

Law Shopping in Relation to Data Processing in the Context of Employment: The Dark Side of the EU System for Criminal Judicial Cooperation?

This post was written by Ms Martina Mantovani, Research Fellow at the Max Planck Institute Luxembourg. The author is grateful to her colleague, Ms Adriani Dori, for pointing out the tweet.

On 26th September 2019, Dutch MEP Sophie in 't Veld announced through her Twitter account the lodging of a question for written answer to the EU Commission, prompting the opening of an investigation (and, eventually, of infringement proceedings) in relation to a commercial use of the European Criminal Record Information System (ECRIS). A cornerstone of judicial cooperation in criminal matters, this network is allegedly being exploited by a commercial company operating on the European market (hereinafter name, for the purposes of this entry, The Company), in order to provide, against payment, a speedy and efficient service to actual or prospective employers, wishing to access the criminal records of current employees or prospect hires.

Commercial activities of this kind raise a number of questions concerning, first and foremost, the lawfulness of the use of the ECRIS network beyond its institutional purpose, as well as the potential liability under EU law of the national authorities which are (more or less knowingly) fostering such practices. Moreover, as specifically concerns the topic of interest of this blog, such commercial practices exemplify how law shopping, stemming from the lack of coordination of Member States' data protection laws, can be turned into a veritable profit-seeking commercial endeavor. As it is, these commercial practices are made possible not only by the specific legislation instituting the ECRIS, but also due to the legal uncertainty and fragmentation fostered by the GDPR. In fact, this Regulation leaves rooms for maneuver for Member States' legislators to specify its provisions in relation to, *inter alia*, the processing of personal data in

the context of employment (art 88), without nonetheless providing for either a guiding criterion or an explicit uniform rule to delimit or coordinate the geographical scope of application of national provisions enacted on this basis. This contributes to creating a situation whereby advantage might be taken of the uncertainty relating to the applicable data protection regime, to the detriment of the fundamental right to data protection of actual or prospective employees.

The ECRIS: institutional mission and open concerns.

The ECRIS is based on two separate but related pieces of legislation, Council Framework Decision 2009/315/JHA and Council Decision 2009/316/JHA, as well as on a separate data protection framework, previously set out by Council Framework Decision 2008/977/JHA, now repealed and replaced by Directive (EU) 2016/680. The institutional mission of the ECRIS consists in providing competent public authorities from one Member States with access to information from the criminal records of nationals of other Member States. By facilitating the exchange of information from criminal records, this network aims at informing the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings, so that his/her previous convictions can be taken into account to adapt the decision to the individual situation (Recital 15 of Council Framework Decision 2009/315/JHA). The ECRIS additionally aims at ensuring that a person convicted of a sexual offence against children will no longer be able to conceal this conviction or disqualification with a view to performing professional activity related to supervision of children in another Member State (Recital 12 of Council Framework Decision 2009/315/JHA, in conjunction with article 10(3) of Directive 2011/93/EU). In current law, ECRIS applications for accessing extracts from criminal records can be filed by judicial or competent administrative authorities, such as bodies authorized to vet persons for sensitive employment or firearms ownership. In such cases, these applications must be submitted with the central authority of the Member State to which the applicant authority belongs. This central authority may (and not *shall*) submit the request to the central authority of another Member State in accordance with its national law. In addition, access requests can also be filed by the person concerned for information on own criminal records. In this case, the central authority of the Member State in which the request is made may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from its criminal record,

provided the person concerned is or was a resident or a national of either the requesting or the requested Member State. In relation to information extracted via the ECRIS for any purposes other than that of criminal proceedings, a Statewatch Report of 2011 already expressed serious concerns, noting that while the European Data Protection Supervisor recommended that requests of this kind should have only be allowed “under exceptional circumstances”, the Council Framework Decision did not finally introduce such a stringent limitation. Moreover, since, under current article 7, the requested central authority shall reply to such requests *in accordance with its national law*, this piece of legislation provides “*an opportunity for the widespread cross-border exchange of information extracted from criminal records for a variety of purposes unrelated to criminal proceedings*”. That same Report additionally stresses the huge potential for “information shopping” that may thus arise, insofar as applicants who are not able to obtain information on an individual from that person’s home Member State, may access it via another Member State which also holds the information and has less stringent data protection legislation.

New commercial practices.

It is within this framework that the new commercial practices lying at the heart of Ms Sophie in ‘t Veld’s question must be understood. The commercial services in question are provided by The Company, expressly identified in the MEP’s interrogation. On its website, The Company takes great care to specify that, while it may have a name which closely echoes the EU system, it remains a private company offering commercial services and that “*the purpose of this similarity is to highlight [it uses] the EU structures to access information on criminal records*”. According to the same source, the services provided aim at addressing a widespread need of employers from Europe and rest of the world, who wish to ensure that their employees have no criminal background. Having remarked that said employers often struggle to perform background checks in a compliant manner, with legislation varying across the European Union rendering such a check “*complicated, time consuming or impossible*”, The Company proposes an innovative solution. According to its website, it “discovered” that by resorting to a EU program called European Criminal Records Information System, it is “*able to address all of those concerns and offer easy and compliant access to state-issued EU criminal records certificates*”. The FAQs further specify how this procedure works in practice. They confirm that all certificates are obtained from central

criminal registers of EU Member States. What makes the service provided “unique” is that The Company is declaredly streamlining all access requests through the ECRIS central authority of just one Member State, who requests criminal information from its European counterparts on The Company’s behalf. According to both The Company’s website and MEP Sophie in ‘t Veld’s interrogation, the National Criminal Register of this Country “*play[s] a role of a middleman in the flow of documentation and requests the information from the central register of the destined country*”. While The Company claims that “*the application is made with the applicant’s full awareness and explicit consent*”, the MEP stresses “*it is not clear whether the person whose records are obtained has given explicit consent*”. In fact, it must be acknowledged that the website’s wording is rather ambiguous, being unclear whether the expression “*the applicant*” refers to the employer seeking the company’s services, or to the persons whose criminal records are being accessed. The way in which The Company (which, incidentally, has UK phone number and which, according its website’s FAQ’s, seems to direct its services primarily to employers operating in the UK and Ireland) is effectively resorting to a foreign National Criminal Register for accessing the ECRIS remains a mystery. In fact, The Company cannot certainly be counted among either the administrative or the judicial authorities admitted to filing a request under Council Framework Decision 2009/315/JHA. Two highly speculative guesses might be made. A first possibility might be that the National Criminal Register allegedly playing the role of middleman might be misapplying the Framework Decision by submitting requests filed by non-legitimate applicants (as MEP in ‘t Veld seems to imply, by appealing to the principle of mutual trust and by envisioning the possibility of opening infringement proceedings). As it is, the form for access requests used by said National Criminal Register does not strictly require, according to its letter, that person filing the request shall be the same person whose criminal records need to be obtained, although it contains the explicit warning that “obtaining unauthorized information about a person from the National Criminal Register is punishable by a fine, restriction of liberty or imprisonment up to 2 years”. A second possibility is that the company might be exploiting individual access requests, which – it must be stressed – could concern only “residents or nationals of the requesting or requested Member State” (article 6§2 of Council Framework Decision 2009/315/JHA). In such cases, one might imagine that, after being approached by the employer, The Company would transmit the aforementioned form to the employee/prospect hire, who would personally sign the form, thus

explicitly consenting to the procedure. From the standpoint of data protection law, however, such an approach would not be less problematic. As repeatedly confirmed by the Article 29 Working Party, an employer which processes personal data (even within the framework of a recruitment process) qualifies as a controller of the employee/prospect hire personal data, having moreover very limited possibilities to rely on the employee's express consent as a lawful basis for their processing. Furthermore, such approach remains even more controversial if account is taken of the fact that it may be purposefully used to circumvent the more restrictive data protection provisions in matters of employment enacted by another Member State.

The Member State's law applicable to the processing of personal data in the context of employment.

Albeit having been promoted by the EU Commission as "a single, pan-European law for data protection", the new GDPR fails to level out all legislative differences in the Member States' data protection laws. As mentioned above, it provides in fact a margin of maneuver for Member States to specify its rules, including for the processing of special categories of personal data. To that extent, it does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful (recital 10). In this vein, its article 88 provides that "Member States *may*, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of recruitment [...]". Commercial practices such as those signaled by Ms in 't Veld seem to thrive on this situation of persisting legal uncertainty and fragmentation. In fact, some Member States' data protection legislation expressly prohibits the use of individual access requests to criminal record in connection with the recruitment of an employee, except for very exceptional circumstances. Nonetheless, such legislative measures are often rendered toothless at the international level, either because the legislator limited – more or less willingly – their reach to the domestic domain, or because their geographical scope of application, left undefined by the relevant GDPR-complementing law, remains highly ambiguous. This is precisely what happens in relation to the British and the Irish Data Protection Acts, expressly mentioned by The Company's website.

- *The UK Data Protection Act 2018*

This law, meant to adapt the UK data protection regime to the GDPR, provides, under its *Section 184*, that:

“it is an offence for a person (“P1”) to require another person to provide P1 with, or give P1 access to, a relevant record in connection with— (a)the recruitment of an employee by P1; (b)the continued employment of a person by P1; or (c)a contract for the provision of services to P1.” According to *Schedule 18* of the same law, *“relevant record”* means— [...] (b)*a relevant record relating to a conviction or caution ...[which] (a)has been or is to be obtained by a data subject in the exercise of a data subject access right from a person listed in sub-paragraph (2), and (b)contains information relating to a conviction or caution.* The Company is well aware of these restrictions, which are expressly reported on its website (reference is made to *Section 56* of the *Data Protection Act (DPA) 2015*, corresponding to *Section 184* of the new *DPA 2018*). Nonetheless, it is further clarified that *“[The Company] do[es] not make any requests under section [184] of the DPA, therefore [being] not limited by [it]”* and that, consequently, it might even be *“safer”*, as a UK-based employer, to resort to its services. And this might admittedly be true, since the prohibition set out by *Section 184* solely concerns records obtained by a data subject in the exercise his/her access right from one of the UK-based authorities listed in §3(2) of *Schedule 18*, and not by a foreign Criminal Register. Nonetheless, despite the apparent lawfulness of the whole process, the fact remains that the use (or abuse?) of an EU system, established to address specific needs of the judicial cooperation in criminal matters, becomes, in practice, the tool for enabling a UK-established employer to access employees’ personal data which he could not lawfully access domestically. This goes explicitly against the declared ratio and aim of *Section 184* of the UK Data Protection Act. As clarified by the Explanatory Notes, this provision aims at thwarting conducts which may give the employer access to records which they would not otherwise have been entitled. There are, in fact, established legal routes for employers and public service providers to carry out background checks, which do not rely on them obtaining information via subject access requests. Disclosure and Barring Service (DBS) checks can in fact be performed *locally* only by one responsible organizations registered with DBS and according to the procedure and guarantees set out by British law.

- *The Irish Data Protection Act 2018*

The other relevant national GDPR-complementing provision is Section 4 of this law, entitled “obligation not to require data subject to exercise right of access under Data Protection Regulation and Directive in certain circumstances”. This provision prohibits a person from requiring, in connection with the recruitment of an individual as an employee or his continued employment, that individual to exercise his rights of access to own criminal records, or to supply the employer with data obtained as a result of such a request. Again, The Company’s website specifies that the services provided are not based on requests under Section 4 of the Irish law, and that this provision does not consequently constitute a limitation, thus making the use of their services “safer” for employers. It must be noted, however, that as opposed to the British provision, Section 4 does not limit the scope of the prohibition to records obtained by requesting access to Irish authorities. Therefore, the extent to which the processing of employees’ personal data, including their criminal records, will be covered by Section 4 of the Irish Data Protection Act will finally depend on the identification of the scope of application of this Act *as a whole*. The problem with the Irish Data Protection Act (and with many other national GDPR-complementing laws, such as, *inter alia*, the Italian and the Spanish legislations) is that it does not explicitly define its geographical reach, thus fostering uncertainty as to the range of factual situations effectively covered and governed by its complementing provisions. This omission has been maintained in the final text of the Irish Data Protection Act despite the contrary advice given, during the drafting process, by the Irish Law Society. This pointed to such a lacuna as a potential source of ambiguity, for both individuals and controllers/processors, with regard to the remit and applicability of that piece of legislation. In particular, clarity as to what entities the Data Protection Act 2018 applies would have been especially desirable “given the number of corporations processing personal data on a large scale in Ireland and the likely queries that might otherwise arise and require judicial clarification”.

