Australian article round-up 2011: General

Readers may be interested in a range of articles which have been published since the last Australian article round-up in 2010. Over the coming days, I will post abstracts for the articles roughly grouped into themes. Today's is a general theme.

- **John Fogarty, 'Peter Edward Nygh AM: His Work and Times' (2010) 1 *Family Law Review* 4:**

In this article the author outlines and honours the work and life of Peter Edward Nygh AM. From his early life in western Europe, through his relocation to Australia and to his subsequent contributions in academia, the Family Court of Australia and the Hague Conference on Private International Law, the article honours Peter Nygh's success as an academic, judge, reformer and internationalist, and his life as an honourable and decent man.

- **Mary Keyes, 'Substance and Procedure in Multistate Tort Litigation' (2010) 18 *Torts Law Journal* 201:**

Where a tort occurred outside the territory of the forum state, the Australian tort choice of law rule requires that the forum court must apply the law of the place where the tort occurred to resolve the dispute. Several exceptions to this principle are recognised, according to which the forum court may apply forum law instead of the otherwise applicable foreign law. This article considers these exceptions, focusing on the distinction between matters of substance, which may be governed by foreign law, and matters of procedure, which are always governed by forum law. The justifications for the separate treatment of procedural rules are critically examined. This article suggests that most of those justifications are weak and that, when taken together with the other exceptions that permit a forum court to apply its own law, they show that the Australian choice of law rule for multistate torts remains in need of further refinement.

- **Kate Lewins, 'Australian Cruise Passengers Travel in Legal Equivalent of Steerage — Considering the Merits of a Passenger Liability Regime for Australia' (2010) 38 *Australian Business Law Review* 127:**

Two Australian passengers contact their travel agent on the same day. Each books a cruise of similar duration, embarking at an Australian port for a Pacific cruise, on a different cruise ship line. One contract claims to be governed by United States law, with any claim to be brought in Florida within one year, and a limit on liability of about A$80,000 for personal injury or death claims. The second, (the lucky one), boards a ship with a contract governed by Australian law, allowing commencement in an Australian court within two years. Any legal recovery for injury or death sustained on the cruise is already fraught with complexity. But the variation between cruise ship liner's passenger contracts for voyages departing Australia can be significant. This article argues that the time has come for Australia to introduce a regime for the liability for passengers carried by sea from or to Australian ports.

- **Guan Siew Teo, 'Choice of Law in *Forum Non Conveniens* Analysis: *Puttick v Tenon Ltd* [2008] HCA 54′ (2010) 22 *Singapore Academy of Law Journal* 440:**

The overlap between questions of jurisdiction and choice of law is perhaps most visible when applying the doctrine of forum non conveniens: it is now generally accepted that the lex causae is indicative of where the natural forum is. But as the facts and holding of the decision of the High Court of Australia in Puttick v Tenon Ltd suggest, some issues remain which warrant careful treatment when considerations of the applicable law enter the jurisdictional analysis. Such difficulties relate to uncertainties on the threshold of proof, as well as the interaction between the forum non conveniens inquiry and procedural rules on pleading and proof of foreign law.

- **Rachel Joseph, 'Enabling the Operation of Religious Legal Systems in Australia by Extending Private International Law Principles' (2011) 85 *Australian Law Journal* 105:**

The current failure to recognise and accommodate religious law outside an arbitration context has led to informal religious dispute resolution processes that often lack protections (such as natural justice) which are inherent in Australia's secular legal system. This article proposes recognising and accommodating religious law through an expansion of common law principles of private international law. It argues that enabling the use of religious law outside an arbitration context would discourage the use of informal religious dispute resolution processes and enable Australia's secular legal system to

reassert control over all legal issues, including matters involving religious significance, by ensuring that the operation of religious law is governed by, and subject to, secular laws.

Silberman on Morrison

Linda Silberman, who is the Martin Lipton Professor of Law at New York University Law School, has posted *Morrison v. National Australia Bank*: Implications for Global Securities Class Actions on SSRN.

> *The recent U.S. Supreme Court decision in Morrison v. National Australia Bank has had a significant impact on the extraterritorial reach of the U.S. Securities Laws as well as a limitating global class actions. Other countries have begun to fill a perceived gap with respect to such class actions, as the recent Converium case in the Netherlands and the Imax decision in Canada illustrate. In addition to thosse developments, the article discusses various post-Morrison developments in the United States, including the recent Dodd-Frank legislation, the possibility of bringing claims in the United States under foreign law, lower court interpretations of Morrison, including off-exchange case law. The author concludes with a call for increased regulatory cooperation as well as the need for an international treaty.*

The paper is forthcoming in the *Yearbook of Private International Law*.

