AG opinion on Roda Golf (Regulation Nº 1348/00)

On October 2007, a company named Roda Golf & Beach Resort S.L. ('Roda Golf'), executed before a notary an instrument of notification and request, seeking the service of 16 letters giving notice of the termination of a contract on addressees residing in the United Kingdom. On November 2007, the notary appeared before the clerk of the Juzgados de Primera Instancia e Instrucción, San Javier, and formally served the notarial instrument together with the original copies of the 16 letters. The clerk of the referring court issued a measure refusing to effect service of the letters. Roda Golf lodged an application for review before the Juzgado de Primera Instancia e Instrucción No 5, San Javier, in accordance with Article 224 of the Ley de Enjuiciamiento Civil (Law on Civil Procedure). When examining the action contesting the measure of organisation issued by the clerk, the court was uncertain about the interpretation of Regulation (EC) No 1348/2000; therefore, on January 2008 it referred the following two questions to the Court of Justice for preliminary ruling:

'1. Does the scope of Regulation (EC) No 1348/2000 extend to the service of extrajudicial documents exclusively by and on private persons using the physical and personal resources of the courts and tribunals of the European Union and the regulatory framework of European law even when no court proceedings have been commenced? Or,

2. Does Regulation (EC) No 1348/2000 on the contrary apply exclusively in the context of judicial cooperation between Member States and court proceedings in progress (Articles 61(c), 67(1) and 65 EC and recital 6 of the preamble to Regulation (EC) No 1348/2000)?'

AG Ruiz-Jarabo Colomer's long opinion has been delivered on March, the 5th. He starts analysing the matter of admissibility of the question, which is a twofold objection raised by the Commission.

A) According with Article 68 EC, only courts or tribunals of last instance may refer a preliminary ruling question concerning Title IV of the EC Treaty and acts based thereon; the Spanish court asserts it is a court of last instance in

accordance with the aforementioned article; the Commission denies it. AG sets out the history and the reasons which led the Member States to adopt Article 68 EC; he concludes that the rule has to be interpreted in accordance with the fundamental right to effective legal protection, therefore restrictively. He then turns to consider what is a "court of last instance" within the meaning of Article 68 EC: only a court sitting at the apex of the national court structure (if so, the Spanish question would not be admissible), or the final court which may give a decision in accordance with the domestic system of remedies?. Judging from previous cases before the ECJ -although concerning Article 234 EC- he rejects the organic approach in favour of the specific-case approach: Article 68 EC refers to courts against whose decisions there is no judicial remedy, applying to supreme courts and also to any other national courts against whose decisions there is no right of appeal.

Unfortunately, under Spanish procedural law it is unclear whether an appeal may be brought against a decision such as the one pending before the Juzgado de Primera Instancia e Instrucción No 5, San Javier. Under this circumstances, AG draws attention to the referring court's view that it has the status of a court of last instance; he also points out that where uncertainties arise, it is appropriate to choose the approach which is most favourable to the reference for a preliminary ruling. He therefore concludes that the first plea of inadmissibility must be dismissed.

B) The second plea of inadmissibility concerns another essential condition that a court has to meet in order to seek a preliminary ruling: the question must arise in the context of proceedings; 'a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'. This means two requirements: the reference must be made by a court or tribunal (first requirement), in relation to a case in which (second condition) it exercises a judicial function. In the instant case, although the referring court is part of the Spanish judicial structure, there are uncertainties regarding whether the action concerned is an *inter partes* dispute , and whether the decision of the court is judicial in nature.

AG Ruiz-Jarabo Colomer studies EC case law on Article 234 EC, stating that it also applies to preliminary rulings sought under Article 68 EC. He then recalls the conditions set by the ECJ for a proceeding to be considered *inter partes*: first, it

will suffice if an individual is claiming a right and seeks a ruling from a court; second, the claim must be clearly defined in terms of both the facts and the law; third, the national court must ensure the observance of all procedural safeguards when it exercises jurisdiction. Applying such criteria to the present case, AG concludes that the main proceedings are *inter partes*.

