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.

Conference Report: First German conference for Young Scholars in Private International Law

The following report has been kindly provided by Dr. Susanne Gössl, LL.M. (Tulane) and Daniela Schröder.

On April 6th and 7th, 2017, the first German conference for young scholars interested in Private International Law took place at the University of Bonn. The general topic was "Politics and Private International Law (?)".

The conference was organized by Susanne Gössl, Bonn, and a group of doctoral or postdoctoral students from different universities. It was supported by the Institute for German, European and International Family Law, the Institute for Commercial and Economic Law and the Institute for Private International Law and Comparative Law of the University of Bonn the German Research Foundation (DFG), the German Society of International Law (DGIR), the Dr. Otto-Schmidt-

Stiftung zur Förderung der Internationalisierung und der Europäisierung des Rechts, the Studienstiftung Ius Vivum, the Verein zur Förderung des Deutschen, Europäischen und Vergleichenden Wirtschaftsrechts e.V., and the publisher Mohr Siebeck.

Professor *Dagmar Coester-Walten*, LL.M. (Michigan), Göttingen, gave the opening speech. She emphasized that the relation between politics and conflict of laws has always been controversial. Even the "classic" conflict of laws approach (Savigny etc.) was never free from political and other substantive values, as seen in the discussion about international mandatory law and the use of the public policy exception. She outlined the controversy around the "political" Private International Law in the 20th century, resulting in new theories of Private International Law such as Currie's "governmental interest analysis" and counter-reactions in continental Europe. Even after a review of the more political conflict of laws rules of the EU, Professor Coester-Waltjen came to the conclusion that the changes of the last decades were less a revolution than a careful reform in continuance of earlier tendencies.

The first day was devoted to international procedural law. First, ***Iina Tornberg*, Helsinki**, evaluated more than 20 arbitration awards from the International Chamber of Commerce (ICC). Her focus was on the use of the concept *ordre public transnational*. She came to the result that there is no reference to truly transnational values. Instead, domestic values are read into the concept of the *ordre public transnational*. ***Masut Ulfat*, Marburg**, claimed that the Rome I Regulation should mandatorily determine the applicable law in arbitration proceedings to ensure a high level of consumer protection and enhance EU law harmonization. In his *responsio* ***Reinmar Wolff*, Marburg**, to the contrary, had the opinion that this last statement contradicts the fundamental principles of international arbitration as a private proceeding and its dogmatic basis in party autonomy. In addition, he did not regard the application of Rome I as necessary: the level of consumer protection could be reviewed at the stage of recognition and enforcement of the arbitration award.

In the second panel ***Dominik Düsterhaus***, **Luxemburg**, dealt with the question to what extend EU law and the interpretation through the CJEU lead to a "constitutinalisation" of Private International Law and International Procedure Law. He showed clear tendencies of such a charge with legal policy considerations of apparently objective procedural regulations. He criticized the

legal uncertainty, arising from the fact that the CJEU does not always disclose his political considerations. Furthermore, only 4% of the referred cases include questions of Private International Law. Thus, the CJEU has only few possibilities to concretize his considerations. ***Jennifer Lee Antomo***, **Mainz**, dedicated herself to the question whether an agreement of exclusive international jurisdiction is also a contractual agreement with the effect that it is possible to claim compensation for breach of contract. She answered generally in the affirmative in the case a claimant brings a suit in a derogated court. Nevertheless, court authority to adjudicate can be limited, especially within the EU due to the EU concept of *res iudicata*.

The second day was dedicated to conflict of laws. ***Friederike Pförtner***, **Konstanz**, analysed human rights abuses by companies in third countries. She objected a broad use of "escape devices" such as the public policy exception or *loi de police*. As exceptions they should be applied restrictively. ***Reka Fuglinsky***, **Budapest**, investigated the problem of cross-border emissions with a focus on the CJEU case law and the new Hungarian Private International Law Act. She scrutinized, *inter alia*, under which conditions a foreign emission protection permission has effects on the application or interpretation of national (tort) law. Another more factual problem is the later enforcement of domestic decisions in third countries.
Finally, ***Martina Melcher***, **Graz**, analysed the relation between Private International Law and the EU General Data Protection Regulation, which is combining a private international law approach with a public international one. A separate conflict of laws rule should be introduced in the Rome II Regulation, following the *lex loci solutionis* instead of the territoriality principle. ***Tamas Szabados*, Budapest**, talked about the enforcement of economic sanctions by Private International Law. He characterized economic sanctions as overriding mandatory provisions (Article 9 (1) Rome I). In cases of third state (e.g. US) sanctions, an application was only possible as "being considered" in the sense of Article 9 (3) Rome I. A clear decision by the CJEU is necessary to ensure a transparent approach and a unitary EU foreign policy.

