Asserting Personal Jurisdiction in Human Rights Cases

My colleague Roger Alford has a fascinating post over at the blog Opinio Juris (available here) detailing a recent decision of the United States Court of Appeals for the Ninth Circuit in the case of Bauman v. DaimlerChrysler AG. In that case, a panel of the Ninth Circuit held that a United States federal district court did not have personal jurisdiction over DaimlerChrysler because the corporation did not have continuous and systematic contacts with the forum. The case arose out of the alleged kidnapping, detention, and torture of Argentinian citizens in Argentina by Argentinian state security forces acting at the direction of Mercedes Benz Argentina. The plaintiffs sued the parent company, DaimlerChrysler AG, and the Ninth Circuit concluded that it lacked personal jurisdiction.

As Roger notes, this conclusion is not surprising under current US caselaw. What is perhaps surprising is Judge Stephen Reinhardt's dissent, in which he argues that promoting international human rights is a state interest that should factor into a finding of personal jurisdiction. Reinhardt first concluded that DaimlerChrysler AG had minimum contacts in the forum through its American subsidiary. He then examined whether it was reasonable to assert jurisdiction based on seven factors, including "the state's interest in adjudicating the suit."

As Roger explains, this looks very much like a *forum non conveniens* argument "dressed up as an assertion of personal jurisdiction." On the one hand, such an argument is clearly incorrect in that personal jurisdiction and *forum non conveniens* are different analytical frameworks. In the context of personal jurisdiction, the question is whether the assertion of jurisdiction by a United States court is appropriate under due process. In the context of *forum non conveniens*, the question is whether the forum is a convenient place for resolving the suit in light of various public and private factors. On the other hand, there is a close relationship between the two doctrines. The historical development of the *forum non conveniens* doctrine in the US was closely related to evolving concepts of judicial jurisdiction in the early 1900s. As *Pennoyer's* strict territoriality rules were transformed into a minimum contacts analysis under *International Shoe*, it is arguable that *forum non conveniens* in the US was employed to moderate expansive jurisdiction by US courts. In that the two are connected historically, it

was perhaps appropriate for Reinhardt to conflate the two analyses under a reasonableness approach. Although, there was perhaps no reason to reach the question of reasonableness given the state of the law as to subsidiaries.

International Max Planck Research School on Successful Dispute Resolution in International Law: Doctoral Research Positions

The Max Planck Institute for Comparative Public Law and International Law in Heidelberg, in cooperation with the Institute of Comparative and Private International Law, Ruprecht Karls University of Heidelberg and the Max Planck Institute for Foreign and International Criminal Law in Freiburg, is accepting applications for several **doctoral research positions** in the areas of international law, international private law and international criminal law beginning 1 January 2010 or later.

The Max Planck Research School on Successful Dispute Resolution in International Law will concentrate on the question which conditions must be present to successfully resolve disputes at the international level and is headed by *Prof. Burkhard Hess* and *Prof. Rüdiger Wolfrum* (both Heidelberg).

Further details and contact information can be found here.

Research Assistants in Trier

The Faculty of Law of the University of Trier (Professor Dr. Jan von Hein) is seeking to recruit two Assistants (PhD students) in Private International Law, Comparative Law or Civil Law/Corporate Law. The candidates should be PhD students who will be expected to work on their doctorate, to teach a few hours per week and to contribute to research projects, mainly in private international law and comparative law. The contracts are 2-year fixed-term, renewable once.

Trier is not only Germany's oldest city, a world cultural heritage and a favourite tourist destination, but also a hot spot for research in private international law, as it is the seat of the Academy of European Law (see our recent post) and very close to Luxembourg, where the European Court of Justice is situated and the newly founded Max-Planck-Institute for International Procedural Law will start its work in 2010.

The full text of the advertisement can be found here. The deadline for the application is 25 September 2009.

Dublin Conference on Rome I and Brussels I Regulations

The Commercial Law Centre at University College Dublin has arranged a morning conference next Thursday (17 September 2009, 8:45am-1pm) dealing with the Rome I and Brussels I Regulations.

According to the conference materials on the CLC's website:

> *The Rome I Regulation on the Law Applicable to Contractual Obligations, replacing the Rome Convention comes into effect on 17th December 2009.*
>
> *A thorough familiarity with this Regulation is essential for all professionals*

engaged in drafting, reviewing and litigating international commercial agreements.

At this seminar, a panel of distinguished experts will review some key elements in the Regulation:

1. *What limitations does the Regulation place on the freedom of parties to an international contract to choose the governing law?*
2. *Where the parties fail to select a governing law, how do courts and practitioners determine the relevant law?*
3. *How does Rome I apply to the difficult issue of contracts on financial instruments?*

The remainder of the seminar will focus on some key issues under Brussels I Regulation:

- *How do practitioners ensure effective choice of court agreements under Brussels I?*
- *How will the Hague Choice of Court Convention, recently signed by the European Community and which seeks to establish a global choice of court regime, interact with Brussels I.*
- *How effective are dispute resolution agreements which embody both litigation and arbitration options?*

As a consequence of increasing globalisation, the problem of concurrent international procedures is becoming more frequent. The seminar will consider the vexed question, discussed recently in Ireland in GOSHAWK DEDICATED, of whether a Brussels Regulation court as the domiciliary court of the defendant, can stay proceedings in favour of earlier proceedings begun in a non-member state court.

