Devaux on French Choice of Law Rules on Marriage

Angelique Devaux has posted The New French Marriage in an International and Comparative Law Perspectives on SSRN.

> *"Drinking, eating, sleeping together is marriage it seems to me" already wrote Antoine Loysel, Jurisconsult, into Institutes Coutumières at the beginning of the 16th century.*
>
> *After several failed attempts and the creation of a civil partnership designed as a semi-loophole to a heated debate and timely subject, it took France more than twelve years after the Netherlands to finally join the family of countries authorizing marriage of homosexual couples.*
>
> *Equality is the key word of the French reform: Equality in duties and rights that allows an identical access for legal protection to marriage like for opposite-sex couples, inspired from The Declaration of Human and Civic Rights of 26 August 1789 .*
>
> *To perfect the equality to an international level, the Act of 17 May 2013 included language which states that marriages performed in a foreign jurisdiction satisfy the legal requirements of marriages in France. The new bill also confirms France's traditional choice of law rule according to which the law of the nationality of each spouse applies to the substantive validity of marriage. In order to be effective, the statute adopts a new conflict of law rule providing that same-sex marriage would still be allowed when the national law, or the law of the residence, or the law of the domicile of one of the spouses allows it. Intended to translate an extensive and cosmopolitan access to same-sex marriage, the new rules of conflict of laws suffer in reality from imperfection and do not provide an equal access to marriage for all, in particular due to historical international conventions that superseded the law.*
>
> *The difficulties for both gay and lesbian spouses occupy an even more prominent place in today's globalized world where more and more couples live outside their country of origin. As soon as cross-border elements come, the new definition of French marriage faces a multitude of challenges related to*

immigration, benefits, adoption, international wealth management, matrimonial property regime, divorce, and succession.

What are the surrounding practical consequences when same-sex married couples decide to move abroad, and how to solve or to anticipate all the dormant problems?

In this paper, I am examining some of the potential issues related to same-sex marriage and conflict of laws in a comparative law perspective, and I suggest a new approach to deal with these coming questions in accordance with the international and European tools that may serve individuals from countries that already have opened marriage to same-sex couples, and those who want to join the international family.

Issue 2013.4 Nederlands Internationaal Privaatrecht

The fourth issue of 2013 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes two contributions on the Commission Recommendation on Collective Redress and an article on the obligations of parties with regard to pleading and contesting jurisdiction under the Brussels I Regulation in the Netherlands.

Astrid Stadler, 'The Commission's Recommendation on common principles of collective redress and private international law issues', p. 483-488. The abstract reads:

For its new policy on collective redress the European Commission has chosen the form of a mere 'Recommendation' instead of a binding directive or regulation with respect to the violation of (consumer) rights granted under EU law. The Recommendation provides some basic principles on collective redress instruments which should be taken into account by the Member States when

implementing injunctive or compensatory collective redress mechanisms. There is, however, no obligation for the Member States to implement such procedural tools. Despite the attempt at establishing common principles, the European legislature thus seems to accept a heterogeneous landscape of collective redress in Europe and has missed the opportunity to provide rules on international jurisdiction, recognition and the applicable law particularly designed for cross-border mass litigation. As a consequence forum shopping becomes even more important for plaintiffs in mass damage cases.

Mick Baart, 'Implications of Commission Recommendation 2013/39 on common principles for collective redress. Can safeguards limit the potential for abuse without compromising the realization of policy goals?', p. 489-498. The abstract reads:

The recent publication of Recommendation 2013/39 seeks to establish a common European approach to collective redress. In response to concerns that collective procedures may introduce opportunities for abuse, the European Commission included a number of procedural safeguards. However, can these safeguards limit the potential for abuse without hindering the achievement of policy goals? This article evaluates this question from the perspective of group formation since opt-out procedures have traditionally been perceived as an important factor in abusive practices. The Recommendation accordingly considers the use of opt-in procedures to be an essential safeguard against abuse. Nonetheless, the rejection of opt-out procedures appears to entail an inherent paradox as it reduces the potential for abuse but simultaneously presents significant obstacles to the effectiveness of collective procedures. Moreover, it could have unintended consequences for questions of private international law as Member States that actively use opt-out mechanisms are not obliged to comply with a non-binding Recommendation.

