

Annual Conference of the American Association of Private International Law (ASADIP)

The American Association of Private International Law (Asociación americana de derecho internacional privado ASADIP) will hold its third annual conference “International Business Law in a time of change” on 12 and 13 November in Venezuela, Isla de Margarita). A special tribute will be given to Tatiana Maekelt, who was one of the most outstanding conflicts scholars of Latin America.


Among the topics that will be addressed and which might interest members of this list are:

- Bernard Audit (Paris II Panthéon-Assas University) on “Problemas actuales del convenio arbitral: efecto negativo, extensión a otros contratos y a otros miembros del grupo societario”
- Georges Bermann (ColumbiaUniversityl) on “Recent Trends in Parallel Litigation”
- Herbert Kronke (Heidelberg University) on “Transnational Certainty and the Convention on Intermediated Securities -Reflections on Key Issues”
- David P. Stewart (Georgetown University) on “Companies and Human Rights: Litigation in the United States Under the “Alien Tort Statute”
- Juan M. Velázquez Gardeta (Basque Country University) on “Challenges of E-Commerce: North American Case Law and the Future of Latin America”
- Didier Opertti Badán (Catholic University of Uruguay) on “The Situation of Private International Law in a Context of Globalization”

For more information, please consult the website of the conference:
<http://www.negociosinternacionales.com.ve/>

and here to ask for your membership to the asociacion.

New Journal of International Dispute Settlement

Oxford University Press will publish a new *Journal of International Dispute Settlement* from 2010 onwards. The General Editors will be Geneva based scholars Gabrielle Kaufman-Köhler and Joost Pauwelyn, with Thomas Schultz being the Managing Editor. 

Since the 1980s, a radical development has taken place in international dispute settlement. The number of international courts, tribunals and other international dispute resolution mechanisms has increased dramatically. The number of international disputes resolved by such means has risen in even greater proportions. These disputes more and more frequently raise issues that combine private and public international law, effectively bringing back to light the deep-seated interactions that have always existed between these two traditional fields of academic study. The regulatory impact of certain branches of international dispute settlement – such as international arbitration – further create the need to take a step back and think about where we are going. The growth of the field of international dispute settlement in practice, the novelty and significance of the issues posed, and the originality of the academic angle from which such issues need to be addressed are the factors that triggered the launch of the Journal of International Dispute Settlement.

JIDS defines its mission according to these developments. It is primarily designed to encourage interest in issues of enduring importance and to highlight significant trends in the field of international dispute settlement. Heavyweight and reflective articles will find preference over news-driven works. In addition to strictly legal approaches, the journal's purview encompasses studies inspired by legal sociology, legal philosophy, the history of law, law and political science, and law and economics. It covers all forms of international dispute settlement and focuses particularly on developments in private and public international law that carry commercial, economic and financial implications. The main subjects that will be dealt with are international commercial and investment arbitration, WTO dispute resolution, diplomatic dispute settlement, the settlement of international political disputes over economic matters in the UN, as well as international negotiation and

mediation. Particular attention will be paid to questions that involve a combination of private and public international law.


JIDS will address procedural issues that arise in international dispute resolution procedures, such as provisional measures; the consensual character of jurisdiction; evidence; amicus curiae interventions; res judicata, lis pendens and double fora; the procedural influence of human rights; experts and witnesses; interpretation, revision and challenge of awards and decisions; recognition and enforcement, etc. Comparative approaches, which are attentive to the different ways that these issues are dealt with in different types of dispute resolution procedures, are of particular interest.

The journal will also include substantive aspects pertaining to those fields of the law that are shaped by international courts and tribunals, be they of an interstate, private or mixed character. Hence, substantive issues in international economic law and international investment law will be considered, so long as the link to international dispute settlement is clearly established. This will include questions of substantive law properly speaking, but also more general aspects of the substantive evolution of international law, covering issues such as the proliferation of international dispute settlement mechanisms and the ensuing fragmentation of international law.

JIDS is intended not only for academics with an interest in international dispute settlement, international arbitration, private or public international law. It is also intended for practitioners who are looking for a single source that captures the fundamental trends with the field, allowing them to anticipate new issues and new ways to resolve them. Graduate and post-graduate students, government officials, in-house lawyers dealing with international disputes, and people working for international courts and tribunals and for international arbitration institutions should also find interest in this journal.

The contents of the first two issues of the Journal can be found [here](#).

Dr Krombach's Final (?) Contribution to the European Judicial Area

Last week-end, Dr. Dieter Krombach was found in the street, tied up, in front of a court in Mulhouse, France, in the middle of the night. 

What was he doing there, you may wonder?

