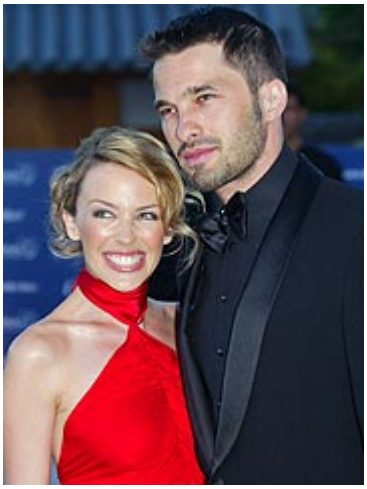
ECJ Rules in E-Date Advertising and Martinez

The Grand Chamber of the European Court of Justice has delivered today its joint judgment in E-Date Advertising and Martinez (Cases C-509/09 and C-161/10). We had reported earlier on the Advocate General's opinion.



In these cases, the ECJ was asked two important questions.

Internet and Infringement of Personality Rights

The first question was concerned with the interpretation of Article 5.3 of the Brussels I Regulation in cases of alleged infringement of personality rights by means of content placed online on an internet website. Article 5.3 grants jurisdiction to the court of the place where the harmful event occurred or may occur. In *Fiona Shevill*, the Court had held that victims of defamation by means of newspapers could sue the publisher either for the whole harm suffered in the country where the publisher is established, or in countries where the newspaper was distributed, but only for compensation of the harm suffered in the relevant country.

Were these criteria to be adapted in cases where internet was the media used by the alleged tortfeasor? The Court ruled:

> *48 The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have*

on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.

49 The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.

The Court concluded:

1. Article 5(3) 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 must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

E-Commerce Directive and Choice of Law

The German supreme court for civil matters had also interrogated the ECJ on the impact of the 2000 E-Commerce Directive on choice of law. Although Article 1-4 of the Directive provides that the Directive "does not establish additional rules on private international law", Article 3-2 provides:

2. Member States may not, for reasons falling within the coordinated field,

restrict the freedom to provide information society services from another Member State.

It has therefore long been wondered whether Art. 3-2 did in fact establish a choice of law rule providing for the application of the law of the service provider (ie in defamation cases the law of the publisher) or, at the very least, whether Article 3-2 imposes on Member states to amend their choice of law rules insofar as they would stand against the European freedom of service.

The Court ruled that Article 3.2 does not create a choice of law rule:

61 In that regard, it must be noted, firstly, that an interpretation of the internal market rule enshrined in Article 3(1) of the Directive as meaning that it leads to the application of the substantive law in force in the Member State of establishment does not determine its classification as a rule of private international law. That paragraph principally imposes on Member States the obligation to ensure that the information society services provided by a service provider established on their territory comply with the national provisions applicable in the Member States in question which fall within the coordinated field. The imposition of such an obligation is not in the nature of a conflict-of-laws rule designed to resolve a specific conflict between several laws which may be applicable.

62 Secondly, Article 3(2) of the Directive prohibits Member States from restricting, for reasons falling within the coordinated field, the freedom to provide information society services from another Member State. By contrast, it is apparent from Article 1(4) of the Directive, read in the light of recital 23 in the preamble thereto, that host Member States are in principle free to designate, pursuant to their private international law, the substantive rules which are applicable so long as this does not result in a restriction of the freedom to provide electronic commerce services.

63 It follows that Article 3(2) of the Directive does not require transposition in the form of a specific conflict-of-laws rule.

Yet, the Court ruled private international law should not stand in the way of the European freedom of service of e-commerce service providers:

66 In relation to the mechanism provided for by Article 3 of the Directive, it must be held that the fact of making electronic commerce services subject to the legal system of the Member State in which their providers are established pursuant to Article 3(1) does not allow the free movement of services to be fully guaranteed if the service providers must ultimately comply, in the host Member State, with stricter requirements than those applicable to them in the Member State in which they are established.

67 It follows that Article 3 of the Directive precludes, subject to derogations authorised in accordance with the conditions set out in Article 3(4), a provider of an electronic commerce service from being made subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established.

The Court concluded:

2. Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), must be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule. Nevertheless, in relation to the coordinated field, Member States must ensure that, subject to the derogations authorised in accordance with the conditions set out in Article 3(4) of Directive 2000/31, the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.

Krombach Sentenced Again to 15

years

On October 22nd, 2011, Doctor Dieter Krombach, 76, was sentenced to 15 years in prison by a French criminal court for killing Kalinka Bamberski in 1982. Again. A French criminal court had already sentenced Krombach in 1995 to 15 years. But he resided in Germany (where the alleged offence was also committed), and German authorities, after investigating the case, had dismissed the charges in the 1980s.

Krombach had thus not appeared before the French court in the first proceedings. French criminal procedure would not, at the time, allow his lawyer to represent him. After he was not only found guilty of killing the child, but also ordered to pay damages, he had sued France in Strasbourg, where France had been found to have violated Article 6 of the European Convention of Human Rights. When Andre Bamberski sought to enforce the civil judgment in Germany, the German court referred the case to Luxembourg. The European Court of Justice held that the violation of Article 6 was a ground for denying enforcement of the French judgment in Germany in one of its most important interpretative rulings of the Brussels Convention.

Krombach was thus protected by the combination of the border between Germany and France and the unfairness of French criminal procedure.

We have reported how, two years ago, Mr Bamberski decided to resolve the issue of the border by having Krombach kidnapped in Germany and delivered to French judicial authorities. Despite protests of German authorities, France decided to try Dr. Krombach again. The result is Saturday’s verdict.

So much for mutual trust. So much for the European single area of justice.

Anuario Español de Derecho Internacional Privado, vol. X (2010)

A new volume of the *Anuario Español de Derecho Internacional Privado* has just been released. It includes a number of unique studies, most of which are in-depth developments of the ideas briefly presented both by Spanish and foreign scholars at the International Seminar on Private International Law, held last March at the Universidad Complutense de Madrid; that is why the volume is as rich as the seminar was. Patricia Orejudo, secretary of the magazine since 2010, has kindly provided the abstract of each single publication:

JACQUET, J.M.: "La aplicación de las leyes de policía en materia de contratos internacionales", pp. 35–48.

This article analyses from a current perspective some of the issues raised by the application of overriding mandatory provisions, with a special emphasis on questions of EU Law. On the one hand, the author identifies the practical obstacles which hinder the effective application of overriding mandatory provisions, either by means of a control to be carried out prior to their application, or by means of jurisdictional mechanisms intended to obstruct such application, as for example choice of court agreements and arbitration agreements. On the other hand, the author points out possible solutions –both material and procedural– that can be used to overcome the obstacles previously detected, in order to guarantee that the imperative character of overriding mandatory provisions is respected and, consequently, that such provisions are effectively applied to all the cases falling within their scope of application.