The conference concluded with the unanimous decision to organize further conferences for young scholars in Private International Law, probably every two years. The next conference will be held in Würzburg, Germany, in spring 2019.

The full texts of the presentations will be published in a forthcoming book by

Mohr Siebeck. The presentations of the conference are available here (all in German).

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2017: Abstracts

The latest issue of the "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

C. Thole: **The recast of the European Insolvency Regulation**

On 26 June 2017, the recast of the European Insolvency Regulation (reg. 2015/848) will enter into force. Although the recast does not entail radical changes, it is not confined to minor editorial amendments either, but adds some distinct new features to the EIR. This article sketches the corner points of the recast and attempts to identify new legal questions brought up by the new regulation.

M.-P. Weller: **The Recast of the Brussels II bis Regulation**

On 6/30/2016 the European Commission presented its draft of a revised version of the Brussels II bis Regulation. The proposals for reform primarily affect proceedings in matters of paternal responsibility. The article provides an outline and a discussion of the benefits and shortcomings of the essential changes proposed by the draft. In addition, the article critically reviews the Commission's opinion on the lack of a need for a reform of the rules on matrimonial matters.

B. Heiderhoff: **The Adjustment of German Law to the Matrimonial Property Regulations**

Before the EU regulations on matrimonial property regimes (2016/ 1103) and on property consequences of registered partnerships (2016/1104) come into force on

29th January 2019, the national law must be adjusted. This contribution makes suggestions for the alignment of the conflict of laws rules as well as the introduction of the necessary procedural complements. In essence, it recommends adopting the same conflict of laws rules contained in the regulations also for those general effects of marriage that are not covered by the regulation. The procedural implementation should be effected in a separate new law and structured as parallel as possible to the law implementing the EU Succession Regulation.

M. Rohls/M. C. Mekat: **The interplay between the provisions of the EU Service Regulation and the German Regulation on Judicial Assistance in Civil Matters (ZRHO) concerning the service of judicial documents to foreign States**

The authors examine the interplay between the provisions of the EU Service Regulation and the German Regulation on Judicial Assistance in Civil Matters (Rechtshilfeordnung für Zivilsachen, abbreviated "ZRHO") in the field of service of judicial documents to foreign states. The authors conclude that the options of service of documents as granted by the EU Service Regulation – within their scope – cannot be restricted by the ZRHO's character as domestic administrative guidelines. Against this background, the authors call for a primary application of the provisions on the service of documents as foreseen in the EU Service Regulation, insofar as contrary national provisions in Germany (and other Member States of the EU) restrict a service of documents to foreign states.

G. Kühne: **Some Observations on the 1986 German Reform of Private International Law**

The German Private International Law Reform of 1986 has recently been the subject of discussions and contributions to this Review by various authors. The author of this article has contributed to the 1986 reform by a separate Draft, the so-called "Kühne-Entwurf" of 1980. In the following article he adds some supplementary observations on a few specific aspects concerning his Draft, in particular party autonomy in international matrimonial and succession law, where his proposals differed from those put forward by the German Council for Private International Law.

O. L. Knöfel: **Public policy – The Concept of Extrajudicial Documents – Does**

the European Service Regulation Apply to Private Documents?

The article reviews a decision of the European Court of Justice (Case C-223/14 – Tecom Mican SL, José Arias Domínguez), dealing with the question whether the concept of "extrajudicial documents" (Art. 16 of the European Service Regulation of 13 November 2007) covers private documents. The Court answered this question in the affirmative, which is not convincing, as the notion of "extrajudicial documents" is habitually considered to encompass only documents emanating from authorities and judicial officers of a State. The author analyses the background of the notion of "extrajudicial documents" in the Hague Conventions on civil procedure and in other international legal instruments, and discusses the consequences of the decision of the ECJ for international legal assistance in civil and commercial matters.

