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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.*
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> *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.*
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> *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."

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.

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.

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.

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.

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.

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

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.*

Now Available in English: "The Disastrous Brexit Dinner"

The recent report by the German newspaper *Frankfurter Allgemeine Sonntagszeitung* (FAS) on *Jean-Claude Juncker's* dinner with British PM *Theresa May* has already triggered a lively political debate on both sides of the channel. For those not fluent in German, it is perhaps welcome that the FAS has taken the rather unusual step of publishing the article again in an English translation on its website here. For readers interested in the legal aspects of future negotiations on Brexit, it is probably most interesting that, in the course of the dinner, *May* alluded to British opt-in rights under Protocol 36 to the TFEU as a blueprint for "a mutually beneficial reciprocal agreement, which on paper changed much, but in reality, changed little". It is not reported, though, whether the British Government would suggest a similar strategy with regard to Protocol 21 which deals with opt-in rights of the UK concerning the EU's legislative acts on private international law as well. It is difficult to imagine how such an approach could be

reconciled with the UK Government's desire to be freed from the judicial surveillance by the CJEU, however. Anyway, the article states that the head of the Commission resolutely rejected any kind of legal window-dressing. So, it seems that Brexit will actually mean Brexit.