Approach to Jurisdiction under the CJPTA

The British Columbia Court of Appeal's decision in *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 (available here) is an important contribution to the developing Canadian jurisprudence on the Civil Jurisdiction and Proceedings Transfer Act, a statute governing the taking of jurisdiction that has been adopted in several provinces.

A leading common law approach to the question of whether there is a real and substantial connection between a dispute and the forum (the test for jurisdiction) is that outlined in the Court of Appeal for Ontario's decision in *Muscutt v. Courcelles* (available here). There is an ongoing controversy about the extent to which that approach has any relevance after a province has adopted the CJPTA. This is because the statute sets out an open-ended list of situations in which a real and substantial connection is presumed to exist (s. 10). However, it remains open to a plaintiff (under s. 3) to otherwise establish such a connection, and on one view the approach in *Muscutt* is relevant to that analysis. See in Nova Scotia the decision in *Bouch v. Penny* (available here).

In *Stanway* the court expresses considerable hostility towards the *Muscutt* approach. It references academic and judicial criticism of the decision, while selectively omitting any reference to the competing academic and judicial support for it. It makes clear that it has no application in cases that are caught by s. 10. It does not indicate what should happen in cases outside that section, but the overall tone suggests that it would not welcome using *Muscutt* in such cases.

My own view is that the *Muscutt* analysis should remain relevant to cases that are not caught by the statutory presumptions – cases which the statute has deliberately chosen to leave governed by the open-ended language of the real and substantial connection test.

Some might find it interesting that despite the difference in analysis between the appellate court and the motions court judge in *Stanway*, this is one of many cases where the two competing analyses reach the same conclusion (here that the court of British Columbia has jurisdiction).

The approach in *Muscutt* is the dominant one in Ontario, which has not enacted the CJPTA. However, last October the Court of Appeal for Ontario heard submissions about whether that approach should be modified. The decision in those appeals is eagerly awaited.

Private International Law Dispute before the ICJ (Belgium v. Switzerland on the Interpretation and Application of the Lugano Convention)

The increasing intertwining between private international law and public international law has been once again and very recently proved. The International Court of Justice will indeed be the theatre of a promising interesting debate between Belgium and Switzerland in respect of the Lugano Convention.

On 21 December 2009, Belgium initiated proceedings against Switzerland in respect of a dispute concerning the interpretation and application of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (see the Press Release).

The dispute has arisen out of the pursuit of parallel judicial proceedings in Belgium and Switzerland concerning the alleged misconduct of the Swiss shareholders in Sabena, the former Belgian airline now in bankruptcy. The Swiss shareholders SAirgroup (formerly Swissair) and its subsidiary SAirLines, also now in bankruptcy, and the Belgian shareholders (the Belgian State and three companies directly or indirectly hold by the Belgian State) in Sabena entered into different contracts between 1995 and 2001 for among other things the financing and joint management of Sabena. These contracts provided for the exclusive jurisdiction of the Brussels courts and for the application of Belgian Law.

Proceedings were first initiated by the Belgian Shareholders before the Brussels courts for contractual liability and tort. The Brussels Court found its jurisdiction on the basis of art. 17 and 5(3) of the Lugano Convention but rejected the claims for damages brought by the Belgian shareholders. The Court of Appeal of Brussels by a partial judgment upheld the Belgian court's jurisdiction over the dispute. The proceedings on the merits are still pending before that court.

In the mean time, the Swiss shareholders (Swissair and its subsidiary) submitted to the Zurich courts an application for a debt-restructuring moratorium, which ended in the bankruptcy of the Swiss shareholders. The Belgian shareholders sought to declare their debt claims (whose existence and amount depended on the proceedings before the Brussels court) against them in these proceedings.

