Fourth Issue of 2010's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes four articles and several casenotes.

The only article dealing with a conflict issue is authored by Gerald Goldstein, who is a professor of law at the University de Montreal, and Horatia Muir Watt, who is a professor of law at Sciences Po Law School. It discusses the application of the new method of recognition in the context of the 2007 Munich Convention on the recognition of civil partnerships (*La méthode de la reconnaissance à la lueur de la Convention de Munich du 5 septembre 2007 sur la reconnaissance des partenariats enregistrés*) The English abstract reads:

> *The new "method of recognition" displaces the frontiers between choice of law and recognition of foreign judgments. It entails giving effect to situations created abroad within the sway of another legal system, without prior verification of compliance with the forum conflicts rule. Without excluding all control of the quality of the link between the situation and the forum, the new method is more concerned with the effectiveness of an existing situation than its conformity with a preconceived parameter of validity laid down by the law of the forum. For some, these characteristics predisposes the new method to govern civil partnerships, since the novelty and diversity of these institutions makes it difficult to formulate an appropriate choice of law rule.*
>
> *An analysis of the 2007 Munich Convention on the recognition of civil partnerships favorises a study of the advantages such a method has over the traditional choice of law process and suggests a certain number of more general methodological reflexions on its characteristics, objectives and foundations.*

Articles of the *JDI* are available online for subscribers of Juris Classeur Lexis Nexis.

Report on Dutch Collective Settlements Act

The Dutch Collective Settlements Act in the International Arena

At the request of the Research and Documentation Centre of the Dutch Ministry of Justice, researchers at Erasmus School of Law (Erasmus University Rotterdam) have carried out exhaustive research on the private international law aspects of the Dutch Collective Settlements Act. The research was conducted and the Final Report was written by Hélène van Lith, supervised by Filip De Ly and Xandra Kramer, and assisted by Steven Stuij.

The Dutch Collective Settlements Act entered into force on 27 July 2005 to provide for collective redress in mass damage cases. In essence, the Act provides for collective redress on the basis of a settlement agreement concluded between one or more foundations representing a group of affected persons to whom damage was allegedly caused and one or more allegedly liable parties.

The Report analyses aspects of private international law when a collective settlement is concluded for the benefit of foreign interested parties under the Dutch Collective Settlements Act. The principal object of the Research was to assess the suitability of existing private international law instruments at the national, European and international levels for the application of the Dutch Collective Settlements Act in transnational mass damage cases.

The internationally famous *Shell Settlement* and more recently the *Converium Settlement* are examples of the important role The Netherlands could play in the collective redress of mass claims and makes the Dutch Collective Settlement Act an attractive alternative to American and Canadian class actions and class settlements. The Dutch Act received a lot of attention because, like the American and Canadian systems, but unlike most other European collective redress systems, the Act works on an ‘opt out’ basis. If the Court declares the collective settlement binding, it binds all persons covered by its terms, except for those who have indicated that they do not wish to be bound by the agreement.

The research was conducted by analyzing literature and through a series of interviews with professionals directly involved with the WCAM collective settlements. It also includes several comparative observations in relation to jurisdictions such as the U.S. and Canada that are familiar with collective actions with opt-out mechanisms.

The Report concludes that, especially with respect to international jurisdiction and cross border recognition, there is a 'mismatch' between the European rules (Brussels I Regulation) and the Dutch Collective Settlements Act. Further clarifications of the European rules are needed and new legislation at the European level specifically dealing with collective redress may be advisable. Recommendations are also made with respect to the worldwide notification of unknown interested foreign parties, as well as the representation of foreign interested parties and issues of applicable law.

The Report is available on the website of the Research and Documentation Centre of the Dutch Ministry of Justice and can be downloaded here (see "Bijlagen").

A commercial edition will appear with Maklu Publishers and will be updated with the latest ruling of the Amsterdam Court of 12 November 2010 concerning the *Converium Settlement.*

For more information please contact Hélène van Lith; vanlith@law.eur.nl

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French Supreme Court Rules on Punitive Damages

On December 1st, the French Supreme Court for private and criminal matters ruled on whether a foreign judgment awarding punitive damages could be enforced in France.

