Canadian Conflict of Laws Articles

Here are some recent articles from Canadian publications:

Janet Walker, “Are National Class Actions Constitutional? A Reply to Hogg and McKee” (2010) 48 Osgoode Hall LJ 95

Jeffrey Haylock, “The National Class as Extraterritorial Legislation” (2009) 32 Dal LJ 253

Gerald Robertson, “The Law of Domicile: *Re Foote Estate*” (2010) 48 Alta L Rev 189

Joost Blom, “The Challenge of Jurisdiction: *Van Breda v. Village Resorts* and *Black v. Breeden*” (2010) 49 Can Bus LJ 400

Vaughan Black, Joost Blom and Janet Walker, “Current Jurisdictional and Recognitional Issues in the Conflict of Laws” (2011) 50 Can Bus LJ 499

The debate about the scope of Canadian class actions continues, and important questions about the analysis of a real and substantial connection for taking jurisdiction over foreign defendants await some answers from the Supreme Court of Canada in the four cases currently on reserve.

New Pocketbook of the Hague Academy

The Hague Academy of International Law continues to publish some of the courses in its pocket book serie.

The latest is the course given by Professor Andreas Bucher in 2009 on the social dimension of private international law (*La dimension sociale du droit international privé*).

Andreas Bucher, professeur honoraire de l'Université de Genève, a été membre de la délégation suisse à plusieurs sessions diplomatiques de la Conférence de La Haye de droit international privé et président de la commission relative à la Convention sur les accords d'élection de for lors de la vingtième session ; membre de la commission d'experts pour la codification du droit international privé suisse. Il est membre de l'Institut de droit international.

Ce cours apporte la cohérence au pluralisme des méthodes, dans une perspective qui tient compte des intérêts de la société. Les règles de conflit de lois sont présentées dans une nouvelle structure, exhaustive, permettant de définir la place des règles unilatérales et bilatérales et des lois de police et d'y intégrer le droit de l'Union européenne. On distinguera ainsi entre les règles attributives, matérielles et réceptives de conflit de lois. Le lecteur emportera le message que les « mécanismes », la « proximité », l'« harmonie des solutions », la « coopération » et tant d'autres « techniques » en droit international privé doivent être remplies d'une idée de justice sans laquelle elles n'ont pas de mérite. Cette justice met en valeur l'identité et la protection de la personne à travers les ordres juridiques. Le regard sur cette idée sera le meilleur guide dans l'étude des règles et des méthodes du droit international privé.

More information can be found here.

First Issue of 2011's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found here.

The first article discusses the new judicial review procedure introduced in France in 2009 in a European context.

In the second article, Bertrand Ancel (Paris II University, co-director of the *Revue*) presents a French translation of a lecture of private international law given in Latin by Charles du Moulin in 1553 when he taught at Tübingen university (*Les Conclusion sur les Statuts et Coutumes locaux de Du Moulin, traduites en français*).

Pocket a Rome II Commentary

A new commentary on the Rome II Regulation has been (or will shortly be) published by Sellier European Law Publishers.

The "Rome II Regulation: Pocket Commentary" is the first in a series of books designed to appeal to brain, hand luggage and wallet alike. It has been co-authored by a team of German scholars – Dr Martin Illmer (Max Planck Institute, Hamburg), Dr Angelika Fuchs (Academy of European Law, Trier), Professor Peter Huber, Dr Ivo Bach and Markus Altenkirch (all University of Mainz) – and edited by Professor Huber.

The Rome II Pocket Commentary is priced at €49.00 and available in paperback or eBook versions. Further information is available here.

International Maritime Law Conference on the Croatian Islands of Brijuni

The Institute of European and Comparative Law of the Rijeka Law Faculty, the Fridtjof Nansen Institute, The Croatian Comparative Law Association, the

Croatian Maritime Law Association, and the Croatian Justice Academy organise the conference "**The Resolution of International Maritime Disputes within the European and International Legal Framework**". The conference will take place on 2 and 3 June 2011 on the Islands of Brijuni, one of the Croatian National Parks.

