Second Issue of 2010's Revue de l'Arbitrage

The second issue of 2010's French *Revue de l'arbitrage* was released in July.

It contains three articles, one of which addresses an issue of private international law. It is authored by Mathias Audit, who is professor of law at the University Paris Ouest (formerly Paris 10) and discusses the influence of the recent *INSERM* judgment of one of French supreme courts on the regime of arbitration of disputes arising out of international administrative contracts (*Le nouveau régime de l'arbitrage des contrats administratifs internationaux (à la suite de l'arrêt rendu par le Tribunal des conflits dans l'affaire* INSERM*)*). The English abstract reads:

> *Pursuant to a judgment of 17 May 2010, the "Conflicts Court" ("Tribunal des conflits") laid down the first foundations for the international arbitral regime to be applied to administrative contracts concluded by French public bodies with foreign contracting parties. The Court has in particular decided to entrust to administrative courts the review of awards issued under certain types of such contracts. Using this judgment as a starting point, this article aims to review more generally this new regime which now applies to arbitration of disputes arising under international administrative contracts.*

Knowles on the Alien Tort Statute

Robert Knowles, who is a Visiting Assistant Professor at Chicago-Kent College of Law, has posted A Realist Defense of the Alien Tort Statute on SSRN. Here is the abstract:

> *This Article offers a new justification for modern litigation under the Alien Tort Statute ("ATS"), a provision from the 1789 Judiciary Act that permits victims of*

human rights violations anywhere in the world to sue tortfeasors in U.S. courts. The ATS, moribund for nearly 200 years, has recently emerged as an important but controversial tool for the enforcement of human rights norms. "Realist" critics contend that ATS litigation exasperates U.S. allies and rivals, weakens efforts to combat terrorism, and threatens U.S. sovereignty by importing into our jurisprudence undemocratic international law norms. Defenders of the statute, largely because they do not share the critics' realist assumptions about international relations, have so far declined to engage with the cost-benefit critique of ATS litigation and instead justify the ATS as a key component in a global human rights regime.

This Article addresses the realists' critique on its own terms, offering the first defense of ATS litigation that is itself rooted in realism – the view that nations are unitary, rational actors pursuing their security in an anarchic world and obeying international law only when it suits their interests. In particular, this Article identifies three flaws in the current realist ATS critique: First, critics rely on speculation about catastrophic future costs without giving sufficient weight to the actual history of ATS litigation and to the prudential and substantive limits courts have already imposed on it.

Second, critics' fears about the sovereignty costs that will arise when federal courts incorporate international-law norms into domes-tic law are overblown because U.S. law already reflects the limited set of universal norms, such as torture and genocide, that are actionable under the ATS. Finally, this realist critique fails to overcome the incoherence created by contending that the exercise of jurisdiction by the courts may harm U.S. interests while also assuming that nations are unitary, rational actors.

Moving beyond the critique, this Article offers a new, positive realist argument for ATS litigation. This Article suggests that, in practice, the U.S. government as a whole pursues its security and economic interests in ATS litigation by signaling cooperativeness through respect for human rights while also ensuring that the law is developed on U.S. terms. This realist understanding, offered here for the first time, both explains the persistence of ATS litigation and bridges the gap that has frustrated efforts to weigh the ATS's true costs and benefits.

The article is forthcoming in the *Washington University Law Review*, Vol. 88, 2011.

Third Issue of 2010's Journal du Droit International

The third issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes four articles and several casenotes. Two of the articles deal with conflict issues.

The first one is authored by Nabil Ferjani and Véronique Huet and discusses the impact of embargo United Nation decisions on the performance of international contracts (*L'impact de la décision onusienne d'embargo sur l'exécution des contrats internationaux*). The English abstract reads:

> *Generally, an international contract has to been studied in a very large context, in relation with political, juridical and economic circumstances in what it takes place. This is all right if we consider the juridical order to the conclusion of this form of contract during all its existence. The international doctrine gives a good place to contractual clauses and to their interprÉtation by arbiters of international commerce. Defined as a temporary measure, the pre-juridical decision of embargo, adopted as by UNI, as unilaterally, as by regional organizations, ended as soon as the infractions of a State have been finished, in period of armed or post-conflict, in the only goal to end the violation of the international legality. The smart sanctions adopted by Security Council of the United Nations these last years have to been considered as a just and proportionate appreciation of humanitarian situations of suffering people.*

The second one is authored by Bernard Haftel, who lectures at the University of Orleans, and discusses the uniform interpretation of the Rome I Regulation (*Entre*

Rome II et Bruxelles I. L'interprétation communautaire uniforme du Règlement Rome I). The English abstract reads:

> *Last-born among European Union Private International Law, the « Rome I » Regulation establishes rules concerning the law applicable to contracts. Thus, some of its notions and terms are also in use in other European Union Regulations concerning Private International Law such as the « Brussels I » and the « Rome II » Regulations. « Rome I » and « Rome II » deal with the same legal issue – i.e. choice of Law – but one focuses on the contractual side while the other considers the non-contractual side of obligations. « Rome I » and « Brussels I » both deal with matters relating to contracts, the former establishing the Choice of Law rules while the latter deals with Jurisdiction. Therefore, a study of these regulations seems necessary in order to determine to what extent the interpretations adopted by the Court of Justice for one of these Regulations should, or shouldn't, be used for the others.*

Povse v. Alpago. ECJ preliminary ruling on Reg. (EC) No 2201/2003 under the urgent procedure

On 3 May 2010, the Oberster Gerichsthof (Austria) referred to the ECJ for a preliminary ruling five questions concerning Regulation (EC) nº 2210/2003 . At the national court request, the reference was dealt with under the urgent procedure provided for in Article 104b of the Rules of Procedure; the reason for doing so was that contact between the child and her father had been broken, and that a delayed decision on enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering return of the child to Italy would exacerbate the deterioration of the relationship between father and child, and thereby increase the risk of psychological harm if the child were sent back to Italy.

The ECJ's judgment in case C- 211/10 PPU was pronounced on 1 July 2010; it has been published today (OJ C 234, 28 August 2010).

The facts of the case

Ms Povse and Mr Alpago lived together as an unmarried couple in Vittorio Veneto, Italy, until the end of January 2008 with their daughter Sofia, born 6 December 2006. In accordance with Article 317a of the Italian Civil Code, the parents had joint custody of the child. At the end of January 2008, the couple separated and Ms Povse left the family home taking her daughter Sofia with her. Although the Tribunale per i Minorenni di Venezia (Court for matters concerning minors in Venice), by a provisional and urgent decision of 8 February 2008 at the father's request, prohibited the mother from leaving Italy with the child, Ms Povse and her daughter travelled in February 2008 to Austria, where they have lived since that date.

On 16 April 2008 Mr Alpago brought an action before the Bezirksgericht Leoben (Austria) to obtain the return of his child to Italy on the basis of Article 12 of the 1980 Hague Convention.

On 23 May 2008 the Tribunale per i Minorenni di Venezia issued a judgment in which it revoked the prohibition on the mother leaving Italy with the child and awarded, provisionally, custody to both parents, while stating that the child could reside, pending final judgment, in Austria with her mother, to whom the court granted authority to make 'decisions of day to day organisation'. In the same provisional judgment, the Italian court ordered the father to share the costs of supporting the child, established conditions and times for the father to have access to the child and instructed an expert report from a social worker in order to determine the nature of the relationship between the child and the two parents.

Notwithstanding that judgment, a report drawn up on 15 May 2009 by the appointed social worker stated that the access permitted to the father by the mother was minimal and insufficient to allow the father's relationship with his daughter to be assessed, particularly with regard to his parental abilities. Accordingly the social worker concerned considered that he (the father) was unable to carry out his task fully and in the interests of the child.

On 3 July 2008 the Bezirksgericht Leoben dismissed Mr Alpago's action of 16 April 2008, but on 1 September 2008 that decision was set aside by the Landesgericht Leoben (Austria) on the ground that Mr Alpago had not been heard in accordance with Article 11(5) of the regulation.

On 21 November 2008 the Bezirksgericht Leoben again dismissed Mr Alpago's action, on the basis of the judgment of Tribunale per i Minorenni di Venezia of 23 May 2008, according to which the child could reside provisionally with her mother.

On 7 January 2009 the Landesgericht Leoben upheld the decision to dismiss Mr Alpago's action on the ground that there was a grave risk of psychological harm to the child, within the meaning of Article 13(b) of the 1980 Hague Convention.

Ms Povse brought an action before the Bezirksgericht Judenburg (Austria), which had local jurisdiction, requesting that custody of the child be granted to her. On 26 May 2009 that court, without allowing Mr Alpago the opportunity to state his case in accordance with the principle that both parties must be heard, declared that it had jurisdiction on the basis of Article 15(5) of Regulation 2201/2003, and asked the Tribunale per i Minorenni di Venezia to decline its jurisdiction.

