# Buxbaum on "Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy"

Professor Hannah L. Buxbaum of Indiana University Bloomington Maurer School of Law hast just released an article adressing the treatment of geographic scope restrictions in state law in the current draft of the Restatement (Third) of Conflicts of Law.

The article begins by analyzing the role of the presumption against extraterritoriality in supplying implied restrictions on the scope of law. It considers the role of the presumption in both international and interstate conflicts of laws, and argues that the Restatement (Third) should differentiate clearly between those two contexts. It then turns to the question whether geographic scope restrictions should properly be considered part of a state's internal law. The paper analyzes that question through the lens of a common problem: a contract dispute involving a transaction or event that falls outside the scope of the law chosen by the parties to govern their agreement. On the basis of that analysis, it concludes that forthcoming sections will need to address the implications of the draft's categorical treatment of legislative scope.

The Indiana Legal Studies Research Paper No. 372 is available on SSRN and will be published in the Duke Journal of Comparative & International Law, Vol. 27, 2017.

# Pay Day – The German Federal Labour Court Gives its Final Ruling on Foreign Mandatory Rules in the Nikiforidis Case

On February 25, 2015, the German Federal Labour Court had referred questions relating to the interpretation of Art. 9 Rome I to the CJEU (see here). In the context of a wage claim made by a Greek national who is employed by the Hellenic Republic at a Greek primary school in Germany, the German Federal Labour Court faced the problem whether to apply the Greek Saving Laws No 3833/2010 and 3845/2010 as overriding mandatory provisions. The claimant, Mr. Nikiforidis, had argued that, as a teacher who is employed in Germany under a contract governed by German law, he did not have to accept the wage cuts imposed on his Greek colleagues working in the Hellenic Republic. For a closer analysis, see the earlier post by Lisa Günther here.

In its decision of October 18, 2016 – C-135/15 (available here), the CJEU held (at para 50) that Article 9 of the Rome I Regulation must be interpreted "as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed. Consequently, since, according to the referring court, Mr. Nikiforidis's employment contract has been performed in Germany, and the referring court is German, the latter cannot in this instance apply, directly or indirectly, the Greek overriding mandatory provisions which it sets out in the request for a preliminary ruling ". According to the CJEU, the duty of sincere cooperation laid down in Article 4(3) TEU does not modify this restrictive approach. The Court went on, however, to confirm the practice established by German courts of taking foreign mandatory rules into account as a matter of fact (at para 52): "On the other hand, Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the

regulation." Finally, the CJEU reached the conclusion (at para. 53) that "[a]ccordingly, the referring court has the task of ascertaining whether Laws No 3833/2010 and No 3845/2010 are capable of being taken into account when assessing the facts of the case which are relevant in the light of the substantive law applicable to the employment contract at issue in the main proceedings." For a critical evaluation of this decision, see the comment by Geert van Calster here.

On April 26, 2017, the Federal Labour Court delivered its final decision in this case (5 AZR 962/13; the German press release is available here). Although the CJEU has, as a general principle, allowed German courts to take foreign mandatory laws into account as a matter of fact, the Federal Labour Court respectfully declines to follow this path in the particular case because substantive German labour law does not provide for a suitable point of entry for the Greek saving laws. Under German labour law, an employee is – unless specifically agreed between the parties – not obliged to accept permanent wage cuts merely because his employer is in financial difficulties. Seen in this light, the preliminary reference of February 2015 has, at least partially, a certain hypothetical flavour to it – nevertheless, the methodological clarifications made by the CJEU will be helpful in future cases.

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# U.S. Supreme Court: The Hague Service Convention Does Not Prohibit Service of Process By Mail

The 1965 Hague Convention on Service of Process is one of the cornerstone treaties for international litigation. It provides a simple and effective process to provide due notice of a proceeding in one signatory state to a party in another, via a designated Central Authority in each signatory state. Nevertheless, one provision has vexed U.S. courts for decades. Article 10 provides that,

notwithstanding the Central Authority procedures, and "[p]rovided the State of destination does not object, the present Convention shall not interfere with. . . the freedom to send judicial documents, by postal channels, directly to persons abroad." By virtue of the fact that the provision says "send" and not the magic word "serve," U.S. Courts have long disagreed over whether the Convention's procedures preclude international service of process by mail.

