Lugano Convention in force in Switzerland

We had reported earlier on the willingness of Switzerland to apply the 2007 Lugano Convention in 2011.

Switzerland has indeed ratified the Convention on October 20th, 2010. The notice of the ratification to the Contracting Parties can be found here, and includes Switzerland's reservations and declarations.

Switzerland's official documents therefore provide that the Lugano Convention entered into force in Switzerland on January 1st, 2011. The Convention was meant to enter into force on the first day of the third month following the new ratification.

Thanks to Rafaël Jafferali for the tip-off

Kinsch on Choice of Law and the Prohibition of Discrimination

Patrick Kinsch, who is a visiting professor at the University of Luxembourg and the Secretary General of the European Group for Private International Law, has posted Choice of Law and the Prohibition of Discrimination under the European Convention on Human Rights on SSRN. The abstract reads:

> *This article deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large*

> *extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.*

The paper is forthcoming in the *Nederlands Internationaal Privaatrecht*.

Should American Courts Hear Transnational Tort Claims Against Corporations?

As was recently reported on this blog, in September the United States Court of Appeals for the Second Circuit entered an important decision in *Kiobel v. Royal Dutch Petroleum* regarding whether corporations may be sued under the Alien Tort Statute. The upshot of that opinion was that corporations cannot be sued under the Alien Tort State for violations of customary international law because "the concept of corporate liability . . . has not achieved universal recognition or acceptance of a norm in the relations of States with each other." Slip op. at 49.

Today, the Second Circuit denied panel rehearing and rehearing en banc (splitting 5-5). One particularly interesting concurrence in the denial of rehearing was issued by Chief Judge Dennis Jacobs. There he makes the following important legal and policy arguments concerning the use of the Alien Tort Statute against corporations and, perhaps, the prospect of transnational tort litigation generally against similar actors.

> *All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies,*

sustaining employees, pensioners and creditors–and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them–and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance–the very opposite of the universal consensus that sustains customary international law.

The imposition of liability on corporations, moreover, raises vexed questions. What employee actions can be imputed to the corporation? What about piercing the corporate veil? Can these judgments be discharged in bankruptcy, and, if so, in the bankruptcy courts of what country? Punitive damages is a peculiar feature of American law; can they be exacted? These issues bear on the life and death of corporations, and are of supreme consequence to the nations in which the defendant corporations were created, make their headquarters, and pay their taxes. Is it clear that the nations of the earth would be complacent about having these matters decided in U.S. courts?

These policy considerations explain why no international consensus has arisen (or is likely to arise) supporting corporate liability. Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them–or be tantamount to "judicial imperialism"?

Besides such policy arguments, Chief Judge Jacobs explained the impact that this will have on litigation tactics.

The holding of this case matters nevertheless because, without it, plaintiffs would be able to plead around Talisman in a way that (notwithstanding Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, — U.S. 13 —, 129 S. Ct. 1937 (2009)) would delay dismissal of ATS suits against corporations; and the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other

nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal–and Kiobel is it—it should be considered and used.

This is a candid appraisal of the policy and legal arguments at play in ATS and transnational tort cases that deserves closer scrutiny in both legal and public policy circles.

MPI Comments on Green Paper on European Contract Law

The Max Planck Institute for Comparative and International Private Law has submitted its comments on the European Commission's Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses.

These Comments are the product of a working group established inside the Institute which has met since September 2010. The Comments will also be published in a forthcoming issue of the *RabelsZeitschrift*.

While welcoming the Commission's initiative, the Institute criticizes that the Commission did not sufficiently consider the issue of the legislative competence of the EU. At present, an optional instrument (opt-in) drafted as a Regulation (option 4) and based on Art. 352 TFEU seems to be the preferable option. Such an instrument raises a number of questions regarding its choice and its area of application which have been addressed by the Working Group. An optional instrument should be granted a broad scope of application, including both B2B

and B2C contracts, domestic contracts, intra-Union cross-border contracts as well as contracts with parties resident in third states. Its scope should neither be limited to cross-border contracts nor to contracts concluded online. At present, however, the Institute does not recommend any specific option since such a recommendation would in the end depend on the substantive quality of the final instrument. In this regard, an important preparatory work for any future European contract law, i.e. the Draft Common Frame of Reference (DCFR), has already been criticized by some members of the Working Group.

See also the post of the Institute on its website.

Paris, the Jurisdiction of Choice?

On January 17th, the President of the Paris Commercial Court (*Tribunal de commerce*) inaugurated a new international division.

