The French Like It Delocalized: Lex Non Facit Arbitrum.

Arbitral awards remain delocalized under the French law of international arbitration. They can be recognised and enforced in France irrespective of the decision of the court of the seat of the arbitration to set them aside. F.A. Mann, and many in England are of the opinion that arbitration only exists if the seat of the arbitration allows it. Lex facit arbitrum. The French disagree and believe that arbitration is a private activity, which can be considered favorably or unfavorably, but certainly does not need to be empowered by any state ex ante. Thus, if the court of the seat nullifies the award, this does not mean that it cannot be recognised in another legal order. Would any court think of nullifying a road accident?

This delocalization doctrine builds on the *Hilmarton* precedent. On June 29, 2007, the French Supreme Court for Private Matters (*Cour de cassation*) confirmed in a case where the award had been set aside by the High Court in London. It held that the arbitral award did not belong to any state legal order, and that, as a consequence, it was an "international decision", the effect of which was a matter for the courts where recognition or enforcement was sought. In other words, it was not an "English award" for the sole reason that it had been made by a tribunal seating in England. As usual, the *Cour de cassation* relied on article VII of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to justify the application of the French law of arbitration when it is more favorable than the NY Convention.

The dispute had arisen between French company Est Epices and Indonesian company PT Putrabali Adyamulia. Putrabali had sold white peper to Est Epices, but the goods were lost during the carriage by sea. Est Epices refused to pay, and Putrabali initiated arbitral proceedings in London under the aegis of the International General Produce Association. In 2001, an arbitral panel found that Est Epices was entitled not to pay the price. Putrabali challenged the award before the English High Court, appealing on a point of law as the 1996 Arbitration Act allowed it to. The challenged was admitted and the award partially set aside. A second award was made in 2003, and found in favor of Putrabali, ordering Est Epices to pay Euro 163,086.

Est Epices sought recognition of the first 2001 award in France. The 2001 award was declared enforceable by the Paris court of appeal in March 2005. Putrabali appealed to the *Cour de cassation*. In a first judgment of June 29, 2007, the Court dismissed the appeal on the grounds given above.

At the same time, Putrabali had sought the recognition of the second 2003 award. In November 2005, the Paris Court of Appeal held that it could not be declared enforceable. In a second judgment of June 29, 2007, the *Cour de cassation* confirmed. It held that the recognition of the first award precluded the recognition of the second, as the first had res judicata. This was already held 13 years ago in *Hilmarton*.

The rationale behind the French solution is to limit the influence of local peculiarities. So, if a local mandatory rule obliges some witnesses to swear in a particular religious form, this should not be let jeopardize the whole arbitral process. In *Putrabali*, the award had been set aside as a consequence of a review of its merits. From France, this certainly looked like a shocking local peculiarity.

German Annotations on "Color Drack"

Two annotations discussing the judgment given by the European Court of Justice on 3 May 2007 on Article 5 (1) (b) Brussels I Regulation in *Color Drack* have been published in German legal journals:

Stefan Leible/Christian Reinert (both Bayreuth), EuZW 2007, 372 and

Burghard Piltz (Gütersloh), NJW 2007, 1801.

See with regard to the Advocate General's opinion and the judgment also our older posts which can be found here and here.

German Article on the Cross-Border Enforcement of English Freezing Injunctions

Christian Heinze (Hamburg) has published an article on the enforcement of English world-wide freezing injunctions in a foreign jurisdiction ("Grenzüberschreitende Vollstreckung englischer freezing injunctions") in the latest issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax 2007, 343 et seq.).

An English abstract has kindly been provided by the author:

In recent years, the English freezing (former Mareva) injunction has become an important instrument of international litigation. Worldwide freezing orders were subject to enforcement proceedings in several European countries (e.g. Germany, France and Switzerland) and have recently served as a model for Art. 9 (2) of the directive 2004/48/EC on the enforcement of intellectual property rights. Under English law, the cross-border enforcement of freezing orders is normally not automatically permitted after such an order is granted, but rather subject to the permission of the English court to seek to enforce the order in a country outside England and Wales (Civil Procedure Rules Part 25 Practice Direction Annex Schedule B paragraph 10). In Dadourian Group International v. Simms (11 April 2006, [2006] 1 WLR 2499 = [2006] 3 All ER 48), the Court of Appeal has set out guidelines how to exercise its discretion to permit a party to enforce a worldwide freezing order in a foreign jurisdiction. The article discusses these guidelines and their implications with reference to the enforcement of freezing orders in Germany and Switzerland. As a result of the Dadourian Guidelines, evidence as to the applicable law and practice in the foreign court and the nature and terms of foreign relief might become more important (see guidelines 4 and 5) which would create a practical need for comparative studies in the field of enforcement.

