

# Preliminary Question on Art. 5 No. 3 Brussels I

It has not been mentioned on this blog that the German Federal Supreme Court on August 15, 2012 referred the following question relating to the interpretation of Article 5 No. 3 of the Brussels I Regulation to the Court of the European Union (Case C-387/12 – *Hi Hotel HCF SARL ./. Uwe Spoering*):

*Is Article 5(3) of Regulation (EC) No 44/2001 to be interpreted as meaning that the harmful event occurred in one Member State (Member State A) in the case where the tort or delict which forms the subject-matter of the proceedings or from which claims are derived was committed in another Member State (Member State B) and consists in participation in the tort or delict (principal act) committed in the first Member State (Member State A)?*

The facts of the case are in large part disputed, but according to the Federal Supreme Court and for the sake of the preliminary ruling they are assumed to be as follows: the plaintiff (*Uwe Spoering*) is a photographer. On behalf of the defendant (*Hi Hotel*), a hotel operator in Nice in the South of France, he took various pictures of the hotel interior. He granted defendant the right to use the photographs in his brochures and on his website. However, in 2008, the plaintiff found nine of his photographs (re-)printed in two photobooks, one published by Phaidon Press (based in Berlin, Germany) and another one published by Taschen (based in Cologne, Germany). Phaidon Press had received the photographs via a Paris based sister company. The sister company, in turn, had received the photographs from the defendant.

The plaintiff brought an action for copyright infringement in Germany asking for a prohibitory injunction as well as damages. He argued that German courts were competent to hear the case under Art. 5 no. 3 of the Brussels I Regulation. According to this provision a person who is domiciled in a Member State, may be sued in matters relating to torts, delict or quasi-delict in the court of the Member State where the harmful event occurred or may occur. Plaintiff argued that the harmful event – the copyright infringement – occurred in Germany because this is where Phaidon Press distributed the photographs. He further argued that

defendant participated in the copyright infringement by handing over the photographs to Phaidon Press. Defendant, in contrast, argued that German courts did not have jurisdiction under Art. 5 No. 3 Brussels I Regulation since he handed over the photographs to Phaidon's sister company in France and not in Germany.

With the preliminary question the German Federal Supreme Courts wants to know whether jurisdiction under Art. 5 No. 3 Brussels I Regulation covers claims for copyright infringement against accomplices if the accomplice (only) acted abroad.

The full text of the decision can be found [here](#) (in German). The reference to the CEU is available [here](#) (in English).

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## **ERA-Summer Course on European Civil Litigation**

From 17 to 21 June, 2013 the Academy of European Law (ERA) will host a summer course on European Civil Litigation. The course is designed to introduce lawyers to practical aspects of cross-border litigation and will concentrate on practical issues, including the (new) Brussels I Regulation, the European payment order and the European small claims procedure. More information is available [here](#).

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## **ERA-Conference on Cross-border Divorce and Maintenance**

From 25 to 27 February 2013 the Academy of European Law (ERA) will host a

conference on “Cross-border Divorce and Maintenance: Jurisdiction and Applicable Law” in Dublin. The conference will provide information on the Brussels II bis Regulation, the Rome III Regulation as well as the Maintenance Regulation. Further information is available [here](#). The programme reads as follows:

## **Monday, 25 February**

- 08:45 Arrival and registration of participants

### **I. Cross-border divorce: jurisdiction and procedure**

- 09:15 Opening session
- 09:45 Setting the scene: framework and key elements of cross-border cooperation in family matters
- 10:30 Coffee break
- 11:00 Cross-border divorce in the EU: jurisdiction, recognition and lis pendens
- 13:00 Lunch
- 14:30 Interaction of Regulation Brussels II bis with other EU legal instruments and mechanisms:
  - legal aid
  - service of documents
  - preliminary ruling procedure
  - alternative dispute resolution
- 15:30 Coffee break
- 16:00 Exercise I: Case studies on cross-border divorce
- 18:00 End of the first workshop day
- 19:30 Dinner

## **Tuesday, 26 February**

### **II. Cross-border divorce: applicable law**

- 09:00 Cross-border divorce in the EU: applicable law
- 10:30 Coffee break
- 11:00 The application of foreign law in a crossborder divorce case
- 12:00 Lunch
- 13:30 Exercise II: Case studies on the identification and application of

foreign law in a divorce case

- 15:30 Coffee break

### III. Cross-border maintenance

- 16:00 Jurisdiction and applicable law in crossborder maintenance cases
- 18:00 End of the second workshop day
- 19:30 Dinner

### **Wednesday, 27 February**

- 09:00 Cooperation between Central Authorities and access to justice in cross-border maintenance cases
- 10:00 Exercise III: Case-study on a crossborder maintenance case
- 12:00 Coffee break

