Cuadernos de Derecho Transnacional, 2009-2

The second issue of the *Cuadernos de Derecho Transnacional*, the Spanish online journal created by Profs. Calvo Caravaca and Carrascosa Gonzalez (see presentation post), has been published last week. The magazine, wholly available under this net address, contains articles and notes written by from authors of different nationalities (Spanish, Italian and Portuguese). All of them are summarized in an English abstract.

Table of contents (Studies)

Hilda Aguilar Grieder, "Arbitraje comercial internacional y grupos de sociedades"
Abstract: Within the framework of the companies of the group, the parties that have not signed the international contract often take part in its negotiation, execution and termination. When the aforementioned contract includes an arbitration clause, the question arises as to whether the clause would affect these non-signatories; that is to say, whether these parties are allowed to undertake legal proceedings or can have claims filed against them in court. According to the "group of companies" doctrine which is, in specific circumstances, widely accepted in arbitral and state practice, the effects of the arbitration agreement would extend to the non-signatories of the companies of the group even though they have not signed the contract in which the arbitration clause is written.

C.M. Caamiña Domínguez, "Los contratos de seguro del art. 7 del Reglamento Roma I"
Abstract: This study analyses Article 7 of the Rome I Regulation. This Article establishes the law applicable to insurance contracts covering a large risk whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. An insurance contract covering a large risk shall be governed by the law chosen by the parties. In the absence of choice, it shall be governed by the law of the country where the insurer has his habitual residence unless the contract is manifestly more closely connected with another country. When an insurance contract covers a non-large risk situated within the EU, party autonomy is limited.

To the extent that the law applicable has not been chosen, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. In accordance with Article 7, additional rules shall apply to compulsory insurances.

A.L. Calvo Caravaca, "El Reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas"
Abstract: The Rome I Regulation has tried to improve the 1980 Rome Convention. The final result has been uneven. This study focuses on three matters. Firstly, it explains how to select the law applicable to the contract (Art. 3 Rome I Regulation). It will be a controversial regulation because of the connection between jurisdiction and applicable law as well as its opposition to the new Lex mercatoria. Secondly, consumer contracts are examined (Art. 6 Rome I Regulation). The concept of consumer contracts includes any contract concluded by a natural person with another person acting in the exercise of his trade or profession. However, it does not solve two matters: if overriding mandatory provisions are applicable to those contracts and how to protect active consumers. Lastly, although Article 9 is inspired by Article 7 of the Rome Convention, it adds two innovations: a controversial Community definition of overriding mandatory provisions, and when to give effect to overriding mandatory provisions of a different law from the one of the forum.

E. Castellanos Ruiz, "Las normas de Derecho Internacional Privado sobre consumidores en la Ley 34/2002 de servicios de la sociedad de la información y de comercio electrónico"
Abstract: The rules of private law on consumers in Directive 2000/31 of 8 June 2000 on certain legal aspects of the information society, in particular electronic commerce in the Internal Market (Directive on e-commerce) and the Act transposing the Directive on the legal Spanish Law 34/2002 of July 11, services of information society and electronic commerce are very rare, and most have a "character clarification". These rules of private international law clarificatory highlighted in the arts. 26 and 29 of the LSSI concerning the law applicable to electronic contracts and determining the place of conclusion of contracts online, respectively.

C. Llorente Gómez de Segura, "La ley aplicable al contrato de transporte internacional según el Reglamento Roma I"
Abstract: Contracts of carriage have received a specific legal treatment under the

Rome I Regulation following a trend initiated by the Rome Convention. However, Rome I has not merely introduced cosmetic changes with respect to the Rome Convention but has produced new rules particularly, although not exclusively, regarding carriage of passengers. In addition, this article aims to be a reference guide for the analysis of the Rome I general rules in order to facilitate its application to contracts of carriage.

