Rejecting Renvoi: Iran v Berend

BAILII has just published the intriguing judgment in ***Iran v Berend*** **[2007] EWHC 132 (QB)**, which was handed down last Thursday (1 February 2007).

The case concerned a fragment of an Achaemenid limestone relief, believed to originate from the first half of the fifth century B.C in Persepolis (see some of the background to the dispute on Iran's Cultural Heritage News Agency website – be wary of the obvious bias, however.) Mme Denyse Berend allegedly acquired title in the fragment after it was sold to her through an agent at a New York auction in October 1974. Mme Berend attempted to sell the fragment at auction in July 2005, but Iran sought (and was granted) an injunction to prevent the sale.

The defendant, Berend, quite sensibly argued that, as the fragment is movable property, the English conflict of laws rules dictate that French law governs the question of title to the fragment, since the defendant obtained her title to it at a time when the fragment was in France (i.e. on delivery in November 1974). She would obtain it either by good faith or by prescription under Article 2262 of the French Code, on the basis that she had possessed it for more than 30 years.

The claimant, Iran, sought to argue that the English court should not simply apply French domestic law, but should apply also the French conflict of law rules, i.e. the English court should apply the doctrine of *renvoi*. The claimant argued that a french court would apply an exception to the *lex situs* rule, and apply Iranian law (as the law of the state of origin), which would in turn demand return of the fragment.

So what of renvoi in English law? Eady J. stated:

> *Whether or not it should apply in any given circumstances is largely a question of policy. To take examples, it has been applied most frequently in the context of the law of succession; on the other hand, it is not applied in the fields of contractual relations or tort. It seems that the modern approach towards renvoi is that there is no over-arching doctrine to be applied, but it will be seen as a useful tool to be applied where appropriate (i.e. to achieving the policy objectives of the particular choice of law rule): see e.g. Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] QB 825, at [26]-[29], per Mance*

LJ; Neilson v Overseas Projects Corporation of Victoria Ltd [2005] HCA 54, High Court of Australia (see Reid Mortensen's excellent article in the Journal of Private International Law on Neilson)

Eady J. analysed the crumbs left by various decisions on other forms of property on whether or not the court should accept a renvoi. Ultimately, it seems, weight was given to the following passage in Dicey, Morris & Collins:

> *As a purely practical matter it would seem that a court should not undertake the onerous task of trying to ascertain how a foreign court would decide the question, unless the advantages of doing so clearly outweigh the disadvantages. In most situations, the balance of convenience surely lies in interpreting the reference to foreign law to mean its domestic rules*

Eady J. found particular solace in the judgment of Millett J. in *Macmillan v Bishopsgate Investment Trust plc (No3)* [1995] 1 WLR 978:

> *...it seems from the context to be clear that Millett J was endorsing an established policy in English law of choosing the lex situs in the sense of domestic law. Otherwise it would hardly make sense for the judgment to reject the doctrine of renvoi. I can find no reason to differ from Millett J and to hold, for the first time, that public policy requires English law to introduce the notion of renvoi into the determination of title to movables.*

As a result, Eady J. held, "I determine the first question in favour of the Defendant. I hold that, as a matter of English law, **there is no good reason to introduce the doctrine of *renvoi*** and that title to the fragment should thus be determined in accordance with French domestic law."

A sigh of relief all round, then. French domestic law was unequivocal that Mme Berend was entitled to the fragment, and so she succeeded. Eady J. did, however, go on to ask whether a French court would have applied Iranian law for the "sake of completeness". Just to rub it in, Eady J. found he was not so persuaded. One wonders whether there will be any further appeal from Iran, although after Mr Justice Eady's judgment they must be *fairly* discouraged.

Update: We have been told that the possibility of an appeal by Iran is *extremely*

unlikely.

Many thanks to Derek Fincham (University of Aberdeen) for the story and his excellent write-up over on the Illicit Cultural Property blog.

Last Issue of Revue Critique de Droit International Privé

The last issue of one of the two French leading journals of international private law, the *Revue Critique de Droit International Privé (2006),* was released last week. In addition to several case commentaries, it contains three articles. Unfortunately and contrary to previous practices, the *Revue* does not provide any abstract for any of them, even in French.

