Publication: International Family Law for the European Union

A very interesting compilation of contributions resulting from a research project on the elaboration of international family law rules within the European Union, funded by the European Commission and conducted by the universities of Antwerp, Barcelona, Louvain-la-Neuve, Lund, Milan, Toulouse and Utrecht has been published by *Johan Meeusen*, *Marta Pertegás*, *Gert Straetmans* and *Frederik Swennen*:

International Family Law for the European Union.

It contains the following articles:

- *Johan Meeusen/Marta Pertegás/Gert Straetmans/Frederik Swennen*: General Report
- *Masha Antokolksaia*: Objectives and Values of Substantive Family Law
- *Dieter Martiny*: Objectives and Values of (Private) International Law in Family Law
- *Helen Stalford* : EU Family Law: A Human Rights Perspective
- *Alegría Borrás*: Institutional Framework: Adequate Instruments and the External Dimension
- *Marc Fallon*: Constraints of Internal Market Law on Family Law
- *Gert Straetmans*: Non-Economic Free Movement of European Union Citizens and Family Law Matters
- *Johan Meeusen*: System Shopping in European Private International Law in Family Matters
- *Sylvaine Poillot Peruzzetto* : The Exception of Public Policy in Family Law within the European Legal System
- *Michael Bogdan*: The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law

- *Marta Pertegás*: Beyond Nationality and Habitual Residence: Other Connecting Factors in European Private International Law in Family Matters
- *Laura Tomasi, Carola Ricci and Stefania Bariatti*: Characterisation in Family Matters for Purposes of European Private International Law
- *Frederik Swennen*: Atypical Families in EU (Private International) Family Law
- *Cristina Gonzáles Beilfuss*: Islamic Family Law in the European Union
- *Jean-Yves Carlier* and S*ylvie Saroléa*: Migrations and Family Law

More information can be found on the publisher's website where the book can also be ordered.

Highly recommended.

A "Major" Federal Copyright Decision on Enforcing Foreign Judgments

Continuing the trend of interesting private international cases coming out of the patent and copyright fields (see previous posts here and here), the Second circuit recently decided a case involving the enforcement of a French judgment involving copyrighted dress designs.

In *Sarl Louis Feraud International v. Viewfinder, Inc.*, 2007 WL 1598057 (2d Cir. June 5, 2007), a French court held, by default judgment, that Plaintiff's copyright in the actual design of dresses was infringed by Defendant's taking photographs of them and placing them on a website. Enforcement was sought in the U.S. under New York State law. Judge Lynch refused to enforce the French judgment on the grounds that it would be repugnant to the public policy of New York as it would

violate Defendant's First Amendment rights. 406 F. Supp. 2d 274 (S.D.N.Y. 2005). Lynch said it was obvious that Defendant's activities fall within the protections of the First Amendment, because they are "matter[s] of great public interest, for artistic as well as commercial purposes. . . . [T]he extensive coverage given to such events in various mass media makes clear that there is widespread public interest in these matters."

Judge Lynch said a conflict arises when U.S. courts are asked to enforce judgments from countries that do not have First Amendment protections.

> *"Many democratic countries, which share our general commitment to human rights and maintain free and open societies in which freedom of speech and thought is fully respected, differ from us in the resolution of certain questions involving the balance between freedom of expression and the maintenance of ordered liberty, particularly in areas where freedom of expression may be in tension with the protection of other human rights, such as equality or human dignity. . . . Even in those areas, however, where reasonable people and decent societies may reasonably disagree, American courts have recognized that foreign judgments that run afoul of First Amendment values are inconsistent with our notions of what is fair and just, and conflict with the strong public policy of our state."*

The judge noted that the First Amendment protects speech that can be banned in other democratic countries, and courts in the United States have refused to enforce foreign judgments such as one that restricted access to Nazi propaganda in France. American courts also have refused to recognize English libel judgments that would be inconsistent with the U.S. Constitution or the laws of the states.

The Second Circuit just reversed, 2007 WL 1598057 (2d Cir. June 5, 2007). The court began by noting the rule of comity inhering to default foreign judgment, and held that, "for the purposes of this action, we must accept that Viewfinder's conduct constitutes an unauthorized reproduction or performance of plaintiffs' copyrighted work infringing on plaintiffs' intellectual property rights, and the only question to consider is whether a law that sanctions such conduct is repugnant to the public policy of New York." In so considering, however, the Court held that Judge Lynch had not "conducted a full analysis" of the issue.

