Hage-Chahine on Culpa in Contrahendo in European PIL

Najib Hage-Chahine has posted Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation on SSRN.

Precontractual liability is liability that arises out of a harmful conduct that occurs during the formation period of a contract. Where the harmful conduct occurs during international negotiations, a conflict of laws issue arises. The determination of the applicable law to precontractual liability can be a complex and tedious task, which is why the European Legislature has provided a special conflict-of-law rule in Article 12 of the Rome II Regulation on the applicable law to non-contractual obligations. Through this provision, the European Legislature aims to achieve uniformity between EU Member States, while providing an appropriate conflicts rule. The present essay assesses the European Legislature's attempt at codification and offers a commentary of Article 12 of the Rome II Regulation. It comes at a time when the Commission is scheduled to submit a report on the application of the Rome II Regulation to the European Parliament, the Council, and the European Economic and Social Committee. This essay will show that the Legislature has displaced the traditional rules of European private international law by adopting a contractual connecting factor in order to determine the applicable law to a non-contractual obligation. Indeed, the European Legislature has, for the purposes of European private international law, chosen to characterize culpa in contrahendo as non-contractual, but has chosen to determine the applicable law to this non-contractual obligation on the basis of a contractual connecting factor. Thus, Article 12(1) of the Rome II Regulation has, in fact, chosen to submit claims arising out of culpa in contrahendo to the lex contractus in negotio. According to this provision, the applicable law to claims arising out of culpa in contrahendo is the law of the contract that was under negotiation. In spite of its advantages, the rule provided by Article 12 of the Rome II Regulation lacks flexibility. The lack of escape devices and the relative inapplicability of the second paragraph of Article 12 of the Rome II Regulation make this rule a rigid one whose application cannot be displaced whenever it reaches inappropriate results.

The paper was published in the *Northwestern Journal of International Law & Business*.

Cross-Border Road Accidents Claims (Monograph)

Angel Espiniella Menéndez, lecturer of Private International Law at the University of Oviedo, has just published the book "Las reclamaciones derivadas de accidentes de circulación por carretera transfronterizos" (Claims arising from Cross Border Road Accidents), which is number 185 in the Collection "Cuadernos de la Fundación Mapfre". Based on the legal theory of obligations and addressed to the practitioners involved in this kind of litigation, the book aims to provide a comprehensive overview of a hypothetical complaint. To this end the monograph is divided into three sections: cross-border claims of injured parties against those allegedly liable; cross-border claims of injured parties against insurers; and cross-border claims for reimbursement among compensation duty bearers. Thus, the book analyzes the cross-border litigation against drivers, owners of vehicles , manufacturers of vehicles, persons claimed to be liable for the acts of others (employers, masters or principals), transferors of the vehicles, carriers, etc., and it also deals with the cross-border intervention of insurance companies, cross-border claim representatives, national funds of guarantees and compensation bodies, National Insurers' Bureaux, and their correspondents.

After a thorough investigation the author concludes that the rules of the Rome II Regulation are more appropriate than those of the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, even though the Regulation does not contain specific rules on the subject matter; therefore, he recommends the denonciation of the Convention. He also suggests that the insurer coverage be governed by the law of the State where the accident occurs, regardless of the law of the State where the vehicle is normally based; and accordingly he prompts the amendment of the Directive 2009/103, Article 14. To conclude the author proposes separate, specific rules for claims among the entities providing

coverage, including Bureaux, compensation bodies, guarantee funds, insurers, representatives and their correspondents.

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Third Issue of 2012's Rivista di diritto internazionale privato e processuale

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

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

In the first article, *Claudio Consolo*, Professor of Law at the University of Padua, discusses the new proceedings for interim relief (with full cognizance) for the ascertainment of the effectiveness of foreign judgments in Italy after Legislative Decree No. 150/2011 ("Il nuovo rito sommario (a cognizione piena) per il giudizio di accertamento dell'efficacia delle sentenze straniere in Italia dopo il d.lgs. n. 150/2011"; in Italian).

In the second article, *Costanza Honorati*, Professor of Law at the University of Milano-Bicocca, offers a critical appraisal of provisional measures under the proposal for a recast of the Brussels I Regulation ("Provisional Measures and the Recast of Brussels I Regulation: A Missed Opportunity for a Better Ruling"; in English).

In the third article, *Theodor Schilling*, Professor of Law at the Humboldt University of Berlin, discusses the enforcement of foreign judgments in the case-law of the European Court of Human Rights ("The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights"; in English).

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

- *Lorenzo Ascanio* (Adjunct Professor at the University of Macerata), "Equivoci linguistici e insidie interpretative sul ripudio in Marocco" (Linguistic Ambiguities and Interpretative Pitfalls on Repudiation in Morocco; in Italian);
- *Lidia Sandrini* (Researcher at the University of Milan), "La tutela del creditore in pendenza del procedimento di exequatur nel regolamento Bruxelles I" (Creditor's Protection Pending the Exequatur Proceedings under the Brussels I Regulation; in Italian);
- *Giuseppe Serranò* (Research Fellow at the University of Milano-Bicocca), "Considerazioni in merito alla sentenza della Corte internazionale di giustizia nel caso relativo alle immunità giurisdizionali dello Stato" (Remarks on the Judgment of the International Court of Justice on Jurisdictional Immunities of the State; in Italian);
- *Cristina M. Mariottini* (Senior Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), "Statutory Ceilings on Damages under the Rome II Regulation: Shifting Boundaries in the Traditional Dichotomy between Substance and Procedure?" (in English).

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

By Royal Appointment: No Closer to an EU Private International Law Settlement?

Members of the British Royal Family and aristocracy have long contributed to the development of the law in England governing matters of personal privacy. As long ago as 1849, Prince Albert, the prince consort of Queen Victoria, resorted to the courts to prevent the publication of etchings and drawings by the Royal couple, including of their children (Prince Albert v Strange (1849) 2 De G & Sm 652). In a 1964 case, the Duchess of Argyll sued her formal husband, the 11th Duke, to prevent disclosure of the secrets of their marriage to national newspapers (Argyll v Argyll [1967] Ch. 302). In recent years, both Her Majesty the Queen and Prince Charles, Prince of Wales, have taken legal action in the English courts following the disclosure, or threatened disclosure, of personal information.

The recent flurry of judicial activity following the unwarranted invasion of the privacy of Her Royal Highness Princess William, Duchess of Cambridge, Countess of Strathearn and Baroness Carrickfergus (a.k.a. Mrs Mountbatten-Windsor) highlights the potential advantages for claimants of French privacy laws, both civil and criminal. No doubt, the Duchess and her husband wished to be seen to have taken prompt and effective action to protect their private lives in this high profile case *pour encourager les autres*. Their chosen avenues of recourse through the French courts would appear to have been designed to serve both as a swift, effective and public assertion of their rights (the civil injunction) and as a deterrent (the nascent criminal complaint).

