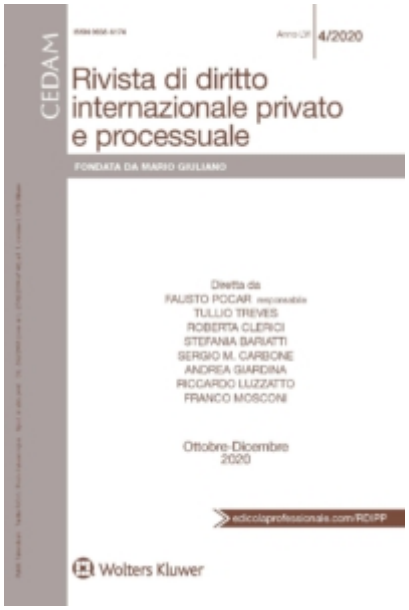
Rivista di diritto internazionale privato e processuale (RDIPP) No 2/2021: Abstracts



The second issue of 2021 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) has been released. It features:

Christian Kohler, Honorary Professor at the University of Saarland, **Limiting European Integration through Constitutional Law? Recent Decisions of the German Bundesverfassungsgericht and their Impact on Private International Law** (in English)

- On May 5, 2020 the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) in Germany ruled that the Public Sector Purchase Programme ("PSPP") of the European Central Bank (ECB) as well as the judgment of the Court of Justice of the European Union (CJEU) in case C-493/17 were "ultra vires" because they exceeded the competences conferred on these institutions. Both the PSPP and the CJEU's judgments were thus without effect in Germany. In order to assess the judgment of the BVerfG and to measure the ensuing conflict, a look at its case-law in matters of European integration is indispensable. In seminal judgments relating to the ratification of the Maastricht treaty (1993) and the treaty of Lisbon (2009), the Constitutional Court had previously explained its approach toward the European Union as being a confederation sui generis of sovereign states governed by the principle of

conferral, and that any action of the German institutions relating to the European integration has to respect a twofold limitation: it has to remain within the limits of the competences conferred by the treaties, and it has to safeguard Germany's "constitutional identity" as enshrined in the Basic Law. Any act taken in violation of these limits may be declared void by the Constitutional Court. The control exercised by the BVerfG has been further extended by a ruling of February 13, 2020: the Court held that the German law authorizing the ratification of the Agreement on a Unified Patent Court (UPC) was void as it had not been adopted by a majority of two thirds by the Bundestag and the Bundesrat as required by the Basic Law. This implies that from now on the Court will control not only the material but also the formal validity of an act relating to the European integration. Both the "Lisbon" judgment and the UPC ruling have implications for European private international law. Whereas these implications are well defined in the "Lisbon" judgment they are less visible but nevertheless present in the ruling of February 13, 2020.

Fabrizio Marongiu Buonaiuti, Professor at the University of Macerata, **Il rinvio della legge italiana di riforma del diritto internazionale privato alle convenzioni internazionali, tra adeguamento al mutato contesto normativo e strumentalita` alla tutela dei valori ispiratori** (The Reference to International Conventions Made in the Law Reforming the Italian System of Private International Law: Between Adaptation to the Changed Normative Context and Instrumentality to the Protection of the Underlying Principles)

- A salient feature of the law providing for the reform of the Italian system of private international law (Law No. 218 of 31 May 1995) consists of the references it embodies to some private international law conventions for the purposes of relying on their rules in order to regulate issues not falling within their scope of application, consistently with the regime contained in the relevant convention. This article discusses the fate of those references, as a consequence of the fact that most of the conventions referred to have in the meantime been replaced by EU regulations, when not by subsequent conventions. While just one of the said references, that embodied under Article 45 of the said law, concerning the law applicable to maintenance obligations, has been updated so far by the Italian legislature, the author proposes that, as a

matter of consistent interpretation, the other references made by the same law should be held as directed to the new instruments having replaced the conventions existing at the time the law was passed. As argued in the final part of the article, the proposed solution is also conducive to a more effective achievement of the objectives pursued already by the conventions initially referred to.

Zeno Crespi Reghizzi, Professor at the University of Milan, **La "presa in considerazione" di norme straniere di applicazione necessaria nel regolamento Roma I** ('Considering' Foreign Overriding Mandatory Provisions under the Rome I Regulation)

- In its *Nikiforidis* judgment of 2016, the Court of Justice of the European Union ruled that the limits set by Article 9(3) of the Rome I Regulation to the effects of foreign rules of mandatory application concern only their 'application' in the international private law sense, not also their 'taking into account' by substantive rules of the *lex contractus*. The present article discusses the reasons for this interpretative solution and highlights the need to specify its scope in order to preserve the Regulation's systemic coherence.

The following comment is also featured:

Rebekka Monico, Research fellow at the University of Insubria, **La disciplina europea sul Geo-blocking e il diritto internazionale privato e processuale** (The EU Geo-Blocking Regulation and Private International and Procedural Law)

- This article analyses the relationship between Regulation (EU) No 2018/302 on the prohibition of geo-blocking practices which are not justified on objective grounds and the rules of private international law contained in the Brussels I-bis, the Rome I and the Rome II Regulations. In this respect, Article 1(6) of Regulation (EU) 2018/302 contains, in addition to a safeguard clause of the Union law concerning judicial cooperation in civil matters, the clarification that the mere fact that the trader complies with the prohibitions imposed by the Geo-blocking Regulation does not imply that he intentionally directs his activity towards the Member State of the consumer pursuant to Articles 17(1)(c) and 6(1)(b) of the Brussels I-bis and the Rome I Regulations, respectively.

Although this clarification is consistent with the *Pammer*, *Mühlleitner*, *Emrek* and *Hobohm* judgments, the Author endorses a new interpretation of the directed-activity criterion by the Court of Justice of the European Union which would protect consumers and, at the same time, provide greater legal certainty for traders.

In addition to the foregoing, this issue features the following book review by *Cristina M. Mariottini*, Senior Research Fellow at the Max Planck Institute Luxembourg: Julia HÖRNLE, **Internet Jurisdiction: Law and Practice**, Oxford University Press, New York, 2021, pp. vii-485.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2021: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

B. Heiderhoff: **International Product Liability 4.0**

While the discussion on how liability for damages caused by autonomous systems, or “artificial intelligence”, should be integrated into the substantive law is well advanced, the private international law aspect has, so far, been neglected. In this contribution, it is shown that unilateral approaches – such as the EU Parliament has suggested (P9_TA-PROV(2020)0276) – are unnecessary and detrimental. It is preferable to develop a classical conflict of laws rule with connecting factors, which mirror the assessments of the substantive law. It is shown that a mere reinterpretation of the existing Article 5 Rome II Regulation might lead to legal insecurity, and that an addition of the provision is preferable. In particular, the notion of marketing, and its importance as a connecting factor, should be revised.

K. Vollmöller: **The determination of the law applicable on claims for infringement of trade secrets in contractual relationships**

Subject of the article is the determination of the applicable law in cross-border situations when a lawsuit is based on the violation of trade secrets within a contractual relationship. According to German Law, claims for infringement of trade secrets are regulated in the German Trade Secrets Act (Geschäftsgeheimnisgesetz – GeschGehG) that has implemented the European Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The focus is on the question how tort claims are connected if the contracting partners have agreed on confidentiality terms, in particular under a non-disclosure agreement. In case the agreement of the parties is ruled by the laws of a Non-European state, it is doubtful whether the harmonized European trade secret law is applicable. The author comes to the conclusion that a secondary connection to the jurisdiction governing the agreement according to Art. 4 Paragraph 3 Rome II Regulation should be limited to relationships where the parties have assumed further contractual obligations beyond confidentiality. In this case, the law applicable on the contract overrides the harmonized European trade secret law regulations which cannot be considered as mandatory rules either.

