Recent Australian Journal Articles

Martin Davies, 'Reflections on the Past Decade of Transnational Litigation' (2009) 10 *Melbourne Journal of International Law* 46

The brief article begins:

> *The past decade of transnational litigation has seen a consolidation of the trend towards disputes about venue. Increasingly, transnational litigation takes the form of a battle about where the battle is to be fought.*

Cameron Sim, 'Non-Justiciability in Australian Private International Law: A Lack of 'Judicial Restraint'?' (2009) 10 *Melbourne Journal of International Law* 102

The abstract reads:

> *The involvement of foreign states in domestic courts sits at the intersection between private and public international law. Whilst courts are becoming increasingly prepared to defer underlying notions of sovereignty and territoriality to protect private rights, they remain at times hesitant in adjudicating on matters concerning foreign states. The doctrine of non-justiciability affords protection to both foreign states and the forum executive in determining that courts will not adjudicate on the transactions of foreign states. This article examines the doctrine as adopted in the United Kingdom and applied in Australia, as well as the political questions doctrine of the United states and the merits-based approach followed in Canada. The article argues that foreign states are no longer sacrosanct in Australian courts, and a correct understanding of executive certification and the Australian executive's prerogative in foreign affairs ameliorates the need for the doctrine.*

Peter Handford, 'Edward John Eyre and the Conflict of Laws' (2008) *Melbourne University Law Review* 822

The abstract reads:

> *In 1865 Edward John Eyre, the Governor of Jamaica, in the course of suppressing a revolt, caused a leading activist to be tried and executed under*

martial law. Over the next three years, a group of leading politicians and thinkers in England attempted to have Eyre prosecuted for murder. When the criminal process failed, they attempted to have him sued for trespass and false imprisonment. Though this case, Phillips v Eyre, was mainly concerned with constitutional issues, Willes J laid down a rule for choice of law in tort which endured for nearly a century before it was finally superseded. In this article, the author illuminates the case by reference to its background. The author speculates on why the decision, which initially occasioned little notice, became the subject of academic and judicial controversy many years afterwards.

Substance and Procedure: The Statute of Frauds in Australia

A recent decision of the Western Australian Court of Appeal is apparently the first Australian decision to address the correctness of the decision in *Leroux v Brown* (1852) 12 CB 801; 138 ER 1119 after the High Court of Australia's decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which adopted a wider definition of 'substance' for the purposes of characterisation than had previously been the case. *Leroux v Brown* had determined that s 4 of the *Statute of Frauds* (UK) was procedural, and that an oral agreement made in France was not enforceable in England despite being enforceable under its proper law.

The recent case concerned an oral contract of guarantee whose proper law was in dispute: if the law of Western Australia applied, an equivalent to s 4 of the Statute of Frauds would bar the plaintiff's claim; whereas no such bar existed under the law of New South Wales. Characterisation and choice of law were therefore of equal practical importance: if the proper law were that of NSW and *Leroux and Brown* were not good law, the plaintiffs would succeed.

As it turned out, McLure JA (with whom Wheeler and Newnes JJA agreed) decided that the proper law of the contract was the law of WA, and that *Leroux v Brown* was no longer good law in Australia after the decision in *John Pfeiffer*. Thus, the

Statute of Frauds applied as substantive law, and plaintiff's claim was barred.

Tipperary Developments Pty Ltd v The State of Western Australia [2009] WASCA 126 (22 July 2009)

Foreign-Domiciled Testators: Jurisdiction over Family Maintenance Claims

In each of the Australian states, legislation exists to recognise that testators have a moral duty to make provision in their wills for certain kinds of dependents and other claimants, and to empower such claimants to make claims upon the estate of testators who failed to make appropriate provision in their wills. The relevant NSW legislation is now ch 3 of the *Succession Act 2006* (NSW) (but the *Family Provision Act 1982* (NSW) continues to apply to the estates of testators dying before 1 March 2009),which is similar to its interstate equivalents, although the precise details and the width of the category of eligible claimants vary from state to state. Complicated jurisdictional and choice of law questions can arise depending on the domicile of the testator and the location of the relevant property.

