Monday, 24 January 2005

**Program on Parallel Proceedings**
*Sponsored by The Law Society of England & Wales*

Experts: Elizabeth Barrett (Slaughter & May, London); Michael Brindle QC (Fountain Court, London); The Honorable Mr Justice Collins (High Court, London); Alexander Layton QC (20 Essex Street Chambers, London); Lawrence Newman (Baker & McKenzie, New York); Pierre Raoul-Duval (Gide Loyrette Nouel, Paris).

Moderator: David Greene (Edwin Coe, London)

Rapporteur: Katherine Birmingham Wilmore (Debevoise & Plimpton, London)

Larry Newman started off the program with a *tour de l'horizon* on parallel proceedings in the United States. He noted that there are two schools of thought among the federal circuits. Some, the Fifth, Ninth, and the Seventh has expressed a leaning in this direction, take the so-called liberal approach, enjoining defendants that initiate suits in foreign jurisdictions after federal proceedings are already pending against them, if the other suits are vexatious. Others, the First, Second, Sixth, and DC Circuits, take a conservative approach, finding mere vexatiousness to be insufficient to justify an anti-suit injunction and would enjoin only where the second proceeding threatened the jurisdiction of the first. In1984, in the *Laker Airways* case, the DC Circuit Court of Appeals sided with the conservative jurisdictions, issuing the seminal opinion on the issue, stating that, "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." 731 F.2d 909, 926-927 (D.C. Cir. 1984). In sum, Newman summarised the default in the United States as that parallel proceedings are viewed as acceptable, and injunctions to stop them are the exception, not the rule. When you have overlapping jurisdiction, a race to judgment is more frequent than a race to the courthouse.

Newman then explained that parallel proceedings are frequently handled in US courts by means of the doctrine of *forum non conveniens*, where the threshold issue is frequently whether the proposed alternative forum is acceptable. Here, the essential question is would its judgment be accepted in the United States and be enforceable under the Uniform Enforcement of Foreign Money Judgments Act. He gave as examples cases where lower courts have been persuaded that a foreign jurisdiction is too corrupt, for instance, to serve as an acceptable alternative forum. In such rare circumstances, that forum will not be viewed as acceptable. Generally, however, U.S. courts will not hold foreign fora unacceptable simply because they offer different forms of relief, allow different or very limited discovery, or do not allow for the same claims as are available in U.S. law. Typically, the decision on forum non conveniens is made on the basis of the balancing of specific factors to determine which jurisdiction has the most ties to the parties and the case.

Pierre Raoul-Duval next spoke to the treatment of parallel proceedings in French courts, addressing four topics. *First*, as between tribunals and courts there is a strong view in French law of *compétence- compétence*, such that arbitral panels are free to determine their own

jurisdiction. Here, Raoul-Duval noted the positive and negative effects of this rule in the Civil Code. In the positive sense, under Civil Code Article 1466, similar to Article 5(3) of the New York Convention and the rules of many international arbitration institutions, if a party challenges the scope of an arbitrator's authority, the arbitral tribunal shall determine its own jurisdiction. In the negative sense, if a French court is then also seized of a matter already pending before an arbitral tribunal with jurisdiction, the court is obliged under French law to declare itself incompetent. However, an exception arises under Civil Code Article 1458, if the arbitration clause is found to be manifestly null and void.

*Second*, although French law recognizes that many treaties and other laws provide for concurrent jurisdiction, and thus proceedings may arise in more than one country, Article 15 of the French Civil Code establishes a jurisdiction privilege for French nationals entitling them to have their rights adjudicated in the French courts. This privilege is often excluded by treaty, for instance the Brussels Convention on recognition of judgments among EU member states. It can also be waived expressly by virtue of a jurisdiction clause in a contract or impliedly where a defendant fails to raise it in foreign proceedings.

