A Deepening Split Of Authority Over The Burden of Proof In The Federal Long-Arm Statute (And The Continuing Debate Over the Broad Assertion of Personal Jurisdiction Stemming From Patent Applications)

The Federal Circuit this week has taken a side in a long-running circuit split over the burden of proving the applicability of Fed. R. Civ. P. 4(k)(2), the federal long-arm statute that provides for service and personal jurisdiction for federal causes of action whenever a foreign defendant is not amenable to suit in any one U.S. state.

In *Touchcom, Inc. v. Bereskin & Parr*, No. 2008-1229 (Fed. Cir. Aug. 4, 2009), a Canadian inventor hired a Canadian law firm to register a patent in both the UK and United States. Unfortunately, however, the application transmitted to the United States failed to include a source code, which rendered the patent invalid for indefiniteness. The inventor sued the law firm for malpractice in the Eastern District of Virginia, basing jurisdiction on the patent application sent to the US Patent and Trademark Office ("USPTO") there. The district court dismissed that action for lack of personal jurisdiction. On appeal, the Federal Circuit identified "a question . . . of first impression, *viz.*, whether the act of filing an application for a U.S. patent at the USPTO is sufficient to subject the filing attorney to personal jurisdiction in a malpractice claim that is based on that filing and is brought in federal court."

The court held that it is was, but not though the usual means. The court agreed with the district court that the simple fact of sending a patent application to Alexandria, Virginia, "do not indicate a purposeful availment of the privilege of conducting business in Virginia," and thus the law firm "do[es] not therefore

possess the constitutional minimum contacts with" that state. However, because the claim is a federal one, the Court looked to Fed. R. Civ. P. 4(k)(2) for a basis of personal jurisdiction. Under that rule, personal jurisdiction is possible over federal claims if a nonresident defendant has insufficient contacts to be amenable to service under the long-arm statute of any state, but sufficient nationwide contacts to satisfy the due process requirements of the Fifth Amendment. It is clear that the plaintiff bears the initial burden of pleading a prima facie case for the latter, but must he also walk the narrow tightrope and make a fifty-fold showing under the former as well?

The Fifth, Seventh, Ninth, Eleventh and D.C. Circuits have said "no." In their view, under 4(k)(2), once a plaintiff makes a prima facie showing of sufficient nationwide contacts, the defendant can combat personal jurisdiction in one of two ways. He can either rebut that showing of nationwide contacts, or—if he can't do so—he can name some other state in which the plaintiff can proceed (and thus consent to jurisdiction there). In other words, a nonresident defendants' immunity to personal jurisdiction in one of the several states is presumed at the pleading stage, and the refusal to stipulate to another state forum will result in the application of the federal long-arm statute in the forum of the plaintiff's choosing.

The First and Fourth Circuits, however, take more defendant-friendly approach. In addition to carrying their burden as to nationwide contacts, those courts require the plaintiff to certify that "based on information readily available to plaintiff and his counsel" no other state's long-arm statute is applicable to the foreign defendant. Relying on an analysis proposed by Professor Stephen B. Burbank, the First Circuit determined that only then does the burden shift to the defendant to produce evidence which would show amenability to service under a state long-arm statute or insufficiency of nationwide contacts for Fifth Amendment purposes.

The Federal Circuit sided with the majority approach, and presumed a foreign defendant's immunity to another state's jurisdiction until the defendant shows otherwise. The effect, then, for all patent cases is that service and personal jurisdiction under Rule 4(k)(2) will be permitted upon a singular prima facie showing of nationwide contacts, unless the defendant rebuts that showing or consents to jurisdiction in another U.S. forum. As Judge Selya acknowledged nearly a decade ago, "[i]n a world of exponential growth in international transactions, the practical importance of [the burden of proof under Rule 4(k)(2)]

looms large." It especially looms large for patent lawyers and applicants. Recently—and quite prophetically—Peter Trooboff noted how "Rule 4(k)(2) is becoming a valuable basis for supporting infringement claims against non-U.S. parties."