Jacques de Heer, 'De stelplicht van eiser en gedaagde in geschillen voor de Nederlandse rechter over internationale bevoegdheid op grond van de EEX-Verordening', p. 499-507. The English abstract reads:

In cross-border contentious proceedings, the plaintiff only has a conditional obligation to show that the court in which proceedings are brought has jurisdiction. This condition follows from Article 24 of the Brussels I Regulation, which deals with jurisdiction through submission to the forum. When the

defendant wishes to contest the jurisdiction of the court, he is under no immediate obligation to argue why this is so. However, if the factual arguments put forward by the plaintiff to found the jurisdiction of (for example) the Dutch court remain uncontested, this court has to consider these facts when deciding on its jurisdiction. In so deciding, the court is not bound by the jurisdictional rules of the Brussels I Regulation as mentioned by the defendant. When the defendant only raises a defence of concurrent proceedings in another Member State, he is obliged to immediately state the relevant facts.

ICC Conference on Jurisdiction Clauses

The Institute of World Business Law at the International Chamber of Commerce will host a conference on May 23rd on Jurisdictional Choices in Times of Trouble.

The following topics will be addressed:

Morning 09.30-13.00
Session I – Asymmetrical choices

The validity of unilateral optional clauses

- Overview of the jurisdictions which uphold unilateral option clauses and
- those that consider them void The resulting legal uncertainty
- Study of the causes, implications and solutions
- Is the situation the same if the option reserves the right to resolve disputes via recourse to an arbitral tribunal rather than courts?

Pr. Marie-Elodie Ancel, University Paris-Est Créteil Val de Marne
Dr. Anton Asoskov, Lomonosov Moscow State University
Pr. Alain Rau, University of Texas

Dr. Maxi Scherer, Queen Mary, University of London

Moderated by: Dr. Georges Affaki, Chairman of the Legal Committee of the ICC Banking Commission

Questions – Discussion

The limits to the parties' free choice of jurisdiction

- The requirement of an objective link between the choice of jurisdiction and the connection of the contract to a specific country
- Other formal requirements for the validity of jurisdictional choices (incorporation by reference, etc)
- News on the doctrine of forum non conveniens
- Debate on The Hague Convention on exclusive choice of court agreements: less favourable than the Brussels 1 bis Regulation but tendancy to favourize relations with third parties

Marie Berard, Clifford Chance LLP, United Kingdom
Pr. Diego Fernández Arroyo, Sciences Po Law School
Khawar Qureshi QC, McNair Chambers

Moderated by: Dr. Horacio Grigera Naón, Independent Arbitrator, United States

Questions – Discussion

Disparities in the choice of arbitrators

Pr. Eric Loquin, University of Burgundy
Paolo-Michele Patocchi, Patocchi & Marzolini, Switzerland

Moderated by: Pr. Pierre Mayer, Dechert LLP Paris

Questions – Discussion

Afternoon 14.30-17.45

Session II – The influence of national laws on jurisdictional choices

Applicable law

- Sulamerica and Arsanovia–is there a contrast between these two English

cases and national laws opting for a substantive approach (rather than a conflict of law approach) to determine the validity of the arbitration clause?
- Debate on Article 25 of the Brussels 1 bis Regulation on the validity of the jurisdiction clause in substance (cf recital 20): as in Sulamerica, the DIP of the chosen court is applied, not the law governing the contract.

Dr. Georges Affaki
Pr. Julian D.M. Lew QC, Queen Mary, University of London; 20 Essex Street Chambers
Pr. François-Xavier Train, University Paris 10
Pr. Laurence Usunier,University Paris 13

Moderated by: Dr. Horacio Grigera Naón

Questions – Discussion

The law applicable to the arbitrability of the dispute

Pr. Carlos Alberto Carmona, Marques Rosado Toledo Cesar & Carmona – Advogados, Brazil
Pr. Hans van Houtte, President, Iran-United States Claims Tribunal

Moderated by*:* Yves Derains, Derains & Gharavi, France

Questions – Discussion

Choice of a tribunal and lis pendens

- The conflict between the EU Brussels Regulation 1 bis and other legislations – which solutions?
- What are the consequences of the ratification of The Hague Convention on the choice of court?

