Broad Grounds for Service of Australian Originating Process Outside of Australia in Tort Cases

Heilbrunn v Lightwood PLC [2007] FCA 433 is a recent Federal Court of Australia decision which evidences the breadth of rules for service of originating process outside of Australia in tort cases, which are common to all Australian superior courts except the Supreme Court of Western Australia.

A vintage Vauxhall motor car made in 1921, owned by the Australian-resident plaintiff, was damaged while being loaded into a container in England by an employee of the English-based defendant. The Vauxhall had been shipped to England from Australia to participate in a celebration of the centenary of production of Vauxhalls and the damage occurred while it was being loaded for the return journey. Repairs to the car were undertaken in Australia upon its return.

The plaintiff sought leave to serve the defendant, which did not carry out business in Australia, in England pursuant to the provision of the *Federal Court Rules* permitting service overseas in a proceeding 'based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring)'. Unlike the rules of some other Australian superior courts, the *Federal Court Rules* require leave of the Court before service can be made out of the jurisdiction.

Following the interpretation adopted in relation to similar rules by other Australian courts, the Federal Court held that the rule did not require that the injury which completed the tort occur in Australia, but only that the disadvantage or detriment suffered by the plaintiff as a result of the tort occur in Australia. This can be satisfied where a degree of personal suffering or expenditure has occurred within the jurisdiction, as took place in this case by virtue of the fact that the repairs to the car were undertaken and paid for by the plaintiff in Australia.

On the basis of the broad interpretation of the rule evidenced by this case, Australian courts have jurisdiction based on service overseas in many tort cases

where the only connection to Australia is the fact that the plaintiff has come to Australia (even where they were not previously resident in Australia) and personal suffering or expenditure has occurred in Australia. Indeed, the *Federal Court Rules* make it clear that service out is permitted where a tort claim causing damage in Australia is only one of several causes of action alleged in a proceeding, even if service out would not be authorised in respect of the other causes of action. The rules of some other Australian superior courts are narrower on this point, requiring that service out be authorised in respect of each of the causes of action alleged.

Or course, even if an Australian court would have jurisdiction based on service overseas, it may decline to exercise jurisdiction on the basis that the court is a clearly inappropriate forum pursuant to the narrow Australian doctrine of *forum non conveniens*, but this is a relatively difficult test to satisfy: see the High Court of Australia decision of *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10.

Some Significant Forum Non Conveniens Decisions Since Sinochem

While the long-term practical effect of *Sinochem* on the American doctrine of forum non conveniens remains to be seen, the Federal Courts of Appeals are beginning to shape the landscape in the first six months since the Court's decision.

The most significant forum non conveniens decision since *Sinochem* was recently handed-down by the Seventh Circuit. In *Gullone v. Bayer Corp.*, 484 F.3d 951 (7th Cir. 2007), a group of U.K.-based plaintiffs were among those that sued defendant drug companies for allegedly being exposed to the HIV or Hepatitis C virus during blood transfusions. Judge Diane Wood, writing for a unanimous panel, reviewed

the current state of the forum non conveniens doctrine in U.S. courts, and affirmed a district court's dismissal of U.K plaintiffs on forum non conveneins grounds in favor of an English forum:

> *Although we find it a close call, largely because the district court placed surprisingly little weight on the interest of . . . the original forum in this litigation and it may have overestimated the administrative difficulties in keeping the case in the United States, we conclude in the end that the court acted within its discretion when it dismissed the case.*

While Judge Wood engaged a scoping review of English case law regarding Plaintiff's causes of action, in particular the recent decision of the House of Lords in *Fairchild v. Glenhaven Funeral Servs., Ltd.*, (2003) 1 A.C. 32 (H.L.), the decision tends to presage that the ultimate battleground for forum non conveniens will rest in the U.S. district courts. Sinochem's strong authorization of trial-court discretion over this fact-based inquiry will continue to scare appellate courts from more intense review. The Seventh Circuit website has a link to the oral argument in *Gullone*.

For sure, *Gullone* is not the only FNC dismissal in favor of a foreign forum in the wake of *Sinochem*; other circuits have similarly affirmed such dismissals, though in unpublished decisions. *See, e.g., Gilstrap v. Radianz, Ltd.*, No. 06-3984, 2007 U.S. App. LEXIS 13686 (June 11, 2007) (dismissing a tortious interference claim in favor of an English forum).

