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Issue 1 of the *Journal of Private International Law* is now available. It contains the following articles:

Rhona Schuz, Choice of law in relation to matrimonial property in the 21st century, pp. 1-49

Abstract: *The traditional lack of consensus in relation to the choice of law rule/s governing matrimonial property has become topical and relevant over the last few years. The European Union, concerned about the impact of the disparities between the laws of Member States in this field, in the light of increasing divorce and migration, embarked on an initiative to harmonize private international law rules in relation to matrimonial property. However, the Regulation which it produced did not command universal support. Moreover, the recent demographic changes in Europe have added a new dimension to the problem. To date, relatively little attention has been paid to the choice of law implications of migration from non-Western States, in which religious or customary law governs the economic consequences of marriage and which typically have separate property systems which discriminate against women. The mass migration into Europe from such States over the past few years makes it imperative to consider the implications of the choice of law rules in relation to matrimonial property for migrants from non-Western States.*

Accordingly, in the light of these developments, there is a need to revisit critically the issues involved and the different approaches to choice of law in relation to matrimonial property in the light of modern choice of law theory. This article meets this need by analysing the extent to which the various approaches best promote central choice of law objectives. In addition, insights are gleaned from the experience of the Israeli legal system in relation to couples migrating from Islamic States. The conclusions drawn from this analysis, which are significantly different from those which informed the EU Regulation, will be of value to law and policymakers throughout the world, when facing the challenge of making decisions pertaining to choice of law in relation to matrimonial property in the twenty-first century.

Liam W. Harris, Understanding public policy limits to the enforceability of forum

selection clauses after *Douez v Facebook*, pp. 50-96

Abstract: *This article explores the nature of public policy limits to the enforcement of forum selection clauses, recently considered by the Supreme Court of Canada in Douez v Facebook. The public policy factors relied on by the plurality of the Court, inequality of bargaining power and the quasi-constitutional nature of the right at issue, possess neither the doctrinal clarity nor the transnational focus necessary to guide the deployment of public policy in this context. Here, I argue for a public policy exception to the enforcement of forum selection clauses based on the doctrine of mandatory overriding rules. This approach would focus on whether a forum selection clause has the effect of avoiding the application of local norms intended to enjoy mandatory application in the transnational context. This conception of public policy would be a more coherent guide to the exercise of courts' discretion to enforce forum selection clauses in cases like Douez.*

Adeline Chong & Man Yip, Singapore as a centre for international commercial litigation: party autonomy to the fore, pp 97-129

Abstract: *This article considers two recent developments in Singapore private international law: the establishment of the Singapore International Commercial Court and the enactment of the Hague Convention on Choice of Court Agreements 2005 into Singapore law. These two developments are part of Singapore's strategy to promote itself as an international dispute resolution hub and are underscored by giving an enhanced role to party autonomy. This article examines the impact of these two developments on the traditional rules of private international law and whether they achieve the stated aim of positioning Singapore as a major player in the international litigation arena.*

Muyiwa Adigun, Enforcing ECOWAS judgments in Nigeria through the common law rule on the enforcement of foreign judgments, pp. 130-161

Abstract: *The ECOWAS Court was established by the Revised ECOWAS Treaty. By virtue of that treaty, the Court has assumed an existence at the international plane and has delivered a number of judgments. This study therefore examines the enforcement of the judgments of the ECOWAS Court in Nigeria as a Member State. The study finds that Nigeria has not been enforcing the*

judgments of the Court like other Member States. The study further finds that there are five sources of international law namely: treaties, custom, general principles of law recognised by civilised nations, judicial decisions and the writings of the most qualified publicists and that while Nigerian law has addressed domestic effect of treaties and custom, that of other sources most notably the decisions of international tribunals has not been seriously addressed. The study therefore argues that the common law on the enforcement of foreign judgments can be successfully adapted to give domestic effect to the judgments of the ECOWAS Court as an international tribunal in Nigeria. The study therefore recommends that the Nigerian judiciary should take the gauntlet to make the judgments of the ECOWAS Court effective in Nigeria.

Justin Monsenepwo, Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the codification of party autonomy under OHADA Law, pp. 162-185

Abstract: *The Organization for the Harmonization of Business Law in Africa (hereinafter referred to as OHADA) was created on 17 October 1993 to foster economic development in Africa by creating a uniform and secure legal framework for the conduct of business in Africa. In an effort to reform the law of contracts in its Member States, OHADA has prepared the Preliminary Draft of the Uniform Act on the Law of Obligations (hereinafter referred to as the Preliminary Draft). Several provisions of the Preliminary Draft set forth general principles concerning choice of law in international commercial contracts. Indeed, the Preliminary Draft encompasses innovative provisions on party autonomy in international contracts, such as the explicit recognition of the right of parties to choose the law applicable to their contracts and the inclusion of limited exceptions to party autonomy (overriding mandatory rules and public policy). Yet, it still needs to be improved in respect of various issues, including for instance the ability of parties to choose different laws to apply to distinct parts of their contract and the possibility for the parties to expressly include in their choice of law the private international law rules of the chosen law. This paper analyses the provisions of the Preliminary Draft in the light of the Hague Principles on Choice of Law in International Commercial Contracts (hereinafter referred to as the Hague Principles). More particularly, it explores how the Hague Principles can help refine the rules on party autonomy contained in the*

Preliminary Draft to enhance legal certainty and predictability in the OHADA region.

Jeanne Huang, Chinese private international law and online data protection, pp. 186-209

Abstract: *This paper explores how Chinese private international law responds to online data protection from two aspects: jurisdiction and applicable law. Compared with foreign laws, Chinese private international law related to online data protection has two distinct features. Chinese law for personal jurisdiction is still highly territorial-based. The "target" factor and the interactive level of a website have no play in Chinese jurisprudence. Regarding applicable law, Chinese legislators focus more on the domestic compliance with data regulations rather than their extra-territorial application. Moreover, like foreign countries, China also resorts to Internet intermediaries to enhance enforcement of domestic law. These features should be understood in the Chinese contexts of high-level data localization and Internet censorship.*

Giorgio Risso, Product liability and protection of EU consumers: is it time for a serious reassessment? pp 210 – 233

Abstract: *The European Union (EU) has not enacted a coherent and fully-fledged product liability regime. At the substantive level, the Product Liability Directive – adopted in 1985 – is the only piece of legislation harmonising the laws of the Member States. At the private international law level, the special choice-of-laws provision in the Rome II Regulation coexists with the general rules in the Brussels I-bis Regulation. Cross-border product liability cases are therefore subject to different pieces of legislation containing either "general" or "specific" provisions. In turn, such general and specific provisions do have their own rationales which, simplistically, can be inspired by "pro-consumer", "pro-producer", or more "balanced" considerations, or can be completely "indifferent" to consumer protection. This article examines the interactions between the Directive, the Rome II and the Brussels I-bis Regulations in cross-border product liability cases. The aim of this article is to assess whether the piecemeal regime existing at the EU level risks undermining the protection of EU consumers. The analysis demonstrates that the regime is quite effective in guaranteeing an adequate level of consumer protection, but reforms are*

needed, especially to address liability claims involving non-EU manufacturers or claims otherwise connected to third States, without requiring a complete overhaul of the EU product liability regime.

Guangjian Tu, The flowing tide of parties' freedom in private international law: party autonomy in contractual choice of law in China, pp. 234-240 (Review Article)

Dutch collective redress dangerous? A call for a more nuanced approach

Prepared by Alexandre Biard, Xandra Kramer and Ilja Tillema, Erasmus University Rotterdam

The Netherlands has become dangerously involved in the treatment of mass claims, Lisa Rickard from the US Chamber of Commerce recently said to the Dutch financial daily (*Het Financieele Dagblad*, 28 September 2017) and the Dutch BNR newsradio (broadcast of 28 September 2017). This statement follows the conclusions of two reports published in March and September 2017 by the US Institute for Legal Reforms (ILR), an entity affiliated with the US Chamber of Commerce. Within a few hours, the news spread like wildfire in online Dutch newspapers, see for instance here.

Worryingly enough, the March 2017 report, which assessed collective redress mechanisms in ten Member States, predicted that 'there are a number of very powerful indicators that all of the same incentives and forces that have led to mass abuse in other jurisdictions are also gathering force in the EU'. Among the jurisdictions surveyed, the Netherlands appeared as a place particularly prone to

such abuse. The September 2017 report focuses on consumer attitudes towards collective redress safeguards, and ultimately concludes that 85% of respondents tend to support the introduction of safeguards for the resolution of mass claims.

The publication of the aforementioned reports is timely as the European Commission's evaluation report on the 2013 Recommendation on Collective Redress is expected this autumn, following the recent call for evidence. Some of the statements in these reports call for a more nuanced view. Indeed, the Dutch approach to the resolution of mass claims might have its drawbacks. It is certainly not exempt from criticisms. However, in a matter of such expedient nature, it is of the utmost importance that *both* sides are thoroughly addressed and assessed.

For the information of readers that are not familiar with the Dutch system: the Netherlands currently has two mechanisms that have been designed for collective redress specifically. The first one is the collective action for *injunctive* or *declaratory* relief. A verdict in such action can provide the basis for an amicable settlement or for individual proceedings to seek monetary compensation. The second mechanism is the much-discussed WCAM settlement (based on the Dutch Collective Settlements Act, see also a previous post linking to papers and a report on the WCAM procedure). In addition, there is a proposal to introduce a collective action for *damages* (see a previous post on this blog).

