# Third Issue of 2011's Journal du Droit International

The third issue of French *Journal du droit international* (*Clunet*) for 2011 was just released.

It includes three articles, two of which might be of interest for readers of this blog.

In the first one, Sabine Corneloup, who is a professor of law at the university of Burgundy, explores how an EU law of nationality is currently developing (*Réflexion sur l'émergence d'un droit de l'Union européenne en matière de nationalité*). The English abstract reads:

> *The nationality of a Member State is to be determined exclusively on the basis of the national law of that Member State, but each Member State must exercise this competence with due regard to EU law. The ECJ ensures in particular that the legal effects of the possession of the nationality of a Member State are recognized without any restriction. This control affects mainly the national treatment of multiple nationalities. However, the control of the ECJ goes even further and defines also the conditions of loss of the nationality of a Member State. An inventory of the European case law is drawn up. It shows that the ECJ exceeds the Union's competence determined by the treaties. A European framework for the nationality laws of the Member States requires the adoption of specific legal instruments. Some proposals are specially made to resolve positive conflicts of nationalities which may arise in the application of EU law.*

In the second one, Giulio Cesare Giorgini, who lectures at Nice University (that is, the university of the city of Nice), wonders whether the plurality of methods of private international law should be abandoned in international business law (*Les limites des méthodes en droit international des affaires . – Pour dépasser une simple lecture économique*). The English abstract reads:

> *International business law is a law of pluralism : pluralism of sources, pluralism of actors, pluralisms of goals, pluralism of methods. However, determining and articulating the domain of these methods is difficult. National legal systems*

*have sometimes rules in order to address this issue but their logic – a logic of authority – seems less satisfactory in this specific field. The article examines the possible solutions in order to suggest that usual approaches must be abandoned. Thus measuring the rational coherence of the concurrent norms may reconcile international business law legal pluralism and the uniformity of its purpose.*

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# Parry on Oklahoma's Save our State Amendment

John Parry, who is a professor of law at Lewis and Clark Law School, has posted Oklahoma's Save Our State Amendment and the Conflict of Laws on SSRN.

> *In November 2010, Oklahoma voters adopted the "Save Our State Amendment," which provides a catalog of legal sources that Oklahoma courts may use when deciding cases, as well as a catalog of forbidden sources, which include "the legal precepts of other nations or cultures," international law, and "Sharia Law." A federal district court has enjoined the entire amendment in response to establishment and free exercise concerns (and without considering whether the "Sharia Law" portions could be severed from the rest of the amendment).*
>
> *Much of the reaction to the amendment has focused on these same constitutional issues and related political concerns. This essay, by contrast, approaches the Save Our State Amendment from a conflict of laws perspective, and I treat it primarily as a choice of law statute. Seen in this way, the Save Our State Amendment is a wretched piece of work, at least under the rather formal issue spotting analysis that I present here. If the amendment goes into effect – whether in whole or in part – it will raise a host of questions, some of them difficult, that could take years to work their way through the Oklahoma judicial system.*

*The first section of this essay addresses the scope of the amendment – the entities to and the situations in which it applies. The second section considers the amendment's impact on Oklahoma choice of law doctrine through its list of approved and forbidden legal sources for Oklahoma courts (and, by extension, federal district courts in Oklahoma when hearing diversity cases). The final section is a brief conclusion that assesses the larger impact of the issues I identify in this essay.*

*I do not claim to have identified or fully addressed every issue that the amendment raises or every problem that it creates, and I have largely left discussion of the religion clauses issues to other writers, but I trust that this essay says enough to convince even those who support the amendment's political goals that this is an irresponsible way to make law.*

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# Third Issue of 2011's ICLQ

The last issue (July 2011) of the *International and Comparative Law Quarterly* was just released. It offers two articles discussing private international law issues.

The first is authored by Sirko Harder, who is a Senior Lecturer at Monash Law School: Statutes of Limitations Between Classification and Renvoi – Australian and South African Approaches Compared.