Well, André Bamberski has now revealed that he had the 74 year old German doctor kidnapped in Germany and brought to France. The French police had been alerted that Dr. Krombach could be found in Mulhouse by an anonymous phone call from someone speaking French with a strong Russian accent.

Of course, many readers will know what Bamberski has against Krombach from the famous *Krombach* cases of the European Court of Justice and the European Court of Human Rights. Krombach allegedly raped and killed Bamberski's 14 year old daughter in 1982. He was sentenced by a French court in absentia in 1995 to 15 years of prison. But he never served them, as German authorities did not prosecute him, nor extradited him. So Bamberski, it might be argued, was thinking that he would soon die without serving his sentence. One logical theory is that he did not really trust the German legal system, so he decided to take the necessary steps to ensure that justice would be done. It has been suggested that he thus involved a couple of Russian associates he had met in Munich earlier this month.

If that is true (and we offer no formal opinion either way here), he may or may not have been aware that what he was doing was illegal. Possibly, he had not heard about *West Tankers* and mutual trust. At the same time, one doubts that Dr Krombach was a stronger believer in mutual trust, since the European Court of Human Rights recognized that he had not been afforded a fair trial by French criminal courts.

In any case, Bamberski has now been arrested in France and charged on Tuesday with kidnapping, among other criminal offences.

Professor Hess informed me that the Bavarian ministry of justice has issued earlier today a press declaration insisting that States have the monopoly of violence, that private individuals may substitute neither judges nor enforcement authorities, and that this abduction was wholly unacceptable.

Krombach was first brought to a hospital in Mulhouse, then transferred to Paris so that he could be heard by a French judge on Wednesday night. Bamberski's lawyer is calling for a new criminal trial in France.

Latest Issue of “Rabels Zeitschrift”

The latest issue of the **Rabels Zeitschrift** (Vol. 73, No. 4, October 2009) is a special issue on the occasion of the 60th birthday of *Professor Jürgen Basedow* and contains the following articles:

- **Dietmar Baetge:** Contingency Fees – An Economic Analysis of the Federal Constitutional Court's Decision Authorising Attorney Contingency Fees – the English abstract reads as follows:

In Germany, until recently, contingency fees were prohibited. In December 2006, the legal ban on contingency fees was declared unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht). Implementing the Court's ruling, the German legislator, in 2008, legalised contingency fees on a limited basis. This paper attempts to analyse the Constitutional Court's decision from an economic vantage point. The main constitutional reasons given to justify the legal ban on contingency fees are translated into economic terms and further elaborated. Points of discussion include the problem of moral hazard between the lawyer and the judge on the one hand and the lawyer and his client on the other. A third question dealt with in the paper is the extent to which contingency fees may influence the efficient allocation of resources. The paper concludes that access to the instrument of contingency fees should not be limited to poor clients but also extended to affluent persons.

- **Moritz Bälz:** Japan's Accession to the CISG – the English abstract reads as follows:

On 1 July 2008 Japan, as the 71st state, acceded to the United Nations Convention on the International Sale of Goods (CISG). As of 1 August 2009, the most important convention in the field of uniform private law will thus enter into force in Japan, leaving Great Britain as the sole major trading nation not yet party to the convention. The article examines the complex reasons why Japan did not accede earlier as well as why this step was finally now undertaken. It, furthermore, offers an assessment of the importance of the CISG for Japan prior to the accession and the impact to be expected from the convention on the reform of the Japanese Civil Code which is currently under way. Finally, it is argued that Japan's accession nourishes the hope that the CISG will spread further in Asia, thus not only extending its reach to one of the world's most dynamic regions, but also opening up opportunities for a future harmonisation of Asian contract law.

- **Friedrich Wenzel Bulst:** The Application of Art. 82 EC to Abusive Exclusionary Conduct – the English abstract reads as follows:

The article addresses recent developments in the application of the prohibition of abuse of dominance in EC competition law. The European Commission has published a communication providing guidance on its enforcement priorities in applying Art. 82 EC to abusive exclusionary conduct of dominant undertakings. Under this more effects-based approach which focuses on ensuring consistency in the application of Arts. 81 and 82 EC as well as the Merger Regulation, priority will be given to cases where the conduct in question is liable to have harmful effects on consumers. After a brief introduction (section I), the author outlines the main elements of the communication and illustrates how the Commission's approach to providing guidance in this area has evolved since the publication of its 2005 discussion paper on exclusionary abuses (section II). The author then addresses the scope of the communication against the background of the case law on the Commission's discretion (not) to pursue cases (section III). The central concept of the communication is that of »foreclosure leading to consumer harm«. Against this background the author discusses, in the context of refusal to supply abuses both in and outside an IP context, the operationalisation of the criterion of harm to consumers (section IV) before

concluding (section V).

