Conference on the Judge and the Border in Beirut

An international conference will be held on 22 October 2010 in Beirut, Lebanon, on 'The Judge and the Border'.

The morning session focuses on 'The extra-territorial activity of the courts', and deals with the powers of the courts in respect of foreign territories, foreign evidence, foreign litigants, foreign judgments, etc. The afternoon session deals with 'International judicial cooperation and conflict of laws', and covers issues such as lis pendens, the reception of foreign procedural institutions, the application of foreign mandatory rules, etc.

The speakers include Professors Paul Lagarde, Bernard Audit, Pascal de Vareilles-Sommières, Léna Ganagé, Marie-Maure Niboyet, Etienne Pataut, Arnaud Nuyts, Mouhib Maamari, Sami Mansour, Haffiza Haddad. The Conference (in French and Arabic) is held under the auspices of the 'Conseil supérieur de la magistrature' and 'Institut d'Etudes Judiciaires du Liban'.

The full programme can be found on www.dipulb.be.

(European) Mercy for Jérôme Kerviel? (updated)

Jérôme Kerviel was a young trader with a promising future. Today, a French criminal court ordered him to pay his employer Société Générale € 4.9 BILLION in damages. The court has also sentenced him to serve 3 years in prison. Unsurprisingly, Mr Kerviel has already announced that he will appeal.

€ 5 billion is a high sum that Mr Kerviel will likely have difficulties paying. The court has forbidden him to be a trader again. That will not help. Given his current salary (he is in computers now), journalists have calculated that he may need to

work 177,000 years to pay his debt. After all, as journalists have also reported, € 5 billion is the GDP of Benin.

It seems that some innovative legal argument would be welcome here. On the top of my hat, two come to mind.

First, Mr Kerviel may want to pay nothing at all. What about trying insolvency? Unfortunately, it is not available for him in France, as he is a mere employee. But it might be elsewhere in Europe. If he settles in such country, could he after a while take advantage of local insolvency law, and obtain recognition of the judgment in France under the insolvency regulation?

> *Readers have pointed out to me that it might be enough for Mr Kerviel to move inside France. Alsace and Moselle have kept a special insolvency regime (French Commercial Code, Art. L 670-1), that German debtors particularly fancy, and which is open to everybody, including employees. The geographic requirement is to be domiciled in one of these two regions. Mr Kerviel could thus move to Metz or Strasbourg and, if he could show that he would have genuinely settled there, benefit from local insolvency law. However, the rule of French law which does not allow debts resulting from criminal offences to be cancelled in such cases, also applies in Alsace and Moselle. But maybe other jurisdictions would allow the cancellation for even such debts.*

Secondly, Mr Kerviel may want to pay his debt, and think that he would thus need to be back in business again. Would the ban of the French criminal court be recognised outside of Europe? Could he practice in other major financial centers of the world?

UPDATE: Société Général people have told the French press that they would not insist that Mr Kerviel pay the entire sum. When asked whether that meant that they did not intend to ask for any payment, they said that it only meant that they would be happy to explore whether they could reach an agreement with Mr Kerviel. Well, even if Mr Kerviel was fortunate enough to settle for 1% of the entire sum, he would still need 1,770 years to meet his new obligation. In any case, he announced this morning on a French radio that he was not asking anything to SocGen.

Enforcement, Liability and Jurisdiction

Which court has jurisdiction over liability actions against banks in relation to enforcement measures? In Europe, does such action fall under Article 22 of the Brussels I Regulation?

In April this year, the French Supreme court for private and criminal matters (*Cour de cassation*) delivered an interesting judgment in this respect. A French creditor had obtained a judgment from the Paris court of appeal ordering her debtor to pay him monies. The creditor then sought to enforce the judgment in Ivory coast, where he had been able to locate a bank account opened in the name of the debtor. He thus contacted a local enforcement officer (*huissier de justice*) who carried out an attachment (*saisie-attribution*) over the bank debt. The bank, Banque internationale pour le commerce et l'industrie en Côte d'Ivoire, declared that it held CFA Franc 11 million (€ 16,700).

