Supreme Court of Canada Evolves Test for Taking Jurisdiction

The Supreme Court of Canada has released its decision in *Lapointe Rosenstein Marchand Melancon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 (available here). The decision builds on the court's foundational decision in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, which altered the law on taking jurisdiction in cases not involving presence in the forum or submission to the forum.

In *Club Resorts* the court held that to take jurisdiction in service *ex juris* cases the plaintiff had to establish a presumptive connecting factor (PCF) and it identified four non-exhaustive PCFs for tort claims. The fourth of these was that a contract connected with the dispute was made in the forum. This was viewed as unusual: there was very little precedential support for considering such a connection sufficient to ground jurisdiction in tort cases. Commentators expressed concern about the weakness of the connection, based as it was on the place of making a contract, and about the lack of a clear test for determining whether such a contract was sufficiently connected to the tort claim. Both of these issues were squarely raised in *Lapointe Rosenstein*.

The majority (6-1) agreed with the motions judge and the Court of Appeal for Ontario that this PCF was established on the facts of this case. Justice Cote dissented, concluding both that the contract was not made in Ontario and that it was not sufficiently connected with the tort claim.

The facts are somewhat complex. After the 2008 financial crisis the Canadian government bailed out General Motors of Canada Ltd (GM Canada). In return for this financial support, GM Canada agreed to close dealerships (ultimately over 200) across Canada. Each dealership being closed was compensated under a Wind-Down Agreement (WDA) between GM Canada and the dealer. The WDA was governed by Ontario law and contained an exclusive jurisdiction clause for Ontario. The WDA required each dealer to obtain independent legal advice (ILA) about the consequences of signing the WDA.

Some time after the dealerships closed over 200 dealers brought a class action in

Ontario against GM Canada disputing the legality of the WDAs. They also sued Cassels Brock & Blackwell, the lawyers for the Canadian Automobile Dealers Association, for negligent advice to the dealers. In turn, Cassels Brock brought third-party claims against 150 law firms which had provided the ILA to the dealers. Many of the law firms, including those in Quebec, challenged the court's jurisdiction over the third-party claim. Cassels Brock argued that the WDAs were contracts made in Ontario and that the WDAs were connected with the tort claim Cassels Brock was advancing in the third-party claim (which was for negligence in providing the ILA).

The court had the chance to adjust or move away from this PCF, given the criticism which it had attracted (see para 88). But it affirmed it. Worse, the Court of Appeal for Ontario had at least expressed a willingness to be flexible in determining the place of making of the contract (which in part got around the central weakness in this PCF). In contrast the majority stresses the "traditional rules of contract formation" (para 31). Insisting on the traditional rules is what gives rise to the core difference between the majority (Ontario: paras 42-43) and the dissent (Quebec: paras 74-80) on where the WDAs were made. Those rules mean the dissent is right to point out (para 81) that related connections between the WDAs and Ontario (such as the applicable law and the jurisdiction clause: see para 48) do not, strictly speaking, have anything to do with where the contract is made and so must be ignored on that issue. The more robust approach of the Court of Appeal allows more to be assessed and thus for an easier (more consensual) conclusion that the WDAs were "made" in Ontario. There is reason to be quite concerned that the Supreme Court of Canada's approach will lead to more disputes about where a particular contract has been made, focusing on technical rules, which is unwelcome.

The court also splits on whether the contract, if made in Ontario, is connected to the tort claim. I am inclined to think the majority gets it right when it finds that it is. Note, though, that I think it is wrong to claim, as the majority does (para 47 last sentence), that somehow the law firms were brought "within the scope of the contractual relationship" by providing the advice about it. The best part of the dissent is the demolition of that claim (para 86). The real problem is that a close enough connection should be available to be found even in the absence of bringing the defendant "within" that contractual relationship. This PCF, if the misguided narrow focus on place of contracting could be overcome, can be

broader than that and thus broader than the dissent would make it (para 87).

