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

Symposium on Chinese – EU

Private International Law

Tsinghua University School of Law, Strasbourg University and China-EU School of Law will co-organize an International Symposium on *The Law applicable to International Contracts: A Comparison between Chinese New Private International Law and EU Private International Law* on 28 -29 March 2011 at Tsinghua University in Beijing.

Programme:

First Day, 28 March 2011

8h45 Registration
9h00 Opening Ceremony
Chairperson, CHEN Weizuo, Director of the Research Centre for Private International Law and Comparative Law, Tsinghua University School of Law
9h-9h15 Welcome Address by Professor WANG Zhenmin, Dean of Tsinghua University School of Law (to be confirmed)
9h15-9h30 Speech by Professor HUANG Jin, President of China University of Political Science and Law (to be confirmed)
9h30-9h40 Speech by Professor Ninon Colneric, Co-Dean of China EU School of Law
9h40-9h45 Speech by Mrs. Danièle Alexandre, Emeritus Professor at University of Strasbourg
9h45-9h55 Photo Session for All Participants, Mingli Building, Tsinghua Univeristy

Section I – The Chinese New PIL Statute and its Innovations

9h55-10h25 An Overview of the New Chinese PIL, Professor HUANG Jin, President of China University of Political Science and Law (to be confirmed)
10h25-10h40 Coffee/Tea Break
10h40-11h10 Enactment of the Chinese New PIL Statute, Report by a Member of the Legislative Affairs Commission of the Standing Committee of the National People's Congress (Department Chief Mrs. YAO Hong or Her Deputies)
11h10-11h40 The New Chinese PIL and Foreign-Related Trials of Chinese Courts, Ms. Judge WANG Yun, Deputy Chief Judge of the Fourth Civil Division of the Supreme People's Court of the PRC

11h40-12h10 Discussions
12h20 Lunch

14h Chairperson: (to be determined)
14h-14h40 China's New PIL and International Commercial Arbitration, Ms. DONG Jingjing, Ph.D. Candidate at University of Strasbourg
14h40-15h20 The Role of the Principle of Party Autonomy and the Principle of the Closest Connection in China's New PIL, CHEN Weizuo, Director of the Research Centre for Private International Law and Comparative Law, Tsinghua University School of Law
15h20-16h Comments on the Chinese New PIL Statute: A European Perspective, Mr. Nicolas Nord, University of Strasbourg
16h-16h30 Discussions
16h30-16h45 Coffee/Tea Break

Section II – Conflicts of Law Rules of Chinese PIL and EU PIL in Contractual Matters, Comparative Perspectives

16h45 Chairperson: DU Huangfang, Professor at Renmin University Law School
16h45-17h25 The Notion of Contract in Chinese and EU PIL, Gustavo Vieira da Costa Cerqueira, University of Strasbourg
17h25-18h05 The Principle of Party Autonomy in EU PIL: impact and significance, Ms. Delphine Porcheron, University of Strasbourg
18h05-18h25 Discussions

Second Day, 29 March 2011
9h Chairperson: CHEN Weizuo, Director of the Research Centre for Private International Law and Comparative Law, Tsinghua University School of Law
9h-9h40 The Law Applicable to a Contract in the Absence of a Choice by the Parties in Chinese New PIL and EU PIL, (to be determined).
9h40-10h20 Conflicts of Law Rules and the Protection of the Weaker Party in EU PIL and Chinese New PIL, Mrs. Danièle Alexandre, Emeritus Professor at University of Strasbourg
10h20-11h Exceptions Based on Public Policy and Overriding Mandatory Provisions in EU PIL and Chinese New PIL, Mr. Nicolas Nord, University of Strasbourg
11h-11h30 Discussions
11h30 -11h45 Coffee/Tea Break

11h45-11h55 Closing Address, One of the Leaders of Tsinghua University School of Law
12h End of the Symposium
12h10 Lunch

Location: Law School of Tsinghua University, Mingli Building, Tsinghua University, HaidianDistrict, Beijing, P.R. China
No registration fee required.

Book: Maher and Rodger on Civil Jurisdiction in the Scottish Courts

Gerry Maher (Edinburgh) and Barry Rodger (Strathclyde) have published *Civil Jurisdiction in the Scottish Courts* (W. Green, 2010). Here's the blurb:

> *The last comprehensive survey of the law on civil jurisdiction in Scotland, by Duncan & Dykes, was published in 1911. Given the major developments in the law since then, the legal market in Scotland has been crying out for an up-to-date account of the subject. It has taken just under a century for such a text to be published! The necessity of a modern title on civil jurisdiction is particularly apparent. Professors Gerry Maher and Barry Rodger have now presented us with this new reference tool which provides comprehensive coverage of all the areas of civil jurisdiction, including family actions, succession, insolvency and diligence.*
>
> *Written in a highly practical style, the book will be an essential reference instrument for all Scottish civil court practitioners. The issue of jurisdiction is involved every time an action is raised in the Scottish courts. This new book is the first to deal with the practical aspects of jurisdiction for Scottish practitioners. As an in-depth exposition of the law of civil jurisdiction in the Scottish courts, the primary focus of this title is on the jurisdiction of the Court of Session and sheriff courts across Scotland over persons who are parties to court proceedings. This is a wide-ranging text and covers all rules on civil*

jurisdiction and every type of action, explaining the provisions on jurisdiction to be found in many statutes of the Scottish and UK Parliament, especially the Civil Jurisdiction and Judgments Act 1982. The authors also cover a wide array of EU instruments. The subject matters covered includes civil, commercial, family, obligations, trusts and succession, diligence and insolvency. The significance of EU legal developments is a key feature of the text, with discussion focusing on the impact of EU case law on Scottish cases. It also considers the application of the rules in Scottish courts to parties, issues and events outside of the EU, making it a unique title.

