Issue 2010/2 Nederlands Internationaal Privaatrecht

The second issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht (www.nipr-online.eu)* includes the following contributions on Party autonomy in Rome I and II; Art. 5(3) Brussels I (Zuid-Chemie case); Scope of the Service Regulation; Enforcement in the Netherlands; and Implementation of the European Order for Payment Procedure in the Netherlands:

- Symeon C. Symeonides, Party autonomy in Rome I and II: an outsider's perspective, p. 191-205. The introduction reads:

The principle that contracting parties should be allowed, within certain limits, to pre-select the law governing their contract (party autonomy) is almost as ancient as private international law itself, dating back at least to Hellenistic times. Although this principle has had a somewhat checkered history in the United States, it has been a gravamen of continental conflicts doctrine and practice, at least since the days of Charles Dumoulin (1500-1566). The latest codified expression of party autonomy in European private international law is found in the European Union's Rome I Regulation of 2008 on the Law Applicable to Contractual Obligations, which replaced the 1980 Rome Convention, as well as in the Rome II Regulation of 2007 on the Law Applicable to Non-Contractual Obligations. In the meantime, most other legal systems have recognized the principle of party autonomy, making it 'perhaps the most widely accepted private international rule of our time'. Nonetheless, disagreements remain in defining the modalities, parameters, and limitations of this principle. These disagreements include questions such as: (1) the required or permissible mode of expression of the contractual choice of law; (2) whether the chosen state must have a specified factual connection with the parties or the transaction; (3) which state's law should define the substantive limits of party autonomy; (4) whether the choice must be limited to the law of a state or whether it can also include non-state norms; and (5) whether the choice may encompass non-contractual issues. This essay offers an outsider's limited textual assessment of some of the modalities and limitations of party autonomy under the Rome I and Rome II Regulations and a comparison with the prevailing practice in the United States.

- H. Duintjer Tebbens, Het '*forum delicti*' voor professionele productaansprakelijkheid en het Europese Hof van Justitie: een initieel antwoord over initiële schade, Hof van Justitie EG 16 juli 2009, zaak

C-189/08 (*Zuid-Chemie/Philippo's Mineralenfabriek*), p. 206-209. The English abstract reads:

The author offers a critical analysis of the latest judgment of the European Court of Justice in a line of cases concerning the proper interpretation of 'the place where the harmful event occurred' (here: the initial damage) for the purposes of the allocation of jurisdiction in tort under Article 5(3) of the Brussels Convention and its successor, the Brussels I Regulation. In Zuid-Chemie v. Philippo's Mineralenfabriek*, C-189/08, on a reference by the Dutch* Hoge Raad*, the Court had to answer the principal question whether, in a dispute between commercial parties concerning liability arising out of a contaminated chemical product used for the production of fertilizer, the place where the initial damage occurred was where the product was delivered or the place where, as a result of the normal use of the product, (material) damage was caused to the fertilizer. The referring court further asked whether, if the second alternative was correct, this would also extend to the hypothesis that the initial damage consisted of pure economic loss. As to the procedural treatment of this reference the Note questions the wisdom of having resort in the present case to the accelerated procedure for preliminary rulings, which implies that the Advocate General does not deliver an Opinion. On the principal question concerning interpretation of Article 5(3), the author agrees with the decision of the European Court which further develops earlier case law, in particular its ruling in Marinari, C-364/93. Nevertheless, he criticizes some parts of the reasoning of the Court as well as certain points of terminology. He notes that the European Court made its own assessment of what kind of damage was at issue in the case, i.e. material damage to the fertilizer produced by the claimant, which did not completely match the findings of fact by the* Hoge Raad*. This explains why the European Court did not deal with the second question referred by the Dutch court whose point of departure was that the initial damage consisted of pure economic loss. The author concludes that it is still an open question whether Article 5(3) offers a forum if the initial damage is purely of a pecuniary nature, for example in the case of losses from financial transactions.*

- Chr.F. Kroes, Kantoorbetekening zet de Bet.-Vo. buiten spel oordeelt de Hoge Raad, Enige kanttekeningen bij Hoge Raad 18 december 2009, nr. 09/03464 (*Demerara/Karl Heinz Haus*), p. 210-214. The English abstract reads:

On December 18, 2009, the Supreme Court handed down a decision that will be dear to the hearts of pragmatists. The Supreme Court found that the possibility of service pursuant to Article 63(1) of the Code of Civil Procedure renders the Service Regulation (EC 1393/2007) inapplicable. The Supreme Court's decision is based on one of the recitals of the Service Regulation and information in the parliamentary papers that accompanied the proposal for the Dutch Execution Act on the new Service Regulation. Therefore, its judgment seems to fail to take into account the case law of the ECJ.

