November 2007 Round-Up: Focus on Anti-Suit Injunctions, The Hague Convention on the Civil Aspects of International Child Abduction, and Foreign Relations Implications of Private Lawsuits

Significant issues of private international received notable attention in the federal courts over this past month.

We'll begin with an issue that has long-tortured consensus in federal courts: anti-suit injunctions. Over three years ago, Judge Selya outlined a split of circuit authority over the "legal standards to be employed in determining whether the power to enjoin an international proceeding should be exercised." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 3161 F.3d 11 (1st Cir. 2004). The application of these standards – whichever are employed – dictates when the power "should be exercised." These decisions, however, say nothing of the threshold inquiry of when they "can be exercised." The Second and (now) Eleventh Circuits believe that the discretionary balancing test articulated by *Quaak* is triggered *only* if the domestic action is "dispositive" of the foreign action; the Ninth and First Circuits take a bit more lenient approach, and engage in a comity-analysis so long as the actions are "substantially similar."

In *Canon Latin America, Inc. v. Lantech S.A.*, No. 07-13571 (11th Cir., November 21, 2007), a party sought to enjoin a Costa Rican action that, in essence, sought damages under Costa Rican law for the unlawful termination of a exclusive distributorship agreement. The opposing party brought an action in the Southern District of Florida to declare the non-exclusivity portions of the distributorship valid. The Court of Appeals vacated an anti-suit injunction because, "strictly" speaking, the domestic action would not "dispos[e] of . . . statutory rights that are unique to Costa Rica." In a footnote, the panel noted the disagreement among the circuits; to wit, the Ninth and First Circuit have, in strikingly similar

circumstances, found the threshold inquiry satisfied and proceeded to determine whether an injunction "should" issue. *Id*. at n. 8. The decision of the Eleventh Circuit is located here.

In a second development, the Sixth Circuit has re-weighed-in on a significant disagreement governing The Hague Convention on the Civil Aspects of International Child Abduction. The pivotal question in *Robert v. Tesson*, No. 06-3889 (6th Cir., November 14, 2007) concerns how to determine a child's "habitual residence" under the Convention. The Ninth and Eleventh Circuits generally give dispositive weight to the "subjective intention of the parents" in answering this question. The Sixth Circuit, in line with the Third and Seventh Circuits, pins habitual residence on the place where there is a "degree of settled purpose from the child's perspective." The decision in *Robert*, which includes a studious examination of the Convention, its text and intent, can be found here.

Finally, the Supreme Court has granted certiorari in a significant case concerning the foreign policy implications of a private lawsuit, and will most likely receive a compelling petition to hear another. In *Republic of Phillipines v. Pimentel*, the Court agreed to consider a dispute over money stolen by the late Philippines dictator Ferdinand Marcos. The money is now in a U.S. bank account, and the court will consider whether it can be distributed to individuals asserting claims for human rights abuses against Marcos in the absence of the Republic from the case (who is asserting sovereign immunity). The ruling by the Ninth Circuit Court to allow the distribution would allegedly prejudice cases pending in the Philippines on the same issue. Appearing as amicus curiae, the Solicitor General asserts on behalf of the Republic that the willingness of lower U.S. courts to get involved "raises significant concerns," that "threatens to undermine" the ability of the United States to assert sovereign immunity in foreign courts in similar circumstances or to enforce its judgments abroad. The Ninth Circuit's decision is available here, and the Solicitor General's brief is available here.

A similar case is on the verge of Supreme Court review was previously noted on this site. *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir.) concerns claims against various multinational corporations stemming from decades of apartheid in South Africa. Remarkably, in its recent decision in *Sosa v. Alvarez-Machain*, the Court held in a footnote that this very case presents a "strong argument" for deferring to the Executive Branch, which has steadfast opposed the suit on the grounds of foreign policy. A majority of the Second Circuit panel that allowed the

claims to proceed held that outright dismissal was “premature” in light of a Supreme Court footnote. Along with the mandate of its “foreshadowing footnote,” Lyle Denniston at SCOTUSBlog points out that review by the Court would also

> *give the Justices an opportunity to clarify . . . its June 2004 ruling in the Sosa case. That decision clearly left the courthouse door ajar to claims of human rights abuses, if they were confined to “a relatively modest set of actions alleging violations of the law of nations…a small number of international norms.” [While] Justice David H. Souter, called for “judicial caution” and for “great caution in adapting the law of nations to private rights,” . . . Justice Antonin Scalia suggested that the claim of discretionary power in the U.S. courts to create rights to sue to enforce international law was deeply flawed.*

See this post for more details and links to the decision and briefs.