S. Burrer: **The question of cautio judicatum solvi in the case of German claimants domiciled outside of Germany and the Hague Convention on Civil Procedure**

Following the amendment in 1998 to § 110 German Code of Civil Procedure to abolish the obligation on foreign claimants to furnish cautio judicatum solvi and the implementation of a new obligation on all claimants who are not residents in the EU/the EEA to provide security for costs, a question arose as to how German claimants domiciled outside of the EU/the EEA but domiciled in one of the signatory states of the Hague Convention on Civil Procedure (HCCP) should be treated. This question was neither discussed nor solved for several years. Initial views in both jurisprudence and literature refused an exemption of such expatriate German claimants as compared to nationals from other contracting states. Dissenting with these views, the Higher Regional Court of Munich decided in 2014 that such expatriate German claimants also enjoy exemption from the obligation to provide security where they are domiciled within the area of application of the HCCP due to the general principle of equality in Art. 3 para. 1 German Basic Law. This article critically discusses both the opposing view as well as the reasoning of the Higher Regional Court of Munich and shows by way of an analysis of the historic sources, a comparison with the legal situation in Switzerland and by purposive interpretation of the HCCP, that freedom from the security requirement within the scope of the convention is the correct outcome. This is not justified by applying the exemption in Art. 17 HCCP in conjunction with § 110 para. 2 no. 1 Code of Civil Procedure, but solely as a result of the

commitment of enforcement in Art. 18 HCCP in conjunction with § 110 para. 2 no. 2 Code of Civil Procedure.

U. P. Gruber: **Die Überleitung eines europäischen Mahnverfahrens in ein Erkenntnisverfahren**

Pursuant to Art. 17 of the Regulation (EC) No 1896/2006, when the defendant lodges a statement of opposition to the European order for payment, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure. In its decision C-94/14, the ECJ emphasizes that the transfer to ordinary civil proceedings is governed by the national laws of the Member States. The laws of the Member States also govern the extent of the verification obligations to which national courts are subject when determining their international jurisdiction. European law only sets certain minimum standards that must be observed, i.e. the rights of the defence and the effectiveness of European regulations. German law meets these standards; in the author's opinion, also the claimant's obligation to designate the competent court (§ 1090 ZPO) is in accordance with European law.

B. Rentsch/M.-P. Weller: **Recognition of judgments in International Family Law – regulatory levels in Brussels IIbis vs. leveled balancing of public policy**

The Brussels IIbis Regulation is unique in its intertwinement with both European and International Family Law instruments. Despite its independence both from International treaties on child protection and neighboring EU instruments, all regimes of child protection tend to coincide in International family law litigation. In its judgment P ./. Q, the ECJ makes an effort to distinguish, namely, protection mechanisms of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, and the return regime provided by Art. 10 Brussels IIbis-Regulation. Given its advocacy for a clear-cut separation, the judgment still evidences how both regimes may end up converging on the level of public policy.

P. F. Schlosser: **Standard Forms and unclearly drafted choice of law stipulations**

Regarding private international law the court makes three statements of general interest.
1. The issue whether the applicability of a national legal system has validly been

agreed is to be dealt with according to the law possibly designated.
2. This rule includes the inference of unclear drafting which, according to § 305c (German) BGB, leads to the solution, and hence in the case of choice of law stipulations, to the law most favorable for the partner of the user of general trade terms.
3. In this specific case the judgment relied on the common view of both parties that German law was the most favorable for the co-contracting partner. By arguing in this way the court could not reach the more general issue, which solution should be "more favorable" for the co-contracting party if the unclear stipulation refers to a complex multitude of terms or to a national legal system encompassing both, elements favorable as well as unfavorable for the co-contracting party. The author's proposition is: to grant an option to the co-contracting party; but only to choose between the respective entirety of the standard terms or of the dispositions of a national legal system.

