Drawing a Line in the Sand: Personal Jurisdiction for Acts of Terrorism

The Second Circuit today issued a noteworthy decision on whether and when foreign individuals are subject to personal jurisdiction in U.S. Courts for acts of international terrorism. See In re Terrorist Attacks on September 11, 2001, No. 06-cv-0319 (2d Cir., August 14, 2008). In a case that sought to hold Saudi Arabia and four of its princes liable for the Sept. 11 attacks—because they allegedly provided financial and logistical support to al Quaeda—the court held that the defendants are protected by sovereign immunity from suit in their official capacities, and that there is no personal jurisdiction to sue them in their personal capacities.

On the jurisdictional question (part VI of the decision), the court contrasted this case with "five opinions from other circuits" which held foreign persons amenable to suit for acts of terrorism. Those cases all involved defendants who had consciously and purposely "directed terror" at the United States and/or its citizens (*e.g.* Osama bin Laden, an individual al Quaeda member who fought U.S. forces in Afghanistan, the Republic of Libya with regard to Pan Am Flight 103, and the Republic of Iraq with regard to the invasion of Kuwait). In this case, however:

> *Th[e] burden [of establishing the necessary jurisdictional nexus] is not satisfied by the allegation that the Four Princes intended to fund al Qaeda through their donations to Muslim charities. Even assuming that the Four Princes were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts. It may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but foreseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the Four Princes "expressly aimed" intentional tortious acts at residents of the United States. Providing indirect funding to an*

organization that was openly hostile to the United States does not constitute this type of intentional conduct. In the absence of such a showing, American courts lacked personal jurisdiction over the Four Princes.

"How Appealing" initially reported on the decision, as did the Associated Press.

Article on Rome I Regulation

Stefan Leible and *Matthias Lehmann* (both University of Bayreuth, Germany) have published an article on the Rome I Regulation: "Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I"). The article has appeared in the August issue of the German legal journal *Recht der Internationalen Wirtschaft* (RIW), 2008, pp. 528-544.

The authors have kindly provided the following English abstract:

The article provides an in-depth-analysis of the Regulation. It covers each of its provisions, starting from the scope of application to the relationship with other Community instruments. Major problems are highlighted, such as the application of consumer law (Art. 6), overriding mandatory provisions (Art. 9) or the law governing assignment and subrogation (Art. 14). A number of practical examples is used to illustrate the workings of the Regulation's rules. The authors do not spare their criticism. For instance, they portray the treatment of insurance contracts (Art. 7) as overly complex and unsatisfactory. The Regulation's provision allowing the application of certain foreign mandatory provisions (Art. 9 para 3) is criticized for not achieving the intended results.

See with regard to Rome I also our previous posts which can be found here.

Reminder: Essay Competition in Private International Law 1st September Deadline

A short note to remind all that the deadline for the **Conflict of Laws .net Essay Competition in Private International Law**, sponsored by Clifford Chance LLP and Hart Publishing, is **1st September 2008** at 6pm.

There are substantial prizes for the top three entries, and the best essays will be submitted for consideration to the Journal of Private International Law. The Competition is open to any student of a higher education institution anywhere in the world, writing in English on any aspect of private international law.

See the competition page for the rules and submission details.

Jurisdiction over Foreign Defendants and Jurisdiction over Foreign Land: One Question or Two?

The Court of Appeal for Ontario has released its decision in *Precious Metal Capital Corp. v. Smith* (available here). In many ways the decision is unexceptional: it agrees with a quite sensible decision by the judge at first instance. But there may be a more interesting, and contentious, aspect to the decision in the way the court has expressed its reasons.

The defendants had raised four separate objections to the litigation proceeding in Ontario: (1) the claims advanced against foreign defendants did not fit within the

procedural rules allowing for service outside the province, (2) the court lacked jurisdiction because there was not a real and substantial connection between the dispute and Ontario, (3) the court lacked jurisdiction because the claim concerned foreign land (the *Mocambique* rule), and (4) if the court had jurisdiction, it should order a stay based on *forum non conveniens*. Getting to the right result on each of these objections was not difficult – they all failed both before the motions judge and the Court of Appeal.

