Baude on Choice of State Law in U.S. Federal Statutes

William Baude, who is a fellow at Stanford Law School, has posted Beyond DOMA: Choice of State Law in Federal Statutes on SSRN. The abstract reads:

> *The Defense of Marriage Act has been abandoned by the executive and held unconstitutional by courts, so it is time to think about what will be left in its place. Federal law frequently asks whether a couple is married. But marriage is primarily a creature of state law, and states differ as to who may marry. The federal government has no system for deciding what state's law governs a marriage, though more than a thousand legal provisions look to marital status, more than a hundred thousand same-sex couples report being married, and many of those marriages ultimately cross state lines. Unless a federal choice of law system is designed, DOMA's demise will lead to chaos.*
>
> *This paper argues that such a system can and should be designed: Because the underlying choice-of-law problem is ultimately a problem of statutory interpretation, Congress can and should replace it with a clear choice-of-law rule. Failing that, federal courts can and should develop a common law rule of their own – they are not (and should not be) bound by the Supreme Court's decision in Klaxon v. Stentor Electric. The paper further argues that different institutions should solve the problem differently: If Congress acts, it should recognize all marriages that were valid in the state where they took place. If, instead, the courts create a common-law rule, they should recognize all marriages that are valid in the couple's domicile.*
>
> *The implications of this argument run far beyond the demise of DOMA. In all areas of what is here called "interstitial law," federal interpretive institutions can and should devise a set of choice-of-law rules for federal law that draws upon state law, and what set of rules is proper may well depend on who adopts them.*

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

BP Wins Case in Siberian Court

Last Friday was November 11th, 2011. Quite a few readers may have wondered whether something extraordinary would happen on such a remarkable date.

It has. On Friday, a foreigner won a case against a Russian party in a Russian court.

Several newspapers have reported that a Siberian court ruled in favour of BP in a dispute against a Russian party on Friday. The proceedings had been initiated by Andrei Prokhorov, a minority shareholder in the Russian joint venture of BP, TNK-BP. Among other claims, Mr Prokhorov sought USD 13 billion in damages against BP. He argued that a failed deal between BP and another Russian company, Rosneft, would cost the joint venture billions in profit.

After the Siberian court had authorized the search of BP's offices at the end of August by Russian commandos armed with assault rifles, BP might have been pessimistic about the outcome of the case. But it seems it was nothing else than the local way of conducting pre-trial discovery.

The Russian party has announced that it will appeal the judgment. If the court of appeal rules in December next year, BP may well win again.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2011)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Christoph M. Giebel***: "Fünf Jahre Europäischer Vollstreckungstitel in der deutschen Gerichtspraxis – Zwischenbilanz und fortbestehender Klärungsbedarf" – the English abstract reads as follows:

The regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims has been applicable for more than five years now. During this time, German courts, including the Federal Supreme Court, have rendered substantial case law on this subject matter. Whilst awaiting further clarifications through the European Court of Justice, legal practice has thus been provided with valuable indications on the procedural requirements to be observed when applying for a European Enforcement Order in Germany. Despite the abundance of case law rendered by German Courts, a need for general clarification persists in certain areas. The article analyses this case law and proposes solutions for some material problems still to be solved. As the most serious deficit of the current German legal situation relating to European Enforcement Orders the author identifies the lack of clear-cut provisions on due information requirements under German law as to certain decisions that fall within the scope of application of the regulation. This particularly relates to resolutions determining costs or expenses (Kostenfestsetzungsbeschlüsse) and contempt fines (Zwangsgeld-/Ordnungsgeldbeschlüsse). The author suggests that the German legislator should introduce the relevant due information requirements in the German Code of Civil Procedure. In the meanwhile, the lack of such provisions does not hinder German judgement creditors from providing due information to the debtors themselves.

- ***Carl Friedrich Nordmeier***: New Yorker Heimfallrecht an erbenlosen Nachlassgegenständen und deutsches Staatserbrecht (§ 1936 BGB) – the English abstract reads as follows:

§ 3-5.1 of the New Yorker Estates, Powers and Trust Law (EPTL) determines as applicable for succession in immovables the lex rei sitae, for succession in movables the law of the state in which the decedent was domiciled at death. According to § 4-1.5 EPTL, heirless property situated in the State of New York escheats to the State. The present article shows, based on an analysis of § 4-1.5 EPTL, that the law of the State of New York generally calls for the application

of the lex rei sitae if an estate is left without heir. § 4-1.5 EPTL is based on an "idea of power", according to which a state does not pass heirless property which is found on its territory to another state.

