Australian article round-up 2011: Finance

Continuing the Australian article round-up, readers may be interested in the following three articles raising points about finance:

- **Anthea Markstein, 'The Law Governing Letters of Credit' (2010) 16 *Auckland University Law Review* 138:**

Letters of credit are frequently used to effect payment in commercial transactions where parties are resident in different jurisdictions. While it seems prudent for parties to give careful consideration to the governing law of these contracts, in reality, letters of credit generally make no provision for a governing law. … In attempting to find a governing law in keeping with the commercial expectations of the parties, the courts have endeavoured to apply the same law to all the contracts in the letter of credit transaction (with the exception of the underlying contract). … This article argues that finding a governing law that provides legal certainty and has a close connection to the contract is vital in determining a governing law in the absence of choice in the letter of credit context. Achieving consistency in the governing law across all the contracts, however, is only important where commercial expectations require this outcome. This article suggests that commercial expectations do not require this outcome in the context of freely negotiable letters of credit, and sets out three alternative methods for determining the governing law of a freely negotiable letter of credit. Finding a consistent method with which to determine the governing law of a letter of credit contract is of particular importance given that it is likely to have implications for tortious and restitutionary claims arising in connection with a letter of credit contract.

- **David Chaikin, 'A Critical Examination of How Contract Law is Used by Financial Institutions Operating in Multiple Jurisdictions' (2010) 34 *Melbourne University Law Review* 34:**

Financial institutions operating in multiple jurisdictions are vulnerable to extraterritorial jurisdictional claims, especially under United States anti-money laundering and economic sanctions laws. A survey shows that banks licensed in

Australia have revised their standard form contracts so as to reduce the risks arising from the extraterritorial enforcement of foreign laws. Under the new contracts, customers have purportedly consented ex ante to banks supplying confidential information directly to foreign states and agreed to the freezing of their bank accounts based on a possible breach of foreign law. The contractual provisions are controversial because they circumvent the legal procedures that would otherwise apply in cases of international criminal, civil or regulatory assistance. The legal efficacy and policy implications of the contractual terms are analysed.

- **The Honourable J J Spigelman AC, 'The Global Financial Crisis and Australian Courts' (2010) 84 *Australian Law Journal* 615:**

Nearly two years after the collapse of Lehman Brothers, the effects of the global financial crisis are increasingly discernible in Australian courts. In this speech, Chief Justice Spigelman surveys the range of legal proceedings that have accompanied recent corporate collapses. The litigation discussed is characterised by its complexity, which is partly a consequence of the highly leveraged and interlocked nature of failed companies and investment schemes, and by the significance of cross-border issues. With respect to the latter, the crisis has highlighted the need for cross border judicial co-operation.

Second Issue of 2011's Belgian PIL E-Journal

The second issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was just released.

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue includes one article by Patrick Wautelet (Liège University) on International Aspects of the

Franchise Contract (*Le contrat de franchise – aspects internationaux*).

Wedding Shopping in NYC

On June 29th, 2011, the New York state's lawmaker legalized gay marriage.

The law is meant to bring marriage equality to the state of New York (hence its name: the Marriage Equality Act). This is because, the bill memo explained, "the freedom to marry is, in the words of the US Supreme Court, one the vital personal rights essential to the orderly pursuit of happiness by free people".

But it is also expected that the law will bring some USD 311 million in revenue of all kinds to the state. A report released by the state Senate's Independent Democratic Conference has estimated that, within three years, the state would earn in marriage license fees (3m), sales tax (22m), but also in wedding revenue and tourism (283m) and hotel occupancy taxes (259,000).

The reason why the new law would generate tourism revenue would not only be because the relatives of the future spouses would travel to New York for the ceremony. It would first and foremost be because couples living in states where same sex marriage is not allowed would come to marry in New York. The report predicts that while 21,000 couples living in New York would benefit from the new law, 3,300 couples living in surrounding states with less liberal laws would also come to marry in New York, and that more than 40,000 couples would travel to New York as a wedding destination.

Australian article round-up 2011:

Insolvency

Continuing the Australian article round-up, readers may be interested in the following three articles raising points about insolvency:

- **Stewart Maiden, 'A comparative analysis of the use of the UNCITRAL Model Law on Cross-border Insolvency in Australia, Great Britain and the United States' (2010) 18 *Insolvency Law Journal* 63:**

UNCITRAL's Model Law on Cross-border Insolvency has been adopted by parliaments in 18 states across six continents. Each separate implementation departs from the archetype for various reasons, principally the necessity to tailor the Model Law to fit domestic law and policy. Model Law Art 8 requires courts to have regard to the international origin of the Model Law and the desirability of uniformity when interpreting local enactments of the Model Law. However, the nuances of the foreign texts, and differences between the suites of insolvency laws of which the texts form part, mean that a study of the text and context of any foreign implementation is required before its impact on the operation of the local enactment can properly be considered. For those reasons, this article compares the implementation of the Model Law in Australia, Great Britain and the United States. It also attempts to assist the reader to understand how courts in each of the three states are likely to deal with problems presented under the Model Law.

