Court of Appeal for Ontario Rejects "Fourth Defence" to Enforcement of Foreign Judgments

The long-running litigation between the United States and a group of defendants who operated a cross-border telemarketing business selling Canadian and foreign lottery tickets to Americans has reached another mile-post with the decision of the Court of Appeal for Ontario in *United States of America v. Yemec*, 2010 ONCA 414 (available here). The defendants were likely riding high before this decision, having done quite well in resisting the enforcement of the judgment of an Illinois court finding them liable for $19 million and permanently enjoining them from telemarketing any product or service to anyone in the United States. But the tables are now turned, with the Court of Appeal for Ontario ordering enforcement of the Illinois judgment.

The most notable jurisprudential issue in the case concerns the scope of the defences at common law to an action to recognize and enforce a foreign judgment. At common law there are three central defences: fraud, denial of natural justice, and public policy. However, the Supreme Court of Canada indicated in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 that this was not a closed list and in the appropriate circumstances a new defence might be created. In *Yemec* the motions judge of the Superior Court of Justice hearing the case was persuaded that there was a genuine issue requiring a trial on the question of a "fourth defence", namely "denial of a meaningful opportunity to be heard". The Court of Appeal has now held that there is no such defence: that concerns of this nature fall comfortably within the scope of the denial of natural justice defence. Further, on the facts, the appellate court found that the defendants were not denied an opportunity to be heard in the courts of Illinois (paras. 26-29).

The case is one of several in the wake of *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 to enforce a foreign non-monetary order, namely the permanent injunction. The Court of Appeal found the criteria for enforcement set out by the Supreme Court of Canada in *Pro Swing* were met in this case (paras. 45-53).

The case raises one other interesting issue. The United States had, at the outset of the litigation in Illinois and Ontario, obtained a freezing order (*Mareva*) and a civil seizure order (*Anton Piller*). These interlocutory orders were subsequently dissolved, in part for failure of the United States to make full disclosure when moving *ex parte* to obtain the orders. The defendants then insisted on a damages inquiry under the undertaking in damages the United States had provided as a condition of obtaining the orders. The plaintiff argued that such an inquiry should not proceed, given that in effect the defendants were seeking to recover lost profits from a business the Illinois court had concluded was illegal. The Court of Appeal for Ontario held that the damages inquiry should proceed, stressing the importance of enforcing the general undertaking in damages (paras. 69-72). It did note, though, that there was evidence that the defendants had violated both Canadian and American law (paras. 78-83) and that accordingly it would be difficult for them to establish compensable damages. But they were entitled to try (paras 85-86).

French Conference on Choice of Law after Rome I

The University of Dijon will host a conference on Choice of Law in International Contracts under the Rome I Regulation (*Le règlement communautaire « Rome 1 » et le choix de loi dans les contrats internationaux*) on September 10th and 11th, 2010.

Speakers will be mostly French academics, but will also include some practitioners and a few academics from other European jurisdictions. Some of the leading French specialists such as Paul Lagarde or Pierre Mayer will be present.

The full programme and list of speakers can be found here. Further details can be found here and here.

First 2010 Special Issue of Gazette du Palais on International Litigation

The last issue of French daily legal journal *Gazette du Palais* dedicated to european and international litigation (*Contentieux judiciaire européen et international*) was released on May 29th, 2010.

In a first piece, Marie-Laure Niboyet and Mathias Audit, who are both professors at Paris X Nanterre University discuss the recent decisions rendered by French courts in the *Vivendi* case (*L'affaire Vivendi Universal SA ou comment une class action diligentée aux États-Unis renouvelle le droit du contentieux international en France*).

In a second piece, two French judges, Nicolas Castell (who is currently seconded to the French Ministry of Justice) and Michel de Lapasse, offer an analysis of the revision of the Brussels I Regulation (*La révision du règlement Bruxelles I à la suite de la publication du livre vert de la Commission – Perspectives et opportunités*).

Finally, the Gazette offers various short reports and casenotes.

Articles of the *Gazette* can be downloaded here by suscribers to Lextenso.

Iceland authorizes same sex

marriages

The Icelandic Parliament (Althingi) approved yesterday by 49 votes to none against a law that allows marriage between same sex partners. The so called rule of “neutral marriage ” means the end of the rules on partnerships, existing since 1996. With the adoption of this new law that will enter into force later this month, Iceland has become the ninth country to allow marriage between same sex couples, after the Netherlands, Spain, Belgium, Canada, South Africa, Norway, Sweden and Portugal (on May 17 the President of the Republic of Portugal enacted a law allowing civil marriage for same sex couples, without the right to adoption; the law had been approved by the Parliament on February).