Today, the U.S. Supreme Court settled the question, and held that the Hague Service Convention does not prohibit service of process by mail. This permissive reading serves to increase the practical utility of the Convention around the world.

The opinion is available here, and it is a fairly straightforward exercise in treaty interpretation by Justice Alito. He starts with the "treaty's text and the context in which its words are used," as well as the overall "structure of the Convention" to divine the meaning of Article 10. To buttress his permissive interpretation, he then discusses "three extratextual sources [that] are especially helpful in ascertaining Article 10(a)'s meaning": the Convention's drafting history, the interpretation of the U.S. Executive Branch, and that of other signatories to the Convention.

As a practical matter, though, this decision doesn't necessarily open the mailboxes of the world to liberal service of process. Rather, service by mail is still only permissible if the receiving state has not objected to service by mail (some do by way of reservations) and if such service is authorized under otherwise-applicable law. In this case, because the Court of Appeals concluded that the Convention prohibited service by mail, it did not consider whether Texas law authorizes the methods of service. That question was sent back to the lower courts to consider on remand.

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# TDM Call for Papers: Special Issue

# on Judicial Measures and Investment Treaty Law

Investment treaty claims arising out of judicial conduct—whether based on annulment of a contract for corruption or other irregularity or a fundamental jurisprudential shift—have been on the rise. To a foreign investor affected by such judicial measures, it is not always clear, however, what judicial measures can be subject to a claim under investment treaty law; which theory of liability is appropriate for a state's liability arising out of judiciary's conduct (or omissions); and which policy issues these different theories of liability raise.
This TDM special, thus, will be a unique, timely, and significant contribution to the current debate on investment treaty claims arising out of judicial measures. The special will explore the legal dimensions of judicial measures and potential theories for a state's liability under investment treaty law, as well as the appropriate remedy for illegal judicial measures.

This special issue will be edited by Rajat Rana (Dechert LLP) and Nicole Silver (Winston & Strawn LLP). The call for papers can also be found on the TDM website here

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# American Association of Law Schools Section on Conflict of Laws Call for Papers

**AALS Section on Conflict of Laws Call for Papers – 2018 AALS Annual Meeting**

The AALS Section on Conflict of Laws invites papers for its program entitled "Crossing Borders: Mapping the Future of Conflict of Laws Scholarship" at the AALS Annual Meeting, January 3-6, 2018, in San Diego.

**TOPIC DESCRIPTION:** Now more than ever, the challenges created by conflicting laws are figuring prominently in multiple areas of legal scholarship. In subjects as diverse as state and federal regulation, technology and intellectual property, and commercial arbitration, scholars using a variety of methodological approaches are finding innovative ways to study conflict of laws problems. This panel discussion will explore these emerging trends in conflicts scholarship, and their implications for future work in the field. The Section Executive Committee welcomes papers that are theoretical, doctrinal, policy-oriented, or empirical.

**ELIGIBILITY:** All full-time faculty members of AALS member and fee-paid law schools are eligible to submit papers. Please note that presenters will be responsible for paying their registration fee and hotel and travel expenses.

**SUBMISSION PROCEDURE:** All submissions must be e-mailed, in Microsoft Word format, to Section Chair Jamelle Sharpe's administrative assistant Ms. Angela Martin (aymartin@illinois.edu). The title of the e-mail submission should read: "Submission – 2018 AALS Section on Conflict of Laws." Please do not e-mail your submission directly to the Section Chair, or to any other member of the Section Executive Committee.