Bad apples and the bigger picture

In the past years, few incidents have occurred in Dutch collective redress that may indeed come close to 'American situations' that are generally feared in Europe. Unfortunately, some commentators have chosen to mainly highlight such incidents. Notably, the ILR report of March 2017 refers to the notorious case of *Stichting Loterijverlies*, in which a foundation initiated a collective action on behalf of aggrieved lottery ticket holders against the Dutch State Lottery. The report rightfully mentions that the foundation's director has been accused of funnelling elsewhere, for personal gain, part of the consumers' financial contribution to the foundation. However, the report neglects to mention that the foundation had also been litigating for quite some years and that, ultimately, the Supreme Court ruled in its favour: the Dutch State Lottery had misled consumers for years. Furthermore, the report fails to mention that some of the foundation's participants successfully filed a request to replace the foundation's board. Moreover, despite (or on account of) the complexity of establishing causation and

damages, the case has now been amicably settled. As part of the settlement, participants of the foundation have been reimbursed their financial contribution thereto, and all class members were free to participate in the settlement: an extraordinary, one-off lottery draw. Reportedly, 2.5 million individuals have done so.

Obviously, incidents such as the aforementioned case are of no avail to civil justice, and justify concerns about claim vehicles' activities and motives. However, we should also consider the many positive effects of collective redress mechanisms. Generally, Dutch collective actions and WCAM settlements provide for much-needed effective and efficient dispute resolution in mass harm situations.

Safeguards work: learning from experience

The March report by the ILR warns against the gradual decline of safeguards in the Netherlands, and in the EU more generally. Yet, various safeguards already exist, continue to do so, and generally function well in practice. For instance, the admissibility rules regarding representative organizations (that bring collective actions or are involved in a WCAM settlement) have become more stringent and are applied increasingly strict by courts. As to the current Dutch collective actions, there is proof that its numbers have slowly risen since 1994, but no proof exists that this is necessarily attributable to entrepreneurial parties, let alone that they have increased the number of frivolous claims (Tillema 2017). The proposed collective action for damages further raises the current threshold for representative organizations to obtain standing. The requirements concern the organizations' governance, financial means, representativeness, experience and expertise, and individuals' participation in the decision-making process. Indeed, a judgment will have binding effect upon all aggrieved parties who have not opted out, but all actions will be publicly registered, there is a strict scope rule, and individuals can raise objections.

So far, eight WCAM settlement have been declared binding. Undeniably, various parties have entered this market, including US counsels and their sizeable fees. However, in spite of its difficult task, the Amsterdam Court of Appeal seems growingly comfortable in assessing the reasonableness of a collective settlement, including the representative organizations' remuneration. In Converium, the reasonableness of (contingency) fees was assessed for the first time. In the

currently pending eighth WCAM case, the *Fortis*-settlement, the court has demonstrated its awareness of the risks and of its task to also scrutinize the motives of representative organizations. In its interlocutory judgment, it has ruled that the settlement, in its current state, cannot be declared binding. It is deemed not reasonable due to, inter alia, the sizeable remuneration of the representative organizations and their lack of transparency thereon.

A Dutch 'manoeuvre' to become a 'go-to-point' for mass claim or an attempt to enhance access to justice for all?

'The Netherlands and the UK seem to be manoeuvring themselves to become the go-to jurisdictions for collective claims outside the EU', the March report highlighted. Obviously, this not the first time that other countries express their concerns against the extra-territorial effects of the Dutch legislation, an issue that has been discussed for several years in the context of the WCAM (Van Lith, 2011). The ILR report indeed highlighted that in the Converium case, the Amsterdam Court of Appeal declared the settlement binding where a majority of shareholders were domiciled outside the Netherlands. Yet, the key question here is whether, for reasons linked to equality and efficiency, individuals who have suffered from losses resulting from a same misbehaviour should not be treated in a same manner and in the same proceeding, regardless of their actual location. By asserting global jurisdiction, the Amsterdam Court of Appeal ultimately ensured access to justice and equal treatment for all parties placed in similar situations, and ultimately avoided costly fragmentation of the case for parties and courts. In this regard, it should also be highlighted that the WCAM is a settlement-only mechanism, and – to the benefit of victims of wrongdoings – it is the wrongdoing party and the representatives of the aggrieved parties that jointly choose to address the Amsterdam Court of Appeal considering that the Netherlands has a suitable procedure to declare such settlement binding.

It is evident that collective redress mechanisms have both benefits and drawbacks. More than ever, the challenging, yet indispensable key word here is *balance*. As Commissioner Jourova recently observed at the release of the ILR September report, 'the discussion in EU countries is in full swing on how to strike the right balance between access to justice and prevention of abuse'. We hope this short post can contribute to the discussion.

Third Country Law in the CJEU's Data Protection Judgments

This post by Prof. Christopher Kuner was published last week at the European Law Blog. *I thought it worth reproducing it here, the same week of the hearing of case C-498/16 (Schrems again, but this time from a different perspective: private, and within the framework of Regulation Brussels I).*

Introduction

Much discussion of foreign law in the work of the Court of Justice of the European Union (CJEU) has focused on how it deals with the rules, principles, and traditions of the EU member states. However, in its data protection judgments a different type of situation involving foreign law is increasingly arising, namely cases where the Court needs to evaluate the law of *third countries* in order to answer questions of EU law.

This is illustrated by its judgment in *Schrems* (Case C-362/14; previously discussed on this blog, as well as here), and by *Opinion 1/15* (also discussed on this blog, part I and part II), a case currently before the CJEU in which the judgment is scheduled to be issued on 26 July. While these two cases deal with data protection law, the questions they raise are also relevant for other areas of EU law where issues of third country law may arise. The way the Court deals with third country law in the context of its data protection judgments illustrates how interpretation of EU law sometimes involves the evaluation of foreign legal systems, despite the Court's reluctance to admit this.

The *Schrems* judgment

The *Schrems* case involved the validity of the EU-US Safe Harbour arrangement, a self-regulatory mechanism that US-based companies could join to protect personal data transferred from the EU to the US. Article 25(1) of the EU Data Protection Directive 95/46/EC allows transfers of personal data from the EU to third countries only when they provide an 'adequate level of data protection' as

determined by a formal decision of the European Commission. On 26 July 2000 the Commission issued such a decision finding that the Safe Harbour provided adequate protection.

The plaintiff Schrems brought suit in Ireland based on the data transfer practices of Facebook, which was a Safe Harbour member. Schrems claimed that the Safe Harbour did not in fact provide adequate protection, and that the Irish Data Protection Commissioner (DPC) should reach this conclusion notwithstanding the Commission adequacy decision.

On 18 June 2014 the Irish High Court referred two questions to the CJEU dealing with the issue of whether the DPC could examine the validity of the Safe Harbour. In its judgment of 6 October 2015, the CJEU invalidated the Commission's decision and held that providing an adequate level of data protection under EU law requires that third country law and standards must be 'essentially equivalent' to those under EU data protection law (para. 73). A more detailed, general analysis of *Schrems* can be found in my article in the current issue of the *German Law Journal*.

Third country law under *Schrems* and *Opinion 1/15*

As far as third country law is concerned, the *Schrems* judgment requires an individual to be allowed to bring a claim to a data protection authority (DPA) that a Commission adequacy decision is invalid, after which he or she must be able to contest in national court the DPA's rejection of such a claim, and the national court must make a preliminary reference to the CJEU if it finds the claim to be well-founded (para. 64). Thus, the Court practically invites individuals to bring claims to DPAs regarding the adequacy of protection in third countries, and requires national courts to refer them to the CJEU for a preliminary ruling.

Under the judgment, the standard for determining the validity of a Commission decision is whether third country law is 'essentially equivalent' to EU law, which by definition must involve an examination of the third country law with which EU law is compared.

The Court has stated that it does not pass judgment on the law of third countries. In the interview he gave to the *Wall Street Journal* in which he discussed the *Schrems* judgment, CJEU President Lenaerts said that 'We are not judging the U.S. system here, we are judging the requirements of EU law in terms of the

conditions to transfer data to third countries, whatever they be'. Advocate General Mengozzi also reiterated this point in para. 163 of his Opinion in *Opinion 1/15*.

However, it is surely disingenuous to claim that the *Schrems* case did not involve evaluation of US legal standards. First of all, the need to review third country law is logically inherent in the evaluation of a Commission decision finding that such law provides protection essentially equivalent to that under EU law. Secondly, the CJEU in *Schrems* did indeed consider US law and intelligence gathering practices and their effect on fundamental rights under EU law, as can be seen, for example, in its mention of studies by the Commission finding that US authorities were able to access data in ways that did not meet EU legal standards, in particular the requirements of purpose limitation, necessity, and proportionality (para. 90). Indeed, whether US law adequately protects against mass surveillance by the intelligence agencies was a major issue in the case, as the oral hearing before the Court indicates.