As yet, the incident and its aftermath do not seem momentous from a private international law perspective. The prosecution by English nationals of a civil claim in France against a French publisher, requiring the delivery up of photographs in the publisher's possession which are said to have resulted from an invasion of the claimant's privacy on French territory, would not appear to raise significant or complex issues of jurisdiction or applicable law.

Nevertheless, the case encourages reflection as to how well EU private international law deals with situations involving (alleged) violations of personal

privacy, and other contributors to this symposium have raised a variety of issues.

Two introductory points may be noted before embarking on further discussion of this topic. First, and putting to one side the need to provide an autonomous definition in an EU context (see below), one must accept that the notion of a "violation of privacy" may in common usage cover a wide variety of fact situations, which are not necessarily to be treated alike. Taking the facts of the Duchess of Cambridge case as an example, the essence of any judicial complaint could rest upon the unauthorised (i) taking, (ii) transmission, (iii) receipt or (iv) publication of photographs or other media, with any transfer or publication occurring either (a) electronically (including via the internet) or (b) by other means. In other circumstances, a violation of personal privacy may be tantamount to a physical assault, as in the case of stalking, or to theft, as in the case of the removal of papers (the Pontiff's butler) or computer hacking. The matter may also have a commercial background, in particular if the claimant intended himself to exploit the disclosed information, as in the Douglas-Zeta Jones wedding case (Douglas v Hello! Limited [2007] UKHL 21).

Secondly, if it is determined that any or all of these situations do require special treatment within EU private international law instruments, one must recognise that that this will inevitably create problems of classification, which may be thought to compromise the underlying objectives of promoting legal certainty, and harmonious decision making, that these instruments outwardly pursue.

EU law has already shown itself to be adept in creating difficulties of this kind. In the Rome II Regulation, non-contractual obligations arising out of violations of privacy (and of personality rights) are presently excluded altogether (Art. 1(2)(g)), but the task of elaborating what wrongful conduct amounts or does not amount to a "violation of privacy" for this purpose has been left to the courts, and remains incomplete. Following criticism levelled at this exception, there have been (as Professor von Hein explains) various proposals for a new, special rule covering the same ground as the current exclusion. If adopted, however, the new rule would not remove the classification problem, but merely transfer it from being one of the material scope of the Regulation to one of the material scope of a rule within the Regulation, and its separation from other rules (in particular, the general rule for tort/delict in Art. 4).

In relation to online activities, the eCommerce Directive raises many (as yet

unresolved) issues as to the scope of its "country of origin" regulation, and the various exceptions and qualifications to that regime. The European Court's eDate Advertising / Martinez decision, rather than clearing the air, has only heightened the challenges that this Directive presents in the area of civil liability.

Last but not least, the eDate decision also has a separate jurisdictional aspect, on which the remainder of this comment will focus. The effect of this part of the Court's judgment is that a distinction must now be drawn for jurisdiction purposes between "an infringement of a personality right by means of the internet" (which the CJEU has told us merits a special, claimant-friendly interpretation of Art. 5(3)) and other cases (which remain subject to well-established principles governing the operation of that Article).

At first impression, these two points may seem to pull in different directions, the first supporting a more granular approach and the second tending towards a uniform solution. Both, however, provide reasons for caution when formulating special rules, whether of jurisdiction or applicable law, which treat violations of privacy and personality rights as a single, separate category. Further, the proliferation of different fact patterns within the realm of "violations of privacy" and analogies to other categories of wrongdoing (such as those highlighted above) may itself be thought to militate in favour of maintaining general rules such as Art. 5(3) of the Brussels I Regulation in its pre-eDate form and Art. 4 of the Rome II Regulation. The latter provision, in particular, may be argued to be sufficiently well-calibrated to deal with the range of new situations that would fall within its scope if the Art. 1(2)(g) exception were simply to be removed when the Regulation is reviewed.

In his contribution, Professor von Hein supports the adoption of a special rule for violations of privacy and personality rights. As part of his proposal, he favours giving claimants who sue in the courts of their own habitual residence or of the defendant's domicile a right to elect to apply the law of the forum to the entire claim.

This element of Professor von Hein's proposal seeks to build upon the jurisdictional aspect of the CJEU's decision in eDate. This, however, is the law reform equivalent of constructing a house on swampland. The decision has strong claims to be the worst that the Court has ever delivered on the Brussels I regime, conflicting with long established principles central to the functioning of the

Regulation and giving the impression either that the Court considers itself at liberty to make up new rules of jurisdiction on the spot or that there is a sacred text in its library in which the Regulation's rules are elaborated, but to which the outside world does not yet have access.

The decision may be criticised in no less than seven respects.

First, having expressed ubiquitous remarks about the ubiquitous nature of internet publications (para, 45), the Court observed (with good reason) that this causes difficulty in applying the criterion of "damage" as a factor connecting the tort to a given legal system for the purposes of Art. 5(3) of the Regulation: "the internet reduces the usefulness of the criterion relating to distribution in so far as the scope of the distribution of content placed online is in principle universal" (para. 46). In light of these conclusions, and given that the special rules of jurisdiction are intended to secure "a close link between the court and the action" and/or "to facilitate the sound administration of justice" (Recital (12); see also para. 40 of the eDate judgment), one might have expected that the Court would conclude that the concept of "harmful event" should be given a narrow reading in cases of this kind so as to *exclude* the criterion of damage as a connecting factor for jurisdiction purposes (for an analogous approach in a contractual context, see Case C-256/00, Besix, paras 32 and following). That conclusion would have been consistent with the dominant approach in the case law to the interpretation of exceptions to the general rule in Art. 2 (e.g. Case C-103/05, Reisch Montage, paras 22 and 23). The Court, however, chose a different path.

Secondly, the Court asserted that the connecting factors used within Art. 5(3) "must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all the damage caused" (para 48). This argument, which the Court uses as its launching pad for its novel "centre of gravity approach", is utterly devoid of merit. As the Court had acknowledged (para. 43), the claimant in such a case already has at least one, and possibly, two options available for bringing an action in respect of all the damage caused in one Member State court. Most significantly within the framework of the Regulation, he/she may always bring an action in the Courts of the defendant's domicile (see Besix, para 50; Case C-420/97, Leathertex, para 41). Moreover, if the publication emanates from an establishment in a Member State other than that of the publisher's domicile, the claimant may bring an action in that Member State, as

the place of the event giving rise to damage, (Case C-68/93, Shevill, paras 24-25; eDate, para. 42; Case C-523/10, Wintersteiger, paras 36-39). There was no need to create a new global connecting factor.