The first article is from Dr. Hunter-Henin from UCL. Its title is "*Droit des personnes et droits de l'homme : Combinaison ou confrontation*" (Family Law and Human Rights: Can They Go Along or Do They Exclude Each Other?). I am grateful to her for providing me with the following abstract:

> *Developments in European Family Law via EC Regulations or fequent recourse to the right to respect for private and family life under article 8 of the European Convention on Human Rights have increased individual freedom. However, the concepts of personhood, family and personal status have as a result lost some of their meaning and permanence.*
>
> *This article first examines the process by which personhood and the traditional personal connecting factor in French Private International Law – nationality – have both lost most of their substance.*
>
> *It then purports to suggest ways in which the Human Rights' discourse and the benefits of EU Regulations may blend with rather than trump traditonal values of Private International law, thus ensuring better predictability of individual judicial outcomes and narrowing the current widening gap between European*

and non European countries.

The author of the second article is Michael Wilderspin from the European Commission. Its title in French is "*La compétence juridictionnelle en matière de litiges concernant la violation des droits de propriété intellectuelle. Les arrêts de la Cour de Justice dans les affaires C-4/30, GAT c. LUK et C-539/03, Roche Nederland c. Primus et Goldberg*" (Jurisdiction in Disputes Involving the Infringement of Intellectual Property Rights. The Decisions of ECJ in Cases *C-4/30, GAT c. LUK and C-539/03, Roche Nederland c. Primus et Goldberg*).

The authors of the third article are Dr. Jault-Seseke and Dr. Robine from Rouen University Law Faculty. Its title in French is "*L'interprétation du Règlement n°1346/2000 relatif aux procédures d'insolvabilité, la fin des incertitudes ?*" (The construction of Regulation n°1346/2000 on Insolvency Proceedings: the End of Uncertainties?). An English abstract should be made available by authors and posted soon.

Conference: Contract Damages – Domestic and International Perspectives

[Although not strictly on private international law, we believe this might be of interest – especially in view of the superstar lineup]

CONFERENCE: CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES

School of Law, University of Birmingham, 28-29 June 2007

The conference will bring together academics, practitioners, arbitrators and judges to discuss contract damages from a wide variety of perspectives. The first day of the conference is dedicated to the examination of damages in the context

of the common law, and the second day will focus on international contract and commercial law instruments.

Speakers include:

- Professor Daniel Friedmann (Tel-Aviv)
- Professor Andrew Burrows (Oxford)
- Professor Stephen Smith (McGill)
- Professor Peter Jaffey (Brunel)
- Professor Anthony Ogus (Manchester)
- Professor Stephen Waddams (Toronto)
- Professor David McLauchlan (VUW)
- Professor Charles Proctor (Bird & Bird)
- Dr Harvey McGregor QC (Hailsham Chambers)
- Mr Adam Kramer (3 Verulam Buildings)
- Mr Ralph Cunnington (Birmingham)
- Professor Ingeborg Schwenzer (Basel)
- Professor Michael Joachim Bonnell (Rome)
- Professor Ole Lando (Copenhagen)
- Professor Alastair Mullis (UEA)
- Professor Jan Ramberg (Stockholm)
- Professor Alexander Komarov (Moscow)
- Professor Franco Ferrari (Verona)
- Professor Michael Bridge (UCL)
- Professor Michael Furmston (Bristol)

The conference will be held in the Business School at the University of Birmingham. There will be a conference dinner taking place at the Birmingham Botanical Gardens. Conference fee (including conference pack, buffet lunch, and drinks reception):

- **Standard Rate (incl CPD): £200 two day package; £120 one day package**
- **Academic Rate: £130 two day package; £80 one day package**
- **Student Rate: £90 two day package; £55 one day package**

Conference dinner tickets will cost £40 each. The event has been accredited for

CPD (10.5 hours) by the Law Society and the Bar Council.

See the Conference Homepage for more information, online booking, and information on the sponsors.

Allocating Jurisdiction in Private Competition Law Claims Within the EU

Jonathan Fitchen (University of Wales Aberystwyth) has published an article in the new edition of the *Maastricht Journal of European and Comparative Law* on "**Allocating jurisdiction in Private Competition Law Claims Within the EU**" (*Maastricht J. 2006, 13(4), 381-401*). Here's the abstract:

Subscription information can be found here (there is a substantial discount for students). You can also obtain a single issue of the Journal for EUR 25.

