U.S. Decisions: December 2006 Round-Up: Part I

December 2006 has seen a wealth of activity in the U.S. federal courts on topics of particular interest to private international practitioners. This month's U.S. round-up will divide the pertinent and most interesting cases into four primary subject-matter areas: (1) Choice of law; (2) Personal Jurisdiction; (3) International Discovery; and (4) Foreign Sovereign Immunity. Part I here will focus only on the first two issues, with Part II to follow within the next few days.

(1) Choice of Law

K.T. v. Dash, 2006 WL 3627688, (N.Y. Sup. Ct. App. Div. Dec. 14, 2006)

In this tort case, Plaintiff and Defendant, both New York residents, were on holiday in Brazil. Plaintiff alleged that she was raped by Defendant, and Defendant moved for dismissal on forum non conveniens ("FNC"), or in the alternative, the determination that Brazilian law applies to the suit. The appellate court first affirmed the trial court's denial of FNC dismissal, concluding that both parties reside in NY, many witnesses are also NY residents, and there is little burden on NY courts. Therefore, even though the events occurred in Brazil, NY is still a proper forum.

Turning to choice of law, the court first decided whether there is an actual conflict between Brazilian and NY law. To show actual conflict, defense counsel submitted an affidavit from a Brazilian lawyer claiming the elements of proving sexual assault in Brazil are much greater than those in New York. Because the affidavits were unclear and general, the court determined that defendants have not proven that an actual conflict exists.

The court nonetheless held that New York law is applicable even were a conflict to exist. Based on an interests analysis, the court held that New York is the forum with the greatest interests in both parties. Because both Defendant and Plaintiff only spent a few days while on vacation in Brazil, Brazil has little to no interest in applying its law for the suit.

The court concluded with this well reasoned discussion of the choice of law

question in tort cases:

> *[I]t is useful in our analysis to consider whether the application of the law of Brazil would thwart or threaten an important policy underlying New York's law, or, on the other hand, whether the application of New York law would frustrate any policies underlying Brazil's applicable rule of law. Defendant emphasizes that Brazil has a sovereign interest in regulating conduct within its borders, [but] the present litigation provides no proposed protection of anyone in Brazil, and, indeed, the outcome of the litigation will have no impact at all on Brazil or any of its citizens or residents. Brazil's interest in ensuring that citizens and non-citizens damaged by tortious conduct within its borders have the right to seek compensation from the tortfeasor, is in no way damaged by application of New York law in the present case. In addition, while enforcement of its rules regarding misconduct within its borders could generally be said to serve as a deterrent against future tortious conduct, the possibility of such a deterrent effect being felt in Brazil is minimal where the interaction was entirely between New Yorkers, and the matter is being addressed in a New York court. In contrast, . . . [the] application of Brazil's rule[s] could thwart New York's strong interest in providing recompense for its residents who have been injured by a sexual assault, especially if it was perpetrated by another New Yorker. So, even if the purpose of the Brazilian rule of law were said to be primarily conduct-regulating, in this context the general rule that "the law of the jurisdiction where the tort occurred will generally apply" (see Cooney, 81 N.Y.2d at 72) should not be applied. . . .We therefore conclude that New York law must govern this action, notwithstanding the occurrence of the alleged tort in Brazil and the conduct-regulating aspects of the competing rules.*

As the International Civil Litigation Blog astutely points out, this is a potentially important case giving international effect to cornerstone NY choice of law cases like *Babcock* and *Schultz*, and applying an interest analysis rather than a strict *lex loci delicti*.

The tort aspect of choice of law rules in *K.T.* must be read alongside a recent decision by the same court in a contract case. In *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 822 N.Y.S.2d 30 (N.Y. Sup. Ct. App. Div. 2006), the question presented was whether New York or New Jersey law governed a large number of excess liability insurance policies for asbestos-related claims.

Supplanting a mere "grouping of contracts" approach for a "governmental interest analysis," the court held that "where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured domicile should be regarded as the proxy for the principal location of the insured risk. As such, the state of the domicile [at the time the policy was issued] is the source of applicable law."

(2) Personal Jurisdiction

Amirhour v. Marriott Intern. Inc., 2006 WL 3499241 (N.D. Cal. Dec. 4 2006)

This is a tort claim arising from a California resident's stay at a French Marriott. The chair attached to the wall of the shower collapsed, causing the plaintiff to fracture her pelvis. As is fairly typical in international litigation, plaintiffs brought suit at home in California rather than in France. The French defendant moved to dismiss for lack of personal jurisdiction, and all defendants sought dismissal on forum non conveniens.

