Germany: New Central Authority For International Child Abduction and Adoption Cases

Since 1 Januar 2007, Germany has a new authority dealing with questions of international legal relations and international legal assistance which had fallen before in the competence of the Federal Public Prosecutor (*Generalbundesanwalt*) – the *Bundesamt für Justiz*.

Thus, the *Bundesamt für Justiz* is now *inter alia* the competent authority according to:

- the 1980 Hague Convention on the Civil Aspects of International Child Abduction
- the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption
- the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- the Brussels II *bis* Regulation

In addition, the *Bundesamt für Justiz*

- is the German contact point in the European Judicial Network (EJN)
- is competent to refer questions on the interpretation of the Brussels Convention and the Rome Convention on the Law Applicable to Contractual Obligations to the ECJ
- will be the central authority according to the Hague Convention on the International Protection of Adults as soon as it will enter into force (the German Parliament adopted the implementing law on 14 December 2006 – however, for the entry into force of this Convention it is necessary that, besides Germany, a third State ratifies the Convention. So far, only the UK has ratified the Convention (only for Scotland))

Cf. with regard to the competences of this new authority the article by *Rolf Wagner*, Das Bundesamt für Justiz, IPRax 2007, 87

German Courts: Non-Applicability of Art.5 (2) Lugano Convention in Favour of a Public Authority

According to the *Oberlandesgericht* (Higher Regional Court) *Dresden*, Art.5 (2) Lugano Convention is not applicable in favour of a claimant governed by public law subrogated to the rights of the maintenance creditor.

In the present case, a public authority had paid an education grant to the daughter of the defendant who was legally obliged to provide her maintenance. Afterwards, the public authority brought an action against the defendant aiming at the disclosure of his income as well as the variation of the maintenance order based on a statutory subrogation. The claimant referred to Art.5 (2) Lugano Convention.

The appeal court held that Art.5 (2) Lugano Convention was not intended to facilitate maintenance actions of public authorities subrogated to the rights of the maintenance creditor brought against the maintenance debtor. This point of view is founded on the nature of Art.5 (2) as an exception to the general rule of Art.2, according to which the defendant is to be sued in the courts of his domicile. The exception to this general principle in Art.5 (2) was justified by the goal to protect the maintenance creditor who is regarded as the weaker party and to provide him with the opportunity to sue the maintenance debtor at his, i.e. the creditor's, domicile/habitual residence. This rationale, however, could not be asserted in favour of a public authority since a public authority was – in contrast to a private maintenance creditor – not in an inferior position. Even though the wording of the provision itself did not require the maintance creditor to be the claimant, the Court advocated, in view of the aforementioned arguments, this restrictive interpretation of Art.5 (2) Lugano Convention.

The Court referred in particular to the ECJ's ruling in C-433/01 (*Freistaat Bayern v. Jan Blijdenstein*) where the ECJ had decided in this sense as well, even though

with regard to the Brussels Convention. However, the *Oberlandesgericht Dresden* held that this ruling was applicable to the case at issue since both Conventions had to be interpreted uniformly.

Abstracts of the reasoning can be found in NJW 2007, 446 (OLG Dresden, judgment of 28 September 2006 – 21 UF 381/06).

Conference: «The New European Contract Law: From the Rome Convention to the "Rome I" Regulation»

An international symposium on **Rome I Proposal** is organised **on March 23th and 24th in Bari** by the ***Fondazione Italiana per il Notariato*** (Italian Notary Public Foundation) and the **University of Bari** (Department of International Law and EU Law):

> *More than fifteen years after the Rome Convention on the law applicable to contractual obligations took effect, there are several reasons to open a new public debate on the private international law provisions for one of the most crucial areas in the notarial practice.*
>
> *First of all, the development of specific contract–related rules, both at Community and international level, frequently clashes with the discipline set by the Convention. Moreover, delicate problems arise both from the possibility to choose, as the applicable law, not only national statutes, but also non binding codes (for example the UNIDROIT principles) and from the progressive development of a core of mandatory Community rules applicable to intra-Community cases.*
>
> *The application of the Convention meets further challenges in the rise of new*

issues (such as e-contracting and its influence on the rules concerning contract completion; consumers' contracts); and in the development of new legal issues, such as the agreements that govern non-matrimonial relationships.

