Court Agreements in favour of Third States (still on aff. C-154/11)

The contract of employment between Mr. Mahamdia and the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria (see previous post) contained an agreement on jurisdiction which read as follows:

'VI. Settlement of disputes

In the event of differences of opinion or disputes arising from this contract, the Algerian courts alone shall have jurisdiction.'

As already said in the previous post, Mr. Mahamdia appealed against the judgment of the Arbeitsgericht Berlin (2 July 2008) to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg). By its judgment of 14 January 2009 the Landesarbeitsgericht Berlin-Brandenburg rejected the agreement on jurisdiction, considering that it did not satisfy the conditions laid down in Article 21 of Regulation 44/2001, as it had been concluded before the dispute arose and referred the employee to the Algerian courts exclusively.

The People's Democratic Republic of Algeria appealed to the Bundesarbeitsgericht (Federal Labour Court). By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin?Brandenburg. The second question referred to the ECJ for a preliminary ruling by this national court was as follows

2. (…) Can an agreement on jurisdiction, reached before the dispute arises, confer jurisdiction on a court outside the scope of Regulation 44/2001, if, by virtue of the agreement on jurisdiction, the jurisdiction conferred under Articles 18 and 19 of Regulation 44/2001 would not apply?'

To which the ECJ (Grand Chamber), streching out once again the impact of the Regulation, said that

> "Article 21(2) of Regulation 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that

> provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union."

(Click here for the whole text).

On What an Embassy is (for the Purposes of Regulation 44/01)

Mr Mahamdia lives in Germany. On September 2002 he concluded with the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria a contract of employment for a renewable period of one year, for work as a driver at the Algerian Embassy in Berlin. Mr Mahamdia had to drive guests and colleagues and, as a replacement driver, also the ambassador. In addition, he delivered embassy correspondence to entities in Germany and to the post office. Diplomatic post was received or passed on by a colleague at the embassy who for his part was driven by Mr Mahamdia.

On August 2007 Mr Mahamdia brought proceedings against the People's Democratic Republic of Algeria in the Arbeitsgericht Berlin (Labour Court, Berlin), seeking to be paid for overtime he claimed to have worked in the years 2005 to 2007. Sometime later Mr Mahamdia was dismissed as from 30 September 2007. Mr Mahamdia thereupon added to his principal claim before the Arbeitsgericht Berlin a claim for a declaration that the termination of his employment contract had been unlawful and for him to be paid compensation for non-acceptance and to have his employment continued until the end of the dispute. In the proceedings concerning the dismissal, the People's Democratic Republic of Algeria raised the objection that the German courts had no jurisdiction, relying both on international rules on immunity from jurisdiction and on the agreement on jurisdiction in the employment contract.

By judgment of 2 July 2008, the Arbeitsgericht Berlin allowed that objection, and

consequently dismissed Mr Mahamdia's claim. It took the view that, in accordance with the rules of international law, States enjoy immunity from jurisdiction in the exercise of their sovereign powers and the applicant's activities, which were functionally connected to the diplomatic activities of the embassy, were outside the jurisdiction of the German courts. The applicant in the main proceedings appealed against that judgment to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg), which by judgment of 14 January 2009 quashed in part the judgment of the Arbeitsgericht Berlin. It observed that, since the applicant was a driver at the embassy, his activities did not form part of the exercise of public powers by the defendant State, but constituted an activity that was ancillary to that State's exercise of sovereignty. The People's Democratic Republic of Algeria therefore did not enjoy immunity in this case. Moreover, it considered that the German courts had jurisdiction to hear the case, since the embassy was an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001. Consequently, the rules set out in Article 19 of the regulation applied. It pointed out that, while an 'establishment' is indeed normally a place where commercial activities are carried on, Article 18(2) of Regulation 44/2001 is applicable to an embassy since, first, that regulation does not contain any provision under which the diplomatic representations of States are excluded from its scope and, secondly, an embassy has its own management which concludes contracts independently, including contracts in civil matters such as employment contracts.

