Council Adopts a Common Position on Rome II

After their general agreement on the text of the **draft Regulation on the law applicable to non-contractual obligations ("Rome II")** on 1-2 June 2006, the Council of the European Union has adopted a common position on 25 September 2006 under the co-decision procedure (by a qualified majority).

The Council's common position responds both to the Commission's original proposal in 2003, as modified by their proposal on 22 February 2006, and the amendments suggested by the European Parliament on 6 July 2005.

The draft statement of the Council's reasons can be found here. **The complete text of the draft Regulation proposed by the Council in their common position can be downloaded from here.**

All comments on the various acceptances and rejections contained therein are welcome.

Draft "Rome I" Report by European Parliament Legal Affairs Committee

The draft report on the "Rome I" Regulation (which proposes to convert the Rome Convention on the law applicable to contractual obligations into a Community Regulation) has been produced by rapporteur Maria Berger, as part of the European Parliament Legal Affairs Committee (JURI), in response to the European Commission's original proposal on 15th December 2005.

The report is publicly available from the JURI website. JURI will meet on 11th September 2006 to consider the report, and potentially map out a timetable for

amendments.

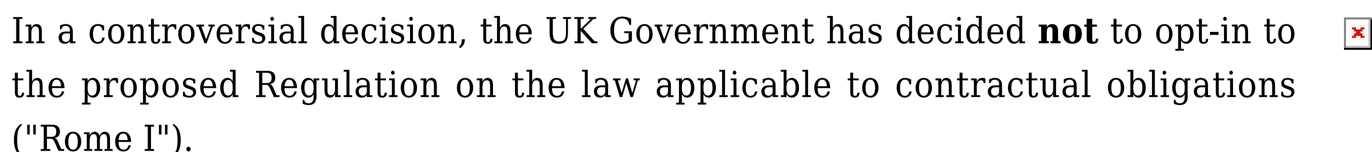
There are some key changes to the Commission's proposal in JURI's report. The rapporteur summarises them thus:

> *The amendments contained in this report are designed to improve the text as proposed by the Commission in the light of the various submissions that have been made to the rapporteur and with a view to making it more consistent with the Rome II project as it stands at present. She has concentrated particularly on certain key provisions, such as Article 4 (Applicable law in the absence of choice) and Article 6 (Individual employment contracts), where she advocates an approach closer to that adopted by Parliament in its first reading of Rome II and to the conflict-of-law rules of non-EU jurisdictions. Your rapporteur has also sought to distinguish between internal and international mandatory rules by amending Article 8 on the ground that the various references to "mandatory rules" in Articles 3(5), 6(1), 8 and 10(1) could give rise to confusion.*

The amendment to Article 4 reintroduces the "closest connection" rule (which was conspiciously absent from the Commission's proposal), supplemented with a number of presumptions for particular types of contract (thus bringing it more in line with the current Rome Convention, and also more closely mirroring the provisions of the "Rome II" Regulation). Significantly, the draft report also deletes Article 8(3), which gives effect to the mandatory (overriding) rules of another country with which the situation has a close connection. It will be remembered that Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia and the United Kingdom all entered a reservation for the corresponding provision in the Rome Convention (Article 7(1)). It may be this change, as much as any other, that will entice the UK to opt back in.

As always, comments on the draft report are very welcome.

UK Government to opt-out of Rome I Regulation



In a controversial decision, the UK Government has decided **not** to opt-in to the proposed Regulation on the law applicable to contractual obligations ("Rome I").

- Information on Rome I (press release)
- The Report of the Financial Markets Law Committee (which may have had an impact on the UK decision)

Further information will be posted as it becomes available.

Source: BIICL Mailing List

EU Council reach political agreement on Rome II

The EU Council, with Estonia and Latvia entering reservations, have reached a political agreement on the Regulation applicable to non-contractual obligations ("Rome II").

The press release from the 2725th Council Meeting can be downloaded here (PDF) – the relevant section can be found on pages 23-24.

Source: BIICL Mailing List

The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam) and Xandra Kramer (Erasmus University Rotterdam/Utrecht University), members of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

After extensive negotiations, on 24 April 2024, the European Parliament approved the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D) as part of the EU Green Deal. Considering the intensive discussions, multiple changes, and the upcoming elections in view, the fate of the Commission's proposal has been uncertain. The Directive marks an important step in human rights and environmental protection, aiming to foster sustainable and responsible corporate behaviour throughout global value chains. Some Member States have incorporated similar acts already, and the Directive will expand this to the other Member States, which will also ensure a level playing field for companies operating in the EU. It mandates that companies, along with their associated partners in the supply chain, manufacturing, and distribution, must take steps to avoid, halt, or reduce any negative effects they may have on human rights and the environment. The Directive will apply to big EU companies (generally those with more than 1,000 employees and a worldwide turnover of more than EUR 450 000 000) but also to companies established under the law of a third country that meet the Directive's criteria (Article 2 CSDDD).

Among the CSDDD's key provisions is the rule on civil liability enshrined in Article 29. This rule states that companies shall be held liable for damages caused in breach of the Directive's provisions. Accompanying such a rule are also some provisions that deal with matters of civil procedure and conflict of laws, though as has been pointed out earlier on this blog by Kilimcioglu, Kruger, and Van Hof, the CSDDD is mostly silent on PIL. When the Commission proposal was adopted in 2022, Michaels and Sommerfeld elaborated earlier on this blog on the

consequences of the absence of rules on jurisdiction in the CSDDD and referred to the Recommendation of GEDIP in this regard. The limited attention for PIL aspects in the CSDDD is does not mean that the importance of corporate sustainability and human rights is not on the radar of the European policy maker and legislator. In the context of both the ongoing evaluation of the Rome II Regulation and Brussels I-bis Regulation this has been flagged as a topic of interest.

This blog post briefly discusses the CSDDD rules on conflict of laws and (international) civil procedure, which underscore the growing importance of both in corporate sustainability and human rights agendas.

Conflict of laws and overriding mandatory provisions

The role of PIL in the agenda of business and human rights has increasingly received scholarly attention. Noteworthy works addressing this intersection include recent contributions by Lehmann (2020), as well as volumes 380 (Van Loon, 2016) and 385 (Marrella, 2017) of the *Collected Courses of The Hague Academy of International Law*. Additionally, pertinent insights can be found in the collaborative effort of Van Loon, Michaels, and Ruiz Abou-Nigm (eds) in their comprehensive publication, The Private Side of Transforming our World (2021). From an older date is a 2014 special issue of Erasmus Law Review, co-edited by Kramer and Carballo Piñeiro on the role of PIL in contemporary society.