- **Anatol Dutta:** The Death of the Shareholder in the Conflict of Laws – the English abstract reads as follows:

The death of the shareholder raises the question how the law applicable to the company and the law governing the succession in the deceased shareholder's estate have to be delimited. This borderline becomes more and more relevant against the background of recent jurisprudence of the European Court of Justice (ECJ) in Centros, Überseering and Inspire Art concerning the freedom of movement of companies in the Community. On the one hand, as a consequence of this jurisprudence the laws governing the company and the succession often differ. On the other hand, the ECJ's jurisprudence might further blur the boundaries between the laws governing companies and successions. The article tries to draw the border between the relevant choice-of-law rules. It comes to the conclusion that the consequences of the shareholder's death for the company and his share are subject to the conflict rules for companies (supra III.). More problematic, though, is the characterisation of the succession in the share of the deceased shareholder. Some legal systems contain special succession regimes for shares in certain private companies and partnerships. The article argues (supra IV.) that the succession in shares has to be dually-characterised and subjected to both, the law governing the company and the succession. Yet clashes between the applicable company and succession laws are to be solved by giving precedence to the applicable company law. The precedence of company law should be clarified by the legislator – by the German legislator when codifying the conflict rules for companies and by the European legislator when codifying the conflict rules for successions upon death (supra V.).

- **Franco Ferrari:** From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)
- **Christian Heinze:** Industrial Action in the Conflict of Laws – the English abstract reads as follows:

The introduction of a special conflicts rule for industrial action in Art. 9 Rome II

Regulation can be considered as a felicitous innovation of European Private International Law. The application of the law of the country where the industrial action is to be taken or has been taken is founded on the public (social) policy concerns of the country where the action takes place and will therefore, in general, obviate the need for any enforcement of this country's strike laws by means of the ordre public or as internationally mandatory provisions (at least as far as intra-European cases are concerned). The major drawback of Art. 9 does not derive from the rule itself but rather from its restriction to »non-contractual liability«. Article 9 Rome II Regulation may therefore designate a substantive law applicable to the non-contractual liability for the industrial action which is different from the law applicable to the individual employment contract (Art. 8 Rome I Regulation) or a collective labour agreement. This may be unfortunate because the industrial action will usually have consequences for at least the individual employment contract (e.g. a suspension of contractual obligations) which might be governed by a different law (Art. 8 Rome I Regulation) than the industrial action itself (Art. 9 Rome II Regulation). Possible conflicts between these laws can be resolved by extending the scope of Art. 9 Rome II Regulation to the legality of the industrial action in general, thus subjecting any preliminary or incidental questions of legality of industrial actions to Art. 9 Rome II Regulation while applying the lex contractus to the contractual consequences of the action.

- **Eva-Maria Kieninger:** The Full Harmonisation of Standard Contract Terms - a Utopia? - the English abstract reads as follows:

The article discusses the proposal for a consumer rights directive of October 2008, in which the European Commission suggests to move from minimum to full harmonisation of specific areas of consumer contract law. The article specifically examines whether full harmonisation of the law relating to the judicial control of unfair contract terms, even if politically desirable, will be feasible in the context of non-harmonised national contract law. Examples are presented for cases which were decided differently by national courts on the basis of divergent rules of general contract law. The article discusses whether the Draft Common Frame of Reference (DCFR) can be used by the European Court of Justice (ECJ) and the national courts as a common yardstick to measure the unfairness of a contractual term. Two problems present themselves: one is the question of legitimacy because, until now, the DCFR is

no more than a scientific endeavour which in part rests on the autonomous decisions of its drafters and does not merely present a comparative restatement of Member States' laws; second, the DCFR makes excessive use of the term »reasonableness« so that, in many instances, its ability to give guidance in the assessment of the unfairness of a specific contract term is considerably reduced. The question of legitimacy could be solved by an optional instrument which could be chosen by the parties as the applicable law.

- **Jan Kleinheisterkamp:** Internationally Mandatory Rules and Arbitration
- A Practical Attempt - the English abstract reads as follows:

This article treats the impact that internationally mandatory rules of the forum state may have on the effectiveness of arbitration agreements if the claims are based on such internationally mandatory rules but the parties had submitted their contract to a foreign law. The specific problems of conflicts of economic regulation are illustrated and discussed on the basis of Belgian and German court decisions on disputes relating to commercial distribution and agency agreements. European courts have adopted a restrictive practice of denying the efficacy of such tandems of choice-of-law and arbitration clauses if there is a strong probability that their internationally mandatory rules will not be applied in foreign procedures. This article shows that neither this approach nor the much more pro-arbitration biased solutions proposed by critics are convincing. It elaborates a third solution which allows national courts both to reconcile their legislator's intention to enforce a given public policy with the parties' original intention to arbitrate and to optimize the effectiveness of public interests as well as that of arbitration.

