Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case

[Guest post written by Thijs Bosters LL.M., a PhD Researcher (Private International Law and Collective redress) at Tilburg University.]

After the *Morrison v. NAB* decision of last June, the question was raised how and where an f-cubed case should be filed in the future. It has been proposed that, for example, the Canadian class action or the Dutch collective settlement procedure could serve as alternatives in cross-border securities mass disputes. What makes the Dutch collective settlement procedure such an interesting alternative is that a settlement can be declared binding by the Amsterdam Court of Appeal on all persons to which it applies according to its terms. In this way, all plaintiffs can be covered and a mass dispute can be resolved through a single action (for more information on the Collective Settlement Act (*Wet collectieve afwikkeling massaschade*), see the The Global Class Actions Exchange report of Stanford Law School). With the 2009 Shell collective settlement, the Dutch Act proved that it can be instrumental in the resolution of cross-border securities mass disputes. The *Shell* case, however, was only a partially f-cubed case, as quite many of the investors involved were Dutch.

Converium

On 12 November 2010, the Amsterdam Court of Appeal assumed preliminary jurisdiction in the "full f-cubed" *Converium* case (the Dutch text can be found here). This case revolves around the Swiss reinsurance company Converium Holding AG (currently known as SCOR Holding AG). In late 2001, Zürich Financial Services Ltd, of which Converium was a full subsidiary, sold its shares through an initial public offering. The shares were listed on the SWX Swiss Exchange in Switzerland and as American Depositary Shares (ADSs) on the New York Stock Exchange. Between 7 January 2002 and 2 September 2004, Converium made several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance

unit. The existing reserve deficiency forced Converium to announce that it would take a charge of between $ 400 and $ 500 million to increase its reserve. This, combined with the downgrade of the company's credit rating by Standard & Poor's in response to the reserve increase, caused a massive drop of the share value.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and certain of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-U.S. persons who had purchased Converium shares on any non-U.S. exchange, leaving them empty-handed. Because of the positive way the Shell case was being resolved in the Netherlands, Converium and ZFS agreed that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system.

Converium, ZFS, the special Converium Securities Compensation Foundation (which represents the group of individual purchasers that were excluded from the U.S. class), and the Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the Court first wanted to decide whether this link was enough to assume jurisdiction over the case.

Jurisdiction Amsterdam Court of Appeal

The Court first examined whether it could assume jurisdiction to effectuate the settlement and subsequently whether it was also competent to bind all the purchasers named in the settlement. This would prevent plaintiffs from filing a claim for damages in the future.

As the settlement only takes effect if it is made binding, it is not possible to directly use Article 5(1) Brussels I/Lugano to determine which court has jurisdiction because the place of performance, the main requirement of this provision, is unknown. However, in *Effer v. Kantner*, the court also based its

jurisdiction on Article 5(1) Brussels I/Lugano in a dispute concerning a contract which had not been concluded yet, so the place of performance was unknown as well. Because the Converium settlement is aimed at a certain performance that will take place in the Netherlands, namely, payment of damages by the Dutch special compensation foundation, the Dutch Court of Appeal can assume jurisdiction.

To prevent parallel and irreconcilable litigation, the Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding on Article 6(1) Brussels I/Lugano. The Court stated that the claims of the various purchasers are so closely connected that it is expedient to hear and decide on them together. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Brussels I/Lugano makes it possible to assume jurisdiction in the combined case.

Although the majority of the purchasers are domiciled in one of the Brussels I Regulation/Lugano Convention member states, there are also purchasers that are not. In these cases, the Dutch Code of Civil Procedure decides whether a Dutch court has jurisdiction. According to this Code, a court can assume jurisdiction over cases in which one or more purchasers are domiciled in the Netherlands. In the *Converium* case, the Compensation Foundation and the Investors Association are domiciled in the Netherlands. Moreover, because the settlement will be executed in the Netherlands, there is a sufficient connection with the Dutch jurisdiction for the Amsterdam Court of Appeal to also assume jurisdiction for those cases which involve non-Brussels I/Lugano purchasers.

Based on the above-mentioned provisions, the Amsterdam Court of Appeal may assume jurisdiction in the *Converium* case. Article 6 ECHR and the principle of *audi alteram partem*, however, prevent the Court from making a final decision on its competence. As not all the purchasers have been summoned yet, the Court will be forced to stay the proceedings (Article 26(2) Brussels I/Lugano) till they have been given proper notice. Until then, the ruling will be provisional. During the fairness hearing, which still has to be scheduled but will probably take place in the second half of 2011, the purchasers may still advance a different view on the jurisdiction issue.

Postgraduate Studentships in Private International Law of the EU at Aberdeen

The University of Aberdeen has one of the most significant groups of private international law (PIL) researchers in the world, an excellent dedicated Law Library and a proven track record in research supervision. The EU has embraced harmonised PIL as the means of preserving the cultural and legal diversity that makes Europe so interesting while giving sufficient unity and coherence to the EU to make it strong.

The research topics that could be selected are from across all areas of private international law that have been or could be legislated for within the EU. Successful applicants will be given a significant financial award designed to cover their fees and in some cases to help with maintenance. We hope that there will be opportunities for successful applicants to supplement their income by working as tutors and/or research assistants in the Law School.

The awards are tenable from September 2011 (but the start date is flexible) and can last for up to 3 years for a PhD (depending on good progress) and one year for a research LLM.