Thirdly, having concluded that the Regulation did not present the claimant with sufficient options for pursuing his claim, the Court proposed attributing full jurisdiction to "the court of the place where the victim has his centre of interests" on the ground that the impact of material placed online might best be assessed by that court (para. 48), sitting in a place which corresponds in general to the claimant's habitual residence (para. 49). In these two sentences, and without further explanation or justification, the Court repudiates its longstanding principle of avoiding interpretations of the rules of special jurisdiction in Art. 5 which favour the courts of the claimant's domicile in such a way as to undermine to an unacceptable degree the protection which Art. 2 affords to the defendant (e.g. Case C-364/93, Marinari, para. 13; Case C-51/97, Réunion Européenne, para. 29).

Fourthly, the Court considered that its proposed new ground of jurisdiction has the benefit of predictability for both parties, and that the publisher of harmful conduct will, at the time content is placed online (being, apparently, the relevant time for this purpose†), be in a position to know the centres of interests of the persons who are the subject of that content (para. 50). It is, however, extremely difficult to reconcile this confident statement with the Court's earlier recognition that "a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State" (para. 49). If predictability were the objective, it is hard to see how the Court could have done more to remove it.

Fifthly, given that a person's private life (and reputation) may have several centres, which change over time, it does not seem possible to say more than that there *might* be a strong link between the facts of a particular case and the place where the claimant's centre of interests is held to lie. Equally, there might not. Take the case of a former Bundesliga footballer, with Polish nationality, who signs for an English club and moves to England. While visiting a German friend, he has rather too much to drink in a nightclub. The story is published, in German, on a German football website. Does the sound administration of justice support giving the English courts jurisdiction over the footballer's claim against the website

publisher? In the Duchess of Cambridge's case, does the sound administration of justice support giving the English courts jurisdiction over the publication of photographs on a French, or Italian or Irish, website, particularly as the current position is that those courts would have no jurisdiction with respect to hard-copy publications by a newspaper or magazine under the same ownership? Given that the French, Italian or Irish courts would have global jurisdiction under Art. 2, it is suggested that the answer is a resounding "no".

Sixthly, having decried the utility, in internet cases, of the criterion of damage *á la Shevill*, the Court inexplicably chose to retain it as a connecting factor for jurisdiction purposes, allowing an action "in each Member State in the territory of which content placed online is or has been accessible" (para. 51). This begs the following question: if the new connecting factor is not a substitute for the "damage" limb of the Bier formulation, what then is it? In para. 48 of its judgment, the Court had seemed to suggest that the claimant's centre of interests was "*the place* in which the damage caused in the European Union by that infringement occurred", but this cannot be taken literally given that the Court returns three paragraphs later to the view that damage may occur in each Member State. The eDate variant of "damage" would seem to be a derivative or indirect form, of the kind that the Court had in its earlier case rejected as being a sufficient foundation for jurisdiction (Marinari, para. 14). If a label is needed, perhaps "damage-lite" would do the job?

Finally, the Court's assertion that its new rule corresponds to the objective of the sound administration of justice (para. 48) is also called into question by the second part of its judgment, interpreting the eCommerce Directive in a way that gives an essential role in cases falling within its scope to the law of the service provider's (i.e. the defendant's) country of origin. Although questions of jurisdiction and applicable law are distinct, and the Brussels I Regulation and eCommerce Directive pursue different objectives, the suitability of the courts of the claimant's centre of interests is undermined by the need to take into account, in *all* cross-border cases, a foreign law. By contrast, jurisdiction and applicable law are much more likely to coincide where jurisdiction is vested in the courts of the defendant's domicile or establishment.

Any proposed new rule in the Rome II Regulation must also face the complexity which the eCommerce Directive introduces in this area, particularly after the eDate judgment. In an ideal world, the priority between the two instruments

would be reversed, with the Directive being pruned to exclude its effect upon questions of civil liability and to enable a single instrument to govern questions of the law applicable to non-contractual obligations arising out of violations of privacy and personality rights. That, however, may be too much to hope for – once embedded, an EU legislative instrument is hard to dislodge.

Professor Muir-Watt makes the important point that, in this area, choice of law rules must yield, to a greater degree than in many other areas of civil law, to considerations of public policy and to the fundamental rights to which all Member States subscribe as parties to the European Convention (we will have to agree to disagree about the significance of the Charter of Fundamental Rights even if the Rome II Regulation were extended).

In cases such as that of the Duchess of Cambridge, there is of course a tension between (at least) two rights – that of the right to a private and family life (Art. 8) and that of freedom of expression (Art. 10). As recent cases before the European Court of Human Rights demonstrate (in particular, the two decisions involving Caroline, Princess of Monaco), the balance between them is not easy to strike, and the margin of appreciation will continue to allow different solutions to be adopted in different States. It may be questioned, however, whether this perilous balance is well served by a rule of election for applicable law which, coupled with claimant friendly rules of jurisdiction, enables the subject of a publication which is alleged to be defamatory or to violate privacy to choose to apply to the whole of his claim either the law of his country of habitual residence or the law of the defendant's domicile, whichever is the more favourable. This, unlike environmental damage (Rome II Regulation, Art. 7) is not an area where the policy factors favour an overwhelmingly pro-claimant approach.

Enough said. To offer a personal view in conclusion: the best way forward would be (1) to amend the Brussels I Regulation to reverse the eDate decision, (2) to carve civil liability out of the eCommerce Directive, and (3) to remove the exception for violations of privacy and personality rights in Art. 1(2)(g) of the Rome II Regulation, leaving the general rule for tort/delict (Art. 4) to apply to such cases. At the same time, it seems more likely that my own daughter will marry into the Royal Family than that these three reforms will come to fruition. Princess Nell anyone?

† Straying into the detail of Professor von Hein's rule of election, one consequence of this would appear to be that the claimant's habitual residence and the defendant's domicile would be tested by reference to a different point in time (the latter being identified at the date of commencement of proceedings). This is not a reason in itself to reject the rule.

Von Hein on Kate Provence Pictures

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The Duchess of Cambridge's topless photos
A boost for amending the Rome II Regulation?