This is the second international scientific conference dedicated to the memory of one of the most prominent Croatian private international lawyers and the University of Rijeka Rector and Professor of Law Petar Sarcevic (the first conference was reported here). This event will gather number of international experts to discuss various topics in the fields of European law, private international law, international procedural law, and maritime law. The conference program is available here. Working languages are Croatian and English, with simultaneous translation provided throughout the event.

Applications are received at: zeup@pravri.hr, where any additional information concerning the conference may be obtained as well. The hotel inquiries and reservations should be addressed to: f.marsetic@brijuni.hr.

Before the High Court: Michael Wilson & Partners Ltd v Nicholls

An interesting case is to be heard by the High Court on 31 May. It is an appeal from the decision of the New South Wales Court of Appeal in *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222.

The case arose out of the employment of two Australian citizens by a law firm operating in Kazakhstan. The firm commenced proceedings against the employees in the Supreme Court of New South Wales alleging that they and a partner of the firm had stolen clients of the firm when they left the firm and set up a rival business. The firm alleged that the employees were liable for breach of contract, inducing breach of contract, conspiracy to injure, breach of fiduciary duty and knowing assistance. The partner was not a party. The firm separately commenced

arbitration proceedings in London against him, to which proceedings the employees were not party. The Supreme Court of New South Wales held the employees liable to the firm and awarded compensation. Subsequently the London arbitrators held that the partner had breached his duties but that this did not cause the firm any compensable loss.

Out of these circumstances, the matters before the High Court are:

1. whether, in light of the arbitral award, it was an abuse of process for the firm to seek to recover against the employees in the Supreme Court of New South Wales;
2. whether the judge ought to have recused himself on the ground of apprehended bias in light of findings he made at interlocutory stages of the proceeding; and
3. whether the employees waived their right to appeal the judge's judgment after trial on the ground that he wrongly dismissed their application, prior to trial, for him to recuse himself, where the judge invited the employees to appeal that decision and they did not do so.

The parties' written submissions may be found on the High Court's website. (It may be of interest to know that the High Court has, from this year, begun publishing parties' submissions on its website.)

One of the matters raised at trial, and before the Court of Appeal, but not the subject of the appeal to the High Court was the governing law of the firm's claims against the employees. The Court of Appeal upheld the judge's decision to apply the law of New South Wales to all of the claims. The Court of Appeal held that:

1. the trial judge did not err in holding that the onus was on the employees to prove the content of Kazakh law and that absent such proof the presumption of identity applied (at [320]-[335]);
2. equitable claims were ordinarily governed by the law of the forum and, in light of the judge's conclusion that the employment contracts were governed by the law of New South Wales, no occasion arose to depart from that ordinary position on the ground that the source of the equitable obligations was a contract governed by foreign law (at [339]-[346]); and
3. though the firm was incorporated in the British Virgin Islands, it was not necessary to consider whether under the law of that place the partner

breached his obligations to the firm arising from company law (as required by the *Foreign Corporations (Application of Laws) Act 1989* (Cth)) because the obligations asserted arose in equity not from company law (at [347]-[363]).

While the Court of Appeal's conclusion on the first point is a helpful authority concerning the presumption of identity, the point in fact appears to have been a false one in light of the trial judge's reasoning ([2009] NSWSC 1033). The employees pleaded that all the claims were governed by Kazakh law as the law governing their employment contracts and the conduct of business in Kazakhstan (at [324]). Based on the expert evidence, the trial judge concluded that, under Kazakh choice of law rules, the employment contracts were governed by New South Wales law (at [314]-[342]). He concluded that the same result followed under Australian choice of law rules (at [343]-[363]). It is not apparent why it was felt necessary to consider the position under Kazakh choice of law rules, given that the question of the governing law of the contract would be expected to be addressed by Australian choice of law rules and they directed attention only to New South Wales law. In those circumstances, no renvoi question could arise. The judge then concluded (at [364]):

> *The defendants have failed to prove as a matter of fact that Kazakhstan law applies to the contracts of employment. The plaintiff has overwhelmingly proved it does not. The presumption that Kazakhstan law is the same as local New South Wales law applies in that event.*

The third sentence does not follow from the previous two. This was not a case involving the presumption of identity at all, ie one in which the court concludes that foreign law applies but there is no evidence as to its content. Rather, the employees' position was that Kazakh substantive law applied, the firm's position was that New South Wales substantive law applied and the judge accepted the latter view.

