Symeonides on Choice of Law in American Courts in 2011

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey on SSRN. It is, as usual, to be published in the *American Journal of Comparative Law* (Vol. 60, 2012). Here is the abstract:

This is the 25th Annual Survey of American Choice-of-Law Cases. It is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. The Survey covers cases decided by American state and federal appellate courts in 2011. The following are some of the cases discussed:

• Three Supreme Court decisions, one on general jurisdiction, one on specific jurisdiction, and one holding that the Federal Arbitration Act preempts state court rulings that protected consumers by refusing to enforce certain class-arbitration waivers.

• Two state supreme court cases refusing to enforce arbitration clauses that waive tort claims arising from gross negligence and criticizing the Supreme Court for "tendentious reasoning" and for creating new doctrines "from whole cloth."

• A New York case struggling with the Neumeier rules in a case involving the same pattern as Schultz, and a California case worthy of Traynor's legacy in delineating the extraterritorial reach of California statutes.

• A Delaware case holding that Delaware has an interest in "regulating the conduct of its licensed drivers," even when they drive in states with lower standards; a conflict between a dram shop act and an anti-dram shop act; and a product liability case in which a driver who crushed his car after taking a sleeping pill prevailed on the choice-of-law question.

• A case enforcing a foreign arbitration and choice-of-law clause prospectively waiving a seaman's federal statutory rights, even though there was little possibility for a subsequent review of the arbitration award.

• Several cases illustrating the operation of four competing approaches to statutes of limitation conflicts.

• A case rejecting a claim that a Sudanese cultural marriage was invalid because the groom had paid only 35 of the 50 cows he promised as dowry to the bride's father. • Two cases recognizing Canadian same-sex marriages.

• A case holding that the court had jurisdiction to terminate a father's parental rights without in personam jurisdiction over him, as long as the children were domiciled in the forum state.

• A case holding that a state's refusal to issue a revised birth certificate listing two unmarried same-sex partners as the child's parents after an adoption in another state did not violate the Full Faith and Credit clause.

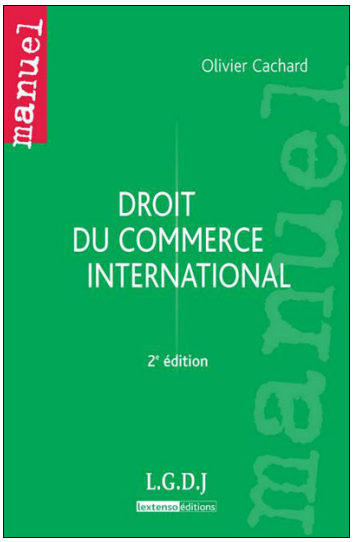
• A case characterizing as penal and refusing to recognize a sister-state judgment imposing a fine for a violation of zoning restrictions.

• Several cases involving sex offenders required by sister-state judgments to register their place or residence, or terminating the obligation to register.

• Four federal appellate decisions holding that corporate defendants can be sued under the Alien Tort Statute for aiding and abetting in the commission of international law violations.

New French Book on International Commercial Law

Olivier Cachard, who is a professor of law at Nancy University, has published the second edition of his manual on international commercial law.



In the French tradition, the book includes developments on international commercial contracts, the law governing corporations, international insolvency, international bank undertakings, and international commercial arbitration. The table of contents is available here.

More details can be found here.

ITA Winter Forum: February 2-3, 2012, San Francisco

The Institute for Transnational Arbitration has announced the content of its 2012 Winter Forum, and is including several topics of interest to private international law. The program includes, *inter alia*, discussions on the Role of Courts in Aid of International Arbitration and Precedent and Accuracy in Arbitration, and a Luncheon Interview with Prof. George A. Bermann, Chief Reporter of the ALI Restatement (Third) of the US Law of International Commercial Arbitration.

According to Susan Frank, one of the Co-Chairs of the Forum, “This is not just another arbitration conference. Rather it is the first of its kind that seeks to build upon ITA’s academic tradition and bring together practitioners and academics, executives and government officials, at both the junior and senior levels to foster

a collaborative exchange on international arbitration. The first half of the forum will be targeted towards a group of works-in-progress, [and] the afternoon session we will be a Tylney-Hall style interactive discussion."

The full program and registration materials are available here.

Bermann on Figueiredo Ferraz v. Republic of Peru

George A. Bermann is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, and the Chief Reporter for the ALI Restatement (Third) of the US Law of International Commercial Arbitration.

The recent decision of the Second Circuit panel in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru* is sadly misguided.

