Jurisdiction to Take Control over, and Liquidate, Foreign Companies

Is it permissible for a court to appoint a receiver whose powers will include taking control of a foreign company, holding in his possession all its assets, and liquidate it? Would that, at the very least, require recognition of the court order in the jurisdiction where the company has its seat?

These are some of the very many interesting issues raised by the proceedings initiated by the American Securities and Exchange Commission (SEC) against an American businessman living in France, Richard Blech, and companies of his group, Credit Bancorp. Blech has been accused of running a ponzi scheme in the United States. The SEC initiated proceedings against him before the U.S. District Court for the Southern District of New York for violation of U.S. securities laws. Pending the determination of the merits of its claims, the SEC sought interim orders aiming at preserving the assets of the defendants. In November 1999, the U.S. Court issued a first temporary restraining order and asset freeze and then a second one. These orders not only purported to freeze the assets of the defendants world wide but also appointed a Fiscal Agent for both Blech and some of his companies.

The authority of the Fiscal Agent included asserting control over foreign companies by being appointed by Blech as their sole officer and director. The companies were incorporated in various jurisdictions in the world, but what really mattered to the Fiscal Agent was Credit Bancorp N.V., the holding of the group which was incorporated in the Netherlands Antilles. The Fiscal Agent (who had been appointed in the meantime as a Receiver by the U.S. Court by an order of January 2000 which had now empowered him to liquidate Credit Bancorp N.V.) demanded that Blech designate him as the signatory of all accounts of the company, and that he appoint him as the sole director and officer of Credit Bancorp N.V., and indeed of all other companies. As Blech would not, he was declared in contempt of court by Court Order of April 2000 and ordered to pay US$ 100 per day of non-compliance. The financial penalty eventually reached US$ 13 million (I have already reported on the enforcement proceedings that the Receiver has initiated in France).

In August 2008, the Netherlands Antilles lawyer of Credit Bancorp N.V. wrote to the Receiver in his personal capacity to inform him that he had been instructed to seek compensation for his improper interferences with the company, arguing in particular that the receiver had no lawful jurisdiction over Credit Bancorp N.V. The Receiver answered that he was properly constituted by the U.S. Court. He also demanded that Blech instruct the Netherlands Antilles lawyer to discontinue its activities. On December 17, 2008, Credit Bancorp N.V. initiated proceedings in Curacao, Netherlands Antilles, against the Receiver (still in his personal capacity) and his American lawyers, claiming US$ 150 million in damages for unlawful interference. Arguments put forward by Credit Bancorp N.V. include that U.S. Court never had jurisdiction over Credit Bancorp N.V., that the Receiver never sought recognition of any of the U.S. orders abroad (and that he consequently has no authority in Curacao), and that he has never served properly the foreign company.

In October 2009, the Receiver sought an antisuit injunction in New York. On the jurisdictional points, he argued that Credit Bancorp N.V. was the very same company as its American subsidiaries, and indeed that all Credit Bancorp companies wherever incorporated are just different names used by Blech to operate his scheme. On October 14, 2009, the U.S. District Court issued another contempt order against Blech. The order finds that Blech is in contempt for interfering with the Receiver's duties, and issues an arrest warrant which will remain in effect as long as the Netherlands Antilles action will not be dismissed.

Is the assertion of jurisdiction of the U.S. Court admissible? The court appointed receiver certainly carries state authority. May a Court freely empower him to act abroad? Is it relevant whether he will physically travel to the foreign jurisdiction or whether he will instead merely act from the country where he was granted authority?

Is the situation different when his actions include taking control over a foreign company, and might result in its liquidation? In this case, the Receiver argued that the "foreign" company could not be distinguished from a local company. But I understand that the companies each had offices in the jurisdiction where they were incorporated, with salaried resident directors. And the Receiver still demanded Blech to relinquish control over the foreign company. If there had really been no difference, maybe he would not have insisted so much and sought two contempt orders. Does the existence of a company fall within the exclusive

jurisdiction of the state where it was incorporated?

Case note on Gambazzi

I have posted a draft case note in English on the *Gambazzi* case on SSRN.

It discusses a variety of the issues raised by the judgment of the ECJ, including the characterization of English default judgments as judgments within the meaning of article 25 of the Brussels Convention (as it was then) and the compatibility of the English proceedings with public policy.