Of the most interesting unpublished decisions applying the actual holding in *Sinochem*, the Third Circuit has ironically moved to the forefront. In *Davis Int'l, LLC v. New Start Group Corp.*, Nos-06-2294/2408, U.S. App. LEXIS 12032 (3rd Cir., May 23, 2007), a group of Russian defendants were sued in the District Court for the District of Delaware, and sought to dismiss the claims based on, *inter alia*, subject-matter jurisdiction, personal jurisdiction, and direct estoppel of a prior federal decision. The latter motion was based on a 2000 decision by the Southern District of New York that dismissed indentical claims against the Defendants on forum non conveniens grounds in favor of a Russian forum. The District of Delaware dismissed the new claims "by reason of the estoppel effect of another court's forum non conveniens decision, without first deciding [Plaintiff's] subject-matter and personal jurisdiction motions." The Third Circuit (per judge

Debevoise, sitting by designation) affirmed this course "in light of" *Sinochem* . *Davis* thus represents a slight expansion of *Sinochem*; not only are forum non conveniens dismissals proper before jurisdiction is established, but so are estoppel dismissals based on a prior forum non conveniens determination

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Rome II Regulation Adopted

After the adoption by the Council in the session of 28 June, **the joint text of the Rome II Regulation has been approved on 10 July 2007 by the plenary session of the European Parliament**, in a vote by a show of hands on the legislative resolution attached to the Report prepared by Diana Wallis (the debate held in the EP's session is available here: it is worth mentioning that the Rapporteur and other MEPs consider the text agreed upon in the conciliation stage as "an initial roadmap", stressing the importance of the review clause and of the studies that shall be submitted by the Commission on the matters that were set aside in the conciliation stage).

The Rome II Regulation, after the signing of the Presidents of the Council and of the Parliament, will be soon published in the Official Journal.

It will enter into force on the twentieth day following its publication in the O.J., and will apply, to events giving rise to damage occurred after its entry into force (Art. 31), from 18 months after the date of its adoption (Art. 32).

Recent Canadian Articles

Some readers of this site may be interested in the following:

Vaughan Black, "The Hague Choice of Court Convention" (2006) 6 Canadian International Lawyer 181-195 (an account of the proposed treaty's principal

provisions and discussion of differences with existing Canadian law)

Elizabeth Edinger, “New British Columbia Legislation: The Court Jurisdiction and Proceedings Transfer Act; The Enforcement of Canadian Judgments and Decrees Act” (2006) 39 U.B.C.L. Rev. 407-421 (review of the main provisions of two provincal statutes that codify, but also change, the law on jurisdiction and on recognition and enforcement)

Richard Frimpong Oppong, “Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond” (2006) 39 U.B.C.L. Rev. 257-286 (focuses on the Court of Appeal decision in Pro Swing but also advances general arguments and comparative analysis)

Janet Walker, “Castillo v. Castillo: Closing the Barn Door” (2006) 43 C.B.L.J. 487-500 (analysis of Supreme Court of Canada decision on choice of law and limitation periods)

I cannot provide links to these, but at least some should be available through various on-line subscription sites.

Two CLIP Articles Published in German Periodicals

The conclusions included in the CLIP papers on Intellectual Property in Brussels I and Rome I Regulations posted on the web site of the Max Planck Institute for Comparative and International Private Law and previously reported at the conflict of laws.net have been published in two law journals.

First is the publication of the comments on Rome I Proposal in the *International Review of Intellectual Property and Competition Law*, Vol. 38, No. 4, 2007, pp. 471-477.

Second published is the article titled “Intellectual Property and the Reform of Private International Law – Sparks from a Difficult Relationship” that an be found

in the July 2007 edition of the *Praxis des Internationalen Privat- und Verfahrensrechts* at pages 284-290.

Setting Aside Foreign Judgments in Australia

A recent judgment of the Supreme Court of South Australia provides a useful summary of the Australian common law authorities about when the enforcement of a foreign judgment can be set aside.