BERGÉ, J–S.: "El Derecho europeo ante la fragmentación del Derecho aplicable a las relaciones internacionales: la mirada del internacional–privatista", pp. 49–68.

When we evoke the question of the European law (European Union) confronted with the fragmentation of the choice of law to the international relations, by what law do we speak? For the private lawyer, two answers are

outlined. The fragmentation of the choice of law can result, at the first level, from a confrontation of the solutions and the methods of the private international law and from the European law. But it can also find accommodation, at the second level, in the appropriate constructions of the European private international law.

MEDINA ORTEGA, M.: "El Derecho patrimonial europeo en la perspectiva del programa de Estocolmo", pp. 69–90.

The principle of mutual recognition and its extension to the rules of jurisdiction, recognition and enforcement of decisions and Law applicable is not enough satisfactory for a European Union which aims at creating an internal market where persons, goods, capitals and services are not subject to the arbitrary application of a given legal order, on grounds of legal technique. No matter the reasons that could be bestowed to uphold the "living" nature of Law and its connexion to the national culture and traditions, the European Union, as a great area of supranational peace, is developing its own society and its own social and legal culture. Such culture may not be split on basis of whimsy sociological and legal theories that are nostalgic of the culture of the "peoples of Europe", for these "peoples" are nowadays melting in a unified political community, right before our eyes. The European "acquis" in contractual matters is already important; though still spread in a set of instruments whose purpose is the harmonization of certain fields: mainly the field of consumer protection. In this context, the CFR is an ambitious project. It still has an uncertain future, but both the Commission and the European Parliament are doing their best to take it forward, in its most cautious character, i.e., that of an optional instrument to which parties could resort in order to avoid a particular state Law. The task is not easy, but the multiplication of efforts over the past decade by the common institutions to achieve a harmonization of European property law shows that it is a necessary and urgent task that the European citizens demand today as an essential part of the Area of Freedom and Justice established by the Treaties of the European Union.

RÜHL, G.: "La protección de los consumidores en el Derecho internacional privado", pp. 91–120.

The majority of cross–border consumer contracts are governed by general

contract terms provided by the professional. In most cases these terms provide for a choice of law clause. From an economic perspective these clauses pose serious problems. However, this is not because consumers are "weaker" than professionals, but rather because they know less about the applicable law and have no incentive to invest into the gathering of the relevant information. Professionals, in contrast, enter into a large number of similar contracts on the same market. As a result, they have an incentive to gather information about the applicable law in order to choose the law that provides the most benefits for them and the least benefits for consumers. Since consumers are not able to distinguish between professionals who choose consumer–friendly laws and those who don't, this may lead to a race to the bottom and a market for lemons. The self–healing powers of markets are unlikely to avoid these problems. Therefore, it is necessary to directly regulate consumer transactions by modifying the general provisions determining the applicable law. An analysis of the various models that are applied around the world lead us to conclude that the general European model, which is also to be found, albeit with differences in detail, in Japan, Korea, Russia, Turkey and the United States, promises the greatest benefits in terms of efficiency.

MIQUEL SALA, R.: "El fracaso de la elección del Derecho a la luz del Reglamento Roma I y de las libertades fundamentales", pp. 121–154.

According to an obiter dictum in the decision Alsthom Atlantique, it seems that party autonomy excludes the control by the ECJ of a possible limitation of the fundamental freedoms by the chosen law. This paper analyses the implications and the convenience of this rule, not considering the cases in which despite freedom of choice of law the parties have not been able to avoid the application of the given legal system. In order to find out to what extent the parties should carry the risk of the application of rules which are contrary to community law, it focuses on the issues of the admissibility and the validity of the choice–of–law agreement under the Rome I Regulation and the Spanish civil law.

Later on, the paper discusses the practical problems of the application of this doctrine and the arguments in favour and against of the control of dispositive law by the ECJ.

OREJUDO PRIETO DE LOS MOZOS, P.: "El idioma del contrato en el

Derecho internacional privado", pp. 155–182.

Where the parties to a contract do not share the same mother tongue, an additional question arises. It happens to be necessary to choose the language to be employed within their relationship and to conclude the contract. Each party will try to impose its own language, so as to avoid linguistic risks, and the election will become a matter of negotiation. The parties may agree to use a third neutral language (habitually, English), the language of one of them or both. In any case, specific language clauses will be needed in order to solve or prevent conflicts. The language finally chosen will be paramount to manifest the concepts, and it will impinge on the interpretation of the contract. But it might also have some effect on international jurisdiction, the law applicable to the contract and the service of documents and acts.

UBERTAZZI, B.: "Derechos de propiedad intelectual y competencia exclusiva (por razón de la materia): entre el Derecho internacional privado y público", pp. 183–257.

In the last years, prestigious courts of different countries around the world have declined jurisdiction in matters related to foreign -registered or not- intellectual property rights: in particular, when an incidental question concerning the validity of the right arise. This incidental question comes up both when the proceedings concern the violation of intellectual property rights and the defendant argues that the right is void or null, so there is no violation at all; and when the claimant aims at a declaration of no-violation of the right, on grounds of its nullity. The present paper takes up and develops a thesis that is being held by the majority of scholars and has been brought to the most recent academic works, such as the Principles of the American Law Institute and the Draft CLIP Principles. According to this thesis, the rules on exclusive jurisdiction in matters of intellectual property are not suggested by Public International Law, and are illicit according with the general principles of denial of justice and the fundamental human right of access to jurisdiction. Therefore, the said rules must be abandoned not only in the matters related to the violation of the right, but also when a question concerning the validity of the right arises.

REQUEJO ISIDRO, M.: "Litigación civil internacional por abusos contra derechos humanos. El problema de la competencia judicial

internacional", pp. 259–300.

In 2008, the Committee on Civil Litigation and the Interests of the Public of the International Law Association launched a research into the area called "private litigation for violations of human rights", with particular focus on the private international law aspects of civil actions against multinational corporations. In its 2010 report, the Committee presented the issue of international jurisdiction as one of the most serious obstacles to such actions. Our study examines personal jurisdiction criteria in the U.S. (so far the prime forum for this kind of litigation), and Europe (as potential forum, likely to become a real one to counterbalance the increasingly serious restrictions to access to American jurisdiction). Not surprisingly, we conclude that the situation is unsatisfactory, and that as far as Europe is concerned, the proposal for amending EC Regulation No. 44/01 does not alter such result. Changes in PIL will not be enough for private litigation to become a useful regulatory mechanism of corporations in relation to human rights; a much more comprehensive action is needed, supported by international consensus. In other words: still a long way to run.

