Chinese Judgment Enforced in the United States

On August 12, 2009, the United States District Court for the Central District of California issued a judgment enforcing a $6.5 million dollar Chinese judgment against an American corporate defendant under California's version of the Uniform Foreign Money Judgments Recognition Act. The court's full decision is available here.

This case is unique because it is generally believed that United States courts will not enforce Chinese judgments given the lack of a treaty between the two countries on the issue and given that Chinese courts generally do not enforce United States judgments in China, which limits the argument for reciprocity in the United States. Given this decision, California may become a favorable forum for enforcement of Chinese judgments in the United States.

PIL conference @ UJ

The final programme for the PIL conference at the University of Johannesburg, 8-11 Sept 09, is now available at www.uj.ac.za/law.

Narrowing the Extraterritorial Reach of U.S. Patent Laws: Cardiac

Pacemakers Inc. v. St. Jude Medical Inc.

In a follow-on development from a 2007 U.S. Supreme Court case that was previously discussed on this site (*Microsoft Corp. v AT&T Corp.*), an *en banc* decision by the U.S. Court of Appeals for the Federal Circuit on Wednesday has again narrowed the reach of U.S. patent laws covering companies' overseas production and sales. In *Cardiac Pacemakers Inc. v. St. Jude Medical Inc.*, the Federal Circuit determined that patents for "methods or processes" are not subject to 35 U.S.C. § 271(f), and thus cannot give rise to patent infringement liability if the products are assembled and sold overseas. Two years ago, the Supreme Court similarly held that Microsoft was not liable under U.S. patent law for sending master discs with encrypted Windows data to foreign companies, who would then sell the products to non-U.S. customers, even though the end-product infringed on an AT&T speech software patent.

The plaintiffs in the case accused a company that sells implantable cardioverter defibrillators, which detect and correct abnormal heartbeats, of infringing on a patent for a "method of heart stimulation." The method uses a programmable, implantable heart stimulator. The en banc ruling overturned the Federal Circuit's Dec. 18 decision holding defendant liable for infringement of a method patent, and refusing to limit damages to U.S. sales. As in *Microsoft*, the dispute here concerned the interpretation of 35 U.S.C. § 271(f), which seeks to impose liability on companies that send "components of a patented invention" abroad for assembly and sale. Circuit Judge Alan Lourie got the "clear message" from the Supreme Court in *Microsoft*: "that the territorial limits of patents should not lightly be breached." Writing for the majority of the en banc court, he acknowledged that Federal Circuit "precedents draw a clear distinction between method an apparatus claims for purposes of infringement liability, which is what Section 271 is directed to," and held that "the langue of [the law's relevant section], its legislative history, and the provision's place in the overall statutory scheme all support the conclusion that [that section] does not apply to method patents." This decision overruled a 2005 Federal Circuit decision on the same issue, *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*, and drew a lengthy dissent from Judge Newman.

Pleading Alien Tort Statute Cases in the US: Heightened Pleading in International Cases

As recently discussed on this blog, the US Supreme Court case of *Ashcroft v. Iqbal* will have important ramifications for private international law cases filed in US federal courts. That case requires that a complaint state a "plausible" claim for relief to survive a motion to dismiss. While it is too soon to have a full sense of *Iqbal*'s impact across the entire private international law field and civil litigation generally in the US, a recent Alien Tort Statute case decided by the US Court of Appeals for the Eleventh Circuit perhaps offers an important clue about where we are heading in pleading international cases in US federal courts.

In *Sinaltrainal v. Coca-Cola Company*, a group of consolidated plaintiffs, who were trade union leaders in Colombia, brought suit under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA) alleging that their employers–two bottling companies in Colombia–collaborated with Colombian paramilitary forces (and, in one case, conspired with local police officials) to murder and torture plaintiffs. Coca-Cola was allegedly connected to the bottlers through a series of alter ego and agency relationships, but was not alleged to be directly liable for the murder and torture; rather, the conduct was allegedly committed by paramilitary and local officials acting in concert with the local management of the bottling facilities. The district court dismissed the case for lack of subject matter jurisdiction against the Coca-Cola defendants in *Sinaltrainal I* because Coca-Cola did not have the requisite control to be liable for the bottlers' alleged actions, and in *Sinaltrainal II* the district court similarly dismissed the complaints against the bottlers for insufficiently pleading a conspiracy. This appeal followed to the Eleventh Circuit.

