Which Law Governed at Abu Ghraib?

Four Iraqis who were detained in Abu Ghraib have sued U.S. military contractors before American courts. The cases were filed on June 30, 2008, in federal courts of Maryland, Ohio, Michigan and Washington state, where individual contractors reside. The plaintiffs are represented by law firms in Philadelphia and Detroit and by the Centre for Constitutional Rights.

Details on the parties can be found here.

The cases raise an interesting issue of choice of law. Which law will U.S. courts apply? The four complaints (which can also be found here) address the issue superficially, by stating that the laws of the United States have been violated, which seems to imply that they govern. Here is an excerpt of one of the complaints, but they are all drafted similarly:

> *DEFENDANTS KNEW THAT THEIR TORTURE OF PRISONERS VIOLATED THE LAWS OF THE UNITED STATES*
>
> *48 [Contractors] knew that military officials were prohibited from torturing prisoners by the Army Field Manual and other controlling law, and that any military official who were doing so were violating the law.*
>
> *49 [Contractors] knew that the US government has denounced the use of torture and other cruel, inhuman or degrading treatment at all times. [Contractors] knew that it was illegal for them to participate in, instigate, direct or aid and abet the torture of X and other prisoners.*
>
> *50 For example, in its Initial Report to the UN Committee Against Torture, the*

US Department of State note that "[t]orture is prohibited by law throughout the US. It is categorically denounced as a matter of policy and as a tool of state authority …. No official of the government, federal, state or local, civilian or military is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form" (…) The State Department's Report on Human Rights Practices characterized the following as prohibited forms of torture: mock executions, sensory deprivation, repeated slapping, exposure to cold, stripping and blindfolding, food and sleep deprivation, threats to detainees or family members, dripping water on the head, squeezing of the testicles, rape and sexual humiliation.

51 [Contractors] knew that the ban on torture is absolute and no exigent circumstances permit the use of torture.

52 [Contractors] knew that the US intended and required that any person acting under the contract to the US would conduct themselves in accord with the relevant domestic and international laws.

53 [Contractors] knew and understood that the US does not condone torture of prisoners.

54 Defendants cannot credibly claim that the wrongful and criminal conduct of certain military and government personnel misled them into thinking that the torture of prisoners was lawful and permissible.

Given that American federal courts apply state choice of law rules, the issue will likely be addressed differently by each of the four district courts. Most readers will of course be aware that while a few American states still follow the traditional approach, most have moved on to the so called "modern approach", such as interest analysis. Although the complaints refer to the Army Field Manual and to the contract concluded by the contractors, this looks to me like a tort action. The complaints also rely on the Alien Tort Claims Act (though solely for jurisdictional purposes), so the plaintiffs may argue that public international law applies.

Book: Calvo Caravaca / Carrascosa González – Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II

Prof. Alfonso-Luis Calvo Caravaca (University Carlos III of Madrid) and *Prof. Javier Carrascosa González* (University of Murcia) have recently published their latest work, devoted to tort conflicts: **"Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II"** (Editorial Comares, May 2008). Despite its title, centered on the new EC Regulation on the law applicable to non-contractual obligations, the book (in Spanish) covers the whole area of tort conflicts, both under the point of view of jurisdiction and applicable law, including matters excluded from the scope of application *ratione materiae* of the Rome II Reg. It is divided into three parts.

The first part (*Competencia judicial internacional y obligaciones extracontractuales*), **devoted to jurisdictional issues**, focuses on Art. 5(3) Brussels I Reg./1968 Brussels Convention, and the abundant case law of the ECJ on the interpretation of these basic provisions. Other conventional texts are taken into account, in the Brussels system (new Lugano Convention of 2007) and in special matters (nuclear damages, civil liability for oil pollution, intellectual and industrial property rights, international transports, etc.), along with the Spanish rules on jurisdiction in torts (Art. 22 of the *Ley Organica del Poder Judicial*). The final section deals with jurisdictional issues arising out of torts committed on the Internet.

The second part (*Ley aplicable a las obligaciones extracontractuales: conexiones generales*) **analyses the main features of the Rome II Reg.**: its methodological foundations, relationships with other international/EC instruments, scope of application, the provision on **choice of law by the parties** (Art. 14) and the **general rule set out in Art. 4** (*lex loci damni*, common domicile exception, escape clause).