T. Lutzi: **Ruth Bader Ginsburg – Internationalist by Conviction**

In Ruth Bader Ginsburg, the Supreme Court has not only lost an icon of gender equality and towering figure, but also a great internationalist. Ginsburg's jurisprudence was characterised by her own academic background as a proceduralist and comparativist, a decidedly international perspective, and a firm belief in a respectful and cooperative coexistence of legal systems. An English version of this text can be found at www.iprax.de/de/dokumente/online-veroeffentlichungen/

C. Kohler: **Dismantling the „mosaic principle": defining jurisdiction for violations of personality rights through the internet**

In case C-194/16, Bolagsupplysningen, the ECJ ruled that, according to Article 7(2) of Regulation (EU) No 1215/2012, a legal person claiming that its personality rights have been infringed by the publication of incorrect information on the internet and by a failure to remove comments relating to it can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located. On the other hand, an action for rectification of that information and removal of those comments cannot be brought before the courts of each Member State in which the information published on the internet is or was accessible. Thus, the ECJ's decision in case C-509/09 and C-161/10, eDate Advertising a.o., also applies where the aggrieved party is a legal person. However, the "mosaic principle" defined in that judgment is inapplicable because an action for rectification and removal of information on the internet is "single and indivisible" and can, consequently, only be brought before a court with jurisdiction to rule on the entire damage. The author welcomes this limitation and advocates that the mosaic principle be given up entirely, particularly as it does not find resonance on the international level.

P. Mankowski: **Consumer protection under the Brussels Ibis Regulation and company agreements**

Company agreements pose a challenge to Arts. 17–19 Brussels Ibis Regulation; Arts. 15–17 Lugano Convention 2007 since these rules are designed for bipolar contracts whereas the formers typically are multi-party contracts. This generates major problems, amongst them identifying the "other party" or answering how far a quest for equal treatment of shareholders might possibly carry. Arguments from the lack of a full-fledged forum societatis might weigh in, as do arguments from the realm of European private law or possible consequences for jurisdiction clauses in company statutes. The picture is threefold as to scenarios: founding and establishing a company; accession to an already established company; and derivative acquisition of a share in an already established company.

W. Wurmnest/C. Grandel: **Enforcement of consumer protection rules by public authorities as a „civil and commercial matter"**

In case C-73/19 (Belgische Staat ./. Movic) the European Court of Justice once again dealt with the delineation of "civil and commercial matters" (Art. 1(1) of the Brussels Ibis Regulation) when public authorities are involved. The Court correctly classified an action brought by Belgian authorities against Dutch companies seeking a declaration as to the unlawfulness of the defendants' business practices (selling tickets for events at prices above their original price) and an injunction of these practices as a "civil and commercial matter", as the position of the authorities was comparable to that of a consumer protection association. Furthermore, the Court clarified its case law on the thorny issue as to what extent evidence obtained by public authorities based on their powers may turn the litigation into a public law dispute. Finally, the judgment dealt with the classification of various ancillary measures requested by the Belgian authorities. Most notably, a request by the authorities to be granted the power to determine future violations of the law simply by means of a report "under oath" issued by an official of the authorities was not a "civil- and commercial matter" as private litigants could not be granted similar powers under Belgian law.

R. Wagner: **Jurisdiction in a dispute with defendants in different member states of the European Union**

The article discusses a court ruling of the Higher Regional Court of Hamm on jurisdiction concerning the "Diesel emission scandal". The plaintiff had his domicile in Bielefeld (Germany). He bought a car in Cologne (Germany) where the seller had his domicile. Later on, the plaintiff brought an action for damages and for a declaratory judgment against the seller, the importer of the car (domicile: Darmstadt, Germany) and the producer of the car (domicile: in the Czech Republic) before the District Court of Bielefeld. The plaintiff argued that the producer of the car had used illegal software to manipulate the results of the emissions tests. He based his claim on tort. Against the first defendant he also claimed his warranty rights. In order to sue all three defendants in one trial the plaintiff requested the District Court of Bielefeld to ask the Higher Regional Court of Hamm to determine jurisdiction. In its decision the Court in Hamm took into account Article 8 No. 1 of the Brussels Ibis Regulation and § 36 I No. 3, II of the German Code of Civil Procedure.

J. Wolber: **Jurisdiction for an Application opposing Enforcement in cross-border Enforcement of a Maintenance Decision**

The question, whether the maintenance debtor should be entitled to raise the objection that he has predominantly discharged his debt in the Member State of enforcement is highly relevant in practice and disputed in the scientific literature. The European Court of Justice (ECJ) has decided on this question – upon a request for a preliminary ruling by a German court – in the case FX ./. GZ with judgment of 4th June 2020. The ECJ confirms the jurisdiction of the German court based on Article 41 of Regulation No 4/2009. This judgment has effects beyond the enforcement of maintenance decisions on other instruments of European Law of Civil Procedure. While this judgment deserves approval in the result, the reasoning of the court is not convincing. The ECJ judgment does not cover the question of the territorial scope of such a judgment.

P. Schlosser: **Clarification of the service of documents abroad**

In extending the term "demnächst" ("soon") the judgment of the Bundesgerichtshof ruled that a person interested in serving a document to somebody (in particular the initial claim) must only request the court to care for the translation and pay immediately thereafter the estimated costs of the translation for correctly initiating the litigation and thus meeting the term of limitation. The rest of time needed for the translation is irrelevant. The author is developing the impact of this decision for the three variants of serving a document to someone abroad in the European Union:

(1) Serving the document spontaneously in time together with the translation,

(2) Serving the document belated together with the translation after

the court has asked whether the respective person wants a translation,

(3) Serving initially without a translation but serving the document again together with a translation after the addressee has refused to accept service without any translation.

A. Dutta: **European Certificate of Succession for administrators of insolvent estates?**

German law provides for a special insolvency procedure for insolvent estates (Nachlassinsolvenzverfahren) which is subject to the European Insolvency Regulation. The Oberlandesgericht Frankfurt am Main came to the conclusion that nevertheless the liquidator of such an insolvency procedure can apply for a European Certificate of Succession under the Succession Regulation being an "administrator of the estate". The case note argues that the German Nachlassinsolvenzverfahren falls within the scope of the Insolvency and the Succession Regulation (section II & III) and that issuing a Certificate causes only indirect frictions between both instruments which are not grave enough to invoke the conflict rule in Article 76 of the Succession Regulation (section IV). The case shows that the model of the Certificate could be extended to other areas (section V).

E. Jayme: **The restitution of the „Welfenschatz" before the U.S. Supreme Court**

The US Supreme Court, in a case involving the restitution of the treasure of the Guelphs and the question of state immunity of the Federal Republic of Germany, decides that the FSIA's exception concerning property taken in violation of the international law of expropriation does not refer to property owned by German nationals ("domestic takings rule"). The heirs of German Jewish Art dealers who had acquired a large part of the art treasure of the Guelphs from the Ducal family of Braunschweig asked for the restitution of such parts of the treasure which they had sold to Prussia in 1935 alleging that they had been unlawfully coerced to sell the pieces for a third of its value. The defendants were the Federal Republic of Germany and the Stiftung Preußischer Kulturbesitz. The plaintiffs argued inter alia that the forced purchase of the treasure had been an act of genocide in violation of international law and, therefore, justified an exception to State immunity. The District Court denied Germany's motion to dismiss, and the D.C. Circuit Court affirmed. The Supreme Court held that the phrase "rights in property taken in violation of international law" refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule. The case was remanded to the D.C. Circuit Court of Appeals for further

proceedings which inter alia will concern the question whether the Jewish art dealers were German nationals at the time of the sale of the treasure (1935).

Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

By Zhen Chen, PhD Researcher, University of Groningen

This blog post is part of the article 'Tort Conflicts Rules in Cross-border Multi-party Litigation: Which Law Has a Closer or the Closest Connection?' published by the Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177/1023263X211034103. A related previous post is 'Personal Injury and Article 4(3) of Rome II Regulation', available here https://conflictoflaws.net/2021/personal-injury-and-article-43-of-rome-ii-regulation/

This article compares Owen v. Galgey under Article 4 Rome II Regulation and YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act in the context of cross-border multi-party litigation on tort liability. As to the interpretation of tort conflicts rules, such as lex loci delicti, the notion of 'damage', lex domicilii communis and the closer/closest connection test, these two

cases demonstrate different approaches adopted in European and Chinese private international law. This article does not intend to reach a conclusion which law is better between Rome II Regulation and Chinese Conflicts Act, but rather highlights on a common challenge faced by both Chinese courts and English courts in international tort litigation and how to tackle such challenge in an efficient way.

I. Tort conflicts rules in China and the EU

It is widely accepted rule that lex loci delicti will be the applicable law for cross-border tort liability in private international law. This is also the case in China and the EU. The application of lex loci delicti, as a general rule, is stipulated in Article 44 Chinese Conflicts Act and Article 4(1) Rome II Regulation. However, Article 4(1) Rome II Regulation explicitly refers to the place of damage, namely 'the law of the country in which the damage occurs' (lex loci damni), and expressly excludes the place of wrong ('the country in which the event giving rise to the damage occurred') and the place of consequential loss ('the country or countries in which the indirect consequences of that event occur'). By contrast, it remains unclear whether lex loci delicti in Article 44 Chinese Conflicts Act merely refers to lex loci damni, as such provision does not expressly state so.

The application of lex loci delicti in China and the EU is subject to several exceptions. Specifically, lex loci delicti is superseded by the law chosen by the parties under Article 44 Chinese Conflicts Act and Article 14 Rome II Regulation, while lex domicilii communis takes precedence over lex loci delicti under Article 44 Chinese Conflicts Act and Article 4(2) Rome II Regulation. Moreover, the escape clause enshrined in Article 4(3) Rome II Regulation gives priority to the law of the country which has a 'manifestly closer connection' with the tort/delict, of which the pre-existing relationship between the parties might be a contract. By contrast, Article 44 Chinese Conflicts Act does not provide an escape clause, but the closest connection principle, which is comparable to the closer connection test in Article 4(3) Rome II, is stipulated in several other provisions.

The questions raised in YANG Shuying v. British Carnival Cruise and Owen v. Galgey were how to determine the applicable law to tort liability in multiparty litigation under Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation and what are the criteria for the closer/closest connection test.

II. Owen v. Galgey under Article 4 Rome II Regulation

In case Owen v. Galgey , a British citizen Gary Owen domiciled in England, fell into an empty swimming pool which was undergoing renovation works at a villa in France owned by the Galgey Couple, domiciled in England, as a holiday home. The British victim sued the British couple, their French public liability insurer, the French contractor carrying out renovation works on the swimming pool and its French public liability insurer for personal injury compensation. As regards which law is applicable, the British victim contended that French law should be applied by virtue of Article 4(3) Rome II Regulation, since the tort was manifestly more closely connected with France than it was with England. The British defendants held that English law should be applicable law under Article 4(2) Rome II Regulation, because the claimant and the defendants were habitually resident in England. The English High Court held the case was manifestly more closely connected with France, because France was the country where the centre of gravity of the situation was located.

III. YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act

In case YANG Shuying v. British Carnival Cruise, a Chinese tourist domiciled in China, sued the British Carnival Cruise Company, incorporated in the UK, for personal injury sustained in a swimming pool accident happened in the cruise when it was located on the high seas. The plaintiff signed an outbound travel contract with Zhejiang China Travel Agency for such cruise tour. The plaintiff held that English law, as the lex loci delicti, should be applicable since the parties did not share common habitual residence in China and the accident occurred on the cruise, which can be regarded as the territory of the UK according to the floating territory theory. The place of wrong and the place of damage were both on the cruise under Article 44 Chinese Conflicts Act. The defendant and the third party argued that Chinese law should be applied since the parties had common habitual residence in China, the floating territory theory was inapplicable and the (indirect) damage of the tort took place in China.

The Shanghai Maritime Court adopted a strict interpretation of the term ‘the parties’ by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the lex loci delicti leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis ofTort Choice of Law Rules in Cross-border

Multi-party Litigation under European and Chinese Private International Law

Zhen Chen

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IV. Comments

Both Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation apply to multi-party litigation on tort liability. Article 4(1) Rome II merely refers to lex loci damni and limits the concept 'damage' to direct damage, whilst Article 44 Chinese Conflicts Act can be interpreted broadly to cover the law of the place of wrong and the term 'damage' include both direct damage and indirect damage or consequential loss. As to lex domicilii communis, the law of the country of the common habitual residence of some of the parties, instead of all parties, should not be applicable in accordance with Article 4(2) Rome II and Article 44 Chinese Conflicts Act. The exercise of the closest connection principle or the manifestly closer connection test under 44 Chinese Conflicts Act and Article 4(3) Rome II Regulation requires the the consideration of all relevant factors or all the circumstances in the case. When conducting a balancing test, the factor of the place of direct damage should not be given too much weight to the extent that all other relevant factors are disregarded. A quantitive and qualitative analysis should be conducted to elaborate the relevance or weight of each factor to determine the centre of gravity of a legal relationship.

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New issue alert: RabelsZ 3/2021

The latest issue of RabelsZ is out. It contains the following articles:

Kai-Oliver Knops: Die unionsrechtlichen Voraussetzungen des Rechtsmissbrauchseinwands – am Beispiel des Widerrufs von Verbraucherdarlehens- und Versicherungsverträgen (The Requirements of EU Law on Abuse of Law and Abuse of Rights – the Example of the Right to Withdraw from Credit Agreements and Insurance Contract), Volume 85 (2021) / Issue 3, pp. 505-543 (39), https://doi.org/10.1628/rabelsz-2021-0023

> *In the European Union, it is apparently only in Germany that withdrawals by*

consumers and policy-holders are often rejected as invalid and abusive. Mostly it is argued that an objection of abuse is subject to national law and that application of the principle of good faith is a matter for the judge alone. In fact, the jurisprudence of the Court of Justice of the European Union sets strict limits on the objection of abuse and requires special justification, which the national legal system must comply with in accordance with the primacy of European Union law. Under EU law, withdrawal from consumer loans and insurance contracts will be vulnerable to an objection of legal abuse only in very exceptional cases and by no means as a rule.

Bettina Rentsch: Grenzüberschreitender kollektiver Rechtsschutz in der Europäischen Union: No New Deal for Consumers (Cross-Border Collective Redress: No New Deal for Consumers), Volume 85 (2021) / Issue 3, pp. 544-578 (35), https://doi.org/10.1628/rabelsz-2021-0024

The recently adopted Directive on representative actions marks the beginning of a new era for collective redress in the European Union. However, applying the Brussels Ia and Rome Regulations for questions regarding jurisdiction, recognition, enforcement and the applicable law entails jurisdictional and choice-of-law-related problems inherent in cross-border aggregate litigation as such: European private international law, including its rules on jurisdiction and enforcement, is designed for bipartisan proceedings and thus shows a variety of inconsistencies, deficits and contradictions when faced with collective redress. Moreover, applying a multitude of laws to a single collective proceeding generates prohibitive costs for the plaintiff side, while generating economies of scale on the defendant side. It is unlikely that the parties to collective proceedings will enter a subsequent choice of law agreement to reduce the number of applicable laws.

