Issue 2012.1 Nederlands Internationaal Privaatrecht

The first issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition and Enforcement of US Punitive Damages and Documentary Credit under Rome I:

Csongor István Nagy, Recognition and enforcement of US judgments involving punitive damages in continental Europe, p. 4-11. The abstract reads:

The paper examines the recognition practice of US punitive awards in continental Europe from a comparative and critical perspective. After analysing the pros and cons of the recognition of punitive awards from a theoretical point of view, it presents and evaluates the judicial practice of the European (French, German, Greek, Italian, Spanish and Swiss) national courts and the potential impact of the 2005 Hague Choice-of-Court Convention and the Rome II Regulation. The paper ends with the final conclusions containing a critical evaluation of the present judicial practice and a proposal for a comprehensive legal test for the recognition of punitive damages.

Marc van Maanen en Alexander van Veen, Toepasselijk recht op documentair kredietverhoudingen onder het EVO en Rome I, p. 12-18. The English abstract reads:

A documentary credit contains a variety of contractual relationships between the applicant, one or more banks and the beneficiary. Usually the parties involved are domiciled in more than one country. Unsurprisingly, disputes over the governing law in documentary credit matters regularly arise. In a case where the letter of credit called for drafts drawn on the issuing bank, the Amsterdam Court of Appeal held that the legal basis for the claim of the Dutch beneficiary vis-à-vis *the Iraqi issuing bank is the obligation to pay under the letter of credit, not the debt embodied in the drafts. The Court of Appeal held that pursuant to Article 4(2) Rome Convention (Rome, 19 June 1980) the relationship is governed by the law of the country of the party effecting the characteristic performance. Even though the letter of credit was available at a Dutch advising bank, the Court of Appeal*

held that the characteristic performance was effected by the issuing bank and that consequently, Iraqi law applied. The Court of Appeal held that the limitation period under Iraqi law is 15 years. Therefore, the beneficiary's claim was not time barred. In similar cases, however, English courts have applied Article 4(5) Rome Convention instead. An English court would in this case probably consider that the credit was available in the Netherlands and hold that the relationship is more closely connected with the Netherlands than with Iraq. Therefore, an English court would probably apply Dutch law instead of Iraqi law and the beneficiary's claim would, consequently, have been time barred. In this article the judgment of the Court of Appeal is analysed and (some of) the differences between the Dutch and the English approaches are discussed. In addition, it is considered whether it is likely that the Rome I Regulation (EC No 593/2008) harmonises the different approaches.

Book Presentation: N.A. Baarsma, *The Europeanisation of International Family Law*, T.M.C. Asser Press, The Hague 2011 (p. 19-20)

Proposal for a Spanish International Cooperation (Civil Matters) Act

The Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*), adopted in 2000, required the Government to send to Parliament a bill of international legal co-operation in civil matters. Soon after, the private international law Department of the Universidad Autónoma of Madrid (UAM) drafted a law proposal on the subject intending to provide guidance to the government. More than a decade later, the legal imperative contained in the Civil Procedure Act has not yet been fulfilled. The original proposal needed to be updated and adapted to the existing normative framework. UAM Professors Miguel Virgós Soriano, Iván Heredia Cervantes, and Francisco José Garcimartín Alférez, together with the Spanish registrar and current president of the International Commission on Civil Status (CIEC) Spanish

section Juan María Díaz Fraile, have undertaken the task with a twofold purpose: to be a point of reference in the development of a future law, and to promote a critical and public debate on the topic. The Spanish *Boletín Oficial del Ministerio de Justicia* has just published their work, reproducing the last version of the Proposal and including a detailed explanatory memorandum which exposes the draft's essential features. The article can be downloaded from the website of the newly born *Spanish Forum of Private International Law*, the approval of a future International Legal Cooperation Act being one of the issues on which the Forum intends to focus its immediate activity.

Kiobel Supplemental Briefs

For those interested in summer beach reading, I wanted to note that all briefs in the *Kiobel* case, including the supplemental briefs on the extraterritoriality question, are being compiled by SCOTUSBlog and can be accessed here. For an interesting comparative examination of the case, Jodie Kirshner has an article entitled "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritorialism, Sovereignty, and the Alien Tort Statute." Here is the abstract:

> *The United States has policed the multinational effects of multinational corporations more aggressively than any other coun-try, but recent decisions under the Alien Tort Statute indicate that it is now backtracking. Europe, paradoxically, is moving in the other direction. Why do some countries retract extraterritorial jurisdiction while others step forward? The article traces the opposing trends through corporate human rights cases and suggests that the answer may lie in attitudes towards national sovereignty. The developments raise important questions regarding the position of the United States in a globalizing world and its role in upholding international norms.*

French Court Rules Gay Adoption Violates Public Policy

In two judgments of June 7th, 2012, the French Supreme Court for private and criminal matters (*Cour de cassation*) ruled that foreign judgments allowing adoption by a same sex couple were contrary to French public policy.

In the first case, the couple was composed of two men, one French and one Canadian, who had lived together in Montreal since 1997 and had welcomed in 2005 a three year old. They had obtained an adoption order from a Quebec court in 2009.

