Brussels I Regulation – The UK Parliament has its say

The House of Lords' influential European Union Committee (chaired by Lord Mance) has published a report on the Commission's Green Paper on the Brussels I Regulation. The report scrutinises the Green Paper, in light of evidence presented by representatives of the UK Ministry of Justice (Lord Bach and Oliver Parker) and Richard Fentiman of Cambridge University, and considers all of the topics raised by the Commission (and discussed on these pages). The evidence is appended at the back of the report.

The Committee's conclusion (in contrast, for example, to its view on the proposed Rome II Regulation) is favourable:

> *We very much welcome the Commission's initiative in producing the Report and the proposals outlined in the Green Paper. While the Regulation has been successful, in particular by introducing clear common rules, there have undoubtedly been areas where some of the rules have, in practice, opened up the possibility for abuse contrary to the interests of justice. This opportunity should be taken to reform the rules with the aim of minimising abuse and to make other useful reforms. We hope the Commission will, following the conclusion of its consultation, move quickly to bring forward proposals to amend the Regulation.*

The report is an important contribution to the debate surrounding the proposed reforms to the Brussels I Regulation, and emphasises the need to extend the consultation process beyond any Proposal by the Commission to allow all stakeholders to contribute to the improvement of this, the central instrument of European private international law.

BIICL event: Lis Pendens in International Litigation

The British Institute of International and Comparative Law (BIICL) hosts an event titled **“Lis Pendens in International Litigation“** as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? The question of international lis pendens has long been controversial, but has taken on new and urgent importance in our age. Globalization has driven an unprecedented rise in forum shopping between national courts, but also the proliferation of new international tribunals has brought with it new challenges of interaction in today’s fragmented international legal system. The response to these challenges also has profound theoretical implications for the interaction of legal systems in today’s pluralistic world. This seminar will analyse the problems of parallel litigation across the landscape of international litigation – from private international litigation, through international commercial arbitration and investment treaty arbitration, to public international law.

Venue: The venue is Charles Clore House, 17 Russell Square, London, WC1B 5JP.

Date: Tuesday 27 October 2009 17:30 to 19:30

Chair: The Rt Hon Lord Collins, Lord of Appeal in Ordinary
Speaker: Campbell McLachlan QC, Professor of Law at Victoria University of Wellington; member of Bankside Chambers and Auckland & Essex Court Chambers, London

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Hague Academy, Summer

Programme for 2010

The summer is coming to an end. So it is already time to think about next summer.

In case you are already checking for flights and hotels at your favorite sea resort in July 2010, the Hague Academy has already posted the details of its next Summer Programme.

Most unfortunately, however, the registration office is closed until September 21st, which does not help those of us wishing to prepare reasonably in advance their holidays.

Private International Law

5 – 23 July 2010

E=English, **F=**French

Michael BOGDAN, Professor at Lund University, Sweden

General Course (E) *Private International Law as a Component of the Law of the Forum*

Roberto BARATTA, Professor at the University of Macerata, Italy

Special Course (F) *The International Recognition of Personal and Family Legal Situations*

Abdoullah CISSÉ, Professor at the University of Saint-Louis, Senegal

Special Course (F) *Evolving Private International Law in Francophone Black Africa (Interpersonal Conflicts and Interprofessional Conflicts)*

Noemi DOWNES, Professor at the University of La Laguna, Canary Islands

Special Course (E) *Foreign Second Homes and Timesharing: Lessons For Private International Law*

Nadia DE ARAÚJO, Professor at the Pontifical Catholic University of Rio de Janeiro, Brazil

Special Course (E) *International Contracts and Party Autonomy*

Jeffrey TALPIS, Professor at the University of Montreal, Canada

Special Course (F) *The Transmission of Property at Death other than by Succession in Private International Law*

Johan ERAUW, Professor at Ghent University, Belgium

Special Course (E) *Substitution and Principle of Equivalence in Private International Law (F)*

Léna GANNAGÉ, Professor at the University Panthéon-Assas (Paris II), France

Special Course (F) *The Methods of Private International Law put to the Test of Conflicts of Cultures*

All the lectures delivered in French, will be simultaneously interpreted into English

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Opinion of the Comittee of the

Regions on Consumer Rights: quite a critical view on the Proposal for a Directive of the European Parliament and of the Council on consumer rights