Frederick Rieländer: Der »Vertragsabschlussschaden« im europäischen Deliktskollisions- und Zuständigkeitsrecht (Locating "Unfavourable Contracts" in European Private International Law), Volume 85 (2021) / Issue 3, pp. 579-619 (41), https://doi.org/10.1628/rabelsz-2021-0025

The inconsistent case law of the ECJ concerning the task of locating pure economic loss, for the purposes of Art. 7 No. 2 Brussels Ibis Regulation and Art. 4 para. 1 Rome II Regulation, is characterisedby the absence of a careful theoretical analysis of the protective purposes of the relevant liability rules. In this article, it is submitted that in the voluminous category of cases where a party has been induced into entering an unfavourable contract with a third party, "damage" for the purposes of Art. 7 No. 2 Brussels Ibis Regulation and Art. 4 para. 1 Rome II Regulation generally occurs at the moment when the victim is irreversibly bound to perform its obligation to the third party, whilst it is immaterial whether and, if so, where the contract is performed. Although the locus contractus appears to be the most appropriate connecting factor in the majority of the relevant cases of misrepresentation – particularly for the purpose of tying prospectus liability to the market affected – it needs to be displaced, for instance, in those cases where consumers are lured into purchasing faulty products abroad by fraudulent misrepresentations on the part of the manufacturer.

Raphael de Barros Fritz: Die kollisionsrechtliche Behandlung von trusts im Zusammenhang mit der EuErbVO (The Treatment of Trusts under the European Succession Regulation), Volume 85 (2021) / Issue 3, pp. 620-652 (33), https://doi.org/10.1628/rabelsz-2021-0026

Few legal institutions cause more difficulties in the context of the European Succession Regulation (ESR) than trusts. There is, for instance, hardly any agreement on the scope of the exception created for trusts in Art. 1 para. 2 lit. j ESR. There is also widespread support in academic literature for the application of Art. 31 ESR to trusts, although neither the precise contours of this enigmatic provision nor its exact functioning in connection with trusts has yet been established. The present article addresses, therefore, the question of how trusts are to be treated within the ESR. In particular, it will be shown how Art. 1 para. 2 lit. j ESR is to be understood against the background of Recital 13. In addition, the question will be raised as to what extent Art. 31 ESR has any importance at all in connection with trusts.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2021: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

O. Remien: **The European Succession Regulation and the many questions of the European court practice – five years after entry into force**

After five years of application of the European Succession Regulation it is time to have a look at European court practice: The general connecting factor of habitual residence has somehow been addressed by the European Court of Justice (ECJ) in *E.E.*, but especially national court practice shows many interesting cases of the necessary overall assessment. Choice of law by the testator is particularly important and a notary should point not only at the present situation, but also at possible developments in the future. Estate planning has become more interesting. The legacy *per vindicationem* (*Vindikationslegat*, i.e. with *in rem* effect) recognized in *Kubicka* poses specific problems. The position of the surviving spouse under § 1371 BGB in German law has become a highly debated subject and here the aspect of free movement of persons is highlighted. The European Succession Certificate also raises many questions, among them the applicability of the competence rules in case of national notarial succession certificates or court certificates, cases *Oberle*, *WB* and *E.E.*. The article pleads for an equilibrated multilateral approach. Donation *mortis causa* will have to be dealt with by the ECJ soon. Five years of application of the Succession Regulation – and many questions are open.

P. Hay: **Product Liability: Specific Jurisdiction over Out-of-State Defendants in the United States**

“Stream of commerce” jurisdiction in American law describes the exercise of jurisdiction in product liability cases over an out-of-state enterprise when a product produced and first sold by it in another American state or a foreign country reached the forum state and caused injury there. The enterprise cannot be reached under modern American rules applicable to “general” (claim unrelated) jurisdiction. Can it be reached by exercise of “specific” (claim related) jurisdiction even though it did not itself introduce the product into the forum state? This is an important question for interstate American as well as for foreign companies engaged in international commerce. The applicable federal constitutional limits on the exercise of such “stream of commerce” jurisdiction have long been nuanced and uncertain. It was often assumed that the claim must have “arisen out of” the defendant’s forum contacts: what did that mean? The long-awaited U.S. Supreme Court decision in March 2021 in Ford vs. Montana now permits the exercise of specific jurisdiction when the claim arises out of or is (sufficiently) “related” to the defendant’s in-state contacts and activities. This comment raises the question whether the decision reduces or in effect continues the previous uncertainty.

W. Wurmnest: **International Jurisdiction in Abuse of Dominance Cases**

The CJEU (Grand Chamber) has issued a landmark ruling on the borderline between contract and tort disputes under Article 7(1) and (2) of the Brussels I-bis Regulation. *Wikingerhof* concerned a claim against a dominant firm for violation of Art. 102 TFEU and/or national competition law rules. This article analyses the scope of the ruling and its impact on actions brought against dominant firms for violation of European and/or national competition law and also touches upon the salient question as to what extent such disputes are covered by choice of court agreements.

C.F. Nordmeier: **The waiver of succession according to Art. 13 Regulation (EU) 650/2012 and § 31 IntErbRVG in cases with reference to third countries**

According to Art. 13 Regulation (EU) 650/2012, a waiver of succession can be declared before the courts of the state in which the declarant has his habitual

residence. The present article discusses a decision of the Cologne Higher Regional Court on the acceptance of such a declaration. The decision also deals with questions of German procedural law. The article shows that – mainly due to the wording and history of origin – Art. 13 Regulation (EU) 650/2012 presupposes the jurisdiction of a member state bound to the Regulation (EU) 650/2012 to rule on the succession as a whole. Details for establishing such a jurisdiction are examined. According to German procedural law, the reception of a waiver of succession is an estate matter. If Section 31 of the IntErbRVG is applicable, a rejection of the acceptance demands a judicial decree which is subject to appeal.

P. Mankowski: **The location of global certificates – New world greets old world**

New kinds of assets and modern developments in contracting and technology pose new challenges concerning the methods how to locate assets. In many instances, the rules challenged are old or rooted in traditional thinking. Section 23 of the German Code of Civil Procedure (ZPO) is a good example for such confrontation. For instance, locating global certificates requires quite some reconsideration. Could arguments derived from modern legislation like the Hague Intermediated Securities Convention, Art. 2 pt. (9) EIR 2015 or § 17a DepotG offer a helping hand in interpreting such older rules?

S. Zwirlein-Forschner: **All in One Star Limited – Registration of a UK Company in Germany after the End of the Brexit Transition Period**

Since 1 January 2021, Brexit has been fully effective as the transition period for the UK has ended. In a recent decision, the Federal Court of Justice (BGH) has taken this into account in a referral procedure to the Court of Justice of the European Union (CJEU). The decision raises interesting questions on the demarcation between register law and company law, on conflict of laws and on the interpretation of norms implementing EU law. This article comments on these questions.

K. Sendlmeier: **Informal Binding of Third Parties – Relativising the Voluntary Nature of International Commercial Arbitration?**

The two decisions from the US and Switzerland deal with the formless binding of third parties to arbitration agreements that have been formally concluded between other parties. They thus address one of the most controversial issues in international commercial arbitration. Both courts interpret what is arguably the most important international agreement on commercial arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Supreme Court has ruled that the Convention does not preclude non-signatories from being bound by arbitration based on equitable estoppel in US arbitration law. In the Swiss decision, the binding nature of a non-signatory is based on its interference in the performance of the main contract of other parties. According to the established case law of the Swiss Federal Tribunal, this binding approach does not conflict with the New York Convention either.

K. Bälz: **Can a State Company be held liable for State Debt? Piercing of the Corporate Veil vs. attribution pursuant to Public International Law – Cour d'appel de Paris of 5 September 2019, No. 18/17592**

The question of whether the creditor of a foreign state can enforce against the assets of public authorities and state enterprises of that state is of significant practical importance, particularly in view of the increasing number of investment arbitrations. In a decision of 5 September 2019, the Paris Court of Appeal has confirmed that a creditor of the Libyan State can enforce an arbitral award against the assets of the Libyan Investment Authority (LIA), arguing that – although the LIA enjoys separate legal personality under Libyan law – it was in fact an organ *(émanation)* of the Libyan State, that was functionally integrated into the state apparatus without clearly separated assets of its own. This approach is based on public international law concepts of state liability and diverges from corporate law principles, according to which a shareholder cannot generally be held liable for the corporation's debts.

