McNeilly v Imbree [2007] NSWCA 156

The decision of the New South Wales Court of Appeal in *McNeilly v Imbree* [2007] NSWCA 156 may be of interest to those in the United Kingdom (and elsewhere) because it raises the private international law dimensions of the same New South Wales statute as was considered by the House of Lords in *Harding v Wealands* [2006] UKHL 32; [2006] 4 All ER 1; [2006] 3 WLR 83, namely the New South Wales *Motor Accidents Compensation Act 1999* (the ***MACA***).

McNeilly concerned a plaintiff who was seriously injured in a car accident that occurred in the Northern Territory. The plaintiff took action in New South Wales against the driver of the car for negligence. One issue in the case was whether the assessment of damages was governed by the MACA or the equivalent Northern Territory statute, the MACA providing a lower discount rate for damages for future economic loss. The Court of Appeal concluded that the Northern Territory statute applied on the basis that the assessment of damages was a question of substance governed by the law of the Northern Territory as the place of the tort, pursuant to the Australian common law choice of law rule for torts (the *lex loci delicti* rule). It was not argued that the *lex loci delicti* rule was excluded by s 123 of the MACA as a mandatory law of the forum, which provides: "A Court cannot award damages to a person in respect of a motor accident contrary to this Chapter."

McNeilly may be contrasted with *Harding*, which concerned a claim before the English courts arising out of a car accident in New South Wales. The House of Lords characterised the question of damages as a question of procedure and therefore applied English law as the law of the forum, rather than the MACA. Section 123 of the MACA could not affect this conclusion: even if it had the effect of a mandatory law of the forum in a case before the New South Wales courts, it could not have that effect in a case before the English courts.

Article on the Enforcement of Foreign Registered IP Rights in Australia

Richard Baddeley has written an article entitled "Out of Africa: The *Moçambique* Rule and Obstacles to Suits for Enforcement of Foreign Registered Intellectual Property Rights in Australia" in the June 2007 edition of *The Intellectual Property Forum* (pp 36-47). The introduction reads, in part:

> *This article challenges the prevailing view that registered intellectual property rights may only be protected through local actions. An Australian court cannot entertain an action for infringement of a foreign registered intellectual property right because it lacks "subject matter jurisdiction" even though it may exercise personal jurisdiction under relevant court rules. What barriers prevent subject matter jurisdiction? The Moçambique rule, based on respect for international comity and sovereignty, has been a major barrier preventing such actions. Another obstructive rule has been the "double actionability" (or lex fori rule). However, the basis for the Moçambique and "double actionability" rules seems to be eroding to the point where it now seems possible that Australian courts could decide actions involving the infringement of foreign registered intellectual property rights.*

The Intellectual Property Forum is the journal of the Intellectual Property Society of Australia and New Zealand Inc. The article is not available online.

West Tankers Case: Articles by

Max Planck Institute's Scholars

Following the **reference to the ECJ of the *West Tankers* case by the House of Lords**, first comments on the subject-matter of the preliminary question are provided by three articles written by scholars affiliated to the Max Planck Institute for Comparative and International Private Law (Hamburg).

Here's a presentation of the articles, from the Institute's website:

> *On the occasion of the House of Lords referral, Institute researchers have renewed their engagement with the question of the reconciliability of the English anti-suit injunction in support of arbitration agreements with European procedural law. Their opinions conclude that the ECJ in continuance of the judicature it has thus far developed is also likely to declare that anti-suit injunctions supporting the implementation of arbitration agreements are incompatible with EC Regulation 44/2001 and other fundamental European laws.*
>
> *As such, **Martin Illmer** and **Ingrid Naumann** explain in their article, appearing in Internationales Handelsrecht 2007, 64, that the rationale in the ECJ Turner decision is equally applicable to the legal context of arbitration agreements and that the economic considerations set forward by the House of Lords represent unjustified protectionism in favour of London arbitral settings.*
>
> *In a continuation of their earlier published work on anti-suit injunctions, **Anatol Dutta** and **Christian Heinze** consider the English legal regulations and, moreover, comprehensively examine the legality of anti-suit injunctions in protection of arbitration agreements from a European legal perspective in light of EC Regulation 44/2001. In their article "Anti-suit injunctions zum Schutz von Schiedsvereinbarungen", Recht der Internationalen Wirtschaft 2007, 411, they similarly argue for applying the principles of the ECJ decision in Turner and thereby conclude a breach of EC Regulation 44/2001.*
>
> *Finally, in "The Impact of EU Law on Anti-suit Injunctions in aid of English Arbitration Proceedings", Civil Justice Quarterly 2007, 358, **Ben Steinbrück** adopts the specific perspective of arbitration law and reasons why the decision as to the effects and scope of English arbitration agreements may not permissibly be monopolised by English courts.*

