

# Book: Pocar - Viarengo - Villata (Eds.), Recasting Brussels I

✖ The Italian publishing house CEDAM has published a new volume on the review of the Brussels I regulation: “Recasting Brussels I”. The book, edited by *Fausto Pocar*, *Ilaria Viarengo* and *Francesca Clara Villata* (all from the Univ. of Milan) includes twenty-five papers divided into five parts, devoted to the scope of application (I), rules on jurisdiction (II), choice-of-court agreements (III), coordination of proceedings (IV) and recognition and enforcement of judgments (V).

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- *Manlio Frigo*, Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast Proposal of the Brussels I Regulation;
- *Marco De Cristofaro*, The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense.

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Title: Recasting Brussels I, edited by *F. Pocar, I. Viarengo* and *F.C. Villata*, CEDAM (Series: Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale – Volume 76), Padova, 2012, XXIV – 382 pages.

ISBN 9788813314699. Price: EUR 32,50. Available at CEDAM.

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

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## Issue      2012.2      Netherlands Internationaal Privaatrecht

The second issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition of (Dutch) Mass Settlement in Germany, the CLIP Principles, the European Patent Court and case note on Brussels I and the Unknown Address (Lindner):

Axel Halfmeier, Recognition of a WCAM settlement in Germany, p. 176-184. The abstract reads:

*The Dutch ‘Wet Collectieve Afwikkeling Massaschade’(WCAM) [Collective Settlements Act] has emerged as a noteworthy model in the context of the European discussion on collective redress procedures. It provides an opportunity to settle mass claims in what appears to be an efficient procedure. As the WCAM has been used in important transnational cases, this article looks at questions of*

*jurisdiction and the recognition of these court-approved settlements under the Brussels Regulation. It is argued that because of substantial participation by the courts, such declarations are to be treated as 'judgments' in the sense of the Brussels Regulation and thus are objects of recognition in all EU Member States. Written from the perspective of the German legal system, the article also takes the position that the opt-out system inherent in the WCAM procedure does not violate the German ordre public, but is compatible with fair trial principles under the German Constitution as well as under the European Human Rights Convention. The WCAM therefore appears as an attractive model for the future reform of collective proceedings on the European level.*

Mireille van Eechoud & Annette Kur, Internationaal privaatrecht in intellectuele eigendomszaken – de 'CLIP' Principles, p. 185-192. The English abstract reads:

*The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) presented its Principles in November 2011 to an international group of legal scholars, judges, and lawyers from commercial practice, governments and international organisations. This article sets out the objectives and principal characteristics of the CLIP Principles. The Principles are informed by instruments of European private international law, but nonetheless differ in some important respects from the rules of the Brussels I Regulation on jurisdiction and the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations. This is especially so in situations where adherence to a strict territorial approach creates significant problems with the efficient adjudication of disputes over intellectual property rights or undermines legal certainty. The most notable differences are discussed below.*

M.C.A. Kant, A specialised Patent Court for Europe? An analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 concerning the establishment of a European and Community Patents Court and a proposal for an alternative solution, p. 193-201. The abstract reads:

*Attempts have been made for decades to establish both a Community patent and a centralised European court which would have exclusive jurisdiction in this matter. However, none of these attempts has ever been fully successful. In its Opinion 1/09 from 8 March 2011, the Court of Justice of the European Union (hereinafter CJEU) held, inter alia, that the establishment of a unified patent litigation system as planned in the draft agreement on the European and Community Patents Court*

would be in breach of the rules of the EU Treaty and the FEU Treaty. However, it is argued in this paper that also in view of Opinion 1/09 the creation of a unified court has not become per se unattainable. After clarifying in whose interest effective patent protection in Europe should primarily be formed, different constellations of judicial systems shall be discussed. The author will deliver his own proposal for a two-step approach in structure and time, comprising, in a first step, the creation of a specialized chamber of the CJEU for patent litigation, and in a second step the creation of a central EU Court for all EU intellectual property litigation. The paper will finish with an analysis of how the requirements for a unified patent litigation system (indirectly) set up by the CJEU in its Opinion 1/09 could be taken into consideration, and with some further deliberations on effective patent protection and enforcement.

Jochem Vlek, *De EEX-Vo en onbekende woonplaats van de verweerder*. Hof van Justitie EU 17 november 2011, zaak C-327/10 (*Lindner*) (Case note), p. 202-206. The English abstract reads:

*The author reviews the decision of the ECJ in the case of Hypotecni banka/Udo Mike Lindner in which the ECJ ruled on the application of the jurisdictional rules of the Brussels I Regulation in the case of a consumer/defendant with an unknown domicile. Several issues are highlighted: first, the existence of an international element in the case of a defendant with unknown domicile whose nationality differs from the state of the court seized; secondly, the application of Article 4(1) Brussels I Regulation if the domicile of the defendant is unknown and (since the ECJ does not apply Article 4(1) in this regard) the interpretation of Article 16(2) Brussels I Regulation; thirdly, the requirement that the rights of the defence are observed, as also laid down in Article 47 of the Charter of Fundamental Rights of the EU. Additionally, the article briefly mentions the subsequent case of G/Cornelius de Visser, in which a German Court resorted to public notice under national law of the document instituting the proceedings in the case of a defendant with an unknown address.*

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# 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)

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# **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 cooperation 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.

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## 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 country, 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.*



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# 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.

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## 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](#).

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## **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* (Infringement of Personality Rights in the European Civil Judicial Cooperation)

The full table of contents is available [here](#).

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## 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](#).

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# **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](mailto:carol.davies@abdn.ac.uk).