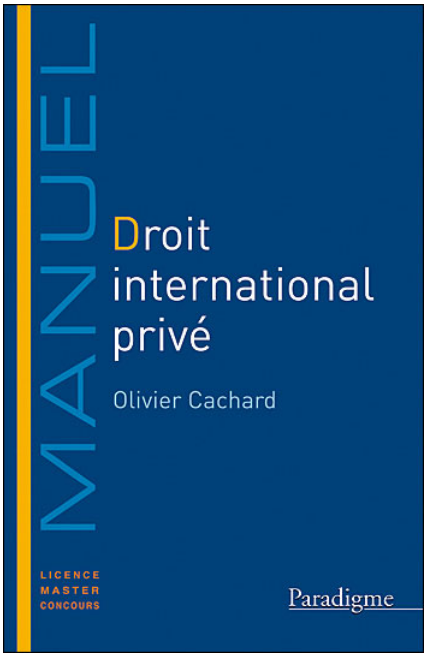
New French Book on Private International Law

Professor Olivier Cachard, who is the Dean of the Law Faculty of Nancy, has recently published a book on French private international law.

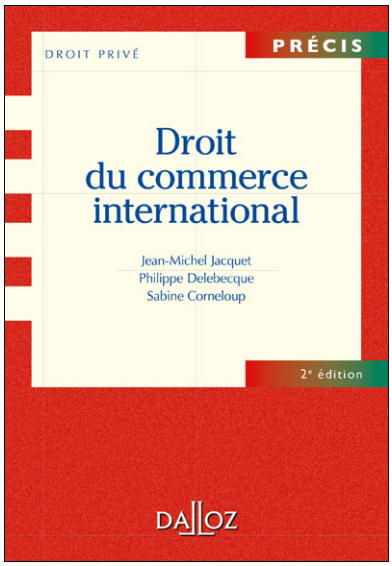


The book is short (less than 300 pages). It aims at surveying the subject, and will thus be very useful for not only for students, but also for foreigners wishing to get a first acquaintance with the subject. Remarkably, it also includes quite a few materials such as cases, statutory texts and extracts from leading articles.

More details can be found here.

New French Book on International Commercial Law

The second edition of Jean-Michel Jacquet, Philippe Delebecque and Sabine Corneloup's manual on international business law (*Droit du commerce international*) was released this summer.



It is one of the few comprehensive French books in this field, and it is up to date.

For more details, see here.

Rueda and Cuniberti on Abolition of Exequatur

Isabelle Rueda and I (University of Luxembourg) have posted Abolition of Exequatur – Addressing the Commission's Concerns on SSRN. The abstract reads:

> *After the European Council called for the reduction of intermediate measures necessary for the enforcement of judgments, the European Commission has initiated a process of gradual abolition of exequatur in the European Union. The exequatur procedure, however, serves the important purpose of preventing the enforcement of foreign judgments made in violation of human rights. Along with many other critiques of the project, this Article argues that existing mechanisms sanctioning human rights violations do not serve the same purpose, and that the new remedies forged by the Commission do not afford the same level of protection. However, unlike many other critiques, the Article argues that the concerns articulated by the European lawmaker with respect to the traditional exequatur procedure should not be ignored and could be*

addressed by reforming exequatur in a less radical way.

The paper can be freely downloaded here. All comments welcome!

Faculty Position at National University of Singapore

The Faculty of Law at the National University of Singapore invites applications for full-time academic appointment at all levels.

JOB DESCRIPTION:

We seek candidates who are committed to excellence in research and teaching. Applications in all areas are welcome. At present, we are especially interested in scholars who specialise in (1) Conflict of Laws (Private International Law) or (2) Law and Economics.

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APPLICATION DEADLINES: 31 Dec 2010 and 1 June 2011

Another twist in surrogacy motherhood saga

Many thanks to Isabel Rodríguez-Uría Suárez

The 5th of October the Spanish Dirección General de los Registros y el Notariado (hereinafter DGRN) has issued an Instruction about the regulation of affiliation registration in cases of surrogate pregnancy in order to protect the best interests of the child and the interests of the women who give birth (see BOE, n. 243, 7.10.2010).

According to the Instruction, a prerequisite is required for the registration of

births by surrogate motherhood: it is necessary to produce before the Spanish responsible of the Registro Civil a judicial resolution of the competent Court of the country in which the surrogate pregnancy occurred. The judicial resolution must determine the affiliation of the child. This requisite is demanded in order to control the legal requirements of the surrogate pregnancy contract and to ensure the protection of the best interests of the child and the interests of the pregnant mother.