As Gilles Cuniberti has already informed the readers of this blog, the Duchess of Cambridge recently obtained a victory in a lawsuit that she and her husband had filed at the Tribunal de Grande Instance de Nanterre in France (the full text of the court's judgment is available at http://www.legipresse.com). The royal couple had demanded both damages for and an injunction against the publication and further reproduction (both online and in print media) of photos made of the Duchess without her consent while she was sunbathing at the terrace of a private residence in France, which was surrounded by a large woody park, well shielded from intrusive gazes by passers-by or any other people. Rumour has it that the pictures may have been taken by a so-called "drone", i.e. a pilotless radio-controlled mini aircraft (on this aspect of the case, see the interesting comment by Dr. Claudia Kornmeier in the Legal Tribune Online). The Nanterre court based its judgment on article 9 of the French Code Civil without discussing issues of jurisdiction and choice of law. Nevertheless, the case has obvious international elements: While the defendant is a French publisher, the plaintiffs are habitually resident in the United Kingdom; moreover, the pictures were accessible via the

internet across Europe. This raises the question what European choice of laws rules have to say about the proper law in this case. At the moment, the answer is: nothing, because the Rome II Regulation contains a deliberate carve-out for violations of personality rights (Article 1(2)(g) Rome II). The European Parliament, however, has adopted, on 10 May 2012, a resolution with recommendations to the Commission on the amendment of the Rome II Regulation. The Parliament's proposal reads as follows:

> *Article 5a Privacy and rights relating to personality*
>
> *1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.*
>
> *2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.*
>
> *3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.*
>
> *4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.*

This most recent proposal, drafted by rapporteur Cecilia Wikström, combines

various elements of suggested solutions that have been on the table before. It all started with the Commission's initial draft proposal of 2002 which recommended submitting violations of personality rights to the habitual residence of the victim. This proposal, although popular in academia, met with fierce resistance from the media lobby and was replaced in the Commission's final proposal of 2003 by a mosaic principle which would have led to the application of the laws at the various places of distribution, limited to the damage suffered by the victim in the respective country. The Parliament, in 2005, presented a proposal which was similar to paragraphs 1, 3 and 4 of its current article 5a; in the former version, however, the specific rule for publishers of printed matter and broadcasters was extended to internet publications as well. At the end of the day, a consensus could not be reached, and the whole question was excepted from the scope of the Rome II Regulation. In 2011, former rapporteur Diana Wallis made a new attempt at amending the Regulation, presenting a proposal which was influenced by a rule that I had suggested in a conflictoflaws.net online symposium before (see here). Miss Wallis' proposal read as follows:

> *Article 5a – Privacy and rights relating to personality*
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.*
>
> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*
>
> *(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*
>
> *(4) The law applicable under this Article may be derogated from by an*

agreement pursuant to Article 14.

For a full explanation of the reasons behind this proposal, I refer both to Miss Wallis' excellent working document of May 23, 2011 and to my contribution to the online symposium already mentioned. In sum, the basic ideas guiding this approach were the following: (1) Closely tracing the Court of Justice's Shevill jurisprudence, which relates to Article 5(3) Brussels I, for choice of law as well, i.e. applying the so-called mosaic principle (full damages available at the publisher's domicile, only partial damages at the various places of damages). Although the plaintiff was slightly favoured by giving him or her an option to choose the applicable law, this favour was mitigated by restricting the reach of the laws in force at the place(s) of damage, thus creating, on the whole, a balanced solution. (2) Anchoring the rule in the doctrinal framework of Rome II, i.e. avoiding an uncritical bias towards favouring the victim and reserving the application of general rules for torts (Articles 4(2) and (3), Article 14). (3) Online publications and conventional modes of publication (print media, broadcasting) should be treated alike for the sake of simplicity, clarity and to avoid unnecessary technicalities. (4) Sticking to the concept of a loi uniforme (Article 3 Rome II), i.e. avoiding any distinction between EU and third state victims or defendants. (5) Denying the need for a specific public policy clause to protect the freedom of the press, but taking into account the legitimate need for foreseeability of the applicable law from the point of view of alleged tortfeasors.

However, the CJEU's jurisprudence on Article 5(3) Brussels I has evolved considerably since Shevill. In its eDate judgment (C-509/09 and C-161/10) of October 25, 2001 (see the pertinent post on this blog here), the Court modified its Shevill decisional rules for violations of personality rights committed via the Internet. For the latter group of cases, the plaintiff now has three options: (1) Suing at the defendant publisher's domicile for recovering his or her whole damage, (2) suing at his or her habitual residence as the presumptive centre of interests, again for recovering his or her whole damage (3) suing at the various places of damages; in this case, however, the plaintiff remains limited to recovering only the damage that he or she has suffered in the respective forum. From the Court's reasoning, it must be inferred that the judges intend to cling to the former Shevill rules, however, as far as violations of personality rights by conventional media (print, broadcasting) are concerned. This artificial distinction raises severe doubts: As the case of the Duchess of Cambridge's topless photos

demonstrates, media content violating personality rights is, in our modern world, regularly distributed through various media channels simultaneously (print, broadcast, Internet, Twitter etc.). Differentiating between those channels creates the risk of contradictory decisions concerning the same substantive content: Pursuant to the eDate principles, the Duchess could have sued the French Magazine in the UK (her habitual residence) for recovering her whole damage with regard to the topless photos disseminated online, but would have been limited to the partial damage suffered in this forum with regard to the printed pictures. The CJEU justified such a distinction by two reasons: First of all, it referred to "the ubiquity of that [online] content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control" (para. 45). Yet, this factual assumption is hard to square with the reality of the internet. Every user of youtube, for instance, knows that, instead of a video clip, sometimes a sign pops up which informs the viewer that the desired content is protected by copyright and not available in his or her country. Evidently, users are identified by their IP address, and their access is restricted accordingly. Apart from that, several online media require a user's registration before allowing him or her to access the content provided. Thus, it is far from evident that a publisher should be deemed to have absolutely no control of where the content that it places online is accessed. "Moreover", the Court assessed, "it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State" (para. 46). Yet it is of course feasible to design websites in such a way that they record the number of times that they have been visited. Every page on SSRN, for example. displays the number of "abstract views". I am sure that every publisher's marketing department collects such data (at least my publishers do…). So why should it not be technically possible to quantify distribution of online content in a certain member state? If the victim does not know these figures, this is a problem of procedural rules on the disclosure of evidence by the defendant, but not an issue that should have an influence on the question of jurisdiction.

Be that as it may, any new conflicts rule will have to be tuned to the current jurisdictional framework established by the eDate decision. In this light, I will now turn to an analysis of the most recent proposal by the Parliament (PP 2012). It is

obvious from a first glance that this draft as well contains a problematic differentiation between various channels of distribution: There is a general rule in Article 5a(1) PP 2012, but this paragraph is superseded by Article 5a(3) PP 2012 with regard to a violation caused by the publication of printed matter or by a broadcast. Contrary to the Parliament's proposal of 2005 (therein paragraph 1, subparagraph 3), the special rule on printed matter and broadcasts is no longer extended "mutatis mutandis" to the distribution of content via the Internet. From this change in the drafting, it must be inferred that the law applicable to violations of personality rights committed online will have to be determined by the general rule found in Article 5a(1) PP 2012. Unfortunately, however, paragraphs 1 and 3 of Article 5a PP 2012 lead to diametrically opposed results. Paragraph 1 refers to the "law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur". Thus, the place of acting (the publisher's domicile) is discarded in favour of a "centre of gravity" approach. In the context of the eDate decision, this centre of main interests of the victim will have to be located at his or her habitual residence. Contrary to the eDate decision, however, the mosaic principle (the Shevill approach) is no longer of even residual relevance. If one applied Article 5a(1) PP 2012 to the Duchess of Cambridge's topless photos which have been distributed online, this rule would lead to the application of English law. With regard to the photos distributed by the publication of printed matter, however, Article 5a(3) PP 2012 would lead to the application of the law of the "country to which the publication or broadcasting is principally directed, or if this is not apparent, the country in which editorial control is exercised". This rule points to the application of French law, because the photos were published in a French Magazine. It is highly debatable whether such an artificial and technical differentiation is justified by any convincing reasons of policy. Whereas Article 5a(1) PP 2012 favours the victim, Article 5a(3) PP 2012 favours the defendant, but why this should be so is far from evident.

