The international protection of vulnerable adults: recent developments from Brussels and The Hague

On 10 November 2016, the French MEP Joëlle Bergeron submitted to the Committee on Legal Affairs of the European Parliament a draft report regarding the protection of vulnerable adults.

The draft report comes with a set of recommendations to the European Commission. Under the draft, the European Parliament, among other things, 'deplores the fact that the Commission has failed to act on Parliament's call that it should submit … a report setting out details of the problems encountered and the best practices noted in connection with the application of the Hague Convention [of 13 January 2000 on the international protection of adults], and 'calls on the Commission to submit … before 31 March 2018, pursuant to Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

A document annexed to the report lists the 'principles and aims' of the proposal that the Parliament expects to receive from the Commission.

In particular, following the suggestions illustrated in a study by the European Parliamentary Service, the regulation should, *inter alia*, 'grant any person who is given responsibility for protecting the person or the property of a vulnerable adult the right to obtain within a reasonable period a certificate specifying his or her status and the powers which have been conferred on him or her', and 'foster the enforcement in the other Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of these measures being required'. The envisaged regulation should also 'introduce single mandate in anticipation of incapacity forms in order to facilitate the use of such mandates by the persons concerned, and the circulation,

recognition and enforcement of mandates'.

In the meanwhile, on 15 December 2016, Latvia signed the Hague Convention of 2000 on the international protection of adults. According to the press release circulated by the Permanent Bureau of the Hague Conference on Private International Law, the Convention is anticipated to be ratified by Latvia in 2017.

Conflict of Laws and Silicon Valley

See here for a fascinating post by Professor Marketa Trimble (UNLV Law). From the post:

> Now that conflict of laws has caught up with Silicon Valley and is forcing internet companies to rethink the problems that occupy this fascinating field of law, conflict-of-laws experts should catch up on the internet: they should better educate themselves about internet technology; they should prepare law students for a practice in which the internet is a common, and not a special or unusual, feature; and they should prevent conflict of laws from becoming a fragment of larger trade negotiations in which multifaceted, intricate, and crucial conflict-of-laws policy considerations can easily be overlooked or ignored.

Droit des Contrats Internationaux, 1st edition

This book authored by M.E. Ancel, P. Deumier and M. Laazouzi, and published by Sirey, is the first manual written in French solely devoted to international contracts examined through the lens of judicial litigation and arbitration. It provides a rich and rigorous presentation in light of the legal instruments recently adopted or under discussion in France, as well as at the European and international levels.

After an introduction to the general principles of the matter, the reader will be able to take cognizance of the regimes of the most frequent contracts in the international order: business contracts (sale of goods and intermediary contracts), contracts relating to specific sectors (insurance, transport), contracts involving a weaker party (labor and consumer contracts) or a public person.

Advanced students, researchers as well as practitioners will find in this volume the tools enabling them to grasp the abundant world of international contracts, to identify the different issues and to master the many sources of the discipline.

The ensemble is backed up by a highly developed set of case law and doctrinal references, updated on August 15, 2016.

More information about the book in traditional format is available here, and here for the e-book format.

Marie-Elodie Ancel is a professor at the University Paris Est Créteil Val de Marne (UPEC), where she heads two programs in International Business Litigation and Arbitration.

Pascale Deumier is a professor at the Jean Moulin University (Lyon 3), where she is a member of the Private Law Team and coordinates the research focus on the Sources of Law.

Malik Laazouzi is a professor at the Jean Moulin University (Lyon 3), where he heads the Master 2 of Private International and Comparative Law.

Research Assistant Position at the BIICL, London

The BIICL is seeking to appoint three Research Assistants on a 0.8 FTE basis for paid internships of four months each, with the possibility of extension for a further month.

Research Assistants are expected to undertake various core tasks, including:

* Assisting in the coordination and organisation of research activities;

* Contributing to the production of high quality research in their areas including, where appropriate, assisting with desk-based research, literature reviews, data analysis, drafting of proposals and submissions, report writing and drafting of articles, social media content etc.

* Assisting in the management and co-ordination of events;

* Attending meetings with external groups/partners, including government, legal profession and NGOs; and

* Working as part of a team with other researchers.