ESPINIELLA MENÉNDEZ, A.: "Incidencia de la nacionalidad de las sociedades de capital en su residencia fiscal", pp. 301–317.

Rules on tax residence in Spain and rules on Spanish Nationality in respect of corporate enterprises are consistent because they are both based on the incorporation under the Spanish Law and the placement of the registered office in Spain. Nevertheless, tax rules are silent on certain issues of dual nationality and change of nationality.

MICHINEL ÁLVAREZ, M.A.: "Inversiones extranjeras y sostenibilidad", pp. 319–338.

International investment Law has been generally drawn upon a model which largely assumes first the need to solve the problem about protection of investors, in despite of the interests of the host States, in particular the developing countries, whose needs for foreign investments are much more intense. That situation is shown not just by the text of the agreements itself, but also when they are applied in the arbitration proceedings. However, a number of significant problems have emerged, considering the tension

between the policies oriented towards the sustainable development of host States – regarding basically environmental protection and social welfare– and the protection of foreign investments. This kind of problems must be solved through a new International Investment Law. This paper highlights those tensions and focuses on the ways to find the proper balance.

ÁLVAREZ GONZÁLEZ, S.: "Efectos en España de la gestación por sustitución llevada a cabo en el extranjero", pp. 339–377.

This paper points out the current situation that arises in Spain after some recent events related to surrogacy. Two contradictory statements triggered new rules to be enacted at a civil registry level. The first one, delivered by the DGRN (administrative body depending on the Ministry of Justice), recognizes Californian surrogacy in order to register it on the Spanish civil register. This statement (resolución) was revoked by a Court of Justice, that ruled the statement of the DGRN was unlawful. The author deals with the new situation and points out that these new rules are clearly unsatisfactory to offer an adequate and proper answer to the wide constellation of problems arising from surrogacy. According to him, the fact that surrogacy is banned by the Spanish civil law is not enough reason to consider surrogacy as opposite to Spanish international public policy. So it would be possible nowadays to recognise some situations of foreign surrogacy. The main question is to determine the precise conditions to admit foreign surrogacy and to act in order to provide an adequate degree of stability for the recognized cases. In this context, the author also proposes a change at civil level: the admission of surrogacy in Spanish civil law. The admission under certain conditions of foreign surrogacy jointly with the maintenance of its ban in Spanish law brings as unsatisfactory outcome the promotion of a undesirable discrimination between people that can afford a foreign surrogacy and those who can not. From a methodological perspective, the author deals with the delimitation between conflict of laws and recognition method and, related to this second issue, with the scope of public policy and the question of fraus legis.

HELLNER, M.: "El futuro Reglamento de la UE sobre sucesiones. la relación con terceros Estados", pp. 379–395.

The proposal for a Regulation on jurisdiction, applicable law, recognition and

enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession follows a recent trend in EU private international law regulations in that its rules on jurisdiction are intended to apply universally. In order to compensate for the non–referral to national rules of jurisdiction, the proposed Regulation itself contains rules on subsidiary jurisdiction in Article 6 which foresees a kind of jurisdiction based on the location of property. And an Article 6a on forum necessitatis *has also been added in the latest text discussed in the Council. But the proposal has some lacunae, that must be remedied before the final adoption or there is great risk that a situation of unnecessary 'limping' devolutions of estates will occur. The paper proposes three different ways to avoid such 'limping' devolutions: renvoi, deference to the foreign devolution and limiting the devolution to assets located in the EU and the inclusion of mechanisms for taking a foreign distribution into account.*

GONZÁLEZ BEILFUSS, C.: "El Acuerdo franco–alemán instituyendo un régimen económico matrimonial común", pp. 397–416.

In February 2010 France and Germany signed a bilateral Uniform law Convention on the property relations between spouses. This paper analyzes this agreement, which introduces a common matrimonial property regime of Participation in acquisitions into the respective substantive law, from the perspective of its eventual interest for Catalan law and as a possible model for European private law.

CARO GÁNDARA, R.: "(Des)confianza comunitaria a la luz de la jurisprudencia del Tribunal de Justicia sobre el Reglamento Bruselas II *bis*: algunas claves para el debate", pp. 417–439.

The judgments handed down by the Court of Justice in 2010 relating to the interpretation to be given to the rules of the Brussels Regulation II bis concerning the custody of minors, have reinforced the principle of mutual trust as between the courts of the Member States exercising jurisdiction on the merits. The Court has indicated that no limits or exceptions are to apply to the mutual recognition of decisions, not even when this might result in a possible violation of a minor's rights under the Charter of Human Rights of the European Union. But the Court has also set down a premise: the principle of mutual trust presupposes the high degree of responsibility of the courts

that hear the cases. If that condition is not satisfied, the judiciaries will not be trusted and their provisional measures will not produce their intended effect. Countenancing training for the personnel assigned to the administration of Justice in the different Member States, along with the harmonization of rules of Civil Procedure, will help foster that level of trust required for the consolidation of a genuine common European space for Justice.

AÑOVEROS TERRADAS, B.: "Los pactos prematrimoniales en previsión de ruptura en el Derecho internacional privado", pp. 441–469.

The significant social developments occurred in Family Law, and especially the increase of the so called mobile marriages, have rise the use of the so called pre–nuptial agreements, even before marriage, in order to establish in advance the economic consequences of divorce. The laws of the different jurisdictions with regard to such agreements vary considerably from one state to the other. Such legal disparities (both substantive and conflicts) may jeopardise the preventive character of the prenuptial agreement and create legal uncertainty. For this reason, a suitable Community private international law legislation is needed (both in the field of jurisdiction and with regard to the applicable law to the agreement) in order for the spouses to have guaranteed the enforceability and validity of the prenuptial agreement.

PAREDES PÉREZ, J.I.: "La incidencia de los derechos fundamentales en la ley aplicable al estatuto familiar", pp. 471–490.

The universalist scope of human rights, instead of tempering the particularities among different legal systems, has widened the conflict among civilizations, and thus, the alteration of the role of international private law. Apart from the coordination role among legal systems, current international private law (IPL) has become an IPL of intercultural cooperation, more concerned with avoiding limping legal situations than with the classical goal of solution's international harmony. IPL in family matters becomes, in this sense, a real testing ground of the impact that fundamental rights have had, and still have, not only regarding goals of the IPL but also in the construction of the legal system and the functioning of the regulation techniques themselves.

GUZMÁN PECES, M.: "¿Hacia un Derecho dispositivo en materia de estatuto personal y familiar?. Reflexiones a la luz del Derecho internacional privado español", pp. 491–510.