Here a local Quebec law firm is asked by its local client to provide it with advice about the client's entering into the WDA. The terms of the WDA expressly say that to so enter into it the client has to get that advice. The WDA is clearly very connected to Ontario. It seems to me right to say that the WDA is a contract related to any subsequent negligent advice claim the client would advance against the firm. The WDA is not just context, bearing peripherally on the advice. The advice entirely centers on the WDA and whether the client should enter into it. The WDA is what the advice is about. The majority gets all of this right in para 47 except for its last sentence. Of the 11 judges who addressed this issue in the three levels of court, only Justice Cote finds the connection between the contract and the tort claim to be insufficient.

So I think the decision is right but the majority errs by stressing the traditional rules of contract formation for assessing the place of making and by using the "within the scope of the contractual relationship" test for the requisite connection.

Some smaller points:

1. I am somewhat puzzled by the idea (para 31) that parties would expressly think about how they would go about making their contracts so as to have them made in a particular place so as to get to subsequently take advantage of this PCF. Do parties think like that? Did they before this PCF was created? I suppose it is easier to say they now do think like that since they are being told to do so by the court.

2. For future debates about where contracts are made, I worry about some of the court's language. One example is para 40's reference to where the acceptance "took place". Is that compatible with the postal acceptance rule which looks, for some contracts, at the place of posting rather than place of receipt? Would we say the acceptance in such a case "took place" at the place of posting? See in contrast para 73.

3. Justice Cote's dissent could be seen as a covert attempt to eliminate this PCF. She insists on a very tight connection between the contract and the tort claim. She refers to circumstances in which "the defendant's breach of contract and his tort are *indissociable*" (para 95; emphasis in original) and states that this PCF

"only provides jurisdiction over claims where the defendant's liability in tort flows immediately from the defendant's own contractual obligations" (para. 90). In such cases, this PCF (tied to the place of contracting) might safely be abolished and replaced with other, better PCFs relating to tort and contract claims (especially in light of para 99 of *Club Resorts*). It would not be needed for the court to be able to take jurisdiction, as it was on the facts of *Club Resorts* and *Lapointe Rosenstein*. I am sympathetic to a desire to eliminate this PCF, but I think that result needed to be confronted directly rather than indirectly. In the wake of the majority decision, it is now unlikely to happen at all.

Corporations between International Private and Criminal Law

The most recent issue of the German „Zeitschrift für Unternehmens- und Gesellschaftsrecht" (ZGR, Journal of Enterprise and Corporate Law) has just been released. The volume is based on presentations given at a conference in Königstein/Taunus in January 2016. It contains several articles dealing with the relationship between private and criminal law and its impact on corporate governance. In particular, two articles approach the subject from a conflict-of-laws perspective. Here are the English abstracts:

Marc-Philippe Weller, Wissenszurechnung in internationalen Unternehmensstrafverfahren, ZGR 2016, pp. 384–413

The article deals with the imputation of knowledge in legal entities from a private and a criminal law perspective. Several foreign criminal proceedings against domestic companies induce this question. Firstly, the article demonstrates the different ways to determine the applicable law to this imputation. Secondly, it discusses measures to limit the imputation via knowledge governance.

Jan von Hein, USA: Punitive Damages für unternehmerische Menschenrechtsverletzungen, ZGR 2016, pp. 414–436

While German Law traditionally neither accepts universal civil jurisdiction for violations of customary international law nor a penal responsibility of corporations, foreign companies have in the past been frequently sued in the United States on the basis of the Alien Tort Statute of 1789 for the payment of punitive damages for alleged human rights violations. However, the U.S. Supreme Court has severely curtailed the reach of this jurisdiction in its groundbreaking Kiobel judgment of 2013. The present article analyzes, in light of the subsequent jurisprudence, the impact of this decision on German-American legal relations and the defenses available to German corporations.

"Oops, they did it again" – Remarks on the intertemporal application of the recast Insolvency Regulation

Robert Freitag, Professor for private, European and international law at the University of Erlangen, Germany, has kindly provided us with his following thoughts on the recast Insolvency Regulation.