In particular, the Second circuit refused to allow Defendant to rest its defense

entirely upon its status as a news magazine covering a public event. Because "[i]ntellectual property laws co-exist with the First Amendment in this country, . . . [t]he First Amendment does not provide such categorical protection." Rather, in deciding whether the French Judgments are repugnant
to the public policy of New York, the district court should:

> *"first determine the level of First Amendment protection required by New York public policy when a news entity engages in the unauthorized use of intellectual property at issue here. Then, it should determine whether the French intellectual property regime provides comparable protections."*

On the first prong of the test, the court directed exclusive use of the "fair use doctrine," which "balances the competing interests of the copyright laws and the First Amendment" under a four-factor test. Because the district court analyzed the "fair use doctrine" in a single sentence, and the record as it stands was insufficient for the court to decide it here, the decision was vacated and the case remanded to be addressed on a "fully-developed record." The court also directed a more in-depth examination of the second prong of the analysis under Fed. R. Civ. P. 44.1, i.e. "the manner of protection afforded plaintiff's fashion shows by French law."

Because the court seemed to place any First Amendment defense to foreign judgment enforcement exclusively within, and not in addition to, the "fair use doctrine," Commentators have already acknowledged that "[t]his is a major decision." The court also seems to acknowledge that, if Judge Lynch concludes that Defendant's use of plaintiff's intellectual property would be fair under U.S. law (regardless of whether it would be permitted under French law), then the judgment cannot be enforced.

Is the Brussels Convention

Compliant with Article 6 ECHR?

This is the interesting question that the French supreme court for private matters (*Cour de cassation*) addressed in a judgement of March 6, 2007.

The argument was raised in respect of the rule allowing to seek a decision of enforceability of the foreign judgement ex parte. Article 34 of the 1968 Brussels Convention provided:

> *the party against whom enforcement is sought shall not at this stage of the proceedings be allowed to make any submissions on the application.*

In this case, a Belgian bank, Fortis, had sued in Belgium two spouses domiciled in France. The Court of appeal of Mons, Belgium, had ruled in favour of the bank, which sought enforcement of the judgement in France. The Belgian judgement was declared enforceable by a French first instance court. The defendants appealed to the Court of appeal of Amiens and lost. They then appealed to the *Cour de cassation*. Their only argument was that the proceedings in the first instance in France were a violation of their right to a fair trial, as they were ex parte proceedings. The *Cour de cassation* held that there was no such violation as they were entiteld to appeal. The appeal was thus dismissed (again).

This case raises two issues. The first is anecdotal. It is fascinating to see that the defendants could take this case up to the French supreme court. The Belgian judgement was made in 2001, and it seems that the enforcement proceedings took six years.

The second issue is much more interesting. Could the Brussels Convention or the Brussels I Regulation be found to be in violation of the European Convention of Human Rights (ECHR)? Before the *Cour de cassation*, the defendants argued that the ECHR was superior to any treaty concluded by the French state. In *Fortis*, the Court does not directly deal with the argument, but it indirectly addresses it since it accepts to rule on whether article 34 complies with article 6 ECHR.

Obviously, the *Cour de cassation* will only give the point of view of the French legal order. The Strasbourg or the Luxembourg courts would certainly have different views on this.

Was the issue addressed elsewhere in Europe?

British Institute of International & Comparative Law Seeks New Director

The **British Institute of International & Comparative Law** (see information about the Institute here) is looking to **recruit a new Director**.

The Institute, the UK's leading centre for the advancement of the understanding and practical application of international law, will celebrate its 50th Anniversary in 2008. The present Director, Professor Gillian Triggs, will be returning to Australia shortly to take up the post of Dean of the Law School at the University of Sydney, and the Institute is now seeking a dynamic individual with global vision as her successor.