This paper analyzes the recent legal reforms in matters of personal and family status to be induced if there is a trend to a law device in the current private international law both in the field of international jurisdiction and in the sector of applicable law. To this end, we analyze various legal institutions such as parenthood, marriage and marital crisis and maintenance obligations.

NAGY, C.I.: "El Derecho aplicable a los aspectos patrimoniales del matrimonio: la ley rectora del matrimonio empieza donde el amor acaba", pp. 511–529.

The matrimonial property regimes and maintenance are questions which have a great practical importance in the international litigations derived from the dissolution of the marriage. These questions carry problems of characterization and problems of context, because they change according to the system to which there belongs the jurisdiction that knows about the case (common Law or civil law). After analyzing some conceptual aspects of the Draft Regulation on Matrimonial Property, one can conclude that it, though with some exceptions, introduces uniform rules of conflict of law throughout the European Union in this matter. Nevertheless, this instrument does not serve to break with the national diversity that in this field exists in Europe – from a theoretical point of view–, since it does not address the issue of characterization and inter–relation. In order to achieve the wished result it might be tried by two ways: through of party autonomy, or with the insertion of escape clauses (option not foreseen in the Draft Regulation on Matrimonial Property).

BOUTIN I., G.: "El fideicomiso–testamentario en el Derecho internacional privado panameño y comparado", pp. 531–546.

The testamentary trust in the Panamanian private international and comparative law summarizes the development of this evolution from the common law and how it will be assimilated by the Spanish–American coded systems, thanks to the conceptualization from Alfaro and Garay, who introduce the notion of trust in the Region. Similarly, the applicable law is

interpreted and the recognition of the trust will, based on the rule of conflict of the self–registration autonomy and the subsidiary rule of the law of administration of trust, without neglecting the issue of jurisdiction or conflict of jurisdiction based on two potential options at the arbitral forum and the attributive clause forum of the jurisdiction; both figures regulated by the autonomy of the settlor.

ARENAS GARCÍA, R.: "Condicionantes y principios del Derecho interterritorial español actual: desarrollo normativo, fraccionamiento de la jurisdicción y perspectiva europea", pp. 547–593.

Spanish Civil Law is a complex system. Not only Central State, but also some Autonomous Communities have legislative competence in the field of Civil Law. During the past thirty years, Spanish Autonomic Communities have developed their own civil laws. This development has exceeded the lines drawn by the Spanish Constitution of 1978 and caused some tension. This tension affects the articulation of the different Spanish Civil Laws and the unity of jurisdiction. The increasing relevance of the UE in PIL is another factor to take into consideration, thus the personal and territorial scope of the Spanish civil laws is affected by the UE Regulations.

ÁLVAREZ RUBIO, J.J.: "Hacia una vecindad vasca: la futura ley de Derecho civil vasco", pp. 595–614.

Given the diversity that characterizes the internal regulations Basque Civil Law, the purpose of these reflections is directed from a historical angle to an appreciation of the Basque regional legislature's intention of trying to adapt to their particular circumstances, which require specific policy responses. These are articulated through rules that have a special role within the inter–law, framed in a subcategory that might be described as interlocal law in a spring ad intra of the system, with the aim of responding to the specific features of the fragmentation of Legislative jurisdiction and diversity that characterizes the Basque regional civil law.

PÉREZ MILLA, J.: "Una perspectiva de renovación y dos parámetros de solución en los actuales conflictos internos de leyes españolas", pp. 615–637.

Spain is a plural Legal system that is organized territorially. However, the

territoriality has created inefficiencies that are compounded both by the expansion of Regional Law as well as the economic crisis. This study analyzes how to overcome the distortions of territoriality with two parameters. First, from a constitutional point of view, strengthening the balance of the multi Legal organization; second, implementing a new principle of action that comes from the Services Directive. The stated purpose of the study is to facilitate the communication between the different Spanish territories and develop sufficiently the internal Spanish Conflicts of Law system.

RODRÍGUEZ–URÍA SUÁREZ, I.: "La propuesta de reglamento sobre sucesiones y testamentos y su posible aplicación al Derecho interregional: especial consideración de los pactos sucesorios", pp. 639–665.

This contribution analyzes the possibility of resolving Spanish interregional conflicts related to agreements as to succession through an European rule of law. At a first stage, we apply both the Proposal for a Regulation of successions and wills and also art. 9.8º of the Spanish Civil Code (hereinafter, Cc) to three different cases with an interregional factor involving agreements as to succession. Secondly, we deal with the feasible solutions under the point of view of the interests of agreements as to succession and the requirements of the interregional law system. We conclude reaching our own decision and suggesting new ways of possible interpretations of art. 9.8º Cc.

HSU, Yao–Ming: "Los nuevos códigos de Derecho internacional privado de China y Taiwán de 2010–especial referencia a la materia de familia", pp. 669–689.

We briefly summarize the respective amendment or new codification of private international law in Taiwan and in China. These new regulations both ambitiously show the intention to cope with the newest international regulatory trends but also carefully keep their own specificities. Especially in the domain of lex personalis*, Taiwan keeps the choice of* lex patriae*, but China chooses the path of habitual residence as connecting factor. This difference in legislative principle result in the diverse applicable law in family matters on both sides of the strait. After their promulgation of the new laws, from the 26 May 2011 on in Taiwan and from the first April 2011 on in China, these differences will probably create other divergences for resolving the*

cross–strait family matters, even though on both sides there exists other specific regulation for the interregional conflict of laws. Besides, there exist some ambiguities in some provisions both in Taiwanese and Chinese new codes. More jurisprudences and doctrinal explanations would be needed for the future application.

ASAMI, E.: "La ley japonesa sobre las normas generales de aplicación de las leyes (Ley 78/2006 de 21 de junio)", pp. 691–705.

The beginning of the Japanese private international law dates back to the late 19th century when the Japanese jurists, under the guidance of European experts, prepared the "Act on the Application of Laws" known as Horei*. After more than 100 years of existence,* Horei *has been entirely reformed and in 2006 culminated in the enactment of the "Act on General Rules for Application of Laws". This is a special code which contains only the choice–of–law rules, whereas the rules regarding the international jurisdiction as well as the recognition and enforcement of foreign judgements are found in the Code of Civil Procedure. The most notable change is the modernization of Japanese language which is considered to be a big progress. It will contribute to raise awareness of Japanese law internationally, thanks to the more comprehensive writing of the Japanese language. This article explores the background of the reform and highlights features of the new law.*

ELVIRA BENAYAS, M.J.: "Matrimonios forzosos", pp. 707–715.