In a decision rendered on 30 September 2008, the Swiss Federal Court rejected the application of the Lugano Convention on this matter and declined to stay its proceedings on the basis that the Swiss courts had exclusive jurisdiction because of the territoriality principle and the procedural nature of the dispute. According to Belgium, the refusal by the Swiss Courts and more particularly the Federal Supreme Court to apply the Lugano Convention and consequently the refusal to recognize the future Belgian decision and to stay their proceedings, violate various provisions of the Lugano Convention and "the rules of general international law that govern the exercise of State authority, in particular in the judicial domain".

It is worth noticing that according to Belgium, the Lugano convention does not provide for a dispute settlement mechanism and the standing committee established by the protocol 2 on the uniform interpretation of the convention does not have jurisdiction in this matter. In its application (§48), Belgium submits also that the European Court of Justice does not have jurisdiction since the "new Lugano Convention", for which the European commission has exclusive jurisdiction, is not applicable.

Swiss Institute of Comparative Law: Conference on the EU's Proposal on Succession

On Friday, 19th March 2010, **the 22nd *Journée de droit international privé***, organised by the **Swiss Institute of Comparative Law** (ISDC) and the **University of Lausanne** (Center of Comparative Law, European Law and Foreign Legislations), will analyse the **Commission's Proposal on Succession**: "Droit international privé des successions – quel futur en Europe et en Suisse?".

The list of confirmed speakers includes *Prof. Andrea Bonomi* (Univ. of Lausanne), *Prof. Paul Lagarde* (Univ. of Paris I – Sorbonne) and *Prof. Oliver Remien* (Univ. of Würzburg). A detailed programme and further information will be posted as soon as available.

Publication: Reithmann/Martiny: Internationales Vertragsrecht

The 7th edition of the work

Internationales Vertragsrecht

edited by *Christoph Reithmann* and *Dieter Martiny*

has recently been published.

The new edition of this well-established book includes in particular the new Rome I Regulation (Regulation (EC) No. 593/2008) and the consequences resulting from the transformation of the Rome Convention into a Community Regulation and encompasses all relevant types of cross-border contracts.

The work is structured into seven major parts:

The **first part** deals with the determination of the law governing the contract. Here, the process of the unification of law is described, taking into account in particular the Rome I Regulation, i. e. its historical background – and therefore also the Rome Convention – its scope of application, its relationship to other Community instruments as well as existing international conventions and its different choice of law rules. Further, this first part contains practical advice for the drafting of contracts.

The **second part** of the book is dedicated to the scope of the law governing the contract as for instance consent, material validity, the interpretation of contracts, the content of contracts, defective performance, burden of proof, limitation of actions, voluntary assignment, subrogation, multiple liability and the transfer of obligations.

The **third part** deals with non-contractual obligations and culpa in contrahendo and therefore refers to the Rome II Regulation: In particular, the book addresses the question of freedom of choice (Art. 14 Rome II) and the basic principles which are common to unjustified enrichment and negotiorum gestio such as accessorial connection, common habitual residence and manifest closer connection. Further, the law applicable to unjust enrichment, negotiorum gestio and culpa in contrahendo under the Rome II Regulation is described as well as its scope (Art. 15 Rome II). In addition, this part covers also subrogation (Art. 19 Rome II) and multiple liability (Art. 20 Rome II).

The **fourth part** concerns overriding mandatory provisions (Art. 9 Rome I). Here, the first chapter is dedicated to the historical background of Art. 9 and gives an overview of this rule. The second chapter deals with the application of Art. 9 and therefore in particular with its scope, its (restrictive) interpretation and its effects. The third chapter addresses overriding mandatory provisions of the law of the forum (Art. 9 (2) Rome I), while the fourth chapter deals with mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed (Art. 9 (3) Rome I). The fifth and the sixth chapter are dedicated to foreign currency and to formalities.

The **fifth part**, constituting the main part of the work, is dedicated to the different types of contracts: contracts of sale (including CISG); different types of

contracts on the provision of services such as for instance contracts for work and services, leasing, guarantees, loans and brokerage agreements; further contracts on immovable property (here in particular the sale of land and ground lease); contracts on intellectual property; franchise contracts; commercial agency contracts and distribution agreements; contracts concerning the financial market; contracts of carriage; consumer contracts; transactions such as share and asset deals and joint ventures; insurance contracts and employment contracts.

