Developments in the Recognition of Foreign Class Action Judgments

With the courts of Canadian provinces willing to take jurisdiction over a "national" class claim, involving a plaintiff class which includes members located in other provinces, and with American courts willing to take jurisdiction over "international" classes, involving a plaintiff class which includes members located in Canada, Canadian courts are increasingly having to confront the issue of whether to recognize a foreign class action decision. If a defendant settles a class claim brought in the United States which purports to bind class members in Canada, that defendant then will raise that settlement, as approved by judicial order, in response to subsequent class claims in Canada. Given the value of class claims, the decision whether or not to recognize the foreign decision has significant economic repercussions.

Two relatively recent Canadian decisions on whether to recognize such judgments are *Parsons v. McDonald's Restaurants of Canada Ltd.* (available here) and *Currie v. McDonald's Restaurants of Canada Ltd.* (available here). These decisions generally support recognition of such judgments, but they impose particular conditions relating to the process followed in the foreign court and the notice given to the people affected in Canada. More recently, two Quebec decisions have addressed the recognition of foreign class action judgments. See *Lépine v. Société Canadienne des postes* (available here; affirmed on appeal) and *HSBC Bank Canada c. Hocking* (lower court decision available here; appellate decision will be available on CanLII). The latter decision has just been released, and the former decision has been appealed to the Supreme Court of Canada, so further guidance on these issues is likely forthcoming.

Some of these issues are addressed in Janet Walker, "Crossborder Class Actions: A View from Across the Border" (2003) Mich. St. L. Rev. 755; Debra Lyn Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham L. Rev. 41; Ellen Snow, "Protecting Canadian Plaintiffs in International Class Actions: The Need for A Principled Approach in Light of *Currie v. McDonald's Restaurants of Canada Ltd.*" (2005) 2 Can. Class Action Rev. 217; and Craig Jones & Angela Baxter, "Fumbling Toward Efficacy: Interjurisdictional Class Actions After *Currie v. McDonald's*" (2006) 3 Can. Class

Action Rev. 405.

ECJ: Judgment on Service Regulation (Weiss und Partner)

Today, the ECJ delivered its judgment in case C-14/07 (*Weiss und Partner*).

The German Federal Supreme Court (*Bundesgerichtshof*) had referred the **following questions** to the ECJ for a preliminary ruling:

> *Must Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('the Regulation') be interpreted as meaning that an addressee does not have the right to refuse to accept a document pursuant to Article 8(1) of the Regulation if only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?*
>
> *If the answer to the first question is in the negative:*
>
> *Must Article 8(1)(b) of the Regulation be interpreted as meaning that the addressee 'understands' the language of a Member State of transmission within the meaning of that regulation because, in the exercise of his business activity, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?*
>
> *If the answer to the second question is in the negative:*
>
> *Must Article 8(1) of the Regulation be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of such annexes to a document, which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, if the addressee concludes a contract in the exercise of his business activity in which he agrees that correspondence is to be*

conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language?

The Court now held in its **judgment:**

1. Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is to be interpreted as meaning that the addressee of a document instituting the proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subject?matter of the claim and the cause of action.

It is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated.

2. Article 8(1)(b) of Regulation No 1348/2000 is to be interpreted as meaning that the fact that the addressee of a document served has agreed in a contract concluded with the applicant in the course of his business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language, but is evidence which the court may take into account in determining whether that addressee understands the language of the Member State of transmission.

3. Article 8(1) of Regulation No 1348/2000 is to be interpreted as meaning that the addressee of a document served may not in any event rely on that provision in order to refuse acceptance of annexes to the document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands where the addressee concluded a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of

transmission and the annexes concern that correspondence and are written in the agreed language.

See for the full judgment the website of the ECJ and with regard to the background of the case our previous post on the opinion of Advocate General Trstenjak which can be found here.

Inconsistent State Laws in Australia

Australian commentators have long speculated about whether the federal Constitution contains any rule that would resolve a direct conflict between the statute law of two States. Thus far, the High Court has defused potential conflicts without the need for such a constitutional rule. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the potential conflict between ACT and NSW law was resolved by a common law choice of law rule; and in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 a potential conflict between NSW and Victorian law was resolved by a process of statutory construction.

