

# O'Hara and Ribstein on Conflict Rules and Global Competition

Erin A. O'Hara, who is a professor of law at Vanderbilt Law School, and Larry E. Ribstein, who is a professor of law at the University of Illinois College of Law, have posted *Exit and the American Illness* on SSRN. Here is the abstract:

This essay, prepared for a book on the effect of regulatory, liability, and litigation inefficiencies on the global competitive position of the U.S., focuses on the role of the US federal system. We show that, although multiple US states offer significant potential for jurisdictional choice to address misguided or inappropriate law, this system is only a partial solution to these problems and can itself be a source of bad law and excessive litigiousness. Federal law and enforcement of contractual choice-of-law, choice-of-court, and arbitration clauses provide some, but only partial, relief. As a result, choice of law and jurisdiction rules potentially expose firms that do business nationally or internationally to oppressive law in any of the US states. Without reform of the rules regarding jurisdictional choice the US is losing an opportunity to exploit the edge in international competition it might get from its federal system.

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# Italian Forum on the Brussels I Review Proposal

The Italian Society of International Law is currently holding a Forum on the Brussels I Review Proposal.

The Forum offers contributions of Italian scholars on the Proposal, in Italian. So far, two have been posted:

- Pietro Franzina, La garanzia dell'osservanza delle regole sulla competenza giurisdizionale nella proposta di revisione del regolamento "Bruxelles I"

- Antonio Leandro, La proposta per la riforma del regolamento “Bruxelles I” e l’arbitrato

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## **Publication: Liber Amicorum Bernardo Cremades**

Bernardo Maria Cremades Sanz Pastor, University professor and lawyer of the Ilustre Colegio de Abogados of Madrid, former Vice President of the London Court of International Arbitration, and member of the ICSID Panels of Conciliators and Arbitrators, is undoubtedly the Spanish best known and most recognised legal professional in international arbitration. He has been, and remains, the great master of arbitration in Spain; but his brilliant career is admired far beyond our borders, making him the best of our ambassadors. It is therefore no surprise that the Spanish Arbitration Club has decided to pay tribute to his long career with the publication of a book that gathers the contributions of more than seventy experts in the field: prestigious specialists from around the world that have paid homage to Bernardo Cremades with studies, written primarily in English, that cover the most important fields of arbitration.



Click here to see the table of contents of the book (publishing house: La Ley. ISBN/ISSN: 978-84-8126-590-3)

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## **Conference on the Brussels I**

# Review Proposal

The British Institute of International and Comparative Law will hold a conference on the Commission's Brussels I Review Proposal of December 2010 on February 10th, 2011.

Speakers will include:

**The Right Hon the Lord Mance**, Justice of the Supreme Court of the United Kingdom

**Professor Alegria Borrás**, University of Barcelona, Spain; GEDIP

**Andrew Dickinson**, Professor in Private International Law, University of Sydney; Consultant, Clifford Chance LLP; Visiting Fellow at the British Institute of International and Comparative Law

**Dr Pippa Rogerson**, University of Cambridge

**Professor Jonathan Harris**, University of Birmingham; Serle Court, London

**Professor Michael Bogdan**, University of Lund, Sweden

**Professor Andreas Furrer**, University of Luzern, Switzerland

**Alexander Layton QC**, 20 Essex Street

**Professor em Ulrich Magnus**, University of Hamburg, Germany

**Professor Luboš Tichý**, Charles University Prague, Czech Republic

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More details can be found [here](#).

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## OUP Yearbooks Available Online

*Law Yearbooks from OUP - Free Online Access until Feb. 28<sup>th</sup>*

*Since the start of January 2011 the law yearbooks from Oxford University Press, previously available only in print, have become available online as well. This includes all volumes since 1996 but not the most recent ones which only*

*published in December 2010.*

*To launch this initiative we are making all of this content **freely available** until the end of February 2011. To view, browse, download and search the material click on these links:*

*British Year Book of International Law*

*Yearbook of International Environmental Law*

*Yearbook of European Law*

*Current Legal Problems*

*The latest volume of each will become available to subscribers from April 2011. New content for future volumes will become available online to subscribers as it is processed thus dramatically reducing the time taken before an author's work is publicly available.*

*For access after the end of February you will need a subscription. Please contact your librarian if you are not sure whether your institution has taken up a subscription.*

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## **Lis pendens in Regulation (EC) 2201/03 (again on Purrucker v. Vallés)**

Reference for a preliminary ruling from the Amtsgericht Stuttgart (Germany), to be dealt with through the accelerated procedure, was lodged on 16 June 2010 in case C- 296/10 (Bianca Purrucker v Guillermo Vallés Pérez, noch ein mal). ECJ's answer was published on Saturday in OJ, C, 013.