O.L. Knöfel: **Liability of Officials for Sovereign Acts (acta iure imperii) as a Challenge for EU and Austrian Private International Law**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 1 Ob 33/19p). The Court held that a civil action for compensation brought in Austria, by the victim of a downhill skiing accident, against a German school teacher on account of alleged negligence during a reconnaissance ride down an Austrian ski slope, does not constitute a "civil and commercial matter" under the Rome II Regulation, as it involves an *actum iure imperii* (Art. 1 cl. 1 Rome II Regulation). As a consequence, the Court applied German Law, relying on an alleged customary conflicts rule (*lex officii* principle), according to which indemnity claims against officials who act on behalf of the State are inevitably and invariably governed by the law of the liable State. Finally, the Court held that an action brought directly against a foreign official in Austria is not barred by sec. 9 cl. 5 of the Austrian Act of State Liability *(Amtshaftungsgesetz)*. The Court's decision is clearly wrong as being at variance with many well-established principles of the conflict of laws in general and of cross-border State liability in particular.

E. Piovesani: **Italian Ex Lege Qualified Overriding Mandatory Provisions as a Response to the "COVID-19 Epidemiological Emergency"**

Art. 88-bis Decree-Law 18/2020 (converted, with modifications, by Law 27/2020) is headed "Reimbursement of Travel and Accommodation Contracts and Package Travel". This provision is only one of the several provisions adopted by the Italian legislator as a response to the so-called "COVID- 19 epidemiological emergency". What makes Art. 88-bis Decree-Law 18/2020 "special" is that its para. 13 qualifies the provisions contained in the same article as overriding mandatory provisions.

Shell litigation in the Dutch courts

– milestones for private international law and the fight against climate change

by Xandra Kramer (Erasmus University Rotterdam/Utrecht Univeristy) and Ekaterina Pannebakker (Leiden University), editors

1. Introduction

As was briefly announced earlier on this blog, on 29 January 2021, the Dutch Court of Appeal in The Hague gave a ruling in a long-standing litigation launched by four Nigerian farmers and the Dutch *Milieudefensie*. The Hague Court held Shell Nigeria liable for pollution caused by oil spills that took place in 2004-2007; the UK-Dutch parent company is ordered to install equipment to prevent damage in the future. Though decided almost four months ago, the case merits discussion of several private international law aspects that will perhaps become one of the milestones in the broader context of liability of parent companies for the actions of their foreign-based subsidiaries.

Climate change and related human rights litigation is undoubtedly of increasing importance in private international law. This is also on the radar of the European institutions as evidenced among others by the ongoing review of the Rome II Regulation (point 6). Today, 26 May 2021, another milestone was reached, both for for private international law but for the fight against global climate change, with the historical judgment (English version, Dutch version) by the Hague District Court ordering Shell to reduce Co2 emissions (point 7). This latter case is discussed more at length in today's blogpost by Matthias Weller.

2. Oil spill in Nigeria and litigation in The Hague courts

As is well-known Shell and other multinationals have been extracting oil in Nigeria since a number of decades. Leaking oil pipes have been causing environmental damage in the Niger Delta, and consequently causing health damage and social-economic damage to the local population and farmers. Litigation has been ongoing in the Netherlands and the United Kingdom for years (see Geert van Calster blog for comments on a recent ruling by the English Supreme Court). At stake in the present case are several oil spills that occurred between 2004-2007 at the underground pipelines and an oil well near the villages Oruma, Goi and Ikot Ada Udo. The spilled oil pollutes agricultural land and water used by the farmers for a living.

Shortly after the oil spills, four Nigerian farmers instituted proceedings in the Netherlands, at the District Court of The Hague. The farmers are supported by the Dutch foundation *Milieudefensie*, which is also a claimant in the procedure. The claimants submit that the land and water, which the Nigerian farmers explored for living, became infertile. They claim compensation for the damage caused by the Shell's wrongful acts and negligence while extracting oil and maintaining the pipelines and the well. Furthermore, they claim to order Shell to secure better cleaning of the polluted land and to take appropriate measures to prevent oil leaks in the future.

The farmers summon both the Shell's Nigerian subsidiary and the parent company at the Dutch court. To be precise, they institute proceedings against the Shell's Nigerian subsidiary – Shell Petroleum Development Company of Nigeria Ltd and against the British-Dutch Shell parent companies – Royal Dutch Shell Plc (UK), with office in The Hague; Shell Petroleum N.V. (a Dutch company) and the 'Shell' Transport and Trading Company Ltd (a British company). It is this corporate structure that brings the Nigerian farmers to the court in The Hague and paves the way for the jurisdiction of Dutch courts.

3. Jurisdiction of Dutch courts: anchor defendant in the Netherlands and sufficient connection

Both the first instance court (in 2009) and the court of appeal at The Hague (in appeal in 2015) hold that the Dutch courts have jurisdiction. The ruling of the

Court of Appeal is available in English and contains a detailed motivation of the grounds of jurisdiction of the Dutch courts. See in particular at [3.3] – [3.9].

Claim against Shell parent company/companies. Dutch courts have jurisdiction to hear the claim against Shell Petroleum based on art. 2(1) Brussels I Regulation, as the company has its registered office in the Netherlands. Furthermore, the jurisdiction of Dutch courts to hear the claims against Royal Dutch Shell is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and the jurisdiction over claims to Shell Transport and Trading Company – on art. 6(1) and art. 24 Brussels I Regulation.

Claim against Shell's Nigerian subsidiary. The jurisdiction of the Dutch courts to hear the claim against Shell's Nigerian subsidiary is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and on art. 7(1) of the Dutch Code of civil procedure (DCCP). Art. 7(1) deals with multiple defendants. By virtue of art. 7(1) DCCP, if the Dutch court with jurisdiction to hear the claim against one defendant (in this case this is the Royal Dutch Shell), has also the jurisdiction to hear the claims against co-defendant(s), 'provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing'. The jurisdiction on the claim against the so-called 'anchor defendant' (for instance, the parent company) can thus carry with itself the jurisdiction on the other, connected, claims against other defendants.

Both the first instance court and the court in appeal found that the claims were sufficiently connected, despite the contentions of Shell. The Shell's contentions were twofold. First, Shell stated that the claimants abused procedural law, because the claims against Royal Dutch Shall were 'obviously bound to fail and for that reason could not serve as a basis for jurisdiction as provided in art. 7(1) DCCP' (at [3.1] in the 2015 ruling). According to Shell, the claim was bound to fail, because the oil leaks were caused by sabotage, in which case Shell would be exempt from liability under the applicable Nigerian law. This contention was dismissed: the claim was not necessarily bound to fail, according to the first instance court. The appellate court added that it was too early to assume that the oil spill was caused by sabotage. Second, Shell contested the jurisdiction of the Dutch courts because the parent companies could not reasonably foresee that they would be summoned in the Netherlands for the claims as the ones in the case. Dismissing this contention the court of appeal at The Hague stated in the 2015 ruling that 'in the light of (i) the ongoing developments in the field of *foreign*

direct liability claims (cf. the cases instituted in the USA against Shell for the alleged involvement of the company in human rights violations; *Bowoto v. Chevron Texaco* (09-15641); *Kiobel v Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013), as well as *Lubbe v. Cape Plc*. [2000] UKHL 41), added to (ii) the many oil spills that occurred annually during the extraction of oil in Nigeria, (iii) the legal actions that have been conducted for many years about this (for over 60 years according to Shell), (iv) the problems these oil spills present to humans and the environment and (v) the increased attention for such problems, it must have been reasonably foreseeable' for the parent companies taken to court with jurisdiction with regard to Royal Dutch Shell (see the 2015 ruling at [3.6].