As for the requirement of judicial nature of the function, the AG brings up a special exception set by the EJ in the *Job Centre* affair (case C- 11/94), where the applicant asked for an order to register a company: the Court ruled that there was no judicial activity, but only the exercise of administrative authority; it nevertheless went on to state that 'Only if the person empowered under national law to apply for such confirmation seeks judicial review of a decision rejecting that application – and thus of the application for registration – may the court seised be regarded as exercising a judicial function, for the purposes of Article [234]". Applying the exception to the present case, AG concludes that the function performed by the referring court is judicial in nature.

The issue of admissibility being solved, AG tackles the questions referred for preliminary ruling. The Juzgado de Primera Instancia e Instrucción No 5, San Javier, seeks a precise definition *of extrajudicial documents* in the context of Regulation (EC) No 1348/20. For some Member States, extrajudicial documents may be served under this Regulation only where court proceedings have been commenced; since ordinary declaratory proceedings have not yet been commenced in the matter referred by the Juzgado de Primera Instancia e Instrucción No 5, San Javier, those Member States propose that the Court should restrict the service of extrajudicial documents to situations where proceedings are underway. However, this opinion is not shared by the AG: leaning on the purpose of Regulation (EC) Nº 1348/2000 and its legal basis (art. 65 EC), he defends a broad interpretation of the scope of the Regulation; *extrajudicial documents* are not only documents which are included in a case-file; the term also covers documents which are required to be served, regardless of whether or not proceedings have been commenced.

To end, AG suggest a definition of *extrajudicial document* mid way between an autonomous interpretation and interpretation by reference to the law of the State of origin: in his view extrajudicial documents are documents which, first, require the involvement of an authority or a public act; second, give rise to specific and different legal effects as a result of that involvement; and, third, are used to

support a claim in possible court proceedings.

(Regulation (EC) Nº 1348/2000 has been replaced by Regulation (EC) Nº 1393/2007, which is already in force)

European Commission's Proposal on Succession and Wills to Be Presented Shortly

According to the January 2009 issue of *Brussels News*, the information bulletin of the Brussels Office of the Bar Council, the European Commission will present its **Proposal for a regulation on PIL aspects of succession and wills on 24 March 2009**:

> ***Wills and Succession***
> *The Commission's long-awaited private international law proposal is due out on 24 March. It is expected to cover not only applicable law, but also jurisdiction, recognition and enforcement. The Chancery Bar Association has been actively following preparations, and will react.*

As it is widely known, works on the proposed EC legislation have been prepared by the Commission through a Green Paper on Succession and Wills, published in 2005 (see also the annex working document – in French), and a subsequent public hearing, held on 30 November 2006, based on the contributions received in reply to the Green Paper. On 16 November 2006, the European Parliament voted a resolution with recommendations, calling on the Commission to submit a legislative proposal (see our post here).

A thorough research had been previously carried at an academic level, on behalf of the Commission, by the Deutsches Notarinstitut in cooperation with *Prof. H. Dörner* and *Prof. P . Lagarde* (the whole documentation – including the Final

Report – can be downloaded from the Documentation Centre of the DG Justice, Freedom and Security).

Following the research, a conference, "**Conflict of Law of Succession in the European Union – Perspectives for a Harmonisation**", was organized in Brussels on 10-11 May 2004, where a number of very interesting papers were presented by leading scholars from various European jurisdictions. The proceedings of the symposium (highly recommended) are available on the DNotI website.

On the Commission's initiative, see also **our Guest Editorial** ("Reflections on the Proposed EU Regulation on Succession and Wills") **by *Prof. Jonathan Harris*** (University of Birmingham, co-editor of the Journal of Private International Law), who has been advising the UK Ministry of Justice on the proposed Regulation, and gave oral evidence to the House of Lords Select Committee on European Union Law in October 2007. The transcript of this evidence is available here.

