

Choice of Law in American Courts 2010

Once again, Dean Symeon Symeonides has compiled his annual choice of law survey. Here is the abstract:

This is the Twenty-Fourth Annual Survey of American Choice-of-Law Cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws, and is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. The Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2010. Of the 1,271 appellate conflicts cases decided during this period, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law—and, particularly, choice of law.

This has been an unusually rich year in choice-of-law developments. Some of the highlights include:

- * Four decisions by the U.S. Supreme Court (on extraterritoriality, sovereign immunity, class actions, and the Hague Convention on International Child Abduction, respectively), and several circuit court decisions on the extraterritorial reach of federal laws;*
- * A constitutional amendment in Oklahoma purporting to prohibit its courts from using international law, foreign law, and Sharia law;*
- * Three cases involving efforts to recover art lost during the Nazi era and also implicating federal affairs questions;*
- * Several cases affirming class certification in consumer protection cases and one case holding that the application of one state's consumer credit law to soliciting out-of-state lenders was unconstitutional under the dormant Commerce Clause;*
- * A major decision by the California Supreme Court refining its comparative impairment approach and a richer than usual assortment of cases involving tort, contract, product liability and insurance conflicts, as well as domestic relations conflicts; and*
- * Several opinions written by Judge Posner in his always interesting style, including one questioning the value of using foreign-law experts.*

The full survey is available for free [here](#).

Thanks to Dean Symeonides for providing this valuable resource on the state of American conflicts law.

Job offer in Brussels - lawyer experienced in Private International Law of the Family required

ADDE (Association pour le Droit des Étrangers), is an association for permanent education which promotes the rights of foreigners through the respect of the principles of equality, non discrimination and human rights.

ADDE recruits a lawyer to support its “Point d’Appui DIP familial” under a contract of full-time job for 8 months, possibly renewable, from 1 March 2011.

Functions:

- Provide legal advice in family private international law, and keep and monitor the records;
- Write analyses and studies;
- Organize training and animations;
- Strengthen the network of legal support.

Profile:

- Master / Bachelor of Law;
- Professional experience in the field of international private law concerning the family;
- Ability to work as a team and to energize a network;
- Excellent verbal and written communication skills;

- Proficiency in computer skills;
- Knowledge of Dutch would be considered an advantage.

CV and a letter explaining motivation must be addressed to Isabelle Doyen, Association pour le droit des étrangers asbl, rue du Boulet, 22-1000 Brussels. Deadline: 1 February 2011.

ECJ Rules on Human Rights and Abolition of Exequatur

On December 22nd, the European Court of Justice delivered its judgment in *Joseba Andoni Aguirre Zarraga v. Simone Pelz*. For the timebeing, it is only available in Spanish, German and French. 

The case was concerned with a Spanish judgment which had ruled on the divorce of a German-Spanish couple, and had ordered the return of a child to Spain. According to Article 42 of the Brussels IIa Regulation, this part of the judgment was immediately enforceable in Germany, as exequatur has been abolished for such judgments. Yet, the German party tried to resist enforcement in Germany on the ground that the Spanish judgment had been rendered in violation of human rights, as it appeared that the child had not been heard in the Spanish proceedings, and this was arguably contrary to Article 24 of the European Charter on Human Rights.

The Court of appeal of Celle, Germany, thus referred the matter to the ECJ, and asked whether, despite the abolition of exequatur, enforcing courts still had the power to review judgments rendered by courts from other member states on the ground that they would have been made in gross violation of the European Charter on Human Rights.

 The ECJ answered that there was no such power. It put forward two reasons in support of its decision. First, in matters regarding child custody, time is of the essence and judgments should be immediately enforced. Second, the principle

of mutual trust demands that foreign judgements be not reviewable on other grounds than those kept by the Regulation.

The German party should thus have challenged the Spanish judgment in Spain, and not in Germany.