4. Application of (substantive) Nigerian law

Substantive law. All claims addressed in the Court of Appeal ruling of 29 January 2021 are assessed according to Nigerian law. This is the law of the state where the spill occurred, the ensuing damage occurred and where the Shell's Nigerian subsidiary (managed and monitored by Shell) has its registered office. The events that are the subject of litigation occurred in 2004-2007 and fall outside the temporal scope of Rome II. Applicable law is defined based on the Dutch conflict of laws rules on torts, namely art. 3(1) and (2) *Wet Conflictenrecht Onrechtmatige Daad* (see the first instance ruling at [4.10]).

Procedural matters. Perhaps because the case of damage to environment as the one in the discussed case, the application of substantive law is strictly tied to the evidence, the court goes on to specify private international law with further finesse. It mentions explicitly that procedural matters are regulated by the Dutch code of civil procedure. In the meantime, the substantive law aspects of the procedure, including the question which sanctions can be imposed, are governed by the *lex causae* (Nigerian law). The same holds true for substantive law of evidence, including the specific rules on the burden of proof relating to a particular legal relationship. The other, general matters relating to the burden of proof and evidence are regulated by the *lex fori*, thus the Dutch law of civil procedure (at [3.1]).

5. The ruling of The Hague Court of Appeal

In its the ruling, the Dutch court holds Shell Nigeria liable for damage resulting from the leaks of pipelines in Oruma and Goi. Nigerian law provides for a high threshold of burden of proof that rests on the one who invokes sabotage of the pipelines (in this case, Shell). The fact of sabotage must be (evidenced to be) beyond reasonable doubt. Shell could not provide for such evidence for the pipelines in Oruma and Goi. Furthermore, Shell has not undertaken sufficient steps for the cleaning and limiting environmental damage. Shell Nigeria is therefore liable for the damage caused by the leaks in the pipelines. The amount of the damage to be compensated is still to be decided. The relevant procedure will follow up. The ruling is, however, not limited to this. Shell is also ordered to build at one of the pipelines (the Oruma-pipeline) a Leak Detection System (LDS), so that the future possible leaks could be swiftly noticed and future damage to the environment can be limited. This order is made to Shell Nigeria and to the parent companies.

Spills at Oruma and Goi are are two out of three oil spills. The procedure on the third claim – the procedure regarding the well at Ikot Ada Udo will continue: the reason for the oil spill is not yet clear and the next hearing has been scheduled.

6. Human rights litigation and Rome II

This Shell case at the Dutch court is one in a series of cases where human rights and corporate responsibility are central. Increasingly, it seems, victims of environmental damage and foundations fighting for environmental protection can celebrate victories. In the introduction we mentioned the English Supreme Court ruling in Okpaby v Shell [2021] UKSC 3 of February 2021. In this case the Supreme Court reversed judgments by the Court of Appeal and the High Court in which the claim by Nigerian farmers brought against Shell's parent company and its subsidiary in Nigeria had been struck out (see also Geert van Calster's blog, guest post by Robert McCorquodale). Also there is a growing body of doctrinal work on human right violations in other countries, corporate social responsibility, due diligence and the intricacies of private international law, as a quick search on the present blog also indicates.

From a European private international law perspective, as also the discussion above shows, the Brussels I*bis* Regulation and the Rome II Regulation are key. The latter Regulation has been subject of an evaluation study commissioned by

the European Commission over the past year, and the final report is expected in the next months. Apart from evaluating ten years of operation of this Regulation, one of the focal points is the issue of cross-border corporate violations of human rights. The question is whether the present rules provide an adequate framework for assessing the applicable law in these cases. As discussed in point 5 above, in the Dutch Shell case the court concluded that Nigerian law applied, which may not necessarily be in the best interest of environmental protection. This was based on Dutch conflict rules applicable before the Rome II Regulation became applicable, but Art. 4 Rome II would in essence lead to the same result. For environmental protection, however, Art. 7 Rome II may come to the rescue as it enables victims to make a choice for the law of the country in which the event giving rise to damage occurred instead of having the law of the country in which the damage occurs of Art. 4 applied. In a similar vein, the European Parliament in its draft report with recommendations to the Commission on corporate due diligence and corporate accountability, dated 11 September 2020, proposes to incorporate a general ubiquity rule in art. 6a, enabling a choice of law for victims of business-related human rights violations. In such cases a choice could be made for the law of the country in which the event giving rise to the damage occurred, or the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates. This draft report, which also addresses the jurisdiction rules under the Brussels I*bis* Regulation was briefly discussed on this blog in an earlier blogpost by Jan von Hein.

7. Shell and climate continued: The Hague court strikes again

Today, all eyes were on the next move of The Hague District Court in an environmental claim brought against Royal Dutch Shell Plc (RDS). It concerns a collective action under the (revised) Dutch collective action act (see earlier on this blog by Hoevenaars & Kramer, and extensively Tzankova & Kramer 2021), brought – once again by *Milieudefensie*, also on behalf of 17,379 individual claimants, and by six other foundations (among others *Greenpeace*). The claim boils down to requesting the court to order Shell to reduce emissions. First, the court extensively deals with the admissibility and representativeness of the claimants as part of the new collective action act (art. 3:305a Dutch Civil Code). Second, the court assesses the international environmental law, regulation and

policy framework, including the UN Climate Convention, the IPCC, UNEP, the Paris Agreement as well as European law and policy and Dutch law and policy.

Third, and perhaps most interesting for the readers of this blog, the court assesses the applicable law, as the claim concerns the global activities of Shell. As Weller has highlighted in his blogpost that discussion mostly evolves around Art. 7 Rome II. Milieudefensie pleaded that Art. 7 should, pursuant to its choice, lead to the applicability of Dutch law and, should this provision not lead to Dutch law, on the basis of Art. 4(1) Rome II. In establishing the place where the event giving rise to the damage occurs the court states that 'An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.' Milieudefensie holds RDS liable in its capacity as policy-setting entity of the Shell group. RDS pleads for a restrictive interpretation and argues that corporate policy is a preparatory act that falls outside the scope of Art. 7 as 'the mere adoption of a policy does not cause damage'. However, The Hague Court finds this approach too narrow and agrees with the claimants that Dutch law applies on the basis of Art. 7 and that, in so far as the action seeks to protect the interests of Dutch residents, this also leads to the applicability of Dutch law on the basis of Art. 4.

The judgment of the court, and that's what has been all over the Dutch and international media, is that it orders 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels'.

To be continued – undoubtedly.

CJEU on jurisdiction for an assigned insurance claim and branch jurisdiction in the case CNP, C-913/19

Back in January, we reported about the Opinion presented by AG Campos Sánchez-Bordona in the case CNP, C-913/19. At the request of the Court, the Opinion addressed only the second preliminary question on the branch jurisdiction under the Brussels I bis Regulation. This Thursday the Court delivered its judgment, which answers the second as well as two other (first and third) questions of the referring court, pertaining to the jurisdiction in matters of insurance.

The outline of the factual and legal contexts of the case can be consulted in the previous post. Remarks on the EU legal framework of relevance for the issues raised by the present case were made by Geert Van Calster and they should still be a point of consideration for those wishing to delve thoroughly into these issues.

Factual context in the main proceedings

In brief summary, an owner of a vehicle damaged in a road accident occurred in Poland assigns the claim against a Danish insurer covering, under a motor liability insurance, the liability of the person responsible for the accident to an automobile repair workshop, which provides a replacement vehicle to the assignor. Subsequently, the automobile repair workshop assigns that claim to CNP, a liability limited company established in Poland.

In its attempts to obtain the payment corresponding to the rental amount for the replacement vehicle, CNP is interacting with two companies established in Poland that represent the interests of the insurer in this Member State, namely Polins and Crawford Polska.

