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.

A New Assignment for the Rome I Regulation – Update

UPDATE: THE FINAL SUBMISSION DATE FOR THE QUESTIONNAIRE HAS BEEN EXTENDED TO WEDNESDAY 15 JUNE. ALL THOSE WITH AN INTEREST IN THIS ASPECT OF THE FUNCTIONING OF THE ROME I REGULATION ARE ENCOURAGED TO RESPOND TO ANY PART OF THE QUESTIONNAIRE WHICH APPLIES TO THEM.

ALTHOUGH THE QUESTIONNAIRE IS DRAFTED WITH BUSINESSES AND LEGAL PRACTITIONERS IN MIND, OTHERS (E.G. ACADEMIC LAWYERS, GOVERNMENTAL AND NON-GOVERNMENTAL ORGANISATIONS) MAY COMPLETE PART 3 (POLICY OPTIONS) ONLY.

When the Rome I Regulation was finalised in 2008, certain questions concerning the effect of assignments upon third parties (e.g. judgment creditors, security holders, prior assignees of the same right) were left open. In this connection, the Commission undertook to prepare and submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties, and the priority of the assigned or subrogated claim over a right of another person (Art 27(2)).

The British Institute of International and Comparative Law (BIICL) has been "Commissioned" to undertake a study upon which this report will, in part, be based. For the purposes of this study, BIICL has prepared a questionnaire concerning the role of assignments and the surrounding legal environment in

transactions with a cross-border element. Answers to this questionnaire (involving requests for information about the nature and value of transactions undertaken, practical examples of the impact of legal regulation and views on policy options for a possible new EU conflicts rule in this area) will be used by BIICL in preparing its study report and submitted to the Commission as part of its impact assessment for any future proposal. Accordingly, the process is intended to enable EU businesses and members of the legal profession to make their views known at the outset of the review process.

As a member of the BIICL team, I would encourage all of you to take part in the study by (1) downloading and completing any parts of the questionnaire which apply to you (download here) and returning the form to Dr Eva Lein at the Institute (see contact details in the questionnaire), and/or (2) by forwarding this post to any business contact whom you think may have an interest in the subject matter of the study. Please also contact Dr Lein (e.lein@biicl.org) if you have any questions concerning the project or the questionnaire.

The New Spanish Arbitration Law Reform Act

This post has been written by Miguel Gómez Jene, Senior Lecturer of Private International Law at the UNED (Universidad Nacional de Educación a Distancia)

On May 21st, the Spanish official Gazette (www.boe.es) published the reform of the Arbitration Act. This Act amends certain provisions concerning the Arbitration legislation (2003). From the point of view of international private law, the most significant changes involve the reallocation of competence in arbitration matters. Indeed, after the coming into force of the Reform (twenty days after its publication), the corresponding High Court of each “autonomous community” (Tribunales Superiores de Justicia de las Comunidades Autónomas) shall be competent for exequatur and annulment proceedings and appointment of arbitrators. Although this modification appears desirable, it should be noted that

no appeal is possible against the judgment of the High Court resolving the exequatur or annulment proceedings. Therefore the Spanish Supreme Court has no competence to deal with arbitration matters.

The prima facie standard of review for the validity of arbitration agreements has also been affected. Specifically, the amendments concern the period to submit the objection to jurisdiction. This objection to jurisdiction shall be made in the first ten days of period to answer the claim.

The possibility of arbitration in relation to company disputes has been expressly affirmed. However two special requirements have been made. First, the introduction of the arbitration agreement in the by-laws of the company requires two thirds of the votes corresponding to shares or participations. Secondly, arbitration in company disputes must be submitted to institutional arbitration. Incomprehensibly, ad hoc arbitrations are not allowed in these matters.

The Reform introduces a new regulative framework for the relationship between arbitrator and mediator. This regulation states that, unless otherwise agreed, a mediator shall not be able to become the arbitrator in the same dispute between the parties.

The expiration of a temporal limit to render an award shall not affect its validity any longer. Previously there was a six months period to render the arbitral award. Such period of time led to a contradictory case law in order to its consideration as a ground for setting aside the award. Furthermore the temporal limit was also considered a very short period of time to render an award in an international arbitration.

The reform also provides an important new amendment regarding the scope of rectification and interpretation of the award. In cases where arbitrators have decided upon matters which have not been submitted to their consideration or upon not arbitrable matters, parties may request for a rectification of “partial extra limitation” to the arbitral tribunal.

Finally, it should be noted that the Bankruptcy Act has also been amended in order to maintain the validity of the arbitral agreement in cases of declaration of bankruptcy.

New French E-Journal

The Law Faculty of Metz has launched a new e-journal *Scientia Juris*. The new Journal is not specialised, but the editors anounce that it will have a clear comparative focus. The articles, which are freely available online, will not only be offered in French, but also in other European languages.

Indeed, the first issue includes articles written in English, German, Spanish and French.