The Section Executive Committee will select up to five papers for presentation at the program. There is no formal requirement as to the form or length of submissions. However, the Committee will give priority to more complete drafts as compared to abstracts. The Committee will only review anonymous submissions. Accordingly, please redact your name, institution, and other identifying information from the submission itself; we will track your submission via the e-mail to which you attached it.

**DEADLINES:** Submissions must be e-mailed to Ms. Angela Martin no later than **6:00 p.m. EST on Friday, August 18, 2017**. Authors of selected submissions will be notified no later than September 22, 2017. Complete drafts of the selected papers are due no later than December 8, 2017.

**QUESTIONS:** If you have any questions, please contact the Section Chair, Jamelle Sharpe, at jcsharpe@illinois.edu.

# Book: International sale of goods – A Private International Law Comparative and Prospective analysis of Sino-European Relations

*International sale of goods – A Private International Law Comparative and Prospective analysis of Sino-European Relations*, Niicolas Nord, Gustavo Cerqueira (Eds.), Pref. Cl. Witz, International Sale of Goods, China-EU Law Series 5, Springer, 2017, 183 pp.

This book provides an in-depth study of Private International Law reasoning in the field of international sale of goods contracts. It connects the dots between European and Chinese law and offers an unprecedented transversal and comparative legal study on the matter. Its main purpose is to identify the consequences of European rules on Chinese companies and vice versa. The first part addresses the conflict of jurisdiction and conflict of law rules, while the second part discusses in detail the practical importance and the impact of arbitration, which is becoming more common thanks to its flexibility. The third part focuses on the Vienna Convention on Contracts for the International Sale of Goods and the Unidroit Principles of International Commercial Contracts and carefully analyses their use. The final part examines contracts involving consumers.

The chapters of this book reproduce the lectures given during the fifth symposium of the China-EU School of Law (CESL) — International Symposium Series, held on the 20th and the 21st of June 2016 at the China University of Political Science and Law, in Beijing, and jointly organised by the University of Strasbourg and the China-EU School of Law at the China University of Political Science and Law.

Prefaced by Professor Claude Witz (Saarland University) and foreworded by Mrs.

Cheng Minzhu (Supreme People's Court of PRC), this book is organized by the French Professors Nicolas Nord (University of Strasbourg) and Gustavo Cerqueira (University of Reims).

**Table of contents**

International Consumer Sales: International Jurisdiction and ADR in Europe and Chine *Markus Petsche*

The Law Applicable to the Consumer Contracts: Protection and Gaps in China and in Europe *Nicolas Nord*

*The Preface, Presentation and Foreword can be freely accessed here*

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# InDret, Extraordinary Issue (April 2017)

Dr. Nuria Bouza Vidal, Professor of Private International Law at University of Barcelona and Pompeu Fabra University, retired in 2015; currently she is a member of the Unidroit Governing Council. As a kind of tribute to a life devoted to Private International Law the Spanish legal e-review *InDret* (www.indret.com) has just published an extraordinary issue collecting the presentations made at a ceremony held in her honor entitled "Internal, European and International Public Policy".

The issue contains the following articles:

- **José Carlos FERNÁNDEZ ROZAS, "The Public Policy of Arbitrator in the International Commercial Arbitration" (**"El orden público del árbitro en el arbitraje comercial internacional", pp. 5-69).

English abstract : Party autonomy in international commercial arbitration is the most compelling reason for the contracting parties to enter into arbitration agreement, rather than opting for litigation. However, arbitration functionalities may be hindered by several factors, one of which is arbitrability and public policy. The concept of public policy exists in almost all legal systems. Yet, it is one of the most elusive concepts in law given the contradictory case law and convoluted literature. The scope of public order is more than a mere tool of judicial review,

upon completion of the proceedings before the arbitrators. It is manifested throughout the arbitration process which influence the determination of competence of arbitrators, in the substantiation of the arbitration proceedings and in determining the law applicable to the arbitration agreement, leading to a sort of "public order of the arbitrator". Consequently, the appreciation of public policy does not relate exclusively to the judges. The arbitrators are as competent as the judges to inquire about the content of the underlying public policy of a particular law, regulation or in an arbitration practice.

