De Miguel on Derecho Privado de Internet (4th edn)

The fourth edition of *Derecho privado de internet*, by Professor Pedro de Miguel (Universidad Complutense de Madrid) has just been published. Eight years have elapsed since the previous edition, so I would rather say this is a new book in line with the rapid evolution of Internet services, regulatory developments related to it, and caselaw.

The First Chapter examines the legal architecture of the Internet, the role of ICANN and the organizations that develop technical standards as well as the main regulatory challenges raised by Internet activities. Chapter Two focuses on the legal aspects of information society services, including the implications of technological and media convergence and delimitation with electronic communications services and audiovisual services. This chapter contains a detailed analysis of information and other requirements applicable to information society service providers. Issues concerning liability arising out of illicit activities or contents and liability of intermediary service providers receive also special attention. Chapter Three offers a complete study of data protection issues, including an in-depth discussion of the legal treatment of data processing with regard to web pages, social networks, search engines and advertising services. Unfair practices and commercial communications are the subject-matter of Chapter Four. Advertising, spam and special restrictions affecting trade in certain products or services, like gambling and medicines, are among the topics covered. Chapter Five is devoted to industrial property rights. After discussing the role of patents and know-how in the protection of software and Internet business models, this part incorporates a complete analysis of domain name and trademark law, covering issues such as UDRP, use of trademarks as advertising keywords and metatags, and special treatment of certain activities such as auction sites. Chapter Six deals with copyright and related rights. Among the most innovative aspects of the new edition in this area, reference can be made to the in-depth treatment of intellectual property implications of the services related to the so-called Web 2.0 including a critical assessment of creative commons licences. This part incorporates also an analysis of copyright limitations in the context of the most relevant activities and services, such as the functioning of search engines.

The responses to the challenges raised by p2p file-sharing are also considered with a critical analysis of the legal measures adopted in several EU countries, including Spain, France and UK. Other issues such as open access to academic works and the legal implications of the Google Book Search Project receive particular attention. Enforcement mechanisms and liability of intermediaries play also a prominent role. The last Chapter is devoted to electronic contracts. After discussing contract formation, information requirements, recourse to standards terms, requirements related to the performance of obligations, and protection of consumers, Chapter Seven focuses on payment services and electronic money. Electronic signatures and the assessment of their contribution to the development of e-commerce are also the subject of detailed analysis. Finally, it is remarkable that in line with the global reach of the Internet the cross-border implications of all issues mentioned receive special attention all over the book. International jurisdiction, applicable law and recognition of decisions are discussed in detailed in every chapter.

Click here to get to the publishers page.

First e-Apostille issued and registered in Spain

According to the official press release of the Hague Conference on Private International Law dated on 20 May 2011 (see here), Spain has already issued and registered its first e-Apostilles using state-of-the-art technology developed under the e-APP (electronic Apostille Pilot Program) for Europe project, thus becoming the second State worldwide (after New Zealand) to have completed a comprehensive implementation of both of the e-APP's components

Full adoption of e-APP means that Spain has implemented a technologically advanced system to facilitate (1) the issuance of and use of electronic Apostilles (e-Apostilles), and (2) the electronic registration of Apostilles in an e-Register that is accessible online. Spain is also unique in that it has become the first State

worldwide to develop a central e-Register to operate and record data across multiple domestic jurisdictions.

In practice, this means that the applicant can download e-Apostilles online from the website of the Spanish Ministry of Justice ("Sede electrónica"). The applicant will then obtain an electronic file consisting of a digitally signed e-Apostille and the underlying public document. These e-Apostilles are available for public documents issued in either paper or electronic form. The e-Apostille can be easily verified in other States via the central e-Register which will contain information regarding Apostilles issued by all Competent Authorities in Spain.

