2010 Yearbook of Private International Law

The 12th volume of the Yearbook of Private International Law (2010) will shortly be released.

It contains the following contributions:

Doctrine

- Katharina BOELE-WOELKI, For Better or for Worse: The Europeanization of International Divorce Law
- CHEN Weizuo, Chinese Private International Law Statute of 28 October 2010
- Talia EINHORN, The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards
- Sixto SANCHEZ LORENZO, Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I

Recent Developments in U.S. Conflicts of Laws

- Patrick J. BORCHERS, The Emergence of Quasi Rules in U.S. Conflicts Law
- Ronald A. BRAND, U.S. Implementation vel non of the 2005 Hague Convention on Choice of Court Agreements
- Linda J. SILBERMAN, *Morrison v. National Australia Bank*: Implications for Global Securities Class Actions
- Robert G. SPECTOR, A Guide to United States Case Law under the Hague Convention on the Civil Aspects of International Child Abduction
- David P. STEWART, Recognition and Enforcement of Foreign Judgments in the United States
- Symeon C. SYMEONIDES, Codifying Choice of Law for Tort Conflicts: The Oregon Experience in Comparative Perspective

The Revision of the Brussels I Regulation

- Andrew DICKINSON, Surveying the Proposed Brussels I bis Regulation: Solid Foundations but Renovation Needed

- Adrian BRIGGS, What Should Be Done about Jurisdiction Agreements?
- Alegría BORRÁS, Application of the Brussels I Regulation to External Situations – From Studies Carried Out by the European Group for Private International Law (EGPIL/GEDIP) to the Proposal for the Revision of the Regulation
- Rafael ARENAS GARCÍA, Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea
- Sara SÁNCHEZ FERNÁNDEZ, Choice-of-Court Agreements: Breach and Damages Within the Brussels I Regime
- Diana SANCHO VILLA, Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime

News from the Hague

- Hans VAN LOON, The Hague Conference on Private International Law: Work in Progress (2008-2010)

National Reports

- Rodrigo RODRIGUEZ / Alexander R. MARKUS, The Implementation of the Revised Lugano Convention in Swiss Procedural Law
- Mohamed S. ABDEL WAHAB, The Law Applicable to Technology Transfer Contracts and Egyptian Conflict of Laws: A Triumph of Nationalism over Internationalism?
- Torstein FRANTZEN, Party Autonomy in Norwegian International Matrimonial Property Law and Succession Law
- Tiong Min YEO, Common Law Innovations in Proving Foreign Law
- Seyed N. EBRAHIMI, An Overview of the Private International Law of Iran: Theory and Practice
- Adi CHEN, Conflict of Laws, Conflict of Mores and External Public Policy in Israel: Registration and Recognition of Foreign Divorce Decrees – A Modern Critique

Court Decisions

- Michael BOGDAN, Website Accessibility as a Basis for Jurisdiction under Art. 15(1)(C) of the Brussels I Regulation – Case Note on the ECJ

Judgments *Pammer* and *Alpenhof*
- Eva LEIN, Modern Art – The ECJ's Latest Sketches of Art. 5 No. 1 lit. b Brussels I Regulation
- Zeno CRESPI REGHIZZI, Reservation of Title in Insolvency Proceedings: Some Remarks in Light of the *German Graphics* Judgment of the ECJ
- Gilles CUNIBERTI, Resisting American Class Actions at Home: Vivendi's Crusade against U.S. Imperialism
- Patricia OREJUDO PRIETO DE LOS MOZOS, Recognition in Spain of Parentage Created by Surrogate Motherhood

Forum

- Carmen AZCÁRRAGA MONZONÍS, An Old Issue from a Current Perspective: American and European Private International Law

More information can be found here.

Second Issue of 2011's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains three articles and several casenotes. The full table of contents can be found here.

In a first article, Pascal de Vareilles Sommieres, who is a professor of law at Paris I Pantheon Sorbonne University, explores the relationship between international mandatory rules and policy (*Lois de police et politiques legislatives*). The English asbtract reads:

> *Still somewhat ill-defined the role of legal policy, which is irrelevant in the*

determination of ordinary private law rules in Savigny's methodology, is of course a decisive element in characterization of mandatory rules, as a definition of their scope. In conflict of laws, policy considerations occupy a more significant place when the mandatory rule emanates from the legal system of the forum then when it is a foreign rule. In conflict of jurisdiction, policy requirements of varying intensity have to compose with other considerations of judicial administration, so that each mandatory rule exerts its own specific impact, whether on the jurisdiction of the court or on the status of foreign judgments.

In the second article, Petra Hammje, who is a professor of law at the University of Cergy-Pontoise, offers a survey of the new Rome III Regulation (*Le nouveau reglement (UE) no 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*).

Finally, in the last article, Horatia Muir Watt, who is a professor of law at the Paris Institute of Political Science (*Science Po*) discusses the implications of the Chevron litigation (*Chevron, l'enchevetrement des fors. Un combat sans issue ?*). I am grateful to the author for providing me with the following abstract:

A decade after the dismissal of their claim by US courts for forum non conveniens and the victims' return to Ecuador, a new act of the Chevron (Texaco) drama began when the local court gave judgment in early 2011 against the multinational for its role in the environmental pollution in the Amazon forest region and its harmful consequences for the health of its indigenous population. Various strategies are currently being deployed internationally with a view to resist, neutralise or invalidate this judgment (in the form of a worldwide anti-suit injunction, a RICO action, or the invocation of international investment law) before the US court or in international arbitration. In this complex game where multiple fora make simultaneous claim to autority and engage in its mutual neutralisation, the reassuring traditional liberal model of international legal order is clearly out-of-step. The lesson of Chevron case is that it is time to quit the Westphalian perspective so that private international law may assume a useful role in global governance.