- **Núria BOUZA VIDAL, "The Safeguard of Public policy in International contracts: Private International Law approach and its adjustment in European law" ("La salvaguarda del orden público en los contratos internacionales: enfoque de derecho internacional privado y su adaptación en el derecho europeo",** p. 70-101).

English abstract: This study analyses the ways to safeguard public policy in international contracts with the purpose to analyze and evaluate its meaning and function in the Private International Law of the Member States of European Union and in the substantive law of the European Union. In the first place, the different tools of Private international law aimed at safeguarding internal and international public policy of states are examined. In second place, the tools of Private international law to safeguard public policy must conform to the primary and secondary legislation of the European Union. These tools cannot restrict the freedom of movements in the internal European Market except for the reasons justified on the ground of public policy or overriding requirements of the public interest. Special attention should be paid to these notions because its meaning are not the same in European Law and in Private International Law. Also, some harmonization European Directives contains provisions about their geographic scope. Often these provisions are improperly considered overriding mandatory provisions.

- **Juan José ÁLVAREZ RUBIO, "Liability for damage to the marine environment: channels of international procedural action**" (**"Responsabilidad por daños al medio marino: cauces de actuación procesal internacional",** p. 102-138).

English abstract: This article analyzes the international procedural dimension linked to disputes arising from marine casualties for Oil spillage, and analyzes the

interaction between the various regulatory blocks in the presence, and in particular the conventional dimension over domestic legislation and the institutional, from the European legislator. The criminal legal remedy becomes ineffective for the analysis of the complexity inherent in the realization of civil liability and its subjective and quantitative scope, and the international conventions in force establish a system of limitation of liability that is difficult to justify and sustainable today.

- **Estelle GALLANT, "International prenuptial agreements and anticipation of financial consequences of a divorce: which public policy?" (**"Contrats nuptiaux internationaux et anticipation des conséquences financières du divorce : ¿quel ordre public?", p. 139-164).

English abstract: In some jurisdictions the law allows spouses not only to regulate their matrimonial property regime by agreement, but also to anticipate the financial consequences of their divorce, either by fixing the amount that such spouses may be allowed to claim to each other, or by ruling out any possibility of claiming any financial compensation. The receipt of a prenuptial agreement governed by a foreign law in a less lenient legal system raises the question of the role of international public policy as far as party autonomy is concerned, especially in a context where Maintenance Regulation and the Hague Protocol seek to balance the parties' forecast with a form of maintenance justice.

- **Santiago ÁLVAREZ GONZÁLEZ, "Surrogacy and Public Policy (ordre public)"** ("Gestación por sustitución y orden público", pp. 165-200).

English abstract: This paper deals with the role of public policy (ordre public) in light of international surrogacy cases. The author analyzes several judgments held by the supreme courts of Germany, Spain, France, Italy and Switzerland. This analysis shows that, even when faced by a series of common elements, the domestic ordre public remains different in each country. Equivalent situations receive different answers by law. This outcome is due to an also different idea about the ordre public scope, to a different view on the paramount interest of children, to a different understanding of the ECHR's jurisprudence and, last but not least, to the different possibilities of reconstruction of the family ties that each national law offers. The author concludes that this ordre public exception, linked so far to each national law, will no longer have a preeminent place on the

international surrogacy issues, among other reasons, because it is not possible to achieve a satisfactory solution to the wide range of problems around surrogacy from the point of view of a sole national law.

- **Ana QUIÑONES ESCÁMEZ, "Surrogacy arrangements do not establish parenthood but a public authority intervention in accordance to law (Recognition method for foreign public acts and Conflict of laws for evidence and private acts)"** ("El contrato de gestación por sustitución no determina la filiación sino la intervención de una autoridad pública conforme a ley (Método del reconocimiento para los actos públicos extranjeros y método conflictual para los hechos y los actos jurídicos privados)", pp. 201-251).