The third part (*Ley aplicable a las obligaciones extracontractuales: materias específicas*) **covers the special rules of the Rome II Regulation on specific categories of torts and other non-contractual obligations** (Articles 5-13), along with matters excluded from its material scope of application (such as rights relating to the personality) or whose conflict regime is provided in other international instruments (oil pollution damages, collision between vessels, nuclear damages, etc.). As in the first part on jurisdiction, the last sections are devoted to the Spanish conflict rule on torts (Art. 10(9) of the *Código Civil*) and to problems arising from Internet torts.

The analysis of each provision and issue is complemented by a number of examples, taken from real cases or fictitious, which help the reader to understand the conflict reasoning and the outcome of the choice-of-law process.

The detailed table of contents, and the introductory chapter (*Presentación*) can be found on the publisher's website.

Title: **Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II**, by *Alfonso-Luis Calvo Caravaca* and *Javier Carrascosa González*, Editorial Comares, Albolote (Granada), 2008, 248 pages.

ISBN: 978-84-9836-390-6. Price: EUR 23.

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off)

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Readers of this blog might also be interested in the forthcoming ninth edition of the conflict of laws manual by *Calvo Caravaca* and *Carrascosa González*: ***Derecho Internacional Privado – Volumen I*** and ***Volumen II*** (Editorial Comares, July 2008). In addition, a valuable resource on PIL cases and legislation is the **excellent website of the Accursio Group** (Spanish Multi-University Group of Research, Teaching & Practice on Private International Law), created and maintained by the two Spanish professors with other scholars: see, besides a number of sections focused on Spanish PIL (such as those on international successions and polygamy), the *Laboratorio Bruselas* section (references and text of the ECJ's case-law on the EC instruments on PIL) and the *Super-Caso* section (tricky conflict cases to be solved by readers).

Publication: Briggs on Agreements on Jurisdiction and Choice of Law

It has been our book of the month for a few weeks now, but as yet we have not formally announced the publication of Professor Adrian Briggs' latest work, ***Agreements on Jurisdiction and Choice of Law*** (Oxford, OUP, 2008). So, here's the blurb:

> *In this book, the author analyses the law and practice relating to the classification, drafting, validity and enforcement of contracts relating to jurisdiction and choice of law. The focus is on English law, EU law and common law measures, but there is also some comparative material built in. The book will be useful in particular to practising lawyers seeking to draft, interpret or enforce the types of contract discussed, but the in-depth discussion will also be valuable to academic lawyers specialising in private international law.*
>
> *Written by an academic who is also a practising barrister, this book gives in-depth coverage of how the instruments and principles of private international law can be used for the resolution of cross-border or multi-jurisdictional disputes. It examines the operation and application of the Brussels Regulation, the Rome Convention and the Hague Convention on Exclusive Choice of Court Agreements in such disputes, but also discusses the judgments and decisions of the courts in significant cases such as Turner v Grovit, Union Discount v Zoller, and De Wolf v Cox.*
>
> *Much of the book is given over to practical evaluation of how agreements on jurisdiction and choice of law should be put together, with guidance on, amongst other things, drafting of the agreements (including some sample clauses), severability of agreements, consent, and the resolution of disputes by arbitration.*

The table of contents:

1. Introduction and Scheme
2. Consent in private international law
3. Dispute resolution and severability
4. Clauses, principles, and interpretation
5. Drafting agreements
6. Jurisdiction agreements: primary obligations
7. Jurisdiction agreements: Brussels Regulation
8. Jurisdiction agreements: secondary obligations
9. Foreign Judgments
10. Agreements on choice of law
11. Giving effect to agreements on choice of law
12. Agreements to resolve disputes by arbitration
13. Conclusions

A more detailed table of contents can be found on the OUP website, where you can also download a sample chapter (PDF). The price is £145, and you can buy it from Amazon, or OUP. Needless to say, it is **highly recommended**.

Exxon, Punitive Damages and the Conflict of Laws

Yesterday, the U.S. Supreme Court delivered its decision in Exxon v. Baker. The central issue of the case was whether an award of punitive damages of US$ 2.5 billion (as reduced by the lower courts from an initial award of US$ 5 billion) was excessive as a matter of maritime common law. The Court held 5 to 3 (with Alito recused) that such awards should be limited by using a ratio of punitive to compensatory damages. The court held that, in maritime cases, a ratio of 1:1 is a fair upper limit. Thus, as the lower court had assessed the compensatory damages to US$ 507 million in that case, the Supreme Court held that punitive damages should be reduced to that amount as well.

