Van Den Eeckhout on the ongoing process of revising the Posting Directive

written by Veerle Van Den Eeckhout

On the blog section of the Dutch journal Nederlands Juristenblad, a new blog of Veerle Van Den Eeckhout on the Proposal for a revision of the Posting Directive has been published, see here.

Previous blogs on this theme can be found here and here.

This blog is entitled “Ipr en het verdergaande proces tot wijziging van de Detacheringsrichtlijn. Ipr in een politiek-juridisch krachtenveld (in English: “Private International Law and the ongoing process of revising the Posting Directive. PIL in a legal-political force field”). It is written in Dutch. An English version can be found here.

Journal of International Arbitration Special BREXIT Issue (Launch)

Wilmer Cutler Pickering Hale and Dorr LLP are delighted to invite you to the launch of the special BREXIT issue of the Kluwer *Journal of International Arbitration*.
Professor Dr. Maxi Scherer, General Editor of the Journal of International Arbitration and Dr. Johannes Koepp, Special Issue Editor, will host a discussion with the authors on the content of the Special Issue.

Topics and speakers will include:

How Brexit Will Happen: A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit – Dr. Holger P. Hestermeyer
What Does Brexit Mean for the Brussels Regime? – Sara Masters QC & Belinda McRae
Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe – Michael McIlwrath
Impact of Brexit on UK Competition Litigation and Arbitration –Gilbert Paul
Brexit and the Future of Intellectual Property Litigation and Arbitration – Annet van Hooft
Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs – Markus Burgstaller

Date: Thursday, September 29, 2016 6–9 p.m.

Venue: 49 Park Lane, London, W1K 1PS

To register: here

(The Special Issue journal launch will be followed by a champagne reception)

The applicable (European) law as 'Hidden Civil Law' (new book)

Roel Westrik, associate professor of private law at Erasmus School of Law, is the author of a noteworthy book that presents an original approach to the applicable European law in "Hidden Civil Law. How can you know what the applicable law is?' (Paris, 2016). The abstract reads:

> *Lawyers are taught to work with applicable law and to be familiar with the applicable law, they should 'keep up to date with their literature'. Here, in two sentences, the reality and ways of working of lawyers throughout the past century. Past because, in contemporary times, applicable law can no longer be*

easily 'recognised'. There is a knowing problem related to applicable law of European origin. This problem consists in two main questions: How are lawyers to know what applicable law is? And, if there is a presumption of 'other' applicable law when practising 'national law', where is it to be found?

These questions must be posed in every case, every advice to be written as well as judgments and rulings that have to be pronounced. What, in a specific case, is the prevailing, applicable law irrespective of whether its origins are national or European?

The acknowledgement that these questions must be posed in advance, before 'solving' any case, will make great strides in the current ways of working and classification of legal areas. Also, it will pay scant attention to the existing approach where 'European law' is seen as corpus alienum, which influences national law from 'outside' and creates a 'Hidden Civil Law'.

A message is sent to the legal world of civil law: Wake up! European law is part of national law and should be studied as applicable law. It should be recognised and implemented rather than being taken as a separate supplement under the flag of 'IPL, European law or its impact'. It is applicable civil law!

More information is available here.

TDM Journal, Special Issue

The Arbitration Institute of the Stockholm Chamber of Commerce will turn 100 years in 2017. As part of the celebrations in January, a book about the history of arbitration will be published, where lawyers and diplomats from all over the world each write about one particular dispute.

One of the contributions is written by the winner of a large competition initiated by the SCC and aimed at young lawyers. The competition inspired many highly qualified contributions and several were so well-written that they will now be published in a separate edition of Transnational Dispute Management Journal

(TDM).

The four texts deal with four different arbitrations that affected international relations: from a border dispute between the United States and Great Britain in what is now Canada, via an early ISDS case from the year 1900 over a Portuguese railway project and a relatively recent arbitration between Singapore and Malaysia, which was concluded at the Permanent Court of Arbitration in 2014.

You can read more about the publication, including the foreword by SCC Secretary-General Annette Magnusson, clicking here.

