# Second Issue of 2012's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains four articles and several casenotes. A table of content is accessible here.

In the first article, Thomas Clay, who is a professor at Versailles Saint Quentin University, offers a survey of the French law on arbitration *(« Liberté, Égalité, Efficacité » : La devise du nouveau droit français de l'arbitrage – Commentaire article par article*). The English abstract reads:

> *It was the long-awaited reform. The arbitration regulation has just been amended and modernized, more than thirty years after the previous regime came into force. This has been achieved by different means : by rewriting certain unclear or outdated sections, by implementing case law-developed solutions already being applied in arbitral proceedings and, finally, by promoting new (sometimes avantgardist) solutions. All the above has resulted in the enactement of a real new Arbitration act.*
>
> *Therefore, an article-by-article review seems to be a suitable form for an accurate and comprehensive study. This study consists of a comparison between the replaced articles and the new ones, a an analysis of the first commentaries on the reform and an interpretation of the case law following the enactment of the new regulation.*
>
> *The proposed analysis also evidences the main principles governing the new French law of arbitration. Surprisingly they are in fact rooted in the foundations, not only of private law, but also on the principles of our Republic since they apply (almost perfectly), our Republican maxim, except that brotherhood is substituted by efficiency (the later being more representative).*
>
> *In conclusion, it is without any doubt a successful text and the long wait was worth it. However it is useful to explain the circumstances of its endless development, which has experienced many disruptions. The article below starts by describing such circumstances.*

In the second article, Olivier Cachard, who is a professor of law at the university of Nancy, present the recently adopted Rotterdam Rules (*La Convention des Nations Unies sur le contrat de transport international de marchandises effectué entièrement ou partiellement par mer (Règles de Rotterdam)*).

> *The Rotterdam Rules, that were signed on 23th september 2009, were recently ratified by the Kingdom of Spain, while the maritime community is now expecting the ratification by the United States of America. The purpose of this Convention is to address the new realities of transportation by sea, going further than the antique Hague Rules. The scope of the Convention is larger, encompassing door-to-door transportation. Although the Convention dedicates substantial provisions to transportation documents, it is not limited to contracts where a bill of lading is issued. The new uniform regime is built on the traditional case law, but takes into consideration containers and tends to establish a new balance between carriers and shippers. The provisions dedicated to jurisdiction and arbitration deserve more criticism and fortunately are under a opt in regime.*

In the third article, Thomas Schultz, who lectures at the University of Geneva, and David Holloway, who is barrister at Number 5 Chambers in London, provide an account of the emergence and development of comity in the history of private international law (*Retour sur la comity . – Deuxième partie : La comity dans l'histoire du droit international privé*). The English abstract reads:

> *In a series of two articles, published in the previous and the current issue of the Clunet, the authors provide an account of the emergence and development of comity in the history of private international law. In the previous article, the authors have reviewed the forces that led to strict territoriality in the 17th century and how comity became needed to mitigate it. In the current article, the authors discuss the historical development of the concept of comity in the context of the history of private international law generally. An examination of five issues that marked the history of comity seems to allow a global yet fragmented understanding of the concept: the idea of a natural or universal law of conflicts ; the theoretical building blocks of the modern interstate system; the normative character of a concept created specifically to avoid constraining sovereigns ; reciprocity as a principle of international collaboration; and the international dimension of private international law. The most critical finding of*

*the study is this: the history of the comity principle negates the ideas that the very nature of comity requires bilateral reciprocity and that it is a strictly discretionary and internal principle.*

Valérie Parisot, who lectures at the university of Rouen, discusses the implications of recent cases of the ECJ on choice of law in employment contracts (*Vers une cohérence verticale des textes communautaires en droit du travail ? Réflexion autour des arrêts* Heiko Koelzsch *et* Jan Voogsgeerd *de la Cour de justice*).