This case comes after several decisions where the Supreme court has interpreted

the Due Process Clause as setting limits to punitive damages awards. In those cases, it was held that a ratio superior to one digit (i.e. superior to 9:1) would rarely satisfy Due Process, and that when the award of compensatory damages was already substantial, it might be that only a ratio of 1:1 would satisfy the constitutional requirement.

There is therefore a clear trend in American law towards more reasonableness and predictability in the award of punitive damages.

To bolster its holding limiting punitive damages, the Court noted that the practice of other common law jurisdictions was different, but also that awards of punitive damages were often denied recognition abroad:

> *For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. See … Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. See … And some legal systems not only decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy. See, e.g., Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514,518, 528 (2007) (noting refusals to enforce judgments by Japanese, Italian, and German courts, positing that such refusals may be on the decline, but concluding, "American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognizedand enforced in other countries").*

From a conflict perspective, the interesting question is whether such an evolution of American law would change anything. Would Japanese, Italian or German courts recognize lower awards? Is size the issue? Or is it just the punitive nature of such judgments, which makes them, for conflict purposes, criminal in nature?

Comments from all jurisdictions welcome!

First Issue of 2008's Revue Critique de Droit International Privé

The first issue of 2008's *Revue Critique de Droit International Privé* has just been released. It contains three articles, but only one dealing with a conflict issue per se, the public law exception within the Brussels I Regulation after the *Lechouritou* case ("*Les actes* jure imperii *et le Règlement Bruxelles I – A propos de l'affaire* Lechouritou"). The two other articles discuss immigration law issues.

The article is authored by French scholars Horatia Muir Watt, who teaches at Paris I University (and who was our Guest Editor of last month), and Etienne Pataut, who teaches at Cergy University.

The authors have kindly provided the following abstract:

Inasmuch as private international law in continental legal systems is entirely structured by the distinction between private cross-border relationships subjected to the conflict of laws, and the public sphere, correlatively excluded, it is now undergoing profound transformations due to to the changing nature and function of substantive « private » law. The traditional opposition between public and private law is if not discredited, at least in search of re-definition. It is not surprising, therefore, that the "public law exception" which first appeared in the Brussels Convention in 1968 and continues to figure unaltered in the new Community private international law instruments, raises considerable difficulties in the case-law of the Court of justice, and gives rise to varying constructions in the courts of the various Member States. The 2007 Lechouritou case (C-292/05) is emblematic of these difficulties, insofar as it reveals a lack of coherence between the scope of sovereign immunity and the public law exception within the Brussels I Regulation. This article uses the Lechouritou case to revisit the distinction between public and « civil and commercial matters » and suggests a new reading of the Regulation in this context.

Conference: The Rome I Regulation – New Choice of Law Rules in Contract

We are pleased to announce the:

Journal of Private International Law Conference
The Rome I Regulation: New Choice of Law Rules in Contract
Friday 19th September 2008
Herbert Smith, Exchange House, London

The full programme, also set out below, can be found on our **dedicated conference page**. The speakers are all internationally recognised experts in the fields of private international law, insurance e-commerce and IP, and financial services. The keynote speech is to be delivered by The Honourable Mr Justice Richard Plender, Royal Courts of Justice.

Details on fees and booking can be found here – if you wish to attend, I suggest booking with all due speed as places *are* limited.

The conference is kindly sponsored by Herbert Smith, the University of Birmingham, the University of Aberdeen and the University of Southampton.

Programme

9.30am – 10.00am **Registration and Coffee/Tea**

10.00am – 10.15am **Opening and Keynote Address**

The Honourable Mr Justice Richard Plender, Royal Courts of Justice, *'Towards a European Private International Law of Obligations'*

10.15am – 11.30am **The General Framework**

(Chair: Professor Paul Beaumont, University of Aberdeen)

Raquel Correia, Legal Adviser and JHA Counsellor, Portuguese Permanent Representation to the European Union

Andrew Dickinson, Clifford Chance LLP, London; Visiting Fellow in Private International Law, British Institute of International and Comparative Law

Dr Michael Hellner, University of Uppsala

Oliver Parker, Legal Adviser, Ministry of Justice

11.30am – 12.00pm **Coffee/Tea Break**

12.00pm–1.00pm **Insurance**

(Chair: Adam Johnson, Partner, Herbert Smith LLP)