Seminar: "New Trends in EU Private International Law" (Milan, 15 September 2016)

The **University of Milan** will host a very interesting seminar on **15 September 2016 (15h00) on "New Trends in EU Private International Law"**. Here is the programme:

Welcome address: *Prof. Laura Ammannati* (Univ. of Milan);

Chair: *Prof. Dr. h.c. mult. Fausto Pocar* (Univ. of Milan);

- *Prof. Paul Lagarde* (Univ. of Paris I Panthéon-Sorbonne): Les règlements en matière de régimes matrimoniaux et d'effets patrimoniaux des partenariats enregistrés;
- *Prof. Dr. Dr. h.c. mult. Jürgen Basedow* (MPI, Hamburg): Damages claims for anticompetitive conduct and the competition of legal services;
- *Prof. Dr. Christian Kohler* (Univ. des Saarlandes): Les dispositions de d.i.p. du règlement 2016/679 relatif à la protection des données à caractère personnel (et de la directive 2016/680);
- *Prof. Francisco Garcimartín Alférez* (Univ. Autónoma de Madrid): The

GEDIP proposal on the law applicable to companies;
- *Prof. Manlio Frigo* (Univ. of Milan): Methods and techniques of dispute settlement in the international practice of restitution and return of cultural property;

Final remarks: *Prof. Stefania Bariatti* (Univ. of Milan).

Further information and the (mandatory) registration form can be found here.

(Many thanks to Prof. Francesca Villata for the tip-off)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2016: Abstracts

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

B. Hess: **The impacts of the Brexit on European private international and procedural law**
This article explores the consequences of the *Brexit* on European private international and procedural law. Although Article 50 TEU provides for a two year transitional period, the (adverse) consequences will affect the London judicial market immediately. Following this transitional period, the Brussels Ibis Regulation and all EU instruments in their area of law will no longer apply to the United Kingdom. A substitution by the Lugano Convention will be difficult, but the United Kingdom might ratify the Hague Choice of Court Convention and the (future) Hague Judgments Convention. In the course of the two-year period, parties should carefully consider whether choice of courts agreements in favour of London will lose their validity after *Brexit*. In international company law, United Kingdom companies operating on the Continent should verify whether their legal status will be recognized after the *Brexit*. In family matters, the legal

status of EU (secondary) legislation should be respected even after the *Brexit*. All in all, European private international law will be affected by the cultural loss of the English law. And the same will apply vice versa to English law.

R. Freitag: **Explicit and Implicit Limitations of the Scope of Application of Regulations Rome I and Rome II**

Almost ten years after the enactment of Regulation "Rome II" on the law applicable to non-contractual obligations and nine years after the publication in the Official Journal of Regulation "Rome I" on the law applicable to contractual obligations, the fundamental question of the material scope of application of the uniform private international law of the EU remains unanswered: Are the aforementioned regulations limited to contracts in the strict sense of voluntarily incurred obligations (governed by Regulation "Rome I") and to torts, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* (as defined in Regulation "Rome II") or are both regulations to be seen as an ensemble forming a comprehensive regime for the law of obligations (with the exception of the matters explicitly mentioned in art. 1 par. (2) of Regulation Rome I and Rome II respectively)? The answer is of practical importance for a significant number of institutions of national substantive law that are characterized by their hybrid nature positioning them between contracts and legal obligations which cannot be qualified as torts, unjust enrichment etc. The aim of the article is to show that despite the fact that an all-encompassing European regime of conflict of laws is highly desirable, the existing Regulations "Rome I" and "Rome II" remain eclectic. They do not allow for a uniform treatment of all relevant institutions of substantive law and namely their rules on mandatory provisions (art. 9 Regulation "Rome I", art. 16 Regulation "Rome II") cannot be activated to this end.

