Zamora Cabot on the Islamic Veil

Prof. Zamora Cabot (University of Castellón, España) has just published an article on multiculturalism, entitled "Europa entre las corrientes de la multiculturalidad: incidencia del velo islámico en el Reino Unido" (Papeles en el tiempo de los derechos, num. 14, 2011. ISBN: 1989-8797)

This paper addresses the topic of the Islamic veil, one of the most significant ones in the area of multiculturalism in Europe, with reference to the example of the United Kingdom. Its first section highlights the values which should frame the issue, namely tolerance and legal pluralism, singularly at the current time: a time in which the events in the Arab world force Europeans to an exercise of empathy, and towards finding a way to match discourse and real practice of these values.

The second section focuses in the UK, exploring the social and political substrate and milestones that must be taken into account to understand the legal response given in that country to the Islamic way of dressing. Some general observations are made on these clothes, also aiming to provide the reader with a better understanding of the English legal response; and the well known decision of the House of Lords in the Begum case is analyzed from a critical point of view. In this regard, the important efforts made by the various courts, crowned by that decision, are neither ignored nor underestimated; nevertheless, they deserve a negative assessment, as it seems that formal considerations and the will to maintain the status quo have prevailed at the expense of an analysis based on pluralism, that should have led to a different outcome.

The burqa or full veil is discussed in section four, through a variety of scenarios based on different practices in different contexts. Pragmatism and respect for religious convictions are remarkable in all of them: for example, when facing the delicate question of the use of the burqa in proceedings before the courts.

The concluding section praises the liberal spirit of British society where, unlike several European countries, these matters have not been addressed through a repressive apparatus. That is why the UK is considered in this work as a remarkable example that ought to be emulated.

Thiede and McGrath on Mass Media, Personality Rights and European Conflict of Laws

Thomas Thiede and Colm P. McGrath have posted Mass Media, Personality Rights and European Conflict of Laws on SSRN. The abstract reads:

> *In this article the authors critically analyse the current approach of the European Court of Justice (ECJ) alongside the proposed alternatives to a unified European conflict of laws rule dealing with the problem of cross-border infringements of personality rights. Having exposed the weakness of these approaches they set out one suggested path for reform.*

Andrea Bonomi: Varia on Succession and PIL

Prof. Andrea Bonomi, Vice-Dean of the Faculté de droit et des sciences criminelles and Director of the Centre de droit comparé, européen et international (CDCEI), University of Lausanne, has just published a critical opinion on the Proposal for a Regulation in matters of succession in the collective book *Innovatives Recht* (Festschrift für Ivo Schwander), under the title "La compétence des juridictions des Etats membres de l'Union Européenne dans les relations avec les Etats tiers à l'aune des récentes propositions en matière de droit de la famille et des successions". He has kindly sent me an abstract :

> The Commission's Proposal for a Regulation in matters of succession covers

among alia the jurisdiction of the courts of EU Members States. By virtue of the recent Proposals for Regulations for matrimonial property and for the property consequences of registered partnership, the court with jurisdiction over the administration and distribution of the estate of a spouse or registered partner also has jurisdiction to rule on the winding up of the matrimonial property *régime* and on the property consequences of the partnership.

Normally, the competent court will be that of the last habitual residence of the deceased. However, where the deceased had his/her last habitual residence in a non-Member State, the competent court will have to be determined in accordance with Art. 6 of the Succession Proposal. This provision is for many reasons unfortunate, in particular because it creates the conditions for positive conflicts among the courts of several Member States and with the courts of non-Member States, as it is shown in the relationship to Switzerland.

In this article we analyze the shortcomings of Art. 6 and suggest some possible improvements of this provision (deleting Art. 6(c); reducing the role of nationality by retaining this criteria only in the case of a choice of the national law; reducing the reach of the court's residual jurisdiction by excluding the property situated outside the European Union; including a *lispendens* rule applicable in the relation to third States' courts; including a *forum necessitatis* to avoid negative conflicts). We hope that this provision will be corrected during the negotiation process.

