Article on choice of law for intra-Australian torts after the civil liability legislation

Professor Martin Davies, co-author of the leading text on Australian private international law (Nygh and Davies, *Conflict of Laws in Australia*, now in its 7th edition (2002)), has an article in the most recent *Torts Law Journal*. It concerns the choice of law issues which have been created by the various Acts passed by the Australian states and territories to reform aspects of Australian tort law. As the abstract explains:

> *The civil liability legislation passed by the states and territories in the early part of this decade was not uniform in form or effect. As a result, choice of law in intra-Australian torts cases has been given a new lease of life. The lex loci delicti (law of the place of the wrong) choice of law test adopted by the High Court in John Pfeiffer Pty Ltd v Rogerson applies only to questions of substance. Thus, it is now necessary to ask whether the statutory reforms made by the civil liability legislation are substantive or procedural. This article suggests some tentative characterisations. No generalisations are possible because each statutory rule must be characterised individually. Because some of the statutory reforms seem clearly to be procedural, they create a new incentive for plaintiffs to go forum-shopping for a jurisdiction that provides a more favourable environment for their claims. Defendants can only protect themselves against that forum-shopping by applying for a venue transfer under the cross-vesting legislation. There is uncertainty about the operation of that legislation, too. Thus, a new set of unsettled questions has been melded to an existing area of uncertainty. The result is a fertile source of disagreement and future litigation.*

The article is both interesting and of use to practitioners. The citation is Martin Davies, "Choice of Law after the Civil Liability legislation" (2008) 16 *Torts Law Journal* 10.

UK Regulations Implementing Rome II Regulation Adopted

As pointed out by Andrew Dickinson on the BIICL-PRIVATEINTLAW list (the mailing list promoted by the British Institute of International and Comparative Law, devoted to conflict matters), on 18 November 2008 were laid before the UK Parliament the Regulations implementing the EC Rome II Regulation in England, Wales and Northern Ireland (the Scottish Parliament is expected to legislate separately for Scotland).

The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (S.I., 2008, No. 2986), dated 12 November 2008, were made by the Secretary of State, as designated by the European Communities (Designation) (No.2) Order 2008 no. 1792 to exercise the powers conferred by section 2(2) of the European Communities Act 1972 (c. 68) in relation to private international law (readers who are unfamiliar – as I am – with the implementation of EC Law in the UK by means of statutory instruments may find useful this Wikipedia page and the Explanatory Memorandum to the European Community (Designation) (No. 2) Order 2008).

Here's an excerpt of the Explanatory Note to the implementing Regulations; most notably, **the application of the conflict rules provided by the EC instrument is extended to intra-UK conflicts**:

> *The purpose of these regulations is two-fold. The first is to modify the relevant current inconsistent national law in England and Wales and Northern Ireland. Regulations 2 and 3 restrict the application of the general statutory choice of law rules in this area. These are contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Regulation 4 restricts the application of certain provisions in the Foreign Limitation Periods Act 1984 and regulation 5 restricts the application of analogous provisions in the Foreign Limitation Periods (Northern Ireland) Order 1985.*
>
> *The second purpose involves extending the application of the Regulation to*

certain cases that would otherwise not be regulated by it. These are cases where in principle the choice of applicable law is confined to the law of one of the United Kingdom's three jurisdictions, that is England and Wales, Scotland and Northern Ireland, and to the law of Gibraltar. These cases therefore lack the international dimension which is otherwise characteristic of cases falling under the Regulation. Under Article 25(2) of the Regulation Member States are not obliged to apply the Regulation to such cases. To maximise consistency between the rules that apply to determine the law applicable to non-contractual obligations, regulation 6 of these regulations extends, in relation to England and Wales and Northern Ireland, the scope of the Regulation to conflicts solely between the laws of England and Wales, Scotland, Northern Ireland and Gibraltar.

The Regulations, subject in the Parliament to the negative resolution procedure, will enter into force on 11 January 2009 (the same date as the Rome II Reg.: see its Art. 32, and the comments to our previous post here). The text is available on the Office of Public Sector Information (OPSI) website.