The court first rejected plaintiffs' claim for general jurisdiction over the MVCI Holidays France by holding that Marriott Ownership Resorts, the U.S. based defendant, did not act as general agents for the foreign defendant. Turning to specific jurisdiction, the court held that MVCI Holidays France had not "directed activity at California which would have invoked the benefits and protections of the laws of California." Newsletters and payment reminders sent to plaintiff in California where insufficient. Those newsletters and notices were only sent after Plaintiff voluntarily contracted with Marriott Ownership Resorts and expressly agreed that they could send her such notices. Accordingly, the court dismissed MVCI Holidays France for a lack of personal jurisdiction.

Marriott International, Inc., a U.S. based corporation, sought dismissal of the entire suit through forum non conveniens. The defendant contended "that this action bears no relationship to California, arose out of activity occurring in France, and will involve the application of French civil law." Analyzing the Gulf Oil Corp. v. Gilbert factors, the court concluded that both the private and public interest factors weigh in favor of keeping the suit in California. Plaintiffs limited resources and inability to successfully maintain a case in France was the decisive private factor. Further, the court held that California has an interest in the protection of its citizens. Accordingly, the court denied the motion to dismiss for

FNC.

Again, the authors at the International Civil Litigation Blog point out an interesting twist. The court acknowledged that it deviated from the general Ninth Circuit rule requiring a trial court to make a choice of law determination prior to deciding FNC. Pereira v. Utah Transp., Inc., 764 F.2d 686, 688-89 (9th Cir. 1985). Although defendants alleged throughout their papers that French substantive law would apply, they did not submit any evidence in support of this contention, foreclosing the Court from making a choice of law determination. Nevertheless, even if French law applies were to apply this case, the court noted that it would still deny defendants motion to dismiss on forum non conveniens grounds.

R.J. Reynolds Tobacco Co. v. Tuazon, Nilo D., No. 05-1525 (U.S.)

In another interesting development — or non-development — coming from the Ninth Circuit, the Supreme Court this month denied certiorari over Reynolds' attempt to clarify and limit the application of general jurisdiction for torts ocurring abroad. Plaintiff Tuazon, a long-time resident and citizen of the Phillipines, asserted claims against the tobacco company in the State of Washington for injuries he sustained from smoking in his home country. Reynolds, a North Carolina corporation, moved to dismiss the suit on jurisdictional grounds. The Ninth Circuit held that, because Reynolds sold a substantial amount of cigarettes in Washington, alongside other activities aimed at marketing those sales, the court could exercise general (or "doing business") jurisdiction over the company there, even though its place of incorporation and principal place of business was in North Carolina and the cause of action arose abroad. *See* 433 F.3d 1163 (9th Cir. 2006). Lawyers for the company argued to the Court that, under the holding of the Ninth Circuit (as well as those of the Second, Sixth, Eighth and Federal circuits), which simply weighed the "confluence" of commercial contacts with the state to find minimum contacts, large companies like Reynolds who sell products in every jurisdiction can be de facto subject to suit on any cause of action in any state. They also pointed out that the federal courts of appeals have become widely split on the manner of assessing contacts for general jurisdiction — with the First, Fourth, Fifth and Eleventh Circuits taking a qualitative rather than quantitative approach to the minimum contacts analysis for general jurisdiction — and asked the Court to accept the case and clarify the matter. The Supreme Court has upheld the assertion of general jurisdiction only once in the modern era (*see Perkins v.*

Benguet Mining Co., 342 U.S. 437 (1952)), and spoken to the issue last in 1984 (*See Helicopteros v. Hall, 466 U.S. 408 (1984)*). Though initially signalling interest in the case (by ordering a Brief in Opposition from the Respondent in September), the Court eventually denied certiorari on December 4. American law of general jurisdiction will have to wait even longer for a long-awaited clarification from the Court.

Several news sources picked-up on this cert denial, including CNN, and the SCOTUSBlog. The order of the Court can be found here.

(Disclaimer: Charles Kotuby is an attorney with Jones Day, who represented Petitioner in this matter)

Final Reminder: Call for Papers – Conference 2007

This is a **final reminder** that the **deadline for submission of an abstract of a proposed paper**, to present at the **Journal of Private International Law Conference 2007**, is **20th December 2006, at 6pm**.

Update: the deadline has now passed. Many thanks for all the submissions.