With respect to public policy, the central argument is that the ECJ's conclusion that the English proceedings ought to be scrutinized globally is unhelpful and confusing. It should have been conceptually much clearer and should have identified the particular aspects of the proceedings which could be found as infringing Gambazzi's fundamental rights.

The note can be freely downloaded here. It is a draft, so I very much welcome comments!

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2009)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed**

decisions):

- ***Klaus Bitterich:*** "Vergaberechtswidrig geschlossene Verträge und internationales Vertragsrecht" – the English abstract reads as follows:

This article is concerned with the law applicable to international (works or supplies) contracts concluded by a German public authority on the basis of an unlawful award procedure or decision. In many, but not all cases there will be an express or implied choice of law agreement in favor of German law by way of reference to the German Standard Building Contract Terms "VOB/B" or, in case of a supplies contract, the "VOL/B" respectively. In the absence of choice, a contract concluded as a result of a tender procedure governed by public procurement legislation is, as the author intends to show, according to the escape clause of article 4 para. 3 of the new Rome I-Regulation No. 593/2008 governed by the law of the country where the tender procedure took place, because such a contract is more closely connected to this place than to the place where the party who is to effect the characteristic performance has his habitual residence. Thus, where German authorities are involved German law will apply to the question whether a breach of a public procurement rule is capable of affecting the validity of the contract. The relevant German provisions of substantive law state that such breach may only be invoked by means of a specific review process according to §§ 102 et seq. of the "Gesetz gegen Wettbewerbsbeschränkungen" (GWB) and, as this remedy is no longer available after the contract has been concluded, as a principle hold errors in the procurement procedure which where not subject to such review irrelevant. The only exception is § 101b GWB (replacing the former § 13 of the "Vergabeverordnung" – public procurement regulation –) declaring void contracts concluded without prior information of tenderers whose offers will not be accepted and, on the other hand, contracts concluded without a regular tender procedure. Whether this provision is an overriding mandatory provision within the meaning of article 9 para. 1 of the Rome I-Regulation and thus applicable irrespective of the law otherwise applicable to the contract is the second subject of the article at hand. The author argues that this is not the case due to its inability to effectively enforce the public procurement regime even on a national level after the contract has been concluded. It must be noted, though, that the Oberlandesgericht (OLG) Düsseldorf has taken the opposite view.

- ***Felix Dörfelt***: "Gerichtsstand sowie Anerkennung und Vollstreckung nach dem Bunkeröl-Übereinkommen" – the English abstract reads as follows:

The International Convention on Civil Liability for Bunker Oil Pollution Damage designates international jurisdiction to the country where the damage occurred. The author discusses the various available local fori under the Brussels I-Regulation and the German ZPO, emphasizing on the forum actoris under Art. 9 para. 1 lit. b in connection with Art. 11 para. 2 Brussels I-Regulation. The gap in German local jurisdiction for damages in the exclusive economic zone can be bridged by an analogy to § 40 AtomG. Concerning the recognition and enforcement of Judgments under the convention the author criticises the possibility of "recognition-tourism" due to the global effect of recognition under Art. 10 para. 1 Bunker Oil Convention. The convention allows subsequent enforcement of judgements recognized without the possibility of a public policy exception due to the specialties of the German law on recognition and enforcement. This problem can be overcome by an extensive interpretation of "formalities" in Art. 10 para. 2 Bunker Oil Convention allowing for courts to invoke the public order exception.

- ***Peter Mankowski***: "Die Darlegungs- und Beweislast für die Tatbestände des Internationalen Verbraucherprozess- und Verbrauchervertragsrechts" – the English abstract reads as follows:

The burden of proof and the onus for the underlying facts in the concrete application of both conflict rules and rules on jurisdiction is one of the dark areas. The present article examines it in the field of international consumer law. The fundamental maxim is that the party who alleges that a certain rule is applicable bears the burden of stating and proving that the facts required are fulfilled. Hence, generally it is for the consumer to show that the facts required to bring the protective regime of international consumer law in operation, are present since ordinarily the consumer will allege its applicability. He who invokes an exception is liable to present the facts supporting such contention. If a choice of law or choice of court agreement is at stake the party invoking it must show that such agreement has been concluded in accordance with the chosen law.

