Not So Fast: Canadian Courts Cannot Sit Everywhere

In an earlier post I discussed three first-instance decisions of Canadian courts, one from each of Ontario, British Columbia and Quebec, holding that the court could, at its discretion, sit outside the province.

Two of those decisions were appealed and one appeal has now been decided. In *Endean v British Columbia*, 2014 BCCA 61 (available here) the Court of Appeal has reversed the lower court's decision in British Columbia and called into question the other two lower court decisions.

The court held (at para 82) that "British Columbia judges cannot conduct hearings that take place outside the province. Such a major law reform is for the legislature to determine." The court did note that "There is, however, no objection to a judge who is not personally present in the province conducting a hearing that takes place in a British Columbia courtroom by telephone, video conference or other communication medium".

The reasoning of the Court of Appeal echoes that in a comment written about the three first-instance decisions by Vaughan Black and Stephen G.A. Pitel entitled "Out of Bounds: Can a Court Sit Outside its Home Jurisdiction?" (currently available only through access to (2013) 41 Advocates' Quarterly 503).

We're refurbishing – please excuse our dust

Many of you will have noticed that much of the functionality on the site has temporarily disappeared. This is intentional, or at least as intentional as it could be. I will not bore you with details of servers and software, backends and

frameworks, but suffice to say when all of this was upgraded, it broke the design of the site. So, I am now working on a new design which does work, but this will take me a little time. Until then, you should still see all of the posts on here, receive of all the updates, and be able to comment as appropriate.

Conclusions & Recommendations of the Experts' Group meeting on the Recognition and Enforcement of Foreign Protection Orders

The Hague Conference on Private International Law has announced that the Experts' Group on the Recognition and Enforcement of Foreign Protection Orders met in The Hague on 12 and 13 February 2014 and issued Conclusions and Recommendations. A provisional version is available here.

The final versions of the Conclusions and Recommendations, in both English and French, will be included in Preliminary Document No 4 for the attention of the 2014 meeting of the Council on General Affairs and Policy of the Hague Conference.

ECJ Rules on Geographical Scope

of Customs Regulation

On 6 February 2014, the Court of Justice of the European Union delivered its judgment in Blomqvist v. Rolex (case C-98/13).

In January 2010, Mr Blomqvist, a resident of Denmark, ordered a watch described as a Rolex from a Chinese on-line shop. The order was placed and paid for through the English website of the seller. The seller sent the watch from Hong Kong by post. The parcel was inspected by the customs authorities on arrival in Denmark, who suspended the customs clearance of the watch. Rolex established that it was counterfeit, and requested that the buyer consent to destruction, as provided by Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights ('the customs regulation'). The buyer refused. Rolex went to court and won.

On appeal, the Danish court raised the question whether an intellectual property right had actually been infringed, as required for the implementation of the customs regulation, given that, for that regulation to apply, first, there must be a breach of copyright or of a trade mark right which is protected in Denmark and, second, the alleged breach must take place in the same Member State.

The ECJ ruled:

> *26 In those circumstances the questions referred must be understood as meaning that the referring court seeks to know whether it follows from the customs regulation that, in order for the holder of an intellectual property right over goods sold to a person residing in the territory of a Member State through an online sales website in a non-member country to enjoy the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State, that sale must be considered, in that Member State, as a form of distribution to the public or as constituting use in the course of trade. The referring court also raises the question whether, prior to the sale, the goods must have been the subject of an offer for sale or advertising targeting consumers in the same State.*



27 In that regard, it must be borne in mind, first, that the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with that trade mark when that use is in the course of trade, is in relation to goods or services which are identical with, or similar to, those for which that trade mark is registered, and affects, or is liable to affect, the functions of the trade mark (Joined Cases C-236/08 to C-238/08 Google France and Google [2010] ECR I?2417, paragraph 49 and the case-law cited).

28 Second, under the copyright directive, an exclusive right is conferred on authors to authorise or prohibit any form of distribution to the public by sale or otherwise of the original of their works or copies thereof. Distribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. A trader in such circumstances bears responsibility for any act carried out by him or on his behalf giving rise to a 'distribution to the public' in a Member State where the goods distributed are protected by copyright (see, to that effect, Donner, paragraphs 26 and 27).

29 Accordingly, European Union law requires that the sale be considered, in the territory of a Member State, to be a form of distribution to the public within the meaning of the copyright directive, or use in the course of trade within the meaning of the trade mark directive and the Community trade mark regulation. Such distribution to the public must be considered proven where a contract of sale and dispatch has been concluded.