Multicultural societies are faced with situations that are alien, but that affect its members. This is the case of forced marriages involving significant numbers of women and girls in the world and demand of these societies, sometimes an overwhelming response to a practice that involves the violation of Fundamental Rights and Freedoms. Response must be multidisciplinary, with a required preventive function, but also care and legal assistance to victims, where there are several trends that include both the intervention of criminal law, civil law and private international law.

STAATH, C.: "La excepción de orden público internacional como fundamento de denegación del reconocimiento del repudio islámico", pp. 717–729.

When it comes to the recognition of foreign judgments or legal situations, the public policy exception constitutes the last legal tool to ensure the protection of the fundamental values of the forum's legal order, which include Human Rights. This has been perfectly illustrated by the case law on recognition of Islamic talaq divorces in occidental countries. The talaq is a unilateral act that consists of the dissolution of the bond of matrimony under the exclusive and discretionary initiative of the husband. In Europe, various courts have denied recognition of the talaq for its incompatibility with the principle of equality between spouses as embodied in article 5 of the 7th additional Protocol to the European Convention on Human Rights, on the grounds of the public policy exception. Although a talaq could not normally be pronounced in Europe, some courts, such as the French ones, have sometimes accepted to recognize a foreign talaq depending on the degree of connection between the legal situation and the forum. However, such a difference of treatment based on the residence and/or nationality of the parties is not legitimate when it comes to the protection of Human Rights, especially when they are of universal reach, as in the case of the principle of equality between spouses.

GUZMÁN ZAPATER, M.: "Gestación por sustitución y nacimiento en el extranjero: hacia un modelo de regulación (sobre la Instrucción DGRN de 5 de octubre de 2010)", pp. 731–743.

The Instrucción (resolution) of the Dirección General de los Registros y del Notariado of October 5th 2010 is meant to reduce the difficulty to access to Spanish (consular) registries to those born from surrogate mothers in a foreign country. Said Instrucción introduces changes from the previous case law in order to provide a greater protection in these cases in the interest of the child and of the mother through the judicial control of the surrogation contract. Access to the Spanish registry is hereinafter possible only when judicial control has taken place. The Instrucción also creates the legal regime for recognition of the foreign judicial decision. Yet several difficulties remain in place which would make a review of the system advisable.

SÁNCHEZ–CALERO, J. y FUENTES, M.: "La armonización del Derecho europeo de sociedades y los trabajos preparatorios de la *European Model Company Act* (EMCA)", pp. 745–758.

This paper aims to expose the initiative for a few years developed with regard

to the elaboration of a European Model Company Act (EMCA), intended to be inserted in the construction of European company law. This is a project led by renowned academics from across Europe, which aims to develop a kind of law–model (following the paradigm of the U.S. Model Business Corporation Act) on corporations. For now, the serveral draft chapters already made, show the approach to be made: dispositive rules, information, and a wide range of self–regulation. The working method followed is that of comparative law, so that the EMCA keep in mind the differences and similarities of the European legal systems.

IRURETAGOIENA AGIRREZABALAGA, I.: "Los APPRI en la Unión Europea post–Lisboa", pp. 759–791.

In the European Union, the debate on the future of Bilateral Investment Treaties (intra–EU and extra–EU BITs) is more alive than ever. The Lisbon Treaty has included the subject of foreign direct investment within the Common Commercial Policy, stating the exclusive competence of the Union to conclude treaties in this field with third countries. In this new scenario, the EU is taking the first steps to design a common investment policy, which will gradually replace the network of extra–EU BIT still in force. On the other hand, intra–EU BITs require differentiated analysis. The coexistence of these BIT and EU law raises questions difficult to answer, both from the perspective of international law and from the perspective of EU law. In short, the following question is made: Will the EU be an area without BITs in the near future?

BORRÁS, A.: "La aplicación del Reglamento Bruselas I a domiciliados en terceros Estados: los trabajos del Grupo Europeo de Derecho Internacional Privado", pp. 795–814.

The European Group for Private International Law / Group Européen de Droit international privé *(GEDIP) is working on the revision of the Brussels I Regulation: a revision that will also lead to the modification of the Lugano Convention in its amended version of 2007. A paramount element in this revision is the extension of the scope of application of the Regulation, so that it could be applied also when the defendant is domiciled in a third country. This modification is a step forward in the communitarization or –in more accurate terms nowadays– the europeization of the rules on jurisdiction and*

recognition and enforcement of decisions in civil and commercial matters. It is the time now to assess whether member States are willing to take the step or, on the contrary, this part of the revision must be postponed, as it will probably happen with other elements. Some clear examples might be seen in the GEDIP proposal: in particular, concerning the introduction of "mirror rules" in matters of exclusive grounds of jurisdiction and prorogation clauses, and the settlement of rules on recognition and enforcement of the decisions of third countries.

SALVADORI, M.: "El Convenio sobre acuerdos de elección de foro y el Reglamento Bruselas I: autonomía de la voluntad y procedimientos paralelos", pp. 829–844.

The Hague Convention of 30 June 2005 on Choice of Court Agreements, not yet entered into force, offers a new international instrument to enhance legal certainty and predictability with respect to choice of court agreements in international commercial transactions. The Convention is limited to "exclusive choice of court agreements concluded in civil or commercial matters" and excludes consumer and employment contracts and other specific subject matters. The Convention contains three main rules addressed to different courts: the chosen court must hear the case if the choice of court agreement is valid according to the standards established by the Convention (in particular there is no possible forum non conveniens *in favour of courts of another State); any court seized but not chosen must dismiss the case unless one of the exceptions established by the Convention applies; any judgment rendered by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the standards established by the Convention must be recognised and enforced in other Contracting States unless one of the exceptions established by the Convention applies. Between the Choice of Court Agreements Convention and the Brussels I Regulation important differences rise when the operational systems of the two instruments are compared. In this context the Recast of Brussels I Regulation (December 2010) enhance of the effectiveness of choice of court agreements: giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seized, and introducing a harmonised conflict of law rule on the substantive validity of choice of court agreements. Thereby it will be easy the conclusion of this Convention by the*

European Union.

Bilingual Collection of Sources on Private International Law

Davor Babic, a professor of law at the University of Zagreb, and Christa Jessel-Holst, a former research fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, have published a bilingual collection of sources on Private International Law. The volume assembles the most important international, European, and national legal sources on Private International Law and presents English and Croatian versions of the texts alongside one another.

More information is available on the publisher's website (in Croatian) and here (in English).