Pr. Arnaud Nuyts, University of Brussels (ULB)
Pr. Gilles Cuniberti, University of Luxembourg
Pr. Horatia Muir-Watt, Sciences Po Law School

Moderated by: Dr. Horacio Grigera Naón

Questions – Discussion

Conclusions: Georges Affaki and Horacio Grigera Naón

Closing remarks: Yves Derains

Symposium in Memory of Giuseppe Tarzia at the MPI Luxembourg

Many thanks to Felix Koechel (MPI Luxembourg) for the hint.

The Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law will host a symposium in memory of Giuseppe Tarzia (28.12.1930 – 23.2.2005), Professor emeritus at the Università degli Studi di Milano, on 9 May 2014. On this occasion the personal library of Giuseppe Tarzia as an extension of the Institute's library will be inaugurated.

To view the final program of the event in French and Italian, please visit the Institute's website.

The registration is open until 2 May 2014.

Brand on Overlap between PIL and Substantive Law in the EU

Ronald A. Brand (University of Pittsburgh School of Law) has posted The Evolving Private International Law/Substantive Law Overlap in the European Union on SSRN.

This chapter, written for the FESTSCHRIFT FÜR ULRICH MAGNUS (Sellier European Law Publishers 2014), considers three areas in which, either through legislation or through the decisions of the European Court of Justice, private international law rules found in the Brussels I Regulation have overlapped with substantive law rules to create uncomfortable – and sometimes undesirable – results. These examples arise at the overlap of (1) the CISG Article 31 rules on delivery of goods and the Brussels I Recast Regulation Article 7(1) (original Article 5(1)) contract jurisdiction rules; (2) national rules on contract formation and the Brussels I Recast Regulation Article 25 (original Article 23) rules on choice of court; and (3) consumer protection and the rules of the Brussels I Recast Regulation on jurisdiction in consumer cases. After discussing each of these overlapping areas of law, the chapter provides comments on how, together, these concerns demonstrate the need to avoid using private international law rules for the purpose of either implementing substantive law goals or for creating new rules that conflict with their substantive law counterparts.

The author welcomes all comments, particularly from those that disagree with him.

Festschrift Ulrich Magnus

A Liber Amicorum for Ulrich Magnus was published in February 2014. It contains a number of contributions on private international law.

III. Internationales Privat- und Zivilverfahrensrecht

- Jürgen Basedow, *Zuständigkeitsderogation, Eingriffsnormen und ordre public*
- Peter Behrens, *Connecting factors for the determination of the proper law of companies*
- Ronald A. Brand, *The Evolving Private International Law / Substantive Law Overlap in the European Union*

- Franco Ferrari, *Forum Shopping: A Plea for a Broad and Value-Neutral Definition*
- Axel Flessner, *Rechtsvergleichung und Kollisionsrecht – Neue Akzente in einer alten Beziehung*
- Robert Freitag, *Halbseitig ausschließliche Gerichtsstandsvereinbarungen unter der Brüssel I-VO*
- Axel Halfmeier, *Transnationale Delikte vor nationalen Gerichten oder: Wie weiter nach dem Ende der amerikanischen Rechtshegemonie?*
- Eva-Maria Kieninger, *Grenzenloser Verbraucherschutz?*
- Oliver L. Knöfel, *Staats- und Amtshaftung im Europäischen Internationalen Privatrecht*
- Harald Koch, *Kollisionsrecht und Auslandsbezug: Wie international ist das IPR?*
- Dieter Martiny, *Zur Einordnung und Anknüpfung der Ansprüche und der Haftung Dritter im Internationalen Schuldrecht*
- Thomas Pfeiffer, *Die Haager Prinzipien des internationalen Vertragsrechts –Ausgewählte Aspekte aus der Sicht der Rom I-VO*
- Kurt Siehr, *Global Jurisdiction of Local Courts and Recognition of Their Judgments Abroad*
- Martin Taschner, *Vertragliche Schuldverhältnisse der Europäischen Union – Zuständigkeit und anwendbares Recht*
- Peter Winkler von Mohrenfels, *Kündigungsschutz und Kleinbetriebsklausel im internationalen Arbeitsrecht – unter besonderer Berücksichtigung des österreichischen Kündigungsschutzrechts*
- Wolfgang Wurmnest, *Die Einbeziehung kartellrechtlicher Ansprüche in Gerichtsstandsvereinbarungen*

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Second Seminar on the

Boundaries of European PIL

Boundaries of European Private International Law

Seminar n° 2 – Louvain la Neuve:

What are the Boundaries between Internal Market and European PIL and among PIL Instruments?