Opinions of Advocates General in data protection cases also illustrate that the CJEU sometimes examines third country law when answering questions of EU law. For example, the opinion of Advocate General Bot in *Schrems* contains an evaluation of the scope of the supervisory powers of the US Federal Trade Commission (paras 207-208). And in *Opinion 1/15*, Advocate General Mengozzi indicated that provisions of Canadian law had been brought before the CJEU (para. 320), and that some of the parties' contentions required interpretation of issues of Canadian law (para. 156). As a reminder, *Opinion 1/15* is based on a request for an opinion by the European Parliament under Article 218(11) TFEU concerning the validity of a draft agreement between the EU and Canada for the transfer of airline passenger name records, which shows the variety of situations in which questions of third country law may come before the CJEU.

Future perspectives

It is inevitable that the CJEU will increasingly be faced with data protection cases that require an evaluation of third country law. For example, the Commission indicated in a Communication of January 2017 that it will consider issuing additional adequacy decisions covering countries in East and South-East Asia, India, Latin America, and the European region. In light of the *Schrems* judgment, challenges to adequacy decisions brought before a DPA or a national court will

often result in references for a preliminary ruling to the CJEU. Furthermore, the interconnectedness of legal orders caused by globalization and the Internet may also give rise to cases in other areas of law where evaluation of third country law is necessary to answer a question of EU law.

Since in references for a preliminary ruling the determinations of national courts will generally be accepted by the CJEU, and a request to intervene in a preliminary ruling procedure to submit observations on third country law is not possible, there is a risk that a judgment in such a case could be based on an insufficient evaluation of third country law, such as when the evidence concerning such law is uncontested and is presented only by a single party. In fact, the evidence concerning US law in the *Schrems* judgment of the Irish High Court that resulted in the reference for a preliminary ruling to the CJEU was in effect uncontested. By contrast, in the so-called '*Schrems II*' case now underway in Ireland, the Irish courts have allowed oral and written submissions on US law and practice by a number of experts.

Scholarship and practice in private international law can provide valuable lessons for the CJEU when it needs to evaluate third country law. For example, situations where evidence concerning foreign law is presented by a single party and is uncontested have been criticized in private international law scholarship as a 'false application of foreign law', because such evidence can prove unreliable and result in unequal treatment between foreign law and the law of the forum (see the excellent 2003 lectures of Prof. Jänterä-Jareborg in volume 304 of the Collected Courses of the Hague Academy of International Law regarding this point).

If the CJEU is going to deal increasingly with third country law, then it should at least have sufficient information to evaluate it accurately. It seems that the CJEU would view third country law as an issue of fact to be proved (see in this regard the article by Judge Rodin in the current issue of the *American Journal of Comparative Law*), which would seem to rule out the possibility for it to order 'measures of inquiry' (such as the commissioning of an expert's report concerning third country law) under Article 64(2) of its Rules of Procedure in a reference for preliminary ruling for the interpretation of Union law. However, the Court may order such measures in the scope of a preliminary ruling on the validity of a Union act, which would seem to cover the references for a preliminary ruling mandated in *Schrems*(see para. 64 of the judgment, where the CJEU mandates national courts to make a reference to the Court 'for a preliminary ruling *on*

validity' (emphasis added)). Thus, the CJEU may have more tools to investigate issues of third country law than it is currently using.

It would also be helpful if the Commission were more transparent about the evaluations of third country law that it conducts when preparing adequacy decisions, which typically include legal studies by outside academics. These are usually not made public, although they would provide useful explanation as to why the Commission found the third country's law to be essentially equivalent to EU law.

Conclusion

In conclusion, the CJEU should accept and be more open about the role that third country law is increasingly playing in its data protection judgments, and will likely play in other areas as well. Dealing more openly with the role of third country law and taking steps to ensure that it is accurately evaluated would also help enhance the legitimacy of the CJEU's judgments. Its upcoming judgment in *Opinion 1/15* may provide further clarification of how the CJEU deals with third country law in its work.

Belgian Court Recognizes US Opt-Out Class Action Settlement

By Stefaan Voet, Leuven University

The Belgian Lernout & Hauspie (L&H) case was one of the largest corporate scandals in European history (for an empirical case study analysis see S. Voet, 'The L&H Case: Belgium's Internet Bubble Story' in D. Hensler, C. Hodges & I. Tzankova (eds.), *Class Actions in Context: How Economics, Politics and Culture Shape Collective Litigation*, Edward Elgar (2016)).

It was a criminal case that was brought before the Criminal Court of Appeal in Ghent. Contrary to common law jurisdictions, the victim of a Belgian criminal

case is not absent from the criminal trial. He or she is a formal party to the proceedings and has standing to plead. Regarding his or her civil claim, the victim can piggyback on the evidence brought forward by the Public Prosecutor in order to prove a civil fault. The victim only has to prove causation and his or her damages. Based on this technique, more than 15,000 duped shareholders filed their civil claim during the L&H criminal trial.

On 20 September 2010, the Court ruled on the criminal aspect of the case. L&H's founding fathers and most previous directors were convicted. The deep-pocket defendants Dexia Bank and KPMG, respectively L&H's bank and statutory auditor, were acquitted.

On 23 March 2017, seven years after its criminal decision, the Court ruled its first decision on the civil claims. The decision is available in Dutch at https://www.rechtbanken-tribunaux.be/sites/default/files/public/content/lh_-_geanonimiseerd.pdf.

Because L&H also had a second headquarters in the US, some (opt-out) class action procedures, on behalf of all persons and entities who had bought L&H shares on Nasdaq, were brought there against Dexia and KPMG (*In re* Lernout & Hauspie Sec. Litig., 138 F. Supp. 2d 39 (D. Mass. 2001); *In re* Lernout & Hauspie Sec. Litig., 208 F. Supp. 2d 74 (D. Mass. 2002) and Warlop v. Lernout, 473 F. Supp. 2d 260 (D. Mass. 2007)). Ultimately, these cases were settled. In the KPMG settlement 115 million dollars were paid, while in the Dexia settlement the shareholders received 60 million dollars.

One of the issues the Belgian Court had to deal with was the impact of these US class action settlements in the Belgian procedure. More particularly, the question arose if the civil claimants in the Belgian procedure who were part of the US class action settlements and who had not opted out, still can claim damages in the Belgian procedure. In other words, does the Belgian Court has to recognize the US class action settlements?

Because the court decisions approving the class action settlements are rendered by a US court, the European rules (i.e. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) do not apply. Belgian international private law is applicable, and more particularly

the Belgian Code of Private International Law (CPIL) (an English translation is available at http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf).

The Court first decides that the US decisions approving the class action settlements are foreign judgements that can be recognized and enforced in Belgium (Art 22, §1 CPIL). The Court rebuts the argument of one of the parties that the class actions settlements are nothing more than contractual agreements to which he is not a party (§ 66).

The central issue before the Court is whether the US court decision approving the class action settlements can be recognized in Belgium and whether the class members who did not opt out are bound by these settlements in the Belgian procedure (§ 67). If not, they can bring their civil claim. If so, they cannot bring their civil claim (at least to the amount they received in the US class action settlements).

The Court cannot assess the question whether the US District Court (approving the class action settlements) correctly applied Rule 23(a) and Rule 23(b)(3) FRCP (Federal Rules of Civil Procedure). Art 25, §2 CPIL clearly states that under no circumstances the foreign judgment will be reviewed on the merits (§§ 68-69).

Art 22, §1, 4th para CPIL states that the foreign judgment may only be recognized or declared enforceable if it does not violate the conditions of Art 25 CPIL. The latter states (in §1, 1° and 2°): "A foreign judgment shall not be recognized or declared enforceable if 1° the result of the recognition or enforceability would be manifestly incompatible with public policy; upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby and 2° the rights of the defense were violated." These are the two basic questions before the Court (§ 72).

The main criterion is the international public order. According to Belgium's Supreme Court (i.e. Court of Cassation) a law is of international public order if the legislator wanted to lay down a principle that is vital for Belgium's established moral, public or economic order. Any foreign rule or decision violating this international public order should be set aside (Court of Cassation 18 June 2007, C.04.030.F, www.cass.be). The criterion is subject to a marginal appreciation by the court (§§ 74-75).

The Court concludes that the US decision approving the class actions settlement does *not* violate Belgium's international public order. Consequently, the Court has to recognize the US decision. The Court invokes multiple reasons.

First of all, reference is made to the existence in Belgium, since September 2014, of an opt-out class action procedure (as laid down in Title II of Book XVII of the Code of Economic Law (CEL)) (see about this Belgian class action procedure S. Voet, 'Consumer Collective Redress in Belgium: Class Actions to the Rescue?', European Business Organization Law Review 2015, 121-143). Moreover, the legislature emphasized that the opt-out system is compatible with Art 6 ECHM (§§ 79-80).

Secondly, the Court compares the procedural rights of class members according to US federal class action law and to Belgian class action law. The US class action settlements were subject to a fairness hearing (see Rule 23(e)(2) FRCP). A similar provision exists in Belgium (Art XVII.38 CEL). The class action settlements were notified to US and foreign L&H shareholders (see Rule 23(e)(1) FRCP). A special website was also created. Similar provisions exist in Belgium (Art XVII.43, §3 CEL). In the US, the Court assessed whether the class actions settlements were fair, reasonable, and adequate (see Rule 23(e)(2) FRCP). Similar provisions exist in Belgium (Art XVII.49, §2 FRCP). Based on this analysis, the Court concludes that the procedural rights of the class members in the US class actions settlements were protected in a similar way as they would have been protected under Belgian law. The Court adds that the procedural protection under Rule 23 FRCP is even stronger than under Belgian law (§§ 82-83).