The foreign court decision raises a question of recognition in Spain. The DGRN distinguishes between contentious and non-contentious proceedings: on the one hand, contentious foreign decisions must be recognized by *exequatur*; on the other hand, the DGRN gives a set of guidelines for the recognition of non-contentious decisions in affiliation matters. In short, the Spanish officer in charge of the Registro Civil must check: a) the formal validity of the foreign decision b) that the original court had based its international jurisdiction in conditions equivalent to those provided by Spanish law c) the due process respect d) that the interests of the child and the pregnant mother had been guaranteed e) that the foreign decision is a final decision and that the consents given in the contract are irrevocable.

Finally, the Spanish DGRN states that foreign registration certificates do not support affiliation registration in the Registro Civil.

Conference on the Judge and the Border in Beirut

An international conference will be held on 22 October 2010 in Beirut, Lebanon, on ‘The Judge and the Border’.

The morning session focuses on ‘The extra-territorial activity of the courts’, and deals with the powers of the courts in respect of foreign territories, foreign evidence, foreign litigants, foreign judgments, etc. The afternoon session deals with ‘International judicial cooperation and conflict of laws’, and covers issues

such as lis pendens, the reception of foreign procedural institutions, the application of foreign mandatory rules, etc.

The speakers include Professors Paul Lagarde, Bernard Audit, Pascal de Vareilles-Sommières, Léna Ganagé, Marie-Maure Niboyet, Etienne Pataut, Arnaud Nuyts, Mouhib Maamari, Sami Mansour, Haffiza Haddad. The Conference (in French and Arabic) is held under the auspices of the 'Conseil supérieur de la magistrature' and 'Institut d'Etudes Judiciaires du Liban'.

The full programme can be found on www.dipulb.be.

(European) Mercy for Jérôme Kerviel? (updated)

Jérôme Kerviel was a young trader with a promising future. Today, a French criminal court ordered him to pay his employer Société Générale € 4.9 BILLION in damages. The court has also sentenced him to serve 3 years in prison. Unsurprisingly, Mr Kerviel has already announced that he will appeal.

€ 5 billion is a high sum that Mr Kerviel will likely have difficulties paying. The court has forbidden him to be a trader again. That will not help. Given his current salary (he is in computers now), journalists have calculated that he may need to work 177,000 years to pay his debt. After all, as journalists have also reported, € 5 billion is the GDP of Benin.

It seems that some innovative legal argument would be welcome here. On the top of my hat, two come to mind.

First, Mr Kerviel may want to pay nothing at all. What about trying insolvency? Unfortunately, it is not available for him in France, as he is a mere employee. But it might be elsewhere in Europe. If he settles in such country, could he after a while take advantage of local insolvency law, and obtain recognition of the judgment in France under the insolvency regulation?

Readers have pointed out to me that it might be enough for Mr Kerviel to move inside France. Alsace and Moselle have kept a special insolvency regime (French Commercial Code, Art. L 670-1), that German debtors particularly fancy, and which is open to everybody, including employees. The geographic requirement is to be domiciled in one of these two regions. Mr Kerviel could thus move to Metz or Strasbourg and, if he could show that he would have genuinely settled there, benefit from local insolvency law. However, the rule of French law which does not allow debts resulting from criminal offences to be cancelled in such cases, also applies in Alsace and Moselle. But maybe other jurisdictions would allow the cancellation for even such debts.

Secondly, Mr Kerviel may want to pay his debt, and think that he would thus need to be back in business again. Would the ban of the French criminal court be recognised outside of Europe? Could he practice in other major financial centers of the world?

UPDATE: Société Général people have told the French press that they would not insist that Mr Kerviel pay the entire sum. When asked whether that meant that they did not intend to ask for any payment, they said that it only meant that they would be happy to explore whether they could reach an agreement with Mr Kerviel. Well, even if Mr Kerviel was fortunate enough to settle for 1% of the entire sum, he would still need 1,770 years to meet his new obligation. In any case, he announced this morning on a French radio that he was not asking anything to SocGen.

Enforcement, Liability and Jurisdiction

Which court has jurisdiction over liability actions against banks in relation to enforcement measures? In Europe, does such action fall under Article 22 of the Brussels I Regulation?

In April this year, the French Supreme court for private and criminal matters (*Cour de cassation*) delivered an interesting judgment in this respect. A French creditor had obtained a judgment from the Paris court of appeal ordering her debtor to pay him monies. The creditor then sought to enforce the judgment in Ivory coast, where he had been able to locate a bank account opened in the name of the debtor. He thus contacted a local enforcement officer (*huissier de justice*) who carried out an attachment (*saisie-attribution*) over the bank debt. The bank, Banque internationale pour le commerce et l'industrie en Côte d'Ivoire, declared that it held CFA Franc 11 million (€ 16,700).