The judge concluded:

> *a foreign judgment is only binding and conclusive so long as it stands. A corollary of this principle is that where a judgment is made entirely on the basis of a foreign judgment, and the foreign judgment is later overturned and set aside, good reason exists to set aside the judgment that relied on it.*

Benefit Strategies Group Inc v Prider [2007] SASC 250 (4 July 2007)

French Judgment on Article 5 (1) b of the Brussels I Regulation, Part III

On March 27, 2007, the French supreme court for private matters (*Cour de cassation*) delivered yet another judgment on Article 5 (1) b of the Brussels I Regulation (for previous judgments on the issue, see here and here). In *SA ND*

Conseil v. Le Méridien Hotels et Resorts World Headquarters, the *Cour de cassation* held that, first, the combination of the conception, the making and the delivery of documents could be regarded as a single operation, and that, second, the operation had to be characterised as a provision of service.

In *SA ND Conseil v. Le Méridien Hotels et Resorts World Headquarters*, English company Le Meridien Hotels had hired French advertisement company ND Conseil. Under the contract, which had been concluded on June 5, 2002, ND Conseil was to promote the Le Meridien hotel chain by designing and making advertisement documents to that effect, to be delivered to Le Méridien Hotel company. The judgment of the *Cour de cassation* is not very detailed on the facts, nor on the arguments of the parties, but it seems that it was argued that the design of the documents took place in France, while the delivery took place in England. Eventually, Le Méridien Hotel terminated the contract, and ND Conseil sued for wrongful termination before French courts.

The first instance court (the commercial court of Nanterre, in the suburbia of Paris) retained jurisdiction in a judgment of December 2004. The Court of appeal of Versailles reversed and declined jurisdiction in March 2006. ND Conseil appealed to the *Cour de cassation*.

The *Cour de cassation* confirmed the judgment of the court of appeal and held that French courts did not have jurisdiction under the article 5 of the Brussels I Regulation. The judgment of the French highest court can be summarized as follows. First, ND Conseil had undertaken to perform two series of obligations. On the one hand, designing the documents. On the other hand, making them physically and delivering them. Second, under the contract, the making and the delivery of the documents were not only ancillary to their design, but also intertwined with it. As a consequence, there was one single contractual operation. Third, this operation was a provision of service in the meaning of article 5. Fourth, this service was provided in London.

The case raises many issues. As usual, the judgment of the *Cour de cassation* is so short that it could be interpreted in many ways. Here are a few of them.

First, no explanation is clearly given as to why the single operation is a provision of services, and not a sale of goods, or neither of the above. Indeed, one would have rather expected, after recent decisions of the court, that it would easily find

that a given contract was neither a provision of services, nor a sale of goods. The judgment could be interpreted as meaning that the court is of the opinion that it should be a provision of services because the sale was ancillary to the services.

Second, the judgment insists on the fact that the operation was a single one under the contract. This may mean that the architecture of the contract will matter, but again this is unclear.

Third, no explanation is given on why the global service was performed in London.

Final Round for Rome II: Adoption by the Council, Commission's Statements on the Review Clause and Parliament's Report on the Joint Text

The Council, in the meeting held by the "Environment" configuration in Luxembourg on 28 June 2007, **has adopted the Rome II joint text** approved by the Conciliation Committee, **with the Latvian and Estonian delegations voting against** (see the concerns regarding the conflict rule on industrial action – art. 9 – that these Member States had expressed in a joint declaration issued in the Council's vote on the Common position).

An addendum to the minutes of the Council's meeting contains **three statements by the Commission on the studies regarding the controversial issues** that were set aside in the conciliation (violations of privacy and rights relating to personality, level of compensation awarded to victims of road traffic accidents, treatment of foreign law), to be submitted in the frame of the review clause of Art. 30. These statements will be published in the Official Journal with the legislative

act.

The **Parliament's vote** on the joint text, that will formally end the codecision procedure by adopting the Rome II Regulation, is scheduled **on 9 July 2007**. With a view to the final vote, **Rapporteur Diana Wallis** has prepared a **Report of the EP Delegation to the Conciliation Committee**, summarizing the legislative procedure and presenting to the Parliament's plenary the agreement reached with the Council.