Richard Lord QC, Brick Court Chambers

Professor Robert Merkin, University of Southampton

Louise Merrett, Trinity College, University of Cambridge; Fountain Court Chambers

1.00pm – 2.15pm **Lunch**

2.15pm – 3.15pm **E-Commerce and IP**

(Chair: Professor Gerrit Betlem, University of Southampton)

Richard Fentiman, Queens' College, University of Cambridge

Dr Julia Hörnle, Queen Mary, University of London

Professor Paul Torremans, University of Nottingham

3.15pm – 4.30pm **Financial Services**

(Chair: Professor Jonathan Harris, University of Birmingham; Brick Court Chambers)

Professor Michael Bridge, London School of Economics, University of London

Professor Francisco Garcimartin Alférez, University of Madrid Rey Juan Carlos

Dr Joanna Perkins, Secretary of the Financial Markets Law Committee

Charles Proctor, Partner, Bird & Bird; Honorary Professor, University of Birmingham

4.30pm – 5.00pm **Coffee/Tea Break**

5.00pm – 5.30pm **Panel Discussion**

(Chair: Murray Rosen QC, Partner, Herbert Smith LLP)

5.30pm **Drinks Reception**

Booking and Fees

New Reference on Brussels II bis

Another reference for a preliminary ruling on the **Brussels II *bis* Regulation** has been referred to the ECJ, this time by the Republic of Lithuania.

The Lithuanian court (*Lietuvos Aukš?iausiasis Teismas*) has referred the following questions to the ECJ:

> *Can an interested party within the meaning of Article 21 of Council Regulation (EC) No 2201/2003 apply for non-recognition of a judicial decision if no application has been submitted for recognition of that decision?*
>
> *If the answer to Question 1 is in the affirmative: how is a national court, when examining an application for non-recognition of a decision brought by a person against whom that decision is to be enforced, to apply Article 31(1) of Regulation No 2201/2003, which states that '… Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application'?*

Is the national court which has received an application by the holder of parental responsibility for non-recognition of that part of the decision of the court of the Member State of origin requiring that that holder return to the State of origin the child staying with that holder, and in respect of which the certificate provided for in Article 42 of Regulation No 2201/2003 has been issued, required to examine that application on the basis of the provisions contained in Sections 1 and 2 of Chapter III of Regulation No 2201/2003, as provided for in Article 40(2) of that regulation?

What meaning is to be attached to the condition laid down in Article 21(3) of Regulation No 2201/2003 ('Without prejudice to Section 4 of this Chapter')?

Do the adoption of a decision that the child be returned and the issue of a certificate under Article 42 of Regulation No 2201/2003 in the court of the Member State of origin, after a court of the Member State in which the child is being unlawfully kept has taken a decision that the child be returned to his or her State of origin, comply with the objectives of and procedures under Regulation No 2201/2003?

Does the prohibition in Article 24 of Regulation No 2201/2003 of review of the jurisdiction of the court of the Member State of origin mean that, if it has received an application for recognition or non-recognition of a decision of a foreign court and is unable to establish the jurisdiction of the court of the Member State of origin and unable to identify any other grounds set out in Article 23 of Regulation No 2201/2003 as a basis for non-recognition of decisions, the national court is obliged to recognise the decision of the court of the Member State of origin ordering the child's return in the case where the court of the Member State of origin failed to observe the procedures laid down in the regulation when deciding on the issue of the child's return?

The case is pending as C-195/08 (*Inga Rinau*)

(Many thanks again to Jens Karsten (Brussels) for information on this case.)

Update: it seems that *Rinau* is the first reference to the ECJ to use the "urgent preliminary reference procedure" – more information can be found on the excellent EU Law Blog (which is where we spotted it). The effect of that is that the hearing is due before the Third Chamber on 26th June 2008, *less than two*

months after it was first lodged.

See for more information on the urgent preliminary reference procedure the following press release of the Commission which can be found here.

Ph.D. Grants of the International Max Planck Research School for Maritime Affairs

The International Max Planck Research School for Maritime Affairs at the University of Hamburg will award for the period commencing 1 October 2008 six Ph.D. grants for a term of two years. The particular area of emphasis to be supported by this round of grants is the **Implications of Climatic Changes in the Arctic**.

Deadline for applications is 31 July 2008.

