Rome I Regulation – Magnus/Mankowski Commentary



The advance of the English language article-of-article commentary gathers ever more momentum. The series of European Commentaries on Private International Law (ECPIL), edited by Ulrich Magnus and Peter Mankowski, welcomes the publication of its second volume addressing the Rome I Regulation. It assembles a team of prominent authors from all over Europe. The result is the by far most voluminous English language commentary on the Rome I Regulation, the prime pillar of European private international law and the fundament of cross-border trade with Europe. Its attitude is to aspire at leaving virtually no question unanswered. Parties' choice of law, the tangles of objective connections under Art. 4, consumer contracts, employment contracts, insurance contracts, form and all the other topics of the Rome I Regulation attract the in-depth analysis they truly deserve.

Private International Law: Embracing Diversity (updated)

There is just a month to go for the *Private International Law: Embracing Diversity* event taking place in Edinburgh, organized by the University in cooperation with several other institutions from the UK and abroad. The updated program of this one-day meeting of PIL experts can be downloaded here. Please remember the venue (St. Trinnean's Room, St. Leonard's Hall – University of Edinburgh, EH16 5AY), and also that registration is required at www.law.ed.ac.uk/events (attendance fee: £40.00 per attendee).

Kind Reminder on the EAPO

My colleague Adriani Dori (MPI Luxembourg) kindly reminded me today: the EU Regulation 655/2014 is applicable from Wednesday 18. I thought it worth recalling here as well.

Monograph on Intellectual Property Rights and Applicable Law, by Javier Maseda Rodríguez

It is my pleasure to give notice of a recently published monograph of my colleague Dr. Javier Maseda Rodríguez (Associate Professor of private international law at the University of Santiago de Compostela, Spain), entitled

La ley aplicable a la titularidad original de los derechos de propiedad intelectual sobre las obras creadas en el marco de una relación laboral (The law applicable to the initial ownership of intellectual property rights of works created in the context of an employment relationship).

This monograph aims to identify the applicable law to the initial ownership of intellectual property rights to works created in the context of an employment relationship. The topic is indeed a classic one for private international law scholars with an interest in intellectual property. Still, it remains a hot issue, as shown in a book that compiles with a comparative intent normative, practical and doctrinal positions on the subject, explaining at the same time the reception in Spanish law of regulations alien to the Spanish tradition – such as Art. 11 (2) English *Copyright, Designs and Patent Act* 1988, Art. 7 Dutch IPL or the *works made for hire* from sect. 201.b, par. 17, American *Copyright Act 1976.*

The research undertaken by Dr. Maseda Rodríguez evinces the controversy raised by the ascription of the initial ownership of intellectual property rights to a specific work, in light of the different responses given by legal systems –and this, in spite of the rapprochement among systems thanks to rules like the *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*-, both in general and with respect to works created in the context of an employment relationship. Hence the comparative law analysis, providing support for the different viewpoints as to the applicable law: on the one hand, the continental systems of *droit d'auteur*, which identify the employee as the author and therefore as original holder of economic and moral rights (art. 1, 5.1, 51 y 97.4 Spanish LPI). On the other, the *copyright* systems, which consider the entrepreneur/employer, who facilitates the creation by investing in the product, as *author*, and therefore as original holder of all rights, economic and moral (art. 11 (2) English *Copyright, Designs and Patent Act* 1988, the art. 7 Dutch IPL or *works made for hire* of the sect. 201.b, par. 17, American *Copyright Act 1976*).

The absence of any material notion of *author* facilitates to address the question of the original ownership of intellectual property rights from a pure conflict-of-law rules perspective. Dr. Maseda approaches the issue from two points of view -employment and intellectual property-, regulated by different applicable rules –the *lex laboris* and the law regulating intellectual property rights. The *pros* and *cons* of both solutions are discussed; so is their respective implementation, which is explained decoupling moral and economic intellectual property rights, as their different nature result in different problems.

Regarding the implementation of the *lex laboris* to the original ownership of economic intellectual property rights the following three issues are tackled with in the monograph: first, the reception of *copyright* rules into Spanish law; secondly, the problems generated by the availability of economic intellectual property rights by its original owner; thirdly, the restrictions to the *lex laboris* (protection of the salaried creator: limits to party autonomy, and the recourse to the *lois de police* or the international public policy regarding the original ownership of economic intellectual property rights).