Further particulars can be obtained from the Law School by contacting the postgraduate secretary, Mrs Claire Thomson, law438@abdn.ac.uk

How to apply?

Please send a copy of your cv, your research proposal and two academic references (in signed and sealed envelopes) to Professor Paul Beaumont, School of Law, University of Aberdeen, Aberdeen AB24 3UB, Scotland, UK by 1 February 2011.

Rome III: Agreement in Council on the Text of the New Rules on Divorce and Legal Separation

The JHA Council, in its meeting held on 3 December 2010 in Brussels, **agreed on the text** (doc. n. 17045/10) **of the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (see our previous post here).

As stated in the Council's press release (doc. n. 17151/10),

> *The new rules will apply to all participating member states as of mid-2012. Other EU member states which are not yet ready but wish to join this pioneer group at a later stage will be able to do so. The agreement also constitutes the implementation of the first enhanced cooperation in the history of the EU.*
>
> *For its adoption two more procedural steps are necessary: The European Parliament is expected to adopt an opinion on the file in its December plenary session. The Council will then adopt the new rules without discussion, most likely at the Environment Council on 20 December 2010.*

Upon the adoption, the regulation will be accompanied by declarations by the Council (on *forum necessitatis*), and by the Commission, Malta and Finland on a new controversial art. 7a ("Differences in national law"): see Annexes I, II, III and IV to doc. n. 17046/10.

The position of the European Parliament, under examination in the JURI Committee, can be found in the Draft report prepared by rapporteur *Tadeusz Zwiefka* (see, in particular, the Explanatory Statement) and additional amendments.

EU Consultation on Harmonisation of Securities Law

The European Commission has launched a month ago a Consultation on the Harmonisation of Securities Law.

The objective of the consultation is to obtain

> *advice from Member States, market participants and other stakeholders, in particular investors, on a certain number of principles, on which the Commission could base its future legislative proposals in order to improve the EU-wide legal framework for cross-border transfers of securities*

Contributions are welcome until January 1st, 2011.

The consultation raises an interesting issue of choice of law:

> ***14 – Determination of the applicable law***
>
> *14.1 Principle*
>
> *1. The national law should provide that any question with respect to any of the matters specified in paragraph 3 arising in relation to account-held securities should be governed by the national law of the country where the relevant securities account is maintained by the account provider. Where an account provider has branches located in jurisdictions different from the head offices' jurisdiction, the account is maintained by the branch which handles the relationship with the account holder in relation to the securities account, otherwise by the head office.*
>
> *2. An account provider is responsible for communicating in writing to the account holder whether the head office or a branch and, if applicable, which branch, handles the relationship with the account holder. The communication itself does not alter the determination of the applicable law under paragraph 1.*

The communication should be standardised.

3. The matters referred to in paragraph 1 are:
(a) the legal nature of account-held securities;

(b) the legal nature and the requirements of an acquisition or disposition of account-held securities as well as its effects between the parties and against third parties;

(c) whether a disposition of account-held securities extends to entitlements to dividends or other distributions, or redemption, sale or other proceeds;

(d) the effectiveness of an acquisition or disposition and whether it can be invalidated, reversed or otherwise be undone;

(e) whether a person's interest in account-held securities extinguishes or has priority over another person's interest;

(f) the duties, if any, of an account provider to a person other than the account holder who asserts in competition with the account holder or another person an interest in account-held securities;

(f) the requirements, if any, for the realisation of an interest in account-held securities.

4. Paragraph 1 determines the applicable law regardless of the legal nature of the rights conferred upon the account holder upon crediting of account-held securities to his securities account.

14.2 Background

Many dispositions in securities involve a cross-border element. Therefore, more than one jurisdiction may be relevant to these dispositions. As already mentioned, not only the legal concepts applying to securities held through account providers vary considerably, but similarly the conflict-of-laws rules do not conform to each other. Three directives address the issue, amongst other questions, notably Article 9(1) of the Financial Collateral Directive, Article 9(2) of the Settlement Finality Directive, and Article 24 of the Winding-Up Directive.

The status quo raises three questions: First, the conflict-of-laws rules as

contained in the three directives are based on slightly different criteria. The envisaged legislation should bring the three rules in line with each other so as to ensure consistency and predictability.

Second, these rules exclusively apply to the relatively limited scope of the directives, notably to those organisations covered by their personal scope. The envisaged legislation should apply to all account holders and account providers. Consequently, a uniform conflict-of-laws rule for all market participants would be useful.

Third, taking Article 9(1) of the Financial Collateral Directive, which is the most recent one, as a conceptual starting point, it becomes clear that that in some (admittedly rare) cases the interpretation of where securities accounts are "located" could diverge. That means, before settling on a uniform conflict-of-laws rule for the entire environment, the rule itself needed to be clarified as regards the so called "connecting factor.

The connecting factor of the conflict-of-laws rule should be based on the factual criterion similar to the criterion used in the three directives, i.e. where a securities account is 'maintained'. However, more guidance is needed for proper interpretation of this criterion, in particular as regards multi-branch entities. In this respect, regard has to be given to the reasonable perspective of the account holder, which expects that the national law of the country is applicable where the branch is located which handles the relationship with the account holder in relation to the securities account. In deciding which branch is servicing the client, the question of through which branch the account was opened, which branch handles the commercial relationship with the account holder, and which branch administers payments or corporate actions relating to the securities credited to the securities account, and similar aspects, will have to be taken into account, whereas the place of the location of supporting technology or of call or mailing centres should be disregarded. However, these additional guidelines as to which branch handles the relationship should not figure as cumulative elements of the connecting factor but rather as clarifying elements of interpretation figuring in the recitals of the instrument (cf. paragraph 1 of the envisaged Principle).

