Postdoctoral Research Position in Louvain

The Chair of European Law of the Université Catholique de Louvain is seeking to recruit a postdoctoral fellow for next academic year.

This post is opened in the context of a research project on the relationship between private international law and competition law, which is financed by the European Commission. The work will predominantly focus on collective action/redress issues in civil litigation related to breach of competition law.

The application deadline is June 30, 2009 and the contract would start in September 2009.

The Université Catholique de Louvain (UCL) was established in 1425 and continues to be committed today to the highest standards in education and research. Located in Louvain-la-Neuve and Brussels, the UCL campuses welcome 21.000 students and employ 5.000 academics, researchers and support staff. In that respect, UCL is by far the largest French-speaking university of Belgium and one of the largest in the world. The UCL law school (located in Louvain-la-Neuve) is as old as the university and offers a full range of law degrees. Many of its faculty members are leaders in their respective fields and are part of European and international research networks.

The Chair of European Law was established in 2007 to further strengthen the law school's resources in the area of European Union law. In terms of research, the Chair focuses on the study of tools and techniques developed at EU level to manage legal diversity and promote integration. Recently, the Chair has received significant funding from the European Commission to explore and offer solutions to various coordination issues raised by the implementation of EC competition law (Regulation 1/2003) and antitrust litigation, in particular damages claims. The project is carried out in partnership with the "Collège européen" of University Paris II Panthéon-Assas (Professors L. Idot and C. Kessedjian) and the Max Planck Institute for International and Comparative Law (Prof. J. Basedow).

In that framework, the Chair of European Law is seeking to recruit a fulltime Postdoctoral Researcher for a one-year period starting in September 2009. The postdoctoral researcher will be attached administratively to the Charles De Visscher Center for International and European Law, a team of about 15 academics whose research interests cover a broad range of international and European law topics. In practice, he/she will work in close contact with Professor Stéphanie Francq, the holder of the Chair of European Law, and other researchers involved in the project financed by the European Commission.

The position is open for a promising researcher in law of English mother tongue (or fluent in English) interested in undertaking in-depth research in relation to collective action/redress issues in the field of competition law (aside from his/her own research projects). Preference will be given to researchers who have already worked on competition and/or conflict-of-laws issues in the context of the European Union. The position will involve some management tasks (assistance in the organization of a research seminar and an international conference) but no teaching or tutorial assignment.

Candidates for the position must evidence the following qualifications:
- *A doctorate or equivalent degree in law (or a doctoral manuscript approved before the application deadline)*
- *Research experience and publications commensurate with the stage at which the candidate finds him- or herself in his or her career;*
- *Interest and ability to carry out inter-disciplinary and collective research;*
- *Languages: English mother tongue (or fluency demonstrated by prior professional experience); French (at least passive knowledge) and ideally German (at least passive knowledge).*

***Terms of employment**. Post-graduate research grants at UCL amount to approximately (but not less than) €2000/month (net), depending on seniority, and, depending on the nationality of the recipient, include access to the Belgian welfare system and thus health benefits. The post-graduate researcher will also benefit from private office space, access to modern computing facilities and to the library and other academic resources generally available to faculty members and the scientific staff. In addition, he/she will benefit from the daily interactions with other members of the Charles De Visscher Center for International and European Law and, generally, from access to the whole UCL*

legal community.

***Applications**. Applications and accompanying documents should be submitted before June 30, 2009 to the following three addressees: Prof. Stéphanie Francq (Holder of the*
Chair of European Law – Stephanie.Francq@uclouvain.be), Prof. March Fallon (President of the Charles De Visscher Center for International and European Law –
Marc.Fallon@uclouvain.be) and Damien Gerard (Research Fellow at the Chair of European Law – Damien.Gerard@uclouvain.be). Applications should indicate how the
candidate meets the requirements set out above and should include a curriculum vitae, copies of sample articles and/or papers and two letters of references. The most promising
candidates will be contacted for a meeting or a telephone interview in early July 2009.

***Information**. For further questions please contact Ms. Rita Vandenplas, secretary of the Chair of European Law at Rita.Vandenplas@uclouvain.be or +32 (0)10 474773 or Mr*
Damien Gerard, Research Fellow at the Chair of European Law: Damien.Gerard@uclouvain.be or +32 (0)10 474768.

West Tankers and Indian Courts

What is the territorial scope of *West Tankers*? It certainly applies within the European Union, but does it prevent English Courts from enjoining parties to litigate outside of Europe?

In a judgment published yesterday (*Shashou & Ors v Sharma* ([2009] EWHC 957 (Comm)), Cook J. ruled that *West Tankers* is irrelevant when the injunction enjoins the parties from litigating in India in contravention with an agreement providing for ICC arbitration in London.

Since India has not acceded to the EU (and is not, so far as I am aware, expected ever to do so), why was West Tankers even mentioned ?

