May 2007 Roundup of U.S. Decisions

Here's a quick roundup of significant caselaw from the U.S. Court of Appeals and Supreme Court relating to private international law issues.

Two interesting actions relating to judgment enforcement have come down from the Ninth and D.C. Circuits. The latest salvo in *Ministry of Defense for the Armed Froces of the Islamic Rep. of Iran v. Elahi*, No. 03-55015 (9th Cir., May 30, 2007), seems to complete a tortured case history that included a Supreme Court decision, and ICC decision and several appellate decisions relating to the enforcment of a judgment for wrongful death agains the Republic of Iran. Plaintiff, whose brother was allegedly assassinated by agents of the Iranian state, sought to enforce the $11.7 million default judgment he received in the United States District Court for the District of Columbia. Unable to seek satisfaction of that amount under the Foreign Sovereign Immunity Act – a conclusion that was affirmed again here on appeal – plaintiff sought a lien against a $2.8 million ICC judgment in favor of Iran from its previous breach of contract action against an American defense contractor. The Terrorism Risk Insurance Act permits such an action against "terrorist parties," provided that the judgment was not currently "at issue" before an international tribunal. Because the ICC judgment was "present[ed]," "fully adjudicated" and "reduced to judgment" in favor of Iran, and because Iran has been labelled as a "state sponsor of terrorism" since 1984, the amount currently held by the American contractor is vulnerable to attachment. Interestingly, the U.S. Government filed papers in support of Iran in this action. The full decision is available here.

The D.C. Circuit in *Termorio S.A. v. Electanta S.P.*, No. 06-7058 (D.C. Cir., May 25, 2007) refused to enforce an arbitral award from the Republic of Columbia between a state-owned entity and two American utility companies. At issue was a $60 million arbitral award against the Columbian entity. The award was made in Columbia. Immediately thereafter, various Columbian government agencies refused to comply with the award and began criminal investigations of executives who worked for the plaintiff in that action. The award was eventually vacated by a Columbian court. Plaintiff then sued in U.S. federal court to enforce the award, notwithstanding its anullment. "[R]esolving this matter with reference to . . . the

New York Convention," particularly Article V(1)(e), the court held that once an award is lawfully set aside in its place of origin, there is nothing to enforce under that Convention. An interesting discussion of the discretion of U.S. courts to enforce such awards despite a foreign anullment followed. While the court,

> *accept[ed] that there is a narrow public policy gloss on Article V(1)(e) and that a foreign judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States,'*

Plaintiffs here failed to meet this high threshold. The full decision is available here.

The Eleventh Circuit decided an interesting case applying the "most significant relationship" test to determine the law applicable to a cross-border tort of tortious interference. In Grupo *Televisa S.A. v. Telemundo Comm. Group, Inc.*, No. 05-16659 (11th Cir., May 10, 2007), a Mexican broadcast company sued its American rival in U.S. federal court alleging that it thwarted its contract with a Mexican soap opera star by offering her a competing role. The American company moved to dismiss the claim by arguing that Mexican law, which does not recognize the tort of tortious intereference with contractual relations, governs the dispute. The district court agreed and dismissed the case, holding, inter alia, that the "place of the injury" should not play an important role in this choice of law decision. The Eleventh Circuit reversed that decision. It began by reference to Section 145 of the Second Restatement, and the four "contacts" that should be considered in a tort action. It then considered the "principal location of the defendant's conduct" as the single most important factor in a "misappropriation of trade values case," and held that "the Florida contacts are both numerically and qualitatively more significant" here. Turning to the general factors in Section 6 of the Second Restatement, the court also recognized that "the relevant policies of the forum [and] other interested states," the "protection of justified expectations," "certainty, predictability and uniformity of result," and "the ease in determination of the law to be applied" counselled the application of Florida law. The full decision is available here.

Finally, the Supreme Court invited the Solicitor General to file a brief in a notable conflicts case. In Teck Cominco Metals v. Pakootas, Petitioner posed the

interesting question of,

> *[W]hether the Ninth Circuit erred in concluding, in derogation of numerous treaties and established diplomatic practice, that CERCLA (and, by extension, other American environmental laws) can be applied unilaterally to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws.*

The Petition and other briefs at that stage are available here.