In a nutshell, the complaint alleged that defendants conspired with paramilitary forces and/or the local police to rid their bottling facilities of unions. As to the complaints alleging violation of the ATS, the appellate court held that the

plaintiffs mere recital that paramilitary forces were in a relationship with and assisted by the Colombian government did not state a plausible allegation of state action. Slip op. at 23. This was so because the complaints needed to sufficiently (read plausibly) plead that "(1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the defendants, or their agents, conspired with the state actors, or those acting uncer color of law, in carrying out the tortious acts." *Id.* Finding the war crimes exception inapplicable, this meant that plaintiffs needed to plead "factual allegations" to support their conclusion of a relationship between the paramilitary and the Colombian government, which they did not do. *Id.* (noting that the complaint alleged merely that the paramilitary were "permitted to exist" and "assisted" by the Colombian government). As to the complaint alleging conspiracy, the court held that the mere recital of an alleged conspiracy without alleging "when" the conspiracy occurred and "with whom" the conspiracy was entered into likewise fails to state a claim under the ATS. *Id*. at 30. As described by the the Eleventh Circuit, "[t]he scope of the conspiracy and its participants are undefined." *Id*. Similar rationales were applied to the TVPA claims. *Id*. at 32-33. At bottom, the Eleventh Circuit has required clear statements of government action and clear identification of the scope and participants in an alleged conspiracy to survive a motion to dismiss in ATS and TVPA cases.

In the pre-*Iqbal* era, it is likely that the complaint would have survived a motion to dismiss in that there were some factual allegations that could have given rise to a cause of action. The allegation of government action and conspiracy based on information and belief would have entitled the plaintiffs to at least some discovery in the pre-*Iqbal* era to prove their case. In that *Iqbal* now requires heightened pleading, the Eleventh Circuit has been clear that a plaintiff must plead facts that make the allegation of unlawful conduct plausible on the face of the complaint. In other words, plaintiffs will not have the guarantee of discovery to help make out their case.

There are important outcomes to this decision. To begin with, it shows that the next wave of ATS litigation will be fought at the motion to dismiss phase for failure to plead plausible claims. Rather than focusing on legal theories–for instance, whether a certain type of liability is contemplated under the ATS–courts will now be asked to focus on whether the facts alleged in plausible detail

unlawful activity. Such an approach to pleading will be tough for plaintiffs in ATS cases because plaintiffs may not have access to the facts necessary to prove such claims as conspiracy, especially given the necessity of discovery from foreign governments and officials. This places plaintiffs lawyers in a tough position. Even in cases where they believe under Rule 11 of the Federal Rules of Civil Procedure that the "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," they may in fact not be entitled to any discovery. As such, plaintiffs lawyers may need to think twice about filing these cases.

Second, courts are now be empowered to create heightened pleading pleading standards in ATS cases. This means that the tide of ATS litigation may be stemmed through motions practice on factual as opposed to legal issues.

Third, it is likely that we will see *Iqbal* play itself out in myriad ways in international law cases generally. The most important way is that it is now much harder to allege private international law violations in US courts because such violations frequently require court-ordered discovery to enable plaintiffs and their lawyers to investigate activities occurring abroad.

It is now clear that the new pleading regime established by the US Supreme Court is having important ramifications in international civil litigation cases in the United States. The question, of course, is whether the new pleading standards announced by the Court are the appropriate standards for private international law cases. Will such cases needlessly be hampered by heightened pleading standards that may well be impossible to meet in cases involving foreign goverenments, foreign governmental entities, and foreign facts?

Publication: Mills on The

Confluence of Public and Private International Law

Alex Mills (Selwyn College, Cambridge) has published a monograph, based upon his doctorate, on *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (2009, Cambridge University Press). Here's the blurb:

> *A sharp distinction is usually drawn between public international law, concerned with the rights and obligations of states with respect to other states and individuals, and private international law, concerned with issues of jurisdiction, applicable law and the recognition and enforcement of foreign judgments in international private law disputes before national courts. Through the adoption of an international systemic perspective, Dr Alex Mills challenges this distinction by exploring the ways in which norms of public international law shape and are given effect through private international law. Based on an analysis of the history of private international law, its role in US, EU, Australian and Canadian federal constitutional law, and its relationship with international constitutional law, he rejects its conventional characterisation as purely national law. He argues instead that private international law effects an international ordering of regulatory authority in private law, structured by international principles of justice, pluralism and subsidiarity.*
>
> *• Brings together and develops legal scholarship in both public and private international law, making the material from each discipline more relevant and accessible to the other • A wide-ranging analysis of approaches to private international law, exploring their relationship with ideas of international constitutionalism. Examines the rules of private international law in various common law and civil law systems from an international systemic perspective relevant to a global readership • Includes extensive comparative analysis of the role of private international law and its relationship with constitutional law in the US, EU, Australia and Canada, covering both history and new developments*

This is a highly interesting and persuasive work, exploring themes and ideas that have either never gained the mainstream approval of private international (or

public international) scholars, or that simply have never been examined in such detail before. You can view the Table of Contents, as well as an Excerpt, on the CUP website. The book is available in paperback for £24.99, or hardback for £55 from CUP, or you can order it from Amazon UK for just £21.24 (paperback) or £46.75 (hardback) respectively. It is *highly recommended.*

Hamburg Lectures on Maritime Affairs

In the period 04.09. – 21.10. 2009 this year's Hamburg Lectures on Maritime Affairs, organised by the International Max Planck Research School for Maritime Affairs and the International Tribunal of the Law of the Sea (ITLOS), will take place in Hamburg.

The lectures feature renowned scholars and practitioners addressing current developments in the maritime field. All lectures and panel discussions are open to the public.

The schedule for the Hamburg Lectures 2009 is available here:

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.