(To find more about the electronic Apostille Pilot Programme click here)

Many thanks to Edina Marton for the tip

Canadian Conflict of Laws Articles

Here are some recent articles from Canadian publications:

Janet Walker, "Are National Class Actions Constitutional? A Reply to Hogg and McKee" (2010) 48 Osgoode Hall LJ 95

Jeffrey Haylock, "The National Class as Extraterritorial Legislation" (2009) 32 Dal LJ 253

Gerald Robertson, "The Law of Domicile: *Re Foote Estate*" (2010) 48 Alta L Rev 189

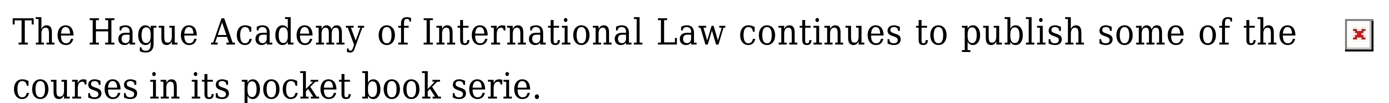
Joost Blom, "The Challenge of Jurisdiction: *Van Breda v. Village Resorts* and *Black v. Breeden*" (2010) 49 Can Bus LJ 400

Vaughan Black, Joost Blom and Janet Walker, "Current Jurisdictional and Recognitional Issues in the Conflict of Laws" (2011) 50 Can Bus LJ 499

The debate about the scope of Canadian class actions continues, and important questions about the analysis of a real and substantial connection for taking

jurisdiction over foreign defendants await some answers from the Supreme Court of Canada in the four cases currently on reserve.

New Pocketbook of the Hague Academy



The Hague Academy of International Law continues to publish some of the courses in its pocket book serie.

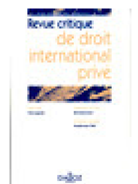
The latest is the course given by Professor Andreas Bucher in 2009 on the social dimension of private international law (*La dimension sociale du droit international privé*).

> *Andreas Bucher, professeur honoraire de l'Université de Genève, a été membre de la délégation suisse à plusieurs sessions diplomatiques de la Conférence de La Haye de droit international privé et président de la commission relative à la Convention sur les accords d'élection de for lors de la vingtième session ; membre de la commission d'experts pour la codification du droit international privé suisse. Il est membre de l'Institut de droit international.*
>
> *Ce cours apporte la cohérence au pluralisme des méthodes, dans une perspective qui tient compte des intérêts de la société. Les règles de conflit de lois sont présentées dans une nouvelle structure, exhaustive, permettant de définir la place des règles unilatérales et bilatérales et des lois de police et d'y intégrer le droit de l'Union européenne. On distinguera ainsi entre les règles attributives, matérielles et réceptives de conflit de lois. Le lecteur emportera le message que les « mécanismes », la « proximité », l'« harmonie des solutions », la « coopération » et tant d'autres « techniques » en droit international privé doivent être remplies d'une idée de justice sans laquelle elles n'ont pas de mérite. Cette justice met en valeur l'identité et la protection de la personne à travers les ordres juridiques. Le regard sur cette idée sera le meilleur guide dans l'étude des règles et des méthodes du droit international privé.*

More information can be found here.

First Issue of 2011's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found here.



The first article discusses the new judicial review procedure introduced in France in 2009 in a European context.

In the second article, Bertrand Ancel (Paris II University, co-director of the *Revue*) presents a French translation of a lecture of private international law given in Latin by Charles du Moulin in 1553 when he taught at Tübingen university (*Les Conclusion sur les Statuts et Coutumes locaux de Du Moulin, traduites en français*).

Pocket a Rome II Commentary

A new commentary on the Rome II Regulation has been (or will shortly be) published by Sellier European Law Publishers.

The "Rome II Regulation: Pocket Commentary" is the first in a series of books designed to appeal to brain, hand luggage and wallet alike. It has been co-authored by a team of German scholars – Dr Martin Illmer (Max Planck Institute, Hamburg), Dr Angelika Fuchs (Academy of European Law, Trier), Professor Peter Huber, Dr Ivo Bach and Markus Altenkirch (all University of Mainz) – and edited by Professor Huber.

The Rome II Pocket Commentary is priced at €49.00 and available in paperback or eBook versions. Further information is available here.