English abstract : The present article focuses on Private International Law issues raised by international surrogacy arrangements. I will examine the resolution methods offered by Private International Law: mandatory rules, conflict of laws and recognition of decisions and legal situations. Attention will be focused on the possibilities offered by the recognition method regarding a parenthood link between a child and the commissioning parents already established by a foreign public authority. Based on the principle that a child's parenthood cannot be subject to private autonomy, in cases where we are only faced with facts (reproductive practice) and private acts (surrogacy arrangements) the child's parenthood will not be established yet (conflict of Laws method), in order to serve her best interest. Giving some examples, I will show that solutions offered to international surrogacy arrangements in the USA or the EU are not so different, and that the surrogacy arrangement is not treated as a current arrangement in any other country. Finally, I will make some proposals at both domestic and international levels which, by means of respecting legislative diversity, foresee international limits when citizens from other countries access to this practice abroad. This solution aims at avoiding "limping situations" and guaranteeing that children conceived through surrogacy will not be delivered to unknown foreign citizens. Last but not least, I advocate for controlling relocation strategies of legal and procreative industry at international level, whose clients are recruited at their respective markets.

- **Esther FARNÓS AMORÓS, "Public policy and donor anonymity" (**"¿Deben los donantes de gametos permanecer en el anonimato?", pp. 252-273).

English abstract: This article highlights the tension between the anonymity of the donor and the donor conceived individuals' right to know one's origins. The study of legal systems that recognize this right spurs us to further examine the hypotheses, quite widespread today, which consider outdated traditional arguments for anonymity. In this regard, the article also shows the different treatment granted to adopted children and donor conceived children by legal systems such as the Spanish one. Beyond the possible conflicting rights of children, donors and parents, arguments provided by anonymity supporters, such as the moral damage resulting from disclosure or the possible link between disclosure and a decrease in the number of donors, should be also taken into account. However, these arguments require absolute empirical evidence, which is not currently conclusive. Last but not least, disclosure of the donor's identity is consistent with the ever-growing trend to dissociate biological, social and legal spheres of parentage.

- **Mònica VINAIXA MIQUEL, "The party autonomy in the new EU Regulations on Matrimonial Property Regimes (2016/1103) and Property consequences of Registered Partnesrships (2016/1104) (**"La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)", pp. 274-314).

English abstract: On June 24, 2016, with the aim of facilitating the citizens and international couples' life, in particular, in cross-border situations to which they may be exposed, the Council adopted by way of the enhanced cooperation, the Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2016/1103 Regulation) and the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships (2016/1104 Regulation). With their approval an important gap in the current EU Private International Law on Family matters have been covered. Both of them are Private International Law instruments through which EU seeks to establish a clear and uniform legal framework on the subject. The new Regulations do not affect the substantive law of the Member States on Matrimonial Property Regimes and Property consequences of Registered Partnerships. The party autonomy has enormous advantages in the field of applicable law, unlike the subsidiary connecting factors applicable in the absence of choice of law by the parties,

particularly in procedures about the liquidation of matrimonial/registered partnership property regime as a result of its breakdown or because of the death of one of the partners. As we will see, choice of law is the best connecting factor for the coordination of the different EU Regulations that can be applied in the same procedure, for example, the 1259/2010 Regulation on divorce and legal separation, the 650/2012 Regulation on successions and the 2016/1103 or the 2016/1104 Regulations recently adopted. If the parties choose one law as applicable to the different claim petitions, the competent court will have to apply only one law. The problem is that different Regulations do not contain uniform rules on choice of law. However, this result it is more difficult to be achieved through the objective connecting factors of the different UE Regulations as they are fixed in different periods. While the 1259/2010 and 650/2012 Regulations fix the connecting factors at the end of the couple´s life, the new Regulations fixes them at its beginning (immutability rule). The aim of this contribution is party autonomy, however it is also taken into account the influence of the overriding mandatory provisions (such as certain rules of the primary matrimonial regime) which are applicable irrespective of the law otherwise applicable to the matrimonial or registered partnership property regime under the Regulations, the protection of third party rights as well as the role of the public policy in this field, which particularly operates when the applicable law is that of a third state.