Research Assistants will each be assigned to a Supervisor in their legal areas. For this round of applications, we are particularly looking to appoint in the areas of:

* Public International Law;

* Private International Law and/or Competition Law; and

* Rule of Law

New Book for Spanish-English Speaking Lawyers

Lawyers who speak both Spanish and English may be interested in a new book written by Professors S.I. Strong of the University of Missouri, Katia Fach Gómez of the University of Zaragoza and Laura Carballo Piñeiro of the University of Santiago de Compostela. *Comparative Law for Spanish-English Lawyers: Legal Cultures, Legal Terms and Legal Practices / Derecho comparado para abogados*

anglo- e hispanoparlantes: Culturas jurídicas, términos jurídicos y prácticas jurídicas (Edward Elgar Publishing Ltd., 2016), is an entirely bilingual text that seeks to help those who are conversationally fluent in a second language achieve legal fluency in that language. The book, which is aimed primarily at private international and comparative lawyers, is appropriate for both group and individual study, and provides practical and doctrinal insights into a variety of English- and Spanish-speaking jurisdictions. The book is available in both hard copy and electronic form, and Elgar is currently offering a discount on website sales. See here for more information.

SAVE THE DATE: Brexit and Family Law, 27 March 2017

archa joint seminar of the Child & Family Law Quarterly and Cambridge Family Law

27 March 2017, at Trinity College, University of Cambridge

The withdrawal of the UK from the European Union will precipitate important change in the field of international family law. EU law has increasingly come to define key aspects of both jurisdiction and recognition & enforcement of judgments on divorce, maintenance, and disputes over children, including international child abduction, and provided new frameworks for cross-national cooperation. At this seminar, international experts and practitioners will discuss the impacts of 'Brexit' on family law, from a range of national and European perspectives, and reflect on the future of international family law practice in the UK.

Booking will open soon. CPD points will be available.

Please visit www.family.law.cam.ac.uk/ to join the Cambridge Family Law mailing

list in order to receive an email when booking opens.

Service by Mail. Certiorari Granted

I've come across this piece of news by Stacie I. Strong, and found it worth to be shared.

On Friday, the U.S. Supreme Court granted certiorari in *Water Splash, Inc.* v. *Menon* to address the question of whether the Hague Service Convention authorizes service of process by mail.

Click here to get to the initial submissions on whether the matter should be addressed by the SC.

Brussels Ibis Regulation – Changes and Challenges of the Renewed Procedural Scheme

Brussels Ibis Regulation – Changes and Challenges of the Renewed Procedural Scheme – Short Studies in Private International Law,

is the title of a book just released, edited by Vesna Lazic and Steven Stuij.

The book focuses on major amendments introduced in the Brussels I regulatory framework. The contributions scrutenise the changes introduced in the Brussels Ibis Regulation, a legal instrument that presents a core of

the unification of private international law rules on the European Union level. It is one of the first publications addressing all the changes in the Brussels I regulatory scheme, which takes into consideration relevant CJEU case law up to July 2016.

The texts, written by legal scholars who have published extensively in the field of private international law and international civil procedure, will add to the development of EU private international law. In addition, the authors' critical analysis may open further discussions on the topic and so benefit a consistent and harmonised application of the Regulation. In this respect the book takes a different approach than the commentaries which have so far been published.

It is primarily meant for legal academics in private international law and practitioners who are regularly engaged in cross-border civil proceedings. It may also be of added value to advanced students and to those with a particular interest in the subject of international litigation and more generally in the area of dispute resolution.

Vesna Lazic is a Senior Researcher at the T.M.C. Asser Instituut, an Associate Professor of Private Law at Utrecht University and Professor of European Civil Procedure at the
University of Rijeka.

Steven Stuij is an expert in Private International Law and an external Ph.D. candidate at Erasmus School of Law, Rotterdam.

Click here for more information.

The UK Government Confirms its Intention to Ratify the Unified Patent Court Agreement

The author of this entry is Dr. Arantxa Gandía Sellens, senior research fellow at the MPI Luxembourg.

Yesterday the UK government announced that it is proceeding with preparations to ratify the Unified Patent Court Agreement. Following the Brexit vote, this piece of news is not only relevant for the patent world, but also for the future Brexit negotiations between the UK and the EU (art. 50 Treaty of the European Union).

Here I will focus on the implications of this decision on the unitary patent system.

A brief explanation of the unitary patent system

The European patent with unitary effect –thus different from the «classic» European patent– was introduced by Regulation (EU) no. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (hereinafter, Regulation 1257/2012).