Here the **Dadourian Guidelines** of the Court of Appeal:

Guideline 1: The principle applying to the grant of permission to enforce a worldwide freezing order (WFO) abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2: *All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, as well as the form of any order.*

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

Non-Justiciability and Political Questions in Australia

An interesting divided judgment of the Full Court of the Federal Court of Australia has considered the non-justiciability of political questions and the decision in *Buttes Gas* [1982] AC 888.

The appellant was a PNG national who sought joinder as a party to an Australian native title claim over an area in the Torres Strait abutting PNG. The respondents successfully opposed that joinder at first instance because of a concern that the appellant would use the proceedings to agitate political matters concerning the maritime boundaries treaty between Australia and PNG. Significantly, the Australian government did not oppose the joinder so long as those political questions were not raised.

Gyles J, with whom Sundberg J agreed, allowed the appeal and held that the appellant should have been joined. Gyles J held that:

> *The appellant does not need to put any argument based upon the [political issues] to establish his interests for the purposes of the case. The docket judge can control the proceeding to prevent truly irrelevant or inappropriate arguments or material being advanced by a party. Counsel for the Commonwealth indicated that there should be no problem if the case is approached along those lines. The Commonwealth should be in a good position to judge that situation. … An appropriate term could have been constructed imposing conditions upon a grant of leave to be joined.*

Kiefel J dissented. Her Honour summarised the non-justiciability principle as being that “negotiations and agreements between Australia and another country are not to be the subject of judicial determination for the reason that they might cause embarrassment and affect relations between the countries.” Although the Australian government was not actually “embarrassed” by the potential joinder, her Honour considered that “it is the nature of the question for the Court which renders it non-justiciable”, and not the presence of actual embarrassment.

Gamogab v Akiba [2007] FCAFC 74 (18 July 2007)

German Book on European Ordre Public

A German monograph on the evolving concept of the public policy exception from a national level into a European perspective has been recently published by Mohr Siebeck. It has been written by ***Ioanna Thoma*** (Brunel University, London): **Die Europäisierung und die Vergemeinschaftung des nationalen ordre public (The Europeanization and Communitarization of National Public Policy)**.

The English presentation reads as follows (a longer version is available in German on the publisher’s website):

> *Ioanna Thoma deals with the influence of the ECHR and EU law on the public policy exception in private international law. In spite of the harmonization of substantive laws in many areas, especially within the context of the EU, there is still room for the application of the public policy exception. She portrays the way in which the content of national public policy is gradually changing under the normative effect of the ECHR and EU law. By referring to seminal decisions of the European and national courts, Ioanna Thoma proves that the public policy exception is no longer purely national.*

Ioanna Thoma, Die Europäisierung und die Vergemeinschaftung des nationalen

ordre public, 2007. XX, 288 pages (*Studien zum ausländischen und internationalen Privatrecht 182*). ISBN 978-3-16-149351-5. Available from Mohr Siebeck.

French Conference on Rome II

Burgundy University in Dijon will host a conference on the Rome II Regulation on September 20th, 2007.

Speeches will be delivered in French. The speakers will be mostly French academics, but will also include a member of the European commission. The program can be found here.

The conference will take place in the castle of Saulon-la-Rue, in the vicinity of Dijon.

German Annotation on Referring Decision in FBTO Schadeverzekeringen N.V. v Jack Odenbreit (C-463/06)

An interesting annotation by *Angelika Fuchs* on the decision of the German Federal Supreme Court asking the European Court of Justice for a preliminary ruling on the interpretation of Article 11 (2) and Article 9 (1) (b) of Regulation No 44/2001/EC has been published in the latest issue of the German legal journal Praxis des Internationalen Privat- und Verfahrensrechts (IPRax 2007, 302 et seq.).