K. Thorn/C. Lasthaus: **The „CAS-Ruling" of the German Federal Court of Justice – Carte Blanche for Sports Arbitration?**

In its judgement, the German Federal Court of Justice (*BGH*) ruled on the legal validity of an arbitration agreement in favour of the Court of Arbitration for Sport (*CAS*) between an athlete and an international sports federation. Even though sports federations constitute a monopoly and as a result, athletes are not free to choose between arbitration and courts of law without losing their status as a professional, the agreement is legally effective according to the *BGH*, thus precluding the parties from settling their dispute before courts of law. In this legal review, the authors argue that – due to the athletes' lack of freedom –

arbitration agreements in sport can only be considered effective if they lead to a court of arbitration constituting a minimum rule of law. With regards to the *CAS* and considering the influence of sports federations in the establishment of the *CAS*' list of arbitrators, they take the view that the *CAS* does not fulfil such minimum legal requirements. Furthermore, they criticise the fact that an arbitrator is not required to disclose previous appointments by one of the parties involved in the current arbitration procedure. This way, the right to refuse an arbitrator suffers devaluation. Notwithstanding the fact that the international sporting system requires consistent interpretation and application of sporting rules by an international arbitration court in order to establish equal opportunities among the athletes, this must not be achieved at the expense of the athletes' constitutional rights. Due to the aforementioned legal deficits, the *BGH* should have ruled the agreement void.

C. Mayer: **Judicial determination of paternity with regard to embryos: characterization, private international law, substantive law**

The Higher Regional Court of Düsseldorf had to decide on a motion to determine the legal paternity of a sperm donor with regard to nine embryos, who are currently deep frozen and stored in a fertility clinic in California. The hasty recourse to the German law of decent by the court overlooks the preceding issue whether assessing, as of when the judicial determination of paternity is possible, is to be qualified as a question of procedure or substantive law and is, thus, to be solved according to the *lex fori* or *lex causae*. Furthermore, the court's considerations concerning the conflict-of-laws provisions, denying the analogous application of Art. 19 par. 1 s. 1 *EGBGB* (Introductory Act to the German Civil Code), are not convincing, the more so as it left the question unanswered which conflict-of-laws provision decides on the applicable law instead.

K. Siehr: **Criminal Responsibility of the Father for Abduction of his own Daughter**

A man of Syrian nationality and a woman married in Germany and had a daughter. The couple finally divorced and parental responsibility was given exclusively to the mother. In December 2006 the couple decided to visit the father's relatives in Syria in order to spend Christmas vacation with them, to detract the daughter from bad influences in Germany and to change the daughter's name. The daughter felt very uncomfortable in Syria, because she was not allowed to go to school and could not leave her relatives' home without being

accompanied by some elderly person of her relatives. She wanted to go back to Germany, but was not allowed to do so by her father. Her mother tried to enable her to leave Syria with the help of the German embassy, but this could not be realized. The daughter was beaten by her father and the mother was prohibited to have contact with her daughter. After having reached majority age, the daughter managed to go back to Germany, where the mother indicted the father for depriving a minor from the person having exclusive parental responsibility (§ 235 German Criminal Code). The County Court of Koblenz convicted the father of being guilty of dangerous bodily harm (§ 223a German Criminal Code) and of depriving a minor from her mother (§ 235 German Criminal Code). The Federal Court for Civil and Criminal Cases (*Bundesgerichtshof* = *BGH*) confirmed this decision and rejected the attorney general's and the accused's appeal against it. The Federal Court correctly decided that German criminal law applies, because the person, having exclusive parental responsibility, had her habitual residence in Germany, hence the result of deprivation was also felt in Germany. The Federal Court also correctly held that the private law question of parental responsibility has to be answered by German law, including German private international law.

C.F. Nordmeier: **Acceptance and waiver of the succession and their avoidance according to the Introductory Act to the German Civil Code and to Regulation (EU) No. 650/2012**

In matters of succession, a *renvoi* that results in the scission of the estate causes particular problems. The present contribution discusses acceptance and waiver of the succession and their avoidance in a case involving German and Thai law. The law applicable to the formal validity of such declarations is determined by art. 11 of the Introductory Act to the German Civil Code. It covers the question whether the declaration must be made before an authority or a court if this is provided for by the *lex successionis* without prescribing a review as to its content. In case of the avoidance of the acceptance of the succession based on a mistake about its over-indebtedness, the ignorance of the scission of the estate may serve as a base for voidability. The second part of the present contribution deals with Regulation (EU) No. 650/2012. Art. 13 of the Regulation applies in the case of the scission of the estate even if only a part of the estate is located in a Member State and the declaration at hand does not concern this part. Avoidance and revocation of the declarations mentioned in art. 13 and art. 28 of the Regulation are covered by these norms.