The opinion of the Committee of the Regions on Consumer Rights has been published in today's OJ, C 200/76. Notwithstanding the approval of the Commissions proposal aiming to consolidate existing consumer protection directives into a single set of rules (8 october 2008) the Committee expresses a quite critical opinion on several basic points of the proposal, such as the scant number of directives subject to revision, the definition of fundamental terms ("consumer", "trader"), or the provisions relating to general information requirements. More interesting from a PIL point of view is the serious criticism addressed against the proposals axis idea, that of full harmonisation: the Commission having so far failed to give cogent reasons for swichting to full harmonisation in this area, it does not appear to be strictly necessary, seems inconsistent with the basic tenets of subsidiarity, and implies that the Member States may have to sacrifice particular consumer protection provisions, even where these have proved effective in the country concerned. The Committee also has its doubts as to whether full harmonisation will boost consumer confidence and foster competition, considering that up to now, consumer difficulties have mostly been caused by the uncertainties and complexities of law enforcement in cross-border trade (language barriers, legal fees, courts costs, etc.) which are not removed by the proposed directive. The Committee holds to the idea that full harmonisation should be considered selectively, i.e. in specific technical cases only, where the different national provisions in place are genuinely placing a burden on cross-border businesses, or represent a substantial obstacle to achieving the four freedoms of the European Union: full harmonisation should therefore be applied in just a few core areas of the internal market.

Note: a quite expressive title, "Cronica de una muerte anunciada: the Commission Proposal for a Directive of Consumer Rights", from H. W. Micklitz

and N. Reich, can be read in Common Market Law Review, 2009 (vol. 46).

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

The second issue of the *Revue Critique de Droit International Privé* was released earlier this month.

It contains three articles, but only two deal with conflict issues.

The first is authored by Tunisian professor Sami Bostanji. It addresses the Survival of Communitarism in Judicial Application of Tunisian Private International Law (*La survivance du communautarisme dans l'application judiciaire du droit international privé tunisien*). Here is the English abstract:

> *Despite the efforts afforded by codification to modernise and rationalise private international law in Tunisia, later case-law bears witness to the survival of communitarism, through a practice inspired by the idea that each individual "belongs" to a differentiated community. This approach favors discontinuity between different legal orders to the detriment of individual rights, and disregards the important objective of coordinating legal systems. It looks much like traditional religious communitarism, for instance in the treatment of relationships between spouses or between parents and children (adoption, custody, etc…), But it also takes on the form of nationalistic communitarism, which ignores or even violates the codified rules of private international law.*

The second article is authored by Carlos Alberto Arrue-Montenegro, a scholar from Panama, and discusses the economic rationale of a recent Panama statute as far as choice of court agreements in admiralty matters are concerned (*Les*

orientations économiques du droit maritime international de Panama en matière d'accord de juridiction. A propos de la loi n°12 du 23 janvier 2009 modifiant la loi panaméenne procédure maritime). Unfortunately, no abstract is provided.

Articles of the *Revue Critique* cannot be downloaded.

Chinese Judgment Enforced in the United States

On August 12, 2009, the United States District Court for the Central District of California issued a judgment enforcing a $6.5 million dollar Chinese judgment against an American corporate defendant under California's version of the Uniform Foreign Money Judgments Recognition Act. The court's full decision is available here.

This case is unique because it is generally believed that United States courts will not enforce Chinese judgments given the lack of a treaty between the two countries on the issue and given that Chinese courts generally do not enforce United States judgments in China, which limits the argument for reciprocity in the United States. Given this decision, California may become a favorable forum for enforcement of Chinese judgments in the United States.

PIL conference @ UJ

The final programme for the PIL conference at the University of Johannesburg, 8-11 Sept 09, is now available at www.uj.ac.za/law.

Narrowing the Extraterritorial Reach of U.S. Patent Laws: Cardiac Pacemakers Inc. v. St. Jude Medical Inc.