Hague Academy Fourth Newsletter

The Hague Academy of International Law has published its fourth Newsletter a couple of days ago.

Italian Society of International Law's XVI Annual Meeting (Catania, 23-24 June 2011)

The **Italian Society of International Law** (Società Italiana di Diritto Internazionale – SIDI) will open today its **XVI Annual Meeting at the University of Catania** (23-24 June 2011). The conference is devoted to **"Protection of Human Rights and International Law"** ("La tutela dei diritti umani e il diritto internazionale").

In the morning of Friday, 24 June, the meeting will be structured in three parallel sessions, respectively dealing with the topic in a public international law, private international law and international economic law perspective (see the complete programme here). Here's the programme of the PIL session:

Morning session (Friday 24 June 2011, 9:30) – Private International Law and Human Rights

Chair and introductory remarks: *Angelo Davì* (Univ. of Rome "Sapienza")

- *Patrick Kinsch* (Univ. du Luxembourg – Secrétaire du GEDIP): Droits de l'homme et reconnaissance internationale des situations juridiques personnelles et familiales;
- *Cristina Campiglio* (Univ. of Pavia): Identità culturale, diritti umani e diritto internazionale privato;
- *Francesco Salerno* (Univ. of Ferrara): Competenza giurisdizionale, riconoscimento delle decisioni e diritto all'equo processo;
- *Nadina Foggetti* (Univ. of Bari): Riconoscibilità del matrimonio islamico temporaneo (Mut'a) e tutela dei diritti umani;
- *Fabrizio Marongiu Buonaiuti* (Univ. of Rome "Sapienza"), La tutela del diritto di accesso alla giustizia e della parità delle armi tra i litiganti nella proposta di revisione del regolamento n. 44/2001.

The **concluding session** of the meeting, in the afternoon of Friday, 24 June (16:00), will host a **round table on "International Courts and International Protection of Human Rights"**, chaired by *Luigi Condorelli* (Univ. of Florence), with *Flavia Lattanzi* (ICTY), *Paolo Mengozzi* (ECJ), *Tullio Treves* (ITLOS) and *Abdulqawi Yusuf* (ICJ).

Hague Conference's Recommendations on Abduction Convention

On June 10th, 2011, the Sixth Meeting of the Special Commission to review the practical operation of the Hague Abduction and Child Protection Conventions concluded with recommendations for judges, other government officials and experts to consider when confronted with Convention issues.

See the press release of the Hague Conference on Private International Law here.

Colon on Choice of Law and Islamic Finance

Julio Colon has posted Choice of Law and Islamic Finance on SSRN.

> *The past decade has seen the rapid growth of Islamic finance on both international and domestic levels. Accompanying that growth is a rise in the number of disputes that implicate Islamic law. This remains true even when the primary law of the contract is that of a common law or civil law country. If judges and lawmakers do not understand the reasoning of Islamic finance*

professionals in incorporating Shariah law, the result could be precedents and codes that hamper the growth of a multi-trillion dollar industry. This note compares the reasoning of the English court in Shamil Bank v. Beximco Pharmaceuticals to the practice of forums specializing in Islamic finance dispute resolution. The note then addresses other perceived difficulties in applying Islamic law in common law and civil law courts. The practice of Islamic finance alternative dispute resolution (ADR) forums shows a consistent reliance on the use of national laws coupled with Shariah. Also, there are cases showing that U.S. courts and European arbitrators are willing to use Islamic law. Research indicates that the decision in Shamil Bank v. Beximco Pharmaceuticals was not consistent with the intentions of the parties or the commercial goals of Islamic finance. Finally, this note concludes that it is not unreasonable for a Western court to judge a case if the dispute arises out of an Islamic finance agreement.

The Paper is forthcoming in the *Texas International Law Journal*.

Lugano Convention Grand Slam – Iceland Comes Out of the Cold

It should be noted that, on 25 February 2011, Iceland ratified the 2007 Lugano Convention, the last signatory to do so (see here). Accordingly, the 2007 Lugano Convention entered into force for Iceland on 1 May 2011. This follows the ratifications of the EU, Denmark and Norway (effective 1 January 2010) and Switzerland (effective 1 January 2011).