W. Wurmnest: **The applicability of the German-Iranian Friendship and Settlement Treaty to inheritance disputes and the role of German public policy**

Based on a judgment of the District Court Hamburg-St. Georg, the article discusses the conditions under which the applicable law in succession matters has to be determined in accordance with the German-Iranian Friendship and Settlement Treaty of 1929, which takes precedence over the German conflict rules and those of Regulation (EU) No. 650/2012. The article further elaborates on the scope of the German public policy threshold with regard to the application of Iranian succession law. It is argued that the disinheritance of an heir as a matter of law would be incompatible with German public policy if based on the heir either having a different religion than the testator or having the status of illegitimate child. However, these grounds will be upheld if the discrimination has been specifically approved by the testator.

C. Thole: **Discharge under foreign law and German transaction avoidance**

The judgment of the Federal Court of Justice deals with the question whether recognition of an automatic discharge obtained by the debtor in an English insolvency proceeding excludes a subsequent non-insolvency action based on German law on fraudulent transfers. The Court rightly negates this question, however, the court's reasoning is not completely convincing. In particular, the judgment entails a bunch of follow-up questions with respect to the interdependency between a foreign insolvency or restructuring proceeding and German fraudulent transfer law (outside of insolvency proceedings).

F. Ferrari/F. Rosenfeld: **Yukos revisited – A case comment on the set-aside decision in Yukos Universal Limited (Isle of Man) et al. v. Russia**

In a decision of 20/4/2016, the District Court of The Hague set aside six arbitral awards that had been rendered in the proceedings *Yukos Universal Limited (Isle of Man) et. al.* against *Russia*. The arbitral tribunal had ordered *Russia* to pay compensation for its breach of the Energy Charta Treaty. According to the District Court of The Hague, the arbitral tribunal had erroneously found that the Energy Charta Treaty was provisionally applicable. For this reason, the arbitral tribunal could not base its jurisdiction on the arbitration clause set forth in Art. 26 Energy Charta Treaty. The present case note examines the set-aside decision of the District Court of The Hague as well as its implications for ongoing enforcement proceedings. Various approaches towards the enforceability of

annulled arbitral awards will be presented.

P. Mankowski: **Embargoes, Foreign Policy in PIL, Respecting Facts: Art. 9 (3) Rome I Regulation in Practice**

Internationally mandatory rules of third states are a much discussed topic. But only rarely they produce court cases. Amongst the cases, foreign embargoes provide for the highlights. The USA has graced the world with their shades. Yet the *Cour d'appel de Paris* makes short shrift with the (then) US embargo against the Iran and simply invokes Art. 9 (3) of the Rome I Regulation – or rather the *conclusio a contrario* to be drawn from this rule – to such avail. It does not embark upon the intricacies of conflicting foreign policies but sticks with a technical and topical line of argument. Blocking statutes forming part of the law of the forum state explicitly adds the political dimension.

C. Thomale: **On the recognition of Ukranian surrogacy-based Certificates of Paternity in Italy**

The Italian Supreme Court denied recognition of a Ukrainian birth certificate stipulating intended parents of an alleged surrogacy arrangement as the legal parents of a newborn. The reasoning given by the Court covers fundamental questions regarding the notions of the public policy exception, the superior interest of the child as well as the relationship between surrogacy and adoption. The comment elaborates on those considerations and argues for adoption reform.

