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.

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.

Dallah: French Court Pays No Attention to Lords' Lecture

The Paris Court of Appeal ruled yesterday on the action introduced by the Government of Pakistan to set aside the award which had ordered it to pay over USD 20 million to Dallah.

The Court found that the arbitral tribunal had been right to retain jurisdiction in this case, and dismissed the action of Pakistan.

We had already reported on the English decisions which had denied enforcement of this award in the United Kingdom. Quite remarkably, the English Court of appeal and then the UK Supreme court held that, **under French law**, the arbitral tribunal did not have jurisdiction.

It seems that French judges were unimpressed by the lectures that Lord Collins and Lord Mance gave on the French law of arbitration at this occasion.

Someone must now find a solution to this mess: Twickenham?

More on the reasons of the French court soon.

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.

O'Hara and Ribstein on Conflict Rules and Global Competition

Erin A. O'Hara, who is a professor of law at Vanderbilt Law School, and Larry E. Ribstein, who is a professor of law at the University of Illinois College of Law, have posted Exit and the American Illness on SSRN. Here is the abstract:

> This essay, prepared for a book on the effect of regulatory, liability, and

litigation inefficiencies on the global competitive position of the U.S., focuses on the role of the US federal system. We show that, although multiple US states offer significant potential for jurisdictional choice to address misguided or inappropriate law, this system is only a partial solution to these problems and can itself be a source of bad law and excessive litigiousness. Federal law and enforcement of contractual choice-of-law, choice-of-court, and arbitration clauses provide some, but only partial, relief. As a result, choice of law and jurisdiction rules potentially expose firms that do business nationally or internationally to oppressive law in any of the US states. Without reform of the rules regarding jurisdictional choice the US is losing an opportunity to exploit the edge in international competition it might get from its federal system.

Publication: Liber Amicorum Bernardo Cremades

Bernardo Maria Cremades Sanz Pastor, University professor and lawyer of the Ilustre Colegio de Abogados of Madrid, former Vice President of the London Court of International Arbitration, and member of the ICSID Panels of Conciliatiors and Arbitrators, is undoubtedly the Spanish best known and most recognised legal professional in international arbitration. He has been, and remains, the great master of arbitration in Spain; but his brilliant career is admired far beyond our borders, making him the best of our ambassadors. It is therefore no surprise that the Spanish Arbitration Club has decided to pay tribute to his long career with the publication of a book that gathers the contributions of more than seventy experts in the field: prestigious specialists from around the world that have paid homage to Bernardo Cremades with studies, written primarily in English, that cover the most important fields of arbitration.

Click here to see the table of contents of the book (publishing house: La Ley. ISBN/ISSN: 978-84-8126-590-3)

Fourth Issue of 2010's Belgian PIL E-Journal

The fourth issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was released at the end of December.

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue offers one article in English from Herman Verbist on *Investment arbitration under public scrutiny and the new European competence in the field*.

The issue can be freely downloaded here.

Journal of Private International Law Conference 2011 (Milan) – Programme and Registration

The editors of J.Priv.Int.L are very pleased to announce that the **4th Journal of Private International Law Conference will take place in the University of Milan from Thursday 14th April 2011 at 2pm until Saturday 16th April at 5pm**. Over 50 early career papers are expected in parallel sessions on Thursday afternoon and Friday morning and 24 papers from experienced academics on Friday afternoon and Saturday.

- The fees for the conference are:

1. full price: 100 euros;

2. academics: 50 euros
3. students (undergraduate and postgraduate) and speakers: free

- The price for the dinner on Friday evening is 60 euros
- The price range for University accommodation per night is between 45-100 euros
- The price range for hotel accommodation per night is between 125-220 euros.

Accommodation has been reserved until the end of February 2011 and will be allocated on a first come first service basis. For registration to the conference and for further details, as well as to book any University accommodation, please contact Dr Giuseppe Serranò and Paola Carminati at jpil_2011@unimi.it. For any other accommodation, please directly contact the hotel at issue, quoting the participation in the *JPIL 2011 conference*.

