Castermans and de Graaf on Competition in European Insolvency Law

Alex Castermans and Ruben de Graaf (Leiden Law School) have posted The General Concept of Concurrence Applied to European Insolvency Law on SSRN.

> *In the current multilevel legal order, private relationships are governed by rules rooted in different international, European and national regimes. Where these rules lead to conflicts, important questions arise. May they be applied simultaneously, or should one of the regimes be excluded in favor of the other? And if the latter is the case, who should make that choice: the claimant or the court?*
>
> *To solve these questions, a method of interpretation is needed, crafted with private relationships in mind. This contribution seeks to uncover such a method within the area of European insolvency law, where issues of concurrence arise as the result of the division of companies and as a result of private international law.*
>
> *Note: The contribution has been published in the Liber Amicorum for Prof. Bob Wessels (international insolvency law, Leiden Law School).*

Munagorri on Hierarchy of Norms and PIL

Rafael Munagorri (university of Nantes) has posted Droit international privé et hiérarchie des normes: Observations sur une rencontre (Private Law and Hierarchy of Norms: Some Remarks on Their Relations) on SSRN.

Traditional methods to solve conflicts of laws and conflict of jurisdictions have been shaped without the idea of the hierarchy of norms. Moreover, some specialists of international private law consider that the very idea of hierarchy of norms is inappropriate within their field. This opinion reflects an ideological point of view. Hierarchy of norms is interesting in order to understand historical, theoretical and epistemological dimensions of international private law.

The paper was published in the Journal for Constitutional Theory and Philosophy of Law in 2013.

ECJ Rules on Territorial Reach of EU Data Protection Law

Many readers will have heard of the landmark decision of the Court of Justice of the European Union of May 13 in *Gonzales v. Google* (case C 131/12).

In 2010 Mario Costeja González, a Spanish national, lodged with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, the AEPD) a complaint against La Vanguardia Ediciones SL (the publisher of a daily newspaper with a large circulation in Spain, in particular in Catalonia) and against Google Spain and Google Inc. Mr Costeja González contended that, when an internet user entered his name in the search engine of the Google group ('Google Search'), the list of results would display links to two pages of La Vanguardia's newspaper, of January and March 1998. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by Mr Costeja González.

Scholars are debatting whether there is now a right to be forgotten. The case also has a choice of law dimension, as it accepts that the Data Protection Directive applies to Google.

The press release of the Court summarized the ruling on this point as follows.

> *As regards the directive's territorial scope, the Court observes that Google Spain is a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of the directive. The Court rejects the argument that the processing of personal data by Google Search is not carried out in the context of the activities of that establishment in Spain. The Court holds, in this regard, that where such data are processed for the purposes of a search engine operated by an undertaking which, although it has its seat in a non-member State, has an establishment in a Member State, the processing is carried out 'in the context of the activities' of that establishment, within the meaning of the directive, if the establishment is intended to promote and sell, in the Member State in question, advertising space offered by the search engine in order to make the service offered by the engine profitable.*

Here are the reasons of the Court:

> *44 Specifically, the main issues raised by the referring court concern the notion of 'establishment', within the meaning of Article 4(1)(a) of Directive 95/46, and of 'use of equipment situated on the territory of the said Member State', within the meaning of Article 4(1)(c).*
>
> *Question 1(a)*
>
> *45 By Question 1(a), the referring court asks, in essence, whether Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when one or more of the following three conditions are met:*
>
> *– the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State, or*
>
> *– the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate*

to the data of customers who have contracted for advertising with that undertaking, or

– the branch or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to protection of personal data, even where such collaboration is engaged in voluntarily.

46 So far as concerns the first of those three conditions, the referring court states that Google Search is operated and managed by Google Inc. and that it has not been established that Google Spain carries out in Spain an activity directly linked to the indexing or storage of information or data contained on third parties' websites. Nevertheless, according to the referring court, the promotion and sale of advertising space, which Google Spain attends to in respect of Spain, constitutes the bulk of the Google group's commercial activity and may be regarded as closely linked to Google Search.

47 Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the Commission submit that, in the light of the inextricable link between the activity of the search engine operated by Google Inc. and the activity of Google Spain, the latter must be regarded as an establishment of the former and the processing of personal data is carried out in context of the activities of that establishment. On the other hand, according to Google Spain, Google Inc. and the Greek Government, Article 4(1)(a) of Directive 95/46 is not applicable in the case of the first of the three conditions listed by the referring court.

