

Parallel Class Actions in Canada

Canadian provincial courts continue to analyze how to manage class actions that include class members from other provinces. While Canada is a federal country, it is acceptable for the court in a province to certify a class that includes members from other provinces. A difficulty arises if two provinces are each asked to certify a multijurisdictional class in respect of the same underlying claim.

Currently there are class actions against Merck Frosst in both Ontario and Saskatchewan in respect of Vioxx. In each of these provinces, the class action regime is “opt-out”, so that the class as defined catches all described members without any specific action on the part of a particular member. Merck moved to stay the Ontario action on the basis that it should not be subject to two multijurisdictional class actions that involve substantially the same plaintiffs and issues. In *Mignacca v. Merck Frosst Canada Ltd.* (an as-yet unreported decision of the Ontario Divisional Court, dated Feb. 13, 2009) the court refused to stay the Ontario action.

The court refused to adopt an approach that would defer to the court that first certified the class action: “a rule of swiftest to the finish line taking all encourages tactics that may well be contrary to the interests of justice” (para. 47). The court noted that in other cases parallel class actions involving jurisdictional overlap had been resolved through the cooperation of counsel and guidance from the court.

An unusual element of this case was the Ontario court’s concern about the lawyer representing the plaintiff class in the Saskatchewan proceedings. It noted that he had five disciplinary violations from 1972 to 2006. This strengthened the court’s desire to have the Ontario proceedings continue.

Two Cases on Internet Jurisdiction

Court Upholds Forum Selection Clause in Web Hosting Agreement

Jenny Kim (Stanford Law School) has, on the CIS-website, posted a case review of decision 2008 WL 4951020 (N.D. Cal. November 18, 2008) where the U.S. District Court for the Northern District of California dismissed *Bennett v. Hosting.com* for improper venue last November. The plaintiff's company, *HowFastTheyGrow.com*, had signed an agreement to litigate all disputes in Jefferson County, Kentucky when contracting the defendant's web-hosting services. The court upheld the forum selection clause despite Bennett's contention that it was unenforceable for unconscionability and inapplicable to her tort claims. For more, have a look at the current issue of Packets.

Arizona District Court Rules Website Targeting Plaintiff Does Not Create Jurisdiction in Plaintiff's Home State

Allison Pedrazzi Helfrich (Stanford Law School) has, on the CIS-website, posted a case review of decision 2008 WL 5235373. In January 2008, Jan Kruska filed defamation, cyberstalking, and other claims against Perverted Justice Foundation, Inc. (and other defendants), for disseminating rumors on various websites that Kruska was a convicted child molester and a pedophile. In December 2008, a U.S. District Court in Arizona dismissed the complaint against Perverted Justice Foundation based on a lack of personal jurisdiction. Perverted Justice is a non-profit corporation based in California and Oregon and has no licenses or designated agent for service of process in Arizona, conducts no business with Arizona, and is not incorporated in Arizona. The court held there could be no general jurisdiction over Perverted Justice "in the absence of these types of contacts that approximate physical presence in Arizona." The plaintiff argued, however, that Perverted Justice made her a target of its online activities and therefore became subject to jurisdiction in Arizona by expressly aiming its tortious actions at the forum state. Although the court recognized the "effects test" basis for jurisdiction, it held that the "essentially passive nature" of Perverted Justice's activity in posting a website with a low degree of interactivity is not sufficient to establish specific jurisdiction. For more, have a look at the current issue of Packets.

An Early 2009 Round-Up: Significant Federal Cases Over the Past Two Months

In this round-up of significant U.S. decisions during the first two months of 2009, we'll focus on two areas of law that generate a lot of jurisprudence at the appellate level.

A. Jurisdiction for Acts Occurring Abroad

Two federal statutory schemes—the first a response to the events of September 11, the second a 200 year old response to piracy on the high seas—are generating a lot of jurisdictional quandaries of late. The Intelligence Reform and Terrorism Prevention Act of 2004 criminalizes the provision of material support to foreign terrorist organizations, and provides for “extraterritorial Federal jurisdiction” to punish those acts. It also provides a civil remedy for those injured in his “person, property or business” by such criminal acts. In *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 538 F.3d 71 (2d Cir. 2008), pet’n for cert. filed, No. 08-640 (Nov. 12, 2008), the Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who “directed” or “commanded” terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely “fores[aw] that recipients of their donations would attack targets in the United States.” According to the court, even those foreign entities who knowingly funded al Qaeda and Osama bin Laden were “far too attenuated” to fall within the jurisdiction of U.S. courts. This decision fostered a split with decisions in the D.C., Ninth and Seventh Circuits, and (along with other facets of the opinion on scope of the FSIA) is now pending on a Writ of Certiorari before the United States Supreme Court. This week, the Court requested the views of the Solicitor General on whether to grant the Petition. This case could become a very significant decision on the constitutional scope of personal jurisdiction over foreign parties if it is granted.