In addition to clarifying the connecting factor itself improvement of ex-ante legal certainty is necessary. As the connecting factor is fact-based and subject

to legal interpretation, ultimately confined to the judge, it is basically a criterion delivering an ex post view. However, increased legal certainty requires active reliable ex ante knowledge of the applicable law. Paragraph 2 of the envisaged Principle cuts the Gordian knot by prescribing a practical solution, allowing for a fact based connecting factor while at the same time increasing ex ante predictability: account provider should always be in a position to tell where an account is maintained, i.e. which branch handles the client relationship. This certainty should be transferred to the account holder by communicating the relevant location. The account provider should be responsible for the correct fulfilment of this duty and the competent authority should be in a position to intervene where the communication does not reflect the location where the account is actually serviced. However, there needs to be a clarification that the approach remains entirely fact based and that the communication must not be able to alter the underlying analysis of where the account is actually maintained. A judge will have to look at the facts, not at the communication, in order to determine the applicable law. In case the factual analysis and the communication differ, the factual analysis prevails and the account provider will be responsible for any incorrect communication in this regard (cf. Paragraph 2 of the envisaged Principle).

There is agreement that a conflict-of-laws rule should roughly cover what is dealt with in the substantive law part regarding holding and disposition of account-held securities. However, there are additional elements which need to be covered by the conflict of laws rule, notably those that are closely connected to the matter but are, in the substantive law part, left to autonomous national legislation. For instance, the characterisation of the legal nature of the rights arising from crediting securities accounts would need to be included. Furthermore, there are aspects addressed in the substantive part which should not be governed by the conflict-of-laws rule, for instance the loss sharing mechanism in case of insolvency. Consequently, a detailed list of issues setting out the scope of the conflict-of-laws rule needs to be included in a separate paragraph, (cf. paragraph 4 of the envisaged Principle).

There needs to be a clarification that all securities credited to a securities account are covered by the conflict-of-laws rule, regardless the legal nature that national law attributes to them. This aspect is particularly important where national law characterises certain account-held securities in a cross-border

context as being of contractual or similar nature (cf. paragraph 5 of the envisaged Principle).

There might be additional benefit in harmonising the way by which the location is communicated to the account holder, for example in a separate document, on the account statement, or even as part of the account number. This rather technical issue would benefit from some degree of standardisation.

14.3 Questions

Q27: Would a Principle along the lines described above allow for a consistent conflictof-laws regime? If not: Which part of the proposal causes practical difficulties that could be addressed better?

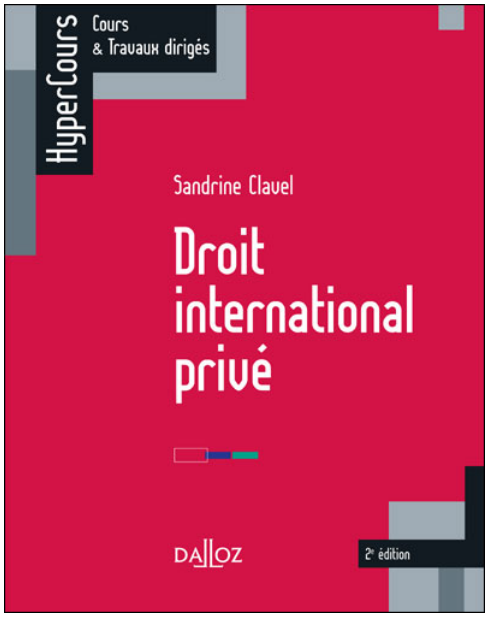
Q28: Would the mechanism of communicating to the client, whether the head offices or a branch (and if a branch, which one) is handling the relationship with the client, add to exante clarity? Is it reasonable to hold the account provider responsible for the correctness of this information? If applicable, would any negative repercussions on your business model occur?

Q29: The Hague Securities Convention provides for a global harmonised instrument regarding the conflict-of-law rule of holding and disposition of securities, covering the same scope as the proposal outlined above and the three EU Directives. Most EU Member States and the EU itself have participated in the negotiations of this Convention. The proposed principle 14 differ from the Convention as regards the basic legal mechanism for the identification of the applicable law. However, the scope of principle 14 is the same than the scope of the Convention: property law, collateral, effectiveness, priority. Do you agree that this will facilitate the resolution of conflicts with third country jurisdictions ? If not, please explain why.

Many thanks to Bram van der Eem for the tip-off.

New Edition of Clavel's Droit International Privé

Sandrine Clavel, who is a professor of law at the University of Versailles-Saint-Quentin and the co-director of the Master Arbitrage et Commerce International, has published the second edition of her manual.



The book offers an account of the entirety of French private international law. But it is also a teaching book, as it includes a variety of exercises, many summaries of cases and tests that students may use to verify their correct understanding of the field.

More details can be found here.

China's First Statute on Choice of Law – German Translation

Following Gilles' post of 3 November, *Christian Heinze* (Hamburg) kindly brought to my attention the German translation of the Chinese Statute on Choice of Law. The translation by *Knut Benjamin Pißler* (Max Planck Institute for Comparative and Private International Law, Hamburg) can be found **here**.