Symposium: "International Litigation In Intellectual Property And Information Technology"

The symposium is organized by the *Unité de droit international privé* of the ULB (*Université Libre de Bruxelles*) in the framework of the project on **"Judicial Cooperation in Matters of Intellectual Property and Information**

Technology”, co-financed by the European Commission, and will take place in **Brussels on Friday, March 2nd 2007**.

It is a follow-up to an earlier roundtable, held in Heidelberg in late 2006 (a background paper prepared for the Heidelberg meeting can be found here; other interesting preliminary documents dealing with specific topics are available here). As stated on the symposium programme, a number of key issues related to cross-border IP litigation will be addressed, in the light of recent case-law of the European Court of Justice (GAT and Roche judgments, on which a number of recent posts can be found on our website) and legislative proposals (Rome II Regulation):

> *How should the applicable procedural framework be organized to guarantee at the same time an effective protection of intellectual property rights and legal certainty? Which court has jurisdiction to entertain actions relating to foreign rights and/or relating to infringements perpetrated trough the internet? Is it still possible to consolidate proceedings relating to parallel IP rights after the decisions of the European Court of Justice in the GAT and Roche cases? What are the means to collect evidence located abroad in cross-border IP cases? What is the role and scope of preliminary and protective measures in IP international litigation?*

For the full programme, the complete list of speakers and further information (including registration, free for students), see the project website and the downloadable leaflet.

New website of the Unité de D.I.P. – Université Libre de Bruxelles

On February 1st, 2007, the new website (in French) of the *Unité de droit international privé* (*Centre de droit privé, Faculté de Droit*) *de l’Université Libre de Bruxelles*, directed by Prof. Nadine Watté, has been launched online.

The site provides a complete coverage of the different sectors of conflict of laws and jurisdictions, with useful references to legal texts, literature and cases. A special attention is obviously dedicated to Belgian PIL and the development of EC action in this field (including short summaries of ECJ case-law on Brussels Convention and Brussels I Regulation). An older version of the site, whose content has not yet been transferred in the new one, can be found here.

An English Case on CPR r.6.20(5) and "In Respect of a Contract"

NIGEL PETER ALBON (T/A N A CARRIAGE CO) v (1) NAZA MOTOR TRADING SDN BHD (A company incorporated with limited liability in Malaysia) (2) TAN SRI DATO NASIMUDDIN AMIN [2007] EWHC 9 (Ch)

Summary: the words "in respect of a contract" in the CPR r.6.20(5) did not require that the claim arose under a contract; they required only that the claim related to or was connected with the contract.

The applicants (N and X) applied for an order setting aside an order permitting the respondent (Y) to serve proceedings on them in Malaysia. Y had brought an action against N, a Malaysian company, and X, its main shareholder, arising from three agreements. In respect of the first agreement (the UK agreement), Y sought the recovery of alleged overpayments that he claimed had been made under an oral agreement whereby he would sell cars exported from Malaysia by N and be paid a share of the profits. As to the second agreement (the South African agreement), Y asserted the existence of an oral agreement under which N had agreed to pay him commission on cars sourced by him from South Africa and supplied to N in Malaysia. As to the third agreement (the expenses agreement), Y alleged that he had paid personal expenses of X in London amounting to just less than £200,000. The master acceded to Y's application, made without notice, for an order permitting him to serve proceedings on N and X in Malaysia.

