Eldon Foote’s Domicile on May 17, 2004

Those interested in lengthy discussions of the law of domicile might enjoy the Alberta Court of Queen’s Bench’s odyssey undertaken to determine where the late Eldon Foote died domiciled (available here). The decision is over 100 pages long. Spoiler alert – the answer is Norfolk Island, an external territory of Australia located in the south Pacific Ocean. Other options considered but rejected were Alberta and British Columbia. The court sets out the applicable legal principles over some 23 pages, providing a useful summary of the law of domicile in common law Canada. The reasons then contain extended discussion of whether, at various points in his life, Mr. Foote had changed his domicile.

One point of note on the law is that the court rejects the old notion that a domicile of origin should be considered particularly difficult to change. Instead, the ordinary standard of proof on the balance of probabilities is all that is required (paras. 71-74).

Another interesting point is the court’s view that if a revival of the domicile of origin would produce an “absurd” result, the court has “residual authority to instead conclude that a person has retained their last domicile of choice” (para. 97). Thre is little authority to support this view, and if it is correct it represents an important development in the Canadian law of domicile.

At the time of his death Mr. Foote was worth over US$130 million. He was a civil litigation lawyer who made his money after leaving the law, ultimately having his business bought out by the Dutch conglomerate Sara Lee. He was apparently drawn to Norfolk Island because it was a tax haven.

French Conference on Parallel Litigation

The Master of arbitration and international commercial law of the university of Versailles Saint-Quentin will organize a conference on Thursday November 26th on parallel litigation.

There will be two speakers, who will speak in French. First, Gilberto Boutin, from the university of Panama, will present recent developments in the doctrines of forum non conveniens and lis pendens in South America. Then, Gilles Cuniberti, from the university of Luxembourg, will discuss parallel proceedings between courts and arbitral tribunals, with a special focus on recent European developments.

The conference will begin at 5 pm. It is free of charge.

More details can be found here.

The Written Observations Submitted in the Gambazzi Case

Many thanks to Prof. Koji Takahashi for sending the following text and the files with the written observations submitted in the Gambazzi case.

The written observations submitted to the European Court of Justice are normally unpublished. Earlier this year, I obtained the observations submitted in Case C-394/07 Gambazzi by the United Kingdom, the Republic of Italy and the Commission of the European Communities as well as the French translation of the observation of Italy supplied by the Court of Justice. The request was made under the United Kingdom Freedom of Information Act 2000 (My thanks are due to the United Kingdom Ministry of Justice and those helped me in the process). Since I was told that those observations were now regarded as being in the public

domain, I think I should make them available to all rather than keeping them to myself. Please note that the United Kingdom is withholding the written observations submitted on behalf of the Hellenic Republic, Mr Gambazzi, Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company since they did not consent to disclosure by the United Kingdom.

Commission observations

UK observations

Italy observations (in italian)

Italy observations (in french)

Note: On October the 1st Advocate General Poiares Maduro delivered his opinion in the joined Cases C?514/07 P, C?528/07 P and C?532/07 P. The Opinion is connected with the information provided by Prof. Takahashi in as much as the central issue submitted to the ECJ is "to what extent do the principles of transparency of judicial proceedings and publicity of trial require members of the public to be allowed access to the written submissions filed with the Court by the parties to a case".

Many thanks to Daniel Sarmiento Ramirez-Escudero for the hint.

Anti-suit Injunction Issued By US Court

The United States Court of Appeals for the Ninth Circuit recently decided the case of *Applied Medical v. The Surgical Company* (available here), which raised the issue whether a district court abused its discretion in denying an anti-suit injunction. In short form, the facts were that two companies entered into a purchasing relationship that was subject to a written agreement that included a choice of law and choice of forum clause. That clause read as follows: "This Agreement shall be governed by and construed under the laws of the State

of California. The federal and state courts within the State of California shall have exclusive jurisdiction to adjudicate any dispute arising out of this Agreement." Subject to other clauses in the Agreement, which allowed parties to terminate the agreement and limit liability, Allied decided against renewing the agreement past 2007. Surgical replied by asserting that it was entitled to protection under Belgian law in the form of compensation. Applied then filed a complaint for declaratory relief against Surgical in the United States District Court for the Central District of California. As relevant here, Applied filed a motion for summary judgment requesting that the district court "enjoin Surgical from pursuing relief in Belgium or any other non-California forum under non-California law." Slip op. at 14822. The district court declined to enjoin Surgical.

