Now (partly) online: Encyclopedia of Private International Law

During the last four years a group of 181 authors from 57 countries has been working very hard to make a special book project come true: the 4-volume Encyclopedia of Private International Law (published by Edward Elgar and edited by Jürgen Basedow, Franco Ferrari, Pedro de Miguel Asensio and me). Containing 247 chapters, 80 national reports and English translations of legal instruments from 80 countries, some parts of the Encyclopedia are now available via Elgaronline (in beta version).

Access to the actual content (i.e. the entries, the national reports and the translated legal instruments) is limited to paying customers. However, some chapters including the following, are accessible free of charge:

- (American) conflict of laws revolution, by *Linda Silberman*
- Choice of forum and submission to jurisdiction, by *Adrian Briggs*
- Choice of law, by *Jürgen Basedow*
- Globalisation and private international law, by *Horatia Muir-Watt*

Publication of the Encyclopedia in print is scheduled for Summer 2017.

Public consultation third party effects transactions in securities and claims

The European Commission has published a public consultation on the **conflict of law rules for third party effects of transactions in securities and claims.**

The aim of the consultation is to 'gather stakeholders' views on the practical problems and types of risks caused by the current state of harmonisation of the conflict of laws rules on third party effects of transactions in securities and claims and to gather views on possibilities for improving such rules'.

The public consultation will be open till **30 June 2017.**

Thanks to Paulien van der Grinten (Ministry of Security and Justice, the Netherlands) for the tip-off.

Brexit Negotiations Series on OBLB

On 17 March 2017 Horst Eidenmüller and John Armour, both from the University of Oxford, organised a one-day conference at St Hugh's College, Oxford, on 'Negotiating Brexit'. One panel focused on the effects of Brexit on the resolution of international disputes, including issues of jurisdiction, choice of law, recognition and enforcement as well as international arbitration. Two of the contributions to the conference have recently been published on the Oxford Business Law Blog:

- Giesela Rühl, *The Effect of Brexit on Choice of Law and Jurisdiction in Civil and Commercial Matters*, available here;
- Marco Torsello, *The Impact of Brexit on International Commercial Arbitration*, available here.

A third post by Tom Snelling will deal with the impact of Brexit on recognition and enforcement on foreign judgments.

Letter from the French Minister of Justice

By Vincent Richard, Research Fellow at the Max Planck Institute Luxembourg for International, European, and Regulatory Procedural Law

In view of the upcoming election, Jean-Jacques Urvoas, the French Minister of Justice released an “open letter” (57 pages) to his successor published by Dalloz. It details what has been done and what should be done in the field of justice in France over the next years.

The letter covers topics such as access to justice, technology in the judiciary and focuses on criminal justice and independence of the judiciary. Conditions of detention and prison policy are the most discussed issues in the current French political campaign in the field of justice.

The readers of this blog will be mostly interested in Chapter IX of the letter which deals with Justice in Europe. In this part, the Minister pleads in favour of enhanced cooperation notably regarding the future European Public Prosecutor’s office. He also advocates for the creation of international chambers within French courts and proposes to establish a European Centre for Judicial Translation (“centre européen de traduction judiciaire”) designed to alleviate the burden of translation (and its cost) on national courts.

We also wanted to underline the following quote which summarises the Minister’s views on judicial cooperation and mutual trust:

“Dans les faits, cette coopération s’est édifiée depuis vingt ans sur le principe de la reconnaissance mutuelle des décisions de justice, qui lui-même suppose la confiance réciproque entre les autorités des États membres. Or cette confiance ne se décrète pas, elle se construit. Et c’est objectivement devenu une gageure à 27 ou à 28. Il faut donc trouver le bon équilibre, ne pas céder à l’illusion de l’harmonisation des procédures judiciaires ou à une uniformisation, séduisante sur le papier, mais irréalisable en pratique. Il s’agit du penchant naturel de la

Commission européenne, même si elle déploie de puis quelques années des efforts louables pour moins et mieux légiférer.”

You can find the full text (in French) here: http://www-nog.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2017/04/gds_ambition_justice-global000.pdf

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International Insolvency Law in the New Hungarian PIL Act – A Window of (missed?) Opportunity to Enact the UNCITRAL Model Law on Cross-Border Insolvency

by Zoltán Fabók LL.M. (Heidelberg), visiting lecturer at ELTE University, PhD Candidate at Nottingham Trent University

The Hungarian Parliament has recently adopted a new act on private international law (see the previous post by Tamás Szabados). The legislator set ambitious goals: the new law extends, somewhat surprisingly, to the PIL aspects – jurisdiction, applicable law and recognition of foreign proceedings – of the international insolvency law.

