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.

Swiss Institute of Comparative Law: Conference on International Successions and Colloquium on Lugano Convention

Two interesting events dealing with private international law will take place in March 2007 at the Swiss Institute of Comparative Law (ISDC, Lausanne).

The first one, **on Thursday, 15th March, at 17h00**, is the inaugural conference of the Association of Alumni and Friends of the Swiss Institute of Comparative Law (AISDC): ***Prof. Andrea Bonomi*** (University of Lausanne) will lecture on "La scission des successions internationales", focusing on problems arising from **international successions** in legal systems which adopt the so-called **"principle of scission"** (i.e. different conflict rules determining the law applicable to the succession for movable and immovable property). A small fee is required for participation (free of charge for students).

On Friday, 16th March, **the *19th Journée de droit international privé***, organised by the ISDC and the University of Lausanne (Center of Comparative Law, European Law and Foreign Legislations), **will analyse the present and future perspectives of the Lugano Convention**, providing an overview of recent case law and focusing on some specific provisions of the Convention. Here's a short presentation of the programme (*our translation from French*):

19e Journée de droit international privé:

"*La Convention de Lugano. Passé, présent et devenir*"

MORNING SESSION

Chair: *Eleanor Cashin Ritaine* (Director of the ISDC)

The new Lugano Convention

- *Monique Jametti Greiner* (Federal Office of Justice, Bern)

Recent case law on Lugano Convention

- *Gian Paolo Romano* (ISDC)

Jurisdiction in matters relating to a contract

- *Alexander Markus* (Federal Office of Justice, Bern)
- *Eva Lein* (ISDC)

Protective rules for the weaker party

- *Andrea Bonomi* (University of Lausanne)
- *Anne-Sophie Papeil* (University of Neuchâtel)

Round Table, with the participation of:

- *Hélène Gaudemet-Tallon* (University of Paris II)
- *Fausto Pocar* (President of the ICTY – Rapporteur of the new Lugano Convention)

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AFTERNOON SESSION

Chair: *Andrea Bonomi* (University of Lausanne)

Lis pendens and connected claims

- *Jolanta Kren Kostkiewicz* (University of Bern)
- *Bart Volders* (ISDC)

Recognition and enforcement of judgments

- *Anton K. Schnyder* (University of Zurich)
- *Valentin Retornaz* (University of Neuchâtel)

Round table and final discussion, with the participation of:

- *Monique Jametti Greiner* (Federal Office of Justice, Bern)
- *Andreas Bucher* (University of Geneva)
- *Yves Donzallaz* (Avocat in Sion)

The conference will be held in French, German and English (no translation is

provided).

For the detailed programme and further information (including fees), see the ISDC website and the downloadable leaflet. An online registration form is available.

First Issue of 2007's LMCLQ and Private International Law

There is a veritable feast of articles, casenotes and book reviews in the latest issue of the *Lloyd's Maritime & Commercial Law Quarterly*. They are:

"Piercing the corporate veil: searching for appropriate choice of law rules" by Chee Ho Tham (*L.M.C.L.Q. 2007, 1(Feb), 22-43*)

> *Analyses case law on whether the English courts will exceptionally disregard the separate legal personality of foreign incorporated entities in litigation, applying English or foreign company law. Discusses the jurisdiction to order remedies against shareholders on the ground that incorporation was a sham. Considers the nature of limited liability under English law.*

"Substance and procedure and choice of law in torts" by Andrew Scott (L.M.C.L.Q. 2007, 1(Feb), 44-62)

> *Discusses the House of Lords judgment in Harding v Wealands on the choice of law in actions for tort under the Private International Law (Miscellaneous Provisions) Act 1995 s.14. Interprets the scope of procedural matters to be determined in accordance with the laws of the forum. Reviews UK and Commonwealth cases. Considers potential problems if substantive and procedural issues must be determined according to different national laws.*

"EU Private International Law: Harmonization of Laws, 2006, Peter Stone"

Reviewed by Adrian Briggs (*L.M.C.L.Q. 2007, 1(Feb), 123-126*) (see our items on this publication here).

"Concise Introduction to EU Private International Law, 2006, Michael Bogdan" Reviewed by Adrian Briggs (L.M.C.L.Q. 2007, 1(Feb), 123-126)

"EU Private International Law: An EC Court Casebook, 2006, Edited by Michael Bogdan and Ulf Maunsbach" Reviewed by Adrian Briggs *(L.M.C.L.Q. 2007, 1(Feb), 123-126)*

The LMCLQ isn't available online – paper subscription only.