Subscribers of *Dalloz* can download the *Revue* here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2011)

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

Here is the contents:

- ***Jürgen Basedow***: "Das Staatsangehörigkeitsprinzip in der Europäischen Union" – the English abstract reads as follows:

> *In continental countries, citizenship has traditionally played an important role as a connecting factor in the private international law relating to personal status. The article outlines the gradual emergence of this connecting factor throughout the 150 years of rising nationalism up to World War II and explores its remaining significance in the framework of European integration, with a par- ticular view to the prohibition of discrimination on grounds of nationality under article 18 TFEU. Against the background of the historical purpose of that provi- sion, the author advocates an anti-protectionist reading of that article which does not categorically prohibit the use of citizenship as a connecting factor, but only a discrimination of foreigners on the sole ground of their foreign citizenship. This interpretation is underpinned by a detailed inquiry into the case law of the Euro- pean Court of Justice on article 18 and into the secondary law of the European Union. This approach leads to detailed conclusions with regard to the use of nationality in the areas of jurisdiction, choice of law rules and recognition.*

- ***Ivo Bach****:* "Zurück in die Zukunft – die dogmatische Einordnung der Rechtsscheinvollmacht im gemeineuropäischen IPR" – the English

abstract reads as follows:

Under most legal systems, a principal may be bound by a contract that his agent has concluded even if the agent lacked the actual authority to do so. As long as the principal's conduct creates the reasonable impression that he authorized his agent to conduct the transaction, the law protects the third party. Under German law, such a "reasonable impression" is presumed in particular when (a) the principal has knowledge of the agent's behavior yet does not intervene ("Duldungs- vollmacht"), or when (b) the principal could (and should) have knowledge that would allow him to intervene ("Anscheinsvollmacht").

European conflict-of-laws rules raise the question of whether the prin- cipal's liability under the agent's apparent authority should be classified as a contractual or a non-contractual obligation – i.e. whether Rome I or Rome II determines the applicable law. In light of the ECJ's criteria for dis- tinguishing contractual from non-contractual obligations, this paper concludes that both of the above-mentioned apparent authority scenarios of German law must be classified as non-contractual obligations, thus placing them within the scope of Rome II.

This result generates a difficult follow-up question: is apparent authority a case of culpa in contrahendo (Art. 12 Rome II) or should it be governed by Rome II's general rule on torts/delicts (Art. 4)? This paper tends towards an application of Art. 12 Rome II.

- ***Marianne Micha:*** "Der Klägergerichtsstand des Geschädigten bei versicherungsrechtlichen Direktklagen in der Revision der EuGVVO" – the English abstract reads as follows:

The Commission of the EC presented a Report together with a Green Paper on the review of Regulation 44/2001 on jurisdiction in civil and commercial matters. The present article examines the needs for review with a view to a recent decision of the ECJ (FTBO ./. Jack Odenbreit), in which it granted the person injured in a car accident a forum in the Member State of his domicile, although the accident took place in another Member State where the insured tortfeasor was domiciled and had taken out motor liability insurance for his car. On the whole, the present legal situation is satisfying. Concerning third State

situations, the injured person should be granted a forum at his domicile, if the accident took place within the EU although the insurer is not domiciled in a Member State. Choice of court agreements do not bind the injured person if they are to his detriment.

- ***Burkhard Hess****:* "Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts" – the English abstract reads as follows:

On December 14, 2010, the European Commission presented its highly anticipated proposal for the reform of the Brussels I Regulation. KOM (2010) 748 endg. vom 14.12.2010, der Text ist verfügbar unter: http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf. Im folgenden Beitrag werden die Vorschläge als EuGVVO-E bezeichnet. This proposal marks the beginning of the formal law-making process to recast the Regulation. Intense, legal and political debate concerning the function and the reform of this central legal instrument of the European Judicial Area can be expected in the next months. This debate should not be limited to the legal instrument itself, but it should address the future of European Procedural Law as a whole. In particular, procedural law academics should continue to engage actively in – and thereby influence – European judicial policy. The following contribution deals with the cornerstones of the reform proposals and contrasts them to the current stage of European Civil Procedural Law. It also contains a first evaluation of the reform proposals.

- ***Andreas Spickhoff*** on the ECJ's decision in C-278/09 (Olivier Martinez, Robert Martinez ./. MGN Ltd) as well as decisions of the German Federal Supreme Court (2.3.2010 – VI ZR 23/09); Regional Court Cologne (26.8.2009 – 28 O 478/08) and the Austrian Supreme Court (8.9.2009 – 4 Ob 138/09m) dealing with the questions of jurisdiction and applicable law with regard to the infringement of personal rights on the internet: "Persönlichkeitsverletzungen im Internet: Internationale Zuständigkeit und Kollisionsrecht"
- ***Anatol Dutta.*** "Ein besonderer Gerichtsstand für die Geschäftsführung ohne Auftrag in Europa?(Higher Regional Court Cologne – 13.5.2009 – 6 U 217/08, Regional Court Aachen, 31.10.2008 – 12 O 40/089" – the English abstract reads as follows:

Localising negotiorum gestio on the map of the law of obligations is a difficult task, especially when applying autonomous criteria such as those developed by the European Court of Justice for the terms "contract" and "tort" in Article 5 (1) and (3) of the Brussels I Regulation. In a recent decision, the Regional Court of Appeal in Cologne held that obligations flowing from negotiorum gestio are, for purposes of the European jurisdictional rules, neither contractual nor tortuous. That view appears to be sound not only in theory but also in practice (infra III.): Article 5 (1) and (3) of the Brussels I Regulation – if applied to negotiorum gestio – would not lead to the proper forum for disputes on negotiorum gestio, namely the courts at the place where the negotiorum gestio was performed (infra II). Hence, the article suggests that a new special head of jurisdiction for negotiorum gestio should be introduced (infra IV.).