The need for better coordination of national data protection laws in the context of employment.

Following Ms in ‘t Veld’s question, the EU Commission will eventually investigate whether such a use of the ECRIS system is compliant with EU law, and whether the National Criminal Register in question is lawfully taking action on the basis of applications filed by/or with the help of The Company. In any event, the objective difficulties that may be encountered, in current law, in deciding over the

lawfulness of commercial practices this kind, which might be merely taking advantage of pre-existing legislative loopholes and gaps, are a clear cry for better coordination of the Member States' data protection laws enacted on the basis of the opening clauses enshrined in the GDPR. In a related paper, which is forthcoming in the *Rivista italiana di diritto internazionale privato e processuale*, this author tries and demonstrate that this problem is of an overarching nature, not being limited to the rather specific issues of, on the one side, the parochial approach adopted by the UK Parliament in defining the reach of its provision on forced access to criminal records for employment purposes and, on the other side, the silence kept by many national legislators concerning the geographical reach of their domestic data protection law. As it is, the entire European regime on data protection is deeply and adversely affected by a generalized lack of coordination of the spatial reach of domestic GDPR-complementing provisions. Lacking any uniform solution at EU level (set out either by the GDPR itself or by other existing instruments) the delimitation of the scope of application of national GDPR-complementing provisions is in fact left to unilateral and uncoordinated initiatives of domestic legislators. The review of existing national legislation evidences the variety of techniques and connecting factors employed for these purposes by the several Member States, which is liable to generate endemic risks of over- and under-regulations, and, above all, gaps of legal protection which are perfectly exemplified by, but not limited to, the commercial practices arisen in relation to the use of the ECRIS.

The Role of Private International Law Academia in Latin America

Written by Alexia Pato, Senior Research Fellow at the University of Bonn

On 10 September 2019, I had the immense pleasure to attend a Conference on the role of private international law (PIL) academia in Latin America (LATAM), which took place in the fast-paced environment of the Max Planck Institute for

Comparative and International Private Law (MPI) in Hamburg. The Conference was organised and chaired by **Ralf Michaels** and **Verónica Ruiz Abou-Nigm**. I thank them both for their warm welcome and congratulate them for the success of the Conference, which honours the long-standing PIL tradition in LATAM and encourages collaborative learning beyond borders.

This well-structured event encompassed two roundtables: whereas the first one dealt with PIL culture in LATAM, the second one discussed the impact of PIL schools of thought. Speakers of both roundtables prepared short handouts and submitted research questions to the audience, which created a fertile ground for interactions. The following paragraphs summarise the content of the presentations, as well as the follow-up discussions.

The PIL Culture in LATAM

The first roundtable discussed the specific features of academia in LATAM. In particular, **María Mercedes Albornoz** highlighted that many PIL scholars cumulate academic and professional positions. This might be unfortunate, as the time dedicated to research tends to decrease. A call for more interactions between PIL scholars around the world was made, in order to foster the exchange of ideas and the search for solutions to global concerns. This could be achieved through, e.g. the introduction of double university degrees or visiting programs for professors.

In that respect, the specific role of both the MPI and the Uruguayan Institute of Private International Law (IUDIP) was emphasised by Gonzalo Lorenzo Idiarte and Jan Peter Schmidt. First, **Gonzalo Lorenzo Idiarte** explained the key role of law Institutes in promoting scientific activities. Additionally, they help universities to deal with the increasingly higher number of students and the corresponding teaching workload. In particular, the IUDIP is active in organising academic events – such as conferences and reports – and regularly drafts PIL texts. The IUDIP is trying to acquire more visibility and encourage scholars to visit.

As for the MPI, **Jan Peter Schmidt** pointed out that the Institute has contributed to fruitful academic exchanges. On the one hand, many PIL scholars in LATAM visited the MPI and hence, participated to the diffusion of Latin American PIL in Europe. They often helped the MPI in its role of providing legal opinions to German courts on the application of foreign, Latin American law. Indeed, scholars

are of utmost importance, as they provide access to “remote” literature and court decisions. On the other hand, renown PIL experts, such as Jürgen Samtleben, Paul Heinrich Neuhaus and Jürgen Basedow, reinforced the links of the MPI with LATAM countries.

Finally, **Inez Lopes** insisted on the role of ASADIP (*Asociación Americana de Derecho Internacional Privado*), which gives LATAM countries a voice at the global level. The influence of such an association is potentially huge. Vertically, it can assist LATAM countries in implementing international conventions and advise governments. Horizontally, since ASADIP takes part in several international organisations – such as the HCCH, UNIDROIT, UNCITRAL and OAS – it has a chance to participate in the decision-making process.

The language in which scientific works should be written was extensively discussed with the audience. In particular, should LATAM scholars publish in English? On the one hand, it was highlighted that English is a language that enables Latin American PIL to gain a global dimension. Indeed, the diffusion of knowledge in a globalised setting mainly takes place in that language. On the other hand, legal English describes the law of common law countries. Therefore, using English to describe PIL in LATAM could be perceived as a cultural mismatch.

The Impact of PIL Schools of Thought in LATAM

The second roundtable highlighted the fundamental role of scholars in drafting PIL acts and conventions. In Argentina, Ramírez, Vargas Guillemette and Alfonsín fostered the development of PIL, thanks to their rather avant-gardist ideas, as **Cecilia Fresnedo de Aguirre** explained. More recently, outstanding scholars contributed to the elaboration of PIL rules within the framework of international organisations, such as the HCCH, UNIDROIT and the OAS.

Although academia boosts the creation of PIL, parliaments tend to blatantly disregard PIL issues and texts. For example, Gonzalo Lorenzo Idiarte and Cecilia Fresnedo de Aguirre explained the challenging legislative path of the Uruguayan General Private International Law Bill. Academics drafted this text and presented it to the parliament, which rejected it three times (!). Its approval is still pending at the time I write those lines.

In Venezuela, the same trend is observable, as **Javier Ochoa Muñoz** explained.

The Venezuelan Private International Law Bill was first drafted in 1965 but only approved in 1999, thanks to the work and energy of Tatiana Maekelt. Here too, an academic supported the development of PIL. Additionally, Tatiana Maekelt encouraged the creation of the ASADIP in 2007 and set up a successful Master Program in Private International and Comparative Law.

At the regional level, the Inter-American Specialized Conferences on Private International Law (CIDIP), organised under the auspices of the OAS, played an important role in the codification and harmonisation of PIL in LATAM. Today, however, this process stalls and, as a consequence, **Valesca Raizer Borges Moschen** asked if and how the role of the OAS should be redefined. She noted the increasing role of the Inter-American Juridical Committee and the preference for the creation of flexible PIL instruments.

Since international codifications came to a standstill, **Sebastián Paredes** explained that, in the recent years, LATAM countries have engaged in individual, uncoordinated efforts to codify and modernise their PIL rules. This certainly created coordination issues and further complicated the quest for harmonised solutions to collective problems.

Finally, in his closing speech, **Jürgen Samtleben** talked about his first steps as a PIL academic in LATAM. He delighted the audience with many anecdotes and a touch of humour.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

5/2019: Abstracts

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

E. Jayme: **On the Legal Status of Indigenous Peoples in German Cultural**

Property Proceedings

The Nama Traditional Leaders Association asked the Constitutional Court of the federal state Baden-Wurttemberg to issue an interim order to prevent its government from returning certain pieces of cultural property to the Republic of Namibia. These cultural goods had been taken by Germans during the colonial period and have been displayed in the Linden-Museum in Stuttgart since 1902. The Nama Association relied on the argument that these goods belonged to the Witbooi family and were part of the Nama cultural heritage. The Constitutional Court dismissed the action on procedural grounds. According to the Court, an interim order required a main action which lacked in that case. In addition, the Court remarked that the litigation was such to be better handled within Namibia. The restitution of colonial goods from European museums to the territories of their origin has been discussed widely since President Macron, in 2017, gave a speech in Ouagadougou (Burkina Faso) asking for the return of colonial goods to African countries. This idea throws up many questions of law and particularly of conflict of laws, as is evident in the Nama-case, which centres around the legal status of indigenous people in German court proceedings concerning cultural goods. The author also discusses problems of private international law, such as the law applicable to the question of property regarding such colonial goods.

M. Drehsen: Service of judicial documents within the context of the EuMahnVO

The intersection of the Regulation (EC) No 1896/2006 and the Regulation (EC) No 1393/2007 is the service of the European order for payment. Even if Art. 12 (5), 13 to 15 Regulation (EC) No 1896/2006 contain provisions on the service of the same, these are not complete upon closer examination, so that according to the decision of the ECJ of 6.9.2018 worthy of approval, recourse may be had to the Regulation (EC) No 1393/2007 and in particular to Art. 8 Regulation (EC) No 1393/2007 and the case-law of the ECJ issued in this regard. Even if the same legal consequences as for the absence of a corresponding translation are to apply to the non-addition of the form under Annex II of the Regulation (EC) No 1393/2007, the period for statement of opposition under Art. 16 (2) Regulation (EC) No 1896/2006 can begin differently for these two service defects to be distinguished.

S. Arnold/T. Garber: A Pyrrhic victory for Greece: International Procedure

and the limits of state sovereignty

In 2012, Greek government bonds were restructured which caused enormous losses to private investors. Many of them sued the Hellenic Republic, especially in German and Austrian courts. Following a referral of the Austrian Supreme Court (OGH) the ECJ decided that actions brought by private investors against the Hellenic Republic are not covered by the scope of application of the Brussels Ibis Regulation. After the ECJ's decision, the OGH even denied international jurisdiction of Austrian courts according to the national (Austrian) rules of civil procedure. Both decisions are flawed as regards their outcomes and their reasonings. The following lines will explore these flaws and shed some light on the decisions' consequences.

Q.C. Lobach: International jurisdiction of the courts at the place of performance of a contract of carriage for air passengers' claims under the Flight Compensation Reg. against a third-party operating carrier

In the *Rehder/Air Baltic* case, the CJEU held that the places of performance of a contract of carriage pursuant to art. 7 (1) (b) second indent Brussels I Recast Reg. are both the place of departure as well as the place of arrival of a flight. Consequently, air passengers' claims for compensation on the basis of the Flight Compensation Reg. can be pursued before a court at either place at the election of the claimant. However, divergent opinions existed on whether these principles were accordingly applicable in cases in which a journey by air consists of various legs, while the contracting air carrier on the basis of code sharing has engaged an operating air carrier for one of the legs. In such a situation, the question is whether merely the courts at the places of departure and arrival of that particular leg or rather the courts at these places of the air travel in its totality are competent to hear the passenger's claims against the operating air carrier. In the case at hand, the CJEU answers these as well as various other questions on international jurisdiction in relation to air passengers' compensation claims under the Flight Compensation Reg.

H. Roth: Agreement of jurisdiction according to Art. 25 Brussels Ia Reg. and ex officio review by national courts

According to German Civil Procedure law, jurisdiction is always reviewed ex officio. Hereby, the Brussels Ia Reg. leaves room for the application of the

respective national civil procedure law. According to German Civil Procedure law, the plaintiff has to conclusively present the relevant facts of the case, which are sufficient to establish the international jurisdiction of the court seized. In case of an effective objection by the defendant, the court has to take evidence. The same is true in case of an international trade custom (Art. 25 par. 1 s. 3 lit. c Brussels Ia Reg.). The German Federal Supreme Court's decision is therefore persuasive not only by its legal outcome but also by its legal reasoning.

V. Lipp: Applicable law to child support when child changes habitual residence

The ECJ case KP./ LO is its very first case on the interpretation of the "Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations". This "Protocol", in fact an international convention drafted by the Hague Conference on Private International Law, contains the rules on applicable law to maintenance obligations for all member states of the European Union except Denmark and the UK. The ECJ thus first clarifies the status of the Protocol as secondary law of the EU and its competence to interpret it. It then deals with Art. 4 para. 2 of the Protocol when a child changes its habitual residence and now claims support from a parent for the period before that change took place. The following article discusses these issues in the context of the new regime for international maintenance, both within the EU and outside of it.