The point of interest was in the analysis adopted by the Court of Appeal. The motions judge had separately considered objections (2) and (3). In contrast, the Court of Appeal held that issues related to the remedy being sought (in respect of foreign land) should, in cases involving foreign defendants, not be analyzed separately. Rather, they should be subsumed as part of the court's analysis of whether there was a real and substantial connection to Ontario (see paras. 15-18 among others).

This works no evils in this particular case, but I question the benefit of running issues (2) and (3) together. The latter has tended to be a separate question for two reasons: it focuses on subject-matter jurisdiction rather than jurisdiction over the defendant, and as an issue it can arise whether the case is one of service in or service out. To me it seems a cleaner analysis to continue to treat these as distinct questions rather than running them together.

Does running them together, for example, make it possible for the court to conclude it has jurisdiction even in a case squarely involving title to foreign land and not falling within the historic *Penn v. Baltimore* exception, based on other elements of the *Muscutt* test for a real and substantial connection? Is this then a signal that the *Mocambique* rule itself is under threat?

Volume 4, Issue 2, Journal of

Private International Law (August 2008)

The August 2008 issue of the *Journal of Private International Law* has just been published. The contents are (click on the links to view the abstracts on the Hart Publishing website):

- A Bucher, **'The New Swiss Federal Act on International Child Abduction'**
- J Neels, **'Falconbridge in Africa'**
- A Mills, **'The Dimensions of Public Policy in Private International Law'**
- T Dornis, **'Contribution and Indemnification among Joint Torteasors in Multi-State Conflict Cases: A Study of Doctrine and the Current Law in the US and under the Rome II Regulation'**
- A Gray, **'Loss Distribution Issues in Multinational Tort Claims: Giving Substance to Substance'**
- R Frimpong Oppong, **'Roman-Dutch Law Meets the Common Law on Jurisdiction in International Matters'**
- O Sibanda, **'Jurisdictional Arrest of a Foreign Peregrinus now Unconstitutional in South Africa: Bid Industrial Holdings v Strang'**

Conflict of Laws .net readers are entitled to a 10% discount when subscribing to the *Journal of Private International Law*. The subscription rates for the Journal are already very good for both institutions and individuals, and our discount makes them even better. **Download the order form** (PDF) to receive your discount.

Symeonides: Choice of Law for

Products Liability

Symeon C. Symeonides, Dean of the College of Law at Willamette University, has just last week posted Choice of Law for Products Liability: The 1990s and Beyond (forthcoming on the Tulane Law Review, Vol. 78, No. 1247, 2004) on SSRN. Here is the abstract:

This Article provides a comprehensive review of product-liability conflicts cases decided by American courts between 1989 and 2004 and involving significant choice-of-law questions.

Among the Article's findings are that choice-of-law methodology plays a less significant role in the courts' choice of the governing law than do other factors, such as the number and pertinence of factual contacts with a given state. For example, regardless of methodology, in 79% of the cases in which the product's acquisition and the victim's domicile and injury were in the same state, the courts applied that state's law, regardless of whether it favored the plaintiff or the defendant and regardless of whether that state was also the forum. Among the Article's unexpected findings are that, contrary to prevailing perceptions, forum-shopping is not as common or rewarding as critics assume, and that courts do not unduly favor plaintiffs as a class nor the law or the domiciliaries of the forum state.

The Article concludes that an all-inclusive review of the cases reveals that, on the whole, the record of American courts in resolving these most intractable of conflicts is much better than one might assume from a selective reading of a few cases. However, because this record entails a heavy cost in time and resources for courts and litigants, the Article proposes a new choice-of-law rule that would produce mostly the same results as the decided cases, but much more quickly and at a lower cost.

The proposed rule differentiates between liability and damages and, within certain narrow parameters, allows plaintiffs and secondarily defendants to choose the state whose law will determine liability. Surprisingly, this rule will not favor plaintiffs more than the decided cases, but it should increase the incentive for early negotiations with regard to damages and encourage settlements without resort to litigation.

The complete list of Prof. Symeonides' works (where are often announced on this site) can be found on the SSRN author page.

ERA Conference on Recent Developments in Private International Law and Business Law

The Academy of European Law (ERA), situated in Trier and with the financial support of the European Commission, organises conferences and summer schools on various topics of EU law. On 5-6 June a conference was held on recent developments in private international law and business law (covering civil jurisdiction, civil procedure, contract, delict, insolvency, and company law).

