New Canadian Framework for Assumption of Jurisdiction

After 13 months the Supreme Court of Canada has finally released its decisions in four appeals on the issue of the taking and exercising of jurisdiction. The main decision is in *Club Resorts Ltd v Van Breda* (available here) which deals with two of the appeals. The other two decisions are *Breeden v Black* (here) and *Editions Ecosociete Inc v Banro Corp* (here).

The result is perhaps reasonably straightforward: in all four cases the court upholds the decisions of both the motions judges and the Court of Appeal for Ontario. All courts throughout held that Ontario had jurisdiction in these cases and that Ontario was not a *forum non conveniens*.

The reasoning is more challenging, and it will take some time for academics, lawyers and lower courts to work out the full impact of these decisions. The court's reasoning differs in several respects from that of the courts below.

The court notes that a clear distinction needs to be drawn between the constitutional and private international law dimensions of the real and substantial connection test. This is an interesting observation, particularly in light of the fact that the court's own decision is not as clear on this distinction as it could be. I expect that going forward there will be different interpretations of what the court is truly saying on this issue.

The court is reasonably clear that the real and substantial connection test should not be used as a conflicts rule in itself. It is not a rule of direct application. Rather, it is a principle that informs more specific private international law rules governing the taking of jurisdiction. This is a change from the approach used by provincial appellate courts, especially the Court of Appeal for Ontario, which arguably had been using the real and substantial connection test as its rule, at least in part, for establishing jurisdiction in service *ex juris* cases.

The court states that it is establishing the framework for the analysis of jurisdiction. Going forward, a real and substantial connection must be found through a "presumptive connecting factor" which is a factor that triggers a presumption of such a connection. The presumption can be rebutted. If the

plaintiff cannot establish such a presumption, the court cannot take jurisdiction. This last point is perhaps the largest change made to the law. On the law as it stood, the plaintiff could establish jurisdiction through a variety of non-presumptive factual connections that collectively amounted to a real and substantial connection to the forum. That approach is rejected by the Supreme Court of Canada.

The court does not purport to set out a complete list of presumptive connections. It confines itself to identifying some such connections that could apply in tort cases, namely that (a) the defendant is domiciled or resident in the forum, (b) the defendant carries on business in the forum, (c) the tort was committed in the forum, and (d) a contract connected with the dispute was made in the forum. It is quite open, on the language in the decisions, as to what other presumptive connections lower courts will need to be finding in other cases. One possible solution is that lower courts will largely continue to follow the recent approach of the Court of Appeal for Ontario that the enumerated bases for service *ex juris*, subject to some exceptions, amount to such presumptive connections.

The decisions also address the test for the doctrine of *forum non conveniens*. Three points can be made about that analysis. First, the language suggests the burden is always on the defendant/moving party. Second, emphasis is placed on "clearly" in "clearly more appropriate", suggesting that it will be harder to displace the plaintiff's choice of forum. Third, the court cautions against giving too much weight to juridical advantage factors. Judges should avoid invidious comparisons across forums and refrain from "leaning too instinctively" in favour of the judge's own forum.

The decisions are not a radical break with the earlier cases but they do change the law on taking jurisdiction in several respects. In addition, the court makes several points along the way, as asides, that will impact other aspects of the conflict of laws. For example, the court confirms the propriety of taking jurisdiction based on the defendant's presence in the forum.

Yes We Can, Except in Belgium

Can France control the internet? 

Today, the French are voting to elect their next president. They may vote until 8 pm. But polls have been available since mid afternoon, and it has long been considered in France that nobody should vote knowing those polls, and pretty much the results. French law thus prohibits to publish any poll before 8 pm…

Everyone knows, however, that French law will have a hard time reaching other countries, and websites of newspapers in other countries. Whatever! French officials have declared that a team of 20 people has been surfing on the internet to locate any tortfeasor and denounce him to French prosecution services. Everybody knows where the bad guys might be: Switzerland, Belgium … Can France control Swiss and Belgian newspapers?

An additional measure has been to get nine French polling agencies to undertake to starve potential tortfeasors, by waiting until 8 to reveal the precious information…

So, have the French scared their neighbours?