Pursuant to that case law, the Service Regulation should be interpreted autonomously. Statements of the Council may not be used to interpret the Service Regulation, if they are not reflected in the provisions of the Regulation itself. The recitals may not be used to arrive at a restrictive interpretation of the scope of application of the Regulation. Therefore, it is difficult to see how information in the Dutch parliamentary papers supports an interpretation that restricts the application of the Service Regulation.

- Niek Peters, Bevoegdheid van de Nederlandse rechter bij een exequaturprocedure en een *actio iudicati*, p. 215-222. The English abstract reads:

In the Netherlands it is not possible for a creditor to simply enforce a foreign monetary judgment against a debtor. A creditor must first of all obtain a Dutch enforcement order For this purpose, he must either file an application for leave for enforcement (exequatur) – pursuant to Articles 38 et seq. Brussels I Regulation and Articles 985 et seq. DCCP respectively – or alternatively file a claim pursuant to Article 431 paragraph 2 DCCP. However, the jurisdiction of the Dutch courts over such an application or claim is not necessarily ensued, when a debtor has his place of domicile outside of the Netherlands. This is essentially due to the fact that a Dutch court may not assume jurisdiction if a creditor merely states that the enforcement will (or could) be required in his district. For instance, in a procedure for ordering enforcement (exequatur procedure), a creditor must make a plausible argument that a debtor has, or could have, assets in said district. In case of a claim pursuant to Article 431 paragraph 2 DCCP, a Dutch court may not have jurisdiction until after a prejudgment attachment has been (successfully) levied. As a consequence, it is possible that a creditor cannot obtain an enforcement order in the Netherlands, even though he may have a justifiable interest in obtaining such order. Therefore, it would be recommendable if there is at least a court that has jurisdiction over an application for leave of enforcement or, respectively, a claim pursuant to Article 431 paragraph 2 DCCP.

- Mirjam Freudenthal, Perikelen rond de uitvoering van de Verordening van een Europees betalingsbevel, p. 223-225. The English abstract reads:

The Netherlands 2009 Act adapting Dutch civil procedure to the Regulation for a European Order for Payment did not include an effective provision on the referral of the order for payment procedure to a regular court procedure once the order for payment was objected to by the defendant. Recently the government published a Bill with adjustments to the 2009 Act, in which it proposed to concentrate all order for payment procedures in the The Hague court and a new provision was introduced regulating all aspects of this referral of the ex parte order for payment procedure to the regular court. In this article the consequences of the Bill's proposals are discussed and measures to

improve the referral procedure are suggested.

If you are interested in contributing to this journal, please contact the editing assistant Wilma van Sas-Wildeman, w.van.sas-wildeman@asser.nl, or the editor-in-chief Xandra Kramer, kramer@frg.eur.nl

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The Battle Between Oklahoma and Foreign Law

Yesterday was election day in the United States, when the entire House of Representative and one third of the US Senate stood for reelection. It was also a day when ballot measures were taken up in several states. Strangely, choice of law was on the ballot in one state. Voters in Oklahoma were given the option to approve the following measure:

> *"The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia Law."*

Nearly 70% of those voting approved the measure to ban the use of international law and Sharia law in Oklahoma state courts. While this bears some resemblance to initiatives in the 1800s that sought to prevent US courts from relying on the common law, I am fairly comfortable in stating that this may very well be the first time the US electorate (or the electorate of one US state) has voted on a choice of law initiative and has voted to close a state's doors to foreign, non-U.S. law. I have no doubt that the courts will be asked to step in to reivew this. It may be the case that such a ban is unconstitutional under the First Amendment, as my

colleague Michael Helfand has recently explained. And to think that most Americans thought this election was about the economy!

Anuario Español de Derecho Internacional Privado 2009

A new number of the AEDIPr has been released. These are the doctrinal studies included in the volume:

ESTUDIOS

Nerina Boschiero, "Las reglas de competencia judicial de la unión europea en el espacio jurídico internacional"

Haimo Schack, "La (indebida) abolición de los procedimientos de exequátur en la unión europea"

Alegría Borrás, "La celebracion de convenios internacionales de derecho internacional privado entre estados miembros de la union europea y terceros estados"

Angel Espiniella Menéndez, "Dimensión externa del derecho procesal europeo"

Manuel Desantes y José Luis Iglesias Buhigues, "Hacia un sistema de derecho internacional privado de la unión europea"

Paul Beaumont y Burcu Yürsel, "La reforma del reglamento de Bruselas I sobre acuerdos de sumisión y la preparación para la ratificación por la UE del Convenio de la Haya sobre acuerdos de elección de foro"

Paul L.C. Torremans, "El EPLA y la patente comunitaria o el acuerdo sobre el tribunal europeo y de la UE y la patente de la UE: ¿una oportunidad para deshacerse de Gat / Luk y de la competencia exclusiva?"

