Hague Conference's Recommendations on Abduction Convention

On June 10th, 2011, the Sixth Meeting of the Special Commission to review the practical operation of the Hague Abduction and Child Protection Conventions concluded with recommendations for judges, other government officials and experts to consider when confronted with Convention issues.

See the press release of the Hague Conference on Private International Law here.

Colon on Choice of Law and Islamic Finance

Julio Colon has posted Choice of Law and Islamic Finance on SSRN.

> *The past decade has seen the rapid growth of Islamic finance on both international and domestic levels. Accompanying that growth is a rise in the number of disputes that implicate Islamic law. This remains true even when the primary law of the contract is that of a common law or civil law country. If judges and lawmakers do not understand the reasoning of Islamic finance professionals in incorporating Shariah law, the result could be precedents and codes that hamper the growth of a multi-trillion dollar industry. This note compares the reasoning of the English court in Shamil Bank v. Beximco Pharmaceuticals to the practice of forums specializing in Islamic finance dispute resolution. The note then addresses other perceived difficulties in applying Islamic law in common law and civil law courts. The practice of Islamic finance alternative dispute resolution (ADR) forums shows a consistent reliance on the use of national laws coupled with Shariah. Also, there are cases showing that U.S. courts and European arbitrators are willing to use Islamic law.*

Research indicates that the decision in Shamil Bank v. Beximco Pharmaceuticals was not consistent with the intentions of the parties or the commercial goals of Islamic finance. Finally, this note concludes that it is not unreasonable for a Western court to judge a case if the dispute arises out of an Islamic finance agreement.

The Paper is forthcoming in the *Texas International Law Journal*.

Lugano Convention Grand Slam – Iceland Comes Out of the Cold

It should be noted that, on 25 February 2011, Iceland ratified the 2007 Lugano Convention, the last signatory to do so (see here). Accordingly, the 2007 Lugano Convention entered into force for Iceland on 1 May 2011. This follows the ratifications of the EU, Denmark and Norway (effective 1 January 2010) and Switzerland (effective 1 January 2011).

The Future of Private International Law in Australia: papers and podcast now available

For those unable to attend the recent seminar in Sydney "The Future of Private International Law in Australia" — see my post here — papers and a podcast are now available here. The speakers were:

- The Honourable Justice Paul Le Gay Brereton AM RFD, Judge of the

Supreme Court of New South Wales and co-author of *Nygh's Conflict of Laws in Australia* (8th ed);
- Dr Andrew Bell SC, New South Wales Bar and co-author of *Nygh's Conflict of Laws in Australia*;
- Thomas John, head of the Private International Law Section of the Commonwealth Attorney-General's Department; and
- Professor Andrew Dickinson, Professor in Private International Law at Sydney Law School and one of the specialist editors of *Dicey, Morris & Collins: The Conflict of Laws*.

Suing France instead of Foreign Diplomats

Foreign diplomats enjoy diplomatic immunities in France. This is a rule of customary international law, which was also codified in the 1961 Vienna Convention on Diplomatic Relations. This means that employees of foreign diplomats will be unable to enforce judgments against their employer if the latter does not comply with applicable labour law. Right, but in France they may be able to sue the French state instead.

Modern Slave

Ms Susilawati had been hired by a diplomat from the sultanate of Oman who was serving at UNESCO in Paris. The job was to be a housemaid at the home of the diplomat, a five bedrooms apartment in Paris' 16th *arrondissement*. The French press has reported that the 34 year old woman had been hired in Jakarta for 200 USD per month, which was four times what she was making in Indonesia, 30% more than what she was paid when she worked in Ryad for a Saudi prince, but not quite the French minimum wage. Indeed, she was meant to work 7 days a week. That, too, was not exactly compliant with French labour law.

A neighbour called Amnesty International, who alerted the French committee against modern slavery . The case was taken to French labour courts, which

eventually ordered the diplomat to pay her € 33,000 in unpaid salaries. The French jugdment could not be enforced, however, as the diplomat enjoyed an immunity from execution. Why would he pay, after all: he had honored the contract. He is reported to have explained:

> *She got all her salary. She was happy and lived very well. Then she disappeared from my house.*

The employee then petitioned the French state to have it pay instead. The French Ministry of foreign affairs refused. The employee challenged that decision before French administrative courts. She eventually won before the French supreme court for administrative matters (*Conseil d'Etat*) which, in a judgment of February 11th, 2011, held that the French state was strictly liable, and ought to compensate for the loss of the employee.

Egalité des citoyens devant les charges publiques

To reach that result, the *Conseil d'Etat* applied a half century old common law rule providing for the liability of the French state for the application of international treaties. In 45 years, it is only the third time that the court has compensated a plaintiff pursuant to this rule.