The Court held that, in principle, foreign judgments awarding punitive damages are not contrary to public policy and will thus be recognised. However, the Court

also ruled that such awards would exceptionnally violate public policy in cases where they would not be proportionate to the harm sustained and the contractual breach.

In this case, the foreign judgment was unsurprisingly American (Superior Court of California, it seems). The plaintiffs had been awarded USD 1.39 million in compensatory damages and USD 1.46 million in punitive damages. This was found to be "clearly" disproportionate. This was because, the Court held, the amount of punitive damages was clearly higher than the amount of compensatory damages (the "very large" difference was USD 70,000).

The U.S. Supreme Court has also ruled that disproportionate awards in punitive damages violate the U.S. Due Process Clause and are thus unconstitutional. But the Court laid down the famous single digit ratio test for that purpose: no more than *nine* times the amount in compensatory damages.

The judgment of the court can be found here. It dismisses an appeal against a judgment from the Poitiers Court of appeal, which was previously mentioned on this site.

Thanks to Elbalti Béligh for the tip-off

Pretelli on Fraudulent Conveyances

Ilaria Pretelli, who is a research fellow in private international law and the Director of the Centro Studi Giuridici Europei at the Carlo Bo University of Urbino, Italy, has published a monograph on *Garanzie del credito e conflitti di leggi – Lo statuto dell'azione revocatoria*.

The author has kindly provided the following English abstract:

> *In private international law of obligations, few topics are so neglected as fraudulent conveyances. The book fills the gap in Italian and continental*

conflict of laws, while keeping an eye on the new sources of law provided by the European Union. In continental law three judicial remedies are essentially appointed for creditors to prevent ineffective execution: the actio pauliana, the action oblique (indirect action) and the action declaring a transaction simulated on the purpose of defrauding creditors. Such remedies are deeply rooted in continental and common law, coming from Roman law principles and from the Statute of Elizabeth 13 (1571), however their characterization is still unclear, because of their ties with contract law, torts law, procedural law and even real estate law. These connexions disclose the rationale of invoking different methods to solve private international law problems: from the German Interessenjurisprudenz, reacting to the dogmatism of the Begriffsjurisprudenz; towards the "new" American ideas arising from the storm called "American conflicts revolution" criticizing some consequences and interpretations of the continental approach to conflicts of laws. Comparing the solutions and their rationale we see
these arising from an eclectic method, combining concepts and interests analysis: as a matter of facts the problem of the applicable law is still subject to debate in the absence of a clear European framework. The Brussell I/Rome I/Rome II system seems to imply the issue of the pauliana in its scope, but if we turn to the letter of the text it is hard to find any clue in order to solve the conflict between the creditor and the third party within the scheme of the aforementioned actions. The question of jurisdiction is not, however, dramatic and more and more precisions are coming from the ECJ decisions (Deko Marty and C-213/10, F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma' still pending). On the other hand, in order to fill the gap of the applicable law, while national systems cannot but address the question with an unilateralistic approach, it is possible to suggest a universal solution at the European scale by means of the only common value to the different legal systems dealing with the pauliana and similar remedies: good faith.

More details can be found here.

Publication: Hill & Chong on International Commercial Disputes

The fourth edition of J Hill & (now) A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* has just been published by Hart. Here's the blurb:

> *This is the fourth edition of this highly regarded work on the law of international commercial litigation as practised in the English courts. As such it is primarily concerned with how commercial disputes which have connections with more than one country are dealt with by the English courts. Much of the law which provides the framework for the resolution of such disputes is derived from international instruments, including recent Conventions and Regulations which have significantly re-shaped the law in the European Union. The scope and impact of these European instruments is fully explained and assessed in this new edition.*
>
> *The work is organised in four parts. The first part considers the jurisdiction of the English courts and the recognition and enforcement in England of judgments granted by the courts of other countries. This part of the work, which involves analysis of both the Brussels I Regulation and the so-called traditional rules, includes chapters dealing with jurisdiction in personam and in rem, anti-suit injunctions and provisional measures. The work's second part focuses on the rules which determine whether English law or the law of another country is applicable to a given situation. The part includes a discussion of choice of law in contract and tort, with particular attention being devoted to the recent Rome I and Rome II Regulations. The third part of the work includes three new chapters on international aspects of insolvency (in particular, under the EC Insolvency Regulation) and the final part focuses on an analysis of legal aspects of international commercial arbitration. In particular, this part examines: the powers of the English courts to support or supervise an arbitration; the effect of an arbitration agreement on the jurisdiction of the English courts; the law which governs an arbitration agreement and the parties' dispute; and the recognition and enforcement of foreign arbitration awards.*

