Massimo Benedettelli on EU Private International Law of Companies

Professor *Massimo Benedettelli* (University of Bari "Aldo Moro") has just published a highly noteworthy article entitled "Five Lay Commandments for the EU Private International Law of Companies" in the 17th Volume of the Yearbook of Private International Law (2015/2016).

The author has kindly provided us with the following abstract:

*'While praising European company law as a "cornerstone of the internal market", the EU institutions have devoted limited attention to issues of competent jurisdiction, applicable law and recognition of judgments which necessarily arise when companies carry out their business on a cross-border basis. This is a paradox, especially if one considers that in this area the EU often follows a policy of "minimal harmonization" of the laws of the Member States and that this policy leads to the co-existence of a variety of different rules and institutions directly or indirectly impinging on the regulation of companies, thus to possible conflicts of jurisdictions and/or laws. The European Court of Justice's "*Centros *doctrine" fills this gap only partially: this is due not only to the inherent limits of its case-law origin, but also to various hidden assumptions and corollaries on which it appears to be grounded and which still need to be unearthed. Hence, time has come for a better coordination of the legal systems of the Member States in the field of company law, possibly through the enactment of an ad hoc instrument. To be properly carried out, however, such coordination requires a preliminary clarification of what the EU private international law of companies really is and how it should be handled at the current stage of the European integration. This article tries to contribute to such clarification by proposing five main guidelines, in the form of "commandments" for the European legislator, courts and practitioners. It is submitted that, first, one should understand the different scope of the three legal disciplines (EU law, private international law and company law) which interact in this field so as to assess when and to what extent the lack of coordination of the Member States' domestic laws may affect the achievement of the objectives pursued by the EU. As a second analytical step, the impact that the*

EU constitutional principles of subsidiarity and proportionality may have on the scope of the relevant regulatory powers of the EU and of the Member States should be determined. Third, the issue of "characterization" should be addressed so that the boundaries of company law vis-à-vis neighbouring disciplines (capital markets law, insolvency law, contract law, tort law) are fixed throughout the entire EU legal space in a uniform and consistent way. Fourth, the Member States' legal systems should be coordinated on the basis of the "jurisdictional approach" method (which de facto *inspires the ECJ in* Centros *and its progenies) by granting a role of prominence to the Member State under the laws of which a company has been incorporated. Fifth, any residual conflict which may still arise among different Member States in the regulation of a given company should be resolved, in principle, by respecting the will of the parties to the corporate contract and the rights "to incorporate" and "to re-incorporate" which they enjoy under EU law. In the author's opinion, an EU private international law of companies developed on the basis of these guidelines not only would achieve a fair balance between the needs of the integration and the Member States' sovereignty, but would also create a framework for a European "market of company law" where a "virtuous" forum and law shopping could be performed in a predictable and regulated way.'*

Supreme Court of Canada Allows Courts to Sit Extraterritorially

In *Endean v British Columbia*, 2016 SCC 42 (available here) the Supreme Court of Canada has held that "In pan-national class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions, provided that the judge will not have to resort to the court's coercive powers in order to convene or conduct the hearing and the hearing is not contrary to the law of the place in which it will be held" (quotation from the court's summary/headnote).

The qualifications on the holding are important, since some of the earlier lower court decisions had been more expansive in asserting the inherent power of the superior court to sit outside the province (for example beyond the class proceedings context). I am concerned about any extraterritorial hearings that are not expressly authorized by specific statutory provisions, but I do appreciate the utility (from an efficiency perspective) of the court's conclusion in the particular context of this dispute. It remains to be seen if attempts will be made to broaden this holding to other contexts.

The court has also held that "A video link between the out-of-province courtroom where the hearing takes place and a courtroom in the judge's home province is not a condition for a judge to be able to sit outside his or her home province. Neither the [class proceeding statutes] nor the inherent jurisdiction of the court imposes such a requirement. The open court principle is not violated when a superior court judge exercises his or her discretion to sit outside his or her home province without a video link to the home jurisdiction" (quotation from the court's summary/headnote).

This aspect of the decision concerns me, since my view is that the open court principle requires that members of the Ontario public and the media can see the proceedings of an Ontario court in an Ontario courtroom. It is a hollow claim that they can fly to another province to watch them there. The separate concurring decision appreciates this aspect of the case more than the majority decision, though it too stops short of requiring a video link. In its view, "While the court should not presumptively order that a video link back to the home provinces be set up where the court sits extraprovincially, members of the public, the media, or counsel can request that a video link or other means be used to enhance the accessibility of the hearing. If such a request is made, or the judge considers it appropriate, a video link or other means to enhance accessibility should be ordered, subject to any countervailing considerations" (quotation from the court's summary/headnote).