Regarding the EU Commission proposal for a Regulation on the law applicable in matters of succession, the present contribution suggests the application of the lex rei sitae for estates without a claimant (art. 24 of the Proposal) and the admission of renvoi (art. 26 of the Proposal) when the law of a third State is designated to be applicable by the Regulation.

- ***Christoph Thole***: "Die Reichweite des Art. 22 Nr. 2 EuGVVO bei Rechtsstreitigkeiten über Organbeschlüsse" – the English abstract reads as follows:

In its decision, the ECJ held that Art. 22(2) of the Brussels I-Regulation is inapplicable in cases in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes. Thus, exclusive jurisdiction is not conferred on the courts of the country in which the company has its seat in cases where the validity of a decision of the company's organs is put in issue merely as a preliminary question to the validity of a contract. The ECJ established, inter alia, that the ruling of the famous GAT case concerning Art. 22(4) is not to be applied to the construction of Art. 22(2). In conclusion, the Court significantly narrows the scope of Art. 22(2). The article shows that the judgment is both persuasive in its findings and in accordance with former decisions. However, the ECJ has not managed to completely resolve the obvious disparity between the GAT case and other decisions dealing with the matter of preliminary questions.

- ***Ansgar Staudinger:*** "Wer nicht rügt, der nicht gewinnt – Grenzen der stillschweigenden Prorogation nach Art. 24 EuGVVO" – the English abstract reads as follows:

The court correctly clarified that the second sentence in Art. 24 of the Brussels I Regulation constitutes an exceptional clause which is subject to a restrictive interpretation (this applies accordingly to the parallel agreement between the EU and Denmark, the Lugano Convention, as well as Council Regulation No

4/2009 on matters relating to maintenance obligations). As a form of tacit prorogation, Art. 24 Brussels I Regulation is the equivalent of Art. 23 Brussels I Regulation. As far as the elements of Art. 24 Brussels I Regulation are fulfilled, the court must have jurisdiction. To this extent, national courts do not have discretionary power.

Currently, the Brussels I Regulation does not provide an obligation to inform or instruct the defending party, prior to it entering an appearance without contesting the court's jurisdiction. Such an obligation may only be introduced by the European legislator. Thus, in the scope of the Brussels I Regulation, provisions such as § 39 sentence 2 and § 504 of the German Code of Civil Procedure (Zivilprozessordnung) infringe the regulation's precedence over national law. However, the spirit and purpose of the protective clause in matters relating to insurance require that the court may ensure that the defending party is aware of the consequences of entering an appearance without contesting the court's jurisdiction, and that the decision to do so is therefore deliberate. This applies accordingly to matters relating to individual contracts of employment as well as consumer contracts. Only to this extent is a recourse to § 39 sentence 2 and § 504 of the German Code of Civil Procedure possible. The aforementioned principles may vary in light of the Council Directive on unfair terms in consumer contracts, as the judge's discretionary powers in this context may be reduced to such a degree that an obligation to instruct the defending party would be necessary as to not breach the directive. In any case, an instruction is not to be given to parties with legal representation by a lawyer. As far as legal policy is concerned, it seems preferable to specify an obligation of instruction in Art. 24 Brussels I Regulation, de lege ferenda. Therefore, the Commission's proposal for reform is welcome in its original intention. However, it is too far-reaching in its extent, since it neither differentiates between defendants with and those without legal representation by a lawyer, nor distinguishes initial cases from appeal procedures and lacks any distinction within matters relating to insurance.