The Federal Circuit didn't forget to analyze the fairness of personal jurisdiction under *Asahi*, but it nevertheless held that there was no due process violation in asserting personal jurisdiction here. This ultimate conclusion drew a sharp dissent from Judge Prost, who would have held that "this case present one of those rare situations in which minimum contacts are present but exercising personal jurisdiction would nevertheless violate due process" under *Asahi*. This case adds fuel to a fire that was previously discussed on this site. Not long ago, the Fourth Circuit held that a foreign company that has no United States employees, locations or business activities must nevertheless produce a designee to testify at a deposition in the Eastern District of Virginia for the sole reason that it has applied for a trademark registration with a government office located there. *Rosenruist-Gestao E Servicos LDA v. Virgin Enterprises Ltd.*, No. 06-1588 (4th Cir., December 27, 2007). Dissenting in that case, Judge Wilkinson called this decision "a first for any federal court," and "problematic for many reasons." The Supreme Court denied certiorari over that case last term, leaving the long-arm of the USPTO—and the danger of submitting to personal jurisdiction in the United States when one submits a patent application—for now intact.

Rabels Zeitschrift: Special Issue on the Communitarisation of Private International Law

The latest issue (Vol. 73, No. 3) of the German law journal **Rabels Zeitschrift** is a special issue dedicated to the communitarisation of private international law and contains the following articles (written in English):

- *Heinz-Peter Mansel:* Kurt Lipstein (1909-2006)
- *Jürgen Basedow*: The Communitarisation of Private International Law – Introduction
- *Jan von Hein*: Of Older Siblings and Distant Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law
- *Paul Beaumont*: International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity
- *Anatol Dutta*: Succession and Wills in the Conflict of Laws on the Eve of Europeanisation
- *Eva-Maria Kieninger*: The Law Applicable to Corporations in the EC
- *Stefania Bariatti*: Recent Case-Law Concerning Jurisdiction and Recognition of Judgments under the European Insolvency Regulation
- *Cathrin Bauer/Matteo Fornasier*: The Communitarisation of Private International Law

The journal is electronically available (for a fee) here.

Civil Procedure (Amendment) Rules 2009

Some changes to the CPR Rules, effective October 2009. Nothing of great importance to conflicts, although note the new 68.2A on requests to apply the urgent preliminary ruling procedure to the ECJ.

Choice of law clauses are not promissory

The recent Australian case of *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 discusses an important question of principle concerning contractual choice of law clauses: are they promissory terms of the contract or merely declaratory of the parties' intention?

The case arose out of class action litigation presently pending in the United States. The class actions concern a toy developed by Moose, an Australian company, called "Aqua Dots", which was distributed in the US but then recalled following allegations that it contains a toxic substance. 4.2 million Aqua Dots sets were recalled. Moose is insured for personal injury claims by Ace, an Australian insurer, pursuant to an insurance policy made in Australia, containing an express Australian choice of law clause and an express Australian jurisdiction clause. Ace at first funded and conducted the defence of the class actions on behalf of Moose but subsequently gave notice that it would cease to do so, on the basis that the policy did not cover the claims made in the class actions.

In December 2008, Moose commenced proceedings in California seeking a declaration that, as a result of the policy and Californian law, Ace is obliged to defend the actions. In January 2009, Ace commenced proceedings in New South Wales seeking an anti-suit injunction, restraining Moose from continuing the Californian proceedings.

Brereton J granted the anti-suit injunction. His Honour placed principal importance on the Australian jurisdiction clause in the policy, which he construed to be an exclusive jurisdiction clause though it did not use the word "exclusive". The fact that the the policy and the parties were connected so strongly with Australia, such that Australia was the "natural forum" for disputes, suggested that the jurisdiction clause must have been intended to do more than be merely a submission to jurisdiction.

Of perhaps greater interest was the argument by Ace that by instituting Californian proceedings for the purposes of taking advantage of Californian law, Moose had contravened an implied contractual obligation arising from the

Australian choice of law clause, and that an anti-suit injunction should be issued to restrain this contravention. This argument was founded upon the idea, developed in Adrian Briggs' recent book, *Agreements on Jurisdiction and Choice of Law* (2006), at 431-464 [11.16]-[11.78], that a choice of law clause should ordinarily be considered promissory in effect. Brereton J rejected this contention. His Honour concluded (at [47], [51]):