In the second case, the couple was composed of two men, one French and one British, who lived in the United Kingdom. In 2008, an English court had issued an adoption order for a 10 year old.

Both couples sought recognition of the relevant adoption judgment in France so that they could appear as the parents of the child on French registries. The lower courts had granted recognition. The *Cour de cassation* reversed, and ruled that the foreign judgments violated French public policy.

> *Attendu qu'est contraire à un principe essentiel du droit français de la filiation, la reconnaissance en France d'une décision étrangère dont la transcription sur les registres de l'état civil français, valant acte de naissance, emporte inscription d'un enfant comme né de deux parents du même sexe*

In substance, the Court held that a fundamental principle of French law prohibited that French registries provide that a child had parents of the same sex. An important factor was that the foreign judgments were perceived as cutting the filiation relationship between the child and his biological parents. This suggests that incomplete adoption would not raise the same issue.

The conciliation of these decisions with a previous one of 2010 which had recognised a foreign gay adoption will be an interesting exercise for French

scholars.

Second Issue of 2012's ICLQ

The second issue of the *International and Comparative Law Quarterly* for 2012 includes three articles exploring choice of law issues.

Zheng Sophia Tang (Leeds University), Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts — A Pragmatic Study

> *Chinese judicial practice demonstrates great diversity in enforcing exclusive jurisdiction clauses. In practice, the derogation effect of a valid foreign jurisdiction clause is frequently ignored by some Chinese courts. It may be argued that these Chinese courts fail to respect party autonomy and international comity. However, a close scrutiny shows that the effectiveness of an exclusive jurisdiction clause has close connections with the recognition and enforcement of judgments. If the judgment of the chosen court cannot be recognized and enforced in the request court by any means, the request court may take jurisdiction in breach of the jurisdiction clause in order to achieve justice. Chinese judicial practice demonstrates the inevitable influence of the narrow scope of the Chinese law in recognition and enforcement of foreign judgments. It is submitted that the Chinese courts do not zealously guard Chinese jurisdiction, or deliberately ignore party autonomy and international comity. Instead, the Chinese courts have considered the possibility of enforcement of judgments and the goal of justice. Applying the prima facie unreasonable decision test is the best the courts can do in the specific context of the Chinese law. The status quo cannot be improved simply by reforming Chinese jurisdiction rules in choice of court agreements. A comprehensive improvement of civil procedure law in both jurisdiction rules and recognition and enforcement of foreign judgments is needed.*

Jacob van de Velden (Gronigen University), The Cautious Lex Fori Approach to Foreign Judgments and Preclusion

> *If from the imperfect evidence of foreign law produced before it, or its misapprehension of the effect of that evidence, a mistake is made by an English court, it is much to be lamented, but the tribunal is free from blame. The mistake to be lamented presently is the High Court decision in Yukos Capital Sarl v OJSC Rosneft Oil Co that a Dutch judgment gave rise to an issue estoppel in English proceedings, precluding a party from disputing as a fact the partiality and dependence of the Russian judiciary. The decision was a mistake because on a proper construction of Dutch law the significance of the Dutch judgment was—if anything—evidential, not preclusive. The outcome is lamentable, because a party was unduly shut out from litigation by the application of English preclusion law to a foreign judgment that was not preclusive in the jurisdiction where it was originally given.*

Aude Fiorini (Dundee University), Habitual Residence and the New Born – A French Perspective

> *Where a pregnant woman travels and subsequently gives birth to a child abroad, should the left behind father be able to petition for the 'return' of his child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction? An affirmative answer would not only presuppose that the abduction of the child had been in breach of the father's actually exercised rights of custody, but would also depend on which country, if any, the child was habitually resident in immediately before the 'abduction'.*

The full table of content is available here.

Second Issue of 2012's Rivista di diritto internazionale privato e

processuale

The last issue of the leading Italian journal of private international law (*Rivista di diritto internazionale privato e processuale*) was just released.

It includes the following articles:

- F. Mosconi, C. Campiglio, *I matrimoni tra persone dello stesso sesso: livello «federale» e livello statale in Europa e negli Stati Uniti* (Same-Sex Marriages: ‘‘Federal’’ Level and State Level in Europe and in the United States)
- Z. Crespi Reghizzi, *«Contratto» e «illecito»: la qualificazione delle obbligazioni nel diritto internazionale privato dell’Unione europea* (‘‘Contract’’ and ‘‘Tort’’: The Characterization of Obligations in EU Private International Law)
- P. Franzina, *Sulla notifica degli atti giudiziari mediante la posta secondo la convenzione dell’Aja del 1965* (On Service by Mail of Judicial Documents under the 1965 Hague Convention)
- S. Marino, *La violazione dei diritti della personalita` nella cooperazione giudiziaria civile europea* (Infringment of Personality Rights in the European Civil Judicial Cooperation)

The full table of contents is available here.