Consultation Paper on Jurisdiction

The Law Commission of Ontario has released a consultation paper written by Professor Janet Walker (Osgoode Hall Law School, York University). The paper (available here) proposes that Ontario's current law on the taking and retaining of jurisdiction in civil matters is in need of reform. It offers a proposed statute which would reform the law in this area. The proposals have some common elements with the Uniform Law Conference of Canada's model statute, the Court Jurisdiction and Proceedings Transfer Act (available here), but also some important differences.

The Law Commission welcomes comments on the paper, and the process for commenting is explained in the paper. Beyond this, those generally interested in how countries resolve issues of jurisdiction in civil matters should find the points raised in the paper of interest.

To date three Canadian provinces have moved away from the traditional

approach, which is based on a combination of common law and rules of civil procedure, and have brought into force the Court Jurisdiction and Proceedings Transfer Act (British Columbia, Saskatchewan and Nova Scotia). Some other provinces have enacted the statute but not yet brought it into force, and some other provinces are considering adopting it.

Recognition of a U.S. Judgment in Brazil

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

In *General Electric Company v. Varig S Aviação Aérea Rio-Grandense*, the Superior Court of Justice in Brazilia, Brazil allowed the recognition (*homologação*) of a US judgment issued by the New York Southern District Court. The Brazilian decision was dated November 5, 2008 but was only published on December 11, 2008.

The parties signed a contract, General Terms of Agreement, according to which Varig purchased from GE an aircraft engine. The contract had a New York choice-of-law clause. The New York judgment was declaratory and it established that General Electric was not responsible for certain malfunctioning of the engine. The American court had decided that: "a) the General Terms of Agreement entered between Varig and GE is in full force and it is applicable to the incident caused by the engine malfunction of June 7, 2000; and b) the Agreement shall be construed following the substantive law of New York."

Varig argued that the chosen law should be stricken, as a matter of Brazilian public policy, and that the Brazilian Consumer Code (*Código de Defesa do Consumidor*) should be applied instead. In particular, Varig asserted that this was a consumer transaction and that the Brazilian Consumer Code banned clauses whereby the buyer waived any redress in instances of the seller's negligence.

The case was complicated by a related action, against General Electric, filed in Brazil by Varig's insurance company (Presumably the declaratory action would be used to defend against this lawsuit.)

The Brazilian court allowed recognition of the foreign judgment. It held that the Consumer Code applied internally and that it did not prevent the law chosen by the parties to operate freely. It also determined that the recognition requirements (jurisdiction, service, translations, etc.) of art. 15 of the introductory law to the Civil Code had been complied with. Finally, the court decided that the existence of related litigation in Brazil posed no obstacle to the recognition of the foreign judgment according to art. 90 of the Code of Civil Procedure (no *lis pendens*).

This is an important case where the Brazilian court applied truly international standards to an international case. Other Latin American countries should take notice.

Priscila Sato, a Brazilian attorney at Arruda Alvim Wambier *Advocacia e Consultoria Jurídica provided a copy of the text and general guidance.*

Parallel Class Actions in Canada

Canadian provincial courts continue to analyze how to manage class actions that include class members from other provinces. While Canada is a federal country, it is acceptable for the court in a province to certify a class that includes members from other provinces. A difficulty arises if two provinces are each asked to certify a multijurisdictional class in respect of the same underlying claim.

Currently there are class actions against Merck Frosst in both Ontario and Saskatchewan in respect of Vioxx. In each of these provinces, the class action regime is "opt-out", so that the class as defined catches all described members without any specific action on the part of a particular member. Merck moved to stay the Ontario action on the basis that it should not be subject to two multijurisdictional class actions that involve substantially the same plaintiffs and issues. In *Mignacca v. Merck Frosst Canada Ltd.* (an as-yet unreported decision

of the Ontario Divisional Court, dated Feb. 13, 2009) the court refused to stay the Ontario action.

The court refused to adopt an approach that would defer to the court that first certified the class action: "a rule of swiftest to the finish line taking all encourages tactics that may well be contrary to the interests of justice" (para. 47). The court noted that in other cases parallel class actions involving jurisdictional overlap had been resolved through the cooperation of counsel and guidance from the court.