- **Albert FONT I SEGURA, "The delimitation of the public policy reservation and evasion of law in Succession Regulation (EU) 650/2012"** ("La delimitación de la excepción de orden público y del fraude de ley en el Reglamento (UE) 650/2012 en materia sucesoria", pp. 314-365).

English abstract: The outstanding differences among the Member States on succession matters determine the intended coincidence between forum and ius in Regulation 650/2012. However, the combination of the rules of competition and the conflict rules provided for in the European instrument can sometimes lead to the application of foreign law. Under these circumstances the application of public policy reservation or the evasion of law can be taken which results in the application of lex fori, with the main purpose of ensuring the protection of public order. This contribution, above the limits and shortcomings of Regulation 650/2012, highlights the effective restrictions and potential constraints that can be or may be submitted to national jurisdictions. The author suggests mechanisms

for the EUCJ to provide guidelines for interpretation and articulation between the two figures.

- **Jonathan FITCHEN, "Public Policy in Succession Authentic Instruments: Articles 59 and 60 of the European Succession Regulation"**, pp. 366-396.

The abstract reads: This chapter indicates the scope for difficulties in establishing the meaning of the public policy exceptions provided by Article 59(1) and Article 60(3) of the European Succession Regulation. Though EU jurisprudence from other EU Regulations concerning public policy exceptions for judgments offers some guidance, the lack of jurisprudence concerning the public policy of authentic instruments, diversity among national succession laws and the novelty of Article 59's obligation of 'acceptance' may pose problems for authentic instruments in the Succession Regulation. The high probability of the Succession Regulation being operated by non-contentious probate practitioners, rather than by the courts more usually empowered by such European Regulations, is also suggested to potentially add to these difficulties. For those and other reasons it is suggested that cases involving the public policy exceptions should be capable of diversion to domestic or European courts for the determination of the public policy points at issue.

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# Just published: RabelsZ Vol. 81 No. 2 (2017)

The second issue of Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) Vol. 81 (2017) has just been published:

**Wolf-Georg Ringe,** *Das Beschlussmängelrecht in Großbritannien* (Contesting Shareholder Resolutions in Great Britain)

> *The contestability of shareholder resolutions is a perennial problem in corporate law – effective minority protection needs to be carefully balanced*

*with the risk of abuse. An analysis of the approach of English law may inform the policy debate in other legal systems. English law has effectively eliminated the risk of abuse with a number of simple and pragmatic steps.*

*In a nutshell, errors in formal resolutions can hardly ever be challenged, unless the claimant can demonstrate an underlying intentional disadvantage. But even substantive errors in resolutions are rarely conducive to a successful challenge. Instead, English law has developed a number of alternative mechanisms – often beyond our traditional understanding of law – which address the problem.*

*Minority shareholders of a UK company have a variety of ways to make their concerns heard. They may seek a declaratory judgment confirming the invalidity of the shareholders' resolution due to procedural irregularities. Further, they may rely on the traditional shareholder lawsuit (derivative action) or the remedy for unfair prejudice. For each of these remedies, English law succeeds in limiting actionable situations to those where the claimant has been substantially wronged, while also filtering out those situations where a challenge would be arbitrary or vexatious. The more developed capital market in the UK and informal strategic shareholder influence are additional considerations that allow for greater flexibility in the British context.*

**Holger Fleischer & Peter Agstner,** *Grundlagen, Entwicklungslinien, Strukturmerkmale* (Civil and Commercial Partnerships in Italy and Germany – Foundations, Developments, Distinctive Features)

*This paper explores the trajectories of partnership law in Italy and Germany, firstly tracing its origins back to both the classical societas in Roman law and the late medieval commenda and compagnia in Northern Italy. It moves on to analyse the key characteristics of partnerships on both sides of the Alps, beginning with their legal nature and the organisation of partnership property either as joint property or as a community of collected hands (Gesamthand). Further topics include the liability of partners vis-à-vis third parties and the principles of management and the legal representation of partnerships in both jurisdictions.*