A second recent, obviously worth commenting contribution of Prof. Bonomi is his "Succession internationales: conflits de lois et de juridictions", The Hague Academy Collected Courses, vol. 350 (2010), pp. 71-418. The study takes the course taught by him in The Hague in 2007 as point of departure, and deepens and broadens the insights made at the time for the audience (which included me!). Clicking Table des matières you will have access to the index of the publication.

International Arbitration Law Review, Vol. 14, Issue 5

The latest issue of the International Arbitration Law Review (Vol. 14, no. 5, 2011) is out.

Contents include several topics of interest to the intersection of private international law with commercial and investor state arbitration, including:

> *Hong-Lin Yu, How far can party autonomy be stretched in setting the grounds for the refusal of arbitral awards?*
> *Charles Kotuby Jr, 'Other international obligations' as the applicable law in investment arbitration*
> *Sanja Djajic, Contractual claims in treaty-based arbitration – with or without umbrella and forum selection clauses*

Also in this edition are:

> *Thierry Berger & Mark Roberts, The new ICC Rules of Arbitration: a brief overview of the main changes*
> *Judy Zhu, China's CIETAC Arbitration – New Rules under review*
> *Richard Smith, Angeline Welsh & Manish Aggarwal, Jivraj v Hashwani – the UK Supreme Court overturns a controversial Court of Appeal ruling on arbitration*
> *Luis Fernando Bermejo, Mandatory ICC provision in Guatemala's Arbitration Law is declared unconstitutional by the Constitutional Court of Guatemala*

Christmas Presents from the CJEU

Two private international law offerings from the wise folk of the Court of Justice before they disappear on their Christmas vacations. First, the judgment in Case

C-384/10, Voogsgeerd, concerning the employment provisions in Art. 6 of the 1980 Rome Convention. With the Court's earlier decision in Case C-29/10, Koelzsch (see the earlier post by Gilles Cuniberti here), the Court provides substantial guidance as to the application of Art. 6 and its successor, Art. 8 of the Rome I Regulation. These two decisions look set to be cited in tandem in international employment cases for years to come. Secondly, the judgment in Case C-191/10, Rastelli Davide on the question whether the Insolvency Regulation permits joinder of co-insolvent parties whose centre of main interests (COMI) is in another Member State in circumstances where their affairs are intermixed with the insolvent party whose COMI is in the Member State seised of insolvency proceedings. The question, therefore, is essentially whether a jurisdictional hook similar to that found in Art. 6(1) of the Brussels I Regulation can be implied in the Insolvency Regulation regime. Unsurprisingly, the CJEU gives a negative answer to that question and holds further that the intermixture of assets, of itself, is not sufficient to justify the conclusion that two companies have their COMI in the same Member State.

Happy Christmas to all col.net readers.

New Book on Public Contracts and International Arbitration

A new book exploring issues raised by arbitrations involving states and states entities was published earlier this fall. The book, which was edited by professor Mathias Audit (Université Paris Ouest Nanterre la Défense), offers a variety of contibutions in French and in English.

INTERNATIONAL AND REGIONAL PERSPECTIVES

- ICC arbitration & public contracts : the ICC Court's experience of arbitratons involving states and stage entities
- L'arbitrage CIRDI et les contrats de nature publique passés avec un Etat ou une entité étatique

- International arbitration and Public Contracts in Latin America

NATIONAL PERSPECTIVES

- Arbitrage international et contrats publics en France
- Arbitrage international et contrats publics en Belgique
- Arbitrage international et contrats publics au Canada

The full table of contents is available here.

The book can be ordered here.

Fourth Issue of 2011's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2011 was just released. It contains five articles and several casenotes. A table of content is accessible here.

Four articles explore private international law issues.

In the first one, Jonathan Mattout, who practices at the Paris office of Herbert Smith, wonders whether the English Bribery Act is a danger for French businesses (*Le Bribery Act ou les choix de la loi britannique en matière de lutte contre la corruption.- Un danger pour les entreprises françaises ?*). The English abstract reads:

> *The entry into force of the UK Bribery Act is an important step forward in the fight against corruption. This demanding legislation allows the UK to meet its international commitments. It requires all relevant commercial organisations carrying on a business in the UK to have in place adequate procedures designed to prevent bribery or face a serious risk of criminal prosecution. The Act reaches out beyond the UK and gives a new role to compliance, which will inevitably lead foreign businesses trading in the UK to adapt to its*

requirements. It is likely that this new legislation will inspire similar changes in France.

