UAM Conference on EU Law. Call for Papers

The UAM (Universidad Autónoma de Madrid) Faculty of Law will host the 1st *UAM International Conference on EU Law. Recent trends in the case law of the Court of Justice of the EU* (2008-2011) the 14-15 July 2011. This Conference is meant to be a forum for the critical analysis of the most recent ECJ case law. The programme includes two plenary lectures and eight specialized panels, one of them devoted to judicial cooperation in civil matters. Informants for the panel will be selected on the basis of proposals and abstract submitted in response to a Call for Papers.

The deadline for the call for papers is 10th April 2011.

For more information see here

Antisuit Injunctions

My colleague Roger Alford has an excellent post up at Opinio Juris regarding the recent comings and goings in the Chevron Ecuador Litigation. See here for more.

Fourth Issue of 2010'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.

In the first article, Dr. Marius Kohler and Dr. Markus Buschbaum discuss the concept of recognition of authentic instruments in the context of cross-border successions (*La « reconnaissance » des actes authentiques prévue pour les successions transfrontalières. Réflexions critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflits de lois*). The English abstract reads:

> *However advantageous the introduction of a European inheritance certificate may be, as envisaged by the Commission's proposed Regulation on international successions, it is in its current form likely to create friction because of the way in which it organises the relationship with national inheritance certificates. It would therefore be wise to restrict the use of the European certificate to international successions, where it could then be drafted on basis of the national one, and to limit its effects to the Member States of destination. Moreover, as far as the free circulation of authentic instruments in general is concerned, the Regulation raises serious misgivings as to the use made by the proposal of the concept of mutual recognition. It appears that this concept – appropriate as it is for judicial decisions – is unsuitable to promote the circulation of authentic instruments.*

In the second article, Professor Malik Laazouzi, who teaches at St Etienne University, discusses the impact of the recent *Inserm* decision of the French *Tribunal des conflits* (a translation of which can be found here) on choice of law in administrative contracts (*L'impérativité, l'arbitrage international des contrats administratifs et le conflit de lois. A propos de l'arrêt du Tribunal des conflits du 17 mai 2010,* Inserm c/ Fondation Saugstad). I am grateful to the author for providing the following summary:

> *The Inserm case deals primarily with international arbitration issues. But the way of reasoning used to decide the case could also interfere with the handling*

of public law matters involving French public entities in private international law by French jurisdictions.

How did the issue occur ?

A French public law entity (Inserm) entered into a contract with a Norwegian Fondation (Letten F. Sugstad) in order, inter alia, to achieve the implementation of a research facility in France, including a construction project. An arbitration occurred to decide over the termination of the agreement by the Fondation. The arbitral award, rendered in France, dismissed Inserm's claims. The French entity then applied to set aside the award simultaneously before french civil and administrative courts. To assert the jurisdiction of the letter, Insermargued that the dispute arose out of a French administrative contract.

The case has given rise to the intricate issue of allocation of jurisdiction between civil and administrative courts. As a matter of consequence, it has been brought before the Tribunal des conflits.

The question which the Tribunal des conflits had to solve is complicated to enunciate. Which one of the French civil or administrative courts have jurisdiction to set aside an international arbitral award rendered in France, in a dispute arisen out of the performance or termination of a contract to be performed on the French territory and entered into between a French public law entity and a foreign individual or entity ?

The Tribunal des conflits decided, on 17 may 2010, that the application to set aside the award in such a case is to be brought before civil courts, even if the contract is an administrative one under French law. This solution allows an exception when the contract entered into by a french public entity is governed by a mandatory administrative regime. In this particular case, administrative courts retain jurisdiction to decide over challenges to the arbitral award.

This decision is strictly limited to some international arbitration matters involving a contract entered into by a french public entity. When it is not the case – i.e. when no french public entity is involved – French administrative courts does not intervene at all.

This case is worth mentioning within the field of private international law. The

distinction it introduces between mandatory and non mandatory administrative rules in the international arena could reshape the very idea of the split in methods to solve conflict of laws issues according to the public or private law nature of the rules at stake.