This seminar will provide a unique opportunity for practitioners involved in international litigation to learn about the new developments and to engage in discussion with an international panel of speakers.

As well as the author of this post, the speakers include Michael Collins SC (Chairman, Bar Council of Ireland), Michael Wilderspin (Legal Services, Commission), Dr Joanna Perkins (Financial Markets Law Committee), Geraldine

Andrews QC (Essex Court Chambers) and Liam Kennedy (A&L Goodbody).

ERA Annual Conference on Private International and Business Law

The Annual Conference on Private International and Business Law of the Academy of European Law will take place on 8-9 October in Trier.

ANNUAL CONFERENCE ON PRIVATE INTERNATIONAL AND BUSINESS LAW

ROME I, BRUSSELS I, WEST TANKERS AND CARTESIO

The seminar will provide practitioners with an analysis of the latest developments in both legislation and jurisprudence in private international and business law.

- ***Conflict of laws*** *The seminar will focus on the new Regulation on the law applicable to contractual obligations ("Rome I") which will apply from 17 December 2009. The Regulation will be presented and carefully analysed.*
- ***European Civil Procedure*** *In the light of the recent case law of the ECJ, the seminar will address the Brussels I Regulation (e.g. Allianz v West Tankers) and its review. The Hague Convention on Choice of Court Agreements will also be on the agenda.*
- ***European Company Law*** *On 16 December 2008, the ECJ delivered its long-awaited judgment in the Cartesio case. Participants will discuss the current state of play regarding the transfer of a company's seat.*

Areas of Law: *Private International Law, Civil Procedure, Company Law, Judicial Co-operation in Civil Matters*
Target audience: *Practitioners of law involved in international business transactions, lawyers in private practice, in-house counsel, judges, notaries, representatives of ministries and other public authorities, academics*

The full programme can be downloaded here.

Conference on European Procedural Law

The Institute for Comparative Law, Conflict of Laws and International Business Law (University of Heidelberg) and the European Commission will organise the 2nd Conference on European Procedural Law in Heidelberg titled

The Future of European Civil Procedural Law

—

Reforming the Regulation Brussels I

The conference will address in particular the following topics:

- the abolition of exequatur proceedings
- defendants in third states
- cross-border collective litigation and the Regulation Brussels I
- provisional and protective measures
- arbitration and choice of court agreements

The conference is co-organised by the Journal of Private International Law and the journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) and will be held at the Hotel "Der Europäische Hof" in **Heidelberg on December 11th and 12th 2009.**

More information can be found here.

UPDATE: *A detailed conference programme and information on the registration procedure is now available here.*

Recent Australian Journal Articles

Martin Davies, 'Reflections on the Past Decade of Transnational Litigation' (2009) 10 *Melbourne Journal of International Law* 46

The brief article begins:

> *The past decade of transnational litigation has seen a consolidation of the trend towards disputes about venue. Increasingly, transnational litigation takes the form of a battle about where the battle is to be fought.*

Cameron Sim, 'Non-Justiciability in Australian Private International Law: A Lack of 'Judicial Restraint'?' (2009) 10 *Melbourne Journal of International Law* 102

The abstract reads:

> *The involvement of foreign states in domestic courts sits at the intersection between private and public international law. Whilst courts are becoming increasingly prepared to defer underlying notions of sovereignty and territoriality to protect private rights, they remain at times hesitant in adjudicating on matters concerning foreign states. The doctrine of non-justiciability affords protection to both foreign states and the forum executive in determining that courts will not adjudicate on the transactions of foreign states. This article examines the doctrine as adopted in the United Kingdom and applied in Australia, as well as the political questions doctrine of the United states and the merits-based approach followed in Canada. The article argues that foreign states are no longer sacrosanct in Australian courts, and a correct understanding of executive certification and the Australian executive's prerogative in foreign affairs ameliorates the need for the doctrine.*

Peter Handford, 'Edward John Eyre and the Conflict of Laws' (2008) *Melbourne University Law Review* 822

The abstract reads:

> *In 1865 Edward John Eyre, the Governor of Jamaica, in the course of suppressing a revolt, caused a leading activist to be tried and executed under*

martial law. Over the next three years, a group of leading politicians and thinkers in England attempted to have Eyre prosecuted for murder. When the criminal process failed, they attempted to have him sued for trespass and false imprisonment. Though this case, Phillips v Eyre, was mainly concerned with constitutional issues, Willes J laid down a rule for choice of law in tort which endured for nearly a century before it was finally superseded. In this article, the author illuminates the case by reference to its background. The author speculates on why the decision, which initially occasioned little notice, became the subject of academic and judicial controversy many years afterwards.