*This article compares the ways in which Australian and South African courts have approached issues of classification and renvoi where a defendant argues that the action is time-barred. There are two differences in approach. First, Australian courts classify all statutes of limitation as substantive, whereas South African courts distinguish between right-extinguishing statutes (substantive) and merely remedy-barring statutes (procedural). Second, the High Court of Australia has used renvoi in the context of the limitation of actions whereas South African courts have yet to decide on whether to use renvoi. This article assesses the impact of those differences in various*

*situations.*

The second article is authored by Gerard McCormack, who is Professor of International Business Law at the University of Leeds: American Private Law Writ Large? The UNCITRAL Secured Transactions Guide.

> *This article provides a critical evaluation of the main provisions of the UNCITRAL Legislative Guide on Secured Transactions. It examines the Guide in the context of other international and national secured transactions instruments including article 9 of the United States Uniform Commercial Code. The clear objective of the Guide is to facilitate secured financing. It is very facilitating and enabling, and permits the creation of security in all sorts of situations. Security is seen as a good thing, through enhancing the availability of lower-cost credit. The paper suggests that this closeness in approach to article 9 is likely to militate against the prospects of the Guide gaining widespread international acceptance. This is the case for various interlocking reasons including the battering that American legal and financial norms have taken with the global financial crisis.*

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# Zick on Trans-Border Expression

Timothy Zick, who is a professor of law at William and Mary Law School, has posted Falsely Shouting Fire in a Global Theater: Emerging Complexities of Trans-Border Expression on SSRN. The abstract reads:

> *In Schenck v. United States (1919), Justice Holmes wrote that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Owing to globalization, the digitization of expression, and other modern conditions a metaphorical global theater is emerging. In this theater, speakers' voices and the physical and psychological effects of domestic expressive activities will frequently traverse or transcend territorial borders. This Article draws upon several recent events — the Quran*

*burning in Florida, the international reaction to an Internet posting calling for a "Draw Mohammed Day" event, the criminalization of the provision of expressive assistance to designated foreign terrorist organizations, the posting of potentially inciting speech on the Internet, and the WikiLeaks disclosures — to examine how First Amendment doctrines relating to offensive expression, incitement, hostile audiences, treason, and the distribution of secret or potentially harmful information might apply in the global theater.*

*The Article makes four general claims or observations regarding these doctrines. First, although in rare instances the government could punish domestic incitement that causes harmful extraterritorial effects, in general expression that breaches global peace or order by producing distant offense and other harms ought to remain fully protected in the global theater. Second, owing to the instantaneous trans-border flow of offensive and incendiary expression, speakers will frequently have to assess in advance whether they are willing to risk the possibility of harm from distant threats, while officials will need to consider whether to offer some protection to domestic speakers in response to explicit threats from foreign hecklers. Third, the expanding category of proscribed enemy-aiding expression, which now includes the provision of "material support" (including otherwise lawful expression) to terrorists and may include a form of cyber-treason, must be defined as narrowly as possible in the global theater. In general, laws ought to be drafted and enforced such that only intentional enemy-aiding conduct, rather than speech or expressive association, is proscribed. Fourth, with regard to the trans-border exposure of governmental secrets, the United States ought to focus primarily upon improving its processes for protecting secrecy rather than on prosecuting the publishers, whether foreign or domestic, of such information.*

*The Article also draws some broader free speech, association, and press lessons from recent events and controversies in the emerging global theater. Public officials, courts, and commentators must begin to think more systematically about trans-border speech, association, and press concerns. The First Amendment's trans-border dimension must be defined and incorporated into political, legal, and constitutional discussions regarding global information flow in the twenty-first century. In the global theater, America's exceptional regard for offensive expression will be vigorously challenged both at home and abroad. We must be prepared to explain and defend our exceptional First Amendment*