Jurisdiction in Cross-Border Libel Cases

The Court of Appeal for Ontario has released *Paulsson v. Cooper*, 2011 ONCA 150 (available here). The plaintiff, an academic and author resident in Ontario, sued the defendants for publishing an allegedly libellous review of his book. The defendant publisher was incorporated in New York and had its national office in Massachusetts. The reviewer was an Australian academic.

The motions judge had held that Ontario lacked jurisdiction, but the Court of Appeal held that Ontario had jurisdiction and that no other forum was more appropriate for the resolution of the dispute. The court found that there was a "real and substantial connection" to Ontario. The court applied the orthodox analysis that the tort of libel was committed where the statement was read, and so had happened in Ontario. In addition, the place of the damage was Ontario since that was where the plaintiff's reputation was located.

The case was perhaps easier than some other recent cases. The plaintiff's connection to Ontario was quite strong on the facts; he was not a "libel tourist" who had sought out an advantageous forum. The publication was not over the internet, which raises greater complexity, but rather in printed form. The publisher had circulated 3528 copies, of which 81 were circulated in Ontario. Several of those 81 copies had ended up in academic or public-access libraries.

The court agreed with a key quotation from *Barrick Gold Corp. v. Blanchard and Co.* (2003), 9 B.L.R. (4th) 316 (Ont. S.C.J.): "If a person issues a statement and places that statement in a normal distribution channel designed for media

attention and publication, a person ought to assume the burden of defending those statements, wherever they may damage the reputation of the target of those statements and thereby cause the target harm, as long as that harm occurred in a place that the originator of the statements ought reasonably to have had in his, her or its contemplation when the statements were issued."

As noted in an earlier post on this forum, many of these issues are being heard by the Supreme Court of Canada later this month in four other cases being appealed from the Court of Appeal for Ontario.

Arbitration Academy: Summer Courses 2011

An International Academy for Arbitration Law will be launched in Paris in July 2011.

The Academy is an initiative of the French Arbitration Committee (Comité Français de l'Arbitrage (CFA)) and is presided by Professor Emmanuel Gaillard. The Board of Directors is composed of the Academy's President, Alexandre Hory and Yas Banifatemi as co- Secretary Generals, Jean-Georges Betto as Treasurer, Professor Marie- Elodie Ancel and Professor Jean-Baptiste Racine as members of the Selection Committee, and Maitre Philippe Leboulanger as Chair of the CFA. The Academy also has a Board of Advisors which includes Professor George Abi-Saab (Egypt), Professor Liza Chen (China), Professor Eros Grau (Brazil), Professor Horacio Grigera Naon (Argentina), Judge Gilbert Guillaume (France), Professor Gabrielle Kaufmann-Kohler (Switzerland), Professor Alexander Komarov (Russian Federation), Professor Pierre Mayer (France), Professor Michael Reisman (USA), Professor Dorothé Sossa (Benin), Professor Christoph Schreuer (Austria), and V.V. Veeder QC (UK).

The Academy will offer three-week Summer Courses to students and young practitioners interested in the field, covering both international commercial arbitration and international investment arbitration. The Summer Courses will be

given in Paris from 4 July to 22 July 2011, and will be offered in English. They will include a General Course, Special Courses, Workshops on institutional arbitration, an Inaugural Lecture and The Berthold Goldman Lecture on historic arbitration stories.

For the first Session of the Academy in 2011, the General Course will be taught by Professor Christoph Schreuer. The Special Courses will be taught by Professor George Bermann, Professor Pierre- Marie Dupuy, Professor Diego Fernandez Arroyo, Professor François Knoepfler, Professor Pierre Mayer, Dr. Klaus Sachs, and Maître Michael Schneider. The 2011 Workshops will be offered by ICSID, ICC , and the PCA. The Inaugural Lecture will be delivered by Professor Pierre Lalive on the topic "Is Arbitration a Form of International Justice?". The Berthold Goldman Lecture on historic arbitration stories will be given by V.V. Veeder QC on the Lena Goldfield arbitration.