Substance and Procedure: The Statute of Frauds in Australia

A recent decision of the Western Australian Court of Appeal is apparently the first Australian decision to address the correctness of the decision in *Leroux v Brown* (1852) 12 CB 801; 138 ER 1119 after the High Court of Australia's decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which adopted a wider definition of 'substance' for the purposes of characterisation than had previously been the case. *Leroux v Brown* had determined that s 4 of the *Statute of Frauds* (UK) was procedural, and that an oral agreement made in France was not enforceable in England despite being enforceable under its proper law.

The recent case concerned an oral contract of guarantee whose proper law was in dispute: if the law of Western Australia applied, an equivalent to s 4 of the Statute of Frauds would bar the plaintiff's claim; whereas no such bar existed under the law of New South Wales. Characterisation and choice of law were therefore of equal practical importance: if the proper law were that of NSW and *Leroux and Brown* were not good law, the plaintiffs would succeed.

As it turned out, McLure JA (with whom Wheeler and Newnes JJA agreed) decided that the proper law of the contract was the law of WA, and that *Leroux v Brown* was no longer good law in Australia after the decision in *John Pfeiffer*. Thus, the

Statute of Frauds applied as substantive law, and plaintiff's claim was barred.

Tipperary Developments Pty Ltd v The State of Western Australia [2009] WASCA 126 (22 July 2009)

Foreign-Domiciled Testators: Jurisdiction over Family Maintenance Claims

In each of the Australian states, legislation exists to recognise that testators have a moral duty to make provision in their wills for certain kinds of dependents and other claimants, and to empower such claimants to make claims upon the estate of testators who failed to make appropriate provision in their wills. The relevant NSW legislation is now ch 3 of the *Succession Act 2006* (NSW) (but the *Family Provision Act 1982* (NSW) continues to apply to the estates of testators dying before 1 March 2009),which is similar to its interstate equivalents, although the precise details and the width of the category of eligible claimants vary from state to state. Complicated jurisdictional and choice of law questions can arise depending on the domicile of the testator and the location of the relevant property.

A recent case before Brereton J in the NSW Supreme Court concerned the application of Family Provision Act to the estate of a couple who died domiciled in Malta, leaving real and personal property in Malta and in NSW. The couple's adult children made a claim under the Family Provision Act to real property situated in NSW. In his Honour's usual style, the judgment contains a helpfully concise summary of the applicable law (at [26]):

> *"In those circumstances the relevant law is, as stated by Scholl J in Re Paulin [1950] VLR 462 at 465, that in connection with the application of testator's family maintenance legislation, first, the Courts of the domicile alone can exercise jurisdiction under the testator's family maintenance legislation of the*

domicile in respect of movable and immovable property in the place of domicile; secondly, the Court's of the domicile alone can exercise such jurisdiction in respect of movable property of the deceased outside the place domicile; but thirdly, Courts of the situs alone can exercise such jurisdiction in respect of immovable property of the deceased out of the place of domicile, and Courts of the place of domicile cannot exercise such jurisdiction [see also Pain v Holt (1919) 19 SR (NSW) 105; Re Sellar (1925) 25 SR (NSW) 540; Re Donnelly (1927) 28 SR (NSW) 34; Re Osborne [1928] St R Qd 129; Re Butchart [1932] NZLR 125, 131; Ostrander v Houston (1915) 8 WWR 367; Heuston v Barber (1990) 19 NSWLR 354; Balajan v Nikitin (1994) 35 NSWLR 51]. It follows that any order made by this Court can affect only immovable property of the deceased in New South Wales; it cannot affect movable property in New South Wales, nor any property outside the State. However, in deciding what order should be made affecting immovable property in New South Wales, the Court is entitled nonetheless to take into account assets beyond the reach of its jurisdiction which inform the extent to which eligible persons and beneficiaries and others having claims on the deceased's testamentary bounty have and will receive provision. The Court can also take into account assets beyond the reach of the jurisdiction in deciding what order to make in respect of costs relating to the assets in the jurisdiction [see Re Paulin and Re Donnelly]."

Taylor v Farrugia [2009] NSWSC 801 (5 June 2009)

Brussels I Regulation – The UK Parliament has its say

The House of Lords' influential European Union Committee (chaired by Lord Mance) has published a report on the Commission's Green Paper on the Brussels I Regulation. The report scrutinises the Green Paper, in light of evidence presented by representatives of the UK Ministry of Justice (Lord Bach and Oliver Parker) and Richard Fentiman of Cambridge University, and considers all of the

topics raised by the Commission (and discussed on these pages). The evidence is appended at the back of the report.

The Committee's conclusion (in contrast, for example, to its view on the proposed Rome II Regulation) is favourable:

> *We very much welcome the Commission's initiative in producing the Report and the proposals outlined in the Green Paper. While the Regulation has been successful, in particular by introducing clear common rules, there have undoubtedly been areas where some of the rules have, in practice, opened up the possibility for abuse contrary to the interests of justice. This opportunity should be taken to reform the rules with the aim of minimising abuse and to make other useful reforms. We hope the Commission will, following the conclusion of its consultation, move quickly to bring forward proposals to amend the Regulation.*

The report is an important contribution to the debate surrounding the proposed reforms to the Brussels I Regulation, and emphasises the need to extend the consultation process beyond any Proposal by the Commission to allow all stakeholders to contribute to the improvement of this, the central instrument of European private international law.