P. Huber: **CISG: traditional analysis on the right to avoid and a new approach to set off (note on a judgment by the German Bundesgerichtshof)**

The article discusses a judgment by the German Bundesgerichtshof on the Convention for the International Sale of Goods (CISG). The main issues covered are the buyer's right to avoid the contract for non-conforming delivery by the seller and the issue of set off in a CISG contract. With regard to avoidance, the court mainly affirms the prevailing opinion. A rather new aspect, however, is that the court requires the seller who wishes to cure the non-conformity to give notice of that intention to the buyer. The author agrees with this part of the decision. With regard to set off, the court explores new ground by assuming that set off is governed by (general principles underlying) the CISG in cases where both claims are based on the same contractual relationship and where this contract is governed by the CISG. The author criticizes this part of the judgment and argues that set off should be left to the applicable (national) law.

A. Reinisch: **On the Scope of Immunity of the Swiss National Bank before Austrian Courts and Central Banks in General. Case Comment on Austrian Supreme Court, 17 August 2016 – 8 Ob 68/16g.**

The Austrian Supreme Court had an opportunity to rule on a novel issue of immunity from jurisdiction enjoyed by foreign central banks. It decided that

public statements formulated by central bank officials supporting and explaining its foreign exchange policy were so closely connected to the bank's sovereign tasks that they also qualified as non-commercial, iure imperii activities justifying their exemption from judicial scrutiny as a result of sovereign immunity principles. It thereby also confirmed the settled Austrian jurisprudence that foreign states enjoyed a limited, restrictive immunity for iure imperii acts only and that this standard was specifically relevant for foreign central banks where the 1972 Council of Europe Convention on State Immunity was applicable.

S. Corneloup: **Validity and Third-Party Effect of Choice of Court Agreements. The Cour de cassation between European and national interpretation**

The national courts of the Member States are often torn between, on the one hand, the necessity to respect the autonomous interpretation of EU law given by the ECJ and, on the other hand, the temptation to translate their own visions based on national particularities. This tension has become particularly obvious in the recent case-law of the French Cour de cassation with respect to the validity and third-party effect of choice of court agreements. In the matter of third-party effect of choice of court agreements, the Cour de cassation implements the restrictive rulings of the ECJ regarding international chains of contracts even though they are in contradiction with French civil law. In contrast, for asymmetric choice of court agreements the court lays down its own conditions of validity without concern for European harmonization. On both topics the current French case-law is subject to critical analysis.

S. Krebber: **Jurisprudence for suits of an employee against the third person in tripartite constellations of employment law.**

The decision of the chambre sociale of the Cour de cassation deals with jurisdiction under the regime of the Brussels Ibis regulation for suits of an employee against the third person in tripartite constellations. In such tripartite constellations, employment law may be applicable against the third party either because the third party is considered as an employer or because rights and duties also vis-à-vis the third party are vested in the employment relationship between the employer and his employee. Art. 20 et seq. Brussels Ibis regulation are applicable to such suits even though Art. 20 requires an employment contract.

K. Bälz: **DIFC Court of Appeal, Urteil vom 25. Februar 2016 in Sachen DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigations Holdings PSJC**

A recent decision of the DIFC Court of Appeals opens up the possibility to recognize and enforce German court decisions in civil matters in the UAE by using the courts of the financial free zone DIFC as a conduit jurisdiction. In view thereof, there is now reciprocal enforcement in relation to the Emirate of Dubai within the meaning of sec. 328 of the German Code of Civil Procedure (ZPO).

Save the date: LSE-Workshop on International Finance, Party Autonomy and Public Interest

The LSE Law and Financial Markets Project will host a workshop on "International Finance, Party
Autonomy and Public Interest" on 18 May 2017. Speakers include Philipp Paech (LSE), Stéphanie Francq (Louvain-la-Neuve), Jan Kleinheisterkamp (LSE) and Matthias Lehmann (University of Bonn).

Details are available here.

Complaint against France for a violation of several obligations

arising from the Rome III and Brussels IIbis Regulations

On 19 April 2017, Professor Cyril Nourissat and the lawyers Alexandre Boiché, Delphine Eskenazi, Alice Meier-Bourdeau and Gregory Thuan filed a complaint with the European Commission against France for a violation of several obligations arising from the European Rome III and Brussels II*bis* Regulations, as a result of the divorce legislation reform entered into force on 1 January this year. The following summary has been kindly provided by Dr. Boiché.