5/6 June 2014

Coordination : Jean-Sylvestre Bergé (Université Jean Moulin Lyon 3), Stéphanie Francq (Université catholique de Louvain) et Miguel Gardenes Santiago (Universitat Autònoma de Barcelona)

A demonstration of the existence of European private international law is no longer necessary. However, the question of the place of European private international law in a more globalised legal order, i.e. the difficult but crucial theme of reconciling European private international law to the legal frameworks that preceded it at national, international and European level, has been largely neglected to date.

The aim of this research program is to remedy this situation by holding discussions in different locations in Europe (Lyon – Barcelona – Louvain), bringing together European specialists in private international law or European law and doctoral or post-doctoral students.

For this second seminar, taking place in Louvain-la-Neuve (following the very successful Barcelona seminar, held in March), two main themes will be tackled:

1. Reconciling European private international law with other fields of European law, namely the internal market (free circulation and harmonisation of private national legislations) and other aspects of the area of freedom security and justice (immigration and cooperation in criminal matters);

2. Reconciling the various European instruments of private international law.

Thursday, 5 June

Inaugural Session

14:30 to 15.00: inauguration of the seminar and welcome addresses

15.00 to 16:15: opening session, chaired by Dean **Marc Fallon**, Louvain University.

Veerle Van Den Eeckhoudt, Professor, Antwerp & Leiden University, *"The Instrumentalisation of Private International Law by the European Institutions : quo vadis? Rethinking the 'Neutrality' of Private International law in an Era of Europeanisation of Private International law and Globalisation"*

Marion Ho-Dac, Lecturer, University of Valenciennes, *"Adapting European Private International Law to the Demands of the Internal Market."*

15.50- 16.15 Discussion

First workshop: Reconciling European private international law with other European law aspects of EU substantive law: internal market and other aspects of the areas of freedom security and justice

16:45 to 18:15: first session of the first workshop

Ulgjesa Grusic, Lecturer in Law, University of Nottingham, *The principle of effectiveness in EU law and Private International law: the case of transnational Employment in the English courts*

Fieke Van Overbeeke, Doctoral candidate, University of Antwerp, *The lost social dimension of the EU: A private international law perspective of labor in international road transport*

Alexandre Defossez, teaching and research assistant at the University of Liège, *The Posting of Workers Directive: Erase or Rewind?*

Friday, 6 June

9:00 to 10:30: second session of the first workshop

Blandine de Clavière Bonnamour (Lecturer, University Lyon 3) et **Bianca**

Pascale (Doctoral Candidate, University Lyon 3), *The Scope of European Consumer Law (Substantive and Private International Law Aspects)*

Lydia Beil, Doctoral Candidate, University of Freiburg , *Reconciling Private International Law with European Consumer Law: Where to start consumer protection in the context of E-Commerce?*

Laura Liubertaite, Lecturer Vilnius University, *The Impact of Primary Law of the European Union on the Bilateral Conflict of Laws Rules of the Member States*

Second workshop: Reconciling the various European instruments of private international law.

11:00 to 12:30: first session of the second workshop.

Farouk Bellil, Doctoral candidate, University of Rouen, *Articulating the various PIL instruments applying in the field of insolvency*

Eleonore De Duve (Doctoral candidate) and **Anna Katharina Raffelsieper** (Research Fellow), Max Planck Institute for International, European and Regulatory Procedure (Luxembourg), *The Debtor's Protection in European Civil Procedures: Reviewing the Review*

Libor Havelka, Doctoral Candidate, Masaryk University, *Moving Back and Forth, On the Relationship between the Brussels I Regulation and International and National law*

14:30 to 16:00: second session of the second workshop.