Sylvaine Poillot Peruzzett, "La incidencia de las modalidades del reconocimiento

de decisiones en el espacio judicial europeo en la dualidad orden público nacional / orden público europeo"

Crístian Oró Martínez, "Control del orden público y supresión del exequátur en el espacio de libertad, seguridad y justicia: perspectivas de futuro"

Pilar Jiménez Blanco, "Acciones de resarcimiento por incumplimiento de los acuerdos de elección de foro"

Gilles Cuniberti y Marta Requejo Isidro, "Cláusulas de elección de foro: fórmulas de protección"

Patricia Orejudo Prieto de los Mozos, "La incompatibilidad de decisiones como motivo de denegación de la ejecución de los títulos ejecutivos europeos"

Beatriz Añoveros Terradas, "Extensión de los foros de protección del consumidor a demandados domiciliados en terceros estados"

Julio Antonio García López, "Repercusiones de la sentencia del tribunal de justicia europeo en el asunto Sundelind López: ámbito de aplicación espacial de las normas de competencia judicial internacional de la unión europea en materia de separación y divorcio"

Benedetta Ubertazzi, "Licencias de derechos de propiedad intelectual y reglamento comunitario sobre la competencia judicial"

José Ignacio Paredes Pérez, "Licencias de derechos de propiedad y las acciones colectivas en el reglamento "Bruselas I": una aproximación desde la perspectiva de los intereses de los consumidores"

Vésela Andreeva Andreeva, "Licencias de derechos de propiedad y protección de los consumidores en el reglamento Bruselas I y su articulación con el reglamento Roma I"

Mònica Vinaixa Miquel, "La aplicación extracomunitaria de los foros especiales del art. 5 del Reglamento Bruselas I"

Clara I. Cordero Alvarez, "Algunos problemas de aplicación del art. 5.3º del reglamento 44/2001"

María López de Tejada Ruiz, "La incompatibilidad de decisiones en los nuevos

reglamentos comunitarios”

María Jesús Elvira Benayas, “Una visión transversal del reglamento 1206/2001 sobre obtención de pruebas en materia civil y mercantil”

Marta Casado Abarquero, “La investigación del patrimonio del deudor ejecutado en el extranjero”

Alberto Muñoz Fernández, “La obtención de pruebas en EEUU para su empleo en procesos españoles”

Nicolás Zambrana Tévar, “La práctica del discovery entre los EEUU de América y España. especial atención al caso Prestige”

Toshiyuki Kono, “La reforma de la ley relativa al procedimiento civil en Japón “

Aurelio López–Tarruella Martínez, “La regulación en Japón de la competencia judicial internacional en materia de propiedad industrial e intelectual: una visión desde Europa”

Gilberto Boutin “La concurrencia de foros en el derecho procesal internacional panameño y en la Convención de Bustamante: forum non conviniens y litispendencia internacional”

Amalia Uriondo de Martinoli, “Reclamaciones litigiosas de alimentos entre convivientes desde una perspectiva latinoamericana”

Click here to consult whole summary

ANUARIO 2009 I

P.R. China’s First Statute on

Choice of Law

I am grateful to XIAO Fang, Post-doctoral fellow and lecturer at Remnin University Law School, for contributing this report.

The Statute on the Application of Laws over Foreign-Related Civil Relations of the People's Republic of China was adopted at the 17th Session of the Permanent Committee of the 11th National People's Congress of the People's Republic of China on October 28, 2010. It has been promulgated and shall come into force as of April 1, 2011. This is the P.R. China's first statute on conflict rules.

The Statute comprises 52 articles which are divided into 8 chapters (general rules, civil subjects, succession, real rights, obligations, intellectual property, and supplementary provisions). It will be applied over the civil affairs with elements relating foreign countries and China's special administrative regions of Hong Kong and Macao as well.

According to the legislators, during the process of drafting, the conflict law statutes of some countries, principally Germany, Switzerland and Japan, and the conventions of the Hague Conference of Private International Law and some Europe Union's regulations have been referred to.