It is regrettable, but understandable, that the panel felt bound by the Second Circuit's 2002 decision in *In re Arbitration between Monegasque de reassurances S.A.M. v. NAK Naftogaz of Ukraine*, making forum non conveniens stays or dismissal available to defeat actions to enforce New York Convention awards. I say regrettable because, as is clear from the position taken by the ALI Restatement of the US Law of International Commercial Arbitration, exercising a purely discretionary ground like forum non conveniens to deny enforcement of a Convention award is essentially inconsistent with U.S. treaty obligations. The common argument, embraced by the panel majority, that doctrines like forum non conveniens are "saved" by Article III of the New York Convention, which provide that enforcement under the Convention shall be in accordance with the rules of the forum where enforcement is sought, is bogus. When the Convention drafters "saved" forum procedure, they undoubtedly contemplated purely procedural rules such as those governing pleadings, time limitations, evidentiary rules and the like. The drafters were not about to supplant all those rules by a Convention that is silent on the procedures applicable to actions to enforce Convention awards. That

would result in a bizarre procedural vacuum. But forum non conveniens is not, in any event, a rule of that sort. It doesn't determine "how" an adjudication shall be conducted. It determines "whether" an adjudication shall be conducted." And it was precisely the purpose — indeed the *core* purpose — of the Convention to ensure that timely applications for the enforcement of Convention awards would be entertained as a matter of international treaty obligation, subject only to the defenses limitatively set out in the Convention.

The *Monegasque* decision of the Second Circuit may indeed have left the panel in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru* no choice but to entertain the forum non conveniens claim.

But there is still more to regret in this decision, and it is nothing that adherence to *Monagesque* required. In effect, the court used the forum non conveniens doctrine to give effect to a Peruvian ceiling on damages that the court had no business vindicating. The statute purported to limit to three percent of an agency's annual budget the amount of money that an agency of the Peruvian government could pay out annually to satisfy a judgment against it. The majority gave Peru's interest, as reflected in the statute, dispositive weight in the interest balancing that forum non conveniens entails, and it did so without the parties even having designated Peruvian law as the law governing their relationship.

To the extent that an arbitral award grants relief in excess of that allowed by Peruvian law means that the award was, at worst, legally erroneous if judged under Peruvian law. But legal error — even egregious legal error — is decidedly not a ground for denying enforcement of an award under the Convention. Quite frankly, what the decision does, without of course so saying, is to give effect to the public policy of Peru as a basis for denying enforcement of the award, despite the fact that the Convention by its own clear terms entitles a court to deny enforcement of an award on public policy ground only to the extent that enforcement would be "contrary to the public policy *of the country where enforcement is sought*," viz. the United States, not the public policy of some other jurisdiction.

In so deciding, the majority also disrespected the clear holding of the U.S. Supreme Court in the foundational *Piper Aircraft Co. v. Reyno* decision to the effect that little if any weight should be given, in a forum non conveniens analysis, to whether resort to the doctrine would result in application of a different body of

law, and even lead to a different substantive result, than the body of law that would have been applied and the result that would have obtained had the U.S. court retained jurisdiction.

But the decision is not to be entirely regretted, for the simple reason that it elicited a dissenting opinion by Judge Gerard Lynch that is nothing less than brilliant in its demonstration, not only that forum non conveniens is an unwelcome presence under the Conventions, but also that it was in any event folly to apply that doctrine in the circumstances of this case. As Judge Lynch observed in dissent, the net effect of the judgment is perversely to send the parties for enforcement back to a Peruvian court when it is all but certain that they had selected arbitration as their dispute resolution mechanism precisely to avoid the Peruvian court's jurisdiction and when they had reason to believe that the resulting award would win enforcement in a U.S. court, unless one of the stated grounds for denying enforcement could be established.

Second Circuit Denies Enforcement of Arbitral Award on Forum non Conveniens Grounds

On December 14th, 2011, the United States Court of Appeals for the Second Circuit dismissed a suit seeking confirmation of an international arbitration award on the ground of *forum non conveniens* in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*.

By doing so, the Court followed its own 2002 precedent in *In re Arbitration between Monegasque de reassurances S.A.M. v. NAK Naftogaz of Ukraine.*

Facts

In *Figueiredo,* the dispute had arisen out of a consulting agreement entered into by Figueiredo and a Peruvian public entity, pursuant to which Figueiredo was

to prepare engineering studies on water and sewage services in Peru. After a fee dispute arose, arbitral proceedings were commenced in Peru, and eventually lead to a 2005 award ordering the Peruvian party to pay more than USD 21 million. Figueiredo had designated itself as a Peruvian domiciliary in the agreement, but later claimed that it was a Brazilian corporation.

Under Peruvian law, a statute prevents governmental entities to pay more than 3% of their budget each year to satisfy judgments. The Peruvian party began to pay the award, but at a slow pace, as it respected the statutory cap.

In 2008, Figueiredo decided to seek enforcement in the United States, as the Peruvian Republic held there substantial assets resulting from the sale of bonds.

Judgment

The U.S. Court of Appeals dismissed the action on the ground that it was *forum non conveniens* in favor of the courts of Peru.

First, the court refused to consider that the fact that the assets located in the U.S. could only be attached by a U.S. court made the foreign court inadequate as, the court held, it would otherwise mean that the doctrine of forum non conveniens could never be used in enforcement proceedings.