### IV. EU initiatives on property regimes

- 12:30 The proposed legislation on property effects of marriage and registered partnership
- 13:00 Closing session
- 13:30 Lunch and end of the workshop

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# **ERA-Conference on Cross-border Mediation, ADR & ODR**

On April 25 and 26, 2013 the Academy of European Law (ERA) will host a conference on cross-border mediation, ADR & ODR. The conference will cover various aspects of cross-border alternative dispute resolution including the latest trends and developments in legislation at national, international and EU level. Further information is available [here](#). The programme reads as follows:

### **Thursday, 25 April 2013**

- 08:45 Arrival and registration

- 09:10 Welcome

*Angelika Fuchs*

Moderator: *Ana Gonçalves*

## I. CURRENT SITUATION OF MEDIATION IN A COMPARATIVE PERSPECTIVE

- 09:15 State of play following the implementation of the Mediation Directive: concepts and practice of mediation

*Jeremy Lack*

- 09:45 Discussion
- 10:00 Integration of mediation in dispute resolution procedures, including the effects of mediation on limitation and prescription periods

*Carlos Esplugues*

- 10:30 Discussion
- 10:45 Coffee break
- 11:15 Learning from the experience of others: what incentives for mediation are given?

- The Netherlands, England and Wales: *Naomi Creutzfeldt-Banda*

- France and Belgium: *Vincent Tilman*

- Poland and Czech Republic: *Rafal Morek*

- Italy and Spain: *Carlos Esplugues*

- Portugal: *Ana Gonçalves*

- 13:00 Lunch

Moderator: *Jeremy Lack*

## II. INNOVATIVE PROCESSES FOR CONSUMER AND E-COMMERCE DISPUTE RESOLUTION

- 14:15 Consumer ADR & ODR: recent experiences in the member states

*Naomi Creutzfeldt-Banda*

- 15:00 Discussion
- 15:15 Coffee break
- 15:45 Opportunities and challenges for ODR: how will consumers and traders benefit from the new EU legislation?
- 16:15 ODR and consumer protection: high standards or low costs? Taking a fresh look at the EU and UNCITRAL initiatives

*Hans Schulte-Nölke*

- 16:45 Discussion
- 17:15 Towards an instrument on B2B ADR?  
*Vincent Tilman*
- 17:45 Discussion
- 18:00 End of the first conference day
- 19:00 Evening programme and dinner

## **Friday, 26 April 2013**

Moderator: *Diana Wallis*

### **III. MEDIATORS AND MEDIATION PROCEDURE**

- 09:00 How to ensure the quality of mediation? Code of conduct and professional law for mediators  
*Manon Schonewille* (live via videolink)
- 09:30 Discussion
- 09:45 Skills of (e-) mediators  
*Ana Gonçalves*
- 10:15 Discussion
- 10:30 Coffee break
- 11:00 Results of mediation and enforcement of mediation agreements  
*Elena D'Alessandro*
- 11:30 Discussion
- 11:45 Confidentiality in mediation
  - Functions of confidentiality
  - What information is subject to confidentiality?
  - Which persons are bound to respect it?
- Disclosure of information in subsequent litigation or enforcement proceedings  
*Rafal Morek*
- 12:15 Discussion
- 12:45 Self-regulation or regulatory approach: how to further encourage parties to the mediation table?  
*Diana Wallis*
- 13:15 Lunch and end of the conference

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# Chafin v. Chafin: Hague Convention, Mootness, Extraterritorial Authority and Futility

*This is cross-posted by the author on Letters Blogatory, as well.*

We previewed the *Chafin* case on this site when certiorari was granted last summer. It was decided yesterday by a unanimous Court. This is the second Hague Convention case to reach the Court in three years, and while the decision itself is not altogether surprising, Chief Justice Roberts does include an interesting discussion that touches on a wide array of transnational issues (outside of the family law context).

*Chafin* involves a U.S. Army sergeant and a Scottish woman he had married while stationed in Germany. The couple later moved to Alabama, and after their divorce, disputed the care of their daughter, who is now five years old. After obtaining a federal court order under the Hague Convention declaring that Scotland was the girl's country of habitual residence, Mrs. Chafin returned to Scotland with the child. Sgt. Chafin appealed that decision to the Eleventh Circuit, but that court dismissed the case as moot because the child had already returned to Scotland, and was outside the court's jurisdiction. Circuits have been deeply split over a fundamental and very practical question: Is the court's jurisdiction over the dispute truly limited by the water's edge? In other words, if the case were to be reversed on appeal, does the uncertainty of enforcement of the order abroad render the case moot?