This led the European Commission to submit a draft regulation (so-called Rome I), which not only introduces our subject into the communitarisation process of Private International Law, but which also modifies its content on important aspects. This conference represents, therefore, a special opportunity for a de iure condito discussion of the results achieved, and of problems still to be solved, and for an evaluation of possible solutions to be adopted de iure condendo.

Here's the programme:

FRIDAY 23 MARCH – MORNING SESSION

Chair: *Bruno Volpe* (Consiglio Nazionale del Notariato)

- Welcome speech – *Giovanni Cellamare* (University of Bari)
- Introductory address – *Giuseppe Gargani* (Chairman of the European Parliament Legal Affairs Committee)
- The Communitarization of Private International Law: Role and Prospects of Private Autonomy – *Sergio Maria Carbone* (University of Genoa)
- Delimiting the Scope of Application of Community Conflict Rules on Contractual Obligations: in particular, Gifts and Conventions Governing Non-matrimonial Relationships – *Giovanni Liotta* (Consiglio Nazionale del Notariato)
- Delimiting the Scope of Application of Community Conflict Rules on Contractual Obligations: in particular, Shareholders' Agreements – *Stefania Bariatti* (University of Milan)
- The Law Applicable in the Absence of Choice: Difference between the Old and New Discipline – *Ugo Villani* ("Luiss-Guido Carli" University of Rome)
- Freedom of Choice of the Applicable Law – *Gabriella Carella* (scientific coordinator of the conference, University of Bari)

FRIDAY 23 MARCH – AFTERNOON SESSION

Chair: *Fausto Pocar* (University of Milan – President of the ICTY)

- Choosing as Applicable Law «the Principles and Rules of the Substantive Law of Contract Recognised Internationally or in the Community »: Examples and Impact on Contracts' Practice – *Olivier Tell* (European Commission, DG for Freedom, Security and Justice)
- Drafting the Choice-of-law Clauses – *Alfredo Maria Becchetti* (Consiglio Nazionale del Notariato)
- Internally, Communitary and Internationally Mandatory Rules – *Nerina Boschiero* (University of Milan)
- Consumer Contracts Concluded by Remote Communication Techniques – *Cyril Nourissat* ("Jean Moulin" University – Lyon 3)
- The Law Applicable to Agency – *David Ockl* (Consiglio Nazionale del Notariato)
- Matters Governed by Lex Contractus and the Law Applicable to the Effects of Contract as Against Third Parties – *Domenico Damascelli* (scientific coordinator of the conference, Consiglio Nazionale del Notariato)

SATURDAY 24 MARCH – MORNING SESSION

Chair: *Federico Tassinari* (Consiglio Nazionale del Notariato)

- The Law Applicable to the Form of Contracts; in particular, Contracts Relating to a Right *in Rem* or Right of User in Immovable Property – *Tito Ballarino* (University of Padua) and *Paolo Pasqualis* (Consiglio Nazionale del Notariato)
- The Law Applicable to Voluntary Assignment: Delimiting the Competence among Laws to Take into Account – *Andrea Bonomi* (University of Lausanne)
- The Impact of the "Rome I" Regulation on Italian Private International Law – *Francesco Salerno* (University of Ferrara)
- Draft Regulations Relationship with other Provisions of Community Law and with International Conventions – *Andrea Cannone* (University of Bari)
- Coordinating the "Rome I" and "Rome II" Draft Regulations – *Luciano Garofalo* (University of Taranto)

Simultaneous interpreting in English and French will be provided.