However, Mr Alpago had already applied, on 9 April 2009, to the Tribunale per i Minorenni di Venezia, as part of the pending custody proceedings, for an order requiring the return of his child to Italy under Article 11(8) of the regulation. At a hearing arranged before that court on 19 May 2009, Ms Povse declared that she was willing to comply with the programme of meetings between father and daughter drawn up by the social worker. Ms Povse did not disclose her own legal action before the Bezirksgericht Judenburg, which led to the above mentioned decision of 26 May 2009.

On 10 July 2009 the Tribunale per i Minorenni di Venezia declared that it retained jurisdiction since, in its opinion, the conditions governing transfer of jurisdiction as provided for in Article 10 of the Regulation were not satisfied, and held that the inability of the social worker to complete his expert report as instructed by the court was due to the mother's failure to comply with the schedule which the social worker had drawn up in relation to access.

Moreover, by the same judgment of 10 July 2009, the Tribunale per i Minorenni di Venezia ordered the immediate return of the child to Italy and instructed the

social services department of the town of Vittorio Veneto, in the event that the mother returned with the child, to make accommodation available to them and to establish an access schedule for the father. The return order was made on the ground that it was desirable to reestablish contact between the child and her father which had been broken because of the mother's attitude. For that purpose, the Tribunale per i Minorenni di Venezia issued a certificate under Article 42 of the regulation.

On 25 August 2009 the Bezirksgericht Judenburg issued an interim order, awarding provisional custody of the child to Ms Povse. That court sent a copy of that order by mail to the father in Italy, without any information on his right to refuse acceptance of service and without any translation. On 23 September 2009 that order became final and enforceable under Austrian law.

On 22 September 2009 Mr Alpago submitted an application to the Bezirksgericht Leoben for enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering the return of his child to Italy. The Bezirksgericht Leoben dismissed that application on the ground that enforcement of the judgment of the Italian court represented a grave risk of psychological danger to the child. On an appeal brought by Mr Alpago against that decision, the Landesgericht Leoben quashed the decision, on the basis of Case C-195/08 PPU Rinau [2008] ECR I-5271, and ordered return of the child.

Ms Povse brought an appeal against the decision of the Landesgericht Leoben seeking dismissal of the application for enforcement.Having doubts as to the interpretation of the regulation the Oberster Gerichtshof decided to stay proceedings and to refer to the Court five questions for a preliminary ruling.

The questions

'1. Is a "judgment on custody that does not entail the return of the child" within the meaning of Article 10(b)(iv) of [the Regulation] also to be understood as meaning a provisional measure by which "parental decision-making power" and in particular the right to determine the place of residence is awarded to the abducting parent pending the final judgment on custody?

2. Does a return order fall within the scope of Article 11(8) of [the Regulation]

only where the court orders return on the basis of a judgment on custody delivered by that court?

3. If Question 1 or 2 is answered in the affirmative:

(a) Can the lack of jurisdiction of the court of origin (Question 1) or the inapplicability of Article 11(8) of [the Regulation] (Question 2) be relied on in the second State as against the enforcement of a judgment in respect of which the court of origin has issued a certificate in accordance with Article 42(2) of [the Regulation]?

(b) Or, in such circumstances, must the opposing party apply for that certificate to be revoked in the State of origin, thereby allowing enforcement in the second State to be stayed pending the decision in the State of origin?

4. If Questions 1 and 2 or Question 3(a) are/is answered in the negative:

Does a judgment delivered by a court in the second State and regarded as enforceable under the law of that State, by which provisional custody was awarded to the abducting parent, preclude the enforcement of an earlier return order made in the State of origin under Article 11(8) of [the Regulation], in accordance with Article 47(2) of [the Regulation], even if it would not prevent the enforcement of a return order made in the second State under the Hague Convention?

5. If Question 4 is also answered in the negative:

(a) Can the second State refuse to enforce a judgment in respect of which the court of origin has issued a certificate under Article 42(2) of [the regulation] if, since its delivery, the circumstances have changed in such a way that enforcement would now constitute a serious risk to the best interests of the child?

(b) Or must the opposing party invoke that change of circumstances in the State of origin, thereby allowing enforcement in the second State to be stayed pending the judgment in the State of origin?

AG's opinion

The view of Advocate General Sharspton was delivered on 16 June 2010. After a quite long reasoning she concludes that:

‘1) A provisional measure awarding custody of a child to the abducting parent pending the final (or lasting) judgment on custody is not a ‘judgment on custody that does not entail the return of the child’ within the meaning of Article 10(b)(iv) of Council Regulation (EC) No 2201/2003 .

2) A return order falls within the scope of Article 11(8) of Regulation No 2201/2003 irrespective of whether or not the court orders return on the basis of a judgment on custody delivered by that court.