- ***Carsten Müller***: "Die Anwendung des Art. 34 Nr. 4 EuGVVO auf Entscheidungen aus ein- und demselben Mitgliedstaat" – the English abstract reads as follows:

The Council Regulation (EC) No 44/2001 provides in Article 34 (3) and (4) that a judgment, under certain conditions, shall not be recognised if this judgment is irreconcilable with a judgment given in the Member State in which recognition is sought (Article 34 (3)) or with an earlier judgment given in another Member State or in a third State (Article 34 (4)). The following article deals with the question whether "another Member State" in the sense of Article 34 (4) is also the Member State from which the judgment to which the earlier judgment might be opposed originates. The author comes to the conclusion that Article 34 (4) also applies to two judgments originating from the same Member State other than the Member State in which recognition is sought.

- ***Moritz Brinkmann***: "Der Vertragsgerichtsstand bei Klagen aus Lizenzverträgen unter der EuGVVO" – the English abstract reads as follows:

In Falco Privatstiftung and Rabitsch the ECJ has excluded license agreements from the application of Article 5 (1) (b) Brussels I Regulation. The author argues that the Court's narrow understanding of the term "contract for the provision of services" is persuasive particularly in light of Article 4 (1) (b) Rome I Regulation. Regarding Article 5 (1) (a) Brussels I Regulation, the ECJ has held, that the principles which the Court previously developed in Tessili and De Bloos with respect to Article 5 (1) of the Brussels Convention are still pertinent with respect to the construction of Article 5 (1) (a) of the Brussels I Regulation. This position is not surprising as the legislative history of Article 5 (1) gives clear indications that for contracts falling under (a) the legislator wanted to retain the Tessili and De Bloos approach. In the author's view, however, the case gives evidence for the proposition that the solution in Article 5 (1) of the Brussels I Regulation is an unsatisfying compromise as it requires for contracts other than contracts for the sale of goods or for the provision of services a determination of the applicable law. Hence, the ascertainment of jurisdiction is burdened with the potentially difficult determination of the lex causae. The author postulates that the European legislator should de lege ferenda extend the approach taken in Article 5 (1) (b)

to other kinds of contracts where the place of performance of the characteristic obligation can be autonomously ascertained. With respect to license agreements this could be the jurisdiction for which the right to use the intellectual property right is granted.

- ***Markus Fehrenbach***: "Die Zuständigkeit für insolvenzrechtliche Annexverfahren" – the English abstract reads as follows:

Even though the EC Regulation No 1346/2000 on Insolvency Proceedings contains provisions about recognition and enforcement of judgments deriving directly from insolvency proceedings and which are closely linked with them it lacks explicit rules about international jurisdiction for these types of actions. On 12 February 2009 the ECJ ruled on the international jurisdiction on an action to set aside which was brought by the liquidator of a German main insolvency proceeding. The ECJ declared the international jurisdiction to open a main proceeding covered these actions as well. While the ECJ established an international jurisdiction for German courts, German law does not contain explicit rules about local jurisdiction. In its judgment of 19 May 2009 the German Federal Court of Justice decided that local jurisdiction is determined by the seat of the Court of Insolvency. The author analyses both judgments and agrees with the ECJ insofar as international jurisdiction for actions deriving directly from insolvency proceedings and which are closely linked with them, belong to the courts of the member state where the main proceeding was opened. He disagrees insofar as a German action to set aside is regarded as such an action. Once the international jurisdiction of the German courts is established there has to be a local jurisdiction, too. In contrast to the judgment of the German Federal Court of Justice, the local jurisdiction follows by analogy with article 102 sec. 1 para. 3 of the German Act Introducing the Insolvency Code.

- ***Diego P. Fernández Arroyo/Jan Peter Schmidt***: "Das Spiegelbildprinzip und der internationale Gerichtsstand des Erfüllungsortes" – the English abstract reads as follows:

The article comments on a decision by the Oberlandesgericht Düsseldorf on the recognition and enforcement of an Argentine judgment. The Argentine claimant

had obtained an award for payment of a broker's commission against a company domiciled in Germany. Recognition and enforcement of the judgment was denied because, according to the German rules of international jurisdiction, the Argentinean court had not been competent to decide the matter. The case perfectly illustrates Argentine courts' tendency to claim a much wider scope of jurisdiction than their German counterparts in litigation arising out of contractual relations. The authors draw the conclusion that while the decision by the Oberlandesgericht Düsseldorf not to grant recognition and enforcement is fully in accordance with German law, it also highlights the defects of the so called "mirror principle", i. e. the mechanism of reviewing the jurisdiction of foreign courts strictly according to the German rules. In times of ever increasing international legal traffic, more flexible and liberal approaches, which can be found in other legal systems, are clearly preferable.