### **Questions referred**

Is Article 19(2) of Council Regulation (EC) No 2201/2003 ('Brussels IIA') 1 applicable if the court of a Member State first seised by one party to resolve matters of parental responsibility is called upon to grant only provisional measures and the court of another Member State subsequently seised by the other party in the same cause of action is called upon to rule on the substance of the matter?

Is that provision also applicable if a ruling in the isolated proceedings for provisional measures in one Member State is not capable of recognition in another Member State within the meaning of Article 21 of Regulation No 2201/2003?

Is the seising of a court in a Member State for isolated provisional measures to be equated to seising as to the substance of the matter within the meaning of Article 19(2) of Regulation No 2201/2003 if under the national rules of procedure of that State a subsequent action to resolve the issue as to the substance of the matter must be brought in that court within a specified period in order to avoid procedural disadvantages?

## **ECJ Ruling**

The provisions of Article 19(2) of Regulation No 2201/2003 are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Article 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief or that a judgment is handed down in the context of such proceedings and there is nothing in the action brought or the judgment handed down which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation No 2201/2003 does not necessarily preclude the possibility that, as may be provided for by the national law of that Member State, there may be an action as to the substance of the matter which is linked to the action to obtain interim measures and in which there is evidence to

demonstrate that the court seised has jurisdiction within the meaning of that regulation.

Where, notwithstanding efforts made by the court second seised to obtain information by enquiry of the party claiming *lis pendens*, the court first seised and the central authority, the court second seised lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation No 2201/2003, and where, because of specific circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.

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## New French Law of Arbitration

A new law of arbitration was adopted yesterday in France. The Décret n° 2011-48 of 13 January 2011 *portant réforme de l'arbitrage* amends the French Code of Civil Procedure accordingly. The old provisions of the Code on arbitration dated back to 1980 and 1981. The reform is concerned with both domestic and international arbitration.

The new provisions are available [here](#). An explanatory report can be found [here](#).

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# P.R. China's First Statute on Choice of Law (translated in English)

Following up on Xiao Fang's excellent post here regarding the Statute on the Application of Laws over Foreign-Related Civil Relations of the People's Republic of China which shall come into force as of April 1, 2011 and is the P.R. China's first statute on conflict rules, I am very pleased to report that Professor Lu, the Secretary General of the Chinese Society of International Law, has been kind enough to provide an English translation for our readers. The translation is available [here](#) (PIL China).

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## Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2011)

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

Here is the contents:

- **Heinz-Peter Mansel/ Karsten Thorn/Rolf Wagner:** "Europäisches Kollisionsrecht 2010: Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?" - The English abstract reads as follows:

*The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters, covering a period from November 2009 until November 2010. It summarises current projects and new instruments that are currently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which*

were a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ as well as important decisions from German courts touching the subject matter of the article. In particular, it critically analyses two decisions from the Court of Appeal of Munich and the Court of Appeal of Berlin. These two courts used the Grunkin Paul case as a starting point to develop their own kind of recognition principle based on art. 21 Treaty on the Functioning of the European Union, thereby, in the author's view, deciding legal questions that would have been better left to the ECJ to decide. In addition, the present article turns to the current projects of the Hague Conference as well.

- **Theodor Schilling:** "Das Exequatur und die EMRK"- the English abstract reads as follows:

*The article raises the question of the requirements the ECHR may pose for the enforcement of foreign judgments. It starts with discussing the human rights protection of creditor and debtor in enforcement proceedings within a single country. It goes on to consider that protection in foreign enforcement proceedings with special emphasis on the role of the exequatur and of possible alternatives to it. The next item is the level of protection granted by human rights law in foreign enforcement proceedings, exemplified by the Stolzenberg-Gambazzi story and a judgment of the German Federal Court. Finally the discussion turns to the abolition of the exequatur by certain EU regulations. The overall result is that the demands of the ECHR concerning the protection of the debtor in foreign enforcement proceedings are not very high but that human rights law is rather accommodating to the more muscular approaches to enforcement.*

- **Matthias Lehmann/André Duczek:** "Zuständigkeit nach Art. 5 Nr. 1 lit. b EuGVVO - besondere Herausforderungen bei Dienstleistungsverträgen" - the English abstract reads as follows:

*The subject of this article is the application of Article 5 (1) (b) of the Brussels I Regulation on service contracts. The authors criticise the recent ECJ judgment in *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA*, case No. C-19/09. They argue that the decision conflicts with the primary goals of the*

