The Legal Position of Employees in Cross-Border Transfers of Undertakings in the EU

Jonas Malmberg (Arbetslivsinstitutets, Sweden) has published an article on **'The Legal Position of Employees' in Cross-Border Transfers of Undertakings in the EU: A Question of Jurisdiction and Choice of Law'** in the *International Journal of Comparative Labour Law and Industrial Relations*. Here's the abstract:

> *This article deals with the rules designed to enforce European Union labour law in the workplace. Directives do not normally provide specific rules on procedures and sanctions according to which their substantive provisions are to be enforced. Instead, domestic rules are to be applied. The European Court of Justice, however, has developed some requirements that limit the autonomy of the Member States in this area. The aim of this article is to evaluate the principle of effective enforcement in the field of labour law, in the light of actual enforcement procedures in the Member States.*

The abstract (and full article for those with a subscription) can be found on the Kluwer website. 'The Legal Position of Employees' in Cross-Border Transfers of Undertakings in the EU: A Question of Jurisdiction and Choice of Law' (2006) 22 *International Journal of Comparative Labour Law and Industrial Relations* pp. 385-406.

Publication: International Commercial Litigation Handbook

2nd edn

Butterworths have just published the new edition of the **International Commercial Litigation Handbook**, edited by Andrew Dickinson; Roger Baggallay; Graham McBain; and Laurence Murphy QC.

> *Butterworths International Commerical Litigation Handbook brings together in a single volume key UK, EC and international materials which are essential for litigation and arbitration lawyers, as well as criminal and commercial lawyers generally.*
>
> *This new edition is fully updated and expanded to include ADR and mediation materials. It also includes the text of the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Rome Convention on the Law Applicable to Contractual Obligations, together with their interpretative reports. In addition, Tables summarising the ratification, and entry into force of these Conventions are also included. The handbook contains UK statutes and statutory instruments on arbitration and the texts of the 1927 Geneva and 1958 New York Conventions on Arbitral Awards.*
>
> *Other legislation included (together with the relevant Conventions) relate to international transport (road, rail, air, sea) and a variety of other areas including International organisations, state immunity, trusts, evidence, mutual legal assistance, limitation periods and currency.*

Contents:

- *Part I* – Statutes; A. Jurisdiction and Foreign Judgments; B. Applicable Law; C. International Arbitration; D. International Carriage: Road and Air; E. International Carriage: Rail and Sea; F. State Immunity and International Organisations; G. Insolvency; H. Evidence; I. Other;
- *Part II* – Civil Procedure Rules; Selected parts of the Civil Procedure Rules (SI 1998/3132) and selected Practice Directions;
- *Part III* – Statutory Instruments; A. Jurisdiction and Foreign Judgments; B. Applicable Law; C. International Arbitration; D. International Carriage: Road and Air; E. International Carriage: Rail and Sea; F. State Immunity

and International Organisations; G. Insolvency; H. Other;
- *Part IV* – EC Materials; A. EC Treaties; B. Jurisdiction and Foreign Judgments; C. Applicable Law; D. Insolvency; E. Service of documents; F. Evidence; G. Other;
- *Part V* – Other International Materials; A. Jurisdiction and Foreign Judgments; B. Applicable law; C. International Arbitration; D. International Carriage (road and air); E. International Carriage (rail and sea); F. State Immunity; G. Insolvency; H. Service and Evidence

Price: £118.00. ISBN: 9781405718363. Available from Butterworths and Amazon.

CONFLICT OF LAWS .NET will be **reviewing** this text shortly; check back regularly for updates.

Transatlantic Insolvency Jurisdiction

Tony Griffiths and Edward Smith have written an article on "**Transatlantic insolvency jurisdiction – the interplay between Chapter 15 of US Bankruptcy Code and the EU Insolvency Regulation**" in the *Journal of International Banking Law and Regulation*. The abstract reads as follows:

> *Considers the extent to which the US Bankruptcy Code Ch.15 and Council Regulation 1346/2000 have adopted the provisions of the Model Law on Cross Border Insolvency 1997. Examines key features of the US legislation and its advantages over the previous regime for foreign creditors, compares the EC approach to the centre of main interests (COMI) and notes the scope for US courts to refuse to recognise some COMI determinations made under EC law. Reviews the temporary and post recognition remedies available to representatives of foreign proceedings under Ch.15 and the remaining shortcomings of the legislation and of US bankruptcy jurisdiction in general for transatlantic insolvency cases.*

"Transatlantic insolvency jurisdiction – the interplay between Chapter 15 of US Bankruptcy Code and the EU Insolvency Regulation" *J.I.B.L.R.* 2006, 21(8), 435-439 [westlaw link].