- ***Jan D. Lüttringhaus***: "Vorboten des internationalen Arbeitsrechts unter Rom I: Das bei „mobilen Arbeitsplätzen" anwendbare Recht und der Auslegungszusammenhang zwischen IPR und IZVR" – the English abstract reads as follows:

For the first time since the adoption of the European regulations in the private international law of obligations, the Court of Justice has decided on the uniform interpretation of European jurisdiction and conflict of laws terminology. While the preliminary ruling primarily concerns Art. 6 (2)(a) Rome Convention, the Court holds also that the "habitual workplace" has to be interpreted consistently with Art. 8 (2) Rome I as well as with Brussels I. Thus, mobile employees like truck-drivers, flight and train attendants working in more than one state may actually have their habitual workplace not only in the country in which, but also from which they carry out their work.

- ***Urs Peter Gruber:*** "Unterhaltsvereinbarung und Statutenwechsel" – the English abstract reads as follows:

Under Art. 18 par. 1 EGBGB, when the creditor changes his habitual residence, the law of the state of the new habitual residence becomes applicable as from the moment when the change occurs. This rule is convincing as long as the creditor bases his claims on the statutory law of the state of his new residence. If however the parties conclude a maintenance agreement, it seems questionable that a subsequent change of residence should have an influence on the law applicable to that maintenance agreement. If that were the case, the creditor would unilaterally influence the validity of the maintenance agreement by simply changing his habitual residence. This would clearly be in contradiction to the legitimate expectations of both parties. In a decision on legal aid, the OLG Jena has rightly come to the same conclusion.

The OLG Jena has also rightly pointed out that, although the validity of the maintenance agreement is as such not influenced by the subsequent change of residence, the parties might seek a modification on the agreement and base their petition on the fact that – due to the change of residence – the maintenance obligation is now governed by another law. Therefore, one has to differentiate between the validity of the agreement and the possibility to modify the agreement. Whether and to what extent the agreement can be modified is mainly determined by the law of the state of the creditor's new habitual residence.

- ***Markus Würdinger***: "Die Anerkennung ausländischer Entscheidungen

im europäischen Insolvenzrecht" – the English abstract reads as follows:

Regulation No 1346/2000 on insolvency proceedings (European Insolvency Regulation) provides in Article 16, that the judgment opening insolvency proceedings is to be recognised automatically in all the other Member States, with no further formalities. The author analyses a judgement of the ECJ about the recognition of insolvency proceedings opened by a court of a Member State. The ECJ rules that the competent authorities of another Member State are not entitled to order enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory. The author agrees with the judgement, but he criticises, that the ECJ has checked the international jurisdiction. The article also clarifies the follow-up question, whether the attachment effected by the German authorities is lawful.

- ***Susanne Deißner***: "Anerkennung gerichtlicher Entscheidungen im deutsch-chinesischen Rechtsverkehr und Wirksamkeit von Schiedsabreden nach chinesischem Recht" – the English abstract reads as follows:

The question whether Chinese court decisions are to be recognised by German courts was decided in the affirmative by the Higher Regional Court Berlin in a decision of 18 May 2006. With regard to Chinese law and its application by the courts in China it is, however, doubtful that the requirement of reciprocity under German civil procedure law is met by Chinese court decisions under three aspects: the requirement of "reciprocity in fact", the vague notion of public policy in Chinese law, and important differences in the concept of international lis pendens. Nevertheless, the decision by the Higher Regional Court Berlin has possibly – as proof of a positive German recognition practice with regard to Chinese court decisions – enhanced the chances for German judgments to be recognised in China. Dismissing the action, as the Higher Regional Court Berlin did, was, in any case, justified on other grounds mentioned obiter dictum by the court: According to the applicable Chinese law on arbitration, the arbitration agreement in question was invalid.

- ***Matthias Weller:*** "Vollstreckungsimmunität für Kunstleihgaben ausländischer Staaten" – the English abstract reads as follows:

The Higher Regional Court of Berlin once more deals with the question whether loans of art by foreign states are immune from seizure in the host state under customary international law. The decision seems to support such rule of customary international law if the exhibition serves the purpose of cultural representation by the foreign state. The new element of this rule merely lies in the acknowledgment that the loan of works of art and cultural property constitutes one of other modes of cultural representation by a foreign state in the host state. Once this small step is taken, it is clear that property used for the purpose of cultural representation falls within the general rule of customary international law that property used for acta iure imperii of a state cannot be seized or attached while present on the territory of another state. The practical importance of this rule will continue to grow in the future.