D. Moura Vicente, "Liberdades comunitárias e Direito Internacional Privado"
Abstract: The «unity in diversity» demanded by European integration requires a system of coordination of the laws of the Member-States which is compatible with the free movement of persons, goods, services and capitals within the European Community. In recent legislative acts of the Community, as well as in the case-law of the European Court of Justice, a trend can be noticed towards the adoption of rules concerning the law applicable to private international relationships exclusively connected with the European internal market or calling for a principle of mutual recognition in the regulation of those relationships. This papers aims at determining whether and in what measure this «Private International Law of the internal market», which seems to be on the rise, involves a change of paradigm, from the standpoint of the methods and solutions that it enshrines, when compared with the common conflict of laws rules.

G. Pizzolante, "I contratti con i consumatori e la nuova disciplina comunitaria in materia di legge aplicabile alle obbligazioni contrattuali"
Abstract: The «Rome I» Regulation has converted the 1980 Rome Convention into a Community instrument. In relation to consumer contracts, the Regulation has expanded the scope of material application of Article 6. Under the new text, with certain exceptions, the special provision dealing with consumer contracts appliesto any contract entered into between a professional and a consumer, regardless of its object. This paper analyses in particular two aspects (a) the reasons that justified the modifications (b) its scope (subjective and objective) of application. It also shows the development of European consumer contract law within the whole area of European contract law and analyses the inclusion into EC directives on consumer protection of specific provisions as to their international scope in order to ensure their effective and uniform application to international consumer transactions. In fact, certain number of directives contain a provision that, although not being a conflict of laws' rule, have an impact on the applicable law to a contract. If the contract has a direct link to the territory of one

or more Member States, these provisions provide for the application of Community law even if the parties chose the law of a third country.

F. Seatzu, “La Convenzione europea dei diritti dell’uomo e le libertà di iniziativa imprenditoriale e professionale”
Abstract: This article looks at different aspects of the concept of “economic initiative” and delineate its indicia for the purpose of human rights discourse. It discusses the meaning of the notion of economic initiative as a human rights within the context of European Convention on Human Rights. The author argues that a theoretical framework is required in order to clarify how far the Convention allows public authorities to interfere with economic rights. The article addresses a number of issues, including the following questions: what is economic initiative? Is economic initiative a human rights? How are economic rights limited? How far can public authorities legitimately interfere with human rights? In order to do this, the author examines case law of the Convention organs and reflects on the result of cases in the light of the theoretical framework that has been established.

P. Zapatero Miguel, “Diplomacia y cultura legal en el sistema GATT/OMC”
Abstract: The GATT/WTO system has evolved from a diplomacy-based system to a rule-oriented system. This cultural process in which lawyers finally triumphed over diplomats as key professionals running the regime was the direct result of an internal battle over technical qualifications inside the GATT that lasted several decades. Legal techniques have significantly reinforced the multilateral trading system
in comparative institutional terms. However, incremental legalization and judicialization has inevitably broadened the scope of trade justiciability, reaching a critical point that generates some criticism and concern. From the point of view of institutional design, this flexible and adaptative regime is among the most powerful and advanced multilateral artifacts in international legal arquitecture.

*A **Varia** section follows, also enclosing English abstracts.*

Conference Announcement: The Role of Ethics in International Law

The Role of Ethics in International Law

Event Information
Friday, November 13, 2009 / 8:30 AM
Tillar House/Cosmos Club
Washington, D.C.

Each year, the International Legal Theory Interest Group of the American Society of International Law convenes a special conference to consider an important theoretical issue in international law. This year, the conference will focus on the Role of Ethics in International Law. Special attention will be paid both to the role of ethics in public and private international law, as well as to normative and theoretical perspectives. The panels will feature the following distinguished scholars.

The Role of Ethics in Public International Law
Oona A. Hathaway, Yale Law School
Mary Ellen O'Connell, Notre Dame Law School
Edward T. Swain, George Washington University Law School

The Role of Ethics in Private International Law
Lea Brilmayer, Yale Law School
Perry Dane, Rutgers School of Law
Dean Symeon C. Symeonides, Willamette University College of Law

Normative and Theoretical Perspectives
Mashood A. Baderin, School of Law, SOAS, University of London
Samantha Besson, University of Fribourg/Duke University School of Law
H. Patrick Glenn, McGill University

Lunch will be served as part of this free conference for ASIL members ($15.00 for non-ASIL members). For further information, see here.

