On the Desirability of the Alien Tort Statute

> *Judicially made corporate human rights litigation is a luxury we can no longer afford.*

This is the conclusion of an op-ed (Rights Case Gone Wrong) published yesterday in the *Washington Post* by two leading American international law professors, Curtis Bradley (Duke) and Jack Goldsmith (Harvard).

An interesting debate is now following at opiniojuris between the supporters and the critics of the Alien Tort Statute: see the comments of, inter alia, Kevin Jon Heller, Julian Ku, Kenneth Anderson and Eric Posner.

New publication on Israeli PIL

Private International Law in Israel

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Israel's PIL is not codified, nor is it clearly traceable to any one legal system. Since the style and method of legal development in Israel has primarily followed the tradition of the common law, the author first critically analyzes the case law to draw the pertinent rules. However, the study does not confine itself to the rules already existing in Israeli PIL, but establishes rules in areas where such are missing, guided by the methods and principles which the court and legislature would have adopted had they been confronted with these problems.

Subjects covered in the book include:
– national and international sources of Israeli PIL;
– types of choice-of-law rules;
– characterization of legal matters;
– natural and legal persons;
– contractual and non-contractual obligations;
– property law (movables, immovables, trusts, cultural property)
– intellectual and industrial property rights;
– companies organized under the civil or commercial law of any state;
– insolvency;
– family law and succession;
– scope of international jurisdiction in Israeli courts;
– proof of foreign law;
– judicial assistance;
– recognition and enforcement of foreign judgements;
– international arbitration; and
– the role of literature and legal doctrine.

Conference: The Future of Transnational Litigation

The Future of Transnational Litigation Conference will be taking place in Vienna, Austria on 4-5 June 2009. The organizer is the International Bar Association. Topics will include:

- The future for international litigation in Europe: revising the Brussels Regulation
- A role-playing exercise in which an international client, general counsel and lead external counsel consider where to bring suit to recover damages from a multi-national price fixing cartel and counsel from potential venues make the case for bringing suit in their respective fora
- Recent developments in choice of law clauses in international contracts and the case for a new global instrument
- Cross-border litigation: developments in US law

For more information, have a look at the conference website.

CLIP Principles for Conflict of Laws in Intellectual Property: First Preliminary Draft

The European Max-Planck Group for Conflict of Laws in Intellectual Property, or simply CLIP, has published the first version of their Principles which are available for download at their web page. The purpose of publishing the First Preliminary Draft is to invite scholars and practitioners outside the Group to make suggestions or advance critical remarks in regard to the proposed rules on international jurisdiction, applicable law, and recognition and enforcement of foreign decisions in matters of intellectual property. They expect to bring foraward the Second Draft by the end of October 2009, while the final version of the Principles accompanied with the commentary is planned to be published next year.

Lawrence Collins Appointed to the House of Lords

It does not seem very long ago that we announced the appointment of Sir Lawrence Collins (co-author and General Editor of Dicey Morris and Collins: *The Conflict of Laws*) to the Court of Appeal; and, in fact, it wasn't. After two years sitting as a Lord Justice of Appeal, Sir Lawrence has been appointed a Lord of Appeal in Ordinary, and will replace Lord Hoffman (who is retiring) on 20th April 2009. Here is, in relevant part, the rest of the press release:

> *Lord Justice Lawrence Antony Collins (67) was admitted as a solicitor in 1968, took Silk in 1997 and was appointed a Deputy High Court Judge in 1997. He was appointed to the High Court in 2000 and made a Bencher (Inner Temple) in 2001. He was appointed to the Court of Appeal in 2007. He has been a Fellow of Wolfson College, Cambridge since 1975 and a Fellow of the British Academy since 1994. Lord Justice Collins was knighted in 2000.*
>
> *Lord Justice Collins…will become a Justice of the Supreme Court of the United Kingdom when it is launched on 1 October 2009. On that date The Right Honourable Lord Phillips of Worth Matravers will become the President of the Supreme Court and the Law Lords will become Justices of the Supreme Court.*

Sir Brian Kerr will be replacing Lord Carswell on 28th June 2009.

Manitoba Law Reform Commission

Releases Report on Private International Law

The province of Manitoba's Law Reform Commission has released a report on Private International Law (available here). It considers three central issues:

1. Should legislation be adopted to modify the common law choice of law rule for torts as formulated in *Tolofson v. Jensen*?

2. Should legislation be adopted regarding the characterization of limitation periods?

3. Should Manitoba adopt the Uniform Law Conference of Canada's model Court Jurisdiction and Proceedings Transfer Act?

A secondary question under the first issue is how similar the legislation should be to the English PIL(MP)Act 1995.

Journal of Private International Law Conference 2009 at NYU

There are just a few places left at the Journal of Private International Law Conference 2009 – to be held at NYU from 16th – 18th April – so (if you wish to attend) I suggest that you book with all due speed.

I shall be attempting to 'live blog' the conference, alerting readers to the main points and themes from each panel. It promises to be a fantastic event, and I hope to see many of you there.

EC Signs Hague Choice of Court Convention

On 1st April 2009, the Czech Minister for Justice signed the Convention on behalf of the European Community (see the proposal to do so here). Negotiations on the Convention at the Hague were carried out ostensibly under shared competence between the EC and the Member States, but in the wake of Opinion 1/03, of course, the Community has exclusive competence to ratify the Convention. In other words, it does not need to be signed by the Member States (i.e. we're stuck with it, whether we like it or not.) Denmark, however, will not be bound.