*The multiplicity of Community legal provisions leads quite naturally to think about their coherence, especially as far as a uniform interpretation of common terminologies is at stake. Two recent judgments of the European Court of justice deal precisely with this matter. They decide that the ECJ's case-law regarding the interpretation of the connecting factors of Article 5 (1) of the Brussels Convention of 27 September 1968 that are used to determine jurisdiction in matters relating to individual contracts of employment remains relevant to analyze the connecting factors of Article 6 (2) of the Rome Convention of 19 June 1980 and of Article 8 (2) of the Rome Regulation of 17 June 2008, concerning the law applicable to these contracts.*

*Article 6 (2) (a) of the Rome Convention must therefore be understood as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the essential part of his obligations towards his employer (Heiko Koelzsch and Jan Voogsgeerd cases). Furthermore, article 6 (2) (b) of the Rome Convention, which makes subsidiary reference to the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment. The possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of that provision. Finally, the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a « place of*

*business » according to the same provision, if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking (Jan Voogsgeerd case).*

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# CESL Conference in Tübingen, Germany

On 15 and 16 June 2012, the Publisher and Advisory Board of the "Zeitschrift für Gemeinschaftsprivatrecht – Journal of Common Private Law" (GPR) will host a conference on the Proposal for a Common European Sales Law at Tübingen University. More information (in German) is available here and here .

The programme reads as follows:

**Freitag, 15. Juni 2012** (Friday, 15 June 2012)

13:30 **Grußwort und Einführung**

- *Prof. Dr. Heinz-Dieter Assmann*, Vice President of the University of Tübingen
- *Prof. Dr. Jörg Kinzig,* Vice Dean of the Law School at the University of Tübingen
- *Prof. Dr. Martin Gebauer*, University of Tübingen

**I. Grundlagen und Anwendungsbereich**

14:00 – 14:30 **Ein europäisches Kaufrecht für grenzübergreifende Kaufverträge – seine Bedeutung auf offenen Märkten**, *Prof. Dr. Jürgen Basedow*, Max Plack Institute for Comparative and International Private Law, Hamburg

14:30 – 15:00 **Überschießende Anwendung des EU-Kaufrechts – mitgliedstaatliche Optionen und Parteiautonomie ,** *Prof. Dr. Boris Schinkels*, University of Greifswald

15:00 – 15:30 **Diskussion** (Discussion), Chair: *Prof. Dr. Martin Gebauer*, University of Tübingen

15:30 – 16:00 **Kaffee-Pause** (Coffee break)

**II. Die Wahl des EU-Kaufrechts und ihre kollisionsrechtliche Verortung**

16:00 – 16:30 **Rechtsgrundlage des künftigen EU-Kaufrechts und kollisionsrechtliche Einordnung seiner Wahl**, *Dr. Karl-Philipp Wojcik*, Brussels

16:30 – 17:00 **Dogmatische Konstruktion der Einwahl in das EU-Kaufrecht (2., 28. oder integriertes Regime) und die praktischen Folgen,** *Prof. Dr. Matthias Lehmann*, University of Halle

17:00 – 17:30 **Die aufgeklärte Entscheidung: Modalitäten der Einwahl und der kollisionsrechtliche Verbraucherschutz**, *Dr. Christoph Busch*, University of Osnabrück

17:30 – 18:30 Uhr **Diskussion** (Discussion), Chair: *Prof. Dr. Michael Stürner*, University of Frankfurt (Oder)

20:00 Uhr **Abendessen** (Dinner)

**Samstag, 16. Juni 2012** (Saturday, 6 June 2012)

**III. Maßstäbe der Lückenfüllung**

9:00 – 9:30 **Interne und externe Lücken – die Rolle des EuGH und der mitgliedstaatlichen Gerichte,** *Prof. Dr. Beate Gsell,* University of Munich

9:30 – 10:00 **Externe Lücken, allgemeines Kollisionsrecht und die Rolle der Parteiautonomie, insbesondere beim Verbrauchervertrag**, *Prof. Dr. Dennis Solomon*, University oc Passau

10:00 – 10:30 **Diskussion** (Discussion), Chair: Prof. Dr. Peter Jung, University of Basel

10:30 – 11:00 **Kaffee-Pause** (Coffee break)

**IV. Drittstaatensachverhalte und Perspektiven der praktischen Rezeption des EU-Kaufrechts**

11:00 – 11:30 **Der Drittstaatensachverhalt und das EU-Kaufrecht: Perspektiven mitglied- wie drittstaatlicher Gerichte und die Wahrung des internationalen Entscheidungseinklangs**, *Prof. Dr. Stefan Leible*, University of Bayreuth

11:30 – 12:00 **EU-Kaufrecht und CISG – Konkurrenz, Gemeinsamkeiten, Unterschiede der zu erwartenden Akzeptanz in der Rechtspraxis,** *Prof. Dr. Friedrich Graf von Westphalen*, Cologne