Concerning the implementation of the *lex loci protectionis* to the original ownership of moral rights, the author examines the case of claims *for* the Spanish territory and *for* a foreign country. From this point of departure he addresses the reception of foreign norms regulating authorship and/or the initial ownership of

moral intellectual property rights in favor of the employer; and the compatibility with the Spanish public policy of the waiver of moral rights in favor of the employer (for instance through by way of a clause in the employment contract).

Finally, the coexistence of both regulations –the *lex laboris* and the *lex loci protectionis*– is also addressed, with a special emphasis on the conciliation of the conflicting interests between employer and employee.

Dr. Javier Maseda Rodríguez's monograph is the sixteenth volume within the series *De conflictu legum,* a compilation of monographs especially devoted to private international law with a specific focus on civil procedural international law, conflict of law rules and international commercial law.

"And as the fog gets clearer…" – May on Brexit

In her long-awaited speech on what Brexit actually means for the future application of the *acquis communautaire* in the United Kingdom, British Prime Minister *Theresa May*, on 17 January, 2017, stressed that the objective of legal certainty is crucial. She further elaborated:

"We will provide certainty wherever we can. We are about to enter a negotiation. That means there will be give and take. There will have to be compromises. It will require imagination on both sides. And not everybody will be able to know everything at every stage. But I recognise how important it is to provide business, the public sector, and everybody with as much certainty as possible as we move through the process. So where we can offer that certainty, we will do so. […] **And it is why, as we repeal the European Communities Act, we will convert the 'acquis' – the body of existing EU law – into British law.** This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate."

At the same time, *May* promised that "we will take back control of our laws and **bring an end to the jurisdiction of the European Court of Justice** in Britain."

(The full text of the speech is available here.)

This unilateral approach seems to imply that the EU Regulations on Private International Law shall apply as part of the anglicized "acquis" even after the Brexit becomes effective. This would be rather easy to achieve for the Rome I Regulation. In addition, a British version of Rome II could replace the Private International Law (Miscellaneous Provisions) Act of 1995, except for defamation cases and other exemptions from Rome II's scope. At the end of the day, nothing would change very much for choice of law in British courts, apart from the fact that the Court of Justice of the European Union could no longer rule on British requests for a preliminary reference. Transplanting Brussels I*bis* and other EU procedural instruments into autonomous British law would be more difficult, however. Of course, the UK is free to unilaterally extend the liberal Brussels regime on recognition and enforcement to judgments passed by continental courts even after Brexit. It is hard to imagine, though, that the remaining EU Member States would voluntarily reciprocate this favour by treating the UK as a *de facto* Member State of the Brussels I*bis* Regulation. Merely applying the same procedural rules in substance would not suffice for remaining in the Brussels I*bis* camp if the UK, at the same time, rejects the jurisdiction of the CJEU (which it will certainly do, according to *May*). Thus, the only viable solution to preserve the procedural acquis seems to consist in the UK either becoming a Member State of the Lugano Convention of 2007 or in concluding a special parallel agreement similar to that already existing between Denmark and the EU (minus the possibility of a preliminary reference, of course). Since only the latter option would allow British courts to apply the innovations brought by the Brussels I recast compared with the former Brussels and the current Lugano regime, it should clearly be the preferred strategy from the UK point of view – but it cannot be achieved unilaterally by the British legislature.

The Book: Corporate Entities at the Market and European Dimensions

This book is a collection of papers presented at the 24th traditional conference **Corporate Entities at the Market and European Dimensions**. The conference was organized on 19-21 May 2016 in Portoroz, Slovenija, by the Institute for Commercial Law Maribor and the Faculty of Law of the University of Maribor. It was co-financed by the European Commission within the project Remedies concerning Enforcement of Foreign Judgements according to Brussels I Recast. The e-version is available for browse or download here. Many interesting topics of private international law are dealt with under the title in particular related to the implementation of the Brussels I bis Regulation. The list of papers includes:

A General Overview of Enforcement in Commercial and Civil Matters in Austria
Philipp Anzenberger

A General Overview of Enforcement in Commercial and Civil Matters in Lithuania
Darius Bolzanas & Egidija Tamosi?nien? & Dalia Vasarien?