International Maritime Law Conference on the Croatian Islands of Brijuni

The Institute of European and Comparative Law of the Rijeka Law Faculty, the Fridtjof Nansen Institute, The Croatian Comparative Law Association, the Croatian Maritime Law Association, and the Croatian Justice Academy organise the conference "**The Resolution of International Maritime Disputes within the European and International Legal Framework**". The conference will take place on 2 and 3 June 2011 on the Islands of Brijuni, one of the Croatian National Parks.

This is the second international scientific conference dedicated to the memory of one of the most prominent Croatian private international lawyers and the University of Rijeka Rector and Professor of Law Petar Sarcevic (the first conference was reported here). This event will gather number of international experts to discuss various topics in the fields of European law, private international law, international procedural law, and maritime law. The conference program is available here. Working languages are Croatian and English, with simultaneous translation provided throughout the event.

Applications are received at: zeup@pravri.hr, where any additional information concerning the conference may be obtained as well. The hotel inquiries and reservations should be addressed to: f.marsetic@brijuni.hr.

Before the High Court: Michael Wilson & Partners Ltd v Nicholls

An interesting case is to be heard by the High Court on 31 May. It is an appeal from the decision of the New South Wales Court of Appeal in *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222.

The case arose out of the employment of two Australian citizens by a law firm operating in Kazakhstan. The firm commenced proceedings against the employees in the Supreme Court of New South Wales alleging that they and a partner of the firm had stolen clients of the firm when they left the firm and set up a rival business. The firm alleged that the employees were liable for breach of contract, inducing breach of contract, conspiracy to injure, breach of fiduciary duty and knowing assistance. The partner was not a party. The firm separately commenced arbitration proceedings in London against him, to which proceedings the employees were not party. The Supreme Court of New South Wales held the employees liable to the firm and awarded compensation. Subsequently the London arbitrators held that the partner had breached his duties but that this did not cause the firm any compensable loss.

Out of these circumstances, the matters before the High Court are:

1. whether, in light of the arbitral award, it was an abuse of process for the firm to seek to recover against the employees in the Supreme Court of New South Wales;
2. whether the judge ought to have recused himself on the ground of apprehended bias in light of findings he made at interlocutory stages of the proceeding; and
3. whether the employees waived their right to appeal the judge's judgment after trial on the ground that he wrongly dismissed their application, prior to trial, for him to recuse himself, where the judge invited the employees to appeal that decision and they did not do so.

The parties' written submissions may be found on the High Court's website. (It may be of interest to know that the High Court has, from this year, begun publishing parties' submissions on its website.)

One of the matters raised at trial, and before the Court of Appeal, but not the subject of the appeal to the High Court was the governing law of the firm's claims against the employees. The Court of Appeal upheld the judge's decision to apply the law of New South Wales to all of the claims. The Court of Appeal held that:

1. the trial judge did not err in holding that the onus was on the employees to prove the content of Kazakh law and that absent such proof the presumption of identity applied (at [320]-[335]);
2. equitable claims were ordinarily governed by the law of the forum and, in light of the judge's conclusion that the employment contracts were governed by the law of New South Wales, no occasion arose to depart from that ordinary position on the ground that the source of the equitable obligations was a contract governed by foreign law (at [339]-[346]); and
3. though the firm was incorporated in the British Virgin Islands, it was not necessary to consider whether under the law of that place the partner breached his obligations to the firm arising from company law (as required by the *Foreign Corporations (Application of Laws) Act 1989* (Cth)) because the obligations asserted arose in equity not from company law (at [347]-[363]).

While the Court of Appeal's conclusion on the first point is a helpful authority concerning the presumption of identity, the point in fact appears to have been a false one in light of the trial judge's reasoning ([2009] NSWSC 1033). The employees pleaded that all the claims were governed by Kazakh law as the law governing their employment contracts and the conduct of business in Kazakhstan (at [324]). Based on the expert evidence, the trial judge concluded that, under Kazakh choice of law rules, the employment contracts were governed by New South Wales law (at [314]-[342]). He concluded that the same result followed under Australian choice of law rules (at [343]-[363]). It is not apparent why it was felt necessary to consider the position under Kazakh choice of law rules, given that the question of the governing law of the contract would be expected to be addressed by Australian choice of law rules and they directed attention only to New South Wales law. In those circumstances, no renvoi question could arise. The judge then concluded (at [364]):