For further information and registration, see the website of the *Fondazione*

Italiana per il Notariato and the downloadable leaflet (in English and French version).

Swedish Supreme Court on Jurisdiction and Patent Infringements

Introduction

The Swedish Supreme Court (*Högsta Domstolen*) recently rendered a decision on adjudicatory jurisdiction over a negative declaration pursuant to non-infringement of a patent, and hence non-contractual non-liability. The decision is dated 2006-06-02 and was published in NJA 2006 p. 354 (NJA 2006:39), – case no. Ö 2773-05. Following is a brief note on the decision.

Parties, facts and contentions

The plaintiff, Alligator Bioscience AB, a company domiciled in Sweden, served the defendant, Maxygen Inc., a company domiciled in the USA holding a European patent (EP 0 752 008) valid in Sweden, with a subpoena in a Swedish court (Stockholms tingrätt). Alligator´s object of action was to ask the court to declare that Alligator was in its right to manufacture fragment induced diversity by a method of in vitro mutated polynucleodes (abbreviated FINDTM) without infringing Maxygen´s patent. Maxygen asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Swedish adjudicatory law system, based, first, on lack of Swedish adjudicatory authority, and, second, Alligator´s lack of interest to have that question determined by the court. This case note will solely venture into the question of adjudicatory authority.

Court instances and conclusions

The decisions of the court of first and second instance as well as the Supreme Court were as follows. The court of first instance (*Stockholms tingrätt*) attributed adjudicatory authority to Swedish courts based on analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3, admitting that neither were directly applicable. Maxygen appealed that decision to the court of second instance (*Svea Hovrätt*), which concurred with the court of first instance. Maxygen appealed that decision to the Swedish Supreme Court, which attributed adjudicatory authority to Swedish courts on the basis of Swedish national law Chapter 10, §3 in "*rättegaangsbalken*" (1942:740).

Ratio decidendi of the Swedish Supreme Court

In the following, the rationale of the Swedish Supreme Court will be described.

First, the Swedish Supreme Court identified the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Swedish courts. Since the defendant neither was domiciled in an EU State nor an EFTA State, the legal basis for determining the attribution of jurisdiction to Swedish courts was, in accordance with the Brussels I Regulation article 4.1 and the Brussels and Lugano Conventions article 4, to be determined by Swedish law. Further, the Swedish Supreme Court reasoned that the attribution of jurisdiction to court could in principle be based on analogous application of the Brussels and Lugano Convention article 5.3 and the Brussels I Regulation article 5.3 since, finding support in Swedish legal literature (Bogdan´s book titled "Svensk internationell privat- ocj processrätt", 6th edition 2004 p. 113 with references to NJA 1994 p. 81 and 2001 p. 800) those rules express international principles in conflicts of adjudicatory jurisdiction between courts in different States under the condition that their application do not lead to limitation of Swedish adjudicatory authority. However, since the Swedish Supreme Court in case in NJA 2000 p. 273, had established that article 5.3 of the Lugano Convention was inapplicable to negative court declarations of non-contractual non-liability, and it was uncertain and a controversial issue in legal literature whether the Brussels I Regulation article 5.3 and the Brussels Convention article 5.3 encompassed a negative declaration for non-infringement of a patent, and hence a declaration for non-contractual non-liability. Since that question so far was an open question, the Swedish Supreme Court decided it was not evident in this case to base Swedish adjudicatory authority on an analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3.