The facts of the case are as follows: The claimant, who is habitually resident in Germany, suffered an accident in the Netherlands and brought a direct action in Germany against the other party's insurer the latter of which is domiciled in the Netherlands. Here the question arose whether German courts have international jurisdiction for this claim on the basis of Articles 11(2), 9 (1) (b) Brussels I Regulation.

This question was answered in the negative by the first instance court (*Amtsgericht Aachen*) dismissing the action on the grounds that German courts lacked international jurisdiction. However, the court of appeal (*Oberlandesgericht Köln*) held in an interim judgment that the action was admissible. The case was subsequently referred to the Federal Supreme Court (*Bundesgerichtshof*) which pointed out that the crucial question was whether the injured party can be regarded as a "beneficiary" in terms of Article 9 (1) (b) Brussels I Regulation or whether the term "beneficiary" refers only to the beneficiary of the insurance contract (this has been so far the point of view of the prevailing opinion in German doctrine). In the latter case, the injured party could not sue the insurer at his/her (i.e. the injured party's) domicile.

One of the main arguments in favour of the jurisdiction of the courts at the injured party's domicile is Recital 16a of Directive 2000/26/EC which has been suggested in Directive 2005/14/EC and reads as follows:

> *Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled.*

Even though the Supreme Court attached some importance to this recital, the Court had nevertheless doubts whether an autonomous and uniform interpretation of the rules in question was possible on this basis. Thus, the Federal Supreme Court referred with judgment of 26 September 2006 the following question – its first on the Brussels I Regulation – to the ECJ:

> ***Is the reference in Article 11 (2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9***

> ***(1) (b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?***

Fuchs examines in her annotation whether the well-established methods of interpretation militate in favour of the jurisdiction of the courts in the State where the injured party is domiciled and argues that the wording of Articles 11(2), 9 (1) (b) Brussels I Regulation does not support the assumption of jurisdiction since – while the injured party is referred to in Article 11 (2) – this is not the case in Article 9 (1) (b) Brussels I Regulation. In her opinion also a historic interpretation does not lead to another result since the Jenard Report illustrated that a *forum actoris* of the injured party was not intended. This situation had not been altered in the course of the communitarisation of the Brussels Convention. With regard to teleologic arguments, *Fuchs* states first that there was no need to protect the injured party by admitting direct actions before the courts of his/her domicle and secondly that this additional head of jurisdiction might have undesirable consequences such as forum shopping or a race to the court. With regard to a systematic interpretation she refers *inter alia*, in addition to the mentioned Recital 16a of Directive 2000/26/EC (which, however, is not regarded as a conclusive argument), to the Rome II Regulation. Here a special rule for traffic accidents had been discussed – but not been accepted (see for the adopted version of Rome II our older post which can be found here). Thus, according to *Fuchs* only the systematic argument which is based on an analogous application of Article 9 (1) (b) Brussels I Regulation might be used – notwithstanding substantial reservations – in favour of admitting direct actions before the courts of the injured party's domicile.

The referring decision can be found (in German) at the Federal Supreme Court's website. See with regard to the reference also our older post which can be found here.

Aberdeen Lectureship in Private International Law

The University of Aberdeen invites applications from suitably qualified candidates for a post at Lecturer level in the School of Law. The Law School received a rating of 5B in the 1996 and 2001 Research Assessment Exercises and candidates should demonstrate an aptitude for research commensurate with that high ranking. In the 2001 RAE a 'substantial' proportion of those submitted produced publications of 'international' quality. The Law School will welcome applications from candidates in any field of law but **will give a preference to someone who can teach on the new LLM programme in Private International Law** that commences in February 2008. The starting date is **1 February 2008**.

Informal enquires may be made to Professor Beaumont (tel: 01224 272439, e-mail p.beaumont@abdn.ac.uk).

Online application forms and further particulars are available from **here**. Alternatively email jobs@abdn.ac.uk or telephone (01224) 272727 (24-hour answering service) quoting reference number **FLS426A** for an application pack.

The closing date for the receipt of applications is 27 July 2007.

Choice of Law and Contribution Claims in Australia

The Supreme Court of Victoria has recently addressed the choice of law implications of claims for contribution within the Australian federal context. The

decision will be of particular interest to UK readers. The Victorian contribution statute under consideration, Part IV of the *Wrongs Act 1958* (Vic), is materially identical to the *Civil Liability (Contribution) Act 1978* (UK), but the Court declined to follow the view of the UK courts regarding the choice of law consequences of the statute.