The new division, which is in fact the 3rd division of the court (*3ème Chambre*), is to be staffed with nine judges who speak foreign languages, and will therefore be able to assess evidence written in a foreign language. For now, the languages will be English, German and Spanish, as one juge speaking Spanish and two speaking German are currently on the court.

In an interview to the *Fondation de droit continental* (*Civil law initiative*), the President of the Court explained that the point was to make French justice more competitive and attract international cases. It also made clear that France was following Germany's lead, where several international divisions were established in 2009 in Hamburg and Cologne.

French Commercial Courts

It should be pointed out to readers unfamiliar with the French legal system that French commercial courts are not staffed with professional judges, but with members of the business community working part-time at the court (and for free). In Paris, however, many of these judges work in the legal department of their

company, and are thus fine lawyers.

Also, French commercial courts (and French civil courts generally) virtually never hear witnesses, so the issue of the language in which they may address the court does not arise.

Some issues

So, the new international division will be able to read documents in several foreign languages. However, nothing suggests that parties or lawyers will be able either to speak, or to write pleadings, in any other language than French. Lawyers arguing these cases will still need to file their pleadings in French, and thus to translate them in English beforehand for their clients. Furthermore, the interview of the Court's President seems to suggest that using a foreign language will not be a right for the parties. Quite to the contrary, it seems that it will not be possible if one of the parties disagrees, and demands documents be translated in French.

Will that be enough to attract additional commercial cases to Paris?

I wonder whether introducing class actions in French civil procedure would have been more efficient in this respect.

For the full interview of the Court's President, see after the jump.

Creation of an International Chamber at the Tribunal de Commerce [Commercial Court] of Paris

On January 17, 2011, the Tribunal de Commerce of Paris will inaugurate an international chamber, an event all the more in the nature of an official endorsement because this chamber, which already exists, remains unknown to the general public. The President of the Tribunal de Commerce of Paris, Christian de Baecque, explains the stakes of this rehabilitation.

What has driven the need for official recognition of the international chamber of the Tribunal de Commerce of Paris?

Some months ago, I learned of a draft law issued by legislators in Germany allowing documents to be examined by a court without their translation being mandatory. I found the idea to be excellent and after some research, I realized that the French Code allows this practice.

Many people share this idea, with the objective of promoting Paris as a judicial location. There is, in effect, a currently ongoing struggle between the Anglo-American law and civil law. And it is up to us, at the Tribunal de Commerce, to ponder specific actions.

Is the international chamber of the Tribunal de Commerce of Paris therefore participating in this promotional effort?

Yes, absolutely. The stakes underlying a general recognition of this chamber is to avoid the outflow of judicial business to foreign courts. All of the chambers of the Tribunal de Commerce in the resolution of disputes are specialized. We thus also had a chamber specialized in international law. It operated when the parties were neither French nor European. But obviously there were few litigated disputes that actually justified the existence of this chamber. The innovation at the level of the Tribunal is to make public the existence of this chamber, and this publicity should put the Tribunal de Commerce of Paris in a strong position to handle international disputes and thus enhance the position of the civil law.

Could you tell us about the composition of this international chamber?

The 3rd Chamber of the Tribunal, which is the international chamber, will be composed of nine judges having the requisite knowledge of foreign languages, whether English, German or Spanish, so as to be able to accept exhibits that have not been translated into French (to the extent, obviously, that all the parties would be in agreement). This does not exclude the use of foreign languages in any other chamber. The international chamber wishes to serve as a model, it is not intended to be exclusive.

Three languages have been selected, English, German and Spanish. Why not use only English, as is the case in Germany?

In most cases, the judges of the Tribunal de commerce have had the occasion throughout their careers to draft contracts in a foreign language. They have mastered the fine points of the language. Here it is not solely a question a question of translation; the words have an economic meaning and not only a literary one. Also, if that judge has the language skills to grasp the subtleties of a document, it seems logical to provide wider latitude to this mode of operating. Of course, the judgment and the consequences that the judge derives therefrom will be drafted in French.

With the 3rd Chamber, the use of such or another language will depend on of the language skills of the judges. It so happens that next year I will have a judge who speaks Spanish and two German-speaking judges, from whence the decision to hear cases in these two languages.

You are quite willing to state that the object of the process is marketing.

We are in fact going to put in place a mechanism that already exists in a new packaging, and this is being done so as to promote a practice that is unknown to the judges themselves. The latter, just as is the case with the lawyers, often lose a lot of time in translation. Certain cases by-pass the Tribunal de Commerce because of this linguistic obstacle, and I am not referring here to foreign businessmen who, for lack of information as to this mechanism, do not come to attend the hearings. The re-implementation of this international chamber must show that the language is not a barrier for pursuing international dispute resolution in France.