Second, the Swedish Supreme Court outlined its policy considerations for the possibility to seek a negative declaration of non-infringements of patents on the basis of the possibility to seek negative court declarations on non-infringements of trademarks. Since in the EU it is possible to seek a negative declaration on a non-infringement of a trademark on the condition that such a declaration is permitted to seek in accordance with a Member State´s national law (see regulation no 40/94 of 20 December 1993 article 92 b), and such a negative declaration is permitted in the Swedish trademark law § 44, by consequence, the Swedish Supreme Court reasoned, Alligator´s lawsuit were to be attributed to Swedish courts if that claim had been a claim on infringements of trademarks. (Swedish trademark law states that the legal dispute is to be attributed to the court where the defendant is domiciled or has its place of business, or, if the defendant is neither domiciled nor has a place of business in a Member State, the legal dispute shall be attributed to the court where the plaintiff is domiciled or has its place of business, see article 93.1, 93.2 and 93.5.) Further, the Swedish Supreme Court reasoned, since the European Patent Convention does not regulate the equivalent question for patents, and there are no objective grounds to determine the attribution of jurisdiction to court different from negative declarations on non-infringement of trademarks, the solution should be the same for patents as it is for trademarks. Finally, the Swedish Supreme Court noted the Commission proposal on 1 August 2000 to the regulation on European Patents, COM 2000(412), which was a proposal not yet promulgated, which presupposes in articles 30 and 34 that a plaintiff is permitted to seek a negative declaration on non-infringement of a patent against a patent-holder in an EU court for immaterial rights.

Third, upon having determined that the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3 were inapplicable by analogy, and upon establishing that well founded reasons argue in favour to permit a plaintiff to seek a negative declaration on non-infringement of a patent, the Swedish Supreme Court sought the legal basis for determining Swedish adjudicatory authority in Swedish national law Chapter 10, §3 in “rättegaangsbalken” (1942:740). In accordance with this law, the legal or natural person who does not have a known domicile in Sweden, can in disputes relating to movable property be sued at the place where the movable property is. In a previous Swedish Supreme Court decision, in case NJA 2004 p. 891, it was not necessary for the Swedish Supreme Court to determine whether and to what extent immaterial rights could

be located within the sphere of a State territory in the sense the said law required, but expressed it was a controversial issue. Further, since Maxygen´s patent was a European patent, was valid in Sweden and had the same legal position as if the patent were registered in Sweden, and since that patent could be exploited as security rights in accordance with Swedish law, the Supreme Court reasoned those rights were possible to locate, where upon Maxygen´s patent rights could be located in Sweden as conceived in the spirit of the Swedish national law Chapter 10, §3 in "*rättegaangsbalken*" (1942:740).

Fourth, the Swedish Supreme Court ended by commenting on whether and under what conditions a future decision on establishing liability for and enforce permanent discontinuation of patent infringement would lead to a nullification of a preceding negative declaration on non-liability for non-infringement of a patent. The Swedish Supreme Court noted that a preceding negative declaration on non-liability for non-infringement of a patent could not in any event be nullified so long as the decision to establish liability for and enforce permanent discontinuation of patent infringement did not interfere with the uncertainty the plaintiff wished to achieve certainty for through her seeking of the negative declaration on non-liability for non-infringement of a patent.

Consent-Based Jurisdiction: Ontario

See *Mueller v. Resort Investors International, ULC*, [2006] O.J. No. 4952 (S.C.J.) (available here) for a straightforward rejection of the defendant's challenge to the jurisdiction of the Ontario court on the basis that the defendant served and filed both a notice of intent to defend and a statement of defence. The motions judge held there was no need to consider whether there was a "real and substantial connection" to Ontario; the defendant had attorned.

This should seem quite orthodox, for it is. But there have been several recent

Ontario decisions threatening to upset that orthodoxy as part of the impact of *Morguard*. In my view, expressed in "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85 Can. Bar Rev. 61 (with C. Dusten of the Faskens firm in Toronto), *Morguard* and subsequent decisions of the Supreme Court of Canada have not displaced this traditional basis for jurisdiction. Cases like *Shekhdar v. K & M Engineering and Consulting Corp.* (2004), 71 O.R. (3d) 475 (S.C.J.), *Deakin v. Canadian Hockey Enterprises* (2005), 7 C.P.C. (6th) 295 (Ont. S.C.J.) and *R.M. Maromi Investments Ltd. v. Hasco Inc.* (2004), 73 O.R. (3d) 298 (S.C.J.) cannot be correct on this point.