- **Axel Metzger:** Warranties against Third Party Claims under Arts. 41, 42 CISG - the English abstract reads as follows:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides two regimes for warranties against third party claims. The general rule of Art. 41 establishes a strict liability rule for all third party claims not covered by Art. 42. Article 42 limits the seller's liability for infringement claims based on intellectual property. A seller under the CISG warrants only against third party intellectual property claims he »knew or could not have been unaware« at the time of the conclusion of the contract. In addition, his

liability is territorially restricted to claims based on third party intellectual property rights in the countries contemplated by the parties at the conclusion of the contract. This article provides an overview of seller's warranties under Arts. 41 and 42. It examines, more specifically, whether the limited scope of seller's warranties for third party intellectual property claims is efficient and whether it is expedient from a comparative law perspective. Under a traditional economic analysis of law approach, the party who can avoid third party claims most cheaply should bear the risk of infringement claims. This will often be the seller, especially if he has produced the goods or has specific knowledge of the industry. But it may also occur that the buyer is in the superior position to investigate intellectual property rights, e.g. if the buyer is a specialized player in the industry and the seller is a mere vendor without specific knowledge in the field. Article 42 allows an efficient allocation of the risk by the court. The party charged with the risk, be it seller or buyer, should not only warrant against third party rights he knew but also for those he could have been aware of after investigation in the patent and trademark offices of the relevant countries or through other resources. Such a duty to investigate may also exist with regard to unregistered rights like copyrights. A strict interpretation of the seller's (or buyer's) duty is in accordance with international standards. Seller's warranties are strict liabilities rules in many countries with an exception in case of bad faith on the part of the buyer.

- **Ralf Michaels:** Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law – the English abstract reads as follows:

1. The most talked-about purpose of the UNIDROIT Principles of International and Commercial Contracts (PICC) is their applicability as the law chosen by the parties. However, focusing on this purpose in isolation is erroneous. The PICC are not a good candidate for a chosen law – they are conceived not as a result of the exercise of freedom of contract, but instead as a framework to enable such exercise. Their real potential is to serve as objective law – as the general part of transnational contract law. 2. This is obvious in practice. Actually, choice of the PICC is widely possible. National courts accept their incorporation into the contract; arbitrators frequently accept their choice as applicable law. However, in practice, the PICC are rarely chosen. The most important reason is that they

are incomplete. They contain no rules on specific contracts. Further, they refer to national law for mandatory rules and for standards of illegality and immorality. This makes their choice unattractive. 3. The nature of the PICC is much closer to that of the U.S. Restatement of the law. The U.S. Restatement becomes applicable not through party choice but rather as an articulation of background law. Actually, this describes the way in which the PICC are typically used in practice. 4. This use as background law cannot be justified with an asserted legal nature of the PICC (their »law function«). Rather, the use is justified insofar as they fulfill two other functions: the »restatement function« (PICC as description of a common core of legal rules) and the »model function« (PICC as model for a superior law). 5. From a choice-of-law perspective, such use cannot be justified under traditional European choice of law, which designates legal orders, not incomplete codifications, as applicable. 6. By contrast, application could be justified under U.S. choice of law. Under the governmental interest analysis, the PICC could be applicable to situations in which no state is interested in the application of its own law. Their international character qualifies the PICC for the Restatement (2d) Conflict of laws. Finally, for the better-law theory, according to which the substantive quality of a law is a criterion for choice of law, the PICC are a candidate insofar as they perform a model function. 7. In result, the PICC are comparable to general common law or the *ius commune*, within which regulatory rules of national, supranational and international origin act like islands. 8. Altogether, this results in a complex picture of transnational contract law, which combines national, international and non-national rules. The PICC can be no more, but no less, than a general part of this contract law.