French Conference: Dialogue Between Courts at the International Level

A conference will be held in Paris on March 19 on the *Dialogue Between Courts at the International Level*. The speakers will be Guy Canivet, the former chair of the French supreme court in civil, commercial and criminal matters (Cour de cassation), who was appointed last week to the Constitutional Council (Conseil constitutionnel), and professor Horatia Muir Watt from Paris I Panthéon Sorbonne university. The speakers should be speaking in French.

The conference will take place at 7 pm in the Centre Pompidou. It is free of charge.

Unseen Jurisdiction Clause Upheld by the Court of Appeal

The judgment in *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140 was handed down on Monday. The OUT-LAW team at international law firm Pinsent Masons have written an excellent summary of the case, and have kindly given us permission to reproduce it here:

> *A German company can fight an English customer in the German courts because its terms and conditions said that German jurisdiction applied – albeit those conditions were never sent to the English firm, the Court of Appeal ruled this week.*
>
> *Vertex Antennentechnik makes and sells satellite antennae and related equipment. 7E Communications is a telecoms engineering consultancy based in Surrey. 7E agreed to buy some equipment from Vertex which it then declared faulty. Before that dispute could be settled the two parties had to decide in which jurisdiction it could be fought.*
>
> *When Vertex faxed 7E an offer to sell the equipment its quotation said that the sale was offered "according to our general terms and conditions". No copy of those Ts&Cs was supplied.*
>
> *An executive with 7E replied by fax with a new document, a purchase order, which referenced the sale offer quotation by name and reference number. Both parties agreed that the contract between them was concluded when that fax was sent to and received by Vertex, but the terms of that contract were disputed.*
>
> *Vertex claimed that the relevant jurisdiction should be Germany for any disputes arising from the contract, and that it should be exclusively Germany. It pointed to a law known as the* Brussels-I Regulation *(23-page / 212KB PDF), properly called the "Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters".*
>
> *"If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to*

settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction," says article 23 of the Regulation. "Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be in writing or evidenced in writing."

The dispute concerned, then, whether or not the reference to terms and conditions constituted an agreement in writing under the Regulation.

Presiding judge Sir Anthony Clarke ***MR*** *distinguished 7E's circumstances from those in a landmark European Court of Justice (ECJ) case on jurisdiction clauses. That ruling was given in 1976 in a dispute over a German company's sale of upholstering machines to Italian firm Salotti. The signed contract made no reference to the terms and conditions which were on the back. The ECJ said the jurisdiction clause in those terms did not form part of the contract.*

"Where the contract signed by both parties expressly refers to general conditions which include a clause conferring jurisdiction, article 17 (now 23) is satisfied," wrote Sir Anthony. "They do not suggest that the general conditions have themselves to form part of the contractual document. An express reference to the general conditions in the contract is enough. There is no suggestion in those paragraphs that in such circumstances there must be an express reference, not only to the general conditions which contain the jurisdiction clause, but also to the jurisdiction clause itself."

7E also argued that authorities cited by Vertex could not apply because there were two signed documents, not one.

"The question is therefore whether the fact that the parties did not sign one but two documents is a critical distinction," wrote Sir Anthony. "We have reached the clear conclusion that it is not. If both parties had signed the original quotation as evidencing the contract between them, there can be no doubt that the principles stated above would apply and that the quotation would be, in the words of the Court of Justice, 'a writing' evidencing a contract on the terms of the defendant's terms and conditions, including the German jurisdiction clause, and that both parties including the claimant would be bound by the clause, just as Mr Mossler was bound by the clause in [a previous case involving] Credit Suisse, even though he had not seen and did not have a copy either of the

relevant terms or of the jurisdiction clause."

"In our judgment, no distinction in principle is to be drawn between a case in which a contract is contained in one document signed by both parties and a case in which a contract is contained in or evidenced by two documents, one of which is signed by one party and one by the other," said Clarke.

Jon Fell, a partner with Pinsent Masons, the law firm behind OUT-LAW.COM, described the ruling as pragmatic. "The court recognised that most people don't read the small print but it's saying that this is no excuse for a company that was told that small print existed. 7E should have asked to see the small print."

Fell added that if a dispute between a company and a consumer would likely see a different outcome. "A court would probably bend over backwards to support a consumer's argument that unseen conditions should not form part of a contract," he said.

You can find out more about the excellent OUT-LAW website **here**. The judgment can be found in full **here**.