EUFam’s Project: A Report on the existing Internationally-Shared Good Practices

The EUFam’s Project’s Consortium is glad to announce that a new Report is available for download and consultation on the Project website.

The **Report on Internationally-Shared Good Practices,** drafted by the EUFam’s Team of the Max Planck Institute Luxembourg for Procedural Law, is based on the outcomes of the International Exchange Seminar that was held at the Institute on 11-12 May 2017.

Over 80 experts – judges, practitioners, academics, EU policymakers, and national civil servants – took part to the lively discussion by sharing their knowledge, experiences, and views on the application of the existing EU PIL Regulations in family matters in their daily practice.

This new Report further enriches the set of tools offered by the Project’s Consortium to the wider public, such as the National Case-Law Database, the Additional ECtHR Case-Law Index, the First Assessment Report on the Collected Case-Law, the Report on the Outcomes of an Online Questionnaire circulated in the past months, and several reports on national good practices.

Website: www.eufams.unimi.it

Facebook page: www.facebook.com/eufams

The new German choice-of-law rule for agency: Improved translation

Readers of our blog will recall that we posted a translation of the new German choice-of-law rule for agency last week. That translation, however, was misleading because it referred to the law "applicable to a contract between principal and agent", thus implying that the provision applies to the agency contract itself. The provision, however, is only meant to fill the gap left by Article 1(2) lit. g) of the Rome I Regulation. It is, therefore, limited to the agent's authority (granted by contract). We thank an attentive reader for making this point and offer the following revised translation of the newly adopted Article 8 of the German Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – BGB):

> *(1) An agent's authority is governed by the law chosen by the principal before the agency is exercised, if the choice of law is known to both agent and third party. Principal, agent and third party are free to choose the applicable law at any time. The choice of law according to Sentence 2 of this Paragraph takes precedence over Sentence 1.*
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> *(2) In the absence of a choice under Paragraph 1 and if the agent acts in exercise of his commercial activity, the agent's authority is governed by the substantive provisions of the country in which the agent has his habitual residence at the time he acted, unless this country is not identifiable by the third party.*
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> *(3) In the absence of a choice under Paragraph 1 and if the agent acts as employee of the principal, the agent's authority is governed by the substantive provisions of the country in which the principal has his habitual residence, unless this country is not identifiable by the third party.*
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> *(4) If the agent does not act in a way described by Paragraph 2 or 3 and in the absence of a choice under Paragraph 1, a permanent authority between principal and agent is governed by the substantive provisions of the country, in which the agent usually exercises his powers, unless this country is not*

identifiable by the third party.

(5) If the applicable law does not result from Paragraph 1 through 4, the agent's authority is governed by the substantive provisions of the country in which the agent acts in exercise of his powers. If the third party and the agent must have been aware that the agency should only have been exercised in a particular country, the substantive provisions of this country are applicable. If the country in which the agent acts in exercise of his powers is not identifiable by the third party, the substantive provisions of the country in which the principal has his habitual residence at the time the agent exercises his powers, are applicable.

(6) The law applicable for agencies on the disposition of property or the rights on property is to be determined according to Article 43 Paragraph 1 and Article 46.

(7) This Article does not apply to agencies for exchange or auction.

(8) The habitual residence in accordance with this Article is to be determined in line with Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008, provided that the exercise of the agency replaces contract formation. Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008 does not apply, if the country according to that Article is not identifiable by the third party.

Mandatory Mediation Procedures v Effective Access to Courts: CJEU Sets Down Criteria

Authored by Alexandre Biard

To what extent can mandatory mediation procedures be compatible with

consumers' right to access to the judicial system? The preliminary ruling of the First Chamber of the CJEU delivered on 14 June 2017 (case C-75/16, *Menini & Rampanelli v Banco Popolare – Società Cooperativa,* and the associated Opinion of the Advocate General) brings interesting clarifications on this issue at a time where several Member States have – or are about to – introduce mandatory alternative dispute resolution procedures into their national legislations.

In 2015, two Italian individuals brought an appeal before the District Court of Verona (*Tribunale Ordinario di Verona*, hereafter "the referring court") against an order for payment obtained against them by the credit institution Banco Popolare. The order required them to pay the amount of 991,848 EUR corresponding to the balance that remained outstanding under a contract signed between the parties in 2009. However, as the referring court noted, under Italian law (Legislative Decree 28/2010), an application to have an order set aside is admissible only if the parties have first initiated a mediation procedure. The referring court therefore requested clarifications on the interpretation of Directive 2013/11 ("ADR Directive") and Directive 2008/52 ("Mediation Directive"), and on the compatibility of Italian legislation with EU law.