J. Antomo: International child abduction or homecoming: HCA caught between the best interests of the child and general prevention

In cases of child abduction, the HCA intends to restore the status quo ante by requiring the return of the child to be ordered forthwith. Judicial authorities in the state where the child is located must order the child's return, and can only refuse to do so in strictly limited exceptional situations. This principle is based on the assumption that, as a general matter, returning the child to his or her familiar environment is in the child's best interest. In addition, establishing an expectation that return orders will swiftly issue aims to minimize any incentives for abducting children across borders. However, in cases where the child's habitual residence frequently changes, it is doubtful whether a return order actually serves the child's best interests. Nevertheless, the Higher Regional Court of Stuttgart recently ordered the return of two children to Slovakia in a case where the children had only spent six months there, then moved back to their former home

country Germany together with their mother. This article evaluates whether in such cases of removal to the former home country the interest of the individual child should take priority over the general preventive objectives of the Convention. The author shows that the stress that HCA procedures impose on children could particularly be reduced by promoting mediation and amicable settlements.

B. Hess: Not a simple footnote: 9/11 litigation in the civil courts of Luxembourg

On 27/3/2019, the Tribunal d'Arrondissement de Luxembourg refused to recognise two default judgments rendered by the U.S. District Court for the Southern District of New York amounting to 2.1 billion USD.² These judgments had been given in favour of 92 victims of the 9/11 terrorist attacks. The 16 defendants included inter alia the Islamic Republic of Iran, its former heads of state and of government as well as several governmental entities and state enterprises. In a 160 pages judgment, the Luxemburg court held that recognition of the American judgment against the state defendants would amount to a violation of state immunity under customary international law. Referring to the 2012 ICJ's judgment on state immunity³ the Luxemburg court expressly stated that neither a "terrorists exception" nor a non-commercial tort exception from immunity were applicable to the case at hand. Therefore, state immunity barred the recognition of the judgment. Besides, the court declined recognition with regard to the non-state defendants because their rights of defence had not been sufficiently respected in the original proceedings as (substantial) amendments of the lawsuit had not been served on the defendants. The judgment carefully assesses the current developments of state immunity under customary international law. It is also important for the private international law of the Grand Duchy.

I. Schneider: EIR: The reach of the lex fori concursus in lease agreements for companies with real estate property

In its decision in case 1 Ob 24/18p (21 March 2018) the Supreme Court of Austria dealt with various questions regarding the European Insolvency Regulation (EIR). Unfortunately, the court did not make a final statement on these questions since it was not essential to decide the case. The article attempts to reach a solution for the issues raised in the judgement which still remain unsolved by applying the

EIR. That is the interpretation of the term “immoveable property” in Art. 11 para. 1 EIR, the relevance of the choice of law and the scope of the public policy-clause in Art. 33 EIR.

P.A. Nielsen: EU PIL and Denmark 2019

The author explains the reasons for Denmark’s reservation from 1992 towards EU cooperation in civil and commercial matters and its “opt-out” nature as well as the failed attempt in 2015 to change it to an opt-in mechanism identical to the British and Irish reservations. Furthermore, the author examines the existing parallel agreements from 2005 between the EU and Denmark in respect of originally the Brussels I Regulation and the Service Regulation and gives an account of which EU instruments Denmark is bound by.

A. Wohlgemuth: On the International Family Law of Indonesia

Indonesia, domestically equipped with a diversity of laws, that needs internal law allocation, nearly a century after independence, has not yet even codified its Private International Law, the last project of which dates from 2015. Concerning conflict of laws Indonesia is still relying on a handful of rules mostly inherited from the Dutch colonial period. These provisions, for their part, are rooted in the French Civil Code of 1804. International family law, especially on mixed marriages, is covered by the Marriage Law No. 1/1974. The following is a review of the scarce published case law of Indonesian courts and the more comprehensive legal Indonesian literature on the matter.

Rethinking Choice of Law and International Arbitration in Cross-border Commercial Contracts

*Written by Gustavo Becker**

During the 26th Willem C. Vis Moot, Dr. Gustavo Moser, counsel at the London Court of International Arbitration and Ph.D. in international commercial law from the University of Basel, coordinated the organization of a seminar regarding choice of law in international contracts and international arbitration. The seminar's topics revolved around Dr. Moser's recent book *Rethinking Choice of Law in Cross-Border Sales* (Eleven, 2018) which has been globally recognized as one of the most useful books for international commercial lawyers.

On April 15th, taking place at Hotel Regina, in Vienna, the afternoon seminar involved a panel organized and moderated by Dr. Moser and composed of Prof. Ingeborg Schwenzer, Prof. Petra Butler, Prof. Andrea Bjorklund, and Dr. Lisa Spagnolo. The panel addressed three core topics in the current scenario of cross-border sales contracts: Choice of law and Brexit, drafting choice of law clauses, and CISG status and prospects.

The conference started with a video presentation in which Michael McIlwrath (*Baker Hughes, GE*) addressed his perspectives on how Brexit might impact decisions from companies regarding choice of law clauses in international contracts, its effects on the recognition of London as the leading seat for dispute resolution, and the position of English law as the most applicable law in international contracts.

In Mr. McIlwrath's perspective, in spite of Brexit, London will still remain a significant place for international dispute resolution as it adopts globally recognized commercial law principles, is an arbitration friendly state and enjoys a highly praised image as a safe seat for international cases. However, in order to try to predict the impact of Brexit in international dispute resolution, Mr. McIlwrath collected data released by arbitral institutions and found that in the years leading up to the Brexit vote, London did not grow as a seat of arbitration significantly. Considerable growth nonetheless has been seen outside the traditional centers of international arbitration. Therefore, the big issue involving Brexit, in Mr. McIlwrath's view, is the uncertainty that companies will face with the UK's unsettled political future. For this reason, the revision of contract policies is now likely to be undertaken and the choice of English law in international contracts might be affected.

Prof. Schwenzer pointed out that the whole discussion about Brexit and its effects on international dispute resolution depends primarily on the type of Brexit that

will be chosen and the agreements between Europe and Great Britain. In her point of view, one of the main questions is whether the UK will join the Lugano Convention, which would make the enforcement of English court decisions easier in European State-members. Prof. Schwenger also highlighted that, in terms of choice of law, there will be uncertainty issues regarding the regulations that have been imported from Europe and are now part of the English legal system. The problem might be how these rules will be developed further as the Court of Justice of the European Union will no longer be responsible for interpreting this part of English law.

Furthermore, Prof. Bjorklund stated that, whilst the choice of English law will require more caution after Brexit, the well-recognized security related to arbitration in the UK is likely to continue as long as the New York Convention, the English Arbitration Act, and the arbitration friendly character of English commercial courts will not likely change. However, in the point of view of an international arbitration counsel, certainly, the *“risks of arbitrating in the UK”* will leave some room for parties to choose arbitration in other places rather than in London or – at least – to start rethinking the classic choice for English-seated arbitration.

Concerning the choice of English law, Prof. Butler reminded the audience of two important regulations which should be analyzed in the context of Brexit: Rome I for deciding which contract law is applicable in international cases, and the Brussels Regulation to define which court is entitled to decide a case and how to enforce and recognize foreign decisions within the EU. According to Prof. Butler, under the first Brexit bill, the statutes signed within the EU regime would still apply. However, subject to confirmation from the English government, the development of these laws might no longer be applicable.

Dr. Spagnolo added that whether a country joins an international instrument sometimes has little to do with rational factors and are often “emotional”. In this sense, one of the arguments that the political environment seems to emphasize nowadays under the notion of nationalism is the maintenance of sovereignty. According to Dr. Spagnolo, this is a dangerous consideration to be emphasized in an environment that relies on commercial sense and needs basic guarantees of international harmonization, such as the enforcement of foreign awards or the application of a uniform law.

Regarding the topic “drafting choice of law clauses”, Mr. McIlwrath highlighted the “emotional” features involving the choice of law. In his opinion, as Dr. Moser has demonstrated in his book, many choices of law decisions are driven by factors such as how many times a specific law had already been applied by a law firm or what law the attorneys involved in that contract were already familiar with. Considering this, Mr. McIlwrath understands that Brexit can make lawyers rethink the application of English law, even though this might be dependant upon whether financial institutions and companies currently based in London will or will not move away from the UK.

Prof. Schwenger highlighted that what Dr. Moser has found in his research regarding the emotional aspect of the choice of law is a proving fact of what she has experienced in practice: choice of law decisions are mostly emotionally charged and seldom rational. One example is that even though Swiss law is arguably the second most chosen law in international contracts, in Prof. Schwenger’s view, Swiss law is not predictable: in core areas of contract law, such as limitation of liability, Swiss law is not advantageous for commercial contracts in her opinion. Prof. Schwenger added that this shows that lawyers seldom analyze the pros and cons of laws deeply before applying them in international commercial contracts.

Concluding the panel discussions, Dr. Moser brought up the topic “CISG status and prospects”. While discussing this matter, all the panelists agreed upon the urgent need of global initiatives to increase awareness and improve knowledge of the CISG for both young lawyers who are sitting for the bar exam, and for judges who will face international commercial cases and might not be familiar with the CISG or even prepared to apply its set of provisions.

*With contributions from Gustavo Moser

Patience is a virtue - The third party effects of assignments in European Private International Law

Written by Leonhard Huebner, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg University)

The third-party effects of the assignment are one of the “most discussed questions of international contract law” as it concerns the “most important gap of the Rome I Regulation”. This gap is regrettable not only for dogmatic reasons, but above all for practical reasons. The factoring industry has provided more than 217 billion euros of working capital to finance more than 200,000 companies in the EU in 2017 alone. After a long struggle in March of 2018, the European Commission, therefore, published a corresponding draft regulation (COM(2018)0096; in the following Draft Regulation). Based on a recent article (ZEuP 2019, 41) the following post explores whether the Draft Regulation creates the necessary legal certainty in this economically important area of law and thus contributes to the further development of European private international law (see also this post by Robert Freitag).

Legal background and recent case law

Although Article 14 of the Rome I Regulation provides for a rule governing the question regarding which law is applicable to the voluntary assignments of claims, it is the prevailing opinion that the third party effects of assignments are not addressed within the Rome I Regulation. According to Article 27 (2) of the Rome II Regulation, the European Commission was under the obligation to submit a report concerning the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. Said report should have been published no later than 17 June 2013. In March 2018, almost nine years after the Rome I Regulation came into force, the Commission finally presented said report in form of the Draft Regulation subject to this article. The practical importance

and the need for a harmonized European approach have also been demonstrated by recent case law proving the rather unsatisfactory status quo in European PIL. Two recent decisions of the Higher Regional Court of Saarbrücken (dated 8 August 2018 – 4 U 109/17) and of the Norwegian Supreme Court (see IPRax 2018, 539) gave striking examples of how the diverging requirements for the effectiveness of the assignment vis-à-vis third parties lead to different solutions within the respective PIL rules of the member states. The preliminary reference to the ECJ of the Higher Regional Court of Saarbrücken concerns a multiple assignment, while the ruling of the Norwegian Court of Justice deals with the question whether unsecured creditors of the assignor can seize the allegedly assigned claims of the assignor in insolvency (see also this post by Peter Mankowski).

The material scope of the proposed regulation

Art. 5 of the Draft Regulation determines the material scope of application of said Draft Regulation with regard to the effectiveness of an assignment as well as its priority vis-à-vis third parties. The effectiveness vis-à-vis third parties is regularly determined by registration or publication formalities (lit. a), while priority conflicts for the assignee arise vis-à-vis various persons. Lit. b) concerns multiple assignments, while lit. c) regulates the priority over the rights of the assignor's creditors. In addition, lit. d) and e) assign priority conflicts between the assignee and the rights of the beneficiary of a contract transfer/contract assumption and a contract for the conversion of debts to the Draft Regulation.

In essence, Art. 5 of the Draft Regulation covers notification requirements to the assignee. Most legal systems require a publicity act for binding effects vis-à-vis third parties and the debtor, such as a notice of assignment to the debtor or a registration in a public register. Whereas under German law the assignment becomes effective immediately between the assignor and the assignee as well as against third parties, in other jurisdictions this only applies once the debtor has been notified of the assignment (*signification* in French law pursuant to former Art. 1690 of the Code civil or within the framework of legal assignment in the UK).

Connecting factor: habitual residence of the assignor combined with sectorial exceptions

The connecting factors employed by current national PIL rules considerably vary between the member states. In principle, three connecting factors compete with each other: the habitual residence of the assignor, the law applicable to the transfer agreement (assignment ground statute) and the law applicable to the transferred claim. Furthermore, the law at the debtor's domicile might also be considered an important factor.

Art. 4 (1) of the Draft Regulation unties this Gordian knot as it specifies the law of the country in which the assignor has his habitual residence "at the relevant time" as the primary connecting factor. The goal of the European Commission is to create legal certainty and, above all, to promote cross-border trade in claims. By way of sectoral exceptions, the law of the transferred claim is to be applied if either (i) "cash collateral" credited to an account or (ii) claims from financial instruments are transferred (Art. 4 (2) of the Draft Regulation).