Le Temps (Geneva)

> ***Pourquoi Le Temps ne publiera pas d'estimations anticipée***
>
> *Une discussion est née, en cette fin de semaine, doublée d'une radicalisation des positions, en ce qui concerne la publication anticipée des estimations de votes de l'élection présidentielle française*
>
> *Il faut savoir que les principaux instituts de sondage français mettent à disposition de leurs mandataires des estimations basées sur le dépouillement des premiers bureaux tests. Lors des précédentes élections, ces estimations étaient largement portées, au-delà des mandataires directs, à la connaissance des médias étrangers à l'Hexagone. Elles étaient sourcées et livrées de bonne grâce.*
>
> *Aujourd'hui, cette situation a considérablement changé: les neuf principaux instituts de sondage français qui recueillent et élaborent pareilles estimations*

> *ont promis de ne pas communiquer ces résultats aux médias étrangers qui ne respecteraient pas l'embargo de 20h00. Dès lors ces sondages ne sont plus accessibles que de seconde main et ne peuvent être publiés qu'au mépris des engagements pris par les instituts.*
>
> *Au vu de cette situation nouvelle, née de l'exacerbation de la polémique liée à une publication anticipée, Le Temps, après réflexion et pesée précise des intérêts, a décidé de ne publier ces estimations que dès 20h01, dans le respect des embargos décidés.*

Summary: now that we cannot get the polls directly from the polling agencies, let's obey the French embargo.

Le Soir (Brussels)

> *Toute publication est interdite en France avant 20h00, sous peine d'amendes. Mais le soir.be vous dévoile en exclu les premiers resultats.*

Summary: In France, revealing any information would be a criminal offence, but we could not care less, and here they are!

Forthcoming on *conflictoflaws.net*: France v. Le Soir !

UPDATE: French prosecution services have announced that they are investigating several Belgian media and journalists.

Two New U.S. Decisions on Argentina Sovereign Debt Cases

See this post of Ted Folkman over at *Letters Blogatory*.

One of the decisions ruled on a new attempt of NML Capital to enforce its New York judgment. We had reported earlier about attempts in France and Belgium to

enforce the same.

Love with Full Faith and Credit

Students sometimes miss concepts in their civil procedure class. This is why they should always take a conflict of laws course. Click on the picture above for additional evidence.

French Court Rules on Jurisdiction to Sue FIFA for Anti Competitive Conduct

On February 1st, 2012, the French supreme court for private and criminal matters (*Cour de cassation*) ruled that French courts had jurisdiction over a claim brought against FIFA (*Fédération Internationale de Football Association*) for anti competitive conduct.

The plaintiff was willing to begin a career as a player agent in France. He thus sought a professional licence from FIFA, which denied his application in 1994 on the ground that he had not provided a banking guarantee of Swiss Francs 200,000. The agent argued that this was a restriction to his freedom to provide services. In 1998, he petitioned the European Commission on this ground, arguing that FIFA rules were contrary European law. FIFA amended its rules in 2000, and the European Commission rejected the application. In 2007, the agent eventually sued FIFA before a French court seeking damages for anti competitive

conduct (relying both on French tort law and European competition law).

FIFA argued that the French court did not have jurisdiction under the Lugano Convention. The agent argued that It under Article 5-3, the French court had jurisdiction because his loss was directly suffered in France. FIFA, by contrast, argued that the alleged tort was committed in Zürich, where the litigious rules were adopted, and that the direct loss of the agent was suffered there as well. Only indirect financial consequences might have been suffered in France.

The *Cour de cassation* ruled that the direct and immediate loss of the agent had been suffered in France.

Scottish Court Rules on the Impact of the Trust Convention on the Distinction between Contractual and Proprietary Rights

On March 23rd, 2012, Lord Hodge issued an interesting opinion in Clark and Whitehouse Joint Administrators of the Rangers Football Club on the impact of the Hague Trust Convention and the distinction between contractual and proprietary rights for choice of law purposes.