Under French administrative law, the French state may be found liable for the application of treaties under two conditions. The first is that the relevant treaty should not have excluded all forms of compensation of victims of its application. The second rule is that the loss suffered should be "special and severe". The foundation of this tort is that citizens should be equal before "public burdens" (*charge publiques*). It is pretty hard to translate the concept in English, but it certainly includes the burdens of the legal system. In other words, nobody should suffer disproportionately from the application of the law, and if someone was to, he could be compensated for that uncommon and severe loss, which could then be characterised as being "special and severe".

So, had Ms Susilawati really suffered a special loss? The ~~diplomat~~ French state argued that she had not, and the argument was found to be convincing by the lower courts. There was nothing uncommon for the employee of a diplomat about being unable to enforce a judgment against his employer, and whether there were only few diplomats was irrelevant, the lower administrative courts found. The

Conseil d'Etat reversed. It held that, for the purpose of assessing whether the loss suffered was special, the lower courts should have inquired whether the victims of similar acts were numerous or few (later in the judgment, the court actually gives its answer by stating that they are few). The court also ruled that the loss suffered was severe, but did not elaborate on this finding, and in particular did not refer to the particular circumstances of the employment.

Fellmeth on Int'l Law and Foreign Laws in US Legislatures

Aaron Fellmeth, who is a professor of law at Arizona State University College of Law, has posted an *insight* on *International Law and Foreign Laws in U.S. Legislatures* on the site of the American Society of International Law.

> *Beginning in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts. This Insight will summarize the trend in adopting legislation hostile to international law and foreign laws and briefly discuss its causes and consequences.*

The rest of the *Insight* is available here.

Zick on The First Amendment in

Trans-Border Perspective

Timothy Zick, who is a professor of law at William and Mary Law School, has published The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation in the last issue of the *Boston College Law Review*. The abstract reads:

> *This Article examines the First Amendment's critical trans-border dimension—its application to speech, association, press, and reli-gious activities that cross or occur beyond territorial borders. Judicial and scholarly analysis of this aspect of the First Amendment has been limited, at least as compared to consideration of more domestic or purely local concerns. This Article identifies two basic orientations with respect to the First Amendment—the provincial and the cosmopolitan. The provincial orientation, which is the traditional account, generally views the First Amendment rather narrowly—i.e., as a collection of local liberties or a set of limitations on domestic governance. First Amendment provincialism does not fully embrace or protect trans-border speech, press, and religious activities; it views certain foreign ideas, influences, and ideologies with sus-picion or hostility; and it envisions a rather minimal extraterritorial do-main. First Amendment cosmopolitanism, which this Article offers as an alternative orientation, takes a more global perspective. It embraces and protects cross-border exchange and information flow and preserves citi-zens' speech and other First Amendment interests at home and abroad. At the same time, it respects foreign expressive and religious cultures and ex-pands the First Amendment's extraterritorial domain. The Article cri-tiques provincialism on various grounds. It offers a normative defense of First Amendment cosmopolitanism that is both consistent with traditional First Amendment principles and better suited to twenty-first century con-ditions and concerns. The Article demonstrates how a more cosmopolitan approach would concretely affect trans-border speech, association, press, and religious liberties.*

Judicial Cooperation in Civil Matters and Private International Law in the 2008-2011 case-law of the ECJ

The School of Law of the Autónoma University of Madrid (UAM) will host the first *UAM International Conference on European Union Law. Recent trends in the case law of the Court of Justice of the European Union (2008-2011)* on July, the 14th and 15th . Besides the opening and closing lectures by prominent jurists, there are panels on the institutional system of the EU, competition law, citizenship and free movement of persons, external action, social policy and internal market. Most interesting for the readers of this blog, there is also a panel on "Judicial cooperation in civil matters and Private International Law", which will be chaired by *Paul R. Beaumont* (Aberdeen University) and *Francisco Garcimartín Alférez* (Autónoma University of Madrid). *Elena Rodríguez Pineau* (Autónoma University of Madrid) will be the speaker in the panel. Andrej Savin (Copenhagen Business School), Giacomo Biagioni (University of Cagliari) and Luis Carrillo (University of Girona) and Patricia Orejudo (Complutense University of Madrid) will also intervene.

Registration forms must be submitted before July 1, 2011. For more information about the congress and to register for the event please visit: www.uam.es/cidue.