However, the debtor immediately challenged the validity of the attachment before an Abidjan court on the ground that it did not comport with of OHADA law (articles 160 and 34 of the relevant statute). The court set aside the attachment. The creditor appealed, but did not wait for the result to ask the *huissier* to carry out a second attachment which would this time not violate local enforcement law. When the *huissier* did, however, he was told by the bank that there was only CFA Franc 3000 (€ 4.57) on the account. Eventually, the Abidjan Court of appeal confirmed that the first attachment was a nullity.

I am not sure whether, under OHADA law, the bank was meant to freeze the debt for the time of the challenge of the validity of the attachment. In any case, the creditor decided to sue the bank and initiated a quasi-delictual (i.e. for negligence) action before French courts. As far as jurisdiction is concerned, the plaintiff relied on 14 of the Civil code which grants jurisdiction to French courts for all actions initiated by a French national. For 40 years, the *Cour de cassation* has ruled that Article 14 and 15 of the Civil of code apply to all claims, except claims over real property and enforcement. The issue here was of course whether a liability action against a bank belongs to the enforcement of decisions. In a judgment of 14 April 2010, the *Cour de cassation* held that it does, and declined jurisdiction.

> *l'article 14 du code civil, qui permet au plaideur français d'attraire un étranger devant les juridictions françaises, doit être exclu pour des demandes relatives à des voies d'exécution pratiquées hors de France ; qu'ayant retenu que l'action engagée par M. X... contre la BICI CI découlait directement des voies d'exécution pratiquées entre les mains de celle ci en Côte d'Ivoire, elle en a déduit, à bon droit, que M. X... ne pouvait se prévaloir de ce texte, peu important que la régularité de la saisie litigieuse n'eût pas été contestée*

Rumour has it that the main goal of the court was to limit the scope of Article 14 and 15. From a European perspective, however, this might be an unfortunate judgment. To which extent does it inform what the position of the court would be with respect to Article 22 of the Brussels I Regulation? A short (but maybe incomplete) survey of European scholarship shows that many writers have argued, in particular in Germany and France, that liability actions against banks should not fall within the scope of Article 22. Or should they?

Hamburg Lectures on Maritime Affairs 2010

The International Max Planck Research School for Maritime Affairs and the International Tribunal of the Law of the Sea (ITLOS) organize this year's Hamburg Lectures on Maritime Affairs.

The lectures will be held in **Hamburg from 7 October to 10 November** and are open to the public. However, registration in advance is required.

The programme as well as information on the venue and registration and can be found here.

New references for preliminary rulings before the CJEU

Drawn to my attention by the Conflictus Legum are two recent requests for preliminary rulings on interpretation of the EU instruments in the filed of private international law which are now pending before the Court of Justice of the EU.

One reference (C-315/10 *Companhia Siderúrgica Nacional, Csn Cayman Ltd v Unifer Steel SL, BNP-Paribas (Suisse), Colepccl SA, Banco Português de Investimento SA (BPI)*) was submitted by the Portuguese court on 1 July 2010, including the following questions:

> 1. Does the fact that the Portuguese judicial authorities have declared that they lack jurisdiction by reason of nationality to hear an action concerning a commercial claim constitute an obstacle to the connection between causes of action referred to in Articles 6(1) and [28] of Regulation No 44/2001, where the Portuguese court has another action pending before it, a Paulian action brought against both the debtor and the third-party transferee, in this case the transferee of a debt receivable, and the depositaries of the subject-matter of the claim assigned to the third-party transferee, the latter having their seats in Portugal, in order that they may all be bound by the res judicata decision to be given?
> 2. In the event of a negative response, may Article 6(1) of Regulation No 44/2001 be freely applied to the case?

The questions seem somewhat unclear, particularly in relation to declining jurisdiction on the basis of nationality and reference to Art 28. The reference is perhaps due to the same wording used in the two provisions, but might not have a direct connection with the case. The Portuguese court is evidently dealing with the action which is under the Portuguese law called "impugnação pauliana" (Arts. 610 et seq. of the Portuguese Civil Code). It is used to reverse the fraudulent conveyance of property, which is frequently resorted to by debtors on the eve of their insolvency. It might be relevant to know whether the debtor in this case is actually insolvent. Because certain information is missing, regardless of inquiries with some Portuguese colleagues, the situation cannot be fully appreciated for the time being.

The other reference (C-400/10 *J. McB. v L. E.*) of 6 August 2010 originates from the Irish court in relation to (wrongful) removal of a child in case of father not married to the mother of the child. The question reads:

> Does Council Regulation (EC) No 2201/2003 of 27 th November 2003 on the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, whether interpreted pursuant to Article 7 of the Charter of Fundamental Rights of the European Union or otherwise, preclude a Member State from requiring by its law that the father of a child who is

not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having 'custody rights' which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2.11 of that Regulation?