The **sixth part** deals with questions of agency and power of disposal. Therefore, the book contains inter alia chapters on the law applicable to agency, the power of disposition of insolvency administrators as well as different kinds of restrictions of the power of disposal.

The **seventh** and last **part** of the book covers choice of court as well as arbitration agreements.

More information on this book can be found on the publisher's website, where it can be ordered as well.

The Enforceability of Forum Selection Clauses: Federal or State Law?

The Supreme Court has long-extolled a federal policy favoring liberal enforcement of forum selection clauses and has held that such clauses "should control absent a strong showing that [they] should be set aside." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587, 591 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972). Despite this federal policy, however, when federal courts derive their jurisdiction from diversity, the familiar *Erie* doctrine requires those courts to apply state—and not federal—law to determine the enforceability of all contracts. The United States Court of Appeals for the Sixth Circuit is the most recent federal court to grapple with a question at the intersection of these

concepts: When sitting in diversity, is the enforceability of a forum selection clause in an international contract determined by reference to state or federal law? A deep split of federal authority on this issue has been acknowledged for over fifteen years. *See, e.g., Lambert v. Kysar*, 983 F.2d 1110, 1116 n.10 (1st Cir. 1993) (citing conflicting authority, and calling the resolution a "daunting question").

In *Wong v. PartyGaming Ltd.*, No. 09-cv-0432 (6th Cir., Dec. 21, 2009), the Defendant—a Gilbralter-based company—earned a dismissal of the lawsuit filed against it in Ohio on the basis of forum non conveniens. One of the private factors that guided that determination was the existence of a forum selection clause favoring Gibraltar in the parties' contract. On review, the court of appeals had to consider the enforceability of that clause. Noting the divergences between Ohio and federal law, however, it first had to confront the choice of law issue. Looking at the law of other Circuits, the court noted that "six Circuits have held that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law." On the other hand, at least two circuits have considered the question to be substantive, and thus determined under state law, while two others remain plagued by intra-circuit conflicts on the issue. The Sixth Circuit found "persuasive the law used in the majority of circuits," and held that "[g]iven the possibility of diverging state and federal law on an issue of great economic consequence, the risk of inconsistent decisions in diversity cases, and the strong federal interest in procedural matters in federal court," federal law should govern the question. The clause was deemed valid, and the decision affirmed.

Judge Lynch in the Southern District of New York noted nearly a decade-ago that this "question may become increasingly academic, as more and more states adopt the federal rule on forum-selection clauses. At one time, American jurisdictions generally rejected their validity. Today, a clear majority of the states have reversed this stand, and, in agreement with the federal rule of *The Bremen*, will enforce forum-selection clauses unless they create injustice or were imposed by fraud." *Licensed Practical Nurses, Technicians & Healthcare Workers v. Ulysses Cruises*, 131 F. Supp. 2d 393 (S.D.N.Y. 2000). Still, as Ohio law illustrates, the problem remains a practical concern. This question will certainly keep arising in forum non conveniens cases, and in cases seeking to enforce the forum selection clauses at the outset of a case. At least when those clauses underlie a foreign

judgment that is submitted for recognition in the United States, however, the legislation implementing the Hague Choice of Courts Convention should force some much-needed harmony into the field.

English Book on the Rome I Regulation

Will the new Rome I Regulation meet its goals

- to improve the predictability of the outcome of litigation?
- to bring certainty as to the law applicable and the free movement of judgments?
- to designate the same national law irrespective of the country of the court in which an action is brought?