A report summarising the interventions can be downloaded **here**.

A Divided Opinion on the Hague Abduction Convention, With Some Interesting Discussion on the Proof of Foreign Law

The Second Circuit last week issued a split-panel decision in *Duran v. Beaumont*, No. 06-cv-5614 (2d Cir. 2008). The case concerned a Chilean mothers' decision to take her child to the USA and remain there, in derogation of a Chilean court

order. The child's parents—both Chilean—are recently separated, with formal custody not yet determined. However, the child lived with the mother, who—by law—could not leave Chile without the father's consent. When the father withheld consent for a trip to the United States, the mother obtained a court order allowing a limited, 3 month journey with her daughter. At the expiration of that 3 months, the mother and the child did not return.

The father petitioned the court in New York for return of the child. The court's jurisdiction under the Hague Abduction Convention was in issue. If the father had "custody rights" under the law of the child's habitual residence—here Chile—then the court could order the requested relief. If, however, the father only had a "right of access," then the court was without power to order this remedy.

The Chilean Central Authority submitted an affidavit supporting the father, espousing that he had "custody" of the child under Chilean law because the child could not leave the country without his consent. The district court, and later the Second Circuit, gave no weight to this opinion. While recognizing that the interpretation given by a sovereign to its own law is entitled to "some deference" in U.S. courts, it is not entitled to "absolute deference." Where, for instance, such an interpretation conflicts with prior judicial precedent over an issue, that precedent may govern the case. Here, the Second Circuit had already determined that a "ne exeat" right (i.e. the right to determine whether a child will leave the country) does not amount to custody under the Hague Abduction Convention. Under this authority, the father merely had a "right of access" under the Convention, and not custody, giving the New York Court no jurisdiction to order the child's return. The dissenting judge strenuously objected to the panel's refusal to give credence to the Chilean Central Authority.

The decision, and the dissent, can be found here.

This case is interesting not only for the operation of the Convention, but most of all as an illustration of the need (and difficulty) in developing some uniform mechanism for national courts to determine foreign law. Here, even with an international treaty calling on the Central Authority of a contracting state to provide an opinion on its own internal law (art. 3), a court has still chosen to ignore this decision in favor of its own precedent (interpreting Hong Kong law, nonetheless). What develops, then, is a convolution of foreign law concepts in U.S. courts, which tend to be applied over-and-over again in different cases, often

erroneously. Can a new international convention on the proof of foreign law adequately address this problem?

Save the Date – Journal of Private International Law Conference 2009

Following on from the success of the *Journal of Private International Law*'s inaugural conference at Aberdeen in 2005, and last year's conference at Birmingham, the 2009 conference will be held on **16th – 18th April 2009 at New York University School of Law**. The conference itself will be over two days (17th – 18th April 2009), but there will also be an event on 16th April dedicated to Prof. Andreas Lowenfeld.

Further information on the conference will follow as it becomes available, but do feel free to enter the dates in your diary now.

The Results of the JHA Council (24-25 July 2008): UK to Opt into Rome I Reg. – Enhanced Cooperation on Rome III Reg.?

On 24 and 25 July the **Justice and Home Affairs Council** held its 2887th session in Brussels, the first under the French Presidency. The official press

release is currently available ~~only~~ in French (UPDATE: English version). Among the "Justice" issues, discussed on Friday 25th, **two main points are of particular importance as regards the development of European private international law**.

ROME I – UNITED KINGDOM TO OPT-IN

The United Kingdom has expressed its wish to opt-in to the Rome I Regulation (see p. 26 of the official press release; on our site, see the Rome I section and the programme of the September conference organized by the Journal of Private International Law). The decision follows the public consultation launched in April by the British Ministry of Justice, whose results have not yet been made publicly available.

ROME III – ENHANCED COOPERATION BETWEEN SOME MEMBER STATES?

As we reported in a previous post, the JHA Council of 5-6 June 2008 established that the unanimity required to adopt the Rome III Regulation could not be obtained, and therefore the objectives of the proposed instrument could not be attained within a reasonable period by applying the relevant provisions of the EC Treaty. According to press sources (IrishTimes.com and Reuters), agreement in the Council had appeared difficult to reach since the beginning of negotiations in 2006, due to the opposition of Sweden, which did not intend to put into question the application of its liberal divorce rules.