While the CSDDD contains only a singular rule on PIL, specifically concerning overriding mandatory provisions, it should be viewed in the broader EU discourse. The relevance of PIL for the interaction between business and human rights extends beyond this single provision, as evidenced by the Commission's active role in shaping this development. As indicated earlier, this is further indicated by studies on both the Rome II and Brussels I-bis Regulations, both of which delve into the complexities of PIL within the business and human rights debate. Thus, the CSDDD's rule should not be viewed in isolation, but as part of a larger, dynamic conversation on PIL in the EU.

The mentioned Rome II Evaluation Study (2021) commissioned by the Commission, summarised on this blog here, assessed Rome II's applicability to matters pertaining to business and human rights in detail. With regards to overriding mandatory provisions, the study outlines several initiatives at national

level in the Member States that were discussed or approved to enact a mandatory corporate duty of care regarding human rights and the environment. Likewise, the Brussels I-bis Evaluation Study (2023) also examined how the Brussels I-bis applies to business and human rights disputes. Within the EU, establishing jurisdiction over EU-domiciled companies is straightforward under the Regulation, but it becomes complex for third-country domiciled defendants. Claims against such defendants are not covered by the Regulation, leaving jurisdiction to national laws, resulting in varied rules among Member States. *Forum necessitatis* and co-defendants rules may help assert jurisdiction, but lack harmonization across Europe. In this context, as explained by Michaels and Sommerfeld, while the CSDDD applies to certain non-EU firms based on their turnover in the EU (Article 2(2)), jurisdictional issues persist for actions against non-EU defendants in EU courts, with jurisdiction typically governed by national provisions. This could result in limited access to justice within the EU if relevant national rules do not establish jurisdiction.

As was mentioned above, the CSDDD is mostly silent on PIL. However, it does include a rule on overriding mandatory provisions enshrined in Article 29(7) and accompanying Recital 90. This rule aims to ensure the application of the (implemented) rules of the CSSDD regardless of the *lex causae*. Under EU private international law rules, the application of overriding mandatory provisions is also enabled by Article 9 Rome I Regulation and Article 16 Rome II Regulation.

Article 29(7) CSDDD states that 'Member States shall ensure that the provisions of national law transposing' Article 29 CSDDD 'are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State'. A similar provision to that effect can be found in the draft UN Legally Binding Instrument on business and human rights.

This means that the national laws transposing Article 29 CSDDD in their liability systems are applicable irrespective of any other conflict of law provisions in force. This rule also extends to the matters of civil procedure addressed below, as explicitly stated by Recital 90 CSDDD. On this matter, the potential for the CSDDD to become a dominant global regulatory force and overshadow existing and future national regulations, which is only beneficial if effectively prevents and remedies corporate abuses, has been highlighted. However, there is concern that it might mitigate the development of stronger regulatory frameworks in other countries (see FIDH, 2022).

Matters of civil procedure

The rules contained in the CSDDD that pertain to civil procedure are essentially laid down in Article 29(3). These rules on civil procedure naturally apply to both domestic cases and cross-border situations.

Firstly, Article 29(3)(b) CSDDD states that the costs of judicial proceedings seeking to establish the civil liability of companies under the Directive shall not be prohibitively expensive. A report published in 2020 by the EU Agency for Fundamental Rights (FRA) on 'Business and human rights – access to remedy' stressed that private individuals face significant financial risks when resorting to courts due to high costs such as lawyer fees, expert opinions, and potential liability for the opposing party's costs, particularly daunting in cases involving large companies. Suggestions for improvement include making litigation costs proportionate to damages, providing free legal representation through state bodies, and setting thresholds for the losing party's financial obligations, along with supporting civil society organizations offering financial and legal aid to victims of business-related human rights abuses. Secondly, Article 29(3)(c) CSDDD provides the possibility for claimants to seek definitive and provisional injunctive measures, including summarily, of both a restorative or enforcing nature, to ensure compliance with the Directive. Lastly, Article 29(3)(d) and (e) CSDDD, respectively, outline rules on collective actions and disclosure of evidence, the latter two explained below.

Collective actions

The FRA report mentioned above emphasized that many legal systems in the EU lack effective collective redress mechanisms, leading to limited opportunities for claimants to seek financial compensation for business-related human rights abuses. Existing options often apply only to specific types of cases, such as consumer and environmental protection, with procedural complexities further restricting their scope. Article 29(3)(d) CSDDD ensures that collective action mechanisms are put in place to enforce the rights of claimants injured by infringements of the Directive's rules. This provision states that 'Member States shall ensure that [...] reasonable conditions are provided for under which any alleged injured party may *authorise*' the initiation of such proceedings. In our view, if this provision is interpreted in a similar way as the alike-rule on private enforcement contained in Article 80(1) GDPR (which uses the synonym

‘mandate’), then this collective action mechanism shall operate on an opt-in basis (see Pato & Rodriguez-Pineau, 2021). The wording of both provisions points to a necessity of explicit consent from those wishing to be bound by such actions. Recital 84 CSDDD further underscores this interpretation by stating that this authorisation should be ‘based on the explicit consent of the alleged injured party’. Importantly, this is unrelated to the collective enforcement of other obligations, outside the scope of the CSDDD, that may impinge upon the types of companies listed in Article 3(1)(a) CSDDD, like those stemming from financial law and insurance law (e.g. UCITS Directive, EMD, Solvency II, AIFMD, MiFID II, and PSD2). All the latter are included in Annex I Representative Actions Directive (RAD) and therefore may be collectively enforced on an opt-out basis pursuant to Article 9(2) RAD (see Recital 84 CSDDD).

Furthermore, Article 29(3)(d) CSDDD grants the Member States the power to set conditions under which ‘a trade union, non-governmental human rights or environmental organisation or other non-governmental organisation, and, in accordance with national law, national human rights’ institutions’ may be authorized to bring such collective actions. The Directive exemplifies these conditions by mentioning a minimum period of actual public activity and a non-profit status akin to, respectively, Article 4(3)(a) and (c) RAD, as well as Article 80(1) GDPR.