Clark and Whitehouse were appointed administrators of the Rangers Football Club after the club met serious financial difficulties. The administrators sought directions from the Scottish court as to whether they could terminate contracts

concluded with two English Ticketus companies by which Rangers sold to Ticketus large numbers of season tickets for seats in the Ibrox stadium in each of the seasons from 2011-2012 to 2014-2015.

The administrators wondered whether they could get back the rights they had granted to Ticketus so that they could design an interesting offer for any potential buyer of the majority of shares in Rangers. The contracts concluded with Ticketus were governed by English law. According to the advice of an English QC, the rights transferred to Ticketus were irrevocable.

> *they conferred an intermediate right which was not a property right in the conventional sense but was more than a mere personal right, and they could be enforced by the grant of equitable relief which could include an order for specific performance of the rights attaching to the tickets.*

Nobody disputed, however, that Scottish law would govern any proprietary rights over property situated in Scotland.

> *[19] English law governs the meaning of the two Ticketus agreements and it is to that legal system that the court must look to interpret those agreements. But it is Scots law that determines the nature of the proprietary rights (if any) which the agreements confer in the tickets or the stadium seats.*

Ticketus submitted that the issue was not so much the law governing the property, but rather the law governing the trust which had been created by the transaction. It was further argued that

> *under Article 6 of the Hague Convention on Trusts, (…) a trust was governed by the law chosen by the settlor. Thus, (…) under Article 8 the validity of the trust, its construction and its effects were governed by English law. Article 11 provided that a trust created by the law chosen by the settlor be recognised as a trust and that meant in this case that the trust assets did not form part of Rangers' estate on its insolvency.*

Lord Hodge rejected the argument:

> *[23] (…) I note (…) that two other texts (…) assert that the lex situs applies to*

determine whether any property right has passed from a settlor. See Underhill and Hayton, "Law of Trusts and Trustees" (17th ed.) section 102.122, and Harris, "The Hague Trusts Convention" at p.19. But there is also support for the latter view in the Explanatory Report of Professor von Overbeck (http://www.hcch.net), which discusses Article 4 in paras 53-60. Professor von Overbeck, using the analogy of a launcher and a rocket, distinguishes between the act with legal effects which creates the trust (i.e. the launcher), which does not fall within the Convention, and the trust itself (i.e. the rocket) which does. He states (in para 55):

"Article 4 is intended to exclude from the Convention's scope of application both the substantive validity and formal validity of transfers which are preliminary to the creation of the trust."

He records (in para 57) concerns whether the words "assets are transferred to the trustee" covered the case of a declaration of trust by a truster-trustee and the unanimous view of the Special Commission that such acts were envisaged by Article 4. In the event, no change was made to Article 4 as it appears that it was thought that Article 4 when read with Article 2 covered the creation of a trust in that way. See also paragraph 43 of the von Overbeck report.

[24] I am therefore persuaded that the Recognition of Trusts Act 1987 does not have the effect of making the law chosen by the settlor the governing law of the steps needed to create the trust. Were it otherwise, the results would be startling as a settlor would be able to alienate property which he could not dispose of under the lex situs. It would create significant problems for the operation of insolvency law in the jurisdiction in which the asset was located. Additionally by virtue of section 1(2) of the 1987 Act it might be argued that a constructive trust arising from a judicial decision in one legal system would prevail over the lex situs if a foreign settlor could be identified.

Many thanks to Richard Frimston for the tip-off.

Conference on European Contract Law: A Law-and-Economics Perspective

On April 27 and 28 the University of Chichago's Law School will host a Conferecen on European Contract Law (University of Chicago Law School, 1111 E. 60th Street, Chicago, Il 60615 – Room V).