"Indeed, since January the 1st, in the event of a global settlement between the spouses, the divorce agreement is no longer reviewed and approved in Court by a French judge. The agreement is merely recorded in a private contract, signed by the spouses and their respective lawyers. Such agreement is subsequently registered by a French *notaire*, which allows the divorce agreement to be an enforceable document under French law. From a judicial divorce, the French divorce, in the event of an agreement between the spouses, has become a purely administrative divorce. The judge only intervenes if a minor child requests to be heard.

The implications and consequences of this reform in an international environment were deliberately ignored by the French legislator, with a blatant disregard for the high proportion of divorce with an international component in France. The main violations arising from this reform are the following.

First of all, as there will be no control of the jurisdiction, anyone will be able to get a divorce by mutual consent in France, even though they have absolutely no connection with France whatsoever. For instance, a couple of German spouses living in Spain will now be able to use this new method of divorce, in breach of the provisions of the Brussels II*bis* Regulation. The new divorce legislation is also problematic in so far as it remains silent on the law applicable to the divorce.

Moreover, the Brussels II*bis* Regulation states that the judge, when he grants the divorce (and therefore rules on the visitation rights upon the children, or issues a support order, for instance) provides the spouses with certificates, that grant direct enforceability to his decision in the other member states. Yet, the new

divorce legislation only authorizes the notary to deliver the certificate granting enforceability to the dissolution of the marriage itself, but not the certificate related to the visitation rights, nor the support order. This omission is problematic insofar as it will force the spouses who seek to enforce their agreement in another member state to seize the local Courts.

Last but not least, article 24 of the Charter of Fundamental Rights of the European Union makes it imperative for the child's best interests to be taken into consideration above all else, and article 41 of the Brussels II*bis* Regulation provides that the child must be heard every time a decision is taken regarding his residency and/or visitation rights, unless a neutral third party deems it unnecessary. Yet, under the new legislation, it is only the parents of the child who are supposed to inform him that he can be heard, which hardly meets the European requirements. Moreover, article 12 of the Brussels II*bis* Regulation provides that, when a Court is seized whereas it isn't the Court of the child's habitual residence, it can only accept its jurisdiction if it matches the child's best interests. Once again, the absence of any judicial control will allow divorces to be granted in France about children who never lived there, without any consideration for their interests. This might be the main violation of the European legislation issued by this reform.

For all those reasons, the plaintiffs recommend that the Union invites France to undertake the necessary changes, in order for this new legislation to fit harmoniously in the European legal space. In particular, they suggest a mandatory reviewal by the judge in the presence of an international component, such as the foreign citizenship of one of the spouses, or a foreign habitual residence. They would also like this new divorce to be prohibited in the presence of a minor child, an opinion shared by the French 'Défenseur des Droits'"

The full text of the complaint (in French) is available here.

RabelsZ Vol. 81 (2017) No. 1

We have not yet alerted our readers to the first issue of Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) which was published in February 2017. So, here we go:

Jürgen Basedow, *Internationales Einheitsprivatrecht im Zeitalter der Globalisierung* (The International Unification of Private Law in the Era of Globalization)

> *In unifying private law, the international community initially made use of treaties since the subjects of the early years before World War I were conceived of as affecting national sovereignty. As this tool proved functional, it was subsequently retained as the vehicle of "pure private law" unification. In more recent times an increasingly varied number of legal forms can be observed. However, whereas model laws and principles facilitate a spontaneous approximation of laws and allow for the interpretation and supplementation of conventions in legislation and practice, they do not unify the law. Both tools thus have their limits.*
>
> *The institutionalization of legal unification started after World War II; it has meanwhile acquired a very comprehensive character. There is hardly any subject not capable of being treated by a specialized international agency. In many areas international organizations have also taken the political lead in the unification of laws. The task of safeguarding the consistency of private law in this multi-voiced concert is incumbent on UNIDROIT, UNCITRAL and the Hague Conference.*
>
> *In recent decades, a new actor has entered the scene: the European Union. As regards the unification of laws within Europe, it has ousted other international organizations. By necessity the other organizations have relocated the centre of their activities to the extra-European, universal field. The EU has become active in that context as well: as a party to universal conventions, not as a producer of uniform law.*
>
> *The interpretation of uniform law has to a large extent come to be understood as autonomous interpretation taking into account the insights provided by comparative law. With regard to gap-filling, recourse should be had to general*

principles governing the respective area of law at issue. In the long run, the aim of uniform law application cannot be achieved without institutional arrangements such as the referral of preliminary questions to an international tribunal.