Failing to obtain full payment of the rental amount, CNP brings an action against the Danish insurer before a Polish court. The insurer argues that the claim should

be rejected due to the lack of jurisdiction of the Polish court. The national court decides to refer three question for a preliminary ruling.

Jurisdiction in matters relating to insurance and assignment of claims

At the outset the Court clarifies that it deems it appropriate to examine together the first and third questions by which, as the Court puts it, the referring courts asked, in essence, whether Article 13(2) the Brussles I bis Regulation, read in conjunction with Article 10 thereof, must be interpreted as precluding jurisdiction being founded independently under Article 7(2) or Article 7(5) of that Regulation in the case of a dispute between, on the one hand, a professional which has acquired a claim originally held by an injured party against a civil liability insurer and, on the other hand, this insurer.

It seems that the referring court invited the Court to examine whether an action can, as to its substance, fall within the scope of the Section 3 ("matters relating to insurance"), yet the applicant bringing that action and being a professional is barred from relying on the rules on jurisdiction of the Section 2 (as an action in matters relating to insurance is covered exclusively by the Section 3), namely on Article 7(2) and (5) of the Brussels I bis Regulation.

After reminding that an entity that recovers claims from insurance undertakings has to be considered as a professional in insurance sector (paragraph 43), the Court examines whether such professional is barred from relying on Articles 7(2) and (5) of the Brussels I bis Regulation and answers this question in the negative (paragraph 46).

On a side note, as previously hinted, in the present case, the claim was first assigned to the repair workshop and then by this repair workshop to CNP. The latter sought to build up upon this particularity an argument in its favour in the proceedings pending before the Polish court.

While the particularity in question, which distinguishes the present case from the case Hofose (where the owner of the damaged vehicle assigned the claim against the insurer directly to the applicant in the main proceedings), is not reflected in the wording of the preliminary questions, the Court does seem to hint it the presentation of these questions ("claim originally held by an injured party",

paragraph 29). However, it seems to be of no relevance as "no special protection is justified where the parties concerned are professionals in the insurance sector, neither of whom may be presumed to be in a weaker position than the other" (paragraph 40). Besides, the request for a preliminary ruling arose out of the proceedings to which the repair workshop is not a party.

Notion of "branch, agency or other establishment"

By its second question, the referring court asked, in essence, whether Crawford Polska must be regarded as being a "branch, agency or other establishment" within the meaning of Article 7(5) of the Brussels I bis Regulation.

Against this background, just as AG in his Opinion, the Court had to establish which of the two companies representing the insurer's interests in Poland (Polins or Crawford Polska) is the relevant entity for the purposes of Article 7(5) of the Brussels I bis Regulation (see points 53 – 58 of the Opinion). The Court held that referring court is seeking guidance about the scope of this provision in the light of the activity of Crawford Polska, this company had been "instructed by [the insurer] to adjust the claim at issue in the main proceedings" (paragraph 53).

In line with the Opinion, the Court considered that an undertaking which adjusts losses in the context of motor liability insurance in one Member State pursuant to a contract concluded with an insurance undertaking established in another Member State, in the name and on behalf of that undertaking, must be regarded as being a branch, agency or other establishment, within the meaning of that provision, where that undertaking:

- has the appearance of permanency, such as an extension of the insurance undertaking; and
- has a management and is materially equipped to negotiate business with third parties, so that they do not have to deal directly with the insurance undertaking (paragraph 61).

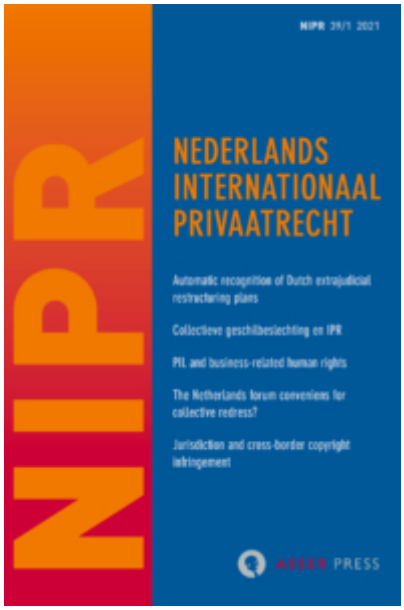
On a side note, in its request for a preliminary ruling, the referring court sought to establish whether the Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) may impact the interpretation of the notion of "branch, agency or other establishment" within the

meaning of Article 7(5) of the Regulation.

In this regard, the Court notes that the interpretation of the latter must be performed in an independent manner (paragraph 60). The judgment echoes therefore the case law built up upon the judgment in Kainz, C-45/13, paragraph 20 (Brussels I Regulation/Rome II Regulation), and brings to mind in particular the judgment in Pillar Securitisation, C-694/17, paragraph 35 (Lugano II Convention / Directive 2008/48/EC on credit agreements for consumers).

The judgment, which is also the subject of a press release, can be consulted here.

Latest issue Dutch PIL journal (NIPR)



The latest issue (21/1) of the Dutch journal *Nederlands Internationaal Privaatrecht* has been published. It includes the following articles.

Vriesendorp, W. van Kesteren, E. Vilarin-Seivane & S. Hinse, Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union / p. 3-17

On 1 January 2021, the Act on Court Confirmation of Extrajudicial Restructuring Plans ('WHOA') was introduced into the Dutch legal framework. It allows for

extrajudicial debt restructuring outside of insolvency proceedings, a novelty in the Netherlands. If certain requirements – mostly relating to due process and voting – are met, court confirmation of the restructuring plan can be requested. A court-confirmed restructuring plan is binding on all creditors and shareholders whose claims are part of that plan, regardless of their approval of the plan. WHOA is available in two distinct versions: one public and the other undisclosed. This article assesses on what basis a Dutch court may assume jurisdiction and if there is a basis for automatic recognition within the EU of a court order handed down in either a public or an undisclosed WHOA procedure.

Arons, Vaststelling van de internationale bevoegdheid en het toepasselijk recht in collectieve geschilbeslechting. In het bijzonder de ipr-aspecten van de Richtlijn representatieve vorderingen / p. 18-34

T*he application of international jurisdiction and applicable law rules in collective proceedings are topics of debate in legal literature and in case law. Collective proceedings distinguish in form between multiple individual claims brought in a single procedure and a collective claim instigated by a representative entity for the benefit of individual claimants. The 'normal' rules of private international law regarding jurisdiction (Brussel Ibis Regulation) and the applicable law (Rome I and Rome II Regulations) apply in collective proceedings. The recently adopted injunctions directive (2020/1828) does not affect this application.*

Nonetheless, the particularities of collective proceedings require an application that differs from its application in individual two-party adversarial proceedings. This article focuses on collective redress proceedings in which an entity seeks to enforce the rights to compensation of a group of individual claimants.

Collective proceedings have different models. In the assignment model the individual rights of the damaged parties are transferred to a single entity. Courts have to establish its jurisdiction and the applicable law in regard of each assigned right individually.

In the case of a collective claim brought by an entity (under Dutch law, claims based on Art. 3:305a BW) the courts cannot judge on the legal relationships of the individual parties whose rights are affected towards the defendant. The legal questions common to the group are central. This requires jurisdiction and the applicable law to be judged at an abstract level.

Bright, M.C. Marullo & F.J. Zamora Cabot, Private international law aspects of the Second Revised Draft of the legally binding instrument on business and human rights / p. 35-52

Claimants filing civil claims on the basis of alleged business-related human rights harms are often unable to access justice and remedy in a prompt, adequate and effective way, in accordance with the rule of law. In their current form, private international law rules on jurisdiction and applicable law often constitute significant barriers which prevent access to effective remedy in concrete cases. Against this backdrop, the Second Revised Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises has adopted a number of provisions on private international law issues which seek to take into account the specificities of such claims and the need to redress the frequent imbalances of power between the parties. This article analyses the provisions on jurisdiction and applicable law and evaluate their potential to ensure effective access to remedy for the claimants.