On appeal, the Ninth Circuit focused on that court's recent decision in *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2009), which held that a district court, in evaluating a request for an anti-suit injunction, must determine (1) "whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined;" (2) whether the foreign litigation would "frustrate a policy of the forum issuing the injunction;" and (3) "whether the impact on comity would be tolerable." *Id*. at 991, 994. The Ninth Circuit concluded that a close reading of *Gallo* as applied to the facts of this case required the district court to enter an anti-suit injunction.

While the whole opinion is worth reading to understand the *Gallo* landscape, what is perhaps most interesting is the Ninth Circuit's treatment of the comity issue. The court minimizes the comity inquiry by finding that all this case involves is a contract between two sophisticated parties to litigate their case in a California forum under California law. Slip op. at 14835-38. As such, comity is not implicated at all, as there is no question of public international law implicated in a dispute that "involve[s] private parties concerning disputes arising out of a contract." Slip op. at 14837-38. Private international lawyers will recognize in this argument a strand of the argument that private international law can be decoupled from state law in hopes of encouraging party expectations.

One might, of course, object to such a statement of comity, for it gives short shrift to the actuality that an American court has entered an order that seeks to bind what parties can do before a foreign court. Such an action uniquely creates a conflict between sovereign powers of legislative and adjudicatory authority, and such an action necessarily brings public actors, most specifically the courts, in

conflict, even though the underlying issue is one of party autonomy.

Given recent cases reports on this blog concerning the circuit split regarding anti-suit injunctions, this case might be one to watch.

Failure of the Hague Abduction Convention: M.J. Carrascosa's fate

M. J. Carrascosa and her ex-husband P. Innes met in a bar in New Jersey in 1999. They married that year in Spain and returned to the U.S., where they both worked. Their daughter V. was born in April 2000.

The couple separated in 2004. The parties reached a settlement under which the child would live with the mother, but Innes was entitled to visit her regularly; they also agreed that the girl would not be driven out of the U.S. without the written consent of the other parent. In January 2005, M.J. travelled to Spain with his daughter and settled in Valencia without permission from the father. Innes got a divorce sentence and the custody of the child in the U.S., while the Spanish courts ruled on the same but in favour of MJ Carrascosa. Innes asked the Spanish courts to apply the Hague Convention on child abduction, which is in force both in Spain and in the USA. The Spanish justice held that the marital agreement was a mere declaration of intent, which also unduly limited the freedom of establishment guaranteed by the Spanish Constitution; the custody of the girl belonged to the mother, the transfer of the minor had not been unlawful, and therefore the Convention was not applicable. US courts think otherwise. Apparently the problem lies in the lack of a uniform meaning of the right of custody.

Carrascosa went to U.S. to stand trial in 2006, carrying the Spanish sentences. She was arrested and is imprisoned ever since. Last Thursday she was found guilty by a jury in New Jersey of a crime of obstruction of justice and eight others for failure to comply with what the U.S. courts decided on the custody of the child. The punishment will be decided on 23 December; Innes will appear before the judge as victim and state which penalty he would like. M.J. faces a sentence of

ten years imprisonment, though optimistic voices indicate she might get only five. As she has already served more than half, she could be released immediately.

V. lives in Valencia with her grandparents. Since 2006, she has not seen neither her mother nor her father.

Source: El País, Sunday 15 November 2009.

(See also Charles Kotuby's post on the subject)

Immunity of CIA Agents for Abduction in Italy

There are interesting posts on this issue at EJIL: Talk! by Apo Akande and Marko Milanovic.