According to its art. 2 (c), the European patent with unitary effect is a «[…] *European patent which benefits from unitary effect in the participating* ***Member States*** *by virtue of this Regulation*». Furthermore, its arts. 5 (1) and 1 (1) establish that the so-called unitary effect of this kind of patent consists of the protection provided throughout the territories of the **Member States** participating in the enhanced cooperation authorized by Decision 2011/167/EU. The unitary patent protection may be requested for any European patent granted on or after the date of application of Regulation 1257/2012 (art. 18.6), which is linked to the date of entry into force of the Agreement on a Unified Patent Court (hereinafter, UPC Agreement), following its art. 18 (2).

The object of the UPC Agreement is to establish a Unified Patent Court for the settlement of disputes relating to European patents and European patents with unitary effect (art. 1). The Agreement requires for its entry into force the ratification of at least thirteen Member States, including the three Member States in which the highest number of European patents had effect in 2012 (art. 89 (1)). At the moment, eleven States have ratified the convention, and only one of them is among those three States whose ratification is mandatory, namely France.

Who can sign and ratify the UPC Agreement?

According to art. 84 of the UPC Agreement, it is open for signature by any **Member State**. Regarding ratification, the same requirement applies: "*This Agreement shall be subject to ratification in accordance with the respective constitutional requirements of the Member States*. […]".

Thus, while the UPC Agreement is not an EU instrument but a classical international convention, only Member States of the European Union can sign and ratify the UPC Agreement.

Notwithstanding the Brexit vote, the UK remains for the moment a Member State of the European Union; therefore, at this time the requirements established by the UPC Agreement for ratification are met. However, the UK government is determined to proceed to Brexit and to become a non-EU country. Therefore, the ratification could create a measure that is contrary to the European Treaties to which the UK is still bound. According to art. 4.3 of the Treaty on European Union a Member State "*shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

Consequences of the UK's ratification of the UPC Agreement

Ratification of the UPC Agreement, followed by exit from the EU would create a series of consequences that would have to be dealt with:

1. The unitary patent cannot cover the territory of a third State. According to art. 3 of Regulation 1257/2012, the unitary patent shall have equal effect in all the participating Member States, meaning that States without the status of "Member State" are excluded. In that scenario, the unitary patent would not have effect in the UK, unless the necessary modifications are made in the legal instruments that constitute the so-called "unitary patent package".
2. Both Regulation 1257/2012 and the UPC Agreement use the terms "participating Member States" or "Contracting Member States" when referring to the States taking part in the system. This wording is a reaction to the ECJ's Opinion 1/09, which dealt with the question of the compatibility of the failed agreement creating a Unified Patent Litigation System with EU law (open also to third States). The ECJ opposed the participation of third States in that convention, as the referral of preliminary questions on EU law could not be guaranteed. Moreover, a third State cannot refer preliminary questions on EU law to the ECJ. This means that a non-member State would not be able to comply with Art. 21 of the UPC Agreement, titled "Requests for preliminary rulings": "[…] *the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law* […]".

3. A seat of the central division cannot be located in a third State. Art. 7.2 of

the UPC Agreement establishes that the central division shall have its seat in Paris, with sections in London and Munich. Although the UPC Agreement does not require that the sections of the central division must be located in a Contracting Member State (paradoxically, this requisite does exist for the local and regional divisions, so that it could also be argued that it applies to the central division, *mutatis mutandis*), the question is not clear cut in light of the EU's constitutional framework, which includes the Treaty on European Union and the Treaty on the Functioning of the European Union.

Two options for the unitary patent system after the Brexit vote

Taking into consideration that the UK will have the status of a non-EU country (third State), two options remain open to proceed with the establishment of the system following the Brexit vote:

First option) Maintaining the *status quo*. As discussed above, if the UK ratifies now the UPC Agreement, the other Member States might rely on art. 4.3 EU Treaty in order to block that ratification. Once the UK's ratification is blocked –and the wording of the UPC Agreement remains– the process for the start-up of the unitary patent system will be delayed until the negotiations following the exit declaration (art. 50 EU Treaty) are concluded.

If, after the negotiations, it is agreed that the unitary patent system should be established without the UK, the UPC Agreement will have to be modified, at least regarding the seat of the UPC central division in London (art. 7.2 of the UPC Agreement).