Next, the Court examines whether the fact that non-US class members are bound by the US opt-out class action settlements violates Belgium's international public order. Although there are arguments to be made that only under an opt-in regime foreign class members can be bound by a class action decision or settlement, the Court reiterates that nevertheless opt-out class actions are possible in Europe (see Art 21 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms and the existing opt-out regimes in Portugal, Bulgaria, Denmark and the Netherlands (under the Dutch Collective Settlements Act)). It concludes that the desirability of an opt-in system for foreign class members does not automatically leads to the conclusion that an opt-out regime contradicts Belgium's international public order (§§ 84-88).

Finally, the Court notes that an opt-out class action, leading to a settlement that could be binding for foreign class members, could entail a violation of the rights of defense if not everything was done to guarantee that the foreign class members were notified of the class action procedure and the opt-out possibility. The Court concludes that this was the case. It for example refers to the following facts: 82.8169 individual notice packages were sent; notification was provided in the Wall Street Journal, the Wall Street Journal Europe and a Belgian journal; a specific website (www.lernouthauspiesettlement.com) was launched; the Belgian press reported about the US class action settlements; one of the Belgian associations representing L&H shareholders informed its clients about the US class action settlements and instructed them what to do if they wanted to opt out or receive money; the US District Court decided that Rule 23(e)(1) FRCP was met and that 288 mainly Belgian shareholders had opted out correctly while 325 other opt-out requests were dismissed; etc. KPMG, one of the parties to the class action settlements, submitted an expert report to the Belgian Court stating that everything possible was done to notify all class members. In conclusion, the Court finds that there was sufficient notice and that the rights of defense of the non-US class members were not violated (§§ 89-93).

The general conclusion of the Court is that all claims brought by the civil parties who were part of the US class action settlements and who did not opt out are only admissible insofar as they claim damages above the amount they received from the US class action settlements.

Suing TNCs in the English courts: the challenge of jurisdiction

By Ekaterina Aristova, PhD in Law Candidate, University of Cambridge

On 26 January 2017, Mr Justice Fraser, sitting as a judge in the Technology and Construction Court, ruled that a claim against Royal Dutch Shell plc, an English-domiciled parent company ("**RDS**"), and its Nigerian operating subsidiary Shell

Petroleum Development Company of Nigeria Ltd ("**SPDC**") will not proceed in the English courts. These proceedings represent one of the many private claims brought by the foreign citizens in the courts of the Western states alleging direct liability of parent companies for the overseas human rights abuses. Despite an increased number of such foreign direct liability cases in the English courts, the issue of jurisdiction still remains one of the principle hurdles faced by the claimants and their lawyers in pursuing civil litigation against transnational corporations ("**TNCs**") outside the territory of the state where main events leading to the alleged crime took place and damage was sustained.

Last year, Mr Justice Coulson allowed a legal claim against English-based mining corporation Vedanta Resources plc and its Zambian subsidiary to be tried in England. The overall analysis of the judgement in *Lungowe v Vedanta Resources plc* suggested that (i) the claims against the parent company in relation to the overseas operations of the foreign subsidiary can be heard in the English courts; and (ii) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state. Although Mr Justice Fraser has not questioned any of the conclusions reached by his colleague, he made it very clear that establishing an arguable claim on the liability of the English-domiciled parent company for the foreign operations of its overseas subsidiary is a challenging task.

The claimants in *Okpabi v Shell* were Nigerian citizens who commenced two sets of proceedings against RDS and SPDC. The first claim was brought on behalf of the Ogale community, while the second was initiated by the inhabitants of the Bille Kingdom in Nigeria. Both claims alleged serious and ongoing pollution and environmental damage caused by oil spills arising out of the Shell operations in and around the claimants' communities. The claimants argued that RDS breached the duty of care it owed to them to ensure that SPDC's operations in the Niger Delta did not cause harm to the environment and their communities. The claims against SPDC were brought on the basis that it was a necessary or proper party to the proceedings against RDS. The defendants argued that both claims have nothing to do with England and should proceed in Nigeria. They claimed that RDS was used as an "anchor defendant" and a device to ensure that the real claim against SPDC was also litigated in England.

Mr Justice Fraser has responded to these arguments by raising several questions

which should have been answered in order to assert jurisdiction of the English courts over both claims (at [20]). It was agreed by both of the parties that the principal question was whether the claimants had legitimate claims in law against RDS. In the opinion of the judge, the claimants failed to provide evidence that there was any duty of care upon RDS as an ultimate holding company of the Shell Group for the acts and/or omissions of SPDC, and the claims against RDS should not proceed (at [122]). In the absence of the proceedings against RDS, the claims against SPDC did not have any connection with the territory of England as they were brought by the Nigerian citizens against Nigerian company for the breach of Nigerian law for acts and omissions in Nigeria (at [119]). Hence, application of SPDC also succeeded (at [122]).

Analysis of the Shell Group corporate structure and its relevance to the existence of the duty of care of the parent company represents the core of the judgement. The judge relied on the fact that RDS was a holding company with no operations whatsoever (at [114]). He took into account that only two officers of RDS were members of the Executive Committee of the Shell Group; RDS only dealt with the financial matters of the group's business that affect it as the ultimate holding company; it did not hold any relevant license to conduct operations in Nigeria; and it did not have specialist knowledge on the oil exploration (at [114-116]). Mr Justice Fraser noted that evidence on the part of the claimants was "extremely thin" and "sketchy" (at [89]). The claimants heavily relied on the public statements by RDS regarding control over SPDC and environmental strategy of the Shell Group (at [99]). The judge did not consider that such evidence could alone demonstrate that RDS owed a duty of care to the claimants. Mr Justice Fraser stated that separate legal personality of the constituent entities of corporate group represents a fundamental principle of English law (at [92]) and claimants failed to provide evidence of high degree of control and direction by RDS sufficient to meet the three-fold test on the existence of duty of care set by *Caparo Industries plc v Dickman* and clarified by *Chandler v Cape*.

The judgment raises several sets of issues. First of all, it clearly confirmed the dominance of the entity-based approach to the nature of TNCs. It was established that certain powers of RDS such as adoption of the group policies does not alone put it in any different position than would be expected of an ultimate parent company (at [102, 106]). In this sense, decision of Mr Justice Fraser is in line with previous practice of the UK courts on the rules of jurisdiction in cases involving

TNCs. Thus, in *Young v Anglo American South Africa Limited*, the Court of Appeal ruled that the powerful influence of the parent company does not by itself causes legal consequences, and should not have any impact on the determination of the domicile of the subsidiaries. Secondly, the judge argued that any references to Shell and Shell Group made by RDS in public statements do not dilute the concept of separate legal personality. This finding is of utmost importance since "common legal persona" is often considered to be not only a particular feature of TNC itself but the factor evidencing that parent company and the subsidiary operate as a single economic unit.

Moreover, attention should be paid to the note of warning expressed by Mr Justice Fraser with respect to the scale of the litigation against Shell. It was stated that approach of the parties to produce an extensive amount of witness and expert statements, authority bundles and lengthy skeleton arguments is "wholly self-defeating and contrary to cost-efficient conduct of litigation" (at [10]). It is inevitable, however, that mass tort actions against TNCs raise a number of complex legal and factual issues which require examination of the considerable amount of evidence, authorities and data. Given the fact that UK Parliament is currently in the process of Human Rights and Business inquiry, including access to effective remedy in the UK, the burden of litigation against TNCs on the English courts could easily become a policy argument.

The judgement in *Okpabi v Shell* definitely has an impact on the development of the tort litigation against TNCs in the English courts. Amnesty International has suggested that it "gives green light for corporations to profit from overseas abuses". Although the judge did not fundamentally challenged the *Vedanta* decision, the strict adherence to the entity-based legal concepts suggests that the novel foreign direct liability cases are still far from advancing to the new level. Leigh Day, solicitors representing the Nigerian communities, have already confirmed that their clients will appeal the decision of Mr Justice Fraser. Even if the Court of Appeal reverses the ruling, the claimants would still struggle in establishing direct liability of the parent company for environmental pollution in Nigeria, since the jurisdictional test is easier to meet as opposed to a liability one. It has become known that *Vedanta* decision is itself being appealed by the corporate defendants. In any case, 2017 promises to be a momentous year for the victims of corporate human rights abuses looking at the English courts as their last hope for justice.

Fourth Issue of 2015's Rivista di diritto internazionale privato e processuale – Proceedings of the conference "For a New Private International Law" (Milan, 2014)

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

- The fourth issue of 2015 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released.

This issue of the Rivista features the texts – updated and integrated with a comprehensive bibliography – of the speeches delivered during the conference "For a New Private International Law" that was hosted at the University of Milan in 2014 to celebrate the Rivista's fiftieth anniversary.

The speeches have been published in four sections, in the order in which they were delivered.

The first section, on "**Fundamentals of Law No 218/1995 and General Questions of Private International Law**", features the following contributions:

Fausto Pocar, Professor Emeritus at the University of Milan, **'La *Rivista* e l'evoluzione del diritto internazionale privato in Italia e in Europa'** (The *Rivista* and the Evolution of Private International Law in Italy and Europe; in Italian).