It is already some time since regulation Rome I on the law applicable to contractual obligations was published in the Official Journal. Some dinosaurs of private international law might still remember that pursuant to art. 29 (2) of regulation Rome I, the regulation was (as a general rule) supposed to be applied "from" December 17, 2009. Quite amazingly, art. 28 of the regulation stated that only contracts concluded "after" December 17, 2009, were to be governed by the new conflicts of law-regime. This lapse in the drafting of the regulation gave rise to a great amount of laughter as well as to some sincere discussions on the correct interpretation of the new law. The European legislator reacted in time by

publishing a "Corrigendum" (OJ 2009 L 309, p. 87) clarifying that regulation Rome I is to be applied to all contracts concluded "as from" December 17, 2009.

Although one can thoroughly debate whether history generally repeats itself, it obviously does so on the European legislative level at least with regard to the intertemporal provisions of European private international law. The 2015 recast regulation on insolvency proceedings (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, p. 19) has, according to its art. 92 (1), entered into force already on June, 26, 2015. However, the European legislator has accorded a lengthy transitional period to practitioners and national authorities. The recast regulation therefore foresees in art. 92 (2) that it will only be applicable "from" June 26, 2017. This correlates well with art. 84 (2) of the recast regulation, according to which "Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened *before* 26 June 2017". Since the old regime will be applicable only before June 26, 2017, the uninitiated reader would expect the new regime to replace the current one for all insolvency proceedings to be opened "as of" or "from" June 26, 2017. This is, hélas, not true under art. 84 (1) of the recast regulation which states that "[…] this Regulation shall apply only to insolvency proceedings opened *after* 26 June 2017." The discrepancy between the two paragraphs of art. 84 is unfortunately not limited to the English version of the recast regulation; they can be observed in the French and the German text as well. The renewed display of incompetence in the drafting of intertemporal provisions would be practically insignificant if on June 26, 2017, all insolvency courts will be closed within the territorial realm of the recast regulation. Unfortunately, June 26, 2017 will be a Monday and therefore (subject to national holidays) an ordinary working day even for insolvency courts. The assumption seems rather farfetched that on one single day next summer no European insolvency regime at all will be in place and that the courts shall – at least for one day – revert to their long forgotten national laws. Art. 84 (1) of the recast regulation is therefore to be interpreted against its wordings as if stating that the new regime will be applicable "as of" (or "from") June 26, 2017. This view is supported not only by art. 92 (2) and art. 84 (2), but also by art. 25 (2). The latter provision obliges the Commission to adopt certain implementation measures "by 26 June 2019".

It would be kind of the Commission if once again it would publish a corrigendum

prior to the relevant date. And it would be even kinder if the members of the "European legislative triangle", i.e. the Commission, the European Parliament and the Counsel, would succeed in avoiding making the same mistake again in the future although there is the famous German saying "Aller guten Dinge sind drei" and it is time for an overhaul of regulation Rome II namely with respect to claims for damages for missing, wrong or misleading information given to investors on capital markets …

RIDOC 2016: Rijeka Doctoral Conference

Rijeka Doctoral Conference is intended for doctoral candidates who wish to present and test their preliminary research findings before academics and practicing lawyers, as well as to discuss these findings with their peers. It is limited to topics of law or closely related to law, including of course private international law. RIDOC 2016 will be held on 2 December 2016 at the University of Rijeka Faculty of Law.
Details about the conference and call for papers are available here.

Journal of Private International Law Conference 2017

The next Journal of Private International Law Conference will take place in Rio de Janeiro, Brazil from 3-5 August 2017. We are now issuing a call for papers on any aspect of private international law. Abstracts of a maximum of 500 words should be sent to jprivintlrioconference2017@gmail.com by 15 November 2016. The previous conferences at Aberdeen, Birmingham, New York, Milan, Madrid and

Cambridge have been extremely successful. The conference is the leading opportunity for private international law academics of all levels of seniority from around the world to gather together to advance our subject.