- **Hannes Rösler:** Protection of the Weaker Party in European Contract Law – Standardised and Individual Inferiority in Multi-Level Private Law – the English abstract reads as follows:

It is a permanent challenge to accomplish freedom of contract effectively and not just to provide its formal guarantee. Indeed, 19th century private law already included elements guaranteeing the protection of this »material« freedom of contract. However, consensus has been reached about the necessity for a private law system which also provides for real chances of self-determination. An example can be found in EC consumer law. Admittedly, this law is restrained – for reasons of legal certainty – by its personal and situational

typicality and bound to formal prerequisites. However, the new rules against discrimination are dominated by approaches which strongly focus on the protection of the individual. It is supplemented by national provisions, which especially counter individual weaknesses. The autonomy of national law can be explained by the different traditions with regard to »social« contract law in the Member States. The differences are especially apparent regarding public policy, good faith or breach of duty before or at the time of contracting (*culpa in contrahendo*). They form another argument against the undifferentiated saltation from partial to total harmonisation of contract law.

- **Giesela Rühl:** The Presumption of Non-Conformity in Consumer Sales Law – The Jurisprudence of the Federal Court of Justice in comparative perspective – the English abstract reads as follows:

The Law on the Modernisation of the Law of Obligations has introduced a large number of provisions into the German Civil Code. One of these provisions has kept German courts particularly busy during the last years: § 476. The provision implements Art. 5 III of the Consumer Sales Directive and provides that any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The presumption has proved to be difficult to apply in practice: the German Federal Court of Justice (Bundesgerichtshof; hereinafter BGH) alone as issued eight – highly controversial – decisions. And numerous articles, case notes and commentaries have analysed and criticised each and every one of them. It is therefore surprising to see that both the BGH and the German literature refrain from exploiting one very obvious source of information that might help to deal with § 476: comparative law. Even though Art. 5 III of the Consumer Sales Directive has been implemented in all Member States except for Lithuania nobody has endeavoured to analyse its application in other countries to this date. The above article tries to fill this gap and looks at § 476 from a comparative perspective. It finds that courts across Europe apply the provision in the same way as the BGH regarding the exclusion and the rebuttal of the presumption. However, regarding the scope of the presumption, the BGH stands alone with its strict interpretation. In fact, no other court in Europe refuses to apply the presumption in cases in which a defect that occurs after delivery might be the result of a basic defect present at the time of

delivery. The article, therefore, concludes that the BGH should rethink its position regarding the scope of the presumption and refer the next case to the European Court of Justice.

- **Jens M. Scherpe:** Children Born out of Wedlock, their Fathers, and the European Convention on Human Rights – the English abstract reads as follows:

Unlike in many European countries, only a father married to the mother will automatically have parental custody (elterliche Sorge) in Germany. A father not married to the mother is effectively barred from obtaining parental custody unless the mother agrees, and there is not even the possibility – unlike e.g. in England – for the courts to interfere with the mother’s decision, cf. §§ 1626a, 1672 BGB. The legal rules are based on the – somewhat questionable – assumption that the mother’s motives for refusal of parental custody are based on the welfare of the child. The German statutory provisions have been challenged unsuccessfully in the German Constitutional Court (Bundesverfassungsgericht; BVerfG). However, the BVerfG voiced some doubt as to the premises upon which these rules rested and has demanded that further development be monitored closely. The vast majority of German academic authors also doubts the constitutionality of § 1626a BGB and are in favour of reforming the law. The matter is now the subject of a case pending at the European Court of Human Rights (ECtHR), Zaunegger v. Germany, in which the applicant claims, inter alia, that his right of respect for family life under Art. 8 ECHR is being violated. In previous cases, McMichael v. United Kingdom and Balbontin v. United Kingdom, challenges of Scots and English law on parental responsibility for fathers not married to the mother have failed. This article critically analyses the legal rules in England and Germany and, based on the differences between them and the relevant case law of the ECtHR, suggests that the Court will find that the German rules are indeed in breach of the European Convention. The article concludes with suggestions for reform.

- **Wolfgang Wurmnest:** Unilateral Restrictions of Parallel Trade by Dominant Pharmaceutical Companies – Protection of Innovation or Anti-competitive Market Foreclosure? – the English abstract reads as follows:

The elimination of cross-border barriers to trade as means of encouraging

competition in the single market lies at the heart of EC-competition policy. Limitations of parallel trade were therefore treated as restrictions of competition. With regard to the pharmaceutical sector the merit of such a competition policy has been called into question. It is said that the unique features of the market for pharmaceuticals, namely the existence of price regulation at the national level for prescription medicines, makes parallel trade socially undesirable as it does not foster real price competition and undermines investment in R&D to the detriment of the consumer. Hence, unilaterally imposed restrictions of parallel trade by dominant producers, such as supply quota systems, should not be regarded as a violation of Art. 82 EC. This article discusses the legal and economic arguments in favour of a policy shift in light of the recent case *Lélos v. GlaxoSmithKline*. In this case the European Court of Justice (ECJ) has held that a pharmaceutical company in a dominant position cannot be allowed to cease honouring the ordinary orders of an existing customer for the sole reason that the customer engages in parallel trade, but that Art. 82 EC does not prohibit a dominant undertaking from refusing to fill orders that are out of the ordinary in terms of quantity in order to protect its commercial interests. It is argued that the ECJ was right in denying pharmaceutical companies a general right to limit the flow of pharmaceutical products by unilateral measures as the pro-competitive effects of parallel trade are greater than often assumed.