In the second article, Thomas Schultz, who lectures at the University of Geneva, and David Holloway, who is barrister at Number 5 Chambers in London, provide an account of the emergence and development of comity in the history of private international law(*Retour sur la comity . – Première partie : Les origines de la comity au carrefour du droit international privé et du droit international public*). The English abstract reads:

In a series of two articles, to be published in the present and the next issue of the Clunet, the authors provide an account of the emergence and development of comity in the history of private international law, discussing where comity came from, how it developed and what purposes it was initially meant to fulfil. The purpose of such recalling of comity is to provide a historical background and conceptual starting point for the increasing current attempts to rely again on the comity doctrine in court decisions and private and public international law scholarship. In the current article, we review the forces that led to strict territoriality in the 17th century and how comity became needed to mitigate it. We will see how regulatory overlaps contributed to making the Thirty Years War inevitable and will discuss the subsequent efforts to do away with such regulatory overlaps through territorial sovereignty, whose radicalism made comity necessary to accommodate the transnationalism of commerce and societies. In the second article, we will present the early history of the concept of comity in the context of the history of private international law generally. We will focus on the evolution of the use of comity through the great stages of its history. We will thus embark on a voyage from Rome and the ius gentium, to Perugia with Bartolus de Saxoferrato, to Holland and the Voets, to Berlin and Prussia with Savigny, to the United States with Joseph Story, and to the UK with Mansfield, Westlake and Dicey.

Valerie Pironon, who is a professor of law at Nantes University, is the author of the third article which discusses the method of focalisation of torts and contracts in e-commerce after recent cases of the European Court of Justice and the French Supreme Court for private and criminal matters (*Dits et non-dits sur la méthode de la focalisation dans le contentieux – contractuel et délictuel – du commerce*

électronique . – (À propos de trois arrêts : CJUE, 7 déc. 2010, aff. C-585/08, Peter Pammer c/ Reederei Karl Schlüter GmbH & Co. KG et C-144/09, Hotel Alpenhof GesmbH c/ Oliver Heller. – Cass. com., 7 déc. 2010, n° 09-16.811, Sté eBay Inc. et a. c/ SA Louis Vuitton Malletier. – Cass. com., 29 mars 2011, n° 10-12.272, Sté eBay Europe et a. c/ SARL Maceo et a).

In recent case law, our highest jurisdictions seem to use the method of the focus to identify the competent judge in the disputes of the e-commerce : the European Court of Justice in B2C conflicts, the commercial chamber of the Cour de cassation in two recent eBay affairs. A comparison of these decisions shows however certain ambiguities relating to the method employed, in particular its subjective dimension. Some gaps concerning the probationary status of the listed indications remain also to be fulfilled.

Finally, Eric Loquin discusses in the last article an important French case of 2010 ruling on the arbitrability of international administrative contracts (*Retour dépassionné sur l'arrêt INSERM c/ Fondation Letten F. Saugstad . – (Tribunal des conflits, 17 mai 2010)*). No English abstract is provided.

U.S. Court Rules (e)Mail Interception Order Violates Public Policy

On July 22, 2011, the U.S. Bankruptcy Court for the Southern District of New York held in *In re Dr. Jürgen Toft, Debtor in a Foreign Proceeding* that a German Mail Interception Order issued in the context of German insolvency proceedings violates U.S. public policy and would thus be denied recognition.

Dr. Jürgen Toft is an orthopedic surgeon who assertedly has debts exceeding 5.6 million euros ($7.6 million) owed to approximately 110 creditors. Insolvency proceedings were initiated against him in Munich on June 10, 2010, but Toft

refused to cooperate with the German trustee and allegedly secreted his assets outside of Europe. On July 8, 2010, the German Court entered a "Mail Interception Order" authorizing the German trustee to intercept Toft's postal and electronic mail.