The holding of the decision reads:

Unter Umständen wie denen des Ausgangsverfahrens kann sich das zuständige Gericht des Vollstreckungsmitgliedstaats der Vollstreckung einer mit einer Bescheinigung versehenen Entscheidung, mit der die Rückgabe eines widerrechtlich zurückgehaltenen Kindes angeordnet wird, nicht mit der Begründung entgegenstellen, dass das Gericht des Ursprungsmitgliedstaats, das diese Entscheidung erlassen hat, gegen Art. 42 der Verordnung (EG) Nr. 2201/2003 des Rates vom 27. November 2003 über die Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung und zur Aufhebung der Verordnung (EG) Nr. 1347/2000 nach dessen mit Art. 24 der Charta der Grundrechte der Europäischen Union konformer Auslegung verstoßen habe, da für die Beurteilung der Frage, ob ein solcher Verstoß vorliegt, ausschließlich die Gerichte des Ursprungsmitgliedstaats zuständig sind.

En circunstancias como las del asunto principal, el órgano jurisdiccional competente del Estado miembro de ejecución no puede oponerse a la ejecución de una resolución certificada que ordena la restitución de un menor ilícitamente retenido por considerar que el órgano jurisdiccional del Estado miembro de origen del que emana esta resolución ha vulnerado el artículo 42 del Reglamento (CE) nº 2201/2003 del Consejo, de 27 de noviembre de 2003, relativo a la competencia, el reconocimiento y la ejecución de resoluciones judiciales en materia matrimonial y de responsabilidad parental, por el que se deroga el Reglamento (CE) nº 1347/2000, interpretado conforme al artículo 24 de la Carta de los Derechos Fundamentales de la Unión Europea, por cuanto la apreciación de la existencia de tal vulneración compete exclusivamente a los órganos jurisdiccionales del Estado miembro de origen.

Dans des circonstances telles que celles de l'affaire au principal, la juridiction compétente de l'État membre d'exécution ne peut pas s'opposer à l'exécution d'une décision certifiée ordonnant le retour d'un enfant illicitement retenu au motif que la juridiction de l'État membre d'origine qui a rendu cette décision aurait violé l'article 42 du règlement (CE) n° 2201/2003 du Conseil, du 27 novembre 2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n° 1347/2000, interprété conformément à l'article 24 de la charte des droits fondamentaux de l'Union européenne, l'appréciation de l'existence d'une telle violation relevant exclusivement de la compétence des juridictions de l'État membre d'origine.

Many thanks to Patrick Kinsch for the tip-off.

Fourth Issue of 2010's Belgian PIL E-Journal

The fourth issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be* / *Revue@dipr.be* was released at the end of December. 

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue offers one article in English from Herman Verbist on *Investment arbitration under public scrutiny and the new European competence in the field*.

The issue can be freely downloaded [here](#).

Journal of Private International Law Conference 2011 (Milan) - Programme and Registration

The editors of J.Priv.Int.L are very pleased to announce that the **4th Journal of Private International Law Conference will take place in the University of Milan from Thursday 14th April 2011 at 2pm until Saturday 16th April at 5pm**. Over 50 early career papers are expected in parallel sessions on Thursday afternoon and Friday morning and 24 papers from experienced academics on Friday afternoon and Saturday.

- The fees for the conference are:

1. full price: 100 euros;
2. academics: 50 euros
3. students (undergraduate and postgraduate) and speakers: free

- The price for the dinner on Friday evening is 60 euros
- The price range for University accommodation per night is between 45-100 euros
- The price range for hotel accommodation per night is between 125-220 euros.

Accommodation has been reserved until the end of February 2011 and will be allocated on a first come first service basis. For registration to the conference and for further details, as well as to book any University accommodation, please contact Dr Giuseppe Serranò and Paola Carminati at jpil_2011@unimi.it. For any other accommodation, please directly contact the hotel at issue, quoting the participation in the *JPIL 2011 conference*.

Programme

Thursday 14 April 2011: 14.00-15.45

Group 1 - Treatment of Foreign Law, Preliminary Questions, PIL Treaties

- C. Azcárraga Monzonís, The urgent need of harmonization of the application of foreign laws by national authorities in Europe
- A. Gardella, Foreign law in member States' courts and its relationship with European Union law
- S. Gössl, The Preliminary Question in European Private International Law
- S. Grossi, An international convention on conflict of laws: the path to Utopia?
- T. Kyselovská, Bilateral (Multilateral) Treaties on Legal Aid as Sources of Law in the European Judicial Area