In our view, the most relevant aspect of the collective action mechanism set by the CSDDD is that it provides for the ability to claim damages. Indeed, Article 29(3)(d) CSDDD allows the entities referred therein to ‘enforce the rights of the alleged injured party’, without making any exceptions as to which rights. This is an important recognition of the potentially pervasive procedural imbalance that can affect claimants’ abilities to pursue damages against multinational corporations in cases of widespread harm (see Kramer & Carballo Piñeiro, 2014; Biard & Kramer, 2018; Buxbaum, *Collected Courses of The Hague Academy of International Law* 399, 2019).

Disclosure of evidence

Finally, Article 29(3)(e) CSDDD enacts a regime of disclosure of evidence in claims seeking to establish the civil liability of companies under the Directive. This provision, similar to Article 6 IP Enforcement Directive, Article 5 Antitrust Damages Directive, and Article 18 RAD, seeks to remedy the procedural

imbalance of evidentiary deficiency, existent when there is economic disparity between the parties and unequal access to factual materials (see Vandenbussche, 2019).

When a claim is filed and the claimant provides a reasoned justification along with reasonably available facts and evidence supporting their claim for damages, courts can order the disclosure of evidence held by the company. This disclosure must adhere to national procedural laws. If such a disclosure is requested in a cross-border setting within the EU, the Taking of Evidence Regulation also applies.

Courts must limit the disclosure of evidence to what is necessary and proportionate to support the potential claim for damages and the preservation of evidence. Factors considered in determining proportionality include the extent to which the claim or defense is supported by available evidence, the scope and cost of disclosure, the legitimate interests of all parties (including third parties), and the need to prevent irrelevant searches for information.

If the evidence contains confidential information, especially regarding third parties, Member States must ensure that national courts have the authority to order its disclosure if relevant to the claim for damages. Effective measures must be in place to protect this confidential information when disclosed.

Outlook

The CSDDD regime on civil procedure described above largely follows the EU's 'silo mentality' (Voet, 2018) of enacting sectoral-based and uncoordinated collective action mechanisms tied to a specific area of substantive law, such as consumer law, non-discrimination law, and environmental law (e.g. UCTD, RED, UCPD, IED, EIAD, etc.). An important difference being, however, that this time the RAD is already in force and being implemented. On this matter, Recital 84 CSDDD states that Article 29(3)(d) CSDDD 'should not be interpreted as requiring the Member States to extend the provisions of their national law' implementing the RAD.

However, being the first EU-wide collective action mechanism and prompting historically collective action-sceptic Member States to adapt accordingly, it is conceptually challenging to posit that the RAD would not potentially influence regimes on collective actions beyond consumer law, including the CSDDD. In this

context, it would not deviate significantly from current developments if some Member States opted for a straightforward extension of their existing and RAD-adapted collective action regimes to the CSDDD, though that demands caution to the latter's specificities and is not legally required.

Another aspect worthy of attention is how these collective actions would be funded. Since such actions may seek damages compensation for widespread harm under Article 29 CSDDD, they can become notably complex and, consequently, expensive. At the same time, a large number of injured persons can mean that these collective actions will ask for high sums in damages. These two factors combined make these collective actions an enticing investment opportunity for the commercial third-party litigation funding (TPF) industry. The CSDDD does not make any reservations in this regard, leaving ample room for Member States to regulate, or not, the involvement of commercial TPF. A report published in mid last year by Kramer, Tzankova, Hoevenaars, and Van Doorn by request of the Dutch Ministry of Justice and Security found that nearly all collective actions seeking damages in the Netherlands make use of commercial TPF. This underscores the crucial role commercial TPF plays in financing such actions, significantly impacting access to justice.

Moreover, the complexities surrounding the integration of PIL into specialized legislation such as the CSDDD, the GDPR, and the anti-SLAPPs Directive reflect a tension between the European Parliament and the Commission. This tension revolves around the extent to which PIL should be addressed within specialized frameworks versus traditional EU legislation on PIL. So far, a clear direction in this regard is lacking, which will trigger further discussions and potential shifts in approach within the EU legislative landscape.

International tech litigation

reaches the next level: collective actions against TikTok and Google

Written by Xandra Kramer (Erasmus University Rotterdam/Utrecht University) & Eduardo Silva de Freitas (Erasmus University Rotterdam), members of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

We have reported on the Dutch WAMCA procedure for collective actions in a number of previous blogposts. This collective action procedure was introduced on 1 January 2020, enabling claims for damages, and has since resulted in a stream of (interim) judgments addressing different aspects in the preliminary stages of the procedure. This includes questions on the admissibility and funding requirements, some of which are also of importance as examples for the rolling out of the Representative Action Directive for consumers in other Member States. It also poses very interesting questions of private international law, as in particular the collective actions for damages against tech giants are usually international cases. We refer in particular to earlier blogposts on international jurisdiction in the privacy case against *TikTok* and the referral to the CJEU regarding international jurisdiction under the Brussels I-bis Regulation in the competition case against *Apple.*

In this blogpost we focus on two follow-up interim judgments: one in the collective action against TikTok entities and the other against Google. The latter case is being discussed due to its striking similarity to the case against Apple.

The next steps in the *TikTok* collective action

The collective action against *TikTok* that was brought before the Amsterdam District Court under the Dutch WAMCA in 2021. Three representative organisations brought the claim against seven *TikTok* entities located in different countries, on the basis of violation of the Code of Conduct of the Dutch Media Act and the EU General Data Protection Regulation (GDPR). The series of claims include, among others, the destruction of unlawfully obtained personal data, the

implementation of an effective system for age registration, parental permission and control, measures to ensure compliance with the Dutch Media Act and the GDPR as well as the compensation of material and immaterial damages.

In an earlier blogpost we reported that the Amsterdam District Court ruled that it had international jurisdiction under the Brussels I-bis Regulation and the GDPR. In the follow-up of this case, the court reviewed the admissibility requirements, one of which concerns the funding and securing that there is not conflict of interest (see Tzankova and Kramer, 2021). This has led to another interim judgment focusing on the assessment of the third party funding agreement as two out of the three claimant organisations had concluded such agreement, as reported on this blog here. In short, the court conditioned the admissibility of the representative claimant organisations on amendments of the agreement with the commercial funder due to concerns related to the control of the procedure and the potential excessiveness of the fee. The court provided as a guideline that the percentage should be determined in such a way that it is expected that, in total, the financers can receive a maximum of five times the amount invested.