Cross-border Insolvency in the UK: an embarrassment of riches

Paul Omar (Sussex University) has written an article in *Insolvency Law & Practice* on cross-border insolvency in the UK. Here's the abstract:

> *This article examines the provisions governing cross border insolvency under the Insolvency Act 1986 s.426, Council Regulation 1346/2000 and the UNCITRAL Model Law on Cross Border Insolvency 1997, outlining the historical background to the development of the system. It identifies which countries are governed by which legislative provisions and outlines how conflicts are resolved for countries which are governed by two of the different regimes.*

The article includes an analysis of two recent decisions of the Chancery division of the High Court – *Daisytek-ISA Ltd, Re* (2003) BCC 562 (Ch D), and *BRAC Rent-A-Car International Inc, Re* (2003) EWHC 128; (2003) 1 WLR 1421 (Ch D (Companies Ct)).

The full article can be found on Lawtel: "**Cross-border insolvency law in the UK: an embarrassment of riches**" *Insolvency Law & Practice I.L. & P.* (2006) Vol.22 No.4 Pages 132-136.

Latvia and the Rome Convention

Martins Aljens (Lejins Torgans & Partners) has posted a summary on how the entry into force of the Rome Convention in Latvia has altered the Latvian conflict of laws rules. The Rome Convention came into force in Latvia on 1st March 2006. The provisions of the Rome Convention override the conflict of laws provisions relating to contractual obligations embodied in the introductory part of the much less-detailed Latvian Civil Law.

Perhaps the biggest area in which the difference will be felt is the identification of the applicable law *in the absence of choice* (Article 4). Aljens argues:

> *The Rome Convention sets a somewhat differrent mechanism to determine the applicable law in the absence of choice by the parties. While, in such case, the Civil Law always directs to the law of the country where the obligation is to be performed, the Rome Convention is more general in providing that the applicable law is that of the country with which the contract is most closely connected. In help of determination of the applicable law in the absence of choice, the Rome Convention provides several presumptions as to the country with which the contract is most closely connected. Although the application of such presumptions may lead to the same result as the Civil Law, it is likely that the applicable law under the Rome Convention will be different in most cases.*

Latvia has also, fortunately, lost the doctrine of *renvoi* (which was applicable in contractual matters under their national conflict of laws rules). Interestingly, Latvia entered a reservation on Article 7(1) (as the UK, Germany, Ireland and Luxembourg did originally, through fear of uncertainty [see the Giuliano-Lagarde Report, OJ 1980 C282/28]), which gives effect to the overriding rules of a closely connected country's law (that is not the applicable law).

For the full summary, see Latvia: Rome Convention on the law applicable to contractual obligations comes into force in Latvia.

Land, Security in Land and the Insolvency Regulation 1346/2000

There is an interesting article on "**Land, security in land and the European Regulation on Insolvency Proceedings 2000**" by Paul Omar in the latest issue of the *Conveyancer and Property Lawyer*. The article discusses the interaction between insolvency law and land law in the UK, France and EU. It summarises Council Regulation 1346/2000, noting the provision for the law of the Member State in which property is situated to govern land issues. It also examines the exceptions to the default lex concursus rule introduced by Arts.5-15 of the Regulation, and addresses the types of security interest affected, particularly where no local equivalent exists.

Conveyancer and Property Lawyer Conv. (2006) July/August Pages 353-373. The full text is available on Westlaw.

Rome I Regulation – A Dangerous Proposal?