Speakers will not have to pay a registration fee for the conference but will be expected to fund their own travel expenses and accommodation costs. In addition, speakers will be expected to submit the finalised version of their articles for consideration for publication in the Journal of Private International Law in the first instance.

Regulatory competition in a post-Brexit EU

Dr. Chris Thomale, University of Heidelberg, has kindly provided us with the following thoughts on the possible consequences of Brexit for European private international law.

Hitherto, academic debate is only starting to appreciate the full ambit and impact a Brexit would have on the European legal landscape. Notably, two important aspects have been neglected, despite their crucial importance in upcoming negotiations about withdrawal arrangements between the EU and the UK under Art. 50 section 2 TEU: First, the vital British interest to leave in force the fundamental freedom of establishment. Second, a possible revival of regulatory competition of corporate laws among remaining Member States, once UK Limited Companies and Limited Liability Partnerships were to lose their EU or EEA status.

As *Hess* and *Requejo-Isidro* are correct in pointing out, Brexit will directly hit the UK judicial market. Brussels I*bis* and its ancillary instruments will cease to apply. It remains yet to be seen if and to what extent new bilateral or multilateral agreements with Member States will make up for this suspension of EU free movement of judgments. This includes an accession to the Lugano Convention, which in itself is due to be reformed. In the meantime, negotiations will have to be

based on a default position, according to which not only EU secondary law on jurisdiction and enforcement but notably mutual trust with regard to its application by UK courts will be suspended. The latter aspect cannot be emphasized enough: British insolvency proceedings in particular have been displaying tendencies to find a Centre of Main Interest of companies and entire global corporate groups inside the UK, often based on hardly understandable factual assertions and the most laconic reasonings given by UK courts (see, e.g. the *Nortel* case).

The mentioned expansionist aspect of the UK judicial market neatly ties in with a similar regulatory export of corporate forms. Under the aegis of Art. 49 seqq. TFEU and Art. 31 seqq. of the EEA Agreement, UK companies profit from being recognised throughout the EEA in their original British legal form of establishment, regardless of their actual place of management. This privilege has been incentivizing a common form of legal arbitrage: Investors establish a Ltd or LLP in the UK, while doing business anywhere else inside the EEA, thereby being able to circumvent mandatory rules applying at their state of business such as laws on co-determination, minimum capital, or mandatory insurance requirements. Such setups will not be available anymore once the UK were to leave the EEA. Putting it bluntly, from the moment UK effectively leaves the EU and the EEA, British companies operating e.g. in France or Germany will be subject to the corporate laws of their administrative seat. For these countries follow the 'real seat' theory, i.e. a conflict of company laws rule that designates the substantive law of the administrative seat as the applicable company law. UK companies not having to show any registration as, say, a *Société à responsabilité limitée* at their real seat, by default will immediately be treated as partnerships, entailing, *inter alia*, unlimited shareholder liability. In order to avoid this, UK companies operating inside the EU will be well advised to reincorporate, i.e. convert into a EU legal form, which better serves their economic interests.

However, will the UK simply let them go? Once Brexit becomes effective, the Directive 2005/56/EC on cross-border mergers will not apply anymore; neither will rulings rendered by the CJEU in *Cartesio* or *Vale*. Restrictions may be put into place, similar to those displayed by British authorities in *Daily Mail*, when corporate mobility required consent by UK Treasury. This may induce a corporate exodus from the UK while its EU membership is still active. Still, leaving UK company forms behind represents only one side of the deal. A second uncertainty

rests with the question, exactly which new legal forms UK companies operating abroad will choose instead. Will they go for an Irish Private Company Limited by Shares, a Dutch *Besloten vennootschap met beperkte aansprakelijkheid* or a German *Gesellschaft mit beschränkter Haftung*? We could witness a revival of regulatory competition within the EU. However, even before that, Member States' interests in the Art. 50 section 2 TEU withdrawal negotiations, regarding the question of preserving or abolishing freedom of establishment between the UK and the EU, will be influenced by their individual prospects and ambitions in such regulatory competition. At this point, there is no telling, who will win the race nor whether it will lead to the top of legal reform or to the bottom of deregulation. Be this as it may, exciting days have found us – not only for game theorists.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2016: Abstracts