Comments on the Commission's Green Paper on the Attachment of Bank Accounts

The European Commission (DG Freedom, Security and Justice) has published on its website the whole set of contributions (more than 60 papers) received in response to the public consultation launched by the **"Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts"** (COM(2006) 618 final), released in October 2006 (see our previous posts here, presenting the Green Paper and related documents, and here, on the comments by the Max Planck Working Group).

Contributors include the European Central Bank, governments of the Member States and other national authorities, academics and private parties (banking associations, non-governmental organizations, bar associations, law firms, etc.).

Rome II: Final Version of the Joint Text

A final version of the Rome II joint text, resulting from the legal and linguistic revision, is available in all languages of the EU in the Register of the Council (doc. PE-CONS 3619/07).

According to current forecasts (see the Rome II OEIL page), the joint text should be officially approved today (25 June 2007) by the Conciliation Committee. Pursuant to Art. 251(5) of the EC Treaty, the Parliament and the Council shall adopt the Regulation in accordance with the joint text within a period of six weeks

(that can be extended to eight weeks) from this approval.

Further details on the joint text and the conciliation stage are available on the Rome II section of our site.

Liberalization of Enforcement of US Judgments in France

In a previous post, I had reported that the French supreme court for private matters (*Cour de cassation*) overruled last year a century old precedent limiting the enforcement of foreign judgments against French nationals. In *Prieur*, the *Cour de cassation* held that Article 15 of the Civil Code should not be construed anymore as giving exclusive jurisdiction to French courts to decide disputes involving French nationals. As a consequence, foreign judgments made against French nationals should be enforced in they meet the other liberal standards of the French law of judgments (as further liberalized by the *Cour de cassation* in *Avianca*).

On May 22, 2007, the *Cour de cassation* confirmed its *Prieur* decision by applying it to a US judgment. The Superior Court of Alameda County, California, had ordered French company Fontaine Pajot to pay damages to two US nationals. The French company resisted enforcement of the Californian judgment in France on the ground that they had not waived their "jurisdictional priviledge" (as Article 15 of the Civil code was sometimes known) to be tried by a French court. In other words, the French company was arguing that the foreign court lacked jurisdiction from the French perspective since one of the parties was French, and French courts had exclusive jurisdiction over disputes involving French nationals. The appeal is dimissed by the *Cour de cassation* on the ground that Article 15 only gives optional jurisdiction to French courts, and that it is now irrelevant to determine the jurisdiction of foreign courts, for the purpose of the enforcement of judgments in France.

Eventually, the *Cour de cassation* held that it was for the trial judges to determine

whether there was a significant connection between the foreign court and the dispute, and thus jurisdiction of the foreign court.

For those of you who read French, I quote the important part of the decision (it is also available on legifrance.gouv.fr, but I have been unable to make a link to the decision):

> *Vu l'article 15 du Code civil; attendu que ce texte ne consacre qu'une compétence facultative de la juridiction francaise, impropre a exclure la compétence indirecte d'un tribunal étranger, des lors que le litige se rattache de maniere caractérisée a l'Etat dont la juridiction est saisie, et que le choix de la juridiction n'est pas frauduleux.*

Two conclusions can be drawn from this case. First and most importantly, *Prieur* is confirmed. Second, denial of enforcement of US judgments will require the identification of a specific issue with the foreign judgment, such as a violation of French public policy for judgments awarding punitive damages. Finally, the new paradigm is doing fine when coping with decisions from jurisdictions where the judiciary is not notoriously corrupt, but a time will come when that will not be the case.

Insolvency Proceedings and Shareholdings: When is a Foreign Judgment not a Judgment?

