There are two new references for a preliminary ruling: One on the scope of application of Regulation (EC) 1347/2000 (C-312/09, *Michalias*) and one on Regulation (EC) No 1206/2001 (C-283/09, *Werynski*)

On 24 September, the AG Opinion in case C-381/08 (*Car Trim*) on Art. 5 (1) (b) Brussels I has been published: Contracts for the delivery of goods to be produced or manufactured are to be classified as a sale of goods.

See also our previous post on the reference.

Judgment and Reference on Brussels I Regulation

The ECJ delivered its **judgment** in case C-347/08 (*Vorarlberger Gebietskrankenkasse*) on Artt. 9 (1) (b), 11 (2) Brussels I Regulation on 17 September and held as follows:

> *The reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) thereof must be interpreted as meaning that a social security institution, acting as the statutory assignee of the rights of the directly injured party in a motor accident, may not bring an action directly in the courts of its Member State of establishment against the insurer of the person allegedly responsible for the accident, where that insurer is established in another Member State.*

(See with regard to this case also our previous post which can be found here).

Further, there is a **new reference** pending at the ECJ on Artt. 2 and 5 (3) Brussels I Regulation (C-278/09, *Martinez*) which has been referred by the Tribunal de grande instance Paris:

> *Must Article 2 and Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters be interpreted to mean that a court or tribunal of a Member State has jurisdiction to hear an action brought in respect on an infringement of personal rights allegedly committed by the placing on-line of information and/or photographs on an Internet site published in another Member State by a company domiciled in that second State – or in a third Member State, but in any event in a State other than the first Member State – :*
> *On the sole condition that that Internet site can be accessed from the first Member State,*
> *On the sole condition that there is between the harmful act and the territory of the first Member State a link which is sufficient, substantial or significant and, in that case, whether that link can be created by:*
> *– the number of hits on the page at issue made from the first Member State, as an absolute figure or as a proportion of all hits on that page,*
> *– the residence, or nationality, of the person who complains of the infringement of his personal rights or more generally of the persons concerned,*
> *– the language in which the information at issue is broadcast or any other factor which may demonstrate the site publisher's intention to address specifically the public of the first Member State,*
> *– the place where the events described occurred and/or where the photographic images put on-line were taken,*
> *– other criteria?*

Mareva orders over foreign land in

the Supreme Court of Victoria

In *Talacko v Talacko* [2009] VSC 349, the Supreme Court of Victoria made *Mareva*-type orders, restraining the defendants to proceedings pending before the Court from disposing of properties in the Czech Republic, Slovakia and Germany. The properties had been owned by the parents of Helena, Peter and Jan Talacko, progressively confiscated by Communist governments in Czechoslovakia and East Germany from 1948, and restored to Jan Talacko, now resident in Victoria, following the fall of those governments. Evidence suggested that the properties were worth over $36 million.

In 1998, Helena Talacko and others instituted proceedings in Victoria against Jan Talacko, alleging that he had breached an agreement to hold the properties on behalf of himself and his siblings in equal shares. The proceedings settled and Jan Talacko agreed to convey interests in the properties and, if he breached his obligations, to pay equitable compensation for breach of fiduciary duty. In 2005, the plaintiffs reinstated the 1998 proceedings and successfully alleged breach of the settlement terms, entitling them (subject to outstanding defences) to equitable compensation. The properties were the main assets from which Jan Talacko would satisfy such judgment. In 2009, Jan Talacko transferred interests in the properties to his sons (one in Prague and one in London) by way of gift. The plaintiffs instituted further proceedings in Victoria against Jan Talacko and his sons.

The plaintiffs sought *Mareva*-type orders against Jan Talacko and his sons, restraining them from disposing of the properties and directing them to take steps to withdraw any documents which had been filed to register the gifts of the properties. Kyrou J's judgment contains a useful summary of the considerations relevant to making *Mareva* orders over foreign land (at [35]):

> *(a) Provided that the defendant is subject to this Court's jurisdiction, this Court has power to make a Mareva order in respect of foreign assets and there is no rule of practice against granting such an injunction.*
>
> *(b) Whether the assets were in the jurisdiction at the time the proceeding was commenced, or indeed have ever been within the jurisdiction, does not affect whether the court has jurisdiction to make a Mareva order or its practice in*

relation to such orders. However, it may be relevant to the exercise of the discretion.

(c) It has been said that the discretion to make a Mareva order in respect of foreign assets should be exercised with considerable circumspection and care. The suggestion in one Australian case that the jurisdiction should only be exercised in 'exceptional cases', which appears to broadly reflect the English position, has not been followed consistently in the Australian cases dealing with the exercise of discretion. With respect, I do not accept that the discretion can only be exercised in exceptional cases. …

(d) The discretion will be exercised more readily after judgment.