The Second Circuit returned a few months later in *Abdullahi v. Pfizer, Inc.*, No. 05-4863, 2009 U.S. App. LEXIS 1768 (2d Cir., January 30, 2009), to assert subject matter jurisdiction over a cause of action under the Alien Tort Statute of 1789 for defendant's alleged drug tests on unwitting Nigerian children. The court—in a 2-1 decision—held that the prohibition on non-consensual medical experimentation is a specific and universal norm of “the law of nations,” which satisfies the jurisdictional predicate of the ATS. Because defendant acted in concert with the Nigerian government, the court held that the claim could proceed past the pleading stage. The Court also reversed the district court's decision on choice of law—which held that Nigerian law would have applied to these claims—and remanded the case with instructions to the court to more carefully and thoroughly weigh the factors of the “most significant relationship test” which could—the Court suggested—eventually lead to the application of Connecticut law.

B. Forum Selection Clauses

In a topic that is of practical import for both litigators and transaction attorneys alike, the federal courts of appeals have been active in the past two months concerning the scope, validity and enforceability of forum selection clauses. Most recently, in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.*, Nos. 08-6014/6032, 2009 U.S. App. LEXIS 2743 (6th Cir., February 13, 2009), the parties disputed the meaning of a contract that contained a “non-exclusive” choice of court clause vesting jurisdiction in the courts of Australia, alongside a provision that allowed either party to request arbitration of their disputes. One party compelled arbitration in the United States, and the other sought to enjoin such arbitration in favor of litigation it previously filed in Australia. The Sixth Circuit held that the choice of court clause did not preclude arbitration, because reading the contract “as a whole . . . unambiguously provides that the courts of [Australia] are only one possible forum” for the claims in this dispute. The court then moved onto thornier issues of international comity abstention and anti-suit injunctions, both of which were “issues of first impression for [the Sixth] Circuit.” Surveying the case law on the “complex interaction of federal jurisdictional and comity concerns,” as well as the dictates of “international law” expressed in treaties expressing the judicial preference for allowing arbitration, the court held that “abstention is inappropriate in this case.” Interestingly, the court seemed to suggest that in any case falling within Article II(3) of the New York Convention, a court in a signatory country has no authority to abstain from compelling

arbitration on comity grounds. With the Australian proceedings voluntarily stayed by the parties pending this appeal, the court declined to review the district court's denial of an anti-suit injunction, but left open the possibility that such an injunction could issue if that litigation were to be reopened and thereby threaten the "important public policy" of the Convention and the United States.

Finally, an interesting recent decision by the Ninth Circuit illustrates the differential treatment a forum selection clause will get in U.S. courts, depending upon what substantive federal statute governs the cause of action. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, No. 06-56831, 2009 U.S. Dist. LEXIS 2111 (9th Cir., February 4, 2009) was, as the Ninth Circuit put it, a "maritime case about a train wreck." There, the parties contracted for the carriage of goods from China to the United States by sea, and then inland by rail to various points in the American Midwest through a single bill of lading. The train derailed in Oklahoma, the American buyer sued in California, but the contract contained a choice of forum clause in favor of Tokyo. The Japanese Defendants moved to dismiss the action on the basis of that clause. If the federal Carriage of Goods by Sea Act (COGSA) were to apply to the entire journey, the choice of forum clause would be liberally respected, and the defendants' motion to dismiss likely granted. If the federal Carmack Amendment—which generally covers inland rail transportation—were to apply to the inland portion of the trip, the deference to choice of courts is much more narrow. In the end, the Ninth Circuit held that the Carmack Amendment applied to the claims, and remanded the case to determine whether that statute's narrow allowance of a foreign forum selection clauses were satisfied. How it got to that conclusion, however, is much more interesting.