- ***Hannes Wais:*** "Internationale Zuständigkeit bei gesellschaftsrechtlichen Ansprüchen aus Geschäftsführerhaftung gemäß § 64 Abs. 2 Satz 1 GmbHG a.F./§ 64 Satz 1 GmbHG n.F.(Higher Regional Court Düsseldorf, 18.12.2009 – I-17 U 152/08, Higher Regional Court Karlsruhe, 22.12.2009 – 13 U 102/09)" **–** the English abstract reads as follows:

Must international jurisdiction for liability claims based on § 64 GmbHG against a foreign director of a German company with restricted liability (Gesellschaft mit beschränkter Haftung) be determined according to the European Insolvency Regulation or according to the Brussels I Regulation? Furthermore, if one applies the Brussels I Regulation, has the claim to be qualified as a matter relating to a contract pursuant to Art. 5 (1), or to a tort pursuant to Art. 5 (3) Brussels I Regulation? Both the OLG Düsseldorf (Higher Regional Court) and the OLG Karlsruhe had to consider these questions in recent cases. In accordance with earlier decisions of German courts the OLG Düsseldorf regarded Art. 5 (1) Brussels I Regulation applicable.

- ***Moritz Brinkmann****:* "Die Auswirkungen der Eröffnung eines Verfahrens nach Chapter 11 U.S. Bankruptcy Code auf im Inland anhängige Prozesse(Federal Supreme Court, 13.10.2009 – X ZR 79/06)" – the English abstract reads as follows:

The article discusses the effects of the commencement of insolvency proceedings on a lawsuit pending between the debtor and another party. When

the lawsuit is taking place in another jurisdiction than the insolvency proceedings, three questions have to be answered: 1.) Does the lex fori processus recognize the foreign insolvency proceedings? 2.) If yes, does the commencement of the foreign insolvency proceedings lead to a stay of the litigation? 3.) If yes, who, or rather which side has the right to resume the lawsuit? Against the backdrop of a decision by the Bundesgerichtshof dealing with the effects of a U.S.-chapter 11 filing on a lawsuit before German courts, Brinkmann shows the differences between the solutions under the European Insolvency Regulation (EC) No 1346/2000 and under § 352 German Insolvency Code (InsO) which is applicable when the insolvency proceedings are in a non-EU member state: While Art. 15 of the European Insolvency Regulation is a conflict rule under which the lex fori processus is applicable to answer questions 2.) and 3.), § 352 I 1 German Insolvency Code is a substantive rule that directly stays the domestic lawsuit. On the question, who has the right to resume the litigation, the Bundesgerichtshof applies the lex fori concursus. Brinkmann argues that this issue should be decided by the lex fori processus notwithstanding § 352 I 2 InsO.

- ***Jörg Pirrung*:** "Teilaussetzung des Verfahrens zur Vollstreckbarerklärung einer griechischen „konservativen Beschlagnahme" von Vermögen(Higher Regional Court Cologne, 15.9.2008 – 16 W 6/08) " – the English abstract reads as follows:

Where the defendant has requested a revocation of a provisional measure according to art. 697 of the Greek law on civil procedure, this is equivalent to an ordinary appeal in the sense of art. 46 of the Brussels I regulation.

- ***Marc-Philippe Weller*:** "Windscheids Anspruchsbegriff im Strudel der Insolvenzrechtsarbitrage (Higher Regional Court Celle, 7.1.2010 – 6 U 60/09)" – the English abstract reads as follows:

The doctrine of actionability of a creditor's claim can be traced back to Windscheid. From the perspective of the German lex fori the actionablity has to be qualified not as a procedural but as a substantive element of the claim. As a consequence an action has to be dismissed not as (procedurally) inadmissible but as unfounded, when the creditor's claim is non-actionable. According to French insolvency law, the creditor's claim loses its element of actionability

when an insolvency proceeding is opened. The claim even remains non-actionable when the insolvency proceeding comes to an end due to lack of assets. According to Art. 17 EuInsVO, these consequences of the French insolvency law has to be recognized in all other EU member states. The differences in the insolvency laws of the EU member states lead to arbitrary behaviour of debtors in International Insolvency Law.

