Compulsory Processes of the Federal Court of Australia Cannot be Invoked while Jurisdiction is under Challenge

In a recent case, the Federal Court of Australia held that a US-incorporated corporation which had been served in the US, and which had filed a conditional appearance only to challenge the Court's jurisdiction, was not required to produce documents pursuant to a notice to produce (similar to a subpoena). Jacobson J said (at [10]): 'I do not consider that at this stage of the proceedings in which the jurisdiction is under challenge, the applicant can invoke the compulsory processes of the Court.' See *Armacel Pty Limited v Smurfit Stone Container Corporation* [2007] FCA 1928.

Commission's Report on the Application of the Council Regulation (EC) 1206/2001 (Taking of Evidence)

From the European Judicial Network website:

> *On 5 December 2007, the Commission adopted its* ***report on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters****.*
>
> *The report has been prepared in accordance with Article 23 of the* Regulation*.*

It concludes that the application of the Regulation has generally improved, simplified and accelerated the cooperation between the courts on the taking of evidence in civil or commercial matters. The Regulation has achieved its two main objectives, namely firstly to simplify the cooperation between Member States and secondly to accelerate the performance of the taking of evidence, to a relatively satisfactory extent. Simplification has been brought about mainly by the introduction of direct court-to-court transmission (although requests are still sometimes or even often sent to central bodies), and by the introduction of standard forms. As far as acceleration is concerned, it can be concluded that most requests for the taking of evidence are executed faster than before the entry into force of the Regulation and within 90 days as foreseen by the Regulation. Consequently, modifications of the Regulation are not required, but its functioning should be improved. In particular in the current period of adaptation which is still ongoing, there are certain aspects concerning the application of the Regulation which should be improved.

The Commission

- *encourages all further efforts – in particular beyond the dissemination of the practice guide – to enhance the level of familiarity with the Regulation among legal practitioners in the European Union.*
- *is of the view that measures should be taken by Member States to ensure that the 90 day time frame for the execution of requests is complied with.*
- *is of the view that the modern communications technology, in particular videoconferencing which is an important means to simplify and accelerate the taking of evidence, is by far not used yet to its possible extent, and encourages Member States to take measures to introduce the necessary means in their courts and tribunals to perform videoconferences in the context of the taking of evidence.*

The Commission's report is **based on a study prepared by an external contractor**, available on the DG Freedom, Security and Justice website: the contractor carried out a survey, using the feedback provided by administrations of Member States, judges, attorneys and other persons involved in the application of the Regulation (see the annexes to the study).

New Service Regulation Repealing Reg. 1348/2000 Published in the Official Journal

The new service regulation repealing reg. 1348/2000, adopted by the European Parliament at second reading in its plenary session of 24 October 2007 (see our dedicated post here), has been published in the Official Journal of the European Union n. L 324 of 10 December 2007. The official reference is the following:

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ n. L 324, p. 79 ff.): pursuant to its Article 26, the new regulation will apply from 13 November 2008.

(Many thanks to Raluca Ionescu – Universidad Autónoma de Barcelona and Àrea de Dret Internacional Privat blog – and to Pietro Franzina – University of Ferrara – for the tip-off)

German Article on Rome II Regulation

Thomas Thiede and *Markus Kellner* (both Vienna) have written an article on **Forum Shopping between Rome II and the Hague Convention on the Law applicable to Traffic Accidents** in the legal journal Versicherungsrecht (VersR 2007, 1624 et seq.): *"'Forum shopping' zwischen dem Haager Übereinkommen*

über das auf Verkehrsunfälle anzuwendende Recht und der Rom-II-Verordnung".

The authors argue that Article 28 (1) Rome II, which provides as a general rule that the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties and which lay down conflict-of-law rules relating to non-contractual obligations, leads to the precedence of the Hague Convention on the law applicable to traffic accidents since the exception clause of Article 28 (2) Rome II is – due to the fact that also Non-Member States are parties to the Hague Convention – not applicable.