The Institute, a community of legal scholars and practitioners, is an independent charitable body which seeks to support the international rule of law in global problem-solving, to foster a comparative understanding of all national legal systems, and to provide a forum for public debate on international law through its well-established research, events and publications, of which its best known is the International and Comparative Law Quarterly. The Institute's unique strength is to combine a diverse community of scholars with practitioners in the world's leading legal marketplace. It serves as an unrivalled focal point for its substantial membership.

Following a period of dramatic growth in the range and depth of its work, the Institute has consolidated its leading position and reputation. It aims to combine the highest standards of scholarship with a high degree of practical relevance for the world of the 21st century. The research staff of the Institute undertakes a wide range of work, including major research projects for a variety of government and private bodies, which seek to address

some of the key issues which have become of increasing public interest – such as the establishment of the rule of law in post-conflict states, international humanitarian law, international trade, the World Trade Organisation and global poverty, and evidence before international courts and tribunals.

The Institute's work ranges across public and private international law, comparative law, European law and human rights. Research is currently streamed into the following 3 programmes:

- International Law programme
- Law and Development programme
- European and Comparative Law programme

Within these programmes there are a number of specialist practitioner groups enabling the members of the Institute to discuss current issues at an expert level. The Director, who reports to the Board of Trustees, has overall responsibility for the Institute's activities, including shaping its research programme and directing its research, managing its staff of some 30 academics, interns and administrators, and representing the Institute externally to government, the legal profession, corporations, non-governmental organisations and the public. In all probability the successful candidate will have a background in law, but could have experience in government, public bodies or other institutions. Candidates should feel comfortable representing the Institute in public and in the media, working with the Institute's Development Director in attracting major funding for its programmes, and have a proven record in managing people and organisations.

A competitive salary is offered, which, depending on age and experience, is likely to be at the upper end of the UK academic range. Written applications with full curriculum vitae and the names of three referees should be made in confidence to: Ruth Eldon, Institute Secretary, BIICL, 17 Russell Square, Charles Clore House, London WC1B 5JP. Tel. + 44 (0) 20 7862 5151. For further particulars e-mail: r.eldon@biicl.org. For more information on BIICL's activities see www.biicl.org. Applications should be received by **22 June 2007**. First interviews will be conducted shortly thereafter.

First Issue of 2007's Journal du Droit International

The last issue of the French *Journal du Droit International* was released a few weeks ago. It contains two articles, written in French, which deal with conflict issues.

The first is authored by Belgian Professor Nicolas Angelet and Belgian Attorney Alexandra Weerts. Its title is "*Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme – La jurisprudence strasbourgeoise et sa prise en compte par les juridictions nationales*" (International Organisations Immunities and Article 6 of the European Convention on Human Rights – Strasbourg Case Law and How it is Taken into Account by National Courts).

The English abstract reads:

> *Many authors, as well as a number of domestic court decisions, consider that the jurisdictional immunity of international organisations is compatible with article 6 ECHR upon the condition that an alternative means, or even an alternative remedy before a fair and impartial tribunal within the meaning of article 6, is available to individuals to protect their rights. When this requirement is not met, immunity is sometimes denied in favour of the right of access to court. Yet, in its Waite and Kennedy and Beer and Regan judgements of 18 February 1999 the European Court did not refer to a remedy but rather to a reasonable alternative means, and described it as a material factor but not as a prerequisite for the observance of article 6. The subsequent case law of the European Court confirms this approach and identifies a series of other criteria relevant for the aprpeciation of the proportionality of a restriction imposed on the right to access to court. As for the consequences of a possible conflict, the incompatibility between an international immunity and the right to access to court does not allow to set immunity aside. Rather, domestic courts face a conflict between contradictory international obligations, unsolved by international law. Insofar as the courts cannot require the executive branch to make a political choice of which obligation to comply with to the detriment of the other, litigants may seek to bring the forum State in the proceedings to*

make it face responsability for the conflict. Above all, domestic courts should seek to prevent the conflict between international obligations, by adopting the balanced approach of the European Court, rather than turning the existence of an alternative remedy into a prerequisite for the observance of article 6.

The second article is authored by Etienne Cornut, who lectures in the French University of New Caledonia. Its title is "*Forum shopping et abus du choix du for en droit international privé*" (Forum Shopping and Abuse of the Choice of Venue in International Private Law).