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Symeonides on Codification and Flexibility in PIL

Dean Symeon C. Symeonides has posted Codification and Flexibility in Private International Law on SSRN. Here is the abstract:

> *The last fifty-year period has been one of the most productive in the history of private international law (PIL), having produced 61 PIL codifications and 101 international conventions, regulations and other similar instruments. This Article examines the way in which these codifications and other instruments confront the constant tension between the need for legal certainty and*

predictability, on the one hand, and the need for flexible, equitable, and individualized solutions, on the other. Among the advances of the art and science of codification during this period is the deployment of several new tools – such as alternative or soft connecting factors, escape clauses, or a combination of rules and residual "approaches" – which entrust judges with greater discretion than in the old codifications. These tools produce a new equilibrium and mutual accommodation between certainty and flexibility and suggest that codification need not be antithetical to flexibility.

The paper is forthcoming in the GENERAL REPORTS OF THE XVIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, K.B. Brown and D.V. Snyder, eds., © Springer Science+Business Media, 2011.

International Workshop on "Private International Law in the Context of Globalization"

On October 22 and 23 the China University of Political Science and Law (CUPL) will host an international workshop on "Private International Law in the Context of Globalization: Opportunities and Challenges" in Beijing. The workshop will bring together leading conflict of laws scholars from Belgium, China, Germany, the Netherlands, Sweden, Switzerland and the United States. Here is the programme:

Saturday, October 22, 2011

Morning

8:15–8:30 Registration

8:30–9:50 Opening Ceremony

Chair: Prof. Xinli Du, Vice Dean of Faculty of International Law, CUPL; Director of the Organizing Committee of the Workshop

Opening Remarks:

- Prof. Jin Huang, President of Chinese Society of Private International Law & President of CUPL
- Prof. Zhongyi Fei, Honorary Chairman of Chinese Society of Private International Law
- Prof. Andrea Bonomi, Vice Dean of Law Faculty of University of Lausanne

9:50-10:10 Taking Group Photo, Tea & Coffee

10:10-12:00 Unification of Private International Law and Chinese Private International Law

Chair**:** Prof. Xianglin Zhao, Ex Vice President of CUP*L*

10:10-10:30 Shengming Wang, Vice Direct of Legislative Committee of National People's Congress of PRR: *The Guiding Principle of the Enactment of the New Conflict of Laws Act of the PRC*

10:30-10:50 Laura E. Little, Professor at Temple University's Beasley School of Law: *Internet Choice of Law Governance: An Opportunity for Learning New Perspectives*

10:50-11:10 Prof. Jin Huang, President of Chinese Society of Private International Law: *The Present and Future of Chinese Legislation on Private International Law*

11:00-11:30 Prof. Andrea Bonomi, Vice Dean of Law Faculty of University of Lausanne: *Parallel Proceedings in International Litigation and Arbitration*

11:30-11:50 Judge Guixiang Liu, Chief Judge of the Fourth Civil Court of the Supreme Court of PRC: *Title to be confirmed*

11:50-12:10 Prof. Mel Kenny at University of Leicester and Prof. James Devenney at Durham University, U.K.: *The EU "Optional Instrument": bypassing Private International Law*

12:10-12:20 Discussion

12:20-14:00 Lunch Buffet at Siji (Four Seasons) Hall

Afternoon

14:00-16:00 New Development of Private International Law in the United States, Europe and Other Parts of the World

Chair: Zheng Tang, Professor at University of Aberdeen, U.K.

14:00-14:20 Prof. Mathijs Huibert ten Wolde, Professor at University of Groningen: *Fundamental Questions Regarding Codification of Private International Law: Does Book 10 Civil Code on the Dutch Conflict of Laws Fit in a World Order*

14:20-14:40 Juan Shen, Professor at Institute of law of Chinese Academy of Social Sciences: *The Choice of Law in Succession? Scission System or Unitary System*

14:40-15:00 Volker Behr, Professor at Law Faculty of University of Augsburg: *Predictability and Flexibility in Choice of Law in Contracts and Torts – Chinese Conflicts Act, E.U. Regulations and U.S. Private International Law Evaluated*

15:00-15:20 Zhengxin Huo, Associate Professor of CUPL: *An Imperfect Improvement: The New Conflict of Laws Act Of The PRC*

15:20-15:40 Comments

- Commentator 1: Prof. Yongping Xiao, Dean of Wuhan University School of Law
- Commentator 2: Prof. Qingsen Xu, Professor at Renmin University School of Law

15:40-16:00 Discussion

16:00-16:15 Tea & Coffee

16:15-18:00 New Development in Contract and Torts Choice-of-law Rules

Chair: Prof. Han Wang, Vice President of Northwest University of Politics and Law

16:15-16:35 Prof. Dr. Jan von Hein, Professor at Law Faculty of University of Trier: *The European Private International Law on Investor Protection and its Impact on Relations with Third States*

16:35-16:55 Prof. Michael Bogdan, Professor at Law Faculty of Lund University Sweden: *Contracts and Torts in Cyberspace in View of the European Regulations Rome I and Rome II*

16:55-17:15 Prof. Xianbo Li, Dean of Law Faculty of Hunan Normal University**:** *Development of the Principle of Lex Loci delicti*

17:15-17:35 Associate Prof. Keyu Wang, Associate Professor at China Central University of Finance and Economics

17:35-18:05 Comments

- Commentator 1: Prof. Renshan Liu, Dean of Law Faculty of Zhongnan University of Economics and Law
- Commentator 2: Ms Jane Willems, Arbitrator of the CIETAC

18:05-18:30 Discussion

18:30-20:00 Banquet

<u>Sunday, October 23, 2011</u>

Morning

8:30-10:20 Judicial Assistance in Civil and Commercial Area in a Globalized World

Chair: Knut B. Pissler, Professor at Max Planck Institute for Comparative and International Private Law

8:30-8:50 Kwang Hyun SUK, Professor at Seoul National University: *Comparative Analysis of the Chinese Private International Law Act and the Taiwanese Private International Law Act: Korean Perspective.*

8:50-9:10 Johan Erauw, Professor at University of Ghent: *The Section On Goods*

And Property Rights In The Chinese Law On Private International Law of 28 October 2010 in Comparison With Other Codes

9:10-9:30 Xiangquan Qi, Professor at School of International Law of CUPL: *The Latest Development of the Legislation regarding to the Application of Laws Concerning Foreign-related Marriage and Family Relations*

9:30-9:50 Xiao Song, Associate Professor at Nanjing University School of Law: *Party Autonomy and Conflicts Law in Property*

9:50-10:10 Comments

- Commentator 1: Mo Zhang, Professor at Temple University
- Commentator 2: Chen Weizuo, Associate Professor at Tsing Hua University