Finally, it is worth noting one — of a very large number — interesting earlier interlocutory disputes in this proceeding. In *Wilson & Partners Ltd v Nicholls* (2008) 74 NSWLR 218; [2008] NSWSC 1230, the Supreme Court made an order for production for inspection of client files, located in Kazakhstan, of Kazakh companies associated with the employees and the partner. The companies were

defendants to the proceeding. The files had been discovered but were not made available for inspection on the ground that this would breach Kazakh law. The Court held that even if this were so, it would not be an absolute bar to an order for production for inspection, as that is a question of procedure governed by the law of the forum (at [5]-[11]) and, in any event, the competing expert evidence did not prove that it would be a breach of Kazakh criminal or administrative law (at [12]-[27]). In resolving this application, the Court was not greatly assisted by the experts (at [12]):

> *Neither of the experts was cross-examined, and no application for leave to cross-examine was made. Neither descended to much detail in setting out the statutory or other authoritative basis for the opinions that they tendered. In many cases, I am left with competing ipse dixits of the two experts.*

Not high praise!

Foreign arbitration awards in Australia: a 'pro-enforcement bias'

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131 provides a recent example of the 'pro-enforcement bias' of at least some Australian courts when it comes to international arbitration awards. The Federal Court of Australia enforced a Ugandan arbitration award under the *International Arbitration Act 1974* (Cth) (which applies the *New York Convention*), notwithstanding that the Australian corporate respondent did not participate in the arbitration. That Act was amended in 2010 to favour the enforcement of foreign arbitral awards even further than had previously been the case. There are two points of more general interest.

First, the Court considered that the arbitration clause at issue — which provided that 'Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration' — was not void for uncertainty

and nor was the dispute outside its scope or determined otherwise than in accordance with the procedure agreed by the parties. The Court was prepared to read the clause as meaning (at [63]): 'All disputes under or in relation to the Contract must be referred to arbitration'. The Court thus effectively read the words 'under or in relation to the Contract' into the arbitration clause. The arbitral procedure adopted was in accordance with Ugandan arbitration legislation, which supplied any deficiencies in the parties' agreement concerning procedure.

Secondly, the Court rejected the respondent's submission that the award should not be enforced on grounds of public policy (s 8(7) of the Act). The respondent had sought to invoke this ground on the basis that the arbitrator made errors of law and fact when determining the award of general damages. The Court said (at [126]) that it was not:

> *against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.*

The Court approved United States authorities consistent with this narrow approach to the public policy exception (*Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier*, 508 F 2d 969 (2d Cir 1974); *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 at 306 (2004)) and disapproved previous Australian authorities supporting a broader approach (*Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432; *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 at [6]-[14], [18]).

Financial Regulation in the Global Market

On Friday 10 June 2011, the British Institute of International and Comparative Law will hold its annual conference (full-day), entitled “Financial Regulation in the Global Market – Moving Beyond the State”. Among the eight panels addressing different aspects of this topic is one focussing on private international law issues. In a session entitled, “Financial Regulation Hitting the Reality of Private Cross-Border Relations” (chaired by Dr Joanna Perkins, 3-4 South Square) the expert speakers will be:

- Dr Peter Werner, ISDA
- Professor Francisco Garcimartin Alferez, University Rey Juan Carlos
- Professor Matthias Lehmann, University of Halle-Wittenberg

Further details (including other panels and speakers, venue and registration) are available here.

A New Assignment for the Rome I Regulation – Update

UPDATE: THE FINAL SUBMISSION DATE FOR THE QUESTIONNAIRE HAS BEEN EXTENDED TO WEDNESDAY 15 JUNE. ALL THOSE WITH AN INTEREST IN THIS ASPECT OF THE FUNCTIONING OF THE ROME I REGULATION ARE ENCOURAGED TO RESPOND TO ANY PART OF THE QUESTIONNAIRE WHICH APPLIES TO THEM.