Interested students and young practitioners are invited to apply to the Academy by April 30, 2011. The Application Form and the complete Program can be viewed on the Academy's Website at www.arbitrationacademy.org.

Many thanks to Marie-Élodie Ancel.

Private International Law Seminar, Madrid 2011

On 24 and 25 March, 2011, a new edition of the Private International Law Seminar organized by Prof. Fernández Rozas and De Miguel Asensio will take place in Madrid. Supported this time by the European Commission and the Notary Association of Madrid, the Seminar is organized in coordination with the Anuario Español de Derecho Internacional Privado, where most of the contributions will be published later this year.

As in previous editions, the Seminar, which has become one of the most successful events in the field of conflict of laws in Spain, will be held at the

Complutense University. It will bwe structured in five sessions: family and successions, interregional conflicts, obligations, company law, and a final panel on harmonization of international business law. The conference will bring together numerous experts, academics and lawyers from more than fifteen countries. Spanish, English and French will be spoken -though no translation is provided. The full programme can be found here

Madrid 2011

and registration (which is free) is now open.

French Court Declines Jurisdiction in Libel Case over Book Review

Yesterday, a Paris criminal court declined jurisdiction over the proceedings initiated against Joseph Weiler for a book review published on his website (original judgment available here, Weiler offers translation of part of it here).

We had reported earlier on this case: an Israel based scholar had initiated criminal libel proceedings in France against Weiler, a U.S based law professor, for the online review of her book by the Dean of Cologne law school.

Jurisdiction

The court settled the case on jurisdiction. It held that no evidence had been provided that the site was accessible and actually consulted in France within 3 months of the publication of the book review. 3 months was the time period within which criminal libel proceedings can be prosecuted under French law. The "plaintiff" had only provided evidence of the accessibility of the site more than 110 days after such date.

Abuse of Right

The court then moved on to entertain Weiler's counter claim. Weiler had filed a

counter tort action for abuse of the right to sue.

The court found that there had been such abuse. First, the "plaintiff" had explained that she had sued in France because it was cheaper, and because the claim had no chance of being successful anywhere else. The court held that this was forum shopping. Secondly, the court found that the plaintiff should have known that she had no chance on the merits. Importantly, the court held the review, which was moderate, expressed a scientific opinion.

Weiler had asked for € 10,000 in damages. He got € 8,000.

Ringe and Hellgardt on Issuer Liability

Wolf-Georg Ringe (Oxford Faculty of Law) and Alexander Hellgardt (Max Planck Institute for Tax Law and Public Finance) have published an article on *The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective* in the last issue of the Oxford Journal of Legal Studies.

> *The worldwide integration of capital markets makes progress and has led both issuers and investors to being active on various markets on both sides of the Atlantic. In times of financial crises, this brings one question into the centre of attention which had not been discussed exhaustively before: In the situation of a securities liability towards investors in an international context, which is the applicable law to the liability claim? The harmonisation of private international law rules in Europe gives rise to new reflections on the problem of international issuer liability. In the United States, on the other hand, the Supreme Court has just granted certiorari in a 'foreign-cubed' securities class action case and will thus rule for the first time on matters relating to the international application of the US securities regulation soon. This paper understands the role of issuer liability in a broader context as a 'corporate governance' device and, from this starting point, develops a new approach to the legal problem of cross-border*

securities liability.

The paper is also available on SSRN.

First Issue of 2011's ICLQ

The first issue of the *International and Comparative Law Quaterly* for 2011 was recently released.

In the only article addressing a conflict issue, Professor Trevor Hartley (LSE) discusses *Choice of Law Regarding The Volontary Assignment of Contractual Obligations under the Rome I Regulation*.