Edited by Prof. S. Leible (University of Bayreuth) and F. Ferrari (University of Verona), the joint-first English book on the Rome I Regulation is conceived to address these issues. To do so it collects the papers submitted to the conference "The Rome I Regulation", held in Verona on March 2009 (see post by Martin George), where the most important features of the Rome Regulation (party autonomy; contracts concerning intellectual property rights; contracts of carriage; consumer contracts; employment contracts; set off; mandatory rules; public policy…) were outlined and discussed by distinguished legal experts all over Europe and beyond.

You can view pricing and the table of contents on the Sellier website.

Swiss Conference on IP Litigation

The University of Geneva will host a conference on the *Resolution of Intellectual Property Disputes* on February 8th, 2010.

The programme can be found here and after the jump.

8 février 2010:
La résolution des litiges de propriété intellectuelle / Resolution of intellectual property disputes

Matin

Président de séance : Prof. Michel VIVANT, Institut d'études politiques, Paris

8h30 Accueil et introduction
Prof. Christian BOVET, Doyen de la Faculté de droit de l'Université de Genève
Prof.Jacques de WERRA, Faculté de droit de l'Université de Genève

8h45 15 years of Intellectual Property Disputes at the WTO – where do we stand and where are we going ?
Prof.Joost PAUWELYN, The Graduate Institute of International and Development Studies, Geneva

9h30 Le contentieux du droit de la propriété industrielle en Europe : stratégies et perspectives
Me Pierre VÉRON, avocat à la cour de Paris, président d'honneur de l'European Patent Lawyers Association

10h15 Pause café

10h45 Les litiges internationaux de propriété intellectuelle et le droit international privé
Prof. Edouard TREPPOZ, Université de Lyon II

11h30 La création de juridictions spécialisées : l'exemple du Tribunal fédéral des brevets
Me Pierre-Alain KILLIAS, docteur en droit, avocat à Lausanne

12h15 Discussion suivie de la pause déjeuner (libre)

Après-midi

Président de séance : Jacques WERNER, président, Geneva Global Arbitration Forum

14h15 Solving Internet domain name disputes : the UDRP and the future dispute resolution mechanisms
Dr Torsten BETTINGER, attorney at law in Munich

15h00 L'arbitrabilité des litiges de propriété intellectuelle
Prof. Bernard HANOTIAU, Université catholique de Louvain, avocat aux Barreaux de Bruxelles et Paris

15h45 Pause café

16h15 Designing tailored alternative dispute resolution methods for intellectual property disputes : the experience of WIPO
Dr Eun-Joo MIN, Head of the Legal Development Section, WIPO Arbitration & Mediation Center

17h00 Discussion

17h30 Conclusion

Practical details can be found here.

Google Loses in French Copyright Case

See this report of the *New York Times*:

> *A French court ruled on Friday that Google infringed copyrights by digitizing books and putting extracts online without authorization, dealing a setback to its embattled book project.*

> *The court in Paris ruled against Google after a publishing group, La Martinière, backed by publishers and authors, argued that the industry was being exploited by Google's Book Search program, which was started in 2005.*
>
> *The court ordered Google to pay over 300,000 euros, or $430,000, in damages and interest and to stop digital reproduction of the material. The company was also ordered to pay 10,000 euros a day in fines until it removed extracts of some French books from its online database.*

The French plaintiffs had sued both Google, Inc. and Google France.

Google had first challenged the jurisdiction of the French first instance court. On March 17, 2007, the court rejected the challenge and retained jurisdiction. I do not know what the precise arguments were, nor how the Paris first instance Court actually addressed them.

Google then argued that American law controlled. It relied on Article 5 § 2 of the Bern Convention. The Paris court applied the French common law of conflicts (but did not say why) and ruled that French law was applicable. It applied the choice of law rule that the French supreme court for private and criminal matters (*Cour de cassation*) has laid down for tort matters in the last 15 years or so. The rule provides that the applicable law is the place where the tort was committed. When the tort is "complex", i.e. when the event giving rise to the damage and the damage occurred in different places, the place should be determined by assessing the proper law of the tort, i.e. which place is the most closely connected. The Paris court ruled that this was a complex tort, and looked for the various connections between the case and France (but did not weigh them against connections with the U.S.). It identified many, and then concluded that the dispute was more closely connected with France. The connecting factors identified by the court were: the litigious books were French, the plaintiffs were French, one defendant was a French company (Google France), and the site was a dot_fr site, available in the French language.