Vacancies for speaking at the conference *cannot* be guaranteed after the deadline, so we would urge all those who wish to present a paper to submit their abstract by 6pm on 20th December 2006. The abstract should be between 200-300 words.

You can find details on submitting the abstract of your proposed paper **here**.

German Article on Consumer Contracts in Rome I

An article by *Giesela Rühl* (Hamburg) on the provision concerning **consumer contracts** in the Rome I proposal has been published in the European Community Private Law Review (GPR) 2006, 196 et seq. The English summary reads as follows:

> *In December 2005 the European Commission has released the Proposal for a Regulation on the law applicable to contractual obligations. One of the most important changes relates to the scope of application of Article 5, which is characterized by the introduction of the targeted activity criterion embodied in Article 15 (1) lit. c) of the Brussels I Regulation and a safeguard clause for the protection of professionals. At first blush this combination – that is new to European private international law – seems to make sense. However, a closer examination reveals that the safeguard clause does not have an independent scope of application if it is combined with the targeted activity criterion. Since it merely complicates the provision of Article 5 (2) it should be deleted.*

German Publication: Private International Law

The 6th edition of the German standard work on private international law, "Internationales Privatrecht" by *Jan Kropholler* (Hamburg), has been published.



The main part of the book is dedicated to choice of law. Here *Kropholler* describes in a first chapter the basic ideas of the conflict of laws, such as its history, the structure of choice of law rules, basic concepts as qualification, connecting factor and public policy before attending in the second chapter to the individual fields of private international law such as legal transactions, family law, the law of contract, non-contractual obligations, the law of property and company law. In the last chapter, *Kropholler* addresses the fundamentals of international civil procedure law. While *Kropholler* focuses on German national rules he includes also international conventions as well as European legal instruments.

German Annotation to the ECJ's Opinion 1/03 – Competence of the EC to conclude the new Lugano Convention

An annotation to Opinion 1/03, where the European Court of Justice has held that "the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (…) falls entirely within the sphere of exclusive competence of the European Community", by *Ulrich G. Schroeter* (Freiburg) has been published in the European Community Private Law Review (GPR) 2006, 203 et seq. The English summary reads as follows:

> *In its recent Opinion 1/03, the European Court of Justice ruled on the question of the competence of the European Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and found that the EC possesses an implicit exclusive competence to conclude the new Convention. The present case note criticizes the reasoning of the ECJ and inter alia argues that the Court (1) has failed to demonstrate that the existing Brussels I-Regulation would be affected*

by the new Lugano Convention, (2) should have scrutinized the EC's internal competence to regulate relations with non-member countries, and (3) has in fact misunderstood the legal relevance of "disconnection clauses".

See regarding this question our older post, which can be found here.

Reviewing U.S. Domestic and Global Choice of Forum Doctrine through Piper Aircraft v Reyno

Richard D. Freer (*Emory University*) has posted "**Reviewing Domestic and Global Choice of Forum Doctrine through a Single Case**" on SSRN. Here's the abstract:

Piper Aircraft Co. v. Reyno is the Supreme Court's leading case on forum non conveniens – that is, on when a federal court should dismiss a pending case in favor of litigation in a foreign forum. Every casebook features the case and every civil procedure professor has taught it. The greatest value of Piper, however, is not its discussion of forum non conveniens, but its fact pattern, which provides an unparalleled vehicle for reviewing a startling number of doctrines pertaining to domestic forum selection, including personal jurisdiction under the stream-of-commerce theory, subject matter jurisdiction based upon diversity of citizenship and alienage, venue, transfer of venue, choice-of-law, as well as statutory interpretation. In addition, its treatment of forum non conveniens raises profound questions about the role of American courts in global perspective. Piper thus accomplishes more than any other single case in the civil procedure course, while emphasizing the importance of forum selection; where litigation proceeds is an issue of surpassing importance, on which litigants will expend great resources.

You can download the full article **here**.

No Surprise But Now Substantiated: Foreign Litigants Lose More in US Courts

As recently covered by the Financial Times, and forthcoming in the Journal of Law and Economics, a new study details an unsurprising yet still unsettling fact when it is substantiated: foreign litigants lose more in U.S. Courts. Here is the abstract:

> *Using a comprehensive sample of 2,361 public U.S. corporate defendants and 715 public foreign corporate defendants in U.S. federal courts in the period 1995-2000, we find that the market reaction at the announcement of a U.S. federal lawsuit is less negative for U.S. corporate defendants. We find that this market reaction is rational; U.S. firms are less likely to lose than foreign firms controlling for year, industry, type of litigation, size and profitability. This may still reflect a sample selection bias. We control for this bias, and the results remain. We thus cannot rule out that U.S. firms have a home court advantage in U.S. federal courts.*

Opinio Juris notes that perhaps the most interesting claim is that judges may be more biased than juries are. As this sort of evidence mounts, I assume it will incrementally bolster the legitimacy of supranational and arbitral fora for dispute resolution.