Programme

Thursday 14 April 2011: 14.00-15.45

Group 1 – Treatment of Foreign Law, Preliminary Questions, PIL Treaties

- C. Azcárraga Monzonís, The urgent need of harmonization of the application of foreign laws by national authorities in Europe
- A. Gardella, Foreign law in member States' courts and its relationship with European Union law
- S. Gössl, The Preliminary Question in European Private International Law
- S. Grossi, An international convention on conflict of laws: the path to Utopia?
- T. Kyselovská, Bilateral (Multilateral) Treaties on Legal Aid as Sources of Law in the European Judicial Area

Group 2 – Jurisdiction in civil and commercial cases

- A. Arzandeh, Twenty five years of Spiliada
- U. Grusic, Jurisdiction in complex contracts under the Brussels I Regulation
- J. Kramberger Škerl, A. Jurisdiction over third party proceedings: articles

6/2 and 65 of the Brussels I Regulation and the countries in-between
- U. Maunsbach, New Technology, new problems and new solutions – Private International Law and the Internet Revisited

Group 3 – Family law – Adults

- J. Borg-Barthet, Family Law in Europe: Should Civil Rights be Divorced from Questions of Sovereignty?
- M. Harding, The public effect of marriage and the un-oustable jurisdiction of the English Matrimonial Courts over the financial consequences of marriage
- M. Melcher, An EU Regulation on the law applicable to registered relationships
- A. Sapota, What happened with Regulation Rome III? Seeking the way for unifying the rules on applicable law in divorce matters.
- S. Shakargy, Local Marriage in a Globalized World: Choice of Law in Marriage and Divorce

16.15-18.00

Group 4 – General PIL

- V. Macokina A new bill of Polish private international law – double edged sword?
- C. Staath, Human Rights Protection in Private International Law: the role of access to justice
- E. Tornese, Mandatory rules within the European legal system
- T. Kozlowski, Ever Growing Borders in the Ever Closer Union of the EU

Group 5 – Choice of Law in Contract

- A. Dyson, Interpreting Article 4(3) of the Rome I Regulation: Something Old, Something Borrowed or Something New?
- M. Erkan, Examining the Overriding Mandatory Rules under the Rome I Regulation and the Turkish Private International Law Perspective
- E. Lein, The Optional Instrument for European Contract Law and the Conflict of Laws
- W. Long, Mandatory Rules in Cross-Border Contracts: Is China Looking Towards the EU?

Group 6 – Recognition and enforcement of judgments

- P. Mariani, The free movement of judgements in the European Union and the CMR
- C. Nagy, Recognition and enforcement of US judgments involving punitive damages in Europe
- W. Zhang, A Comparative Research on the Exequatur Procedure within the EU and China
- G.B. Özçelik, Application of the Brussels I Regulation and property disputes in Cyprus: reflections on the Orams case

Friday 15 April 2011: 09.00-10.30

Group 7 – Choice of Law in Tort/Delict

- J. Papettas, Rome II, Intra-Community Cross Border Traffic Accidents and the Motor Insurance Directives
- D. Krivokapic, Potential impact on the US Speech Act: Influence of the Speech Act on Ongoing PIL Debate within EU and Third Countries
- J.J. Kuipers, Towards a European approach in cross-border infringement of personality rights
- T. Thiede, The protection of personality rights against supra-national invasions by mass-media

Group 8 – Family Law – children

- P. Jimenez Blanco, The Charter of fundamental rights of the European Union and international child abduction
- I. Kucina, K. Trimmings, P. Beaumont, Loopholes in the Brussels IIbis Child Abduction Regime
- A. Muñoz Fernández, Recognition of guardianships that were established abroad and preventive powers of attorney granted abroad
- F. S. ?ahin, S. Ünver, Affiliation in surrogate motherhood in private international law perspective
  M. Wells-Greco, Cross-border surrogacy and nationality: achieving full parent status

Group 9 – Competition Law and Intellectual Property

- M. Danov, Cross-border EU competition law actions: should private international law be relied upon by the EU legislator in the European context?
- P. Dolniak, The rule in Article 6 of the Rome II Regulation as a „clarification" of general rule specified in Article 4
- S. Neumann, The infringement of intellectual property rights in European private international law – meeting the requirements of territoriality and private international law
- B. Ubertazzi, Intellectual Property Rights, Exclusive (Subject-Matter) Jurisdiction and Public International Law
- N. Zhao, China's Choice-of-law Rules in International Copyright and Related Right Disputes

11.00 – 12.30

Group 10 – Trusts and insolvency

- N. Zitkevits, Recognition of trusts in the European Union countries
- R. Yatsunami, The Choice of Law Rules on Trust in Japan
- Z. Crespi Reghizzi, Jurisdiction, recognition of judgments and law applicable to reservation of title in insolvency proceedings
  A. Leandro, EU cross-border insolvency: a free zone for the anti suit injunctions?