The traditional approach of amending protocols has proven unsatisfactory for adapting aging conventions to a new environment because of the inherent uncertainty and time-consuming nature of ratification procedures. New approaches in some conventions demonstrate that simplified revision procedures are possible and promising.

Ulrich G. Schroeter, *Gegenwart und Zukunft des Einheitskaufrechts* (Present and Future of Uniform Sales Law)

Uniform sales law forms a part of uniform private law that comprises a number of Conventions unifying either conflict-of-laws rules for sales or substantive sales law. The Hague Convention on the Law Applicable to International Sales of Goods (1955) and the Hague Uniform Sales Laws of 1964 achieved a certain legal uniformity for international sales contracts, but both were ratified by only a few Western European States. The UN (Vienna) Sales Convention of 1980 (CISG) has, in turn, developed into one of the greatest successes of uniform law-making in private law.

The currently more than 80 Contracting States are proof of the fact that the CISG has been accepted by the global community of States. Its Contracting States include most major international trading nations and at the same time countries from all regions of the world. In the upcoming years, the Sales Convention's ratification by further developing States should be actively encouraged.

By contrast, the extent to which the CISG has been accepted in commercial practice is very difficult to assess empirically. Much is to be said for the assumption that its contractual exclusion is significantly less common than sometimes alleged, given that the courts require a clearly expressed intention to exclude and that any exclusion needs to be agreed upon by both parties, which is often not the case. The assessment of the Sales Convention's practical importance is further complicated by its frequent application by arbitral tribunals, because the resulting arbitral awards usually remain confidential and

thus inaccessible.

In the future, the quest for a uniform interpretation of the Sales Convention is likely to be the most important challenge. Article 7(1) CISG provides some guidance by imposing three interpretative goals that in practice have mostly been observed. They have resulted in a generally uniform interpretation, although limited areas of non-uniformity exist. A general challenge arises from sales contracts' nature as everyday contracts in international trade, resulting in the uniform sales law's frequent application by non-specialised lawyers. It is therefore necessary to enable and assist a uniform interpretation through appropriate organisational arrangements, with a cross-border cooperation among specialised academics as the most suitable solution, designed to evaluate and assess international CISG case law and make it available to uniform law users in every country.

The Sales Convention has furthermore contributed to legal uniformity through its use as a model for other international Conventions as well as for domestic and regional law reforms. By contrast, a future revision of the Convention's text seems neither desirable nor realistic, with its further development best being left to courts and legal academia.

Finally, the increasing number of uniform law acts for international sales calls for a better coordination between the various law-making organisations. In particular, regional uniform law (notably EU law) should respect the existing uniform sales law by explicitly granting priority to the CISG.

Stefan Huber, *Transnationales Kreditsicherungsrecht* (Secured Transactions Law: A Transnational Perspective)

Asset-based financing requires a secured transactions law which permits the efficient and swift enforcement of security interests. The interplay between substantive law, procedural law and insolvency law is highly complex even at the purely national level. If the object covered by a security interest moves regularly across national frontiers, an additional issue arises: the cross-border recognition of the security interest.

This issue became of particular importance in the era of industrialisation. The intercontinental exchange of goods made high-value vessels indispensable. It is

thus not surprising that the first instrument of transnational secured transactions law concerned security interests in vessels. An instrument concerning aircraft followed. Both instruments, adopted in the first half of the 20th century, are based on the idea of recognition by way of harmonising the conflict of laws rules: A security interest duly created under the law of the Contracting State where the vessel or the aircraft is registered is to be recognised by the other Contracting States. Substantive law, procedure and insolvency rules were not yet harmonised, except for the priority between security interests and charges and some minor procedural questions. As a result of this lack of harmonisation, legal uncertainty remained.