EP Workshop on Civil Justice: "How to facilitate the life of European families and citizens?"

On 30 November 2010 the European Parliament's Committee on Legal Affairs will host in Brussels **an interparliamentary workshop on Civil Justice**, organized in collaboration with the national parliaments of the Member States: **"How to facilitate the life of European families and citizens?"**. The conference is structured in 4 parts, and **can be watched live in video streaming on the EP's website**:

Morning Sessions (h 9.30 – 13.00):

- Opening
- I. Family Law: Latest Developments and the Way Forward;
- II. Cross-Border Successions.

Afternoon Sessions (h 15 – 18.30):

- III. Parental Responsibility and the Protection Of Children;
- IV. Civil Status;
- Conclusions.

Each session will include speakers from the EP, national parliaments and the Commission, as well as the academic world and practitioners: a detailed draft programme is available here.

Here's a presentation of the event:

> *Removing the legal and administrative barriers that citizens face when they start a family life in a Member State other than their own will be at the centre of the Workshop on Civil Justice which will take place in the European Parliament on 30 November.*

The Workshop, which will be attended by EU and national parlamentarians, will be composed of four thematic sessions. The first two sessions will present the "state of play" in the drafting of new legal instruments in the field of European family law and the law of succession.

The third session will focus on child protection in cross-border situations. The topics of parental responsibility, including the controversial issue of the recognition of surrogacy agreements, as well as of international adoption will be addressed therein. Legal practitioners and academics will report on the current situation as it stands in several Member States.

The last session will provide an overview of the current difficulties faced by citizens in proving their civil status in cross-border situations. In this regard, a number of actions ranging from the suppression of the legalisation formalities of civil status acts to the interconnection of civil status registers will be presented. The challenging idea of creating a European "civil status" document will also be discussed.

Finally, the Workshop will also include speeches from Melchior Wathelet, Belgian State Secretary for Family Policy, on the achievements of the Belgian Presidency in the field of family law and Viviane Reding, European Commission (EC) Vice-President, on the actions planned by the EC in this field.

An Italian View on the Living Dead Convention

I am grateful to Pietro Franzina, a researcher in International law at the University of Ferrara, Italy, for sharing his thoughts on the recent case of the Cassazione *on the Brussels Convention. Pietro dealt with this topic in 'Interpretazione e destino del richiamo compiuto dalla legge di riforma del diritto internazionale privato ai criteri di giurisdizione della Convenzione di Bruxelles',* Rivista di diritto internazionale, *2010, 817* et seq.

I agree with Gilles Cuniberti: the conclusion reached by the *Corte di Cassazione* in its order of 21 October 2009 regarding Article 3(2) of the Italian Statute on Private International Law (*see* his post here) is an unfortunate one.

Before I attempt to explain why, in my view, the Court erred in saying that the reference made by that provision to the 1968 Brussels Convention should still be interpreted as a reference to the Convention, and not to the Brussels I regulation, let me put forward a few preliminary remarks.

(a) Article 3(2) of the Italian Statute on Private International Law of 31 May 1995 (hereinafter, the Statute) determines whether Italian courts have jurisdiction in civil and commercial matters in respect of proceedings *falling outside the scope of application* of the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, *i.e.* proceedings instituted against defendants domiciled outside the territory of a contracting State (or a contracting State of the Lugano Conventions). In respect of such proceedings the Italian legislator of 1995 was virtually free to lay out any rule on jurisdiction, and still is.

(b) The drafters of the Statute decided to make use of this freedom in an almost unprecedented way. They incorporated the heads of jurisdiction set out in section 2, 3 and 4 of chapter II of the Brussels Convention within the Statute. To do so, they made an express reference to such heads of jurisdiction, as provided for by the 1968 Convention and by its subsequent modifications in force for Italy ("*e successive modificazioni in vigore per l'Italia*"). This way, the Italian legislator introduced *national* rules providing heads of jurisdiction corresponding to those employed in Articles 5-15 of the Convention.

(c) After the entry into force of the Brussels I regulation, the doubt arose as to whether the reference made in Article 3(2) of the Statute should still be construed as aiming at the Convention, and not at the regulation. While the legislator took no action to amend (or confirm) the wording of Article 3(2), opposing views were expressed by scholars as to how the provision should be interpreted within the new legal landscape.

(d) The interest of the question was not only theoretical. It is well known that while the regulation retained the structure of the Convention and left almost unchanged many of its provisions, some rules have been significantly modified. One of these is Article 5(1), on jurisdiction in contractual matters. Suppose that

an Italian company seeks to recover the price of the goods it sold to a non-European buyer. If the relevant heads of jurisdiction were to be found – via the Statute – in Article 5(1) of the Brussels Convention, the chances of bringing the case before an Italian court would presumably be rather high: the relevant obligation for jurisdictional purpose would be the obligation to pay the price (*De Bloos*), and its place of performance should be determined (under *Tessili* and *Custom Made*) pursuant to the substantial rules governing the contract, be they national rules (such as Article 1498(3) of the Italian Civil Code: at the seller's domicile) or uniform rules (such as Article 57(1)(a) of the CISG: at the seller's place of business). On the contrary, should Article 3(2) of the Statute be construed as implying a reference to Article 5(1)(b), first indent, of the Brussels I regulation, the obligation to be taken into account would be the obligation to deliver the goods (*Color Drack*), and – failing an agreement of the parties – its place of performance should be the place where the purchaser obtained, or should have obtained, actual power of disposal over the goods, at the final destination of the sales transaction (*Car Trim*). The Italian seller would thus presumably be unable to sue the buyer in Italy.