Second, the Court found that the Peruvian cap statute was a highy significant public factor warranting dismissal.

> *there is (…) a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments.*

The court drew a parallel with its domestic case law on abstention in the U.S. federal system, insisting that deferring to litigation in another jurisdiction is appropriate where the litigation is intimately involved with sovereign prerogative.

Finally, the court insisted that the case was more closely connected to Peru, where the contract had been executed between two entities declaring to be domiciled in Peru, and performed.

Justice Lynch dissented.

Third Issue of 2011's Journal of Private International Law

The latest issue of the *Journal of Private International Law* has just been published. The contents:

Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?

Luca G Radicati di Brozolo

In this article I discuss the provisions on arbitration of the European Commission's December 2010 draft recast of Reg (EC) 41/2001 against the backdrop of the earlier proposals on the inclusion of arbitration within the scope of the Regulation. The analysis focuses principally on the functioning and implications of the lis pendens mechanism laid down by Article 29(4) of the draft, pointing out the analogy between the role conferred on the law and forum of the seat of the arbitration and the mechanism of home country control that is at the heart of European Union law. The article also analyses the reasons and positive consequences of the Commissions' restraint in not extending the scope of the Regulation to other arbitration-related issues, especially the circulation of judgments dealing with the validity of arbitration agreements and awards. The article's conclusion is that the Commission's proposal is well balanced. Whilst it does not solve all problems relating to conflicts between court proceedings and arbitration within the EU, it addresses the most pressing one, that of concurrent court and arbitration proceedings. Moreover, it does so in terms which, in contrast to the use of anti-suit injunctions in aid of arbitration, are reconcilable with the basic tenets of European Union law. Its approach is indisputably favourable to the development of arbitration and does not jeopardise the acquis in terms of arbitration law of the more advanced member States.

European Public Policy (with an Emphasis on *Exequatur* Proceedings)

Jerca Kramberger Škerl

After addressing the historical role of the public policy defence in private international law, the author defines European public policy and researches its protection in the case-law of the Court of Justice of the EU and the European Court of Human Rights.

The paper further discusses the possible differences and contradictions between the fundamental values of the European Convention on Human Rights and EU law in the context of giving effect to foreign judgments. Regulations already abolishing the exequatur are assessed from the human rights point of view. The relationship between European public policy and the fundamental values arising from public international law is also treated.

Finally, the author evaluates the impact of the adoption of the Lisbon treaty and the process of revision of the Brussels I Regulation on the protection of European public policy in the EU Member states.

Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts

José Antonio Moreno Rodriguez and María Mercedes Albornoz

The Hague Conference is creating a soft law instrument on international contracts, whicis expected to promote a general admission of the principle of party autonomy. Even if it is nowadays accepted in developed countries, this principle still needs consolidation in other regions of the world, like Latin America. In this context, the importance of the modern solutions adopted by the Mexico Convention on the law applicable to international contracts is outstanding. It is not only that the Mexico Convention clearly accepts party autonomy, but it is also well-known even outside the American continent, for its reception of lex mercatoria –an achievement that we do not find in the European Rome I Regulation. This article carries out an analysis of the main

provisions of the Mexico Convention, in order to highlight some of the reflections it should provoke during the preparation of the Hague instrument.

Where Does Economic Loss Occur?

Matthias Lehmann

It is well-known that rules of private international law for torts often refer to the place where the damage has occurred. Locating this place poses serious difficulties if no physical object has been harmed, but only economic or "financial" loss has been suffered. These cases are of tremendous practical importance. The contribution provides an in-depth analysis of the problem and compares solutions adopted by EU and Swiss courts. Finally, the author suggests an original step-by-step approach as to how to determine the place of economic loss.

International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective

Carmen Otero García-Castrillón

At times where environmental concerns take a predominant role and corporate social responsibility is at the forefront of various legal debates, the fact that the laws and/or the judicial proceedings -to establish it and to order remedies- in the country of damage could be inadequate or even non-existent, makes it appropriate to reflect on the opportunities provided by the international litigation system of the European Union (EU) as compared to the system of the United States (US). Responding to the recent case law, this paper reflects on the international environmental litigation trends from a private international law perspective, analysing the jurisdiction and conflict of laws issues that, within this field, interact with a number of international civil liability conventions. In this regard, the complex determination of the applicable law and the liability limitations in the EU do not prevent the conclusion that, due to recent jurisdiction and applicable law trends in the US, international environmental litigation may be turning to the eastern side of the Atlantic.