M. Zilinsky: **The new conflict of laws in the Netherlands: The introduction of Boek 10 BW**

On 1/1/2012, the 10th book of the Dutch Civil Code (Boek 10 (Internationaal Privaatrecht) Burgerlijk Wetboek) entered into force in the Netherlands. Herewith the Dutch Civil Code is supplemented by a new part by which the different Dutch Conflict of Laws Acts are replaced and are combined to form one legal instrument. The first aim of this legislative process was the consolidation of the Dutch Conflict of Laws. The second aim was the codification of certain developed in legal practice. This article is not a complete treatise on the Dutch Conflict of Laws. The article intends to give only a short explanation of the new part of the Civil Code.

Choice of Forum Agreements under Brussels Ibis and the Hague Convention

Our co-editor Matthias Weller has written an article on jurisdiction clauses under the Brussels Ibis Regulation and the Hague Choice of Court Convention (Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes). The full version is available here. The abstract reads as follows:

Choice of forum agreements are widely used. International uniform law has entered into force recently, namely the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 October 2015, the Brussels Ibis Regulation on 10 January 2015. Both instruments are formally independent but in the legislative process the drafters of the Convention took notice of the Brussels I Regulation, and the European legislator took notice of the Convention while working on the Recast of the Brussels I Regulation in order to "strengthen" choice of forum agreements and to bring about "coherence" of the Brussels regime with the Hague Convention. Against this background, the two instruments now in place are compared in respect to its most important policy decisions: the definition of the internationality of the case as a prerequisite of the applicability of the respective instrument, the understanding of the choice of law rule on the nullity of the agreement, the scope and mode of a public policy control of the agreement and, most extensively, the respective mechanisms for coordinating parallel proceedings, in particular the new mechanism under the Brussels Ibis Regulation granting priority for the designated court. This new mechanisms turns out to be too complex, leaving important points open. Therefore, de lege ferenda an alternative mechanism is suggested along the lines of the Hague Convention by making use of the recent judgment of the ECJ in Gothaer Versicherung. This alternative would not only be much easier and thus more predictable, it would also be able to coordinate each and every parallel proceedings, not only those involving a choice of court

agreement.

Legal Publisher in Munich seeks assistant for European Commission co-funded unalex project

Project “unalex – multilingual information for the uniform interpretation of the instruments of judicial cooperation in civil matters”

English or German native speaker with law degree and knowledge / experience in international private and procedural law, for writing, editing, and translating of legal texts. French or Italian or Spanish native speakers with good German knowledge can also apply.

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New Edition: Canadian Textbook on Conflict of Laws

Irwin Law has published (August 2016) the second edition of *Conflict of Laws* by Stephen Pitel (Western University) and Nicholas Rafferty (University of Calgary). This treatise aims to explain and analyze the rules of the conflict of laws in force in common law Canada in a clear and concise manner. For the second edition, the chapter on jurisdiction has been rewritten in light of the Supreme Court of Canada's decision in *Club Resorts Ltd v Van Breda* (2012) and the evolving jurisprudence under the *Court Jurisdiction and Proceedings Transfer Act*. In addition, a new chapter on matrimonial property division has been added. All chapters have been updated to reflect new decisions, legislative changes and recent scholarship.

The first edition (2010) was shortlisted for the Walter Owen Book Prize and has been cited in decisions of courts across Canada including the Supreme Court of Canada.

More information is available here.

Out now: Fundamental Questions of European Private International Law

Stefan Arnold from the University of Graz has edited a volume on fundamental questions of European Private International Law (Grundfragen des Europäischen Kollisionsrechts, Mohr Siebeck 2016, VII + 167 pages, ISBN 978-3-16-153979-4). Published in German the volume contains, among others, chapters on party autonomy, renvoi, ordre public and connecting factors. The editor has kindly provided us with the following more detailed information:

European Private International Law serves the European idea of an area of freedom, security and justice. For that task, it seems crucial that the legal actors of European Private International Law address its fundamentals. The fundamentals – or fundamental questions – of European Private International Law are manifold. Some of them are discussed in this volume. They concern the political framework within which European Law operates, the challenges of modern concepts of "family" or the relationship of Private International Law and Religious Law. Last not least, European Private International Law needs to ascertain the regulatory function of central Conflict of Laws concepts such as the idea of connecting factors, party autonomy, ordre public and renvoi.

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