In its order of 21 October 2009, the Italian Court of Cassation held that the Brussels Convention, although superseded by the regulation as between Member States, except as regards the territories of such States which fall within the scope of that Convention but lie outside the reach of EU law, must be considered as still in force and applicable. According to the Court, the fact that the Convention remains in force, no matter how narrow its residual scope of application, implies that the reference made in Article 3(2) is still capable of working as it was originally drafted, *i.e.* as a reference to the Convention, leaving no room for a different reading of the provision.

One would be tempted to say that the rationale behind the decision is, at least partly, a 'political' one. The rule regarding jurisdiction in contractual matters is frequently relied on, in Italy, by small and medium enterprises exporting the goods they manufacture. The latest developments in the ECJ's case law regarding the operation of this rule within the Brussels I regulation (*Car Trim*) make it more and more difficult for these businesses to sue their contractual counterparts before an Italian court (it is worth noting that the *Corte di Cassazione*, up until one year ago, interpreted the expression 'place of delivery' under Article 5(1) of the Brussels I regulation as meaning – according to Article 31(a) of the CISG, and

contrary to what is now the view of the ECJ – the place in which the goods are handed over to the first carrier for transmission to the buyer, *i.e.* a place generally 'close' to the seller's place of business). This conclusion may be inevitable for cases regulated by the Brussels I Regulation, but not for cases which are subject to a national provision, such as Article 3(2) of the Statute, provided the 'old' rule of the Convention and its pro-seller bias (as compared with the Regulation) may still be allowed to play a role.

I will leave 'political' considerations aside and try to examine the solution reached by the *Cassazione* from a purely legal standpoint. In this perspective, the Court's order calls for at least two critical remarks.

(1) The Brussels Convention may still be applicable in respect of proceedings against defendants domiciled in Wallis and Futuna, Saint-Pierre and Miquelon and a few other areas around the world, but this does not imply that the Brussels I regulation is to be given no weight in the interpretation of Article 3(2) of the Statute. On the contrary, the correct view – in my opinion – is that the regulation did bring about a "modification" of the Convention for the purpose of Article 3(2) of the Statute. The fact that the two instruments bear a different legal nature is not necessarily at odds with this assumption. According to the law of treaties (as codified in the Vienna Convention of 23 May 1969), a treaty may in general be amended by an agreement between the parties (Articles 39 *et seq.*): the Brussels regulation (and the EU-Denmark Agreement of 19 October 2005, on the application of the regulation between the parties) may be seen as the 'vehicle' by which the contracting States agreed to alter the scope of application of the Convention, limiting it to the cases which were not concurrently regulated by the regulation (and/or the EU-Denmark Agreement). One would hardly imagine, otherwise, how the EU Member States (those who are parties, at the same time, to the Brussels Convention) might ignore in their mutual relationship, without violating it, a convention to which they are still bound.

(2) If the preceding assumption is correct, one should conclude that Article 3(2) of the Statute, according to its terms, implies – after the entry into force of the Brussels I regulation – a 'double' reference: a reference to the Brussels Convention (as long as it is an international treaty in force) *and* a reference to the regulation. Such double reference – a situation which the Italian legislator could not reasonable expect (until then, the modifications of the Brussels Convention were effected through conventions superseding the previously applicable texts *in*

their entirety) – is clearly unworkable in practice. Under the Italian rules on statutory interpretation, issues like this, concerning a national rule ambiguously worded, should be solved through the use of non-textual (*i.e.* systematic and teleological) canons of interpretations. As a matter of fact, the *Corte di Cassazione* paid little or no importance, in its order, to the goals underlying Article 3(2). Through this provisions, the Statute attempted to permanently bring the Italian system of private international law in line with the most developed experiences of international cooperation in this field. Furthermore, by enacting national rules on jurisdiction corresponding to the heads of jurisdiction set out in a frequently applicable legal instrument, such as the Brussels Convention, the drafters of Article 3(2) pursued the objective of simplifying the work of interpreters, placing almost *all* jurisdictional issues susceptible of arising before Italian judges in civil and commercial matters within *one* normative framework. Both goals suggest that the better reading of Article 3(2) is the one implying a reference to the Brussels I regulation, and not to the Convention. The opposite view, followed by the *Cassazione*, prevents the Italian system from taking advantage of the developments of the regime set up by the Convention and 'continued' by the regulation, and runs counter the need of simplification.

Should the 'new' Brussels I regulation contain *erga omnes* rules on jurisdiction, as suggested by many (including the drafters of the Green Paper on the revision of the regulation, COM (2009) 175 def.), the *raison d'être* of Article 3(2) of the Statute will disappear altogether. Till then, the Italian interpreters will need to cope with a highly complex regime arising out of a questionable case law.

The Living Dead Convention

Reports of the death of the 1968 Brussels Convention have been greatly exaggerated.

In some parts of Europe, it is still possible to enjoy the application of old Article 5.1 of the Convention and to determine the place of performance of the obligation in question for a basic sale of goods.

One such example is Italy, where the Convention has risen from the dead. This happened a year ago, in Rome.

Italian Private International Law Act, 1995

In 1995, Italy reformed its private international law and adopted a new statute reforming the Italian System of Private International Law. Article 2 of the 1995 Statute provides that international conventions prevail over domestic rules. Thus, jurisdiction of Italian courts over disputes falling within the scope of the Brussels I Regulation is governed by the said Regulation.

