

A Case of Renvoi (or Something Akin to Renvoi)

Last Thursday R. Alford (Opinio Iuris) published a very interesting post on choice-of-law rules as applied to torts in Iraq. The question to be decided in *McGee v. Arkel Int'l* was what substantive law governs when a National Guardsman is electrocuted in Iraq while cleaning a Humvee due to faulty wiring of an electric generator maintained by a Defense Department contractor. Applying Louisiana choice-of-law principles, the Fifth Circuit concluded that Iraqi substantive law applied: the wrongful conduct and resulting injury occurred in Iraq, therefore Iraqi law should apply. This outcome was reached notwithstanding and in perfect awareness of Iraqi law: Order 17, passed by the Coalition Provisional Authority, tries to avoid the application of Iraqi tort and contract law to contractors working in Iraq for the U.S. Defense Department.

A couple of comments following the post are worth reading. C. Vanleenhove, PhD candidate from Belgium, has kindly sent me his own opinion, which reads as follows:

For me personally this decision is not so surprising. The Louisiana Court applies its own conflict of laws rules to determine the applicable law. It - in my view correctly - asserts that Iraqi law governs this tort. It then looks into Iraqi law to find an immunity rule but cannot find one for torts (there is only for contracts in section 4 of CPA Order 17). So it concludes that Iraqi law applies to this dispute. On a side note, the court also looks at the Iraqi conflict of laws rule in section 18 of CPA Order 17 which it interprets (literally) as referring to U.S. law as a whole (thus including the U.S. conflict of laws rules). This is in my opinion caused by the lack of a rule analog to art. 20 of the Rome I Regulation excluding a renvoi. The problem here is one of a lack of precision and conflict of laws knowledge on the part of the drafters.

What the majority in McGee seems to indicate is that if they would have been an Iraqi court interpreting the rule of section 18 of CPA Order 17, they would have read it as a reference to the law of the Sending State, including the conflict of laws rules. This is the U.S. court's opinion and there is no

guarantee that an Iraqi court will take the same view if the case was brought before them. I think it's highly likely an Iraqi court would interpret it consistent with the intent to apply the (substantive) law of the sending state.

I agree with the dissenting opinion by chief judge Jones where she says: "To say that the tort claims shall be handled "consistent with the Sending State's laws" need not include the Sending State's conflict of laws reference back to Iraq. Such an interpretation preserves the evident intent to apply the domestic law of Sending States to their contractors operating in Iraq".