**Frederick Rieländer**, *Ein einheitliches „Unfallstatut" für Passagiergemeinschaften? – Methoden der Statutenkonzentration im*

*Internationalen Personenbeförderungsrecht* (A Uniform "Accident Act" for Passenger Carriers? – Statutory Concentration Methods for Passenger Carriage in International Law)

*Despite extensive harmonisation of the substantive law relating to personal injuries arising out of traffic accidents during passenger carriage by air, rail, road and sea, the various legal systems in the EU still present striking differences with respect to the recoverability of non-economic damage for "secondary victims" in the case of death or injury to the "primary victim". In terms of mass casualty incidents, the relevant EU conflict of laws rules provide for a useful "concentration effect" by designating a manageable quantity of national legal systems governing the carrier's (extra-)contractual liability against fatally injured passengers and their surviving dependants. Nonetheless, since the claims of passengers and their survivors may be governed by different national legal systems, the amount of damages awarded may vary according to the applicable substantive law. At first glance, applying a single body of law governing the claims of all fatally injured passengers and their survivors against the carrier facilitates claims management and promotes equality between the victims who have shared the same misfortune. This article elaborates on the preconditions for an adaptation of EU conflict of laws rules as a possible means of ensuring the application of a single regime of (extra-)contractual liability for mass casualty incidents. In essence, it could be justified to develop a new concept of adaptation in the EU conflict of laws sphere if applying different national legal systems to a mass casualty incident infringes the principle of equal treatment under EU law. A closer analysis of the respective conflict of laws rules reveals that applying the law of habitual residence of the individual passenger is justified as a legitimate aim of consumer protection. Despite its harmonising effects, the legal concept of adaptation cannot guarantee the application of a sole body of law without exception, as the example of aircraft collisions demonstrates. On the other hand, adopting an artificial conflict of laws rule designating the applicable law for personal injuries arising out of passenger carriage necessarily contravenes the principle of identifying the closest connection and causes unequal treatment between individual victims of comparable tragic scenarios.*

**Corjo Jansen**, *Der Einfluss des deutschen auf das niederländische bürgerliche Recht zwischen 1840 und 1940* (The Influence of German Civil Law on Dutch Civil

Law Between 1840 and 1940)

*From 1840 onwards, Dutch civil law demonstrated a fundamental openness to influences from foreign, especially German, civil law. In fact, German civil law was one of the main sources of inspiration for the Dutch judge, scholar and legislator at the end of the nineteenth century and during the first two decades of the twentieth century, as were the ideas contained in the works of German luminaries such as Friedrich Carl von Savigny, Rudolph von Jhering and Bernhard Windscheid. The Dutch lawyers felt a close kinship to their German colleagues, due to a common historical background in Roman law. This common tradition, which formed the basis of German and Dutch law, made it attractive to borrow German legal concepts for introduction into the Dutch legal system, a process called legal transplant. The concepts of "security ownership" and "legal act" found a warm welcome in Dutch literature and legal practise and helped Dutch law develop, or, in other words, effected the necessary changes so that Dutch business and patrimonial law could meet the requirements of the time. Apparently German lawyers were confronted with problems in connection with extending credit, new technological developments, crises, and so on, several decades earlier than Dutch lawyers, and their solutions seamlessly found their way into Dutch legal practise.*

*Similarly, following the introduction of the German Bürgerliches Gesetz- buch (BGB) in 1900, its influence on Dutch private-law literature, legislation and justice and on Dutch civil lawyers was considerable in the first decades of the twentieth century. The Dutch legislative system was faltering, and so there was every reason to look to the German codification for inspiration and lessons. The comparison with German law in the first decades of the twentieth century breathed new life into the small world of Dutch civil law, even influencing the New Dutch Civil Code which entered into force in 1992. The designer of that Code, the Leiden professor of Civil Law, E. M. Meijers, used his extensive knowledge of German law to design the new Civil Code, an assignment given to him by the Dutch government in 1947.*