Here's a substantial part of the EP's Report (for further details on the previous stages of the procedure, see the Rome II section of our site):

> ***The codecision and conciliation procedure***
>
> *The Commission submitted on 22 July 2003 a proposal for a Regulation on the Law Applicable on Non-Contractual Obligations. Following Parliament's first reading on 6 July 2005 (54 amendments adopted) the Council adopted its common position on 25 September 2006. Parliament then concluded its second reading on 18 January 2007 adopting 19 amendments to the Council's common position. The main issues at stake were: violation of personality rights ("defamation"); road traffic accidents; unfair competition; the definition of "environmental damage" the relationship with other Community instruments; the treatment of foreign law; the review clause.*
>
> *The Council informed with letter from 19 April 2007 that it could not accept all of Parliament's amendments and that conciliation was necessary. Conciliation was then formally opened on 15 May 2007. […]*
>
> *Three trilogues held between 6 March and 24 April 2007 […], followed by subsequent meetings of the EP Delegation […], lead to provisional agreement on 5 amendments. The Conciliation Committee met then in the evening of 15 May 2007 in the European Parliament with a view to formally opening the conciliation procedure and possibly reaching agreement on the outstanding issues. After several hours of deliberations an overall agreement was reached at midnight. It was unanimously confirmed by the EP Delegation with 17 votes in favour.*
>
> *The main points of the agreement reached can be summarised as follows:*

Road traffic accidents

[…] One of the EP Delegation's main priorities was […] to ensure that the individual victim's actual circumstances are taken into consideration by the court seized when deciding on the level of the compensation to be awarded.

For the short term, the EP Delegation succeeded in including a reference in the recitals of the Regulation whereby judges when quantifying personal injuries will take account of all relevant actual circumstances of the specific victim, including in particular the actual losses and cost of after-care and medical attention.

For the long term, the EP Delegation succeeded in securing a public commitment by the Commission for a detailed study on all options, including insurance aspects, on the specific problems faced by victims of cross-border road traffic accidents. The study will be presented by 2008 the latest and would pave the way for a Green Paper. […]

Unfair competition

On the EP Delegation's insistence the Council agreed to the Commission's proposal for a specific rule on unfair competition that respects the principle of the application of one single national law (an important point for judges and lawyers) while at the same time limiting to a large extent the danger of "forum shopping" (the possibility for plaintiffs to raise their law suit in the Member State of their choice).

Environmental damage

The EP Delegation succeeded in obtaining a definition on "environmental damage" – a term used but not defined in the common position. The definition is in line with other EU instruments, such as the Directive on Environmental Liability.

Violation of personal rights ("defamation")

In view of an overall compromise the EP Delegation had to withdraw its amendments on the inclusion of rules on the violation of personal rights, particularly defamation in the press. Though Parliament managed to overcome the national differences and various conflicts of interests and to adopt its

amendments by a large majority, the Member States were unable until the very end to agree on a common approach. The issue however is considered as a "left-over": as part of the review of the Regulation the Commission will draw up a study by 2008 on the situation in this specific field. The findings of the study can serve as a basis for the adoption of relevant rules at a later stage.

Relationship with other Community instruments

On the controversial issue of the relationship between the "Rome II" Regulation and other provisions of Community law it was agreed that the application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments such as the e-Commerce Directive.

Treatment of foreign law

The issue of the treatment of foreign law by national courts – especially how often and how well national courts apply the law of another country – is also settled on the basis of a detailed study to be carried out by the Commission as part of its report on the application of the Regulation. […]

Review clause

On the insistence of the EP Delegation the review clause was split into a special section with a shorter timetable by 2008 as regards violation of privacy rights ("defamation") and a general section with the standard timetable whereby the Commission will present a report on the application of the Regulation four years after its entry into force. As part of the general review clause the Commission will also carry out a study on the treatment and application of foreign law by the courts of the Member States and a second study on the effects of Article 28 of the Regulation ("Relationship with existing international conventions") with regard to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

[Update: following a comment by M. Winkler on a previous item on Rome II, ***Mrs Wallis has posted on our site a reply*** *providing some clarifications on the Parliament's approach to the conflict rule* ***on environmental damage****. Any further comment, on this or other provisions of the Regulation, is welcome]*

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.