Two Paradigms of Jurisdiction

Ralf Michaels (*Duke*) has published "**Two Paradigms of Jurisdiction**" in the Michigan Journal of International Law (27 Mich. J. Int'l. 1003). Prof Michaels has very kindly provided us with an abstract:

> *This article addresses a puzzle: The law of jurisdiction remains strikingly different between the US and Europe, despite cultural and economic similarities. The reason suggested is one of paradigms. My hypothesis is that Americans and Europeans do not simply think differently about how to apply jurisdiction; they even think differently about what jurisdiction is.Similarities of goals notwithstanding, each side remains in its own paradigm of jurisdiction, and these paradigms are significantly different. Paradigms explain not only why these differences exist, but also why they remain stable despite all the transatlantic efforts at agreement and the relative similarity of goals and values. This explanation is seemingly paradoxical: convergence and unification are difficult not because of differences but because of similarities. Precisely because American and European law provide functionally equivalent methods for resolving the same problems, they cannot agree on, much less unify, these methods.*
>
> *Propounding the notion of paradigmatic difference between U.S. and European*

thinking about jurisdiction makes important contributions both to the law of jurisdiction and to the theories and methods of comparative law. The contribution to the law of jurisdiction is both explanatory and evaluative. On a macro-level, exploring paradigmatic difference contributes to a mutual understanding of the structure within which Americans and Europeans think about issues of jurisdiction. Broadly, Americans adopt an "in or out" paradigm that is vertical, unilateral, domestic, and political, while Europeans adopt an "us or them" paradigm that is horizontal, multilateral, international, and apolitical. On a micro-level, understanding paradigmatic difference can provide a single explanation for a wide variety of differences between U.S. and European jurisdictional theory and practice. Taken together, paradigmatic difference suggests mutual criticism tends to be biased. As long as each side argues from within its own paradigm, the approach taken by the other side must necessarily seem deficient.

The second field to which the idea of a paradigmatic difference makes a contribution is the theory of convergence, legal unification, and comparative law. The common understanding is that unification is easy where legal systems are functionally equivalent because each side agrees on the goals and disagrees only on the means. Unification is difficult, according to this account, only where goal preferences differ strongly. By contrast, this Article shows how functional equivalence between different legal orders makes unification more difficult to achieve. Precisely where different legal orders reach similar results by different means, within different legal paradigms, it is very costly for them to unify those means, while the benefits from unification are rather slim. Although the theory of legal paradigms builds on functionalist comparative law, it represents a significant elaboration that can account for difference and for culture.

This Article proceeds as follows. Part II.A. presents two explanations frequently given to explain the differences between U.S. and European jurisdictional law, and shows that both are ultimately insufficient. Part II.B. introduces functional comparison and show how it can actually help stabilize, rather than overcome, difference. Part II.C. introduces the concept of paradigms and paradigmatic difference as a more promising explanation for these differences. Part III develops this hypothesis by laying out two different paradigms underlying different legal systems-a vertical, domestic, unilateral, political paradigm for U.S. law (Part III.A.), and a horizontal, international, multilateral, apolitical

paradigm for European laws (Part III.B.). An important finding in these two sections is that each of the paradigms has ways of accounting for those considerations that are fundamental to the other paradigm, but in different ways: through subsumption under its own terms, and through externalization to other institutions than the law of jurisdiction. Part IV applies the findings of paradigmatic difference to five specific issues on which Americans and Europeans disagree: the role of due process; the discrimination against foreign plaintiffs in U.S. courts and against foreign defendants in European courts; the relevance of state boundaries and extraterritoriality; attitudes towards forum non conveniens, antisuit injunctions, and lis alibi pendens; and negotiation styles in the efforts to conclude a worldwide judgments convention in the Hague. Part V concludes.