Conference report

Touw, The Netherlands: a *forum conveniens* for collective redress? / p. 53-67

On the 5th of February 2021, the seminar 'The Netherlands: a Forum Conveniens for Collective Redress?' took place. The starting point of the seminar is a trend in which mass claims are finding their way into the Dutch judicial system. To what extent is the (changing) Dutch legal framework, i.e. the applicable European instruments on private international law and the adoption of the new Dutch law on collective redress, sufficiently equipped to handle these cases? And also, to what extent will the Dutch position change in light of international and European developments, i.e. the adoption of the European directive on collective redress for consumer matters, and Brexit? In the discussions that took place during the seminar, a consensus became apparent that the Netherlands will most likely remain a 'soft power' in collective redress, but that the developments do raise some thorny issues. Conclusive answers as to how the current situation will evolve are hard to provide, but a common ground to which the discussions seemed to return does shed light on the relevant considerations. When legal and policy decisions need to be made, only in the case of a fair balance, and a

structural assessment thereof, between the prevention of abuse and sufficient access to justice, can the Netherlands indeed be a forum conveniens for collective redress.

Latest PhDs

Van Houtert, Jurisdiction in cross-border copyright infringement cases. Rethinking the approach of the Court of Justice of the European Union (dissertation, Maastricht University, 2020): A summary / p. 68-72

The dissertation demonstrates the need to rethink the CJEU's approach to jurisdiction in cross-border copyright infringement cases. Considering the prevailing role of the EU courts as the 'law finders', chapter four argues that the CJEU's interpretation must remain within the limits of the law. Based on common methods of interpretation, the dissertation therefore examines the leeway that the CJEU has regarding the interpretation of Article 7(2) Brussels Ibis in cross-border copyright infringement cases.

European Parliament Resolution on corporate due diligence and corporate accountability

Our blog has reported earlier on the Proposal and Report by the Committee on Legal Affairs of the European Parliament for a Resolution on corporate due diligence and corporate accountability. That proposal contained recommendations to amend the EU Regulations Brussels Ia (1215/2015) and Rome II (864/2007). The proposals were discussed and commented on by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster.

On 10 March 2021 the European Parliament adopted the Resolution with a large

majority. However, the annexes proposing to amend the Brussels Ia and Rome II Regulations did not survive. The Resolution calls upon the European Commission to draw up a directive to ensure that undertakings active in the EU respect human rights and the environment and that they operate good governance. The European Commission has already indicated that it will work on this.

Even if the private international law instruments are not amended, the Resolution touches private international law in several ways.

* It specifies that the "Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007" (Art. 20). It is a bit strange that this is left to national law and not made an overriding mandatory provision of EU law in line with the CJEU's Ingmar judgment (on the protection of commercial agents – also a Directive). Perhaps the legislator decides otherwise.

* It proposes a broad scope rule covering undertakings "operating in the internal market" and encompassing activities of these undertakings or "those directly linked to their operations, products or services by a business relationship or in their value chains" (Art 1(1)). It thus imposes duties on undertakings to have due diligence strategies and communicate these even if the undertakings do not have their seat in an EU Member State. In this way it moves away from traditional seat theories and place of activities tests.

CJEU judgment on jurisdiction for unpaid public parking ticket in

Obala i lucice, C-307/19

Back in November 2020, we reported about the Opinion delivered by Advocate General Bobek in the case Obala i lucice, C-307/19, in which he revisited the case law built upon the judgment of the Court of Justice in Pula Parking, C-551/15. This Thursday, the Court rendered its judgment in the case in question.

Legal and factual context

In brief summary, a daily parking ticket is issued for a car left in an on-street parking. A Croatian parking management entity commences enforcement proceedings for recovery of the parking ticket debt with a notary. The notarial writ of execution issued against a Slovenian company is challenged by the latter and two Croatian courts consider themselves lacking jurisdiction to hear the case. The case is then transferred to the referring court in order for it to deal with the negative conflict of competence.

A more extensive presentation of the legal and factual context of the case can be consulted in the previous post.

Questions/issues addressed

In his Opinion, at the request of the Court, AG Bobek did not address all the questions referred for a preliminary ruling. Opinion is confined to Questions 1 to 3 and 5 to 7. Not all the Questions addressed in the judgment either, yet for a different reason.

On the one hand, the Court considered that the questions pertaining to the Service Regulation (Questions 1 and 3) were inadmissible (paragraph 51). The referring court is facing a negative conflict of competence and the request for a preliminary ruling does not specify why this court takes the view that the resolution of the case in the main proceedings depends on the interpretation of the Service Regulation. It is worth noticing that this Regulation has been interpreted by AG Bobek in his Opinion, at points 88 to 105.

On similar grounds, the Court considered inadmissible the questions on to compatibility with Article 56 TFEU of the presumption that a contract is concluded by the act of parking in a designated space (on-street parking)

(Questions 4 and, partially, 9). The referring court failed to expose the reasons that prompted it to inquire about the compatibility of that presumption with EU law (paragraph 52).

On the other hand, as mentioned in the previous post, the facts underlying the case pending before the national courts predate the accession of Croatia to the EU. Therefore, the Court considered itself not competent to answer the question on the interpretation of the Rome I and Rome II Regulations (Questions 8 and, partially, 9), these Regulation being not applicable ratione temporis to the facts in question (paragraph 58).

Thus, the Court was left with the remaining issues, namely, **whether an action for payment of a debt relating to the unpaid public parking ticket is a dispute relating to 'civil and commercial matters'** within the meaning of the Brussels I bis Regulation (Question 2), **whether the special ground of jurisdiction for rights in rem is applicable to that action** (Question 6) and, if it is not the case, **whether the grounds of jurisdiction for contract/tort may be relied on by the applicant** (Questions 5 and 7).

Notion of 'civil and commercial matters'

According to the Court's answer, an action for payment of a daily parking ticket, issued for parking in a designated space, in an on-street parking, imposed by a parking management entity falls within the scope of the notion of 'civil and commercial matters' (paragraph 73). This answer is preceded by a fine-grained analysis, accompanied by multiple references to the case law (paragraphs 59 et seq.).

The analysis carried out by the Court should be of a particular interest as it cannot be excluded that much can be inferred from it as to the qualification of a 'civil and commercial matter'. To that effect, it could potentially be read against the background of the Opinion presented by AG Bobek. In fact, at its points 39 to 54, he distinguished two approaches adopted by the Court in its case law in order to establish whether the Regulations on 'civil and commercial matters' are applicable in a specific case. He defined them as 'subject matter' and 'legal relationship' approaches, and it was the latter that he favoured in the case at hand. Such parallel reading could be also supplemented by the lecture of remarks on that very issue made by one of the commentators.

Special ground of jurisdiction for rights in rem

Reiterating the autonomous nature of qualification that needs to be exercised in relation to Article 24(1) of the Brussels I bis Regulation, regardless of the qualification that the legal relationship receives under national law (paragraph 79), the Court held, in essence, that an action for payment of a daily parking ticket, issued for parking in a designated space, in an on-street parking, cannot be considered as an action brought in proceedings which have as their object 'tenancies of immovable property' (paragraph 80).

Contract/tort

Addressing ultimately the contract/tort distinction, the Court held that the action in question falls within the scope of Article 7(1) of the Brussels I bis Regulation (paragraph 89).

Next, referring to the Opinion, it considered that the 'parking contract in question in the main proceedings' can be qualified as a 'contract for the provision of services' in the sense of Article 7(1)(b) of the Regulation (paragraph 97).

The judgment itself can be consulted here (so far in French), with the request for a preliminary ruling being available here.