12:00 – 12:30 **Diskussion** (Discussion), Chair: Prof. Dr. Matthias Lehmann, University of Halle

13:00 **Ende der Tagung** (End of conference)

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# Conference: New Challenges in International Distribution (Venice, 18-19 May 2012)

On 18-19 May 2012, the International Distribution Institute (IDI) will hold its annual conference on international distribution law in Venice: "New Challenges in International Distribution – Distribution contracts with Department Stores and Sales through Internet". Here's an excerpt of the event's presentation (programme in .pdf):

> *The conference is addressed to lawyers and businessmen involved in negotiating, drafting and managing international distribution contracts (agency, distributorship, franchising, etc.) and will deal with a number of topical issues which justify an in-depth discussion between the participants and qualified*

*experts in this field. The conference is divided into a main session (on Friday 18 May) and three parallel workshops on specific issues chosen by IDI in collaboration with its members (on Saturday 19 May, morning).*

*Friday 18 May*

- *Morning Session (9h00 – 13h00): Negotiating agreements for distribution within department stores (concessions, corners, etc.);*
- *Afternoon Session (14h30 – 19h00): Selling through the Internet without jeopardizing the existing network and the supplier's corporate image.*

*Saturday 19 May*

- *Workshop 1 (9h00 – 13h00): Critical issues arising in case of termination of a master franchise agreement.*
- *Workshop 2 (9h00 – 13h00): Drafting sales contracts/general conditions for distributors: would the European Common Sales Law be an appropriate tool?*
- *Workshop 3 (9h00 – 13h00): The notion of commercial agency and its borderlines. Are there alternative solutions with other types of contracts?*

For the full list of speakers and further information (including fees), see the conference programme and IDI's website.

*(Many thanks to Prof. Fabrizio Marrella for the tip-off)*

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# Reflections of Legal Pluralism in Multicultural Settings (article)

Prof. Zamora Cabot and Victoria Camarero (University of Castellón), have just published a new, co-authored article in the series Working Papers "El Tiempo de

los Derechos" (ISSN: 1989-8797).

Focusing on the USA, Canada and the United Kingdom, the authors of the paper have carried out an extensive, thoroughly documented initial survey (published elsewhere) of the relationship between legal pluralism and multiculturality. Along this line, in the present study they offer some introductory reflections to frame the complex and multifaceted world of legal pluralism, highlighting the religious factor (especially Muslims and the Sharia). They then proceed with two sections devoted to analyze the existence of elements of plurality, both in the domestic substantive law and in the systems of private international law of the abovementioned jurisdictions. The authors conclude that those elements are far from being enough to address the challenges arising from the presence of Muslim minorities in Western European, particularly against the current background of economic crisis.

Click here for the whole text.

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# Luxembourg Conference on Exequatur in the Grande Region

On May 21st, I will present the preliminary results of an empirical study conducted by the university of Luxembourg on Exequatur in Luxembourg and surrounding regions of France, Belgium and Germany. A team of researchers of the university has collected data on judgments rendered by courts of Arlon, Trier, Saarbrücken, Lorraine and Luxembourg.

The presentation will take place at lunch time in French. More information is available here.

# Competition in International Sales Law – Perspectives on Choice

On Friday, 15 June 2012, the Maastricht European Private Law Institute (M-EPLI) will host a one-day roundtable conference at the Feestzaal of Maastricht Law Faculty.

From the official announcement:

> *This roundtable is divided into three panels, distinguished on the basis of perspective. Contributions in the first panel offer an institutional perspective on the choices available. A second panel focuses on competition between the instruments and how parties may be expected to choose. The third sheds some light on the similarities and differences between the instruments, suggesting criteria to evaluate these instruments, as well as views on what the best instrument is. Speakers are drawn from academia, legal practice, as well as commercial interests.*

Attendance is free, but access is limited. Admissions can be submitted until 8 June 2012 by email to mepli@maastrichtuniversity.nl.