For starters, the Defendants argued that the Carmack Amendment was categorically inapplicable to them. They are ocean carriers, who only contracted for follow-on rail line transportation at the end of their journey, and the Carmack Amendment literally applies only to persons or companies "providing common carrier railroad transportation for compensation." The Second Circuit, the Florida Supreme Court, and at least one other federal district court, have held that the Carmack Amendment did not apply to ocean carriers who did not perform rail transportation services. The Ninth Circuit disagreed with these decisions, and held that ocean carriers could fall within the Amendment's provisions.

The Defendants next argued that, even though an ocean carrier may fall within the Carmack Amendment, when that carrier provides only one bill of lading

covering the entire trip (over-sea and over-land), and thereby elects to contractually extend COGSA to the inland portion of the trip, the Carmack Amendment does not apply. No less than four circuits (the Seventh, Sixth, Fourth and Eleventh) support this view. “Despite this weight of authority,” the Ninth Circuit held, “our own precedent expressly forecloses” this argument. The Ninth Circuit, like the Second Circuit, has long held the view that “the language of Carmack encompasses the inland leg of an overseas shipment conducted under a single ‘through’ bill of lading.”

The discord in this area is especially troubling in light of recent Supreme Court jurisprudence. The Court has held—and the Ninth Circuit even acknowledged—that contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of extending COGSA inland when a single bill of lading takes goods from overseas to inland destinations. Indeed, “confusion and inefficiency will inevitably result if more than one body of law governs a given contract’s meaning,” and the Supreme Court has suggested that where this is the case, “the apparent purpose of COGSA” is defeated. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004). Still, in the Ninth Circuit, “the policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and precedent.”

Fourth Issue of 2008’s *Revue Critique de Droit International Privé*

The fourth issue of the *Revue Critique de Droit International Privé* was just released.



It contains two articles. Unfortunately, none of them comes with an abstract in English.

The first is a presentation of the Rome I Regulation by emeritus Professor Paul Lagarde and Aline Tenenbaum, who lectures at the Faculty of Law of Paris XII University.

Belgian Professor Marc Fallon is the author of the second, which deals with The Posting of Workers in Europe (*Le détachement européen des travailleurs, à la croisée de deux logiques conflictualistes*).

The table of contents can be found here , but articles of the *Revue Critique* cannot be downloaded.

Supreme Court of Canada Addresses Role of Parallel Proceedings in Stay Applications

Canada's highest court has delivered its judgment in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* (available here). The decision is quite brief and upholds the decision of both courts below, leaving some to wonder why leave to appeal was granted.

Teck has mining and smelting operations in British Columbia. In 2004 it was sued in Washington State for environmental property damage caused by the discharge of waste material into the Columbia River, which flows from Teck's Canadian operations into the United States. Teck notified its insurers, looking to them to defend the claim, but they refused.

Teck therefore sued the insurers in Washington State to establish its entitlement under the insurance policies. The insurers sued Teck in British Columbia to establish their lack of responsibility under the same policies. So the issue became where the coverage issue would be resolved.

Stay applications were brought in both coverage actions. The application failed in

the United States. It also failed in the courts of British Columbia, but those decisions were appealed to the Supreme Court of Canada.

Teck wanted Canada's highest court to take a different approach to applications for a stay in cases where a foreign court has already positively asserted jurisdiction. This position was framed in a couple of different ways, but its essence was that the parallel proceedings should be an overriding and determinative factor in the analysis. The court rejected that position, confirming that parallel proceedings are only one factor among many to be considered.

The court's decision is under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. However, the court confirms that s. 11 is a codification of the common law doctrine of *forum non conveniens*, and so the reasoning should apply equally in provinces which have not adopted a jurisdiction statute (though it would have been helpful for the court to have expressly made this clear).

Most of the decision is unobjectionable and clear. One point to consider, however, is the court's reference (in para. 30) to a distinction between interprovincial cases and international cases. This raises the possibility that different considerations could arise as between sister provinces. A refusal to stay proceedings in one province might be treated as determinative of the issue in another, in part because of the possibility of appeal to the Supreme Court of Canada and its binding effect on all provinces, and in part if the other province were required to recognize the admittedly interlocutory decision on the stay application. Both of these are debatable issues, and the orthodoxy would suggest that parallel proceedings in a sister province remain just one factor in the analysis. More guidance from the court on this question would have been welcome.