An unusual element of this case was the Ontario court's concern about the lawyer representing the plaintiff class in the Saskatchewan proceedings. It noted that he had five disciplinary violations from 1972 to 2006. This strengthened the court's desire to have the Ontario proceedings continue.

Two Cases on Internet Jurisdiction

Court Upholds Forum Selection Clause in Web Hosting Agreement

Jenny Kim (Stanford Law School) has, on the CIS-website, posted a case review of decision 2008 WL 4951020 (N.D. Cal. November 18, 2008) where the U.S. District Court for the Northern District of California dismissed Bennett v. Hosting.com for improper venue last November. The plaintiff's company, HowFastTheyGrow.com, had signed an agreement to litigate all disputes in Jefferson County, Kentucky when contracting the defendant's web-hosting services. The court upheld the forum selection clause despite Bennett's contention that it was unenforceable for unconscionability and inapplicable to her tort claims. For more, have a look at the current issue of Packets.

Arizona District Court Rules Website Targeting Plaintiff Does Not Create Jurisdiction in Plaintiff's Home State

Allison Pedrazzi Helfrich (Stanford Law School) has, on the CIS-website, posted a case review of decision 2008 WL 5235373. In January 2008, Jan Kruska filed

defamation, cyberstalking, and other claims against Perverted Justice Foundation, Inc. (and other defendants), for disseminating rumors on various websites that Kruska was a convicted child molester and a pedophile. In December 2008, a U.S. District Court in Arizona dismissed the complaint against Perverted Justice Foundation based on a lack of personal jurisdiction. Perverted Justice is a non-profit corporation based in California and Oregon and has no licenses or designated agent for service of process in Arizona, conducts no business with Arizona, and is not incorporated in Arizona. The court held there could be no general jurisdiction over Perverted Justice "in the absence of these types of contacts that approximate physical presence in Arizona." The plaintiff argued, however, that Perverted Justice made her a target of its online activities and therefore became subject to jurisdiction in Arizona by expressly aiming its tortious actions at the forum state. Although the court recognized the "effects test" basis for jurisdiction, it held that the "essentially passive nature" of Perverted Justice's activity in posting a website with a low degree of interactivity is not sufficient to establish specific jurisdiction. For more, have a look at the current issue of Packets.

An Early 2009 Round-Up: Significant Federal Cases Over the Past Two Months

In this round-up of significant U.S. decisions during the first two months of 2009, we'll focus on two areas of law that generate a lot of jurisprudence at the appellate level.

A. Jurisdiction for Acts Occurring Abroad

Two federal statutory schemes—the first a response to the events of September 11, the second a 200 year old response to piracy on the high seas—are generating a lot of jurisdictional quandaries of late. The Intelligence Reform and Terrorism

Prevention Act of 2004 criminalizes the provision of material support to foreign terrorist organizations, and provides for "extraterritorial Federal jurisdiction" to punish those acts. It also provides a civil remedy for those injured in his "person, property or business" by such criminal acts. In *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 538 F.3d 71 (2d Cir. 2008), pet'n for cert. filed, No. 08-640 (Nov. 12, 2008), the Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack targets in the United States." According to the court, even those foreign entities who knowingly funded al Quada and Osama bin Laden were "far too attenuated" to fall within the jurisdiction of U.S. courts. This decision fostered a split with decisions in the D.C., Ninth and Seventh Circuits, and (along with other facets of the opinion on scope of the FSIA) is now pending on a Writ of Certiorari before the United States Supreme Court. This week, the Court requested the views of the Solicitor General on whether to grant the Petition. This case could become a very significant decision on the constitutional scope of personal jurisdiction over foreign parties if it is granted.

The Second Circuit returned a few months later in *Abdullahi v. Pfizer, Inc.*, No. 05-4863, 2009 U.S. App. LEXIS 1768 (2d Cir., January 30, 2009), to assert subject matter jurisdiction over a cause of action under the Alien Tort Statute of 1789 for defendant's alleged drug tests on unwitting Nigerian children. The court—in a 2-1 decision—held that the prohibition on non-consensual medical experimentation is a specific and universal norm of "the law of nations," which satisfies the jurisdictional predicate of the ATS. Because defendant acted in concert with the Nigerian government, the court held that the claim could proceed past the pleading stage. The Court also reversed the district court's decision on choice of law—which held that Nigerian law would have applied to these claims—and remanded the case with instructions to the court to more carefully and thoroughly weigh the factors of the "most significant relationship test" which could—the Court suggested—eventually lead to the application of Connecticut law.