However, the debtor immediately challenged the validity of the attachment before an Abidjan court on the ground that it did not comport with of OHADA law (articles 160 and 34 of the relevant statute). The court set aside the attachment. The creditor appealed, but did not wait for the result to ask the *huissier* to carry out a second attachment which would this time not violate local enforcement law. When the *huissier* did, however, he was told by the bank that there was only CFA Franc 3000 (€ 4.57) on the account. Eventually, the Abidjan Court of appeal confirmed that the first attachment was a nullity.

I am not sure whether, under OHADA law, the bank was meant to freeze the debt for the time of the challenge of the validity of the attachment. In any case, the creditor decided to sue the bank and initiated a quasi-delictual (i.e. for negligence) action before French courts. As far as jurisdiction is concerned, the plaintiff relied on 14 of the Civil code which grants jurisdiction to French courts for all actions initiated by a French national. For 40 years, the *Cour de cassation* has ruled that Article 14 and 15 of the Civil of code apply to all claims, except

claims over real property and enforcement. The issue here was of course whether a liability action against a bank belongs to the enforcement of decisions. In a judgment of 14 April 2010, the *Cour de cassation* held that it does, and declined jurisdiction.

> *l'article 14 du code civil, qui permet au plaideur français d'attraire un étranger devant les juridictions françaises, doit être exclu pour des demandes relatives à des voies d'exécution pratiquées hors de France ; qu'ayant retenu que l'action engagée par M. X... contre la BICI CI découlait directement des voies d'exécution pratiquées entre les mains de celle ci en Côte d'Ivoire, elle en a déduit, à bon droit, que M. X... ne pouvait se prévaloir de ce texte, peu important que la régularité de la saisie litigieuse n'eût pas été contestée*

Rumour has it that the main goal of the court was to limit the scope of Article 14 and 15. From a European perspective, however, this might be an unfortunate judgment. To which extent does it inform what the position of the court would be with respect to Article 22 of the Brussels I Regulation? A short (but maybe incomplete) survey of European scholarship shows that many writers have argued, in particular in Germany and France, that liability actions against banks should not fall within the scope of Article 22. Or should they?

Hamburg Lectures on Maritime Affairs 2010

The International Max Planck Research School for Maritime Affairs and the International Tribunal of the Law of the Sea (ITLOS) organize this year's Hamburg Lectures on Maritime Affairs.

The lectures will be held in **Hamburg from 7 October to 10 November** and are open to the public. However, registration in advance is required.

The programme as well as information on the venue and registration and can be

found here.

New references for preliminary rulings before the CJEU

Drawn to my attention by the Conflictus Legum are two recent requests for preliminary rulings on interpretation of the EU instruments in the filed of private international law which are now pending before the Court of Justice of the EU.

One reference (C-315/10 *Companhia Siderúrgica Nacional, Csn Cayman Ltd v Unifer Steel SL, BNP-Paribas (Suisse), Colepccl SA, Banco Português de Investimento SA (BPI)*) was submitted by the Portuguese court on 1 July 2010, including the following questions:

> 1. Does the fact that the Portuguese judicial authorities have declared that they lack jurisdiction by reason of nationality to hear an action concerning a commercial claim constitute an obstacle to the connection between causes of action referred to in Articles 6(1) and [28] of Regulation No 44/2001, where the Portuguese court has another action pending before it, a Paulian action brought against both the debtor and the third-party transferee, in this case the transferee of a debt receivable, and the depositaries of the subject-matter of the claim assigned to the third-party transferee, the latter having their seats in Portugal, in order that they may all be bound by the res judicata decision to be given?
> 2. In the event of a negative response, may Article 6(1) of Regulation No 44/2001 be freely applied to the case?