The full study can be found here.

In Memoriam: Professor Kurt Lipstein

Professor **Kurt Lipstein**, one of the greatest comparative lawyers of the twentieth century, passed away at 11:15pm on Saturday 2nd December 2006. His wife Gwyneth predeceased him in 1998 and he is survived by two daughters, Eve and Diana. Happily he was active to the very end of his life, and attended his last public function in the Law Faculty (20th November) on the occasion of the 70th anniversary of obtaining his PhD. In September 2006, Cambridge University compiled an account of his extraordinary career:

> *Kurt Lipstein was born in Frankfurt am Main, Germany on 19th March 1909. His father was from Königsberg in East Prussia (now Russia) and his mother from Frankfurt. He had an English great-grandfather, and his grandmother had grown up in England. This explained the relative ease with which Kurt eventually settled into England. After his schooling at the Goethe Gymnasium in Frankfurt, Kurt studied law at the University of Grenoble (1927) and Friedrich Wilhelm University in Berlin (1927-31). Here, he rubbed shoulders (metaphorically if not actually) with professors such as Wolff and Rabels, and younger colleagues including von Caemmerer, and Mezger. His classical education in Greek and Latin allowed him later to have clear insights into the inner workings of Roman Law – these days something of a lost art.*
>
> *Once graduated, his practical legal training began in 1931 as Referendar in Königstein and then at the district of Court of Appeal of Frankfurt, but with the election of the National Socialists to power, his career effectively collapsed. In April 1933 employment in the civil service was barred to Jewish professionals, and in 1934 Kurt emigrated to England to escape persecution. He obtained a place at Trinity College to study for his PhD, which was on the subject of suretyship within Roman Law: the beneficium cedendarum actionum. This was successfully defended in 1936 before Martin Wolff's brother-in-law, H. F. Jolowicz, who was then Professor of Roman Law at the University of London.*
>
> *At that point, financial matters reared their head. He was unsuccessful in applying for a scholarship at Trinity, was unwilling to become a burden on the English branch of his extended family. His savior, and his mentor was Harold*

Gutteridge, the Professor of Comparative Law, who, in 1937, began to pay Kurt from his own pocket to give "supervisions" in Roman Law, Public International Law and Constitutional Law.

Soon after the Second World War broke out (1940) Kurt was interned as an enemy alien and sent to camps at Bury St Edmunds and then Liverpool. Here he met an eclectic mix of academics and professionals, many of whom later went on to either high office or academic status (or both). He mentions some of these in the interviews that are archived elsewhere on this site (as a transcript published by the IJLI, and the original audio version). Luckily the university secured his release later in the year, and he returned to Cambridge where he was given membership of Clare College, with which he has been associated ever since. He became a fellow in 1956. In 2002, fellow legal academics at the college (Moore & Turpin, 2002) conducted an interview with Kurt to reminisce on his associations therewith.

The Faculty Board employed Kurt as Faculty Secretary for a small stipend, and in 1944 he married Gwyneth Herford. After the war, in 1946, he was appointed to one of a batch of new lectureships (which included David Daube, Trevor Thomas and R. Y. Jennings), and he remained in this post until 1962, when he was appointed Reader in Conflict of Laws. In 1973 Kurt became Professor of Comparative Law, following in the footsteps of his erstwhile friend and patron Harold Gutteridge, of whom he reminisces affectionately in our interviews. In 1977 the University awarded him his LLD.

Kurt Lipstein formally retired in 1977, but to this day (Michaelmas Term 2006, in his 98th year) he has continued to give supervisions with great enthusiasm and charisma to students at Clare College, and has remained academically active and scholastically productive. He also lectures at the annual Summer School in English Legal Methods offered by the Faculty of Law. His success with the students is grounded in his legal knowledge, but there is no doubt that his charm and sense of humour have much to do with his popularity.