The People's Democratic Republic of Algeria appealed to the Bundesarbeitsgericht (Federal Labour Court). By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin?Brandenburg. It ordered the Landesarbeitsgericht to assess the activities of Mr Mahamdia, in particular those relating to interpreting, in order to establish whether they could be regarded as sovereign functions of the defendant State. In addition, should it emerge from the examination that that State did not enjoy immunity from jurisdiction, it instructed the Landesarbeitsgericht to determine the court with jurisdiction to hear the main proceedings, taking account inter alia of Article 18(2) of Regulation No 44/2001 and Article 7 of the European Convention on State Immunity, drawn up within the Council of Europe and opened to signature by the States in Basle on 16 May 1972.

The Landesarbeitsgericht Berlin-Brandenburg considered that, in accordance with Article 25 of the Basic Law of the Federal Republic of Germany, States can plead immunity from jurisdiction only in disputes concerning the exercise of their sovereignty. According to the case-law of the Bundesarbeitsgericht, employment law disputes between embassy employees and the State concerned are within the jurisdiction of the German courts where the employee has not carried out, for the State by which he is employed, activities forming part of the sovereign functions of that State. In the present case, the referring court 'presumes' that Mr Mahamdia did not carry out such activities, since the People's Democratic Republic of Algeria has not shown that he took part in those activities. That court further considers that the jurisdiction of the German courts follows from Articles 18 and 19 of Regulation 44/2001, but that, for the purpose of applying those articles, it must be established whether an embassy is a 'branch, agency or other establishment' within the meaning of Article 18(2) of that regulation. Only if that is the case may the People's Democratic Republic of Algeria be regarded as an employer domiciled in a Member State. On the basis of those considerations, the Landesarbeitsgericht Berlin-Brandenburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'1. Is the embassy of a State outside the scope of … Regulation No 44/2001 … which is situated in a Member State a branch, agency or other establishment within the meaning of Article 18(2) of Regulation 44/2001?

And the answer is "yes". This is what the ECJ, Grand Chamber, ruled on July 19, 2012 (see whole text here):

> Article 18(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an embassy of a third State situated in a Member State is an 'establishment' within the meaning of that provision, in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers.

New Hague Abduction Convention Case before the United States Supreme Court

The Supreme Court on Monday added one new case to its docket for the new Term. *Chafin v. Chafin* (docket 11-1347) concerns whether an appeal in a Hague Abduction Convention case becomes moot if the child involved has returned to his or her home country. As reported at SCOTUSBlog, this is a very rare mid-Summer order before the first formal Conference on the new Term on September 24. The order is linked here.

The newly granted case involves a U.S. Army sergeant and a Scottish woman he had married while stationed in Germany. The couple later moved to Alabama, and after their divorce, disputed the care of their daughter, who is now five years old. After obtaining a federal court order under the Hague Convention declaring that Scotland was the girl's country of habitual residence, Mrs. Chafin returned to Scotland with the child. Sgt. Chafin appealed that decision to the Eleventh Circuit, but that court dismissed the case as moot because the child had already returned to Scotland, and was outside the Court's jurisdiction. The federal appeals courts are split on the mootness issue under the Hague Convention, which led the Supreme Court to grant the case.

Petitioner's Brief is available HERE.

La Ley-Unión Europea, July 2012

A new article from Prof. Patricia Orejudo Prieto de los Mozos (Complutense University, Madrid) entitled "La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España" is to be found in the Spanish magazine *La Ley-Unión Europea* of July 31, 2012. The summary reflects the critical view of the author:

> The Rome III Regulation, the first instrument of enhanced cooperation adopted in the EU, seeks to provide "a clear and comprehensive legal framework on applicable law to divorce and legal separation. " However, it does not increase legal predictability, nor does it prevent (on the contrary, it could encourage) the so called "race to the courts." Furthermore, when applied in Spain it will add regulatory fragmentation and complexity to an already intricate situation, making it more difficult to manage for the Spanish legal operators. If we sum this to the democratic deficit inherent to the adoption process and with the fact that the Regulation serves best the conservative values of other Member States, the Spanish decision to participate is hard to understand.

A comment on the recent ECJ ruling *Oracle v. UsedSoft*, from Prof. Miguel Michinel (University of Vigo), has also been published in the same issue of the magazine.