Intellectual Property Rights Infringements in European Private International Law: Meeting the Requirements of Territoriality and Private International Law

Sophie Neumann

The article tends to compare and analyse the private international law solutions adopted by the European legislator and their possible justification for the infringement of intellectual property rights against the background of territoriality of intellectual property rights and against the background of the different methodological approaches adopted, on the one hand, by the Rome II Regulation for the applicable law and, on the other hand, by the Brussels I Regulation for jurisdiction. The thesis to be analysed is that the respective solutions concerning the infringement of intellectual property rights can be read both in an intellectual property perspective against the background of territoriality and in a private international law perspective against the background of a more "genuine" private international law interests' analysis. Both perspectives are affected by territoriality and therefore often lead, notwithstanding the methodological differences, to the same result in practice.

Dual Nationality = Double Trouble?

Thalia Kruger and Jinske Verhellen

The occurrence of dual nationality is increasing, due to several reasons. This article investigates the considerations private international law uses to deal with dual nationality, especially in civil law countries, where nationality is an important connecting factor and is sometimes even used for purposes of jurisdiction. Four such considerations are identified: preference for the forum nationality, the closest connection, the influence of EU law, and the principle of choice by the parties. When analysing the applications of these four considerations in issues of jurisdiction, applicable law and the recognition of foreign authentic acts or judgments, one sees that not all conflicts are real. The authors argue that false conflicts (for instance where jurisdiction can be based on the common nationality of the spouses under the Brussels IIbis Regulation)

need no resolution. Both nationalities can carry equal weight in these cases. For real conflicts (for instance application of the law of the common nationality of the spouses under Art. 8c of the Rome III Regulation), a broad closest-connection test should be maintained, rather than a preference for the forum nationality (which relies heavily on arguments of State sovereignty). A closest-connection test based on objective factors is the most reliable in ensuring an outcome respectful of legal certainty.

International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level

Katarina Trimmings and Paul Beaumont

Recent developments and research in the area of reproductive medicine have resulted in various treatment options becoming available to infertile couples. One of them is the use of a surrogate mother. Over the last two decades, surrogacy has become an increasingly popular method of reproductive technology.

Surrogacy targets the same clientele as its counterpart, adoption. It follows that with an increasingly limited global market for adoption, surrogacy will continue expanding. It is no exaggeration to say that the modern world has already witnessed the development of an extensive international surrogacy market. This market, although initially largely unnoticed, has recently attracted a great deal of interest by the media.

A source of worry, however, is the completely unregulated character of global surrogacy. Addressing this issue, this paper seeks to outline a potential legislative framework for a private international law instrument that could regulate cross-border surrogacy arrangements.

Review Article

A review article by Sirko Harder of K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law:*

Liber Amicorum Kurt Siehr

You can access this issue online and purchase individual papers. You can, alternatively (and it's recommended by us), subscribe to the Journal.

Katia Fach on Latin America and ICSID

Katia Fach, senior Researcher at the University of Zaragoza (Spain) has posted a new article on SSRN, under the title *Latin America and Icsid: David versus Goliath?.* Here is the abstract:

> Some Latin American countries have shown in recent times a very critical attitude with respect to the International Centre for Settlement of Investment Disputes (ICSID). In this regard, various States of this region have individually elaborated some mechanisms to resist against the international arbitration developed under the auspices of the World Bank. Argentina has for example used legal strategies to avoid compliance with a number of ICSID awards that require from the defendant State the payment of high amounts of money; Venezuela and Bolivia have created models of oil contracts in which no reference has been included to ICSID as the forum for settling disputes arising from these investments, and in the same way this ICSID option has been omitted from recent BITs signed by Latin American states; Venezuela and Ecuador seek to disengage from existing BITs and Bolivia and Ecuador have even come to denounce the Washington Convention. Additionally, entities such as UNASUR are trying to develop regional initiatives in Latin America, that aim to be a viable alternative to the ICSID arbitration. In short, Latin America is a region that deserves special attention in the area of international investment, as new initiatives such as the referred may have an influence on the future redefinition of international arbitration.

The text is available here, and also in the *Law and Business Review of the Americas*, volume 17, spring 2011, number 2, pp. 195-230.

Third 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 two articles addressing private international law issues and several casenotes. The full table of contents can be found here.

The first article is a presentation of the new French legislation on arbitration by Professor Sylvain Bollee (Paris I University).

The second article is a study of the international dimension of the liability of rating agencies by Professor Mathias Audit (Paris X University).

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2011)

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

Here is the contents:

- ***Christoph M. Giebel***: "Fünf Jahre Europäischer Vollstreckungstitel in der deutschen Gerichtspraxis – Zwischenbilanz und fortbestehender Klärungsbedarf" – the English abstract reads as follows:

The regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims has been applicable for more than five years now. During this time, German courts, including the Federal Supreme Court, have rendered substantial case law on this subject matter. Whilst awaiting further clarifications through the European Court of Justice, legal practice has thus been provided with valuable indications on the procedural requirements to be observed when applying for a European Enforcement Order in Germany. Despite the abundance of case law rendered by German Courts, a need for general clarification persists in certain areas. The article analyses this case law and proposes solutions for some material problems still to be solved. As the most serious deficit of the current German legal situation relating to European Enforcement Orders the author identifies the lack of clear-cut provisions on due information requirements under German law as to certain decisions that fall within the scope of application of the regulation. This particularly relates to resolutions determining costs or expenses (Kostenfestsetzungsbeschlüsse) and contempt fines (Zwangsgeld-/Ordnungsgeldbeschlüsse). The author suggests that the German legislator should introduce the relevant due information requirements in the German Code of Civil Procedure. In the meanwhile, the lack of such provisions does not hinder German judgement creditors from providing due information to the debtors themselves.