Could there be a better solution? Burkhard Hess has proposed to simply apply the lex fori (either at the publisher's domicile or at the victim's habitual residence) to violations of personality rights and to discard the mosaic principle completely (Juristenzeitung 2012, p. 189, 192 et seq.). This approach certainly has the appeal of simplicity and procedural economy. Hess himself is ready to admit, however, that his proposal would lead to a dubious discrimination of third-state victims, who would be limited to the publisher's law to recover their damages from an EU

tortfeasor. Thus, the concept of a loi uniforme would be sacrificed. The German Council for Private International Law, on the other hand, has proposed to use the victim's habitual residence as a general and single criterion of attachment (Junker, RIW 2010, p. 257, 259). This again has the virtues of simplicity and clarity. It has the drawback, however, that it would force the victim to rely on his or her own law even in cases in which the suit is brought in the courts of the defendant's domicile, thus making more expensive (and slowing down considerably) the passing of an injunction or the recovery of damages in this forum. A compromise solution could consist in returning to Diana Wallis' draft proposal of 2011 (supra), while at the same time accommodating the basic rationale of the eDate decision in its second paragraph, which would then read as follows:

> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues* ***either*** *in the court of the domicile of the defendant* ***or in the court of the plaintiff's habitual residence****, the claimant may instead choose to base his or her claim on the law of the court seised.*

Contrary to the eDate decision, however, this rule should apply regardless of the kind of media channel via which the content was distributed. It certainly tilts the scales towards the victim, but this can hardly be avoided after eDate. Comments welcome!

Clara Cordero on Kate Provence

Pictures

Clara Cordero Alvarez teaches Private International Law in Madrid (Universidad Complutense). She has written her PhD on the protection of the right to honour, to personal privacy and image.

Nowadays, almost all the people around the world have already heard something about the new scandal that has arisen concerning the British royal family: the topless photos of Catherine, Duchess of Cambridge. The pictures – that were taken when she was privately sunbathing during a vacation in a chateau belonging to her husband's uncle in Provence- were initially spilled into public view by the French magazine Closer, but Kate´s private images were rapidly spread all over the world. New photos were published later by different tabloids in several Member States, such as the Italian gossip magazine Chi (owned by the same company that had previously published the pictures inFrance) and the potential harmful content was uploaded in Internet. This is another example where the violations of personality rights are connected with acts in which the alleged offender exercises the fundamental freedom of expression or information.

In this particular case, from a civil perspective, the claimants exclusively asked a French court to stop further publication of the pictures. Based on article 9 of the French Civil Code they were seeking an injunction barring any future publication – online or in print – by the French magazine of the Duchess´ topless photographs. They neither have pushed for existing copies of the magazine to be withdrawn from sales points nor for financial damages. The court has partially accepted the claimants´ request distinguising between photos published on the internet and photos published in the hard copy of the tabloide. Regarding the damages already occurred, the court has barred the defendant from assigning or forwarding all digital forms of the pictures to any third party, ordering to surrender all of them to the plaintiffs. However, no action was taken regarding the potential future publication of these images by the defendant.

Although injunctions to halt or prevent damages are subject to Private Int´l Law general rules on non-contractual obligations, their specific notes in this field must be highlighted. The spatial scope of injunctions to halt or prevent damages –contained either in a provisional measure or in a final judgment on the merits- is linked to the basis on which the jurisdiction of the court of origin is

founded. In this case, an unlimited jurisdiction based on the defendant's domicile -article 2BrusselsI Regulation- or on the place of origin –the establishment of the publisher, in accordance with article 5.3- (both of them available in this case), allows obtaining injunctions to halt or prevent damage in any Member State where these damages could be suffered. Nevertheless, in this case the ruling is limited to French jurisdiction. If the court had resorted to this possibility the main problem would be the eventual recognition and enforcement of the French judgment in each EU Member State in which the publication had been distributed and where the victim was known (for example, Italy, Ireland or Denmark where several tabloids have already published the controversial photos), apart from the potential circulation of these photos on the Internet.

The freedoms of speech and information tend to prevail in most legal systems over rights related to the protection of privacy provided that certain conditions are met. Notwithstanding this finding, the different balance between these fundamental rights determines that their respective scopes –and the consideration of certain acts as illegitimate- vary deeply from oneMemberStateto another. In this field, public policy plays a decisive role not only in the application of the provisions on choice of law but also on the recognition and enforcement of judgments. In particular, the recognition and enforcement of decisions–especially in international defamation cases- public policy has a particular relevance as the main cause to deny recognition and enforcement of a judgment (art. 34.1 Brussels I Regulation). Although within the EU the use of public policy not to recognise a decision originating in another Member State should be exceptional in practice, since all Member States belong to the European Convention on Human Rights and they are all bound by the Charter of Fundamental Rights, such a possibility is still available. In fact, the Italian newspaper that published recently the new photographies has already expressed that, in accordance with the Italian law, the publication of these photographies does not imply a violation of the Duchess right to privacy and that they are protected by the freedom of press. This only an example, since the number of countries –Member and not Member of the EU- in which the photographies could be distributed using Internet, is potentially numerous.

This scenario would not improve if a European uniform rule of conflict of laws in this field is finally established (Rome II Regulation) without a parallel revision of the recognition and enforcement provisions of the Brussels I

Regulation. Looking at the Proposal of December 2010 for the review of the Brussels I Regulation, the recognition and enforcement provisions establish that the judgments arising out of disputes concerning violations of privacy and rights relating to personality will be excluded from the abolition of exequatur and subject to a specific procedure of enforcement (public policy being kept as reason for the refusal of recognition). Hence, in the current circumstances, victims could only ensure the success of their actions in multiple States by bringing their claims before each national jurisdiction where damages occurred (*locus damni*) with limited jurisdiction (*Shevill*, latter confirmed by *eDate)*.

In conclusion, as long as the unification of conflict of laws rules in personal rights within the EU is pursued –in search for a common balance between the interests in conflict-, the exclusion of recognition and enforcement of the decisions in this field from Brussels I would seem clearly detrimental for victims. For the time being, the Duchess will therefore would have to require a large number of courts intervention to achieve a complete and effective protection.