The English abstract reads:

In spite of the harmonization of the rules dealing with conflicts of laws and conflicts of jurisdictions, especially at EU level, forum shopping endures, and this convergence of standards is not a remedy by itself, but can only alleviate the problem without eradicating it. The fight against forum shopping malus can only be considered on a case by case basis, but to that end the only exceptions are not sufficient. International private law has developed several instruments to close these loopholes, yet they all focus on the concept of fraud: fraud to the law, fraud to the sentence, fraud to the jurisdiction. In international private law, the sanction by exception of evasion of law arises when the creation or the alteration of an international situation, though objectively actual, does not fit the real intention of the subject, when it is not subjectively actual. Then, when the subject can enjoy the option of international competency, most often he is already in an existing international situation. He has not devised or altered the situation which enables him to exert a choice. Hence, the theory of fraud cannot apply, since it does not make it possible to approach the situations resulting from a pre-existing international situation. Nevertheless, exercising an option of competence, though legal and non fraudulent, can be reprimanded. In that case, the exception of abuse of rights, despite its traditional antinomy with private international private law, should lead to questioning an abusive choice of jurisdiction.

To my knowledge, these articles cannot be downloaded.

German Casenote on ECJ Lechouritou Judgment

A very interesting article commenting the recent ECJ *Lechouritou* case (C-292/05, judgment of 15 February 2007) has been published in the latest issue of the German Law Journal, an online review in English devoted to developments in German, European and international jurisprudence.

The casenote has been written by *Veronika Gaertner* (University of Heidelberg), editor of conflictoflaws.net for Germany, who has extensively reported on the case for our site (see her posts on the opinion of AG Ruiz-Jarabo Colomer and on the judgment of the Court).

An abstract of the article (**"The Brussels Convention and Reparations – Remarks on the Judgment of the European Court of Justice in Lechouritou and others v. the State of the Federal Republic of Germany"**) has been kindly provided by the author:

> *The article analyses the judgment of the European Court of Justice in the case Lechouritou and others v. the State of the Federal Republic of Germany. In this judgment the Court had held that an action aimed at the payment of compensation for acts perpetrated by armed forces in the course of warfare does not constitute a civil matter in terms of the Brussels Convention.*
>
> *The case note first classifies the judgment in the previous case law of the Court on the concept of civil matters in terms of the Brussels Regime. Hereby, the relevant rulings are examined in view of the criteria developed by the Court for defining the term of "civil and commercial matters" – in particular in distinction to public matters. In this regard, it is argued that the Court followed its previous rulings by basing its argumentation on the question whether the acts constituting the origin of the action for damages result from the exercise of public powers.*
>
> *In the second part the case note addresses – in reference to objections raised by*

> *the plaintiffs – the question whether the qualification of the acts perpetrated by German armed forces as acta iure imperii excluded from the scope of the Brussels Convention can be agreed with. Here, the focus is on the question whether the term of act iure imperii could be regarded as limited to lawful acts, as partly argued with regard to the law of State immunity. This restriction of acta iure imperii to lawful acts is, however, rejected and consequently the assessment of the Court to regard the action of the plaintiffs as excluded from the scope of the Convention is agreed with.*

In addition to a thorough analysis of previous ECJ rulings on the matter, the article contains numerous references to national and international Courts' case law regarding the classification of military acts as the emanation of State authority and the restriction of State immunity in relation to wrongful acts, even if the author points out the different rationales underlying these restrictions in the field of State immunity (with the goal of an improved protection of human rights) and the exclusion of *acta iure imperii* from the scope of the European procedural law instruments.

The distinction between the two levels (public international law on one side, European uniform rules on jurisdiction on the other) is clearly underlined in the final remarks of the casenote:

> *[A]s the Court of Justice has explained in its ruling, the Brussels Convention, as a measure facilitating the internal market by the mutual recognition and enforcement of judgments in civil and commercial matters, is not the right instrument for the assertion of compensation claims based on acts perpetrated by armed forces in the course of warfare. The consequences of war and occupation can […] only be dealt with at a public law level.*

The article is available here (also in downloadable .pdf version). Highly recommended.