The Court used this opportunity to set down the criteria that mandatory mediation procedures should fulfil in order to be compatible with consumers' right to judicial access in the EU (I). Furthermore, although the case does not bring a definitive answer on the articulation between the ADR Directive and the Mediation Directive, it nonetheless provides some clarifications on the hierarchy and relationship between those two directives (II).

(I) Admissibility Criteria for Mandatory Mediation Procedures in the EU

The referring court sought to clarify whether the mandatory mediation procedure imposed by Italian law is compatible with the provisions of the ADR Directive, whose Article 1 ambiguously provides that consumers can, on a "voluntary basis", submit complaints against traders by using ADR procedures, but also indicates that this is "without prejudice to national legislation making participation in such procedures mandatory (…)".

As the Court points out, "the voluntary" nature of ADR schemes does not lie in consumers' freedom of access, but in the freedom of process. In other words, what is important is not that the parties can choose whether or not to use ADR,

but the fact that they should be "themselves in charge of the process, and may organise it as they wish and terminate it at any time". Put simply, "what is important is not whether the mediation system is mandatory or optional, but the fact that the parties' right of access to the judicial system is maintained". Therefore, the mere fact that a national legislation imposes a mandatory mediation procedure should not, as such, be regarded as being contrary to the provisions of the ADR Directive.

That said, the Court also acknowledges that mandatory mediation procedures introduce an additional layer of complexity for consumers. They may therefore ultimately prevent them from exercising their right to access to judicial bodies. While referring to and transposing the conditions set down by the Fourth Chamber of the CJEU in *Alassini and Others* (Case 317/08 to C-320/08 of 18 March 2010), which concerned a settlement procedure, the Court identifies six conditions for a mandatory mediation procedure to be compatible with the principle of effective judicial protection:

1. The mediation procedure should not result in a binding decision for the parties;
2. It should not cause substantial delays;
3. It should suspend the period for the time-barring of claims;
4. It should entail no (or very limited) costs;
5. Electronic means should not be the only means by which the procedure can be accessed; and
6. Interim measures should remain possible in exceptional circumstances.

It is up to the referring court to assess whether the mandatory procedure under consideration indeed complies with the criteria set above.

In parallel, national legislations should not include obligations deemed too burdensome for consumers. In particular:

- National legislation may not include an obligation for consumers to be assisted by a lawyer when they take part in a mediation procedure. This is in accordance with Article 8(b) and 9 of the ADR Directive; and
- Legislation should not authorize consumers to withdraw from a mediation procedure only under the condition that they can demonstrate valid reasons to do so. In accordance with Article 9(2) of the ADR Directive,

such a withdrawal should remain possible at any time.

(II) Preliminary Clarifications on the Relationship Between the ADR Directive and the Mediation Directive

The referring court also sought to clarify the respective scopes of the Mediation Directive and the ADR Directive, as well as their articulation. In particular, the Italian court requested clarifications on whether the provisions of those two directives overlap, or if, on the contrary, the Mediation Directive only governs cases to which the ADR Directive does not apply.

The Court ultimately took the view that reference to the Mediation Directive was here not relevant as the Directive only applies to cross-border situations, which is not the case in the present situation (the litigants being all located in Italy). Although the Court did not address this issue, the conclusions of the Advocate General nonetheless provided some interesting food for thought. The latter indeed considered that, if a conflict between those two directives should arise, the Mediation Directive should, in his view, ultimately prevail. This is because Article 3(2) and Recital 19 of the ADR Directive clearly provide that the Directive "shall be without prejudice to Directive 2008/52/EC".

This decision is an important step towards combining consumers' effective access to judicial bodies on the one hand, and the use of mandatory alternative dispute resolution schemes on the other hand. The key issue is now to see how those criteria will be applied by national courts, and if they are likely to constitute sufficient safeguards to preserve consumers' rights in the EU.

Now on Video: Paris, 12 May 2017 –Symposium on the Recast of the

Brussels IIbis Regulation

On Friday, 12 May 2017, Professor *Sabine Corneloup* and *Alexandre Boiché* organized a symposium on the recast of the Brussels II*bis* Regulation in Paris (see our previous post here). The symposium brought together experts from the academic and institutional worlds as well as from the bar, who shared their experience in order to work together to reach solutions to the problems and shortcomings observed. The conference has been recorded on video; the clips are now available here.

New Website on European Civil Procedure

Prof. Albert Henke (scientific coordinator) has set up a new website on European Civil Procedure. Its goal is to keep academics, professionals, students and all those involved in cross-border litigation in Europe updated about current trends and recent developments in legislation, case law and literature in this area, as well as to create an open educational resource and possibly promote scientific partnerships among Universities, Centres of Research and Institutions active in the field.

The website has been set up within the Jean Monnet Module on European Civil Procedure in a Comparative and Transnational Perspective, a teaching and research project funded by the EU and hosted by Università degli Studi in Milan.