Group 11 – Choice of Court and Arbitration

- V. Salveta, The Enforceability of Exclusive Choice-of-Court Agreements
- L. Manigrassi, Arbitration Exception and Brussels I -Time for Change? An appraisal in light of the review of the Brussels I Regulation
- N. Zambrana Tévar, A new approach to applicable law in investment arbitration
  B. Yüksel, The relevance of the Rome I regulation to international commercial arbitration in the European Union

Group 12 – Class actions, Property and Succession

- V. Ruiz Abou-Nigm, Maritime Liens in the Conflict of Laws Revisited
- M. Casado, The investigation of the debtor´s assets abroad
- K. Svobodova, Relation Between Succession Law Determined under the

EU Draft Regulation on Succession and the Lex Rei Sitae
- B. Glaspell, Global Class Actions Prosecuted in Canadian Courts

12.30 – 14.00 Lunch break

14.00-15.45

PLENARY SESSION

Theory of PIL and party autonomy

- R. Michaels, What Private International Law Is About
- T. Kono, P. Jur?ys, Institutional Perspective to Private International Law
- M. Keyes, Party autonomy in private international law beyond international contracts
- A. Mills, Party Autonomy in Non-Contractual Private International Law Disputes

15.45-16.15 Coffee break

16.15 -18.00

Connecting Factors, Law Reform and Model Laws

- E. Schoeman, The connecting factor in private international law: neglected in theory, yet key to just solutions
- I. Canor, Reform of Choice-of-Laws in Torts in the Israeli Legal System – A Normative Perception and a Comparative Perspective
- D. E. Childress III, Courts and the conflict of norms in private international law
- J.A. Moreno Rodríguez, M.M. Albornoz, The Contribution of the Mexico City Convention to the Reflection on a New Soft Law Instrument on Choice of Law in International Contracts

20.00 Conference Dinner – After Dinner Speaker is Hans Van Loon, Secretary General of the

Hague Conference on Private International Law

Saturday 16 April 2011: 09.00-10.45

Characterisation, external relations in PIL, declining jurisdiction and choice of law in contract

- G. Maher, B. Rodger, The respective roles for the lex fori, the applicable law and autonomous/harmonised concepts in international private law, with particular focus on key aspects of the law of obligations
- P. Mostowik, M. Niedzwiedz, Five Years after ECJ "Lugano II Opinion" – Its Current Developments and Further Consequences
- S. Pitel, The Canadian Codification of Forum Non Conveniens
- G. Tu, Contractual Choice of Law in the People's Republic of China: the Past, the Present and the Future

11.15-13.00

Lex mercatoria, arbitration and consumer protection

- C. Gimenez Corte, Lex mercatoria, independent guarantees and non-state enforcement
  L. Radicati di Brozolo, Conflicts between arbitration and courts in the EU: free for all, harmonization or home country control?
- S.I. Strong, Resolving mass legal disputes in the international sphere: are class arbitrations an option? lessons from the United States and Canada
  G. Rühl, Consumer Protection in Private International Law

Lunch break 13.00-14.00

14.00-15.30

Torts and Intellectual Property

- I. Kunda, Overriding mandatory rules in intellectual property contracts
- M. Lehmann, Where Do Pecuniary Damages Occur?
- C. O. García-Castrillón Private international law issues of non-contractual liability with special reference to environmental law claims

- E. Rodriguez Pineau, The law applicable to intra-family torts

Coffee break 15.30-15.45

15.45-17.00

Family law, succession, nationality and Europeanisation of PIL

- K. Trimmings, P. Beaumont, International Surrogacy Arrangements – An Urgent Need for a Legal Regulation at the International Level
- T. Kruger, J. Verhellen, Dual nationality = double trouble?
- J Fitchen, The Cross-Border Recognition and Enforcement of Authentic Instruments in the proposed European Succession Regulation
- L. Gillies, The Europeanisation of the Conflict of Laws and Third States: Scottish Perspectives

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Commission Proposal on the Review of Brussels I

The long awaited Commission proposal (COM(2010) 748/3) on the review of Brussels I has been published today. The proposed amendments are numerous and require more detailed study, but here are some of the highlights.