3) Where a judgment certified by a court of a Member State in accordance with Article 42(2) of Regulation No 2201/2003 is challenged on the ground of the lack of jurisdiction of the court of origin or of the inapplicability of Article 11(8) of that regulation, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.

4) A judgment delivered by a court in the State of enforcement, awarding provisional custody to the abducting parent, does not preclude the enforcement of an earlier return order made by the State of origin under Article 11(8) of Regulation No 2201/2003.

5) Where a judgment certified by a court of a Member State in accordance with Article 42(2) of Regulation No 2201/2003 is challenged on the ground that its enforcement would constitute a serious risk to the best interests of the child, because the circumstances have changed since that judgment was delivered, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.’

The judgment

Quite close to the view of the Advocate General, the ECJ stated that

1. Article 10(b)(iv) of Council Regulation (EC) No 2201/2003 of 27 November

2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.

2. Article 11(8) of Regulation No 2201/2003 must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.

3. The second sub-paragraph of Article 47(2) of Regulation No 2201/2003 must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.

4. Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.

Yearbook of Private International Law, vol. XI (2009)

The **XI volume (2009) of the Yearbook of Private International Law** (YPIL), published by Sellier – European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC), is out. The Yearbook, edited by

Andrea Bonomi and *Paul Volken*, contains a huge number of articles, national reports, commentaries on court decisions and other materials, up to nearly 650 pages.

Here's the full list of contributions (available as .pdf on the publisher's website, where the volume can be purchased, also in electronic format):

Doctrine

- *Erik Jayme*, Party Autonomy in International Family and Succession Law: New Tendencies;
- *Ralf Michaels*, After the Revolution – Decline and Return of U.S. Conflict of Laws;
- *Diego P. Fernández Arroyo*, Private International Law and Comparative Law: A Relationship Challenged by International and Supranational Law;
- *Koji Takahashi*, Damages for Breach of a Choice-of-Court Agreement: Remaining Issues;
- *Eva Lein*, A Further Step Towards a European Code of Private International Law: The Commission Proposal for a Regulation on Succession;
- *Giulia Rossolillo*, Personal Identity at a Crossroads between Private International Law, International Protection of Human Rights and EU Law;
- *Urs Peter Gruber / Ivo Bach*, The Application of Foreign Law: A Progress Report on a New European Project;
- *Juan José Alvarez Rubio*, Contracts for the International Carriage of Goods: Jurisdiction and Arbitration under the New UNCITRAL Convention 2008.

Private International Law in China – Selected Topics

- *Yongping Xiao / Weidi Long*, Contractual Party Autonomy in Chinese Private International Law;
- *Qisheng He*, Recent Developments with Regards to Choice of Law in Tort in China;
- *Renshan Liu*, Recent Judicial Cooperation in Civil and Commercial Matters between Mainland China and Taiwan, the Hong Kong S.A.R. and the Macao S.A.R.;
- *Weidong Zhu*, Law Applicable to Arbitration Agreements in China;

- *Yongping Xiao*, Foreign Precedents in Chinese Courts;
- *Guoqiang Luo (Steel Rometius)*, Crime of Law-Bending Arbitration in Chinese Criminal Law and Its Effects on International Commercial Arbitration;
- *Fang Xiao*, Law Applicable to Arbitration Clauses in China: Comments on the Chinese People's Supreme Court's Decision in the *Hengji Company* Case.

National Reports

- *Didier Opertti Badán / Cecilia Fresnedo de Aguirre*, The Latest Trends in Latin American Private International Law: the Uruguayan 2009 General Law on Private International Law;
- *Jeffrey Talpis / Gerald Goldstein*, The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law;
- *Yasuhiro Okuda*, Initial Ownership of Copyright in a Cinematographic Work under Japanese Private International Law;
- *Elisabeth Meurling*, Less Surprises for Spouses Moving Within the Nordic Countries? Amendments to the 1931 Nordic Convention on Marriage;
- *Andreas Fötschl*, The Common Optional Matrimonial Property Regime of Germany and France – Epoch-Making in the Unification of Law.

News from UNCITRAL

- *Jenny Clift*, International Insolvency Law: the UNCITRAL Experience with Harmonisation and Modernisation Techniques.

Court Decisions

- *Zeno Crespi Reghizzi*, 'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: The *West Tankers* Judgment of the ECJ;
- *Mary-Rose McGuire*, Jurisdiction in Cases Related to a Licence Contract Under Art. 5(1) Brussels Regulation: Case-Note on Judgment ECJ Case C-533/07 – *Falco Privatstiftung and Thomas Rabitsch* v. *Gisela Weller-Lindhorst*;
- *Antonio Leandro*, *Effet Utile* of the Regulation No. 1346 and *Vis Attractiva Concursus*. Some Remarks on the *Deko Marty Judgment*;
- *Ben Steinbrück*, Jurisdiction to Set Aside Foreign Arbitral Awards in India: Some Remarks on an Erroneous Rule of Law;

- *Gilberto Boutin*, *Forum non conveniens* and *Lis alibi pendens* in International Litigation in Panama.