Further information can be found here. The programm reads as follows:

10.00-10.25 **Registration and coffee**

10.25-10.30 **Welcome address**, *Professor Jan Smits* (Maastricht)

**Panel 1 – A view from the institutions**

10.30-11.00 **An arbitrator's perspective,** *Professor Christina Ramberg* (Stockholm)

11.00-11.30 t.b.a., *Professor Jan Smits* (Maastricht)

11.30-12.00 **Discussion**

12.00-13.30 **Lunch**

**Panel 2 – How parties (ought to) choose**

13.30-13.50 **A psychology of choice of laws**, *Dr Gary Low* (Maastricht)

13.50-14.10 **Choice of jurisdiction**, *Prof Jan Dalhuisen* (King's College London)

14.10-14.30 **A commercial perspective**, *Mr Eric Poelman* (Philips CE)

14.30-15.00 **Discussion**

15.00-15.20 **Coffee break**

**Panel 3 – Comparing choices**

15.20-15.40 **Formation/Incorporation**, *Dr Sonja Kruisinga* (Utrecht)

15.40-16.00 **Interpretation of Contracts**, *Dr Nicole Kornet* (Maastricht)

16.00-16.20 **Remedies for Breach**, *Dr Olaf Meyer* (Bremen)

16.20 – 16.50 **Discussion**

16.50-17.00 **Closing remarks**

17.00 **Reception**

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# Rome II – Parliament Calls for Action on Defamation and Privacy

Yesterday (10 May), the European Parliament adopted an own-initiative (non-legislative) resolution on the law applicable to non-contractual obligations (Rome II) calling for action in the area of claims for violations of privacy and rights relating to personality, including defamation. As is well known (and long debated on this site – see

https://conflictoflaws.de/2010/rome-ii-and-defamation-online-symposium/), such claims are currently excluded from the material scope of the Rome II Regulation by Art. 1(2)(g).

In the key paragraphs of the Resolution (rapporteur: Cecilia Wikström, taking over from Diana Wallis, one of the key proponents of the original Regulation), the Parliament:

> *1. Requests the Commission to submit, on the basis of point (c) of Article 81(2) of the Treaty on the Functioning of the European Union, a proposal designed to add to the Rome II Regulation a provision to govern the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, following the detailed recommendations set out in the annex hereto;*
>
> *2. Further requests the Commission to submit, on the basis of point (d) of Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for the creation of a centre for the voluntary settlement of cross-border disputes arising out of violations of privacy and rights relating to personality, including defamation, by way of alternative dispute resolution; …*

It remains to be seen how the Commission, with limited resources in the civil justice area and an already full in-tray, will respond.

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# First Issue of 2012's Journal of Private International Law

The last issue of the *Journal of Private International Law* was just released. It includes the following articles:

Review of the Brussels I Regulation: A Comment from the Perspectives of Non-

Member States (Third States), by Koji Takahashi

*The review of the Brussels I Regulation is in progress. Quite naturally, the discussions have been centred on the viewpoints of the Member States. Yet, both the current Regulation and the Commission's proposal have significant implications for non-Member States. In fact, stakes for non-Member States are higher in Brussels I than in Rome I or II. This analysis evaluates the current regime and the proposed reform from an angle of non-Member States, focusing on three issues of particular relevance to the interests or positions of such States. They are (1) recognition and enforcement of judgments founded on exorbitant bases of jurisdiction (2) denial of "effet réflexe" and (3) lis pendens between the courts of a Member State and a non-Member State. The analysis reveals that views from inside and outside the Union do not necessarily diverge on the desirable contents of reform but may differ on the priorities of reform. While the EU is entitled to construct its internal legal regime in whatever manner it sees fit, to the extent there are implications for the outside world, it is hoped that due consideration will be given to views from outside.*

Recognition and Enforcement of Judgments in Carriage of Goods by Road Matters in the European Union, by Paolo Mariani

*This article discusses the relationship between Brussels I Regulation and The Convention on the Contract for the International Carriage of goods by road (CMR). The Court of Justice in TNT Express Nederland decision (case C-533/08) confirms the international specialised conventions' primacy on the Regulation, provided the respect of the principles underlying judicial cooperation in civil and commercial matters in the European Union. The Court also acknowledges its lack of jurisdiction to interpret the CMR.*

*TNT Express Nederland contributes in the elaboration of the EU principles underlying judicial cooperation. Unfortunately, this contribution risks being useless for national courts since the decision fails to answer the question as to how CMR provisions should be applied lacking the compliance with the European standard.*