Germany, The Precursor in Hearing Cases in a Foreign Language

In Germany, the Rhine-North-Westphalia and Hamburg Länder, in 2009, took the initiative of putting international chambers in place in the Courts of First Instance of Hamburg and Koln for international commercial cases. Mr. Brauch, Attorney offers some clarification on the current situation and on the differences in relation to the French mechanism.

The establishment of these first international chambers was followed in 2010 by

a request to the Bundesrat (the representative council of the Länder in the Federal Republic) to amend the Federal Code on the Organization of the courts so as to introduce this model in the other Länder of the Federal Republic.

In these "pilot" chambers, the proceeding may thus be held entirely (memoranda of the parties, probative evidence, oral argument at the hearing and the decisions of the Court) in English upon the request of both parties.

English is the only language selected for these chambers because, considered to be the language of international trade, it also serves to pacify the struggles with the courts, with those in England for example, so that the case can be conducted in English in accordance with civil law. English is also in many cases the language of neutrality, as in the case of Franco-German transactions.

This mechanism of the international chamber seems go further than that its French counterpart, in the sense that the entire proceeding, from the arguments to the judgment and inclusive of the pleadings, is pursued in the English language. Only the executory portion is translated for the bailiff into German. For these specialized chambers, the Court of Appeals is also considering establishing special chambers dedicated to proceedings held in English.

As soon as the Federal code of procedure is amended, the establishment of these international chambers will extend to other Länder in cities such as Frankfurt, Munich, Stuttgart and Düsseldorf.

I absolutely approve of these mechanisms which are especially effective in handling international contracts for financial services or of merger/acquisition, an area in which I am especially involved. In such transactions, all of the documents are often drafted in English, even if the two parties are neither English nor American, but German and French or other. Il may be, in fact, that these companies are affiliated with American or English groups, and that the representatives of the parent companies are insisting on having the case litigated in an English language proceeding. Until now, it was necessary in such a case to have recourse to international arbitration or to a foreign English-language court. The establishment of such international chambers thus allows for a proceeding to be held before a German State Court. This is a real opening onto the international horizon.

Italian Forum on the Brussels I Review Proposal (2): Lis Pendens and Related Actions

Following our previous post on the **forum on the Brussels I review currently hosted by the website of the Italian Society of International Law** (SIDI-ISIL), another comment has been added, on the amendments proposed by the Commission in respect of **lis pendens and related actions**. The contribution is authored by *Fabrizio Marongiu Buonaiuti* (University of Rome "La Sapienza"), who has recently published an extensive monograph on the regime of lis pendens and related actions in Italian law, in the European regulations and in other international instruments (*Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile*, Napoli, 2008):

- *Fabrizio Marongiu Buonaiuti*, Litispendenza e connessione nella proposta di revisione del regolamento n. 44/2001.

Bans on foreign law (mainly sharia law)

A reading proposal for a Sunday afternoon: Julian Ku's (Opinio Iuris) recent post on the Oklahoma's prohibition on foreign and international law, that threatens to spread to other States. The ban affects every legal precept of other nations or culture in Arizona's proposal.

Journal of Private International Law Conference 2011 (Update)

Following Martin's post announcing the fourth Journal of Private International Law Conference which will take place in Milan on April 14-16, 2011, I am pleased to announce that the University of Milan has created a webpage gathering all practical details regarding the conference.

Among other information, the programme of the conference is available here, and the registration form here.

Weiler on his Own Trial

We had previously reported about this criminal action initiated for a book review against NYU law professor Joseph Weiler.

The trial took place last week in Paris. Weiler reports on it here.

Verdict on March 3rd.

New French Book on Cross-Border

Debt Recovery

I am delighted to announce the publication of a book that I have coauthored with Clotilde Normand, who practices at Baker & McKenzie in Paris, and Fanny Cornette, who teaches at the University of Rouen, on International Enforcement Law, or Cross-Border Debt Recovery (*Droit international de l'exécution – Recouvrement des créances civiles et commerciales*) .

The book is divided in two parts. Part one discusses how foreign judgments, arbitral awards, authentic acts and decisions of international courts can be declared enforceable in France. Part two explores how enforcement can then actually take place in France in an international context. In particular, it discusses attachments of assets and court injunctions backed with financial penalties.

More details can be found here.