On 10 January 2024 the latest interim judgment was rendered. Without providing further details the Amsterdam District Court concluded that the required adjustments to the funding agreement had been made and that the clauses that had raised concern had been deleted or amended. It considered that the independence of the claimants in taking procedural decisions was sufficiently guaranteed. The court declared the representative organisations admissible, appointing two of them as Exclusive Representative (one for minors and the other for adults) based on their experience, the number of represented people they represent, their collaboration and support. The court confirmed its statement made in a previous interim judgment that the claim for immaterial damages is inadmissible as that would require an assessment per victim, which it considered impossible in a collective action. This is admittedly a setback for the collective protection of privacy rights, notably similar to the one following the 2021 United Kingdom Supreme Court ruling in *Lloyd* v *Google*.

With this last interim judgment the preliminary hurdles have been overcome, and the court proceeded to provide further guidelines as to the opt-out and opt-in as the next step. The WAMCA is an opt-out procedure, but to foreign parties in principle an opt-in regime applies. The collective action was aimed representing people in the Netherlands, but was extended to people who have moved abroad

during the procedure, and these are under the opt-in rule. The information on opt-out and opt-in will be widely published.

It remains to be seen how the case will progress considering the further procedural decisions and the assessment on the merits.

The claim against Google and its private international law implications

Another case with an international dimension is the collective action for damages against Google that was filed under the WAMCA, alleging anticompetitive practices concerning the handling of the app store (DC Amsterdam, 27 December 2023, ECLI:NL:RBAMS:2023:8425; in Dutch). This development comes amidst a landscape marked by high-profile antitrust collective actions with international dimensions, such as the one filed against Apple, in which there is an ongoing legal battle regarding Apple's alleged anticompetitive behavior in the market for app distribution and in-app products on iOS devices. Cases like these are either pending before courts or under investigation by competition authorities worldwide, reflecting a broader global trend towards increased scrutiny of antitrust practices in the digital marketplace.

In the present case, the claimant organisation argues that the anticompetitive nature of Google's business stems from a collection of practices rather than an isolated practice. Such a collection of practices would shield Google from nearly all possible competition and allow it to charge excessive fees due to its dominance in the market. The practices that, taken together, form this anticompetitive behaviour are essentially:

(i) The bundling of pre-installed apps, including Google's Play Store, with the licensing of the Android operating system to the manufacturers of smartphones;

(ii) The imposition that transactions related to the Play Store be undertaken only within Google's own payment system;

(iii) The charging of a fee of 30% from the app's developer, which the claimant organisation deems abusive and only possible due to Google's dominant position created by the abovementioned practices.

Based on these allegations, the claimant organisation accuses Google of engaging in mutually exclusive and exploitative practices, thereby abusing a dominant

position in a manner contrary to Article 102 TFEU. This case unfolds within a broader global context where antitrust actions against Google's Play Store, its payment system, and the bundling with the Android operating system have gained significant momentum. Just last December, Google reached a settlement in a multidistrict litigation involving all 50 states of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands. The settlement addressed issues very similar to those raised in this case, as explicitly outlined in the agreement. The Competition and Markets Authority in the United Kingdom is also conducting an antitrust investigation into these aspects of Google's operations. Furthermore, the practice of pre-installing Google apps as a requirement for obtaining a license to use their app store is under investigation by the Brazilian Competition Authority.

From a private international law perspective, this case closely resembles another one against Apple referred to the CJEU by the District Court of Amsterdam and discussed earlier in this blog, in which similar antitrust claims were raised due to the handling of the app store and the exclusionary design of the respective payment system. However, unlike the collective action against Apple, in this case the District Court of Amsterdam clearly did not refer the case to the CJEU and instead decided by itself whether it had jurisdiction to hear the claim. And again, like the Apple case, the court was called upon to decide on both international jurisdiction and its territorial jurisdiction within the Netherlands.

International jurisdiction

The collective action under the Dutch WAMCA in the Google case was filed against a total of eight defendants. Two of the defendants (Google Netherlands B.V. and Google Netherlands Holdings B.V.) against whom the claim was filed are established in the Netherlands, and for them the standard rule of Article 4 Brussels I-bis Regulation applies. There are also three other defendants (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) established in another EU Member State, namely Ireland. With regards to these defendants, the court also assessed whether it had jurisdiction based on the Brussels I-bis Regulation. Finally, there are three defendants based outside of the EU – Alphabet Inc. and Google LLC in the United States and Google Payment Limited in the United Kingdom. Jurisdiction with regards to these defendants based outside of the EU was established under the pertinent rules contained in the Dutch Code of Civil Procedure (DCCP).

The court initiated its assessment by recognizing that, due to the lack of jurisdiction rules specifically addressing collective actions in both the Brussels I-bis Regulation and the Dutch Code of Civil Procedure, the standard rules within these frameworks should be applied. The court's reasoning was based on the established principle that no differentiation exists between individual and collective actions when determining jurisdiction. The court primarily conducted its assessment regarding whether the Netherlands could be considered the *Erfolgsort* under Article 7(2) of the Brussels I-bis Regulation, mostly *ex officio*, as this was not a point of contention between the parties.

The court's view is that the criteria from Case C-27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533) should be applied, according to which the location of the market affected by the anticompetitive practice is the *Erfolgsort*. The location of the damage is where the initial and direct harm occurred, which primarily involves users overpaying for purchases made on the Play Store. In the present case the court, applying such criteria, decided that the Netherlands can be considered the *Erfolgsort*, given that the claimant organisation represents users that make purchases and reside in the Netherlands. This reasoning is very similar to the one used by the District Court of Amsterdam in deciding to refer the Apple case to the CJEU.

Territorial jurisdiction within the Netherlands

With regards to the jurisdiction of the District Court of Amsterdam to hear this collective action in which the claimant organisation sues on behalf of all the users residing in the Netherlands, the decision contains an assessment starting from the CJEU ruling in Case C-30/20 *Volvo* (ECLI:EU:C:2021:604). Such ruling states that Article 7(2) Brussels I-bis Regulation grants jurisdiction over claims for damages due to infringement of Article 101 TFEU to the court where the goods were purchased. If purchases were made in multiple locations, jurisdiction lies with the court where the alleged victim's registered office is located.