Article 3 of the Statute provides a remarkable rule for disputes in civil and commercial matters falling outside the territorial scope of European law, i.e. when the defendant is not domiciled within the jurisdiction of a Contracting state. Instead of laying down its own rules of jurisdiction, the Italian lawmaker decided to apply further the 'Brussels Convention'. Article 3 provides that the heads of jurisdiction provided by the Convention remain applicable. In other words, Italy extended the territorial scope of the Convention to civil and commercial disputes where the defendant is domiciled outside of a contracting state.

> ***Art. 3 Ambito della giurisdizione****.*
>
> *2. La giurisdizione sussiste inoltre in base ai criteri stabiliti dalle Sezioni 2, 3 e 4 del Titolo II della Convenzione concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale e protocollo, firmati a Bruxelles il 27 settembre 1968, resi esecutivi con la L. 21 giugno 1971, n. 804, e successive modificazioni in vigore per l'Italia, anche allorché il convenuto non sia domiciliato nel territorio di uno Stato contraente, quando si tratti di una delle materie comprese nel campo di applicazione della Convenzione.*

That was all fine in 1995, when the Brussels Convention was alive and kicking. But when the Convention was replaced by the Brussels I Regulation, an issue arose. Was the reference to the '1968 Brussels Convention and it successive modifications in force in Italia' to be interpreted as a reference to the new Regulation? Did it matter that Danemark kept on for a while applying the Brussels Convention? and that it has now stopped?

Legal Miracle

The question was put forward the Italian supreme court for private matters (*Corte di Cassazione*) last year. An Italian firm was suing a company incorporated in Monaco in a dispute involving a sale of goods. Monaco is neither a member of the European Union, nor a party to any Lugano Convention. Would jurisdiction be determined by establishing where the obligation in question had been performed, or by referrence to the place of delivery of the goods?

In October 2009, the *Corte di Cassazione* held that the referrence to the Brussels Convention could not be interpreted as designating the Brussels I Regulation. It thus applied old article 5.1 of the Brussels Convention.

Any comment from Italian readers wishing to explain how international conventions can be resurrected is most welcome!

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2010)

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

Here is the contents:

- ***Anne Röthel/Evelyn Woitge*:** "Das Kollisionsrecht der Vorsorgevollmacht" – the English abstract reads as follows:

> *Various European national laws have recently implemented powers of representation granted by an adult to be exercised when he or she is not in a position to protect his or her interests. The authors show the existence and scope of these powers of representation within Europe and identify the need for conflict norms for this legal institution. Based on an analysis of the respective*

rules in the Hague Convention on the international protection of adults, the authors highlight the need to find a national solution that acknowledges the special interests of incapable adults. They suggest a regulation for powers of representation in autonomous international private law that adapts the concept of the Hague Convention.

- ***Stefanie Sendmeyer*:** "Die Rückabwicklung nichtiger Verträge im Spannungsfeld zwischen Rom II-VO und Internationalem Vertragsrecht" – the English abstract reads as follows:

In private international law, it is highly disputed whether the law applicable to claims aiming to reverse enrichment in case of a void contract is determined by Art. 10 (1) lit. e) Rome II Regulation or by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome I Regulation respectively. After a short analysis of the current state of discussion, it is shown that the argument emanates from the erroneous assumption that the question of restitution in such cases is a matter of unjust enrichment according to Art. 10 Rome II Regulation as well as a topic of private international law concerning contractual obligations. In fact, the question has to be solved by clearly differentiating between contractual and non-contractual obligations and, therefore, between the scope of the Rome II Regulation and the scope of the instruments of private international law dealing with contractual obligations. In consistence with European international procedural law, restitution in case of a void contract is considered a contractual obligation and, therefore, the applicable law is determined by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome II Regulation respectively.

- ***Anatol Dutta:*** "Grenzüberschreitende Forderungsdurchsetzung in Europa: Konvergenzen der Beitreibungssysteme in Zivil- und Verwaltungssachen?" (on ECJ, 14.1.2010 – C-233/08 – Milan Kyrian ./. Celní úrad Tabor) **–** the English abstract reads as follows:

The dogma that claims of the State based on its penal, revenue or other public law are not enforceable abroad – a doctrine also known as the revenue rule – is more and more displaced by European instruments obliging the Member States to collect public law claims of their fellow Member States. One example for this development is the Tax Recovery Directive 76/308/EC (later: 2008/55/EC, now: 2010/24/EU) on the mutual assistance for the recovery of claims relating to

taxes, duties and other measures – an instrument, which has been gradually extended to all taxes levied by the Member States. The present article, which discusses a recent decision of the European Court of Justice interpreting the Tax Recovery Directive, attempts to highlight some similarities between the European enforcement rules for public law claims and those for private law claims. These similarities do not only allow fertilisation across the public-private law border when applying and interpreting the different enforcement rules, but once more demonstrate that the revenue rule should be reconsidered.