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

F. Eichel, **Private International Law Aspects of Arbitration Clauses in Favor of the Court of Arbitration for Sport**
The validity of arbitration clauses in favor of the Court of Arbitration for Sport (CAS) has been called into question by German courts in the long running proceedings of Claudia Pechstein against the International Skating Union. The courts held that the arbitration clause in the athletes' admission form was void. They referred to provisions in German Civil Law (s. 138 German Civil Code – BGB; s. 19 Act against Restraints of Competition – GWB) which are recognized as being internationally applicable so that the German courts could apply them even though the validity of the arbitration clause was governed by Swiss law. The article reflects the Private International Law aspects of these arbitration clauses illustrating that both the relevant law of International Civil Procedure as well as

the choice of law provisions primarily serve the interests of commercial arbitration and thereby reinforce the structural imbalance existing between the sports association and the athlete when signing such arbitration clauses. Against this background, the article argues that the special circumstances of sport arbitration would allow the application of the German law of standard terms (s. 307 BGB) although it is, in principle, not considered to form part of the general ordre public-reservation in Private International Law.

Th. Pfeiffer, **Ruhestandsmigration und EU-Erbrechtsverordnung**
From a German perspective, the most significant change that was brought about by the EU Succession Regulation is the transition from referring to the deceased's nationality as the general connecting factor to the deceased's habitual residence. This transition reflects an analysis of interests which is primarily based on cases of migrant professionals or workers and their families. However, there is also a large group of migrants already retired at the time of their migration (e.g. the large group of German pensioners on the Spanish island of Mallorca). Their situation is different from migrant workers insofar as their migration occurs at a moment when the most significant decisions in their lives have been made already; as a consequence, migration at that age, usually, does not include following generations. Moreover, it is not unlikely that, in many cases, migrating pensioners, when planning for their estates, will not consider the laws of their new habitual residence. Based on this analysis, this article asks how the EU Succession Regulation addresses these particularities of migrating pensioners. In particular, it is discussed under which circumstances the laws of their home state (based on their nationality) may remain applicable. In this context, the article considers: (1) provisions which do not refer to the moment of deceased's death but to an earlier event, (2) the need for an appropriate definition of habitual residence, (3) the escape clause in Art. 21 (2) of the Regulation, (4) a choice of law by the deceased and (5) waivers of succession. The article concludes that the Regulation is open for applying the laws of the deceased's nationality to a certain extent but that this law must not be applied automatically if the principle of referring to the deceased's habitual residence is taken seriously.

A. Brand, **Damages Claims and Torpedo Actions – The Principle of Priority of Art. 29 para 1 Brussels I-Regulation with a particular focus on Cartel Damages Claims.**
Forum shopping by way of „Torpedo actions" is an unwanted means of a

tortfeasor to secure the jurisdiction of their home country rather than having to defend themselves before the courts at the seat of the injured plaintiff. This has gained particular relevance in proceedings concerning cartel-damages claims. The race hunt to the court could and should be avoided by strictly applying the principles of procedural efficiency and fair trial and the requirement of a justified interest for an action for (negative) declaration. As under domestic law, the principle of priority as laid down in art. 29 para. 1 of the Brussels I-Regulation cannot be applied to torpedo actions in case of tort.

W.-H. Roth, **Jurisdictional issues of competition damages claims**
In its CDC-judgment the Court of Justice for the first time had the chance to rule on several issues of jurisdiction concerning cartel-inflicted damages. Claimant was an undertaking specifically set up for the purpose of pursuing such damage claims that had been transferred to her by potential cartel victims. The Court deals with jurisdiction over multiple defendants (Art. 6 No. 1 Regulation EC 44/2001), the scope of tort jurisdiction (Art. 5 No. 3), based on the place where the event giving rise to the damage occurred and on the place where the damage occurred, and with the interpretation of jurisdiction clauses (Art. 23) potentially covering cartel-inflicted damage claims. The results reached and the arguments advanced by the Court, taken all in all, deserve applause. Given that the judgment deals with a setting of a follow-on action (with a binding decision by the EU-Commission) it will have to be clarified whether the main results of the judgment can also be applied in stand-alone actions.