As most of Chinese civil and commercial statutes already include some conflict rules, for the areas that are not covered by this new statute, such as maritime law, civil aviation law and negotiable instrument law, the conflict rules in the related statutes should still be applied .

In the Chapter of General Rules, the Statute provides for the "application immédiate" of Chinese mandatory rules (Article 4), the defense of public policy against the application of foreign law (Article 5) and excludes *renvoi* in Chinese courts (Article 9). Pursuant to the new Statute, the limitation of action is governed by the law applicable to the civil relation (Article 7); characterization is governed by the lex fori (Article 8); the applicable foreign law should be ascertained by judges, while the parties should provide for the content of foreign law if they chose to apply it by agreement (Article 10).

During the process of drafting, the principle of most significant relationship has ever been stipulated as the principle of application of laws, like the provision of

Article 1 of the 1978 Austrian Statute on Private International Law, which provided for: “The law applicable to foreign-related civil relation should have the most significant relationship with the relation.” Nevertheless, in the final draft of the Statute, the article was deleted, and it was provided for in Article 2(2) that the most significant relationship principle will be supplementally applied in absence of conflict rules in the Statute.

Party autonomy got significant development in the new Statute. Besides contracts and family law, its application was extended to torts and real rights: in the cases of real rights in movables (Articles 37, 38) and tort (Article 44), the parties may choose freely the applicable law.

The new Statute also attaches importance to the protection of weaker parties in international civil relations. In the cases of relations between children and parents (Article 25), maintenance (Article 29), Guardianship (Article 30), consumption contract (Article 42), and product liabilities (Article 45) and so on, the lex personalis i.e. law of the nationality or the habitual residence of the weaker parties or the law which is favorable to the protection of the interests of the weaker party should be applied.

Belgian Court Recognizes Californian Surrogacy

In the case of the two men who had contracted with a woman living in California in a case of international surrogate motherhood, a Court of Appeal has recently issued its ruling, reversing in part the decision of the lower court (Court of Appeal of Liège, 1st Chamber, ruling of 6 September 2010, docket No 2010/RQ/20).

As has been indicated, the lower court had denied any recognition to the birth certificates of the twin girls issued by the authorities in California. The lower court had based its reasoning primarily on the violation of the public policy

exception, holding that the birth certificates were only the last step in a series of events which started with the surrogacy agreement. The court placed great weight on the fact that this agreement violated basic human dignity in that it put a price on the life of a child.

In appeal, the Court again reviewed the matter *ab novo*. It found that the first step in the analysis was to review whether the birth certificates could have been issued if the rules of Belgian private international law had been applied. This test is mandated by Article 27 of the Code of Private International Law, which requires that foreign acts, including acts concerning the civil and family status of individuals, comply with the requirements of the law(s) declared applicable by the Belgian rules of private international law. Since both men were Belgian nationals, the Court of Appeal first undertook to determine whether the birth certificates could have been issued applying Belgian law.

The Court proceeded first to review the situation of the parent who was the biological father of the twin girls. It found that under Belgian law, since the surrogate mother was not married, the father could have recognized the children and hence legally become their father. The situation was different for the other man who had 'commissioned' the children, as he was not biologically linked with the children. The Court found that under Belgian law, there was no possibility to establish a legal parentage between a child and two persons of the same sex, outside the specific situation of adoption by same sex couples.

Having found that at least one of the commissioning parents could have established his paternity over the children, had Belgian law been applied, the Court undertook to review the impact on this paternity of the very peculiar circumstances which surrounded the birth of the twin. Specifically the Court examined whether these circumstances, and in particular the existence of a contract between the mother and the commissioning parents, contract which had given rise to the payment of money, did not lead to a violation of public policy.

While it recognized that contracts which directly concern human beings and the human body were void under public policy principles, the Court noted that the public policy reservation called for a nuanced application. Among the principles which could be taken into consideration in the light of the public policy mechanism, the Court singled out the interest of the children, as protected both by international law instrument and the Belgian Constitution. According to the

Court, this interest would be unreasonably curtailed if the children, who resided in Belgium, were deprived of any legal link with their biological father, while at the same time they could not legally be considered the children of the mother who had carried and delivered them. The same could not be said, however, according to the Court, for the legal link between the twin sisters and the other man.

Accordingly, the Court only partially granted the relief sought by the two men. It decided to recognize and give effects to the birth certificates issued in California in so far as they form the basis for the legal link between the sisters and their biological father.