The annoucement on the conferece's homepage reads as follows:

> *The movement to harmonize European contract law generated various proposals for uniform statutes and optional instruments, culminating by the recent Draft Common European Sales Law. This ambitious reform envisions a uniform Sales Law for Europe with strong consumer protections, enacted by every member nation. Transactors will be able to choose this law to govern their transaction in place of existing contract law.*
>
> *The Chicago conference brings together a group of leading scholars from Europe and from the University of Chicago, exploring the law and economics perspectives of the proposed harmonization. Is such an optional statute a desirable regulatory tool? What economic goals might it serve? Are the protections enacted in it suitable? What can be learned from the American experience with uniform commercial laws?*
>
> *The conference will be hosted by the Institute for Law and Economics at the University of Chicago Law School and will take place on Friday and Saturday, April 27-28, 2012, in Chicago. It is open to the public and attendance is free. Please contact Marjorie Holme (mholme@uchicago.edu) for more details.*
>
> *The conference will be published in the Common Market Law Review (2013).*

The conference schedule reads as follows:

Friday, April 27

9:00 – 9:15 **Opening Remark**

9.15 – 12:30 **Panel I: The Law and Economics of an Optional Instrument**s

- **Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?,** *Thomas Ackermann,* Ludwig?Maximilians University, Munich
- **Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law**, *Fernando Gomez*, Pompeu Fabra University, Barcelona
- **Contract Law as Optional Law: On the Potential and Limits of Choice,** *Jan Smits,* Maastricht University
- **What Can Be Wrong with an Option? The Proposal for an Optional Common European Sales Law,** *Horst Eidenmüller*, Ludwig?Maximilians University, Munich
- **Identifying Legal Costs of the Operation of the Common European Sales Law: Legal Framework, Scope of the Uniform Law and National Judicial Evaluations,** *Simon Whittaker*, Oxford University

12:30 – 1:45 **Lunch**

1:45 – 5:15 **Panel II: A Law and Economics Critique of the CESL**

- **Regulatory Techniques in Consumer Protection: A Critique of the Common European Sales Law**, *Oren Bar?Gill*, New York University, and *Omri Ben?Shahar*, University of Chicago
- **Mistake under the Common European Sales Law**, *Ariel Porat*, University of Chicago and Tel Aviv University
- **Buyers' Remedies under the CESL: Rejection, Rescission, and the Seller's Right to Cure**, *Gerhard Wagner*, University of Bonn
- **Custom and the CESL,** *Lisa Bernstein*, University of Chicago
- **Another Look at the Eurobarometer Contract Law Survey Data,** *William Hubbard*, University of Chicago

Saturday, April 28

9:00 – 12:00 **Panel III: Harmonization and Regulatory Competition**

- **Harmonization, Heterogeneity, and Regulation: Why the Common European Sales Law Should Be Scrapped**, *Richard Epstein*, New York University, Hoover Institute, and University of Chicago

- **The Desirability of an Optional European Contract Law ? and the Impact of a Particular Code Design on this Question,** *Stefan Grundmann*, Humboldt University, Berlin
- **Harmonization, Preferences, and Convergence**, *Saul Levmore*, University of Chicago
- **The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition,** *Eric Posner*, University of Chicago
- **Response,** *Chantal Mak*, University of Amsterdam

12:00 – 1:00 **Lunch**

1:00 – 2:30 **Panel IV: Precontractual Liability**

- **Precontractual Disclosure Duties under the Common European Sales Law**, *Douglas Baird*, University of Chicago
- **CESL and Precontractual Liability from a Status to a Transaction?Based Approach**, *Fabrizio Cafaggi*, European University Institute, Florence

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Max Planck Conference on CISG and Regional Sales Law Unification

On 11 and 12 May 2012 the Max Planck Institute for Comparative and International Private Law Hamburg hosts a conference on the United Nations Convention on the International Sale of Goods (CISG). It discusses CISG vs. Regional Sales Law Unification.

More information is available here. The programme reads as follows:

FRIDAY, 11 MAY 2012

- 14.30 **Welcome,** *Prof. Dr. Jürgen Basedow*
- 14.35 **Introduction,** *Prof. Dr. Ulrich Magnus*

CISG and USA

- 14.45 **CISG vs. UCC: the positive side**, *Prof. Harry Flechtner*
- 15.15 **CISG vs. UCC: the negative side,** *Prof. Dr. Larry A. DiMatteo*
- 15.45 **Discussion**
- 16.15 **Coffee Break**

CISG and Australia

- 16.45 **CISG vs. Australian Common Law,** *Prof. Dr. Bruno Zeller*
- 17.15 **Discussion**
- 17.45 **End of Session**