The questions seem somewhat unclear, particularly in relation to declining jurisdiction on the basis of nationality and reference to Art 28. The reference is perhaps due to the same wording used in the two provisions, but might not have a direct connection with the case. The Portuguese court is evidently dealing with the action which is under the Portuguese law called “impugnação pauliana” (Arts. 610 et seq. of the Portuguese Civil Code). It is used to reverse the fraudulent conveyance of property, which is frequently resorted to by debtors on the eve of

their insolvency. It might be relevant to know whether the debtor in this case is actually insolvent. Because certain information is missing, regardless of inquiries with some Portuguese colleagues, the situation cannot be fully appreciated for the time being.

The other reference (C-400/10 *J. McB. v L. E.*) of 6 August 2010 originates from the Irish court in relation to (wrongful) removal of a child in case of father not married to the mother of the child. The question reads:

> Does Council Regulation (EC) No 2201/2003 of 27 th November 2003 on the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, whether interpreted pursuant to Article 7 of the Charter of Fundamental Rights of the European Union or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having 'custody rights' which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2.11 of that Regulation?

Vacancies at the Secretariat of the ICC

The Secretariat of the ICC International Court of Arbitration is currently recruiting two deputy counsels, one to deal principally with parties from Eastern Europe, another to deal principally with Europe, Africa and the Middle East.

The closing dates for applications are October 4th for the first position, October 11th for the second.

More details can be found here.

Robertson on Transnational Litigation and Institutional Choice

Cassandra Burke Robertson, who is an associate professor at Case Western University School of Law, has published *Transnational Litigation and Institutional Choice* in the last issue of the Boston Law Review. The abstract reads:

> *When U.S. corporations cause harm abroad, should foreign plaintiffs be allowed to sue in the United States? Federal courts are in-creasingly saying no. The courts have expanded the doctrines of forum non conveniens and prudential standing to dismiss a growing number of transnational cases. This restriction of court access has sparked considerable tension in international relations, as a number of other nations view such dismissals as an attempt to insulate U.S. corporations from liability. A growing number of countries have responded by enacting retaliatory leg-islation that may ultimately harm U.S. interests. This Article argues that the judiciary's restriction of access to federal courts ignores important foreign relations, trade, and regulatory considerations. The Article applies institutional choice theory to recommend a process by which the three branches of government can work together to establish a more coherent court-access policy for transnational cases.*

It can be freely downloaded here.

The United States Supreme Court

to Take a Fresh Look at Personal Jurisdiction

Today, the United States Supreme Court granted certiorari in two cases that involve the so-called "stream-of-commerce" theory of personal jurisdiction. Under that theory, a United States court may assert personal jurisdicition over a foreign company defendant when that company's products find their way into U.S. markets, even though the foreign company has not targeted that specific market for commerce. Many non-U.S. readers will find such a theory of personal jurisdiction startling, especially given that recent advances in the law of jurisdiction in Europe in particular have favored the place of a defendant's domicile (or place of incorporation) as the key principle in asserting jurisdiction. It will be interesting to see if the United States Supreme Court resolves these cases in favor of a bright-line rule or a more flexible approach to personal jurisdiction.

The first case, *Goodyear Luxembourg Tires, et al., v. Brown, et al.* (10-76), involves the death of two North Carolina youths in France when a tire made overseas failed and the bus in which they were riding crashed and rolled over. The tire was made in Turkey, but the Luxembourg branch of Goodyear and branches in Turkey and France were sued in a North Carolina court over the tire's failure. The actions sued upon had no contact with North Carolina and the defendants had never taken purposeful action to cause tires which they had manufactured to be shipped into North Carolina. Notwithstanding these facts, the North Carolina Court of Appeals held that because (1) defendants did not purposefully limit their distribution to exclude their tires from North Carolina, (2) defendants did business generally with the United States and (3) North Carolina had a strong interest in providing a forum for its citizens to seek redress for their claims, the assertion of general personal jurisdiction over the defendants was proper. The second case, *J. McIntyre Machinery Ltd. v. Nicastro, et al.* (09-1343), involves an accident in a New Jersey scrap metal facility on a machine made by McIntyre, a British company that sold the machine through an unaffiliated distributor. That lawsuit was pursued in state court in New Jersey. On appeal, the Supreme Court of New Jersey found that because the defendant targeted the United States market generally and its products ended up in the state of New

Jersey the assertion of personal jurisdiction by the New Jersey courts was reasonable, especially considering the radical transformations in international commerce which makes the whole world a market.