… an Italian Court has convicted 23 American agents (including the former head of the CIA in Milan) and 2 Italian intelligence agents for their part in the abduction and rendition of a muslim cleric Abu Omar. Abu Omar was taken from the streets of Milan to Egypt where he claimed to have been tortured. It was alleged that this act of "extraordinary rendition" was carried out by a team of CIA agents with the collaboration of Italian intelligence agency (…) This case is of interest because it appears to be the first conviction of government agents alleged to be involved in the extraordinary rendition programme. It is also of interest because what we have is a conviction by the courts of one country of persons who are officials or agents of another government. The case therefore raises issues as to the immunity which State officials are entitled to, under international law, from the

criminal jurisdiction of foreign States.

Read more here.

Third Issue of 2009's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains three articles and several casenotes. The full table of content can be found here.

The first article is authored by Professor Anne Sinay Cytermann, who teaches at Paris V University. It wonders why jurisdiction and arbitration clauses are regulated differently in consumer and labour contracts (*Une disparité étonnante entre le régime des clauses attributives de juridiction et les clauses compromissoires dans le contrat de travail international et le contrat de consommation international*). The English abstract reads:

> *Although both are deemed weaker parties, the worker and the consumer do not benefit from the same protection on the international sphere, particularly as far as choice of jurisdiction clauses are concerned. Indeed, when such clauses are included in an employment contract, they are subjected to a highly restrictive regime, under which they are considered to be void when they derogate from mandatory heads of jurisdiction, while arbitration clauses cannot be invoked against the worker. On the other hand, when the same clauses appear in consumer contracts, they are exposed to a far ore liberal regime which validates in principle both choice of court and arbitration clauses. It would be preferable that a similar treatment be provided for both types of contract, along the lines of the model applicable to employment contracts.*

The second article is authored by Franco Ferrari, a professor at the University of Verona and a a visiting professor a several law schools in New York. It offers remarks on the law governing contractual obligations in absence of choice by the parties under article 4 of the Rome I Regulation (*Quelques remarques sur le droit applicable aux obligations contractuelles en l'absence de choix des parties – Art. 4 du Règlement Rome I*-):

> *A comparison between article 4 of the 1980 Rome Convention on the law applicable to contractual obligations, the commission's proposal in its 2003 Green Paper and the final version of the same provision in the "Rome I" Regulation shows that the latter, ostensibly a compromise between the Convention's flexibility and the proposal's rigid system of connecting factors, is in fact very close to the original model, at least such as it was implemented by the courts in the various Contracting States. Thus, while the Commission had attempted to correct the Convention's principle of proximity by introducing greater certainty in the form of rigid and autonomous connecting factors, article 4 of the Rome I Regulation, which, like the Commission's proposal, does indeed contain a list of (eight, non exclusive) connecting factors, subjects these to an escape or exception clause similar to that of the Convention, except for the fact that the negative conditions which trigger the clause are stricter. The court must examine of its own motion whether these requirements are fulfilled, even when the contract comes the difference between the Convention, in which the proximity principle presided over the determination of the applicable law in the absence of party choice, and the Regulation in which the role of this principle is less formally apparent, is in fact very limited.*

In the last article, Professor Petra Hammje from Cergy University briefly presents a recent addition to the French civil code providing a choice of law rule for civil unions. There is not abstract, but I'll report shortly on this.

Finally, I am glad to report that the *Revue Critique* has recently been put online and that those articles can now be downloaded.