His Honour noted (at [36]) that these 'principles have, in broad terms, also been applied in relation to mandatory injunctions requiring parties to do acts with an overseas element'. It is worth noting that his Honour also observed that the claim against Jan Talacko fell outside the *Mocambique* rule, being based on breach of terms of settlement arising from allegations of breach of contract, trust and fiduciary duty.

In the circumstances, Kyrou J considered that the requirements for a *Mareva* order were satisfied and that there were 'exceptional circumstances' in this case sufficient to justify making such an order over foreign land (even though his Honour did not think this was required). For the precise facts, see the judgment — suffice to say, Jan Talacko's conduct did not impress the Court …

International Comity: Governmental Statements of Interest in Private International

Litigation

The ongoing case of *Khulumani v. Barclay National Bank* presents interesting questions concerning the nexus of the public and private in international law. In *Khulumani*, a large class of South African plaintiffs assert that several multinational corporations (including Daimler, Ford, General Motors, and IBM) aided and abetted apartheid crimes (including torture, extrajudicial killing, and arbitrary denationalization) in violation of international law, which plaintiffs argue violates the Alien Tort Statute (ATS). *See* 28 U.S.C. § 1350. After significant motions practice in the district court, which led to a dismissal on the ground that aiding and abetting liability is not sufficiently established under international law to state a violation of the ATS, the Second Circuit, in a *per curiam* opinion filed with three lengthy concurring opinions with diverging approaches as to the appropriate ATS analysis, held that a plaintiff may plead such a theory under the ATS and thus remanded the case for further consideration. *Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) (per curiam). After an unsuccessful attempt to have the Supreme Court review that judgment, due to the inability of the Court to constitute a quorum on account of financial conflicts, the case was returned to the district court. On remand, defendants once again filed a motion to dismiss, and among other grounds argued that international comity required dismissal of the complaint.

The defendants argued that the South African Government and the Executive Branch of the United States had "expressed their support for dismissal of the case in various formal statements of interest and other pronouncements, including amicus briefs, resolutions, press releases, and even floor statements in the South African Parliament." *Khulumani*, 617 F. Supp. 2d at 285. On account of these statements, the defendants urged the court to dismiss the case. The district court held that international comity did not require dismissal because there was "an absence of conflict between this litigation and the [Truth and Reconciliation Commission] process." *Id*. The court reached this conclusion in a case where both the US and South African governments asserted "the potential for this lawsuit to deter further investment in South Africa." *Id*. Indeed, the US government's position was clear. As it told the Second Circuit, "[i]t would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances to regulate [the] conduct of a foreign state over its citizens, and all the more so

for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government in South Africa." Brief of the United States of America Amicus Curiae Supporting Defendant-Appellees, at 21, *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 245 (2d Cir. 2007). Notwithstanding these arguments, the district court refused to dismiss the case on comity grounds, and also refused to resolicit governmental views on the matter. That opinion is available here.

This case recently took an interesting turn. Notwithstanding the fact that the Government of South Africa has argued since 2003 that this case should not be heard in a US court and notwithstanding the fact that the district court refused to resolicit governmental views on the matter, the Government of South Africa on September 1, 2009 filed a letter with the district court reversing its opposition to the lawsuit. The letter from South Africa's Minister of Justice and Constitutional Development asserted that the U.S. court is "an appropriate forum" to hear claims by South African citizens that the corporations aided and abetted "very serious crimes, such as torture [and] extrajudicial killing committed in violation of international law by the apartheid regime." The South African government also offered its counsel to facilitate a possible resolution of the cases between the corporate defendants and the South African victims. A copy of the letter is available here. To be clear, the letter reverses the South African government's 2003 position that the lawsuits, in their original form, should be dismissed because the government believed the lawsuits might interfere with South Africa's ability to address its apartheid past and might discourage economic investment in the country.

This recent submission raises several important questions. *First*, will the United States now reverse its position in light of this filing and encourage the court to go forward with the case? Any movement on the part of the US will provide interesting signals as to how the Obama Administration views ATS suits. *Second*, and perhaps more profoundly, should this submission even matter at all? Put another way, should governmental statements of interest encourage a court to decide one way or another in cases implicating sovereign interests? *Third*, are we seeing the demise of the public/private distinction in US views towards international law? The divide between public and private international law may be dissolving somewhat in the wake of cases, especially in the US, which seek to

remedy wrongs committed by public actors or those who work in concert with public actors through private theories of liability. Such cases threaten to enmesh US courts in complex areas of international relations. One way out of that problem is through recourse to the doctrine of international comity, which encourages US courts to take account of foreign and domestic sovereignty interests in their applications of law. However, comity has never been particularly well defined and is perhaps a questionable ground for a court to go about balancing various public, private, and governmental interests in determining legal questions.

