U.S. Decisions: December 2006 Round-Up: Part I

December 2006 has seen a wealth of activity in the U.S. federal courts on topics of particular interest to private international practitioners. This month's U.S. round-up will divide the pertinent and most interesting cases into four primary subject-matter areas: (1) Choice of law; (2) Personal Jurisdiction; (3) International Discovery; and (4) Foreign Sovereign Immunity. Part I here will focus only on the first two issues, with Part II to follow within the next few days.

(1) Choice of Law

K.T. v. Dash, 2006 WL 3627688, (N.Y. Sup. Ct. App. Div. Dec. 14, 2006)

In this tort case, Plaintiff and Defendant, both New York residents, were on holiday in Brazil. Plaintiff alleged that she was raped by Defendant, and Defendant moved for dismissal on forum non conveniens ("FNC"), or in the alternative, the determination that Brazilian law applies to the suit. The appellate court first affirmed the trial court's denial of FNC dismissal, concluding that both parties reside in NY, many witnesses are also NY residents, and there is little burden on NY courts. Therefore, even though the events occurred in Brazil, NY is still a proper forum.

Turning to choice of law, the court first decided whether there is an actual conflict between Brazilian and NY law. To show actual conflict, defense counsel submitted an affidavit from a Brazilian lawyer claiming the elements of proving sexual assault in Brazil are much greater than those in New York. Because the affidavits were unclear and general, the court determined that defendants have not proven that an actual conflict exists.

The court nonetheless held that New York law is applicable even were a conflict to exist. Based on an interests analysis, the court held that New York is the forum with the greatest interests in both parties. Because both Defendant and Plaintiff only spent a few days while on vacation in Brazil, Brazil has little to no interest in applying its law for the suit.

The court concluded with this well reasoned discussion of the choice of law

question in tort cases:

> *[I]t is useful in our analysis to consider whether the application of the law of Brazil would thwart or threaten an important policy underlying New York's law, or, on the other hand, whether the application of New York law would frustrate any policies underlying Brazil's applicable rule of law. Defendant emphasizes that Brazil has a sovereign interest in regulating conduct within its borders, [but] the present litigation provides no proposed protection of anyone in Brazil, and, indeed, the outcome of the litigation will have no impact at all on Brazil or any of its citizens or residents. Brazil's interest in ensuring that citizens and non-citizens damaged by tortious conduct within its borders have the right to seek compensation from the tortfeasor, is in no way damaged by application of New York law in the present case. In addition, while enforcement of its rules regarding misconduct within its borders could generally be said to serve as a deterrent against future tortious conduct, the possibility of such a deterrent effect being felt in Brazil is minimal where the interaction was entirely between New Yorkers, and the matter is being addressed in a New York court. In contrast, . . . [the] application of Brazil's rule[s] could thwart New York's strong interest in providing recompense for its residents who have been injured by a sexual assault, especially if it was perpetrated by another New Yorker. So, even if the purpose of the Brazilian rule of law were said to be primarily conduct-regulating, in this context the general rule that "the law of the jurisdiction where the tort occurred will generally apply" (see Cooney, 81 N.Y.2d at 72) should not be applied. . . .We therefore conclude that New York law must govern this action, notwithstanding the occurrence of the alleged tort in Brazil and the conduct-regulating aspects of the competing rules.*

As the International Civil Litigation Blog astutely points out, this is a potentially important case giving international effect to cornerstone NY choice of law cases like *Babcock* and *Schultz*, and applying an interest analysis rather than a strict *lex loci delicti*.

The tort aspect of choice of law rules in *K.T.* must be read alongside a recent decision by the same court in a contract case. In *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 822 N.Y.S.2d 30 (N.Y. Sup. Ct. App. Div. 2006), the question presented was whether New York or New Jersey law governed a large number of excess liability insurance policies for asbestos-related claims.

Supplanting a mere "grouping of contracts" approach for a "governmental interest analysis," the court held that "where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured domicile should be regarded as the proxy for the principal location of the insured risk. As such, the state of the domicile [at the time the policy was issued] is the source of applicable law."