- **Nadjma Yassari:** The Reform of the Spousal Share under Iranian Succession Law - An example of the transformability of Islamic law - the English abstract reads as follows:

It is generally held that Islamic law is a static system of rules, unable to accommodate change. This is especially thought true of family and succession laws that are firmly rooted in a religious foundation. Nonetheless, one can observe in the last decades how active the Iranian legislator has been in reforming its family laws, with the result that a number of traditional provisions have undergone remarkable changes. Most recently, the Iranian Parliament ventured into the field of succession law by amending the inheritance portion received by the surviving wife, which so far had been limited to movables. Under the new regulations, she takes her portion also from immovable property. The previous limitations placed on the inheritance portion of the widow have no base in the Koran, the primary source of Islamic shi'i law, and

were deduced from another primary source of law, notably the traditions of the twelve Imams. This article examines the religious foundations of the inheritance rule on the spousal share, its codification in the Iranian Civil Code and the proposed amendments by the Iranian Parliament. It shows how the Iranian Parliament by emphasising another interpretation of the sources has been successful in changing a rule that has prevailed in Iranian law for over 80 years. Without doubt, this reform is a significant step towards the harmonisation of the widow's inheritance share and the elimination of the harsh economic consequences of the rule as it stood. Beyond this effect however it can also be taken as an illustration of the way legal development can be set within an Islamic framework. Moreover, it shows that it is ultimately the intrinsic structure of the sources of Islamic law and the methods by which law is deduced from them that makes reform possible.


Enforcement in France of a U.S. Financial Penalty

Earlier this year, the French *Cour de cassation* (Supreme court for private and criminal matters) confirmed a declaration of enforceability of a U.S. financial penalty of 13 million dollars in a judgment of 28 January 2009.

The *Cour de cassation* characterized the foreign penalty as an *astreinte*. Its enforceability was challenged on the grounds that it was criminal in nature, as it sanctioned a contempt of court, and that it was not proportionate to the offence. By contrast, and although the introductory report prepared by one of the members of the court did discuss the issue, the judgment did not address whether *astreinte* was an exercise of state power which as such ought to remain strictly territorial.

The case was about another Ponzi scheme perpetrated in the U.S.. The accused was an American citizen, Richard Blech, who lived in France (he was eventually

extradited to and jailed in New York and in California). He was the manager of an American corporation, Credit Bancorp, that he had used to commit the fraud. In January 2000, the District Court for the Southern District of New York appointed a receiver for Credit Bancorp, who was meant to trace the proceeds of the fraud committed by Blech. Some times later, the receiver sought an injunction from the US Court ordering Blech to cooperate with him. As he would not, he applied for a renewal of the injunction, together with a sanction of US\$ 100 per day of non-compliance, which was to double each day. At that point in time, I understand that Blech was found to be in contempt of court for not complying with the injunction. Four months later, the same receiver applied for the penalty to be calculated, which was done by the court in an order of 25 July 2000 which ordered Blech to pay a bit more than 13 million dollars.

The receiver then sought to enforce the order of July 25, 2000, in a ski resort  in France, where Blech owned a property. In 2003, the competent first instance court of Thonon-les-Bains (French Alps) declared the American judgment enforceable. The judgment was confirmed by the Chambery Court of Appeal in 2006. Blech appealed to the Cour de cassation.

Blech first challenged the lower courts' decisions on the ground that they had recognised a foreign criminal order. Here, much of the argument revolved around the fact that Blech was found to be in contempt of court. The reason why was that, in the *Stolzenberg* case, the *Cour de cassation* had said *obiter* that contempt of court was criminal in nature. Then, the point was to declare enforceable in France a *Mareva* injunction, and the court had ruled that a freezing order is civil in nature irrespective of the sanction of "contempt of court" (cited as such in the judgment) which backs it, and which is criminal. In *Blech*, the issue was not anymore to recognize the foreign injunction, but its sanction. A mechanical application of *Stolzenberg* would have led to rule that it was thus a US penal judgment which could not be enforced in France. But this is not what the *Cour de cassation* did. It held that the financial penalty which was the sanction for non complying with a foreign injunction was civil in nature, and could thus be declared enforceable.