This is a book I have eagerly been waiting for (the 2005 edition is excellent), and it's highly recommended. Get it for **£50 from Hart Publishing**, or **£47.50 from Amazon UK**.

Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case

[Guest post written by Thijs Bosters LL.M., a PhD Researcher (Private International Law and Collective redress) at Tilburg University.]

After the *Morrison v. NAB* decision of last June, the question was raised how and where an f-cubed case should be filed in the future. It has been proposed that, for example, the Canadian class action or the Dutch collective settlement procedure could serve as alternatives in cross-border securities mass disputes. What makes the Dutch collective settlement procedure such an interesting alternative is that a settlement can be declared binding by the Amsterdam Court of Appeal on all persons to which it applies according to its terms. In this way, all plaintiffs can be covered and a mass dispute can be resolved through a single action (for more information on the Collective Settlement Act (*Wet collectieve afwikkeling massaschade*), see the The Global Class Actions Exchange report of Stanford Law School). With the 2009 Shell collective settlement, the Dutch Act proved that it can be instrumental in the resolution of cross-border securities mass disputes. The *Shell* case, however, was only a partially f-cubed case, as quite many of the investors involved were Dutch.

Converium

On 12 November 2010, the Amsterdam Court of Appeal assumed preliminary jurisdiction in the "full f-cubed" *Converium* case (the Dutch text can be found here). This case revolves around the Swiss reinsurance company Converium

Holding AG (currently known as SCOR Holding AG). In late 2001, Zürich Financial Services Ltd, of which Converium was a full subsidiary, sold its shares through an initial public offering. The shares were listed on the SWX Swiss Exchange in Switzerland and as American Depositary Shares (ADSs) on the New York Stock Exchange. Between 7 January 2002 and 2 September 2004, Converium made several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance unit. The existing reserve deficiency forced Converium to announce that it would take a charge of between $ 400 and $ 500 million to increase its reserve. This, combined with the downgrade of the company's credit rating by Standard & Poor's in response to the reserve increase, caused a massive drop of the share value.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and certain of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-U.S. persons who had purchased Converium shares on any non-U.S. exchange, leaving them empty-handed. Because of the positive way the Shell case was being resolved in the Netherlands, Converium and ZFS agreed that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system.

Converium, ZFS, the special Converium Securities Compensation Foundation (which represents the group of individual purchasers that were excluded from the U.S. class), and the Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the Court first wanted to decide whether this link was enough to assume jurisdiction over the case.

Jurisdiction Amsterdam Court of Appeal

The Court first examined whether it could assume jurisdiction to effectuate the settlement and subsequently whether it was also competent to bind all the

purchasers named in the settlement. This would prevent plaintiffs from filing a claim for damages in the future.

As the settlement only takes effect if it is made binding, it is not possible to directly use Article 5(1) Brussels I/Lugano to determine which court has jurisdiction because the place of performance, the main requirement of this provision, is unknown. However, in *Effer v. Kantner*, the court also based its jurisdiction on Article 5(1) Brussels I/Lugano in a dispute concerning a contract which had not been concluded yet, so the place of performance was unknown as well. Because the Converium settlement is aimed at a certain performance that will take place in the Netherlands, namely, payment of damages by the Dutch special compensation foundation, the Dutch Court of Appeal can assume jurisdiction.

To prevent parallel and irreconcilable litigation, the Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding on Article 6(1) Brussels I/Lugano. The Court stated that the claims of the various purchasers are so closely connected that it is expedient to hear and decide on them together. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Brussels I/Lugano makes it possible to assume jurisdiction in the combined case.