A key practical benefit of this essential reference tool is that it makes clear at which particular sheriff court or courts an action can be raised, avoiding laborious searches or embarrassing errors. All civil litigators in Scotland must know this information and this book makes a time-consuming and complex issue a simple process.

You can find more information, and a table of contents, on the Sweet & Maxwell website. The book is £140. Scottish practitioners and academics alike should delve deeply into their pockets in order to purchase a copy.

Book: From House of Lords to Supreme Court (including Article by Briggs)

Hart Publishing has recently published an edited collection entitled *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging*, edited by James Lee (University of Birmingham), celebrating the transition from the House of Lords to the new United Kingdom Supreme Court. The book includes an essay by Adrian Briggs, entitled 'The Development of Principle by a Final Court of Appeal in Matters of Private International (Common) Law'. Briggs analyses "what the Supreme Court might properly have contributed to the

development of principle in private international law, and why it is improbable that it will get much chance to do so".

There are also essays by leading authorities on the House of Lords in its judicial capacity and by academics whose specialisms lie in particular fields of law, including tort, human rights, restitution and European law. Hon Michael Kirby contributes a chapter on appointments to final courts of appeal. Further details of the book, including a full table of contents, may be found here.

Dallah, Part 2: French Court Reaches Opposite Conclusion

We knew that the English and the French do not drive on the same side of the road. We also knew that they do not perceive arbitration in the same way. We now will also know that, when looking at the same evidence, they reach opposite conclusions.

This is the lesson of reading together the judgments of the Paris Court of appeal and of the UK Supreme Court in *Dallah v. Pakistan*. Both courts wondered whether the Government of Pakistan, although it was not a signatory of the Agreement concluded between Dallah and the Awami Hajj Trust (for a summary of the facts of the case, see here), ought to be considered bound by the arbitration clause it contained. After looking at the same evidence, the English court concluded that it was not, while the French court concluded that it was.

The two judgments cannot be compared in other respects, because the French court does not discuss any other issue. It obviously does not discuss the application of the New York Convention, since it entertained annulment proceedings. It does not discuss choice of law either.

The two judgments are not easy to compare, but I think that their disagreement can be summarized as follows.

Pre-Contractual History

To begin with, the two courts interpreted differently pre-contractual events. Before the relevant Agreement was signed, Dallah had negotiated entirely with the state of Pakistan, so much so that Pakistan and Dallah had concluded a Memorandum of Understanding.

For the French court, this was evidence of the involvment of Pakistan from the start.

For Lord Collins, this was a contrario evidence that the parties to the Agreement really took seriously who the formal parties to each contract would be: Pakistan first, but the Trust only next.

Involvment of Pakistan in the Performance of the Agreement

The letter of Mr Mufti.

The key event was the fact that the Agreement was not terminated by its signatory, the Trust, but by a Pakistani official in a letter sent in his capacity of member of a Pakistani Ministry. This official, however, was also the head of the Trust. Furthermore, shortly after, judicial proceedings seeking a declaration that the Agreement had been terminated were initiated by the Trust, and not by Pakistan.

Evidence was contradictory, and could be interpreted both ways.

For the French court, the letter sent by Pakistan told it all. The fact that proceedings were shortly after initiated by the Trust was of little importance.

For Lord Mance, what mattered was the context of the letter. Given that proceedings had been initiated in the name of the Trust, the letter could be neglected.

Other Letters

This letter, however, was not the only one which had been sent to Dallah by Pakistan in the context of the performance of the Agreement. Two other letters had been sent by Pakistan giving instructions on how to perform the contract (issues addressed were setting up a saving scheme for the pilgrims and

publicizing such scheme).

For the French court, this was critical. Added to the letter previously discussed, it clearly showed constant involvment of Pakistan in an Agreement that it had furthermore negotiated.

Remarquably, the Lords barely discussed this item. If I am not mistaken, only Lord Mance mentioned it. But, although he actually concluded that these showed involvment of Pakistan, he then most surprisingly wrote that these were unimportant.

> *44. As to performance of the Agreement, between April 1996 and September 1996, exchanges between Dallah and the Ministry of Religious Affairs ("MORA") of the Government culminated in agreement that one of Dallah's associate companies, Al-Baraka Islamic Investment Bank Ltd., should be appointed trustee bank to manage the Trust's fund as set out in each Ordinance (para 5 above), and in notification by letters dated 30 July and 9 September 1996 of such appointment by the Board of Trustees of the Trust. In subsequent letters dated 26 September and 4 November 1996, the MORA urged Mr Nackvi of the Dallah/Al-Baraka group to give wide publicity to the appointment and to the savings schemes proposed to be floated for the benefit of intending Hujjaj. By letter dated 22 October 1996 Dallah submitted to the MORA a specimen financing agreement for the Trust (never in fact approved or agreed), under one term of which the Trust would have confirmed that it was "under the control of" the Government. The Government's position and involvement in all these respects is clear but understandable, and again adds little if any support to the case for saying that, despite the obvious inference to the contrary deriving from the Agreement itself, any party intended or believed that the Government should be or was party to the Agreement.*

Can these judgments be explained by any legal consideration? The Lords purported to apply French law. Did they get it wrong? Or was it all about assessing facts and evidence?

In any case, it is unclear whether there was an obvious solution to this case. But what is clear is that, in this hard case, the arbitral tribunal had found that there was an arbitration agreement. To say the least, the English court did not demonstrate much arbitration friendliness by overruling the award on such a

disputed point.

French Blocking Statute Still Unimpressive

We had reported earlier on the first French case applying of the French blocking statute criminalizing cooperation with US discovery procedures.

One interesting question that followed that case was whether US courts would then take the statute seriously.

Here is new evidence that this is not the case.