In the case at hand, given the mobile nature of the purchases, it is not possible to pinpoint a specific location. However, under the criteria just mentioned, the District Court of Amsterdam has jurisdiction over the victims' registered offices for those residing in Amsterdam in accordance with both Article 7(2) Brussels I-bis Regulation (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) and the similar provision in Article 102 DCCP (Alphabet

Inc., Google LLC, and Google Payment Limited).

For users residing elsewhere in the Netherlands, the parties agreed that the District Court of Amsterdam would serve as the chosen forum for users who are not based in Amsterdam. The court decided that, with regards to Alphabet Inc., Google LLC, and Google Payment Limited, this is possible under Article 108(1) DCCP on choice of court. As to Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited, the court interpreted Article 7(2) Brussels I-bis Regulation in light of the principle of party autonomy (see Kramer and Themeli, 2016) as enshrined in Recitals 15 and 19, as well as Article 25 Brussels I-bis Regulation. The court also noted that no issues concerning exclusive jurisdiction arise in the present case and made a reference to the rule contained in Article 19(1) Brussels I-bis Regulation according to which the protective rule of Article 18 Brussels I-bis Regulation can be set aside by mutual agreement during pending proceedings.

Finally, the court decided that centralising this claim under its jurisdiction is justified under the principle of sound administration of justice and the prevention of parallel proceedings. In the court's understanding, the goal of Article 7 Brussels I-bis Regulation is to place the claim before the court that is better suited to process it given the connection between the two and, given that the mobile nature of the purchases gives rise to damages all over the Netherlands, such a court would be difficult to designate. Hence the need for respecting the choice of court agreement.

Applicable law

The court established the law applicable to the present dispute under Article 6(3)(a) Rome II Regulation. The court used the same reasoning it had laid out to establish jurisdiction in the Netherlands as the *Erfolgsort*, since it is the market affected by the alleged anticompetitive practices where the users concerned reside and made their purchases. The court also considered the claimant organization's argument that, according to Article 10(1) of the Rome II Regulation, the Dutch law of unjust enrichment could govern the claim. Although the court did not provide extensive elaboration, it agreed with this view.

Funding aspects of the claim against Google

Lastly, in a naturally similar way as regarding the TikTok claim explained above,

the court assessed the funding arrangements of the claim against Google under the requirements set by the WAMCA. The court took issue with the fact that the funding arrangement entered by the claimant organisation is somewhat indirect, since it is apparent that the funder itself relies on another funder which is not a part of the agreement presented to the court. Under these circumstances, the court deems itself unable to properly assess the claimant organisation's independence from the "actual" funder and its relationship with the remuneration structure.

For this reason, the court ordered the claimant organisation to resubmit the agreement, which it is allowed to do in two versions. One version of the agreement will be presented in full and will be available to the court only, to assess it in its entirety. The other version, also available to Google, will have the parts concerning the overall budget for the claim concealed. However, the parts concerning the funder's compensation share must remain legible for discussion around the organisation's independence from the funder, and confirmation that such agreement reflects the whole funding arrangement of the claim was also required.

Third Issue of Journal of Private International Law for 2023

The third issue of the Journal of Private International Law for 2023 has just been published. It contains the following articles:

Chukwuma Samuel Adesina Okoli & Abubakri Yekini, "Implied jurisdiction agreements in international commercial contracts: a global comparative perspective"

This article examines the principles of implied jurisdiction agreements and their validity on a global scale. While the existing scholarly literature primarily focuses on express jurisdiction agreements, this study addresses the evident lack of

scholarly research works on implied jurisdiction agreements. As such, it contributes to an understanding of implied jurisdiction agreements, providing valuable insights into their practical implications for international commercial contracts. The paper's central question is whether implied jurisdiction agreements are globally valid and should be enforced. To answer this question, the article explores primary and secondary sources from various jurisdictions around the world, including common law, civil law, and mixed legal systems, together with insights from experts in commercial conflict of laws. The paper argues for a cautious approach to the validity of implied jurisdiction agreements, highlighting their potential complexities and uncertainties. It contends that such agreements may lead to needless jurisdictional controversies and distract from the emerging global consensus on international jurisdiction grounds. Given these considerations, the paper concludes that promoting clear and explicit jurisdiction agreements, as supported by the extant international legal frameworks, such as the Hague Conventions of 2005 and 2019, the EU Brussels Ia Regulation, and the Lugano Convention, would provide a more predictable basis for resolving cross-border disputes.

Veena Srirangam, "The governing law of contribution claims: looking beyond *Roberts v SSAFA*"

The governing law of claims for contribution, where the applicable law of the underlying claim is a foreign law, has long posed a knotty problem in English private international law. The Supreme Court's decision in Roberts v Soldiers, Sailors, Airmen and Families Association considered this issue in the context of the common law choice of law rules. This article considers the decision in Roberts and claims for contribution falling within the scope of the Rome II Regulation, the Rome I Regulation as well as the Hague Trusts Convention. It is argued here that claims for contribution arising out of the same liability should be considered as "parasitic" on the underlying claim and should prima facie be governed by the applicable law of the underlying claim.

Weitao Wong, "A principled conflict of laws characterisation of fraud in letters of credit"

This article examines how the issue of fraud in letters of credit (which constitutes a critical exception to the autonomy principle) should be characterised in a conflict of laws analysis; and consequently, which law should apply to determine if fraud has been established. It argues that the fraud issue has thus far been incorrectly subsumed within the letter of credit contract, rather than being correctly characterised as a separate and independent issue. On the basis of fundamental conflict of laws principles and policies, this article advocates that the fraud issue should be characterised separately as a tortious/delictual issue. It then discusses how some of the difficulties of such a conflicts characterisation may be adequately addressed.