Garsec goes to the High Court

Readers may recall the interesting *forum non conveniens* case in the New South Wales Court of Appeal, *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008]

[NSWCA 211](#); (2008) 250 ALR 682. My post on that decision is [here](#). It arises out of an alleged contract for the sale of an old, rare and beautiful manuscript copy of the Koran by Garsec to the Sultan for USD 8 million. The Court of Appeal unanimously dismissed an appeal from a decision staying the proceeding. On 13 February 2009, Garsec's application for special leave to appeal to the High Court was referred to an enlarged bench of the Court, with instructions that the parties prepare submissions as if on appeal: see [2009] HCATrans 21. Watch this space.

Retaliation in Alien Tort Statute Litigation?

An interesting case where Chevron is seeking to recover legal costs, including \$ 190,000 in copying expenses, from Nigerian villagers

Publication: Liber Fausto Pocar - New Instruments of Private International Law

✘ The Italian publishing house Giuffrè has recently published a very rich collection of essays in honor of Fausto Pocar, Professor at the University of Milan and judge and former President of the International Criminal Tribunal for the former Yugoslavia, one of Italian leading scholars in the field of public international law, EU law and private international law.

The collection, *Liber Fausto Pocar*, edited by *Gabriella Venturini* and *Stefania Bariatti*, is divided in two volumes, devoted respectively to public international

law (vol. I, Diritti individuali e giustizia internazionale - Individual Rights and International Justice) and private international law (vol. II, Nuovi strumenti del diritto internazionale privato - New instruments of Private International Law).

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- *Stefania Bariatti*, Filling in the Gaps of EC Conflicts of Laws Instruments: The Case of Jurisdiction over Actions Related to Insolvency Proceedings;
- *Maria Caterina Baruffi*, Il riconoscimento delle decisioni in materia di obbligazioni alimentari verso i minori: l'Unione europea e gli Stati Uniti a confronto;
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- *Riccardo Luzzatto*, Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato;
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- *Ilaria Queirolo*, L'influenza del Regolamento comunitario sul difficile coordinamento tra legge fallimentare e legge di riforma del diritto internazionale privato;
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Title: **Liber Fausto Pocar - Vol. II: Nuovi strumenti del diritto internazionale privato**, edited by *Gabriella Venturini* and *Stefania Bariatti*, Giuffrè, Milano, 2009, XXXVII - 1020 pages.

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Jurisdiction in Contract Matters in Brazil

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

São Paulo Civil Appellate Court, Seventh Chamber (Appeal N0. 312.848-4/4-00): *Editoriale Johnson SPA et al.; v. Renção Comércio e Importação e Indústria Ltda et al.*, judgment rendered on December 17, 2008

The parties, an Italian publishing house and a Brazilian distributor, entered into a contract for commercial representation in Brazil. The contract was signed in Italy. Alleging contractual breach plaintiff, the Italian publisher, filed a lawsuit in Brazil, against the Brazilian distributor, claiming rescission plus damages.

The Brazilian District Court dismissed the case for lack of Brazilian jurisdiction, based on the fact that the contract was entered in Italy, which made Italian law applicable to solve the two issues raised: rescission and damages.

The Appellate Court held in its majority decision that although the contract was signed in Italy, performance took place in Brazil where defendant distributed plaintiff's products. It is certain then that although the deal was made in Italy, it was meant to produce effects in Brazil. The case is then controlled by Article 88, paragraph II of the Code of Civil Procedure, as well as Article 12 of the Introductory Act to the Civil Code, both of which grant jurisdiction to the Brazilian court when "the obligation must be performed in Brazil."

The Appellate Court further considered that sending the plaintiff to an Italian court would also impose a heavy burden on the Brazilian defendants and even preventing them access to justice and an ample opportunity to defend themselves.

The district-court judgment was annulled and the file was returned to said court with instructions to conform to the appellate decision.

Brazilian attorney André de Almeida provided the text of this decision.

Programme and Booking for the Journal of Private International Law Conference 2009 at NYU

The **programme for the Journal of Private International Law Conference 2009**, to be held at New York University Law School on 17-18 April 2009, along with a special tribute to Andreas Lowenfeld on 16 April, is now available. The line-up, both in the early careers section, and in the plenary sessions, makes this a diverse and fascinating conflicts conference of the very highest quality. There is limited space available, so it is strongly recommended that you book early. The booking page has details on New York accommodation, as well as the relevant fee for each category of registrant.

I look forward to seeing many of you there. Martin.