From the 1970s on, UNIDROIT and UNCITRAL launched projects pursuing a functional approach. The idea was to establish uniform rules in all areas of law where the efficient cross-border enforcement of security interests required transnational harmonisation. The projects have led to international conventions concerning either certain types of transactions, such as financial leasing, or certain types of assets, such as receivables. The biggest success to date has been the Cape Town Convention on International In- terests in Mobile Equipment with its Aircraft Protocol. Both adopted in 2001, they entered into force in 2006. The combination of general rules in an umbrella convention and specific rules for certain categories of objects in additional protocols – there also exist protocols for railway rolling stock and space assets – was an efficient response to the different needs of different business sectors. 64 states and the EU are already party to the Aircraft Protocol and there are even more contracting parties to the Cape Town Convention itself. The economic impact of the instrument has been high. Having established a new international security interest with a uniform set of substantive, procedural and insolvency rules, the instrument considerably reduces the risks for secured creditors. As a result, credit costs are reduced. Savings in the amount of at least $160 billion are expected over a period of 20 years.

In addition to the conventions, a new type of instrument has more recently appeared in the area of secured transactions law: soft law in the form of model rules and a legislative guide. These instruments are designed for all categories of movable assets.

An analysis of the modern instruments shows that they are based on the following core principles: (1) Non-possessory security interests must be

registered in order to be effective against other creditors; (2) the security interest is accessory to the secured obligation; (3) party autonomy is guaranteed within the limits set by third-party interests; (4) states are encouraged to adopt the optional uniform rules on self-help remedies and on interim relief; (5) the registered non-possessory security interest is effective in the event of the debtor's insolvency; and (6) the international character of a transaction is no longer the predominant connecting factor for determining whether the transnational rules apply.

This list makes clear that the content of the transnational instruments has achieved new dimensions which were not imaginable in the early days of the harmonisation of secured transactions law. At the same time, the number of transnational instruments has risen considerably. A future challenge will be coordinating all these instruments in a way that they constitute a real system of transnational secured transactions law.

Andreas Maurer, *Einheitsrecht im internationalen Warentransport* (Uniform Law in the International Transport of Goods)

The roots of uniform law in the field of transport law can be traced back to antiquity. Today, a number of international conventions form a uniform law for almost all types of common carriers. Those conventions for trains, trucks and inland navigation vessels, however, must be characterized as regional, even if they encompass three continents. Yet, they are not applicable worldwide. The only uniform law with almost worldwide applicability is the regime on air travel. Whereas the uniform laws on transport with the aforementioned common carriers are mostly evaluated positively, uniform laws on international maritime law are rather fragmented and inconsistent. This situation has not been alleviated by the recent introduction of the so-called Rotterdam rules on multimodal transports. Today it is more than questionable whether in the long run a uniform international maritime law can be introduced. Attempts to implement privately-created uniform law have been unsuccessful. Despite the fact that a number of private organizations are involved in the creation of standard contracts and standard clauses in order to unify regulations on international maritime trade, these rules are not (yet) accepted as being law or equal to law.

Alexander Peukert, *Vereinheitlichung des Immaterialgüterrechts: Strukturen, Akteure, Zwecke* (Unification of Intellectual Property Law: Structures, Actors and Aims)

> *Intellectual property (IP) law is among the oldest and most comprehen- sive areas of uniform private law. Nearly all countries are members of the World Intellectual Property Organization and as such agree "to promote the protection of intellectual property throughout the world". The problem, however, is that this legal protection is subject to the equally universally acknowledged territoriality principle. IP rights are limited to the territory of the country granting them and sometimes remain available only for nation- al citizens/local residents. The article provides an overview of the legal measures taken by different actors to address the tension between global communication and fragmented IP protection. It distinguishes between (i) the harmonization of national IP laws, (ii) the creation of supranational procedures, rights, and courts, and (iii) informal cooperations between private stakeholders and patent offices. The guiding question is whether interna- tional IP law is primarily concerned with establishing a global level playing field or whether it pursues a more tangible aim, namely the strengthening of IP protection "throughout the world". The article concludes with a critical assessment of the narrative that considers international IP law a great success because of its indeed impressive growth.*

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.