Sources of French and Brazilian Private International Law Compared

A recent book comparing French and Brazilian laws (Droit français et droit brésilien – Perspectives nationales et comparées) includes developments on the sources of private international law in each system.

La diversité des sources du droit international privé

Rapport français : Danièle Alexandre
Rapport brésilien : Carmen Tibúrcio
Réponses au questionnaire : Carmen Tibúrcio
Commentaires et débats : Gustavo Vieira da Costa Cerqueira et Luiz Fernando Kuyven
Grille d'analyse

The table of contents of the book is available here. More details can be found here.

Centre for Private International Law at the University of Aberdeen – Research Seminar

On **26 June 2012**, the Centre for Private International Law at the University of Aberdeen, Scotland, UK will be hosting a Research Seminar with three invited speakers – Professor Stefania Bariatti from Milan University in Italy; Dr Albert Font i Segura, Professor Titular de Universidad, Pompeu Fabra University, Barcelona in Spain; and Ms Burcu Yuksel from the University of Ankara in Turkey.

The event will take place in the Old Aberdeen campus, Aberdeen, AB24 3UB, Law Building, Taylor A 31 (30) between 12 and 2pm.

For more information see http://www.abdn.ac.uk/law/private-international-law/events.shtml .

Everyone welcome! If planning to attend, please e-mail carol.davies@abdn.ac.uk.

ERA Conference on Cross-Border Successions

On 22 and 23 November 2012 the Academy of European Law (ERA) will host a bilingual (English/German) conference in Trier on the new regulation on cross-border successions. The conference is set up for practitioners (lawyers, notaries, ministry officials) and academics. Key topics are:

- Scope of the instrument
- Jurisdiction and applicable law
- Recognition and enforcement of decisions
- Authentic documents in matters of succession
- Creation of a European Certificate of Succession

The official inivitation reads as follows:

> *On 7 June 2012, the Regulation aimed at simplifying the settlement of international successions was adopted by the EU's Justice Council. This new Regulation will ease the legal burden when a family member with property in another EU country passes away.*
>
> *Under the Regulation, there will be a single criterion for determining both the jurisdiction and the law applicable to a cross-border succession: the deceased's habitual place of residence. People living abroad will, however, be able to opt for the law of their country of nationality to apply to the entirety of their succession. The Regulation will also permit citizens to plan their succession in advance in more legal certainty. This new instrument paves the way for the European Certificate of Succession which will allow people to prove that they are heirs or administrators without further formalities throughout the EU.*
>
> *The conference will provide an in-depth discussion of the most topical issues regarding successions and wills in a European context.*

More information is available at the ERA's website.

Fox on Securities Class Actions Against Foreign Issuers

Merritt B. Fox, who is Michael E. Patterson Professor of Law at Columbia Law School, has published Securities Class Actions Against Foreign Issuers in the last issue of the *Stanford Law Review*.

> *This Article addresses the fundamental question of whether, as a matter of good policy, it is ever appropriate that a foreign issuer be subject to the U.S. fraud-on-the-market private damages class action liability regime, and, if so, by what kinds of claimants and under what circumstances. The bulk of payouts under the U.S. securities laws arise out of fraud-on-the-market class actions—actions against issuers on behalf of secondary market purchasers of their shares for trading losses suffered as a result of issuer misstatements in violation of Rule 10b-5. In the first decade of this century, foreign issuers became frequent targets of such actions, with some of these suits yielding among the very largest payouts in securities law history.*
>
> *The law determining the reach of the U.S. fraud-on-the-market liability regime against foreign issuers has since been thrown into flux. The Supreme Court's recent decision in the Morrison case adopted an entirely new approach for determining the reach of Rule 10b-5 in situations with transnational features. This new approach focused on whether the purchase was of a security listed on a U.S. exchange or occurred in the United States, in contrast to the previous focus on whether either conduct or effects of sufficient importance occurred in the United States. In almost immediate response, Congress, in the Dodd-Frank Act, reversed the Court's decision with respect to actions by the government and mandated that the SEC prepare a report concerning the desirability of doing the same with respect to private damages actions.*
>
> *This Article goes back to first principles to look at the basic policy concerns that are implicated by the reach of fraud-on-the-market class actions for damages, and to determine who, under a variety of circumstances relating to the*

nationality of the purchasers, the place of the trade, and the place of the issuer's misconduct, is ultimately affected by imposition of this liability regime on foreign issuers. The resulting analysis suggests a simple, clear rule likely to both maximize U.S. economic welfare and, by also promoting global economic welfare, foster good foreign relations. The U.S. fraud-on-the-market class action liability regime should not as a general matter be imposed upon any genuinely foreign issuer, even where the claimant is a U.S. investor purchasing shares in a U.S. market or where the issuer engages in significant conduct in the United States relating to the misstatement. The only exception would be a foreign issuer that has agreed, as a form of bonding, to be subject to the U.S. regime.

This Article then charts a practical path to reform based on this simple rule. It assesses the attractions of, and problems with, the two competing alternatives—using the Morrison rule and returning to the conduct/effects test—and explores the possibilities for reform through the courts, SEC rulemaking, and legislation.