The case was about a shareholders agreement for a venture in India between Indian parties. It provided for the substantive law of the contract to be Indian Law.

Cook J. held:

23 It is common ground between the parties that the basis for this court's grant of an anti-suit injunction of the kind sought depends upon the seat of the arbitration. The significance of this has been explored in a number of authorities including in particular ABB Lummus Global v Keppel Fels Ltd [1999] 2 LLR 24, C v D [2007] EWHC 1541 (at first instance) and [2007] EWCA CIV 1282 (in the Court of Appeal), Dubai Islamic Bank PJSC v Paymentech [2001] 1 LLR 65 and Braes of Doune v Alfred McAlpine [2008] EWHC 426. The effect of my decision at paragraphs 23-29 in C v D, relying on earlier authorities and confirmed by the judgment of the Court of Appeal at paragraph 16 and 17 is that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. Not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. Subject to the Front Comor argument which I consider later in this judgment, the Court of Appeal's decision in C v D is to be taken as correctly stating the law.

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35 Mr Timothy Charlton QC on behalf of the defendant submitted that the landscape of anti-suit injunctions had now been changed from the position set out by the Court of Appeal in C v D by the decision of the European Court of Justice in the Front Comor – Case C185/07 ECJ [2009] 1 AER 435. There, an English anti-suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be incompatible with Regulation 44/2001. Although it was conceded that the decision specifically related to countries which were subject to Community law, it was submitted that the reasoning of both the Advocate General and the court should apply to countries which were parties to a convention such as the New York Convention. Reliance was placed on paragraph 33 of the European Court's judgment where, having found that an anti-suit injunction preventing proceedings being pursued in the court of a Member State was not compatible with Regulation No 44/2001, the court went onto say that the finding was supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will at the request of one of the parties refer the parties to arbitration, unless it finds that

the said agreement is null and void, inoperative or incapable of being performed. The Advocate General, in her Opinion said "incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself

36. It is plain from the way in which the matter is put both by the European Court of Justice and the Advocate General, that their concern was to show that there was no incompatibility or inconsistency between the position as they stated it to be, as a matter of European Law, and the New York Convention. This does not however mean that the rationale for that decision, which is binding in Member States, applies to the position between England on the one hand and a country which is not a Member State, whether or not that State is a party to the New York Convention. An examination of the reasoning of the European Court, and the Advocate General reveals that the basis of the decision is the uniform application of the Regulation across the Member States and the mutual trust and confidence that each state should repose in the courts of the other states which are to be granted full autonomy to decide their own jurisdiction and to apply the provisions of the Regulation themselves. Articles 27 and 28 provide a code for dealing with issues of jurisdiction and the courts of one Member State must not interfere with the decisions of the court of another Member State in its application of those provisions. Thus, although the House of Lords was able to find that anti-suit injunctions were permitted because of the exception in Article 1(2)(d) of the Regulation which excludes arbitration from the scope of it, the European Court held that, even though the English proceedings did not come within the scope of the Regulation, the anti-suit injunction granted by the English court had the effect of undermining the effectiveness of the Regulation by preventing the attainment of the objects of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters, because it had the effect of preventing a court of another member state from exercising the jurisdiction conferred on it by the Regulation (paragraph 24).

37. None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v D would now have to be decided differently. Both the USA (with which C v D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contracting states can refuse to recognise or enforce the award once made.

38. The Regulation provides a detailed framework for determining the jurisdiction of member courts where the New York Convention does not, since it is concerned with recognition and enforcement at a later stage. There are no "Convention rights" of the kind with which the European Court was concerned at issue in the present case. The defendant is not seeking to enforce any such rights but merely to outflank the agreed supervisory jurisdiction of this court. What the defendant is seeking to do in India is to challenge the award

(the section 34 IACA Petition) in circumstances where he has failed in a challenge in the courts of the country which is the seat of the arbitration (the ss.68 and 69 Arbitration Act applications). Whilst of course the defendant is entitled to resist enforcement in India on any of the grounds set out in Article V of the New York Convention, what he has done so far is to seek to set aside the Costs Award and to prevent enforcement of the Costs Award in England, in relation to a charging order over a house in England, when the English courts have already decided the matters, which plainly fall within their remit. The defendant is seeking to persuade the Indian courts to interfere with the English courts' enforcement proceedings whilst at the same time arguing that the English courts should not interfere with the Indian courts, which he would like to replace the English courts as the supervisory jurisdiction to which the parties have contractually agreed.

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39. In my judgment therefore there is nothing in the European Court decision in Front Comor which impacts upon the law as developed in this country in relation to anti-suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v D).

