Commission’s Timetable for 2010-2014

The Commission has just published its Action Plan implementing the Stockholm Programme. It contains a timetable of the Commission’s actions until 2014. Here are those regarding conflict issues (if I did not miss any):

Legislative Proposals

2010

– Legislative Proposal for the revision of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I)
– Proposal for a Regulation on the conflicts of laws in matters concerning matrimonial property rights, including the question of jurisdiction and mutual recognition, and for Regulation on the property consequences of the separation of couples from other types of unions
– Proposal for a Regulation on improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts

2011

– Proposal for a Regulation amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, including establishment of common minimum standards in relation to the recognition of decisions on parental responsibility, following a report on its application (2011-2013)
– Regulation on limitation periods on cross border road traffic accidents

2012

– Proposal for Regulation amending Regulation (EC) No 1346/2000 on insolvency proceedings, following a report on its application (2012-2013)

2013

– Legislative proposal on mutual recognition of the effects of certain civil status

documents (e.g. relating to birth, affiliation, adoption, name)
– Proposal for a Regulation on improving the efficiency of the enforcement of judgements in the European Union: transparency of debtor's assets
– Legislative proposal for dispensing with the formalities for the legalisation of documents between the Member States

2014

– Legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law

Green Papers and Reports

2010

– Green paper on the free circulation of the documents: civil status documents, authentic acts and the simplification of legalisation
– Report on the assignment of claims under Regulation (EC) No 593/2008 on the law applicable to contractual relations (Rome I)

2011

– Report on application of Regulation (EC) No 1393/2007 on service of documents in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards (2011-2012)
– Report on the application of Regulation (EC) No 805/2008 on the European Enforcement Order for uncontested claims

2012

– Report on application of Regulation (EC) No 1206/2001 on the taking of evidence in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards (2012-2013)
– Report on the application of Regulation (EC) No 804/2007 on the applicable law on noncontractual obligations (Rome II)
– Report on the functioning of the present EU regime on civil procedural law across borders

2013

– Report on application of Regulation (EC) No 861/2007 establishing a European Small Claims Procedure
– Report on application of Regulation (EC) No 1896/2006 creating a European order for payment procedure
– Report on the applicable law on insurance contracts under Regulation (EC) No 593/2008 on the law applicable to contractual relations (Rome I)
– Green paper on the minimum standards for civil procedures and necessary follow up

2014

– Report on the application of the 2000 Hague Convention on the International Protection of Adults, assessing also the need for additional proposals as regards vulnerable adults
– Green paper on private international law aspects, including applicable law, relating to companies, associations and other legal persons

The Action Plan also provides for other acts such as Practice Guides, Fact Sheets and Compendia, some of which deal with conflict issues.

European Commission Plan for 2010-2014

The European Commission has published yesterday its plan to deliver justice, freedom and security to citizens in the next four years.

Here are 3 of the 10 concrete actions included in the plan which will be of interest for readers of this blog:

> ***4. More legal certainty for international marriages***
>
> *Following an EU proposal to allow international couples to choose which*

country's law applies to their divorce (IP/10/347, MEMO/10/100), the Commission will make a similar proposal this year on which law will apply when it comes to the division of couples' property during these proceedings (legislative proposal, 2010).

5. Less administrative burdens for citizens

Europeans who want to get married, adopt a child or change their civil status should not face additional administrative burdens if they are outside their home country. For example, a Finnish woman who falls in love with a man from the UK would have to submit a certificate of no impediment from the UK to get married. The UK does not provide such documents. To avoid these kinds of situations, the Commission will propose a law for the mutual recognition of certain civil status documents (legislative proposal, 2013).

6. Helping businesses to operate cross-border

If companies are to invest and operate cross-border, they need to have trust in Europe's Single Market – especially in today's economic context. At present, companies only recover 37% of cross-border debts while more than 60% of cross-border debts cannot be enforced. To address this problem and stimulate the incentive to do business cross-border, the Commission will propose legislation on a European "attachment" of bank accounts. This measure will ensure that money that is owed does not disappear (legislative proposal, 2010).

Legal certainty is crucial for motivating businesses to do commerce across borders. If you know the rules of the country where you would like to do business, you will be much more willing to offer your services/goods rather than studying different 27 regimes. These 27 contractual regimes will remain. The Commission is preparing an additional and optional contract law instrument – something similar to the US Uniform Commercial Code. Companies could then choose to apply this instrument to their contractual relations – no matter in which EU country they have their business (Communication, 2010).

The full text of the Communication of the Commission can be found here.

Thanks to Lea Salvini for the tip-off

Gaudemet-Tallon on Jurisdiction and Judgments

The much awaited fourth edition of Professor Gaudemet-Tallon's authoritative work on the European law of jurisdiction and judgments has just been published.

It is the leading French text on the topic. It only deals with civil and commercial matters, i.e. the Brussels I Regulation, the 1968 Brussels Convention, and the two Lugano Conventions.

The abstract and the table of contents can be found here.

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.