48 In this regard, it is to be noted first of all that recital 19 in the preamble to Directive 95/46 states that 'establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements' and that 'the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor'.

49 It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of Article 4(1)(a)

of Directive 95/46.

50 In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be 'carried out in the context of the activities' of an establishment of the controller on the territory of a Member State.

51 Google Spain and Google Inc. dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc., which operates Google Search without any intervention on the part of Google Spain; the latter's activity is limited to providing support to the Google group's advertising activity which is separate from its search engine service.

52 Nevertheless, as the Spanish Government and the Commission in particular have pointed out, Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities' of the establishment.

53 Furthermore, in the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively (see, by analogy, Case C?324/09 L'Oréal and OthersEU:C:2011:474, paragraphs 62 and 63).

54 It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope.

55 In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that

Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.

56 In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.

57 As has been stated in paragraphs 26 to 28 of the present judgment, the very display of personal data on a search results page constitutes processing of such data. Since that display of results is accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller's establishment on the territory of a Member State, in this instance Spanish territory.

58 That being so, it cannot be accepted that the processing of personal data carried out for the purposes of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive's effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure (see, by analogy, L'Oréal and Others EU:C:2011:474, paragraphs 62 and 63), in particular their right to privacy, with respect to the processing of personal data, a right to which the directive accords special importance as is confirmed in particular by Article 1(1) thereof and recitals 2 and 10 in its preamble (see, to this effect, Joined Cases C?465/00, C?138/01 and C?139/01 Österreichischer Rundfunk and Others EU:C:2003:294, paragraph 70; Case C?553/07 Rijkeboer EU:C:2009:293, paragraph 47; and Case C?473/12 IPI EU:C:2013:715, paragraph 28 and the case-law cited).

59 Since the first of the three conditions listed by the referring court suffices by itself for it to be concluded that an establishment such as Google Spain satisfies the criterion laid down in Article 4(1)(a) of Directive 95/46, it is unnecessary to examine the other two conditions.

60 It follows from the foregoing that the answer to Question 1(a) is that

Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2014)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Rolf Wagner***: "15 years of judicial cooperation in civil matters"

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil matters. This event's 15th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead.

- ***Marc-Philippe Weller:*** "Habitual residence as new connecting factor in International Family Law – Counterbalancing changes in the applicable law by the local and moral data approach"

In International Family Law, the traditional connecting factor of nationality is more and more substituted by habitual residence. E.g., according to Article 8 Rome III-Regulation divorce and legal separation shall be subject to the law of the State where the spouses are habitually resident at the time the court is

seized. The connecting factor of habitual residence reflects the greater mobility in the 21st century's open societies. However, it affects the permanence of the law applicable in family matters and causes a change in the applicable law with every cross border-transfer of the spouses' habitual residence. This volatility of substantive family law conflicts with the principle of predictability and interferes with the cultural identity of the individual. It therefore requires counterbalance by means of substantial law. One method of counterbalancing changes in the applicable law is the local and moral data-approach, advocated by Albert A. Ehrenzweig and pursued by my great academic mentor Erik Jayme, whom this article is dedicated to. It discusses the local and moral data-approach and shows its limits of application, especially in the area of ordre public.

- ***Alfred Escher/Nina Keller-Kemmerer***: "On the way to the American Rule? The unconstitutionality of recent German Federal Court's (BGH) decisions on limiting foreign correspondence lawyers' reimbursement claims for litigation costs"

German procedural law is guided by the so called Unterliegenshaftung. According to this principle, which is nearly equal to the English Rule, the unsuccessful party is obliged to pay the costs of the proceedings and the extrajudicial costs necessarily incurred by the applicant in taking the appropriate legal action (lawyers' fees and expenses). In accordance to this guiding principle of German procedural law, the determination of the amount of fees for foreign correspondence lawyers had been based on the relevant foreign law and was not limited to the amount of German correspondence lawyers. In 2005 however, the German Federal Court (BGH) changed this lawful and prevailing jurisprudence and limited the fees for foreign correspondence lawyers to the regulations of the German Rechtsanwaltsvergütungsgesetz (Act on the Remuneration of Lawyers). This article takes the BGH's recent decision of 2012 concerning this question of law as a reason to stress especially two important aspects which only received little attention in the discussions in 2005: That the German Federal Court's decision is not only inconsistent with fundamental principles of German procedural law, but also incompatible with the Constitution.