In a follow-on development from a 2007 U.S. Supreme Court case that was previously discussed on this site (*Microsoft Corp. v AT&T Corp.*), an *en banc* decision by the U.S. Court of Appeals for the Federal Circuit on Wednesday has again narrowed the reach of U.S. patent laws covering companies' overseas production and sales. In *Cardiac Pacemakers Inc. v. St. Jude Medical Inc.*, the Federal Circuit determined that patents for "methods or processes" are not subject to 35 U.S.C. § 271(f), and thus cannot give rise to patent infringement liability if the products are assembled and sold overseas. Two years ago, the Supreme Court similarly held that Microsoft was not liable under U.S. patent law for sending master discs with encrypted Windows data to foreign companies, who would then sell the products to non-U.S. customers, even though the end-product infringed on an AT&T speech software patent.

The plaintiffs in the case accused a company that sells implantable cardioverter defibrillators, which detect and correct abnormal heartbeats, of infringing on a patent for a "method of heart stimulation." The method uses a programmable, implantable heart stimulator. The en banc ruling overturned the Federal Circuit's Dec. 18 decision holding defendant liable for infringement of a method patent, and refusing to limit damages to U.S. sales. As in *Microsoft*, the dispute here concerned the interpretation of 35 U.S.C. § 271(f), which seeks to impose liability on companies that send "components of a patented invention" abroad for assembly and sale. Circuit Judge Alan Lourie got the "clear message" from the Supreme Court in *Microsoft*: "that the territorial limits of patents should not lightly be breached." Writing for the majority of the en banc court, he acknowledged that Federal Circuit "precedents draw a clear distinction between method an apparatus claims for purposes of infringement liability, which is what

Section 271 is directed to," and held that "the langue of [the law's relevant section], its legislative history, and the provision's place in the overall statutory scheme all support the conclusion that [that section] does not apply to method patents." This decision overruled a 2005 Federal Circuit decision on the same issue, *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*, and drew a lengthy dissent from Judge Newman.

Pleading Alien Tort Statute Cases in the US: Heightened Pleading in International Cases

As recently discussed on this blog, the US Supreme Court case of *Ashcroft v. Iqbal* will have important ramifications for private international law cases filed in US federal courts. That case requires that a complaint state a "plausible" claim for relief to survive a motion to dismiss. While it is too soon to have a full sense of *Iqbal*'s impact across the entire private international law field and civil litigation generally in the US, a recent Alien Tort Statute case decided by the US Court of Appeals for the Eleventh Circuit perhaps offers an important clue about where we are heading in pleading international cases in US federal courts.

In *Sinaltrainal v. Coca-Cola Company*, a group of consolidated plaintiffs, who were trade union leaders in Colombia, brought suit under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA) alleging that their employers–two bottling companies in Colombia–collaborated with Colombian paramilitary forces (and, in one case, conspired with local police officials) to murder and torture plaintiffs. Coca-Cola was allegedly connected to the bottlers through a series of alter ego and agency relationships, but was not alleged to be directly liable for the murder and torture; rather, the conduct was allegedly committed by paramilitary and local officials acting in concert with the local management of the bottling facilities. The district court dismissed the case for lack of subject matter jurisdiction against the Coca-Cola defendants in *Sinaltrainal I* because Coca-Cola

did not have the requisite control to be liable for the bottlers' alleged actions, and in *Sinaltrainal II* the district court similarly dismissed the complaints against the bottlers for insufficiently pleading a conspiracy. This appeal followed to the Eleventh Circuit.

In a nutshell, the complaint alleged that defendants conspired with paramilitary forces and/or the local police to rid their bottling facilities of unions. As to the complaints alleging violation of the ATS, the appellate court held that the plaintiffs mere recital that paramilitary forces were in a relationship with and assisted by the Colombian government did not state a plausible allegation of state action. Slip op. at 23. This was so because the complaints needed to sufficiently (read plausibly) plead that "(1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the defendants, or their agents, conspired with the state actors, or those acting uncer color of law, in carrying out the tortious acts." *Id.* Finding the war crimes exception inapplicable, this meant that plaintiffs needed to plead "factual allegations" to support their conclusion of a relationship between the paramilitary and the Colombian government, which they did not do. *Id.* (noting that the complaint alleged merely that the paramilitary were "permitted to exist" and "assisted" by the Colombian government). As to the complaint alleging conspiracy, the court held that the mere recital of an alleged conspiracy without alleging "when" the conspiracy occurred and "with whom" the conspiracy was entered into likewise fails to state a claim under the ATS. *Id*. at 30. As described by the the Eleventh Circuit, "[t]he scope of the conspiracy and its participants are undefined." *Id*. Similar rationales were applied to the TVPA claims. *Id*. at 32-33. At bottom, the Eleventh Circuit has required clear statements of government action and clear identification of the scope and participants in an alleged conspiracy to survive a motion to dismiss in ATS and TVPA cases.