Second option) Including the UK in the unitary patent system. If the UK ratifies the UPC agreement and the other Member States do not rely on art. 4.3 EU treaty, the setting up process will continue as it has been foreseen.

At the moment, as the UK is still an EU Member State, its active participation in the unitary patent system does not entail any problem, formally speaking. On the contrary, the UK is one of the three Member States in which the highest number of European patents had effect in 2012, which makes its ratification a condition for the setting up of the system (art. 89 of the UPC Agreement). However, when the UK loses its status as EU Member State, some modifications to the UPC Agreement will have to be made. Those modifications will have: 1) to make sure

that third States are invited to take part in the system, provided that they oblige themselves to respect EU law and refer questions to the ECJ (in light of the Opinion 1/09); and 2) to change Regulation 1257/2012, in order that the unitary patent system can cover the territory of third States. This might also entail the participation in the system not only by the UK, but also by other interested third States.

The biggest disadvantage of this option is the risk of endangering the application and interpretation of EU law, as already pointed out in the ECJ's Opinion 1/09. The ECJ will have to be consulted on the possibility of the inclusion of third states if those third States are willing to respect the primacy of EU law, referring preliminary questions to the ECJ when necessary. This would be a new feature in comparison to the failed agreement creating a Unified Patent Litigation System, where the referral of preliminary questions to the ECJ was not guaranteed.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2016: Abstracts

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

U. Magnus: **A Special Conflicts Rule for the Law Applicable to Choice of Court and Arbitration Agreements?**
The article examines whether the German legislator should enact a separate conflicts rule which determines the law that is applicable to the conclusion and validity of choice of court and arbitration agreements. With respect to choice of court agreements the national legislator's room for manoeuvre is anyway very limited due to the regulations in Art. 25 Brussels Ibis Regulation and Art. 5 Hague Convention on Choice of Court Agreements of 2005. There is no genuine need for an additional national conflicts rule, in particular since the interpretation and

exact scope of the new conflicts rule in Art. 25 (1) Brussels Ibis Regulation still requires its final determination by the CJEU. After weighing all pros and cons the article recommends not to enact a separate conflicts provision. The same result is reached for arbitration agreements. Here, the international practice that in the absence of a choice the law at the place of arbitration applies should be fixed on the international or European level.

K. Bälz: **Failing states as parties in international commercial disputes: public international law and conflict of laws**
In the aftermath of the "Arab Spring" a number of states in the immediate vicinity of Europe have turned into failing states. Using the Libya cases of the English High Court as a starting point, this article examines the practical questions that arise in commercial disputes involving failing states. The key question is how to implement the international law principles on regime change and state failure in international disputes.

U.P. Gruber: **The new international private law on the equalization of pension rights – a critical assessment**
German international private law contains an extremely complicated rule on the equalization of pension rights. Under this rule, the equalization of pension rights of husband and wife shall be subject to the law applicable to the divorce according to the Rome III Regulation; however, an equalization shall only be granted if accordingly German law is applicable and if such equalization is recognized by the law of one of the countries of which the spouses were nationals at the time when the divorce petition was served. If one of the spouses has acquired during the subsistence of the marriage a pension right with an inland pension fund and carrying out the equalization of pension rights would not be inconsistent with equity, the equalization of pension rights of husband and wife shall be carried out pursuant to German law on application of a spouse.
Lately, Art. 17 (3) *EGBGB* was amended. Whereas in former times, Art. 17 (3) *EGBGB* referred to the law applicable to divorce determined by an autonomous German rule, the provision now makes referral to the Rome III Regulation. In the legislative process, this amendment was neither discussed nor justified. At a closer look, however, the new rule has serious flaws and should be changed.

C. Heinze/B. Steinrötter: **When does a contract fall within the scope of the „directed activity" as provided for in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17(1) (c) Regulation [EU] No 1215/2012)?**

This contribution analyses the recent *Hobohm*-judgment of the European Court of Justice (ECJ), which concerns the requirement "contract falls within the scope of such activities" in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17 (1) (c) Regulation [EU] No 1215/2012). The CJEU decided that the rules on jurisdiction over consumer contracts are applicable even if the respective contract on its own does not fall within the scope of the professional activity which has been directed to the consumer's home state, provided that it is closely linked to an earlier contract falling under Art. 17 (1) (c). The *authors* analyse the elements of this test of close connection and place it into the more general context of the jurisdiction rules for consumer disputes.