SATURDAY, 12 MAY 2012

CISG and Africa

- 9.30 **CISG vs. OHADA Sales Law,** *Prof. Dr. Franco Ferrari*

CISG and Europe

- 10.00 **CISG vs. CESL,** *Prof. Dr. Ulrich Magnus*
- 10.30 **Discussion**
- 11.00 **Coffee Break**
- 11.30 **CISG, CESL and Private International Law,** *Prof. Dr. Peter Mankowski*
- 12.00 **CISG, CESL, PICC and PECL,** *Prof. Dr. Robert Koch LL.M. (McGill)*
- 12.30 **Discussion**
- 13.00 **End of Conference**

And the winner is … West Tankers (again)

Another win for the West Tankers' team in the latest round of the long running litigation. In a decision delivered on 4 April 2012 ([2012] EWHC 854 (Comm)), Flaux J held that EU law (specifically, the decision of the CJEU in West Tankers (Case C-185/07)) did not exclude the jurisdiction of the arbitral tribunal to award damages (specifically, equitable damages) for breach of an arbitration agreement by the bringing of proceedings before a national (Italian) court.

In his Lordship's view (para. 68):

> "In my judgment, arbitration falls outside the Regulation and an arbitral tribunal is not bound to give effect to the principle of effective judicial protection. It follows that the tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity."

SEC Issues Study on Cross Border Scope of Private Right of Action after Morrison

The staff of the U.S. Securities and Exchange Commission (SEC) has issued a Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934.

After the *Morrison* case and the reform of the 1934 Act for the purpose of indicating that the Act applies extraterritorially for actions involving transnational securities frauds brought by the SEC and the U.S. Department of Justice, the Dodd-Frank Act directed the SEC to solicit public comment and then conduct a

study to consider the extension of the cross-border scope of private actions in a similar fashion, or in some narrower manner, and to consider and analyze the potential implications on international comity and the potential economic costs and benefits of extending the cross-border scope of private actions.

The study eventually advances the following options regarding the cross-border reach of section 10(b) private actions:

> ***Options Regarding the Conduct and Effects Tests****. Enactment of conduct and effects tests for Section 10(b) private actions similar to the test enacted for Commission and DOJ enforcement actions is one potential option. Consideration might also be given to alternative approaches focusing on narrowing the conduct test's scope to ameliorate those concerns that have been voiced about the negative consequences of a broad conduct test. One such approach (which the Solicitor General and the Commission recommended in the Morrison litigation) would be to require the plaintiff to demonstrate that the plaintiff's injury resulted directly from conduct within the United States. Among other things, requiring private plaintiffs to establish that their losses were a direct result of conduct in the United States could mitigate the risk of potential conflict with foreign nations' laws by limiting the availability of a Section 10(b) private remedy to situations in which the domestic conduct is closely linked to the overseas injury. The Commission has not altered its view in support of this standard.*
>
> *Another option is to enact conduct and effects tests only for U.S. resident investors. Such an approach could limit the potential conflict between U.S. and foreign law, while still potentially furthering two of the principal regulatory interests of the U.S. securities laws – i.e., protection of U.S. investors and U.S. markets.*
>
> ***Options to Supplement and Clarify the Transactional Test****. In addition to possible enactment of some form of conduct and effects tests, the Study sets forth four options for consideration to supplement and clarify the transactional test. One option is to permit investors to pursue a Section 10(b) private action for the purchase or sale of any security that is of the same class of securities registered in the United States, irrespective of the actual location of the transaction. A second option, which is not exclusive of other options, is to authorize Section 10(b) private actions against securities intermediaries such*

as broker-dealers and investment advisers that engage in securities fraud while purchasing or selling securities overseas for U.S. investors or providing other services related to overseas securities transactions to U.S. investors. A third option is to permit investors to pursue a Section 10(b) private action if they can demonstrate that they were fraudulently induced while in the United States to engage in the transaction, irrespective of where the actual transaction takes place. A final option is to clarify that an off-exchange transaction takes place in the United States if either party made the offer to sell or purchase, or accepted the offer to sell or purchase, while in the United States.

Many thanks to Maria João Matias Fernandes for the tip-off.