> *The voluntary assignment of contractual (and non-contractual) obligations in conflict of laws is governed by article 14 of the Rome I Regulation. Under this, the validity of the assignment as between the assignor and assignee is governed by the law applicable to the contract between them (paragraph 1 of article 14). On the other hand, the assignability of the claim and the relationship between the debtor and the assignee are governed by the law applicable to the obligation assigned (paragraph 2 of article 14). Certain issues are, however, outside the scope of article 14 as it stands at present. These are the question of priorities between competing assignments (if the same obligation is assigned twice to different assignees) and the rights of third parties (mainly creditors of the assignor). This article examines the precise scope of the two existing paragraphs and considers the arguments that might be relevant in deciding what law should govern the issues at present not covered by either paragraph, a question that has become more pressing in view of the fact that negotiations will soon begin on a possible amendment of article 14 to deal with it.*

The Article can be downloaded here by subscribers.

Gambazzi Looses in Milan

On 24 November 2010, the Milan Court of appeal found that the English judgments delivered in 1998 and 1999 in the *Gambazzi* case were not contrary to Italian public policy and could thus be declared enforceable in Italy.

We had reported earlier on this judicial saga which has occupied the dockets of a number of higher courts of the western world in the last decade.

Most readers will remember that the Milan court had first referred the case to Luxembourg. The European Court of Justice had asked the national court to verify the following:

> *42 With regard, first, to the disclosure order, it is for the national court to examine whether, and if so to what extent, Mr Gambazzi had the opportunity to be heard as to its subject-matter and scope, before it was made. It is also for it to examine what legal remedies were available to Mr. Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions.*
>
> *43 With regard to Mr Gambazzi's failure to comply with the disclosure order, it is for the national court to ascertain whether the reasons advanced by Mr Gambazzi, in particular the fact that disclosure of the information requested would have led him to infringe the principle of protection of legal confidentiality by which he is bound as a lawyer and therefore to commit a criminal offence, could have been raised in adversarial court proceedings.*
>
> *44 Concerning, second, the making of the unless order, the national court must*

> *examine whether Mr Gambazzi could avail himself of procedural guarantees which gave him a genuine possibility of challenging the adopted measure.*
>
> *45 Finally, with regard to the High Court judgments in which the High Court ruled on the applicants' claims as if the defendant was in default, it is for the national court to investigate the question whether the well-foundedness of those claims was examined, at that stage or at an earlier stage, and whether Mr Gambazzi had, at that stage or at an earlier stage, the possibility of expressing his opinion on that subject and a right of appeal.*

In a ten page long judgment, the Milan Court of appeal explained why the English proceedings were not manifestly unfair to Gambazzi. The essentials of the decision are the following.

Betting on Winning on Jurisdiction

Gambazzi was able to convince Swiss courts to deny recognition to the English judgments because the documents he needed to defend himself had been retained by an English firm with which he had an argument over the fees which had been charged (Pounds 1 million).

The Milan court found that Gambazzi had admitted that he had hoped to win on jurisdiction and had therefore dedicated all its resources to the jurisdictional challenge, that he eventually lost before the House of Lords. As a consequence, he had consciously decided not to invest anymore on defending on the merits, if only because by doing so, he was taking the risk of being told that he had submitted to English jurisdiction (and so he would indeed be told by the New York Court of Appeals later at the enforcement stage). The Milan court was not ready to rule that his rights to defend himself on the merits had been violated, since this was the result, the Milan Court ruled, of an informed decision to focus on jurisdiction.

Proportionality of the Sanction

The heart of the decision of the Italian court is that the sanction suffered by Gambazzi was proportionate. The judgement repeated several time that the lesson from the ECJ judgment was that Contempt of Court was not a violation of the right to a fair trial per se, but only if disproportionate with the goals pursued

by the institution, namely proper adminsitration of justice.

The conclusion of the Milan court was that, although debarment from defending was clearly severe, and unknown from Italian civil procedure, human rights are not absolute, proper administration of justice being a value which should also be considered. The issue was then whether such sanction was proportionate. The Court held that it was, for the following reasons: 1) Gambazzi had been repeatedly in default (the Court had also acknowledged, however, that Gambazzi had participated actively during the first stages of the English proceedings), 2) Gambazzi had no proper reason not to comply such as violating professional secrecy or foreign (i.e. Swiss) criminal law, and 3) Gambazzi knew about the sanction.

Many thanks to Remo Caponi for the tip-off