- ***Daniel Girsberger*** on a new book by Kronke, Herbert/Nacimiento, Patricia/Otto, Dirk/Port, Nicola Christine (Hrsg.): Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention
- ***Jörn Griebel***: "Zuständigkeitsabgrenzung von Verwaltungs- und Justizgerichtsbarkeit in Frankreich" – the English abstract reads as follows:

In its decision of 17 May 2010 (no. 3754) the French Tribunal des conflits addresses the division of jurisdiction between the juridiction de l'ordre administratif and the juridiction de l'ordre judiciaire. Within the decision the Tribunal des conflits defines under which circumstances the juridiction de l'ordre administratif is mandatory, inter alia where state property or government procurement contracts are at stake. In the present case the jurisdiction fell, however, into the juridiction de l'ordre judiciaire because the contract in question was concluded by a public entity with a foreign person and comprised elements of international commercial law.

- ***Michael Stürner***: "Staatenimmunität bei Entschädigungsklagen wegen Kriegsverbrechen" – the English abstract reads as follows:

There has been an ongoing controversial discussion on State immunity, a long-standing principle of customary international law. While according to the traditional view the principle of State immunity extends to any act of State (acta

iure imperii) a newly emerging opinion pleads in favour of exceptions in cases of grave violations of human rights. Both decisions discussed here reflect that debate. The Highest Court of the Republic of Poland, on the one hand, also considering the pending case Germany against Italy before the ICJ, does not see any ground for departing from the principle par in parem non habet iurisdictionem. Conversely, the Italian Corte di Cassazione follows its previous case law, according to which a restriction of State immunity in cases dealing with crimes against humanity is justified.

- ***Ruiting QIN***: "Eingriffsnormen im Recht der Volksrepublik China und das neue chinesische IPR-Gesetz" – the English abstract reads as follows:

There exist some provisions in the Chinese law, especially in the Chinese law relating to foreign exchange administration, which are in nature overriding statutes of the law of the Mainland of China. However, the judicial practice of the Chinese people's courts up to now has dealt with these provisions incorrectly. These provisions should be applied to all foreign-related loan contracts as well as guarantee contracts directly, no matter which law governs the aforesaid contracts. The judicial practice of the Chinese people's courts which has applied the Chinese overriding statutes by a roundabout way through forbidding evasion of law not only runs against the Chinese private international law de lege data, but also is harmful to the development of the Chinese private international law. According to Article 4 of Law on the Application of Law for Foreign-related Civil Relations of the People's Republic of China, coming into force on April 1st, 2011, should the provisions relating to foreign exchange administration in the Chinese law be directly applied as overriding statutes of the law of the Mainland of China. Overriding statutes, choice of law and evasion of law are three kinds of private international law phenomena and need different legislative regulation. Article 4 of the new Chinese Private International Law is a great development of the Chinese private international law, but it still need improvement.

- ***Arkadiusz Wowerka***: Translation of the new Polish statute on PIL "Gesetz der Republik Polen vom 4.2.2011: Das Internationale Privatrecht"

Professorship in Civil Procedure in Luxembourg

The University of Luxembourg is seeking to recruit a professor of civil procedure for next academic year.

Candidates with a strong interest in international or European civil procedure are most welcome. Indeed, Luxembourg should soon welcome a Max Planck Institute focusing on procedure, and one of its directors will be a specialist of international and European civil procedure. There should therefore soon be several scholars based in Luxembourg and interested in the field, who will hopefully conduct common research projects.

It should be noted that candidates should be ready to teach Luxemburgish civil procedure in the bachelor programme, which is inspired from French civil procedure.

> *The University of Luxembourg is a multilingual, international research University. The Faculty of Law, Economics and Finance of the University of Luxembourg has an opening for 1 Professor in Private Judicial Law (M/F) Ref: F2-110014 (to be mentioned in all correspondence) full time employee status.*
>
> *MISSION: The responsibilities contain the education at the levels BA, MA and doctorate, the research and the management of research projects.*
>
> *PROFILE:*
> *– A PhD in private law, ideally in internal, european or international processual law, since at least 3 years.*
> *– Publications in internationally recognised peer-reviewed journals, which testify a comparative or european curiosity; an interest for the alternative modes of disputes resolution will be an asset.*
> *– Perfect knowledge of French civil procedure.*
> *– Experience and aptitude for teaching and supervision of research at university level.*

– Ability to work in a multilingual environment: fluency in French and in one of the two other languages of the University: English or German.