- ***Rolf A. Schütze***: "No hay materia más confusa …" – In this article, the author discusses a decision of the German Federal Court of Justice dealing with the question which standard has to be applied with regard to the (in)consistency of national arbitral awards with public policy (BGH, 30.10.2008 – III ZB 17/08).
- ***Dirk Looschelders***: "Anwendbarkeit des § 1371 Abs. 1 BGB nach Korrektur einer ausländischen Erbquote wegen Unvereinbarkeit mit dem ordre public" – the English abstract reads as follows:

Under the German statutory marital property regime a person who outlives his or her spouse and becomes legal heir is generally granted an additional quarter of the inheritance pursuant to § 1371 para. 1 BGB. Scholars disagree whether this provision also applies in cases where the legal succession to the deceased is governed by foreign law. The present case involved an unusual situation: the applicable Iranian law of succession discriminates against the surviving wife and therefore violates the German ordre public. The Higher Regional Court of Düsseldorf refused the application of § 1371 para. 1 BGB, since the wife's inheritance pursuant to the Iranian law of succession had already been increased to avoid the ordre public violation. This argument, however, does not convince: There needs to be a clear distinction between the correction of the Iranian law of succession to conform to the German ordre public and the question of whether the provisions of § 1371 para. 1 BGB apply.

- ***Andreas Spickhoff***: "Die Zufügung von „Trauerschmerz" als Borddelikt" – The article analyses a decision of the Austrian Supreme Court of Justice (OGH, 09.09.2008 – 10 Ob 81/08x). The decision concerns – at a PIL-level – the question of the applicable law with regard to a claim for grief compensation in a case of a deadly accident aboard a yacht. At the level of substantive law, the case illustrates the differences between German and Austrian law: While under German law, the compensation of relatives of accident victims requires an impairment of health exceeding the "normal" reaction caused by the death of a close relative, Austrian courts award grief compensation also in cases where the relatives themselves have not suffered an impairment of health – as long as there exists a strong emotional bond which is presumed in case of close relatives living in a joint household.

- ***Santiago Álvarez González***: "The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement"- the introduction reads as follows:

On January 12th 2009, the Spanish Tribunal Supremo (TS henceforth) granted compensation for damages caused by the breach of a choice-of-court agreement favoring Spanish jurisdiction. This is the first, or at least one of the first judgments in Europe (leaving aside the UK), which has dealt with the issue at the highest level of the courts of justice. The TS revoked the two prior rulings (those of the courts of first instance and appeal), in which the claim of the plaintiff had been rejected alleging that, due to the essentially procedural nature of the choice-of-court agreement, its violation could not lead to compensation. For both courts of justice, the natural consequence of the breach of a choice-of-court agreement was the rejection of the claim and (depending on the case) an order for costs. It is not the first time that the Spanish TS decides about a claim for damages due to the breach of a choice-of-court – but it is, indeed, the first time it shows its awareness of the specific problems present in this type of lawsuit. Good proof is that, in an unusual move, the judgment reproduces in extenso the legal arguments advanced by the parties both in first instance and in appeal. It also reproduces the arguments of the first and second instance courts of justice in detail. Nevertheless, the resolution is simple, convincing, and does not take into account (and in my opinion this is correct) the great number of useless details the parties added to their otherwise quite

clear pretensions. In this commentary, I will pay attention just to the contents of the judgment in the light of the elements and issues that are usually relevant in this kind of process, attending to the singularity of the current case – where the non-contractual court is placed on the US, this is, out of the scope of action of Brussels I; it must be noted that Spain has no agreement on enforcement of judgments in civil and commercial matters with the US. After going through the general idea of the case, I will study the rulings of both first and second instance, as well as some non-discussed issues. I will analyze the solution of the TS, and I will finish by giving my own view on the decision and its relevance for the future. The legal discussion was heterogeneous and messy; most of the topics, except that of the procedural or substantive nature of non-fulfillment and its consequences, were not given the importance they indeed have and, at some points, they were not articulated at the right procedural moment through the proper, procedural mechanisms envisaged by the lex fori. This paper tries to reorganize and synthesize this heterogeneity, even at the price of losing some nuances.

