Act of state doctrine, the Moçambique rule and the Australian Constitution in the context of alleged torture in Pakistan, Egypt and Guantanamo Bay

In *Habib v The Commonwealth* [2010] FCAFC 12, a Full Court of the Federal Court of Australia considered whether the applicant's claim against the Commonwealth for complicity in alleged acts of torture committed on him by officials of the governments of Pakistan, Egypt and the United States was precluded by the act of state doctrine. The Court allowed the claim to proceed. In doing so, the Court has, it seems, concluded that the act of state doctrine cannot, consistently with the *Australian Constitution*, preclude an action against the Commonwealth based upon an allegation that the Commonwealth has exceeded its executive or legislative power.

The applicant was allegedly arrested in Pakistan a few days before the US commenced military operations in Afghanistan in October 2001. He alleged that while there, and afterwards in Egypt, he was tortured by Pakistani and then Egyptian officials, with the knowledge and assistance of US officials. He alleged that he was then transferred to Afghanistan and later Guantanamo Bay, where he was tortured by US officials. He alleged that Australian officials participated in his mistreatment. The applicant claimed damages from the Commonwealth based on the acts of the Australian officials. His claim was that the acts of the foreign officials were criminal offences under Australian legislation (which expressly had extraterritorial effect), that the Australian officials aided and abetted those offences, that this made them guilty of those offences under the Australian legislation, that committing those offences was outside the Australian officials' authority and that the Australian officials therefore committed the tort of misfeasance in public office or intentional infliction of indirect harm.

The Commonwealth contended that the Court could not determine the applicant's claim, because it would require the Court to sit in judgment on the acts of governments of foreign states committed on their own territories. This was said to infringe the act of state doctrine, as explained in decisions such as that of the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897) and the House of Lords in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. The doctrine has been approved by the High Court of Australia: *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; [1906] HCA 88; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; [1988] HCA 25.

The Full Court rejected the Commonwealth's contention. Jagot J (with whom Black CJ agreed) reviewed the US and UK cases and concluded that they recognised circumstances where the act of state of doctrine would not apply. In particular, she said that the UK cases supported the existence of a public policy exception where there was alleged a breach of a clearly established principle of international law, which included the prohibition against torture. She considered that the Australian authorities were not inconsistent with this approach and that it applied in this case. She also considered that the same result would be reached by considering the factors said to be relevant by the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

More fundamentally, as noted above, Jagot J (again with Black CJ's agreement) concluded that for the act of state doctrine to prevent the Federal Court from considering a claim for damages against Australian officials based upon a breach of Australian law would be contrary to the *Australian Constitution*. This was because the *Constitution* conferred jurisdiction upon the High Court '[i]n all matters … in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. The Federal Court has been invested with the same jurisdiction by legislation.

Indeed, the other member of the Court, Perram J, based his decision entirely on this constitutional ground. In doing so, Perram J made the *obiter* comment that it would be similarly inconsistent with the *Constitution* to invoke the *Moçambique* rule in response to a claim which asserted that the Commonwealth had exceeded its legislative or executive power. He considered that a previous decision of the Full Court, *Petrotimor Companhia de Petroleos SARL v The Commonwealth* [2003] FCAFC 3; (2003) 126 FCR 354, which treated the act of state doctrine as

going to whether there was a 'matter' within the meaning of the *Constitution*, was plainly wrong. Having reached this conclusion, it was unnecessary for Perram J to consider whether there was a human rights exception to the act of state doctrine. However, without reaching a definite conclusion, he considered the point in some detail, in particular the contrasting views of whether the act of state doctrine is a 'super choice of law rule' requiring the court to treat the foreign state acts as valid or a doctrine of abstention requiring the court to abstain from considering those acts.

This case represents a significant development in Australian law on the act of state doctrine and, so far as Perram J's comments are concerned, the *Moçambique* rule. The position adopted by the Full Court is, at the least, contestable. If it is accepted that the *Moçambique* rule and the act of state doctrine are legitimate restraints on State Supreme Courts, which have plenary jurisdiction, why should they not also restrain the federal courts, which have limited jurisdiction? Not every restriction on the exercise of federal jurisdiction is unconstitutional: limitation periods, procedural rules, the requirement to plead a cause of action and the rules of evidence all do so. The *Moçambique* rule and the act of state doctrine were well understood principles at the time of federation. It seems surprising to suggest that the *Constitution* operates to oust those principles without any express words, simply because it sets out limits on federal power and contains a general conferral of jurisdiction on the High Court. Indeed, in the case of the Federal Court, the Court's jurisdiciton is provided not by the *Constitution* but by legislation, albeit picking up the words of the *Constitution*. The question is one of the construction of that legislation, not the *Constitution*, and whether *it* purported to oust those principles. In any event, both in the *Constitution* and the relevant legislation, reading the word 'matter' — which it is accepted contains limits on the Courts' jurisdiction (eg precluding advisory opinions) — as informed by, not ousting, the *Moçambique* rule and the act of state doctrine is at least arguably more consistent with the historical position.