APPLICATION PROCEDURE: Applications (in French or English) will contain following documents:

– The application form (see below)
– A motivation letter
– A copy of the diploma of doctorate
– A detailed curriculum vitae with a list of publications of the candidate
– A text of up to 6000 characters (3 pages) describing the scientific activities which the applicant wishes to carry out
– A copy of the doctoral thesis
– A list of three references with their name, address and present position. Please indicate their relationship to you
– A copy of the three publications that the candidate considers as most representative of his or her research activity

The University of Luxembourg offers competitive salaries. Information about the position can be obtained from Professor Andre Prum, Dean of the Faculty of Law, Economics and Finance, email: andre.prum@uni.lu

All applications should be sent in printed form and electronic version before 30th December 2011 to the following address:

Professor Andre Prum
Dean of the Faculty of Law, Economics and Finance
University of Luxembourg
162 A, Avenue de la Faiencerie
L-1511 Luxembourg
Email: fdef-recrutement@uni.lu

All applications will be handled in strictest confidence. The University of Luxembourg is an equal opportunity employer.

Position at the Hague Conference in International Family Law

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) is seeking a Legal Officer (full-time).

JOB DESCRIPTION: He or she will work in the areas of international family law and international child protection and be part of a team, under the direction of the responsible First Secretary, supporting the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Additionally, the Legal Officer will work on a variety of projects arising from recommendations made by various Special Commissions, including international family mediation and the private international law issues surrounding the status of children (including international surrogacy arrangements).

Duties may further include comparative research on general aspects of cross-border family law, work on the international child abduction database (INCADAT), drafting of research papers and other documentation, drafting and general preparation of materials for publication, answering daily requests for information relating to the relevant Conventions, preparation for meetings (including Special Commission meetings), assistance in the preparation of and participation in conferences, seminars and training programmes, giving presentations and lectures on issues related to international family law, and such other work as may be required by the Secretary General from time to time.

JOB QUALIFICATIONS: The successful applicant will have a good knowledge of private international law, particularly in the areas of international family law and international child protection. Familiarity with comparative law and public international law is desirable as is knowledge of civil law systems. He or she will have excellent language skills (oral and drafting) in at least one official language of the Hague Conference (English or French), and should have a good working knowledge of the other. Knowledge of a third language is an asset. He or she will be sensitive with regard to different legal cultures, and any experience with non-western cultures would be helpful. He or she should work well in a team and respond well to time-critical requests. Five to 10 years experience as a lawyer in private practice or in an academic or research institution, or as a government

official or an official with an International Organisation is required. Type of appointment and duration: two-year contract, with the possibility for renewal. Grade (Co-ordinated Organisations scale): +/- A1/1 subject to relevant experience.

APPLICATION PROCEDURE: Deadline for applications: 4 January 2012

Applications should be made by e-mail, with *Curriculum Vitae*, letter of motivation and at least two references, to be addressed to the Secretary General, e-mail: secretariat@hcch.net

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Workshop on the Proposal for a Common European Sales Law

On 17 and 18 November 2011, following the official opening of the secretariat of the European Law Institute (ELI), the ELI will host its first project workshop. Dedicated to the Proposal for a Common European Sales Law (CESL) the workshop will bring together leading European scholars and discuss the context, the structure and the content of the envisioned optional instrument. More information on the event is available on the Institute's website.

Official Opening of the Secretariat of the European Law Institute

On 1 November 2011 the Secretariat of the recently founded European Law Institute (ELI) has moved to its new premises in Vienna. To mark the occasion a public presentation of the ELI, and of the work of the Secretariat, will be made on 17 November 2011 at 10 am in the presence and with the support of Viviane

Reding, Vice-President of the European Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship. More information on the event is available on the Institute's website.