Forum

- *Fabrizio Marongiu Buonaiuti*, *Lis Alibi Pendens* and Related Actions in Civil and Commercial Matters Within the European Judicial Area;
- *Caroline Kleiner*, Money in Private International Law: What Are the Problems? What Are the Solutions?;
- *Benedetta Ubertazzi*, Intellectual Property and State Immunity from Jurisdiction in the New York Convention of 2004.

See also our previous posts on the 2006, 2007 and 2008 volumes of the YPIL.

(*Many thanks to Gian Paolo Romano, Production Editor of the YPIL)*

Knox on the Presumption against Extrajurisdictionality

John H. Knox, who is a professor at Wake Forest University Law School, has posted *A Presumption against Extrajurisdictionality* on SSRN.

> *This article describes the Supreme Court's jurisprudence on the geographic reach of federal statutes. It argues that the Court's decisions are a parade of inconsistencies that fail to give clear guidance to lower courts, the executive branch, and Congress. The result is that no one can know with any certainty whether a statute of general application will be construed to extend to places outside U.S. boundaries but under U.S. control, such as Guantanamo Bay, or to foreign activities with domestic effects, or to foreign ships within U.S. territory.*
>
> *The article proposes that the Court return its jurisprudence to coherence by adopting a new canon: a presumption against extrajurisdictionality. Under the proposal, the Court would look for guidance to the body of international law that allocates legislative jurisdiction among countries. If that law provides the*

> *United States with sole or primary legislative jurisdiction over a situation, the Court would have a green light to construe the statute without any presumption against its application. If the United States has no basis for jurisdiction, the light would be red. There would be a strict presumption against application of the statute, which could be overcome only by a clear statement in the law itself. Finally, situations in neither of these categories would fall under a yellow light: if the United States has some basis for jurisdiction, but not the sole or primary basis, then the Court would employ a soft presumption against application of the statute, which could be overcome by any indication of legislative intent to do so.*

The paper is forthcoming in the *American Journal of International Law*.

Hoffheimer on Conflicting Rules of Interpretation

Michael Hoffheimer, who is a professor at the University of Mississippi Law School, has posted *Conflicting Rules of Interpretation and Construction in Multi-Jurisdictional Disputes* on SSRN. The abstract reads:

> *This paper discusses history of choice of law rules for interpreting ambiguous language and criticizes current approaches that apply foreign rules of interpretation and construction when doing so frustrates the intent of parties.*

And from the introduction:

> *This Article concludes that courts should routinely apply their own forum law to matters of interpretation and construction in the absence of a good reason for applying a different foreign rule. In principle, there are good reasons for applying the law chosen by the parties, but it makes no sense to apply such law when it frustrates their intent or effectively renders a contract illusory. A forum's own principles of interpretation will be flexible enough to take into*

consideration any foreign law relied on by drafters, just as they will be flexible enough to consider the meaning of foreign words and phrases.

Knapp on EU Data Protection and US Discovery

Kristen A. Knapp has posted *Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?* on SSRN.

> *Although the U.S. Supreme Court first considered the conflict between U.S. discovery rules and foreign non-disclosure law in 1958, a clear standard regarding how to enforce U.S. law against foreign domiciled companies has yet to emerge. As a result of the 2006 ammendments to the U.S. Federal Rules of Civil Procedure concerning electronic discovery ("e-discovery") procedures "[m]ore and more companies with global operations are finding themselves enmeshed in e-discovery that requires a greater understanding of the issues and laws from a global perspective" because "[i]t is challenging to navigate and manage e-discovery when you have parent companies based overseas or U.S.-based companies with foreign subsidiaries."*
>
> *This paper looks at, in light of the 2006 amendments and the lack of case law regarding the affect of the 2006 amendments, whether the enforcement techniques, as applied to "paper" discovery should be applied to e-discovery and whether there is anything specific to the nature of e-discovery that necessitates a change in the application of the law. Specifically, the paper addresses how the European data privacy regime may affect the application of paper discovery enforcement techniques to e-discovery. The paper suggests that it would be unwise for U.S. courts to afford the European Data Privacy regime significant deference. Instead, the European Data Privacy regime should be treated with skepticism, similarly to how the U.S. courts have viewed "blocking statutes" contained in foreign law. In particular, treating the EU Data*

> *Privacy regime with skepticism will help to prevent the creation of perverse incentives for companies to store their data abroad that hope to avoid legitimate discovery production requests under the Federal Rules of Civil Procedure, by raising the transaction costs for such behavior.*

The paper can be freely downloaded here.

