Borchers on Punitive Damages

Patrick J. Borchers, who is the Dean of Creighton University School of Law, has posted *Punitive Damages, Forum Shopping and the Conflict of Laws* on SSRN. The abstract reads:

> *Few issues have as profound an impact on civil litigation as the availability and dimensions of punitive damages. States, however, vary considerably on whether punitive damages are allowed, the quantum and burden of proof necessary to establish liability for them, their insurability and the standard of appellate review of their award. Because of the high stakes involved, all three of the traditional branches of the discipline of the conflict of laws — jurisdiction, choice of law and judgment recognition — are directly involved. Civil plaintiffs naturally seek to find courts that will be hospitable to their attempted assertion of punitive damage liability and civil defendants are equally anxious to avoid such courts. The practice of attempting to find a friendly court is known colloquially as "forum shopping." This article examines how the branches of the conflict of laws are implicated in this high stakes battle and also examines what implications the Supreme Court's decision in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) has for conflicts issues in the punitive damage wars.*

The paper, which is forthcoming in the *Louisiana Law Review*, can be downloaded here.

EU Ratifies 2007 Hague Protocol

The Hague Conference reports that the European Union has signed and ratified the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations on April 8th.

The EU is the first member to ratify. Article 25 of the Protocol provides that two

ratifications are necessary for the Protocol to enter into force.

ERA Conference on Cross-Border Insolvency

On May 20-21, 2010, the Academy of European Law will host a conference on Cross-Border Insolvency Proceedings in the EU in Trier.

> ***The objective*** *of this conference is to meet the requirements of insolvency lawyers to stay informed on the latest developments in legislation, jurisprudence and best practice in this field.*
>
> ***Key topics*** *include:*
>
> *– jurisdiction, recognition and enforcement under the European Insolvency Regulation;*
>
> *– scope of the lex concursus;*
>
> *– effects of insolvency on cross-border security;*
>
> *– international asset tracing;*
>
> *– preventive measures;*
>
> *– banking crisis and insolvency;*
>
> *– EU Framework for cross-border crisis management in the banking sector.*
>
> ***Target group*** *is primarily lawyers practising in the field of insolvency law*

Announced speakers are **Professor Avv Stefania Bariatti**, University of Milan; Partner, Chiomenti Studio Legale, Milan; **Dr Reinhard Dammann**, Partner, Clifford Chance, Paris; **Mr Jens Haubold**, Partner, Thümmel, Schütze & Partner, Stuttgart; **Ms Jennifer Marshall**, Partner, Allen & Overy, London; **Professor**

Michel Menjucq, Cabinet Lexia, University of Paris I Panthéon-Sorbonne; **Mr Gabriel Moss QC**, Barrister, 3-4 South Square, Gray's Inn, London; **Professor Christoph G Paulus**, Dean of the Law Faculty, Humboldt-Universität zu Berlin; **Ms Georgina Peters**, Barrister, 3-4 South Square, Gray's Inn, London; **Ms Ruth Walters**, Banking and Financial Conglomerates Unit, DG Internal Market and Services, European Commission, Brussels

More information can be found here.

Childress on Comity as Conflict

Trey Childress, who teaches at Pepperdine University School of Law, has posted *Comity as Conflict: Resituating Comity as Conflict of Laws* on SSRN. Here is the abstract:

> *This Article seeks to resituate international comity as a conflict of laws doctrine. Comity is important to United States courts in transnational cases and its importance will continue to grow as more international issues creep into domestic litigation. Recognizing this, the Article evaluates the recent invocation of the comity doctrine in the In re South African Apartheid Litigation, filed for alleged violations of the Alien Tort Statute and currently pending before the United States Court of Appeals for the Second Circuit. By evaluating that case and others, the Article shows that courts use the comity doctrine in many circumstances without considering its historical position as a conflict of laws doctrine. In so doing, courts gloss over the doctrine's foundation in conflicts jurisprudence, and thus give short shrift to the doctrine's main historical purpose, which was to mediate the conflict between sovereigns and their laws. This non-conflicts approach leads courts to give only cursory consideration to governmental interests and obscures the ultimate question in transnational cases where a conflict of sovereign power is presented: Is there a conflict between sovereigns that counsels in favor of judicial deference through comity? Resituating comity within the conflict of laws tradition provides a more principled basis for applying the doctrine by bringing sovereign interests to*

light. Applying comity in this way also emerges the complex political and international concerns at stake in many transnational cases.

The paper is forthcoming in the *University of California – Davies Law Review*. It can be downloaded here.

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