Lightman J. held that (1) The master had been justified in granting Y permission

to serve outside the jurisdiction in respect of the UK agreement. Y's claim in restitution was a claim "in respect of a contract" for the purposes of the CPR r.6.20(5). Those words did not require that the claim arose under a contract; they required only that the claim related to or was connected with the contract. Lightman J. stated (para. 26),

> *...in my judgment claims under Gateway 6.20(5) are not confined to claims arising under a contract. It extends to claims made "in respect of a contract" and the formula "in respect of" (tested by reference to English law) is wider than "under a contract": see e.g. Tatum v. Reeve [1893] 1 QB 44. The provision in the CPR is in this regard deliberately wider than the provision in its predecessor RSC Order XI. In this regard, unlike Mr Nathan (counsel for the Defendants) I do not think that any assistance is obtained from the decision in Kleinwort Benson v. Glasgow City Council [1991] 1 AC 153 at 162 and 167. In that case the House of Lords was concerned with section 16 and 17 of the Civil Jurisdiction and Judgments Act 1982 which (subject to certain modifications) incorporated the Brussels Convention into the law of the United Kingdom. One modification effected to Title 11 of the Convention was to the following effect:*
>
> *"5. A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; ..."*
>
> *In the context of the formula of words there used, and in particular the reference to the place of performance of the obligation in question, there is postulated the existence of a contract giving rise to an obligation of performance in the country whose courts are to have jurisdiction.*
>
> *Accordingly the formula of words in CPR 6.20(5) "in respect of a contract" does not require that the claim arises under a contract: it requires only that the claim relates to or is connected with the contract. That is the clear and unambiguous meaning of the words used. No reference is necessary for this purpose to authority and none were cited beyond Tatum v. Reeve supra. If such reference were needed, I would find support in a passage which I found after I had reserved judgment in the judgment of Mann CJ in Trustees Executors and Agency Co Ltd v Reilly [1941] VLR 110 at 111:*

Further, there could be no doubt that English law was the law with which the UK

agreement was most closely connected. England was Y's habitual residence when he entered into the agreement, and the characteristic performance of the agreement was the provision of his agency services in England in return for which he was to be remunerated. Moreover, there was a serious issue to be tried, and the appropriate forum for the resolution of the disputes relating to the agreement was plainly England. Although there had been a number of defaults in disclosure by Y on the application for permission, that did not justify the setting aside of the master's order. To take that course would be disproportionate and contrary to the overriding objective of dealing with the case justly. Y should, however, face a sanction in costs for the breaches of his disclosure obligations. (2) On the available evidence, it was clear that South African law was the proper law of the South African agreement.

Further, South Africa was the suitable forum for the resolution of the disputes between the parties. It would therefore be appropriate to set aside the master's order insofar as it related to that agreement. (3) As to the expenses agreement, although the requirements of each of the gateways in the CPR r.6.20 on which Y had relied were satisfied, he had been guilty of non-disclosures that went to the heart of the application, and the master had been sorely misled as to the merits in respect of two critical facts. It would therefore be appropriate to set aside the grant of permission to pursue any claims under the expenses agreement.

See the HMCS website for the full judgment.

Source: Lawtel.

Choice of Law in American Courts in 2006: Twentieth Annual Survey

Dean Symeon Symeonides has just released his latest annual salvo into surveying the vast array of choice of law cases in American federal and state courts. Of the 2,598 conflicts cases referencing such matters this past year, the Survey focuses on those cases that may add something new to the development or understanding

of choice of law issues. The Survey is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its central purpose is to inform rather than to advocate.

This year's Survey covers the following topics and sub-topics:

I. Methodology (1. Torts; 2. Contracts; 3. The Methodological Count);

II. Torts in General (1. Car-Lessor's Liability; 2. "No play, No pay" Rules; 3. Other Traffic Accident Cases; 4. "Border-Line" Cases (Literally); 5. Cross-Border Pollution 6. Cross-Border Medical Malpractice; 7. Consumer Fraud; 8. Premises Liability; 9. Sexual Assault);

III. Products Liability (1. Inverse Conflicts; 2. Direct or True Conflicts);

IV. Contracts (1. Contracts with Choice-of-Law Clauses; a. Employment Contracts; b. What Law Governs Choice-of-Forum Clauses; c. Choice-of-Law and Arbitration Clauses; 2. Contracts without Choice-of-Law Clauses; a. Attorney Fees; b. CISG);

V. Insurance Conflicts (1. Automobile Insurance; 2. Other Insurance Conflicts);

VI. Statutes of Limitation;

VII. Privileges and Immunities;

IX. Defense of Marriage Act; and

X. International Cases (1. Hypothetical Jurisdiction and Forum Non Conveniens ;2. Alien Torts Claims Act; 3. Extraordinary Rendition and TVPA; 4. Suits Against Foreign Governments; 5. Yahoo! and Foreign Judgments; 6. Extraterritorial Reach of Federal Statutes; a. Sarbanes-Oxley; b. Civil Rights Act of 1871; c. Criminal Statutes; d. Patents and Trademarks).