One of them is authored by Marta Requejo and explores a conflict issue: *La responsabilidad de las empresas por violacion de derechos humanos – deficiencias del marco legal*. The English abstract reads:

> *In a globalized world the activities of multinational and transnational corporations have a profound impact on the human rights of individuals and communities, especially in developing countries. The human rights violations committed by these agents have to be dealt with. Today is commonly accepted that the optimal approach from a legal point of view should be one of international law; but so far international law has not provided satisfactory answers. Therefore, the accountability of multinational and transnational corporations requires the intervention of domestic systems, where various regulatory options seem possible: one is the use of private civil claims. Civil litigation for human rights often involves private international law problems. Traditional PIL solutions for civil liability do not suit the factual context of violations of human rights. That is why changes on issues such as the criteria of international jurisdiction are needed. In the EU the task could be addressed at this very moment, in the context of the process of review of Regulation Brussels I.*

It can be downloaded here.

Mr Strauss Kahn’s Handcuffs

Most readers will have heard that the IMF director was arrested a few days ago in New York City and is accused of sexual assault against a young hotel maid. Many readers will also have seen the accused waiting in court, or leaving the NYPD premises. Handcuffed.

Well, non-French based readers should know how lucky they are. In France, it has been forbidden since 2001 to show an accused handcuffed. The rationale for the rule is that showing the accused handcuffed damages badly his reputation at a stage of the proceedings where he is presumed to be innocent. Any person breaching this command of the law can be fined up to € 15,000 (for details on the French rules, see here).

Now, of course, the application of French criminal law is territorial. This means that the persons concerned by such prohibition should be first and foremost French newspapers and televisions. But what about websites directing their activities towards France? Or simply accessible in France?

In any case, French televisions have been showing over and over again Mr Strauss Kahn walking handcuffed out of the Police premises in NYC. French journalists have said that they have considered the prohibition, but quickly to decide that given that all other media in the world would be showing the litigious pictures, they should and would as well. And we have not heard of any prosecution.

How is that possible? Several explanations could be offered.

1. One could first think that the French media have made a simple cost-benefit analysis and realised that they might make much more than €15,000 by showing the pictures. Indeed, the audience of News at 8 main programmes have increased remarkably in the first few days following the arrest. But how could one explain, then, that enforcement authorities did not even try to enforce the relevant law.
2. Is globalisation preventing them from actually doing so? Have French

authorities concluded that, given that all other laws allow these pictures, there is no point trying to enforce the local law?

Pacta Sunt Servanda and Article 22.2 of the Brussels I Regulation

This post is written by Adrian Briggs, Professor of Private International Law at the University of Oxford.

One should note the decision of the European Court in C-144/10 *BVG v JP Morgan Chase* (12th May, 2011: Third Chamber), which held that where a bank sues to enforce the obligations of a swap contract which is valid according to its governing law, and the corporate defendant raises by way of defence the contention that its constitution or constitutional law deprived it of legal power to enter into the contract, the matter is not one to which Article 22.2 of the Brussels I Regulation applies, and it does not follow that the defence must be adjudicated, or the whole action prosecuted, in the court in which the corporate entity has its seat. This is because the point of company law or company validity is to be seen as no more than incidental or ancillary to the main issue, which is a contractual one. It followed that proceedings brought by the corporate German entity in Germany, by which it sought a declaration that it was not bound by a swaps contract which it had entered into with the bank, was not one which Article 22.2 allowed or required the German courts to hear, as Article 22.2 had no application to the proceedings.

The consequence was that the attempt of the corporate entity to derail earlier-commenced proceedings brought by the bank against the corporate entity in the English courts to enforce the obligations of the contract, by bringing counter-proceedings in Germany and seeking to use Article 22.2 as a mechanism to contend that the German courts were not bound by Article 27 to yield jurisdiction to the English courts – relying for this contention on the point left open after Overseas Union Insurance and never since settled – fell at the first fence. There

being no jurisdiction in the German court in the first place, there was no need to go on to consider the Article 27 point, which is in one respect a pity.

Some will see in this a welcome piece of common sense, entirely in accord with the manner in which the English High Court and Court of Appeal had addressed (albeit in mirror image) the same issue in the proceedings which the bank had brought: *BVG v Morgan Chase Bank NA* [2010] EWCA Civ 390. It also means that the reference made in the same proceedings by the Supreme Court of the United Kingdom at the end of last year, registered as Case C-54/11, is now practically redundant, and the reference should now be withdrawn. It also means that the way Art 22.2 operates, in that it is triggered only when the company law point is the principal issue in the proceedings, and which it will not be where the company law point is a mere defence to a contractual claim which has been or will be asserted, is different from the way Art 22.4 works. This is because the validity of a patent, as any fule kno, is always at the heart and core of an infringement action, in the way the validity of the decision of an organ of a company is not always at the heart of a contract claim against that company, even when the company takes the point of validity as the whole of its defence.