German Article on the Procedure for a Declaration of Enforceability under the Brussels Regulation

Burkhard Hess and *David Bittmann* (both Heidelberg) have published a very interesting article on the possibilities for an increase of efficiency of the procedure for a declaration of enforceability according to the Brussels I-Regulation ("Die Effektuierung des Exequaturverfahrens nach der Europäischen Gerichtsstands- und Vollstreckungsverordnung") in the latest issue of the "Praxis des Internationalen Privat- und Wirtschaftsrecht" (IPRax 2007, 277 et seq.).

An English abstract has kindly been provided by *David Bittmann*:

> *The article evaluates possible ways to increase the efficiency in cross-border enforcement proceedings according to the Brussels I-Regulation. This contribution is based on a comparative study of the application of the Regulation in 25 Member States conducted by the Institute for Private International Law and Business Law of the University of Heidelberg (Prof. Dr. Burkhard Hess and Prof. Dr. Thomas Pfeiffer) in cooperation with Prof. Dr. Peter Schlosser (University of Munich). The study has been supervised by the European Commission. In the first part of the article, the authors show possible ways forward to accelerate the time for obtaining a declaration of enforceability by shifting the competence for granting the declaration from the presiding judge of the Landgericht (Regional Court) to a court's clerk (Rechtspfleger). A comparison is drawn with the proceedings according to the Regulation creating a European Enforcement Order for uncontested claims and to the national proceedings for obtaining a warrant of execution. These proceedings lie already, in most of the Member States evaluated in the article, in the hands of a court's clerk. As a consequence, the same procedure should be chosen for the declaration of enforceability. The second part deals with possible improvements of the procedure of exequatur. The authors suggest an extension of the standard form in Annex V of the Brussels I-Regulation. The standard form should be drafted in accordance with the standard form of the new Regulation creating a European Payment Order, which entails all necessary details for an immediate enforcement of the foreign title, such as interest or the maturity of*

> *the claim. The result of such an extension was, that the time-consuming procedure for obtaining a declaration of enforceability would no longer be necessary, at least for the enforcement because of money debts. The foreign bailiff could start enforcement proceedings without the interference of the court, because all details concerning the foreign claim can be taken directly from the form. The standard form would have the effect of a "judicial passport".*

Ontario: Jurisdiction and Family Law

In *Okmyansky v. Okmyansk*, 2007 ONCA 427 (available here) the court answered three questions about its jurisdiction to hear different types of family law issues.

It held that under the (federal) *Divorce Act* it did not have jurisdiction to hear an application for spousal support following a valid divorce in a foreign jurisdiction (in this case Russia). The divorce had to have been a Canadian divorce for the court to be able to address support. On this issue the court's decision is in line with recent British Columbia authority and is contrary to recent authority from Quebec.

It held that under the (provincial) *Family Law Act* it equally did not have jurisdiction to hear an application for spousal support following a foreign divorce.

It held that under the *Family Law Act* it did have jurisdiction to hear a claim for equalization of the family assets following a foreign divorce. Accordingly, this claim was allowed to proceed in Ontario.

On each issue the analysis focuses mainly on statutory interpretation and the fact that under the Canadian constitution the federal government's ability to make laws governing support (otherwise a provincial matter) is only ancillary to its exclusive ability to make laws about divorce.

Second Issue of 2007's Journal du Droit International

The second issue of the French *Journal du Droit International* for 2007 was released a few days ago. As a journal covering the whole spectrum of international law, it contains articles on topics related to public international law, European Union law and European human rights. For a complete table of content in French, see here.

The Journal also contains a few articles dealing with conflicts issues, all written in French.