*Brussels I Regulation, because (1) the competent court cannot be determined with certainty since the determination would depend on factual circumstances that may occur after the conclusion of the contract; (2) the court at the place where the main service is rendered is not necessarily close to the dispute between the parties; (3) the determination of the competent court would require a lot of futile time and effort; and (4) if no main service can be found, the service provider would be able to bring the claim at its domicile, contrary to the principle of *actor sequitur forum rei*. In light of these problems, the authors suggest a different approach: In their view, the court at the place of performance of the service that is the subject of litigation should have jurisdiction. Such interpretation would be in line with the goals of legal certainty and proximity and solve most of the problems that the ECJ judgment has produced. But it would create another difficulty since it allows the provider of services in multiple locations to bring its claim, e. g. for payment, virtually anywhere. This problem, the authors suggest, can be avoided through a contractual stipulation on the place of performance, which is explicitly allowed by Article 5 (1) (b) Brussels I Regulation.*

- **Jörg Pirrung:** “Gewöhnlicher Aufenthalt des Kindes bei internationalem Wanderleben und Voraussetzungen für die Zulässigkeit einstweiliger Maßnahmen in Sorgerechtssachen nach der EuEheVO” - the English abstract reads as follows:

*Judgment and Opinion in case A give rise to the hope that the ECJ will interpret the Brussels IIa regulation 2201/2003 in a way leading to success fthe Brussels I regulation 44/2001, the former Brussels Convention of 1968. In view of the entry into force of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children for all EU States, envisaged for 2010 (or 2011), the application of regulation 2201/2003 by courts in the EU should be open-minded. In order to avoid, as far as possible, differences in the development of the law concerning international jurisdiction and recognition of decisions in custody cases in the EU on the one hand and in the relations to the contracting states of the Hague Convention on the other hand, the courts in the EU should try to apply the regulation in conformity with the understanding of the international treaty.*

- **David-Christoph Bittmann:** "Das Verhältnis der EuVTVO zur EuGVVO"  
- the English abstract reads as follows:

*Today European Civil Procedure Law offers creditors several ways of executing a title in another Member State. Beside the "traditional" way of applying for a declaration of enforceability in the second state - as foreseen by Regulation (EC) 44/2001 - the creditor can make use of some modern legal instruments, which provide simplified procedures for getting a European title enforceable in all Member States. To reach this aim the European legislator especially created the European Payment Order and a Small-Claim-Procedure. Some years before, as a first step towards an original European title, the European Enforcement Order for uncontested claims was established by Regulation (EC) 805/2004. With the rising number of such parallel-regulations concerning cross-border enforcement the question of how to delineate the scope of application of these instruments appeared. A special problem discussed in German literature and jurisprudence was, if it should be possible for a creditor to apply for a declaration of enforceability in the second state according to Regulation (EC) 44/2001 although he already holds a European Enforcement Order issued by the court of the first state. The German Federal Supreme Court (BGH) denied this possibility by stating that the creditor does not have an interest in getting a declaration of enforceability when he can reach his aim of cross-border enforcement by making use of the European Enforcement Order. This article discusses the decision of the Federal Supreme Court.*

- **Hans-Patrick Schroeder:** "Zur Reichweite des § 110 ZPO im grenzüberschreitenden Konzernverbund" - the English abstract reads as follows:

*Under the preconditions of Sec. 110 et seq. German Code of Civil Procedure (Zivilprozessordnung, "ZPO"), a respondent in a civil action may request the court to order the claimant to provide security for costs. The statutory preconditions include that the claimant must have its seat or residence outside of the EU and that the claimant does not have any real property inside the EU which could enable the respondent to enforce a claim for reimbursement of costs. Starting with two recent decisions rendered by German courts, the article explores the scope of application of Sec. 110 et seq. ZPO in the context*

*of international groups of companies. Its first conclusion is that a German company may not be ordered to provide security for costs under any circumstances. This applies even if it is the subsidiary of a holding company outside of the EU and was created only to bring a claim instead of the holding company in order to circumvent the duty to provide security for costs. Under such circumstances, however, the assignment of the rights claimed might be void if the German company is insufficiently funded and the intent to frustrate the respondent's potential claim for reimbursement of costs is evident. Its second conclusion is that having a subsidiary within the territory of the EU does not exempt a claimant seated outside the EU from the duty to provide security for costs since the respondent cannot enforce a claim for the reimbursement of costs against the subsidiary which is not a party to the dispute. This is the main difference between a legally independent subsidiary and a branch lacking legal independence. Only in the latter case are the assets located at the branch attributable to the claimant. Consequently, they may then enable the respondent to enforce its claim for reimbursement of costs within the territory of the EU.*