Although the majority of the purchasers are domiciled in one of the Brussels I Regulation/Lugano Convention member states, there are also purchasers that are not. In these cases, the Dutch Code of Civil Procedure decides whether a Dutch court has jurisdiction. According to this Code, a court can assume jurisdiction over cases in which one or more purchasers are domiciled in the Netherlands. In the *Converium* case, the Compensation Foundation and the Investors Association are domiciled in the Netherlands. Moreover, because the settlement will be executed in the Netherlands, there is a sufficient connection with the Dutch jurisdiction for the Amsterdam Court of Appeal to also assume jurisdiction for those cases which involve non-Brussels I/Lugano purchasers.

Based on the above-mentioned provisions, the Amsterdam Court of Appeal may assume jurisdiction in the *Converium* case. Article 6 ECHR and the principle of *audi alteram partem*, however, prevent the Court from making a final decision on its competence. As not all the purchasers have been summoned yet, the Court will be forced to stay the proceedings (Article 26(2) Brussels I/Lugano) till they have been given proper notice. Until then, the ruling will be provisional. During the

fairness hearing, which still has to be scheduled but will probably take place in the second half of 2011, the purchasers may still advance a different view on the jurisdiction issue.

Postgraduate Studentships in Private International Law of the EU at Aberdeen

The University of Aberdeen has one of the most significant groups of private international law (PIL) researchers in the world, an excellent dedicated Law Library and a proven track record in research supervision. The EU has embraced harmonised PIL as the means of preserving the cultural and legal diversity that makes Europe so interesting while giving sufficient unity and coherence to the EU to make it strong.

The research topics that could be selected are from across all areas of private international law that have been or could be legislated for within the EU. Successful applicants will be given a significant financial award designed to cover their fees and in some cases to help with maintenance. We hope that there will be opportunities for successful applicants to supplement their income by working as tutors and/or research assistants in the Law School.

The awards are tenable from September 2011 (but the start date is flexible) and can last for up to 3 years for a PhD (depending on good progress) and one year for a research LLM.

Further particulars can be obtained from the Law School by contacting the postgraduate secretary, Mrs Claire Thomson, law438@abdn.ac.uk

How to apply?

Please send a copy of your cv, your research proposal and two academic

references (in signed and sealed envelopes) to Professor Paul Beaumont, School of Law, University of Aberdeen, Aberdeen AB24 3UB, Scotland, UK by 1 February 2011.

Rome III: Agreement in Council on the Text of the New Rules on Divorce and Legal Separation

The JHA Council, in its meeting held on 3 December 2010 in Brussels, **agreed on the text** (doc. n. 17045/10) **of the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (see our previous post here).

As stated in the Council's press release (doc. n. 17151/10),

> *The new rules will apply to all participating member states as of mid-2012. Other EU member states which are not yet ready but wish to join this pioneer group at a later stage will be able to do so. The agreement also constitutes the implementation of the first enhanced cooperation in the history of the EU.*
>
> *For its adoption two more procedural steps are necessary: The European Parliament is expected to adopt an opinion on the file in its December plenary session. The Council will then adopt the new rules without discussion, most likely at the Environment Council on 20 December 2010.*

Upon the adoption, the regulation will be accompanied by declarations by the Council (on *forum necessitatis*), and by the Commission, Malta and Finland on a new controversial art. 7a ("Differences in national law"): see Annexes I, II, III and IV to doc. n. 17046/10.

The position of the European Parliament, under examination in the JURI Committee, can be found in the Draft report prepared by rapporteur *Tadeusz*

Zwiefka (see, in particular, the Explanatory Statement) and additional amendments.

EU Consultation on Harmonisation of Securities Law

The European Commission has launched a month ago a Consultation on the Harmonisation of Securities Law.

The objective of the consultation is to obtain

> *advice from Member States, market participants and other stakeholders, in particular investors, on a certain number of principles, on which the Commission could base its future legislative proposals in order to improve the EU-wide legal framework for cross-border transfers of securities*

Contributions are welcome until January 1st, 2011.