Chee Ho Tham has written an casenote in the latest issue of the *Lloyd's Maritime & Commercial Law Quarterly* on "**Insolvency proceedings and shareholdings: when is a foreign judgment not a judgment?**" (L.M.C.L.Q. 2007, 2(May), 129-136). Here's the abstract:

> *Comments on the Privy Council judgment in* Cambridge Gas Transport Corp v

> *Official Committee of Unsecured Creditors of Navigator Holdings Plc on whether a US bankruptcy ruling could be enforced against a Cayman Islands corporation which owned shares in an Isle of Man holding company. Discusses whether the US plan of reorganisation was a judgment in rem or in personam or was a judgment at all, for the purposes of enforcement in the Isle of Man.*

Available to those with a subscription to the *LMCLQ* (not available online, unfortunately.)

*(Please note that the site will probably be fairly quiet for the next few days, until the **conference** is over. See you on the other side!)*

BIICL Seminar on West Tankers Case

Here's a seminar announcement from the British Institute of International & Comparative Law:

As you will undoubtedly know, the House of Lords has referred the case of *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA & Others [2007] UKHL 4* to the European Court of Justice for a preliminary ruling.

The question raised is **whether Regulation 44/2001 permits anti-suit injunctions to protect an arbitration agreement**. On **11 July (5-7pm)**, the Institute has planned a seminar where the case and its potential implications will be discussed.

Chair: – **Rt Hon Lord Justice Lawrence Collins**.

Speakers:

– **Audley Sheppard**, Clifford Chance LLP

– **Clare Ambrose**, 20 Essex Street

– **Dr Christian Heinze**, Max Planck Institute for Comparative and International Private Law

Participants can download a discussion note. The note introduces the case and further provides an overview of relevant findings of the 2007 Report of the Heidelberg Institute for Private International Law prepared for the European Commission on the application of Regulation 44/2001.

The event will be followed by a reception for all those attending. To register, please visit the Institute's website by clicking here.

Reference for a Preliminary Ruling on Brussels II bis

The **Swedish** Supreme Court (*Högsta Domstolen*) has referred the following question to the European Court of Justice for a preliminary ruling on the interpretation of Brussels II *bis:*

> *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 [bis] 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?*

This case is pending at the ECJ under C-68/07 (*Kerstin Sundelind Lopez v. Miquel Enrique Lopez Lizazo)*. It represents the second reference on Brussels II *bis* so far.

The first reference for a preliminary ruling on Brussels II *bis* comes from the the **Finnish** *Korkein hallinto-oikeus* which referred to following questions to the ECJ:

> *(a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the*

matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels 11a Regulation) apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;

(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;

(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned?

If the answer to Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?

If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?

This case is pending under C-435/06 (*Applicant: C*)

Rome I: Parliament's Compromise Amendment on Consumer Contracts

A compromise amendment to Art. 5 of the Commission's Rome I Proposal has been presented by the Rapporteur *Ian Dumitrescu* in the last meeting of the EP's Committee on Legal Affairs (JURI). The amendment seems to take into account a number of concerns recently raised on the functioning of the conflict rule on consumer contracts (see our recent posts on the note by the Luxembourg delegation, the document from the Commission on certain financial aspects relating to the application of Articles 4 and 5 and the German position on services supplied to the consumer exclusively in a country other than that of his habitual residence).

The compromise amendment is partly a redraft of the Commission's proposal, with few relevant modifications:

– **the protective rule is not limited to consumers who are habitually resident in a Member State**;

– **the parties may choose the law applicable to the contract pursuant to Art. 3**, **but such a law "may not have the effect of derogating" from the law of the consumer's habitual residence** (new para. 2a: compare this provision with current Art. 5(2) of the Rome Convention, according to which "a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence");

– according to Art. 5(2) of the proposed amendment, the protective rule applies if "(a) the professional exercises his trade or profession in the Member State in which the consumer has his habitual residence; (b) or **the professional, by means of deliberate acts**, **directs his activity** towards the Member State in question or a number of countries including the Member State in question";

– **the list of contracts exempted from the protective regime is enlarged** (Art. 5(3)), including

> *(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;*
>
> *[…]*
>
> ***[new]** (d) contracts concluded on a financial market and contracts for the purchase, by way of subscription, of shares, bonds or other newly issued securities;*
>
> ***[new]** (e) contracts relating to the supply of investment services or financial instruments as defined by Directive 2004/39/EC.*

The initial Draft Report under discussion in the JURI Committee, together with two previous sets of amendments, can be found in our previous post here.

The adoption of the Report on the Rome I Proposal is expected in the EP's JURI Committee in one of the forthcoming meetings. According to current forecasts, the vote at first reading in the Parliament's plenary session is scheduled on 10 October 2007 (see the Rome I OEIL page).