It remains to be seen whether the Commonwealth seeks special leave to appeal to the High Court.

2010 Summer Seminar in Urbino

The city of Raffaello and Federico da Montefeltro will host its 52nd Summer Seminar of European Law in August 2010. Courses, most of which concerning European private international law, will be taught in French, Italian and English by professors coming from Italy (Tito Ballarino, Luigi Mari, Dante Storti, etc.), France (Bertrand Ancel, Horatia Muir Watt, Pierre Mayer, Dany Cohen, etc.), England (Robert Bray) and other European countries (Lesley Jane Smith).

Attendance to the Seminar is attested by a certificate, and passing the exams of the Seminar twice, whether two summers in a row or not, is sanctioned by a diploma granted by the prestigious five-centuries old Law Faculty of Urbino University.

Created in 1959, the Seminar has welcomed leading European professors of private international law, most of whom have also lectured at The Hague Academy of International Law: Riccardo Monaco (1949, 1960, 1968, 1977), Piero Ziccardi (1958, 1976), Henri Batiffol (1959, 1967, 1973), Yvon Loussouarn (1959, 1973), Mario Giuliano (1960, 1968, 1977), Phocion Francescakis (1964), Fritz Schwind (1966, 1984), Ignaz Seidl-Hohenveldern (1968, 1986), Edoardo Vitta (1969, 1979), Alessandro Migliazza (1972), René Rodière (1972), Georges Droz (1974, 1991, 1999), Pierre Gothot (1981), Erik Jayme (1982, 1995, 2000), Bernard Audit (1984, 2003), Michel Pélichet (1987), Pierre Bourel (1989), Pierre Mayer (1989, 2007), Tito Ballarino (1990), Hélène Gaudemet-Tallon (1991, 2005), Alegría Borrás (1994, 2005), Bertrand Ancel (1995), Giorgio Sacerdoti (1997), José Carlos Fernández Rozas (2001), Horatia Muir Watt (2004), Andrea Bonomi (2007).

The program of the 2010 Seminar can be found here. I was myself a student at the Seminar and I have to say that I really enjoyed my time there and can only recommend it!

Trans-Tasman Proceedings Law Reform

Readers involved in Trans-Tasman Australian or New Zealand practice will be interested to know that the Trans-Tasman Proceedings Bill 2009 has been passed by the Australian Parliament. The legislation implements the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed on 24 July 2008. A copy of the Bill and explanatory memorandum may be found here. Reciprocal legislation is before the New Zealand Parliament.

The legislation will change various aspects of Trans-Tasman practice. Among other things, the legislation:

- allows civil initiating process issued in Australian courts to be served in New Zealand without leave;
- broadens the range of New Zealand judgments that can be enforced in Australia to include non-money judgments, civil pecuniary penalties and certain fines; and
- replaces the 'clearly inappropriate forum' test for *forum non conveniens* with a 'more appropriate forum' test when New Zealand is involved.

Journal of Private International Law, 2010, Vol 6(1)

The April 2010 (Vol 6, Number 1) issue of the *Journal of Private International Law* is now out, and contains the following articles (links to abstracts on IngentaConnect included):

- **Cross-Border Assignments under Rome I** (*Verhagen, Hendrik L.E.; van Dongen, Sanne)*

- **Choice of Law in International Contracts in Latin American Legal Systems** (*Albornoz, María Mercedes)*
- **The Problem of International Transactions: Conflict of Laws Revisited** *(Rühl, Giesela)*
- **The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with Some Room for Forum Shopping – How So?** (*Nagy, Csongor István)*
- **Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws** (*Huang, Jie)*
- **The Constitutionalisation of Party Autonomy in European Family Law** (*Yetano, Toni Marzal)*
- **The Insolubility of *Renvoi* and its Consequences** (*Hughes, David Alexander)*
- **Private International Law in Consumer Contracts: A European Perspective** (*Tang, Zheng Sophia)*

Subscription information for J Priv Int L is here.

Suing the Pope?

Can the Pope be sued? Does he enjoy an immunity? As a head of state? But is the Holy See a State?

It seems that it is seriously envisaged to initiate proceedings in England against him for allegedly covering up sexual abuses by priests.

See this post of Julian Ku at opiniojuris, and more specifically the comments. See also the update here.

Switzerland to Apply Lugano Convention in 2011

Switzerland has announced its willingness to apply the 2007 Lugano Convention on jurisdiction and judgments starting January 1st, 2011.