Most recently, in *Betfair Pty Limited v Western Australia* [2008] HCA 11, the High Court resolved a potential conflict between the laws of Tasmania and Western Australia by striking down the Western Australian statute because it infringed s 92 of the Constitution (which prevents protectionist burdens on interstate trade and commerce). The Court noted in passing that its conclusion about s 92 made it "unnecessary to consider whether [the WA law] is invalid by reason of the alleged direct conflict between it and … the Tasmanian Act. This is not the occasion to consider what may be the controlling constitutional principles were there demonstrated to be such a clash of State legislation." Since no such occasion has

yet arisen in the 108 years of Australian federation, the direct conflict between State laws is perhaps a problem of greater theoretical than practical importance.

High Court of Australia Considers Hague Convention on Child Abduction

The High Court of Australia has recently addressed the Hague Convention on the Civil Aspects of International Child Abduction: *MW v Director-General, Department of Community Services* [2008] HCA 12. In a 3:2 decision, the Court considered that the Director-General (as State Central Authority) had not sufficiently established that the removal of a child from New Zealand to Australia was wrongful, and thus the Family Court of Australia ought not to have made an order for the return of the child.

In Australia, the Hague Convention does not apply of its own force, but is instead implemented by the Family Law Act 1975 (Cth) and the Family Law (Child Abduction Convention) Regulations 1986(Cth). The case turned on reg 16(1A)(c) of the Regulations, which provides that "the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia". As such, the High Court was required to address difficult factual and legal questions relating to the child's circumstances in New Zealand. At least in the case of New Zealand law, that task was eased in Australia by the Evidence and Procedure (New Zealand) Act 1994 (Cth).

Recent Article Entitled “Pleading and Proving Foreign Law in Australia”

James McComish, my Australian Conflict of Laws.net co-editor, has recently had published an article entitled “Pleading and Proving Foreign Law in Australia” in volume 31(2) of the *Melbourne University Law Review*. The abstract reads:

> *Foreign law lies at the heart of private international law. After all, a true conflict of law cannot be resolved unless and until the content of foreign law is established. Despite this, the pleading and proof of foreign law remain among the most under-explored topics in Australian private international law. In light of the High Court of Australia’s significant change of direction on choice of law since 2000, most notably in cases such as John Pfeiffer Pty Ltd v Rogerson, Regie Nationale des Usines Renault SA v Zhang and Neilson v Overseas Projects Corporation of Victoria Ltd, it is all the more important to answer some of the basic questions about the pleading and proof of foreign law. Who pleads foreign law? What law do they plead? Are they obliged to do so? How do they prove its content? When can local law be applied in the place of foreign law? This article addresses these and related questions with a particular focus on Australian law as it has developed since 2000. It concludes that Australian courts take a more robust and pragmatic approach to these issues than might be supposed. In particular, the so-called presumption of identity is a label that masks a much richer and more complex reality.*

The article’s full citation is (2007) 31(2) *Melbourne University Law Review* 400.

Rome II: a Critical Appraisal of the Conflict Rule on Culpa In Contrahendo

Prof. Rafael Arenas Garcia (Universitat Autònoma de Barcelona and Àrea de Dret Internacional Privat blog) has written an interesting article on the controversial issue of the **law applicable to culpa in contrahendo**, discussing the conflict rule set out in **Art. 12 of the Rome II regulation**: **"La regulación de la responsabilidad precontractual en el Reglamento Roma II"**.

The article (in Spanish) will be published in the forthcoming issue (2007) of the *Anuario Español de Derecho Internacional Privado* (Spanish Yearbook of Private International Law – AEDIPr.), but it can be downloaded as a .pdf file from the Àrea de Dret Internacional Privat blog.