While this ruling may not be the last word in this case, it is quite likely that the other parent will now seek to adopt the children.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr

As we pointed out in a previous post, a very rich collection of essays **in honor of Prof. Kurt Siehr** on his 75th birthday has been recently published by Eleven International Publishing and Schulthess, under the editorship of *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger* and *Symeon Symeonides*: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**. A previous *Festschrift* was dedicated to Prof. Siehr in 2000: "Private Law in the International Arena – From National Conflict Rules Towards Harmonization and Unification: Liber amicorum Kurt Siehr" (see Google Books).

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Title: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**, edited by *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger*, *Symeon Symeonides*; Eleven International Publishing – Schulthess,

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Katharina Boele-Woelki Talia Einhorn Daniel Girsberger Symeon Symeonides

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New Edition of Audit's Droit International Privé

The sixth edition of Bernard Audit's leading treaty on French private international law was just released.

This new edition is co-authored by Louis d'Avout, who is a professor of law at the University of Lyon III.

More details can be found here.

Reminder: Journal of Private International Law Conference 2011 (Milan) Call for Papers

The organisers of the conference are delighted that many people have already submitted their abstracts for the next Journal of Private International Law Conference in Milan in April 2011 but more abstracts are still very welcome. You are politely reminded that you have until the **end of Sunday 31 October 2010** to email your abstract if you would like to be considered as a speaker at the conference. Please make it clear whether you are willing for your abstract to be considered for the 'early career' parallel sessions of the Conference. Further

details on the conference are available here.

Kuwait Airways Corporation v. Iraq in the Supreme Court of Canada

In yet another, but not the final, step in the very long-running litigation between KAC, IAC and the Republic of Iraq, the Supreme Court of Canada has held that the enforcement in Quebec of a 2008 judgment of the English Commercial Court ordering Iraq to pay CAD$84 million to KAC is not barred by soveriegn immunity (decision here).

Many on this list will be familar with the facts. After the 1990 invasion of Kuwait, KAC sued IAC in England for conversion of several airplanes. As part of that litigation, KAC was able to claim against Iraq for the costs of the actions that had been brought. This claim flowed from Iraq's having controlled and funded IAC's defence, and it was not barred by sovereign immunity in England because it fell within the commercial activity exception. Iraq did not defend this claim and default judgment was granted.

KAC discovered immovable property owned by Iraq in Quebec and also some undelivered airplanes Iraq was buying from Bombardier Aerospace. It thus brought proceedings in Quebec to enforce the English judgment. Two lower courts held the claim was barred by sovereign immunity but the Supreme Court of Canada found that it fell within the commercial activity exception.

The court applied the *State Immunity Act*, RSC 1985, c S-18 and held that it applied to proceedings to enforce a foreign judgment (paras. 19-20). The English decision, which addressed the issue of sovereign immunity, was not binding in Canada and was not *res judicata* (since to be so it would first have to be recognized in Canada, which was the very issue before the court) (para. 22). The application of the commercial activity exception to the facts is somewhat brief (para. 35), though there is some useful discussion of the scope of the exception in the United Kingdom, the United States and Canada (paras. 25-33).

Two other points of interest: 1. the court does not wade into the issue of whether there are any exceptions to sovereign immunity beyond those set out in the statute (para. 24), and 2. the court accepts the factual findings of the English decision as part of its analysis, prior to concluding that the decision is enforceable in Canada (para. 34). This latter point seems somewhat hard to explain, and the court does not offer much explanation.

The Supreme Court of Canada did not determine if the English judgment is enforceable in Quebec – it only dealt with the sovereign immunity issue. The case was therefore remanded to the court of first instance to hear the claim for enforcement. Iraq likely has some further arguments to advance, such as that the Quebec court lacks jurisdiction over it and that the English default judgment is not entitled to recognition and enforcement (for example, due to the lack of a real and substantial connection between England and the claim advanced against Iraq).

Looking Back and Looking Forward at Canadian Private International Law

At the recent 40th Annual Workshop on Commercial and Consumer Law at the University of Toronto, three leading Canadian conflict of laws scholars – Vaughan Black of the Schulich School of Law, Joost Blom of the University of British Columbia and Janet Walker of Osgoode Hall Law School – presented a paper looking back at the last forty years in private international law and offering thoughts on what lies ahead. Each author picked out a particular theme: a judicial trend toward uniformity between provincial conflicts rules, the impact of *Morguard* on the structure of conflicts rules, and how the profile of the field has changed over time. The paper is not currently available on the web but will be published in an upcoming issue of the Canadian Business Law Journal.

The paper was supplemented at the Workshop by Genevieve Saumier of McGill University's oral comments on trends in Quebec's private international law. The session was chaired by Elizabeth Edinger of the University of British Columbia.