> *The Swiss Ratification and Implementation Act was adopted by the parliament on 11 December 2009. In accordance with a decision of the Swiss Federal Council of 31 March 2010 , the Convention will now be ratified with effect on 1st January 2011.*

This means that Switzerland will have to ratify the Convention three months before, as Article 69 (5) of the Convention provides that once the Convention entered into force between the European Community and one EFTA state, it will "enter into force in relation to any other party on the first day of the third month following the deposit of its instrument of ratification".

We reported earlier that the Convention entered into force between the Member States of the EU (including Danemark) and Norway on January 1st, 2010.

Thanks to Didier Boden for the tip-off

MPI Comments on the Proposal for a Regulation in Succession Matters

The Max Planck Institute for Comparative and International Private Law (Hamburg) has published its comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic

instruments in matters of succession and the creation of a European Certificate of Succession.

The comprehensive statement has been prepared by a working group of the institute coordinated by *Jürgen Basedow* and *Anatol Dutta*.

The full text of the statement can be found here and will be published in issue No. 3 (2010) of the "Rabels Zeitschrift".

Publication: Galgano & Marrella, Diritto e Prassi del Commercio Internazionale

Prof. Francesco Galgano (emeritus in the University of Bologna Law School and founder of Galgano Law Firm) and *Prof. Fabrizio Marrella* ("Cà Foscari" University of Venice) have recently published "Diritto e Prassi del Commercio Internazionale" (CEDAM, 2010), vol. LIV of the "Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia", one of the most authoritative Italian legal series, directed by *Prof. Galgano*.

A presentation has been kindly provided by the authors (the complete TOC is available on the publisher's website):

> *The problems affecting cross-border transactions from a legal standpoint as well as arbitration have boomed in the last years. This book is the first systematic and accurate analysis of International Business Law updated to the most important reforms in the European Union such as: the Lisbon Treaty; Regulation Rome I on the law applicable to contractual obligations and Regulation Rome II on the law applicable to non contractual obligations. New competences for international trade negotiations have been attributed by Member States to the EU. Moreover, an entirely new choice of law regime has been introduced in the European Union affecting world international contracts*

and transnational arbitration. In addition,new instruments have been generated from the business side such as the new UCP 600 (the Uniform Customs and Practice for Documentary Credits, i.e. a set of rules on the issuance and use of letters of credit utilised by bankers and commercial parties in more than 175 countries in trade finance).

Beautifully written by two world reputed Authors in the field, the purpose of this work is to closely examine actors and sources of International Commercial Law with particular reference to contracts for the sale of goods and other forms of exports; licensing of intellectual property; and foreign direct investment.

Title: Diritto e Prassi del Commercio Internazionale, by *Francesco Galgano* and *Fabrizio Marrella*, CEDAM (series: Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia, vol. LIV), Padova, 2010, XLVIII-956 pages.

ISBN: 978-88-13-28228-8. Price: EUR 98.

Washington Declaration on Intl Family Relocation

Last week, the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children organized an international judicial conference in Washington DC on cross-border family relocation. The opening remarks of the president of the Centre can be found here.

The following Declaration was then adopted:

On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in

Washington, D.C. to discuss cross-border family relocation. They agreed on the following:

Availability of Legal Procedures Concerning International Relocation

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.

Reasonable Notice of International Relocation

2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.

Factors Relevant to Decisions on International Relocation

3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.

4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:

i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;

ii) the views of the child having regard to the child's age and maturity;

iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

iv) where relevant to the determination of the outcome, the reasons for seeking

or opposing the relocation;

v) any history of family violence or abuse, whether physical or psychological;

vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

vii) pre-existing custody and access determinations;

viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;

ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;

xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

xii) issues of mobility for family members; and

xiii) any other circumstances deemed to be relevant by the judge.

5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.

6. The factors reflect research findings concerning children's needs and development in the context of relocation.

The Hague Conventions of 1980 on International Child Abduction and 1996 on International Child Protection

7. It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of

relocation orders and the conditions attached to them. It facilitates direct co-operation between administrative and judicial authorities between the two States concerned, as well as the exchange of information relevant to the child's protection. With due regard to the domestic laws of the States, this framework should be seen as an integral part of the global system for the protection of children's rights. States that have not already done so are urged to join these Conventions.

Promoting Agreement

8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.

Enforcement of Relocation Orders

9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.

Modification of Contact Provisions

10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.

Direct Judicial Communications

11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.

Research

12. It is recognised that additional research in the area of relocation is

necessary to analyse trends and outcomes in relocation cases.

Further Development and Promotion of Principles

13. The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.

Anti-suit injunctions, again and again

On Thursday, 18 March 2010, the weblog of the *Journal of Intellectual Property Law and Practice* published a piece of news under the title "Exclusive jurisdiction clauses and antisuit injunctions", on a new English case on anti-suit injunctions under the Brussels Regulation (the "other" State being a third State). I have been allowed to reproduce the facts of the case; an analyse by David Wilson and Joanna Silver is to be found here.