With regard to Latin America, homosexual marriage is accepted by Mexico City since December 2009. On May 2010 the Chamber of Deputies of Argentina became the first Latin American legislative body to approve a bill allowing marriage between same sex; however, it still needs to be approved by the Senate. So far, five couples have been married, but mediating judicial authorization that can be appealed. It is worth recalling that on March, the 30th, Argentina decreed the expulsion of a Spanish woman married in Canada since 2008 to an Argentinian citizen (also a woman). The enforcement of the decree has nevertheless been suspended.

We will have to wait to see the PIL implications of these laws. As for Spain, Spanish law is always applied, and therefore two persons of the same sex can always get married in Spain regardless of their national law (obviously provided they meet the reminding requirements).

European proposals on PIL and its impact on interregional law

The most recent EU Proposals on Private International Law (on the one hand, the

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final, and on the other hand, the Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 105 final) have raised some concerns regarding their possible effects in States with more than one legal system of private law, such as Spain and the United Kingdom. To analyse from a Spanish perspective some of the issues that may be triggered by these Proposals, a Workshop organised by the Department of Justice of the Generalitat de Catalunya (the Catalan regional Government) took place in Barcelona on June 8th (see the Program here)

The Workshop started with a brief presentation of the Proposal on successions (by Albert Font, from the Universitat Pompeu Fabra) and the Proposal on divorce and legal separation (by Rafael Arenas, from the Universitat Autònoma de Barcelona), paying special attention to those aspects which are likely to have an impact in Spain, as a consequence of the several private law legal systems which coexist in this country.

The second part of the Workshop was devoted to the presentation of the Working Materials prepared by the Group on Interregional Law of the Observatory on Private Law of Catalonia. These Working Materials are the result of an initial project of elaborating the draft of an Act on Interregional Law, dealing with the determination of the applicable law in intra-Spanish conflicts of private law (a matter currently dealt with by the Preliminary Title of the Spanish Civil Code). Although the draft has so far not been officially presented for its consideration by the Spanish Parliament, these Working Materials can be useful for further discussion on the subject.

For an account of the Workshop and a link to the Working Materials, please click here.

Many thanks to Cristian Oró Martínez, Postdoctoral Researcher at the Universidad Autónoma de Barcelona

Canadian Articles on Multijurisdictional Class Actions

Three recent articles have been published about multijurisdictional class actions in Canada. One of the most critical issues is whether the courts of a province will enforce a class action judgment from another province or another country approving a settlement that purports to bind plaintiffs resident in the province. I know that similar issues are under consideration in other countries, so this literature could be of value as comparative law.

Genevieve Saumier, “Competing Class Actions Across Canada: Still at the Starting Gate after Canada Post v. Levine” (2010) 48 C.B.L.J. 462

Tanya Monestier, “Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?” (2010) 45 Texas International Law Journal 537

Peter W. Hogg & S. Gordon McKee, “Are National Class Actions Constitutional?” (2010) 26 N.J.C.L. 279

These take their place alongside several other articles on this topic from the past few years.

Res Judicata for Foreign Freezing Orders?

Can foreign freezing orders prevent the forum from granting leave to attach provisionally local assets? The Rouen Court of appeal ruled so in a judgment of 24 March 2009.

The case was about the sale of a ship from a company incorporated in Panama to a companny incorporated in the Marshall Islands. The parties had concluded a memorandum of agreement whereby the buyer, which had paid a deposit upon the signature of the memorandum, would pay the price within three days of the notification of the delivery of the ship. The seller notified. The buyer did not pay. The seller terminated the contract, but kept the deposit. The buyer initiated arbitration proceedings in London (substantive claims are not known).

Parallel arrest proceedings

While the arbitration proceedings were pending, the buyer sought to arrest provisionally (*saisie conservatoire*) the ship in Greece. A Greek court granted leave to do so ex parte, but when the defendant challenged the order in inter partes proceedings, a Greek court set aside the order on the ground that two critical requirements of Greek law were not met: there was neither a good arguable case nor a real risk that the award would go unsatisfied.

When the ship showed up in France a year later, the buyer sought to arrest it provisionally again. The commercial court of Rouen (Normandy) granted leave to do so ex parte. The defendant challenged unsuccessfully the French order in inter partes proceedings. It then appealed.

Recognition of Foreign Order

The Court of appeal of Rouen allowed the appeal, and set aside the arrest. It did so on the ground that the dispute had been settled by the Greek court, not on the ground of French substantive law. Indeed, the Court ruled that French law had different requirements, but that this was irrelevant since the court was bound to recognize the foreign order. It underlined that the foreign order had been rendered between the same parties, had the same object and the same cause.

One would have expected the court to rule that the foreign order was *res judicata* and thus prevented any other European court from deciding the dispute again. The court referred to article 33 of the Brussels I Regulation and held that it was bound to recognize the foreign order. It also held that the two disputes were the same by the Brussels I Regulation standards (parties, cause, object).

However, the court got it all wrong when it offered its final legal analysis. It held that the French order was irreconcilable with the Greek order. It concluded that,

in such circonstances, article 34 of the Brussels I Regulation demanded that the foreign order be recognized and the French court not issue a contradictory order. This was a rather innovative reading of article 34. Article 34 provides that, when one of the two irreconcilable judgments was rendered by the forum, it should always be preferred. Article 34 does not help recognition: it offers grounds for denying it.

Nevertheless, the decision is interesting. If the court had applied the *res judicata* doctrine instead of addressing the issue through the conflict of judgments doctrine, it would have reached the exact result that it wanted to reach.

It might then have wanted to discuss the issue of the applicable law to res judicata: *res judicata of* provisional orders is typically limited , as they often can be modified in case of new circumstances. This is what article 700 of the Greek Code of civil procedure provides. But did Greek law govern the issue?

I am grateful to Sebastien Lootgieter for drawing my attention to this case.

Symeonides on American Federalism and Conflicts

Dean Symeon Symeonides has posted American Federalism and Private International Law on SSRN. The abstract reads:

> *This Article is written for readers outside the United States, especially those in the European Union, who are interested in knowing how American federalism has affected the development of American conflicts law.*
>
> *Among the topics discussed in the Article are: the constitutional allocation of law-making powers between the federal and state governments; the Supreme Court's interpretation of the constitutional clauses that have a bearing on state choice-of-law decisions; the relative insignificance of interstate as opposed to international boundaries; the development of state choice of law for interstate*

conflicts; and the law applicable to international conflicts between federal or state law, on the one hand, and foreign law, on the other.

The Article discusses how American conflicts law has moved: (1) from the rigidity of the First Conflicts Restatement to the total flexibility of the choice-of-law revolution; and (2) from the Supreme Court's close scrutiny of state choice-of-law decisions during the early part of the twentieth century to the laissez faire stance of the Court's recent jurisprudence. The first movement predates a parallel but much smaller move toward flexibility in Europe, while the latter movement is contrary to the recent rapid centralization of private international law exemplified in the European Union's Rome I and Rome II regulations.

The Article suggests that the preferred option is a middle course between the excessive flexibility of the American choice-of-law revolution and the European preoccupation with certainty, and between the American de facto regime of total decentralization and the European Union's rush toward centralization of private international law.

The article is forthcoming in the *Hellenic Journal of International Law* (2010). It can be freely downloaded here.

First Issue of 2010's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains three articles and several casenotes.

The first article is a survey of judicial cooperation within the European Union in civil matters (*La coopération judiciaire en matière civile dans l'Union européenne: bilan et perspectives*). It is authored by Fernando Paulino Pereira, who is in

charge of judicial cooperation at the General Secretariat of the Council of the European Union. No abstract is provided, either in French or in English.

In the second article, Laurence Usunier, who lectures at the University of Luxembourg, wonders how useful the Hague Convention on Choice will be (*La Convention de la Haye du 30 juin 2005 sur les accords d'élection de for. Beaucoup de bruit pour rien ?*). The English abstract reads:

> *On June 30, 2005, the member states of the Hague Conference of Private International Law adopted the Convention on Choice of Court Agreements. At first sight, one may be disappointed by the outcome of the lengthy negotiations carried out in the Hague. As a matter of fact, there is a huge gap between the ambitions of the initial project – a worldwide convention on jurisdiction and enforcement of judgments in civil and commercial matters – and the subject matter of the Convention which was finally concluded – business-to-business choice of court agreements. However, a thorough study of the Convention scheme reveals that it is far from useless, as it seems to fulfill its main goal, as limited as it may be: making choice of court agreements as effective as possible.*

Finally, the Permanent Bureau of the Hague Conference on Private International Law has produced the third article which discusses the opportunity for the Conference of producing principles for international contracts (*Choix de la loi applicable aux contrats du commerce international : des principes de La Haye ?*). No abstract is provided, either in French or in English.

A full table of contents can be found here. The *Revue* can be downloaded here, for a fee.

The Supreme Court and Foreign

Sovereign Immunity

Today, the United States Supreme Court released its decision in Samantar v. Yousef, a case involving whether a top official of Somalia was entitled to assert sovereign immunity for torture and abuse conducted by the government of Somalia on its citizens in the 1980s. The Court held that the Foreign Sovereign Immunities Act does not govern whether former foreign officials living in the United States can claim immunity from lawsuits in U.S. Courts because the text of the Act, and its legislative history, led to the conclusion that the law was not meant to protect individuals. Rather, the Act was limited to states and their agencies or instrumentalities, which, in the Court's view, did not include natural persons.

While this decision might be read to open United States courts for suits against foreign officials, the Court noted that such officials my enjoy immunity under the common law or "other valid defenses" to be examined by the district court on remand. Such cases will now provide opportunities for the United States government to offer their views on immunity, as did the United States government before the adoption of the Act. As such, the Obama Administration, and future administrations, will be more concretely involved in determining the metes and bounds of official immunity in United States courts.