- **Viktória Harsági/Miklós Kengyel***:* "Anwendungsprobleme des Europäischen Zivilverfahrensrechts in Mittel- und Osteuropa" – the English abstract reads as follows:

The study is the summary of an international conference organized at the Andrássy Gyula German Speaking University. It deals with the effect of the community law on the legal systems of eight new Central and Eastern European Member States, (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovenia) on the field of civil procedure. Apart from this, former member states like Austria and potential member states like Croatia and Turkey are also analyzed. The article examines the specific problems of applying the law in cross-border litigation, such as questions of jurisdiction, recognition, enforcement, service of documents and taking of evidence.

- ***Hilmar Krüger*** presents selected PIL decisions of the Jordanian Court of Cassation: "Jordanische Rechtsprechung zum Kollisionsrecht"
- ***Carl Friedrich Nordmeier***: "Timor-Leste (Osttimor): Neues Internationales Zivilprozessrecht" – the English abstract reads as follows:

The Democratic Republic of Timor-Leste (East Timor) enacted a new Civil Procedure Code (Código de Processo Civil) by decree-law n. 1/2006 of 21st of December, 2006. This article reports on the new rules of international jurisdiction and enforcement of foreign judgments in Timor-Leste. The wording of the new provisions is very similar to the corresponding rules of the Portuguese Civil Procedure Code.

Eldon Foote's Domicile on May 17, 2004

Those interested in lengthy discussions of the law of domicile might enjoy the Alberta Court of Queen's Bench's odyssey undertaken to determine where the late Eldon Foote died domiciled (available here). The decision is over 100 pages long. Spoiler alert – the answer is Norfolk Island, an external territory of Australia located in the south Pacific Ocean. Other options considered but rejected were Alberta and British Columbia. The court sets out the applicable legal principles over some 23 pages, providing a useful summary of the law of domicile in common law Canada. The reasons then contain extended discussion of whether, at various points in his life, Mr. Foote had changed his domicile.

One point of note on the law is that the court rejects the old notion that a domicile of origin should be considered particularly difficult to change. Instead, the ordinary standard of proof on the balance of probabilities is all that is required (paras. 71-74).

Another interesting point is the court's view that if a revival of the domicile of origin would produce an "absurd" result, the court has "residual authority to instead conclude that a person has retained their last domicile of choice" (para. 97). Thre is little authority to support this view, and if it is correct it represents an important development in the Canadian law of domicile.

At the time of his death Mr. Foote was worth over US$130 million. He was a civil litigation lawyer who made his money after leaving the law, ultimately having his business bought out by the Dutch conglomerate Sara Lee. He was apparently drawn to Norfolk Island because it was a tax haven.

French Conference on Parallel Litigation

The Master of arbitration and international commercial law of the university of Versailles Saint-Quentin will organize a conference on Thursday November 26th on parallel litigation.

There will be two speakers, who will speak in French. First, Gilberto Boutin, from the university of Panama, will present recent developments in the doctrines of forum non conveniens and lis pendens in South America. Then, Gilles Cuniberti, from the university of Luxembourg, will discuss parallel proceedings between courts and arbitral tribunals, with a special focus on recent European developments.

The conference will begin at 5 pm. It is free of charge.

More details can be found here.

The Written Observations Submitted in the Gambazzi Case

Many thanks to Prof. Koji Takahashi for sending the following text and the files with the written observations submitted in the Gambazzi case.

The written observations submitted to the European Court of Justice are normally unpublished. Earlier this year, I obtained the observations submitted in Case C-394/07 Gambazzi by the United Kingdom, the Republic of Italy and the Commission of the European Communities as well as the French translation of the observation of Italy supplied by the Court of Justice. The request was made under the United Kingdom Freedom of Information Act 2000 (My thanks are due to the United Kingdom Ministry of Justice and those helped me in the process). Since I was told that those observations were now regarded as being in the public domain, I think I should make them available to all rather than keeping them to myself. Please note that the United Kingdom is withholding the written observations submitted on behalf of the Hellenic Republic, Mr Gambazzi, Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company since they did not consent to disclosure by the United Kingdom.