- ***Carl Friedrich Nordmeier***: New Yorker Heimfallrecht an erbenlosen Nachlassgegenständen und deutsches Staatserbrecht (§ 1936 BGB) – the English abstract reads as follows:

§ 3-5.1 of the New Yorker Estates, Powers and Trust Law (EPTL) determines as applicable for succession in immovables the lex rei sitae, for succession in movables the law of the state in which the decedent was domiciled at death. According to § 4-1.5 EPTL, heirless property situated in the State of New York escheats to the State. The present article shows, based on an analysis of § 4-1.5 EPTL, that the law of the State of New York generally calls for the application of the lex rei sitae if an estate is left without heir. § 4-1.5 EPTL is based on an "idea of power", according to which a state does not pass heirless property which is found on its territory to another state.

Regarding the EU Commission proposal for a Regulation on the law applicable in matters of succession, the present contribution suggests the application of

the lex rei sitae for estates without a claimant (art. 24 of the Proposal) and the admission of renvoi (art. 26 of the Proposal) when the law of a third State is designated to be applicable by the Regulation.

- ***Christoph Thole***: "Die Reichweite des Art. 22 Nr. 2 EuGVVO bei Rechtsstreitigkeiten über Organbeschlüsse" – the English abstract reads as follows:

In its decision, the ECJ held that Art. 22(2) of the Brussels I-Regulation is inapplicable in cases in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes. Thus, exclusive jurisdiction is not conferred on the courts of the country in which the company has its seat in cases where the validity of a decision of the company's organs is put in issue merely as a preliminary question to the validity of a contract. The ECJ established, inter alia, that the ruling of the famous GAT case concerning Art. 22(4) is not to be applied to the construction of Art. 22(2). In conclusion, the Court significantly narrows the scope of Art. 22(2). The article shows that the judgment is both persuasive in its findings and in accordance with former decisions. However, the ECJ has not managed to completely resolve the obvious disparity between the GAT case and other decisions dealing with the matter of preliminary questions.

- ***Ansgar Staudinger:*** "Wer nicht rügt, der nicht gewinnt – Grenzen der stillschweigenden Prorogation nach Art. 24 EuGVVO" – the English abstract reads as follows:

The court correctly clarified that the second sentence in Art. 24 of the Brussels I Regulation constitutes an exceptional clause which is subject to a restrictive interpretation (this applies accordingly to the parallel agreement between the EU and Denmark, the Lugano Convention, as well as Council Regulation No 4/2009 on matters relating to maintenance obligations). As a form of tacit prorogation, Art. 24 Brussels I Regulation is the equivalent of Art. 23 Brussels I Regulation. As far as the elements of Art. 24 Brussels I Regulation are fulfilled, the court must have jurisdiction. To this extent, national courts do not have discretionary power.

Currently, the Brussels I Regulation does not provide an obligation to inform or instruct the defending party, prior to it entering an appearance without contesting the court's jurisdiction. Such an obligation may only be introduced by the European legislator. Thus, in the scope of the Brussels I Regulation, provisions such as § 39 sentence 2 and § 504 of the German Code of Civil Procedure (Zivilprozessordnung) infringe the regulation's precedence over national law. However, the spirit and purpose of the protective clause in matters relating to insurance require that the court may ensure that the defending party is aware of the consequences of entering an appearance without contesting the court's jurisdiction, and that the decision to do so is therefore deliberate. This applies accordingly to matters relating to individual contracts of employment as well as consumer contracts. Only to this extent is a recourse to § 39 sentence 2 and § 504 of the German Code of Civil Procedure possible. The aforementioned principles may vary in light of the Council Directive on unfair terms in consumer contracts, as the judge's discretionary powers in this context may be reduced to such a degree that an obligation to instruct the defending party would be necessary as to not breach the directive. In any case, an instruction is not to be given to parties with legal representation by a lawyer. As far as legal policy is concerned, it seems preferable to specify an obligation of instruction in Art. 24 Brussels I Regulation, de lege ferenda. Therefore, the Commission's proposal for reform is welcome in its original intention. However, it is too far-reaching in its extent, since it neither differentiates between defendants with and those without legal representation by a lawyer, nor distinguishes initial cases from appeal procedures and lacks any distinction within matters relating to insurance.