- ***Bettina Heiderhoff:*** "Wann ist ein „Clean Break" unterhaltsrechtlich zu qualifizieren?(Federal Supreme Court, 12.8.2009 – XII ZB 12/05) – the English abstract reads as follows:

It seemed scandalous to some when the 12th chamber of the German Supreme Court (BGH) decided, in 2009, that an English divorce judgement was only partly enforceable. However, the BGH only held that the Brussels I Regulation was not applicable as the 2004 order of the High Court concerned matrimonial property (excluded from the scope of the regulation under Article 1 sec 2 lit a) rather than maintenance (to which the regulation is applicable). It is internationally acknowledged that maintenance may be paid in a lump sum. In order to decide whether a payment serves as maintenance or as a division of matrimonial property, one must inquire about the reasons behind the payment: i.e., where the payment serves to secure the future standard of living it functions as maintenance; however, where economic disparity sustained by one partner during the marriage is to be compensated, matrimonial property law is concerned. From an EU perspective, the main question should be whether the national courts may determine the quality of the lump sum payment or whether there should be a purely autonomous determination by the ECJ. It would certainly be frustrating if the mere use of the word "maintenance" in the national court order was held to be decisive. Objective and secure criteria for a distinction between matrimonial property and maintenance may be found, although none seem obvious at first glance. They must consider the fact that different countries have different economic realities, especially as far as housing is concerned. These questions should, however, be answered by the ECJ and the BGH should have requested a preliminary ruling.

- ***Ulrike Janzen/ Veronika Gärtner*:** "Kindschaftsrechtliche Spannungsverhältnisse im Rahmen der EuEheVO – die Entscheidung des

EuGH in Sachen Deticek (ECJ, 23.12.2009 – Rs. C-403/09 PPU – Jasna Deticek ./. Maurizio Sgueglia)" – the English abstract reads as follows:

On 23 December 2009 the ECJ delivered its judgment in Re Deti?ek which has been dealt with under the urgent procedure pursuant to Art. 104b of the ECJ's Rules of Procedure. The case concerned basically the question whether courts of the Member State where the child is present, can take protective measures on the basis of Art. 20 Brussels II bis Regulation even if a court of another Member State having jurisdiction as to the substance has already taken a protective measure declared enforceable in the first Member State. The ECJ answered this question in the negative, based primarily on teleological and systematic arguments. While the authors agree with the ECJ with regard to the case in question, the approach taken by the ECJ might be challenged in several respects: First, it can be questioned whether the ECJ put too much emphasis on systematic and technical arguments such as facilitating the enforcement of decisions of another Member State as well as the deterrence from wrongful removals, while neglecting the principal aim of the Regulation's provisions on parental responsibility – safeguarding the child's best interest. In the authors' opinion, Art. 20 (1) Brussels II bis does, in principle, not allow provisional measures in situations where the court having jurisdiction as to the substance has already taken a protective measure declared enforceable in the Member State in question, which is illustrated by the rule Art. 20 (2) Brussels II bis. However, the authors argue that – taking into account the Regulation's paramount objective – there might be a need to allow provisional measures also in these cases under certain (strict) conditions – namely if the factual situation has changed significantly subsequent to this first decision and if the new circumstances lead to the assumption of an urgent case in terms of Art. 20 (1) Brussels II bis. Secondly, the authors raise the question whether the ECJ proceeded in a methodologically correct way by examining whether the requirements for provisional measures according to Art. 20 Brussels II bis – urgency, presence of the relevant person(s) in the Member State in question, provisional nature of the measure – are met in the present case, or whether this was rather for the national court to decide. Further, in this context it is submitted that – in derogation from the position adopted by the ECJ in the present decision – it is decisive for the question whether measures can be taken under Art. 20 Brussels II bis whether the child is present in the respective Member State – and not where the parents are located.

- ***Sergej Kopylov****:* "Zur Verbürgung der Gegenseitigkeit zwischen der Russischen Föderation und Deutschland (Oberstes Wirtschaftsgericht der Russischen Föderation, 7.12.2009 – VAS 13688/09)" – the English abstract reads as follows:

In German-Russian legal relations, there is a considerable need for certainty relating to the enforcement (exequatur) of Russian decisions in Germany and vice versa. On this issue, the supreme Russian commercial court (arbitration court) adopted a position in a ruling dated 07/12/2009 and declared a Dutch judgement enforceable. The decision is a further step towards establishing a practice of recognition and enforcement of European decisions in Russia and thus towards guaranteeing reciprocity also with Germany. In the commercial courts' now also recognising British and Dutch court rulings – in addition to the already existing treaties under international law concluded with numerous EU Member States on the recognition and enforcement of court decision – they have created a mutual legal platform, also facilitating "in the triangle" recognition. In the interim, the French courts have issued exequatur for Russian decisions in civil matters.

- ***Erik Jayme*** on the conference of the German-Lusitanian Lawyers' Association in Osnabrück: "Internationales Erbrecht und lusophone Rechte"

First Issue of 2011's ICLQ

The first issue of the *International and Comparative Law Quaterly* for 2011 was recently released.

In the only article addressing a conflict issue, Professor Trevor Hartley (LSE) discusses *Choice of Law Regarding The Volontary Assignment of Contractual Obligations under the Rome I Regulation*.

> *The voluntary assignment of contractual (and non-contractual) obligations in conflict of laws is governed by article 14 of the Rome I Regulation. Under this, the validity of the assignment as between the assignor and assignee is governed by the law applicable to the contract between them (paragraph 1 of article 14). On the other hand, the assignability of the claim and the relationship between the debtor and the assignee are governed by the law applicable to the obligation assigned (paragraph 2 of article 14). Certain issues are, however, outside the scope of article 14 as it stands at present. These are the question of priorities between competing assignments (if the same obligation is assigned twice to different assignees) and the rights of third parties (mainly creditors of the assignor). This article examines the precise scope of the two existing paragraphs and considers the arguments that might be relevant in deciding what law should govern the issues at present not covered by either paragraph, a question that has become more pressing in view of the fact that negotiations will soon begin on a possible amendment of article 14 to deal with it.*

The Article can be downloaded here by subscribers.