Commission observations

UK observations

Italy observations (in italian)

Italy observations (in french)

Note: On October the 1st Advocate General Poiares Maduro delivered his opinion in the joined Cases C?514/07 P, C?528/07 P and C?532/07 P. The Opinion is connected with the information provided by Prof. Takahashi in as much as the central issue submitted to the ECJ is “to what extent do the principles of transparency of judicial proceedings and publicity of trial require members of the public to be allowed access to the written submissions filed with the Court by the parties to a case”.

Many thanks to Daniel Sarmiento Ramirez-Escudero for the hint.

Anti-suit Injunction Issued By US Court

The United States Court of Appeals for the Ninth Circuit recently decided the case of *Applied Medical v. The Surgical Company* (available here), which raised the issue whether a district court abused its discretion in denying an anti-suit injunction. In short form, the facts were that two companies entered into a purchasing relationship that was subject to a written agreement that included a choice of law and choice of forum clause. That clause read as follows: "This Agreement shall be governed by and construed under the laws of the State of California. The federal and state courts within the State of California shall have exclusive jurisdiction to adjudicate any dispute arising out of this Agreement." Subject to other clauses in the Agreement, which allowed parties to terminate the agreement and limit liability, Allied decided against renewing the agreement past 2007. Surgical replied by asserting that it was entitled to protection under Belgian law in the form of compensation. Applied then filed a complaint for declaratory relief against Surgical in the United States District Court for the Central District of California. As relevant here, Applied filed a motion for summary judgment requesting that the district court "enjoin Surgical from pursuing relief in Belgium or any other non-California forum under non-California law." Slip op. at 14822. The district court declined to enjoin Surgical.

On appeal, the Ninth Circuit focused on that court's recent decision in *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2009), which held that a district court, in evaluating a request for an anti-suit injunction, must determine (1) "whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined;" (2) whether the foreign litigation would "frustrate a policy of the forum issuing the injunction;" and (3) "whether the impact on comity would be tolerable." *Id*. at 991, 994. The Ninth Circuit concluded that a close reading of *Gallo* as applied to the facts of this case required the district court to enter an anti-suit injunction.

While the whole opinion is worth reading to understand the *Gallo* landscape, what is perhaps most interesting is the Ninth Circuit's treatment of the comity issue. The court minimizes the comity inquiry by finding that all this case involves is a contract between two sophisticated parties to litigate their case in a

California forum under California law. Slip op. at 14835-38. As such, comity is not implicated at all, as there is no question of public international law implicated in a dispute that "involve[s] private parties concerning disputes arising out of a contract." Slip op. at 14837-38. Private international lawyers will recognize in this argument a strand of the argument that private international law can be decoupled from state law in hopes of encouraging party expectations.

One might, of course, object to such a statement of comity, for it gives short shrift to the actuality that an American court has entered an order that seeks to bind what parties can do before a foreign court. Such an action uniquely creates a conflict between sovereign powers of legislative and adjudicatory authority, and such an action necessarily brings public actors, most specifically the courts, in conflict, even though the underlying issue is one of party autonomy.

Given recent cases reports on this blog concerning the circuit split regarding anti-suit injunctions, this case might be one to watch.

Failure of the Hague Abduction Convention: M.J. Carrascosa's fate

M. J. Carrascosa and her ex-husband P. Innes met in a bar in New Jersey in 1999. They married that year in Spain and returned to the U.S., where they both worked. Their daughter V. was born in April 2000.

The couple separated in 2004. The parties reached a settlement under which the child would live with the mother, but Innes was entitled to visit her regularly; they also agreed that the girl would not be driven out of the U.S. without the written consent of the other parent. In January 2005, M.J. travelled to Spain with his daughter and settled in Valencia without permission from the father. Innes got a divorce sentence and the custody of the child in the U.S., while the Spanish courts ruled on the same but in favour of MJ Carrascosa. Innes asked the Spanish courts to apply the Hague Convention on child abduction, which is in force both in Spain and in the USA. The Spanish justice held that the marital agreement was a mere

declaration of intent, which also unduly limited the freedom of establishment guaranteed by the Spanish Constitution; the custody of the girl belonged to the mother, the transfer of the minor had not been unlawful, and therefore the Convention was not applicable. US courts think otherwise. Apparently the problem lies in the lack of a uniform meaning of the right of custody.