Hat tip: Hew Dundas, Jacob van de Velden

Article on Google Book Search Settlement

Yesterday's issue of the *Frankfurter Allgemeine Zeitung* (***FAZ***) contains an interesting article on the Google Book Search Settlement written by ***Prof. Burkhard Hess:***

The settlement concerns a class action lawsuit between Google and – as plaintiffs – the Authors Guild, the Association of American Publishers as well as individual authors and publishers about books scanned for the Google Book Search without the authors' consent. Basically, the proposal for the settlement provides on the one side the payment of compensation for class members and the establishment of a registry of rights to books while it contains on the other side an authorisation of Google to scan books, maintain an electronic database and to make worldwide commercial uses of books.

The problematic issue the present article is dealing with, is the opt-out-mechanism provided by the settlement: Authors who do not object within the opt-out deadline (which has been extended until 4 September 2009) will be bound by

the settlement. Thus, authors are "compelled" to take action if they don't want to be bound by the settlement. In other words – the opt-out mechanism is meant to substitute the authors' consent in the digitalisation and marketing of their books.

Hess points out in his article that the strategy of an opt-out mechanism might involve difficulties in view of the Berne Convention for the Protection of Literary and Artistic Works since this Convention guarantees a certain minimum standard of protection: In his article, *Hess* raises doubts whether the opt-out mechanism – which would lead to an automatic deprivation of the authors' copyright – meets the requirements of this protection standard.

With regard to the fairness hearing – which will take place in New York on 3 September – *Hess* suggests that it is not only the concerned authors who should intervene – rather he suggests that also the German Federal Government could do so, as an amicus curiae, in order to submit the reservations against the settlement.

The article titled "Es wird Zeit, dass die Bundesregierung eingreift" can be found (in German) also online on the website of the FAZ.

China Antitrust Gets Global

In an interesting Editorial, the *Financial Times* discussed yesterday recent rulings of Chinese authorities demonstrating their willingness to enforce Chinese anti-monopoly law in respect of global deals. Indeed, the *FT* reports that two out of three of the deals had only secondary implications in China (other reports on the deals can be found here and here).

As the *Editorial* notes, an interesting consequence is that Chinese law will only be another legislation purporting to reach global deals:

> *The three rulings … show that Beijing will not hesitate to intervene in largely extra-territorial deals. That means China has joined the US and the European Union as a global competition referee, providing M&A lawyers with a fresh set*

of problems to wrestle with.

What is too bad for M&A lawyers, of course, is that you cannot really pick up one of the relevant laws. The traditional choice of law methodology does not work. Each forum is concerned with the protection of its own market, and does not really consider applying foreign law. You could give a variety of rationales for that result, but the most common is probably that antitrust laws are mandatory rules.

So your options are either to develop a regime for the resolution of conflicts of mandatory rules, or hope that the authorities of the relevant markets will conclude agreements on the application of their laws, as the U.S. and the E.U. have done. I wonder whether there is any similar agreement with China.

BIICL Seminar on West Tankers

The British Institute for International & Comparative Law are hosting a seminar on Tuesday 12th May (17.30-19.30) entitled *Enforcing Arbitration Agreements: West Tankers – Where are we? Where do we go from here?* Here's the synopsis:

> *The February 2009* West Tankers *ruling of the European Court of Justice has the unintended consequence of disrupting the flow of arbitrators' powers. The precise extent to which these are affected remains unclear, however. In its ruling, the Court stated:*
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> ***"It is incompatible with Council Regulation (EC) No 44/2001 … for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."***
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> *Following this ruling essentially two questions arise: "Where are we?" and "Where do we go from here?". The former question involves an assessment of West Tankers' immediate implications. The second turns on an emerging consensus, encompassing comments from at least Germany, France and the*

> *United Kingdom, that legislative change is needed to attend to the unsatisfactory state of the law in this context. The Heidelberg Report 2007 on the Brussels I Regulation proposes amendments bringing proceedings ancillary to arbitration within the Regulation's scope, and to confer exclusive jurisdiction on the courts of the state of the arbitration. Should this proposal be supported?*
>
> *The Institute has convened leading practitioners and academics, including one of the authors of the Heidelberg Report, to rise to the challenge of answering these questions. There will be ample occasion for discussion, so those attending are encouraged to share their thoughts and ideas.*
>
> ***2 CPD hours may be claimed by both solicitors and barristers through attendance at this event.***

Chair: The Hon Sir Anthony Colman, Essex Court Chambers

Speakers:
Alex Layton QC, 20 Essex Street; Chairman of the Board of Trustees, British Institute of International and Comparative Law
Professor Adrian Briggs, Oxford University
Professor Julian Lew QC, Head of the School of International Arbitration (Queen Mary), 20 Essex Street
Professor Thomas Pfeiffer, Heidelberg University; co-author of the Heidelberg Report 2007
Adam Johnson, Herbert Smith
Professor Jonathan Harris, Birmingham University and Brick Court Chambers

Details on prices and booking can be found on the BIICL website.

