November 2007 Round-Up: Focus on Anti-Suit Injunctions, The Hague Convention on the Civil Aspects of International Child Abduction, and Foreign Relations Implications of Private Lawsuits

Significant issues of private international received notable attention in the federal courts over this past month.

We'll begin with an issue that has long-tortured consensus in federal courts: anti-suit injunctions. Over three years ago, Judge Selya outlined a split of circuit authority over the "legal standards to be employed in determining whether the power to enjoin an international proceeding should be exercised." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 3161 F.3d 11 (1st Cir. 2004). The application of these standards – whichever are employed – dictates when the power "should be exercised." These decisions, however, say nothing of the threshold inquiry of when they "can be exercised." The Second and (now) Eleventh Circuits believe that the discretionary balancing test articulated by *Quaak* is triggered *only* if the domestic action is "dispositive" of the foreign action; the Ninth and First Circuits take a bit more lenient approach, and engage in a comity-analysis so long as the actions are "substantially similar."

In *Canon Latin America, Inc. v. Lantech S.A.*, No. 07-13571 (11th Cir., November 21, 2007), a party sought to enjoin a Costa Rican action that, in essence, sought damages under Costa Rican law for the unlawful termination of a exclusive distributorship agreement. The opposing party brought an action in the Southern District of Florida to declare the non-exclusivity portions of the distributorship valid. The Court of Appeals vacated an anti-suit injunction because, "strictly" speaking, the domestic action would not "dispos[e] of . . . statutory rights that are unique to Costa Rica." In a footnote, the panel noted the disagreement among the circuits; to wit, the Ninth and First Circuit have, in strikingly similar

circumstances, found the threshold inquiry satisfied and proceeded to determine whether an injunction "should" issue. *Id*. at n. 8. The decision of the Eleventh Circuit is located here.

In a second development, the Sixth Circuit has re-weighed-in on a significant disagreement governing The Hague Convention on the Civil Aspects of International Child Abduction. The pivotal question in *Robert v. Tesson*, No. 06-3889 (6th Cir., November 14, 2007) concerns how to determine a child's "habitual residence" under the Convention. The Ninth and Eleventh Circuits generally give dispositive weight to the "subjective intention of the parents" in answering this question. The Sixth Circuit, in line with the Third and Seventh Circuits, pins habitual residence on the place where there is a "degree of settled purpose from the child's perspective." The decision in *Robert*, which includes a studious examination of the Convention, its text and intent, can be found here.

Finally, the Supreme Court has granted certiorari in a significant case concerning the foreign policy implications of a private lawsuit, and will most likely receive a compelling petition to hear another. In *Republic of Phillipines v. Pimentel*, the Court agreed to consider a dispute over money stolen by the late Philippines dictator Ferdinand Marcos. The money is now in a U.S. bank account, and the court will consider whether it can be distributed to individuals asserting claims for human rights abuses against Marcos in the absence of the Republic from the case (who is asserting sovereign immunity). The ruling by the Ninth Circuit Court to allow the distribution would allegedly prejudice cases pending in the Philippines on the same issue. Appearing as amicus curiae, the Solicitor General asserts on behalf of the Republic that the willingness of lower U.S. courts to get involved "raises significant concerns," that "threatens to undermine" the ability of the United States to assert sovereign immunity in foreign courts in similar circumstances or to enforce its judgments abroad. The Ninth Circuit's decision is available here, and the Solicitor General's brief is available here.

A similar case is on the verge of Supreme Court review was previously noted on this site. *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir.) concerns claims against various multinational corporations stemming from decades of apartheid in South Africa. Remarkably, in its recent decision in *Sosa v. Alvarez-Machain*, the Court held in a footnote that this very case presents a "strong argument" for deferring to the Executive Branch, which has steadfast opposed the suit on the grounds of foreign policy. A majority of the Second Circuit panel that allowed the

claims to proceed held that outright dismissal was "premature" in light of a Supreme Court footnote. Along with the mandate of its "foreshadowing footnote," Lyle Denniston at SCOTUSBlog points out that review by the Court would also

> *give the Justices an opportunity to clarify . . . its June 2004 ruling in the Sosa case. That decision clearly left the courthouse door ajar to claims of human rights abuses, if they were confined to "a relatively modest set of actions alleging violations of the law of nations…a small number of international norms." [While] Justice David H. Souter, called for "judicial caution" and for "great caution in adapting the law of nations to private rights," . . . Justice Antonin Scalia suggested that the claim of discretionary power in the U.S. courts to create rights to sue to enforce international law was deeply flawed.*

See this post for more details and links to the decision and briefs.

Regulation on Maintenance Obligations

The European Parliament released on 26 November 2007 its tabled legislative report, 1st reading or single reading (download the report from the OEIL page and see the status of the procedure). This report is expected to be debated or examined by the Council on 6 December 2007 after which a probable part-session is scheduled by the DG of the Presidency, 1st reading on 12 December 2007. See our earlier posts on the maintenance obligations regulation here, here and here.