> *Fifty years after the foundation of the Rivista, this article portrays the reasons that led to the publication of this journal and its core features, in particular its unfettered nature and the breadth of its thought with respect to the definition of private international law. In this regard the Rivista – by promptly drawing*

attention to the significant contribution provided by the law of the European Union in the area of jurisdiction and conflict of laws – succeeded in anticipating the subsequent developments, which resulted in the impressive legislation of the European Union in the field of private international law since the entry into force of the Treaty of Amsterdam in 1999. These developments have significantly affected the Italian domestic legislation as laid down in Law No 218 of 1995. As a result of such impact, the Italian system of private international law shall undergo a further revision in order to harmonize it with the European legislative acts, as well as with recent international conventions adopted in the framework of the Hague Conference on Private International Law, to which the European Union – a Member of the Conference – is party.

Roberto Baratta, Professor at the Scuola Nazionale dell'Amministrazione, **'Note sull'evoluzione del diritto internazionale privato in chiave europea'** (Remarks on the Evolution of Private International Law in a European Perspective; in Italian).

National sovereignties have been eroded in the last decades. Domestic systems of conflict of laws are no exceptions. While contributing with some remarks on certain evolving processes that are affecting the private international law systems, this paper notes that within the EU – however fragmentary its legislation in the field of civil justice may be – the erosion of national competences follows as a matter of course. It then argues that the EU points to setting up a common space in which inter alia fundamental rights and mutual recognition play a major role. Thus, a supranational system of private international law is gradually being forged with the aim to ensure the continuity of legal relationships duly created in a Member State. As a result, domestic systems of private international law are deemed to become complementary in character. Their conceptualization as a kind of inter-local rules, the application of which cannot raise obstacles to the continuity principle, appears logically conceivable.

Marc Fallon, Professor at the Catholic University of Louvain, **'La révision de loi italienne de droit international privé au regard du droit comparé et européen des conflits de lois'** (The Recast of the Italian Private International Law with Regard to Comparative and European Conflict of Laws; in French).

The comparison of the present state of Italian choice-of law rules with the overall revision process at stake abroad and with the new European Union policy in civil matters shows the need for a profound recast, in particular in family law matters. First, several European and international instruments have precedence over national rules, namely in the field of parental responsibility, divorce, maintenance obligations, succession, and shortly matrimonial property. Due to their universal application, these instruments leave no place to national choice-of law rules in the subject matters falling into their scope. Second, a recast of the Italian rules on private international law would give the opportunity to adapt some current rules to new values and objectives. For example, the Kegel's ladder giving priority to nationality as a connecting factor should be inverted, giving priority to habitual residence. To achieve such result, a small group of scholars representative of the main ·streams in Italian private international law should prepare a draft and persuade political stakeholders that updating national law promotes legal certainty and a positive image of society. The European context of the approximation of choice-of-law rules should not withhold them from starting such project, so long as the Union delays the adoption of a globalized private international law code. On the other hand, one must be aware of the changing nature of law in modern society, and accept that enacting new rules requires a continuous reappraisal process.

Hans van Loon, Former Secretary General of the Hague Conference on Private International Law, **'The Transnational Context: Impact of the Global Hague and Regional European Instruments'** (in English).

As a result of the growing impact of global and EU choice of law instruments, modern private international law statutes in Europe increasingly tend to have a "layered" structure, with norms derived from (1) global (Hague) and (2) regional (EU) instruments, completed by supplementary, or residual (3) domestic private international law rules. Law No 218/1995 already gives prominence to international conventions (Article 2), to which the new law should obviously add EU regulations. Consideration might be given to the inclusion by reference in the new law of three Hague Conventions not yet ratified by Italy (on the Recognition of the Validity of Marriages, Protection of Adults and Access to Justice). This would enhance certainty, predictability and respect for private rights in cross-border situations. The new law should maintain the method of incorporation by reference to regional and global

instruments. Currently such references are few in number, but in the new law they are bound to expand considerably. This article discusses how the reference method could best be applied to, on the one hand, instruments on applicable law, and, on the other, instruments on jurisdiction, recognition and enforcement of decisions as well as administrative cooperation. As globalization and regional integration unfold, Italy will be facing many more foreign decisions and situations created abroad than foreseen in the 1995 Law. Articles 64 and following probably go a long way to respond to this challenge in respect of foreign decisions. In respect of foreign legal situations – not established or confirmed by a judicial or administrative decision – Article 13 of the Law No 218/1995 on renvoi may have been thought of a way of facilitating the task of the Italian authorities and of bringing international harmony. But, partly as a result of the growing weight of international and regional instruments which generally reject renvoi, this technique tends to become an anomaly in modern private international law codes. Instead, other ways of introducing the flexibility needed might be considered, such as Article 19 of the Belgian Code on Private International Law, or Article 9 Book 10 of the Dutch Civil Code.

The second section, on "**Personal Status**", features the following contributions:

Roberta Clerici, Professor at the University of Milan,**'Quale futuro per le norme della legge di riforma relative allo statuto personale?'**(Which Future for the Provisions on Personal Status of the Italian Law Reforming the Private International Law System?; in Italian).

Since its first year of publication, the Rivista has devoted ample space to the personal status of the individual (including the right to a name), family matters, maintenance obligations and successions. In fact, both the relevant international treaties and the Italian provisions, including of course those laid down in Law No 218 of 31 May 1995 reforming the Italian private international law system – which has introduced significant modifications especially in the aforementioned areas of the law – were examined and commented. However, the regulations of the European Union and the international conventions that entered into force after the adoption of the Italian law reforming private international law designate habitual residence as the principal connecting factor. One may therefore wonder whether nationality, which is the connecting factor laid down in most of the provisions in Law No 218/1995, should not be

replaced with that of habitual residence. An additional question stems from the "incorporation" in Law No 218/1995 of the 1961 Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (Article 42 of Law No 218/1995) and of the 1973 Hague Convention on maintenance obligations (Article 45 of Law No 218/1995), which have been replaced by the 1996 Hague Convention and the 2007 Protocol, respectively. With respect to the 1961 Hague Convention, a legislative proposal is currently being discussed, however it raises some questions concerning interpretation. The same proposal puts forth a general provision on the replacement of the "nationalized" Conventions with the new Conventions ratified by the European Union. However, quite surprisingly, the proposal does not mention the regulations of the European Union that have replaced other conventions that are referred to in Law No 218/1995.

Alegría Borrás, Professor Emeritus at the University of Barcelona,**'La necessità di applicare strumenti convenzionali e dell'Unione europea: l'ambito della persona, della famiglia e delle successioni. La situazione spagnola e quella italiana a confronto'** (The Need to Apply International and European Union Instruments: Persons, Family, and Successions. A Comparison between the Italian and Spanish Systems; in Italian).

This article examines the characteristics and evolution of the Spanish system of private international law in questions related to persons, family and successions taking into account the need to apply European Union instruments and international Conventions. The main points addressed in this article are related to the absence of a law of private international law and the fact that Spain has a non-unified legal system.

Luigi Fumagalli, Professor at the University of Milan**, 'Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni : spazi residui per la legge interna?'** (The Italian System of Private International and Procedural Law and Regulation (EU) No 650/2013 on Successions: Is There Any Room Left for the Italian Domestic Provisions?; in Italian).

Regulation No 650/2012 has a pervasive scope of application, as it governs, in an integrated manner, all traditional fields of private international law:

jurisdiction, governing law, recognition and enforcement of foreign judgments. As a result, the entry into force of the Regulation leaves little, if any, room for the application of domestic legislation, and chiefly of the provisions of Law No 218/1995, in the same areas. With respect to jurisdiction, in fact, an examination of the rules in the Regulation shows that they apply every time a dispute in a succession matter is brought before a court in a Member State: no room therefore remains for internal rules, which, as opposed to the situation occurring with respect to Regulation No 1215/2012, cannot ground the exercise of jurisdiction in the circumstances in which the Regulation does not apply: not even the Italian rule on lis pendens seems to apply to coordinate the exercise of Italian jurisdiction with the jurisdiction of non-Member State. The same happens with respect to the conflict-of law rules set by the Regulation, since they have a universal scope of application. The only remaining area in which internal rules may apply is therefore that concerning the recognition and enforcement of decisions rendered in non-Member States. The opportunity for a revision of internal rules is therefore mentioned.

Costanza Honorati, Professor at the University of Milan**–**Bicocca, **'Norme di applicazione necessaria e responsabilità parentale del padre non sposato'** (Overriding Mandatory Rules and Parental Responsibility of the Unwed Father; in Italian).

The recently enacted Italian Law on the Status Filiationis (Law No 219/2012 and subsequent Legislative Decree No 154/2013) inserts a new PIL rule stating that the principle of shared parental responsibility is mandatory in nature (Article 36-bis). While in the Italian legal system such principle is rooted in the principle of non discrimination among parents, the situation appears to be more controversial in other legal systems, especially in regards of the unmarried father. Several decisions of the ECtHR (from Balbotin to Sporer) have indeed declared the legitimacy of the different treatment for the unmarried father, as long as he has the possibility to claim such right before a judicial court. In the light of the same value underlying these different approach to parental responsibility – to be found in the aim to pursue the best interest of the child in each given case – the present paper questions the opportunity of the new Article 36-bis of the Italian PIL and reflects on the effects of the subsequent Italian ratification of the 1996 Hague Convention.