- ***Sebastian Mock:*** "Internationale Streitgenossenzuständigkeit" **–** the English abstract reads as follows:

The international jurisdiction for claims against several defendants at the domicile of one of the defendants as today established by Art. 6 No. 1 Brussels I Regulation is unknown in several member states and consequently causes general doubts due to the existing possibilities of manipulation in this context. Although the European Court of Justice reflected these doubts by establishing the additional need of the risk of irreconcilable judgments resulting from separate proceedings in the application of Art. 6 No. 1 Brussels Convention and Art. 6 No. 1 Lugano Convention – which was later recognized by the European legislator in the drafting of Art. 6 No. 1 Brussels I Regulation – the determination of this additional requirement is still left unclear. In its recent decision the German Federal Court of Justice delivered a rather broad understanding of this requirement. The court held that the jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation does not require that all defendants have to be sued at the same time. Moreover the court held that the violation of a duty of a member of the board of directors is sufficient to establish a jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation for a claim against the member of the board of directors when the plaintiff already filed a claim against the company of the director. However, the author doubts that this ruling can be considered as a general principle in the application of Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation and shows that the ruling has to be seen in context with a special provision of the applicable Swiss corporate law.

- ***Martin Schaper:*** "Internationale Zuständigkeit nach Art. 22 Nr. 2

EuGVVO und Schiedsfähigkeit von Beschlussmängelstreitigkeiten – Implikationen für den europäischen Wettbewerb der Gesellschaftsrechte" – the English abstract reads as follows:

Art. 22 (2) Brussels I Regulation establishes an exclusive jurisdiction of a Member State's court for proceedings which have as their object, among others, the nullity or the dissolution of companies and the validity of the decisions of their organs. This jurisdiction depends on where the company's seat is located. For determining this seat the court has to apply its rules of International Private Law (lex fori). Although Germany generally adheres to the real seat theory, the OLG Frankfurt a.M. (Higher Regional Court) decided that a private limited company's statutory seat is the relevant factor for determining the exclusive jurisdiction.

Since the freedom of establishment, as interpreted by the Court of Justice of the European Union, promoted corporate mobility there is an increasing demand for settling disputes not in the state of incorporation, but in the country where the major business operations take place. Therefore, the article examines the possibility of arbitration proceedings on the nullity and avoidance of decisions taken by shareholders' meetings in an international context.

Finally, based on the experience with the state competition for corporate charters in the USA, the impact of a jurisdiction's courts and the admissibility of arbitration proceedings is analysed within the context of regulatory competition in company law in Europe.

- ***Veronika Gärtner:*** "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" – the English abstract reads as follows:

Until recently, German law did not know an explicit rule on international jurisdiction with regard to proceedings dealing with the adjustment of pension rights between divorced spouses. The Federal Court of Justice held in several judgments that international jurisdiction with regard to the adjustment of pension rights followed – also in cases where those proceedings are initiated independently from divorce proceedings – the rules of international jurisdiction

with regard to the divorce proceedings due to the strong link between both issues.

With reference to this case law, the Regional Court of Karlsruhe held in its decision of 17 August 2009 (16 UF 99/09) that German courts lacked international jurisdiction with regard to (independent) proceedings on the adjustment of domestic pension rights between two Portuguese divorced spouses habitually resident in Portugal, based on the argumentation that Art. 3 Brussels II bis Regulation had to be applied analogously with regard to the question of international jurisdiction. Due to the fact that the requirements of this provision were not met, German courts were – according to the Higher Regional Court Karlsruhe – not competent to rule on the adjustment of the (German) pension rights.

This result is undoubtedly incorrect under the present legal situation: With effect of 1 September 2009 – in the course of a general revision of the procedural rules in family law and non-contentious cases – a new rule has been introduced stating explicitly that German courts have international jurisdiction with regard to proceedings on the adjustment of pension rights inter alia in cases concerning domestic (pension) rights (§ 102 Nr. 2 FamFG).

However, the author argues that also before the entry into force of this new rule, the Regional Court of Karlsruhe should have answered the question of international jurisdiction in the affirmative: First, it is argued that the court's reference to Art. 3 Brussels II bis Regulation was misplaced since – as Recital No. 8 of the Brussels II bis Regulation illustrates – "ancillary measures" – and therefore also proceedings on the adjustment of pension rights of divorced spouses – are not included into the scope of application of Brussels II bis.

Further, the author argues that the negation of international jurisdiction in cases concerning domestic (pension) rights leads to a denial of justice. Therefore it is argued that international jurisdiction could – and should – have been assumed on the basis of general principles of jurisdiction.

- ***Gerhard Hohloch/ Ilka Klöckner:*** "Versorgungsausgleich mit Auslandsberührung – vom alten zum neuen Recht – Korrektur eines

Irrwegs" – the English abstract reads as follows:

On the 11th of February 2009, the Federal Supreme Court of Justice has had its first opportunity to decide whether or not the Dutch provisions on pension rights adjustment were to be regarded as equivalent to the German "Versorgungsausgleich" (VA) in the matter of Art. 17 III 1 EGBGB. Though until then this was generally accepted, the Court decided to deviate from the established opinion. In the course of the 2009 Reform, Art. 17 III EGBGB was revised and significantly restricted regarding its field of application. According to this new regulation, German law must now be applicable in order for the plaintiff to successfully be able to claim an adjustment of pension rights in Germany. Starting off with a critical examination of the Supreme Court's decisions, the authors then point out the impact of the Court's adjudication on the interpretation and the application of the new Art. 17 III EGBGB.