European Data Science Conference in Luxembourg, 7-8 November 2016

The European Association for Data Science (EuADS) will hold the first European Data Science Conference in Luxembourg on 7-8 November 2016. This interdisciplinary event is the inaugural conference of EuADS and aims to provide a setting for fostering communication among all stakeholders of Data Science in Europe. You may download the flyer of the conference here. Conference topics include, among others, the question of trust, transparency and provenance of data including where data come from and by which mechanisms trust in data might be achieved, as well as legal aspects of data science such as data protection, data privacy and data access. The conference will feature a symposium on "Legal dimensions of Data Science" with contributions by Burkhard Hess (MPI Luxembourg), Advocate General Pedro Cruz Villalón, Gerald Spindler (University of Göttingen), Mark D. Cole (University of Luxembourg) and Jan von Hein (University of Freiburg). The full programme is available here.

EBS Law School Arbitration Day: All new and all better? From New Rules to New Courts: The Quest for Improved Systems of Arbitration

The EBS Law School in cooperation with Clifford Chance will host the EBS Law School Arbitration Day on 18 November 2016 organized by Professor Dr. Matthias Weller and Dr. Alexandra Diehl.

The event will focus on the quest for improved systems of arbitration. Topics will be:

- Dispute Resolution in Asia: Dominated by the Singaporean Merlion?
- The Iran-United States Claims Tribunal: a role model for international arbitration?
- TTIP and CETA: On a Road to Nowhere or to Success?

The speakers are:

- Claudia Annacker, Cleary Gottlieb, Paris
- Simon Greenberg, Clifford Chance, Paris
- Elan Krishna, Clifford Chance, Singapore
- Dr. Cristina Hoss, Legal Adviser to Judge Bruno Simma, Iran-US Claims Tribunal, Den Haag
- Prof. Dr. R. Alexander Lorz, Secretary for Public Education, German State of Hesse, Wiesbaden
- Representative from US Consulate General Frankfurt
- Prof. Dr. André Schmidt, EBS Business School/University Witten-Herdecke
- Prof. Dr. Mathias Wolkewitz, General Counsel Legal, Taxes, Insurances, Wintershall AG

The lectures as well as the panel discussions will be in English. The event will start at 1.30 p.m. in Lecture Room “Sydney” at EBS Law School in Wiesbaden.

For further information and registration see here.

Foreign Sovereign Immunity at the U.S. Supreme Court

Helmerich & Payne International v. Venezuela

On Wednesday, November 2, 2016, the Supreme Court will hear oral arguments

in the case of *Helmerich & Payne International v. Venezuela*. The Court granted certiorari to resolve a circuit split regarding the proper pleading standard needed to allege an expropriation claim for purposes of the Foreign Sovereign Immunities Act's (FSIA) expropriation exception. The FSIA provides that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by international agreements and by exceptions contained in the statute. 28 U.S.C. § 1604; see 28 U.S.C. § 1605-§ 1607. The exception involved here is the expropriation exception. That exception provides that a "foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue" and there is a specified commercial-activity nexus to the United States. 28 U.S.C. § 1605(a)(3). The Court will resolve whether a plaintiff needs only to plead some non-frivolous facts that could show an expropriation to survive a motion to dismiss or does a plaintiff need to plausibly allege that an expropriation occurred in violation of international law.

Venezuela, the Petitioner, and the United States, as amicus curiae in support of Venezuela, argue that for a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is legally sufficient to satisfy the provision's substantive requirements. According to the United States, "[w]hen the foreign state challenges the legal sufficiency of the complaint's jurisdictional allegations under Federal Rule of Civil Procedure 12(b)(1), the district court must determine whether the plaintiff's allegations, if true, actually describe a 'tak[ing] in violation of international law'—that is, conduct that is prohibited by international expropriation law—and identify 'rights in property' that were impaired as a result of the foreign state's conduct. If those substantive requirements are not satisfied, the foreign state is immune from suit both federal and state courts, the district court lacks subject-matter jurisdiction, and the claim must be dismissed." Brief of the United States as Amicus Curiae at 7-8.