A downside of the link to the law of habitual residence is its changeability, which may lead to a *conflict mobile*. By altering the connecting factor, the applicable law may also change leading to legal uncertainty. To overcome such conflict, so called meta conflict of laws rules are also provided for in the Draft Regulation. In this case, it is a matter of determining the relevant point in time in order to make a viable connection. This rule has been implemented in Art. 4 (2) of the Draft Regulation.

An unsolved problem is the determination of the "material point in time" cited in Art. 4 (1) of the Draft Regulation. Accordingly, the third parties' effects are determined by the assignor's habitual residence at the relevant time. However, neither a recital nor the catalogue of Art. 2 of the Draft Regulation give an adequate definition of this relevant point in time so far. It is therefore advisable to replace the term "at the relevant time" with "at the time of conclusion of the assignment contract" in the final regulation. This is also reflected in the EP's legislative resolution of 13 February 2019 (P8_TA-PROV(2019)0086, p. 12). The advantage of this clarification would be that the same point in time would be relevant in the legal systems of the member states which follow the principle of separation as well as those which follow the principle of unity.

A step forward?

The Draft Regulation would represent a major step forward in the trade of cross-

border receivables in the EU. It closes a large gap within European PIL, while at the same time aiding EU member states to partly adapt their domestic legal system accordingly. Even if the European Commission did not comply with the (unrealistic) deadline for the review cited in Art. 27 (2) of the Rome I Regulation, the legal debate made this essential progress possible demonstrating the EU's ability to reach compromises. Although the Draft Regulation solves many problems, it may also raise new ones. That is again good news for lawyers interested in PIL. Nevertheless, the enactment of the Draft Regulation would eventually answer "one of the most frequently discussed questions of international contract law". The old saying "patience is a virtue" would be proven right again.

This blog post is a condensed version of the author's article in ZEuP 2019, 41 et seqq. which explores the new Draft Regulation in more detail and contains comprehensive references to the relevant literature.

The race is on: German reference to the CJEU on the interpretation of Art. 14 Rome I Regulation with regard to third-party effects of assignments

By Prof. Dr. Peter Mankowski, University of Hamburg

Sometimes the unexpected simply happens. Rome I aficionados will remember that the entire Rome I project was on the brink of failure since Member States could not agree on the only seemingly technical and arcane issue of the law applicable to the third-party effects of assignments of claims. An agreement to disagree saved the project in the last minute, back then. Of course, this did not make the issue vanish – and this issue concerns billion euro-markets in the

financial industry. In the spring of this year the Commission finally ventured to table a Proposal COM (2018) 96 final for a separate Regulation. This was the result of extensive preparation – and does yet deviate in important respects from the majority results reached in a very prominently staffed expert commission. The Commission proposes a compromise and combined model. Regardless of the degree to which one agrees or disagrees with this proposal (for discussion see *Peter Mankowski*, *Recht der Internationalen Wirtschaft* [RIW] 2018, 488; *Andrew Dickinson*, *IPRax* 2018, 337; *Michael F. Müller*, *Zeitschrift für Europäisches Wirtschaftsrecht* [EuZW] 2018, 522; *Leplat*, *Petites Affiches* n° 155, 3 août 2018, 3), one thing should be clear: The proposed model does definitely not form part of the still *lex lata*.

And now enter the surprise guest. Astonishingly, for ten years after the implementation of Rome I not a single reference to the CJEU had been made on the relevance which Art. 14 Rome I might have in the said regard. But once the Proposal is out, the Oberlandesgericht Saarbrücken (decision of 8 August 2018, case 4 U 109/17) simply did it. The decision is excellently structured and well researched. The questions submitted to the CJEU are pin-point accurate. They follow a strict line. In the author's translation they read:

1. Is Art. 14 Rome I Regulation applicable to the third-party effects of multiple assignments of the same claim by the same assignor?
2. If the first question is to be answered in the affirmative: Which law is applicable to such third-party effects?
3. If the first question is to be answered in the negative: Is Art. 14 Rome I Regulation to be applied *per analogiam*?
4. If the third question is to be answered in the affirmative: Which law is applicable to such third-party effects?

Multiple assignments of the same claim by the same assignor are particularly a field where applying the law of the assignor's habitual residence scores and applying the *lex causae* of the claim assigned fares not too badly whereas applying the law governing the relation between assignor and assignee fails.

But the more interesting question of course is whether the recent reference will interfere with the progress which the Commission Proposal might make. Will Council and Parliament wait for the CJEU to point into any direction for the *lex lata*? And if the CJEU will utter an opinion as to substance, which influence will it

exert on the substance of a possible *lex ferenda*?

If one dares to employ the crystal maze and to conduct some Kirchberg astrology the most likely outcome of the reference procedure might be that the CJEU will answer the first and third questions submitted in the negative thus rendering any answer to the second and fourth questions obsolete. In the light of the drafting history how Art. 14 Rome I Regulation was rescued in the last minute (see the dramatic account by the Dutch delegate, *Pauline van der Grinten*, in: *Westrik/van der Weide* (eds.), *Party Autonomy in International Property Law* [2011] p. 145, 154-161) this would be a sound way out for the CJEU leaving all liberty and leeway possible for Commission, Council and Parliament.

Update on ‘This one is next: the Netherlands Commercial Court!’

A brief update on our previous post regarding the approval of the establishment of the Netherlands Commercial Court by the House of Representatives (*Tweede Kamer*). The bill is now scheduled for rubber-stamping by the Senate (*Eerste Kamer*) on 27 March 2018. This makes the kick-off date of 1 July 2018 realistic.

We believe that this court will strengthen international commercial complex litigation in the Netherlands, and it offers business litigants an alternative to arbitration and high quality commercial courts in other countries. See also (for Dutch readers) Eddy Bauw and Xandra Kramer, ‘Commercial Court’ is uitkomst voor complexe internationale handelszaken, *Het Financieele Dagblad*, 11 October 2017.

More news will follow soon.

Our previous post:

This one is next: the Netherlands Commercial Court!

By Georgia Antonopoulou, Erlis Themeli, and Xandra Kramer, Erasmus University Rotterdam

(PhD candidate, postdoc researcher and PI ERC project Building EU Civil Justice)

Following up on our previous post, asking which international commercial court would be established next, the adoption of the proposal for the Netherlands Commercial Court by the House of Representatives (*Tweede Kamer*) today answers the question. It will still have to pass the Senate (*Eerste Kamer*), but this should only be a matter of time. The Netherlands Commercial Court (NCC) is expected to open its doors on 1 July 2018 or shortly after.

The NCC is a specialized court established to meet the growing need for efficient dispute resolution in cross-border civil and commercial cases. This court is established as a special chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. Key features are that proceedings will take place in the English language, and before a panel of judges selected for their wide expertise in international commercial litigation and their English language skills.

To accommodate the demand for efficient court proceedings in these cases a special set of rules of procedure has been developed. The draft Rules of Procedure NCC can be consulted here in English and in Dutch. It goes without saying that the court is equipped with the necessary court technology.

The Netherlands prides itself on having one of the most efficient court systems in the world, as is also indicated in the Rule of Law Index - in the 2017-2018 Report it was ranked first in Civil Justice, and 5th in overall performance. The establishment of the NCC should also be understood from this perspective. According to the website of the Dutch judiciary, the NCC distinguishes itself by its pragmatic approach and active case management, allowing it to handle complex cases within short timeframes, and on the basis of fixed fees.

Dutch collective redress dangerous? A call for a more nuanced approach

Prepared by Alexandre Biard, Xandra Kramer and Ilja Tillema, Erasmus University Rotterdam

The Netherlands has become dangerously involved in the treatment of mass claims, Lisa Rickard from the US Chamber of Commerce recently said to the Dutch financial daily (*Het Financieele Dagblad*, 28 September 2017) and the Dutch BNR newsradio (broadcast of 28 September 2017). This statement follows the conclusions of two reports published in March and September 2017 by the US Institute for Legal Reforms (ILR), an entity affiliated with the US Chamber of Commerce. Within a few hours, the news spread like wildfire in online Dutch newspapers, see for instance [here](#).

Worryingly enough, the March 2017 report, which assessed collective redress mechanisms in ten Member States, predicted that ‘there are a number of very powerful indicators that all of the same incentives and forces that have led to mass abuse in other jurisdictions are also gathering force in the EU’. Among the jurisdictions surveyed, the Netherlands appeared as a place particularly prone to such abuse. The September 2017 report focuses on consumer attitudes towards collective redress safeguards, and ultimately concludes that 85% of respondents tend to support the introduction of safeguards for the resolution of mass claims.

The publication of the aforementioned reports is timely as the European Commission’s evaluation report on the 2013 Recommendation on Collective Redress is expected this autumn, following the recent call for evidence. Some of the statements in these reports call for a more nuanced view. Indeed, the Dutch approach to the resolution of mass claims might have its drawbacks. It is certainly not exempt from criticisms. However, in a matter of such expedient nature, it is of the utmost importance that *both* sides are thoroughly addressed and assessed.

For the information of readers that are not familiar with the Dutch system: the Netherlands currently has two mechanisms that have been designed for collective redress specifically. The first one is the collective action for *injunctive* or

declaratory relief. A verdict in such action can provide the basis for an amicable settlement or for individual proceedings to seek monetary compensation. The second mechanism is the much-discussed WCAM settlement (based on the Dutch Collective Settlements Act, see also a previous post linking to papers and a report on the WCAM procedure). In addition, there is a proposal to introduce a collective action for *damages* (see a previous post on this blog).

Bad apples and the bigger picture

In the past years, few incidents have occurred in Dutch collective redress that may indeed come close to ‘American situations’ that are generally feared in Europe. Unfortunately, some commentators have chosen to mainly highlight such incidents. Notably, the ILR report of March 2017 refers to the notorious case of *Stichting Loterijverlies*, in which a foundation initiated a collective action on behalf of aggrieved lottery ticket holders against the Dutch State Lottery. The report rightfully mentions that the foundation’s director has been accused of funnelling elsewhere, for personal gain, part of the consumers’ financial contribution to the foundation. However, the report neglects to mention that the foundation had also been litigating for quite some years and that, ultimately, the Supreme Court ruled in its favour: the Dutch State Lottery had misled consumers for years. Furthermore, the report fails to mention that some of the foundation’s participants successfully filed a request to replace the foundation’s board. Moreover, despite (or on account of) the complexity of establishing causation and damages, the case has now been amicably settled. As part of the settlement, participants of the foundation have been reimbursed their financial contribution thereto, and all class members were free to participate in the settlement: an extraordinary, one-off lottery draw. Reportedly, 2.5 million individuals have done so.

Obviously, incidents such as the aforementioned case are of no avail to civil justice, and justify concerns about claim vehicles’ activities and motives. However, we should also consider the many positive effects of collective redress mechanisms. Generally, Dutch collective actions and WCAM settlements provide for much-needed effective and efficient dispute resolution in mass harm situations.

Safeguards work: learning from experience

The March report by the ILR warns against the gradual decline of safeguards in the Netherlands, and in the EU more generally. Yet, various safeguards already exist, continue to do so, and generally function well in practice. For instance, the admissibility rules regarding representative organizations (that bring collective actions or are involved in a WCAM settlement) have become more stringent and are applied increasingly strict by courts. As to the current Dutch collective actions, there is proof that its numbers have slowly risen since 1994, but no proof exists that this is necessarily attributable to entrepreneurial parties, let alone that they have increased the number of frivolous claims (Tillema 2017). The proposed collective action for damages further raises the current threshold for representative organizations to obtain standing. The requirements concern the organizations' governance, financial means, representativeness, experience and expertise, and individuals' participation in the decision-making process. Indeed, a judgment will have binding effect upon all aggrieved parties who have not opted out, but all actions will be publicly registered, there is a strict scope rule, and individuals can raise objections.

So far, eight WCAM settlement have been declared binding. Undeniably, various parties have entered this market, including US counsels and their sizeable fees. However, in spite of its difficult task, the Amsterdam Court of Appeal seems growingly comfortable in assessing the reasonableness of a collective settlement, including the representative organizations' remuneration. In *Converium*, the reasonableness of (contingency) fees was assessed for the first time. In the currently pending eighth WCAM case, the *Fortis*-settlement, the court has demonstrated its awareness of the risks and of its task to also scrutinize the motives of representative organizations. In its interlocutory judgment, it has ruled that the settlement, in its current state, cannot be declared binding. It is deemed not reasonable due to, inter alia, the sizeable remuneration of the representative organizations and their lack of transparency thereon.