You can download the article from **here** (PDF). **Highly recommended**.

Insurance in Rome I: A Consultation by the Treasury and DCA

From the HM Treasury website:

In December 2005, the European Commission proposed to transpose the 1980 Rome Convention into an EU regulation (Rome I). Following consultation with stakeholders which raised a number of serious issues with the initial text, the United Kingdom elected not to opt in to Rome I in May 2006. In doing so, the UK undertook to work for an acceptable text that might allow the UK to opt into at the end of the process, provided the outcome was judged acceptable. The Finnish and German EU Presidencies jointly presented a revised Rome I text on 12 December 2006, which would bring insurance generally within Rome I for the first time. As insurance is a new area for Rome I, HM Treasury and DCA are conducting this consultation.

Click here for the full "Insurance in Rome I" consultation paper (PDF, 953kb). Comments are expected by 30 March 2007.

Stay of Divorce Proceedings in England

Carel Johannes Steven Bentinck v Lisa Bentinck [2007] EWCA Civ 175

Divorce proceedings brought in England were stayed in circumstances where the issue of which jurisdiction was first seised between the English and Swiss jurisdictions had been argued out in Switzerland and all that was awaited to determine the issue was the judgment of the Swiss court.

The appellant husband (H) appealed against a case management order directing preparations for contested hearings in relation to divorce proceedings brought between H and his wife (W) in both the Swiss and English jurisdictions. Following the break-up of their marriage H had taken up permanent residency in Switzerland and W had remained in the United Kingdom. A premarital agreement had provided that the contract and marital relationship between the parties would be governed by Swiss law and be subject to Swiss jurisdiction. H initiated conciliation and divorce proceedings in the Swiss court. W then petitioned for divorce in England and later contested the jurisdiction of the Swiss court. Following various hearings and applications the issue was pending in both courts as to which was first seised. The Swiss court issued a notice fixing the hearing on jurisdiction in divorce and ancillary matters. That hearing proceeded and at the time of the instant hearing judgment was reserved. H argued that as the Swiss court had yet to decide whether it was first seised, the English court should stay its proceedings until such time as that decision was made and that once Switzerland had decided whether or not it was seised of the matter, the English court could make the necessary directions consequent upon the Swiss decision.

The Court of Appeal held that H's appeal succeeded despite the fact that no single criticism could be made of the judgment of the court below. The judge had rightly

identified that the essential dispute between the parties was as to money. With equal clarity he recorded that he had taken the case in circumstances that were plainly unsatisfactory with no opportunity for pre-reading and little time for argument. Despite the absence of error in the judgment below it was not only open to the instant court but incumbent upon it to act to avoid any further wastage of costs and court resources. There was a strong argument for deferring in London for the simple reason that the issue of which jurisdiction was first seised was to be determined in Switzerland according to Swiss law. The notion of having conflicting expert evidence from Swiss lawyers upon which a London judge had then to determine seisin according to Swiss law made no sense at all when a Swiss judge was there to determine the very issue. That consideration became even more powerful when the issue had been argued out in Switzerland and all that was awaited was the judgment of the court. The instant court would abandon common sense and responsibility if it permitted the parties to continue to incur costs in the English jurisdiction in preparation for a London fixture on the premise that it might precede in time the delivery of the Swiss judgment. H's application for a stay of proceedings was granted.

(Postscript: the Klosters judgment did, in the event, decide that Switzerland had jurisdiction and was first seised in respect of all relevant matters). You can download the Court of Appeal judgment from BAILII.

Source: Lawtel

U.S. Supreme Court Decides Sinochem: A "Textbook" Forum Non Conveniens Dismissal May Be Ordered Without First

Determining Jurisdiction

The U.S. Supreme Court decided an important dispute involving the jurisdictional rules that apply in U.S. federal courts. In *Sinochem Int'l Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102, Justice Ginsburg, writing for a unanimous court, held that "a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection," such as subject-matter jurisdiction over the dispute or personal jurisdiction over the parties.