Helmerich, the Respondent, argues that "nothing in the FSIA displaces the longstanding, widespread practice that the possibility a claim might fail on its merits does not defeat the court's jurisdiction to decide the merits, at least where the claim is not 'clearly . . . immaterial and made solely for the purpose of obtaining jurisdiction' or 'wholly insubstantial and frivolous.'" Brief of Respondent at 14.

This case has the potential to be a blockbuster, as it will define when suits against foreign governments get through the courthouse door. The Court's interpretation of the pleading standard for the expropriation exception will also impact the pleading standards for the FSIA's other exceptions, such as the commercial activity exception and noncommercial tort exceptions. The fact that the U.S. Government will participate in oral argument as amicus curiae in support of Venezuela will also be noteworthy, given that the Obama Administration recently suffered its first override of a presidential veto when the House and Senate voted against the President's objection to a bill that amended the FSIA to allow family members to sue Saudi Arabia over claims it aided or financed the Sept. 11 terrorist attacks.

Conference: Family law and Moroccan nationals living abroad

On 2 December a Conference on Family law and Moroccan nationals living abroad will take place in Brussels. This conference will be in French.

Here is the background:
In 2004 Morocco adopted a new Family Code (MFC). On the occasion of the 10th anniversary of the entry into force of the MFC (2004-2014) a comparative research on the application of the MFC in Europe and Morocco has been undertaken under the direction of Professor Marie-Claire Foblets (Max Planck Institute Halle and KULeuven). For five European countries with the largest population of Moroccan residents (Belgium, France,
Italy, the Netherlands and Spain) an in-depth analysis of the case law available since 2004 has been made. This analysis provides a more concrete idea of the problems raised by the application of the MFC since 2004 and especially of the legal problems affecting the family lives of Morrocan nationals living abroad (MNAs). Besides the analysis of the case law of the European countries, a study of the Moroccan case law concerning MNAs and a field study at three Moroccan consulates in Europe have been undertaken.

The full programme and enrolment information are available here (link at the bottom of the page).

ERA-Conference: “Freezing Bank Accounts across Europe (and Beyond)”

The Academy of European Law (ERA) will host a conference on the new Regulation (EU) 655/2014 establishing a European Account Preservation Order (EAPO), which will become operational from January 2017. The conference, which will take place on **1–2 December 2016** in **Trier (Germany)**, will focus on the practical implications of the new instrument for commercial parties, including banks.

Key topics will be:

- The EAPO and its interplay with other EU Regulations and national law
- Obligations of the banks operating in the Member States
- Scope and procedure for obtaining an EAPO
- Enforcing and resisting enforcement of an EAPO
- Maintaining surprise vs protecting the debtor
- EAPO, US and UK (worldwide) freezing orders

The conference language will be English. The event is organized by Dr *Angelika Fuchs* (ERA). The programme is available here.

The confirmed speakers are:

- **Gilles Cuniberti**, Professor at the University of Luxembourg
- **Joseph Delhaye**, Head Legal and Senior Vice President at the State and Savings Bank, Luxembourg
- **Pietro Franzina**, Associate Professor at the University of Ferrara
- **Sarah Garvey**, Counsel and Head of Litigation KnowHow and Training,

Allen & Overy LLP, London
- **Burkhard Hess**, Professor and Director of the Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg
- **Clara Mara-Marhuenda**, Counsel Dispute Resolution, Arendt & Medernach, Luxembourg
- **Fernando de la Mata**, Partner, Baker & McKenzie SLP, Barcelona
- **Brandon O'Neil**, Senior Associate, Allen & Overy LLP, London
- **Philippe-Emmanuel Partsch**, Partner, Arendt & Medernach, Luxembourg
- **Katharina Raffelsieper**, *Avocate*, Thewes & Reuter – Avocats à la Cour, Luxembourg
- **Daniel Staehelin**, Professor, Attorney and Notary Public, Partner, Kellerhals Carrard, Basel
- **Heinz Weil**, *Avocat & Rechtsanwalt*, Chairman of the European Committee of the German Federal Bar (BRAK), Weil & Associés, Paris

Registrations before 1 November 2016 will benefit from an "early bird" rebate. After this deadline, however, discounts will be available for young lawyers and academics. For further information and registration, please see the conference website.

EUFam's Project: Case-Law Database Available!

The EUFam's Project's Consortium is glad to announce that the first version of the EUFam's case-law database, filled in the past months by all partners of the project, is now available for public consultation.