Zlatan Meški, Anita Durakovi, Jasmina Alihodži, Shafiqul Hassan & Šejla Handali, "Recognition of talaq in European states – in search of a uniform approach"

The paper aims to answer the question if and under which conditions a talaq performed in an Islamic state may be recognised in European states. The authors provide an analysis of various forms of talaq performed in different Islamic states and reach conclusions on the effects that may be recognised in Europe, with an outlook towards a possible uniform approach. The recognition of talaqs in England and Wales, Germany and Bosnia and Herzegovina are used as examples for different solutions to similar problems before European courts. The EU legislator has not adopted a uniform approach to the application and recognition of talaqs in the EU. The CJEU got it wrong in Sahyouni II and missed the opportunity to contribute to a uniform EU policy but its subsequent decision in TB opens the door for the CJEU to overturn Sahyouni II if another case concerning a non-EU talaq divorce comes before them. The Hague Divorce Convention of 1970 is an international instrument that provides for appropriate solutions. Ratification by more states in which a talaq is a legally effective form of divorce and by more European states would provide the much-needed security for families moving from Islamic states to Europe.

Sharon Shakargy, "Capacitating personal capacity: cross-border regulation of guardianship alternatives for adults"

Increasing global mobility of people with disabilities, changes in the measures

employed to protect them, and growing awareness of their human rights significantly challenge the existing cross-border protection of adults around the world. National legislations are slow to react to this challenge, and the existing solutions are often insufficient. While the Hague Convention on the Protection of Adults (2000) is imperfect, it offers a solution to this problem. This article discusses the changing approach towards people with disabilities and their rights and demonstrates the incompatibility of the local protection of adults with their cross-border protection. The article further explores possible solutions to this problem. It then explains why the Hague Adults Convention is the best solution to this problem and what changes should and could be made in order to improve the solution offered by the Convention even further.

Anna Natalia Schulz, "The principle of the best interests of the child and the principle of mutual trust in the justice systems of EU Member States – Return of a child in cross-border cases within the EU in the light of EU Council Regulation 2019/1111 and the situation in Poland"

The suspension of the enforcement of a return order under the Hague Convention on the Civil Aspects of International Child Abduction and EU law, as well as the admissibility of modifying such an order, remains one of the most sensitive matters in cross-border family disputes. The article analyses EU Council Regulations 2201/2003 (Brussels IIa) and 2019/1111 (Brussels IIb) in terms of the objectives set by the EU legislator: strengthening the protection of the interests of the child and mutual trust of Member States in their justice systems. The text also refers to Polish law as an example of the evolution of the approach to the analysed issues. It presents its development, highlights the solutions concerning the competences of the Ombudsman for Children, and provides an assessment of the current legal situation in the context of Brussels IIb.

Bich Ngoc Du, "Practical application of the reciprocity principle in the recognition and enforcement of foreign judgments in civil and commercial matters in Vietnam"

The reciprocity principle was first introduced in Vietnam by Decree 83/1998 to allow for the recognition of foreign non-executionary judgments, decisions on

family and marriage matters in Vietnam. It was then adapted in the first Civil Procedure Code in 2004 and was later modified in the current Civil Procedure Code for the purpose of recognition and enforcement of foreign judgments from non-treaty countries. This article examines the practical application of this reciprocity principle in Vietnamese courts by analysing cases in which they have recognised or denied recognition to foreign judgments in civil and commercial matters (that is, non-family matters), as well as a recent development in the Supreme Court's Resolution Draft on guidance on the recognition and enforcement of foreign judgments, which adopts a presumed reciprocity approach. The article concludes that the courts have not applied the reciprocity principle in a consistent manner. The resolution for this current problem is for the presumed reciprocity approach to be promulgated soon to facilitate a uniform application in the local courts.

Meltem Ece Oba, "Procedural issues in international bankruptcy under Turkish law"

This article examines the procedural issues in a bankruptcy lawsuit with a foreign element from a Turkish private international law perspective. The article begins with a brief overview of the bankruptcy procedure under Turkish domestic law. It then explores the jurisdiction of Turkish courts in an international bankruptcy lawsuit in detail. The effects of a foreign choice of court agreement and parallel proceedings are also addressed in discussing the international jurisdiction of Turkish courts. The article also touches upon the debates on the possible legal grounds for the inclusion of assets located abroad to the bankruptcy estate established before Turkish courts considering the approaches of universalism and territorialism. Finally, problems related to the recognition of foreign bankruptcy decisions are examined.

Review Article:

Uglješa Grušic, "Transboundary pollution at the intersection of private and public international law"

This article reviews Guillaume Laganière's *Liability for Transboundary Pollution*

at the Intersection of Public and Private International Law (Bloomsbury Publishing, 2022). This book makes a valuable contribution to private international law scholarship by exploring the relationship between public and private international law and the regulatory function of private international law in relation to transboundary pollution. The book's focus on transboundary pollution, however, is narrow. A comprehensive and nuanced regulatory response to contemporary environmental challenges in private international law must also address cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states

---

Van Calster on European Private International Law (4th Edition)

The fourth edition of Geert van Calster's (KU Leuven) *European Private International Law* has just been published by Hart/Bloomsbury. It focuses on those instruments and developments that are most significant in commercial litigation. I had the privilege to review the first edition of the book in the *Law Quarterly Review* and I am certain that the latest edition will live up to the expectations.

The blurb reads as follows:

This classic textbook provides a thorough overview of European private international law. It is essential reading for both practitioners and students of private international law and transnational litigation, wherever they may be located: the European rules extend beyond European shores.

Opening with foundational questions, the book clearly explains the subject's central tenets: the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort). Additional chapters explore private international law and insolvency, freedom of establishment, and the impact of

private international law on corporate social responsibility. The relevant Hague instruments, and the impact of Brexit, are fully integrated in the various chapters.

Drawing on the author's rich experience, the new edition retains the book's hallmarks of insight and clarity of expression ensuring it maintains its position as the leading textbook in the field.

Dutch Journal of PIL (NIPR) – issue 2023/4

The latest issue of the Dutch Journal on Private International Law (NIPR) has just been published

NIPR 2023 issue 4

EDITORIAL

I. Sumner, The next stops on the European international family law train / p. 569-571

Abstract
The European legislature is not yet finished with the Europeanisation of private international family law. This editorial briefly introduces two new proposals, namely the Proposal for a European Parentage Regulation and the Proposal for a European Adult Protection Regulation.