> *No doubt a contractual provision could be framed which unambiguously contained a promise to do nothing that might result in some other system of law becoming applicable. However, in my opinion that is not ordinarily the effect of a choice of law clause, which is usually declaratory of the intent of the parties, rather than promissory. …*
>
> *In our system of private international law, therefore, choice of law is about ascertaining the intention of the parties as to the legal system that is to govern their contract, not about covenants or promises that a particular legal system will apply. Where a choice of law is "inferred" rather than "express", it is not conceivable that there would be an implied negative stipulation not to invoke the jurisdiction of a court, which would apply a law other than the chosen one. In my view, that supports the conclusion that where there is an express choice of law, there is similarly no implied obligation not to invoke the jurisdiction of a court, which will not apply the chosen law; the express choice of law is declaratory of the parties' intention, not promissory. It may well be that the parties could frame a provision which was promissory in effect, but – given the conventional function of a choice of law clause – it would require very clear language to make it promissory rather than declaratory.*

Given that the jurisdiction clause in question did not use the word "exclusive" and the amount of money likely to be at stake, it would not be surprising if Moose appeals to the Court of Appeal.

Italian Commentary on Rome I Regulation

An extensive and thorough **commentary on the Rome I Regulation** – the first, to the best of my knowledge, to provide an article-by-article analysis of the rules of the new EC instrument on the law applicable to contractual obligations – has been published in the latest issue (no. 3-4/2009) of the Italian journal ***Le Nuove Leggi Civili Commentate*** , one of the most authoritative Italian law review, published bimonthly by CEDAM (Padova).

The commentary (nearly 450 pages) has been **edited by *Francesco Salerno* and *Pietro Franzina*** *(*both Univ. of Ferrara), and has been written by a team of Italian scholars: *Paolo Bertoli* (Univ. of Insubria), *Giacomo Biagioni* (Univ. of Cagliari), *Bernardo Cortese* (Univ. of Padova), *Anna Gardella* (Univ. Cattolica del Sacro Cuore, Milan), *Antonio Leandro* (Univ. of Bari), *Fabrizio Marongiu Buonaiuti* (Univ. of Rome "La Sapienza"), *Giuseppina Pizzolante* (Univ. of Bari), *Paolo Venturi* (Univ. of Siena). The same group of PIL experts had already published, back in 2007, a volume discussing the 2005 Rome I Commission's Proposal (see our post here).

Here's the comments' list:

Introductory remarks: *F. Salerno, F. Marongiu Buonaiuti*; **Art. 1:** *P. Bertoli* (general comment and lit. *i*), *G. Biagioni* (lit. *a-c*), *A. Gardella* (lit. *d–f*), *P. Franzina* (lit. *g–h*), *G. Pizzolante* (lit. *j*); **Art. 2:** *P. Franzina*; **Art. 3:** *A. Gardella*, *G. Biagioni*; **Art. 4:** *A. Leandro (*general comment), *P. Franzina (*lit. *a*, *c*, *d* and *g)*, *F. Marongiu Buonaiuti (*lit. *b*, *e*, and *f*), *A. Gardella* (lit. *h*); **Art. 5:** *G. Biagioni*; **Arts. 6-7:** *G. Pizzolante*; **Art. 8:** *P. Venturi*; **Art. 9:** *G. Biagioni*; **Arts. 10-11:** *B. Cortese*; **Art. 12:** *A. Leandro*; **Art. 13:** *F. Marongiu Buonaiuti*; **Arts. 14-18:** *A. Leandro*; **Art. 19:** *F. Marongiu Buonaiuti*; **Art. 20:** *P. Franzina*; **Art. 21:** *G. Biagioni*; **Art. 22:** *P. Franzina*; **Art. 23:** *F. Marongiu Buonaiuti*; **Arts. 24-26:** *P. Franzina*; **Arts. 27-29:** *F. Marongiu Buonaiuti*.

A detailed table of contents is available here.

An English translation of the Introductory Act to the German Civil Code (EGBGB) (as amended up to 17 March 2009) is now available here.

Two new IPL Regulations

Today's Official Journal (L, nº 200), publishes two new IPL Regulations: REGULATION (EC) No 662/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations; and COUNCIL REGULATION (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations. Both Regulations shall enter into force on the 20th day following their publication in the Official Journal of the European Union.

According to whereas nº 6 to 8 of both Regulations, it is for the Community to conclude, pursuant to Article 300 of the Treaty, agreements between the Community and a third country on matters falling within the exclusive competence of the Community; article 10 of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. With regard to agreements with third countries on specific civil justice issues falling within the exclusive competence of the Community, a coherent and transparent procedure should be established to authorise a Member State to amend an existing agreement or to negotiate and conclude a new agreement, in

particular where the Community itself has not indicated its intention to exercise its external competence to conclude an agreement by way of an already existing mandate of negotiation or an envisaged mandate of negotiation.