First Issue 2007 of “Rivista di Diritto Internazionale Privato e Processuale”

The first issue for 2007 of *Rivista di Diritto internazionale privato e processuale* (*RDIPP*, published by CEDAM, Padova), one of Italy’s leading journals in private international law, has been recently released. It provides quarterly a complete coverage of the different sectors of conflict of laws and jurisdictions, with articles, comments, legal texts and cases by Italian, foreign and EC Courts. All the articles in this issue are in Italian, and unfortunately just an English translation of the titles is available, but no abstract. Here’s the list:

ARTICLES

- *F. Mosconi* (University of Pavia), The protection of the Internal Order of the Forum: Balancing Italian Law, International Conventions and EC Regulations (La difesa dell’armonia interna dell’ordinamento del foro tra legge italiana, convenzioni internazionali e regolamenti comunitari);
- *S.M. Carbone* (University of Genoa), Lex mercatus and lex societatis vis-à-vis Principles of Private International Law and Financial Markets Rules (Lex mercatus e lex societatis tra principi di diritto internazionale privato e disciplina dei mercati finanziari);
- *F. Salerno* (University of Ferrara), EC Jurisdiction Criteria in Matrimonial Matters (I criteri di giurisdizione comunitari in materia matrimoniale).

COMMENTS

- *C. Amalfitano* (University of Milan), The European Arrest Warrant, the Italian Corte di Cassazione and the Protection of Fundamental Human Rights (Mandato d’arresto europeo, Corte di Cassazione e tutela dei diritti fondamentali dell’individuo);
- *A. Atteritano*, The Jurisdiction of National Courts to Enforce Foreign Arbitration Awards under the 1958 New York Convention (La «jurisdiction» del giudice statale nei procedimenti di «enforcement» dei lodi arbitrali stranieri disciplinati dalla Convenzione di New York del 1958).

The *RDIPP* is not available online (for subscription information, refer to the publisher's website, CEDAM).

An archive of the TOCs since 1998 is available on the ESSPER website (an online project for indexing articles of Italian journals and working papers in law and other social sciences, headed by the library of LIUC University of Castellanza).

Vol. 3, Issue 1, Journal of Private International Law

The new issue of the **Journal of Private International Law, Volume 3, Issue 1 (April 2007)**, will be published shortly. The contents are (*click on the links below to view the abstract*):

Canada and the US Contemplate Changes to Foreign-Judgment Enforcement *by Vaughan Black (Professor, Dalhousie Law School, Halifax)*

The Rome I Proposal *by Ole Lando & Peter Arnt Nielson (Copenhagen Business School)*

Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu? *by Andrew Dickinson (Consultant, Clifford Chance LLP; Visiting Fellow in Private International Law, BIICL)*

Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of The Rome Convention by the Rome I Regulation *by Lorna Gillies (Lecturer in Law, University of Leicester)*

Parties' Choice of Law in E-Consumer Contracts *by Zheng Tang (Lecturer in Law, University of Aberdeen)*

Choice of Law in Maritime Torts *by Martin P. George (PhD Candidate & Postgraduate Teaching Assistant, University of Birmingham)*

The European Convention on Human Rights and English Private International Law *by Ben Juratowitch (DPhil candidate, University of Oxford)*

Child Abduction: Convention "Rights of Custody" – Who Decides? An Anglo-Spanish Perspective *by Kisch Beevers (University of Sheffield) & Javier Peréz Milla (University of Zaragoza)*

Book Review: J. Meeusen, M. Pertegàs and G. Straetmans (eds) Enforcement of International Contracts in the European Union: Convergence and Divergence between Brussels I and Rome I *by Lorna Gillies (Lecturer in Law, University of Leicester)*

For those who haven't yet subscribed to the **Journal of Private International Law**, subscription information can be found **here**. In addition to the Journal itself, you will also receive online access to all of the articles (current subscribers will be able to download the articles linked to above straight away).

GEDIP: Working Sessions of the Sixteenth Annual Meeting (2006)

A very interesting **report of the working sessions of the 16th Annual meeting of the European Group for Private International Law (GEDIP-EGPIL)**, held in Coimbra on 22-24 September 2006, has been recently published on the new site of the Group. The summary (in French) has been compiled by *N. Ascensão Silva*, *R. Pereira Dias* and *G. Rocha Ribeiro* (University of Coimbra).