R. Hüßtege, **A tree must be bent while it is young**
The Federal Constitutional Court of Germany reprimands that the district court in an adoption procedure did not use all sources of knowledge in accordance to the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and to the European Judicial Network, in order to determine whether an effective Romanian adoption exists. Due to this omission fundamental rights of the complainant were injured in the adoption case concerning the recognition of the Romanian decision. This case shows that instruments, like the mentioned regulation and the European Judicial Network in commercial and civil matters are not well known to courts. There is an urgent need for training of judges.

C. F. Nordmeier, **Lis pendens under art. 16 Brussels IIa and Art. 32 Brussels Ia when proceedings are stayed**

The case at hand deals with the decisive moment for lis pendens according to art. 16 (1) (a) Brussels IIa (equivalent to art. 32 (1) (a) Brussels Ia) if proceedings are stayed before service in order to reach an amicable arrangement. The provision contains an own obligation of the applicant. Whether a delay of service restrains lis pendens depends on the breach of this obligation being imputable to the applicant. Intention or negligence should not serve as a basis to impute the breach. The present contribution analyses different types of delay and its imputability: stay of proceedings to reach an amicable arrangement, deficiencies of the documents submitted for service and mistakes of the court while effecting service. For the continuance of lis pendens the author argues that a stay or an interruption of proceedings does not abolish the effects of lis pendens.

B. Heiderhoff, **Perpetuatio fori in custody proceedings**
Even if parents, as in the case at hand, have joint parental responsibility with the exception of the right to determine the child's place of residence, the parent who has the sole right to determine the child's place of residence may lawfully move abroad with the child. The other parent has to accept the complications in exercising parental responsibility. If the child is relocating its habitual residence to a state that is not a member state of the EU, but a signatory state to the Hague 1996 Children's Convention, the Convention must be applied. This is clearly stated in Art. 61 Brussels II-Regulation. Unlike Art. 8 Brussels II-Regulation, the 1996 Children's Convention does not follow the principle of perpetuatio fori. In order to prevent a parent from taking a child abroad during ongoing court proceedings, the courts should regularly consider an injunction by which the right to determine residence of the child is limited to Germany. This applies particularly when both parents have joint responsibility and merely the isolated right to determine the child's place of residence is assigned to one parent. If one parent has sole custody at the beginning of the procedure, the interests must be weighed differently. The right to move abroad with the child during the proceedings should, in general, only be excluded if there is a rather serious chance for the affected parent to lose sole custody.

U. P. Gruber, **How to modify decisions on maintenance obligations**
In scholarly writing, proceedings to modify decisions on maintenance obligations have only attracted limited attention. However, these proceedings raise very intricate und unsolved problems of characterization. The Bundesgerichtshof, in a new decision, has tackled some of the questions while leaving others unanswered.

In the author's opinion, the modification of decisions on maintenance obligations is governed by the Hague Protocol of 23 November 2007. The convention's predecessor, the Hague Convention of 2 October 1973, also covered the modification of decisions, and it can be presumed that the Hague Protocol, as far as its scope is concerned, follows the Hague Convention. The procedural framework of the proceedings to modify decisions on maintenance obligations, however, is governed by the lex fori, i.e. the law of the state in which the proceedings to modify the decision are brought. The Hague Protocol of 23 November 2007 is part of EU law. Therefore, it seems likely that the ECJ will be requested to decide on the issue. Whether or not the ECJ will support the application of the Hague Protocol seems impossible to predict.

