

# 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](http://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 : à 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 Partnerships (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 EU CJ 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.*

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# **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.

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# **New International Commercial Arbitration Statute for Ontario**

Ontario has enacted and brought into force the *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5 (available [here](#)) to replace its previous statute on international commercial arbitration. The central feature of the new statute is that it provides that BOTH the 1958 New York Convention and the 1985 Model Law have the force of law in Ontario. Previously, when Ontario had given the Model Law the force of law in Ontario it had repealed its statute that had given the New York Convention the force of law in Ontario. This made Ontario an outlier within Canada since the New York Convention has the force of law in all other provinces (as does the Model Law).

The previous statute did not address the issue of the limitation period for enforcing a foreign award. The new statute addresses this in section 10, adopting a general 10 year period from the date of the award (subject to some exceptions). Section 8 deals with the consolidation of arbitrations and section 11 deals with appeals from arbitral decisions on jurisdiction.

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# International Law Claims in U.S. Court: The Supreme Court Decides *Venezuela v. Helmerich & Payne*

Last week, the US Supreme Court issued its decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne International*, deciding the pleading threshold a party must establish for the purposes of the ‘expropriation exception’ under § 1605(a)(3) of the Foreign Sovereign Immunities Act (FSIA).

We’ve reported on the case already [here](#) and [here](#), and at this stage, there is little more that can be said about the decision that has not already been reported by Amy Howe at SCOTUSBlog and Ted Folkman and Ira Ryk-Lakhman at Letters Blogatory.

In sum, the plaintiff is a U.S. company, and its Venezuelan subsidiary, Helmerich & Payne de Venezuela. Helmerich & Payne de Venezuela started drilling for the state-owned oil company decades ago, but in 2010, then-President Hugo Chavez issued a decree appropriating the subsidiary’s drilling rigs, which the state-owned oil company now uses. A little over a year later, the two companies filed a lawsuit in federal court in Washington, D.C., invoking the “expropriation exception” to the FSIA. That exception allows lawsuits against foreign governments to go forward in the United States when “rights in property taken in violation of international law are in issue” and the state or state-owned entity later owns that property and has a commercial connection to the United States. As you can see, the language of the statute shows that the merits of a claim and the jurisdictional inquiries are substantially intertwined

In 2015, the court of appeals held that the claims could go forward so long they met the “exceptionally low bar” of not being “wholly insubstantial or frivolous.” In an opinion by Justice Stephen Breyer, the court explained that the bar for such claims is, in fact, a bit higher. To wit, the expropriation exception will apply, and a U.S. court will have jurisdiction, only when the facts “do show (and not just arguably show) a taking of property in violation of international law.” Such questions, the Court held, should be decided “as close to the outset” of the case “as is reasonably possible,” in order to provide clarity to foreign governments and

minimize the extent to which they are involved in litigation in U.S. courts. This, the court suggested, will in turn reduce the likelihood of friction with other countries and retaliatory litigation against the United States overseas.

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# **Childress on “International Conflict of Laws and the New Conflicts Restatement”**

Professor Donald Earl Childress III of Pepperdine University School of Law has just released on SSRN an article that will soon appear in the Duke Journal of Comparative & International Law. It is a contribution to a symposium on internationalizing the new Conflicts Restatement, and examines the impact that transnational cases have had on judicial decisions in the United States, and how the resolution of these cases by U.S. courts may be helpful to the drafters of the new Conflicts Restatement. It begins with the observation that recent transnational cases, regardless of whether they are treated separately by the new Conflicts Restatement, offer important insights into the current and evolving conflict-of-laws process in the United States. These cases also offer insight into the ways in which the new Conflicts Restatement’s focus on scope and priority should be developed. Part I explores how the presumption against extraterritoriality relates to the new Conflicts Restatement’s concern with scope and priority. Part II considers whether the new Conflicts Restatement should consider larger, regulatory conflicts in the transnational arena, and, if so, how to deal with them, especially in the context of the priority question. This contribution concludes with some points for further study that should be examined by the new Conflicts Restatement.

It is available for download [here](#).

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# US Litigation Today : Still a Threat For European Businesses or Just a Paper Tiger ?

Recent developments have significantly affected some of the characteristic features of litigation in the US and their impact on foreign jurisdictions. In light of this, the Swiss Institute for Comparative Law, together with the University of Lausanne have organized a one-day conference next June 23, where well-known US, Swiss and European law professors and practicing lawyers will debate on issues such as the jurisdictional reach of US courts, choice-of-court agreements, class actions, discovery, extraterritorial application of US law, and the recognition and enforcement of judgments.

[Click here to see the program.](#)

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## Publication: Zamora Cabot on “The Rule of Law and Access to Justice”

Professor Francisco Javier Zamora Cabot has just published an article on **The Rule of Law and Access to Justice in Recent and Key Decisions of the UK Courts**

The English abstract reads:

Following an Introduction that points out the current significance of transnational human rights litigations, and their implications arising out of the recent stance



taken by the United Kingdom Supreme Court in the case *Belhaj v. Straw*, the present study underlines throughout Section II the approach to this case, linked with the “Extraordinary Renditions Programme”, of the United States, and with tortures as well as unlawful detention suffered by the plaintiffs, in which the British Government is denounced as an accomplice.

This Section also reflects decisions of the High and Appeal Courts, giving way all along Section III to the Supreme Court judgment, in the same direction of the one of the Court of Appeal as far as immunity of jurisdiction and the Act of State are concerned, and that afterwards it is scrutinized by the author of the present study in a positive way to the extent that access to justice by victims of serious violations of HHRR prevails. And that is so above all through the inactivation in the case of State of Act for the english public policy, allowing such an access and largely in agreement with a great deal of initiatives emerging from the international community and at the same time widespread doctrinal opinions.

This study comes to an end with some Conclusive Reflections (Section IV), bringing to light the way the Supreme Court has come to find a path in order to respond to a question involving sensitive edges, enhancing the rule of law, the access to justice and the defense of HHRR as foundations that cannot be waived in the course of its performance.

The full article (in Spanish) is available in the Papeles el Tiempo de los Derechos (open access): <https://redtiempodelosderechos.files.wordpress.com/2015/01/wp-3-17.pdf>

and on SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2960256](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960256)

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# Éléments d'histoire du droit

# international privé, by Bertrand Ancel

✖ More than many other legal disciplines Private International Law draws its inspiration from its history. The complexity, the technicality characterizing it, but also a continuity that no euphoria of legislation has succeeded to compromise, urge to exploit the treasure of a past gathering both the constructive efforts of an untiring doctrinal reflection and the lessons of a constantly renewed experience of concrete cases. The understanding of the problems that the plurality of legal orders poses to private law relationships, and of the methods and solutions employed to tackle them, come at this price.

This book is conceived to meet this need, addressing it with what can only be called a natural humbleness. It would have been too daring to aim at an exhaustive account of the innumerable hesitations and temerities of a doctrine and a practice experienced through an abundant casuistry. With the hope of providing useful guidance in the understanding of today's Private International Law, this monograph endeavors to present elements constituting the milestones that marked and shaped a rich and complex evolution.

*Bertrand Ancel is Professor Emeritus of the University of Paris II Panthéon-Assas where he taught civil law, comparative private law and private international law, and where some fifteen years ago he set up the teaching of the history of Private International Law. The book *Éléments d'histoire du droit international privé* has just been published by LGDJ.*