Panamanian Conflict Rules Trump Forum Non Conveniens

I am grateful to Brian A. Ratner, a partner at Hausfeld LLP, for contributing this report.

Panamanian Supreme Court of Justice.

August 3, 2010.

MSD, Inc. Petitioner of the Cassation Challenge in the Case of Sara Grant Tobal, Josefina Escalante Romero et al. v. Multidata Systems International Corp. et al.

This Panama Supreme Court decision relates to U. S. defendant corporations that manufactured X-ray machinery used at the Hospital Oncológico of Panama. Because of technical defects attributed to the manufacturers, these machines emitted excessive radiation which caused serious radioactive burns to a number of patients undergoing treatment in that hospital.

Plaintiffs, all Panamanian citizens, filed a lawsuit for damages in St. Louis, Missouri, USA, where some of the defendants were domiciled. On January 8, 2004, the U.S. court dismissed the case on forum non conveniens grounds, accepting defendants' premise that Panama was an available, and therefore, alternative forum.

Plaintiffs complied with the U.S. court order and re-filed their case in Panama. On

June 9, 2006, the Panamanian District Court dismissed the case due to lack of jurisdiction and competence ("falta de competencia y jurisdicción").

Defendants appealed this ruling. On March 17, 2009, the Panamanian Appellate Court affirmed the lower court's decision. On August 3, 2010, the Supreme Court affirmed the Appellate Court's decision, dismissed the Defendants' cassation challenge and determined the amount of costs to be 200 Balboas.

Defendants had challenged the Panamanian District Court ruling on the grounds that it "had abstained from exercising its jurisdiction". In particular, defendants argued that the following principles of Panamanian law had been breached:

1. The injury had taken place in Panama.
2. Pendency in a foreign court is an extraneous event, which should not be taken into account in determining the existence of Panamanian jurisdiction.
3. The ancient rule of "locus regit processum" was disregarded.
4. Pendency before a foreign court does not exclude Panamanian jurisdiction.
5. The principle of right of protection by the courts ("tutela judicial efectiva") was ignored.
6. Panamanian sovereignty was violated by holding that pendency of a lawsuit abroad blocks national jurisdiction.

The above arguments were supported by the Defendants ("Movants") with articles 259, 231, 232, 238 and 464 of the Panamanian Code of Civil Procedure ("Código Judicial").

The record reveals that the District Court as well as the Appellate Court in Panama held that since the case had been previously filed in the U.S.; Panamanian jurisdiction had been dissolved due to preemptive jurisdiction ("competencia preventiva").

The Supreme Court in Panama agreed with the lower court rulings finding that filing an action abroad, where defendants are domiciled means that "*the present case has sufficient foreign elements, rendering possible a conflict of international jurisdiction*." This is because, the Supreme Court reasoned, plaintiffs are Panamanian, the facts originating the case happened in Panama, but the defendants are American corporations.

> *These international elements, known in international jargon as connecting factors (puntos de conexión) lead this Division to analyze the cassation challenge, under the special rules of Private International Law.*

The record shows that the Panamanian courts took cognizance of the fact that the case was filed first in the U.S.; and was subsequently dismissed on forum non conveniens grounds.

Movants alleged strongly that Art. 259 of the Code of Civil Procedure grants Panamanian jurisdiction when the injury takes place in Panama:

> *However, as we have stated previously, the instant case should be viewed under the special rules of Private International Law, so this controversy must be solved according to the special conflict rules.*
>
> *In that sense, our Code of Civil Procedure includes special rules for the resolution of international disputes in the area of Private International Law, which are directly applicable to this case, such as article 1421-J of the Code of Civil Procedure, the effectiveness of which was reinstated by Law 38 of 2008. Such rule, against what Petitioners plead, establishes the lack of jurisdiction of national courts to hear the present case, stating as follows:*
>
> *Art. 1421-J. In cases referred to in this chapter, national judges* ***lack jurisdiction if the claim or the action filed in the country has been previously rejected or dismissed by a foreign judge applying forum non conveniens****. In these cases, national judges must reject hearing the lawsuit or the action due to reasons of a constitutional or preventive jurisdiction nature. (Emphasis added by this Court).*

Therefore, although plaintiffs previously filed in Missouri, USA, where the case was ultimately dismissed on forum non conveniens grounds, the transcribed rule bars future jurisdiction in Panama under the doctrine of preemptive jurisdiction.