# Kotuby and Sobota: General Principles of Law and International Due Process

Chuck Kotuby and Luke Sobota recently published *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press). The book updates Bin Cheng's seminal book on general principles from 1953. The book also collects and distills these principles in a single volume as a practical resource for lawyers and scholars. According to Judge James Crawford, "This book explores how general principles of law are being applied, providing a timely update to Bin Cheng's classic work. It focuses on the application of the principles to private conduct–an astute response to the evolution of international process over the past half-century. The result is a work that will benefit both academics and practitioners."

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# Characterization of Unfunded Pension Liability Claims

In *Re Walter Energy Canada Holdings, Inc*, 2017 BCSC 709 (available here) the British Columbia Supreme Court had to consider the validity of a large claim (over $1 billion) filed in restructuring proceedings underway in the province under federal legislation. The claim was for unfunded pension liabilities and was based on an American statute, the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001. So the court had to consider whether that statute could apply to a claim in British Columbia against entities organized in Canada (mostly in British Columbia).

Starting at para. 93 the court considered whether the claim against the entities being restructured was governed by Canadian or American law (in each case the relevant law was either federal rather than provincial or state or did not vary as between provinces). This is a choice of law question which raises the issue of the characterization of the claim. Canadian courts do not often analyze characterization in detail, but the court did so in this case, making the decision notable. The claimant argued that the claim was one in the law of obligations and sought to identify the proper law of the obligation. The entities being restructured in contrast argued the claim went to a point of corporate law, namely their separate existence from other entities in an international corporate group. The court referred to several of the main general authorities about the characterization process but considered the specific issue before it to be one of first instance. It sided with the entities being restructured – the claim went to the issue of separation of corporate personality and status. The American statute was imposing liability by "lifting the corporate veil" (paras. 137-38) between international corporate entities.

Having characterized the issue, the court then had to identify the connecting factor for the choice of law rule. It held:

> *[160] The issue as to whether the Walter Canada Group's separate legal personalities can be ignored is subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the law of the place in which it was incorporated, namely British Columbia and Alberta. Here, as with the corporations within the Walter Canada Group, both with limited liability and unlimited liability, it is admitted that all of the partnerships were organized under British Columbia law. Accordingly, the choice of law analysis leads to the same result in relation to the partnerships, namely British Columbia law, including under the Partnership Act, R.S.B.C. 1996, c. 348.*
>
> *[161]The place of incorporation or organization is a matter of public record and all persons who would do business with or otherwise deal with the Walter Canada Group entities would or should be well aware of that fact.*
>
> *[162] I agree that, under Canadian choice of law rules, the place of incorporation or organization of the Walter Canada Group entities is the appropriate "connecting factor" in relation to the issue arising from the 1974 Plan's claim. As a result, British Columbia and Alberta law determine whether*

> *the separate legal personalities of the Walter Canada Group entities can be ignored.*

Given that the American statute is not part of British Columbia or Alberta law, the court concluded that the claim failed (paras. 177-78).

I want to reflect more on the decision, but at this point I am not certain I agree with the characterization analysis. It is true that the only way the American statute makes the Canadian entities liable is by imposing liability on others within a larger corporate group. But to me it does not follow that the statute is a matter of corporate status and not of obligation. The statute imposes an obligation and extends that obligation to various entities. I think there is room to debate that the primary element of the statute is the obligation it imposes.

However, support for the decision could lie in *Macmillan Inc v Bishopsgate Investment Trust (No 3)*, [1996] 1 WLR 387 (CA), which the court does mention (see for example para. 126), which stresses the possibility of characterizing a specific legal issue within the context of a broader claim. The analysis could be that there is a nested issue – that of corporate separation or status – within the broader question of liability for an unfunded pension.