- **Nadjma Yassari:** “Die islamische Brautgabe im deutschen Kollisions- und Sachrecht” - the English abstract reads as follows:

*This article critically reviews a judgement of the German Federal Supreme Court on the characterisation of the Islamic dower (mahr, s. ada-q, mehriye) in German private international law. On 9 December 2009, the German Federal Supreme Court (BGH) concluded a long-lasting dispute by deciding that the mahr was to be characterised as an effect of the marriage under Art. 14 EGBGB. The court rejected all other norms of international family law including the characterisation of the mahr under the matrimonial property regime of Art. 15 EGBGB. It mainly held that the mahr did not constitute, amend or replace a matrimonial property regime and that the unchangeable nature of the connection of the matrimonial property regime under Art. 15 EGBGB (Unwandelbarkeit) was too static to accommodate the changes in the lives of people who had immigrated to Germany, acquired German nationality and left behind any relation to the law of their former nationality. This view is contested. Rather it is argued that Art. 15 EGBGB provides for a better characterisation of the mahr. Firstly, the mahr is an important instrument of property transfer in marriage. Secondly, linking the mahr to the matrimonial*

*property regime in terms of characterisation will ensure that both the mahr and the financial equalization of the spouses' property upon divorce are governed by the same law, thus leading to more equitable results. The judgement of the BGH will lead to an increase of cases in which the mahr will fall under German law. Unfortunately, however, the court provides only for little guidance as to the accommodation of the mahr in German national family law. It declares the agreement on the mahr to be valid, but fails to give details on its relation to the native claims awarded under German law, i.e. post-marital maintenance and the equalisation of the matrimonial accrue. Finally, one also misses conclusive hints on the formal requirement for the validity of the mahr agreement under German law.*

- **Dieter Henrich** on a decision of the Higher Regional Court Stuttgart on the voidability of marriage: "Rechtsprechungsübersicht zu OLG Stuttgart, Beschluss v. 30.8.2010 - 17 UF 195/10"
- **Peter Mankowski**: "Zur Abgrenzung des Individual- vom Kollektivarbeitsrecht im europäischen internationalen Zivilverfahrensrecht" - the English abstract reads as follows:

*Arts. 18-21 Brussels I Regulation establish a protective regime for labour suits. But this covers only individual law suits by individual employees or employers. It does not encompass actions by trade unions, employer's organisations, works councils or other institutional bodies. Yet the borderline between the two areas can be a slippery slope and can require quite some thought on which side of the line a case falls if for instance a local Works Councils sues substantially on an individual employee's behalf. Formal characterisation of the plaintiff body and concrete mode of claims pursued have to be reconciled.*

- **Oriola Uka/Michael Wietzorek**: "Anerkennung einer deutschen Ehescheidung durch das Appellationsgericht Tirana" - the English abstract reads as follows:

*So far, it was disputed whether there is factual reciprocity as required by § 328 Sec. 1 Nr. 5 German Civil Procedure Code and § 109 Sec. 4 Family Procedure Law with regards to Albania, partially due to the circumstance that German literature was unaware of any decision of an Albanian court that recognised a German decision. Based on the decision of the Court of Appeals of Tirana dated*

12 April 2010, which recognised a decision of the First Instance Court of Nuremberg regarding a divorce, and on the autonomous Albanian regulations regarding the recognition and enforcement of foreign court decisions, the present essay argues that German courts should assume that Albanian courts are generally willing and ready to recognise German decisions in Albania.

- **Erik Jayme** on the conference of the European Group for Private International Law in Copenhagen: "Tagung der Europäischen Gruppe für Internationales Privatrecht (GEDIP) in Kopenhagen"

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## International Interdisciplinary Seminar, Surrey, 21 June 2011

The Surrey International Law Centre (SILC) announces a call for papers for an international interdisciplinary seminar on cultural legitimacy and the international law and policy on climate change that will take place on 21 June 2011 at the School of Law, University of Surrey.

The seminar seeks to contribute to research on the international law and policy of climate change by focusing on the issue of cultural legitimacy. Beginning from the premise that legitimacy critiques of international climate change regulation have the capacity to positively influence policy trends and legal choices, we seek a range of papers, from across all the disciplines that investigate the link between the efficacy of international legal and policy mechanisms on climate change and cultural legitimacy or local acceptance.

Abstracts for poster presentations, short papers (10 minutes) and research papers (20 minutes) on these themes will be accepted until 15 February 2011. They should be a maximum of 300 words, in English, sent either by fax or by email. Selected papers from the conference will be published in an edited book.

You will find more information here.