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.

Issue 2010.4 Nederlands Internationaal Privaatrecht

The last issue of 2010 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Succession and Party Autonomy, European Cooperation and Child Maintenance, Brussels I and Contracts of Service and PIL aspect of Islamic Financing:

- Andrea Bonomi, Testamentary freedom or forced heirship? Blancing party autonomy and the protection of family members, p. 605-610. The conclusion reads:

Although targeting private international law issues, the proposed Regulation can be regarded as the expression of a quite liberal approach to successions. It is submitted that the choice of this approach for international cases can also, in the long term, have an indirect impact on crucial aspects of the domestic law of succession. Thus, the adoption of conflict rules favouring agreements as to succession will probably reinforce the opinion that the prohibition of such agreements, which still exists in several Member States, has outlived and favour substantive law reform. In the same way the adoption of conflict rules that reduce the effectiveness of forced heirship rights in international situations may also stimulate the existing debate on the possibility of making these traditional protection mechanisms more flexible in purely internal situations. As already noted in other areas of law, the European Union could, through the unification of the private international law of succession, have an influence on the development of the substantive laws of the Member States.

- Ian Curry-Sumner, Administrative co-operation and free legal aid in international child maintenance recovery. What is the added value of the European Maintenance Regulation?, p. 611-621. The author provided the following summary:

The international recovery of child maintenance is one important piece in the larger puzzle that ensures that children receive the assistance they need and deserve. Having acknowledged the need for new legislation, both the Hague Conference and the European Union have drafted new instruments aiming to improve the functioning of the current system. Both instruments lay down the

framework for the creation of a network of Central Authorities, forming the cornerstone of a future European and global system of administrative co-operation with respect to the international recovery of maintenance. Since both instruments are due to enter into force at the same time, the question arises whether it was indeed necessary to have two separate instruments dealing with this issue. This article, therefore, addresses the question of whether the provisions with respect to administrative co-operation in the European Maintenance Regulation have added value alongside the provisions contained in the Hague Maintenance Convention. The achievements of the Hague Conference and the European Union should not for one second be underestimated. The abolition of exequatur at EU level and the creation of a global free legal aid for international recovery cases are two achievements that will go down in the annals of legislative history as monumental achievements. Nevertheless, that does not make these instruments immune from criticism. As this article shows, the provisions with respect to administrative co-operation in the European Maintenance Regulation are far from impervious to disapproval.

- Jan-Jaap Kuipers, De plaats waar een dienstenovereenkomst dient te worden verricht als grond voor rechterlijke bevoegdheid, p. 622-628. The English abstract reads:

The European Court of Justice (ECJ) has recently been given the opportunity in a number of preliminary rulings to clarify where, for the purpose of establishing special jurisdiction, a service was or should have been provided within the meaning of Article 5(1)(b) Brussels I. The present article argues that the ECJ has been able to rectify the legal uncertainty that existed under the Tessili doctrine. Despite the fact that the case law sometimes lacks internal coherence and reaches results which are different from the Rome I Regulation, the ECJ has succeeded in developing simple and predictable criteria.

- Omar Salah, 'Nakheel Sukuk': internationaal privaatrecht in de VAE, p. 629-638. The English abstract reads:

In November 2009, Dubai World created a great deal of disturbance in the capital markets when it requested a restructuring of its debts, in particular with regard to Nakheel Sukuk (Islamic financial securities). Analyses by the lawyers of Dubai World and its creditors showed that the sukuk holders might not have the level of protection they had expected. This raised several questions with regard to private

international law, more in particular concerning the recognition and enforcement of foreign judgments in the United Arab Emirates (UAE). The article deals with the legal aspects of Nakheel Sukuk with a focus on private international law. First, a main introduction to Islamic finance and to sukuk will be given. Taking the case study of Nakheel Sukuk as a starting point, the author discusses next (i) the choice of forum and the choice of law under English law; (ii) the legal system of Dubai and the UAE; (ii) the relevant rules on the choice of forum, choice of law, and recognition and enforcement of foreign judgements in the UAE under the Law of Civil Procedure and the Federal Civil Code of the UAE; and (iv) alternative solutions, such as the possibility for an arbitration clause under the laws of the UAE. All of the above provides an insight into the legal system of the UAE and its rules on private international law in particular, leading to a better understanding of how to structure transactions when dealing with this region in the future.

Publication: Baratta (Ed.), Dizionario di Diritto Internazionale Privato

The Italian publishing house Giuffrè has recently published a new book in the law dictionary series *Dizionari del diritto privato*, directed by *Prof. Natalino Irti*. The volume, ***Diritto internazionale privato***, edited by *Prof. Roberto Baratta*, is entirely devoted to Private International Law.

It contains more than 60 entries relating to conflict of laws and jurisdictions, authored by prominent Italian PIL scholars. A detailed TOC is available here.

Title: Diritto internazionale privato, edited by *Roberto Baratta*, Giuffrè (series: Dizionari del Diritto privato), Milano, 2010, VI-566 pages.

ISBN: 978-88-14-15911-4. Price: EUR 65. Available at Giuffrè.

(Many thanks to Fabrizio Marongiu Buonaiuti, Univ. of Rome "La Sapienza", for

the tip-off)

ICCS Convention No. 29 on the recognition of decisions recording a sex reassignment

On March 1, 2011, the ICCS Convention No. 29 on the recognition of decisions recording a sex reassignment, adopted by the Lisbon General Assembly on 16 September 1999, and signed at Vienna on September 12, 2000, will enter into force. Two States have so far ratified the Convention: Spain in October 2010, and the Netherlands in 2004.

Under the Convention final court or administrative decisions recording a person's sex reassignment issued by the competent authorities in a Contracting State shall be recognized in other Contracting States, when at the time when the application was made the applicant was national or habitually resident in the State in which the decision was taken.

There are three exceptions to this rule:

– if the physical adaptation of the person concerned has not been carried out and has not been recorded in the decision in question

– recognition is contrary to public policy in the required Contracting State

– the decision has been obtained by fraudulent means

The State which recognizes a resolution pursuant to the Convention shall update the birth certificate of the person concerned, on the basis of the resolution and in the manner prescribed by its domestic law.