Currently, the database contains data concerning over 400 decisions applying the European Union Regulations on cross-border litigation in family matters, issued by the courts of Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Italy, Slovakia, and Spain.

The consortium will keep the database up to date and publish new versions of the file in the upcoming months in the section 'Public Database' of the EUFam's website, in order to keep it up-to-date with the new cases that all partners will classify until December 2017, date of the end of the project.

Website: www.eufams.unimi.it

Facebook page: www.facebook.com/eufams

On the project:

The Project 'Planning the future of cross-border families: a path through coordination' (EUFam's – JUST/2014/JCOO/AG/CIVI/7729) aims at analysing is the practice of several Member States concerning the application of EU Regulations No 2201/2003, No 1259/2010, No 4/2009, and No 650/2012, as well as the 2007 Hague Maintenance Protocol, and the 2007 Hague Recovery Convention.

The purpose of the research activity is to identify the difficulties met by courts and practitioners in applying the rules laid down in the regulations, and to collect and share the solutions and best practices adopted by them in order to overcome such issues.

Partners of the Project are: the University of Milan (coordinator), the University of Heidelberg, the University of Osijek, the University of Valencia, the University of Verona, the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, the Italian Family Lawyers Association (AIAF), the Spanish Family Lawyers Association (AEAFA), the Italian Judicial Academy (SSM), and the Croatian Judicial Academy.

The EUFam's Project is co-funded by the Directorate-General for Justice and Consumers of the European Commission, within the programme 'Projects to support judicial cooperation in civil or criminal matters' (Justice Programme).

The e-mail contact for further information is: eufams@unimi.it

Report: BREXIT Issue Launch

On 29 September 2016, Wilmer Cutler Pickering Hale and Dorr LLP and Wolters Kluwer co-hosted a seminar in London to mark the launch of the special BREXIT issue of the Kluwer *Journal of International Arbitration*. The speakers comprised of the authors of the articles within the BREXIT issue, who discussed varied topics relating to Brexit and private international law. Leading the seminar were Professor Dr Maxi Scherer, special counsel at Wilmer Cutler Pickering Hale and Dorr LLP and the journal's general editor, and Dr Johannes Koepp, partner at Baker Botts LLP and the special issue editor.

The speakers, who were of both academic and professional acclaim, provided interesting insights and lively debate on the multifaceted impacts that Brexit could have on the UK's legal landscape. Topics included Brexit's effect on: London as a seat for international dispute resolution; recognition and enforcement of foreign judgments; UK competition litigation and arbitration; and intellectual property disputes.

This post, which has been kindly sent to me by **Reyna** Ge (BCL Candidate, University of Oxford) serves to provide an overview of the presentations and issues raised. A full recording of the seminar is available **here**, with a shortened version including the highlights of the event **here**.

London as a Seat of International Dispute Resolution in Europe

Michael McIlwrath, Global Chief Litigation Counsel of GE Oil & Gas, presented via videoconference "An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe". In determining the impact that Brexit might have on London as a seat for international commercial arbitration, he suggested that London would lose cases in the short- to medium- term, while long-term growth would be subject to other assumptions. However, he also noted that Brexit would most likely not impact the trend of increased growth in the appointment of UK arbitrators.

EU Law and Constitutional Law Questions

Dr Holger Hestermeyer, Shell Reader in International Dispute Resolution, King's College London, presented "How Brexit Will Happen: A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit". Dr Hestermeyer explained that Article 50 of the Treaty of the European Union required a Member State to make a decision to withdraw from the EU in accordance with that State's constitutional law, with the conclusion that the referendum itself was not legally binding. It is controversial whether a binding decision ought to be made by the Government on the basis of royal prerogative (as argued by the UK Government) or on the basis of a Parliamentary decision. Dr Hestermeyer also explored the process of leaving the EU, which would comprise negotiations for a "divorce agreement" and "future agreement". This raised questions concerning the conduct of negotiations, the need for ratification of such agreements by the EU Member States and the UK, and the potential involvement of the European Free Trade Association States ("EFTA States").

Brexit and the Brussels Regime

Sara Masters QC and Belinda McRae, barristers practising at 20 Essex Street Chambers in London, presented "What Does Brexit Mean for the Brussels Regime?" They examined what would be the effect of Brexit on the two main instruments on the allocation of jurisdiction and on the recognition and enforcement of foreign judgments, the Brussels I Regulation (Recast) ("Recast Regulation") and the Lugano II Convention.