A Dutch 'manoeuvre' to become a 'go-to-point' for mass claim or an attempt to enhance access to justice for all?

'The Netherlands and the UK seem to be manoeuvring themselves to become the go-to jurisdictions for collective claims outside the EU', the March report highlighted. Obviously, this not the first time that other countries express their concerns against the extra-territorial effects of the Dutch legislation, an issue that has been discussed for several years in the context of the WCAM (Van Lith, 2011).

The ILR report indeed highlighted that in the *Converium* case, the Amsterdam Court of Appeal declared the settlement binding where a majority of shareholders were domiciled outside the Netherlands. Yet, the key question here is whether, for reasons linked to equality and efficiency, individuals who have suffered from losses resulting from a same misbehaviour should not be treated in a same manner and in the same proceeding, regardless of their actual location. By asserting global jurisdiction, the Amsterdam Court of Appeal ultimately ensured access to justice and equal treatment for all parties placed in similar situations, and ultimately avoided costly fragmentation of the case for parties and courts. In this regard, it should also be highlighted that the WCAM is a settlement-only mechanism, and – to the benefit of victims of wrongdoings – it is the wrongdoing party and the representatives of the aggrieved parties that jointly choose to address the Amsterdam Court of Appeal considering that the Netherlands has a suitable procedure to declare such settlement binding.

It is evident that collective redress mechanisms have both benefits and drawbacks. More than ever, the challenging, yet indispensable key word here is *balance*. As Commissioner Jourova recently observed at the release of the ILR September report, ‘the discussion in EU countries is in full swing on how to strike the right balance between access to justice and prevention of abuse’. We hope this short post can contribute to the discussion.

Conference Report: INSOLVENCY PROCEEDINGS WITHIN THE EU: LATEST DEVELOPMENTS, ERA, 8 to 9 June 2017

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

On 8 and 9 June 2017 the Academy of European Law (ERA), in co-operation with

the Academic Forum of INSOL Europe hosted a conference in Trier on the latest developments of insolvency proceedings within the EU. The conference aimed not only at giving an in-depth analysis of the Recast EIR (EU Regulation No 2015/848), but also at discussing post-Brexit implications for insolvency and restructuring as well as examining the new Commission proposal for a Directive on insolvency, restructuring and second chance, published late 2016.

After opening and welcoming remarks by Dr. Angelika Fuchs (Head of Section – Private Law, ERA, Trier) and Prof. Michael Veder (Adviser at RESOR, Amsterdam; Professor of Insolvency Law at Radboud University Nijmegen; Chair of INSOL Europe Academic Forum), the first session of the conference dealt with recent CJEU case law on cross-border insolvency proceedings. Stefania Bariatti (Professor at the University of Milan; Of Counsel, Chiometi Studio Legale, Milan) presented the most important cases on the EIR decided in 2016 by the CJEU, as well as some cases still pending. As it was shown by Prof. Bariatti the CJEU decided on various open questions relating to Art. 3 EIR and the COMI concept in the case of *Leonmobili* (case C-353/15) in 2016. Another question regarding the interpretation of Art. 3 EIR is still pending before the CJEU in the case of *Tünkers* (C-641/16). The treatment of rights in rem, and the interpretation of Art. 5 EIR, was object of *SCI Senior Home and Private Equity Insurance Group “SIA”* (C-156/15). After the CJEU decided the first two cases dealing with Art. 13 EIR and detrimental acts in 2015 – *Lutz* (C-557/13) and *Nike* (C-310/14) – an Italian case (*Vynils Italia SpA*, C-54/16) concerning Art. 13 is still pending before the CJEU. Other cross-border insolvency issues that went to the CJEU in 2016 concerned the Dutch prepack proceeding (*Federatie Nederlandse Vakvereniging*, C-126/16) and the interplay between the Regulation No 800/2008 and the EIR (*Nerea SpA/Regione Marche*, C-245/16).

Subsequently, Michal Barlowski (Senior Counsel, Wardynsky & Partners, Warsaw) gave an introduction about the new EIR focusing on its scope of application especially regarding pre-insolvency and hybrid proceedings. Mr. Barlowski identified the following six changes in the Recast Regulation as most important: 1.) the revisited and expanded COMI concept, 2.) the expansion of the scope of applicability, 3.) the synchronization (coordination) of main and secondary proceedings, 4.) the introduction of group coordination proceedings, 5.) the extension of authority and duties of IP’s and 6.) the ease of access to insolvency registers. Analyzing the positive and negative prerequisites of the

scope of applicability as laid down in Art. 1 EIR Recast, Barlowski emphasized that it might be problematic to include certain pre-insolvency or hybrid proceedings under the scope of the EIR Recast. This is due to the fact, that Art. 1 EIR Recast requires “public” proceedings, although especially pre-insolvency proceedings more commonly seek a solution of the debtors situation rather in “private”. Furthermore, Barlowski pointed out that the widened scope of application, the synchronisation of main and secondary proceedings as well as of proceedings within a group, the rising role of IPs and the higher availability of legal instruments lead to greater complexity of processes and thereby create new opportunities as well as challenges. Barlowski concluded with stating that the new EIR is characterized by “complexity vs. simplicity”.

Gabriel Moss QC (Barrister, 3-4 South Square, Gray’s Inn, London; Visiting Professor at Oxford University) dealt with the definition of COMI and the “Head Office Functions” test, as well as COMI shifts. There are now express provisions confirming the previous case law such as *Interedil* (Case C-396/09), although the concept of COMI remains the same under the Recast Regulation. Therefore, the “Head Office Function” test is still valid for determining the COMI. In regards to COMI shifting the EIR Recast now contains several new provisions dealing with fraudulent or abusive moves of COMI or with “bad” forum shopping. Whereas “good” forum shopping, usually done by a legal person, tends to benefit the general body of creditors, “bad” forum shopping, usually done by a natural person, tends to escape the creditors or generally disadvantages them. Especially Art. 3 (1) EIR Recast now states that the registered office presumption will be disapplied, if the debtor’s registered office is moved to another Member State within three months prior to the request for opening of proceedings, respectively six months if the debtor is an individual and moves his or her habitual residence. Furthermore, Art. 4 EIR Recast now requires a court considering a request to open insolvency proceedings to examine whether it has jurisdiction under Art. 3 EIR Recast whereas Art. 5 EIR Recast gives any creditor the right to challenge the opening of main proceedings on the grounds of international jurisdiction. However, the new presumptions designed to prevent “bad” forum shopping may not be effective as cases are usually decided based on facts not presumptions. Moss concludes that both, the court’s duty to check jurisdiction and the ability of creditors to challenge an opening of a main proceeding, are powerful tools against fraudulent COMI shifts. In Moss’ view the codification of the case law relating to COMI is welcome and useful, especially in jurisdiction, that rely rather

on the relevant statute than case law.

Reinhard Dammann (Avocat à la Cour, Partner, Clifford Chance Europe LLP, Paris) analysed the coordination of main and secondary proceedings as well as tools to prevent secondary proceedings. Dammann started out with assessing that secondary proceedings are not weakened in the Regulation Recast, but rather strengthened. On the one hand, the Member States understand secondary proceedings as a defence against the universal main proceedings, on the other hand secondary proceedings might prove useful in ensuring an effective administration, especially in cases of a complicated estate or an intended eradication of the protection of rights in rem through Art. 8 EIR Recast. But, the EIR Recast includes two new tools to prevent secondary proceedings: the giving of an undertaking pursuant to Art. 36 EIR Recast and a stay of the opening of secondary proceedings pursuant to Art. 38 III EIR Recast. However, Dammann heavily criticized both tools. Although the Regulation of the undertaking in Art. 36 EIR recast may be used to facilitate a sale of the assets in a combined set allowing for going concern of the insolvent company, it shows several inconsistencies and flaws: it might be difficult to identify the “known” local creditors in terms of Art. 36 EIR Recast; Art. 36 EIR Recast is discriminating the non-local creditors; pursuant to Art. 36 (5) EIR Recast the rules on majority and voting that apply to the adoption of restructuring plans shall also apply to the approval of the undertaking, whereas the matter of subject is not a restructuring, but an asset sale, and lastly the relationship between the undertaking and Art. 8 EIR Recast is unclear. Therefore, if an asset sale is intended in the main proceeding, it should be more effective to execute an asset sale in the main proceeding and subsequently open secondary proceedings and distribute the proceeds in the single proceedings. If a debt restructuring is intended in the main proceeding, the opening of a secondary proceeding, as well as an undertaking would frustrate the debt restructuring. In such cases a stay of the opening of secondary proceedings pursuant to Art. 38 (3) EIR Recast might prove helpful. However, the scope of applicability of Art. 38 (3) EIR Recast is unclear as it is specifically designed after the Spanish pre-insolvency proceeding pursuant to Art. 5bis Ley Concursal.

Bob Wessels (Independent Legal Counsel, Adviser and Arbitrator; Professor emeritus at University of Leiden) continued with practical concerns surrounding the publication of insolvency proceedings. Whereas the publicity of proceedings and the lodging of claims was one of the major shortcomings of the EIR, the

Regulation Recast now requires the Member States to publish all relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers, as well as introduces standard forms for the lodging of claims. Wessels then gave a detailed analysis of Art. 24 to 27 concerning the establishment of insolvency registers and the interconnection between insolvency registers. Both Art. 24 (1) EIR Recast (establishment of insolvency registers) as well as Art. 25 (1) EIR Recast (interconnection between insolvency registers) will not apply from 26 June 2017, but from June 2018 and 26 June 2019. The wording of recital 76 of the EIR Recast, as well as the requirements of Art. 24 (2) EIR Recast seem to indicate that only proceedings found in Annex A will be taken into the register that have extra-territorial effect. Whereas Art. 24 (2) EIR Recast provides for mandatory information, Member states are not precluded to include additional information (see Art. 24 (3) EIR Recast). The information that has to be taken into the registers differs depending on whether the debtor is an individual exercising an independent business or a professional activity, a legal person, or a consumer (Art. 24 (4) EIR Recast intends to protect the privacy of consumers). Pursuant to Art. 24 (5) EIR Recast, the publication of information in the registers has only the legal effects laid down in Art. 55 (6) EIR Recast and in national law. However, it is unclear whether this applies only to the mandatory information or to optional information as well. After all the access to EU-wide insolvency registers through the European e-Justice Portal should improve the efficiency and effectiveness of cross-border insolvency proceedings with benefits such as a quicker, real-time access to information crucial for business decisions, the free availability of key insolvency information and clear explanations on the insolvency terminology and the systems of the different Member States facilitating a better understanding of the content. As a last point Wessels presented the requirements for lodging claims as laid down in Art. 53 to 55 EIR Recast.

After lunch Alexander Bornemann (Head of Division, Federal Ministry of Justice and Consumer Protection, Berlin) scrutinized the treatment of corporate groups under the EIR Recast. The Recast's approach to corporate groups rests on two pillars. The first pillar may be described as the centralization of venue, in cases where there is a common COMI or an undertaking pursuant to Art. 36 EIR Recast is given. The centralization of venue avoids costs, delays and frictions associated with coordination of proceedings across borders. The second pillar may be described as the coordination of decentralized main proceedings, either through

“centralized” coordination with coordination proceedings pursuant to Art. 61 to 77, or through “decentralized” coordination with cooperation and coordination between courts and IPs pursuant to Art. 56 to 59 or participation and invention rights pursuant to Art. 60. However, the EIR Recast still lacks the next logical step in the treatment of corporate groups, namely the consolidation of proceedings. The new group coordination proceeding is inspired by the German *Koordinationsverfahren* as laid down in §§ 269d et seqq. of the German Insolvency Code and provides a procedural framework for the centralization of some of the functions of coordination such as the development of a plan, recommendations and mediation. However, the coordinated proceedings remain autonomous and thus combines centralized coordination with decentralized implementation. Ultimately the new coordination proceeding provokes significant difficulties in the practical administration of the proceeding and the complex system of procedural requirements and safeguards may offset the aspired advantages. The new regime should therefore be viewed as a field trial and a first modest step towards a “real” framework for groups. New perspectives may be opened for private autonomous (synthetic) replications by way of agreements and protocols as laid down in Art. 56 (2) EIR Recast. Other further developments will be based upon the experiences made or not made under the EIR Recast (see evaluation clause Art. 90 (2) EIR Recast).