This case is noteworthy because it so purposefully imposes a conflict-of-laws standard to an international case. Due to Panama's unique conflict of law doctrine- i.e. "preemptive jurisdiction", the forum non conveniens standard in the U.S., which encourages cases to be heard in otherwise able jurisdictions, ultimately bars Panamanian plaintiffs from bringing claims it otherwise could

have brought had no forum non conveniens ruling been made.

It seems that the article of forum non conveniens under Panamanian law was briefly repealed, but that it later was restored by Law 38, of June 30, 2008. An English version of the text is available here.

Note. *The Panamanian statute on procedural conflict-of-laws*, on which the previous decision is based, was enacted as Law 32, of 2006. This law adopted the Latin American Model Act for International Litigation. The USA / Spanish / Argentine attorney Henry Saint Dahl drafted both the Model Law and the Panamanian statute. These two texts cover issues such as service abroad, evidence, damages, and statute of limitations.

Tick, Tock: Temporal Application of the Rome II Regulation Referred to the CJEU

Two recent decisions of the English High Court consider the temporal effect of the Rome II Regulation, with the first of these making a reference to the CJEU as to the combined effect of Articles 31-32 of the Regulation (to my knowledge, the first reference with respect to this Regulation).

Each of the cases (Homawoo v GMF Assurance SA [2010] EWHC 1941 (QB) and Bacon v Nacional Suiza [2010] EWHC 1941 (QB)) concerned proceedings with respect to injuries suffered by the claimant in a road traffic accident occurring (a) in a Member State (France in Homawoo and Spain in Bacon) and (b) in 2007 (but in each case after 20 August, the first critical date in terms of defining the temporal effect of the Regulation). In each case, proceedings were issued in England before 9 January 2009 (the second critical date). In Bacon, the sole defendant was the insurer of the only car involved in the accident (Mr Bacon was a pedestrian). In Homawoo, although the driver and owner of the car causing

injury were also joined, proceedings were only pursued against the insurer. Liability was disputed (successfully) in Bacon, but accepted in Homawoo.

The question for decision by each of Sharp J (Homawoo) and Tomlinson J (Bacon) was whether the Rome II Regulation applied, with the result that damages would fall to be assessed by reference to the law applicable under the Regulation (French or Spanish law) and not the law of the forum (cf. Harding v Wealands [2007] 1 AC 1, under the pre-existing English rules of applicable law).

Under Article 31 of the Rome II Regulation, the Regulation "shall apply to events giving rise to damage which occur after its entry into force". Under Article 32, the Regulation (with the sole exception of Article 29) "shall apply from 11 January 2009". This combination clearly suggests, as both judges accepted, a distinction between the date of entry into force of the Regulation and its date of application, with only the latter being specifically designated in Article 32 (9 January 2009). If that view, supported by records of the discussions in the Council's Rome II working group, is accepted as representing the legislative intention of the EU, it would seem to follow that the date of entry into force must be fixed at 20 August 2007 in accordance with Article 254 of the EC Treaty (now TFEU, Article 297). Nevertheless, an important conundrum remains to be resolved, in that the precise meaning of the words "shall apply" in Articles 31 and 32 must be explained: What is it to which the Regulation's rules of applicable law "shall apply"?

Needless to say, given the unsatisfactory drafting, commentators differ in their approaches (for my own, see Dickinson, The Rome II Regulation (2008), paras 3.315-3.321), as did the two judges in these cases.

In Homawoo, Sharp J (at [43]-[49]) was unhappy with interpretations of Article 32 as referring to the date of commencement of legal proceeedings or the date of determination of those proceedings. She suggested (at [50]) that a reading of Articles 31 and 32 as inter-linking and complete in themselves so that the Regulation would apply only to events giving rise to damage after 11 January 2009 "would give legal certainty", but accepted that the "clear language of Article 31" made it impossible to reach this conclusion, at least without a preliminary reference to the CJEU. Accordingly (at [51]) she posed the following questions:

> *If the meaning and effect of Article 31 is that Rome II is to apply to events*

> *giving rise to damage which occur after the 'entry into force' of the Regulation on 20th August 2007, what is the meaning and effect of 'shall apply from 11th January 2009' in Article 32? Is it 'apply to proceedings commenced' or 'apply to determination by a court' after that date? What is the meaning and effect of Article 31? Should it be interpreted so that the Regulation shall apply to events giving rise to damage which occur on or after 11th January 2009?*

In Bacon, it was not necessary for Tomlinson finally to decide the temporal application point or to consider whether to make a reference, as he had held the claimant on the facts solely responsible for the accident and exhonerated the defendant under Spanish law, which it was agreed applied to the question of liability in any event. Nevertheless, having heard arguments similar to those advanced before Sharp J, he concluded (at [61]) that the Regulation applied to the determination as from 11 January 2009 of the law applicable to a non-contractual obligation arising out of an event giving rise to damage on or after 20 August 2007.