*norms, principles, and values to both domestic and global audiences. Recent episodes confirm that core First Amendment principles, including marketplace justifications for protecting offensive speech, will retain considerable force in the global theater. The Article also discusses various lessons for the press, as it continues its transformation from a domestic information hub and local watchdog to a loosely bound international distribution network. As this transformation occurs, the press will need to be more circumspect in its reporting on matters of global concern, such as religion, and with regard to the nature and character of its relationships with some foreign sources. Moreover, the press's own commitment to the free flow of information will be tested, as new sources and publishers, operating on different models and in pursuit of different missions, continue to materialize.*

*Finally, new threats to free speech and information flow will arise in the global theater. We ought to be paying more attention to the influence of private intermediaries on the trans-border flow of information, and to new forms of governmental information control such as prosecution of information distributors and extra-judicial means of punishing speakers (including targeted executions).*

The paper is forthcoming in the *Vanderbilt Law Review*.

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# Jurisdiction Based on a Domain Name

In *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (available here) the Court of Appeal for Ontario considered whether to take jurisdiction in a dispute over the ownership of an internet domain name.

Tucows is a Nova Scotia corporation with its principal office in Ontario. Renner is a Brazilian corporation operating a series of retail department stores. Tucows bought 30,000 domain names from another corporation, and one of the names

was renner.com. Tucows is the registrant of that domain name with the internationally-recognized non-profit organization, the Internet Corporation for Assigned Names and Numbers (ICANN). Renner complained to WIPO and in response Tucows sued in Ontario, seeking a declaration that it was the owner of the domain name. Renner objected to Ontario's jurisdiction over the dispute.

The core issue was whether this dispute concerned "personal property in Ontario". An earlier decision of the Ontario Superior Court, *Easthaven Ltd. v. Nutrisystem.com Inc.* (2001), 55 O.R. (3d) 334 (S.C.J.), had concluded that because a domain name lacks a physical existence it was not "property in Ontario" and the mere fact the domain name was registered through a corporation that happened to carry on business in Ontario (the domain name Registrar) did not give it a physical presence here.

The court reviewed several scholarly articles on the issue from around the world and also considered jurisprudence from several other countries, including the United States, the United Kingdom and Australia. It concluded that the emerging consensus appears to be that domain names are a form of property. After a further analysis of the nature of personal property, the court concluded that a domain name is personal property. Further, the connecting factors favouring location of the domain name in Ontario were held to be the location of the registrant of the domain name and the location of the registrar and the servers as intermediaries. On this basis the court found the domain name in issue to be personal property in Ontario, and thus took jurisdiction under the approach in *Van Breda* (discussed in an earlier post).

The case discusses several other issues, including (i) the relationship between the dispute settlement mechanism provided by WIPO and civil litigation and (ii) the propriety of a claim to obtain a declaration as a remedy.

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# Issue 2011.1 Nederlands

# Internationaal Privaatrecht

The first issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, which was published in April of this year (apologies for the late posting), was a special issue on Human Rights and Private International Law.

It includes the following interesting contributions:

Laurens Kiestra, Article 1 ECHR and private international law, p. 3-7. The conclusion reads:

*In this paper, the role of Article 1 ECHR, which defines the scope of the instrument, with regard to private international law has been discussed. When a court of one of the Contracting Parties either applies a foreign law or recognizes a foreign judgment originating from a third State, there is no reason not to apply the ECHR to such cases. Even though such a third State has never signed the ECHR, it would ultimately be the court of one of the Contracting Parties whose application of a foreign law or recognition of a foreign judgment violating one of the rights guaranteed in the ECHR that would breach the ECHR. This follows from the Court's case law concerning the extraterritorial effects of the ECHR which has been confirmed by the little case law that specifically deals with private international law. Even in circumstances in which there is only a negligible connection with the Contracting Party, the situation does not change appreciably. Such situations still come within the jurisdiction of the Contracting Party and the ECHR is thus applicable to such cases. This does not mean that there cannot be any consideration of specific private international law issues, but only that such concerns should be dealt with within the system of the ECHR. Therefore, one could question whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR.*