In the pre-*Iqbal* era, it is likely that the complaint would have survived a motion to dismiss in that there were some factual allegations that could have given rise to a cause of action. The allegation of government action and conspiracy based on information and belief would have entitled the plaintiffs to at least some discovery in the pre-*Iqbal* era to prove their case. In that *Iqbal* now requires heightened pleading, the Eleventh Circuit has been clear that a plaintiff must plead facts that make the allegation of unlawful conduct plausible on the face of the complaint. In

other words, plaintiffs will not have the guarantee of discovery to help make out their case.

There are important outcomes to this decision. To begin with, it shows that the next wave of ATS litigation will be fought at the motion to dismiss phase for failure to plead plausible claims. Rather than focusing on legal theories–for instance, whether a certain type of liability is contemplated under the ATS–courts will now be asked to focus on whether the facts alleged in plausible detail unlawful activity. Such an approach to pleading will be tough for plaintiffs in ATS cases because plaintiffs may not have access to the facts necessary to prove such claims as conspiracy, especially given the necessity of discovery from foreign governments and officials. This places plaintiffs lawyers in a tough position. Even in cases where they believe under Rule 11 of the Federal Rules of Civil Procedure that the "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," they may in fact not be entitled to any discovery. As such, plaintiffs lawyers may need to think twice about filing these cases.

Second, courts are now be empowered to create heightened pleading pleading standards in ATS cases. This means that the tide of ATS litigation may be stemmed through motions practice on factual as opposed to legal issues.

Third, it is likely that we will see *Iqbal* play itself out in myriad ways in international law cases generally. The most important way is that it is now much harder to allege private international law violations in US courts because such violations frequently require court-ordered discovery to enable plaintiffs and their lawyers to investigate activities occurring abroad.

It is now clear that the new pleading regime established by the US Supreme Court is having important ramifications in international civil litigation cases in the United States. The question, of course, is whether the new pleading standards announced by the Court are the appropriate standards for private international law cases. Will such cases needlessly be hampered by heightened pleading standards that may well be impossible to meet in cases involving foreign goverenments, foreign governmental entities, and foreign facts?

Publication: Mills on The Confluence of Public and Private International Law

Alex Mills (Selwyn College, Cambridge) has published a monograph, based upon his doctorate, on *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (2009, Cambridge University Press). Here's the blurb:

> *A sharp distinction is usually drawn between public international law, concerned with the rights and obligations of states with respect to other states and individuals, and private international law, concerned with issues of jurisdiction, applicable law and the recognition and enforcement of foreign judgments in international private law disputes before national courts. Through the adoption of an international systemic perspective, Dr Alex Mills challenges this distinction by exploring the ways in which norms of public international law shape and are given effect through private international law. Based on an analysis of the history of private international law, its role in US, EU, Australian and Canadian federal constitutional law, and its relationship with international constitutional law, he rejects its conventional characterisation as purely national law. He argues instead that private international law effects an international ordering of regulatory authority in private law, structured by international principles of justice, pluralism and subsidiarity.*
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> *• Brings together and develops legal scholarship in both public and private international law, making the material from each discipline more relevant and accessible to the other • A wide-ranging analysis of approaches to private international law, exploring their relationship with ideas of international constitutionalism. Examines the rules of private international law in various common law and civil law systems from an international systemic perspective relevant to a global readership • Includes extensive comparative analysis of the role of private international law and its relationship with constitutional law in*

the US, EU, Australia and Canada, covering both history and new developments

This is a highly interesting and persuasive work, exploring themes and ideas that have either never gained the mainstream approval of private international (or public international) scholars, or that simply have never been examined in such detail before. You can view the Table of Contents, as well as an Excerpt, on the CUP website. The book is available in paperback for £24.99, or hardback for £55 from CUP, or you can order it from Amazon UK for just £21.24 (paperback) or £46.75 (hardback) respectively. It is *highly recommended.*