- ***Chris Thomale***: "Brussel I and the eastern EU enlargement – defining the scope ratione temporis of Reg (EC) 44/2001"

The European Court of Justice recently held that for the Brussels I-Regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed. This decision raises general questions on the spatial and temporal scope of the Brussels I-Regulation as well as the normative relationship between its Art. 2 et seqq. and Art. 32 et seqq., which are discussed in this article.

- ***Moritz Brinkmann***: "International jurisdiction with respect to avoidance claims in the context of insolvency proceedings regarding credit institutions"

At the centre of the case, that is an ancillary proceeding to the insolvency proceedings regarding the Lehman Brothers Bankhaus AG, are intricate issues regarding the international jurisdiction with respect to avoidance claims: The most pertinent is the question whether the doctrine developed in Deko Marty is also applicable in the context of the Directives 2001/24/EC on the reorganisation and winding up of credit institutions and 2001/17/EC on the reorganisation and winding-up of insurance undertakings. If this was answered in the affirmative, one has to ask whether national legislation that implements the directives into the law of a Member State can be interpreted in conformity with the Directive, even though the legislation does not explicitly deal with ancillary proceedings and the autonomous law of that Member State does not follow the approach taken in Deko Marty. In this sense, the case is also about the limits of the duty of the national courts to interpret national legislation in conformity with European law insofar as it implements directives.

- ***Peter Mankowski***: "Die internationale Zuständigkeit nach Art. 3 EuUnterhVO und der Regress öffentlicher Einrichtungen"

If public bodies enforce claims for maintenance subrogated by them, jurisdiction is vested in the court of the place where the original creditor is habitually resident, by virtue of Art. 3 (b) Maintenance Regulation. Art. 3

Maintenance Regulation establishes a system of general jurisdiction and does not retain the relation which was previously prevailing between Arts. 2 and 5 (2) Brussels I Regulation. Else an unwilling or defaultive debtor would indirectly benefit from the subrogation and the transfer of the claim to the public body. This would generate quite some unwelcome and counterproductive incentives. Conversely, to vest jurisdiction in the court for the place where the original creditor is habitually resident, proves to be advantageous in many regards.

- ***Christoph Thole:*** "Member States may take cross-border evidence without recourse to the methods of the Evidence Regulation"

The Council Regulation (EC) No 1206/2001 has no conclusive character. This was recently ruled by the ECJ. The decision confirms the Court's earlier ruling in Lippens and finally settles a long lasting dispute about the scope of the Regulation. While the ECJ's arguments, which are primarily based on teleological grounds, are convincing and the ruling to be welcomed, it is questionable though, what effect the decision will have on the factual application of the Regulation. The comment analyses the decision and its consequences.

- ***Björn Laukemann***: "Public policy control in European insolvency proceedings in the light of fraudulent recourse to the court's competence and subreption of discharging residual debts: a creditors' perspective"

Bankruptcy tourism within the European internal market is legion. Especially uninformed and involuntary creditors suffer from cross-border COMIshifts of the insolvent debtor undertaken with fraudulent intention. In this context, it is hardly surprising – as demonstrated by a new decision of the Local court of Göttingen – that the public policy exception comes into play. The article will shed light on the question if the interpretation of Art. 26 of the European Insolvency Regulation has to distinguish between objections concerning the international jurisdiction of the insolvency court (Art. 3 EIR) and alleged violations of the creditors' right to participate effectively in foreign proceedings. The author will point out that infringements against the latter may, under specific conditions, trigger the application of Art. 26 EIR. In this regard, the adequate balance between the creditors' need for a prior legal

defence, on the one hand, and their obligation to (constantly) inform about the insolvency of their debtor, on the other, is of peculiar importance. The outcome of the current reform of the Insolvency Regulation will show to what extent it will meet the necessity to strengthen the procedural position of foreign creditors – beyond Art. 26 EIR.