Opinion on European Service Regulation

Yesterday, Advocate General *Trstenjak* delivered her opinion in case C-14/07 (*Weiss und Partner*).

The background of the case was as follows: The Chamber of Industry and Commerce Berlin (*Industrie- und Handelskammer Berlin*) sued Nicholas Grimshaw & Partners Ltd. for damages under a architect contract. The parties had agreed in this contract that correspondence was to be conducted in German. The defendant was served with a statement of claim as well as annexes which were drafted in German. After Grimshaw had refused acceptance of the statement of claim and the annexes, Grimshaw was served with an English translation of the statement of claim and annexes written in German without an English translation. Subsequently, Grimshaw referred to Art. 8 (1) Service Regulation (Regulation (EC) No 1348/2000) and refused to accept the documents due to the fact that the annexes had not been translated into English. After the appeal of Grimshaw against an interim judgment of the Regional Court (*Landgericht*) Berlin declaring the claim having been served properly was refused by the Court of Appeal (*Kammergericht*) Berlin, the third party (Weiss and Partner GbR) appealed to the Federal Supreme Court (*Bundesgerichtshof*).

Since the *Bundesgerichtshof* had doubts on the interpretation of Regulation (EC) No 1348/2000, it 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:*
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> *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?

Advocate General *Trstenjak* recommended in her **opinion** that the ECJ should decide in the following way:

With regard to the **first question,** the Advocate General suggests that Art. 8 (1) Service Regulation should be interpreted as providing in case of the service of a document including annexes a right of the addressee to refuse acceptance pursuant to Art. 8 (1) Service Regulation also in cases where only the annexes to the document to be served have not been written in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

In respect of the **second question**, the Advocate General recommends that Art. 8 (1) b) Service Regulation should be construed in this sense that there exists a refutable presumption that the addressee of a document understands the language of a Member State of transmission in terms of this Regulation if he agrees contractually in the exercise of his business activity that correspondence between the contracting parties on the one side and with authorities and public institutions of the Member State of transmission on the other side is conducted in the language of this Member State of transmission. However, since this constitutes only a refutable presumption, the addressee can refute this presumption under the rules of evidence of the Member State where the lawsuit

is conducted.

In regard to the **third question**, the Advocate General submits that Art. 8 (1) Service Regulation should be interpreted as not granting a right to the addressee to refuse the acceptance of annexes to a statement of claim which are not drafted in the language of the Member State addressed, but in the language which has been agreed upon contractually between the parties in the exercise of their business activity for correspondence with authorities and public institutions of the Member State of transmission, if he concludes a contract in excercise of his business activity and agrees that correspondence with authorities and public institutions of the Member State of transmission is conducted in the language of this State and if the transmitted annexes concern this correspondence and are drafted in the agreed language.

(Approximate translation from the German version of the opinion available at the ECJ website.)

See for the full opinion (in German, French, Spanish, Estonian, Dutch, Slovene, Finnish and Swedish) and the reference the website of the ECJ. The referring decision can be found (in German) at the website of the Bundesgerichtshof.

Supreme Court of Canada to Hear Forum Non Conveniens Appeal

The Supreme Court of Canada has just granted leave to appeal in *Teck Cominco Metals Ltd. v. Lombard General Insurance Company of Canada* (also indexed as *Lloyd's Underwriters v. Cominco Ltd.*), a decision of the British Columbia Court of Appeal (available here).

In British Columbia the insurance companies each sought a declaration that they did not have to defend or indemnify Teck Cominco in respect of environmental damage claims. Teck Cominco moved to stay those proceedings, primarily on the basis that related litigation was already underway in the State of Washington,

USA. The motion was denied and that decision was upheld on appeal, such that the British Columbia proceedings could proceed.

It is unusual for the Supreme Court of Canada to agree to hear an appeal about the most appropriate forum for the resolution of a dispute. As is its practice, the court did not provide any reasons for its decision to grant leave. The court may be wanting to address the role of comity in stay motion cases where there has been a prior positive assertion of jurisdiction by a foreign court.

Rome I: EP Adopts Legislative Resolution at First Reading

As reported in our previous post, **the EP's plenary session adopted** today in Brussels, **at first reading, a legislative resolution on the Rome I Proposal**. While largely based, as regards the conflict rules, on the draft legislative resolution contained in the report voted by the JURI Committee on 21 November 2007, the EP's final text is the result of some further amendments filed jointly by all the EP political groups before the plenary's vote.

Three of these last-minute amendments are worth mentioning:

– a new Art. 7 provides a **conflict rule on insurance contracts** (the issue has been discussed at length in the Council's Committee on Civil Law Matters: see doc. n. 8935/1/07 of 4 May 2007);

– a third paragraph is added to Art. 9 on **overriding mandatory provisions**:

> ***Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed****, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

– as a result of the introduction of the provision on insurance contracts, **Art. 20 on the exclusion of renvoi is redrafted** as follows:

> *The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law,* ***unless provided otherwise in this Regulation****.*

A provisional edition of the Rome I legislative resolution is available in the collection of the texts adopted by the EP in the session (see p. 73 ff.). Further information will be provided, as soon as the minutes of the sitting are available.