(2) Personal Jurisdiction

Amirhour v. Marriott Intern. Inc., 2006 WL 3499241 (N.D. Cal. Dec. 4 2006)

This is a tort claim arising from a California resident's stay at a French Marriott. The chair attached to the wall of the shower collapsed, causing the plaintiff to fracture her pelvis. As is fairly typical in international litigation, plaintiffs brought suit at home in California rather than in France. The French defendant moved to dismiss for lack of personal jurisdiction, and all defendants sought dismissal on forum non conveniens.

The court first rejected plaintiffs' claim for general jurisdiction over the MVCI Holidays France by holding that Marriott Ownership Resorts, the U.S. based defendant, did not act as general agents for the foreign defendant. Turning to specific jurisdiction, the court held that MVCI Holidays France had not "directed activity at California which would have invoked the benefits and protections of the laws of California." Newsletters and payment reminders sent to plaintiff in California where insufficient. Those newsletters and notices were only sent after Plaintiff voluntarily contracted with Marriott Ownership Resorts and expressly agreed that they could send her such notices. Accordingly, the court dismissed MVCI Holidays France for a lack of personal jurisdiction.

Marriott International, Inc., a U.S. based corporation, sought dismissal of the entire suit through forum non conveniens. The defendant contended "that this action bears no relationship to California, arose out of activity occurring in France, and will involve the application of French civil law." Analyzing the Gulf Oil Corp. v. Gilbert factors, the court concluded that both the private and public interest factors weigh in favor of keeping the suit in California. Plaintiffs limited resources and inability to successfully maintain a case in France was the decisive private factor. Further, the court held that California has an interest in the protection of its citizens. Accordingly, the court denied the motion to dismiss for

FNC.

Again, the authors at the International Civil Litigation Blog point out an interesting twist. The court acknowledged that it deviated from the general Ninth Circuit rule requiring a trial court to make a choice of law determination prior to deciding FNC. Pereira v. Utah Transp., Inc., 764 F.2d 686, 688-89 (9th Cir. 1985). Although defendants alleged throughout their papers that French substantive law would apply, they did not submit any evidence in support of this contention, foreclosing the Court from making a choice of law determination. Nevertheless, even if French law applies were to apply this case, the court noted that it would still deny defendants motion to dismiss on forum non conveniens grounds.

R.J. Reynolds Tobacco Co. v. Tuazon, Nilo D., No. 05-1525 (U.S.)

In another interesting development — or non-development — coming from the Ninth Circuit, the Supreme Court this month denied certiorari over Reynolds' attempt to clarify and limit the application of general jurisdiction for torts ocurring abroad. Plaintiff Tuazon, a long-time resident and citizen of the Phillipines, asserted claims against the tobacco company in the State of Washington for injuries he sustained from smoking in his home country. Reynolds, a North Carolina corporation, moved to dismiss the suit on jurisdictional grounds. The Ninth Circuit held that, because Reynolds sold a substantial amount of cigarettes in Washington, alongside other activities aimed at marketing those sales, the court could exercise general (or "doing business") jurisdiction over the company there, even though its place of incorporation and principal place of business was in North Carolina and the cause of action arose abroad. *See* 433 F.3d 1163 (9th Cir. 2006). Lawyers for the company argued to the Court that, under the holding of the Ninth Circuit (as well as those of the Second, Sixth, Eighth and Federal circuits), which simply weighed the "confluence" of commercial contacts with the state to find minimum contacts, large companies like Reynolds who sell products in every jurisdiction can be de facto subject to suit on any cause of action in any state. They also pointed out that the federal courts of appeals have become widely split on the manner of assessing contacts for general jurisdiction — with the First, Fourth, Fifth and Eleventh Circuits taking a qualitative rather than quantitative approach to the minimum contacts analysis for general jurisdiction — and asked the Court to accept the case and clarify the matter. The Supreme Court has upheld the assertion of general jurisdiction only once in the modern era (*see Perkins v.*

Benguet Mining Co., 342 U.S. 437 (1952)), and spoken to the issue last in 1984 (*See Helicopteros v. Hall, 466 U.S. 408 (1984)*). Though initially signalling interest in the case (by ordering a Brief in Opposition from the Respondent in September), the Court eventually denied certiorari on December 4. American law of general jurisdiction will have to wait even longer for a long-awaited clarification from the Court.

Several news sources picked-up on this cert denial, including CNN, and the SCOTUSBlog. The order of the Court can be found here.

(Disclaimer: Charles Kotuby is an attorney with Jones Day, who represented Petitioner in this matter)