During the next panel Nicolaes Tollenaar (RESOR, Amsterdam) presented a case study dealing with the restructuring of a group of companies based on real facts. The concerned group consisted of a holding company incorporated in the Netherlands, where it has its COMI as well, and two subsidiaries one based in Delaware (USA) and one based in Germany. The financial debt is mainly located at the level of the holding company, but the subsidiaries are guarantors of such debt and some obligations are secured by pledges over the shares or participations in those subsidiaries. Due to financial difficulties suffered by the group, the Dutch Company obtained a court moratorium in the Netherlands in order to be able to conduct negotiations with its creditors. However, the Dutch Company has a significant portion of its assets outside the Netherlands. The conference audience then had to discuss the cross-border effects of the Dutch moratorium. The case was a perfect example of how easily cross-border insolvency issues might get very complicated, but with the help of experts such as Michael Veder, Gabriel Moss, Jenny Clift, Bob Wessels and many other present, probably no case is too complicated. However, the lesson to be learned was that

the scope of applicability of the EIR Recast regarding pre-insolvency or hybrid proceedings might turn out to be problematic, due to its requirements as laid down in Art. 1 EIR Recast. Additionally, the case showed that the protection of rights in rem through Art. 8 EIR Recast and the new provisions in Art. 2 EIR Recast about the location of assets might lead to difficulties in cases where assets are situated in another Member State and the debtor does not possess an establishment in this Member State and therefore the opening of a secondary proceeding is not possible.

Jenny Clift (Senior Legal Officer, International Trade Law Division, UNCITRAL Secretariat, Vienna) reported on harmonisation trends on security rights and insolvency law at an international level. Topics considered for harmonization efforts, include both current and future work and national law reform efforts on insolvency and secured transactions. Currently, work is being undertaken on a model law on recognition and enforcement of insolvency-related judgments, and it is hoped that it can be finalised for adoption, together with a guide to enactment, at the 2018 Commission session. UNCITRAL is as well working on a set of draft legislative provisions on facilitating the cross-border insolvency of enterprise groups. However, areas still requiring further discussion include the use of “synthetic” proceedings to minimise the commencement of both main and non-main proceedings, the powers of the group representative appointed in a planning proceeding to coordinate the development of a group insolvency solution and the approval of a group insolvency solution. Furthermore, part four of Legislative Guide will be extended to include obligations of directors of enterprise group companies in the period approaching insolvency. Moreover, the Commission has agreed that work should be undertaken on the insolvency of micro, small and medium-sized enterprises (MSMEs). Possible future topics include choice of law in insolvency, a review of the Legislative Guide in regard to insolvency treatment of financial contracts and netting, the treatment of intellectual property contracts in cross-border insolvency cases, the use of arbitration in cross-border insolvency cases and sovereign insolvency. On a national level, there are now 43 states that enacted the UNCITRAL Model Law on Cross-Border Insolvency. Topics being considered for harmonization efforts regarding secured transactions include the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions. Possible future topics entail contractual issues, transactional and regulatory issues, finance for MSMEs, warehouse receipt financing, intellectual property licensing, as well as alternative dispute resolution in secured transactions. On a

national level, there has been significant activity in secured transactions law reform and in the establishment of collateral registries, as well as interest in the enactment of the Model Law on Secured Transactions.

The conference day ended with a “Brexit Dialogue” between Gabriel Moss and Bob Wessels, discussing potential effects of Brexit on European cross-border insolvency law and possible solutions to caused problems. Moss argued that from a rational point of view the EU Regulations and Directives are a “win-win” for all parties, and should therefore be kept. However, some EU politicians refuse “cherry-picking” and consider that the UK must be seen worst off outside the EU. Currently, the UK intends a “Great Reform Bill” which will keep all EU law as domestic UK law. Nevertheless, this will only be temporary and subject to change and the Regulations and Directives then cannot be applied on a unilateral basis, so reciprocity will no longer exist, unless otherwise agreed between the UK and the EU. If the UK loses the EU legislation it may fall back to s. 426 UK Insolvency Act 1986, the Model Law and the Common Law. However, the 27 Member States do not have s. 426 UK Insolvency Act 1986 or common law (except Ireland) and only some have adopted the Model Law. This would result in a “win” for the EU Member States and a “lose” for the UK. Wessels (see also) then proposed three solutions including only the Member States and three solutions including the EU. One could be a revival of existing treaties such as listed in Art. 85 EIR Recast. Another option is that the UK is treated as a third country making it subject to the national legislation of each Member State. However, the Member States then might enact the Model Law. Last, but not least one could think about reviving the Istanbul Convention. As an EU oriented solution, one could consider a transitional rule similar to Art. 84 (2) EIR Recast, i.e. that the EIR Recast continues to apply up to certain date in the future. Another solution could be found in a new multiparty initiative by academics and practitioners. It also seems possible to strengthen the role of courts, relying much stronger on court-to-court cooperation and communication.

The first conference day ended with a guided tour of the Karl-Marx-Haus and a joint dinner at the “Weinhaus”.

The second conference day dealt with the new Commission proposal for a Directive on insolvency, restructuring and second chance and pre-insolvency

restructuring in general.

Alexander Stein (Head of Unit, Civil Justice Policy, DG Justice and Consumers, European Commission, Brussels) began with a presentation of the new Commission proposal for a Directive on insolvency, restructuring and second chance. Its main objectives are reducing the barriers for cross-border investment, increasing investment and job opportunities in the internal market (Capital Markets Union Action Plan), decreasing the cost and improving the opportunities for honest entrepreneurs to be given a fresh start (Single Market Strategy) and supporting efforts to reduce future levels of non-performing loans (ECOFIN Council Conclusions of July 2016). The proposal provides for the harmonisation of preventive restructuring procedures and contains seven main elements to ensure efficient and fast proceedings with low cost: Early access to the procedure, strong position of the debtor, a stay of individual enforcement actions, the adoption of restructuring plans, encouraging new financing and interim financing, court involvement and rights of shareholders. Other efficiency elements include early warning tools. The proposal touches upon discharge periods for over-indebted entrepreneurs, the training and specialisation of judges and IPs, the appointment, remuneration and supervision of IPs and the digitalisation of procedures. It also contains provisions about data collection to allow a better assessment of how Member States are implementing the directive, how it is performing, and how it would need to be improved in the future. Stein reported that on 8 June the Council already discussed the role of courts and the debtor-in-possession principle. The next step is a hearing on 20 June before the European Parliament. Points that will be discussed once more include the role of the IP and the court involvement. However, the Commission plays a constructive role and intends a quick adoption of the proposal.

Nicolaes Tollenaar then took over again and presented the procedural steps of preventive restructuring proceedings with a view to the new Commission proposal. Although, Tollenaar welcomed the proposal as such, he has some significant critique as well. Firstly, the proposal only provides the debtor with the right to propose a restructuring plan. Thus, the debtor might use the right to propose a plan in an abusive manner. Secondly, it is unclear what exactly is meant with a minimum harmonisation in regard to pre-insolvency proceeding: May Member States grant creditors the right to propose a plan as well? Thirdly, the “likelihood of insolvency” is sufficient to open a pre-insolvency proceeding

and use a cross-class cram down to adopt a restructuring plan. However, it is questionable if the “likelihood of insolvency” justifies a cross-class cram down. Tollenaar therefore recommends giving creditors the right to propose a plan and to distinguish between two phases: The “likelihood of insolvency”, where only the debtor has the right to propose a plan and no cram down is available and “Insolvency or inevitable insolvency”, where creditors have the right to propose a plan and cram down is available. Furthermore, he recommends giving a wide right to seek early (non-public) court directions on issues such as jurisdiction, admittance of claims or permissible content of the plan and confirmation criteria and to established specialized courts.

Next, Florian Bruder (Rechtsanwalt, Counsel, DLA Piper, Munich) spoke about creditor’s rights and the protection of new and interim finance in the restructuring process in the proposal. From a creditor’s point of view the proposal provides a framework procedure allowing the debtor to pursue a quasi-consensual (financial) restructuring, addressing creditor hold outs and shareholder opposition as the most practical issues. Creditors and the debtor may prepare and lead the restructuring process supported by new finance. However, there is a substantial risk of deterioration of the value of the business and therefore recovery for the creditors due to the stay. The suspension of creditor’s rights to file for insolvency and to accelerate, terminate or in any other way modify executory contracts to the detriment of the debtor severely restricts the creditor’s rights to control the procedure. Therefore, adequate protection is crucial. Eventually safeguards for the creditors mostly rely on active intervention of the creditors and are available quite late. Hence, the adequate protection of the creditor’s interests depends even more on the access to commercially-minded and experienced courts.

Michael Barlowski then focused on the interplay between the proposed Directive and the Recast Insolvency Regulation. Both instruments will overlap regarding cross-border aspects of restructuring proceedings. Practical problems which need to be further examined include rights in rem (1), territorial proceedings (2) and the effectiveness in third-countries (3): 1.) While Art. 6 (2) of the proposal provides for a stay of individual enforcement actions in respect of secured creditors as well, Art. 8 (1) EIR Recast exempts the rights in rem of creditors from the effects of the opening of proceedings, resulting in a paradox situation. 2.) Admittedly, Art. 7 of the proposal provides for a general stay covering all

creditors that shall prevent the opening of insolvency procedures at the request of one or more creditors, however this covers only “principle” proceedings, but not “territorial proceedings”, which therefore may frustrate the negotiations between the creditors and the debtor. Art. 38 (3) EIR Recast is no help either, as its scope of applicability is unclear. 3.) If the debtor has assets outside the EU, it may be essential to ensure that the effects of the stay and the restructuring plan cover those assets as well. However, there is no EU agreement, and therefore the domestic law of the concerned third country applies.

Finally, a round table consisting of Michal Barlowski, Florian Bruder, Andreas Stein, Michael Veder and Alexander Bornemann discussed the question of how the insolvency landscape in the EU is changing. It was agreed upon that the Commission proposal tries to strike a balance between cost-efficiency and the protection of the involved parties’ interests. The proposal is flexible as well, and covers not only one proceeding but a variety of different proceedings. It was proposed that the Member States should provide for different types of proceedings for different situations, i.e. proceedings for small and medium enterprises and proceedings for bigger companies, similar to the UK regime of the Company Voluntary Arrangement and the Scheme of Arrangement.

The event ended with warm words of thanks and respect to the organizers and speakers for an outstanding conference.

 Gabriel Moss

 Reinhard Dammann

 Michal Barlowski

 Bob Wessels



Gabriel Moss and Bob Wessels

Fourth Issue of 2015's Rivista di diritto internazionale privato e processuale - Proceedings of the conference "For a New Private International Law" (Milan, 2014)

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

✘ The fourth issue of 2015 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released.

This issue of the Rivista features the texts - updated and integrated with a comprehensive bibliography - of the speeches delivered during the conference "For a New Private International Law" that was hosted at the University of Milan in 2014 to celebrate the Rivista's fiftieth anniversary.

The speeches have been published in four sections, in the order in which they were delivered.

The first section, on "**Fundamentals of Law No 218/1995 and General Questions of Private International Law**", features the following contributions:

Fausto Pocar, Professor Emeritus at the University of Milan, '**La Rivista e l'evoluzione del diritto internazionale privato in Italia e in Europa**' (The Rivista and the Evolution of Private International Law in Italy and Europe; in Italian).

Fifty years after the foundation of the Rivista, this article portrays the reasons that led to the publication of this journal and its core features, in particular its unfettered nature and the breadth of its thought with respect to the definition of private international law. In this regard the Rivista - by promptly drawing attention to the significant contribution provided by the law of the European Union in the area of jurisdiction and conflict of laws - succeeded in anticipating

the subsequent developments, which resulted in the impressive legislation of the European Union in the field of private international law since the entry into force of the Treaty of Amsterdam in 1999. These developments have significantly affected the Italian domestic legislation as laid down in Law No 218 of 1995. As a result of such impact, the Italian system of private international law shall undergo a further revision in order to harmonize it with the European legislative acts, as well as with recent international conventions adopted in the framework of the Hague Conference on Private International Law, to which the European Union – a Member of the Conference – is party.

Roberto Baratta, Professor at the Scuola Nazionale dell'Amministrazione, '**Note sull'evoluzione del diritto internazionale privato in chiave europea**' (Remarks on the Evolution of Private International Law in a European Perspective; in Italian).