McRae explained the three academic possibilities that could arise if no agreement or decisions be made in this area, and concluded that a lack of action by the government concerning this framework would be very concerning for commercial parties.

Masters QC stated that the best outcome would be to negotiate a regime that is as close to the Recast Regulation as possible. The next best alternative would be to accede to the Lugano II Convention, even though this would mean that the innovations introduced by the Recast Regulation would not be present. Otherwise, the UK could accede to the Hague Choice of Court Convention, which could be a good short-term solution as it has the advantage of not being dependent on the reciprocity of the EU.

UK Competition Litigation and Arbitration

Paul Gilbert, Counsel at Cleary Gottlieb Steen & Hamilton LLP, presented "Impact of Brexit on UK Competition Litigation and Arbitration". Gilbert commented that there were signs that the UK government was moving toward a "hard Brexit" in relation to competition law. This would mean that more cases would be looked at within the UK, instead of providing Brussels with the sole jurisdiction over cases such as cartels.

Gilbert noted that the effect on competition litigation, in the form of follow-on actions, would be more difficult to predict. Following Brexit, EU cases would no longer be binding. Even if the UK decides to apply UK competition law consistently with EU law, future EU Commission decisions may not make further reference to the position in the UK on competition matters and thus make alignment difficult. Additionally, it was unclear what information would be released to claimants, and a finding of infringement pursuant to EU law may not necessarily be a basis for bringing a damages claim in a UK court. The implementation of the Damages Directive in the EU would also impact competition law.

Intellectual Property Litigation and Arbitration

Annet van Hooft, Partner at Bird & Bird LLP, presented "Brexit and the Future of Intellectual Property Litigation and Arbitration". She noted that Brexit has impacted the creation of the Unitary Patent Court ("UPC"). Whether the UK would ratify the UPC regime and the future of the subdivision of the UPC that was to be located in London are two examples of issues arising from Brexit. The UPC, therefore, would experience delays in implementation.

Regarding trademarks and designs, while UK trademarks and designs would be unaffected, there would be uncertainty concerning the future treatment of community trademarks and designs in the UK. Van Hooft noted further uncertainty concerning database rights, the enforcement of pan-EU relief for unitary rights, exhaustion and licenses.

Intra- and Extra-EU Bilateral Investment Treaties

Markus Burgstaller, Partner at Hogan Lovells International LLP, presented "Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs". With regard to intra-EU BITs, Burgstaller argued that such BITs would likely be found to be incompatible with EU law, and noted that the European Commission

had called for the termination of the intra-EU BITs as early as in 2006. However, many States had not terminated these BITs, as was the case with the UK. Currently, the ECJ is set to rule upon the compatibility of intra-EU BITs in the case of the Netherlands-Slovakia BIT. Upon UK withdrawing from the EU, the intra-EU BITs would lose their intra-EU character.

Comments and discussion

Following presentation by the speakers, lively debate was entertained concerning the topics. The speakers and participants highlighted the importance of seeking agreement on matters such as BITs and the replacement for the Brussels Regime with the EU, for the purpose of promoting legal certainty. The potential for growth in the use of international arbitration, for the purposes of capitalising on the recognition and enforcement framework provided by the New York Convention, was also raised.

The European Commission establishes the forms to be used in connection with a European Account Preservation Order

By Implementing Regulation (EU) 2016/1823 of 10 October 2016, the European Commission has established the forms referred to in Regulation (EU) No 655/2014 of 15 May 2014 on the European Account Preservation Order (EAPO) procedure, an *ex parte* procedure that applies in cross-border cases and is intended to allow creditors to preserve funds in bank accounts under uniform conditions in all EU Member States (with the exception of the UK and Denmark). The procedure will become available on 18 January 2017.

The forms established by the Commission include, *inter alia*, the form to be used by the creditor to apply for a EAPO, the forms to be used by the court for the issue and the revocation of a EAPO, and the form to be used by the debtor to apply for a remedy against a EAPO. Each form comes with an explanatory text providing practical guidelines.

The Commission is now expected to make publicly available the information that the Member States, pursuant to Article 50 of Regulation No 655/2014, were required to provide before 18 July 2016 as regards the organisation of the EAPO procedure in their legal systems (such as the courts designated as competent to issue a EAPO and the authorities charged with the enforcement of EAPOs).