> *The defendants have failed to prove as a matter of fact that Kazakhstan law applies to the contracts of employment. The plaintiff has overwhelmingly proved it does not. The presumption that Kazakhstan law is the same as local*

> *New South Wales law applies in that event.*

The third sentence does not follow from the previous two. This was not a case involving the presumption of identity at all, ie one in which the court concludes that foreign law applies but there is no evidence as to its content. Rather, the employees' position was that Kazakh substantive law applied, the firm's position was that New South Wales substantive law applied and the judge accepted the latter view.

Finally, it is worth noting one — of a very large number — interesting earlier interlocutory disputes in this proceeding. In *Wilson & Partners Ltd v Nicholls* (2008) 74 NSWLR 218; [2008] NSWSC 1230, the Supreme Court made an order for production for inspection of client files, located in Kazakhstan, of Kazakh companies associated with the employees and the partner. The companies were defendants to the proceeding. The files had been discovered but were not made available for inspection on the ground that this would breach Kazakh law. The Court held that even if this were so, it would not be an absolute bar to an order for production for inspection, as that is a question of procedure governed by the law of the forum (at [5]-[11]) and, in any event, the competing expert evidence did not prove that it would be a breach of Kazakh criminal or administrative law (at [12]-[27]). In resolving this application, the Court was not greatly assisted by the experts (at [12]):

> *Neither of the experts was cross-examined, and no application for leave to - cross-examine was made. Neither descended to much detail in setting out the statutory or other authoritative basis for the opinions that they tendered. In many cases, I am left with competing ipse dixits of the two experts.*

Not high praise!

Foreign arbitration awards in Australia: a 'pro-enforcement bias'

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131 provides a recent example of the 'pro-enforcement bias' of at least some Australian courts when it comes to international arbitration awards. The Federal Court of Australia enforced a Ugandan arbitration award under the *International Arbitration Act 1974* (Cth) (which applies the *New York Convention*), notwithstanding that the Australian corporate respondent did not participate in the arbitration. That Act was amended in 2010 to favour the enforcement of foreign arbitral awards even further than had previously been the case. There are two points of more general interest.

First, the Court considered that the arbitration clause at issue — which provided that 'Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration' — was not void for uncertainty and nor was the dispute outside its scope or determined otherwise than in accordance with the procedure agreed by the parties. The Court was prepared to read the clause as meaning (at [63]): 'All disputes under or in relation to the Contract must be referred to arbitration'. The Court thus effectively read the words 'under or in relation to the Contract' into the arbitration clause. The arbitral procedure adopted was in accordance with Ugandan arbitration legislation, which supplied any deficiencies in the parties' agreement concerning procedure.

Secondly, the Court rejected the respondent's submission that the award should not be enforced on grounds of public policy (s 8(7) of the Act). The respondent had sought to invoke this ground on the basis that the arbitrator made errors of law and fact when determining the award of general damages. The Court said (at [126]) that it was not:

> *against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to*

> *support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.*

The Court approved United States authorities consistent with this narrow approach to the public policy exception (*Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier*, 508 F 2d 969 (2d Cir 1974); *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 at 306 (2004)) and disapproved previous Australian authorities supporting a broader approach (*Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432; *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 at [6]-[14], [18]).

Financial Regulation in the Global Market

On Friday 10 June 2011, the British Institute of International and Comparative Law will hold its annual conference (full-day), entitled "Financial Regulation in the Global Market – Moving Beyond the State". Among the eight panels addressing different aspects of this topic is one focussing on private international law issues. In a session entitled, "Financial Regulation Hitting the Reality of Private Cross-Border Relations" (chaired by Dr Joanna Perkins, 3-4 South Square) the expert speakers will be:

- Dr Peter Werner, ISDA
- Professor Francisco Garcimartin Alferez, University Rey Juan Carlos
- Professor Matthias Lehmann, University of Halle-Wittenberg

Further details (including other panels and speakers, venue and registration) are available here.