Dámaso Ruiz-Járabo Colomer

Advocate General Dámaso Ruiz-Jarabo Colomer has passed away in Luxembourg. Born in 1949, Mr Dámaso Ruiz-Jarabo Colomer was Judge and then Member of the Consejo General del Poder Judicial (General Council of the Judiciary of Spain). He worked as professor of Administrative Law and served as Head of the Private Office of the President of the Consejo General del Poder Judicial. He was an ad hoc Judge at the European Court of Human Rights and Judge at the Tribunal Supremo (Supreme Court of Spain) from 1996. Since 19 January 1995 he was also Advocate General at the Court of Justice. Among his writings we may recall the book "El Juez nacional como juez comunitario" (Civitas, 1993), or the articles "Los derechos humanos en la Jurisprudencia de Tribunal de las Comunidades Europeas" (Poder Judicial, 1989, pp. 159-184); "Técnica Jurídica de protección de los derechos humanos en la Comunidad Europea" (Revista de Instituciones Europeas, 1990, pp. 151-186); "La jurisprudencia del Tribunal de Justicia sobre la admisibilidad de las cuestiones prejudiciales" (Revista del Poder Judicial, 1997, pp. 83-114); "La réforme de la Cour de Justice opérée par le Traité de Nice et sa mise en oeuvre future" (Revue Trimestrielle de Droit Euopeen, 2001, pp. 705-725); "Los Tribunales constitucionales ante el Derecho comunitario" (Estudios de Derecho Judicial, 2006, pp. 185-202), or the recent "El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa" (Noticias de la Unión Europea, 2009, pp. 31-40). As Advocate General he worked in many fields, including Private International Law. He will be remembered among us for his opinion in cases as Lechouritou (as. C- 292/05, on the Brussels Convention), Deko Marty (as. C- 339/07, on Regulation num. 1346/2000 of 29 May 2000 on insolvency proceedings) Roda Golf (as. C-14/08, concerning Regulation num. 1348/2000 on the service of documents).

May he rest in peace.

Publication: Hess, Europäisches Zivilprozessrecht

Prof. Dr. Burkhard Hess (Heidelberg) has published a comprehensive work on European Law of Civil Procedure:

Europäisches Zivilprozessrecht

(C.F. Müller 2010. XXXII, 752 pages, Hardcover 128 EUR; ISBN 978-3-8114-3304-5)

The publication provides an analysis of the European Community's legislative competences including the new legal situation under the Treaty of Lisbon, the different instruments of European procedural law, their interpretation and the relationship between the different Community instruments. In addition, the book discusses the preliminary reference procedure provided by Art. 234 EC and gives an outlook on the future developments of European procedural law as well as the possibility of creating a uniform code of European civil procedure.

In particular, the book analyses all relevant Community instruments:

- Brussels I Regulation
- Brussels II bis Regulation
- legal instruments on Judicial Assistance (Service of Documents, Taking of Evidence, Legal Aid)
- Insolvency Regulation
- European Order of Payment Procedure
- European Enforcement Order for Uncontested Claims
- Small Claim Procedure
- Maintenance Regulation
- Directive on Mediation

More information on this book can be found here.

Conference on the Role of Ethics in International Law

Some of our readers will be interested in the following conference this Friday in Washington, D.C.

The Role of Ethics in International Law

Event Information
Friday, November 13, 2009 / 8:30 AM
Tillar House/Cosmos Club
Washington, D.C.

Each year, the International Legal Theory Interest Group of the American Society of International Law convenes a special conference to consider an important theoretical issue in international law. This year, the conference will focus on the Role of Ethics in International Law. Special attention will be paid both to the role of ethics in public and private international law, as well as to normative and theoretical perspectives. The panels will feature the following distinguished scholars.

The Role of Ethics in Public International Law
Moderator: Brian Lepard, University of Nebraska School of Law
Roger P. Alford, Pepperdine University School of Law, *Moral Reasoning in International Law*
Oona A. Hathaway, Yale Law School, *Why Do States Comply With International Law?*
Edward T. Swaine, George Washington University Law School, *Breaching*

The Role of Ethics in Private International Law
Moderator: Trey Childress, Pepperdine University School of Law
Lea Brilmayer, Yale Law School, *The Ethical Problem in Private International Law*
Perry Dane, Rutgers School of Law, *The Natural Law Challenge to Choice of Law*
Dean Symeon C. Symeonides, Willamette University College of Law, *The Quest for*

Multistate Justice

Normative and Theoretical Perspectives
Moderator: Tim Sellers, Baltimore University School of Law
Samantha Besson, University of Fribourg/Duke University School of Law, *The Nature of Human Rights Theory*
H. Patrick Glenn, McGill University, *The Ethic of International Law*
Mary Ellen O'Connell, Notre Dame Law School, *Finding*Jus Cogens*: Preemptory Norms and Natural Law Process*

Lunch will be served as part of this free conference for ASIL members ($15.00 for non-ASIL members). For further information, see here.