1) **Abolition of the exequatur.** Following the argumentation in the Green Paper on the costs, time and trouble of obtaining a declaration of enforceability in another Member State, and the abolition of the exequatur in recent specific instruments, the Commission proposal indeed provides for the abolition of the exequatur (Art. 38). However, exceptions are made for defamation cases – also excluded from Rome II – and, most interestingly, compensatory collective redress cases – at least on a transitional basis. The 'necessary safeguards' are: 1) a review procedure at the court of origin in exceptional cases where the defendant was not properly informed, similar to the review clause in specific instruments abolishing the exequatur; 2) an extraordinary remedy at the Member State of enforcement to

contest any other procedural defects which may have infringed the defendant's right to a fair trial; 3) a remedy in case the judgment is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled – in another country. The proposal also contains a series of standard forms which aim at facilitating the recognition or enforcement of the foreign judgment in the absence of the *exequatur* procedure as well as the application for a review.

2) **Extension of the Regulation to defendant's domiciled in third States.** The special grounds of jurisdiction will enable businesses and citizens to sue a non EU defendant in, amongst others, the place of contractual performance, or the place where the harmful event occurred. It further aims to ensure that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. Two additional fora are created: under certain conditions a non-EU defendant can be sued at the place where moveable assets belonging to him are located, or where no other forum is available and the dispute has a sufficient connection with the Member State concerned ("*forum necessitatis*"). Further, the proposal introduces a discretionary *lis pendens* rule for disputes on the same subject matter and between the same parties which are pending before the courts in the EU and in a third country.

3) **Enhanced effectiveness of choice of court clauses.** Another anchor is the improvement of the effectiveness of choice of court clauses, by: a) giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised, meaning that any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction; b) introducing a harmonised conflict of law rule on the substantive validity, referring to the law of the chosen court. As the explanatory memorandum states, both modifications reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.

4) **Improvement of the interface between the regulation and arbitration.** One of the most controversial issues giving rise to heated debates is whether the arbitration exception should be maintained. Art. 1 of the proposal still contains the arbitration exclusion, but adds 'save as provided for in Articles 29, paragraph 4 and 33, paragraph 3'. The proposed Article 29 includes a specific rule on the relation between arbitration and court proceedings, which obliges a court seised

of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration.

5) **Provisional and protective measures.** The proposal adds several articles concerning provisional, including protective measures. It provides that the court where proceedings on the substance are pending and the court that is addressed in relation to provisional measures, should cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted. Further, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte* (!). However, contrary to the Mietz decision, the proposal provides that provisional measures ordered by a court other than the one having jurisdiction on the substance cannot at all be enforced in another Member State, in view of the wide divergence of national law on this issue and to prevent the risk of abusive forum-shopping.

There are many more interesting proposed amendments. This proposal certainly is ambitious, but also controversial on some points. Let the negotiations and the scholarly debate begin!

Publication: Hill & Chong on International Commercial Disputes

The fourth edition of J Hill & (now) A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* has just been published by Hart. Here's the blurb:

> *This is the fourth edition of this highly regarded work on the law of*

international commercial litigation as practised in the English courts. As such it is primarily concerned with how commercial disputes which have connections with more than one country are dealt with by the English courts. Much of the law which provides the framework for the resolution of such disputes is derived from international instruments, including recent Conventions and Regulations which have significantly re-shaped the law in the European Union. The scope and impact of these European instruments is fully explained and assessed in this new edition.

The work is organised in four parts. The first part considers the jurisdiction of the English courts and the recognition and enforcement in England of judgments granted by the courts of other countries. This part of the work, which involves analysis of both the Brussels I Regulation and the so-called traditional rules, includes chapters dealing with jurisdiction in personam and in rem, anti-suit injunctions and provisional measures. The work's second part focuses on the rules which determine whether English law or the law of another country is applicable to a given situation. The part includes a discussion of choice of law in contract and tort, with particular attention being devoted to the recent Rome I and Rome II Regulations. The third part of the work includes three new chapters on international aspects of insolvency (in particular, under the EC Insolvency Regulation) and the final part focuses on an analysis of legal aspects of international commercial arbitration. In particular, this part examines: the powers of the English courts to support or supervise an arbitration; the effect of an arbitration agreement on the jurisdiction of the English courts; the law which governs an arbitration agreement and the parties' dispute; and the recognition and enforcement of foreign arbitration awards.

This is a book I have eagerly been waiting for (the 2005 edition is excellent), and it's highly recommended. Get it for **£50 from Hart Publishing**, or **£47.50 from Amazon UK**.