Finally, it is noteworthy that the only company which is ordered to pay damages and to stop violating French law is the American entity, Google, Inc., and that an injunction has been issued against it to stop violating French law under an *astreinte* (a civil penalty, not a fine as the NYTimes reported) of € 10,000 per day

of non-compliance (on the recent case law of the *Cour de cassation* on injunctions against foreign based web sites, see my previous posts here and here).

Many thanks to V. Gaertner and B. Hess for providing me with the judgment.

Franco-American Lis Pendens

It is not good to be a Franco-American couple these days.

Yesterday, the French supreme court for private and criminal matters (*Cour de cassation*) delivered yet another judgment on parallel divorce proceedings in the U.S. and in France.

The story was pretty much the same as in a case on which I have previously reported. The French husband sued in France, the American wife sued in New York. This time, however, the claims were not exactly the same. It seems that divorce was only sought in France, while a ruling on maintenance and parental responsibility was sought in both fora.

As it understood that it was the only one seized of the divorce action, the French court ruled on it and granted the divorce. However, on the maintenance and the parental responsability issues, the French court found that it had been seized second and declined jurisdiction on the ground of *lis pendens*. The husband appealed, but by the time the Paris Court of Appeal heard the case, the New York court had issued final judgments. The French Court of appeal held that, pursuant to the French common law of judgments, the American judgments were to be recognized. In particular, they were certainly not contrary to public policy for the sole reason that they had awarded what the husband considered too high a sum for maintenance.

In a judgment of december 16, 2009, the *Cour de cassation* confirmed the decision of the Paris Court of appeal.

The dates when each court was seized were disputed. But the *Cour de cassation*

held again that whether the French court had been seized first was irrelevant for the purpose of assessing whether the American judgments should be recognised in France.

Rushing to Court or Rushing to Judgment?

Should *lis pendens* also result in denying recognition to judgments issued by foreign courts seized second?

No, ruled the French Supreme court for civil and criminal matters (*Cour de cassation*) in a case involving a French court and an American court. A Franco-American couple was breaking up. The French husband initiated divorce proceedings in Toulouse, France, on October 28, 2005. A month later, on November 21, 2005, the American wife also sought divorce before a Massachusetts Court. The American court was seized second, but it caught up and delivered a divorce judgment much before the French court, on August 16, 2006. The woman sought recognition of the American judgment in France. In May 2008, the Toulouse court held that the foreign jugdment was entitled to be recognized in France, and thus terminated the French proceedings.

Under the French common law of jurisdiction, the rule of *lis pendens* applies to proceedings initiated first in a foreign country. When this happens, French courts may decline jurisdiction if an eventual jugdment of the foreign court would be recognized in France.

Here of course, the situation is different, as the French court was seized first. The question is therefore whether *lis pendens* could produce an indirect effect. One of the requirements for the recognition of foreign judgments is that the foreign court have jurisdiction from the perspective of the French legal order. Could a foreign court seized second lack such jurisdiction because it ignored French proceedings initiated first? Until 2006, there was no real need to answer this question, since the mere fact that the party who would resist recognition was

French was enough. However, article 15 of the Civil Code is no bar anymore to the recognition of foreign judgments in France.

In a judgment of 30 September 2009, the *Cour de cassation* confirmed the judgment of the Toulouse court. It merely applied the traditional requirements of the French common law of judgments and found that the American judgment deserved recognition. With respect to the *lis pendens* situation, it held that it was irrelevant.

Conclusion: what really matters when you might be, or even have been, sued before a French court is not to rush to court, but to rush to judgment.