Kurt Lipstein has an unparalleled association with the Squire Law Library, having occupied offices and worked as a scholar in each of its manifestations: Downing Street (1934-37), The Old Schools (1937-1995), and now the glass and concrete titanic West Road site (1995-). This is a unique achievement, and exploring his memories of its personalities and how the library developed over

those 72 years, forms the core of the interviews we conducted with Kurt in 2004. Remember, the Squire Law Library is only four years older than Kurt and it is fascinating to hear how relatively small and parochial the collections appear to have been in those early years.

Kurt has a long publications record, but many of his writings are in Festschriften and similar works that are not readily available in our digitised age: 14 from his total of 118 publications, and readers might find some of his publications difficult to lay their hands on. In the bibliography, we have listed all those for which we can account.

Although his earliest works dealt with Roman Law, Kurt's reputation and later career rest largely on his studies on the conflict of laws within international law (both public and private), and his views (with Gutteridge) have strongly influenced the coverage of the subject in Dicey & Morris's Conflict of Laws (Forsyth 2004). An important development in broadening his horizons on the reception of western law into jurisdictions with different cultures, was his appointment as Directeur des Recherches of the International Association of Legal Science for the period 1954-59. The results of this are apparent in the five publications Kurt produced on the legal regimes in Turkey and India.

During our interviews, it was clear that Kurt was particularly sensible (the word proud would be an unworthy epithet for such a self-effacing man) of the honour accorded him on his invitation to give The Hague lectures in 1972 (and which he published separately in 1976). When he was asked for the highlights of his career at the end of the interviews, he replied; the achievement of an academic career, the title of Queen's Counsel, and his membership of the Institute of International Law.

His academic career has been long and fruitful, and its legacy is bound to be felt for the foreseeable future. As for the others, Kurt was called to the Bar (Middle Temple) in 1950, and in 1993 he was elected to the Institut de Droit International. The Institut then gave him the task of preparing a Resolution on a theme of "Taking foreign private international [law] into consideration". This was a taxing remit: under the heading "Renvoi" it had twice previously come before the Institut for resolution (1896-1900 & 1957-1965), with inconclusive results. Kurt Lipstein tackled it with his usual foresight, and when he reported (in 1998), as he modesty put it, his new "Resolution was accepted with few

modifications" (Lipstein 2004 p. 769). The question of his success, where others had failed, was raised during our interviews (question 73), and his reply is a model of understatement.

His final highlight was achieved when he was made an Honorary Queen's Counsel in 1998. Kurt was an Honorary Fellow of Wolfson College, and still lives in the secluded house in Newnham he built in 1947-8 and shared with Clive Parry, and their respective families.

Finally, it is clear from the last paragraph of his own reminiscences of his time at Cambridge, that Kurt Lipstein feels he owes a debt of gratitude to the institution that gave him the chance to make a new life when the land of his birth was no longer welcoming (Lipstein 2004). This has manifest itself in a lifetime devoted to upholding its values and faithfully following a path of true scholarship.

A bibiography of all of Professor Lipstein's published works can be found here, and you can also look through an archive of photos charting Professor Lipstein's life. A series of interviews with the man himself can be downloaded from here, and you can leave your thoughts and condolences on the comments board on the Cambridge website. Our thoughts are with his family, as I'm sure are all those who have felt the influence of Professor Lipstein's unparalleled scholarship in the field over the last seventy years.

Determinants for Dataflow

Georg Philip Krog (Norwegian Research Center for Computers and Law) has posted a short article on SSRN entitled, "Determinants for Dataflow: Norm and Action – Causation in Law, and Causation from Law to Action". Here's the abstract:

The paper explores succinctly two questions in abbreviated form: First, how may law, elucidated by the rules of international adjudicatory authority, be a

determinant for cross-border circulation of intangible data and communicational behaviour in global computer networks? Second, why are rules on international adjudicatory authority the starting point for such a determination?

The full article is available here.

New Text on Private International Law in Australia

Reid Mortensen (*TC Beirne School of Law, University of Queensland*) has published a new text on **Private International Law in Australia**. Here's the publisher's summary:

Private International Law in Australia is a substantial new text, providing comprehensive coverage by an internationally respected expert author in this area of law. The standard range of topics is covered in suitable detail for LLB students. The book includes important recent developments in private international law. Examination of the decision in Renault v Zhang (2002) and other recent developments will make this the most current, accurate text covering the private international law of tort, a major part of the field for practitioners and students. Summary of contents:

- *Introduction to Private International Law*
- *Jurisdiction and Judgments*
- *Choice of Law*
- *International Family Law*
- *Choice of Obligations Law*
- *Choice of Property Law*

ISBN: 9780409322446. Price: $95.00 (Australian dollars). Available from

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