Foreign Notary Deed in Spain

A recent press release from the *Consejo General del Poder Judicial (General Council for the Judiciary)* reports an interesting ruling of the Spanish Supreme Court. The decision, of 19 June 2012, ratifies the one of the previous instance according the registration in a Spanish Land Registry of a deed of sale of an immovable located in Spain, notarized by a German Notary. Taking into account the rules of private international law the Supreme Court confirms the validity of the foreign deed in Spain as a basis for a Registry record.

In the instant case litigation arose from the sale of an apartment in Tenerife, which was acquired undivided by two German citizens. One of them sold his share to a third party with the consent of the other; the transfer was formalized by a German notary and the acquirer sought to have it recorded in the Land Registry of Puerto de la Cruz. The registrar refused, considering that the German document lacked full legal force in Spain; his decision was upheld by the General

Directorate for Registries and Notaries, but rejected on appeal both by the Court of First Instance and the *Audiencia Provincial*, as well as by the Supreme Court.

According to the Supreme Court, a decision such as the one taken by the registrar and supported by the General Directorate cannot be approved under the current understanding of the freedom to provide services at the European Union level; also, to require the involvement of a Spanish Notary would mean an unjustified limitation to the freedom of transfer of goods. Article 1462 of the Spanish Civil Code, which applies in the case, equates issuing of a public deed with delivery of the sold thing; the provision does not require that the deed be granted by a Spanish Notary public, therefore a formally valid deed granted by a foreign Notary will have the same effect (in terms of equation with delivery) as one notarized in Spain. The Supreme Court believes that this interpretation matches the EU tendency to avoid duplication of formal requirements, once they have been fulfilled in a member State for a purpose identical or similar to that required in the State where the act thus documented aims to produce effects. To back this opinion the Court leans on the Commission's Green Paper of December 14, 2010 entitled "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records"; on the consistency of the understanding with the Spanish regulation on foreign investments, which does not require that contracts be notarized by a Spanish Notary; and on Article 323 of the Spanish Civil Procedure Act, which accords full evidential effect to public documents formalized abroad when comparable to the Spanish "escritura pública" in as far as the role of the Notary is concerned, regardless of the formal differences.

Two members of the Court do nevertheless dissent with the idea that Article 1462 Civil Code allows for the same treatment to be granted to Spanish and foreign deeds, as, according to the provision, equation between the public deed and the delivery of the sold asset is excluded when the deed states (or it can easily be inferred) otherwise. In this regard, the differences between the German and the Spanish systems for the conveyance of ownership justifies the need for the intervention of Spanish Notaries: only they can safeguard the essential rules of the legal transfer of property that governs our country, which is that of *título y modo* (grounds of acquisition followed by the *traditio* or delivery).

Liber Amicorum for the Croatian Professor Emeritus Krešimir Sajko

Liber Amicorum for Professor Emeritus Krešimir Sajko was published within the *Collected Papers of the Zagreb Law Faculty*, volume 62, numbers 1-2. The papers in Croatian, German and English language published in the Liber Amicorum fall under the topics on private international law, international civil procedure, international commercial arbitration and alternative dispute resolution, as well as private law – comparative and Croatian. The table of contents is available here: 00 Nulti.indd. Professor Emeritus Sajko is one of the renowned Croatian professors of private international law, while his interests reach much further which is confirmed in his rich opus listed here 27 Popis radova.indd.

EU Regulation on Succession and Wills Published in the Official Journal

The EU regulation on succession (see our most recent post here) has been published in the Official Journal of the European Union n. L 201 of 27 July 2012. The official reference is the following: **Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession** (OJ n. L 201, p. 107 ff.).

Pursuant to its Art. 84(2), **the regulation shall apply from 17 August 2015, to the succession of persons who die on or after the same date** (see Art. 83(1)). Denmark, Ireland and the United Kingdom did not take part in the adoption of the instrument and are not bound by it.

Our friend *Federico Garau*, over at Conflictus Legum, provides an excellent summary of the main principles underlying this new piece of EU PIL legislation. A rich list of references on the regulation and its legislative history is pointed out by *Pietro Franzina*, at the Aldricus blog.

