# Canberra Calling

Australia has often been described as the “lucky country”. Blessed with spectacular coastlines and landscapes as well as bountiful natural resources, Australia’s international prominence has grown throughout the past century as her products and people have become increasingly mobile.

During this period, the development of private international law rules has been left, principally, to the Courts and to the legislatures of the States and Territories that make up the Commonwealth of Australia and the focus, until very recently, has been on the regulation of internal situations involving two or more States/Territories. As a result, private international law in Australia is an interesting, but erratic, patchwork of common law rules (e.g. law applicable to contract and tort), local legislation (e.g. jurisdiction over non-local defendants) and unified Commonwealth-level regimes (e.g. enforcement of some foreign judgments).

In 2011, the Standing Committee of Law and Justice (comprising the Attorneys-General of the Commonwealth Government and of each of the States and Territories, as well as the Minister of Justice of New Zealand) recognised the need to assess the suitability of Australia’s private international law rules in modern conditions. In April 2012, the SCLJ agreed to the establishment of a working group to commence consultations with key stakeholders to determine whether further reform in this area would deliver worthwhile micro-economic benefits for the community.

Having established its working group, the Commonwealth Attorney-General has now launched a public consultation on its newly created Private International Law website, and in parallel on Twitter (@agd_pil), Linked In (AGD – Private International Law) and on Facebook (Private International Law). Online discussions have been launched on jurisdiction, applicable law and other private international law issues and all contributions are welcomed. In particular, and without wishing to exclude the contributions of experts in the field, the organisers of the consultation would like to solicit the views of businesses and individuals with practical experience of the operation of the Australian rules which currently apply to cross-border transactions and events.

There is no need to hop on a plane – follow the link now.

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# Brussels I (Recast)

For the latest amendments of the European Parliament to the Commission's Proposal, dated 25 September 2012, click here.

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# International Child Abduction and the Importance of Speaking Catalan

Today's *Boletín Oficial del Estado* publishes Spain's acceptance of the accession of Andorra to the Hague Convention on the Civil Aspects of International Child Abduction; it will enter into force on 1 November 2012. That's how I've learnt about Andorra's first reservation to the Convention:

> Reservation relating to article 24. In accordance with the provisions of article 42 and pursuant to article 24, second paragraph of the Convention, the Principality of Andorra declares that it will not accept the applications, communications and other documents sent to its Authority unless they are accompanied by a translation into Catalan or, where that is not feasible, a translation into French.

Which is quite easy to understand, Catalan being the official language there.

I must confess that before realising that I was stricken by the text. We are living a turbulent political moment in Spain.

# PIL and Human Rights In Europe

Professor Zamora Cabot (University of Castellón) has just published "Derecho Internacional Privado y Derechos Humanos en el Ámbito Europeo" in Papeles el tiempo de los derechos, 2012 (number 4).

This paper is a previous version of a broader article that will appear under the same title in a *Liber Amicorum* for Professor Alegria Borras. With this publication the author continues an already fruitful research on the relationship between private international law and human rights.

The article is introduced by a reflection on the need for a rapprochement between private international law and international law, with the aim of mutually reinforcing their potential against global governance- the *Kiobel* case being a good opportunity for experimenting in the field.

Section II is devoted to multiculturalism, which according to the author provides an appropriate "testing ground" to try out the interrelation between private international law and human rights through principles such as legal pluralism and tolerance.

In Section III Prof. Zamora focuses on the question of multinational corporations accountability – again another opportunity for private international law to show its potential, this time via the improvement of the legal remedies available to victims of human rights violations perpetrated by transnational and multinational corporations. In this regard the author draws attention to the different trends currently in place in Europe and the US, the protection of the victims being progressively enhanced here through case law and gradual legislative changes at the State level, as well as through the expression of a strong interest in the reform and improvement of the *acquis communnautaire* which deals with these questions.

Prof. Zamora concludes the article expressing his firm belief in private international law as a tool in the fight against racism and xenophobia -two phenomena which are unfortunately quite visible in nowadays Europe-, and

against the frequent lack of respect towards human rights displayed by European transnational corporations present in third, underdeveloped countries.

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# French Supreme Court Strikes Down One Way Jurisdiction Clause

In a judgment of September 26th, 2012, the French Supreme Court for private and criminal matters (*Cour de cassation*) struck down a one way choice of court agreement governed by Article 23 of the Brussels I Regulation.

A woman had received € 1,7 million from her father. She had put it on a bank account in Luxembourg. The contract with the bank included  a clause providing for the exclusive jurisdiction of Luxembourg courts, but allowing the bank to sue wherever it wanted to. The woman sued the bank and its French sister company in Paris.