Changed Circumstances in Slovene Case Law
Klemen Drnovsek

A General Overview of Enforcement in Commercial and Civil Matters in Italy
Andrea Giussani

Law Aspects of Servitization
Janja Hojnik

Removal of Exequatur in England and Wales
Wendy Kennett

Cross Border Service of Documents – Partical Aspects and Case Law
Urska Kezmah

Diputes regarding the use of distributable profits and ensuring a minimum

dividend and balance shee-financial aspects of canceled resolutions d.d.
Marijan Kocbek & Saša Prelic

Subscribers Liabilities to Subcontractor Under Directive 2014/24/EU and ZJN-3
Vesna Kranjc

Certan Open Issues Regarding the Refusal of Enforcement Under the Brussels I Regulation in Slovenia
Jerca Kramberger Skerl

Owerview of the Croatian Enforcement System With Focus on the Remedies
Ivana Kunda

Selected Issues of Recognition and Enforcement of Foreign Judgments from the Prespective of EU Member States
Ji?i Valdhans & Tereza Kyselovská

Editing Working Relationships of Companies Directors (Managerial Staff)
Darja Sencur Pecek

The Order Problem of the Acquisition of Derivative rights in the Event of Realestate Owner Bankruptcy
Renato Vrencur

The Brussel Regulation Recast – Abolishing the Exequatur Maintaining the Exequatur Function?
Christian Wolf

Cross-border Legal Representation as Seen in a Case Study
Sascha Verovnik

Brexit Means Brexit, But What

Does Brexit Mean? Seminar Series

The Centre of European Law at King's College London is running a series of seminars on the meaning of Brexit and its potential impact on different areas of law. It considers the options for the new legal regime between the UK and the EU, taking into account the international legal framework.

On **26 January 2017** the topic will be **Brexit and Private International Law**. The Chair will be Professor Jonathan Harris QC.

Speakers are:

Sir Richard Aikens: Brick Court Chambers and King's College London

Alexander Layton QC: 20 Essex Street Chambers and King's College London

Dr Manuel Penades Fons: King's College London

The seminar will discuss the risks which Brexit poses for the UK as a centre for dispute resolution of civil and commercial disputes, with particular reference to Jurisdiction/Enforcement; Applicable law; Procedure; and Cross-border Insolvency law.

It will take place at King's College London – Strand Campus at 6.30 p.m.

For registration and more information, see here.

ERA conference "Freezing Bank Accounts Across Europe (and Beyond)": compte-rendu

*This report has been prepared by **Martina Mantovan**i, research fellow at the MPI Luxembourg.*

On 1st and 2nd December 2016, the Academy of European Law (ERA) hosted, in Trier, the conference "***Freezing Bank Accounts Across Europe (and Beyond)"***, bringing together a wide range of academics and practitioners to discuss the new scenarios opened by the prospective implementation of the new European Account Preservation Order, which will apply from 18 January 2017.

This post provides an overview of the presentations and of the discussions on the issues raised.

LOOKING ACROSS EU BORDERS

Freezing of assets (by foreign parties) in Swiss banks – Prof. Dr. Daniel Staehelin provided valuable insights on the current situation in Switzerland. With its 276 banks, this country is still one the largest managers of offshore wealth, thus being an appealing target in the eyes of foreign creditors who seek to recover their monetary claims. Special attention was given to the procedural requirements for obtaining a Swiss freezing order and to the possible difficulties arising from the interaction with the bank secrecy regime. Pursuant to the 1889 Debt Enforcement and Bankruptcy Act, in fact, the claimant shall prove, *inter alia*, that the debtor is the client of a specific bank. In this respect, it is worth stressing that the relative weakening of the bank secrecy regime, brought along by the Treaties concluded by Switzerland over the last few years, solely concerns the requests coming from authorities of the contracting States for tax recovery claims. Conversely, in civil and commercial matters, banks can – and generally will – still invoke the professional secret against requests coming from private persons engaged in debt collection activities.