Benedetta Ubertazzi's book on Exclusive Jurisdiction in IP

Benedetta Ubertazzi, an Assistant Professor of International Law at the Faculty of Law of the University of Macerata (Italy), has published a book titled "**Exclusive Jurisdiction in Intellectual Property**". The issue of exclusive jurisdiction in intellectual property matters, especially those related to existence and validity of intellectual property rights, was revived in the recent years due to several important court cases, including the CJEU judgment in GAT v. LuK, the US ruling in Voda v. Cordis, and the UK decisions in Lucasfilm v. Ainsworth. In this book Benedetta Ubertazzi argues that the grounds regularly invoked to support the exclusive jurisdiction rules related to intellectual property rights do not stand the test of justifiableness. Moreover, she purports that such exclusive jurisdiction should be abandoned because it runs contrary to public international rules concerning the avoidance of a denial of justice.

The book is published in 2012 by Mohr Siebeck as 273rd title in a series of books *Studien zum ausländischen und internationalen Privatrecht (StudIPR)* and available for order here, also as an e-book. The article by the same author on this topic was published in 15 Intellectual Property L. Rev. 357 (2011) and available here.

Recent Canadian Conflicts Articles

The following articles about conflict of laws in Canada were published over the past year or so:

Elizabeth Edinger, “Is Duke v Andler Still Good Law in Common Law Canada?” (2011) 51 Can Bus LJ 52-75

Matthew E Castel, “The Impact of the Canadian Apology Legislation when Determining Civil Liability in Canadian Private International Law” (2012) 39 Adv Q 440-451

Nicholas Pengelley, “This Pig Won’t Fly: Death Threats as Grounds for Refusing Enforcement of an Arbitral Award” (2010) 37 Adv Q 386-402

Tanya Monestier, “Is Canada the New ‘Shangri-La’ of Global Securities Class Actions?” (2012) 32 Northwestern Journal of International Law and Business _.

Electronic access to these articles depends on the nature of the subscriptions. Some journals are available immediately through aggregate providers like HeinOnline while others delay access for a period of months or years.

Declaration of Committee of Ministers on Libel Tourism

The Committee of Ministers of the Council of Europe has adopted on July 4th a Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to Ensure Freedom of Expression.

1. The full respect for the right of all individuals to receive and impart information, ideas and opinions, without interference by public authorities and regardless of frontiers constitutes one of the fundamental principles upon which a democratic society is based. This is enshrined in the provisions of Article 10 of the European Convention on Human Rights ("the Convention", ETS No. 5). Freedom of expression and information in the media is an essential requirement of democracy. Public participation in the democratic decision-making process requires the public to be well informed and to have the possibility of freely discussing different opinions.

2. Article 10 of the Convention also states that the right to freedom of expression "carries with it duties and responsibilities". However, States may only limit the exercise of this right to protect the reputation or rights of others, as long as these limitations are "prescribed by law and are necessary in a democratic society". In this respect, in its reply to Parliamentary Assembly Recommendation 1814 (2007) "Towards decriminalisation of defamation", adopted on 7 October 2009, the Committee of Ministers endorsed the Parliamentary Assembly's views and called on member States to take a proactive approach in respect of defamation by examining domestic legislation against the case law of the European Court of Human Rights ("the Court") and, where appropriate, aligning criminal, administrative and civil legislation with those standards. Furthermore, the Committee of Ministers recalled Parliamentary Assembly Recommendation 1589 (2003) on "Freedom of expression in the media in Europe".

3. The European Commission of Human Rights and the Court have, in several cases, reaffirmed a number of principles that stem from paragraphs 1 and 2 of Article 10. The media play an essential role in democratic societies, providing the public with information and acting as a watchdog,1 exposing wrongdoing and inspiring political debate, and therefore have specific rights. The media's purpose is to impart information and ideas on all matters of public interest.2 Their impact and ability to put certain issues on the public agenda entails responsibilities and obligations. Among these is to respect the reputation and rights of others and their right to a private life. Furthermore, "subject to paragraph 2 of Article 10 (art. 10-2), [freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or

disturb the State or any sector of the population".3

4. In defamation cases, a fine balance must be struck between guaranteeing the fundamental right to freedom of expression and protecting a person's honour and reputation. The proportionality of this balance is judged differently in different member States within the Council of Europe. This has led to substantial variations in the stringency of defamation law or case law, for example different degrees of attributed damages and procedural costs, varying definitions of first publication and the related statute of limitations or the reversal of the burden of proof in some jurisdictions. The Court has established case law in this respect: "In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for Contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted".4

