Forum Non Conveniens and Foreign Law in Australia

A recent judgment of the New South Wales Court of Appeal contains a number of points of interest, even if the ultimate conclusion is routine and unsurprising: an Australian court refused an application for stay of proceedings on forum non conveniens grounds in a case concerning an Australian-resident plaintiff.

The facts in Fleming v Marshall [2011] NSWCA 86 were complex and multi-jurisdictional. An Australian man was killed in a plane crash in the State of South Australia. His dependent survivors, apparently based in the State of New South Wales, brought tort proceedings against the manufacturers of the aircraft and its engines who were located in the State of Pennsylvania, USA. To do so, the survivors engaged a New York firm of attorneys (who in turn engaged Pennsylvania agents) whose services were partly paid for by a litigation funder and partly by a contingency fee arrangement. The manufacturers ultimately reached a settlement with the claimants, out of which the New York attorneys claimed a success fee, and to which the attorneys attached conditions before they would pay the claimants in Australia.

The present litigation before the NSW courts was brought by the dependent survivors against the New York attorneys, as they were dissatisfied with the deductions and conditions attached to the settlement. They claimed that this amounted to breach of the contract of retainer, breach of duty of care in tort (a claim abandoned on appeal) and breach of fiduciary duty, as well as allegedly the tort of conspiracy. Significantly, the plaintiffs conceded that if New York law applied, their claim was time-barred by a now-expired 3 year limitation period, whether the claim was heard in New York or NSW.

The primary judge rejected the defendant's application for a stay on forum non conveniens grounds [[2010] NSWSC 86]. His Honour observed that 'there is no one cause and no one applicable law', and that each of the laws of South Australia, NSW and New York might be implicated. He also placed some importance on the lex loci contractus of the contract of retainer, which he considered to be most likely to be that of NSW.

On appeal, the defendants submitted that the case 'principally concerns the professional standards of lawyers practising in New York' and that the trial judge was wrong to emphasise the importance of the place of contracting at the expense of the jurisdiction with which the contract had 'the closest and most real connection' [Bonython v Commonwealth of Australia (1950) 81 CLR 486; [1951] AC 201]. The plaintiffs resisted those contentions, and also emphasised the fact that (on their account of the facts) the New York attorneys had acted through Australian agents—therefore performing at least some of the retainer in Australia.

Macfarlan JA (with whom Spigelman CJ and Sackville AJA agreed) criticised the primary judge's treatment of the lex loci contractus:

> *"The primary judge correctly treated the identification of the proper law of the contract of retainer as relevant to the question of whether New South Wales is a clearly inappropriate forum for determination of the disputes between the parties. However in determining what was the proper law of the contract (that is, that with which the transaction had "the closest and most real connection": Bonython) his Honour in my view placed undue emphasis upon the place where it was concluded. If read on its own, paragraph [38] of the primary judgment (see [43] above) would suggest that his Honour regarded the place of contracting as determining, rather than simply being relevant to, the identity of the proper law." [at [61]]*

That being the case, the Court of Appeal proceeded to decide for itself the question of whether NSW was a clearly inappropriate forum, but ultimately reached the same view as the primary judge. Along the way, they emphasised:

- the unavailability of New York as an alternative forum because of the statute bar;
- the fact that it was 'not appropriate that at this stage of the proceedings a final determination be made as to the identity of the proper law of the contract of retainer', despite their Honours' 'provisional view' that it was New York law;
- the fact that, even if foreign law applied, this was 'not of itself a reason for granting a stay';
- the irrelevance of the lawyers' professional indemnity insurance cover being limited to proceedings brought in the US or Canada.

These conclusions are entirely within the mainstream of Australian private international law. As repeated decisions demonstrate, the practical reality is that Australian courts will never under any circumstances relinquish jurisdiction in a case concerning an Australian-resident natural plaintiff.

One topic referred to in the judgment which was not of direct importance to the case at hand is nonetheless likely to be of wider interest to non-Australian readers, namely the reference of questions of foreign law by the forum court to a court of that foreign jurisdiction. This was of potential future relevance to the case since the NSW forum was likely to end up applying New York law. The Supreme Court of NSW and the Supreme Court of New York have recently entered into a bilateral arrangement to facilitate such references, and Chief Justice Spigelman has recently published an article on the topic: J J Spigelman "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 Law Quarterly Review 208. More details of the NSW-New York bilateral arrangements can be found here on the NSW Supreme Court's website.

In the context of the case at hand, the Chief Justice remarked that:

> *"It is by no means clear whether the present case is one in which this mechanism for deciding such an issue would be more cost effective than the customary means of determining a question of foreign law by expert evidence. However, the determination of an issue of professional practice is one of the kinds of legal issues for which there is unlikely to be a single correct answer. Advice from three serving appellate judges of the foreign jurisdiction is much more likely to be accurate than an Australian judge choosing between contesting expert reports." [at [10]]*

American Society of Comparative

Law Younger Comparativists Committee Call for Papers

I am happy to post the following call for papers that should be of interest to our readers.

AMERICAN SOCIETY OF COMPARATIVE LAW

YOUNGER COMPARATIVISTS COMMITTEE – CALL FOR PAPERS

The Younger Comparativists Committee of the American Society of Comparative Law is pleased to invite submissions to fill a panel on "New Perspectives in Comparative Law," to be held at the Society's 2011 Annual Meeting in Sacramento, California, on October 20-22, at the University of the Pacific, McGeorge School of Law. The purpose of the panel is to highlight the scholarship of new and younger comparativists.

Submissions will be accepted on any subject of public or private comparative law from scholars who have been engaged as law teachers for ten years or fewer as of July 1, 2011. The Scholarship Advisory Group of the Younger Comparativists Committee will review submissions with the authors' identities concealed. Two submissions will be chosen for the panel.

To submit an entry, scholars should email an abstract of 1200-1500 words (including footnotes) no later than June 6, 2011, to Judy Yi at the following address: judy.yi@bc.edu. Abstracts should reflect original research that will not yet have been published by the time of the Society's Annual Meeting. The abstract should be accompanied by a separate cover sheet indicating the author's name, title of the paper, institutional affiliation, and contact information. The abstract itself must not contain any references that identify the author or the author's institutional affiliation.

Scholars whose entries are selected for the panel will be required to submit final papers no longer than 25,000 words by August 15, 2011.

Please direct all inquiries to Richard Albert, Chair of the Younger Comparativists Committee, by email at richard.albert@bc.edu or telephone at 617.552.3930.

French Court Rules Foreign Freezing Orders have Res Judicata

In a judgment of March 8th, 2011, the French Supreme Court for private and criminal matters (*Cour de cassation*) confirmed that a Greek order refusing to authorize the pre-award attachment of a ship in Athens was to be recognized in France. As a consequence, the French court could not try again the dispute and authorize to attach the same ship in France a year later.

We had already reported on the decision of the Court of appeal of Rouen which had denied the application of the (alleged) creditor on the ground that a Greek court had already done so. The *Cour de cassation* dismissed an appeal against this decision.

Background

It should be underlined that freezing attachments are carried out in two stages both in France and, I understand, in Greece. First, a court authorizes an enforcement authority to carry out the attachment. Then, the said authority does. The issue in this case was whether the decision on whether to authorize to carry out the attachment issued in Greece had res judicata effect in France.

Territoriality Principle Irrelevant

The first argument put before the Court by the appellant was that freezing attachments belong to enforcement, and are thus unable to produce extra-territorial effect. The Greek order, it was argued, might not be recognized in France, since it could not possibly purport to produce effect outside of Greece.

The *Cour de cassation* answered to this argument by saying that Article 33 of the Brussels I Regulation demanded that the Greek order be recognized. The Court thus ruled that the Court of appeal was right to consider that the foreign order could produce effect extra-territorially. In passing, the Court explained that the Court of appeal had rightly refused to review the foreign order on the merits.

Res judicata

The appellant then raised a variety of arguments against the foreign order having res judicata in France. One of them was that, as the foreign court had applied the lex fori, the triple identity rule was not satisfied, since a French court would apply a different law. Another was that, as the ship had moved, there was a new fact which justified a new decision.

The *Cour de cassation* answered to these two arguments as follows. First, it ruled that there indeed was a triple identity between the two cases, and that the Court of appeal had verified that it was asked to rule on a point which had already been settled by the foreign order. Secondly, it had not been argued before the Court of appeal that there was any new fact which would justify not taking into consideration the foreign order.

Many thanks to Sebastien Lootgieter for the tip-off.

NY Court Grants Pre-Award Attachment in Aid of Foreign Arbitration

In *Sojitz Corp. v. Prithvi Information Solutions Ltd,* the New York Supreme Court (ie an intermediate appellate court) recently agreed to grant a pre-award attachment in aid of an arbitration with a foreign seat (Singapore) and between two foreign parties over which NY courts did not have personal jurisdiction.

In 1982, the New York Court of Appeals (ie the supreme court in the state of NY) had held in *Cooper* that NY courts did not have such power.

See the report of G. Born and T. Snider over at the Kluwer Arbitration Blog.

Green on Erie

Michael Steven Green (William and Mary Law School) has posted Horizontal Erie and the Presumption of Forum Law on SSRN.

> *According to Erie Railroad v. Tompkins and its progeny, a federal court interpreting state law must decide as the state's supreme court would. In this Article, I argue that a state court interpreting the law of a sister state is subject to the same obligation. It must decide as the sister state's supreme court would.*
>
> *Horizontal Erie is such a plausible idea that one might think it is already established law. But the Supreme Court has in fact given state courts significant freedom to misinterpret sister-state law. And state courts have taken advantage of this freedom, by routinely presuming that the law of a sister state is the same as their own—often in the face of substantial evidence that the sister state's supreme court would decide differently. This presumption of similarity to forum law is particularly significant in nationwide class actions. A class will be certified, despite the fact that many states' laws apply to the plaintiffs' actions, on the ground that the defendant has failed to provide enough evidence to overcome the presumption that sister states' laws are the same as the forum's. I argue that this vestige of Swift v. Tyson needs to end.*
>
> *Applying horizontal Erie to state courts is also essential to preserving federal courts' obligations under vertical Erie. If New York state courts presume that unsettled Pennsylvania law is the same as their own while federal courts in New York do their best to decide as the Pennsylvania Supreme Court would, the result will be the forum shopping and inequitable administration of the laws that are forbidden under Erie and its progeny. As a result, federal courts have often held that they too must employ the presumption of similarity to forum-state law, despite its conflict with their obligations under vertical Erie. Applying horizontal Erie to state courts solves this puzzle.*

The paper is forthcoming in the *Michigan Law Review*.

He had posted few weeks before Erie's Suppressed Premise .

> *The Erie doctrine is usually understood as a limitation on federal courts' power. This Article concerns the unexplored role that the Erie doctrine has in limiting the power of state courts.*
>
> *According to Erie Railroad Co. v. Tompkins, a federal court must follow state supreme court decisions when interpreting state law. But at the time that Erie was decided, some state supreme courts were still committed to Swift v. Tyson. They considered the content of their common law to be a factual matter, concerning which federal (and sister state) courts could make an independent judgment. Indeed, the Georgia Supreme Court still views its common law this way. In order to explain Brandeis's conclusion in Erie that state supreme court decisions bind federal courts, even when the state supreme court does not want them to be binding, a premise must be added to his argument – one that limits state supreme court power in this area.*
>
> *The missing premise is a non-discrimination principle that is a hitherto unrecognized – but essential – part of the Erie doctrine. A state supreme court can free federal courts of the duty to follow its decisions only if it is willing to free domestic courts of the same duty. It cannot discriminate concerning the binding effect of its decisions on the basis of whether the effect is in domestic or federal court.*
>
> *A similar puzzle arises when a federal court interprets unsettled state law. The Supreme Court has suggested that a federal court should predict how the relevant state supreme court would decide. But many state supreme courts – including the New York Court of Appeals – have indicated that they do not care if federal (or sister state) courts use the predictive method concerning their unsettled law. Here, too, the non-discrimination principle latent in Erie explains how the Supreme Court can demand that federal courts adopt the predictive method, whatever a state supreme court has said about the matter.*
>
> *The Article ends by briefly discussing the transformative effect that Erie's non-discrimination principle should have for choice of law, where Swift v. Tyson remains ubiquitous.*

The paper is forthcoming in the *Minnesota Law Review*.

Sherry on Erie

Suzanna Sherry (Vanderbilt Law School) has posted Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time on SSRN.

> *This essay was written for "Supreme Mistakes: Exploring the Most Maligned Decisions in Supreme Court History." A symposium on the worst Supreme Court decision of all time risks becoming an exercise best described by Claude Rains's memorable line in Casablanca: "Round up the usual suspects." Two things saved this symposium from that fate. First, each of the usual suspects was appointed defense counsel, which made things more interesting. Second, a new face found its way into the line-up: Erie Railroad v. Tompkins. My goal in this essay is to explain why Erie is in fact guiltier than all of the usual suspects.*
>
> *I begin, in Part I, by setting out the three criteria that I believe must be satisfied for a decision to qualify as the worst of all time. I also explain briefly why each of the usual suspects fails to meet one or more of those criteria. The heart of the essay is Part II, examining in detail how Erie satisfies each of the three criteria. I close with some concluding thoughts on the surprising relationship between Erie's flaws and those of the other suspects.*

The paper is forthcoming in the *Pepperdine Law Review*.

News and a Query (Recovery of Child Support, Recital 26 –

Matrimonial Property Regimes)

Just a word to recall that Council's Decision of 31 March 2011, on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, has been published in the OJ of April, 7th.

And, a query: does anybody know what the exact meaning of Recital 26 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes is?

> *Recital 26: "Since there are States in which two or more systems of law or sets of rules concerning matters governed by this Regulation coexist, there should be a provision governing the extent to which this Regulation applies in the different territorial units of those States"*

Weber on Universal Jurisdiction in Brussels I Reform

Johannes Weber (Max Planck Institute for Comparative and PIL) has posted Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation on SSRN. The abstract reads:

> *In December 2010, the European Commission published a Proposal for a reform of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. One of the cornerstones of the Proposal is the operation of the Regulation in the international legal order, a subject which has proven to be one of the most intricate issues in European international civil procedure. The following paper will give a first assessment of the Commission Proposal as regards third State*

scenarios. After a brief discussion of the Union's competence and the Union's interest to legislate in this field, it will turn to the extension of special heads of jurisdiction to third State defendants, the decline of jurisdiction in favour of third States and the proposal for new subsidiary grounds of jurisdiction, before briefly concluding on recognition and enforcement of third State judgments.

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Illmer on Arbitration and Brussels I Revisited

Martin Illmer (Max Planck Institute for Comparative and PIL) has posted Brussels I and Arbitration Revisited – The European Commission's Proposal COM(2010) 748 final on SSRN. The abstract reads:

In December 2010, the European Commission presented its long-awaited proposal for a reformed Brussels I Regulation. One of the cornerstones of the proposal is the interface between the Regulation and arbitration. In the first part, the article sets out the development of the exclusion of arbitration from the Regulation's scope up to the West Tankers and National Navigation cases. In the second, main part, the author, who is a member of the Commission's Expert Group on the arbitration interface, provides a detailed account and evaluation of the new lis pendens-mechanism established by the Commission proposal in order to effectively prevent parallel proceedings in the arbitration context. In the third, final part, the author scrutinizes the Commission proposal against the background of the Commission's Impact Assessment before concluding with a short resumé.

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Kessedjian on the Brussels I Review

Catherine Kessedjian (Paris II University) will publish a comment (in French) on the Brussels I review proposal in the next issue of the *Revue trimestrielle de droit européen*.

It is already available here.