- ***Bettina Heiderhoff***: "The "mirror principle" and the violation of international public policy in German recognition procedures"

For the recognition of divorce decrees from non EU member states, the German courts must determine whether the decision was within the jurisdiction of the foreign court (§ 109 para. 2, nr. 1 FamFG). In order to do so, the German rules on jurisdiction are applied to the foreign case in a "mirrored" fashion (the socalled "mirror principle"). In some special cases, it is debatable, but also decisive, as to whether the German judge must mirror § 98 FamFG or Art 3 et seq Brussels IIbis regulation. This counts, in particular, where one or both of the divorcees may have given up their former nationality of the State of origin. The article indicates that the German court must always mirror § 98 FamFG. The Brussels IIbis regulation can only justify additional competences. In particular, the exclusive competence of art. 6 Brussels IIbis is not applicable in this context. Furthermore, the article points out that each party can refer to a violation of the international public policy during the recognition procedure, even if he hasn't made use of a possible appeal before the foreign court. It is a question for the individual case if the right to appeal before the court of origin has to be considered by the German court.

- ***Jens Adolphsen/Johannes Bachmann***: "The Certification of orders to perform concurrently ("Zug-um-Zug") as European Enforcement Orders"

The reviewed judgment of the Regional High Court of Karlsruhe, Germany is dealing with the certification of an order to perform concurrently ("Zug-um-Zug") as a European Enforcement Order. In contrast to the court, a majority in German literature and jurisprudence denies the possibility of certification in such cases. But "Zug-um-Zug" claims can still be issued as European Enforcement Orders. The following article describes the academic discussion and names the necessary requirements for certification.

- ***Rolf A. Schütze***: "Zur cautio iudicatum solvi juristischer Personen"

German law practices the principle of residence in determining the obligation of cautio iudicatum solvi. It is contested whether legal entities have their usual residence at the place of incorporation or at the place of administration. Contrary to the prevailing opinion in case law and legal writing the OLG Schleswig – in the commented decision – sees the usual residence at the place of incorporation. The author contests that and favours the place of administration as decisive in application of sect. 110 German Code of Civil Procedure.

- ***Stefan Pürner:*** "The reciprocity (concerning the recognition of civil judgments) in the relation between Bosnia and Herzegovina and Germany"

The article describes the development of the German court practice related to the reciprocity concerning the recognition of civil judgments in the relation between Bosnia and Herzegovina and Germany. There are contra dictionary judgments in Germany related to this question. In the midst of the 90s the Higher regional Court Cologne ruled that, due to the war situation in Bosnia and Herzegovina, there would be no reciprocity. The author holds that this judgment was wrong already in the time it was brought. In any case it is overtaken by the legal development in the meantime which convinced also the newer German court practice to affirm the existence of the reciprocity in the said relation. However, even in the present German legal literature authors deny that the reciprocity exists in mentioned relation. From this, the author draws the conclusion that in cases with foreign elements country- specific knowledge is essential. In addition to that, past former findings of courts should not be just carried forward. Moreover he emphasizes that, in particular in relation to states with a very agile legal development (e.g. the transformation states) the legal situation concerning questions like the reciprocity may be answered only on the basis of laws, judgments and legal literature of the respective states (or by legal opinions of experts or institutions which are specialized in the law of the respective country) as primary source whilst judgments of German (and all other foreign courts) are only secondary sources of information.

- ***Tobias Lutzi***: “France’s New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international”

In a lawsuit that attracted huge media attention, the French Cour d’appel de Chambéry has confirmed France’s first lower court decision concerning the relation between the new Art. 202-1 § 2 of the Code civil (which provides that same-sex marriage is allowed if only the law of the nationality or the law of the residence of one of the spouses allows it) and bilateral treaties that provide exclusively for the application of the law of the nationality of each spouse. Although the court recognized the superiority of these treaties to the provisions of the Code civil under Art. 55 of the French Constitution, it ruled that the Franco-Moroccan Agreement of 10 August 1981 does not apply to the marriage of a Franco-Moroccan same-sex couple as the prohibition of same-sex marriages contradicts French international public policy.

Bamberski’s Trial to Start this Week

The trial of André Bamberski will be held in Mulhouse on Thursday and Friday (French style: no need to spend several months on that).

Mr Bamberski is accused of ordering the kidnapping of Dr Dieter Krombach in Germany for delivering him to French authorities so that he could be tried, again, for the murder of Kalinka Bamberski in 1982.

A German court confirmed the decision of German prosecutors not to prosecute Dr Krombach in 1987. He was then sentenced in abstentia by a French court to 15 years of prison in 1995. As he could not be represented by a lawyer under the French criminal procedure of the time, he could successfully sue France before

the European Court of Human Rights, and get the Court of Justice of the European Communities to agree that the civil ruling of the French criminal court should be denied recognition in Germany on that ground.

