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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.*
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> *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.*
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> *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.*
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> *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.

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

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.