Regulations (EC) No 662/2009 and No 664/2009 therefore establish a procedure to authorise a Member State to amend an existing agreement or to negotiate and conclude a new agreement with a third country. This is a summary of such procedure:

.- Following article 3, where a Member State intends to enter into negotiations in order to amend an existing agreement or to conclude a new agreement falling within the scope of this Regulation, it shall notify the Commission in writing of its intention at the earliest possible moment before the envisaged opening of formal negotiations. Upon receipt of the notification referred to, the Commission shall assess whether the Member State may open formal negotiations. If the envisaged agreement meets the conditions set out in article 4(2) of the Regulation, the Commission shall, within 90 days of receipt of the notification referred to before, give a reasoned decision on the application of the Member State authorising it to open formal negotiations on that agreement. If necessary, the Commission may propose negotiating guidelines and may request the inclusion of particular clauses in the envisaged agreement.

.- If, on the basis of its assessment , the Commission intends not to authorise the opening of formal negotiations on the envisaged agreement, it shall give an opinion to the Member State concerned within 90 days of receipt of the notification referred to in Article 3. Within 30 days of receipt of the opinion of the Commission, the Member State concerned may request the Commission to enter into discussions with it with a view to finding a solution.

.- According to article 7 of both Regulations, the Commission may participate as an observer in the negotiations between the Member State and the third country as far as matters falling within the scope of the Regulation are concerned. If the Commission does not participate as an observer, it shall be kept informed of the progress and results throughout the different stages of the negotiations.

.- Article 8 states that before signing a negotiated agreement, the Member State concerned shall notify the outcome of the negotiations to the Commission and shall transmit to it the text of the agreement. Upon receipt of that notification the

Commission shall assess whether the negotiated agreement meets the conditions stated in art. 8. If the negotiated agreement fulfils the conditions and requirements referred to in paragraph 2, the Commission shall, within 90 days of receipt of the notification referred to in paragraph 1, give a reasoned decision on the application of the Member State authorising it to conclude that agreement.

.- If, on the basis of its assessment under Article 8(2), the Commission intends not to authorise the conclusion of the negotiated agreement, it shall give an opinion to the Member State concerned, as well as to the European Parliament and to the Council, within 90 days of receipt of the nptification referred to in Article 8(1). Within 30 days of receipt of the opinion of the Commission, the Member State concerned may request the Commission to enter into discussions with it with a view to finding a solution.

Where, at the time of entry into force of this Regulation, a Member State has already started the process of negotiating an agreement with a third country, the described procedure shall apply.

Article on Passengers' Rights

Jens Karsten (Brussels/Oslo) has written a paper on recent developments in the field of European passenger law with references to PIL issues. "Im Fahrwasser der Athener Verordnung zu Seereisenden: Neuere Entwicklungen des europäischen Passagierrechts" has been published in the German law journal "Verbraucher und Recht" (VuR) vol. 6/2009, pp. 213 et seq.

The article mainly deals with Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents. The Athens Regulation incorporates most of the Athens Convention 2002 (www.imo.org) into the acquis communautaire but postpones the implementation of its Articles 17 and 17bis on jurisdiction and enforcement (deviating from 'Brussels I') until such time as the EC has acceded to the Convention.

Beyond the discussion of the Athens Regulation, the paper also presents new

references for preliminary rulings and recent decisions of the ECJ linking travel law and PIL. The author refers inter alia to the "Rehder" case (which in the meantime – as we have reported – has been decided). It also introduces the Austrian reference on Art. 15(3) 'Brussels I' in the "Pammer" case (now also Case C-144/09, Alpenhof v. Heller).

Most significant for the development of EU-PIL, the paper raises the question of the interaction of the European Commission proposal of 8 October 2008 for a Directive on Consumer Rights (COM(2008) 614 final) with the 'Rome I'-Regulation (first discussed in this forum by Giorgio Buono on 9 October 2008: "EC Commission Presents a Proposal for a Directive on Consumer Rights"). The proposal aims at merging four existing directives on consumer rights: Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees. Three of these directives provide for conflict-of-law clauses concerning the scope of EC consumer law (scope clauses). Those clauses, where applicable, have the effect of making, for instance, unfair term control as foreseen in EC law under Directive 93/13/EEC on Unfair Terms in Consumer Contracts possible even when the law of a third country is chosen. Somewhat hidden in its provisions, the proposal would abolish the scope clauses of its predecessor directives. The author assesses the impact of this change in EC-PIL de lege ferenda, taking in particular into account Article 5 and Article 3(4) of 'Rome I', both new provisions compared to the Rome Convention. The choice of law of a third, non-EU-country for seat-only sales would consequently be possible also in those areas of EC consumer law whose application is so far guaranteed by the scope clauses. This significant change is welcomed; however, uncertainty remains whether this consequence has been properly considered in the proposal. The author encourages therefore a discussion on the territorial scope of EC consumer law with regard to passengers' rights.