Bamberski did not give up on the idea of seeing Krombach in jail and had him eventually kidnapped in Germany in 2009, and delivered to French authorities. Germany protested, but Krombach was tried again, and sentenced, again, to 15 years.

Appeal to the French Supreme Court

Dr Krombach's last appeal to the French *Cour de cassation* was dismissed on 2 April 2014.

But, wait, how could a French court tolerate that criminals be delivered by kidnappers in the middle of the night? That´s all right, the Court ruled, as long as Krombach could get legal representation and the kidnappers were not French (special) officials. Real bad guys only please!

That was an easy one. Harder now: what about mutual trust? Answer: no mutual trust unless you are really obliged to trust the legal system of other Member states, and, well, there is such obligation only when a special provision of European law mandates so. Article 82 of the Treaty on the Functioning of the EU is not enough for this purpose.

Dr Krombach´s lawyer announced his intention to bring the matter before the Court of Justice of the European Union, because "le juge français dicte sa loi à l'Europe". But it seems he had only requested a referrence to the CJUE before the lower court, which rejected it.

And Now

Mr Bamberski´s own trial will now take place. Bamberski has already said that he has no regrets.

A movie on the life of Bamberski seems to be in the making, with Daniel Auteuil in the lead role.

UPDATE: Bamberski got a one year suspended sentence.

Second Issue of 2014's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2014 was just released. It contains three articles focusing on issues of private international law and several casenotes. A full table of content is available here.

Vincent Chetail (Institute of Graduate Studies, Geneva), *Les relations entre droit international privé et droit international des réfugiés : histoire d'une brève rencontre*

> *Although the interaction between private international law and international refugee law has received scant attention from the doctrine, the relationship between the two branches of law highlights both their convergence and specificity. Their mutual influence oscillates between two contradictory trends : interdependence and particularism. On the one hand, private international law constitutes a substantial source of inspiration for elucidating the whole structure of the refugee status. On the other hand, international refugee law paradoxically emancipates from private international law on issues directly pertaining to this last discipline.*

Eric Fongaro (Bordeaux University), *L'anticipation successorale à l'épreuve du « règlement successions »*

> *The Regulation (EU) N° 650/2012, known as « Regulation Succession » will bring important innovations, when it will come into force, for the settlement of successions which will open as from August 17th, 2015 and which will present elements of foreign origin. However, right now, some revolutionary provisions of the European text have authority to apply to anticipate the future settlements of succession. In this respect, the Regulation contains provisions particularly welcome for fixing the law applicable to provisions on death. However, if the succession treatment of these liberalities is called to raise the succession law, the regulation, by the new criteria of attachments that pose, also authorizes the*

establishment of new succession anticipation strategies for changing times the law of succession. It facilitates this way, not only the anticipation under the control of the law of succession strategies, but also strategies to directly control the inheritance law itself.

Hugues Fulchiron (Lyon University), *La lutte contre le tourisme procréatif : vers un instrument de coopération internationale ?*

For several years a global market of procreation is developing, carried by the rising desire to have a child, among heterosexual couples as among gay couples, and the division of States on subjects as sensitive as medically assisted procreation and surrogacy. Beyond the ethical questions raised by the procreative tourism, the issue of the situation of persons involved in the process : intended parents, surrogates, and especially children. Only international cooperation on the model of the Hague Convention regarding international adoption, could help to find a balance between the principles defended by the States and the protection of people, especially children.

UK Supreme Court Rules on Concept of Rights of Custody under Brussels IIa Regulation

On 15 May 2014, the Supreme Court of the United Kingdom delivered its judgment in In the matter of K (A Child) (Northern Ireland).

The Court issued the following press summary.

BACKGROUND TO THE APPEALS

This appeal concerns the meaning of the words ‘rights of custody’ in article 3 of the Hague Convention on the Civil Aspects of International Child Abduction (‘the

Convention'), and in the Brussels II Revised Regulation (EC) No 2201/2003 ('the Regulation') which complements and takes precedence over the Convention between most member states of the European Union. A child is wrongfully removed or retained in a country under the Convention if such removal or retention is in breach of 'rights of custody'. The issue is whether the rights of custody must already be legally recognised and enforceable, or include informal rights (termed 'inchoate rights'), the existence of which would have been legally recognised had the question arisen before the removal or retention in question.