As mentioned earlier, the judgment does not discuss whether, though not criminal, the foreign sanction could have been regarded as an exercise of American state authority, and should thus have produced effect on American soil only. The likely reason is that, as the foreign penalty had been calculated, it was

perceived as not raising such an issue. French scholars all agree that as soon as a threat of financial sanction ceases to be a mere threat and is turned into an actual order to pay, the problem is not anymore one of exercising state authority. Support for this position is thought to be in article 49 of the Brussels I Regulation, although it obviously did not apply in this case.

Blech further challenged the recognition of the U.S. order on the ground that it was a disproportionate penalty: 13 million for not cooperating with the receiver. The Court answered that trial judges could not be criticized for finding that it was a perfectly proportionate sanction given that the fraud was for US\$ 200 million. Implicitly, however, the Court accepted that foreign civil penalties could only be recognized if proportionate. The Court referred to the proportionality principle which lies both in the French Constitution (1789 *Declaration des droits de l'homme et du citoyen*, article 8) and in European Human Rights Law (Article 1 of the First Protocol to the European Convention on Human Rights). In another context, this is what the European Court of Justice recently held in *Gambazzi*.

M. Blech has served his sentence in California and is now back to France.

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 paper 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 applicabile 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 applies to 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 delineates 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 architecture.

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

Publication: Rossolillo, “Identità personale e diritto internazionale privato”

A very interesting book on conflict issues arising out of personal identity and name has been recently published by the Italian publishing house CEDAM. 

The volume, “**Identità personale e diritto internazionale privato**”, is authored by Prof. **Giulia Rossolillo** (University of Pavia). Prof. *Rossolillo* carries on a thorough analysis of PIL issues relating to name, both in its “private” and “public” dimension, taking into account legislation, legal scholarship and caselaw from various national jurisdictions and from the ECJ and the European Court of Human Rights.

An abstract has been kindly provided by the author (the complete table of contents is available on the publisher’s website):

The transnational aspects of personal identity are today subject-matter not only of private international law provisions, but also of the case law of the European Court of Human Rights and of the Court of Justice of the European Communities. Through a comparative approach, this book underlines the role of the principle of continuity and stability of names in these three fields.

As far as private international law is concerned, the two basic functions of the name (expression of one's personality and identity, and means by which the State identifies the subjects) are mirrored in the functioning of the related private international law rules of many civil law countries. Indeed, one can distinguish conflict of laws provisions concerning the "private aspect" of the name, that is the transmission and changing of it linked to family relationships, and provisions related to the attribution and modification of the name through a public authority act. The first aspect in many continental European countries is regulated by rules referring to the national legal system of the subject as a whole and assuming its point of view, while the so called "public aspect" of the name is generally regulated by unilateral provisions, taking into account only the point of view of the forum State. The underlying idea of the first approach is that the assumption of the point of view of the nationality legal order can guarantee, to a certain extent, the continuity of name every time the person moves from one State to another, whereas the principle of continuity plays a weaker role as regards the second approach. The pivotal role of the principle of continuity comes out, moreover, from national provisions allowing the individual to choose the law that will be applied to his name, like the Swiss private international law provisions giving the individual the opportunity to submit his name to his national law, instead of having it regulated by the law of the State of domicile.

The attempt of balancing private and public interests and the importance of stability for the protection of the personal identity of the individual comes out also from the case law of the European Court of Human Rights. On the one hand the Court gives, in fact, a great importance to State's interests, but on the other hand these interests are overruled when the interference of the State would lead to oblige the individual to change a name that, having been used for a long time, has become an expression of his personal identity.

The Court of Justice of the European Communities seems, on the contrary, to protect personal identity in a different way: the obligation for every member

State to recognize a name given by another member State, envisaged by the Court in the Grunkin-Paul judgment, is, in fact, independent of any effectiveness requirement, that is of the fact that the individual has made actual use of that name, which has become a part of his identity. State interests are, thus, always overruled by the right of the individual to obtain the recognition of his name in the whole Union.

Title: **“Identità personale e diritto internazionale privato”**, by *Giulia Rossolillo*, CEDAM (Padova), 2009, XVI - 248 pages.

ISBN: 978-88-13-29065-8. Price: EUR 24,50. Available at CEDAM.

Conference: **“Il diritto al nome e all’identità personale nell’Unione europea”**

✖ An interesting conference on issues relating to name and personal identity in private international law and EU law will be hosted by the Faculty of Law of the **University of Milan - Bicocca on 22 May 2009** (h. 9:15-13:45): **“Il diritto al nome e all’identità personale nell’Unione europea”** (*Right to Name and Personal Identity in the EU*).