Carlo Rimini, Professor at the University of Milan**, 'La rifrazione del conflitto familiare attraverso il prisma del diritto internazionale privato europeo'** (The Refraction of Family Conflict through the Prism of the European Private International Law; in Italian).

> *The prism built up by the European Regulations relating to family law has the effect to refract the family conflict in several different aspects that are supposed to be dealt before different courts and with different laws. As a matter of facts, the rules concerning jurisdiction and applicable law do not have the aim to concentrate (or to try to concentrate) the whole conflict arising from the family's crisis in the hands of a single judge who applies a single law. This choice has large costs both for the parties who needs to have lawyers in each jurisdiction involved, and for the efficiency of the legal system. Moreover, it often leads to an irrational and unfair solution of the family conflict. This is especially evident dealing about the patrimonial effects of the family's breaking.*

Ilaria Viarengo, Professor at the University of Milan**, 'Sulla disciplina degli obblighi alimentari nella famiglia e dei rapporti patrimoniali tra coniugi'** (On the Regulation of Family Maintenance Obligations and Matrimonial Property; in Italian).

> *This article examines the provisions of the Italian Private International Law Act (Law 31 May 1995 No 218) on maintenance obligations and matrimonial property regimes. It analyses these provisions in the prospect of a possible reform of Law No 218/1995. With particular regard to maintenance obligations, currently regulated by a common harmonized system of conflicts of law rules, this article underlines how Article 43 of Law No 218/1995, which refers to the 1973 Hague Convention, appears to be no longer relevant. With respect to matrimonial property, a new EU regulation is forthcoming, which will replace the current Article 30 of Law No 218/1995. In this regard, this article examines the amendments deemed to be necessary in the Italian law in the view of the new Regulation, focusing in particular on the need to protect the interests of third parties.*

Franco Mosconi, Professor Emeritus at the University of Pavia, **'Qualche considerazione in tema di matrimonio'** (Some Remarks on Marriage; in Italian).

Assuming that no revolutionary change is foreseen in the approach of the Italian legal system regarding same sex marriages – also in light of the case law of the Corte Costituzionale and the European Court of Human Rights – this paper considers several issues bound to arise from foreign same sex marriages. The paper also criticizes the excessive competitive character of some States' legislation in favour of same sex marriages.

The third section, on "**Companies, contractual and non-contractual obligations**", features the following contributions:

Riccardo Luzzatto, Professor Emeritus at the University of Milan, **'Introduzione alla sessione: Società, obbligazioni contrattuali ed extracontrattuali'** (Opening Remarks: Companies, Contractual and Non-Contractual Obligations; in Italian).

The fiftieth anniversary of the Rivista provides an important opportunity to share some thoughts to the current status of the law in this complex sector of the conflict of laws, with particular regard to the prevailing situation in Italy. Actually, this anniversary prompts to consider the present status of the law in comparison with that existing at the time when the Rivista was first published, i.e. fifty years ago. From this point of view it is certainly appropriate to qualify the changes occurred in this period as a true conflict-of laws revolution, borrowing an expression frequently used with reference to the United States. The Italian revolution originates from two different factors: the adoption in 1995 of a new Act on private international law and the massive intervention of European Community law into this sector of the legal systems of the Member States. The problems faced by the lawmaker, the judge and any other interpreter are as a consequence rather complex. The national, domestic character of the rules of private international law has not been cancelled by the new powers conferred to the EU institutions by the Treaty of Amsterdam, thus obliging to carefully review and determine the relationship and reciprocal interferences of national and supranational sources in any given field where European common rules have been enacted. This is a necessary, but complex exercise that cannot be avoided, and can bring to very different results depending on the specific features of the legal institutions under consideration. Two interesting and significant examples are offered by the subject matters considered in this Session, i.e. the law of companies and other legal entities on

the one part, and the law of obligations, both contractual and non-contractual, on the other.

Ruggiero Cafari Panico, Professor at the University of Milan**, 'Società, obbligazioni contrattuali ed extracontrattuali. Osmosi fra i sistemi, questioni interpretative e prospettive di riforma della legge n. 218/1995'** (Companies, Contractual and Non-Contractual Obligations. Osmosis between Systems, Questions of Interpretation, and Prospect of a Recast of Law No 218/1995; in Italian).

This paper focuses on the need for reform of the Italian private international law rules in order to adapt them to the principles of the European internal market. The continuous development of judicial cooperation in civil matters having cross-border implications has progressively reduced the scope of application of national conflict of law rules and deeply influenced the domestic regulation of matters not yet harmonized. This process of osmosis is not free from difficulties. The application of the criteria indicated in European private international law regulations to cases not pertinent to the internal market may be questionable. Similar concepts, when used in different European instruments, may lead to different results in connection with the choice of applicable law and of appropriate jurisdiction. Achieving a parallel ius and forum, although desirable, especially in employment relationships, may thus be difficult. All this has to be taken into account in any reform of the Italian private international law rules, which should be consistent with the proper functioning of the internal market.

Cristina Campiglio, Professor at the University of Pavia, **'La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della *privacy*)'** (The Law Applicable to Non-Contractual Obligations (with Particular Regard to Violations of Privacy); in Italian).

Among the areas where EU private international law has curtailed the scope of application of the Italian Statute on Private International Law of 31 May 1995 No 218 is the area of non-contractual obligations (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, Rome II). However, while Article 63 of Law No 218/1995 on product liability has been repealed by Article 5 of the Rome II Regulation, Articles 58 and 59 of Law No 218/1995 – on non-

contractual obligations arising out of unilateral promise and under bills of exchange, cheques and promissory notes, respectively – are to be considered still in force, and Articles 60 and 61 of Law No 21811995 – on representation and ex lege obligation – preserve a limited scope of application. In this context, the fate of Article 62 of Law No 218/1995 on torts, which is also applicable to obligations arising out of violations of rights relating to personality, is rather dubious; while, indeed the Regulation expressly excludes these obligations from its scope, de iure condendo it may be envisaged that Article 62 of Law No 218/1995 be adapted to the EU principles and to the case law of the Court of Justice relating to (jurisdiction in case of) violations of rights relating to personality which have been carried out through the mass media, including online defamation.

Domenico Damascelli, Associate Professor at the University of Salento, **'Il trasferimento della sede sociale da e per l'estero con mutamento della legge applicabile'** (The Transfer of a Company's Seat Abroad and from Abroad with the Change of the Applicable Law; in Italian).

After having distinguished the case where the applicable law changes as a result of the transfer abroad of the company seat from that in which such change does not take place (either as a result of the shareholders' will or as a consequence of the conflict of law rules of the State of origin and/or the State of destination), this article analyzes this issue from the standpoint of EU Private International Law – considering, in particular, the case law of the Court of Justice – and it puts forth a series of suggestions to reform the Italian conflict of law and substantive law rules to make the cross-border mobility of Italian companies more efficient.

Paola Ivaldi, Professor at the University of Genoa, **'Illeciti marittimi e diritto internazionale privato: per una norma *ad hoc* nella legge n. 218/1995?'** (Maritime Torts and Private International Law: Does Law No 218/95 Need *Ad Hoc* Provisions?; in Italian).

Due to their intrinsically international character and very frequent cross-border implications, maritime torts typically involve private international law matters. Therefore, with regard to cases and issues falling outside the scope of application of the relevant uniform law Conventions, the problem arises of

determining the applicable law according to the conflict-of law rules – which are mostly based on territorial connecting/actors – laid down, at EU level, in the Rome II Regulation (Regulation (EC) No 864/2007). The implementation of such rules, however, is sometimes critical, in particular in presence of "external torts" (i.e., torts which produce damage either on several ships or outside a ship) occurring on the High Seas; with respect to these cases, some national legislations (e.g., the Dutch civil code) have introduced ad hoc rules providing/or the application of the lex fori. In the light of the above, the present contribution assesses the opportunity to adopt the same solution on the occasion of the envisaged revision of the 1995 Italian legislation on private international law (Law No 218/1995), concluding, however, that such integration ab externo of the Regulation is not ultimately required.

Peter Kindler, Professor at the University of Munich, **'L'amministrazione centrale come criterio di collegamento del diritto internazionale privato delle società'** (The Place of Administration as Connecting Factor in Conflict of Laws in Company Matters; in Italian).

This article reviews and analyses the case law of the Court of Justice of the European Union since the Cadbury Schweppes case (2006) and the principles laid down in secondary European legislation with specific reference to Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings. The author proposes to use the Centre of main interests (COMI) of the company as a connecting factor not only in the field of European insolvency law (Articles 3 and 7 of Regulation No 2015/848), but also in a future Regulation on the law applicable to companies and other bodies. Since the COMI is identical to the company's central administration (recital 30 of Regulation No 2015/848), this term should be used by such a Regulation. The Author rejects the incorporation theory (Griindungstheorie) and favours the real seat theory (Sitztheorie), instead. In his view, thus, the substantive corporate law of the country applies where most of the company's creditors and the bulk of the company's assets are located. At the same time, regulatory arbitrage opportunities are restricted.