More information on the International Max Planck Research School for Maritime Affairs, application requirements as well as the application procedure can be found here.

The Standard of Proof of Facts going to Jurisdiction

The recent case of *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 (available here) addresses, at some length, the standard of proof required of jurisdictional facts.

I have recently co-written an article on a related topic – the standard of proof for jurisdiction clauses – in the Canadian Business Law Journal. See SGA Pitel & J de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 C.B.L.J. 66.

In the main, the British Columbia Court of Appeal uses the language of the orthodox cases – facts need not be proven on the balance of probabilities, but rather only need to be proven to the "good arguable case" standard. And to some degree the decision may turn on the specifics of the province's regulatory provisions, which allow the defendant to keep jurisdiction a live issue up to and including trial (see paras. 38 and 39 of the decision). But overall I am troubled by the court's analysis.

In the article, we draw the distinction between the sort of facts that can found jurisdiction under the heads of service out, like the breach of a contract committed in Ontario, and other sorts of facts. For the former, the good arguable case standard seems right. The plaintiff does not have to show, at the jurisdiction stage, that there has, on balance of probabilities, been such a breach. That is for trial. For the latter, in which we include the existence of a jurisdiction clause, there is much less reason for the lower standard of proof. Indeed, in many jurisdictions the determination of the issue will be final in both law and fact. In a footnote at the end of the article we make the following argument:

"This article has focused on jurisdiction clauses because of the highly important role they play—greater than any other factor—in both the jurisdiction and stay of proceedings analyses. While it is beyond the scope of this article, there may be other factual disputes on jurisdictional motions that should also use the higher balance of probabilities standard of proof rather than the traditional lower standard. It is possible, for example, that in light of the importance of whether the defendant is present in the jurisdiction, the higher standard of care should be used for a dispute over that issue. More problematic could be disputes over facts that are deemed or presumed to conclusively found jurisdiction. See for example *The Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 10."

Purple Echo, it seems to me, is a case that fits into this area. The facts in issue were as to whether the defendant had a place of business in British Columbia. Why should the standard of proof for this, a "pure" jurisdictional issue (it goes to nothing else), not be the balance of probabilities? Why delay the resolution of this issue until some later stage of the litigation?

Stephen

New References for Preliminary Rulings

New references for preliminary rulings on the interpretation of the Brussels I Regulation, the Brussels II *bis* Regulation and the Insolvency Regulation have been referred to the ECJ:

1. Reference on Brussels I Regulation

The Swedish *Högsta Domstolen* has referred the following question to the ECJ:

> *Is the exception in the Brussels I Regulation regarding insolvency, compositions and analogous proceedings to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, which ownership is transferred by the liquidator to a company in another Member State (B), where the court based its decision on the fact that Member State A, in the absence of an agreement between the States regarding mutual recognition of insolvency proceedings, does not recognise the liquidator's powers of disposal over property in Member State A?*

The case is pending as *SCT Industri Aktiebolag i likvidation v. Alpenblume Aktiebolag* (C-111/08).

2. Reference on Insolvency Regulation

The Spanish *Juzgado de lo Mercantil No 1* has referred the following questions to the ECJ:

> *1. For the purposes of Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty of European Union and the Treaty establishing*

the European Community, should Denmark be considered to be a Member State within the meaning of Article 16 of Regulation (EC) No 1346/2000 on insolvency proceedings?

2. Does the fact that that Regulation is subject to that Protocol mean that that Regulation does not form part of the body of Community law in that country?

3. Does the fact that Regulation No 1346/2000 is not binding on and is not applicable in Denmark mean that other Member States are not to apply that Regulation in respect of the recognition and enforcement of judicial declarations of insolvency handed down in that country, or, on the other hand, that other Member States are obliged, unless they have made derogations, to apply that Regulation when the judicial declaration of insolvency is handed down in Denmark and is presented for recognition and enforcement in other Member States, in particular, in Spain?

The case is pending as *Finn Mejnertsen v Betina Mandal Barsoe* (C-148/08).

3. Reference on Brussels II *bis* Regulation

The French *Cour de Cassation* has referred the following questions to the ECJ:

Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?

If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more dominant of the two nationalities?

If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?

The case is pending as *Iaszlo Hadadi (Hadady) v Csilla Marta Mesko, married name Hadadi (Hadady)* (C-168/08).

(Many thanks to Jens Karsten (Brussels) for the tip-off.)