It is submitted that the subsidiarity of the Rome II Regulation on the one side and the fact that the Hague Convention has not been ratified by some Member States on the other side entails the possibility of forum shopping. Thus, the authors argue, it would have been preferable to give priority to the Rome II Regulation over all Hague Conventions in order to ascertain – at least for intra-EU cases – the applicability of only one law.

BIICL event: 11th annual review of the Arbitration Act 1996 – Is English law really better?

The British Institute of International and Comparative Law (BIICL) organizes on Monday 21 January 2007, 09.00 -18.00 (at the Honourable Society of Lincoln's Inn, Lincoln's Inn, London, WC2A 3TL) the **11th annual review of the Arbitration Act 1996 titled "Is English law really better?"** The speakers will review the English Arbitration Act 1996. The 2007 annual review proposes a comparative look at developments in England as the courts now approach 1,000 decided cases since entry into force of the Act. This year's review takes place against the background of claims by the Law Society (England and Wales: The Jurisdiction of Choice, October 2007) that London as an arbitration venue and English law are superior to civil law jurisdictions in terms of quality of legal

norms, certainty, predictability, arbitration friendliness, lawyers and infrastructure. Are the Law Society's claims legitimate or merely an expression of legal ethnocentrism by practitioners unfamiliar with systems of law other than their own? The special after dinner speaker is M. Jean-Pierre Ancel Président de Chambre honoraire de la Cour de cassation, France who will give a speech titled "Les principes confirmés et les nouvelles avancées dans l'arbitrage international". For a list of the speakers, have a look at the website.

Flying to California to Bypass the French Ban on Surrogacy – Update

A few weeks ago, I wrote a post on the story of a French couple who bypassed the French ban on surrogacy by resorting to a Californian surrogate mother. When the couple came back to France, French prosecutors took all available legal steps to deny them recognition of their parental status in France.

I am grateful to Kees Saarloos for forwarding me the judgment of the Paris court of appeal which ruled on the conflict issue on October 25, 2007. The judgment, however, is quite disappointing. It seems that French prosecutors were unable to analyze properly the conflict issues and thus to present a robust argumentation against the recognition of the parental status acquired in the U.S. This enabled the French court to reach a decision without truly addressing the issues. The judgment identified a few of them, but then stressed that they were not put forward by the plaintiff (i.e. the prosecutors), and that it did not need address them.

The judgment is more useful for the background it gives on what happened in California. The California Supreme Court had conferred the parental status to the French couple before the actual birth of the children, and ordered both the hospital in San Diego and the Californian Department of Public Health to mention the couple as the only parents on the hospital registry and the birth certificate. The couple could thus have sought recognition of a variety of foreign public acts.

One was the Californian judgment, another was the birth certificate.

In a nutshell, the actual decision of the court can be summarized as follows:

> *As the plaintiffs have not challenged the recognition of either of these acts in France, their challenge of the transcription of the parental status on the French registries is inadmissible. The foreign acts govern.*
>
> *The plaintiffs did not challenge the accuracy of the content of the transcription, but only the transcription itself. The issue of whether the couple was actually the parents of the children was therefore not before the court.*
>
> *Finally, and in any case, failure to provide the couple with a parental status would result in the children having no parents legally speaking, which would not comport with the superior interest of the children.*

One issue which is addressed (very) implicitly by the court is whether the dispute ought to have been decided by application of a law or of a decision. In other words, the court could have ruled that the issue at stake was one of choice of law. It would have then applied its choice of law rule in order to determine the law governing parenthood. Indeed, this was argued by the defendants. Instead, the court finds that the issue is one of recognition. The foreign acts govern, because they were recognised. Arguably, this could have been different if the accuracy of the content of the transcription had been challenged, and this is maybe what the court rules implicitly by noting that there was no such challenge.

Finally, the central issues of whether the foreign acts were contrary to French public policy and whether there had been a *fraude à la loi* are not addressed (on these ground for denial of recognition, see my previous post).

UPDATE: The French text of the decision can be found here (thanks to Esurnir). Various comments of the decision can be found on French blogs (see here and here) Finally, a personal reaction of the father of the children can be found here (in French). The couple has also created its own website.