Carrascosa went to U.S. to stand trial in 2006, carrying the Spanish sentences. She was arrested and is imprisoned ever since. Last Thursday she was found guilty by a jury in New Jersey of a crime of obstruction of justice and eight others for failure to comply with what the U.S. courts decided on the custody of the child. The punishment will be decided on 23 December; Innes will appear before the judge as victim and state which penalty he would like. M.J. faces a sentence of ten years imprisonment, though optimistic voices indicate she might get only five. As she has already served more than half, she could be released immediately.

V. lives in Valencia with her grandparents. Since 2006, she has not seen neither her mother nor her father.

Source: El País, Sunday 15 November 2009.

(See also Charles Kotuby's post on the subject)

Immunity of CIA Agents for Abduction in Italy

There are interesting posts on this issue at EJIL: Talk! by Apo Akande and Marko Milanovic.

… an Italian Court has convicted 23 American agents (including the former head of the CIA in Milan) and 2 Italian intelligence agents for their part in the abduction and rendition of a muslim cleric Abu Omar. Abu Omar was taken from the streets of Milan to Egypt where he claimed to have been tortured. It was alleged that this act of "extraordinary rendition" was carried out by a team of CIA agents with the collaboration of Italian intelligence agency (…) This case is of interest because it appears to be the first conviction of government agents alleged to be involved in the extraordinary rendition programme. It is also of interest because what we have is a conviction by the courts of one country of persons who are officials or agents of another government. The case therefore raises issues as to the immunity which State officials are entitled to, under international law, from the criminal jurisdiction of foreign States.

Read more here.

Third Issue of 2009's Revue Critique de Droit International Privé

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

The first article is authored by Professor Anne Sinay Cytermann, who teaches at Paris V University. It wonders why jurisdiction and arbitration clauses are regulated differently in consumer and labour contracts (*Une disparité étonnante entre le régime des clauses attributives de juridiction et les clauses*

compromissoires dans le contrat de travail international et le contrat de consommation international). The English abstract reads:

> *Although both are deemed weaker parties, the worker and the consumer do not benefit from the same protection on the international sphere, particularly as far as choice of jurisdiction clauses are concerned. Indeed, when such clauses are included in an employment contract, they are subjected to a highly restrictive regime, under which they are considered to be void when they derogate from mandatory heads of jurisdiction, while arbitration clauses cannot be invoked against the worker. On the other hand, when the same clauses appear in consumer contracts, they are exposed to a far ore liberal regime which validates in principle both choice of court and arbitration clauses. It would be preferable that a similar treatment be provided for both types of contract, along the lines of the model applicable to employment contracts.*

The second article is authored by Franco Ferrari, a professor at the University of Verona and a a visiting professor a several law schools in New York. It offers remarks on the law governing contractual obligations in absence of choice by the parties under article 4 of the Rome I Regulation (*Quelques remarques sur le droit applicable aux obligations contractuelles en l'absence de choix des parties – Art. 4 du Règlement Rome I-*):

> *A comparison between article 4 of the 1980 Rome Convention on the law applicable to contractual obligations, the commission's proposal in its 2003 Green Paper and the final version of the same provision in the "Rome I" Regulation shows that the latter, ostensibly a compromise between the Convention's flexibility and the proposal's rigid system of connecting factors, is in fact very close to the original model, at least such as it was implemented by the courts in the various Contracting States. Thus, while the Commission had attempted to correct the Convention's principle of proximity by introducing greater certainty in the form of rigid and autonomous connecting factors, article 4 of the Rome I Regulation, which, like the Commission's proposal, does indeed contain a list of (eight, non exclusive) connecting factors, subjects these to an escape or exception clause similar to that of the Convention, except for the fact that the negative conditions which trigger the clause are stricter. The court must examine of its own motion whether these requirements are fulfilled, even when the contract comes the difference between the Convention, in which*

> *the proximity principle presided over the determination of the applicable law in the absence of party choice, and the Regulation in which the role of this principle is less formally apparent, is in fact very limited.*

In the last article, Professor Petra Hammje from Cergy University briefly presents a recent addition to the French civil code providing a choice of law rule for civil unions. There is not abstract, but I'll report shortly on this.

Finally, I am glad to report that the *Revue Critique* has recently been put online and that those articles can now be downloaded.