Third Issue of 2012's Revue Critique de Droit International Prive

The third issue of the *Revue critique de droit international privé* will soon be released. It contains three articles and several casenotes.

In the first article, Matthias Lehmann, who is a professor of law at Halle University, discusses the proposal of the German Council for Private International Law on financial torts (*Proposition d'une règle spéciale dans le Règlement Rome II pour les délits financiers*)

> *This article explores conflicts of laws relating to financial torts, such as insider dealing or the publication of a prospectus containing incorrect information. The problem is of particular relevance given that in interconnected financial markets, tortious behavior often has repercussions in different countries. The law that applies to the responsibility of the tortfeasor must be determined in conformity with the Rome II Regulation. Yet the latter does not contain any specific conflicts rule for financial torts. Its general provision, article 4(1), leads to the applicability of a multitude of different laws for the same behaviour, which in addition cannot be foreseen. The economic consequences are potentially disastrous. The German Council for Private International Law therefore suggests amending the Rome II Regulation. This contribution analyses the reasons for the proposal and its content.*

In the second article, Javier Carrascosa González, who is a professor of law at the University of Murcia, offers an economic reading of the principle of proximity (*Règle de conflit et théorie économique*).

Finally, in the third article, Horatia Muir Watt, who is a professor at Sciences Po Law School, offers a critical appraisal of the International Court of Justice's

decision on sovereign immunity in Germany v. Italy, Greece intervening, of 3rd Feb. 2012 (*Les droits fondamentaux devant les juges nationaux à l'épreuve des immunités juridictionnelles*).

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2012)

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

- ***Urs Peter Gruber***: "Scheidung auf Europäisch – die Rom III-Verordnung" – the English abstract reads as follows:

> *Regulation (EU) No. 1259/2010 („Rome III") contains uniform conflict-of-laws rules on divorce and legal separation. Compared with the previous conflict-of-laws rules of the Member States, it brings about fundamental changes. Primarily, in contrast to the majority of the pre-existing national laws, it favours party autonomy. Only absent a valid agreement on the applicable law, divorce or legal separation are governed by the law of the state where the spouses have their common habitual residence or – under certain circumstances – were last habitually resident. The common nationality of the spouses and the lex fori are only subsidiary connecting factors.*
>
> *The Regulation also touches some politically intricate subjects. First of all, the Regulation is also applicable to same-sex marriages; however, pursuant to a compromise reached in article 13, those Member States which do not accept same-sex marriages are not obliged to pronounce the divorce of such a marriage. Art. 10 which deals with gender discrimination might lead to a rigid exclusion of Islamic laws.*

- ***Christopher Wilhelm***: "Die Anknüpfung von Treuhandverträgen im

Internationalen Privatrecht unter besonderer Berücksichtigung der Rom I-VO" – the English abstract reads as follows:

Having contractual as well as property rights elements, and because of the great variety of its possible fields of application, the German Treuhand does not only pose problems in German substantive law, but also in private international law. The present article shows how to find the law applicable to the contractual fiduciary relationship according to the Rome I Regulation. It points out and answers certain questions arising from the material scope of the regulation, and discusses the possibility and the advantages of choice of law. The main focus is on the law applicable in the absence of choice by the parties, Article 4 Rome I, and the specific problems occurring. The article closes by summing up the key aspects and a comment of the author.

- ***Matthias Lehmann***: "Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte" – the English abstract reads as follows:

On today's interconnected financial markets, illegal behaviour – such as false or misleading information in prospectuses, violation of disclosure and shareholder transparency rules, ill-founded credit rating, merger offers not complying with legal requirements, insider trading or market manipulation – often has repercussions in different countries. This raises the question of the law that applies to the civil liability of the tortfeasor. In the European Union, the answer has to be found in the Rome II Regulation, which provides a comprehensive set of conflict rules for non-contractual obligations. However, the regulation does not contain any specific provision on financial torts. Its general rule, Article 4 (1), points to the law of the state in which the damage occured, i.e. either the state of the investors' home or that of their bank accounts. When looking from the perspective of the tortfeasor – typically an issuer or an intermediary – this has the effect that a multitude of different laws governs, which moreover cannot be predicted in advance. In order to remedy this situation, the German Council for Private International Law, a body established by the German Ministry of Justice, suggests amending the Rome II Regulation. The proposal, an English version of which is annexed to this article, provides for new, specific connecting factors, an escape and a fallback clause, as well as special rules regarding collective redress, bilateral relationships and

party autonomy.

- ***Martin Illmer***: "Anti-suit injunctions and non-exclusive jurisdiction agreements" – the English abstract reads as follows:

Due to uncertainty about the interpretation and scope of two earlier, potentially conflicting Court of Appeal decisions concerning anti-suit injunctions enforcing non-exclusive jurisdiction agreements, the state of the law was unclear. Setting aside an anti-suit injunction granted by the High Court at first instance, the Court of Appeal made a fresh start. It distinguished the earlier case law on the matter and laid down general guidelines for the grant of anti-suit injunctions enforcing non-exclusive jurisdiction agreements. The decision itself as well as the accompanying plea on behalf of textbook writers deserve full support.

- ***David-Christoph Bittmann***: "Das Gemeinschaftsgeschmacksmuster im Europäischen Zivilprozessrecht" – the English abstract reads as follows:

The following article deals with a decision rendered by the Oberlandesgericht Munich. Subject of this decision is an application for declaration of enforceability of an injunctive relief from the Tribunal de Grande Instance of Paris. With this injunctive relief the French court prohibited further infringements of a community design committed by a French and a Belgium enterprise, which are part of one concern. The applicant was in fear of further infringements of the community design through this concern in Germany so it applied for the declaration of enforceability of the French injunctive relief at the Landgericht Munich I. The German court however declined the application on the grounds that it has no jurisdiction as far as the Belgium enterprise is concerned; furthermore an injunctive relief was not a decision that could be subject of a declaration of enforceability. The Oberlandesgericht changed the decision and released the declaration of enforceability. The following article takes a closer look to the reasoning of the senate that had to deal with questions of international jurisdiction, of remedies in cases of protection of industrial property and of the enforcement of foreign judgements according to the Regulation Brussels I.

- ***Stefan Reinhart:*** "Die Durchsetzung im Inland belegener Absonderungsrechte bei ausländischen Insolvenzverfahren oder Qualifikation, Vorfrage und Substitution im internationalen Insolvenzrecht" – the English abstract reads as follows:

In a recent case the German Federal Court had to decide on cross-border insolvency issues that – at first hand – looked straight forward, which, however, are much more complicated at a second look. A secured creditor applied for enforcement measures in real property situated in Germany against a debtor who had been declared bankrupt in England. The Federal Court held that the application had to be dismissed since on the basis of German enforcement law the enforceable title had not been reindorsed and readressed against the English trustee and had not been served upon the trustee prior to initiating execution proceedings.