*Third*, Raoul-Duval suggested that parallel arbitral proceedings may be more likely to occur where French law applies than elsewhere. In part, this is because French law is very favourable on *ratione personae* and *materiae*. The group of companies theory makes it easier to establish arbitral jurisdiction under French law than in other jurisdictions. Moreover, there is no specific provision regarding consolidation of parallel proceedings, unlike Article 1048 of the Dutch Arbitration Law, for instance. Parties can simply try to apply the same solutions familiar to all practitioners and attempt to have the same arbitral panel decide the two disputes, or argue *res judicata* if one proceeding finishes before the other.

*Fourth*, Raoul-Duval pointed out that anti-suit injunctions are viewed with great suspicion in France. They are considered to be at odds with comity, treaty, and with national trust within the European Union – to the extent the parallel proceeding is pending in another EU jurisdiction. Anti-suit injunctions are also viewed as in opposition with the principle of *compétence-compétence*. In fact, there is only one case in French law where such an injunction has been ordered. This was a bankruptcy case, and the injunction was ordered in the interest of the ordre public, and is considered to have been a special case.

Alexander Layton QC next addressed the conventions addressing parallel proceedings in Europe. In 1968, the Brussels Convention came into force, establishing the recognition of judgments among European Community members. As new states joined the European Union, they signed onto the Brussels Convention. By the Lugano Convention of 1988, the Brussels Convention was extended to most members of the European Free Trade Association – *e.g.* Norway, Iceland and Switzerland. Then in 2000, Council Regulation 44/2001 codified the Brussels Convention. The three regimes were designed to be and are equal.

Prior to the Brussels Convention, the court addressed would check to see whether the original court had proper jurisdiction. In the Brussels Convention the states party agreed to something unique: automatic recognition of judgments, with all rulings subject to oversight by the European Court of Justice. The Convention's rules are clear as to their application and leave

no room for discretion or interpretation – something that Mr Layton remarked was pleasing to civil lawyers, but less so to common law lawyers.

Mr Layton summarized the main principles of the Convention thus. *First*, a party is to be sued in its state of domicile. *Second*, the prior proceedings rule holds, such that whoever starts first gets to proceed and other courts have to stay. *Third*, if a defendant is domiciled outside the EU, domestic rules trump the Brussels Convention. However, if a defendant is domiciled within the EU, but the US, for instance would be a better jurisdiction, various factors apply to determine the forum such as whether there have been prior proceedings, whether there is an exclusive choice of forum clause, what are the connections to the other forum, etc.

Mr Justice Collins then began a discussion of various comity doctrines, by quoting New York's highest court in a decision from 1923, at which time Justice Cardozo sat on its bench. The court in discussing comity stated: "We do justice that justice may be done in return." *Russian Socialist Federated Soviet Republic v. Cibrario et al.*, 235 NY 255, 258 (1923). He noted that while English courts have long emphasized comity in judicial assistance, recently there has been a revival of comity as a way to resolve the problem of parallel proceedings in US courts. Mr Justice Collins cited to Justice Breyer's concurrence in *Alvarez-Machain* and the *Intel* case as examples of this trend. He cited to the *Aerospatiale* and *Laker Airways* cases addressing respectively the application of the Hague Evidence Convention where it did not strictly obtain and anti-suit injunctions, as older examples of the US Supreme Court looking to comity to decide issues involving foreign jurisdictions.

Mr Justice Collins stated that *Turner & Grovit* and other recent decisions have emphasized the rigidity of the European system. The effect of this ECJ decision was that it is for that Court to deal with issues of vexation and abuse in parallel proceedings. It must be assumed that the ECJ would come to the same decision if England enjoined proceedings in foreign jurisdictions, though likely not if there were an exclusive jurisdiction clause.

Mr Michael Brindle QC then spoke on the subject of *forum non conveniens, a* doctrine that was only recently accepted into English law, from Scotland. English courts became increasingly receptive to it in the 1980s, with the House of Lords finally adopting the doctrine authoritatively in *The Spiliada* case in 1987. To obtain a stay on the ground of *forum non conveniens* from an English court, there is a two-fold test: *First*, the defendant must show a more appropriate, available forum. *Second*, it must not be unjust to deprive the plaintiff of his chosen forum. As the House of Lords made clear in the *Abidin Daver* case, English courts will no longer grant a stay simply on a finding that the English system is innately better or more favourable than other systems. A high standard is now applied to find injustice. For instance, it was held in one case that the fact that Indian courts would take 30 years to resolve a dispute was not sufficient to render them unjust. On the other hand, in the *Cape Plc*. case where miners from South Africa suffering from asbestosis in South Africa sued in England and it was clear that South Africa was the most convenient forum, the House of Lords held that it would be unjust to grant a stay for *forum non conveniens*, because there was no legal aid in South Africa.