The website is still under construction.

Solar Award Against Spain Confirmed in NY, Spain Moves for Annulment

The ICSID award in case *Eiser Infrastructure Limited and Energía Solar Luxembourg SARL v. Kingdom of Spain*, case number ARB/13/36, concluding that Spain had violated the Energy Charter Treaty, has been recognized on an ex parte petition by a New York court on June 27. Further information can be found here, edited by K. Duncan.

The award was issued on May 4 by an International Centre for Settlement of Investment Disputes tribunal after it unanimously determined that Spain had violated its international obligations to the companies by upending a series of subsidies aimed at encouraging investment in the renewable energy sector, several years after the companies sunk more than €126 million into three solar plants. The award also includes additional interest.

The case is *EISER Infrastructure Limited et al v. Kingdom of Spain*, case number 1:17-cv-03808, in the U.S. District Court for the Southern District of New York. Spain is seeking annulment of the decision for violation of the FSIA (1976).

Job vacancy: Ph.D. Candidate and Fellow in Private International Law at the University of Cologne

The Institute for Private International and Comparative Law, University of Cologne, Germany invites applications for a Ph.D. Candidate and Fellow with excellent English language skills, starting at the earliest possible date with 19,92 weekly working hours (50% position). The contract will first be limited to one year

with an option to be extended. Payment is based on the German TV-L E13 scale if terms and conditions under collective bargaining law are fulfilled. You may find further details here: job-vacancy-institute-for-private-international-and-comparative-law.

The law applicable to agency: German legislature adopts choice of law rule

On June 11 the German legislature has adopted a new choice of law rule for the law of agency. It is largely based on a proposal of the 2nd Commission of the German Council for Private International Law headed by our co-editor Jan von Hein.

The new Article 8 of the German Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB) reads as follows (private translation):

> *(1) A contract between principal and agent shall be governed by the law chosen by the principal before the agency is exercised, if the choice of law is known to both agent and third party. Principal, agent and third party are free to choose the applicable law at any time. The choice of law according to Sentence 2 of this paragraph takes precedence over Sentence 1.*
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> *(2) In the absence of a choice under Paragraph 1 and if the agent acts in exercise of his commercial activity, a contract between principal and agent, shall be governed by the law of the country in which the agent has his habitual residence at the time he acted, unless this country is not identifiable by the third party.*
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> *(3) In the absence of a choice under Paragraph 1 and if the agent acts as employee of the principal, a contract between principal and agent shall be*

governed by the law of the country in which the principal has his habitual residence, unless this country is not identifiable by the third party.

(4) If the agent does not act in a way described by Paragraph 2 or 3 and in the absence of a choice under Paragraph 1, a permanent contract between principal and agent shall be governed by the law of the country, in which the agent usually exercises his powers, unless this country is not identifiable by the third party.

(5) If the applicable law does not result from Paragraph 1 through 4, a contract between principal and agent shall be governed by the law of the country in which the agent acts in exercise of his powers. If the third party and the agent must have been aware that the agency should only have been exercised in a particular country, the law of this country is applicable. If the country in which the agent acts in exercise of his powers is not identifiable by the third party, the law of the country in which the principal has his habitual residence at the time the agent exercises his powers, is applicable.

(6) The law applicable for agencies on the disposition of property or the rights on property is to be determined according to Article 43 Paragraph 1 and Article 46.

(7) This Article does not apply to agencies for exchange or auction.

(8) The habitual residence in accordance with this Article is to be determined in line with Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008, provided that the exercise of the agency replaces contract formation. Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008 does not apply, if the country according to that Article is not identifiable by the third party.

The original German version is available here.

CJEU rules that child's physical presence is a necessary condition for habitual residence

On 8 June 2017 the CJEU has rendered another opinion regarding the interpretation of the concept of 'habitual residence' of the child under the Brussels II bis Regulation.

The facts of the case, C-111/17 PPU, indicate that OL, an Italian national, and PQ, a Greek national, married in Italy in 2013 and that they resided together in Italy. When PQ was eight months pregnant, the couple travelled together to Greece so that PQ could give birth there. On 3 February 2016 PQ gave birth, in Greece, to a daughter, who has remained since her birth in that Member State with her mother. After the birth of the child, OL returned to Italy. According to OL, he had agreed that PQ should stay in Greece with their child until May 2016, when he expected his wife and child to return to Italy. However, in June 2016 PQ decided to remain in Greece, with the child. OL brought an application before the *Monomeles Protodikeio Athinon* (Court of First Instance of Athens, Greece), for the return of that child to Italy, the Member State where the child's parents resided together before the birth of the child.