Monestier on the Illusory Search for Res Judicata of Transnational

Class Actions

Tanya J. Monestier, who teaches at the Roger Williams University School of Law, has posted Transnational Class Actions and the Illusory Search for Res Judicata on SSRN. The abstract reads:

> *The transnational class action – a class action in which a portion of the class consists of non-U.S. claimants – is here to stay. Defendants typically resist the certification of transnational class actions on the basis that such actions provide no assurance of finality for a defendant, as it will always be possible for a non-U.S. class member to initiate subsequent proceedings in a foreign court. In response to this concern, many U.S. courts will analyze whether the "home" courts of the foreign class members would accord res judicata effect to an eventual U.S. judgment prior to certifying a U.S. class action containing foreign class members. The more likely the foreign court is to recognize a U.S. class judgment, the more likely that an American court will include those foreigners in the U.S. class action.*
>
> *Current scholarship accepts propriety of the res judicata analysis, but questions the manner in which the analysis is carried out. This Article breaks from the existing literature by arguing that the dynamics of class litigation render the res judicata effect of an eventual U.S. class judgment inherently unknowable to a U.S. court ex ante. In particular, I argue that certain "litigation dynamics" – specifically the process of proving foreign law via experts, the principle of party prosecution, and the litigation posture of the action – complicate the transnational class action landscape and prevent a court from accurately analyzing the res judicata issues at play. This is exacerbated by the "structural dynamics" of class litigation: the complexity of foreign law on the recognition and enforcement of judgments; the newness of class action law in most foreign countries; and the distinction between general and fact-specific grounds for non-enforcement of a U.S. class judgment. Accordingly, I argue that U.S. courts should abandon their illusory search for res judicata. Instead, courts should avoid the res judicata problem altogether by employing an opt-in mechanism for foreign class plaintiffs, whereby such plaintiffs are not bound unless they affirmatively undertake to be bound by U.S. class judgment. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S.*

> *litigation if they so choose; it provides additional protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.*

The paper is forthcoming in the *Tulane Law Review* (Vol. 86, p. 1).

Tip-off: Antonin Pribetic

New Alien Tort Statute Case At The United States Supreme Court: Kiobel, et al., v Royal Dutch Petroleum Petition Filed

In *Kiobel, et al., v Royal Dutch Petroleum, et al.*, lawyers for 12 individuals seeking to hold major oil companies legally responsible for human rights abuses in Nigeria in the 1990s have asked the Supreme Court to overturn a federal appeals court's ruling that corporations are immune to such claims in U.S. courts. The law at issue is the Alien Tort Statute, a law that dates from the first Congress in 1789 but has grown in importance after a wave of lawsuits over the past three decades — lawsuits that were originally aimed at individuals, and then began targeting corporations in 1997. Prior coverage of the ATS has appeared on this site here and here, and discussions of this very case have appeared here, here, here, here and here. As Lyle Denniston at the SCOTUSBlog puts it, "[t]he new petition raises what may be the hottest international law issue now affecting business firms," and is "[i]n essence, the . . . ultimate test of what Congress meant when . . . it gave U.S. courts the authority to hear claims by foreign nationals that they were harmed by violations of international law."

Last September, the Second Circuit Court became the first federal court to rule that ATS does not apply at all to corporations, but only to individuals. The panel

split 2-1, and the en banc Court divided 5-5 in refusing to reconsider the panel result. The Petitioners at the Supreme Court now seek to challenge that result and argue that "[c]orporate tort liability was part of the common law landscape in 1789 and is firmly entrenched in all legal systems today. The notion that corporations might be excluded from liability for their complicity in egregious human rights violations is an extraordinary and radical concept."

The *Kiobel* petition puts two questions before the Justices. The first issue is jurisdictional, and questions whether the Circuit Court should have reached the issue of corporate immunity at all. Indeed, neither side had raised the issue of whether ATS applied to corporations in the district court; that question was accordingly not decided by the district judge, and was not an issue sent up to the Circuit Court. The Circuit Court panel majority, without deciding any of the issues actually sent up on appeal, acted *sua sponte* to conclude that it had no jurisdiction to decide the case because the ATS did not apply to corporations. The petition suggests that the Justices should summarily overturn the Circuit Court on this basic procedural point and remand the case for further proceedings.

The second question is the merits question: whether corporations are immune from tort liability for war crimes, crimes against humanity, and other human rights abuses perhaps even amounting to genocide, or whether they are liable as any private individual would be under ATS. On that point, there is a direct conflict between rulings of the Second Circuit and the Eleventh Circuit, and the issue is currently under review in the D.C., Seventh and Ninth Circuits as well. "Today," the petition says, "corporations may be sued under the ATS for their complicity in egregious international human rights violations in Miami or Atlanta, but not in New York or Hartford. This is contrary to the congressional intent that the ATS ensure uniform interpretation of international law in federal courts in cases involving violations of the law of nations."

The corporate defendants will have a chance to oppose the petition before the Justices act on it, and it is also possible that the Justices may seek the views of the federal government. No action on the petition will come until the Court's next Term, starting in October.