Mr Brindle offered a hypothetical to assess the relationship of *forum non conveniens* to the Brussels Convention regimes. A defendant domiciled in England seeks a stay in favour of a foreign court. If it is a court in an EU state, then the Brussels Convention/Council Regulation

44/2001 applies. If not, then perhaps *forum non conveniens* is available. As Mr Brindle noted, there is something to be said for asking a court to stay its own hand rather than asking it to stay the hand of another court.

Speaking last, Elizabeth Barrett made three points about bringing proceedings in a foreign forum. *First*, a court of an EU member state cannot decline jurisdiction based on *forum non conveniens*. *Second*, forum shopping is used, or threatened, as litigation strategy to pursue other claims in other countries. *Third*, Ms. Barrett raised some important considerations when choosing, or shopping for, a forum:

- What substantive law will lead to your client's best result?
- What is the impact of the procedural law of the forum on your client's claims?
- What jurisdiction has your favored remedies? What damages are available in the forum you might choose?
- What is the cost regime of the forum you are considering? Keep in mind especially the "loser pays" costs regime of the English system.
- "home court advantage"
- Ability of witnesses to travel
- Enforcement issues

Her concluding advice based on the discussions of the panel? "Act first fast." In addition, it is clear that an exclusive jurisdiction clause remains essential. So, even if you end up in the wrong court, perhaps it will determine that on the basis of the clause. Also, you can go to another member state for leverage.

A lively discussion period followed the enlightened and enlightening presentations from the panel. Ben Sheppard pointed out that which not only can the federal circuit you pick in the United States determine your result, as Larry Newman had pointed out, but which state court you choose can also be outcome determinative. State law in Texas, for instance allows parallel proceedings, whereas other states do not.

Glenn Hendrix asked the panel for their views on the reduction of the Hague Convention on the Recognition of Judgments, which has now been watered down to a Choice of Courts Convention. Mr Justice Collins expressed the view that it fell apart as a result of the US failure to accept the crucial demand of the other delegates for a limit on US long arm jurisdiction and on excessive damage awards. He, however, saw no harm in the failure of the Convention, as he saw no benefit to a universal judgment recognition convention.

Mr Layton noted that for commercial disputes clarity of the European rules helps define the settlement landscape, and the commercial court is now well used to them. M. Raoul-Duval agreed and commented that he too is very comfortable with these rules. Louise Ellen Teitz

contrasted this with the United States where the jurisprudence has been inconsistent and difficult for outsiders to follow.

With respect to forum shopping, David MacIntosh remarked that it is fine for the one doing the shopping, but unless everyone acts quickly, those who engage in the practice will be criticized for having done so.

Ramon Mullerat commented that in the future we will see more courts with universal jurisdiction, but Mr Justice Collins responded that this was in the distant future.

On the subject of the enforcement of judgments, Mr Justice Collins noted that the US does not have a strong interest in having its judgments enforced abroad. Walker White stated that US courts can get US judgments enforced abroad, and multinational businesses have an interest in bringing cases in the US. Collins agreed this was true, but particularly under the NY Convention, ie -- cases with arbitration clauses. The world, he noted, is divided into (1) those who will not enforce without a treaty; (2) those who will recognize if there is reciprocity; and (3) those who will recognize if you submit to jurisdiction.

Stephen Zack wondered whether it was a factor that US courts are reluctant to serve as the courthouse of the world. Newman concurred that this may be an underlying concern, the fear of accepting large numbers of cases from Latin America. Mr. Justice Collins stated that the courts must look to the public interest factors, but said that the English courts have rejected those factors in order to attract more commercial dispute resolution, as England views this as good for business and important for London.