United States Congress Considering Legislation Relating to Pleading

As was recently reported on this blog, this past May the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which will have relevance for pleading private international law cases in United States federal courts. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) made clear that the heightened standards of pleading announced in 2007 in *Bell Atlantic v. Twombly* should be applied in cases beyond the antitrust context. In *Twombly*, the Court held that to comply with Federal Rule of Civil Procedure 8(a)(2) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief") that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." There had been some confusion in the lower federal courts as to whether that heightened pleading standard of "plausibility" applied in cases outside of the antitrust context. The Court in *Iqbal* answered that question in the affirmative, generally requiring all civil plaintiffs to meet the following standard: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Slip op. at 14. As such, enough facts must be plead to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A complaint must therefore show more than "a sheer possibility that the defendant has acted unlawfully." *Id*.

On Wednesday, Senator Arlen Specter of Pennsylvania introduced a bill to return pleading standards in United States federal courts back to the "standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." That standard, which was overturned by *Twombly*, merely required that the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Likewise, *Conley* provided that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." That approach to pleading, generally described as "notice pleading," enabled plaintiffs to describe their case in the complaint in very

general terms and then to use the mechanics of discovery to prove up their claims at trial and/or force settlement before trial. In overturning that case in *Twombly* and in clarifying in *Iqbal* that in *all* civil cases a complaint must meet the heightened pleading standard of plausibility, the Supreme Court has moved pleading in the the United States ever so slightly towards the civil law's "fact pleading" standard.

Senator Specter's bill would return the United States to the simple "notice pleading" of the pre-*Twombly* era. A couple of observations are in order. *First*, it is clear that *Iqbal* is a blockbuster decision. As recently described by Adam Liptak in the *New York Times*: "The most consequential decision of the Supreme Court's last term got only a little attention when it landed in May. . . . But the lower courts have certainly understood the significance of the decision, *Ashcroft v. Iqbal*, which makes it much easier for judges to dismiss civil lawsuits right after they are filed. They have cited it more than 500 times in just the last two months." The impact for private international law cases will be substantial in that those cases often require extensive discovery to make out claims, as the acts and/or occurrences allegedly giving rise to unlawful activity occur outside the borders of the United States and present unique problems of factual development given their transnational dimension.

Second, Congress has now entered the fray given the importance of that decision to all civil cases. While Senator Specter's bill may be elegant in its simplicity, one wonders whether a bill more carefully crafted and detailed might be in order. For instance, might it be useful to have a carve out for cases, such as private international law ones, that pose unique pleading problems. Or, might it be useful for Congress to more precisely detail the discretion to be employed by district court judges in reviewing civil complaints. To be sure, both *Conley*'s liberal standard and *Iqbal*'s heightened standards are not studies in clarity. Thus, it might be better to provide more-focused principles to be employed by the courts in civil cases rather than merely returning to *Conley*'s opaque standard.

Finally, it should be asked from a comparative perspective whether US courts and Congress might look to the experience of fact pleading abroad before returning to the *Conley* standard. In Europe, there is a rich experience with heightened pleading standards that might provide concrete rules for application in the United States. For instance, perhaps moderating principles of judicial administration might be explored to lessen the seemingly blunt pronouncements in *Twombly* and

Iqbal. This would be especially relevant in private international law cases, where cases sit at the interstices of the common law and civil law divide.

At bottom, private international lawyers should keep a close watch on these developments.

Publication: "La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"

The papers presented at the conference on the Rome I Regulation hosted in November 2008 by the University of Venice "Ca' Foscari" (see here for the webcast) have been published by the Italian publishing house Giappichelli under the editorship of *Nerina Boschiero*: **"La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"**.

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Osservazioni conclusive (*T. Treves*).

Title: **"La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"**, edited by *Nerina Boschiero*, Giappichelli (Torino), 2009, XVI – 548 pages.

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