Here’s the programme (*the session will be held in Italian, except otherwise specified*):

Chair: *Roberto Baratta* (University of Macerata, Permanent Representation of Italy to the European Union);

- “Il diritto al nome come espressione del principio di eguaglianza tra coniugi nella giurisprudenza italiana”: *Maria Dossetti* (University of Milan - Bicocca), *Anna Galizia Danovi* (Centro per la Riforma del Diritto di Famiglia);

- “Le droit au nom dans la jurisprudence de la Cour de Justice” (*in French*): *Jean-Yves Carlier* (Université Catholique de Louvain);
- “Le droit au nom, entre liberté de circulation et droits fondamentaux” (*in French*): *Laura Tomasi* (Registry of the European Court of Human Rights);
- “La legge applicabile al nome: conseguenze dei principi comunitari ed europei sul diritto internazionale privato”: *Giulia Rossolillo* (University of Pavia);
- “Il riconoscimento del diritto al nome nella prassi italiana”: *Sara Tonolo* (University of Insubria);
- Shorter reports and debate: *Valeria Carfì* (University of Siena), *Alessandra Lang* (University of Milan), *Diletta Tega* (University of Milan Bicocca)

Concluding remarks: *Roberto Baratta*.

(Many thanks to *Giulia Rossolillo* for the tip-off)

On the Desirability of the Alien Tort Statute

Judicially made corporate human rights litigation is a luxury we can no longer afford.

This is the conclusion of an op-ed (Rights Case Gone Wrong) published yesterday in the *Washington Post* by two leading American international law professors, Curtis Bradley (Duke) and Jack Goldsmith (Harvard).

An interesting debate is now following at opiniojuris between the supporters and the critics of the Alien Tort Statute: see the comments of, inter alia, Kevin Jon Heller, Julian Ku, Kenneth Anderson and Eric Posner.

ECJ Judgment in Gambazzi

The European Court of Justice (ECJ) has delivered today its judgment in *Gambazzi v. Daimler Chrysler Canada, Inc. and CIBC Mellon Trust Company*.

The case, previously known as *Stolzenberg*, had been already litigated in numerous jurisdictions (see our previous posts [here](#) and [here](#)). The defendants had sued Gambazzi in London and obtained there a *Mareva* injunction. As Gambazzi failed to comply with it, he was sanctioned by the English court and debarred from defending in the main proceedings. As a consequence, the defendants entered into a default judgment against him. They then sought enforcement of the said default judgment throughout Europe, including in Italy. The Court of Appeal of Milan referred the case to the ECJ, and asked:

On the basis of the public policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party which had entered an appearance the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]? Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order made by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?

Following closely the conclusions of Advocate General Kokott, the ECJ ruled this morning that it could only give guidelines to national courts so that they would make a decision themselves. It held:

the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in [Article

27(1)], the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.

Clearly, this is a bit disappointing. We will have to wait longer before getting a chance to know whether nuclear weapons of English civil procedure are compatible with human rights in general, and Article 6 of the European Convention on Human Rights (ECHR) in particular.

The ECJ addressed two issues in its judgment.

First, it made it clear that English default judgments are judgments within the meaning of Article 25 of the Brussels Convention. It held that they meet the *Denilauler* test of being adversarial. This is good to know, but I am not sure this was the most interesting issue. Advocate General Kokott had also focused on whether English default judgments meet the *Solokleinmotoren* test, and this was much more questionable. AG Kokott had concluded that they did meet that test, but the Court is silent in this respect.

Second, the Court discussed whether the English default judgment was contrary to public policy. It only addressed the issue referred to it by the Milan Court, i.e. whether rendering a 'default' judgment as a consequence of debarment from defending was a violation of the right to a fair trial. Along the lines of AG Kokott's conclusions, the ECJ only gave guidelines to national courts which will have to appreciate whether, in the light of all circumstances, there was such violation. In particular, the Court insisted that they should assess whether debarment was a proportionate sanction.

33 *With regard to the sanction adopted in the main proceedings, the exclusion of Mr Gambazzi from any participation in the proceedings, that is, as the Advocate General stated in point 67 of her Opinion, the most serious restriction possible on the rights of the defence. Consequently, such a*

restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights.

34 *It is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case.*

The ECJ does not discuss whether the lack of reasons of English default judgments is contrary to Article 6 ECHR. It does not discuss either whether being prevented from accessing to one's evidence because it is withheld by one's lawyer is contrary to the right to a fair trial. As we had previously reported, other courts in Europe had found that these were violations of their public policy.