Issue 2010.4 Nederlands Internationaal Privaatrecht

The last issue of 2010 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Succession and Party Autonomy, European Cooperation and Child Maintenance, Brussels I and Contracts of Service and PIL aspect of Islamic Financing:

- Andrea Bonomi, Testamentary freedom or forced heirship? Blancing party autonomy and the protection of family members, p. 605-610. The

conclusion reads:

Although targeting private international law issues, the proposed Regulation can be regarded as the expression of a quite liberal approach to successions. It is submitted that the choice of this approach for international cases can also, in the long term, have an indirect impact on crucial aspects of the domestic law of succession. Thus, the adoption of conflict rules favouring agreements as to succession will probably reinforce the opinion that the prohibition of such agreements, which still exists in several Member States, has outlived and favour substantive law reform. In the same way the adoption of conflict rules that reduce the effectiveness of forced heirship rights in international situations may also stimulate the existing debate on the possibility of making these traditional protection mechanisms more flexible in purely internal situations. As already noted in other areas of law, the European Union could, through the unification of the private international law of succession, have an influence on the development of the substantive laws of the Member States.

- Ian Curry-Sumner, Administrative co-operation and free legal aid in international child maintenance recovery. What is the added value of the European Maintenance Regulation?, p. 611-621. The author provided the following summary:

The international recovery of child maintenance is one important piece in the larger puzzle that ensures that children receive the assistance they need and deserve. Having acknowledged the need for new legislation, both the Hague Conference and the European Union have drafted new instruments aiming to improve the functioning of the current system. Both instruments lay down the framework for the creation of a network of Central Authorities, forming the cornerstone of a future European and global system of administrative co-operation with respect to the international recovery of maintenance. Since both instruments are due to enter into force at the same time, the question arises whether it was indeed necessary to have two separate instruments dealing with this issue. This article, therefore, addresses the question of whether the provisions with respect to administrative co-operation in the European Maintenance Regulation have added value alongside the provisions contained in the Hague Maintenance Convention. The achievements of the Hague Conference and the European Union should not for one second be underestimated. The abolition of exequatur at EU level and the creation of a global free legal aid for

international recovery cases are two achievements that will go down in the annals of legislative history as monumental achievements. Nevertheless, that does not make these instruments immune from criticism. As this article shows, the provisions with respect to administrative co-operation in the European Maintenance Regulation are far from impervious to disapproval.

- Jan-Jaap Kuipers, De plaats waar een dienstenovereenkomst dient te worden verricht als grond voor rechterlijke bevoegdheid, p. 622-628. The English abstract reads:

The European Court of Justice (ECJ) has recently been given the opportunity in a number of preliminary rulings to clarify where, for the purpose of establishing special jurisdiction, a service was or should have been provided within the meaning of Article 5(1)(b) Brussels I. The present article argues that the ECJ has been able to rectify the legal uncertainty that existed under the Tessili doctrine. Despite the fact that the case law sometimes lacks internal coherence and reaches results which are different from the Rome I Regulation, the ECJ has succeeded in developing simple and predictable criteria.

- Omar Salah, 'Nakheel Sukuk': internationaal privaatrecht in de VAE, p. 629-638. The English abstract reads:

In November 2009, Dubai World created a great deal of disturbance in the capital markets when it requested a restructuring of its debts, in particular with regard to Nakheel Sukuk (Islamic financial securities). Analyses by the lawyers of Dubai World and its creditors showed that the sukuk holders might not have the level of protection they had expected. This raised several questions with regard to private international law, more in particular concerning the recognition and enforcement of foreign judgments in the United Arab Emirates (UAE). The article deals with the legal aspects of Nakheel Sukuk with a focus on private international law. First, a main introduction to Islamic finance and to sukuk will be given. Taking the case study of Nakheel Sukuk as a starting point, the author discusses next (i) the choice of forum and the choice of law under English law; (ii) the legal system of Dubai and the UAE; (ii) the relevant rules on the choice of forum, choice of law, and recognition and enforcement of foreign judgements in the UAE under the Law of Civil Procedure and the Federal Civil Code of the UAE; and (iv) alternative solutions, such as the possibility for an arbitration clause under the laws of the UAE. All of the above provides an insight into the legal system of the UAE and its

rules on private international law in particular, leading to a better understanding of how to structure transactions when dealing with this region in the future.

Commission Proposal on the Review of Brussels I

The long awaited Commission proposal (COM(2010) 748/3) on the review of Brussels I has been published today. The proposed amendments are numerous and require more detailed study, but here are some of the highlights.

1) **Abolition of the exequatur.** Following the argumentation in the Green Paper on the costs, time and trouble of obtaining a declaration of enforceability in another Member State, and the abolition of the exequatur in recent specific instruments, the Commission proposal indeed provides for the abolition of the exequatur (Art. 38). However, exceptions are made for defamation cases – also excluded from Rome II – and, most interestingly, compensatory collective redress cases – at least on a transitional basis. The 'necessary safeguards' are: 1) a review procedure at the court of origin in exceptional cases where the defendant was not properly informed, similar to the review clause in specific instruments abolishing the exequatur; 2) an extraordinary remedy at the Member State of enforcement to contest any other procedural defects which may have infringed the defendant's right to a fair trial; 3) a remedy in case the judgment is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled – in another country. The proposal also contains a series of standard forms which aim at facilitating the recognition or enforcement of the foreign judgment in the absence of the *exequatur* procedure as well as the application for a review.