The first was written by Gian Paolo Romano and wonders how one can reconciliate the choice of the UNIDROIT Principles by contracting parties with mandatory rules (*Le choix des principes UNIDROIT par les cocontractants à l'épreuve des dispositions impératives*). The English abstract reads:

> *The intensity of the internationally mandatory character of a legal rule varies depending on the strength of the ties existing between the State and the contract. A rule which is mandatory with respect to a given contract may be no longer mandatory with respect to another contract. To the extent that it aims to protect the contracting parties, such rule then gives up its internationally mandatory character thereby becoming either "internationally dispositive", if the State from which it emanates is the one whose law would be applicable in the absence of choice, or, if not, "internationally available" to the parties, who may freely let themselves be governed by it. If the rule is, with respect to a particuler contract, internationally dispositive or available to the parties within the proposed definition, it can hardly be maintained that the State has an interest in applying it to such a contract notwithstanding the choice of the UNIDROIT Principles by the parties. While questioning the practical importance of the dichotomy "substantive – conflict autonomy", the present study allows itself to venture into the realm, still little explored, of the internationally dispositive scope of application of a mandatory rule.*

The second article is authored by Philippe Singer and Jean-Charles Engel, who are members of the staff of the European Court of Justice (for Mr Singer) or the Court of First Instance (for Mr Engel). Its title is the Importance of Comparative Research for Community Justice (*L'importance de la recherche comparative pour la justice communautaire*). The English abstract reads:

> *More than a passage required in certain cases by the Treaties or the expression of a concern to avoid a denial of justice, recourse to comparative law constitutes for the Community judge a real step in deciding a case. If this importance attached to comparative research in Community justice is well-known, its concrete realization and its formalization are perhaps a little less so. The "research notes" requested by the "research and documentation" Service testify, however, to the institutionalization of this method in the heart of the Community Court.*

The third article was written by Francois Melin, who lectures at Amiens Faculty of Law. It deals with the applicable law to set off in European insolvency proceedings (*La loi applicable à la compensation dans les procédures communautaires d'insolvabilité*). The English abstract reads:

> *The role of set off in case of insolvency is particularly important. The EC Regulation on insolvency proceedings alludes therefore to it in two provisions. Article 4.2.d indicates that the law of the State of the opening of the proceedings shall determine the conditions under which set off may be involved. Article 6 states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set off of their claims against the claims of the debtor, where such set off is permitted by the law applicable to the insolvent debtor's claim. The difficulty consists in establishing the relationship between these two provisions.*

Articles of the *Journal* cannot be downloaded.

Federal Court of Australia Sets Aside Order for Non-Party Discovery from the Russian Federation

The decision on appeal of the Full Court of the Federal Court in *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558; [2007] FCAFC 43 has now been reported in the authorised Federal Court Reports (available online to subscribers to Lawbook).

The case arose out of a claim by Spirits and a related company in relation to the ownership of certain registered trademarks, including marks incorporating the words 'Stolichnaya' and 'Moskovskaya'. FKP, as the second respondent to the claim, filed a cross-claim against Spirits and the first respondent seeking the transfer or cancellation of registration of the disputed trademarks. (Related proceedings have been brought in other countries.) FKP is an economic entity existing under the laws of the Russian Federation. Another such entity, Federal Public Unitary Enterprise External Economic Union Sojuzplodoimport (FGUP VO), was joined as a second cross-claimant.

FKP and FGUP alleged that, prior to 1992, the disputed trade marks were owned by an entity existing under the laws of the former Soviet Union and that, following the dissolution of the former Soviet Union in 1992, the marks were wrongfully appropriated by certain individuals and ultimately came to be held by Spirits. Spirits sought discovery of certain documents from the Russian Federation pursuant to the provision of the *Federal Court Rules* permitting the Court in its discretion to order discovery from non-parties. The trial judge concluded that the Russian Federation was the 'real' party to the cross-claim brought by FKP and FGUP, and ordered that it should make the discovery sought and that, unless it did so, the cross-claim would be stayed.

The Full Court set aside the trial judge's orders. The Court noted that it had been conceded (and the Court apparently agreed with the view) that the trial judge had power to make an order for discovery against a non-party foreign state, even if

the foreign state was not the 'real' party to the litigation. However, the Court said that the trial judge did not 'act with the caution that the principled exercise of the discretion requires where there is an intrusion upon the sovereignty of a foreign state.' Even though the intrusion upon the sovereignty of the Russian Federation was only indirect 'and possibly only as a matter of perception' (in the sense that the only sanction for non-compliance was a stay of the cross-claim), 'comity dictated that caution be exercised before making the order'. The Court concluded that the Russian Federation should first be given the opportunity to provide the discovery sought voluntarily and in cooperation with FKP and FGUP.

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)