U.S. Symposium on Forum Non Conveniens and Enforcement of Foreign Judgments

Letters Blogatory is currently holding a very interesting online symposium on Forum Non Conveniens and Enforcement of Foreign Judgments.

Contributors include Ronald Brand, Cassandra Burke, Christopher Whythock, Douglas Cassel, Aaron Marr Page.

Sciences Po PILAGG Workshop Series, January-February 2012

The list of speakers at the workshop on Private International Law as Global Governance at the Law School of the Paris Institute of Political Science (*Sciences Po*) has been updated and is available on the PILAGG website.

The speakers for January and February will be:

• 20th January: Mads ANDENAS ("*External effects of national ECHR judgments*")
• 25th January (doctoral workshop): Shotaro HAMAMOTO ("*L'arbitrage investisseur-État est-il hostile aux intérêts publics?*")
• 27th January: Ingo VENZKE ("*On words and deeds: How the practice of interpretation develops international norms*")
• 9th February (doctoral workshop): Benoit FRYDMAN ("*Approche pragmatique du droit global*")
• 11th February (doctoral workshop): David KENNEDY ("*The renewal of political economy and global governance*")
• 16th February: Michael WEIBEL ("*Privatizing the adjudication of sovereign defaults*")

PILAGG has also launched a new stream on epistemology and methodology of human-rights in transnational context.

Second Circuit Vacates…: Link to Decision

Following Gilles' post: see here.

Abbott v. Abbott Argument Round-Up

The Supreme Court of the United States heard argument in *Abbott v. Abbott* this past week. *Abbott* is the rare family-law case before the Supreme Court involving an American child taken to Texas from his home in Chile by his mother, without his father's consent. Under the 1980 Hague Convention on the Civil Aspects of Child Abduction, children must be automatically returned to the country from which they are taken, so long as the removal was "in breach of rights of custody." The Supreme Court is asked to decide whether the father had a "right of custody" under the treaty, because at the time of the divorce the Chilean family court—and Chilean law as a matter of course—entered a "ne exeat" order prohibiting either parent from removing the child from the country without the consent of the other.

The transcript of the oral argument is available here, and Dahlia Lithwick has a great summary of the argument over at Slate. In her experienced view, "[l]istening to the justices argue over an international child-custody case is a bit like watching them ride the mechanical bull. They aren't experts, but they're ever so willing to go down trying." Justices Ginsburg, Breyer and Roberts were

especially active in the argument, positing a wide array of pointed hypotheticals to test the limits of what constitutes a ne exeat right under foreign law. For example, Justice Breyer posited early in the argument:

> *[What if] the woman is 100 percent entitled to every possible bit of custody and the man can see the child . . . on Christmas day at 4:00 in the morning, that's it. Now there's a law like Chile's that says, you cant take the child out of the country without the permission of the of the father. . . . Are you saying that that's custody? . . [Wouldn't that] turn the treaty into a general: return the child, no matter what?*

According to the SCOTUSBlog, another scenario itched at Justice Breyer so that he raised repeatedly during the argument: What if the custodial parent – presumably the one with whom the child would be better off – is the one who moves the child abroad and the non-custodial parent is the one requesting return? In particular, what if that non-custodial parent is akin to a "Frankenstein's monster" whom the family-law judge denied any rights over the child? If the Convention grants such a parent custody rights, Breyer insisted he could not see the "humane purpose" behind it.

By the end of the petitioner's argument, Chief Justice Roberts and Justices Sotomayor and Ginsburg, at least, seemed satisfied that, in such exceptional circumstances, the Convention would allow a parent to escape abroad with their child. Article 13(b) of the Convention got a bit more attention than the case—or the parties' papers—would have envisioned.

Perhaps prodding the court to issue another *Aerospatialle* -style decision, Karl Hays—the attorney for the Respondent—insisted that a parent left behind could resort to the legal system of the country where the child was taken, using laws such as the Uniform Child Custody Jurisdiction and Enforcement Act in the United States, to seek enforcement of their existing rights of access or custody. Justice Scalia dismissed that argument, scoffing, "If these local remedies were effective, we wouldn't have a treaty."