*The article concludes by supporting the Court of Justice power to provide the interpretation of the Brussels I Regulation in the context of the application of Article 31 CMR in order to enable the national court to assess whether the CMR*

*can be applied in the European Union.*

Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974, by Christopher Bisping

*This article takes a fresh look at the role statutes play within the conflict of laws. The author argues that statutes can only ever apply within the framework of conflict-of-laws rules. Parliament's intention must be taken to subject legislation to the conflict-of-laws system. The opposing view would commit the mistake of falling into the 'statutist trap' and overload statutes with meaning, which they do not have. The author uses the Consumer Credit Act 1974 and the House of Lord's decision in OFT v Lloyds to illustrate the argument.*

Preliminary Questions in EU Private International Law, by Susanne Goessl

*Whenever a rule contains a legal concept, such as "matrimony", rarely are the legal requirements for the concept clarified in the same rule. Determining the meaning of such a concept (preliminary question) is often necessary to resolve the principal question. In an international context, one can apply the lex fori's or the lex causae's PIL to determine the law applicable to the preliminary question. This article analyses which of those two approaches is preferable in the PIL of the EU.*

*Traditional advantages of the lex causae approach loose its cogency in the European context, esp. the deterrence of forum shopping, the presumption of the closer connection and the international harmony. On the other hand, many traditional and new reasons support the lex fori approach, eg national harmony, foreseeability, practicability and further integration.*

*The article comes to the conclusion that, no matter whether the concept occurs in a PIL or a substantive rule the lex fori approach is the better solution. Only in limited cases with an urgent need of international harmony the lex causae approach should prevail.*

Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, by Liang Jieying

*The "Law on the Application of Laws to Foreign-Related Civil Relationships of the People's Republic of China" became effective on 1 April 2011. This is the first statute in China that specifically addresses private international law issues. The party autonomy principle is positioned in the first chapter as one of the "General Provisions". This article provides a critical commentary on the relevant rules in the new law concerning the restrictions on party autonomy in contractual choice of law. The author investigates how the new Codification responds to the problems existing in the previous legal rules and judicial practice, and argues that, although the Codification has provided several rules to resolve some previously unclear questions, it fails to address comprehensively the more critical issues relating to the operation of the party autonomy principle.*

## The Law Applicable to Intra-Family Torts, by Elena Pineau

*Courts increasingly face at the domestic level cases of intra-family torts. Two kinds of answers are provided to the question whether there is a right to reparation and, if so, to what extent: either the answer is given by the same family law rules which are infringed; or resort is had to the general system of tort law as a default solution. At the conflict rules' level, European judges dealing with intra-family torts are confronted with an interesting problem since the Rome II Regulation expressly excludes damages arising out of family relationships out of its scope of application. This being so, the case is posed which are the possible solutions. Two options have been considered: either applying the same law which governs the 'family duty' allegedly infringed, ie, the underlying lex causae; or considering whether it would be reasonable to extend the application of the Rome II Regulation to these cases. It is contended that the first option is to be preferred.*

## Unmarried Fathers and Child Abduction in European Union Law, by Pilar Blanco

*The treatment that the laws of some Member States of the European Union give to the custody rights of unmarried fathers should be regarded as contrary to the European Convention of Human Rights and the Charter of Fundamental Rights, insofar as the unmarried father who is responsible for the child cannot prevent the removal of said child to another State because of the absence of automatic acquisition of rights of custody under national law. Although the*

*Charter only applies to Member States expressly when they are implementing European Union law, this paper has argued for a broad construction of a uniform EU law meaning of "custody rights" under Brussels IIa, including the inchoate custody rights of unmarried fathers, influenced by a desire to avoid unnecessary and disproportionate restrictions on the right to non-discrimination on the grounds of sex in the application of the right to object to a child abduction by fathers compared to mothers.*

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# Save the Date – Journal of Private International Law Conference 2013

**The 5th Journal of Private International Law Conference will take place in Madrid from 12th – 13th September 2013.**

A call for papers as well as the conference programme will be published later this year.

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# First Issue of 2012's Belgian PIL E-Journal

The first issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2012 was just released.

The journal essentially reports on European and Belgian cases addressing issues

of private international law. It includes an article by Patrick Wautelet (Liège University) presenting three recent developments in choice of law in matrimonial property matters (*Les règimes matrimoniaux en droit international privé – Autour de trois questions d'actualité*).