Michael Stürner, Extraterritorial application of the ECHR via private international law? A comment from a German perspective, p. 8-12. The conclusion reads:

*In Article 1 the ECHR binds Contracting States to the observance of its*

*provisions. Authorities of each such State must duly respect and foster Convention rights, implying that the entire legal order of that State must comply with Convention standards. Consequently, the ECHR influences private international law along with other branches of such legal systems. Its rules and provisions must equally avoid contradicting Convention rights. Within such legal orders, the ECHR applies to national and transnational cases alike. As soon as there is jurisdictional competence in the Contracting State's courts, a judge acts as part of the State organs bound by the Convention. The operation of choice-of-law rules as applied by national courts and the ensuing results must be in accordance with Convention standards, just as much as the operation of any other national law of such State. If the consequence of the application of foreign law is a violation of the Convention, the forum judge has to see to it that this violation is avoided or corrected. This can be achieved via the public policy exception which is, in its turn, heavily influenced, inter alia, by ECHR standards. However, such an alteration of the resulting application of foreign law referred to through the rules of private international law does not in itself entail an extraterritorial application of the ECHR. There is, as concluded above, no obligation upon a State under public international law to install or apply choice-of-law rules at all; thus there can be no violation of generally accepted principles of international law through a State's application of a public policy exception emerging from its own legal system, including (in the case of the ECHR) its own obligations assumed under public international law.*

Ioanna Thoma, The ECHR and the *ordre public* exception in private international law, p. 13-18. Here is an abstract from the introduction:

*The purpose of this paper is to crystallize whether the ECHR claims an autonomous and direct application superseding the theoretical premises and technical construction of the conflicts rule itself or whether there is an intertwining interplay between the Convention's ordre public européen and the ordre public exception clause as understood in private international law. First, some examples from domestic case law will demonstrate the methodological approach taken vis-à-vis the interaction between the ECHR and the exception clause of ordre public). Second, further examples from the case law of the ECHR will highlight the position taken by the ECtHR on this question. On the basis of this bottom up and top-down approach our observations and conclusions will be presented.*

Patrick Kinsch, Choice-of-law rules and the prohibition of discrimination under the ECHR, p. 19-24. The abstract included on SSRN reads:

*This article deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.*

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# A welcome comment on ECJ's "Berliner Verkehrsbetriebe" ruling

Last Friday the Spanish magazine *La Ley-Unión Europea* published a comment on ECJ case C- 144/10 by Professor Rafael Arenas (Universidad Autónoma, Barcelona). Prof. Arenas provides some welcome, useful keys on the understanding of the relationship between ECJ rulings in cases C- 04/03, *GAT,* and C-144/10 *BVG;* he also takes into account the reference for a preliminary ruling from the Supreme Court of the United Kingdom (C-54/11) in the same case, still pending before the ECJ. A little reminder: five years ago, in *GAT,* the ECJ established that art. 16(4) of the Brussels Convention applies to any proceedings on the validity of a patent , even if this validity is discussed by way of a plea in objection. On May, 12 2011, the ECJ issued a ruling on C-144/10, *BVG v. JPMorgan,* a case in which a contractual claim was contested by the defendant -a company-, on the basis that the agreement was not valid because the decisions of the society's organs, which had led to the conclusion of the contract, were null

and void. The defendant tried to avoid the London jurisdiction, arguing that the only competent courts were the German ones since the defendant was a German company, and one of the issues under discussion was the validity of decisions of its organs. According to the defendant, article 22(2) of the Regulation applies although the doubts on the validity of the company's decisions was just a preliminary question. Apparently, the ECJ's ruling in *GAT* supports the defendant's arguments. The ECJ established, however, that in the case *BVG v. JPMorgan* article 22(2) of Regulation 44/2001 does not apply. The ECJ maintains that this decision does not contradict his previous ruling in case 4/03, *GAT*; but it is obvious that the compatibility of both judgments requires some explanation. That is why we recommend Prof. Arenas's comment.