The Supreme Court reversed the decision of the Eleventh Circuit because, in Chief Justice John Roberts's words, "[t]his dispute is still very much alive." "On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address 'a

hypothetical state of facts.’” The Respondent and the Eleventh Circuit, the Court held, “confuse[d] mootness with the merits.” To be sure, “Scotland [may] ignore a U.S. re-return order, or decline to assist in enforcing it,” but a litigants “prospects of success are ... not pertinent to the mootness inquiry,” and the “uncertain[]” efficacy of the ultimate judgment “does not typically render cases moot.”

That was enough for Mr. Chafin to win before the Court, but here is where the decision got a bit more interesting for transnational litigants writ large. As I’ve discussed before elsewhere, the circuits are decidedly split on that standard for ordering antisuit injunctions, and recent high-profile cases illustrate the uncertainty surrounding injunctive orders when it concerns foreign parties living abroad. The Court in *Chafin*, however, noted the existence of its power to make such orders with little apparent concern. U.S. courts can “command[] [a party properly before it] to take action ... outside the United States” under the pain of sanctions for non-compliance, the Chief Justice said. He then swiftly moved from an assertion of the Court’s inherent authority to an acknowledgment of its practical limits. Parties ignore our authority all the time, the Court seems to suggest (without expressly saying it that way, of course). For instance, U.S. Courts often “decide cases against foreign nations, whose choices to respect final rulings are not guaranteed.” So Argentine bondholders and an Alabama father find themselves in the same legal limbo. It remains true that a return order may not give Mr. Chafin his daughter, “just as a an order that [a foreign state] pay \$100 million may not make a plaintiff rich.”

These propositions are little more than an interesting aside to the central holding of the case, but they illustrate the Court’s view of its tenuous place in the broader arena of transnational justice.

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## European Parliament Draft Report



# on European Account Preservation Order

The Legal Committee on Legal Affairs of the European Parliament has issued a Draft Report on the proposal for a regulation of the European Parliament and of the Council on creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters on February 5th, 2013.

*H/T: Beatrice Deshayes*

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## Luxembourg Conference on One Way Jurisdiction Clauses

The University of Luxembourg will host a lunchtime seminar on the validity of one way jurisdiction clauses on 27 February 2013.

The seminar, which will be held in French, will discuss the impact of the widely publicised case of the French Supreme court of September 2012 on contractual practices in France and Luxembourg.

The speakers will be Pascal Ancel, a leading scholar of French contract law who recently joined the university of Luxembourg, and myself.

More information can be found [here](#).

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# Recent Private International Law Scholarship

I have just posted a few recent pieces on SSRN that relate to private international law. These pieces are on forum non conveniens in U.S. courts, the role of ethics in international law, and international investment law. I would welcome any comments.

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## Fourth Issue of 2012's *Rivista di diritto internazionale privato e processuale*

*(I am grateful to Prof. Francesca Villata - University of Milan - for the following presentation of the latest issue of the RDIPP)*

✖ The fourth issue of 2012 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and two comments.

In the first article, *Bruno Nascimbene*, Professor of European Union Law at the University of Milan, offers a critical appraisal of fair trial and defense rights in antitrust proceedings before the Commission (“Equo processo e diritti della difesa nel procedimento antitrust avanti alla Commissione: necessità di una riforma?”; in Italian).

In the second article, *Luca G. Radicati di Brozolo*, Professor of International Law at the Catholic University of Milan, discusses non-national rules and conflict of laws in light of the Unidroit and Hague principles (“Non-National Rules and Conflicts of Laws: Reflections in Light of the Unidroit and Hague Principles”; in English).

In the third article, *Manlio Frigo*, Professor of International Law at the University of Milan, addresses the analogies and differentiations of, respectively, insolvency of undertakings and insolvency of States (“*Insolvenza delle imprese e insolvenza degli Stati: analogie ed elementi di differenziazione*” in Italian).

In addition to these articles, the following comments are also featured:

- *Silvia Marino* (Researcher in International Law at the University of Insubria), “Nuovi sviluppi in materia di illecito extracontrattuale on line” (New Developments in Online Torts; in Italian);
- *Giulia D’Agnone* (Ph.D. candidate in International Law at the University of Macerata), “L’interpretazione delle clausole sui *waiting periods* nella giurisprudenza dei tribunali ICSID: obblighi o raccomandazioni?” (The Interpretation of Clauses on Waiting Periods in the Case-Law of ICSID Tribunals: Obligations or Recommendations?; in Italian).

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

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# Hague Academy Seventh Newsletter

The seventh Newsletter of the Hague Academy of International Law can be found here.