Stuart Dutson (Linklaters) has written an article in the Journal of Business Law (J.B.L.): ***A dangerous proposal – the European Commission's attempt to amend the law applicable to contractual obligations***. Here is the abstract:

> *This article analyses the Proposal for a European Parliament and Council Regulation on the law applicable to contractual obligations (Rome I). Explores the proposed changes to the Convention on the Law Applicable to Contractual Obligations 1980, the Rome Convention. The article welcomes some of the proposals, including the ability for parties to choose non-State bodies of law, but argues that two are dangerous, focusing on the provisions on applicable law in the absence of choice and the application of foreign mandatory rules.*

Journal of Business Law J.B.L. (2006) September Pages 608-618.

ECJ Interpretation of Art 6(1) of the Brussels I Regulation

Case C-103/05 Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (13th July 2006) concerns the interpretation of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The question referred to the ECJ by the Oberster Gerichtshof (Supreme Court of Austria) was:

> *Can a claimant rely on Article 6(1) of Regulation … No 44/2001 when bringing a claim against a person domiciled in the forum state and against a person resident in another Member State, but where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?*

The ECJ held, *inter alia*, that:

- Article 6(1) should be interpreted strictly in order to preserve the dominant rule in Article 2(1) (see Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 16, and Case C-265/02 *Frahuil* [2004] ECR I-1543, paragraph 23).
- National courts must have regard for the principle of legal certainty (see Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 38). That principle requires, in particular, that the special rules on jurisdiction be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.

- The provisions of the regulation must be interpreted independently, by reference to its scheme and purpose. Since Article 6(1) is not one of the provisions, such as Article 59 of Regulation No 44/2001, for example, which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules.

Therefore, the Court ruled that Article 6(1) must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.

Case C-103/05 Reisch Montage AG v Kiesel Baumaschinen Handels GmbH [click for full judgment].

Art 16(4) of the Brussels Convention: exclusive jurisdiction in relation to patents

Case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG (13th July 2006) concerned a reference from the Oberlandesgericht Düsseldorf (Germany) to the ECJ for a preliminary ruling on the interpretation of Article 16(4) of the Brussels Convention.

The Oberlandesgericht (Higher Regional Court) Düsseldorf sought, in essence, to ascertain the scope of the exclusive jurisdiction provided for in Article 16(4) of the Convention in relation to patents. It asked whether that rule concerns all proceedings concerned with the registration or validity of a patent, irrespective of whether the question is raised by way of an action or a plea in objection, or

whether its application is limited solely to those cases in which the question of a patent's registration or validity is raised by way of an action.

The ECJ adjudged that:

- To allow a court seised of an action for infringement or for a declaration that there has been no infringement to establish, indirectly, the invalidity of the patent at issue would undermine the binding nature of the rule of jurisdiction laid down in Article 16(4) of the Convention.
- While the parties cannot rely on Article 16(4) of the Convention, the claimant would be able, simply by the way it formulates its claims, to circumvent the mandatory nature of the rule of jurisdiction laid down in that article.
- The possibility which this offers of circumventing Article 16(4) of the Convention would have the effect of multiplying the heads of jurisdiction and would be liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention (see Case C-256/00 *Besix* [2002] ECR I-1699, paragraphs 24 to 26, Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 41, and Case C-539/03 *Roche Nederland and Others* [2006] ECR I?0000, paragraph 37).
- To allow, within the scheme of the Convention, decisions in which courts other than those of a State in which a particular patent is issued rule indirectly on the validity of that patent would also multiply the risk of conflicting decisions which the Convention seeks specifically to avoid (see, to that effect, Case C?406/92 *Tatry* [1994] ECR I-5439, paragraph 52, and *Besix* , cited above, paragraph 27).

On those grounds, the ECJ ruled that **Article 16(4) of the Brussels Convention is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.**

See here for the full judgment.

German Article on Rome II Regulation

Dr. Michael Sonnentag (*Freiburg*) has published an article in the German legal journal "Zeitschrift für vergleichende Rechtswissenschaft" on the Europeanisation of the non-contractual law of obligations ("Zur Europäisierung des Internationalen außervertraglichen Schuldrechts durch die geplante Rom II – Verordnung", Vol. 105 No.3 (2006), p. 256).

In his article *Sonnentag* attends to the background of the existing proposals, the legal basis, the scope of application of a future Rome II Regulation, its individual conflict of law rules and general questions such as public policy.