T. Lutzi: **Qualification of the claim for a 'private copying levy' and the requirement of seeking to establish the liability of a defendant under Art. 5 No. 3 Brussels I (Art. 7 (2) Brussels I recast)**
Seized with the question whether a claim for the "blank-cassette levy" under § 42b of the Austrian *Urheberrechtsgesetz* (which transposes Art. 5 (2) b of the European Copyright Directive) qualifies as delictual within the meaning of Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast Regulation), the Court of Justice had an opportunity to refine its well-known *Kalfelis* formula, according to which an action falls under Art. 5 No. 3 if it "seeks to establish the liability of a defendant" and is "not related to a 'contract' within the meaning of Art. 5 No. 1". Holding that the claim in question sought to establish the liability of the defendant "since [it] is based on an infringement […] of the provisions of the UrhG", the Court seems to have moved away from the more restrictive interpretation of this criterion it has applied in the past. Yet, given the implications of such a broad understanding of Art. 5 No. 3, not least for claims in unjust enrichment, a restrictive reading of the decision is proposed.

L. Hübner: **Effects of cross-border mergers on bonds**
The article deals with the complex interplay of international contract law and international corporate law exemplified by the ECJ decision in the *KA Finanz* case. Three issues will be focused on: (i) the law applicable to a bond indenture after a cross-border merger of one of the contracting parties with a third party; (ii) the law applicable to the legal consequences of such a merger (legal and asset succession as well as creditor protection); and (iii) the application of Art. 15 of Directive 78/855 to securities to which special rights are attached.

C. Thomale: **Multinational Corporate Groups, Secondary insolvency**

proceedings and the extraterritorial reach of EU insolvency law
In its preliminary ruling on the *Nortel Networks* insolvency dispute, the ECJ has made important assertions on procedural and substantive aspects of secondary insolvency proceedings and their coordination with the main proceedings as well as their reach to extraterritorial assets of the debtor. At the same time, the decision fuels the general regulatory debate on corporate group insolvencies. This comment analyses the decision and develops an alternative approach.

D.-C. Bittmann: **Requirements regarding a legal remedy in terms of art. 19 of Regulation (EC) No. 805/2004 and competence for carrying out the certification of a judgment as a European Enforcement Order**
The following article examines a judgment of the ECJ, which deals with several problems regarding the interpretation of Regulation (EC) No. 805/2004 creating a European Enforcement Order (EEO) for uncontested claims. The first part of the decision regards the requirements established by Art. 19 of the regulation. The ECJ rules, that Art. 19 (1) of Regulation (EC) No. 805/2004 requires from the national legal remedy in question that it effectively and without exception allows for a full review, in law and in fact, of a judgment in both of the situations referred to in that provision. Furthermore the EJC rules, that this legal remedy must allow the periods for challenging a judgment on an uncontested claim to be extended, not only in the event of force majeure, but also where other extraordinary circumstances beyond the debtor's control prevented him from contesting the claim in question (Art. 19 (1) (b)). In the second part of the decision the ECJ rules, that the certification of a judgment as an EEO, which may be applied for at any time, can be carried out only by a judge and not by the registrar. The latter is only allowed to carry out the formal act of issuing the standard form according to Art. 9 of Regulation (EC) No. 805/2004 after the decision regarding certification as an EEO has been taken by the judge.

S. Arnold: **Contract, Choice of Law and the Protection of the Consumer abroad when lured into business premises**
Consumer protection is a cornerstone of European Law – just like party autonomy. Even in consumer contracts, parties can choose the applicable law. Yet the choice must not be to the detriment of the consumer. This is the core idea of Art. 6 (2) Rome I-Regulation. The *OLG Stuttgart* (Higher Regional Court of Stuttgart) addressed the range of that provision which is a central tool of consumer protection through conflict of laws. During a package holiday in Turkey, an 85

year old lady had bought a carpet. Turkish substantive Law did not allow for the lady to withdraw from the contract, German substantial Law, however, did. The *OLG Stuttgart* decided that the lady could withdraw from the contract on the basis of German substantial Law. The *OLG Stuttgart* found that the Turkish seller had worked together with the German travel agency in order to lure tourists from Germany into his business premises.