2) **Extension of the Regulation to defendant's domiciled in third States.** The special grounds of jurisdiction will enable businesses and citizens to sue a non EU defendant in, amongst others, the place of contractual performance, or the place where the harmful event occurred. It further aims to ensure that the

protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. Two additional fora are created: under certain conditions a non-EU defendant can be sued at the place where moveable assets belonging to him are located, or where no other forum is available and the dispute has a sufficient connection with the Member State concerned ("*forum necessitatis*"). Further, the proposal introduces a discretionary *lis pendens* rule for disputes on the same subject matter and between the same parties which are pending before the courts in the EU and in a third country.

3) **Enhanced effectiveness of choice of court clauses.** Another anchor is the improvement of the effectiveness of choice of court clauses, by: a) giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised, meaning that any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction; b) introducing a harmonised conflict of law rule on the substantive validity, referring to the law of the chosen court. As the explanatory memorandum states, both modifications reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.

4) **Improvement of the interface between the regulation and arbitration.** One of the most controversial issues giving rise to heated debates is whether the arbitration exception should be maintained. Art. 1 of the proposal still contains the arbitration exclusion, but adds 'save as provided for in Articles 29, paragraph 4 and 33, paragraph 3'. The proposed Article 29 includes a specific rule on the relation between arbitration and court proceedings, which obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration.

5) **Provisional and protective measures.** The proposal adds several articles concerning provisional, including protective measures. It provides that the court where proceedings on the substance are pending and the court that is addressed in relation to provisional measures, should cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted. Further, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the

case, including – subject to certain conditions – of measures which have been granted *ex parte* (!). However, contrary to the Mietz decision, the proposal provides that provisional measures ordered by a court other than the one having jurisdiction on the substance cannot at all be enforced in another Member State, in view of the wide divergence of national law on this issue and to prevent the risk of abusive forum-shopping.

There are many more interesting proposed amendments. This proposal certainly is ambitious, but also controversial on some points. Let the negotiations and the scholarly debate begin!

The Living Dead Convention

Reports of the death of the 1968 Brussels Convention have been greatly exaggerated.

In some parts of Europe, it is still possible to enjoy the application of old Article 5.1 of the Convention and to determine the place of performance of the obligation in question for a basic sale of goods.

One such example is Italy, where the Convention has risen from the dead. This happened a year ago, in Rome.

Italian Private International Law Act, 1995

In 1995, Italy reformed its private international law and adopted a new statute reforming the Italian System of Private International Law. Article 2 of the 1995 Statute provides that international conventions prevail over domestic rules. Thus, jurisdiction of Italian courts over disputes falling within the scope of the Brussels I Regulation is governed by the said Regulation.

Article 3 of the Statute provides a remarkable rule for disputes in civil and commercial matters falling outside the territorial scope of European law, i.e. when the defendant is not domiciled within the jurisdiction of a Contracting state. Instead of laying down its own rules of jurisdiction, the Italian lawmaker decided

to apply further the 'Brussels Convention'. Article 3 provides that the heads of jurisdiction provided by the Convention remain applicable. In other words, Italy extended the territorial scope of the Convention to civil and commercial disputes where the defendant is domiciled outside of a contracting state.

> ***Art. 3 Ambito della giurisdizione****.*
>
> *2. La giurisdizione sussiste inoltre in base ai criteri stabiliti dalle Sezioni 2, 3 e 4 del Titolo II della Convenzione concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale e protocollo, firmati a Bruxelles il 27 settembre 1968, resi esecutivi con la L. 21 giugno 1971, n. 804, e successive modificazioni in vigore per l'Italia, anche allorché il convenuto non sia domiciliato nel territorio di uno Stato contraente, quando si tratti di una delle materie comprese nel campo di applicazione della Convenzione.*

That was all fine in 1995, when the Brussels Convention was alive and kicking. But when the Convention was replaced by the Brussels I Regulation, an issue arose. Was the reference to the '1968 Brussels Convention and it successive modifications in force in Italia' to be interpreted as a reference to the new Regulation? Did it matter that Danemark kept on for a while applying the Brussels Convention? and that it has now stopped?

Legal Miracle

The question was put forward the Italian supreme court for private matters (*Corte di Cassazione*) last year. An Italian firm was suing a company incorporated in Monaco in a dispute involving a sale of goods. Monaco is neither a member of the European Union, nor a party to any Lugano Convention. Would jurisdiction be determined by establishing where the obligation in question had been performed, or by referrence to the place of delivery of the goods?

In October 2009, the *Corte di Cassazione* held that the referrence to the Brussels Convention could not be interpreted as designating the Brussels I Regulation. It thus applied old article 5.1 of the Brussels Convention.

Any comment from Italian readers wishing to explain how international conventions can be resurrected is most welcome!

Issue 2010/3 Nederlands Internationaal Privaatrecht

The third issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* is dedicated to the proposal for a new Dutch Act on Private International Law that will be incorporated in Book 10 of the Dutch Civil Code. It includes a critical general review, and contributions on private international law rules on marriages and the consequences for public policy and human rights; the regulation of overriding mandatory rules; the regulation of *fait accompli*; methods of interpretation in the light of Europeanization and internationalization; and party autonomy and the law of names.