Rome I (Update): Council's Comment on the EP Vote at First Reading – Live Broadcast of the Council's Public Deliberation – The Debate in the EP – UK to Opt-In

Following our post on the forthcoming JHA Council session (6-7 December 2007), here's a document prepared by the General Secretariat of the Council for the Permanent Representatives Committee (COREPER), providing a short presentation of the Parliament's vote on Rome I and the text of the EP legislative resolution at first reading (see our post here):

I. INTRODUCTION

The Committee on Legal Affairs adopted sixty-four amendments to the proposal for a Regulation (amendments 1- 64). In accordance with the provisions of Article 251(2) of the EC Treaty and the joint declaration on practical arrangements for the codecision procedure, ***a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for a second reading and conciliation****.*

In this context, the rapporteur, Mr Cristian DUMITRESCU (PES – RO), and the PES, EPP-ED, ALDE, UEN and Greens/EFA political groups together tabled a further twenty-one compromise amendments *(amendments 65-85).*

These amendments had been agreed during the informal contacts referred to above. *During the debate, Vice-President of the Commission Frattini made a statement regarding Article 5a on behalf of the Commission, and invited the Council to support it.*

II. VOTE

> *At the vote which took place on 29 November 2007, the plenary adopted the twenty-one compromise amendments (amendments 65-85) and forty-nine of the Committee's original amendments […].*
>
> ***The amendments adopted correspond to what was agreed between the three institutions and ought therefore to be acceptable to the Council.***
>
> ***Consequently, once the lawyer-linguists have scrutinised the text, the Council should be in a position to adopt the legislative act.*** *[…]*

As regards the legal-linguistic revision of the EP text, the document sets a deadline of 18 January 2008 for the national delegations to send their observations to the Council's Directorate for the Quality of Legislation: it is therefore likely that, if a political agreement is reached in the Council on 7 December 2007, the Rome I Regulation will be officially adopted in one of the Council's session in early 2008.

The Council's discussion on Rome I, that will take place on 7 December about 11h00 AM, will be open to the public, like every deliberation under the co-decision procedure. It will therefore be broadcasted on the Council's website.

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As regards **the debate that preceded the vote in the European Parliament** (29 November 2007), the transcription (mainly in French) has been made **available on the EP website**. Most part of the speakers (among which Commissioner Frattini and the EP Rapporteur Dumitrescu) **focused on the conflict rule on consumer contracts** (art. 6 of the EP legislative resolution), one of Parliament's main concerns, pointing out the balance struck in the provision between the need of protection of the weaker party and the commercial interests of the "professionals" (especially SMEs).

According to rapporteur Dumitrescu, **the United Kingdom**, that has not so far given notice of its wish to take part in the adoption of the Rome I Regulation, **may be reconsidering its position**, in the light of the text resulting from the informal agreement between EP and Council.

JHA Council Session (6-7 December 2007): Rome I Regulation and New Hague Convention on the International Recovery of Child Support

On 6 and 7 December the Justice and Home Affairs Council will hold its 2838th session in Brussels, under the Portuguese Presidency. Among the "Justice" issues, scheduled for Friday 7th, **the Presidency will inform about the agreement reached with the European Parliament on the Rome I Regulation** (see our post on the EP report and legislative resolution at first reading). Here's an excerpt from the background note:

> *The Presidency will inform the Council about a first reading agreement reached with the European Parliament on a Proposal for a Regulation of the law applicable to contractual obligations. […] Numerous informal meetings have been held with the European Parliament with a view to reaching a first reading agreement in the framework of the co-decision procedure. The European Parliament adopted its report on 29 November 2007.*

As regards the JHA "External Relations" issues, the Presidency will inform on the outcome of the diplomatic conference on the new **Convention on the international recovery of child support and other forms of family maintenance**. The Convention, that was drafted in the frame of the Hague Conference on Private International Law (of which the EC is a member since April 2007), was finalised at the end of the twenty-first session of the diplomatic conference, held in The Hague from 5 to 23 November 2007, along with a **Protocol on the Law Applicable to Maintenance Obligations** (see the HCCH's press release). It was signed on the same day by the United States of America. The text of the Convention and Protocol, and the preliminary documents,

are available on the HCCH website.

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.