The English abstract reads as follows:

> *Article 12 of Rome II Regulation governs the obligations arising out of dealings prior to the conclusion of a contract. It establishes that the law applicable to these obligations shall be the law applicable to the contract. Where it is not possible to determine such law, the second paragraph of article 12 establishes the application of the general connecting factors of Rome II Regulation. It is also possible to choose the law applicable to culpa in contrahendo.*
>
> *These solutions are not problem-free. The application of the law governing the future contract is not suitable in order to forbid the breaking of negotiations, without giving to the parties the possibility to rely on the law of the country in which the party has its habitual residence to establish that he can broke off negotiations without liability. It can also be criticized that there is no provision about the cases in which a contract between the parties has been concluded in order to rule the negotiations. As a result of this lack of provision in these cases the law governing culpa in contrahendo will be the law of the future contract instead of the law of the contract that rules the negotiations.*
>
> *This article analyses these problems and the difficult delimitation between contractual and non-contractual fields in matters relating to obligations arising*

out of dealings prior to the conclusion of a contract. It also includes de lege ferenda proposals.

Interesting Case at the Confluence of Choice of Law, Comity and the Hague Abduction Convention

"At the heart of this sad case, which raises questions of international and federal law under the Hague [Abduction] Convention, is a custody battle over a young girl who has not seen either of her parents in years." That was the lead-in from Judge Jordan to the recent decision by a three-judge panel of the Third Circuit. *Carrascosa v. McGuire*, No. 07-1748/4130 (3rd Cir., March 20, 2008), involved a Spanish mother, once married to an American father, whose child was habitually resident in New Jersey. Upon their divorce, the couple signed a "Parenting Agreement" that established an "interim resolution" of the custody issue and prohibited either of them from traveling outside the country with their daughter. Shortly thereafter, the mother took the daughter to Spain.

A judge in New Jersey issued several orders for the daughter's return, and when each went unanswered, issued a warrant for the mother's arrest. In the meantime, however, purporting to follow the Hague Abduction Convention, the Spanish Courts had decided that the Parenting Agreement violated Article 19 of the Spanish Constitution (regarding the freedom to chose one's place of residence), determined that the removal to that country was not "wrongful" within the meaning of the Convention, and ordered that the daughter remain. When the mother returned to the United States to attend to the divorce proceedings, she was arrested. She challenged her detention as "in violation of the laws and treaties of the United States" through a writ of habeas corpus. In essence, she argued that a decision of the Spanish Court that the Parenting Agreement was null and void should be afforded comity, and void the charges of

contempt against her.

The Federal District Court for the District of New Jersey denied the writ, and the Third Circuit affirmed. Applying the Hague Convention and its implementing legislation, the Court recognized that "[t]here is no dispute that [the daughter's] place of habitual residence, prior to . . . her [removal] to Spain, was the United States, in particular New Jersey." As to whether her removal to Spain was wrongful under Article 3 of the Hague Convention, the District Court examined whether the father's custody rights were breached by Victoria's removal. Because, under New Jersey law, the father had custody rights by virtue of a valid Parenting Agreement, and the mother breached those rights by removing the daughter to Spain without his consent, the removal was "wrongful" within the meaning of Article 3 of the Hague Convention.

The Spanish court, however, in nullifying the Parenting Agreement, never applied New Jersey law, despite their explicit recognition that the daughter's habitual place of residence was New Jersey. They instead based their decision on the "wrongfulness" of the removal solely on Spanish law, while paying only "lip-service" to the Convention. According to the U.S. Court, this "glaring departure . . . from the mandate of the Hague Convention"—i.e. the "total failure to determine [the father's] rights of custody under [the law of the child's habitual residence]"—the decision of the Spanish court was given no weight. The removal was wrongful under the Convention, and the mother's detention was held to be not "in violation of the law or treaties of the United States."

Spanish Reference for a Preliminary Ruling on the Service Regulation

The Spanish *Juzgado de Primera Instancia e Instrucción* (Court of First Instance and Preliminary Investigations) *No 5 of San Javier* has referred the following

questions to the European Court of Justice for a **preliminary ruling on the interpretation of Reg. (EC) No 1348/2000** (Service Regulation):

1. Does the scope of Regulation (EC) No 1348/2000 extend to the service of extrajudicial documents exclusively by and on private persons using the physical and personal resources of the courts and tribunals of the European Union and the regulatory framework of European law even when no court proceedings have been commenced? Or,
2. Does Regulation (EC) No 1348/2000 on the contrary apply exclusively in the context of judicial cooperation between Member States and court proceedings in progress (Articles 61(c), 67(1) and 65 EC and recital 6 of the preamble to Regulation 1348/2000)?