C. Wendelstein: **Cross-border set-off based on counterclaim governed by Italian law**

In the context of an international set-off the German Federal Court of Justice had to deal with various questions in the field of conflict of laws. For the first time the Court had to adjudicate upon the characterization of the notion of *liquidità* in Italian law (Art. 1243 *Codice civile* = Cc). According to the Federal Court of Justice this question has to be answered by the law designated by Art. 17 Rome I Regulation. The author agrees with this finding.

G. Schulze: **The personal statute in case of ineffective dual nationalities (case note on a judgment given by the Federal Court of Justice of Germany on 24th June 2015 – XII ZB 273/13)**

The applicant had been living in Germany since his birth. As he had a double name (according to Spanish customs) registered in the civil registry in Spain he wanted to go by his Spanish family name in Germany as well. The case raises the question of how to determine the personal statute of a multinational person having both a Spanish and a Moroccan nationality if the person has no connections whatsoever to the countries in question. The Federal Court of Justice of Germany (*Bundesgerichtshof, BGH*) held: That in default of an "effective" citizenship the law of habitual residence shall be applicable, *in casu*: German law. That the "limping" name does not violate EU law. There are doubts about this solution: The effectiveness of nationality does not form a part of the elements of Art. 10 (1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*). Effectiveness serves only to clearly define the personal statute for given connecting factors, viz. in order to choose between several citizenships in Art. 5 (1) sentence 1 or to determine the (closer connected) habitual residence in Art. 5 (2) *EGBGB*. *De lege lata* there is no well-founded basis for a supported rejection of the application of law of nationality. However the general tendency to apply the law of habitual residence is not a reason to apply Art. 5 (2) *EGBGB* in analogy given multiple ineffective nationalities. It is not

suitable to extend the escape clause in Art. 5 (2) *EGBGB*. In any case it is not a solution if the nationalities are EU nationalities. A former opportunity for choice of law which was unknown by the tenants does not eliminate an infringement of Art. 18 TEU (discrimination) and 21 TEU (freedom of movement).

M. Andrae: **The matrimonial property regime of the spouses with former Yugoslav nationality**

For the determination of the law applicable to matrimonial property referring to spouses who had at the time of marriage the Yugoslav nationality, two principles have a special significance: 1. The law of the former Yugoslavia shall not apply, including its interregional law and its conflict of laws principles. 2. An automatic change of the applicable law must be avoided, if possible and if it is not the consequence of a choice of law. Priority is given to the first principle. The connecting factor of the common nationality pursuant to Art. 15 (1) and 14 (1) No. 1 *EGBGB* must be supplemented. For this it is suitable to use the principle of closest connection by analogy to Art. 4 (3) sentence 2 *EGBGB*. Reference is made to the right of a successor State, if the spouses have had at the time of entering the marriage the Yugoslav nationality and a common closest connection to an area of the former Yugoslavia, which is now the territory of successor state. If such a connection is absent, then the applicable law has to be determined in accordance with Art. 15 (1) and 14 (1) No. 2 of the *EGBGB*, if necessary by Art. 14 (1) No. 3 *EGBGB*.

A. Reinstadler/A. Reinalter: **The decision opening the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is not an insolvency proceeding pursuant to the European Insolvency Regulation (2002)**

The Court of Appeal of Trento, local section of Bolzano (Italy) had to rule on the question whether the debtor-in-possession proceeding/*Verfahren auf Eigenverwaltung* (§ 270a German Insolvency Act) can be qualified as decision opening an insolvency proceeding pursuant to art. 16 European Insolvency Regulation (2002) and has, therefore, to be recognized automatically by operation of law by the courts of other Member States. Judge-Rapporteur *Elisabeth Roilo* concluded (implicitly referring to the *Eurofood*-formula) that the decision issued by the German district court in which opened the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is neither listed in Annex A of the Regulation nor is the appointed provisional liquidator (*vorläufiger Sachwalter*) included in Annex C of the Regulation. Since the decision, furthermore, foresees

neither the divestment of debtor’s assets nor the forfeiture of the powers of management which he has over his assets, the criteria set down in the *Eurofood*-judgment are not fulfilled. The result is that the decision may not be qualified as a decision opening an insolvency procedure under the terms of art. 16 European Insolvency Regulation (2002).