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# Radicati on Arbitration and the draft Brussels I Review

Luca G. Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Erede Pappalardo, has posted Arbitration and the Draft Revised Brussels I Regulation on SSRN. The abstract reads:

> *This paper discusses the provisions on arbitration of the European Commission's December 2010 draft review of Reg. (EC) 44/2001 against the backdrop of the earlier proposals on the inclusion of arbitration within the scope of the Regulation. The analysis focuses principally on the functioning and implications of the lis pendens mechanism laid down by Article 29(4) of the draft, pointing out the analogy between the role conferred on the law and forum of the seat of the arbitration and the mechanism of home country control that is at the heart of European Union law. The article also analyzes the reasons and positive consequences of the Commissions' restraint in not extending the scope of the Regulation to other arbitration – related issues, especially the circulation of judgments dealing with the validity of arbitration agreements and awards. The article's conclusion is that the Commission proposal is well balanced. Whilst it does not solve all problems relating to conflicts between court*

*proceedings and arbitration within the EU, it addresses the most pressing one, that of concurrent court and arbitration proceedings. Moreover, it does so in terms which, in contrast to the use of anti-suit injunctions in aid of arbitration, are reconcilable with the basic tenets of European Union law. Its approach is indisputably favorable to the development of arbitration and does not jeopardize the acquis in terms of arbitration law of the more advanced member States.*

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# Retirement of J J Spigelman as Chief Justice of New South Wales

It is appropriate to note on this blog the recent retirement of J J Spigelman as Chief Justice of New South Wales. A number of his judgments and speeches over the course of his tenure as Chief Justice constitute significant contributions to Australian private international law.

They are identified in his chapter entitled 'Between the Parochial and the Cosmopolitan' in the recently published collection *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) edited by Justin Gleeson and Ruth Higgins. That chapter also provides an overview of the former Chief Justice's views on the approach of the judiciary to the foreign elements that arise in cases, including cross-border issues, venue disputation, enforcement of judgments, judicial co-operation and determining questions of foreign law. The chapter is based on a speech given by the former Chief Justice in June 2010, the text of which may be found here.

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# Australian article round-up 2011: International co-operation

Concluding the Australian article round-up, readers may be interested in the following articles raising points about international co-operation on conflicts issues:

- Rosehana Amin, 'International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?' (2010) 17 *Australian International Law Journal* 113

*One of the difficulties faced by judges and practitioners when dealing with disputes arising from international commercial transactions is in the application and enforcement of a choice of court or foreign jurisdiction clause to determine the relevant court to adjudicate the dispute. This article explores the process undertaken by Australian courts when deciding whether they should exercise jurisdiction. In addition, the legal uncertainty arising from the distinction drawn between exclusive and non-exclusive jurisdiction clauses, and the ambiguous approach employed in the enforcement of a jurisdiction clause is considered. The Hague Conference on Private International Law has developed the Hague Convention on Choice of Courts Agreement 2005 and it is intended to promote the enforceability of exclusive choice of court agreements and establish the international recognition and enforcement of resulting judgments. This article considers whether Australia should, like its American and European counterparts, take steps to sign and ratify the Hague Convention. Further, the article also assesses the impact the Convention will have in resolving jurisdictional issues faced by Australian courts and the recognition and enforcement of a resulting decision. Finally, the article posits that the Hague Convention will clarify the uncertainties facing Australian courts in international jurisdictional disputes.*

- Gina Elliott and David Hughes, 'Australia joins the Hague Service Convention' (2010) 84 *Australian Law Journal* 532:

*The Hague Service Convention will come into force for Australia on 1*

*November 2010. The Convention presently has 61 states parties, and is the most important multilateral convention in the field of transnational services of process. This article sets out the main features of the Convention, including when it applies, the manner in which the Convention will interact with Australian law, and the methods provided by the Convention for the transmission of documents for service abroad. The article also discusses foreign case law that has developed in connection with key issues that arise under the Convention.*