K. Siehr, **Execution of Foreign Order to Return an Abducted Child**

A child was abducted by his mother from Germany to Poland and after one year re-abducted by his father to Germany. Instead of asking German courts for a return order under the EU Regulation No. 2201/2003 on Matrimonial Matters and Matters of Parental Responsibility the father turned to Polish courts and asked for a return order. Such an order was turned down because the child, in the meantime, had been abducted by the father to Germany. The mother asked the Polish court for a return order and got it as an urgent order because of the habitual residence of the child in Poland. The mother asked German courts to recognize and enforce this Polish order to return the child to Poland. The Court of Appeals of Munich recognized and enforced the Polish return order. The Munich court did not recognize the return order neither under Art. 42 nor under Art. 28 et seq. Regulation 2201/2003 because relevant certificates were missing or some enforcement obstacles (hearing of the father in Poland) were given. The German court decided that the Polish return order should be recognized and enforced under the Hague Convention of 1996 on the Protection of Children without taking care of Art. 61 of the Regulation 2201/2003 which give precedence to the Regulation in this case. Jurisdiction of the Polish court is determined according to Art. 20 of the Regulation and Art. 11 of the Hague Convention of 1996 which granted only territorially limited jurisdiction to local courts in urgent matters. In this case, however, the child was not any more in Poland but in Germany. The German court is criticized because of not explaining properly the application of the Hague Convention of 1996 under Art. 61 of Regulation 2201/2003 and because of misinterpreting Art. 20 of the Regulation 2201/2203 and of Art. 11 Hague Convention by giving them universal jurisdiction.

D. Looschelders, **Problems of Characterization and Adaptation in German-Italian Successions**

German-Italian successions often raise difficult legal questions. In its decision, the Higher Regional Court of Duesseldorf firstly deals with the invalidity of joint wills under Italian law. The main part of the decision is concerned with problems of characterization and adaptation. In the present case, these problems arise due to the parallel applicability of Italian Succession Law and German Matrimonial Property Law. The author supports the decision in general. However, it is stated that the courts considerations with regard to the necessity of adaptation are not convincing in all respects. Finally, it is shown how the problems of the case were to be solved in accordance with the European Succession Regulation which was not yet applicable.

C. Mayer, **Ancillary matrimonial property regime and conflict of laws – characterization of claims arising from an undisclosed partnership between spouses.**

While it is generally agreed that the legal regime for undisclosed partnerships follows the law applicable to contractual obligations, there is debate as regards undisclosed partnerships between spouses. Due to their special connection with the matrimonial property regime, it is argued that compensation claims arising from undisclosed partnerships between spouses are to be characterized as matrimonial. Along with the prevailing opinion, the German Federal Court of Justice now correctly supports a characterization as contractual. Given, however, the close relation to the matrimonial property regime, the court proposes an accessory connection: the partnership agreement is closest connected to the law governing matrimonial property. Subject to criticism is, however, the far-reaching willingness of the court to find an implied choice of law by the spouses.

M. Stöber, **Discharge of Residual Debt and Insolvency Avoidance Actions in Cross-Border Insolvencies with Main and Secondary Proceedings**

15 years after the adoption of the European Regulation on Insolvency Proceedings in the year 2000, it is still difficult to answer the question which national insolvency law applies to cross-border insolvency proceedings within the European Union. The case that – in addition to main insolvency proceedings in one member state – secondary insolvency proceedings have been opened in another member state of the European Union is of particular complexity. In two recent judgments, the German Supreme Court has decided on the impact the

opening of secondary proceedings in another state has on a discharge of residual debt (judgement of 18 September 2014) and on insolvency avoidance actions respectively (judgement of 20 November 2014) granted by the national law applicable to the main proceedings opened in the first state.