Group 2 – Jurisdiction in civil and commercial cases

- A. Arzandeh, Twenty five years of Spiliada
- U. Grusic, Jurisdiction in complex contracts under the Brussels I Regulation
- J. Kramberger Škerl, A. Jurisdiction over third party proceedings: articles 6/2 and 65 of the Brussels I Regulation and the countries in-between
- U. Maunsbach, New Technology, new problems and new solutions – Private International Law and the Internet Revisited

Group 3 – Family law – Adults

- J. Borg-Barthet, Family Law in Europe: Should Civil Rights be Divorced from Questions of Sovereignty?
- M. Harding, The public effect of marriage and the un-oustable jurisdiction of the English Matrimonial Courts over the financial consequences of marriage
- M. Melcher, An EU Regulation on the law applicable to registered relationships
- A. Sapota, What happened with Regulation Rome III? Seeking the way for unifying the rules on applicable law in divorce matters.
- S. Shakargy, Local Marriage in a Globalized World: Choice of Law in Marriage and Divorce

16.15-18.00

Group 4 – General PIL

- V. Macokina A new bill of Polish private international law – double edged

sword?

- C. Staath, Human Rights Protection in Private International Law: the role of access to justice
- E. Tornese, Mandatory rules within the European legal system
- T. Kozlowski, Ever Growing Borders in the Ever Closer Union of the EU

Group 5 – Choice of Law in Contract

- A. Dyson, Interpreting Article 4(3) of the Rome I Regulation: Something Old, Something Borrowed or Something New?
- M. Erkan, Examining the Overriding Mandatory Rules under the Rome I Regulation and the Turkish Private International Law Perspective
- E. Lein, The Optional Instrument for European Contract Law and the Conflict of Laws
- W. Long, Mandatory Rules in Cross-Border Contracts: Is China Looking Towards the EU?

Group 6 – Recognition and enforcement of judgments

- P. Mariani, The free movement of judgements in the European Union and the CMR
- C. Nagy, Recognition and enforcement of US judgments involving punitive damages in Europe
- W. Zhang, A Comparative Research on the Exequatur Procedure within the EU and China
- G.B. Özçelik, Application of the Brussels I Regulation and property disputes in Cyprus: reflections on the Orams case

Friday 15 April 2011: 09.00-10.30

Group 7 – Choice of Law in Tort/Delict

- J. Papettas, Rome II, Intra-Community Cross Border Traffic Accidents and the Motor Insurance Directives
- D. Krivokapic, Potential impact on the US Speech Act: Influence of the Speech Act on Ongoing PIL Debate within EU and Third Countries
- J.J. Kuipers, Towards a European approach in cross-border infringement of personality rights
- T. Thiede, The protection of personality rights against supra-national

invasions by mass-media

Group 8 – Family Law – children

- P. Jimenez Blanco, The Charter of fundamental rights of the European Union and international child abduction
- I. Kucina, K. Trimmings, P. Beaumont, Loopholes in the Brussels IIbis Child Abduction Regime
- A. Muñoz Fernández, Recognition of guardianships that were established abroad and preventive powers of attorney granted abroad
- F. S. Şahin, S. Ünver, Affiliation in surrogate motherhood in private international law perspective
- M. Wells-Greco, Cross-border surrogacy and nationality: achieving full parent status

Group 9 – Competition Law and Intellectual Property

- M. Danov, Cross-border EU competition law actions: should private international law be relied upon by the EU legislator in the European context?
- P. Dolniak, The rule in Article 6 of the Rome II Regulation as a „clarification” of general rule specified in Article 4
- S. Neumann, The infringement of intellectual property rights in European private international law – meeting the requirements of territoriality and private international law
- B. Ubertazzi, Intellectual Property Rights, Exclusive (Subject-Matter) Jurisdiction and Public International Law
- N. Zhao, China’s Choice-of-law Rules in International Copyright and Related Right Disputes

11.00 – 12.30

Group 10 – Trusts and insolvency

- N. Zitkevits, Recognition of trusts in the European Union countries
- R. Yatsunami, The Choice of Law Rules on Trust in Japan
- Z. Crespi Reghizzi, Jurisdiction, recognition of judgments and law applicable to reservation of title in insolvency proceedings
- A. Leandro, EU cross-border insolvency: a free zone for the anti suit

injunctions?