B. Forum Selection Clauses

In a topic that is of practical import for both litigators and transaction attorneys alike, the federal courts of appeals have been active in the past two months concerning the scope, validity and enforceability of forum selection clauses. Most

recently, in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd*., Nos. 08-6014/6032, 2009 U.S. App. LEXIS 2743 (6th Cir., February 13, 2009), the parties disputed the meaning of a contract that contained a "non-exclusive" choice of court clause vesting jurisdiction in the courts of Australia, alongside a provision that allowed either party to request arbitration of their disputes. One party compelled arbitration in the United States, and the other sought to enjoin such arbitration in favor of litigation it previously filed in Australia. The Sixth Circuit held that the choice of court clause did not preclude arbitration, because reading the contract "as a whole . . . unambiguously provides that the courts of [Australia] are only one possible forum" for the claims in this dispute. The court then moved onto thornier issues of international comity abstention and anti-suit injunctions, both of which were "issues of first impression for [the Sixth] Circuit." Surveying the case law on the "complex interaction of federal jurisdictional and comity concerns," as well as the dictates of "international law" expressed in treaties expressing the judicial preference for allowing arbitration, the court held that "abstention is inappropriate in this case." Interestingly, the court seemed to suggest that in any case falling within Article II(3) of the New York Convention, a court in a signatory country has no authority to abstain from compelling arbitration on comity grounds. With the Australian proceedings voluntarily stayed by the parties pending this appeal, the court declined to review the district court's denial of an anti-suit injunction, but left open the possibility that such an injunction could issue if that litigation were to be reopened and thereby threaten the "important public policy" of the Convention and the United States.

Finally, an interesting recent decision by the Ninth Circuit illustrates the differential treatment a forum selection clause will get in U.S. courts, depending upon what substantive federal statute governs the cause of action. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd*., No. 06-56831, 2009 U.S. Dist. LEXIS 2111 (9th Cir., February 4, 2009) was, as the Ninth Circuit put it, a "maritime case about a train wreck." There, the parties contracted for the carriage of goods from China to the United States by sea, and then inland by rail to various points in the American Midwest through a single bill of lading. The train derailed in Oklahoma, the American buyer sued in California, but the contract contained a choice of forum clause in favor of Tokyo. The Japanese Defendants moved to dismiss the action on the basis of that clause. If the federal Carriage of Goods by Sea Act (COGSA) were to apply to the entire journey, the choice of forum clause would be liberally respected, and the defendants' motion to dismiss likely granted. If the

federal Carmack Amendment—which generally covers inland rail transportation—were to apply to the inland portion of the trip, the deference to choice of courts is much more narrow. In the end, the Ninth Circuit held that the Carmack Amendment applied to the claims, and remanded the case to determine whether that statute's narrow allowance of a foreign forum selection clauses were satisfied. How it got to that conclusion, however, is much more interesting.

For starters, the Defendants argued that the Carmack Amendment was categorically inapplicable to them. They are ocean carriers, who only contracted for follow-on rail line transportation at the end of their journey, and the Carmack Amendment literally applies only to persons or companies "providing common carrier railroad transportation for compensation." The Second Circuit, the Florida Supreme Court, and at least one other federal district court, have held that the Carmack Amendment did not apply to ocean carriers who did not perform rail transportation services. The Ninth Circuit disagreed with these decisions, and held that ocean carriers could fall within the Amendment's provisions.