C. Kohler, **Claims for the payment of holiday allowances by a public fund for paid leave for workers: "civil and commercial" or "administrative" matters?**

By its ruling in BGE 141 III 28 the Swiss Federal Court refused to enforce in Switzerland an Austrian judgment according to which a Swiss company had to make payments to the Austrian fund for paid leave for workers in the construction industry that were due for workers posted to Austria by the defendant company. According to the Federal Court, the judgment is outside the scope of the Lugano-Convention as it has not been given in a "civil and commercial matter" as required by art. 1 thereof. The ways and means by which the Austrian fund claimed the payments constituted the exercise of public powers and differed from the legal relationship between the parties to an employment contract. The author submits that the judgment of the Federal Court is not in line with the ECJ's case-law on art. 1 of the Brussels instruments. In order to assess whether a case is a "civil and commercial matter", one has to look not at the modalities for the enforcement but at the origin of the right which forms the subject matter of the proceedings. In the instant case the right to paid leave stems from the employment contract and is of a private law character. As the Federal Court sees no legal basis for the enforcement of the Austrian judgment outside the Lugano-Convention, its judgment leaves a gap in the judicial protection of posted workers' rights as between Austria and Switzerland contrary to the objective of Directive 96/71 which applies according to the bilateral agreements between Switzerland and the EU.

Francisco Javier Zamora Cabot on

the US Supreme Court case of Obb Personenverkehr AG v. Sachs

Francisco Javier Zamora Cabot has placed the following paper on SSRN:

Access of Victims to Justice and Foreign Conducts: The U.S.S.C. Gives Another Turning of the Screw in the Obb Personenverkeher V. Sachs Case, on Sovereign Immunity

The text is in Spanish, but the English abstract reads:

This Note addresses an outline and a critical approach of the Decision of the Supreme Court of the United States of America in Sachs case. After an introduction bringing to the fore in tune with the rulings made by the High Court in its recent and well-known jurisprudence, outstanding among which are Kiobel and Daimler, we present the precedents of the case and the main arguments put forward by the reporting Justice Roberts. Such arguments are debated afterwards in a long and detailed way, following overall assessments on the Decision. With respect to our conclusive comments we refer to the possibility of introducing into both the US jurisdictional system and sovereign immunity the foundations of the methodological approaches of the US modern doctrine as far as the choice of the applicable law is concerned, advocating for a greater awareness on the part of the Supreme Court with regard to the critical problem of access to justice.

Brussels IIbis recast

The European Commission today published the Proposal for the Brussels IIbis Recast and issued a press release.

There are no changes to jurisdiction in divorce matters, but quite a few significant ones on parental responsibility.

The Proposed Regulation clearly seeks to **enhance children's rights**, referring

explicitly to the EU's Charter of Fundamental Rights and to the UN Convention on the Rights of the Child (see recitals 13 and 23). It also introduces a separate provision on the obligation for courts to give children the opportunity to be heard (Art. 20).

Furthermore the Proposal aims to **improve the efficacy of return proceedings** after international parental child abduction. It requires Member States to concentrate the local jurisdiction for these procedures on a limited number of courts (Art. 22) and to limit the number of appeals to one (Art. 25(4)). It clarifies that the six-weeks time frame applies to each instance (Art. 23(1)). Courts will also have to examine the possibility of mediation and agreed solutions without losing time (Art. 23(2)).

As expected, the Commission seeks to **abolish exequatur proceedings** for all parental responsibility cases (Art. 30). The proposal contains a mechanism to request the refusal of recognition or enforcement (Arts. 40-42). This is similar to the route eventually taken in Brussels Ibis (Regulation 1215/2012).

There are many other proposed changes, on issues such as provisional measures, cooperation, the resourcing of Central Authorities, the placement of children in another Member State and a better coordination with the 1996 Hague Child Protection Convention, but I will leave the reader to discover them.

On Mutual Trust and the Brexit (Seminar)

A new session within the series *Seminario Julio D. González Campos*, organized by the Department of Private International Law of the Universidad Autónoma de Madrid, will be held on July 8th, 2016, starting at 10:30 pm. The speaker will be Dr. Matthias Weller, Professor of Civil Law, Civil Procedural Law and Private International Law at the EBS Universität für Wirtschaft und Recht; he will address the topic "Mutual Trust: Still Corner Stone for Judicial Cooperation in

Civil Matters after the Brexit?”

Venue: Seminar room V (4th Floor), Faculty of Law.

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