10:00-10:20 Discussion

10:20-10:35 Tea & Coffee

10:35-12:00 Resolutions to International Civil and Commercial Disputes (Litigation, Arbitration, and Negotiation)

Chair: Prof. Zengyi Xuan, Dean of College of International Students of CUPL

10:35-10:55 Assistant Prof. Kun Fan, Assistant Prof. at Chinese University of Hong Kong, Senior Consultant of Arbitration Asia: *Developments of the Enforcement of Foreign-related and Foreign Awards in China*

10:55-11:15 Lianbin Song, Professor at Wuhan University School of Law: *Development of China's Arbitration after the Establishment of Arbitration Law of the People's Republic of China*

11:15-11:30 Yongfu Chen, Beijing Arbitration Committee: *Topic to be confirmed*

11:30-11:45 Yun Zhao, Associate Professor at the Law Faculty of University of Hong Kong: *Discussions on Mediation Legislation in Hong Kong–Reflections from Mainland's People's Mediation Law*

11:45-12:05 Comments

- Commentator 1: Song Lu, Professor at China Foreign Affairs University
- Commentator 2: Hailing Shan, Professor at Shanghai University of Finance and Economics

12:05-12:30 Closing Ceremony & The Announcement of Beijing Declaration on Private International Law

Chair: Prof. Yongping Xiao, Dean of Wuhan University School of Law

The Announcement of Beijing Declaration on Private International Law

Closing Remarks:

- Prof. Jin Huang, President of Chinese Society of Private International Law
- Prof. Johan Erauw, Professor at University of Ghent
- Prof. Mathijs Huibert ten Wolde, Professor at University of Groningen

12:30-14:00 Lunch at Siji (Four Seasons) Hall

More information (mostly in Chinese) is available on the conference website.

Italo-German Cooperation in the Brussels I Recast: Conference in Milan (25-26 November 2011)

The University of Milan will host a **two-day conference on 25 and 26 November 2011 on the review of the Brussels I regulation**, organized with the University of Padova, the University of Heidelberg and the Ludwig-Maximilians-Universität München: "**Cooperazione Italo-Tedesca nella revisione del Regolamento Bruxelles I – Deutsch-Italienische Kooperation**

im Rahmen der Neufassung der Brüssel I-Verordnung". The working languages will be English, Italian and German. Here's the programme (.pdf):

I Session: Friday 25 November 2011, 10h00

Saluti introduttivi – Grußworte*: Prof. Dr. Marino Regini* (Università degli Studi di Milano); *Prof. Dr. Angela Lupone* (Università degli Studi di Milano)

Chair: *Prof. Dr. Ilaria Viarengo* (University of Milan)

- *Prof. Dr. Rainer Hausmann* (Universität Konstanz): L'ambito di applicazione del regolamento – Der Anwendungsbereich der Verordnung;
- *Prof. Dr. Andrea Gattini* (Università degli Studi di Padova): I rapporti con le convenzioni internazionali – Das Verhältnis zu internationalen Abkommen;
- *Prof. Dr. Burkhard Hess* (Universität Heidelberg): La competenza in materia di liti patrimoniali- Die Gerichtsbarkeit für vermögensrechtliche Streitigkeiten;
- *Prof. Dr. Ruggiero Cafari Panico (*Università degli Studi di Milano): Il forum necessitatis – Die Notzuständigkeit (forum necessitatis).

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II session: Friday 25 November 2011, 14h00

Chair: *Prof. Dr. Peter Kindler* (Ludwig-Maximilians-Universität München)

- *Prof. Dr. Claudio Consolo* (Università degli Studi di Padova): La proposta di revisione del Regolamento Bruxelles I e l'arbitrato – Der Vorschlag zur Revision der Brüssel I-Verordnung und die Schiedsgerichtsbarkeit;
- *Prof. Dr. Christian Kohler* (Universität Saarbrücken) – *Prof. Dr. Ilaria Queirolo* (Università degli Studi di Genova): Gli accordi di proroga della giurisdizione nella proposta di revisione del regolamento Bruxelles I – Die Gerichtsstandsvereinbarung im Vorschlag zur Neufassung der Brüssel I-Verordnung;
- *Prof. Dr. Luigi Fumagalli* (Università degli Studi di Milano): La litispendenza – Die Rechtshängigkeit.

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III session: Saturday 26 November 2011, 9h00

Chair: *Prof. Dr. Kurt Siehr* (Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg)

- *Prof. Dr. Marco De Cristofaro* (Università degli Studi di Padova) – *Prof. Dr. Thomas Pfeiffer* (Universität Heidelberg): L'abolizione dell'exequatur – Die Abschaffung des Exequaturverfahrens;
- *Prof. Dr. Manlio Frigo* (Università degli Studi di Milano): Il riconoscimento e l'esecuzione delle decisioni in materia di diffamazione – Die Anerkennung und Vollstreckung von Entscheidungen bei Verleumdungsklagen;
- *Prof. Dr. Stefania Bariatti* (Università degli Studi di Milano): Il riconoscimento e l'esecuzione delle decisioni rese a seguito di class action – Die Anerkennung und Vollstreckung von Entscheidungen ergangen aufgrund einer Sammelklage (class action).

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Round Table: Saturday 26 November 2011, 11h15

Tavola rotonda sull'impatto della revisione del Regolamento sull'ordinamento italiano e sull'ordinamento tedesco – Podiumsdiskussion zu den Auswirkungen der Revision der Verordnung auf das italienische und das deutsche Recht

Chair: *Prof. Dr. Fausto Pocar* (Università degli Studi di Milano)

- *Prof. Stefano Azzali* (Camera Arbitrale di Milano)
- *Prof. Dr. Sergio M. Carbone* (Università degli Studi di Genova)
- *Prof. Dr. Herbert Kronke* (Universität Heidelberg)
- *Prof. Dr. Riccardo Luzzatto* (Università degli Studi di Milano)
- *Prof. Dr. Alexander R. Markus* (Universität Bern)
- *Prof. Dr. Marco Ricolfi* (Università degli Studi di Torino – Studio Tosetto, Weigmann & Associati)

The event is organized under the patronage of the Italo-German Chamber of Commerce and Chamber of arbitration of Milan, and with the financial support of: Ateneo Italo-Tedesco; Law firm *Gebhard* (Milan, Stuttgart); Law firm *Tosetto,*

Weigmann & Associati (Turin, Milan, Rome); "Associazione per gli scambi culturali tra giuristi italiani e tedeschi".

For further information and registration, see the programme and the conference's webpage.