- ***Jan D. Lüttringhaus***: "Vorboten des internationalen Arbeitsrechts unter Rom I: Das bei „mobilen Arbeitsplätzen" anwendbare Recht und der Auslegungszusammenhang zwischen IPR und IZVR" – the English abstract reads as follows:

For the first time since the adoption of the European regulations in the private international law of obligations, the Court of Justice has decided on the uniform interpretation of European jurisdiction and conflict of laws terminology. While the preliminary ruling primarily concerns Art. 6 (2)(a) Rome Convention, the Court holds also that the "habitual workplace" has to be interpreted consistently with Art. 8 (2) Rome I as well as with Brussels I. Thus, mobile

employees like truck-drivers, flight and train attendants working in more than one state may actually have their habitual workplace not only in the country in which, but also from which they carry out their work.

- ***Urs Peter Gruber:*** "Unterhaltsvereinbarung und Statutenwechsel" – the English abstract reads as follows:

Under Art. 18 par. 1 EGBGB, when the creditor changes his habitual residence, the law of the state of the new habitual residence becomes applicable as from the moment when the change occurs. This rule is convincing as long as the creditor bases his claims on the statutory law of the state of his new residence. If however the parties conclude a maintenance agreement, it seems questionable that a subsequent change of residence should have an influence on the law applicable to that maintenance agreement. If that were the case, the creditor would unilaterally influence the validity of the maintenance agreement by simply changing his habitual residence. This would clearly be in contradiction to the legitimate expectations of both parties. In a decision on legal aid, the OLG Jena has rightly come to the same conclusion.

The OLG Jena has also rightly pointed out that, although the validity of the maintenance agreement is as such not influenced by the subsequent change of residence, the parties might seek a modification on the agreement and base their petition on the fact that – due to the change of residence – the maintenance obligation is now governed by another law. Therefore, one has to differentiate between the validity of the agreement and the possibility to modify the agreement. Whether and to what extent the agreement can be modified is mainly determined by the law of the state of the creditor's new habitual residence.

- ***Markus Würdinger***: "Die Anerkennung ausländischer Entscheidungen im europäischen Insolvenzrecht" – the English abstract reads as follows:

Regulation No 1346/2000 on insolvency proceedings (European Insolvency Regulation) provides in Article 16, that the judgment opening insolvency proceedings is to be recognised automatically in all the other Member States, with no further formalities. The author analyses a judgement of the ECJ about

the recognition of insolvency proceedings opened by a court of a Member State. The ECJ rules that the competent authorities of another Member State are not entitled to order enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory. The author agrees with the judgement, but he criticises, that the ECJ has checked the international jurisdiction. The article also clarifies the follow-up question, whether the attachment effected by the German authorities is lawful.

- ***Susanne Deißner***: "Anerkennung gerichtlicher Entscheidungen im deutsch-chinesischen Rechtsverkehr und Wirksamkeit von Schiedsabreden nach chinesischem Recht" – the English abstract reads as follows:

The question whether Chinese court decisions are to be recognised by German courts was decided in the affirmative by the Higher Regional Court Berlin in a decision of 18 May 2006. With regard to Chinese law and its application by the courts in China it is, however, doubtful that the requirement of reciprocity under German civil procedure law is met by Chinese court decisions under three aspects: the requirement of "reciprocity in fact", the vague notion of public policy in Chinese law, and important differences in the concept of international lis pendens. Nevertheless, the decision by the Higher Regional Court Berlin has possibly – as proof of a positive German recognition practice with regard to Chinese court decisions – enhanced the chances for German judgments to be recognised in China. Dismissing the action, as the Higher Regional Court Berlin did, was, in any case, justified on other grounds mentioned obiter dictum by the court: According to the applicable Chinese law on arbitration, the arbitration agreement in question was invalid.

- ***Matthias Weller:*** "Vollstreckungsimmunität für Kunstleihgaben ausländischer Staaten" – the English abstract reads as follows:

The Higher Regional Court of Berlin once more deals with the question whether loans of art by foreign states are immune from seizure in the host state under customary international law. The decision seems to support such rule of customary international law if the exhibition serves the purpose of cultural representation by the foreign state. The new element of this rule merely lies in the acknowledgment that the loan of works of art and cultural property

constitutes one of other modes of cultural representation by a foreign state in the host state. Once this small step is taken, it is clear that property used for the purpose of cultural representation falls within the general rule of customary international law that property used for acta iure imperii of a state cannot be seized or attached while present on the territory of another state. The practical importance of this rule will continue to grow in the future.

- ***Daniel Girsberger*** on a new book by Kronke, Herbert/Nacimiento, Patricia/Otto, Dirk/Port, Nicola Christine (Hrsg.): Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention
- ***Jörn Griebel***: "Zuständigkeitsabgrenzung von Verwaltungs- und Justizgerichtsbarkeit in Frankreich" – the English abstract reads as follows:

In its decision of 17 May 2010 (no. 3754) the French Tribunal des conflits addresses the division of jurisdiction between the juridiction de l'ordre administratif and the juridiction de l'ordre judiciaire. Within the decision the Tribunal des conflits defines under which circumstances the juridiction de l'ordre administratif is mandatory, inter alia where state property or government procurement contracts are at stake. In the present case the jurisdiction fell, however, into the juridiction de l'ordre judiciaire because the contract in question was concluded by a public entity with a foreign person and comprised elements of international commercial law.