Indeed, the previous Hungarian PIL framework was unfit to adequately address the relevant questions of the international insolvency law outside the context of the Insolvency Regulation. In cross-border situations, the existing regime did not function properly and this resulted in legal uncertainty, improper protection of the foreign debtor’s assets located in Hungary and the neglect of the principle of collective proceedings.

Admittedly, the new law appears to make some (limited) progress regarding the provisions on jurisdiction of Hungarian courts and the law applicable for insolvency proceedings. However, concerning recognition of foreign insolvency proceedings opened in non-EU states the legislator has opted for a flawed model: the extension of the effects of the foreign *lex concursus* to Hungary. Extending the legal effects of insolvency proceedings opened in third states to Hungary without any substantive filter (save for the public policy exception) does not appear to be realistic. The counterbalance introduced by the new law – namely that the recognition would be conditional upon reciprocity – does not really help: it will simply make the system inoperative *vis-à-vis* most foreign states. In effect, in most cases no foreign insolvency proceedings would be recognised in Hungary. This may cause that the foreign debtor's assets located in Hungary would be exposed to individual enforcement actions meaning the violation of the principle of the collective proceedings.

My paper argues that the enactment of the UNCITRAL Model Law on Cross-Border Insolvency by Hungary would adequately fill the regulatory gap left open by the new PIL Act. Rather than extending the legal effects of foreign insolvency proceedings to Hungary, the Model Law attaches limited *sui generis* legal consequences to foreign insolvency proceedings. The Model Law would allow Hungary to keep under control the infiltration of the effects of foreign insolvency proceedings from third states in relation to which it has no full confidence while maintaining the idea of collective insolvency proceedings by protecting the assets of the foreign debtor located in Hungary and preventing individual actions. In other words, the Model Law represents a flexible approach looking for a balance between recognising the universal effects of the insolvency as provided for by the *lex concursus* on the one hand and the rigid territorial principle disregarding the foreign insolvency proceedings on the other.

One could question whether the PIL Act is the proper legal framework for addressing international insolvency law. Arguably, the rules on international insolvency should fall outside the scope of the PIL Act: international insolvency law is a rather complex field of law consisting of elements of conflict of laws, international procedural law and insolvency-specific norms. It would be reasonable to deal with this area of law in the Insolvency Act or in a separate piece of legislation.

The paper has been accepted by UNCITRAL for publication in the compilation to

be issued after the 50th Anniversary Congress. An earlier preprint version, reflecting to the preliminary drafts of the new PIL Act, can be downloaded from http://ssrn.com/abstract=2919047.

Conferences Cycle on Application of Foreign law – Cour de Cassation 2017

The French *Cour de Cassation* promotes in 2017 a series of seven conferences on the application of foreign law, in partnership with the *Société de législation comparée.*

Two of them have already taken place on 20 February ("The judge's role in establishing the content of foreign law", by Jean-Pierre Ancel, former President of the First Civil Chamber of the Cour de cassation) and 20 March ("The application of uniform law and international conventions", by Jean-Baptiste Racine, University of Nice).

The five remaining conferences will be held at the Grand Chambre of the Court (5 Quai de l'Horloge, Paris) between 6 pm and 8 pm on the following dates:

- April 20, 2017: International cooperation in researching the content of foreign law (Florence Hermite)
- May 29, 2017: Optional application of foreign law in situations of availability of law and the uniform application of rules of conflict of European origin (speaker: Sabine Corneloup, University of Paris II)
- September 25, 2017: Foreign law facing the hierarchy of norms (speaker: Gustavo Cerqueira, University of Reims)
- October 23, 2017: The Cour de cassation's control in applying foreign law (speaker: Alice Meier-Bourdeau, lawyer)

- November 27, 2017: The exception of equivalence between the French law and the foreign law (speaker: Sara Godechot-Patris, University of Paris-East)

All conferences are held in French.

For more information: see Cour de Cassation.

Click here to see the whole program.

Séminaire de Droit Comparé et Européen- Summer 2017, Urbino

The 59th edition of the *Séminaire de Droit Comparé et Européen* d'Urbino (Italy) will be held next summer from August 22nd to September 1st.