Cécile Pellegrini, Post-Doctoral Researcher, University of Luxembourg, *Current State of the European and American Exorbitant Grounds of Jurisdiction.*

Maria Aranzazu Gandia Sellens, Doctoral Candidate, University of Valencia, *The Relationship between the Brussels I Regulation Recast and the Agreement on a Unified Patent Court, Specially Focusing on Patent Infringement: when reality exceeds fiction*

Jacqueline Gray (Doctoral candidate, Utrecht University), **Pablo Quinzá Redondo** (Doctoral candidate, University of Valencia), *The Coordination of*

Jurisdiction and Applicable Law in Related Proceedings: the Interaction between the Proposal on Matrimonial Property Regimes and the Regulations on Divorce and Succession

16:30 to 17:30: third session of the second workshop

Ioannis Somarakis, Doctoral Candidate, University of Athens, *The scope of application of the method of recognition for foreign situations in European private international law*

Amélie Panet, Research and Teaching Assistant University Lyon 3, *The recognition of situations of personal status created in third countries*

Polish Decisions on Submission to Jurisdiction

by Michal Kocur and Jan Kieszczynski of Wozniak Kocur, a Polish litigation boutique law firm.

The Appellate Court in Lublin, Poland passed two separate decisions that stand by the principle that a challenge to international jurisdiction must be clear, substantiated and made right away in the defendant's first appearance before the court.

In decisions taken on 26 March 2013 (file no. I ACz 151/13) and on 8 October 2013 (file no. I ACz746/13), the court found that raising a defense of lack of jurisdiction based on an arbitration clause cannot be treated as contesting the court's international jurisdiction within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

The decision is particularly noteworthy as it deals with a controversial issue, as yet undecided by the Court of Justice of the European Union (ECJ).

Disputed jurisdiction

Both of the cases concerned the same dispute that emerged between two parties, a Polish and a French company, concerning the performance of a contract for the international sale of goods (Contract). The Polish company twice sued the French company for payment in the Polish courts. Both cases followed a similar pattern of procedural history, which will be outlined below.

In its statement of defense, the French company filed a motion to dismiss the case, taking the position that the dispute fell within the scope of the arbitration clause contained in the Contract. Apart from raising that jurisdictional defense, the defendant also went into the details of the merits of the case, rejecting the Polish company's claim for payment. The Polish court rejected the French company's jurisdictional defense. The court found that the arbitration agreement contained an exception that allowed the claimant to file a claim in a national court.

The French company appealed that decision. In its appeal, for the first time in the proceedings, the defendant raised a defense specifically invoking the lack of jurisdiction of Polish courts, and filed a motion to dismiss the case on those grounds. The defendant argued that the place of delivery of goods had changed, in light of which French courts had jurisdiction to hear the case, not Polish courts.

In response to the above, the claimant argued that the defendant's challenge to the jurisdiction of Polish courts had not been presented in the statement of defense, and was therefore overdue.According to the claimant, as the Polish courts' international jurisdiction was not contested in due time, the dispute was submitted to Polish courts in accordance with Article 24 Brussels I. Submission under Article 24 Brussels I exists when a defendant enters an appearance before the court, unless the appearance was entered in order to contest international jurisdiction:

> *Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of*

The defendant disagreed. It argued that the statement of defense contained a jurisdictional defense based on the arbitration agreement, and that this defense alone was sufficient to properly contest international jurisdiction in the meaning of Article 24 Brussels I.

Inequality of objections

The issue whether raising an objection against jurisdiction based solely on an arbitration agreement is tantamount to contesting the jurisdiction of a Member State's court has not yet been decided by the ECJ. The issue is controversial. In Poland, some scholars refer to a position presented in German language publications that a defense of the lack of jurisdiction based on an arbitration agreement by the same token contests jurisdiction in the meaning of Article 24 Brussels I.

In both of the cases at hand, the Appellate Court in Lublin rejected the defendant's view and found that it had international jurisdiction as the cases fell under the rule of submission to jurisdiction.

The court held that a jurisdictional defense based on an arbitration clause did not contest the Polish courts' international jurisdiction in the meaning of Article 24 Brussels I. According to the court, the defendant's properly contested international jurisdiction too late and by that time the cases must have been treated as having been submitted. In the written reasons of the decisions, the court stated that a challenge against jurisdiction based on an arbitration agreement and a challenge against international jurisdiction are two separate challenges. It is not possible to assume that raising a defense of lack of jurisdiction due to an arbitration agreement is effective with regard to international jurisdiction.