Many thanks to the authors and to Professor Jeremy Phillips, blogmaster of the JIPLP weblog

"Skype, domiciled in Luxembourg, offered free-to-download software that enabled users to communicate over the internet. Joltid, a BVI company, owned certain software that was integral to Skype's business. Skype and Joltid entered into a written agreement, by which Joltid granted Skype a worldwide licence to use a form of its software, the object code, but retained sole control of the source code. Clause 19.1 of the licence stated:

Any claim arising under or relating to this Agreement shall be governed by the

internal substantive laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts.

In March 2009 Joltid, claiming that Skype had breached the licence by using and accessing the source code, purported to terminate it. In response, Skype commenced proceedings in England, claiming that the purported termination was invalid and the licence remained in force. Skype accepted that it had used the source code, but denied this was a breach. According to Skype, Joltid had supplied the source code rather than the object code. This amounted to a variation of the licence. If not, Joltid was estopped from alleging breach or had waived the right to demand strict compliance. In response, Joltid sought a declaration that the licence was validly terminated, as well as an injunction and financial remedies. Joltid subsequently registered its copyright in the source code in the USA and commenced proceedings in the USA against Skype and its various investors (which were not parties to the licence) for copyright infringement.

Skype claimed that these US proceedings were in breach of clause 19.1 of the licence and sought an anti-suit injunction in the UK proceedings to restrain them. Since Skype was domiciled in Luxembourg, Article 23(1) applies in relation to clause 19.1 of the licence. Lewison J began by assessing whether the claims against Skype in the US proceedings fell within the scope of clause 19.1. Joltid argued that its claims in the US proceedings did not arise out of the licence since they were predicated on the assumption that the licence had been terminated. Lewison J rejected this interpretation as unduly narrow. Interpretation of a jurisdiction clause is a matter of national law (*Benincasa, Knorr-Bremse* (supra), and in *Fiona Trust*, Longmore LJ in the Court of Appeal, applauded by Lord Hoffmann in the House of Lords, stated that 'the words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all"'. Lord Hoffmann added that clause construction should start from the assumption that commercial parties are likely to have intended that all disputes are to be decided by the same tribunal. Accordingly, Lewison J concluded that the US proceedings initiated by Joltid did relate to a dispute covered by clause 19.1.

The court then considered whether Skype was entitled to an anti-suit injunction to prevent any further steps being taken in the US proceedings. Lewison J began by agreeing with Skype that, following Owusu, the UK court should not decline to exercise its exclusive jurisdiction under Article 23(1) on the basis of discretionary considerations such as forum non conveniens and that the UK proceedings should

not therefore be stayed in favour of the US proceedings. Lewison J rejected Skype's argument that the tests for staying domestic proceedings and granting anti-suit injunctions were 'two sides of the same coin' and that it followed that, if the court could not stay its own proceedings, it must grant an anti-suit injunction. In *Turner and West Tankers*, the ECJ held that where proceedings are initiated in another Member State in breach of a jurisdiction or arbitration clause, a court should not grant an anti-suit injunction; it is for each court to rule on whether it has jurisdiction to resolve the dispute before it. Skype argued that this line of authority only applies where both jurisdictions are Member States, but Lewison J rejected this. He noted that Skype's argument that there was no discretion to stay the UK proceedings was founded on *Owusu,* where the ECJ drew no distinction between Member and non-Member States. Thus if Skype was right about this issue, the ECJ's approach to anti-suit injunctions must also be equally applicable in the case of non-Member States. Nonetheless Lewison J concluded that, as a matter of discretion, an anti-suit injunction should be granted. Since there was no dispute that the licence was valid, even if terminated, there was a breach of clause 19.1 and the court would need a good reason before declining to enforce by injunction the parties' contractual bargain on jurisdiction. There was no such reason here. Lewison J considered that the standard *forum non conveniens* arguments prayed in aid by Joltid should be given little weight where, as here, the parties to an agreement of worldwide application deliberately agreed an exclusive jurisdiction clause appointing a neutral territory, and where such factors were eminently foreseeable when the parties entered into the licence. Otherwise, the clause would be deprived of its intended effect since, the more 'neutral' the forum chosen, the less importance the parties must have placed on its convenience for any particular dispute. Another important factor was whether the grant or refusal of the injunction would enable all disputes between the parties to take place in a single forum. In this case, the court's decision either way could not avoid the risk of parallel proceedings; following *Owusu*, the court could not stay the UK proceedings, but it had no jurisdiction to restrain the US proceedings in respect of the parties that did not have the benefit of the exclusive jurisdiction clause."