For his part, Justice Antonin Scalia, whom Lithwick describes as the "sentinel of international law" on the Court and in keeping within his views in Olympic Airways, pointed out that most of the 81 countries that have signed the Hague treaty have agreed that a ne exeat right is also a right of custody. Here is Scalia's

exchange with counsel for respondent:

> *Justice Scalia: Most courts in countries signatory of the treaty have come out the other way and agree that a ne exeat right is a right of custody, and those courts include U.K., France, Germany, I believe Canada, very few come out the way you—how many come out your way?*
> *Mr. Hays: Actually, Your Honor, the United States and Canada do, and the analysis—*
> *Justice Scalia: Well, wait … You're writing our opinion for us, are you?*
> *Mr. Hays: … There have only been seven courts of last resort that have heard this issue. There are some 81 countries that belong—*
> *Justice Scalia: Yes, but, still, in all, I mean, they include some biggies, like the House of Lords, right? And … the purpose of a treaty is to have everybody doing the same thing, and … if it's a case of some ambiguity, we should try to go along with what seems to be the consensus in … other countries that are signatories to the treaty.*
> *Mr. Hays: If, in fact, there were a consensus, but … there is not a consensus in this instance….*

Justices Breyer and Ginsburg then entered the fray with Justice Scalia and the three start counting countries, to which Hays made "the point that . . . if you have one or two or even three countries that have gone one way and then you have other countries that have gone the other way, that there's not a clear-cut overwhelming majority of the other jurisdictions that have ruled in favor of establishing ne exeat orders…." To which Scalia responds, "We will have to parse them out, obviously."

As Roger Alford at Opinion Juris has pointed out:

> *[T]his exchange raises a great question of country-splits in treaty interpretation. Several justices appeared willing to interpret an ambiguous treaty provision consistent with the general consensus of signatory nations. But respondent argues that there is no clear consensus and only a handful of countries out of 81 signatories have even addressed the issue. So even assuming the Court takes the approach suggested by Justice Scalia in Olympic Airways and looks for signatory consensus, what's the Court to do when there are few voices from abroad and those voices are not consistent? Is there still a*

role for comparative interpretive analysis in that context?

Lithwick concludes that "[t]he most interesting thing about [the] argument in Abbott v. Abbott is that it breaks down all the normal divisions on the court: left versus right, women versus men, pragmatists, internationalists, textualists, idealists … all of it flies out the big ornamental doors as the court grapples with this new problem of international child abduction at the grittiest, most practical level. It feels nice. Less an ideological smack down than a good, old-fashioned family argument. I wouldn't get too used to it. But I enjoy it while I can."

A decision is expected before the end of June. Previous coverage of this case on this site can be found here and here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author

then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-

Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No 44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now

Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the

other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of

limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"
- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München"

- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: "The Rome I-Regulation – Internationale Tagung in Verona"

Spanish PIL periodicals (II): Anuario Español de Derecho Internacional Privado

The Anuario Español de Derecho Internacional Privado is an annual magazine specialized in Private International law. It was born in 2000 on an ambitious initiative of Prof. Dr. José Carlos Fernández Rozas (Complutense University, Madrid), in order to provide the Spanish scientific community with accurate and updated information about conflicts of laws in a wide range of subjects, such as commercial arbitration, procedural law, contracts law, tort law, property rights or family and succession law. Besides doctrinal contributions, every volume includes reference to the latest legislative reforms, both Spanish or relating to the Community, and to the international agreements signed by our country in the field of Private International Law. Punctual news of the work in progress or achieved in different international forums (UNIDROIT, UNICUTRAL, The Hague Conference, etc) are also enclosed, as well as deep and critical studies of the jurisprudence and of the administrative Spanish practice on PIL.

The publication is constructed in different sections, some of which are fixed. Each issue begins with an ambitious doctrinal title that gathers relevant scientific contributions from Spanish and foreign authors -translated into Spanish. It is usually followed by a section on legislation (Textos legales), and another, quite exhaustive one, on case law (Jurisprudencia: each volume systematizes several hundreds of decisions of the Spanish courts). A third section reproduces practices materials (Materiales de la práctica española). The Anuario also reports on national and international congresses, meetings and seminars, and gives notice of the whole Spanish bibliography on PIL (research monographs as well

as editorials), appeared throughout the year.

Contents of the Anuario's latest issue:

Juan Antonio CARRILLO SALCEDO: IN MEMORIAM JULIO D. GONZÁLEZ CAMPOS

DOCTRINA

- Santiago ÁLVAREZ GONZÁLEZ
  LA LEY DE ADOPCIÓN INTERNACIONAL. REFLEXIONES A LA LUZ DE SU TEXTO, DE SUS OBJETIVOS Y DE LA COMUNIÓN ENTRE AMBOS
- Gloria ESTEBAN DE LA ROSA
  LA ADAPTACIÓN DE LOS CONTRATOS EN EL COMERCIO INTERNACIONAL

II SEMINARIO INTERNACIONAL: "LA NUEVA REGULACIÓN DE LA LEY APLICABLE A LAS OBLIGACIONES EXTRACONTRACTUA-LES" (MADRID, 21 y 22 DE FEBRERO DE 2008)