The case concerned a claim for contribution brought in Victoria by Fluor Australia Pty Ltd against ASC Engineering Pty Ltd, relating to the breach of a contract governed by the law of Western Australia. In Victoria, as in the UK, the statutory right to contribution covers all forms of liability. In contrast, in WA (and all Australian jurisdictions except Victoria) contribution is governed by equitable principles in conjunction with a limited and gap-filling statutory right to contribution between tortfeasors.

Section 23B(6) of the Victorian Act provides that:

> *References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against that person in Victoria by or on behalf of the person who suffered the damage and it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Victoria.*

Fluor argued that this constituted a statutory choice of law rule in favour of the Victorian lex fori, notwithstanding that common law rules of private international law might have directed the application of WA law. This reasoning was said to be supported by a series of decisions on the equivalent section of the UK Act. In each of those cases, English courts applied the UK Act to claims for contribution regardless of whether those claims would have been governed by English law according to the common law choice of law rule for contribution claims.

Bongiorno J declined to follow this view, holding that it would "encourage forum shopping to the detriment of the whole Australian legal system [and] would be antipathetic to the federal compact itself, with obvious consequences for state sovereignty and the integrity of individual state legal systems." Rather, common law choice of law rules for contribution applied. Section 23B(6) of the Victorian Act was held to be merely "facultative", its role being to confirm that if the common law choice of law rules for contribution directed the application of the

Act, the fact that the "underlying liability" of the person from whom contribution is sought to the person who suffered the loss would be governed by the law of another jurisdiction would not preclude application of the Act.

Although there is uncertainty in Australia as to the applicable common law choice of law rule – both a delictual analysis (favouring the contribution law of the place of commission of the wrong by the person from whom contribution is sought) and a restitutionary analysis (favouring the contribution law of the place with the closest connection to the contribution claim) having been previously posited by Australian courts –his Honour considered that whichever rule applied, the Victorian Act did not apply to Fluor's claim against ASCE. Consequently, his Honour did not express a preference for either possible rule and Australian lawyers are therefore no closer to knowing the applicable common law rule for choice of law in contribution claims.

Fluor Australia Pty Ltd v ASC Engineering Pty Ltd [2007] VSC 262 (17 July 2007)

(Note: Both Perry Herzfeld and I were involved in this case while at Allens Arthur Robinson.)

Article on Jurisdiction and Choice of Law in Economic Perspective

An article by *Katrin Lantermann* and *Hans-Bernd Schäfer* (both Hamburg) has recently been released on SSRN:

"**Jurisdiction and Choice of Law in Economic Perspective**".

Here is the abstract which can be found on the SSRN website:

> *This article looks at choice of law rules from an economic perspective.The aim is to understand whether particular choice of law norms are wealth creating or wealth destroying and which of different norms should be preferred from this point of view. In this article we do not try to understand the forces that*

generate and sustain particular choice of law rules. We restrict ourselves to an efficiency analysis of existing or proposed choice of law rules. In the first part of the paper we argue that a free choice of law should be granted, whenever the choice causes no third party effects. We show that this criterion would extend free choice beyond the present scope. Free menu choice of law increases the wealth of the parties and creates institutional competition. It should be extended to fields of the law other than contract and tort law. In the second part we proceed with choice of law rules if the choice leads to positive or negative third party effects. To take care of these effects mandatory choice rules are sometimes but not always necessary. Methodologically choice of law rules should be market-mimicking rules, which reflect the interests of a grand coalition of the parties and all third parties affected by the choice rule. In the third part of the paper we discuss existing rules for the choice of tort law and refer to the discussion on a draft proposal for a European Council regulation of the law applicable to non-contractual obligations . In the fourth part we discuss whether the German or the US approach of international comparative law is preferable from an economic perspective. The US approach gives more judicial discretion for the choice of law than the German approach. We argue that the choice of law rules should lead to precise and clear legal commands with escape clauses for the judiciary only in exceptional and obvious cases. As Guzman pointed out it is striking that choice of law scholars have paid virtually no attention on how choice of law rules affect individual behaviour. But any economic analysis has to focus on this aspect as otherwise the social consequences of legal norms remain unknown and consequently little can be said about whether the consequences of one rule are socially better than those of another rule .

The full PDF version of the article can be downloaded here.