Sinochem International Co. Ltd. complained in Chinese Admiralty Court that Malaysia International Shipping Corp. had backdated a bill of lading for steel coils loaded at a port in Fairless Hills, Pa., and taken to Huangpu, China. The shipping company sued in federal court in Philadelphia, saying it had suffered damages due to Sinochem's representations about Malaysia International and the seizure of the ship when it got to China. A U.S. District Court judge dismissed the case, saying China is the best forum for the dispute involving two non-American companies. A federal appeals court, in a 2-1 decision, said the lower court should have first determined whether it had jurisdiction over the case before dismissing on forum non conveniens grounds.

The Supreme Court reversed the Third Circuit's ruling. According to the Court, "dismissal for forum non conveniens reflects the court's assessment of a range of considerations, most notably the convenience of the parties." Because such a dismissal is a "non-merits ground," and requires only "a brush with the factual and legal issues of the underlying dispute, it does not "entail any assumption . . . of substantive law-declaring power" and may be made prior to any determination of its subject-matter or personal jurisdiction to decide the case. Rather than a strict ordering of non-merits determinations, a court has "leeway to choose among threshold grounds for denying audience to hear a case on the merits." The Court went on to observe that "[t]his is a textbook case for immediate forum non conveniens dismissal," and that "[j]udicial economy is disserved by continuing litigation in the Eastern District of Pennsylvania."

This victory for Sinochem may have important consequences in future cases brought in U.S. courts against non-U.S. companies having little or no connection to the United States. Foreign companies will now able to seek prompt dismissals

on forum non conveniens grounds without first requiring the federal courts to make a conclusive inquiry into jurisdiction, which in many cases can be costly and prolonged. As the dissenting member of the Third Circuit's decision acknowledged, a contrary rule would "subvert a primary purpose of the forum non conveniens doctrine: protecting a [foreign] defendant from . . . substantial and unnecessary effort and expense."

Interestingly, though, the Court left for another day the important question of whether a court that conditions a forum non conveniens dismissal on a waiver of jurisdiction or limitations defenses in a foreign forum must first determine its own authority to decide the case. Because Malaysia here "faces no genuine risk that the more convenient forum will not take up the case" (because proceedings are currently underway in China), the issue was not before the court.

This case was previously blogged on this site, with links there to the argument and briefs. The official opinion released this morning is available here. Early commentary on the decision appears at Opinio Juris.

No More Lis Pendens between Swiss Courts and Arbitrators

Article 186 of the Swiss Law of International Private Law (the Swiss Law) was amended on October 6, 2006. A new paragraph 1bis was added to that provision. It reads:

> *[Le tribunal arbitral] statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.*
>
> *Free translation: The arbitral tribunal rules on its jurisdiction without taking into consideration proceedings involving the same cause of action and between the same parties already pending before another arbitral tribunal or a court,*

unless there are serious reasons to stay the proceedings.

My understanding is that the rationale of the amendment is to abrogate the 2001 *Fomento* ruling of the Swiss Federal Court. In *Fomento*, the Swiss highest court held that the lis pendens provision of the Swiss Law (art. 9) applied between a foreign court and an arbitral tribunal sitting in Switzerland. As the foreign court has been seized first (and as the judgement could be enforced in Switzerland), the arbitral tribunal had to decline jurisdiction. Because it had not done so, the award was set aside.

Whether there can be lis pendens between an arbitral tribunal and a court is a hotly disputed issue. It could be argued that they cannot both have jurisdiction. This is certainly the French view. But *Fomento* was a good example of an actual lis pendens situation. The reason why the foreign court had taken jurisdiction was that the parties had failed to challenge it in a timely fashion.

New paragraph 1bis of article 186 is applicable as of March 1st, 2007.