Unfortunately, the Federal Court entirely missed to clarify why such rules of German enforcement law would govern the effect of the commencement of an insolvency proceeding abroad. Had the German court adressed the issue, it would have become evident that such issue is explicitly addressed by Art. 4 sub. 2 lit. f of the European Insolvency Regulation (EIR) which, however, declares the lex fori concursus applicable. On the other hand, the situation is comparable to the conflict rule in Art. 15 EIR which refers to the lex fori of the trial pending. The issue can only be solved by a new construction of the meaning of those two provisions. The author argues that the German legal requirement to transcribe the title and to serve the title on the foreign trustee does not fall under the scope of Art. 4 EIR, but concedes that such solution requires a new approach regarding the relation of Art. 15 and 4 EIR.

- ***Roland Abele***: "Ausländisches Arbeitsvertragsstatut und Wartezeit nach § 1 Abs. 1 KSchG" – the English abstract reads as follows:

A recent judgment by the German Federal Labour Court ("BAG") may be relevant to foreign employers who, after having contracted employees under home law, transfer them to Germany where they continue to perform services for their employer. In the case, heard by the BAG, the plaintiff, a Latvian citizen, who had an employment contract with a Latvian bank under Latvian law, moved to Germany to become director of one of the bank's subsidiaries

located in Germany. Shortly afterwards, there was a change in the contract, this time under German law. Finally, the plaintiff was dismissed and he sued for unfair dismissal in Germany. The German statute granting protection against unfair dismissal ("KSchG") provides for a probationary period of six months ("Wartezeit", § 1 para. 1 KSchG). At the time the plaintiff was dismissed, he had not yet served six months under his (altered) contract as per German law. Nonetheless, the BAG sustained the suit, holding that the probationary period could be completed by two consecutive contracts with the same employer. The court also recognized that it is legally irrelevant if parts of the probationary period have been completed under foreign law, provided that German law was applicable to the contract at the time when the employee received notice.

- ***Dominique Jakob/Matthias Uhl***: "Die liechtensteinische Familienstiftung im Blick ausländischer Rechtsprechung" – the English abstract reads as follows:

Several problems concerning Liechtenstein Foundations were repeatedly subject to judgments of Higher Regional Courts in Germany. These judgments were criticised in literature. Meanwhile also the Supreme Court of Austria (OGH) had to deal with a problem located at the crossroads of the principle of separation in foundation law and the legal concept of piercing the corporate veil. Similar to the jurisdiction in Germany the judgment of the OGH from 26.5.2010 seems to put the Liechtenstein Foundation under a general suspicion to present a vehicle for shifting capital in an abusive way. This allegation requires a critical analysis.

On 1.4.2009 a total revision of foundation law in Liechtenstein came into force. Its aim is to preserve the traditional features of the legal instrument while at the same time introducing modern control mechanisms. Indeed it is the Principality and its market participants who are primarily demanded to realise their wish for an improved reputation of the Liechtenstein Foundation. However, the (foreign) courts should accommodate the process by applying established dogmatic principles as well as by treating the Liechtenstein Foundation in line with other foreign legal entities.

- ***Arno Wohlgemuth***: "Anerkennung deutscher Scheidungsurteile in Russland" – the English abstract reads as follows:

Recognition of foreign divorce decrees in Russia is regulated by Chapter 45 (Art. 413–415) of the Russian Code of Civil Procedure, 2002, and Art. 160 of the Russian Family Code, 1995. In 2005 the Supreme Court of Russia dismissed the objections by the wife against a German divorce decree pronounced in 2001, when the Russian couple lived in Germany. Apart from default of the time-limit for filing objections, the Russian Supreme Court did not find any grounds for non-recognition enshrined in Art. 412 CCP. Neither international treaties signed by Russia nor formal procedures are prerequisites for recognition in Russia. Predecessors to the rules on recognition of foreign judgements including those on personal status may be discovered in the Ukase of the Presidium of the Supreme Soviet of the USSR of 1988 on Recognition and Enforcement in the USSR of Foreign Court Decisions and of Foreign Arbitral Awards.

- ***Philipp Habegger/Anna Masser***: "Die revidierte Schweizerische Schiedsgerichtsordnung (Swiss Rules)" – the English abstract reads as follows:

The revised version of the Swiss Rules of International Arbitration (Swiss Rules) entered into force on 1 June 2012. This article addresses the main changes and innovations. After taking into consideration various provisions which aim at further enhancing the efficiency of arbitral proceedings, special emphasis is put on the revised provision on consolidation and joinder and on the new emergency relief proceedings allowing for interim relief prior to the constitution of an arbitral tribunal. The authors conclude that the revision brings to be welcomed amendments that will lead to even more time and cost efficient proceedings.

- ***Carl Friedrich Nordmeier***: "Cape Verde: New Rules on International Civil Procedure" (in English)

Since 1.1.2011, a new Code of Civil Procedure is in force in Cape Verde. It is similar to the Portuguese codification of civil procedure law and contains rules on international civil procedure. The present article analyses these new rules on international jurisdiction, on procedures with connection to a foreign country and on recognition and enforcement of foreign judgments. Under the new regime, reciprocity is granted in accordance with § 328 (1) 5 of the

German Code of Civil Procedure.

- ***Erik Jayme/Carl Zimmer*** on the conference in Potsdam on cultural relativism: "Kulturelle Relativität – Völkerrecht und Internationales Privatrecht" – Tagung in Potsdam

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Issue 2012.1 Nederlands Internationaal Privaatrecht

The first issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition and Enforcement of US Punitive Damages and Documentary Credit under Rome I:

Csongor István Nagy, Recognition and enforcement of US judgments involving punitive damages in continental Europe, p. 4-11. The abstract reads:

The paper examines the recognition practice of US punitive awards in continental Europe from a comparative and critical perspective. After analysing the pros and cons of the recognition of punitive awards from a theoretical point of view, it presents and evaluates the judicial practice of the European (French, German, Greek, Italian, Spanish and Swiss) national courts and the potential impact of the 2005 Hague Choice-of-Court Convention and the Rome II Regulation. The paper ends with the final conclusions containing a critical evaluation of the present judicial practice and a proposal for a comprehensive legal test for the recognition of punitive damages.