The case, lodged on 14 January 2008, is pending under C-14/08 (*Roda Golf & Beach Resort SL*). The referred questions have been published in the OJ n. C 92 of 12 April 2008.

Advocate General's Opinion in Case "Grunkin and Paul"

Today, *Advocate General Sharpston* has delivered her opinion in case C-353/06 (***Grunkin and Paul***).

The background of the case is as follows: The case concerns a child who was born in Denmark having, as well as his parents, only German nationality. The child was registered in Denmark – in accordance with Danish law – under the compound surname *Grunkin-Paul* combining the name of his father (*Grunkin*) and the name of his mother (*Paul*), who did not use a common married name. After moving to Germany, German authorities refused to recognise the surname of the child as it had been determined in Denmark, since according to German private international law (Art.10 EGBGB) the name of a person is subject to the law of his/her nationality, i.e. in this case German law and according to German law (§ 1617 BGB), parents who do not share a married name shall choose *either* the

father's or the mother's surname to be the child's surname.

The Local Court *(Amtsgericht) Niebüll* which was called to designate the parent having the right to choose the child's surname, sought a preliminary ruling of the ECJ on the compatibility of Art.10 EGBGB with Articles 12 and 18 EC-Treaty. However, the ECJ held that it had no jurisdiction to answer the question referred since the referring court acted in an administrative rather than in a judicial capacity (judgment of 27 April 2006, C-96/04). In the following, the parents applied again – without success – to have their son registered with the surname *Grunkin-Paul*. The parents' challenge to this refusal was heard, by virtue of German procedural law, by the *Amtsgericht Flensburg*. The *Amtsgericht Flensburg* held that it was precluded from instructing the registrar to register the applicants' son under this name by German law. However, since the court had doubts as to whether it amounts to a violation of Articles 12 and 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court referred with decision of 16th August 2006 (69 III 11/06) the **following questions** to the ECJ for a **preliminary ruling:**

> *In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?*

Advocate *Generel Sharpston* now held in her **opinion** that the Court should answer the question raised by the *Amtsgericht Flensburg* as follows:

> *– a choice of law rule under which a person's name is to be determined in accordance with the law of his nationality is not in itself incompatible with Articles 12, 17 or 18 EC;*
>
> *– however, any such rule must be applied in such a way as to respect the right of each citizen of the Union to move and reside freely in the territory of the Member States;*
>
> *– that right is not respected if such a citizen has been registered under one name in accordance with the applicable law of his place of birth, before it becomes necessary to register his name elsewhere, and is subsequently*

required to register a different name in another Member State;

– consequently, the authorities of a Member State may not, when registering the name of a citizen of the Union, automatically refuse to recognise a name under which he has already been lawfully registered in accordance with the rules of another Member State, unless recognition would conflict with overriding reasons of public interest which admit of no exception.

See for the full opinion the website of the ECJ. See further on this case also our previous posts on the judgment of the Court of 27 April 2006 which can be found here as well as on the referring decision of the Amtsgericht Flensburg which can be found here.

Swiss Institute of Comparative Law: Proceedings of the Colloquium on the New Lugano Convention

The contributions presented at the *19th Journée de droit international privé*, held in March 2007 at the Swiss Institute of Comparative Law (ISDC) and dedicated to the new Lugano Convention, have been published by Schulthess, under the editorship of *Andrea Bonomi*, *Eleanor Cashin Ritaine* and *Gian Paolo Romano*: **La Convention de Lugano. Passé, présent et devenir**.

Here's the table of contents (available as a .pdf file on the ISDC's website):

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Annex: Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Title: **La Convention de Lugano. Passé, présent et devenir. Actes de la 19e Journée de droit international privé du 16 mars 2007 à Lausanne**, edited by *Andrea Bonomi*, *Eleanor Cashin Ritaine* and *Gian Paolo Romano*, Schulthess (Série des publications de l'ISDC, vol. 59), Zürich, 2007, 209 pages.

ISBN: 978-3-7255-5538-3. Price: CHF 75.

(The official text of the new Lugano Convention has been published in the Official

Journal of the European Union n. L 339 of 21 December 2007, attached to the Council decision on its signing on behalf of the Community. On 29 February 2008 the Commission presented a Proposal for a Council decision concerning the conclusion of the Convention – COM(2008) 116 fin.)