The AALS Section on Conflict of Laws has characterized these surveys as "enormously informative and influential" and "extraordinarily helpful to the members of the Section, other academics, the Bench and the practicing bar." Dean Symeonides' latest survey is available on the SSRN, and will be published in an upcoming volume of the American Journal of Comparative Law. The 2006 edition will also be forthcoming on the American Society of Comparative

Law website.

Article 15 of the Civil Code is No Longer a Bar to the Recognition of Foreign Judgments in France

On May 23rd, 2006, The French supreme court for civil, commercial and criminal matters (*Cour de cassation*) held in the *Prieur* decision that article 15 of the Civil Code is no bar any more to the recognition or enforcement of foreign judgments in France and overruled an 80 year old interpretation of this provision.

Article 15 of the Civil Code provides that French citizens may be sued before French courts. This provision obviously gives jurisdiction to French Courts over French defendants. But the provision was also construed by the *Cour de cassation* as a defence against the recognition of foreign judgments delivered against French defendants. From the French perspective, the jurisdiction of French Courts over French defendants was thus exclusive. This priviledge could be waived by the French defendant, for instance by agreeing to a jurisdiction clause, or by defending on the merits before the foreign court without challenging its jurisdiction. But when it had not been waived, it was a fortress that could not be defeated. It applied in all almost fields (contract, torts, family law, etc…), except in immovable or enforcement matters. But its scope was shrinking as European conventions and many bilateral treaties excluded its application.

In *Prieur*, the *Cour de cassation* held that article 15 could not be used any more to determine whether the foreign court lacked jurisdiction from the French perspective and thus made its judgment unenforceable in France. In that case, a French citizen born and living in Switzerland had married in Switzerland a woman who was also born and lived there. In 1996, a Swiss court annulled the marriage, and the wife then sought a declaration of enforceability of the judgment in France. The husband challenged the jurisdiction of the Swiss court in the

French enforcement proceedings on the sole ground of his citizenship. The court held that it was irrelevant, and that the foreign court having a significant link with the dispute, it had jurisdiction from the French perspective. The Swiss judgment was found enforceable in France.

It is no mystery in French circles that this change is due to a modification of the composition of the court. Several influential French writers have already written that they fully support the change (Bernard Audit in *Recueil Dalloz* 2006, p. 1846, Helene Gaudemet-Tallon in *Revue Critique de Droit International Privé* 2006, p. 871. Professor Courbe, however, wrote a critical commentary in *Les Petites Affiches*, 22 Sept. 2006, p. 10). It is good news for plaintiffs suing French nationals in jurisdictions which have not concluded treaties with France such as, for instance, the United States. The debate in France is now whether the remaining conditions for the recognition of foreign judgments are sufficient to prevent the recognition of judgments that should not be recognised. The answer is probably yes, but one can wonder which condition could be an efficient bar to judgments made by foreign corrupt judiciaries. None of those remaining in France, it is submitted.

Substantive Law, Technology and Intellectual Property in the Conflict of Laws

Kimberlee G. Weatherall (*University of Queensland – T.C. Beirne School of Law*) has posted "**Can Substantive Law Harmonisation and Technology Provide Genuine Alternatives to Conflicts Rules in Intellectual Property?**" on SSRN (also to be found in *Media & Arts Law Review, Vol. 11, No. 4, p. 393, 2006*). The abstract reads:

> *This article investigates whether there could be practical alternatives to relying on private international law to solve legal boundary issues in cross-border*

communications contexts, especially those involving IP rights. It points out that certain developments would seem to be tending in this direction — first, with significant moves to remove the legal boundaries (or make them undetectable) through harmonisation of IP law; second, with advancements in technology that seek to 'reimpose' geographic borders. Developments in both fields proceed apace, and it is worthwhile to explore what difference, if any, they will make. The conclusion is that, although both contribute at some level, perhaps unsurprisingly, neither provides a complete response.

You can download the article, for free as usual, from here.