The Appellate Court's decision was correct. An objection to jurisdiction based on an arbitration agreement and an objection to international jurisdiction are based on different legal and factual grounds. This is exemplified by the case at hand. The lack of jurisdiction due to the arbitration agreement was claimed under the provisions of the Polish Code of Civil Procedure, and the dispute centered around the interpretation of the arbitration clause. The defense of lack of international

jurisdiction was made under the provisions of Brussels I and on the basis of a disputed place of delivery of the goods. If different facts and different legal provisions have to be presented to substantiate either of the two defenses, one cannot treat them as synonymous in their effect.

Importance of submission

The analyzed decision of the Appellate Court in Lublin is also in line with the rules of examining jurisdiction enshrined in Brussels I.

Brussels I provides for an examination of the jurisdiction by the court's own motion only in exceptional situations. That is the case, for example, in Article 22 point 1, which provides for the exclusive jurisdiction of the court in which a property is situated in cases concerning rights in rem in immovable property. Apart from such exceptions, the court only examines its jurisdiction if the jurisdiction is challenged by the defendant. Such challenges must be properly substantiated and raised in the first appearance before the court, i.e. usually, in the statement of defense.

This principle is interconnected with another rule, namely, the rule of submission of jurisdiction if no challenge is made by the defendant at the beginning of proceedings.

Both of the rules make perfect sense, both from the perspective of case management and legal certainty. If the courts were to examine jurisdiction by their own motion at every stage of the case, jurisdiction could be questioned very late in the proceedings, even before the court of last instance. That would lead to the obstruction of justice and deprive the parties of the right to have their case decided in due time.

Finding identity between a jurisdictional defense based on an arbitration agreement and a defense of lack of international jurisdiction would be contrary to the above rules. It would demand from the court to examine a challenge based on an arbitration agreement way beyond the legal reasoning and facts presented in that challenge. In such a case, if the court decided that the challenge based on an arbitration agreement should be dismissed, then the court would have to examine whether it has international jurisdiction, essentially, by its own motion. It would be the court that would be obliged to establish whether there were any other circumstances, apart from the arbitration agreement, that could potentially affect

its jurisdiction to hear the case. This would not be a reasonable solution. Instead, the Brussels I rules discipline the parties to promptly decide whether they question the international jurisdiction of the court where they have been summoned. Those rules also prohibit them from second-guessing their jurisdictional defenses.

First Issue of 2014's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2014 is out.

First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive by *Anatol Dutta and Andrea Schulz*

> *Since the Brussels IIa Regulation became applicable for national courts in 2005, the Court of Justice of the European Union (CJEU) can be welcomed within the circle of the European family courts. The Court has so far dealt, in particular, with the part of Brussels IIa dedicated to child matters, in case C in 2007, in Rinau in 2008, in A and Deticek in 2009 and in Povse, Purrucker I, McB,Purrucker II, Aguirre Zarraga and Mercredi in 2010. In 2012, a judgment concerning the cross-border placement of children followed in the case of Health Service Executive (HSE). Some aspects of these decisions are reviewed in this paper but not so as to present a comprehensive analysis of the Regulation. Rather the article shall provide – as a kind of series of interconnected case notes – the interested reader with a first overview on a rather dynamic area of EU family law as reflected in the case-law of the Court.*

Reforming the European Insolvency Regulation: A Legal and Policy Perspective by G *McCormack*

> *This paper will critically evaluate the proposals for reform of the European*

Insolvency Regulation – regulation 1346/2000 – advanced by the European Commission. While criticised by some commentators as unsatisfactory, the Regulation – is widely understood to work in practice. The Commission proposals have been described as 'modest' and it is fair to say that they amount to a 'service' rather than a complete overhaul of the Regulation. The proposals will be considered under the following heads (1) General Philosophy; (2) Extension of the Regulation to cover pre-insolvency procedures; (3) Jurisdiction to open insolvency proceedings; (4) Co-ordination of main and secondary proceedings; (5) Groups of Companies; (6) Applicable law; (7) Publicity and improving the position of creditors. A final section concludes. The general message is that while there is much that is laudable in the Commission proposals, there is also much that has been missed out, particularly in the context of applicable law. The proposals reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward. This is not necessarily an approach that is mirrored in other areas of European policy making.