- A.P.M.J. Vonken, Boek 10 BW: meer – incomplete – consolidatie dan codificatie van het Nederlandse internationaal privaatrecht. Een bekommernisvolle bespiegeling over een legislatieve IPR-surplace, p. 399-409. The English abstract reads:

In recent decades European private international law (PIL) has undoubtedly made progress. This is largely due to the fact that a number of legislators have either codified part or all of their national PIL rules or adopted treaties and regulations drawn up by, e.g., the Hague Conference on Private International Law and the European Union. Recently, the Dutch legislator has also introduced a codification or, more precisely, a 'consolidation' covering an incomplete set of topics on the field of choice of law. I will argue that this Dutch project should be amended and supplemented to include the areas of international civil procedure (e.g., jurisdiction and the recognition and enforcement of foreign judgments) and to cover a more complete ruling of all kinds of choice of law issues for the sake of legal practice. Finally, I will propose some amendments and refinements to specific rules contained in this consolidation project.

- Susan Rutten, Aanpassing van het huwelijksrecht; gevolgen voor de openbare orde en mensenrechten in het IPR, p. 410-420. The English

abstract reads:

The Dutch government is considering to take on problems of integration caused by the immigration of spouses through amending the rules governing marriage. The objective is to prevent immigrants living in the Netherlands from marrying abroad merely for the purpose of enabling their new spouse to acquire legal residence in the Netherlands. With this in mind, the government intends to raise the minimum age for marrying; to prohibit the conclusion of marriages between cousins; and to tighten the rules governing the recognition of foreign polygamous marriages. The plans will also affect rules of private international marital law, as well as the use of the public policy exception. In this article, the author examines whether the government's tentative proposals respect human rights, in particular the right to marry. Furthermore, she questions whether the public-policy exception is a suitable technique for warding off undesirable foreign marriages. The introduction and codification in the Dutch Civil Code of a new book on private international law provide an opportunity for the legislator to legally define the concept of public policy. An express reference could be made to the effect that human rights are part of our public policy, since human rights, because of their nature, are in any case seen as fundamental principles. The above proposals by the government also prompt us to be aware of the risk of public policy being used or abused for interests other than those for which the exception was intended, where it is invoked to safeguard rules of which it is less evident that they may be seen as fundamental.

- Cathalijne van der Plas, Het leerstuk van de voorrangsregels gecodificeerd in boek 10: werking(ssfeer), p. 421-429. The English abstract reads:

Draft book 10 of the Dutch Civil Code contains a general conflict of laws provision in Article 10:7 on super mandatory rules (lois de police). Many international instruments, in particular several Hague Conventions and the Rome I and II Regulations, provide for the application of such special rules of a mandatory nature in addition to, or in derogation from, applicable private law. It nevertheless makes sense for the Dutch legislature also to provide for a domestic conflict of laws rule on the application of super mandatory rules, because not all areas of private law have been covered (as yet) by international instruments:

notably parts of family law and the law of succession, the law of property, and of corporations. Some aspects of the application of super mandatory rules which remain uncertain in connection with the Rome I and II Regulations have been made explicit by the legislature, in particular the principle that the application of a law pursuant to rules of PIL includes super mandatory rules of that lex causae. Article 10:7 also allows for the application of super mandatory rules of third countries, which goes beyond the room for the application of such rules under Article 9 of the Rome I Regulation. It is submitted that the test which a court must apply when deciding whether the application of foreign public or administrative rules of law is justified and bears a resemblance to the tests under EU case law for determining whether some national rule infringes the free circulation of assets, capital and persons. EU case law provides examples of compelling public interests which could justify the application of a super mandatory rule in a specific situation. However, the Dutch courts will have the freedom to decide on the tests to be applied, and it remains to be seen how the new Article 10:7 will work out in specific cases.

- M.H. ten Wolde, De mysteries van het *fait accompli* en Boek 10 BW, p. 430-436. The English abstract reads:

Article 9 of draft Book 10 of the Civil Code introduces a new fait accompli (an accomplished fact) exception to be used in every area of conflict of laws: 'In the Netherlands, the same legal consequences may be attached to a fact to which legal consequences are attributed under the law which is applicable under the private international law of a foreign state, also when this contravenes the law which is applicable according to Dutch private international law, in as far as not attaching those consequences would constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty.' This provision aims to adjust the result of applying a Dutch conflict of law rule in the event that such a result is unacceptable since the parties involved assumed that a foreign conflict rule that referred the case to a different law was in fact applicable. The question arises whether the consequences attributed to a fact or act according to a foreign conflict of law rule may be accepted, even if those consequences do not arise under the law which is applicable according to Dutch conflict of law rules. In such a case Dutch conflict rules should yield in favour of the foreign conflict rule, but subject to the condition that the parties rightfully believed that their legal

position was determined by the closely connected foreign conflict rules in question. Moreover, not granting such effects has to constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty It is remarkable that the fait accompli exception is codified as an universal exception to all conflict rules since it has never been regarded as such in the case law or literature. Among scholars it is mainly seen as a concept that helps to discover the applicable law. The legislator bases the exception of Article 9 on the principle of legitimate expectations as expressed in the Sabah case decided by the Supreme Court and on legal certainty. However, in the Sabah case the court dealt with a completely different problem, namely that of Dutch conflict rules succeeding each other in time. The author argues that the mentioned principle cannot, without any good reason, be extended to the question of the conflict between Dutch conflict rules and foreign conflict rules. Besides this, there is no valid reason to protect parties who deliberately cross the border to a foreign country against their unfamiliarity with the law (including confict of law) of that country. The reality of international legal practice is that a legal position as a consequence of differing conflict rules may have a different content in one country than in another. Parties should be aware of this fact. International legal practice does not need a fait accompli exception. It is advisable to delete Article 9 from Book 10 Civil Code.