30 It is not disputed that, in the case in the main proceedings, Rolex is the holder in Denmark of the copyright and trade mark right which it claims and that the watch at issue in that case constitutes counterfeit goods and pirated goods within the meaning of Article 2(1)(a) and (b) of the customs regulation. Nor is it disputed that Rolex would have been entitled to claim an infringement of its rights if those goods had been offered for sale by a trader established in that Member State, since, on the occasion of such a sale, made for commercial purposes, use would have been made, on distribution to the public, of its rights in the course of trade. It therefore remains to be ascertained, in order to reply to the questions referred, whether a holder of intellectual property rights, such as Rolex, may claim the same protection for its rights where, as in the case in

the main proceedings, the goods at issue were sold from an online sales website in a non-member country on whose territory that protection is not applicable.

31 Admittedly, the mere fact that a website is accessible from the territory covered by the trade mark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory (L'Oréal and Others, paragraph 64).

32 However, the Court has held that the rights thus protected may be infringed where, even before their arrival in the territory covered by that protection, goods coming from non-member States are the subject of a commercial act directed at consumers in that territory, such as a sale, offer for sale or advertising (see, to that effect, Philips, paragraph 57 and the case-law cited).

33 Thus, goods coming from a non-member State which are imitations of goods protected in the European Union by a trade mark right or copies of goods protected in the European Union by copyright, a related right or a design can be classified as 'counterfeit goods' or 'pirated goods' where it is proven that they are intended to be put on sale in the European Union, such proof being provided, inter alia, where it turns out that the goods have been sold to a customer in the European Union or offered for sale or advertised to consumers in the European Union (see, to that effect, Philips, paragraph 78).

34 It is common ground that, in the case in the main proceedings, the goods at issue were the subject of a sale to a customer in the European Union, such a situation not being therefore in any event comparable to that of goods on offer in an 'online marketplace', nor that of goods brought into the customs territory of the European Union under a suspensive procedure. Consequently, the mere fact that the sale was made from an online sales website in a non-member country cannot have the effect of depriving the holder of an intellectual property right over the goods which were the subject of the sale of the protection afforded by the customs regulation, without it being necessary to verify whether such goods were, in addition, prior to that sale, the subject of an offer for sale or advertising targeting European Union consumers.

35 In the light of the foregoing, the answer to the questions referred is that the customs regulation must be interpreted as meaning that the holder of an

> *intellectual property right over goods sold to a person residing in the territory of a Member State through an online sales website in a non-member country enjoys the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State merely by virtue of the acquisition of those goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that State.*

Ruling:

> ***Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights must be interpreted as meaning that the holder of an intellectual property right over goods sold to a person residing in the territory of a Member State through an online sales website in a non-member country enjoys the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State merely by virtue of the acquisition of those goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that State.***

H/T: Bernd Justin Jutte

Conflict of Laws Bibliography 2013

I am pleased to pass on that Professor Symeon Symeonides has once again compiled a bibliography that covers private international law, or conflict of laws, in a broad sense. In particular, it covers judicial or adjudicatory jurisdiction, prescriptive jurisdiction, choice of forum, choice of law, federal-state conflicts,

recognition and enforcement of sister-state and foreign-country judgments, extraterritoriality, arbitration and related topics. You can find it here.

Thanks to Professor Symeonides for continuing to publish this incredibly helpful resource.

Pribetic on Foreign Judgments in Canada

Antonin Pribetic (Himelfarb Proszanski) has posted Recognition and Enforcement of Foreign Judgments in Canada on SSRN.

> *This paper provides an overview of the governing conflict of laws principles for the recognition or enforcement of foreign judgments, including an analysis of the recent Court of Appeal for Ontario decision in Yaiguaje et al. v. Chevron Corporation et al. and its implications for the recognition and enforcement of foreign judgments, generally. The issue of state immunity as an obstacle to foreign judgment enforcement is also considered.*

University of Missouri Call for Proposals: "Judicial Education and the Art of Judging: From Myth to

Methodology”

The University of Missouri is issuing a call for proposals for an upcoming works-in-progress conference as well as a call for papers for a student writing competition. Both of these calls are affiliated with a symposium that is being convened at the University of Missouri’s Center for the Study of Dispute Resolution on Friday, October 10, 2014.

The symposium is entitled “Judicial Education and the Art of Judging: From Myth to Methodology” and addresses a number of issues relating to the role of judges and the goals and methods of judicial education. The symposium features the Honorable Duane Benton of the United States Court of Appeals for the Eighth Circuit as keynote speaker as well as an accomplished group of judges, academics, and judicial education experts from the United States and Canada as panelists.