National sovereignties have been eroded in the last decades. Domestic systems of conflict of laws are no exceptions. While contributing with some remarks on certain evolving processes that are affecting the private international law systems, this paper notes that within the EU – however fragmentary its legislation in the field of civil justice may be – the erosion of national competences follows as a matter of course. It then argues that the EU points to setting up a common space in which inter alia fundamental rights and mutual recognition play a major role. Thus, a supranational system of private international law is gradually being forged with the aim to ensure the continuity of legal relationships duly created in a Member State. As a result, domestic systems of private international law are deemed to become complementary in character. Their conceptualization as a kind of inter-local rules, the application of which cannot raise obstacles to the continuity principle, appears logically conceivable.

Marc Fallon, Professor at the Catholic University of Louvain, '**La révision de loi italienne de droit international privé au regard du droit comparé et européen des conflits de lois**' (The Recast of the Italian Private International Law with Regard to Comparative and European Conflict of Laws; in French).

The comparison of the present state of Italian choice-of law rules with the overall revision process at stake abroad and with the new European Union

policy in civil matters shows the need for a profound recast, in particular in family law matters. First, several European and international instruments have precedence over national rules, namely in the field of parental responsibility, divorce, maintenance obligations, succession, and shortly matrimonial property. Due to their universal application, these instruments leave no place to national choice-of-law rules in the subject matters falling into their scope. Second, a recast of the Italian rules on private international law would give the opportunity to adapt some current rules to new values and objectives. For example, the Kegel's ladder giving priority to nationality as a connecting factor should be inverted, giving priority to habitual residence. To achieve such result, a small group of scholars representative of the main streams in Italian private international law should prepare a draft and persuade political stakeholders that updating national law promotes legal certainty and a positive image of society. The European context of the approximation of choice-of-law rules should not withhold them from starting such project, so long as the Union delays the adoption of a globalized private international law code. On the other hand, one must be aware of the changing nature of law in modern society, and accept that enacting new rules requires a continuous reappraisal process.

Hans van Loon, Former Secretary General of the Hague Conference on Private International Law, 'The Transnational Context: Impact of the Global Hague and Regional European Instruments' (in English).

As a result of the growing impact of global and EU choice of law instruments, modern private international law statutes in Europe increasingly tend to have a "layered" structure, with norms derived from (1) global (Hague) and (2) regional (EU) instruments, completed by supplementary, or residual (3) domestic private international law rules. Law No 218/1995 already gives prominence to international conventions (Article 2), to which the new law should obviously add EU regulations. Consideration might be given to the inclusion by reference in the new law of three Hague Conventions not yet ratified by Italy (on the Recognition of the Validity of Marriages, Protection of Adults and Access to Justice). This would enhance certainty, predictability and respect for private rights in cross-border situations. The new law should maintain the method of incorporation by reference to regional and global instruments. Currently such references are few in number, but in the new law they are bound to expand considerably. This article discusses how the reference

method could best be applied to, on the one hand, instruments on applicable law, and, on the other, instruments on jurisdiction, recognition and enforcement of decisions as well as administrative cooperation. As globalization and regional integration unfold, Italy will be facing many more foreign decisions and situations created abroad than foreseen in the 1995 Law. Articles 64 and following probably go a long way to respond to this challenge in respect of foreign decisions. In respect of foreign legal situations – not established or confirmed by a judicial or administrative decision – Article 13 of the Law No 218/1995 on renvoi may have been thought of a way of facilitating the task of the Italian authorities and of bringing international harmony. But, partly as a result of the growing weight of international and regional instruments which generally reject renvoi, this technique tends to become an anomaly in modern private international law codes. Instead, other ways of introducing the flexibility needed might be considered, such as Article 19 of the Belgian Code on Private International Law, or Article 9 Book 10 of the Dutch Civil Code.

The second section, on “**Personal Status**”, features the following contributions:

*Roberta Clerici, Professor at the University of Milan, ‘**Quale futuro per le norme della legge di riforma relative allo statuto personale?**’ (Which Future for the Provisions on Personal Status of the Italian Law Reforming the Private International Law System?; in Italian).*

Since its first year of publication, the Rivista has devoted ample space to the personal status of the individual (including the right to a name), family matters, maintenance obligations and successions. In fact, both the relevant international treaties and the Italian provisions, including of course those laid down in Law No 218 of 31 May 1995 reforming the Italian private international law system – which has introduced significant modifications especially in the aforementioned areas of the law – were examined and commented. However, the regulations of the European Union and the international conventions that entered into force after the adoption of the Italian law reforming private international law designate habitual residence as the principal connecting factor. One may therefore wonder whether nationality, which is the connecting factor laid down in most of the provisions in Law No 218/1995, should not be replaced with that of habitual residence. An additional question stems from the “incorporation” in Law No 218/1995 of the 1961 Hague Convention concerning

the powers of authorities and the law applicable in respect of the protection of infants (Article 42 of Law No 218/1995) and of the 1973 Hague Convention on maintenance obligations (Article 45 of Law No 218/1995), which have been replaced by the 1996 Hague Convention and the 2007 Protocol, respectively. With respect to the 1961 Hague Convention, a legislative proposal is currently being discussed, however it raises some questions concerning interpretation. The same proposal puts forth a general provision on the replacement of the “nationalized” Conventions with the new Conventions ratified by the European Union. However, quite surprisingly, the proposal does not mention the regulations of the European Union that have replaced other conventions that are referred to in Law No 218/1995.

*Alegría Borrás, Professor Emeritus at the University of Barcelona, ‘**La necessità di applicare strumenti convenzionali e dell’Unione europea: l’ambito della persona, della famiglia e delle successioni. La situazione spagnola e quella italiana a confronto**’ (The Need to Apply International and European Union Instruments: Persons, Family, and Successions. A Comparison between the Italian and Spanish Systems; in Italian).*

This article examines the characteristics and evolution of the Spanish system of private international law in questions related to persons, family and successions taking into account the need to apply European Union instruments and international Conventions. The main points addressed in this article are related to the absence of a law of private international law and the fact that Spain has a non-unified legal system.

*Luigi Fumagalli, Professor at the University of Milan, ‘**Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni : spazi residui per la legge interna?**’ (The Italian System of Private International and Procedural Law and Regulation (EU) No 650/2013 on Successions: Is There Any Room Left for the Italian Domestic Provisions?; in Italian).*

Regulation No 650/2012 has a pervasive scope of application, as it governs, in an integrated manner, all traditional fields of private international law: jurisdiction, governing law, recognition and enforcement of foreign judgments. As a result, the entry into force of the Regulation leaves little, if any, room for

*the application of domestic legislation, and chiefly of the provisions of Law No 218/1995, in the same areas. With respect to jurisdiction, in fact, an examination of the rules in the Regulation shows that they apply every time a dispute in a succession matter is brought before a court in a Member State: no room therefore remains for internal rules, which, as opposed to the situation occurring with respect to Regulation No 1215/2012, cannot ground the exercise of jurisdiction in the circumstances in which the Regulation does not apply: not even the Italian rule on *lis pendens* seems to apply to coordinate the exercise of Italian jurisdiction with the jurisdiction of non-Member State. The same happens with respect to the conflict-of law rules set by the Regulation, since they have a universal scope of application. The only remaining area in which internal rules may apply is therefore that concerning the recognition and enforcement of decisions rendered in non-Member States. The opportunity for a revision of internal rules is therefore mentioned.*

*Costanza Honorati, Professor at the University of Milan-Bicocca, ‘**Norme di applicazione necessaria e responsabilità parentale del padre non sposato**’ (Overriding Mandatory Rules and Parental Responsibility of the Unwed Father; in Italian).*

*The recently enacted Italian Law on the Status Filiationis (Law No 219/2012 and subsequent Legislative Decree No 154/2013) inserts a new PIL rule stating that the principle of shared parental responsibility is mandatory in nature (Article 36-bis). While in the Italian legal system such principle is rooted in the principle of non discrimination among parents, the situation appears to be more controversial in other legal systems, especially in regards of the unmarried father. Several decisions of the ECtHR (from *Balbotin* to *Sporer*) have indeed declared the legitimacy of the different treatment for the unmarried father, as long as he has the possibility to claim such right before a judicial court. In the light of the same value underlying these different approach to parental responsibility – to be found in the aim to pursue the best interest of the child in each given case – the present paper questions the opportunity of the new Article 36-bis of the Italian PIL and reflects on the effects of the subsequent Italian ratification of the 1996 Hague Convention.*

*Carlo Rimini, Professor at the University of Milan, ‘**La rifrazione del conflitto***

familiare attraverso il prisma del diritto internazionale privato europeo'
(The Refraction of Family Conflict through the Prism of the European Private International Law; in Italian).

The prism built up by the European Regulations relating to family law has the effect to refract the family conflict in several different aspects that are supposed to be dealt before different courts and with different laws. As a matter of facts, the rules concerning jurisdiction and applicable law do not have the aim to concentrate (or to try to concentrate) the whole conflict arising from the family's crisis in the hands of a single judge who applies a single law. This choice has large costs both for the parties who needs to have lawyers in each jurisdiction involved, and for the efficiency of the legal system. Moreover, it often leads to an irrational and unfair solution of the family conflict. This is especially evident dealing about the patrimonial effects of the family's breaking.

Ilaria Viarengo, Professor at the University of Milan, '**Sulla disciplina degli obblighi alimentari nella famiglia e dei rapporti patrimoniali tra coniugi'**
(On the Regulation of Family Maintenance Obligations and Matrimonial Property; in Italian).

This article examines the provisions of the Italian Private International Law Act (Law 31 May 1995 No 218) on maintenance obligations and matrimonial property regimes. It analyses these provisions in the prospect of a possible reform of Law No 218/1995. With particular regard to maintenance obligations, currently regulated by a common harmonized system of conflicts of law rules, this article underlines how Article 43 of Law No 218/1995, which refers to the 1973 Hague Convention, appears to be no longer relevant. With respect to matrimonial property, a new EU regulation is forthcoming, which will replace the current Article 30 of Law No 218/1995. In this regard, this article examines the amendments deemed to be necessary in the Italian law in the view of the new Regulation, focusing in particular on the need to protect the interests of third parties.

Franco Mosconi, Professor Emeritus at the University of Pavia, '**Qualche considerazione in tema di matrimonio'** (Some Remarks on Marriage; in Italian).

Assuming that no revolutionary change is foreseen in the approach of the Italian legal system regarding same sex marriages – also in light of the case law of the Corte Costituzionale and the European Court of Human Rights – this paper considers several issues bound to arise from foreign same sex marriages. The paper also criticizes the excessive competitive character of some States' legislation in favour of same sex marriages.

The third section, on “**Companies, contractual and non-contractual obligations**”, features the following contributions:

Riccardo Luzzatto, Professor Emeritus at the University of Milan, ‘Introduzione alla sessione: Società, obbligazioni contrattuali ed extracontrattuali’ (Opening Remarks: Companies, Contractual and Non-Contractual Obligations; in Italian).

The fiftieth anniversary of the Rivista provides an important opportunity to share some thoughts to the current status of the law in this complex sector of the conflict of laws, with particular regard to the prevailing situation in Italy. Actually, this anniversary prompts to consider the present status of the law in comparison with that existing at the time when the Rivista was first published, i.e. fifty years ago. From this point of view it is certainly appropriate to qualify the changes occurred in this period as a true conflict-of laws revolution, borrowing an expression frequently used with reference to the United States. The Italian revolution originates from two different factors: the adoption in 1995 of a new Act on private international law and the massive intervention of European Community law into this sector of the legal systems of the Member States. The problems faced by the lawmaker, the judge and any other interpreter are as a consequence rather complex. The national, domestic character of the rules of private international law has not been cancelled by the new powers conferred to the EU institutions by the Treaty of Amsterdam, thus obliging to carefully review and determine the relationship and reciprocal interferences of national and supranational sources in any given field where European common rules have been enacted. This is a necessary, but complex exercise that cannot be avoided, and can bring to very different results depending on the specific features of the legal institutions under consideration. Two interesting and significant examples are offered by the subject matters considered in this Session, i.e. the law of companies and other legal entities on

the one part, and the law of obligations, both contractual and non-contractual, on the other.