Agreements as to Succession

On the 31st. October the Spanish magazine *La Ley-Unión Europea* published a paper on Article 18 (Agreements as to succession) of the Proposal for a Regulation of the European Parliament and of the Council 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. Authors, Professor Santiago Álvarez-González and Isabel Rodríguez-Uría-Suárez (University of Santiago de Compostela) highlight that the mere existence of a special rule for agreements as to successions is to be welcome. Nevertheless, they propose some amendments to the current text and the need of rethinking some general options. Some of these proposals are similar to ones made by others scholars or Institutions (actually, authors agree on a wide extent with the Max Planck Comments); some others reflect the need to explore new solutions.

Authors propose the express inclusion of joint wills in the text of Article 18. They also consider that the substantive scope of the rules on applicable law to the agreements as to successions must be clarified, especially in its relationship with the lex succesionis. They disagree with the rule of Article 18 (4) of the Proposal. It is a rule that introduces a vast amount of uncertainty in the parties' expectations; this is the reason why they claim it must be suppressed. Furthermore, they consider than the place given to the possibility to make a choice of law to the whole agreement by the Article 18 (3) of the Proposal should be enlarged, allowing the parties involved in a such agreement to choose the law of the habitual residence of each of them and not only the law that they could have chosen in accordance with Article 17; that is, the law of each of their nationalities at the moment of choice.

The “rule of validation” of Article 18 (1) is analysed to conclude that, although it introduces an instrument to provide the *favor validitatis*, well acknowledged in comparative law, it could sometimes bring uncertainty as to the extent of the testamentary freedom (ie, parties are aware that the agreement they made is null and void according to the applicable law and the person whose succession is involved makes a new will). In the same sense, authors agree with the alternative solution (habitual residence of any of the persons whose succession is involved) provided by Article 18(2) for agreements concerning the succession of several persons, but they wonder whether such a conflict-rule-substantive approach is legitimate in the European Law context.

Argentina’s Diplomatic Immunity in Belgium and France

Should waivers of diplomatic immunity in financial contracts be taken seriously? Should they be interpreted as narrowly as possible? Should it be specifically the case for states close to bankruptcy? For the same reasons, should the scope of diplomatic immunity be interpreted broadly?

These questions arise after two judgments delivered in the same case by the French supreme court and the Court of appeal of Brussels last summer interpreted differently the same contractual clause whereby the Republic of Argentina had waived its sovereign immunity in a financial contract.

Background

On Christmas 2001, the gift of Argentina to its creditors was to declare a moratorium on payments of its external debt. One such creditor was NML Capital Ltd, which was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million.

In the summer 2009, NML Capital initiated enforcement proceedings in Europe. It had enforcement authorities carry out provisional attachements over banks accounts of the Argentine embassies (and of various other Argentine public bodies or missions to international institutions such as UNESCO) both in France and in Belgium.

Argentina challenged the validity of these provisional attachements on the ground that they violated its diplomatic immunity.

Argentina's Waivers of Sovereign Immunities

The relevant financial contracts contained clauses whereby the Republic waived all immunities for the purpose of enforcing a judgment ruling against it in the context of the relevant contracts. Each of the clauses in the different financial contracts then provided for exceptions, i.e. assets over which enforcement of the judgment could not be sought. The first exception was the reserves held by the central bank of Argentina. The second and third exception were two categories of public assets on Argentina's territory. The fourth were certain assets related to the budget of Argentina as defined by a particular Argentine statute.

This looked like carefully drafted clauses. None of them mentioned diplomatic immunity, or diplomatic assets. At the same time, the only assets which the clauses excluded from the waiver were located in Argentina, which suggested that diplomatic assets were covered by the waiver clause.

Belgium

In a judgment of 21 June 2011, the Brussels Court of Appeal dismissed Argentina's challenge and held that the bank accounts could be attached by the plaintiff.

With respect to the scope of the waiver clause, the court found that the 1961 Vienna Convention on diplomatic relations only provides for one requirement for waiver of the diplomatic immunity: it should be express. The court ruled that the waiver in the financial contract was express. It rejected the argument that the diplomatic immunity could only have been waived by a clause providing specifically that diplomatic immunities were also waived, as there is no such requirement in the 1961 Vienna Convention.