Jurisdiction to Enjoin a Foreign Website in the EU, Part II

In a previous post, I had reported how the French *Cour de cassation* ruled that French courts had jurisdiction to enjoin a foreign based website to carry on illegal activities in France, and to impose a financial penalty in case of non-compliance.

On January 15th, 2009, the same division of the court ruled on another injunction issued in the same case against foreign based defendants. In the first case, the injunction was addressed to the website itself, Zeturf Ltd. This time, it was addressed to the companies hosting the site, Bell Med Ltd and Computer Aided Technologies Ltd.

The issue before the court was again whether the French court had jurisdiction to settle a financial penalty accompanying the injunction. The penalty was a French *astreinte*, that is a sum of money that the defendant must pay per day of non compliance with the injunction. At this stage of the proceedings, the defendants challenged the jurisdiction of the French court to calculate the amount owed to the plaintiff and order its payment (*liquider l'astreinte*), not the jurisdiction of French courts to issue the injunction and the threat of the penalty in the first place.

As in the first case, the *Cour de cassation* answered that the French court had jurisdiction as the court of the place where the injunction was to be performed. Trial judges had found that the injunction was to be performed in France (see the end of my previous post on this).

This is pretty much what the court had ruled in its first decision. But this time, it gave a legal basis: *both* article 22-5 of the Brussels I Regulation and the French rule granting international jurisdiction in enforcement matters to the court of the place of the enforcement (art. 9, para. 2, of French Decree of July 31st, 1992).

This is a puzzling decision: one wonders how both article 22 of the Brussels I

Regulation and any provision of French law could found the jurisdiction of French courts at the same time.

If one forgets article 9 of the French 1992 Decree, the judgment is interesting because it decides that the *liquidation* of an *astreinte* belongs to enforcement matters for the purpose of the European law of jurisdiction. What about the issuance of an injunction under penalty of an *astreinte*?

Quebec Court Stays Palestinian Claim Against West Bank Builders

Things have certainly been quiet on the Canadian front over the past few months. Ending the lull, in a decision filled with different conflict of laws issues, the Quebec Superior Court held, in *Bil'In Village Council and Yassin v. Green Park International Inc.* (available here), that Israel is the most appropriate forum for the dispute and therefore it stayed the proceedings in Quebec.

The plaintiffs, resident in the occupied West Bank, sued two corporations incorporated in Quebec for their involvement in building housing for Israelis in the West Bank. The plaintiffs alleged violation of several international law principles.

The reasons address several interesting issues: 1. whether the defendants are protected by state immunity as agents of Israel [no], 2. whether decisions of the High Court of Justice in Israel in which the plaintiffs participated were recognizable in Quebec [yes], 3. whether these judgments statisfied the test for res judicata [no], 4. whether the plaintiffs had the necessary legal interest required under Quebec law to bring the proceedings [yes for one, no for the other], 5. whether the cause of action had no reasonable hope of succeeding [no], 6. whether the court should stay the proceedings [yes].

On the appropriate forum issue, the factual connections massively pointed away from Quebec. The defendants were incorporated there, but largely for tax

purposes – they did no business there – and that was the only connection to Quebec. A key issue was whether the issues raised in the proceedings could be fairly resolved by an Israeli court, but the court found the expert evidence on this point favoured the defendants, not the plaintiffs. This may be the most controversial aspect of the decision.

The decision also contains lengthy analysis of the applicable law and some comments on the absence of proof of foreign law.

It is not common for Canadian courts to mention, as a factor in the *forum non conveniens* analysis, the state of access to the local courts for local plaintiffs (the docket-crowding issue American courts do consider). In this case, however, this factor is noted by the court in its reasons for staying the proceedings.

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.