- ***Michael Stürner***: "Staatenimmunität bei Entschädigungsklagen wegen Kriegsverbrechen" – the English abstract reads as follows:

There has been an ongoing controversial discussion on State immunity, a long-standing principle of customary international law. While according to the traditional view the principle of State immunity extends to any act of State (acta iure imperii) a newly emerging opinion pleads in favour of exceptions in cases of grave violations of human rights. Both decisions discussed here reflect that debate. The Highest Court of the Republic of Poland, on the one hand, also considering the pending case Germany against Italy before the ICJ, does not see any ground for departing from the principle par in parem non habet iurisdictionem. Conversely, the Italian Corte di Cassazione follows its previous

case law, according to which a restriction of State immunity in cases dealing with crimes against humanity is justified.

- ***Ruiting QIN***: "Eingriffsnormen im Recht der Volksrepublik China und das neue chinesische IPR-Gesetz" – the English abstract reads as follows:

There exist some provisions in the Chinese law, especially in the Chinese law relating to foreign exchange administration, which are in nature overriding statutes of the law of the Mainland of China. However, the judicial practice of the Chinese people's courts up to now has dealt with these provisions incorrectly. These provisions should be applied to all foreign-related loan contracts as well as guarantee contracts directly, no matter which law governs the aforesaid contracts. The judicial practice of the Chinese people's courts which has applied the Chinese overriding statutes by a roundabout way through forbidding evasion of law not only runs against the Chinese private international law de lege data, but also is harmful to the development of the Chinese private international law. According to Article 4 of Law on the Application of Law for Foreign-related Civil Relations of the People's Republic of China, coming into force on April 1st, 2011, should the provisions relating to foreign exchange administration in the Chinese law be directly applied as overriding statutes of the law of the Mainland of China. Overriding statutes, choice of law and evasion of law are three kinds of private international law phenomena and need different legislative regulation. Article 4 of the new Chinese Private International Law is a great development of the Chinese private international law, but it still need improvement.

- ***Arkadiusz Wowerka***: Translation of the new Polish statute on PIL "Gesetz der Republik Polen vom 4.2.2011: Das Internationale Privatrecht"

Issue 2011.2 Nederlands Internationaal Privaatrecht

The second issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on the Brussels I Recast (contributions on Provisional Measures and Arbitration), Service of Documents and the new Chinese Private International Law Act:

Jolien Kruit, Voorlopige maatregelen: belangrijke wijzigingen op komst voor de (natte) praktijk!?, p. 271-279. The English abstract reads:

In its proposal to amend the Brussels I Regulation (COM(2010) 748), the European Committee has proposed several changes to the current rules on provisional, including protective, measures, as set out in Article 31 of the Brussel I Regulation and the case law of the European Court of Justice. Most strikingly, the Committee has proposed (1) that an obligation be implemented for the preliminary judge to cooperate with the Court where proceedings are pending as to the substance; and (2) that provisional measures, including – subject to certain conditions – measures which have been granted ex parte, are to be enforced and recognized, if they have been granted by a Court having jurisdiction on the substance of the case. This paper discusses these suggested changes and their consequences for daily practice. It is argued that if the proposed changes are implemented as suggested, serious problems may arise and that the Courts will have to give a reasonable interpretation to the provisions in order to create a practicable and useful regime.

Jacomijn J. van Haersolte-vanHof, The Commission's Proposal to amend the arbitration exception should be embraced!, p. 280-288. An excerpt from the introduction reads:

This contribution will first address the current state of the law, based on the present text of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Regulation') and the main case law of the European Court of Justice. Furthermore, the background and contents of the Commission Proposal1 will be discussed. This leads to an overview of the main reasons why

the Commission's Proposal for a review of this Regulation should be accepted. (…) this contribution is based on the role attributed to the author at the Colloquium held on 25 January 2011 in The Hague, organized by the T.M.C. Asser Institute and the Stichting Dutch Legal Network for Shipping Transport, namely to defend the Commission's Proposal. In fact, this role had been designated even before the Commission's point of view had been published. The author was happy to defend this position, also when the Commission's Proposal was released. At the same time, it should be noted that, initially, the author hoped for and supported a more exhaustive solution for arbitration to be incorporated into the Regulation. Nevertheless, a partial solution at this stage is to be preferred over the complete absence of any solution. But, as this contribution will show, it is not easy to provide for a partial solution. Hopefully, the legislative process will allow certain amendments and fine-tuning further to improve the present Proposal.