Libel tourism and its risks

5. The existing differences between national defamation laws and the special jurisdiction rules in tort and criminal cases have given rise to the phenomenon known as "libel tourism". Libel tourism is a form of "forum shopping" when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue. In some cases a jurisdiction is chosen by a complainant because the legal fees of the applicant are contingent on the outcome ("no win, no fee") and/or because the mere cost of the procedure could have a dissuasive effect on the defendant. The risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet.5

6. Anti-defamation laws can pursue legitimate aims when applied in line with the case law of the Court, including as far as criminal defamation is concerned. However, disproportionate application of these laws may have a chilling effect and restrict freedom of expression and information. The improper use of these laws affects all those who wish to avail themselves of the freedom of expression, especially journalists, other media professionals and academics. It can also

have a detrimental effect, for example on the preservation of information, if content is withdrawn from the Internet due to threats of defamation procedures. In some cases libel tourism may be seen as the attempt to intimidate and silence critical or investigative media purely on the basis of the financial strength of the complainant ("inequality of arms"). In other cases the very existence of small media providers has been affected by the deliberate use of disproportionate damages by claimants through libel tourism. This shows that libel tourism can even have detrimental effects on media pluralism and diversity. Ultimately, the whole of society suffers the consequences of the pressure that may be placed on journalists and media service providers. The Court has developed a body of case law that advocates respect for the principle of proportionality in the use of fines payable in respect of damages and considers that a disproportionately large award constitutes a violation of Article 10 of the Convention.6 The Committee of Ministers also stated this in its Declaration on Freedom of Political Debate in the Media of 12 February 2004.7

7. Libel tourism is an issue of growing concern for Council of Europe member States as it challenges a number of essential rights protected by the Convention such as Article 10 (freedom of expression), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life).

8. Given the wide variety of defamation standards, court practices, freedom of speech standards and a readiness of courts to accept jurisdiction in libel cases, it is often impossible to predict where a defamation/libel claim will be filed. This is especially true for web-based publications. Libel tourism thereby also demonstrates elements of unfairness. There is a general need for increased predictability of jurisdiction, especially for journalists, academics and the media.

9. The situation described in the previous paragraph has been criticised in many instances. Further, in a 2011 Joint Declaration, the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on freedom of the media, the Organisation of American States (OAS) Special Rapporteur on freedom of expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on freedom of expression and access to information in Africa stated that jurisdiction in legal cases relating to Internet content should be restricted

to States to which those cases have a real and substantial connection.

10. Procedural costs may discourage defendants from presenting a defence thus leading to default judgments. Compensations may be considered disproportionate in the member State where the claim is being enforced due to the failure to strike an appropriate balance between freedom of expression and protection of the honour and reputation of persons.

Measures to prevent libel tourism

11. The prevention of libel tourism should be part of the reform of the legislation on libel/defamation in member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights.

12. With a view to further strengthening the freedom of expression and information in member States, an "inventory" of the Court's case law in respect of defamation could be established with a view to suggesting new action if need be. Further, if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty, in line with the requirements set out in the case law of the Court. Finally, clear rules as to the proportionality of damages in defamation cases are highly desirable.

13. Against this background, the Committee of Ministers:

– alerts member States to the fact that libel tourism constitutes a serious threat to the freedom of expression and information;

– acknowledges the necessity to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury, and to align national law provisions with the case law of the Court;

– undertakes to pursue further standard-setting work with a view to providing guidance to member States.

1 Goodwin v. United Kingdom, European Court of Human Rights, 27 March 1996, paragraph 39.

2 De Haes and Gijsels v. Belgium, European Court of Human Rights, 24 February 1997, paragraph 37.

3 Handyside v. United Kingdom, European Court of Human Rights, 7 December 1976, paragraph 49.

4 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, 10 March 2009, paragraph 46.

5 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, paragraph 45.

6 Tolstoy Miloslavsky v. United Kingdom, European Court of Human Rights, 13 July 1995, paragraph 51.

7 "Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned."