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 Alegría Borras, 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.

OUP Yearbooks Available Online

Law Yearbooks from OUP – Free Online Access until Feb. 28th

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.

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.

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.

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).

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"

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.

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.