- **Lindsay Powers, 'Cross-Border Insolvency: The Austrailan Approach to Ascertaining COMI' (2011) 22 *Journal of Banking and Finance Law and Practice* 64:**

The Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Act) brought to Australia the Model Law on Cross-Border Insolvency (Model Law) adopted by the United Nations Commission on International Trade Law. The spirit of the Model Law is cooperation with, and recognition of, foreign insolvency representatives. Australian courts can grant recognition even if the country of the foreign insolvency representative has not adopted the Model Law. That said, the process of recognition is not simply a "rubber stamp". A court in Australia hearing the application for recognition must be satisfied that all the preconditions are satisfied and, if they are, what relief should be granted. From

the relatively few decided cases under the Cross-Border Act, it is clear that the approach of Australian courts is accommodating, but cautious. In the recent decision Ackers v Saad Investments Co Ltd, the Federal Court undertook a careful examination of what needs to be established to satisfy one of the central concepts of the Model Law: the location of an insolvent company's "centre of main interests" (COMI).

- **Lionel Meehan, 'Cross Border Insolvency Law: Reform and Recent Developments in Light of the JAL Corporate Reorganisation Filing' (2011) 22 *Journal of Banking and Finance Law and Practice* 40:**

Japan Airlines Corporation and certain subsidiaries (together, JAL) filed for corporate reorganisation under the Japanese Corporate Reorganisation Law on 19 January 2010. JAL's filing presents an opportunity for the insolvency community to learn more about both the Japanese Corporate Reorganisation Law and the UNCITRAL Model Law on Cross Border Insolvency (Model Law). The JAL case has generated recognition of JAL's corporate reorganisation proceedings as "foreign main proceedings" in the United States under the American implementation of the Model Law in Ch 15 of the US Bankruptcy Code, in the United Kingdom under the Cross Border Insolvency Regulations 2006, in Australia under the Cross Border Insolvency Act 2008 (Cth), and in Canada under the Companies' Creditors Arrangement Act, RSC 1985, c C-36.

Goodyear and McIntyre: General and Specific Personal Jurisdiction Addressed by the U.S. Supreme Court

On Monday, the United States Supreme Court issued its first decisions on personal jurisdiction since 1990. In *Goodyear Dunlop Tires Operations v. Brown*, the Court unanimously held that there was no general jurisdiction over a non-U.S.

subsidiary in North Carolina based only on the subsidiary's products being sold in the state. In *J. McIntyre Machinery Ltd. v. Nicastro*, a divided Court (with no majority) held that a non-U.S. company is not subject to jurisdiction in New Jersey on any stream-of-commerce theory where it sold its products to a distributor in Ohio and never entered, advertised, or sold its products in New Jersey itself. Here is some very preliminary analysis.

In the *Goodyear* case, the families of two North Carolina teenagers killed in a 2004 Paris bus accident alleged a defective Goodyear tire—manufactured by Goodyear subsidiaries based in France, Luxembourg and Turkey—contributed to the crash. The district court held that Goodyear's substantial sales and commercial activities in North Carolina justified the assertion of general jurisdiction over the company. Goodyear, on the other hand, argued that such a broad view of general jurisdiction would mean that companies like it could literally be sued anywhere.

The Supreme Court agreed with Goodyear, and narrowed the permissible instances of general personal jurisdiction to situations analogous to the 1952 case of *Perkins v. Benguet Mining Co*. In that case—which still remains the only instance of general personal jurisdiction ever sustained by the Supreme Court—a Philippines corporation that had ceased all activities there during the Japanese occupation during World War II and was operating entirely out of offices in Ohio during the duration of the War, was subject to general personal jurisdiction in that state. In *Goodyear*, unlike in Perkins, the foreign subsidiaries were "in no sense at home in North Carolina" The Court rejected the lower court's "sprawling view" of general jurisdiction under which "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed." More is required than simply doing a lot of business in the state. At the very least, the company must be formally registered to do business in the state, have offices or plants or stores in the state, have agents in the state, etc. Some commentators have already remarked that Goodyear "could be read as suggesting that even this is not enough." Even those examples are not as continuous, systematic, and substantial as having one's "home" office in the state, as in *Perkins*.

The decision in *McIntyre* clarifies far less than *Goodyear*. This case arose from a products-liability suit filed in New Jersey state court. The plaintiff, a citizen of New Jersey, injured his hand while using a metal-shearing machine manufactured

by J. McIntyre Machinery, Ltd., a company incorporated and operating in England. The question was whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company neither marketed goods in the State nor shipped them there. The Court granted cert in *McIntyre* to resolve a question that had been left open 25 years ago in *Asahi*: whether putting a product into the stream of commerce expecting it to reach a particular state was sufficient purposeful availment or whether the defendant must somehow "target" the forum.

The Court in *Asahi* divided 4-4-1 on that question, with Justice O'Connor arguing that something more is required and Justice Brennan arguing that placing the product into the stream of commerce was sufficient. A quarter of a century later, four justices, lead by Justice Kennedy, again emphatically rejected the Brennan view, but we still do not have a majority. Fearing the rapid changes to modern commerce and communication, Justice Breyer—joined by Justice Alito—thought it "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences." In their view, there was no jurisdiction over the defendant here even under a stream-of-commerce theory, and therefore no reason to resolve the question. Some commentators have noted that, while Justice Breyer's opinion stood in the way of a clear majority, it nevertheless suggests that the Court is not going to wait another twenty years before trying to create a more-modern framework; it just needs the right (likely internet-centered) case.

Much more is left to be written on these decisions, which we will continue to cover on this site.

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.