If you want to do your homework before the event, you might want to visit (or revisit) our West Tankers symposium, not least because four of the speakers at the BIICL seminar were also involved in our symposium.

Garsec discontinued

Readers may recall that a special leave application from the interesting *forum non conveniens* case in the New South Wales Court of Appeal, *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682, was to be heard by the High Court. My previous posts are here and here. The case concerned an alleged contract for the sale of an old, rare and beautiful manuscript copy of the Koran by Garsec to the Sultan for USD 8 million. The Court of Appeal unanimously dismissed an appeal from a decision staying the proceeding on *forum* grounds.

One of the key issues between the parties was whether an immunity afforded to the Sultan in the Brunei Constitution would be applicable in proceedings before Australian courts. That issue was said to turn on the characterisation of that immunity as substantive or procedural, according to Australian notions of that characterisation. The Court of Appeal concluded that it was substantive.

Unfortunately, we will not now have the High Court's views on the question, as the applicant discontinued its application to the High Court. There are some clues to the possible thinking of at least some judges, however, in the transcript of the applicant's original special leave application before Gummow, Heydon and Kiefel JJ. On that application, Gummow J suggested that the question was really one of the "essential validity" of the contract at issue, and that this was governed by the proper law of the contract, which was accepted to be the law of Brunei. Separately, there was debate between the parties as to whether the appropriate approach was to characterise different aspects of Brunei law as procedural or substantive, according to Australian notions of that dichotomy. While that seems to be the hitherto orthodox approach, discussion in the application raises the possibility that the High Court may reconsider it in a future case.

Ph.D. Grant of the International Max Planck Research School for Maritime Affairs

The International Research School for Maritime Affairs at the University of Hamburg will award for the period commencing 1 September 2009 **one Ph.D. grant** for a term of two years (with a possible one year extension).

The particular area of emphasis to be supported by this round of grants is **Maritime Law and Law of the Sea**.

Deadline for applications is 30 June 2009.

More information on the application requirements, the application procedure and the scholarship can be found here.

Nepal Signs 1993 Hague Adoption Convention

The report of the Hague Conference is here.

Article on the Dichotomy of

Substance and Procedure

Martin Illmer has written an article titled:
“Neutrality matters – Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law”

The article is published in Civil Justice Quarterly 28 (2009) 237 et seq.

The abstract reads as follows:

> *The so-called dichotomy of substance and procedure is a classic problem of every system of private international law. In the emerging European system established by the Rome Regulations the dichotomy is addressed only in a fragmented way lacking a general concept. Aiming at an autonomous European concept, it is argued that one should abandon the common terminology which contrasts substance and procedure, since it disguises the real issue – drawing the line between the realms of the lex causae and the lex fori. To draw this line, the author suggests the criterion of neutrality, illustrated by various examples, which is based on systemic interests of European private international law, the efficiency of enforcing rights in foreign courts and the parties’ interests in predictability and reduced time and costs of cross-border litigation, whereas the criterion of inconvenience is rejected.*

French Supreme Court Keeps Flashairlines Case in France

In a previous post, I had reported how the Paris Court of Appeal had accepted to rule on its jurisdiction and to decline it in order to send back a case to the United States.

French victims of a plane crash in Egypt had first sued Boeing and some of its subcontractors in Los Angeles. The District Court had declared itself *forum non conveniens*, but made the dismissal conditional on "*a French Court's acceptance of jurisdiction*". The French victims had subsequently initiated proceedings in France for the sole purpose of obtaining a declaration that French courts lacked jurisdiction. The Paris Court of appeal had entertained the claim and had indeed accepted to decline jurisdiction.

Today, the French Supreme Court for private and criminal matters (*Cour de cassation*) reversed and set aside the judgment of the Paris Court of appeal. It did so, however, on very narrow grounds. It held that, as a matter of French civil procedure, no appeal was allowed from the first instance court to the Paris court of appeal. This is because the first instance court had only ruled on a procedural point (the admissibility of the jurisdictional challenge), and no appeal can be immediately lodged against such decisions under French civil procedure.

The consequence is that the parties are now back before the first instance court of Bobigny. The interim procedural decision had declared that a party could not possibly file suit before a court and then challenge its jurisdiction. Such challenge had been held inadmissible, and the Bobigny Court had directed the parties to argue the merits of the case. Instead, the parties had appealed. The appeal was dismissed and the parties are now meant to get back to where they were, i.e. the merits of the case.

After the judgment of the Court of appeal declining jurisdiction, the plaintiffs hoped to be able to get back to the U.S. Court and argue that, in fact, there was no available court in France, as French courts had declined jurisdiction. As of today, there is a French court available. The plaintiffs must now argue the merits of the case before the first instance court. An appeal will then be available where the parties will have an opportunity to challenge the first instance decision, on the merits but also on the admissibility of the jurisdictional challenge (again).