Although Sharp J (at [46]) had observed that parties who are considering the possibility of settlement will wish to understand what law applies to the calculation of damages and they (like judges) need to know whether Rome II applies, Tomlinson J took the view (I would submit, correctly) that the Regulation is directed at the Member States and their courts (see [61]). This is not to deny that the Regulation's provisions are not relevant in calculating the parameters of settlement, but merely to accept that the parameters of settlement must themselves be calculated by reference to a hypothetical future determination by a court or tribunal having jurisdiction over the matter. Settlement discussions, as other commercial negotiations, are conducted by reference to the putatively applicable law, and in cross-border transactions it must be accepted that the rights and obligations of the parties may fall to be determined at different times and by different courts or tribunals according to different legal rules.

On the view taken by Tomlinson J (according with the wording and legislative history of Articles 31-32) the likely date of any future judicial determination was a factor which those negotiating settlements in the EU before 11 January 2009 would need to take into account, alongside such other factors as the identity and geographical location (within or outside a Member State) of the court(s) or tribunal(s) before which the matter could be brought if their negotiations were

not to bear fruit. That is not illogical or unjust (see Tomlinson J, at [38]). Nor does it involve giving retroactive effect to the Regulation's provisions, which were published in the Official Journal on 31 July 2007. Nor, at the point of determination, does it result in any uncertainty as to the source of the rules of applicable law that the court must apply. Further, as Tomlinson J pointed out (at [65]), the opportunity for taking any tactical advantage of the separation of entry into force and application of the Regulation ended (if this interpretation is accepted) on 11 January 2009, following which any determination by a Member State court of the law applicable to a non-contractual obligation must carried out in accordance with the Regulation's rules. From that date, the Regulation (at least according to its major objective) promotes a different kind of certainty (decisional harmony), in ensuring that Member State courts apply the same law in the determination of non-contractual obligations, even if the event giving rise to damage occurred between 20 August 2007 and 11 January 2009. The harmonisation of approach in this area across the Member States is, of course, the primary objective of the Rome II Regulation (see Recitals (6) and (15)) and this interpretation appears, therefore, teleologically superior, even if it leads to a short term problem (now expired) in terms of the foreseeability of court decisions (see Recital (16)).

In any event, it may be questioned whether the form of "legal certainty" craved by Sharp J and other proponents of this solution is of any significant or lasting value. The very fact of a reference to the CJEU on this point (and the contrary view of Tomlinson J and many others) will leave those engaging in settlement discussions with respect to events occurring between 20 August 2007 and 11 January 2009 in doubt as to the source of the rules for determining the law applicable to the parties' non-contractual obligations for years to come. By the time that we have a firm answer, the large majority of cases (particularly those involving traffic accidents) will likely have settled notwithstanding that doubt (unpredictability of outcome may even be seen as a driver of settlement). If the CJEU follows the view of Tomlinson J, as I would submit that it should, all those whose claims remain (and those whose claims remain undiscovered) will know where they stand, even if the events on which the claim is based occurred in the interregnum. As decisional harmony will (or ought to) have been improved, even in the latter class of cases, so too the incentive for one party to upset settlement discussions by rushing off to bring proceedings in a Member State court that it considers will apply a favourable law will (or ought to) have been diminished. We will all,

according to the tin, be better off.

It is suggested that, what as first sight may appear an awkward or "arbitrary" (Tomlinson J, at [38]) combination of provisions in Articles 31 and 32, is in fact a combination of puritanism and pragmatism. The authors of the Regulation, in their unremitting quest to harmonise the rules of European private international law, were anxious that their new creation should be vivified at the earliest opportunity. That, however posed a problem in that the objectives of the Regulation might be put at risk if the creature's handlers (Member State judges) were not trained as to how to use it, with the result that a period of education was built in. The modified prospective effect of the Regulation can be seen, therefore, as an attempt to resolve the conflict between the ideals of a single area of justice and the reality of twenty six different ones.

The significance of questions of temporal effect will, of course, fade over time as claims are resolved and new ones arise. In a few years, we may all be better off and wonder what the excitement was about, although Mr Homawoo, Mr Bacon and others in their position may question exactly what they have found themselves in the middle of.