The US government's response to these developments, if any, will provide important clues as to where private international law litigation especially concerning public activities may be going in the Obama Administration. The district courts response, if any, to these developments will also tell us how international comity may work in private international litigation.

Judges and Jurists: Reflections on the House of Lords

Thursday 5th and Friday 6th November 2009 (Law Society's Hall, London)

This Seminar, to take place at the Law Society's Hall in London, will mark two events in 2009: the Centenary of the Society of Legal Scholars, and the transition from the House of Lords to the new United Kingdom Supreme Court. There will be a range of reflections on judicial reasoning and the interaction between judges, academics and the professions over a century of transformation. It is being organised by Birmingham Law School (although it is taking place in London).

The opening address will be given by The Hon Michael Kirby AC CMG, sometime Justice of the High Court of Australia, and the closing address will be given by The Rt Hon the Lord Rodger of Earlsferry, who will be one of the senior Justices of the new Supreme Court. There will also be panel sessions on a variety of topics. Perhaps of especial interest to readers here will be the paper to be given by

Professor Adrian Briggs, which is entitled “Being right and being obviously right: reasoning cases in private international law”.

The Seminar is accredited for 12 Continuing Professional Development hours by the Solicitors Regulation Authority and the Bar Standards Board. There is an early booking discount on bookings made before the end of Friday 18th September 2009. Booking is available through the Birmingham Law School website.

Any queries may be directed to the organiser, James Lee.

Dublin Up on Rome I

Following the conference to take place at University College Dublin this week, details of a second conference to take place in the Irish capital on the subject of the Rome I Regulation have been announced. This conference, organised by Trinity College Dublin, is entitled “The Rome I Regulation on the Law Applicable to Contractual Obligations: Implications for International Commercial Litigiation” and includes several of the speakers who participated in the organisers’ earlier successful conference on the Rome II Regulation (for the published papers of which, see here).

The programme is as follows:

FRIDAY 9 OCTOBER

3:30 Registration
4:00 Professor Christopher Forsyth, “The Rome I Regulation: Uniformity, but at What Price?”
4:30 Connection and coherence between and among European Private International Law Instruments in the Law of Obligations
Dr. Janeen Carruthers, “The Connection of Rome I with Rome II”
Professor Elizabeth Crawford, “The Connection of Rome I with Brussels I”
5:15 Tea / Coffee Break

5:30 Professor Ronald Brand, “Rome I’s Rules on Party Autonomy For Choice of Law: A U.S. Perspective”
6:00 Mr. Adam Rushworth, “Restrictions in Party Choice under Rome I and Rome II”
6:30 Conclusion of the Session

SATURDAY 10 OCTOBER

9:15 Dr. Alex Mills, “The relationship between Article 3 and Article 4”
9:45 Professor Dr. Thomas Kadner Graziano, “The Relationship between Rome I and the U.N. Convention on Contracts for the International Sale of Goods”
10:15 Professor Franco Ferrari, Article 4:Applicable Law in the Absence of Choice”
10:45 Tea / Coffee Break
11:10 Professor Jonathan Harris, “Mandatory Rules and Public Policy”
11.40 Professor Xandra Kramer, “The Interaction between Mandatory EU Laws and Rome I”
12:10 Professor Francisco Garcimartin Aflérez, “Article 6: Consumer Contracts”
12:50 Lunch
1:30 Professor Peter Stone, “Article 7: Insurance Contracts”
2.00 Professor Dr. Jan von Hein, “Article 8: Individual Employment Contracts”
2.30 Dr. Andrew Scott, “Characterization Problems in Employment Disputes”
3.00 Mr Richard Fentiman The Assignment of Debts, Articles 14 and 27: Implications for Debt Wholesalers in the Factoring and Securitisation Industries
3.30 Questions and Discussion
4.00 Conference Ends

Further details and a booking form are available on the TCD website.

Croatia Ratifies Hague Child

Protection Convention

The report of the Hague Conference is here.

Greece Ratifies Hague Adoption Convention

The report of the Hague Conference is here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

Recently, the September/October 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)**:

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

> *The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He*

especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution

deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No

44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a

decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by

the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"
- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne

Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München”

- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: “The Rome I-Regulation – Internationale Tagung in Verona”