The Supreme Court's resolution of these cases should do much to correct the confusion that still exists in American courts over the doctrine of personal jurisdiction under the stream of commerce theory, especially when applied to foreign defendants.

Conference on State Insolvency and Sovereign Debts

Mathias Audit, who is a professor of law at the University of Paris Ouest – Nanterre La Défense, will organise a conference in Paris on November 10th, 2010, on State Insolvency and Sovereign Debts.

Here is the programme:

Colloque, le 10 novembre 2010
Palais du Luxembourg – Salle Monnerville

Insolvabilité des Etats et dettes souveraines

Programme

8h30 : Accueil des participants

9h : Ouverture du colloque par M. le sénateur Philippe MARINI

9h15 : Introduction générale aux travaux

Matinée placée sous la présidence de M. Hubert DE VAUPLANE, *Directeur*

juridique et Conformité au Crédit agricole et professeur associé à l'Université Paris II – Panthéon Assas

- 9h30 : **Un Etat peut-il faire faillite ? – Le point de vue économique**
  par M. Jérôme SGARD, *directeur de recherches à Sciences Po/CERI et professeur associé à l'Université Paris-Dauphine*
  10h : **Un Etat peut-il faire faillite ? – Le point de vue juridique**
  par M. Michael WAIBEL, *British Academy Postdoctoral Fellow, Lauterpacht Centre for International Law and Downing College, University of Cambridge*

10h30 : Pause

- 11h : **La dette souveraine appelle-t-elle un statut juridique particulier ?**
  par M. Mathias AUDIT, *professeur de droit à l'Université Paris Ouest – Nanterre La Défense*
- 11h30 : **Incidence des Credit Default Swaps sur les dettes des Etats : bilan et prospective**
  par Me Jérôme DA ROS, *avocat à la cour*
- 12h : **Les « fonds vautours » sont-ils des créanciers comme les autres ?**
  par M. Patrick WAUTELET, *professeur à l'Université de Liège*
- 12h30 : Discussion générale

13h : Déjeuner libre

Débats placés sous la présidence de M. Christian DE BOISSIEU, *professeur d'économie à l'Université Paris I – Panthéon-Sorbonne*

- 14h30 : **Agence de notation : responsabilité, régulation ou *laissez-faire* ?**
  par M. Norbert GAILLARD, *docteur en économie (Sciences Po/Princeton), consultant auprès de la Banque mondiale*
- 15 h : **La régulation de l'information sur le marché des dettes souveraines**
  par M. Alain BERNARD, *professeur à l'Université de Pau et des Pays de l'Adour*

15h30 : Pause

Débats placés sous la présidence de M. Jean-Bernard AUBY, professeur des universités à l'Ecole de Droit de SciencesPo, directeur de la chaire « Mutations de l'Action Publique et du Droit Public » (MADP)

- 16 h : **Les instruments de droit international public pour remédier à l'insolvabilité des Etats**
  par M. Mathias FORTEAU, *professeur à l'Université Paris Ouest – Nanterre La Défense*
- 16h30 : **Les instruments de droit de l'Union européenne pour remédier à l'insolvabilité des Etats**
  par M. Francesco MARTUCCI, *professeur à l'Université de Strasbourg*
- 17h : Discussion générale
- 17h30 : **Conclusion générale**
  par Mme Horatia MUIR WATT, *professeur des universités à l'Ecole de Droit de SciencesPo*

It is free of charge. Registration, however, is compulsory (michele.dreyfus@u-paris10.fr).

Gerrit Betlem

Professor Gerrit Betlem, a close friend and colleague to many of us and a leading scholar in European Private Law, passed away on 26th July 2010. There is an obituary on Southampton's website.