*Ruggiero Cafari Panico, Professor at the University of Milan, ‘**Società, obbligazioni contrattuali ed extracontrattuali. Osmosi fra i sistemi, questioni interpretative e prospettive di riforma della legge n. 218/1995**’ (Companies, Contractual and Non-Contractual Obligations. Osmosis between Systems, Questions of Interpretation, and Prospect of a Recast of Law No 218/1995; in Italian).*

This paper focuses on the need for reform of the Italian private international law rules in order to adapt them to the principles of the European internal market. The continuous development of judicial cooperation in civil matters having cross-border implications has progressively reduced the scope of application of national conflict of law rules and deeply influenced the domestic regulation of matters not yet harmonized. This process of osmosis is not free from difficulties. The application of the criteria indicated in European private international law regulations to cases not pertinent to the internal market may be questionable. Similar concepts, when used in different European instruments, may lead to different results in connection with the choice of applicable law and of appropriate jurisdiction. Achieving a parallel ius and forum, although desirable, especially in employment relationships, may thus be difficult. All this has to be taken into account in any reform of the Italian private international law rules, which should be consistent with the proper functioning of the internal market.

*Cristina Campiglio, Professor at the University of Pavia, ‘**La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della privacy)**’ (The Law Applicable to Non-Contractual Obligations (with Particular Regard to Violations of Privacy); in Italian).*

Among the areas where EU private international law has curtailed the scope of application of the Italian Statute on Private International Law of 31 May 1995 No 218 is the area of non-contractual obligations (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, Rome II). However, while Article 63 of Law No 218/1995 on product liability has been repealed by Article 5 of the Rome II Regulation, Articles 58 and 59 of Law No 218/1995 – on non-

contractual obligations arising out of unilateral promise and under bills of exchange, cheques and promissory notes, respectively – are to be considered still in force, and Articles 60 and 61 of Law No 218/1995 – on representation and ex lege obligation – preserve a limited scope of application. In this context, the fate of Article 62 of Law No 218/1995 on torts, which is also applicable to obligations arising out of violations of rights relating to personality, is rather dubious; while, indeed the Regulation expressly excludes these obligations from its scope, de iure condendo it may be envisaged that Article 62 of Law No 218/1995 be adapted to the EU principles and to the case law of the Court of Justice relating to (jurisdiction in case of) violations of rights relating to personality which have been carried out through the mass media, including online defamation.

Domenico Damascelli, Associate Professor at the University of Salento, **‘Il trasferimento della sede sociale da e per l'estero con mutamento della legge applicabile’** (The Transfer of a Company's Seat Abroad and from Abroad with the Change of the Applicable Law; in Italian).

After having distinguished the case where the applicable law changes as a result of the transfer abroad of the company seat from that in which such change does not take place (either as a result of the shareholders' will or as a consequence of the conflict of law rules of the State of origin and/or the State of destination), this article analyzes this issue from the standpoint of EU Private International Law – considering, in particular, the case law of the Court of Justice – and it puts forth a series of suggestions to reform the Italian conflict of law and substantive law rules to make the cross-border mobility of Italian companies more efficient.

Paola Ivaldi, Professor at the University of Genoa, **‘Illeciti marittimi e diritto internazionale privato: per una norma ad hoc nella legge n. 218/1995?’** (Maritime Torts and Private International Law: Does Law No 218/95 Need Ad Hoc Provisions?; in Italian).

Due to their intrinsically international character and very frequent cross-border implications, maritime torts typically involve private international law matters. Therefore, with regard to cases and issues falling outside the scope of application of the relevant uniform law Conventions, the problem arises of

determining the applicable law according to the conflict-of law rules – which are mostly based on territorial connecting/actors – laid down, at EU level, in the Rome II Regulation (Regulation (EC) No 864/2007). The implementation of such rules, however, is sometimes critical, in particular in presence of “external torts” (i.e., torts which produce damage either on several ships or outside a ship) occurring on the High Seas; with respect to these cases, some national legislations (e.g., the Dutch civil code) have introduced ad hoc rules providing/or the application of the lex fori. In the light of the above, the present contribution assesses the opportunity to adopt the same solution on the occasion of the envisaged revision of the 1995 Italian legislation on private international law (Law No 218/1995), concluding, however, that such integration ab externo of the Regulation is not ultimately required.

Peter Kindler, Professor at the University of Munich, **‘L’amministrazione centrale come criterio di collegamento del diritto internazionale privato delle società’** (The Place of Administration as Connecting Factor in Conflict of Laws in Company Matters; in Italian).

This article reviews and analyses the case law of the Court of Justice of the European Union since the Cadbury Schweppes case (2006) and the principles laid down in secondary European legislation with specific reference to Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings. The author proposes to use the Centre of main interests (COMI) of the company as a connecting factor not only in the field of European insolvency law (Articles 3 and 7 of Regulation No 2015/848), but also in a future Regulation on the law applicable to companies and other bodies. Since the COMI is identical to the company’s central administration (recital 30 of Regulation No 2015/848), this term should be used by such a Regulation. The Author rejects the incorporation theory (Griindungstheorie) and favours the real seat theory (Sitztheorie), instead. In his view, thus, the substantive corporate law of the country applies where most of the company’s creditors and the bulk of the company’s assets are located. At the same time, regulatory arbitrage opportunities are restricted.

Finally, the fourth section, on **“International Civil Procedure Law”**, features the following contributions:

Sergio M. Carbone, Professor Emeritus at the University of Genoa, **‘Introduzione**

alla sessione: il diritto processuale civile internazionale' (Opening Remarks: International Civil Procedural Law; in Italian).

This article has been conceived and prepared with a view to providing an overview of the specific features which have characterized the first fifty years of our Rivista: such features were namely devoted to fostering the development of the Italian system on the resolution of cross-border disputes and the recognition of foreign judgments so as to avoid possible differentiations in their treatment in respect of the corresponding national situation.

Mario Dusi, Attorney at Law in Milan and Munich, '**La verifica della giurisdizione all'atto dell'emissione di decreto ingiuntivo: regolamenti comunitari, norme di diritto internazionale privato italiano e necessità di riforma del codice di procedura civile italiano?**' (The Assessment of Jurisdiction while Issuing a Payment Order: EC Regulations, Italian Private International Law Provisions, and the Need to Amend the Italian Civil Procedure Code?; in Italian).

With the entry into force of Legislative Decree No 231 of 9 October 2002, Italian companies can finally apply for an injunction order against their contractual partners in Europe, who are defaulting their payment obligations. Such provision however did not specify that the court before which the application is filed must assess the existence (or nonexistence) of the prerequisites related to its international jurisdiction, pursuant to various applicable regulations, including the Italian Private International Law No 218/1995, which is the object of this important conference dedicated to the fiftieth anniversary of the Rivista di diritto internazionale privato e processuale. Before starting an ordinary court proceeding in Italy against a foreign party, in particular a European party, all regulations establishing the Italian jurisdiction must be analyzed, starting from the application of EU Regulation No 44/2001, now replaced by EU Regulation No 1215/2012, continuing with Article 3 of the above mentioned Italian law. These two Regulations notoriously state in Article 26 (of EU Regulation No 44/2001) that "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation". Article 28 of EU Regulation No 1215/2012, currently applicable to these cases, states

that the verification ex officio of the jurisdiction applies not only when the defendant decides not to appear in Court, but also to injunction proceedings, although this is not expressly mentioned in the provision. Therefore, in the event of non-appearance in court, or of injunction proceedings, as well as in some ordinary cases, the court must verify on its own initiative whether or not it has international jurisdiction and possibly declare ex officio its lack of jurisdiction; otherwise the injunction order will be declared invalid (see the Italian Supreme Court judgment No 10011/2001). According to the Italian Code of Civil Procedure, the application for an injunction order should expressly indicate the reason why such Court is considered to be competent (Article 637 Italian Code of Civil Procedure). If the Italian legislator wanted to prescribe more precisely all necessary requirements for the file of an application for an injunction order, it could refer to EU Regulation No 1896/2006, namely Articles 7 and 8, on the obligation of the court to “examine” all conditions, before issuing the injunction order. Basically, in order to promote the implementation of a United European Jurisdiction, we need to either establish a greater focus on judges while issuing injunction orders, or promulgate a clear internal rule, which imposes the above verifications on Italian judges.

Alberto Malatesta, Professor at the University Cattaneo-LIUC, **‘L’Article 7 della legge n. 218/1995 dopo il regolamento Bruxelles I-bis: quale ruolo in futuro?’** (Article 7 of Law No 218/1995 after Regulation Brussels I-a: Which Future Role?; in Italian).

This Article deals with the residual scope of Article 7 of Law No 218/1995 on lis pendens after the adoption, in recent past years, of numerous EU acts. In fact, the national provisions of Member States have progressively reduced their importance especially after the entry into force of the Brussels I-a Regulation, whose Articles 33 and 34 provide for rules applicable to proceedings pending before judges of third States. The Author first examines such new regime and its underlying reasons, secondly its impact on Article 7 of Law No 218/1995, and finally discusses the option of a future revision of the same rule, in line with the content of the European rule.

Francesco Salerno, Professor at the University of Ferrara, **‘L’incidenza del regolamento (UE) n. 1215/2012 sulle norme comuni in tema di**

giurisdizione e di efficacia delle sentenze straniere' (The Impact of Regulation (EU) No 1215/2012 on the Italian Provisions on Jurisdiction and Recognition and Enforcement of Foreign Judgments; in Italian).

This paper examines the impact of Regulation (EU) No 1215/2012 (Brussels I Recast) on the Italian rules governing international litigation, as embodied in the Statute of 1995 that reformed the Italian system of private international law. As regards jurisdiction, almost no consequences derive from the Regulation. Article 3(2) of the 1995 Statute does make a reference to uniform European provisions in this area (so as to extend their applicability beyond their intended scope) but it still refers, for this purpose, to the 1968 Brussels Convention. The Author contends that if a legislative reform of the Statute provided for a forum of necessity, this would ultimately give a suitable basis to the trend of Italian courts in favour of a broad interpretation of the heads of jurisdiction resulting from the said reference, no matter whether such broad interpretation departs from the usual interpretation of the corresponding heads of jurisdiction laid down in the Convention. By contrast, the Regulation has a mixed bearing on the domestic regime for the recognition and enforcement of judgments. On the one hand, differently from national rules, the European rules now allow foreign judgments to be enforced internally merely by operation of law. On the other hand, the Regulation, if compared with domestic rules, provides more broadly for the opportunity of scrutinising whether individual judgments are entitled to recognition or not.

Lidia Sandrini, Research Fellow at the University of Milan, '**L'Article 10 della legge n. 218/1995 nel contesto del sistema italiano di diritto internazionale privato e della cooperazione giudiziaria civile dell'Unione'** (Article 10 of Law No 218/1995 in the Framework of the Italian System of Private International Law and of the Judicial Cooperation in Civil Matters in the European Union; in Italian).

This article addresses Article 10 of Italian Law No 218 of 1995 on private international law. It is submitted that the provision governing jurisdiction with regard to the situation in which Italian judges lack jurisdiction on the merits represents a crucial mechanism in the application of the relevant rules on provisional and protective measures provided for by the EU regulations on jurisdiction and enforcement of judgments. Nevertheless, the practice reveals

some difficulties as to the interpretation of the specific connecting factor provided for by the Italian rule. The analysis of the jurisprudence makes it clear that this unsatisfactory situation is due to the drafting, which does not reflect the variety of the instruments in connection with which the rule has to be applied and to the number of modifications of the domestic procedural rules that have been enacted after its entrance into force. In light of that, this article aims to contribute to the debate on the need of a reform of the Italian system of private international law by suggesting the introduction of some more detailed solutions with regard both to the jurisdictional criteria and to the characterization of provisional measures. These suggestions are primarily intended to ensure the consistency of the solutions in the European judicial area, in light of the jurisprudence of the Court of Justice, but also to preserve the coherence of the Italian system of private international law.

Francesca C. Villata, Associate Professor at the University of Milan, **‘Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell’Articolo 4 della legge n. 218/1995’** (On the Law Governing the Substantial Validity of Jurisdiction Clauses: Remarks with a View to a Recast of Article 4 of Law No 218/1995; in Italian).

*This article tackles the question whether the wording of Article 4 of Law No 218 of 1995 and, even more, its critical exegesis are (to date) adequate (a) with respect to the transformed legislative context of the European Union (which refers to such domestic legislation when the court seised is Italian), and (b) even more, to meet the needs of practitioners. Furthermore, this article aims to assess whether the solution adopted under the Brussels I-bis Regulation and the 2005 Hague Convention on Choice of Court Agreements – which both identify the law that governs the substantive validity of the choice of court agreements in the law of the State allegedly designated (including its conflict-of-law provisions) – may (or should) prompt an overall recast of the Italian law or, rather, require a more detailed provision which shall coordinate with the provisions on *lis pendens*.*

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