France

In a judgment of 28 September 2011, the French supreme court for private and criminal matters (*Cour de cassation*) held that Argentina still benefited from its diplomatic immunity, and that the provisional attachements carried out in France were thus void.

With respect to the scope of the waiver clause, the court held that waivers of diplomatic immunities must not only be express, but also special, i.e. provide specifically that they cover diplomatic assets. As it was perfectly aware that the second requirement is absent from the Vienna Convention, the court relied on customary international law. The judgment, however, is as cryptic as all judgments of the court, and thus does not explain how the court comes to this conclusion about the content of customary international law, and whether particular sources were considered.

With respect to the scope of the diplomatic immunity, the Vienna Convention also raised an issue, as it does not mention bank accounts among the assets covered by the diplomatic immunity. Again, the court held that, under customary international law, the diplomatic immunity extended to the accounts of embassies. On this point, the Brussels Court of appeal had reached, reluctantly it seems, the same conclusion.

Further readings

The enforcement of the judgment was also sought, and challenged, in the United Kingdom. The UK Supreme Court ruled on the case in a judgment of July 2011.

Issue 2011.2 Nederlands Internationaal Privaatrecht

The second issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on the

Brussels I Recast (contributions on Provisional Measures and Arbitration), Service of Documents and the new Chinese Private International Law Act:

Jolien Kruit, Voorlopige maatregelen: belangrijke wijzigingen op komst voor de (natte) praktijk!?, p. 271-279. The English abstract reads:

In its proposal to amend the Brussels I Regulation (COM(2010) 748), the European Committee has proposed several changes to the current rules on provisional, including protective, measures, as set out in Article 31 of the Brussel I Regulation and the case law of the European Court of Justice. Most strikingly, the Committee has proposed (1) that an obligation be implemented for the preliminary judge to cooperate with the Court where proceedings are pending as to the substance; and (2) that provisional measures, including – subject to certain conditions – measures which have been granted ex parte, are to be enforced and recognized, if they have been granted by a Court having jurisdiction on the substance of the case. This paper discusses these suggested changes and their consequences for daily practice. It is argued that if the proposed changes are implemented as suggested, serious problems may arise and that the Courts will have to give a reasonable interpretation to the provisions in order to create a practicable and useful regime.

Jacomijn J. van Haersolte-vanHof, The Commission's Proposal to amend the arbitration exception should be embraced!, p. 280-288. An excerpt from the introduction reads:

This contribution will first address the current state of the law, based on the present text 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 (the 'Regulation') and the main case law of the European Court of Justice. Furthermore, the background and contents of the Commission Proposal1 will be discussed. This leads to an overview of the main reasons why the Commission's Proposal for a review of this Regulation should be accepted. (…) this contribution is based on the role attributed to the author at the Colloquium held on 25 January 2011 in The Hague, organized by the T.M.C. Asser Institute and the Stichting Dutch Legal Network for Shipping Transport, namely to defend the Commission's Proposal. In fact, this role had been designated even before the Commission's point of view had been published. The author was happy to defend this position, also when the Commission's Proposal was released. At the same

time, it should be noted that, initially, the author hoped for and supported a more exhaustive solution for arbitration to be incorporated into the Regulation. Nevertheless, a partial solution at this stage is to be preferred over the complete absence of any solution. But, as this contribution will show, it is not easy to provide for a partial solution. Hopefully, the legislative process will allow certain amendments and fine-tuning further to improve the present Proposal.

Vesna Lazic, The amendment to the arbitration exception suggested in the Commission's Proposal: the reasons as to why it should be rejected, p. 289-298. The conclusion reads:

The solution suggested in the Commission's Proposal is both disproportionate and inadequate to meet the needs of the commercial parties. There is a clear discrepancy between the 'problem' allegedly intended to be resolved and the amendments suggested in the Proposal for doing so. The suggested measure of transferring the court intervention in the pre-arbitration phase from one jurisdiction to another can hardly be explained by reasons such as 'enhancing the effectiveness of arbitration agreements' and enhancing the attractiveness of arbitrating in the EU. Particularly erroneous and inadequate is the suggested and presumed binding nature of the decision on the validity of an arbitration agreement, without providing for at least a minimal level of uniformity. It is exactly because the 1958 New York Convention regulates only some instances of court 'intervention' that it is preferable to have a separate instrument within which all relevant aspects would be dealt with. Such an instrument would serve as a genuine supplement to the 1985 New York Convention. It would be a proper means to overcome the undesirable effects of those provisions that proved outdated and, as such, unsuitable for modern business or that have given rise to difficulties and discrepancies in interpretation by national courts. Such a carefully drafted instrument would truly enhance the attractiveness of arbitrating within the EU. Partial solutions in the form of poorly drafted and vaguely worded amendments are counterproductive as they will only be driving away potential users from arbitrating in Europe. Unfortunately, it does not seem likely that the Commission will follow that path and address all the issues in one EU instrument. Numerous interventions, commentaries on the Green Paper and clear preferences for not dealing with issues concerning the interface between arbitration and litigation within the Regulation have obviously been ignored. Thus, it is unrealistic to expect that any comments and suggestions to that effect will have any

relevance in the future. Yet if the Commission wishes to pursue the approach of a '(partial) deletion of the arbitration exception' it is perhaps not too much to expect that the context and the wording of the amendment will be substantially reconsidered and revised. Thereby an approach comparable to Article VI(3) of the European Convention may be a suitable solution. This may be combined with prima facie control over the validity of arbitration agreements by the court seised when no arbitration has yet been initiated. Such an approach would ensure the full effectiveness of arbitration agreements.

Chr. F. Kroes, Bij nader inzien: de Hoge Raad komt terug van zijn opvatting dat bij de kantoorbetekening ex artikel 63 Rv ook het Haags Betekeningsverdrag moet worden gevolgd, p. 299-302 [Annotation to Hoge Raad 4 februari 2011, nr. 10/04456, LJN: BP0006 (NIPR 2011, 222) en nr. 10/05104, LJN: BP 3105 (NIPR 2011, 223). The English abstract reads:

Until recently, the Supreme Court held that national service at the office address of a party's counsel in the first instance ('office service') was not sufficient if the defendant had his/her domicile in a Member State of an international instrument on service abroad (an EU Regulation or a treaty). In such a case, the plaintiff should also adhere to the requirements for service under that instrument. The Supreme Court has now completely reversed its position. With regard to the Service Regulation II, it decided on 18 December 2009 that, in case the Service Regulation II would otherwise be applicable, office service is sufficient. On 4 February 2011, the Supreme Court handed down two decisions that make clear that the same applies in cases where defendants have their domicile in Member States of the Hague Convention on Service in Civil and Commercial Cases 1965. No doubt, these decisions are pragmatic. However, there are objections. First, it is unclear what effort a party's counsel must make in order to make sure that the document that has been served actually reaches his client. In most cases, this will not be a problem, but if counsel has lost contact, it certainly will be. Such an inability to reach the client will go unnoticed by the court that will then simply proceed by default. Secondly, problems with recognition and enforcement outside of the Netherlands may result from such an office service.

Ning Zhao, The first codification of choice-of-law rules in the People's Republic of China: an overview, p. 303-311. The conclusion reads:

Given the continued economic growth and the ever-increasing number of foreign-

related civil relations in the PRC, the enactment of the Statute is certainly a timely one. With this Statute, the legislator has succeeded in achieving the goals of codifying substantial parts of choice-of-law rules, and keeping them in line with major developments achieved in international and national codifications and reforms in this field. In spite of the influence of other codifications, the Chinese legislator has made this Statute suitable for Chinese social reality. From the foregoing, it is clear that the Statute gives preference to legal certainty and conflicts justice over flexibility and substantive justice. The Statute incorporates many of the most advanced developments in the field of choice of law, in that it modernizes and systematizes the rules that are currently in force. Parties in dispute and practitioners will certainly benefit from the clear and transparent rules prescribed in the Statute, and those rules will also facilitate the adjudication of international civil disputes by Chinese courts. Thus, as the first codification of choice-of-law rules in China, the Statute opens a new page for Chinese private international law. It is probably too early to draw a conclusion as to the effectiveness of the Statute, as only practice will put the advantages and inconvenience of the Statute into perspective. Nevertheless, the Statute seems to have the potential to succeed as a basic body of law in regulating choice-of-law problems in foreign related civil relations.