As a consequence, in the meeting of 25 July, nine Member States informally reported to the Council their decision to launch the "enhanced cooperation" mechanism (see pp. 23-24 of the official press release).

Here is an excerpt of the article published by the EUObserver.com (*emphasis added*):

> ***Austria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain*** *have teamed up in order* ***to formally request the European Commission launch the so-called enhanced co-operation mechanism*** *– allowing a group of countries to move ahead in one particular area, even though other states are opposed.*
>
> *It is expected that they will make the request on Monday (28 July), one diplomat*

> *told the EUobserver. It is the first time such a move has been made.*
>
> *It will then be up to the commission to make a legal proposal based on the request. This proposal will then go back to member states where it needs to be approved by a qualified majority of governments.*
>
> *A controversial and politically sensitive issue anyway, this route for dealing with the divorce question has further irked some capitals because, under normal procedures, a decision in this area would have to be taken by unanimity.*
>
> *Reacting to the move by the nine member states, EU justice commissioner Jacques Barrot said: "The commission will have to examine all the political, legal and practical implications of such an enhanced co-operation." "We need to get a clearer idea," he added. […]*
>
> ***Malta and Sweden are widely considered the most reluctant** to give the go-ahead to a EU-wide divorce scheme. Strongly Catholic Malta does not recognise divorce, while Stockholm fears that EU harmonisation in the area could threaten its liberal family law.*
>
> *Should the pioneering group achieve closer cooperation in this area, the mechanism must remain open to other countries as well. **Germany, Belgium, Portugal and Lithuania are also believed to be considering joining the initiative**.*

The enhanced cooperation mechanism was introduced by the Treaty of Amsterdam in 1997, creating the formal possibility of a certain number of Member States establishing a closer (as it was formerly known in the English version before the Treaty of Nice) cooperation between themselves on matters covered by the Treaties, using the institutions and procedures of the EU and EC. The relevant provisions of the Treaties (as amended by the Treaty of Nice), laying down the substantive conditions and the procedure for the establishment of the cooperation, are set out in Title VII of the TEU (Articles 43-45, providing the "general framework" of the mechanism) and Articles 11-11a TEC, which add special arrangements for areas covered by the EC Treaty.

A description of the mechanism can be found on this page of the Europa website. Here's an excerpt detailing the procedure in the Community pillar:

> *Member States intending to establish enhanced cooperation within the framework of the EC Treaty shall address a request to the Commission, which may submit a proposal to the Council to that effect. Authorisation shall be granted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament. A member of the Council may still request that the matter be referred to the European Council of Heads of State and Government. Following this final discussion, the matter is referred back to the Council of Ministers, which may act by the majority provided for in the Treaties. The right of veto granted to the Member States by the Treaty of Amsterdam has thus been abolished. […]*
>
> *Article 11A lays down the procedure applicable to the subsequent participation of a Member State. The Commission shall decide on the request of a Member State to participate in enhanced cooperation. The role of the Commission is thus more important within the framework of the EC Treaty than within the other pillars.*

It is important to note that the provisions on closer/enhanced cooperation were never actually put into effect since their introduction, and that their potential outcome is largely debated (see the controversial issue of the so called "variable geometry", often referred as "two-speed Europe" or "Europe à la carte"): it will be therefore very interesting to see how they will be applied for the first time, and **what will be the impact of this "acceleration" by some Member States in the frame of the general debate on the future of the European integration**, so much troubled after the Irish referendum on the ratification of the Lisbon Treaty.

An interesting article on the matter (in French) has been written by *Jean Quatremer*, over at *Coulisses de Bruxelles* blog, reporting the **negative reactions** of some Member States, such as **Czech Republic, Estonia, Finland, Latvia and Poland**, and the **decision of Ireland, Netherlands and the United Kingdom not to participate** in the enhanced cooperation.

It is paradoxical that the "dismal swamp" of the conflict of laws, one of the last sector to be communitarised, could act as a "front runner" in the progress (or regress?) of the European integration.

Further information will be posted as soon as available.