The consultation raises an interesting issue of choice of law:

> ***14 – Determination of the applicable law***
>
> *14.1 Principle*
>
> *1. The national law should provide that any question with respect to any of the matters specified in paragraph 3 arising in relation to account-held securities should be governed by the national law of the country where the relevant securities account is maintained by the account provider. Where an account provider has branches located in jurisdictions different from the head offices' jurisdiction, the account is maintained by the branch which handles the relationship with the account holder in relation to the securities account, otherwise by the head office.*
>
> *2. An account provider is responsible for communicating in writing to the*

account holder whether the head office or a branch and, if applicable, which branch, handles the relationship with the account holder. The communication itself does not alter the determination of the applicable law under paragraph 1. The communication should be standardised.

3. The matters referred to in paragraph 1 are:
(a) the legal nature of account-held securities;

(b) the legal nature and the requirements of an acquisition or disposition of account-held securities as well as its effects between the parties and against third parties;

(c) whether a disposition of account-held securities extends to entitlements to dividends or other distributions, or redemption, sale or other proceeds;

(d) the effectiveness of an acquisition or disposition and whether it can be invalidated, reversed or otherwise be undone;

(e) whether a person's interest in account-held securities extinguishes or has priority over another person's interest;

(f) the duties, if any, of an account provider to a person other than the account holder who asserts in competition with the account holder or another person an interest in account-held securities;

(f) the requirements, if any, for the realisation of an interest in account-held securities.

4. Paragraph 1 determines the applicable law regardless of the legal nature of the rights conferred upon the account holder upon crediting of account-held securities to his securities account.

14.2 Background

Many dispositions in securities involve a cross-border element. Therefore, more than one jurisdiction may be relevant to these dispositions. As already mentioned, not only the legal concepts applying to securities held through account providers vary considerably, but similarly the conflict-of-laws rules do not conform to each other. Three directives address the issue, amongst other questions, notably Article 9(1) of the Financial Collateral Directive, Article 9(2)

of the Settlement Finality Directive, and Article 24 of the Winding-Up Directive.

The status quo raises three questions: First, the conflict-of-laws rules as contained in the three directives are based on slightly different criteria. The envisaged legislation should bring the three rules in line with each other so as to ensure consistency and predictability.

Second, these rules exclusively apply to the relatively limited scope of the directives, notably to those organisations covered by their personal scope. The envisaged legislation should apply to all account holders and account providers. Consequently, a uniform conflict-of-laws rule for all market participants would be useful.

Third, taking Article 9(1) of the Financial Collateral Directive, which is the most recent one, as a conceptual starting point, it becomes clear that that in some (admittedly rare) cases the interpretation of where securities accounts are "located" could diverge. That means, before settling on a uniform conflict-of-laws rule for the entire environment, the rule itself needed to be clarified as regards the so called "connecting factor.

The connecting factor of the conflict-of-laws rule should be based on the factual criterion similar to the criterion used in the three directives, i.e. where a securities account is 'maintained'. However, more guidance is needed for proper interpretation of this criterion, in particular as regards multi-branch entities. In this respect, regard has to be given to the reasonable perspective of the account holder, which expects that the national law of the country is applicable where the branch is located which handles the relationship with the account holder in relation to the securities account. In deciding which branch is servicing the client, the question of through which branch the account was opened, which branch handles the commercial relationship with the account holder, and which branch administers payments or corporate actions relating to the securities credited to the securities account, and similar aspects, will have to be taken into account, whereas the place of the location of supporting technology or of call or mailing centres should be disregarded. However, these additional guidelines as to which branch handles the relationship should not figure as cumulative elements of the connecting factor but rather as clarifying elements of interpretation figuring in the recitals of the instrument (cf. paragraph 1 of the envisaged Principle).

In addition to clarifying the connecting factor itself improvement of ex-ante legal certainty is necessary. As the connecting factor is fact-based and subject to legal interpretation, ultimately confined to the judge, it is basically a criterion delivering an ex post view. However, increased legal certainty requires active reliable ex ante knowledge of the applicable law. Paragraph 2 of the envisaged Principle cuts the Gordian knot by prescribing a practical solution, allowing for a fact based connecting factor while at the same time increasing ex ante predictability: account provider should always be in a position to tell where an account is maintained, i.e. which branch handles the client relationship. This certainty should be transferred to the account holder by communicating the relevant location. The account provider should be responsible for the correct fulfilment of this duty and the competent authority should be in a position to intervene where the communication does not reflect the location where the account is actually serviced. However, there needs to be a clarification that the approach remains entirely fact based and that the communication must not be able to alter the underlying analysis of where the account is actually maintained. A judge will have to look at the facts, not at the communication, in order to determine the applicable law. In case the factual analysis and the communication differ, the factual analysis prevails and the account provider will be responsible for any incorrect communication in this regard (cf. Paragraph 2 of the envisaged Principle).