A recent case before Brereton J in the NSW Supreme Court concerned the application of Family Provision Act to the estate of a couple who died domiciled in Malta, leaving real and personal property in Malta and in NSW. The couple's adult children made a claim under the Family Provision Act to real property situated in NSW. In his Honour's usual style, the judgment contains a helpfully concise summary of the applicable law (at [26]):

> *"In those circumstances the relevant law is, as stated by Scholl J in Re Paulin [1950] VLR 462 at 465, that in connection with the application of testator's family maintenance legislation, first, the Courts of the domicile alone can exercise jurisdiction under the testator's family maintenance legislation of the*

domicile in respect of movable and immovable property in the place of domicile; secondly, the Court's of the domicile alone can exercise such jurisdiction in respect of movable property of the deceased outside the place domicile; but thirdly, Courts of the situs alone can exercise such jurisdiction in respect of immovable property of the deceased out of the place of domicile, and Courts of the place of domicile cannot exercise such jurisdiction [see also Pain v Holt (1919) 19 SR (NSW) 105; Re Sellar (1925) 25 SR (NSW) 540; Re Donnelly (1927) 28 SR (NSW) 34; Re Osborne [1928] St R Qd 129; Re Butchart [1932] NZLR 125, 131; Ostrander v Houston (1915) 8 WWR 367; Heuston v Barber (1990) 19 NSWLR 354; Balajan v Nikitin (1994) 35 NSWLR 51]. It follows that any order made by this Court can affect only immovable property of the deceased in New South Wales; it cannot affect movable property in New South Wales, nor any property outside the State. However, in deciding what order should be made affecting immovable property in New South Wales, the Court is entitled nonetheless to take into account assets beyond the reach of its jurisdiction which inform the extent to which eligible persons and beneficiaries and others having claims on the deceased's testamentary bounty have and will receive provision. The Court can also take into account assets beyond the reach of the jurisdiction in deciding what order to make in respect of costs relating to the assets in the jurisdiction [see Re Paulin and Re Donnelly]."

Taylor v Farrugia [2009] NSWSC 801 (5 June 2009)

Brussels I Regulation – The UK Parliament has its say

The House of Lords' influential European Union Committee (chaired by Lord Mance) has published a report on the Commission's Green Paper on the Brussels I Regulation. The report scrutinises the Green Paper, in light of evidence presented by representatives of the UK Ministry of Justice (Lord Bach and Oliver Parker) and Richard Fentiman of Cambridge University, and considers all of the

topics raised by the Commission (and discussed on these pages). The evidence is appended at the back of the report.

The Committee's conclusion (in contrast, for example, to its view on the proposed Rome II Regulation) is favourable:

> *We very much welcome the Commission's initiative in producing the Report and the proposals outlined in the Green Paper. While the Regulation has been successful, in particular by introducing clear common rules, there have undoubtedly been areas where some of the rules have, in practice, opened up the possibility for abuse contrary to the interests of justice. This opportunity should be taken to reform the rules with the aim of minimising abuse and to make other useful reforms. We hope the Commission will, following the conclusion of its consultation, move quickly to bring forward proposals to amend the Regulation.*

The report is an important contribution to the debate surrounding the proposed reforms to the Brussels I Regulation, and emphasises the need to extend the consultation process beyond any Proposal by the Commission to allow all stakeholders to contribute to the improvement of this, the central instrument of European private international law.

BIICL event: Lis Pendens in International Litigation

The British Institute of International and Comparative Law (BIICL) hosts an event titled **"Lis Pendens in International Litigation"** as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? The question of international lis pendens has long been controversial, but has taken on new and urgent importance in our age. Globalization has driven an unprecedented rise in forum shopping between

national courts, but also the proliferation of new international tribunals has brought with it new challenges of interaction in today's fragmented international legal system. The response to these challenges also has profound theoretical implications for the interaction of legal systems in today's pluralistic world. This seminar will analyse the problems of parallel litigation across the landscape of international litigation – from private international litigation, through international commercial arbitration and investment treaty arbitration, to public international law.

Venue: The venue is Charles Clore House, 17 Russell Square, London, WC1B 5JP.

Date: Tuesday 27 October 2009 17:30 to 19:30

Chair: The Rt Hon Lord Collins, Lord of Appeal in Ordinary
Speaker: Campbell McLachlan QC, Professor of Law at Victoria University of Wellington; member of Bankside Chambers and Auckland & Essex Court Chambers, London

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Hague Academy, Summer Programme for 2010

The summer is coming to an end. So it is already time to think about next summer.

In case you are already checking for flights and hotels at your favorite sea resort in July 2010, the Hague Academy has already posted the details of its next Summer Programme.

Most unfortunately, however, the registration office is closed until September 21st, which does not help those of us wishing to prepare reasonably in advance their holidays.