The proceedings concern a boy ('K') born in Lithuania in March 2005. From the time of his birth until 2012 he lived with and was cared for by his maternal grandparents. His father separated from his mother before he was born and has played no part in his life. His mother moved to Northern Ireland without K in May 2006 and has lived there ever since. A month after K's birth she authorised her mother to seek medical assistance for K and, before she left for Northern Ireland, executed a notarised consent for her mother to deal with all institutions in relation to K on her behalf. In 2007 a court order was made in Lithuania putting K under the temporary care of his grandmother. This order terminated when K's mother returned in February 2012 seeking to take K into her own care. K's mother also applied to withdraw the notarised consents. Meetings were held at the Children's Rights Division of the local authority where orders were made for her to have weekly contact with K. She was advised that legal proceedings against her mother to obtain custody of K would be costly and protracted and decided instead to seize K forcibly in the street while he was walking home from school with his grandmother on 12 March 2012, and to travel immediately back to Northern Ireland with him by car and ferry.

The grandparents were told by the Lithuanian authorities that they had no right to demand the return of K. However, in February 2013 they issued an originating summons in Northern Ireland seeking a declaration that K was being wrongfully retained in breach of their rights of custody. Maguire J refused their application, and their appeal against his decision was dismissed by the Northern Ireland Court of Appeal.

JUDGMENT

The Supreme Court by a majority (Lord Wilson dissenting) allows the appeal, finding that the grandmother did enjoy 'rights of custody' such that K's removal

from Lithuania was wrongful. It orders that K should be returned to Lithuania forthwith. If K's mother wishes to apply for permission to argue at this very late stage that any of the exceptions to the court's obligation to return K found in article 13 of the Convention apply, this order will be stayed if she makes her application within 21 days. Lady Hale gives the only judgment of the majority. Lord Wilson gives a dissenting judgment.

REASONS FOR THE JUDGMENT

The courts of states parties to the Convention have on several occasions dealt with applications based on inchoate rights of custody [23-42]. In England and Wales such rights have been recognised where the person with legal rights of custody had abandoned the child or delegated his primary care to others [44], but other countries have taken a less expansive view. The Convention is not concerned with the merits of custody rights but it will only characterise a removal of a child as wrongful if it interferes with a right of custody which gives legal content to the situation altered by the removal. Thus it is not enough that K's removal was a classic example of the sort of conduct which the Convention was designed to prevent and to remedy, given the harmful effects on K of wresting him from the person he regarded as his mother and taking him without notice to a country where he knew no-one and did not speak the language [50-51]. The rights relied on by K's grandparents must amount to 'rights of custody' for the purposes of the Convention.

The majority considered that the English courts should continue to recognise inchoate rights as rights of custody under the Convention and the Regulation, provided that the important distinction between rights of custody and rights of access was maintained, and provided that (a) the person asserting the rights was undertaking the responsibilities and enjoying the powers entailed in the primary care of the child; (b) they were not sharing them with the person with a legally recognised right to determine where the child should live and how he should be brought up; (c) that person had abandoned the child or delegated his primary care to them; (d) there was some form of legal or official recognition of their position in the country of habitual residence (to distinguish those whose care of the child is lawful and those whose care is not); and (e) there is every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being while the long term future of the child could be determined in those courts in accordance with his best

interests [59].

These conditions applied to the situation of K's grandparents. The Children's Rights Division was supervising the situation on the basis that K remained living with his grandparents while having contact with his mother. Taking K out of the country without his grandmother's consent was in breach of her rights of custody [61-62].

It followed that the court was bound under the Convention to make an order to return K to Lithuania forthwith. It may be that the grandparents would be content with legally enforceable contact arrangements and the mother now has every incentive to agree to these. If the mother were to seek permission at this late stage to raise one of the exceptions in article 13 to the court's obligation to order the return of the child within 21 days, the order would be stayed until the hearing on the first available date in the High Court to determine whether such permission should be granted to her [66].

Lord Wilson would have dismissed the appeal. In his view the rights of custody enjoyed by K's grandmother were terminated on the mother's return [71]. Even if the courts in Lithuania might have maintained the status quo while K's future was decided, this did not amount to recognition of rights of custody in the grandparents [72]. The Convention application should therefore have been dismissed. As a result, a welfare inquiry into K's interests could then have been conducted under the Children (Northern Ireland) Order 1995, in which his grandparents might have been granted an order for contact or even residence [84].