~~You will remember that~~ Mexico ~~and the~~ USA ~~have already signed the Hague Choice of Court Convention, and with the EC joining that exclusive club only one more ratification is needed for the entry into force of the Convention~~. My attention has been drawn to the fact that the above statement is vague at best, and misleading/confusing/wrong at worst. Apologies; allow me to rework: the Hague Convention requires *two* ratifications or accessions to enter into force (Art 31(1)). So far, only Mexico has acceded to the Convention, and no State has ratified it. If either the EC or US ratify it (having already signed it), or a non-signatory State accedes to it, or another Hague member state signs and ratifies it, then the Convention will enter into force (thanks Andrew and Ralf.)

(Many thanks to everyone who emailed/commented to let us know; much appreciated.)

ECJ: Judgment on Brussels II bis (A)

On 2 April 2009, the ECJ has delivered its judgment in case C-523/07 (*A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-*

oikeus, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard to the interpretation of the Brussels II *bis* Regulation. Thus, it referred four questions to the ECJ for a preliminary ruling.

With the **first question** referred to the ECJ, the Finnish court basically asks whether Article 1(1) of the Regulation is to be interpreted to the effect that, first, it applies to a single decision ordering a child to be taken into care immediately and placed outside his original home and, second, that decision is covered by the term 'civil matters' for the purposes of that provision, where it was adopted in the context of public law rules relating to child protection. Since the exact question had been dealt with already in case C-435/06 (*C*) – the first judgment on the Brussels II *bis* Regulation (see with regard to this case our previous post which can be found here) – the ECJ referred to its decision in this case and held that

> *Article 1(1) of [the Brussels II bis Regulation] must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.*

The **second question** aims at the definition of "habitual residence" in terms of Art. 8 Brussels II *bis* – in particular in a situation in which the child has a permanent residence in one Member State but is staying in another Member State carrying on a peripatetic life there. With regard to this question the Court held that

> *the concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and*

reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

With its **third question**, the referring court asks first the conditions to which the adoption of a protective measure such as the taking into care of children is subject under Article 20(1) of the Regulation. Secondly, the Finnish court wishes to know whether such a measure may be applied in accordance with national law and whether those provisions are binding. Thirdly, the court asks whether the case has to be transferred to the court of another Member State having jurisdiction after the protective measure is taken. In this respect the ECJ held:

A protective measure, such as the taking into care of children, may be decided by a national court under Article 20 of Regulation No 2201/2003 if the following conditions are satisfied:

– the measure must be urgent;

– it must be taken in respect of persons in the Member State concerned, and

– it must be provisional.

The taking of the measure and its binding nature are determined in accordance with national law. After the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, in so far as the protection of the best interests of the child so requires, the national court which has taken provisional or protective measures must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.

By means of the **fourth question**, the *Korkein hallinto-oikeus* asks whether a court of a Member State which has no jurisdiction at all must declare that it has no jurisdiction or transfer the case to the court of another Member State. Here, the Court held as follows:

> *Where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.*

See with regard to this case also our previous posts on the reference as well as Advocate General Kokott's opinion.

Canadian National Class Action Judgment Not Recognized in Quebec

The Supreme Court of Canada has confirmed the decision of the Quebec Court of Appeal in *Canada Post Corp. v. Lepine* (available here). The decision flows from Canada Post's termination, after only a year, of a lifetime internet service it sold to customers. This led to class proceedings in Quebec and Ontario. While aware of the proceedings in Quebec, the parties settled the class proceedings in Ontario in a judgment that purported to cover residents of Quebec. When the Quebec proceedings continued (due to dissatifaction with what was obtained under the Ontario settlement) the defendant sought to have the Ontario judgment recognized in Quebec.

Recognition of foreign judgments in Quebec is governed by Art 3155 of the Civil Code, and so this case is very centrally concerned both with civil law (rather than common law) and with interpreting the specific provisions of the Code. Art 3155 provides several bases for refusing to recognize a foreign judgment (see para.

22).

The first issue is whether the Ontario court had jurisdiction to grant the judgment. The Supreme Court of Canada devotes the most attention to this issue because it raises an interesting question within Quebec's law on recognition. Quebec uses the "mirror principle" for assessing jurisdiction, and so would consider whether the foreign court had taken jurisdiction in accord with Quebec's own approach to taking jurisdiction. That approach includes the doctrine of forum non conveniens. So this raised the issue of whether the Quebec court could hold that, because Ontario did not stay the proceedings at least as they concerned residents of Quebec, it did not have jurisdiction in the sense contemplated by the Code (para. 27). The Supreme Court of Canada rejects this approach: forum non conveniens issues are not to be considered in assessing the foreign court's jurisdiction (paras. 34-37). The Ontario court had jurisdiction.

The second issue is whether the Ontario judgment contravened fundamental principles of procedure. Here the court holds that the class proceeding notices provided to residents of Quebec under the Ontario judgment were deficient. On the facts, this is an understandable conclusion: there is no question that the notices could have been clearer, especially as concerned the relation between the Ontario and Quebec proceedings (para. 45). This conclusion, in itself, is sufficient to resolve the case.

Third, Art 3155 provides a defence to recognition where essentially the same proceeding as that giving rise to the judgment is pending before the Quebec courts. Canada Post had advanced its argument based on a somewhat technical distinction between a proceeding seeking certification for a class action and the subsequently-certified action (para. 53) but the court rejected this distinction (para. 54). This aspect of the decision, interpreting Art 3155(4), could prove very important to the future of so-called national class actions in Canada, since it would then seem that as long as proceedings had started in Quebec, a decision from another province purporting to cover Quebec residents in the same class action would not be recognized in Quebec. This gives residents of Quebec a protection residents of the other provinces do not have.

This is a welcome decision on the first issue, an understandable decision on the second issue, and a decision that requires more consideration on the third issue.