- José Luis IGLESIAS BUHIGUES
  EL LARGO CAMINO DEL REGLAMENTO "ROMA II"
- Rafael GIL-NIEVAS
  EL PROCESO NEGOCIADOR DEL REGLAMENTO "ROMA II": OBSTÁCULOS Y RESULTADOS
- Marc FALLON
  LA RELACIÓN DEL REGLAMENTO "ROMA II" CON OTRAS NORMAS DE CONFLICTO DE LEYES
- Stefan LEIBLE
  EL ALCANCE DE LA AUTONOMÍA DE LA VOLUNTAD EN LA DETERMINACIÓN DE LA LEY APLICABLE A LAS OBLIGACIONES CONTRACTUALES EN EL REGLAMENTO "ROMA II"
- Francisco J. GARCIMARTÍN ALFÉREZ
  UN APUNTE SOBRE LA LLAMADA "REGLA GENERAL" EN EL REGLAMENTO "ROMA II"
- Miguel AMORES CONRADI y Elisa TORRALBA MENDIOLA
  DIFAMACIÓN Y "ROMA II"
- Luigi MARI
  LA SUBROGACIÓN EN EL REGLAMENTO (CE) Nº 864/2007: ASPECTOS

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- Pilar JIMÉNEZ BLANCO
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  LA REGULACIÓN DE LA RESPONSABILIDAD PRECONTRACTUAL EN EL REGLAMENTO “ROMA II”
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- Leonel PEREZNIETO CASTRO
  LA RESPONSABILIDAD EXTRACONTRACTUAL EN MÉXICO Y LAS NUEVAS LEYES SOBRE LA MATERIA
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- Tito BALLARINO
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- Elena RODRÍGUEZ PINEAU
  LEY APLICABLE A LA RESPONSABILIDAD DERIVADA DE ACTOS CONTRARIOS A LA LIBRE COMPETENCIA
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- Ángel ESPINIELLA MENÉNDEZ
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- Amalia URIONDO DE MARTINOLI
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  EL FORO DE LA PLURALIDAD DE DEMANDADOS ANTE EL TJCE. COMENTARIO A LA STJCE (SALA TERCERA) DE 11 DE OCTUBRE DE 2007
- Federico F. GARAU SOBRINO
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- Ana FERNÁNDEZ PÉREZ
  LOS RECURSOS DE INCONSTITUCIONALIDAD CONTRA LAS LEYES DE EXTRANJE-RÍA
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PASOS HACIA EL REGLAMENTO “BRUSELAS IV”

TEXTOS LEGALES (UNIÓN EUROPEA / COMUNIDAD EUROPEA; LEGISLACIÓN ESPAÑOLA; CONVENIOS INTERNACIONALES)
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REVISTA DE REVISTAS

Conference: International Law Association Conference 2008

The 73rd. Conference of the International Law Association, hosted by its Brazilian Branch, will take place in the city of Rio de Janeiro, at the InterContinental Hotel, August 17-21 2008. The central theme of the Conference will be “Law for the Future,” focusing on Natural Resources and Sustainable Development, Rights of the Human Person, Resolution of Private International Disputes, Business and Trade Law, and International Security. Regarding International Private Dispute Resolution, two issues will be addressed:

International Commercial Arbitration

- International Arbitration: Autonomy v. Territorialism
- Public Policy and Mandatory Rules: Influence on the Applicable Law
- The Influence of Cultural Factors on the Choice of the Arbitrator
- Distortions in Contemporary Arbitration: The Problems of Becoming Popular

International Civil Litigation

- Towards World Cooperation Standards: Prospects for the Hague Convention
- The Realities of Regional Judicial Cooperation: Existing Experiences

Registration for the 73rd ILA Biennial Conference is open here.

Arresting a person for civil jurisdiction found unconstitutional by Supreme Court of Appeal of South Africa

In Bid Industrial Holdings (Pty) Ltd v Strang and another [2007] SCA 144 (RSA) the Supreme Court of Appeal of South Africa has ruled on 23 November 2007 that arresting a person in order to found or confirm (civil) jurisdiction is unconstitutional. Under South African law, when a person not domiciled in South Africa is sued in a South African court, the court's jurisdiction had to be confirmed either by attachment of property or arrest of the person, unless the foreign defendant submitted to the jurisdiction of the court. The part of this rule permitting the arrest of a person has now been found to infringe the rights to freedom and security of the person, equality, human dignity, freedom of movement, and possibly also the right to a fair civil trial. It could not be said that the rule provided a justifiable limitation to these fundamental rights. The Court stated that arresting a defendant was a profound infringement and had the effect of coercing him or her to submit to the jurisdiction of the court, to make prompt payment, or to provide security.

The Supreme Court of Appeal abolished the rule and adopted a replacement rule to the effect that where attachment was not possible to found or confirm jurisdiction, the South African courts will have jurisdiction if summons is served on the defendant while he or she is in South Africa and there is sufficient connection between the suit and the area of the court.