- ***Pippa Rogerson*:** Forum Shopping and Brussels II bis (on: High Court of Justice, 19.4.2010 – [2010] EWHC 843 (Fam) – JKN v JCN)

Sometimes real life cases focus academic attention on important issues of principle. In JKN v JCN a husband and wife from New York had been living in London for 12 years and had four young children together. Then they returned to New York where they are all now residing for the foreseeable future. The marriage has broken down and a divorce, financial settlement and arrangements for the children are required. Which court should deal with these matters? The wife commenced proceedings in England under Brussels II bis and the husband in New York. The parties had both UK and US citizenship and the husband at that time was still resident in England. Both parties were pursuing proceedings in a court which provided that party with some advantages. Ideally, the parties should come to a settlement without needing the court's determination. If not, preferably a single court should adjudicate matters. This is achieved within the EU by the lis pendens rule in Brussels II bis. However, there is no similar regime operating with non-Member States. A proliferation of judgments over the same matter is wasteful of the parties' time and assets as well as of the courts' resources. It also leads to problems of enforcement of possibly irreconcilable judgments.

- **Axel Kunze/ Dirk Otto:** "Internationale

Zwangsvollstreckungszuständigkeit, rechtliche Grenzen und Gegenmaßnahmen" (on: New York Court of Appeals, Opinion v. 4.6.2009) – the English abstract reads as follows:

A New York Court recently ruled that courts in New York have international competence to order the cross-border attachment of rights and securities held by a foreign party with a foreign bank abroad as long as the foreign bank carries out business in the state of New York. This decision potentially exposes foreign banks operating in New York state to attachment disputes. The article describes the impact of the decision and compares it with the legal situation in Germany and other EU countries. The authors come to the conclusion that under German law, EU law as well as under the Lugano Convention a court may not order the attachment of claims located in other countries. In order to limit the risk for banks from being caught in the middle, the authors suggest contractual arrangements that would enable banks to "vouch in" customers into disputes before U.S. courts to ensure that banks are not liable if they comply with U.S. rulings. On the other hand customers could initiate legal steps in their home jurisdiction to prevent a bank from transferring assets/securities abroad; such an injunction would also be recognized by U.S. courts.

- ***Bartosz Sujecki*:** "Zur Anerkennung und Vollstreckung von deutschen Kostenfestsetzungsbeschlüssen für einstweilige Verfügungen in den Niederlanden" – the English abstract reads as follows:

The Dutch Supreme Court (Hoge Raad) had to give an answer to the question whether a German decision on the amount of cost (Kostenfestsetzungsbeschluss) related to an interim injunction (einstweilige Verfügung) can be recognized and enforced in the Netherlands. Since the German interim injunction was given in an ex parte procedure and the cost decision was not contested by the defendant, the question arose whether such an uncontested decision can be qualified as a "decision" according to article 32 of the Brussels I Regulation and can be enforced in the Netherlands. This paper discusses and analyzes the decision of the Dutch Supreme Court.

- ***Gerhard Hohloch:*** "Feststellungsentscheidungen im Eltern-Kind-Verhältnis – Zur Anwendbarkeit von MSA, KSÜ und EuEheVO" – the English abstract reads as follows:

The article discusses the Austrian Supreme Court's order issued on May 8th 2008, concerning the applicability of the 1961 Hague Convention "[…] on the protection of minors" on declaratory actions in statutory custody cases. It refers to the international jurisdiction rules (including "Regulation Brussels IIa") as well as to the conflict of law rules. As the significance of the Court's assessment extends beyond the Austrian-German border, the main emphasis is put on how the problems of the case at issue are to be treated in Germany, and furthermore on the impact the 1996 Hague Convention "[…] on the protection of Children" – which is expected to come into force soon – will have on the legal situation in Germany and in Austria.

- ***Oliver L. Knöfel:*** "Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe à la scandinave" **–** the English abstract reads as follows:

The article gives an overview of the mechanisms of judicial assistance in the taking of evidence abroad in civil matters as maintained by the five Nordic Countries (Denmark, Finland, Iceland, Norway, Sweden). In Central and Western Europe, it is little-known that the Nordic Countries have, since the 1970s, erected an autochthonous system of judicial assistance differing quite significantly from the long-standing habits of taking evidence abroad as established by the Hague Conference or recently by the European Union. According to specific reciprocal legislation, Nordic residents are obliged to appear before the courts of any Nordic country, and to give evidence. Thus, there is hardly any need to have a foreign Nordic witness examined by her home court according to a letter rogatory, or to take evidence directly on foreign soil. The article aims at exploring this extraordinary mode of international judicial co-operation with special reference to Swedish procedural law. It is shown that the Nordic mechanism is a product of a very high level of convergence in the field of civil procedure, and that this is due to a common core of Nordic legal cultures.

- ***Reinhard Giesen*** on a decision of the Norwegian Supreme Court on the applicable law with regard to defamation: "Das Recht auf freie Meinungsäußerung und der Schutz der persönlichen Ehre im Kontext unterschiedlicher Kulturen" (on: Norges Høyesterett, 2.12.2009 – HR-2009-2266-A)

- ***Kurt Siehr*** on the Austrian Supreme Court's decision of 18 September 2009 dealing with the question of the applicability of Brussels II bis with regard to the return of abducted children – in particular in cases where the child is over 16 years old : "Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und der EuEheVO "Kind" oder "Nicht-Kind" – das ist hier die Frage!" (on: Austrian Supreme Court, 18.9.2009 – 6 Ob 181/09z)
- ***Erik Jayme*** on the inaugural lecture held by Professor Martin Gebauer in Tübingen on 16 July 2010