The day before the symposium (Thursday, October 9, 2014), the University of Missouri will be hosting an international works-in-progress conference relating to the subject matter of the symposium, broadly interpreted. Presentation proposals should be no more than one page in length and can include analyses that are practical, theoretical or interdisciplinary in nature. Participants can discuss judges at the state, federal or international level, and applications from outside the United States are particularly welcomed. Proposals for the works-in-progress conference should be directed to Professor S.I. Strong (strongsi@missouri.edu) and will be accepted until May 26, 2014. Decisions regarding accepted papers will be made in June 2014. Prospective attendees should note that there is no funding available to assist participants with their travel expenses.

The University of Missouri is also organizing an international student writing competition in association with the symposium. Papers will likely be due in August 2014, although precise details (such as the due date and the amount of any prize money associated with the competition) are still being finalized.

More information about the symposium, works-in-progress conference and student writing competition is available at the symposium website, located here. People may also contact Professor S.I. Strong (strongsi@missouri.edu) with any questions.

Please feel free to distribute this information to anyone you believe might be interested in the symposium, works-in-progress conference or writing competition. You are also welcome to cross-post this information on any blogs.

French Conference on the Future of Choice of Law Methodology

The University Paris Descartes will hold a conference on March 14 on the future of choice of law theory. Speeches will be in French.

Quel avenir pour la théorie des conflits de lois?

9h15 – Rapport introductif: Olivera Boskovic, *Universite Paris Descartes*

I – **Declenchement du raisonnement conflictuel**
Chair: Helene Gaudemet-Tallon (*Emeritus Université Paris II*)

9h45 – L'office du juge: Marie-Laure Niboyet, *Universite Paris Ouest-Nanterre-La Defense*

10h05 – La qualification: Sophie Lemaire, *Universite Paris-Dauphine*

10h25 – Unilateralisme versus bilateralisme: Stephanie Francq, *Universite catholique de Louvain*

10h45 – Discussion

II – Facteurs de perturbation
Chair: Anne Sinay-Cytermann (*Universite Paris Descartes*)

11h15 – Les lois de police: Louis d'Avout, *Universite Paris II*

11h35 – Les questions prealables: Sandrine Sana-Chaille de Nere, *Universite*

Montesquieu, Bordeaux IV

11h55 – Le renvoi: Louis Perreau-Saussine, *Universite Paris-Dauphine*

12h25 – Discussion

III – Eviction de la loi designee

Chair: Paul Lagarde *(Emeritus Université Pantheon-Sorbonne)*

14h30 – La fraude: Sandrine Clavel, *Universite de Versailles Saint-Quentin-en-Yvelines*

14h55 – L'ordre public: Pascal de Vareilles-Sommieres, *Universite Paris I*

15h15 – La clause d'exception: Pierre Berlioz, *Universite de Reims Champagne-Ardenne*

15h35- Discussion

16h05 – La clause marche interieur: Malik Laazouzi, *Universite Jean Moulin, Lyon III*

16h30 – Rapport de synthese: Horatia Muir Watt, *Sciences Po*

17h00 – Cocktail

Venue: Faculte de droit, Universite Paris Descartes (CEDAG), 10 avenue Pierre Larousse – 92 240 Malakoff

Admission is free, registration is possible with Ms Madame Albane Piejos: albane.piejos@parisdescartes.fr

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First Issue of 2014's Journal du Droit International

The first issue of the *Journal du droit international (Clunet)* for 2014 is out. It contains a number of commentaries of recent French and European decisions deciding issues of private international law.

The table of content can be accessed here.

Franzina on Sovereign Bonds and the Conflict of Laws

Pietro Franzina (University of Ferrara) has posted Sovereign Bonds and the Conflict of Laws: A European Perspective on SSRN.

> *This paper provides an account of the rules whereby courts sitting in a Member State of the European Union should decide conflict-of-laws issues relating to loans contracted by States or State-related entities involving the issue of bonds, thereby identifying the country whose legislation must govern the rights and obligations of the bondholders and of the issuing entity. After discussing the peculiar features of sovereign bonds when viewed from a conflict-of-laws perspective, the paper focuses on the choice-of-law clauses almost invariably included in the loans and on the rules governing such clauses pursuant to regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the "Rome I" regulation). The article goes on to determine the issues that must be deemed to be governed by the lex contractus and on the possible exceptions to the operation of conflict-of-laws rules, including the rules on choice of law, in accordance with the said "Rome I" regulation. In particular, the paper explores the way in which, and the extent to which, overriding mandatory provisions and the public policy exception may have a role to play in the global governance of sovereign debt crises, balancing the concerns and*

expectations of creditors, on the one hand, and the interests of distressed sovereign debtors and their populations, on the other.