ALTHOUGH THE QUESTIONNAIRE IS DRAFTED WITH BUSINESSES AND LEGAL PRACTITIONERS IN MIND, OTHERS (E.G. ACADEMIC LAWYERS, GOVERNMENTAL AND NON-GOVERNMENTAL ORGANISATIONS) MAY COMPLETE PART 3 (POLICY OPTIONS) ONLY.

When the Rome I Regulation was finalised in 2008, certain questions concerning the effect of assignments upon third parties (e.g. judgment creditors, security holders, prior assignees of the same right) were left open. In this connection, the Commission undertook to prepare and submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties, and the priority of the assigned or subrogated claim over a right of another person (Art 27(2)).

The British Institute of International and Comparative Law (BIICL) has been "Commissioned" to undertake a study upon which this report will, in part, be based. For the purposes of this study, BIICL has prepared a questionnaire concerning the role of assignments and the surrounding legal environment in transactions with a cross-border element. Answers to this questionnaire (involving requests for information about the nature and value of transactions undertaken, practical examples of the impact of legal regulation and views on policy options for a possible new EU conflicts rule in this area) will be used by BIICL in preparing its study report and submitted to the Commission as part of its impact assessment for any future proposal. Accordingly, the process is intended to enable EU businesses and members of the legal profession to make their views known at the outset of the review process.

As a member of the BIICL team, I would encourage all of you to take part in the study by (1) downloading and completing any parts of the questionnaire which apply to you (download here) and returning the form to Dr Eva Lein at the Institute (see contact details in the questionnaire), and/or (2) by forwarding this post to any business contact whom you think may have an interest in the subject matter of the study. Please also contact Dr Lein (e.lein@biicl.org) if you have any questions concerning the project or the questionnaire.

The New Spanish Arbitration Law

Reform Act

This post has been written by Miguel Gómez Jene, Senior Lecturer of Private International Law at the UNED (Universidad Nacional de Educación a Distancia)

On May 21st, the Spanish official Gazette (www.boe.es) published the reform of the Arbitration Act. This Act amends certain provisions concerning the Arbitration legislation (2003). From the point of view of international private law, the most significant changes involve the reallocation of competence in arbitration matters. Indeed, after the coming into force of the Reform (twenty days after its publication), the corresponding High Court of each "autonomous community" (Tribunales Superiores de Justicia de las Comunidades Autónomas) shall be competent for exequatur and annulment proceedings and appointment of arbitrators. Although this modification appears desirable, it should be noted that no appeal is possible against the judgment of the High Court resolving the exequatur or annulment proceedings. Therefore the Spanish Supreme Court has no competence to deal with arbitration matters.

The prima facie standard of review for the validity of arbitration agreements has also been affected. Specifically, the amendments concern the period to submit the objection to jurisdiction. This objection to jurisdiction shall be made in the first ten days of period to answer the claim.

The possibility of arbitration in relation to company disputes has been expressly affirmed. However two special requirements have been made. First, the introduction of the arbitration agreement in the by-laws of the company requires two thirds of the votes corresponding to shares or participations. Secondly, arbitration in company disputes must be submitted to institutional arbitration. Incomprehensibly, ad hoc arbitrations are not allowed in these matters.

The Reform introduces a new regulative framework for the relationship between arbitrator and mediator. This regulation states that, unless otherwise agreed, a mediator shall not be able to become the arbitrator in the same dispute between the parties.

The expiration of a temporal limit to render an award shall not affect its validity any longer. Previously there was a six months period to render the arbitral award. Such period of time led to a contradictory case law in order to its consideration as

a ground for setting aside the award. Furthermore the temporal limit was also considered a very short period of time to render an award in an international arbitration.

The reform also provides an important new amendment regarding the scope of rectification and interpretation of the award. In cases where arbitrators have decided upon matters which have not been submitted to their consideration or upon not arbitrable matters, parties may request for a rectification of “partial extra limitation” to the arbitral tribunal.

Finally, it should be noted that the Bankruptcy Act has also been amended in order to maintain the validity of the arbitral agreement in cases of declaration of bankruptcy.