- A.E. Oderkerk, Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW – De invloed van Europeanisering en internationalisering van het IPR, p. 437-446. The English abstract reads:

In the Dutch Proposal on Private International Law (Book 10 of the Dutch Civil Code), a 'General Part' containing provisions on topics like public policy, internationally mandatory provisions, party autonomy, capacity et cetera has been included. However, unlike in some foreign private international law Acts, general provisions on interpretation and/or characterisation have been deliberately omitted. In this article it is argued that it would have been useful and possible to introduce such provisions. Useful because different methods (of a general, European or international background) of interpretation and characterisation have to be applied to different (groups of) provisions of this Book and it will not be obvious to practitioners which method will have to be applied when and how. Possible since – as will be shown – guidelines on which methods of interpretation and characterisation are to be applied and in which context can be laid down.

- Emilie C. Maclaine Pont, Partijautonomie in het 'nieuwe' internationale namenrecht, p. 447-455. The English abstract reads:

Recently, a bill has been prepared by the Dutch legislature in order to consolidate the rules of Dutch private international law. This 'Book 10 of the Dutch Civil Code' includes personal status issues. More specifically, this article focuses on surnames. In two judgments – Garcia Avello *and* Grunkin-Paul – *the Court of Justice of the EU provided incentives for the Member States to reconsider their rules regarding surnames concerning conflict of law rules and the recognition of surnames. The question is whether the Dutch regulations as laid down in the new 'Book 10 of the Dutch Civil Code' are in conformity with these decisions. This article reaches the conclusion that this question must be answered in the negative and recommends some adjustments to the current bill with the introduction of a choice of law clause.*

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).

Here's the table of contents:

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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, The Hague – Zürich, 2010, 918 pages.

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Katharina Boele-Woelki Talia Einhorn Daniel Girsberger Symeon Symeonides

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Conference on State Insolvency and Sovereign Debts

Mathias Audit, who is a professor of law at the University of Paris Ouest – Nanterre La Défense, will organise a conference in Paris on November 10th, 2010, on State Insolvency and Sovereign Debts.

Here is the programme:

Colloque, le 10 novembre 2010
Palais du Luxembourg – Salle Monnerville

Insolvabilité des Etats et dettes souveraines

Programme

8h30 : Accueil des participants

9h : Ouverture du colloque par M. le sénateur Philippe MARINI

9h15 : Introduction générale aux travaux

Matinée placée sous la présidence de M. Hubert DE VAUPLANE, *Directeur juridique et Conformité au Crédit agricole et professeur associé à l'Université Paris II – Panthéon Assas*

- 9h30 : **Un Etat peut-il faire faillite ? – Le point de vue économique** par M. Jérôme SGARD, *directeur de recherches à Sciences Po/CERI et professeur associé à l'Université Paris-Dauphine*

10h : **Un Etat peut-il faire faillite ? – Le point de vue juridique**
par M. Michael WAIBEL, *British Academy Postdoctoral Fellow, Lauterpacht Centre for International Law and Downing College, University of Cambridge*

10h30 : Pause

- 11h : **La dette souveraine appelle-t-elle un statut juridique particulier ?**
  par M. Mathias AUDIT, *professeur de droit à l'Université Paris Ouest – Nanterre La Défense*
- 11h30 : **Incidence des Credit Default Swaps sur les dettes des Etats : bilan et prospective**
  par Me Jérôme DA ROS, *avocat à la cour*
- 12h : **Les « fonds vautours » sont-ils des créanciers comme les autres ?**
  par M. Patrick WAUTELET, *professeur à l'Université de Liège*
- 12h30 : Discussion générale

13h : Déjeuner libre

Débats placés sous la présidence de M. Christian DE BOISSIEU, *professeur d'économie à l'Université Paris I – Panthéon-Sorbonne*

- 14h30 : **Agence de notation : responsabilité, régulation ou *laissez-faire* ?**
  par M. Norbert GAILLARD, *docteur en économie (Sciences Po/Princeton), consultant auprès de la Banque mondiale*
- 15 h : **La régulation de l'information sur le marché des dettes souveraines**
  par M. Alain BERNARD, *professeur à l'Université de Pau et des Pays de l'Adour*

15h30 : Pause

Débats placés sous la présidence de M. Jean-Bernard AUBY, professeur des universités à l'Ecole de Droit de SciencesPo, directeur de la chaire « Mutations de l'Action Publique et du Droit Public » (MADP)

- 16 h : **Les instruments de droit international public pour remédier**

à l'insolvabilité des Etats
par M. Mathias FORTEAU, *professeur à l'Université Paris Ouest – Nanterre La Défense*

- 16h30 : **Les instruments de droit de l'Union européenne pour remédier à l'insolvabilité des Etats**
  par M. Francesco MARTUCCI, *professeur à l'Université de Strasbourg*
- 17h : Discussion générale
- 17h30 : **Conclusion générale**
  par Mme Horatia MUIR WATT, *professeur des universités à l'Ecole de Droit de SciencesPo*

It is free of charge. Registration, however, is compulsory (michele.dreyfus@u-paris10.fr).