London

Having received information that Toft might have relocated to London, the trustee initiated a proceeding on January 28, 2011 in England. The English High Court of Justice issued an ex parte order on February 16, 2011, which granted recognition and enforcement to the German Mail Interception Order. It seems that a public policy defense was rejected on the grounds that Toft could have appealed the July order in Germany, but had not, and that § 371 of the 1986 English Insolvency Act provided a similar remedy.

New York

The German trustee then sought to enforce ex parte both the German and the English orders in the United States. The trustee requested that no notice be given to the debtor both before and after the U.S. court would agree to enforce the foreign orders so that the trustee could continue to investigate the affairs of a debtor whose intransigence, obstructionism, and evasive tactics have allegedly thwarted the German insolvency proceeding.

The point of the enforcement proceedings was to access servers located in the United States. The trustee requested that the US court compel the ISPs, AOL, Inc. and 1 & 1 Mail & Media, Inc., to disclose to the trustee all of the debtor's e-mails currently stored on their servers and to deliver to the trustee copies of all e-mails received by the debtor in the future.

The United States has adopted the UNCITRAL Model Law on Cross–Border Insolvency in 2005 as the Chapter 15 of its Bankruptcy Code, including its article 6 providing for a public policy exception (§ 1506 of the Bankruptcy Code). The Court denied recognition to the foreign orders as manifestly contrary to U.S. public policy.

The U.S. Court first examined U.S. privacy law and concluded:

> *the relief sought by the Foreign Representative is banned under U.S. law, and it*

> *would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief "would impinge severely a U.S. constitutional or statutory right."*

The Court then insisted that, contrary to the allegation of the German trustee, a U.S. trustee would not enjoy such power in U.S. insolvency proceedings.

The Court finally concluded:

> *This is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy, reflected in rights that are based on fundamental principles of protecting the secrecy of electronic communications, limiting the powers of an estate representative, and providing notice to parties whose rights are affected by a court order. The motion of the Foreign Representative for ex parte relief is therefore denied.*

Katia Fach on Latin America and ICSID

Katia Fach, senior Researcher at the University of Zaragoza (Spain) has posted a new article on SSRN, under the title *Latin America and Icsid: David versus Goliath?.* Here is the abstract:

> Some Latin American countries have shown in recent times a very critical attitude with respect to the International Centre for Settlement of Investment Disputes (ICSID). In this regard, various States of this region have individually elaborated some mechanisms to resist against the international arbitration developed under the auspices of the World Bank. Argentina has for example used legal strategies to avoid compliance with a number of ICSID awards that

require from the defendant State the payment of high amounts of money; Venezuela and Bolivia have created models of oil contracts in which no reference has been included to ICSID as the forum for settling disputes arising from these investments, and in the same way this ICSID option has been omitted from recent BITs signed by Latin American states; Venezuela and Ecuador seek to disengage from existing BITs and Bolivia and Ecuador have even come to denounce the Washington Convention. Additionally, entities such as UNASUR are trying to develop regional initiatives in Latin America, that aim to be a viable alternative to the ICSID arbitration. In short, Latin America is a region that deserves special attention in the area of international investment, as new initiatives such as the referred may have an influence on the future redefinition of international arbitration.

The text is available here, and also in the *Law and Business Review of the Americas*, volume 17, spring 2011, number 2, pp. 195-230.

Conference Announcement: Our Courts and the World

The Southwestern Journal of International Law will host a symposium on "Our Courts and the World: Transnational Litigation and Civil Procedure," on February 3, 2012. The program is here.

Here's the overview:

> *Transnational litigation and procedure*
> *is an important and timely topic – it is now taught as a first-year course in several law schools, prominent law firms have established transnational litigation practices and national courts have emerged to play a significant role in responding to cross-border challenges. Several recent high-profile cases have involved international elements, and just last term, the U.S. Supreme Court decided its first personal jurisdiction case involving international elements in over 25 years. From personal jurisdiction, forum non coveniens and conflicts of*

laws to interjurisdictional preclusion and enforcement of foreign judgments, a number of important procedural issues now commonly arise in transnational civil
litigation cases.