THE EUROPEAN ACCOUNT PRESERVATION ORDER (EAPO)

Scope and procedure for obtaining an EAPO, including jurisdiction and service of documents – In this second presentation, Prof. Pietro Franzina led us through the procedural steps set forth by the EAPO Regulation for the granting of a European freezing order. These latter play, in fact, a pivotal role in the overall architecture of the EAPO Regulation, as its "added value" vis-à-vis other European instruments (namely, the Brussels I bis and the Maintenance Regulations) lies precisely in the harmonized procedural framework established therein. In addition to some common rules on jurisdiction and on the substantive requirements for issuing a account preservation order, the Regulation sets forth

specific rules governing enforcement by national courts and enforcement authorities. The remedies available to the debtor and the appellate stage of the proceedings are, as well, specifically considered by the Regulation. The underlying intent is to sidestep – at least in theory – most of the practical difficulties arising out of the interaction with domestic procedural regimes, which are thus relegated to a minor gap-filling role.

Practical issues for banks operating in the Member States – The presentation by Sarah Garvey and Joseph Delhaye identified four major operational issues for the bank required to implement the order. At the outset, the identification of the assets which can be preserved through an EAPO may prove particularly challenging in the case of joint and nominee accounts. Since, pursuant to Article 30, these accounts may be preserved only to the extent permitted under the law of the Member State of enforcement, there will be significant discrepancies in the practices followed in the several Member States. Another operational difficulty arising out of the interplay between uniform and domestic regulation consists in the determination of the exempted amounts and of the legal regime governing the bank's potential liability. Pursuant to, respectively, Article 31 and Article 26 of the EAPO Regulation, both shall in fact be determined under the national law of the Member State of enforcement. Again, these provisions will generate significant divergences from State to State. Last but not least, completing the form provided for by Annex IV may raise practical issues which find no express answer in the Regulation (eg. the treatment of pledged accounts, finding a balance between the ex-parte nature of the order and the duty of care and prompt information generally owed by banks to their clients). In light of the above, the banks of the participating States will likely be unable to develop a uniform approach to the EAPO.

What are the risks for claimants? – The position of the claimant vis-à-vis the EAPO has been analysed by Philippe-Emmanuel Partsch and Clara Mara-Marhuenda, who identified four major risks arising in connection with an EAPO application. Firstly, the claimant has to take into account the possibility of having to provide a security, if the court considers it appropriate in the circumstances of the case. Secondly, he may be held liable for any damage caused to the debtor by the Preservation Order due to his fault. Although, generally speaking, the burden of proof shall lie with the debtor, the claimant might have to actively prove the lack of fault on his part in order to reverse the presumption set out by Article 13

(2) of the EAPO Regulation. The third risk is connected with the ranking of the EAPO: as it has the same rank as an "equivalent national order" of the State of enforcement, other domestic measure may hypothetically have priority over the European freezing order, if so provided by national law. Finally, the claimant shall consider that the defendant may challenge the EAPO (Article 33), or oppose to its enforcement (Article 34). If the defendant is successful, the EAPO can be, respectively, revoked (or modified) and terminated (or limited).

WORKSHOP: Freezing monies in bank accounts across Europe – During this workshop, participants were confronted with a comprehensive "freezing of bank account scenario" devised by Prof. Gilles Cuniberti. The analysis of the case brought to light many uncertainties relating to the practical functioning of the EAPO Regulation. The proper interpretation of some concepts used – but not defined – by the Regulation, the interplay with the Service Regulation, compliance with the time-frame set forth by the EU legislator, the standard of due diligence required of the bank were perceived by the participants as the most problematic aspects of the EAPO Regulation.

ROUND TABLE (*Partsch, Delhaye, Raffelsieper, Weil*): Maintaining surprise vs protecting the debtor – As of January 2017, the EAPO Regulation will provide creditors with the possibility of obtaining an ex parte freezing order easily enforceable throughout the EU. This measure evidently purports to overcome the practical limitations arising out of the case *Denilauer,* where the ECJ held that the respect of the rights of the defence necessarily implies the prior hearing of the defendant. In this round-table, the speakers and participants brought attention to the downside of this case-law, insofar as it undermines the *effectiveness* of the protection of creditors' interests. The discussion focused on the system of procedural safeguards set in place by the EAPO Regulation. The speakers agreed on the fact that the Regulation provides for an adequate balance between the interests all the parties involved, while limiting, at the same time, the risk of procedural abuses.