There is agreement that a conflict-of-laws rule should roughly cover what is dealt with in the substantive law part regarding holding and disposition of account-held securities. However, there are additional elements which need to be covered by the conflict of laws rule, notably those that are closely connected to the matter but are, in the substantive law part, left to autonomous national legislation. For instance, the characterisation of the legal nature of the rights arising from crediting securities accounts would need to be included. Furthermore, there are aspects addressed in the substantive part which should not be governed by the conflict-of-laws rule, for instance the loss sharing mechanism in case of insolvency. Consequently, a detailed list of issues setting out the scope of the conflict-of-laws rule needs to be included in a separate paragraph, (cf. paragraph 4 of the envisaged Principle).

There needs to be a clarification that all securities credited to a securities account are covered by the conflict-of-laws rule, regardless the legal nature

that national law attributes to them. This aspect is particularly important where national law characterises certain account-held securities in a cross-border context as being of contractual or similar nature (cf. paragraph 5 of the envisaged Principle).

There might be additional benefit in harmonising the way by which the location is communicated to the account holder, for example in a separate document, on the account statement, or even as part of the account number. This rather technical issue would benefit from some degree of standardisation.

14.3 Questions

Q27: Would a Principle along the lines described above allow for a consistent conflictof-laws regime? If not: Which part of the proposal causes practical difficulties that could be addressed better?

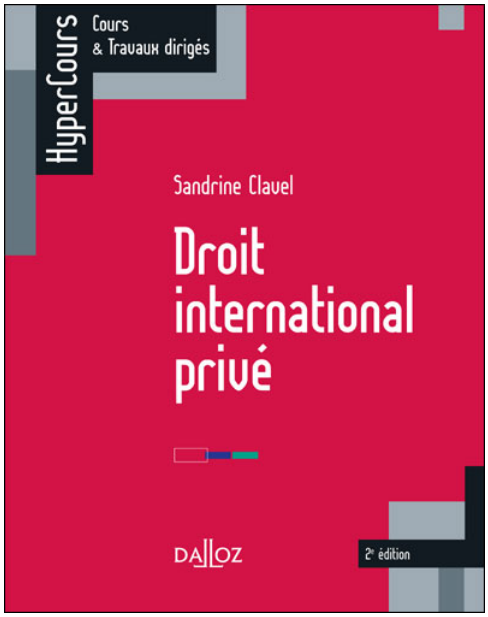
Q28: Would the mechanism of communicating to the client, whether the head offices or a branch (and if a branch, which one) is handling the relationship with the client, add to exante clarity? Is it reasonable to hold the account provider responsible for the correctness of this information? If applicable, would any negative repercussions on your business model occur?

Q29: The Hague Securities Convention provides for a global harmonised instrument regarding the conflict-of-law rule of holding and disposition of securities, covering the same scope as the proposal outlined above and the three EU Directives. Most EU Member States and the EU itself have participated in the negotiations of this Convention. The proposed principle 14 differ from the Convention as regards the basic legal mechanism for the identification of the applicable law. However, the scope of principle 14 is the same than the scope of the Convention: property law, collateral, effectiveness, priority. Do you agree that this will facilitate the resolution of conflicts with third country jurisdictions ? If not, please explain why.

Many thanks to Bram van der Eem for the tip-off.

New Edition of Clavel's Droit International Privé

Sandrine Clavel, who is a professor of law at the University of Versailles-Saint-Quentin and the co-director of the Master Arbitrage et Commerce International, has published the second edition of her manual.



The book offers an account of the entirety of French private international law. But it is also a teaching book, as it includes a variety of exercises, many summaries of cases and tests that students may use to verify their correct understanding of the field.

More details can be found here.