Second Judgment on Brussels II bis Regulation

Today, the ECJ delivered its second judgment on the Brussels II *bis* Regulation (C-68/07, *Sundelind Lopez*).

The case was referred to the ECJ by the Swedish Supreme Court (*Högsta Domstolen*) asking for a preliminary ruling on the **following question**:

> *The respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State. May the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of the Brussels II Regulation], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?*

The **ECJ now held:**

> ***Articles 6 and 7 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as***

> ***amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, as regards treaties with the Holy See, are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.***

See for the full judgment the website of the ECJ. See further also our previous post on the reference which can be found here.

Choice of law, forum non conveniens and asbestos in the Victorian Court of Appeal

In Australia, the applicable law in negligence cases is the law of the place of the tort: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10. On a number of occasions in recent years, Australian courts have dealt with difficult choice of law issues arising out of negligent omissions, asbestos-related injuries and overseas plaintiffs: see, eg, *James Hardie Industries v Hall* (1998) 43 NSWLR 554; [1998] NSWSC 434; *James Hardie Industries v Grigor* (1998) 45 NSWLR 20; [1998] NSWSC 266; *Amaca Pty Ltd v Frost* [2006] NSWCA 173.

In *Puttick v Fletcher Challenge Forests Pty Ltd* [2007] VSCA 264, the Victorian Court of Appeal recently considered the related question of whether Victoria was *forum non conveniens* for an action in which the Victorian-resident plaintiff sued the New Zealand-incorporated holding company, Fletcher, of his former New Zealand-incorporated employer for negligence in relation to his exposure to

asbestos in factories in Belgium and Malaysia which the plaintiff visited at the direction of his employer. At the relevant time, the plaintiff was resident in New Zealand and was employed there.

In accordance with the High Court's decisions in *Zhang* and *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55, a stay of proceedings on the grounds of *forum non conveniens* would only be granted if Victoria was a 'clearly inappropriate forum'. This is a more difficult test to satisfy than showing that another forum is a 'more appropriate forum': cf *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460. The first instance judge concluded that many witnesses and relevant documents would be located in New Zealand, but that this, of itself, did not mean that Victoria was a clearly inappropriate forum. However, his Honour then concluded that the applicable law was that of New Zealand and that this, taken with the other factors, meant that Victoria was a clearly inappropriate forum. The key issue on appeal was whether New Zealand law applied.

A 2:1 majority of the Court of Appeal (Warren CJ and Chernov JA; Maxwell P dissenting) agreed with the trial judge that New Zealand law did apply and, accordingly, that Victoria was *forum non conveniens*. The negligence asserted by the plaintiff was that Fletcher: (1) caused or permitted him to be exposed to asbestos in Belgium and Malaysia; (2) failed to provide and maintain a safe system of work for him whilst he was working in Belgium or Malaysia; and (3) failed to warn or instruct him or his employer about the need for protective clothing and equipment whilst working with or exposed to asbestos dust.

The majority considered that each of these acts occurred in New Zealand, there being no act or failure to act in Belgium or Malaysia to which the plaintiff could point which constituted an alleged wrong. Any action which Fletcher should have taken (eg to give further warnings or instructions) would have been taken in New Zealand, and the instructions to visit Belgium and Malaysia were given by the employer and received by the plaintiff in New Zealand.

In contrast, the minority characterised the plaintiff's complaint as having been exposed to unsafe workplaces in Malaysia and Belgium. Fletcher's conduct in New Zealand created the risk of harm to the plaintiff, but that risk did not assume significance (i.e. the negligent conduct was not completed) until the plaintiff was exposed, without warning or protection, to asbestos in Malaysia and Belgium.

Both the majority and the minority sought to argue that their respective positions were supported by the cases mentioned above in which Australian courts have previously considered similar issues. Ultimately, cases such as *Puttick* exemplify the difficulties associated with locating the place of the tort in cases of negligent omission. It remains to be seen whether the plaintiff will seek special leave to appeal this decision to the High Court.

New Site on Comparative Conflicts

The Section on *Private International Law* of the French Society of Comparative Legislation has now its own website.

The new site will report on recent developments of comparative conflicts. The editors are French academics and foreign (i.e. non French) correspondants from European civil law jurisdictions. It seems that the French editors will report in French, while the foreign editors may report in English. German professor Jurgen Basedow and German scholar Simon Schwarz have reported several times on German developments in English (see below).

Conflict of laws welcomes this new site dedicated to comparative conflicts!

Law Governing Name in German Conflicts

German professor Jurgen Basedow and German scholar Simon Schwarz have reported in English on the new site of the Section of *Private International Law* of the *Society of Comparative Legislation* on a statutory intervention amending the German choice of law rule with regard to name.

The new provision (art. 47 of the Introductory Law to the German Civil Code – *EGBGB*) and the report can be found here.

New German Authority for International Legal Relations

The report of Basedow and Schwarz is here.