Having emphasised the importance of the primary caretaker's situation for determining the child's habitual residence, the CJEU stresses that it is nevertheless important to bear in mind that linking the child's habitual residence to that of his primary caretakers should not result 'in making a general and abstract rule according to which the habitual residence of an infant is necessarily that of his parents'. To adopt the position suggested by the father in OL v PQ, that the intention originally expressed by the parents as to the return of the mother accompanied by the child from Greece to Italy, which was the MS of their habitual residence before the birth of the child, constitutes an preponderant element in determining the child's habitual residence would go beyond the limits of that concept. Allowing the initial intention of the parents that the child resides in Italy

prevails over the fact that she or he has been continuously resident in Greece since her or his birth would render the concept of 'habitual residence' essentially legal rather than fact-based.

The CJEU rules that Article 11(1) of the Brussels II bis Regulation, must be interpreted as meaning that, in a situation in which a child was born and has been continuously residing with his or her mother for several months in accordance with the joint agreement of the parents in a Greece, while in Italy they had their habitual residence before birth, the initial intention of the parents as to the return of the mother accompanied by the child in Italy cannot allow the child to be regarded as having his or her habitual residence in Italy. The CJEU concludes that in such a situation the refusal of the mother to return to Italy accompanied by the child cannot be regarded as an 'unlawful displacement or non-return' within the meaning of Article 11(1).

This case seems to resolve the dilemma, dividing national courts, as to whether the physical presence of the child in the territory of a state is a necessary precondition for establishing the child's habitual residence.

Issue 2017.2 Nederlands Internationaal Privaatrecht

The second issue of 2017 of the Dutch Journal on Private international Law, Nederlands Internationaal Privaatrecht, includes papers on the Commission's proposal to amend the Posting of Workers Directive, the establishment of the Netherlands Commercial Court and the enforcement of foreign judgments in Nigeria.

Aukje van Hoek, 'Editorial: Online shopping en detachering van werknemers – twee hoofdpijndossier op de grens van IPR en interne markt', p. 175-177.

Fieke van Overbeeke, 'The Commission's proposal to amend the Posting of

Workers Directive and private international law implications', p. 178-194.

This article discusses the Commission's proposal to amend the Posting of Workers Directive (PWD), launched on 8 March 2016. One amendment in particular will be highlighted: the insertion of a type of conflict-of-laws rule, determining from when the law of the host Member State would be fully applicable to the posted worker, namely after the posting lasted for two years. This would lead to a pre-determined qualification of Article 8 section 2 Rome I Regulation in posting of workers cases that are covered by the PWD. This has clear private international law implications, which will be discussed thoroughly. Yet, before entering into these aspects the interaction between the PWD and Rome I will be discussed. Uncertainty still exists on this matter, which makes it important to map this first. This results in an article divided into two parts: 1. Elaborating on the general conflict-of-law rules of the PWD and Rome I and their interaction; 2. Analysing the Commission's proposal from a private international law point of view by giving three private international law comments, some final remarks and assessing whether this proposal has implications for the formerly discussed interaction between the two conflict-of-law instruments.

Serge Vlaar, 'IPR-aspecten van het NCC-wetsvoorstel', p. 195-204. (in Dutch, the English abstract reads:)

For the last twenty years, London has already had an international commercial court and this court has been very successful in attracting cases from the European continent. In order to reduce this outflow various European countries have created international commercial courts of their own and the Netherlands is on the verge of doing so. This new court will be a court for large international cases, conducting proceedings in English. The draft law necessary for the functioning of this court has been published for consultation and includes a few interesting topics regarding private international law. This contribution intends to describe these topics and the new court in general.

Abubakri Yekini, 'Foreign judgments in Nigerian courts in the last decade: a dawn of liberalization', p. 205-403

Nigeria has largely been governed by military dictators since it gained

independence from Great Britain in 1960. Sustained democratic transition is a recent phenomenon and that, possibly, account for the recent increase in foreign direct investment, international trade and trade in services between Nigeria and its trading partners such as the European Union, China and the US. The surge in international trade has caused an increase in transnational litigation and requests for the enforcement of foreign judgments in Nigeria. An assessment of reported cases reveals that the majority of these cases were decided roughly between 2005 and 2015. There is a need to evaluate the Nigerian regime for enforcement of foreign judgments, with a particular focus on judicial opinions and legislative policy in this area. The article seeks to achieve this by analyzing the two relevant statutes on judgment enforcement and judicial precedents over the last decade. The article finds that while reciprocity appears to be the policy behind the relevant statutes, the courts have adopted a liberal and pragmatic approach towards recognition and enforcement of foreign judgments. The article therefore concludes that while the liberal approach of the Nigerian Supreme Court is a welcome development, it needs to be supported by clear, consistent, and robust judicial reasoning. This will set a clear agenda for lawmakers tasked with aligning the relevant statutes with already established judicial approach and, above all, will make it easier to offer legal advice to foreign investors.