Private International Law

5 – 23 July 2010

E=English, **F=**French

Michael BOGDAN, Professor at Lund University, Sweden

General Course (E) *Private International Law as a Component of the Law of the Forum*

Roberto BARATTA, Professor at the University of Macerata, Italy

Special Course (F) *The International Recognition of Personal and Family Legal Situations*

Abdoullah CISSÉ, Professor at the University of Saint-Louis, Senegal

Special Course (F) *Evolving Private International Law in Francophone Black Africa (Interpersonal Conflicts and Interprofessional Conflicts)*

Noemi DOWNES, Professor at the University of La Laguna, Canary Islands

Special Course (E) *Foreign Second Homes and Timesharing: Lessons For Private International Law*

Nadia DE ARAÚJO, Professor at the Pontifical Catholic University of Rio de Janeiro, Brazil

Special Course (E) *International Contracts and Party Autonomy*

Jeffrey TALPIS, Professor at the University of Montreal, Canada

Special Course (F) *The Transmission of Property at Death other than by Succession in Private International Law*

Johan ERAUW, Professor at Ghent University, Belgium

Special Course (E) *Substitution and Principle of Equivalence in Private International Law (F)*

Léna GANNAGÉ, Professor at the University Panthéon-Assas (Paris II), France

Special Course (F) *The Methods of Private International Law put to the Test of Conflicts of Cultures*

All the lectures delivered in French, will be simultaneously interpreted into English

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Opinion of the Comittee of the Regions on Consumer Rights: quite a critical view on the Proposal for a Directive of the European Parliament and of the Council on consumer rights

The opinion of the Committee of the Regions on Consumer Rights has been published in today's OJ, C 200/76. Notwithstanding the approval of the Commissions proposal aiming to consolidate existing consumer protection directives into a single set of rules (8 october 2008) the Committee expresses a quite critical opinion on several basic points of the proposal, such as the scant number of directives subject to revision, the definition of fundamental terms ("consumer", "trader"), or the provisions relating to general information requirements. More interesting from a PIL point of view is the serious criticism addressed against the proposals axis idea, that of full harmonisation: the

Commission having so far failed to give cogent reasons for swichting to full harmonisation in this area, it does not appear to be strictly necessary, seems inconsistent with the basic tenets of subsidiarity, and implies that the Member States may have to sacrifice particular consumer protection provisions, even where these have proved effective in the country concerned. The Committee also has its doubts as to whether full harmonisation will boost consumer confidence and foster competition, considering that up to now, consumer difficulties have mostly been caused by the uncertainties and complexities of law enforcement in cross-border trade (language barriers, legal fees, courts costs, etc.) which are not removed by the proposed directive. The Committee holds to the idea that full harmonisation should be considered selectively, i.e. in specific technical cases only, where the different national provisions in place are genuinely placing a burden on cross-border businesses, or represent a substantial obstacle to achieving the four freedoms of the European Union: full harmonisation should therefore be applied in just a few core areas of the internal market.

Note: a quite expressive title, "Cronica de una muerte anunciada: the Commission Proposal for a Directive of Consumer Rights", from H. W. Micklitz and N. Reich, can be read in Common Market Law Review, 2009 (vol. 46).

Second Issue of 2009's Revue Critique de Droit International Privé

The second issue of the *Revue Critique de Droit International Privé* was released earlier this month.

It contains three articles, but only two deal with conflict issues.

The first is authored by Tunisian professor Sami Bostanji. It addresses the

Survival of Communitarism in Judicial Application of Tunisian Private International Law (*La survivance du communautarisme dans l'application judiciaire du droit international privé tunisien*). Here is the English abstract:

> *Despite the efforts afforded by codification to modernise and rationalise private international law in Tunisia, later case-law bears witness to the survival of communitarism, through a practice inspired by the idea that each individual "belongs" to a differentiated community. This approach favors discontinuity between different legal orders to the detriment of individual rights, and disregards the important objective of coordinating legal systems. It looks much like traditional religious communitarism, for instance in the treatment of relationships between spouses or between parents and children (adoption, custody, etc…), But it also takes on the form of nationalistic communitarism, which ignores or even violates the codified rules of private international law.*

The second article is authored by Carlos Alberto Arrue-Montenegro, a scholar from Panama, and discusses the economic rationale of a recent Panama statute as far as choice of court agreements in admiralty matters are concerned (*Les orientations économiques du droit maritime international de Panama en matière d'accord de juridiction. A propos de la loi n°12 du 23 janvier 2009 modifiant la loi panaméenne procédure maritime*). Unfortunately, no abstract is provided.

Articles of the *Revue Critique* cannot be downloaded.

Chinese Judgment Enforced in the United States

On August 12, 2009, the United States District Court for the Central District of California issued a judgment enforcing a $6.5 million dollar Chinese judgment against an American corporate defendant under California's version of the Uniform Foreign Money Judgments Recognition Act. The court's full decision is available here.

This case is unique because it is generally believed that United States courts will not enforce Chinese judgments given the lack of a treaty between the two countries on the issue and given that Chinese courts generally do not enforce United States judgments in China, which limits the argument for reciprocity in the United States. Given this decision, California may become a favorable forum for enforcement of Chinese judgments in the United States.

PIL conference @ UJ

The final programme for the PIL conference at the University of Johannesburg, 8-11 Sept 09, is now available at www.uj.ac.za/law.