Group 11 - Choice of Court and Arbitration

- V. Salveta, The Enforceability of Exclusive Choice-of-Court Agreements
- L. Manigrassi, Arbitration Exception and Brussels I -Time for Change? An appraisal in light of the review of the Brussels I Regulation
- N. Zambrana Tévar, A new approach to applicable law in investment arbitration
- B. Yüksel, The relevance of the Rome I regulation to international commercial arbitration in the European Union

Group 12 - Class actions, Property and Succession

- V. Ruiz Abou-Nigm, Maritime Liens in the Conflict of Laws Revisited
- M. Casado, The investigation of the debtor's assets abroad
- K. Svobodova, Relation Between Succession Law Determined under the EU Draft Regulation on Succession and the Lex Rei Sitae
- B. Glaspell, Global Class Actions Prosecuted in Canadian Courts

12.30 - 14.00 Lunch break

14.00-15.45

PLENARY SESSION

Theory of PIL and party autonomy

- R. Michaels, What Private International Law Is About
- T. Kono, P. Jurys, Institutional Perspective to Private International Law
- M. Keyes, Party autonomy in private international law beyond international contracts
- A. Mills, Party Autonomy in Non-Contractual Private International Law Disputes

15.45-16.15 Coffee break

16.15 -18.00

Connecting Factors, Law Reform and Model Laws

- E. Schoeman, The connecting factor in private international law: neglected in theory, yet key to just solutions
- I. Canor, Reform of Choice-of-Laws in Torts in the Israeli Legal System - A Normative Perception and a Comparative Perspective
- D. E. Childress III, Courts and the conflict of norms in private international law
- J.A. Moreno Rodríguez, M.M. Albornoz, The Contribution of the Mexico City Convention to the Reflection on a New Soft Law Instrument on Choice of Law in International Contracts

20.00 Conference Dinner - After Dinner Speaker is Hans Van Loon, Secretary General of the Hague Conference on Private International Law

Saturday 16 April 2011: 09.00-10.45

Characterisation, external relations in PIL, declining jurisdiction and choice of law in contract

- G. Maher, B. Rodger, The respective roles for the lex fori, the applicable law and autonomous/harmonised concepts in international private law, with particular focus on key aspects of the law of obligations
- P. Mostowik, M. Niedzwiedz, Five Years after ECJ "Lugano II Opinion" - Its Current Developments and Further Consequences
- S. Pitel, The Canadian Codification of Forum Non Conveniens
- G. Tu, Contractual Choice of Law in the People's Republic of China: the Past, the Present and the Future

11.15-13.00

Lex mercatoria, arbitration and consumer protection

- C. Gimenez Corte, Lex mercatoria, independent guarantees and non-state enforcement

L. Radicati di Brozolo, Conflicts between arbitration and courts in the EU: free for all, harmonization or home country control?

- S.I. Strong, Resolving mass legal disputes in the international sphere: are class arbitrations an option? lessons from the United States and Canada
- G. Rühl, Consumer Protection in Private International Law

Lunch break 13.00-14.00

14.00-15.30

Torts and Intellectual Property

- I. Kunda, Overriding mandatory rules in intellectual property contracts
- M. Lehmann, Where Do Pecuniary Damages Occur?
- C. O. García-Castrillón Private international law issues of non-contractual liability with special reference to environmental law claims
- E. Rodriguez Pineau, The law applicable to intra-family torts

Coffee break 15.30-15.45

15.45-17.00

Family law, succession, nationality and Europeanisation of PIL

- K. Trimmings, P. Beaumont, International Surrogacy Arrangements – An Urgent Need for a Legal Regulation at the International Level
 - T. Kruger, J. Verhellen, Dual nationality = double trouble?
 - J Fitchen, The Cross-Border Recognition and Enforcement of Authentic Instruments in the proposed European Succession Regulation
 - L. Gillies, The Europeanisation of the Conflict of Laws and Third States: Scottish Perspectives
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Joerges on Conflicts Law as Europe's Constitutional Form

Christian Joerges, who is a professor of law at Bremen University (and formerly at the European University Institute) has posted *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form* on SSRN. The abstract reads:

"Unity in Diversity" was the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty. The motto did not make it into the Treaty of Lisbon. It deserves to be kept alive in a new constitutional perspective, namely the re-conceptualisation of European law as new type of conflicts law. The new type of conflicts law which the paper advocates is not concerned with selecting the proper legal system in cases with connections to various jurisdictions. It is instead meant to respond to the increasing interdependence of formerly more autonomous legal orders and to the democracy failure of constitutional states which result from the external effects of their laws and legal decisions on non-nationals. European has many means to compensate these shortcomings. It can derive its legitimacy from that compensatory potential without developing federal aspirations.