The Defendants next argued that, even though an ocean carrier may fall within the Carmack Amendment, when that carrier provides only one bill of lading covering the entire trip (over-sea and over-land), and thereby elects to contractually extend COGSA to the inland portion of the trip, the Carmack Amendment does not apply. No less than four circuits (the Seventh, Sixth, Fourth and Eleventh) support this view. "Despite this weight of authority," the Ninth Circuit held, "our own precedent expressly forecloses" this argument. The Ninth Circuit, like the Second Circuit, has long held the view that "the language of Carmack encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading."

The discord in this area is especially troubling in light of recent Supreme Court jurisprudence. The Court has held—and the Ninth Circuit even acknowledged—that contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of extending COGSA inland when a single bill of lading takes goods from overseas to inland destinations. Indeed, "confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning," and the Supreme Court has suggested that where this is the case, "the apparent purpose of COGSA" is defeated. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004). Still, in the Ninth Circuit, "the policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and

precedent.”

Fourth Issue of 2008’s Revue Critique de Droit International Privé

The fourth issue of the *Revue Critique de Droit International Privé* was just released.

It contains two articles. Unfortunately, none of them comes with an abstract in English.

The first is a presentation of the Rome I Regulation by emeritus Professor Paul Lagarde and Aline Tenenbaum, who lectures at the Faculty of Law of Paris XII University.

Belgian Professor Marc Fallon is the author of the second, which deals with The Posting of Workers in Europe (*Le détachement européen des travailleurs, à la croisée de deux logiques conflictualistes*).

The table of contents can be found here , but articles of the *Revue Critique* cannot be downloaded.

Supreme Court of Canada Addresses Role of Parallel Proceedings in Stay Applications

Canada's highest court has delivered its judgment in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* (available here). The decision is quite brief and upholds the decision of both courts below, leaving some to wonder why leave to appeal was granted.

Teck has mining and smelting operations in British Columbia. In 2004 it was sued in Washington State for environmental property damage caused by the discharge of waste material into the Columbia River, which flows from Teck's Canadian operations into the United States. Teck notified its insurers, looking to them to defend the claim, but they refused.

Teck therefore sued the insurers in Washington State to establish its entitlement under the insurance policies. The insurers sued Teck in British Columbia to establish their lack of responsibility under the same policies. So the issue became where the coverage issue would be resolved.

Stay applications were brought in both coverage actions. The application failed in the United States. It also failed in the courts of British Columbia, but those decisions were appealed to the Supreme Court of Canada.

Teck wanted Canada's highest court to take a different approach to applications for a stay in cases where a foreign court has already positively asserted jurisdiction. This position was framed in a couple of different ways, but its essence was that the parallel proceedings should be an overriding and determinative factor in the analysis. The court rejected that position, confirming that parallel proceedings are only one factor among many to be considered.

The court's decision is under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. However, the court confirms that s. 11 is a codification of the common law doctrine of *forum non conveniens*, and so the reasoning should apply equally in provinces which have not adopted a jurisdiction statute (though it would have been helpful for the court to have expressly made

this clear).

Most of the decision is unobjectionable and clear. One point to consider, however, is the court's reference (in para. 3o) to a distinction between interprovincial cases and international cases. This raises the possibility that different considerations could arise as between sister provinces. A refusal to stay proceedings in one province might be treated as determinative of the issue in another, in part because of the possibility of appeal to the Supreme Court of Canada and its binding effect on all provinces, and in part if the other province were required to recognize the admittedly interlocutory decision on the stay application. Both of these are debatable issues, and the orthodoxy would suggest that parallel proceedings in a sister province remain just one factor in the analysis. More guidance from the court on this question would have been welcome.

Garsec goes to the High Court

Readers may recall the interesting *forum non conveniens* case in the New South Wales Court of Appeal, *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682. My post on that decision is here. It arises out of an alleged contract for the sale of an old, rare and beautiful manuscript copy of the Koran by Garsec to the Sultan for USD 8 million. The Court of Appeal unanimously dismissed an appeal from a decision staying the proceeding. On 13 February 2009, Garsec's application for special leave to appeal to the High Court was referred to an enlarged bench of the Court, with instructions that the parties prepare submissions as if on appeal: see [2009] HCATrans 21. Watch this space.