ARTICLES

B. van Houtert, Het Haags Vonnissenverdrag: een game changer in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het commune IPR / p. 573-596

Abstract
On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force in the Netherlands. This article examines whether the HJC can be considered as a game changer in the Netherlands. Therefore, a legal comparison has been made between the HJC and Dutch Private International Law (PIL) on the recognition and enforcement of non-EU judgments in civil and commercial matters. This article shows that the HJC can promote the recognition and enforcement of judgments rendered by non-EU countries in the Netherlands mainly because of the facultative nature of the grounds for refusal in Article 7 HJC. Furthermore, the complementary effect of Dutch PIL on the basis of Article 15 HJC facilitates recognition as some indirect grounds of jurisdiction are broader or less stringent, and some grounds are lacking in Article 5(1) HJC. Compared to the uncodified Dutch PIL, the HJC provides procedural advantages as well as legal certainty that is beneficial to cross-border trade, mobility and dispute resolution. Moreover, preserving the foreign judgment, instead of replacement by a Dutch judgment, serves to respect the sovereignty of states as well as international comity. Despite the limited scope of application, there is an added value of the HJC in the Netherlands because of its possible application by analogy in the Dutch courts, as a Supreme Court's ruling shows. The Convention can also be an inspiration for the future codification of the Dutch PIL on the recognition and enforcement of foreign judgments regarding civil matters. Furthermore, the application of the Convention by analogy will contribute to international legal

harmony. Based on the aforementioned (potential) benefits and added value of the HJC, this article concludes that this Convention can be considered as a game changer in the Netherlands.

K.J. Krzeminski, Te goed van vertrouwen? Een kanttekening bij het advies van de Staatscommissie voor het Internationaal Privaatrecht tot herziening van artikel 431 Rv / p. 597-618

Abstract
In February 2023, the Dutch Standing Government Committee for Private International Law rendered its advice on the possible revision of Article 431 Dutch Code of Civil Proceedings (DCCP). This statutory provision concerns the recognition and enforcement of foreign court judgments in civil matters to which no enforcement treaty or EU regulation applies. While paragraph 1 of Article 431 DCCP prohibits the enforcement of such foreign court judgments absent an exequatur regime, paragraph 2 opens up the possibility for new proceedings before the Dutch courts. In such proceedings, the Dutch Courts are free to grant authority to the foreign court's substantive findings, provided that the foreign judgment meets four universal recognition requirements. The Standing Government Committee proposes to fundamentally alter the system under Article 431 DCCP, by inter alia introducing automatic recognition of all foreign court judgments in the Netherlands. In this article, the concept of and the justification for such an automatic recognition are critically reviewed.

B.P.B. Sequeira, The applicable law to business-related human rights torts under the Rome II Regulation / p. 619-640

Abstract
As the momentum for corporate liability for human rights abuses grows, and as corporations are being increasingly brought to justice for human rights harms that they have caused or contributed to in their global value chains through civil legal action based on the law of torts, access to a remedy remains challenging. Indeed, accountability and proper redress rarely occur, namely due to hurdles such as establishing the law that is applicable law to the proceedings. This article aims to analyse the conflict-of-laws rules provided for under the Rome II Regulation, which determines the applicable law to business and human rights tort actions brought before EU Courts against European parent or lead corporations. In particular, we will focus on their solutions and impact on access

to a remedy for victims of corporate human rights abuses, reflecting on the need to adapt these conflict rules or to come up with new solutions to ensure that European corporations are held liable for human rights harms taking place in their value chains in a third country territory.

CASE LAW

M.H. ten Wolde, Over de grenzen van de Europese Erfrechtverklaring. HvJ EU 9 maart 2023, ECLI:EU:C:2023:184, NIPR 2023-753 (R. J. R./Registr? centras V?) / p. 641-648

Abstract
A European Certificate of Succession issued in one Member State proves in another Member State that the person named therein as heir possesses that capacity and may exercise the rights and powers listed in the certificate. On the basis of the European Certificate of Succession, inter alia, foreign property can be registered in the name of the relevant heir. In the Lithuanian case C-354/21 R. J. R. v Registr? centras V?, the question arose whether the receiving country may impose additional requirements for such registration when there is only one heir. The Advocate General answered this question differently from the European Court of Justice. Which view is to be preferred?

SYMPOSIUM REPORT

K. de Bel, Verslag symposium 'Grootschalige (internationale) schadeclaims in het strafproces: beste praktijken en lessen uit het MH 17 proces' / p. 649-662

Abstract
On 17 November 2022, the District Court of The Hague delivered its final verdict in the criminal case against those involved in the downing of flight MH17 over Ukraine. This case was unique in many ways: because of its political and social implications, the large number of victims and its international aspects. The huge number and the international nature of the civil claims for damages exposed several practical bottlenecks and legal obstacles that arise when civil claims are joined to criminal proceedings. These obstacles and bottlenecks, which all process actors had to address, were the focus of the symposium 'Large-scale (international) civil claims for damages in the criminal process: best practices and questions for the legislator based on the MH17 trial' that took place on 10

October 2023. A summary of the presentations and discussions is provided in this article.

French Cour de cassation rules (again) on duty of domestic courts to apply European rules of conflict on their own motion

Written by Hadrien Pauchard (assistant researcher at Sciences Po Law School)

In the *Airmeex* case (Civ. 1re 27 septembre 2023, n°22-15.146, available here), the French Cour de cassation (première chambre civile) had the opportunity to rule on the duty of domestic courts to apply European rules of conflict on their own motion. The decision is a great opportunity to discuss the French approach to the authority of conflict-of-laws rules.

The case concerns allegations of anticompetitive behaviour following a transfer of corporate control. The dispute broke out after two shareholders of the French corporation *Airmeex* transferred the sole control of the company to the Claimant. The latter, joined by *Airmeex*, alleged several anti-competitive behaviors on the part of his ex-business partners and seized French courts against the two former shareholders and their related corporations in Turkey. The claim was based on general tort law and on French rules regarding "unfair competition". The claim covered the Defendants' acts in Turkey as well as possible infractions in Algeria.

As it happened, none of the parties ever put the question of the applicable law in the debates and neither the trial nor the appeal judges did raise the potential conflict of laws. Indeed, both were content with the straightforward application of

the *lex fori*, *i.e.* French law on “unfair competition”. The lower court hence dismissed the claim by application of French law. The Claimants then petitioned to the Cour de cassation arguing a violation of the applicable rule of conflict, namely article 6 of the Rome II regulation.