The *Cour de cassation* holds that the bank was not genuinely bound by the clause, as it had the right to disregard it. It was thus void, for being "*potestative*". This is an implicit referrence to the French law of obligations, which provides that obligations conditional upon an event that one party entirely controls is void (Civil Code, articles 1170 and 1174).

The court also rules that such *potestative* clauses contradict the rationale and purpose of Article 23 of the Brussels I Regulation.

> *ayant relevé que la clause, aux termes de laquelle la banque se réservait le droit d'agir au domicile de Mme X… ou devant "tout autre tribunal compétent", ne liait, en réalité, que Mme X… qui était seule tenue de saisir les tribunaux luxembourgeois, la cour d'appel en a exactement déduit qu'elle revêtait un caractère potestatif à l'égard de la banque, de sorte qu'elle était contraire à l'objet et à la finalité de la prorogation de compétence ouverte par l'article 23 du Règlement Bruxelles I*

The case is of the highest importance given how standard the clause is in banking contracts, and possibly in others. One might want to argue that the fact that the plaintiff was a natural person, maybe a consumer, suggests that the *Cour de cassation* would be more friendly to a pure business clause. This would not be convincing. The case does not insist on who the plaintiff was, and it only refers to Article 23. Furthermore, it gives full publicity to the jugdment by publishing it immediately on its website, for the purpose of indicating that all should take notice of the case.

An interesting aspect of the case is that it applies a doctrine of French law and thus implicitly rules that French law governed the validity of the clause. One should note, however, that while Luxembourg law seemed more appropriate, as it was both the law of the designated court (likely future choice of law rule under the amended Brussels I Regulation) and the law chosen by the parties to govern the contract, the Luxembourg civil code contains the exact same provisions on *potestativité*.

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# What will the Supreme Court do with the Alien Tort Statute?

What a strange day at the Supreme Court.  If you didn't know you were before a court of law, you might have thought you were a fly on the wall at a legislative bill drafting commission.  Indeed, as the oral argument in the *Kiobel* case developed, it was pretty clear that the Court was focused on two choices.  First, it could hold that the ATS does not apply extraterritorially and thus encourage Congressional action—as the Court did in the *Morrison v. National Australia Bank* case.  Second, it could undertake some saving construction of the ATS and thus encourage another several years of ATS litigation and academic commentary.  Whatever the Court decides, it is likely to encourage what I am calling in a current work in process (which I hope to have done in the next month or so) a "brave new world of transnational litigation" where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases.

To me, one of the most intriguing aspects of the oral argument was the focus on the interest of the United States in adjudicating the case. In the first couple of minutes, Justice Kennedy asked: "What effects that commenced in the United States or that are closely related to the United States exist between what happened here and what happened in Nigeria?" Why did he ask this? Because he, and others, are concerned that allowing a U.S. court to hear a case where there is little or no nexus to this country potentially allows the courts of other countries to hear cases against U.S. corporations where they too have little nexus to the case at bar. So, one series of concerns is directed at reciprocity—if the Court permits U.S. courts to hear these cases against foreign corporations, then foreign courts may hear these cases against U.S. corporations. The question is how might the Court leave open the ATS without subjecting U.S. corporations to expansive jurisdiction in other countries?

Another concern is foreign affairs, and there were a series of questions directed at whether the State Department could sort out some of these issues by requesting dismissal. I have looked at this issue in some detail in the context of international comity. It is not clear to me, however, based on the oral argument that this approach can get a majority.

So, if the Court is not inclined to apply the presumption against extraterritoriality in a robust way but is concerned about a broad construction of the ATS, what might it do? Justice Sotomayor took up the suggestion of an amicus brief filed by the European Commission to lay the ground work for a compromise position. As it had in *Sosa*, the Commission argued that ATS cases should be permitted only where the plaintiff has exhausted local and international legal remedies, or demonstrates that such remedies are unavailable or futile. The Commission defines "local" as "those states with a traditional jurisdictional nexus to the conduct," which would mean, I think, those jurisdictions where the conduct or injury occurred and the home jurisdiction of the defendant. It might also include the home jurisdiction of the plaintiff, if the plaintiff were not a domiciliary of any of these other places.

The key for this exhaustion requirement, as explored by Justice Kagan, is that it not only requires exhaustion of local remedies at the place of conduct or injury, as does the Torture Victims Protection Act, but also other potential fora that may have a closer connection to the case. So, in this case, exhaustion of remedies in at least Nigeria, the Netherlands, and the U.K. would be required before a U.S.

court could hear the case. Armed with such an exhaustion requirement, a defendant could argue for dismissal in favor of various foreign fora.

Note, however, that exhaustion of remedies is generally an affirmative defense. Thus, if a defendant forgets to plead it or makes the decision to waive it, then the U.S. court would hear the case, as many TVPA cases illustrate. A defendant might make this tactical decision to waive where it determines that the U.S. court has the best law and procedure to litigate the case. So, the Court may need a secondary fix for these cases—perhaps forum non conveniens? Furthermore, requiring exhaustion means that many ATS-like cases will be filed in foreign courts, proceed to judgment, and then return as enforcement actions in the United States. So, there is some potential that these cases will return to U.S. courts, albeit under a constrained standard of review, down the road. As I examine in a forthcoming piece in the *Virginia Journal of International Law*, if there is a strong likelihood that the foreign judgment will be enforced in the United States, why should the U.S. court dismiss the case outright and tie its hands when the later enforcement proceeding is brought?

At bottom, a rewrite of the ATS by the Court has the potential to open up a Pandora's box of new issues for courts and commentators to deal with. Here is just a taste of what the future may bring.

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# Kiobel Before the Supreme Court

Click here for the transcript of the oral argument.

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# Spanish Articles on Rome III and the Succession Regulation

Two Spanish Articles on Rome III and the Succession Regulation have recently been published in Diario La Ley:

- **La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España,** *Patricia Orejudo Prieto de los Mozos,* Profesora Titular de Derecho internacional privado (Universidad Complutense de Madrid), Diario La Ley, Nº 7913, Sección Tribuna, 31 July 2012
- **El nuevo reglamento europeo sobre sucesiones,** *Iván Heredia Cervantes*, Profesor Titular de Derecho internacional privado (Universidad Autónoma de Madrid), Diario La Ley, Nº 7933, Sección Tribuna, 28 Sepeptember 2012

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# Kleinheisterkamp on Dallah v Pakistan

*Jan Kleinheisterkamp,* Senior Lecturer in Law at the London School of Economics, has written an arcticle dealing with the much commented "Dallah v. Pakistan" case. The article has been published in *The Modern Law Review* 75 (2012), pp. 639-654. The abstract reads as follows:

> *This note analyses the reasoning of the English and French courts in Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan, in which an arbitral tribunal had accepted jurisdiction over the Government of Pakistan on the basis of an arbitration agreement concluded by a trust that was created, controlled, and then extinguished by the Government. It highlights the English courts' clarifications on the degree to which arbitral awards should benefit from the presumption of validity at the*

*stage of enforcement and discusses how the cultural background of the English and French judges – and of the arbitrators – drove them to come to contradictory results. Moreover, it argues that both judges and arbitrators, owing to the way the parties framed their arguments, probably missed the proper solution of the case.*

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# Article IV, Paragraph 2 of the New York Convention on Arbitration

Confirming Switzerland's reputation as an arbitration-friendly forum, the Swiss Supreme Court has recently opted for a flexible and pragmatic interpretation of the New York Convention, admitting that in certain circumstances, a party seeking enforcement in Switzerland of an award issued in English may be exempt from producing a certified comprehensive translation of the entire arbitral award into one of the Swiss national languages.

**Facts**

A party initiated recognition and enforcement proceedings for an International Chamber of Commerce commercial arbitral award before the cantonal court in Switzerland. The party filed a certified German translation of the dispositive part of the award, together with a non-certified German translation of the cost section, but filed no comprehensive German translation of the award.

The cantonal court held that it had sufficient knowledge of English not to request a full translation of the award, especially since a German translation of the decision on costs, which constituted the subject matter of the dispute, had been produced. It thus dismissed any objection to enforcement. The cantonal court granted recognition and enforcement of the award.

The cantonal court's decision was challenged before the Supreme Court on the ground of infringement of the mandatory requirements of Article IV, Paragraph 2.

The challenging party further contended that the examination of its public policy-based objection to enforcement (Article V, Paragraph 2(b)) required careful consideration of the entire award, which implied a full translation thereof.

**Decision**

The Supreme Court dismissed the challenge and considered that the partial translation produced by the requesting party was sufficient to comply with the formal requirements of Article IV, Paragraph 2.

The Supreme Court noted the lack of uniform judicial practice in Europe, as well as the absence of a clear converging scholarly view in favour of either a strict application of Article IV, Paragraph 2, or a more pragmatic approach to the issue.

Considering that the purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards, the Supreme Court held that it ought to be applied and construed in an enforcement-friendly manner, following a pragmatic, flexible and non-formalistic approach, including with respect to the formalistic requirements set forth in Article IV, Paragraph 2.

*Source:* http://www.internationallawoffice.com