Post Doctoral Researcher on Comparative Civil Procedure at the

University of Luxembourg

The University of Luxembourg is seeking to recruit a post-doctoral researcher with a strong interest in international and comparative civil procedure.

Interested candidates should contact me by mid June at gilles.cuniberti@uni.lu.

European Account Preservation Order adopted

The European Commission issued yesterday the following Press Release.

European Account Preservation Order adopted: New EU rules will make it easier for companies to recover millions of cross-border debt

New EU rules making it easier for companies to recover claims across borders have been adopted today by EU Ministers. Member States in the General Affairs Council signed off on the agreement recently reached with the European Parliament to establish a European Account Preservation Order (MEMO/14/101) – a Regulation that will be directly applicable in the Member States (except in the UK and Denmark which have an opt-out in this area). The European Account Preservation Order is essentially a European procedure that will help businesses recover millions in cross-border debts, allowing creditors to preserve the amount owed in a debtor's bank account. The proposal had been made by the European Commission in July 2011 (IP/11/923).

"Every Euro counts: Small and medium-sized enterprises are the backbone of European economies, making up 99% of businesses in the EU. Around 1 million of them face problems with cross-border debts. In economically challenging times companies need quick solutions to recover outstanding debts. This is exactly what the European Account Preservation Order is about," said Johannes Hahn, EU Commissioner responsible for Justice during Vice-President Viviane Reding's

electoral leave. “Today’s adoption is good news for Europe’s SMEs and the economy. Thanks to these new rules, small businesses will no longer be forced to pursue expensive and confusing lawsuits in foreign countries.”

While the EU’s internal market allows businesses to enter in cross-border trade and boost their earnings, today around 1 million small businesses face problems with cross-border debts. Up to €600 million a year in debt is unnecessarily written off because businesses find it too daunting to pursue expensive, confusing lawsuits in foreign countries. The European Account Preservation Order will help recovering debt across borders by preventing debtors from moving their assets to another country while procedures to obtain and enforce a judgment on the merits are ongoing. It would thus improve the prospects of successfully recovering cross-border debt.

Next steps: After its publication in the Official Journal – the EU’s Statute book , expected in June 2014, the Regulation will be directly applicable in the Member States (except in the UK and Denmark).

Background

The new European Account Preservation Order will allow creditors to preserve funds in bank accounts under the same conditions in all Member States of the EU (except the UK and Denmark where the new EU rules will not apply). Importantly, there will be no change to the national systems for preserving funds. The creditors will be able to choose this European procedure to recover claims abroad in other EU countries. The new procedure is an interim protection procedure. To actually get hold of the money, the creditor will always have to obtain a final judgment on the case in accordance with national law or by using one of the simplified European procedures, such as the European Small Claims Procedure.

The European Account Preservation Order will be available to the creditor as an alternative to procedures existing under national law. It will be of a protective nature, meaning it will only block the debtor’s account but not allow money to be paid out to the creditor. The procedure will only apply to cross-border cases. It provides common rules relating to jurisdiction, conditions and procedure for issuing an order; a disclosure order relating to bank accounts; how it should be enforced by national courts and authorities; and remedies for the debtor and other elements of defendant protection.

The European Parliament's Legal Affairs Committee (JURI) voted to back the Commission's proposal (MEMO/13/481) in May 2013. Ministers discussed the proposal at the Justice Council meeting on 6 June 2013 and reached a general approach on 6 December 2013 (SPEECH/13/1029). The European Parliament issued its support for the proposal in a plenary vote in April 2014 (see MEMO/14/308).

H/T: Maarja Torga

Trimble on the Marrakesh Puzzle

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted The Marrakesh Puzzle on SSRN.

> *This article analyzes the puzzle created by the 2013 Marrakesh Treaty in its provisions concerning the cross-border exchange of copies of copyrighted works made for use by persons who are "blind, visually impaired, or otherwise print disabled" (copies known as "accessible format copies"). The analysis should assist executive and legislative experts as they seek optimal methods for implementing the Treaty. The article provides an overview of the Treaty, notes its unique features, and examines in detail its provisions on the cross-border exchange of accessible format copies. The article discusses three possible sources for implementation tools – choice of law rules, the exhaustion doctrine, and labeling – and concludes that a suitable method of implementing the cross-border exchange provisions of the Treaty may consist of a combination of appropriately-selected rules for choice of applicable law and rules for labeling.*

The paper is forthcoming in the *International Review of Intellectual Property and Competition Law*.