Finally, the fourth section, on "**International Civil Procedure Law**", features the following contributions:

Sergio M. Carbone, Professor Emeritus at the University of Genoa, **'Introduzione**

alla sessione: il diritto processuale civile internazionale' (Opening Remarks: International Civil Procedural Law; in Italian).

> *This article has been conceived and prepared with a view to providing an overview of the specific features which have characterized the first fifty years of our Rivista: such features were namely devoted to fostering the development of the Italian system on the resolution of cross-border disputes and the recognition of foreign judgments so as to avoid possible differentiations in their treatment in respect of the corresponding national situation.*

Mario Dusi, Attorney at Law in Milan and Munich, **'La verifica della giurisdizione all'atto dell'emissione di decreto ingiuntivo: regolamenti comunitari, norme di diritto internazionale privato italiano e necessità di riforma del codice di procedura civile italiano?'** (The Assessment of Jurisdiction while Issuing a Payment Order: EC Regulations, Italian Private International Law Provisions, and the Need to Amend the Italian Civil Procedure Code?; in Italian).

> *With the entry into force of Legislative Decree No 231 of 9 October 2002, Italian companies can finally apply for an injunction order against their contractual partners in Europe, who are defaulting their payment obligations. Such provision however did not specify that the court before which the application is filed must assess the existence (or nonexistence) of the prerequisites related to its international jurisdiction, pursuant to various applicable regulations, including the Italian Private International Law No 218/1995, which is the object of this important conference dedicated to the fiftieth anniversary of the Rivista di diritto internazionale privato e processuale. Before starting an ordinary court proceeding in Italy against a foreign party, in particular a European party, all regulations establishing the Italian jurisdiction must be analyzed, starting from the application of EU Regulation No 44/2001, now replaced by EU Regulation No 1215/2012, continuing with Article 3 of the above mentioned Italian law. These two Regulations notoriously state in Article 26 (of EU Regulation No 44/2001) that "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation". Article 28 of EU Regulation No 1215/2012, currently applicable to these cases, states*

that the verification ex officio of the jurisdiction applies not only when the defendant decides not to appear in Court, but also to injunction proceedings, although this is not expressly mentioned in the provision. Therefore, in the event of non-appearance in court, or of injunction proceedings, as well as in some ordinary cases, the court must verify on its own initiative whether or not it has international jurisdiction and possibly declare ex officio its lack of jurisdiction; otherwise the injunction order will be declared invalid (see the Italian Supreme Court judgment No 10011/2001). According to the Italian Code of Civil Procedure, the application for an injunction order should expressly indicate the reason why such Court is considered to be competent (Article 637 Italian Code of Civil Procedure). If the Italian legislator wanted to prescribe more precisely all necessary requirements for the file of an application for an injunction order, it could refer to EU Regulation No 1896/2006, namely Articles 7 and 8, on the obligation of the court to "examine" all conditions, before issuing the injunction order. Basically, in order to promote the implementation of a United European Jurisdiction, we need to either establish a greater focus on judges while issuing injunction orders, or promulgate a clear internal rule, which imposes the above verifications on Italian judges.

Alberto Malatesta, Professor at the University Cattaneo-LIUC, **'L'Article 7 della legge n. 218/1995 dopo il regolamento Bruxelles I-*bis*: quale ruolo in futuro?'** (Article 7 of Law No 218/1995 after Regulation Brussels I-a: Which Future Role?; in Italian).

This Article deals with the residual scope of Article 7 of Law No 218/1995 on lis pendens after the adoption, in recent past years, of numerous EU acts. In fact, the national provisions of Member States have progressively reduced their importance especially after the entry into force of the Brussels I-a Regulation, whose Articles 33 and 34 provide for rules applicabile to proceedings pending before judges of third States. The Author first examines such new regime and its underliyng reasons, secondly its impact on Article 7 of Law No 218/1995, and finally discusses the option of a future revison of the same rule, in line with the content of the European rule.

Francesco Salerno, Professor at the University of Ferrara, **'L'incidenza del regolamento (UE) n. 1215/2012 sulle norme comuni in tema di**

giurisdizione e di efficacia delle sentenze straniere' (The Impact of Regulation (EU) No 1215/2012 on the Italian Provisions on Jurisdiction and Recognition and Enforcement of Foreign Judgments; in Italian).

This paper examines the impact of Regulation (EU) No 1215/2012 (Brussels I Recast) on the Italian rules governing international litigation, as embodied in the Statute of 1995 that reformed the Italian system of private international law. As regards jurisdiction, almost no consequences derive from the Regulation. Article 3(2) of the 1995 Statute does make a reference to uniform European provisions in this area (so as to extend their applicability beyond their intended scope) but it still refers, for this purpose, to the 1968 Brussels Convention. The Author contends that if a legislative reform of the Statute provided for a forum of necessity, this would ultimately give a suitable basis to the trend of Italian courts in favour of a broad interpretation of the heads of jurisdiction resulting from the said reference, no matter whether such broad interpretation departs from the usual interpretation of the corresponding heads of jurisdiction laid down in the Convention. By contrast, the Regulation has a mixed bearing on the domestic regime for the recognition and enforcement of judgments. On the one hand, differently from national rules, the European rules now allow foreign judgments to be enforced internally merely by operation of law. On the other hand, the Regulation, if compared with domestic rules, provides more broadly for the opportunity of scrutinising whether individual judgments are entitled to recognition or not.

Lidia Sandrini, Research Fellow at the University of Milan, **'L'Article 10 della legge n. 218/1995 nel contesto del sistema italiano di diritto internazionale privato e della cooperazione giudiziaria civile dell'Unione'** (Article 10 of Law No 218/1995 in the Framework of the Italian System of Private International Law and of the Judicial Cooperation in Civil Matters in the European Union; in Italian).

This article addresses Article 10 of Italian Law No 218 of 1995 on private international law. It is submitted that the provision governing jurisdiction with regard to the situation in which Italian judges lack jurisdiction on the merits represents a crucial mechanism in the application of the relevant rules on provisional and protective measures provided for by the EU regulations on jurisdiction and enforcement of judgments. Nevertheless, the practice reveals

some difficulties as to the interpretation of the specific connecting factor provided for by the Italian rule. The analysis of the jurisprudence makes it clear that this unsatisfactory situation is due to the drafting, which does not reflect the variety of the instruments in connection with which the rule has to be applied and to the number of modifications of the domestic procedural rules that have been enacted after its entrance into force. In light of that, this article aims to contribute to the debate on the need of a reform of the Italian system of private international law by suggesting the introduction of some more detailed solutions with regard both to the jurisdictional criteria and to the characterization of provisional measures. These suggestions are primarily intended to ensure the consistency of the solutions in the European judicial area, in light of the jurisprudence of the Court of Justice, but also to preserve the coherence of the Italian system of private international law.

Francesca C. Villata, Associate Professor at the University of Milan, **'Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell'Articolo 4 della legge n. 218/1995'** (On the Law Governing the Substantial Validity of Jurisdiction Clauses: Remarks with a View to a Recast of Article 4 of Law No 218/1995; in Italian).

This article tackles the question whether the wording of Article 4 of Law No 218 of 1995 and, even more, its critical exegesis are (to date) adequate (a) with respect to the transformed legislative context of the European Union (which refers to such domestic legislation when the court seised is Italian), and (b) even more, to meet the needs of practitioners. Furthermore, this article aims to assess whether the solution adopted under the Brussels I-bis Regulation and the 2005 Hague Convention on Choice of Court Agreements – which both identify the law that governs the substantive validity of the choice of court agreements in the law of the State allegedly designated (including its conflict-of-law provisions) – may (or should) prompt an overall recast of the Italian law or, rather, require a more detailed provision which shall coordinate with the provisions on lis pendens.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

TDM’s Latin America Special

Prepared by guest editors Dr. Ignacio Torterola and Quinn Smith, this special addresses the various challenges and changes at work in dispute resolution in Latin America. A second volume that continues many of the themes from different angles and perspectives is also nearing completion. Download a free Excerpt here

EDITORIAL

LATIN AMERICA

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* Los Dilemas De La Mediación. Efectivos Referentes Para Su Enseñanza En El Contexto Latinoamericano
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by R. Ampudia, International Litigation Counsel; M.I. Pradilla Picas, Jones Day

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Conference for Young PIL Scholars: "Politics and Private International Law (?)" – Call for Papers

The following announcement has been kindly provided by Dr. Susanne Lilian Gössl, LL.M., University of Bonn:

Call for Papers

On 6th and 7th April 2017, for the first time a young scholars' conference in the field of Private International Law (PIL) will be held at the University of Bonn.

The general topic will be

Politics and Private International Law (?)

We hereby invite interested junior researchers to send us their proposals for conference papers. We envisage presentations of half an hour each in German language with subsequent discussion on the respective subject. The presented papers will be published in a conference transcript by Mohr Siebeck.

Procedure

If we have stimulated your interest we are looking forward to your application to

nachwuchs-ipr(at)institut-familienrecht.de

until **30 June 2016, 12 a.m. CET** (deadline!).

The application shall include an exposé of maximum 1,000 words in German language and shall be composed anonymously that is without any reference to the authorship. The author including his/her position or other affiliation shall be identifiable from a separate file.