Vesna Lazic, The amendment to the arbitration exception suggested in the Commission's Proposal: the reasons as to why it should be rejected, p. 289-298. The conclusion reads:

The solution suggested in the Commission's Proposal is both disproportionate and inadequate to meet the needs of the commercial parties. There is a clear discrepancy between the 'problem' allegedly intended to be resolved and the amendments suggested in the Proposal for doing so. The suggested measure of transferring the court intervention in the pre-arbitration phase from one jurisdiction to another can hardly be explained by reasons such as 'enhancing the effectiveness of arbitration agreements' and enhancing the attractiveness of arbitrating in the EU. Particularly erroneous and inadequate is the suggested and presumed binding nature of the decision on the validity of an arbitration agreement, without providing for at least a minimal level of uniformity. It is exactly because the 1958 New York Convention regulates only some instances of court 'intervention' that it is preferable to have a separate instrument within which all relevant aspects would be dealt with. Such an instrument would serve as a genuine supplement to the 1985 New York Convention. It would be a proper means to overcome the undesirable effects of those provisions that proved outdated and, as such, unsuitable for modern business or that have given rise to difficulties and discrepancies in interpretation by national courts. Such a carefully drafted instrument would truly enhance the attractiveness of arbitrating within the EU. Partial solutions in the form of poorly drafted and vaguely worded

amendments are counterproductive as they will only be driving away potential users from arbitrating in Europe. Unfortunately, it does not seem likely that the Commission will follow that path and address all the issues in one EU instrument. Numerous interventions, commentaries on the Green Paper and clear preferences for not dealing with issues concerning the interface between arbitration and litigation within the Regulation have obviously been ignored. Thus, it is unrealistic to expect that any comments and suggestions to that effect will have any relevance in the future. Yet if the Commission wishes to pursue the approach of a '(partial) deletion of the arbitration exception' it is perhaps not too much to expect that the context and the wording of the amendment will be substantially reconsidered and revised. Thereby an approach comparable to Article VI(3) of the European Convention may be a suitable solution. This may be combined with prima facie control over the validity of arbitration agreements by the court seised when no arbitration has yet been initiated. Such an approach would ensure the full effectiveness of arbitration agreements.

Chr. F. Kroes, Bij nader inzien: de Hoge Raad komt terug van zijn opvatting dat bij de kantoorbetekening ex artikel 63 Rv ook het Haags Betekeningsverdrag moet worden gevolgd, p. 299-302 [Annotation to Hoge Raad 4 februari 2011, nr. 10/04456, LJN: BP0006 (NIPR 2011, 222) en nr. 10/05104, LJN: BP 3105 (NIPR 2011, 223). The English abstract reads:

Until recently, the Supreme Court held that national service at the office address of a party's counsel in the first instance ('office service') was not sufficient if the defendant had his/her domicile in a Member State of an international instrument on service abroad (an EU Regulation or a treaty). In such a case, the plaintiff should also adhere to the requirements for service under that instrument. The Supreme Court has now completely reversed its position. With regard to the Service Regulation II, it decided on 18 December 2009 that, in case the Service Regulation II would otherwise be applicable, office service is sufficient. On 4 February 2011, the Supreme Court handed down two decisions that make clear that the same applies in cases where defendants have their domicile in Member States of the Hague Convention on Service in Civil and Commercial Cases 1965. No doubt, these decisions are pragmatic. However, there are objections. First, it is unclear what effort a party's counsel must make in order to make sure that the document that has been served actually reaches his client. In most cases, this will not be a problem, but if counsel has lost contact, it certainly will be. Such an

inability to reach the client will go unnoticed by the court that will then simply proceed by default. Secondly, problems with recognition and enforcement outside of the Netherlands may result from such an office service.

Ning Zhao, The first codification of choice-of-law rules in the People's Republic of China: an overview, p. 303-311. The conclusion reads:

Given the continued economic growth and the ever-increasing number of foreign-related civil relations in the PRC, the enactment of the Statute is certainly a timely one. With this Statute, the legislator has succeeded in achieving the goals of codifying substantial parts of choice-of-law rules, and keeping them in line with major developments achieved in international and national codifications and reforms in this field. In spite of the influence of other codifications, the Chinese legislator has made this Statute suitable for Chinese social reality. From the foregoing, it is clear that the Statute gives preference to legal certainty and conflicts justice over flexibility and substantive justice. The Statute incorporates many of the most advanced developments in the field of choice of law, in that it modernizes and systematizes the rules that are currently in force. Parties in dispute and practitioners will certainly benefit from the clear and transparent rules prescribed in the Statute, and those rules will also facilitate the adjudication of international civil disputes by Chinese courts. Thus, as the first codification of choice-of-law rules in China, the Statute opens a new page for Chinese private international law. It is probably too early to draw a conclusion as to the effectiveness of the Statute, as only practice will put the advantages and inconvenience of the Statute into perspective. Nevertheless, the Statute seems to have the potential to succeed as a basic body of law in regulating choice-of-law problems in foreign related civil relations.