Marc van Maanen en Alexander van Veen, Toepasselijk recht op documentair kredietverhoudingen onder het EVO en Rome I, p. 12-18. The English abstract reads:

A documentary credit contains a variety of contractual relationships between the applicant, one or more banks and the beneficiary. Usually the parties involved are

domiciled in more than one country. Unsurprisingly, disputes over the governing law in documentary credit matters regularly arise. In a case where the letter of credit called for drafts drawn on the issuing bank, the Amsterdam Court of Appeal held that the legal basis for the claim of the Dutch beneficiary vis-à-vis *the Iraqi issuing bank is the obligation to pay under the letter of credit, not the debt embodied in the drafts. The Court of Appeal held that pursuant to Article 4(2) Rome Convention (Rome, 19 June 1980) the relationship is governed by the law of the country of the party effecting the characteristic performance. Even though the letter of credit was available at a Dutch advising bank, the Court of Appeal held that the characteristic performance was effected by the issuing bank and that consequently, Iraqi law applied. The Court of Appeal held that the limitation period under Iraqi law is 15 years. Therefore, the beneficiary's claim was not time barred. In similar cases, however, English courts have applied Article 4(5) Rome Convention instead. An English court would in this case probably consider that the credit was available in the Netherlands and hold that the relationship is more closely connected with the Netherlands than with Iraq. Therefore, an English court would probably apply Dutch law instead of Iraqi law and the beneficiary's claim would, consequently, have been time barred. In this article the judgment of the Court of Appeal is analysed and (some of) the differences between the Dutch and the English approaches are discussed. In addition, it is considered whether it is likely that the Rome I Regulation (EC No 593/2008) harmonises the different approaches.*

Book Presentation: N.A. Baarsma, *The Europeanisation of International Family Law*, T.M.C. Asser Press, The Hague 2011 (p. 19-20)

First Issue of 2012's Journal of Private International Law

The last issue of the *Journal of Private International Law* was just released. It includes the following articles:

Review of the Brussels I Regulation: A Comment from the Perspectives of Non-Member States (Third States), by Koji Takahashi

The review of the Brussels I Regulation is in progress. Quite naturally, the discussions have been centred on the viewpoints of the Member States. Yet, both the current Regulation and the Commission's proposal have significant implications for non-Member States. In fact, stakes for non-Member States are higher in Brussels I than in Rome I or II. This analysis evaluates the current regime and the proposed reform from an angle of non-Member States, focusing on three issues of particular relevance to the interests or positions of such States. They are (1) recognition and enforcement of judgments founded on exorbitant bases of jurisdiction (2) denial of "effet réflexe" and (3) lis pendens between the courts of a Member State and a non-Member State. The analysis reveals that views from inside and outside the Union do not necessarily diverge on the desirable contents of reform but may differ on the priorities of reform. While the EU is entitled to construct its internal legal regime in whatever manner it sees fit, to the extent there are implications for the outside world, it is hoped that due consideration will be given to views from outside.

Recognition and Enforcement of Judgments in Carriage of Goods by Road Matters in the European Union, by Paolo Mariani

This article discusses the relationship between Brussels I Regulation and The Convention on the Contract for the International Carriage of goods by road (CMR). The Court of Justice in TNT Express Nederland decision (case C-533/08) confirms the international specialised conventions' primacy on the Regulation, provided the respect of the principles underlying judicial cooperation in civil and commercial matters in the European Union. The Court also acknowledges its lack of jurisdiction to interpret the CMR.

TNT Express Nederland contributes in the elaboration of the EU principles underlying judicial cooperation. Unfortunately, this contribution risks being useless for national courts since the decision fails to answer the question as to how CMR provisions should be applied lacking the compliance with the European standard.

The article concludes by supporting the Court of Justice power to provide the interpretation of the Brussels I Regulation in the context of the application of

Article 31 CMR in order to enable the national court to assess whether the CMR can be applied in the European Union.

Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974, by Christopher Bisping

This article takes a fresh look at the role statutes play within the conflict of laws. The author argues that statutes can only ever apply within the framework of conflict-of-laws rules. Parliament's intention must be taken to subject legislation to the conflict-of-laws system. The opposing view would commit the mistake of falling into the 'statutist trap' and overload statutes with meaning, which they do not have. The author uses the Consumer Credit Act 1974 and the House of Lord's decision in OFT v Lloyds to illustrate the argument.

Preliminary Questions in EU Private International Law, by Susanne Goessl

Whenever a rule contains a legal concept, such as "matrimony", rarely are the legal requirements for the concept clarified in the same rule. Determining the meaning of such a concept (preliminary question) is often necessary to resolve the principal question. In an international context, one can apply the lex fori's or the lex causae's PIL to determine the law applicable to the preliminary question. This article analyses which of those two approaches is preferable in the PIL of the EU.

Traditional advantages of the lex causae approach loose its cogency in the European context, esp. the deterrence of forum shopping, the presumption of the closer connection and the international harmony. On the other hand, many traditional and new reasons support the lex fori approach, eg national harmony, foreseeability, practicability and further integration.

The article comes to the conclusion that, no matter whether the concept occurs in a PIL or a substantive rule the lex fori approach is the better solution. Only in limited cases with an urgent need of international harmony the lex causae approach should prevail.

Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, by Liang Jieying

The "Law on the Application of Laws to Foreign-Related Civil Relationships of the People's Republic of China" became effective on 1 April 2011. This is the first statute in China that specifically addresses private international law issues. The party autonomy principle is positioned in the first chapter as one of the "General Provisions". This article provides a critical commentary on the relevant rules in the new law concerning the restrictions on party autonomy in contractual choice of law. The author investigates how the new Codification responds to the problems existing in the previous legal rules and judicial practice, and argues that, although the Codification has provided several rules to resolve some previously unclear questions, it fails to address comprehensively the more critical issues relating to the operation of the party autonomy principle.

The Law Applicable to Intra-Family Torts, by Elena Pineau

Courts increasingly face at the domestic level cases of intra-family torts. Two kinds of answers are provided to the question whether there is a right to reparation and, if so, to what extent: either the answer is given by the same family law rules which are infringed; or resort is had to the general system of tort law as a default solution. At the conflict rules' level, European judges dealing with intra-family torts are confronted with an interesting problem since the Rome II Regulation expressly excludes damages arising out of family relationships out of its scope of application. This being so, the case is posed which are the possible solutions. Two options have been considered: either applying the same law which governs the 'family duty' allegedly infringed, ie, the underlying lex causae; or considering whether it would be reasonable to extend the application of the Rome II Regulation to these cases. It is contended that the first option is to be preferred.

Unmarried Fathers and Child Abduction in European Union Law, by Pilar Blanco

The treatment that the laws of some Member States of the European Union give to the custody rights of unmarried fathers should be regarded as contrary to the European Convention of Human Rights and the Charter of Fundamental Rights, insofar as the unmarried father who is responsible for the child cannot prevent the removal of said child to another State because of the absence of automatic acquisition of rights of custody under national law. Although the

Charter only applies to Member States expressly when they are implementing European Union law, this paper has argued for a broad construction of a uniform EU law meaning of "custody rights" under Brussels IIa, including the inchoate custody rights of unmarried fathers, influenced by a desire to avoid unnecessary and disproportionate restrictions on the right to non-discrimination on the grounds of sex in the application of the right to object to a child abduction by fathers compared to mothers.