Selection decisions will be communicated in October 2016.

For organisational reasons, a preliminary version of the paper (to measure 35,000 to 50,000 characters including footnotes) and the core statements must be received by not later than 31 March 2017.

Topic:

For our purposes, we explicitly understand PIL in a broader sense: international jurisdiction and procedure, the law of the international settlement of disputes (including ADR) as well as uniform law and comparative law and the comparison of legal cultures are included insofar as they allude to cross-border questions.

Ever since Savigny, conflict of laws rules have traditionally been perceived as "unbiased" or "value-neutral" in Central Europe as they are solely supposed to coordinate the applicable substantive law. However, during the second half of the past century the opinion that conflict of law rules may also strengthen or prevent certain results of substantive law has become prevalent. In the U.S., such discussion led to a partial abolition of the "classical" PIL in favour of balancing the individual governmental interests as to the application of their respective substantive law provisions (so called *governmental interest analysis*). But other legal systems have also explicitly or indirectly restricted classical PIL in some areas in favour of governmental interests. Our conference is dedicated to the various possibilities and aspects of this interaction between PIL and politics as well as to the advantages and disadvantages of this interplay.

Possible topics or topic areas are:

<u>General questions:</u>

- "Politicisation" of PIL on the national, European and international level, or the political target of "value-free" PIL rules (?)
- "Politicisation" of comparative law (?)
- Convergence of PIL and Public International Law, especially the

protection of fundamental rights and human rights by means of PIL
- Uniform applicable law or harmonisation of PIL
- PIL in day-to-day application of law – theory and reality (?)
- General instruments of PIL to enforce political targets: overriding mandatory rules, public policy, *forum non conveniens*, extensive/narrow jurisdiction …
- Allocative functions of PIL and International Civil Procedure Law
- Users, stakeholders and their interests in cross-border questions: parties, attorneys, judges, notaries, experts etc.
- Protection by formal requirements or third parties' obligations to cooperate (e.g. notarial recording of the choice of law agreement)
- Parties' or courts' expenses due to the application of foreign law
- Regulatory competition, e.g. in order to establish a national venue of arbitration
- Forum shopping and locational advantages through low standards of protection (e.g. regarding data protection law, copyright law, family law or consumer protection law)
- Issues of competences as regards European PIL rules
- Extraterritorial application of national (private) law (*Kiobel, Bodo Community*)

Business Law:

- Financial crisis, e.g. resolution of globally operating banks
- Gender Quotas of in Corporate Law, e.g. application of German law on foreign companies or comparison between international regulatory models
- Protection of competition in case of worldwide groups operating, e.g. Google antitrust proceedings by FTC and EU Commission
- Law on co-determination within the European context, e.g. questions referred for a preliminary ruling by KG (Court of Appeal in Berlin) and LG Frankfurt
- Worker protection

Family and Inheritance Law:

- Protection of minors, i.e. regarding repatriation of children or international adoptions: successful legal unification (?)

- Cross-border protection of adults
- Application of religious law and judgements of religious courts

Consumer protection:

- Consumer protection and market freedom (i.a. in the Internet)
- Special jurisdiction, party autonomy and the enforcement of minimum standards in substantive law

Internet and new media:

- Territoriality of rights to ubiquitous goods (e.g. copyright law and data protection rules) and cross-border trade
- Copyright Law and "Fair Use"
- Data protection/privacy and freedom of information

Other recent focal points:

- Migration and refugee crisis, e.g. the determination of the law of the person between integration or preservation of cultural identity
- Environmental protection, e.g. enforcement of titles from class actions or international litigation regarding mass damages
- Protection of cultural property – issues regarding ownership and repatriation

For more information, please visit https://www.jura.uni-bonn.de/en/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/pil-conference/.

If you have any further questions, please contact Dr. Susanne Gössl, LL.M. (sgoessl(at)uni-bonn.de).

We are looking forward to thought-provoking and stimulating discussions!

Yours faithfully,

Susanne Gössl
Rafael Harnos
Leonhard Hübner
Malte Kramme
Tobias Lutzi

Michael Müller
Caroline Rupp
Johannes Ungerer

OGEL and TDM Special Issue: Focus on Renewable Energy Disputes

With renewable energy disputes seemingly everywhere these days, OGEL and TDM have published a special joint issue focusing on these disputes at the level of international, European and national law. Below is the table of contents:

Treaty Protection from the Perspective of Shareholders and Lenders, by A. Reuter, GÖRG Partnerschaft von Rechtsanwälten

Renewable Energy Disputes Before International Economic Tribunals: A Case for Institutional 'Greening'?, by A. Kent, University of East Anglia

Renewable Energy Claims under the Energy Charter Treaty: An Overview, by J.M. Tirado, Winston & Strawn LLP

Non-Pecuniary Remedies Under the Energy Charter Treaty, by A. De Luca, Università Commerciale Luigi Bocconi

Joined Cases C-204/12 to C-208/12, Essent Belgium, by H. Bjørnebye, University of Oslo, Faculty of Law

Ålands Vindkraft AB v Energimyndigheten – The Free Movement Law Perspective, by S.L. Penttinen, UEF Law School, University of Eastern Finland

Recent Renewables Litigation in the UK: Some Interesting Cases, by A. Johnston, Faculty of Law, University College (Oxford)

The Rise and Fall of the Italian Scheme of Support for Renewable Energy From Photovoltaic Plants, by Z. Brocka Balbi

The Italian Photovoltaic sector in two practical cases: how to create an unfavorable investment climate in Renewables, by S.F. Massari, Università degli Studi di Bologna

Renewable Energy and Arbitration in Brazil: Some Topics, by E. Silva da Silva, CCRD-CAM / Brazil-Canada Chamber of Commerce, and N. Sosa Rebelo, Norte Rebelo Law Firm

Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom, by A. De Luca, Università Commerciale Luigi Bocconi

Excerpts of these articles are available here and here

Dutch draft bill on collective action for compensation – a note on extraterritorial application

As many readers will know, the Dutch collective settlement scheme – laid down in the Dutch collective settlement act (*Wet collective afhandeling massaschade*, WCAM) – has attracted a lot of international attention in recent years as a result of several global settlements, including those in the *Shell* and *Converium* securities cases. Once the Amsterdam Court of Appeal (that has exclusive competence in these cases) declares the settlement binding, it binds all interested parties, except those beneficiaries that have exercised the right to opt-out. When the WCAM was enacted almost ten years ago, the Dutch legislature deliberately choose not to include a collective action for the compensation of damages to avoid some of the problematic issues associated with US class actions and settlements.

However, following a Parliamentary motion, this summer the Dutch legislature published a draft proposal for public consultation (meanwhile closed, public responses available here) to extend the existing collective action to obtain injunctive relief to compensation for damages. As the brief English version of the consultation paper states, the draft bill aims to:

> *"enhance the efficient and effective redress of mass damages claims and to strike a balance between a better access to justice in a mass damages claim and the protection of the justified interests of persons held liable. It contains a five-step procedure for a collective damages action before the Dutch district court. Legal entities which fulfill certain specific requirements (expertise regarding the claim, adequate representation, safeguarding of the interests of the persons on whose behalf the action is brought) can start a collective damages action on behalf of a group of persons. The group of persons on whose behalf the entity brings the action must be of a size justifying the use of the collective damages action. Those persons must not have other efficient and effective means to get redress. The entity must have tried to obtain redress from the person held*

liable amicably."

A point of particular interest is a provision regarding the extraterritorial application of the proposed act. The Amsterdam Court of Appeal has been criticized by both Dutch and other scholars for adopting a wide extraterritorial jurisdiction in the WCAM procedure, on the basis of the Brussels Regulation, the Lugano Convention and domestic international jurisdiction rules. The application of the European jurisdiction rules is challenging in view of the particular procedural design of the WCAM scheme (a request to declare a settlement binding between a responsible party and representative organisations/foundations on behalf of interested parties). This draft bill does not introduce separate international jurisdiction rules, but proposes a 'scope rule' to ensure that the case is sufficiently connected to the Netherlands. The draft explanatory memorandum (in Dutch) states that a choice of forum of two foreign parties in relation to an event occurring outside the Netherlands will not suffice to seize the Dutch court for a collective compensatory action, even if parties have made a choice of law for Dutch law (yes, we see similarities to the US Supreme Court case *Morrison v. National Australia Bank*). It is required that either the party addressed has its domicile or habitual residence in the Netherlands (a), or that the majority of the interested parties have their habitual residence in the Netherlands (b), or that the event(s) on which the claim is based occurred in the Netherlands. Needless to say that these rules leave the application of the jurisdiction rules of Brussels and Lugano unimpeded. It is clear that the proposed provision limits the possibility for foreign parties to seek collective compensatory relief in the Netherlands. The risk of the Netherlands becoming a 'magnet jurisdiction' for collective redress as put forward by some commentators seems therefor absent.

See for two recent English publications on the Dutch collective settlements act, published in the *Global Business & Development Law Journal* 2014 (volume 27, issue 2) devoted to Transnational Securities and Regulatory Litigation in the Aftermath of Morrison v. Australia National Bank: Bart Krans (University of Groningen), *The Dutch Act on Collective Settlement of Mass Damages,* and Xandra Kramer (Erasmus University Rotterdam), *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries.*