(Many thanks to Prof. Francesca Villata, University of Milan, for the tip-off)

ECJ Rules on the Enforcement of Fines under Brussels I

On October 18th, 2011, the Grand Chamber of the European Court of Justice held in Realchemie Nederland BV v Bayer CropScience AG (Case C 406/09) that the Brussels I Regulation applies to fines ordered to ensure compliance with jugdments given in civil and commercial matters.

Facts

In 2005, German firm Bayer initiated proceedings in Germany against Dutch firm Realchemie for alleged patent infringement. On December 19, 2005, a German Court issued an interim order prohibiting Realchemie from importing into, possessing or marketing certain pesticides in Germany. The Order was issued on pain of a fine. The Court also ordered the Dutch defendant to provide details of its commercial transactions involving the pesticides and to transfer its stock into the custody of the courts

In 2006, the German Court found that Realchemie had not complied with the order. On August 17, 2006, it thus ordered Realchemie to pay a fine of Euro 20,000 (*Ordnungsgeld*) pursuant to Article 890 of the German Code of civil procedure (*ZPO*), to be paid to the Court. In October 2006, the Court also ordered a periodic payment of Euro 15,000 (*Zwangsgeld*) pursuant to Article 888 of the German Code of civil procedure to encourage it to provide details of the commercial transactions concerning the pesticides in question. Each time, the

Court ordered the Dutch defendant to pay the costs of the proceedings.

In 2007, Bayer sought to enforce the orders in the Netherlands.

Judgment

The Brussels I Regulation only applies to Civil and Commercial Matters. The obvious question was whether a fine ordered to ensure compliance of judgments falls within that category and can thus be enforced under the Regulation.

The Court reiterated that such issues of characterization were to be addressed by looking at the subject matter of the legal relationship between the parties rather than the nature of the particular remedy. It thus held:

> *41 In the present case, even if, according to Paragraph 890 of the ZPO, the fine at issue in the main proceedings is punitive and the reasoning in the order imposing it explicitly mentions the penal nature of that fine, the fact remains that, in those proceedings, there is a dispute between two private persons, the object of which is the authorisation of enforcement in the Netherlands of six orders from the Landgericht Düsseldorf, by which the latter, hearing an application lodged by Bayer and based on an allegation of patent infringement, prohibited Realchimie from importing into, possessing and marketing certain pesticides in Germany. The action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute. In other words, the legal relationship between Bayer and Realchimie must be classified as 'a private law relationship' and is therefore covered by the concept of 'civil and commercial matters' within the meaning of Regulation No 44/2001.*

The fact that the fine was to be paid to the German state was not regarded as decisive:

> *42 It is true, as is apparent from the order for reference, that the fine imposed on Realchimie pursuant to Paragraph 890 of the ZPO, by order of the Landgericht Düsseldorf must be paid, when it is enforced, not to a private party but to the German State, that the fine is not recovered by the private party or on its behalf but automatically, and that the actual recovery is made by the German judicial authorities. Those specific aspects of the German enforcement*

procedure cannot however be regarded as decisive as regards the nature of the right to enforcement. The nature of that right depends on the nature of the subjective right, pursuant to the infringement of which enforcement was ordered, that is, in the present case, Bayer's right to exclusively exploit the invention protected by its patent which is clearly covered by civil and commercial matters within the meaning of Article 1 of Regulation No 44/2001.

The Court therefore concluded:

1. The concept of 'civil and commercial matters' in Article 1 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 must be interpreted as meaning that that regulation applies to the recognition and enforcement of a decision of a court or tribunal that contains an order to pay a fine in order to ensure compliance with a judgment given in a civil and commercial matter.

The Court was also asked to characterize the costs of the proceedings to determine whether they were governed by Article 14 of the Directive on the enforcement of IP rights, which provides that they should be borne by the unsuccessful party. It held:

2. The costs relating to an exequatur procedure brought in a Member State, in the course of which the recognition and enforcement is sought of a judgment given in another Member State in proceedings seeking to enforce an intellectual property right, fall within Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

Many thanks to Maja Brkan for the tip-off.

Cachia on the Brussels I Recast

Paul Cachia, who practises and lectures in Malta, has published an article on the Brussels I Recast in the last issue of the ELSA Malta Law Review.

> *Nearly eight years after its entry into force, the European Commission published a Proposal for a recast of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Proposal identifies a number of shortcomings in the Regulation's operation and proposes a number of amendments to improve its operation with the ultimate objective of facilitating cross-border litigation and removing the remaining obstacles to the free movement of judgments. This paper examines the proposed amendments in the jurisdictional sphere, their objective, and the manner in which they are supposed to change the existing rules. Particular emphasis is given to the proposed extension of the Regulation to jurisdiction over defendants not domiciled in a Member State which, if adopted, would have the effect of wiping out the national jurisdictional rules of the Member States in disputes falling within the domain of the Regulation. This paper also considers the Commission's proposed amendments to enhance the effectiveness of choice of court agreements together with the other proposed amendments in the jurisdictional sphere. If adopted by Parliament and Council, the new legislation would certainly lead to a more complete European codification of the rules on international jurisdiction in civil and commercial matters.*

The article can be freely downloaded here.

United States Supreme Court to Again Consider the Alien Tort

Statute

Today, the United States Supreme Court granted certiorari in the case of Kiobel v. Royal Dutch Petroleum to consider the following questions: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute, 28 U.S.C. § 1350, is a merits question or instead an issue of subject matter jurisdiction; and (2) whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations. In addition to Kiobel, the Court also granted cert. in Mahamad v. Rajoub to consider whether whether the Torture Victim Protection Act of 1991 permits actions against defendants that are not natural persons.

In *Kiobel*, 12 Nigerian nationals claimed human rights violations by oil companies, alleging that the oil companies enlisted the Nigerian government to use its armed forces to suppress resistance to oil exploration in the Niger Delta. In *Mohamad*, the family of a U.S. citizen claimed torture by officers of the Palestianian Authority and the Palestine Liberation Organization. The cases present the question whether the ATS and the TVPA apply to entities other than natural persons–corporiations in *Kiobel* and other organizations in *Mohamad*.

What makes the *Kiobel* grant interesting, besides it being only the second time the US Supreme Court will hear an ATS case, is that the Court granted the case without soliciting the views of the United States. Given that cases raised under the ATS implicate in many cases foreign policy concerns of the Executive Branch, the considered views of the Executive would have advanced the Court's consideration of the case, even at the cert. stage. Whether the Solicitor General will file a brief *amius curiae* and request oral argument time will tell one a great deal about how the Obama Administration responds to the tensions created in ATS cases–at best, the ATS seeks to support human rights throughout the world and, at worst, imposes United States legal views on acts or omissions occurring within the sovereign territory of another country.

For international law scholars, the current Supreme Court term just became a great deal more interesting!