Actio Pauliana – "*Actio Europensis*"? Some Cross-Border Insolvency Issues by *Tuula Linna*

Actio pauliana grants protection to the creditors against detrimental transactions and it is an important tool in the European insolvency system. When an actio pauliana is an ancillary action to collective insolvency proceedings it usually falls outside the scope of the Brussels I Regulation. The problem is that actio pauliana falls also outside the European Insolvency Regulation (EIR) if the insolvency proceedings to which it is related are not mentioned in Annex A of the EIR. These gaps are subjects to amendments in the Commission proposal for the EIR reform. When an actio pauliana falls within the scope of the EIR the lex concursus applies unless it is not possible to challenge the transaction according to the law which normally governs it. If this "veto" has succeeded the lex concursus is not applicable. In cross-border situations actio pauliana raises a number of complicated issues concerning jurisdiction, applicable law, recognition and enforceability.

Should the *Spiliada* Test Be Revised? by *Ardavan Arzandeh*

This article examines recent English authorities concerning the forum (non) conveniens doctrine. It seeks to demonstrate that, largely as a consequence of a

disproportionately broad discretionary framework under its second limb, the doctrine's application has led to numerous problems. The article argues that, for both pragmatic and theoretical reasons, the status quo cannot be maintained. In this respect, its key contribution is to identify a doctrinal avenue through which to limit (rather than completely discard) the court's discretion at the second stage. The article's basic thesis is that the court's discretion under the doctrine's second limb should be curtailed in line with the doctrinal framework underpinning the protection of a person's right to a fair trial under Article 6(1) of the European Convention on Human Rights (as defined in expulsion cases).

European Perspectives on International Commercial Arbitration by *Louise Hauberg Wilhelmsen*

During the revision of the Brussels I Regulation several issues pertaining to the interface between arbitration and the Regulation were discussed. Some of the issues were parallel proceedings and conflicting decisions between courts and between courts and arbitral tribunals and the lack of a uniform rule on the law applicable to the existence and validity of an arbitration agreement. This article examines these issues in order to find out whether they are only European or also inherent in the international regulation of international commercial arbitration. The article examines to which extent these issues have already been addressed in the international regulation. Moreover, the article analyses the issues from a European perspective by analysing the interface between the Brussels I Regulation and arbitration and by looking into the objectives of the EU judicial cooperation in civil matters. Finally, the article looks into what the future might hold for these two issues.

Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws by *Adewale Olawoyin*

The enforcement of a foreign judgment is the reward for often protracted and expensive transnational litigation. This post-judgment aspect of Private International Law is as important as the often-discussed pre-judgment considerations of choice of jurisdiction and choice of law. Regrettably, the position in Nigerian law on the enforcement of foreign judgments is far from coherent and certain. Indeed, it is in a lacunose and largely confused state. It is argued that a coherent and efficient legal regime for the enforcement of foreign

judgments is a necessary adjunct to the heightened diverse global commercial relations of contemporary times between and amongst developing nations of Africa and between those African States and the international community at large. The extant state of affairs in Nigeria is the result of an admixture of a historical legacy of antedated laws, inefficient law revision processes and an inherently weak law reform system. The article conducts an audit of Nigerian law (statute and case law) in this area and the central argument is that there is a pressing need for a holistic law reform starting with a paradigm shift from Private International Law orthodoxy regarding the conceptual predicate of reciprocity as the basis of the statutory regime for the enforcement of foreign judgments at common law.

Review Article: Human Rights and Private International Law: Regulating International Surrogacy by *ClaireFenton-Glynn.*

Van Den Eeckhout on Schlecker

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has posted on SSRN an English version of a paper on international employment law previously published in Dutch in "Tijdschrift Recht en Arbeid" ("TRA", Kluwer, 2014, issue 4).

The paper is entitled "The Escape-Clause of Article 6 Rome Convention (Article 8 Rome I Regulation): How Special is the Case Schlecker?"

In the Schlecker case (12 September 2013, C-64/12), the Court of Justice decides that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.

The author analyses the Schlecker case, commenting the special/ordinary character of Article 6 Rome Convention compared to Articles 3 and 4 Rome Convention, the special/ordinary character of the Schlecker case and the relevance of the decision for cases of international employment in which issues of freedom of movement/freedom of services are addressed.

The author is grateful to Ms. Emanuela Rotella for the English translation of this paper.

The author has also posted on the case at the Leiden Law blog here and here.