The Future of Private International Law in Australia: papers and podcast now available

For those unable to attend the recent seminar in Sydney "The Future of Private International Law in Australia" — see my post here — papers and a podcast are now available here. The speakers were:

- The Honourable Justice Paul Le Gay Brereton AM RFD, Judge of the Supreme Court of New South Wales and co-author of *Nygh's Conflict of Laws in Australia* (8th ed);
- Dr Andrew Bell SC, New South Wales Bar and co-author of *Nygh's Conflict of Laws in Australia*;
- Thomas John, head of the Private International Law Section of the Commonwealth Attorney-General's Department; and
- Professor Andrew Dickinson, Professor in Private International Law at Sydney Law School and one of the specialist editors of *Dicey, Morris & Collins: The Conflict of Laws*.

Suing France instead of Foreign Diplomats

Foreign diplomats enjoy diplomatic immunities in France. This is a rule of customary international law, which was also codified in the 1961 Vienna Convention on Diplomatic Relations. This means that employees of foreign diplomats will be unable to enforce judgments against their employer if the latter does not comply with applicable labour law. Right, but in France they may be able to sue the French state instead.

Modern Slave

Ms Susilawati had been hired by a diplomat from the sultanate of Oman who was serving at UNESCO in Paris. The job was to be a housemaid at the home of the diplomat, a five bedrooms apartment in Paris' 16th *arrondissement*. The French press has reported that the 34 year old woman had been hired in Jakarta for 200 USD per month, which was four times what she was making in Indonesia, 30% more than what she was paid when she worked in Ryad for a Saudi prince, but not quite the French minimum wage. Indeed, she was meant to work 7 days a week. That, too, was not exactly compliant with French labour law.

A neighbour called Amnesty International, who alerted the French committee against modern slavery . The case was taken to French labour courts, which eventually ordered the diplomat to pay her € 33,000 in unpaid salaries. The French jugdment could not be enforced, however, as the diplomat enjoyed an immunity from execution. Why would he pay, after all: he had honored the contract. He is reported to have explained:

> *She got all her salary. She was happy and lived very well. Then she disappeared from my house.*

The employee then petitioned the French state to have it pay instead. The French Ministry of foreign affairs refused. The employee challenged that decision before French administrative courts. She eventually won before the French supreme court for administrative matters (*Conseil d'Etat*) which, in a judgment of February 11th, 2011, held that the French state was strictly liable, and ought to compensate for the loss of the employee.

Egalité des citoyens devant les charges publiques

To reach that result, the *Conseil d'Etat* applied a half century old common law rule providing for the liability of the French state for the application of international treaties. In 45 years, it is only the third time that the court has compensated a plaintiff pursuant to this rule.

Under French administrative law, the French state may be found liable for the application of treaties under two conditions. The first is that the relevant treaty should not have excluded all forms of compensation of victims of its application. The second rule is that the loss suffered should be "special and severe". The foundation of this tort is that citizens should be equal before "public burdens"

(*charge publiques*). It is pretty hard to translate the concept in English, but it certainly includes the burdens of the legal system. In other words, nobody should suffer disproportionately from the application of the law, and if someone was to, he could be compensated for that uncommon and severe loss, which could then be characterised as being "special and severe".

So, had Ms Susilawati really suffered a special loss? The ~~diplomat~~ French state argued that she had not, and the argument was found to be convincing by the lower courts. There was nothing uncommon for the employee of a diplomat about being unable to enforce a judgment against his employer, and whether there were only few diplomats was irrelevant, the lower administrative courts found. The *Conseil d'Etat* reversed. It held that, for the purpose of assessing whether the loss suffered was special, the lower courts should have inquired whether the victims of similar acts were numerous or few (later in the judgment, the court actually gives its answer by stating that they are few). The court also ruled that the loss suffered was severe, but did not elaborate on this finding, and in particular did not refer to the particular circumstances of the employment.

Fellmeth on Int'l Law and Foreign Laws in US Legislatures

Aaron Fellmeth, who is a professor of law at Arizona State University College of Law, has posted an *insight* on *International Law and Foreign Laws in U.S. Legislatures* on the site of the American Society of International Law.

> *Beginning in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts. This Insight will summarize the trend in adopting legislation hostile to international law and foreign laws and briefly discuss its causes and consequences.*

The rest of the *Insight* is available here.