Here's a list of the matters discussed by the Group, as organized by the authors (in brackets the rapporteurs; *our translation and free adaptation from French*):

I. EC Private International Law and Third States:

1. The external competence question (*C. Kessedjan*);
2. The revision of the Lugano Convention (*A. Borrás*).

II. The Commission’s “Rome III” Proposal and the Green Paper on matrimonial property regimes:

1. The Rome III Proposal (*A. Borrás*) [on the Green Paper on applicable law and jurisdiction in divorce matters, see also the report of *M. Struycken* presented at the 2005 meeting (Chania) of the Group and the draft articles on applicable law discussed at the 2003 meeting (Wien)];
2. The Green Paper on matrimonial property regimes (*K. Kreuzer*) (see also the Response of the EGPIL to the Green Paper, prepared after the meeting of Coimbra).

III. The “Rome I” Proposal [on the revision of the Rome Convention, see also a number of previous proposals and comments on the Group’s site]:

1. Article 3(5) of the Rome I Proposal (Choice of the law of a Third State and mandatory rules of Community law) (*E. Jayme*);
2. The Report of the Financial Market Law Committee on «Rome I» Proposal («Legal assessment of the conversion of the Rome Convention to Community instrument and the provisions of the proposed Rome I Regulation») (*T. C. Hartley*).

IV. The mutual recognition method (*P. Lagarde*) (in particular, the ECJ cases *Standesamt Stadt Niebüll/Grunkin*, C-96/04 and C-353/06).

V. The codification of European Private International Law (*M. Fallon*).

VI. Current events:

1. Private international law and human rights – ECHR case *Eskinazi and Chelouche v. Turkey* (application no. 14600/05) (*P. Kinsch*);
2. New developments in EC secondary legislation (*E. Jayme* and *C. Kohler*);
3. New developments in the Hague Conference (*H. van Loon*);
4. Current status of EC projects in Private International Law matters (*M. Francisco Fonseca*).

The report is available here, along with the minutes of all the previous meetings of the Group, since 1991, and a number of related documents and proposals. Highly recommended.

Last Issue of Revue Critique de Droit International Privé

The last issue of one of the two French leading journals of international private law, the *Revue Critique de Droit International Privé (2006),* was released last week. In addition to several case commentaries, it contains three articles. Unfortunately and contrary to previous practices, the *Revue* does not provide any abstract for any of them, even in French.

The first article is from Dr. Hunter-Henin from UCL. Its title is "*Droit des personnes et droits de l'homme : Combinaison ou confrontation*" (Family Law and Human Rights: Can They Go Along or Do They Exclude Each Other?). I am grateful to her for providing me with the following abstract:

> *Developments in European Family Law via EC Regulations or fequent recourse to the right to respect for private and family life under article 8 of the European Convention on Human Rights have increased individual freedom. However, the concepts of personhood, family and personal status have as a result lost some of their meaning and permanence.*
>
> *This article first examines the process by which personhood and the traditional personal connecting factor in French Private International Law – nationality – have both lost most of their substance.*
>
> *It then purports to suggest ways in which the Human Rights' discourse and the benefits of EU Regulations may blend with rather than trump traditonal values of Private International law, thus ensuring better predictability of individual judicial outcomes and narrowing the current widening gap between European and non European countries.*

The author of the second article is Michael Wilderspin from the European Commission. Its title in French is "*La compétence juridictionnelle en matière de litiges concernant la violation des droits de propriété intellectuelle. Les arrêts de*

la Cour de Justice dans les affaires C-4/30, GAT c. LUK et C-539/03, Roche Nederland c. Primus et Goldberg" (Jurisdiction in Disputes Involving the Infringement of Intellectual Property Rights. The Decisions of ECJ in Cases *C-4/30, GAT c. LUK and C-539/03, Roche Nederland c. Primus et Goldberg*).

The authors of the third article are Dr. Jault-Seseke and Dr. Robine from Rouen University Law Faculty. Its title in French is "*L'interprétation du Règlement n°1346/2000 relatif aux procédures d'insolvabilité, la fin des incertitudes ?*" (The construction of Regulation n°1346/2000 on Insolvency Proceedings: the End of Uncertainties?). An English abstract should be made available by authors and posted soon.