WORLDWIDE FREEZING ORDERS

US freezing orders in practice: a primer – In his presentation, Brandon O'Neil provided some useful insights on the system (or, rather, on the lack thereof) governing the attachment of assets in the US. The lack of a uniform Federal approach to the matter results into a piecemeal legal framework, where

attachment of assets is generally seen as an extraordinary remedy whose legal regime differs from State to State. Although several "Model laws" have been proposed over the years, the State legislatures have been strenuously reluctant to give up their restrictive and specific national regimes. As a result, obtaining a freezing order in the US may require the filing of multiple actions in several States. The speaker provided for positive examples of this legal diversification, by giving a brief account of some "domestic peculiarities" – ie Columbia's ex parte procedure, Delaware's business-friendly regime and Florida's standard of the "fraudulent intents". In the second part of the presentation, Mr. O'Neil focused on the standards and procedure set forth by the law of the State of New York.

English freezing orders: the weapon of choice for claimants? – Ms. Sarah Garvey described the substantive and procedural requirements for the granting of English freezing orders, also known as Mareva injunctions. The speaker especially focused on the duty of full and frank disclosure owed by the applicant's solicitors, which factually ensures the adequate protection of the defendant's interests within the framework of an ex parte procedure. Some relatively recent trends of the English practice were as well investigated, such as the possibility of combining freezing injunctions with "search orders", in order to identify and freeze the relevant assets in one go. According to Ms. Garvey, English freezing injunctions may be an appealing alternative to the EAPO. They present, in fact, considerable "competitive advantages" over the European Instrument, namely: (i) their broader scope as to the kinds of assets covered by the measure; (ii) their potential worldwide reach; (iii) the swift and informal nature of the procedure (iv) the tough sanctions for non-compliance with the order.

ROUND TABLE (Hess, Franzina, Garvey, O'Neil): EAPO vs freezing orders – Which path to take? The discussion focused on the legal treatment reserved by the EAPO Regulation to the domiciliaries of non- Participating Member States, who cannot avail themselves of an EAPO but may nevertheless be affected by such a measure if their bank account is held in a Participating State. The concern has been voiced that the exercised of a legal prerogative of some Member States (the right of opting in/opting out) *de facto* results, in this case, in a discriminatory treatment of their domiciliaries, in particular when these latter apply for an EAPO as maintenance creditors. The speakers expressed diverging opinion on this point.

The concluding remarks were made by Prof. Gilles Cuniberti, who expressed cautious optimism as to the prospects of success of this new European

instrument.

Kotuby & Sobota on “General Principles of Law and International Due Process”

This is a shameless plug for my new book. It is available for pre-order on the Oxford University Press website and on Amazon.com. I was fortunate enough to co-author this work with my friend and colleague Luke Sobota from Three Crowns.

This book is intended to be a modern update of Bin Cheng’s seminal book on general principles from 1953–identifying, summarizing and analyzing the core general principles of law and norms of international due process, with a particular focus on developments since Cheng’s writing. The aim is to collect and distill these principles and norms in a single volume as a practical resource for international law jurists, advocates, and scholars. The book includes a Foreward by Judge Stephen M. Schwebel.

We’ve been fortunate to receive some wonderful praise thus far. Judge Schwebel has called it “a signal contribution to the progressive development of international law, . . . [done] with scholarship, insight, and panache.” Pierre Marie Dupuy has deemed it a “most useful study on the place and role of general principles of law in contemporary international arbitration,” while Judge James Crawford expects it to become a “work that will benefit both scholars and practitioners.”

The EUPILLAR Database is live

The EUPILLAR Database, one of the outputs of the EUPILLAR Project funded by the European Union within the scope of the European Commission Civil Justice Programme (JUST/2013/JCIV/AG/4635) and led by the Centre for Private International Law at the University of Aberdeen, is now live. The Database contains summaries in English of over 2300 judgments that were rendered between 1 March 2002 and 31 December 2015 concerning the Brussels I (Brussels I Recast), Brussels IIa, Maintenance, Rome I and Rome II Regulations and the Hague Maintenance Protocol in the Court of Justice of the European Union and in Belgium, Germany, England and Wales, Italy, Poland, Scotland and Spain.

The EUPILLAR Database, established and maintained by the University of Aberdeen, is available at https://w3.abdn.ac.uk/clsm/eupillar/#/home.