The paper illustrates this approach with the help of two topical examples. The first is the conflict between European economic freedoms and national industrial relations (collective labour) law. The recent jurisprudence of the ECJ in Viking, Laval, and Rüffert in which the Court established the supremacy of the freedoms over national labour law is criticised as a counter-productive deepening of Europe's constitutional asymmetry and its social deficit. The second example from environmental law concerns the conflict between Austria and the Czech Republic over the Temelin nuclear power plant. The paper criticises the reasoning of the ECJ, but does not suggest an alternative outcome to the one the Court has reached.

The introductory and the concluding sections generalise the perspectives of the conflicts-law approach. The introductory section takes issue with max Weber's national state. The concluding section suggests a three-dimensional differentiation of the approach which seeks to respond to the need for

It can be freely downloaded [here](#).

Rome III Regulation Published in the Official Journal

The Rome III regulation (see our most recent post [here](#), with links to the previous ones) has been published in the Official Journal of the European Union n. L 343 of 29 December 2010. The official reference is the following: **Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (OJ n. L 343, p. 10 ff.).

Pursuant to its Art. 21(2), **the regulation should apply from 21 June 2012 in the 14 Member States which currently participate in the enhanced cooperation** (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

Art. 18 (*Transitional provisions*) provides that “[the] regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 [choice of the applicable law by the spouses] concluded as from 21 June 2012”. The same article stipulates that “effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with Articles 6 and 7” (rules governing material and formal validity of the agreement). As regards proceedings commenced in the court of a participating Member State before 21 June 2012, the regulation will be without prejudice to *pacta de lege utenda* concluded in accordance with the law of that State (Art. 18(2)).

In order to make national rules concerning formal and procedural requirements of an *optio legis* fully accessible, Art. 17 (applicable from 21 June 2011) requires the

participating Member States to communicate any relevant information in respect thereof to the Commission, which will make them publicly available, in particular through the website of the European Judicial Network in civil and commercial matters.

(Many thanks to Federico Garau - Conflictus Legum blog - for the tip-off)

Morocco Judicial Seminar on Cross-Border Protection of Children and Families

The report of the Hague Conference is available [here](#), and the conclusions of the Seminar can be found [here](#).

Visit of the Hague Conference in Viet Nam (Adoption)

The report of the Hague Conference is available [here](#), and the report of the visit prepared by the Permanent Bureau and the Ministry of Justice of Viet Nam can be found [here](#).

Swiss Book on the Resolution of IP Disputes

The second volume of the Series of books on intellectual property law of the University of Geneva was recently released. It comprises the papers (either in English or in French) which were written for the conference of intellectual property law of February 8, 2010 which was devoted to the theme ***Resolution of intellectual property disputes/La résolution des litiges de propriété intellectuelle***.



The book, which was edited by Jacques de Werra, a professor of law at the University of Geneva, includes the following papers:

- Joost Pauwelyn, *The Dog That Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO*
- Pierre Véron, *Le contentieux de la propriété industrielle en Europe : état des lieux, stratégies et perspectives*
- Edouard Treppoz, *Les litiges internationaux de propriété intellectuelle et le droit international privé*
- Julie Bertholet & Pierre-Alain Killias, *La création de juridictions spécialisées : l'exemple du Tribunal fédéral des brevets*
- Torsten Bettinger, *ICANN's New gTLD Program: Applicant Guidebook and Dispute Resolution*
- Bernard Hanotiau, *L'arbitrabilité des litiges de propriété intellectuelle*
- Sarah Theurich, *Designing Tailored Alternative Dispute Resolution in Intellectual Property: the Experience of WIPO*

The full table of contents can be found [here](#).

The book can be ordered [here](#).