The *Séminaire* is a common venture of Italian and French jurists taking place since 1959. The venue is ideal for developing a dialogue on Comparative, International (both public and private) and European law with jurists from different world countries, since it largely benefits of the relaxing time of the year and of the serenity of the environment: Urbino gave birth to humanism and to the Vitruvian man.

This year's seminar's main topics are robotics and AI international legal problems, State immunity, the future of family law, arbitration and many others. Speaker include Prof. M.E. Ancel, S. Yansky-Ravid, A. Giussani, C. Malberti, P. Morozzo della Rocca, A. Bondi, L. Mari, I. Pretelli as well as practitioners - lawyers, mediators, arbitrators and notaries. The Seminar promotes multilingual competencies: presentations are in French, English or Italian, often followed by summarized translations in the other two languages.

The whole program as well as email addresses for further information is downloadable here.

New Hungarian Private International Law Act

By Tamás Szabados, LL.M. (UCL), PhD (ELTE), Senior Lecturer at the Eötvös Loránd University (Hungary)

On 11 April 2017, the new Hungarian Private International Law Act (Act XXVIII of 2017), adopted earlier by the Hungarian Parliament, was promulgated. The new Act will enter into force on 1 January 2018 and will fully replace the decree-law of 1979 that currently regulates private international law. The adoption of the new Act was justified by the economic and social changes that occurred since then. The drafting process was based on extensive comparative research and the drafters also paid attention to recent developments in EU private international law.

The new Private International Law Act covers the determination of the applicable law, jurisdiction, recognition and enforcement of foreign decisions as well as other aspects of international civil procedure. The new Private International Law Act introduces some changes in comparison to the rules currently in force.

The General Part deals with certain questions not regulated previously: application of the law of states having more than one legal system, overriding mandatory provisions and changes in the circumstances which determine the governing law. As a novelty, the General Part also contains a general escape clause: if, based on the circumstances of the case, it is obvious that the case is substantially more strongly connected with a law other than the law designated by virtue of the Act, the court may exceptionally apply this law. In addition, a general subsidiary choice of law rule provides that, if the new Act does not contain a specific choice of law rule for a legal relationship that is otherwise covered by the Act, the law of the state will apply with which that relationship is most strongly connected.

The Special Part of the Act extends equally to certain issues which were not regulated earlier, such as the (restricted) freedom to choose the applicable law in

property matters for spouses and (registered) partners or the determination of the law applicable to illegally exported cultural property.

Jurisdictional rules as well as the provisions on recognition and enforcement of decisions have been restructured and divided into general and special provisions (such as the rules on matters involving an economic interest and matters concerning family law and personal status).

The text of the New Hungarian Private International Law Act is available (in Hungarian language) here.

Nederlands Internationaal Privaatrecht (NIPR) Vol. 35-1 2017 – with Free Access to English Contribution

The Netherlands journal of private international law, *Nederlands Internationaal Privaatrecht (NIPR)*, vol. 35-1, has just been released: click here to see the full ToC.

Access is possible to the first contribution, written in English by Prof. Dr. Matthias Weller, entitled **Mutual trust within judicial cooperation in civil matters: a normative cornerstone – a factual chimera – a constitutional challenge.** The abstract reads as follows:

> *Mutual trust has become a normative cornerstone of the EU's area of freedom, security and justice, as is being confirmed and reinforced by recent and fundamental decisions of the ECJ. At the same time, some Member States are more than ever occupying low rankings in different surveys on the quality of their administration of justice or are being challenged as not sufficiently implementing the rule of law. Th us, a conflict appears to be currently*

culminating between norm and fact. Th is conflict puts in question the fundaments of judicial cooperation and contributes to centrifugal tendencies within the European Union. In order to counteract such tendencies, the text offers some deeper, including some historical, thoughts on mutual trust, as well as its facets and functions in judicial cooperation amongst the Member States in civil matters (Brussels Ia Regulation), in particular in relation to the return of abducted children (Brussels IIa Regulation), in administrative matters dealing with asylum seekers (Dublin Regulations) and criminal matters (Framework Decision on the European Arrest Warrant), i.e. in cases where there is a transfer of persons from one Member State to another. In this context mutual trust has become an element of the very identity of the European Union whereas from the perspective of (at least German) constitutional and European human rights law mutual trust has become a true challenge. On the basis of these considerations on the general framework of mutual trust, the question is posed whether there should be some rebalancing of mutual trust in the cooperation in civil matters.

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.