By its decision of September 27, 2023, the French Cour de cassation (première chambre civile) ruled in favour of the petitioners. Upholding its previous *Mienta* decision (available here in English), it decided that Article 6 of the Rome II regulation was of mandatory application and was applicable to the alleged anticompetitive behaviours. Under these circumstances, the Cour de cassation held that the lower court should have enforced the mandatory rule of conflict of Article 6 Rome II on its own motion. As a consequence it censored the appeal decision insofar as it had applied the *lex fori* without going through the relevant conflictual reasoning.

Following the *Mienta* precedent, the *Airmeex* decision illustrates the renewal of the issue of the authority of conflict-of-laws rules.

The authority of the rule of conflict in French law

The key question in *Airmeex* concerned the obligation of domestic judges to apply, if necessary on their own motion, European conflict-of-laws rules.

The *ex officio* powers of national judges belong to the sphere of Member States’ procedural autonomy. However, uncertainty remains as to the scope of this autonomy in relation to European rules of conflict, particularly when the said rules leave no room to parties’ autonomy.

Tackling this issue in *Airmeex*, the French Court of Cassation upheld *in extenso* its previous *Mienta* ruling and stated that “if the Court is not obliged, except in the case of specific rules, to change the legal basis of the claims, it is obliged, when the facts before it so justify, to apply the rules of public order resulting from European Union law, such as a rule of conflict of laws when it is forbidden to derogate from it, even if the parties have not invoked them”.

The *Airmeex* ruling confirms the existence of French judge’s double hat in relation to conflict-of-laws rules, depending on the source of it.

On the one hand, for European rules of conflict, judges’ obligation is subject to

the criterion of imperativeness laid out in *Mienta* and *Airmeex*. If the European rule is not mandatory, an *a contrario* reading of the decision leads to conclude that the French judge does not have an obligation to apply it on its own motion. In the present case, the Cour de cassation deduced the imperative character of the rule of conflict of Article 6 Rome II from the prohibition of derogatory agreements set out in the 4th paragraph of the text (according to which "[t]he law applicable under this Article may not be derogated from by an agreement pursuant to Article 14"). Then, noticing the existence of a conflict in that the disputed facts were notably committed in Algeria and Turkey, the Cour de cassation sanctioned the cour d'appel for not having applied the relevant mandatory provisions of Article 6 of the Rome II regulation.

On the other hand, for French rules of conflict, the classical *Belaid–Mutuelle du Mans* system (established by case law) remains positive law, distinguishing between the rights which the parties can freely dispose of (*droits disponibles*, in which case judges are not obliged to apply French conflict-of-laws rules) and the rights which the parties cannot freely dispose of (*droits indisponibles*, in which case judges are obliged to apply French conflict-of-laws rules, on their own motion if necessary). In any case, courts retain the power to raise the conflict *ex officio* where the foreign element is flagrant, but their obligation to do so varies according to the nature of the rights disputed – a criterion often criticized for its imprecision.

In both *Mienta* and *Airmeex* cases, the derogatory regime of European rules of conflict is justified by a direct reference to the principles of primacy and effectiveness of EU law. Thus, for the Cour de cassation, the European conflict-of-laws rule does not enjoy a special status because it is a conflict-of-laws rule but rather because it is a (mandatory) European rule. Moreover, the criterion of the free disposability of rights was enforced on several occasions after *Mienta*, confirming that, in the eyes of the Cour de cassation, French judges have two quite distinct "offices".

While the *Airmeex* ruling does not innovate in relation to the authority of the European rules of conflict, compared to Mienta, the Cour de cassation has nevertheless slightly modified its motivation. By adding a reference to Article 3 of the French Code civil to those to Article 12 of French Code de procédure civile and the principles of primacy and effectiveness of EU law, the court connects its

solution with the general theory of French private international law. It also allows convergence of regimes between the authority of the rule of conflict and the status of foreign law, contemporary case law in the latter domain developing on the ground of the same Article 3.

Despite being two distinct issues, strengthening the status of foreign law is the corollary of reinforcing the authority of conflict-of-laws rules. In France, foreign law is formally considered as a "rule of law" and the establishment of its content is still regulated by the *Aubin–Itraco* system (also established on case law). This case law imposes a "duty of investigation" according to which the judge who recognizes the applicability of foreign law must "investigate its content, either on its own motion or at the request of the party who invokes it, with the assistance of the parties and personally if necessary, and give the disputed question a solution consistent with positive foreign law". However, this apparent automaticity in applying foreign law shall not obscure the fundamental difficulties raised by the encounter with "otherness" in its legal form. Critical approaches to comparative law teach that there is an irreducible space separating *foreign-law-as-it-is-lived-in-its-country-of-origin* and *foreign-law-as-it-is-apprehended-by-the-national-judge*. This literature could fortunately inspire private international law in developing a procedural framework of hospitality for applying foreign law in its own terms.

Conclusion

The *Airmeex* and *Mienta* decisions will only partially content those who advocate for the general obligation of domestic judges to systematically enforce every single European rule of conflict. It will satisfy even less French' majority scholarship, which considers that any rule of conflict should be obligatory for the judge. Nevertheless, it is in line with the traditional approach of the Cour de cassation that elaborates the authority of conflict-of-laws rules on the basis of substantive considerations.

The draft French Code de droit international privé runs counter to this current trend of the case law. Its Article 9 would impose the mandatory application of every rule of conflict, whatever their source or the nature of the rights in dispute. This question of the "office du juge" in the draft Code renders the pitfalls inherent in the codification process all the more apparent. Despite the generic principle enshrined in Article 9, the project multiplies special norms and exceptions in a quite scattered manner. We can express some reservations as to the interest of

rigidifying a matter in which case law has, in spite of repeated resistance from the scholarship, chosen a pragmatic position grounded on substantial considerations, especially when such ossification is based on the hypertrophy of special regimes. Similar flaws appear to jeopardize the draft Code's provisions on the proof of foreign law (namely Articles 13 and 14).

Although the attempt at codification is commendable and the actual result much honourable, the complex status of conflict-of-laws rules and foreign law seem intrinsically irreconcilable with the simplification and systematization approach inherent in the exercise. It might be fortunate to recognize that, when it comes to foreign law, "*l'essentiel est là entre les mains du juge*".