Propositions of EGPIL on the Extension of Brussels I to Relations with Third States

The report of the 18th meeting of the European Group for Private International Law, which was held in Bergen in September 2008, is now available in French on the site of the EGPIL.

The Group makes several propositions regarding a possible extension of the Brussels I Regulation to relations with third states.

The Group also discussed other topics, including the law applicable to maritime torts.

Enforcement of Foreign Judgments in Australia

A recent judgment of the Supreme Court of Victoria provides a useful short summary of the operation of the *Foreign Judgments Act 1991* (Cth) and the circumstances in which registration of a foreign judgment can be set aside on public policy grounds: *Jenton Overseas Investment Pte Ltd v v Townsing* [2008] VSC 470 (11 November 2008).

Whelan J refused an application to set aside the registration of a judgment of the Singapore Court of Appeal, and observed that:

> *"the courts are slow to invoke public policy as a ground for refusing recognition or enforcement of a foreign judgment. There are few instances in which a foreign judgment has not been recognised or enforced on this ground. There are good reasons for this. There are … the "interests of comity" to maintain. The respect and recognition of other sovereign states' institutions is important. This is especially so when acting under the Foreign Judgments Act where the registration and enforcement procedures apply on the basis that there is "substantial reciprocity of treatment" for Australian judgments in the foreign forum. There is also a need for caution because of the inherent volatility of the notion of "public policy"." At [20]*

> *"[S]ubstantial injustice, either because of the existence of a repugnant law or because of a repugnant application of the law in a particular case, may invoke the public policy ground. But it will only do so where the offence to public policy is fundamental and of a high order. For the public policy ground to be invoked in this context enforcement must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs." At [22]*

Forum Non Conveniens and Foreign Law in Australia

The High Court of Australia has handed down judgment in Puttick v Tenon Limited (formerly called Fletcher Challenge Forests Limited) [2008] HCA 54 (12 November 2008), the most recent High Court case to consider stay of proceedings and choice of law in an international tort case. The High Court unanimously reversed the Victorian Court of Appeal and held in two joint judgments (French CJ, Gummow, Hayne and Kiefel JJ; and Heydon and Crennan JJ) that the Supreme Court of Victoria was not a clearly inappropriate forum, the test in Australia for forum non conveniens.

The suit was brought by a man who was exposed to asbestos while visiting factories in Belgium and Malaysia in the course of his employment by a New Zealand-based company. At the time, the man was resident in New Zealand. The man subsequently moved to Victoria, and he sued in the Supreme Court of Victoria after contracting mesothelioma. After his death, his wife was substituted as plaintiff. The Supreme Court and the Court of Appeal (by majority) concluded that Victoria was a clearly inappropriate forum and stayed the proceedings (see Perry Herzfeld's earlier post here). The Court of Appeal majority had concluded that the applicable law was that of New Zealand and that this, combined with other factors such as the location of witnesses and defendants, rendered Victoria a clearly inappropriate forum. This conclusion was then reversed by the High Court on the plaintiff's appeal.

French CJ, Gummow, Hayne and Kiefel JJ held that, in light of the state of the pleadings and the evidence,

> *"the Court of Appeal (and the primary judge) erred in deciding that the material available in this matter was sufficient to decide what law (or laws) govern the rights and duties of the parties. Rather, each should have held only that it was arguable that the law of New Zealand was the law that governed the determination of those rights and duties. Each should have further held, that*

> *assuming, without deciding, that the respondent was right to say that the parties' rights and duties are governed by the law of New Zealand, the respondent did not establish that Victoria is a clearly inappropriate forum." At [2]*

Their Honours added that:

> *"The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction. Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the lex causae as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute." At [31]*

By contrast, Heydon and Crennan JJ appear to have taken a less absolute approach to the relevance of a foreign lex causae:

> *"The question of the lex causae can be relevant to the question whether Victoria is a clearly inappropriate forum. If the lex causae were New Zealand law, that would make a stay more likely, though not inevitable. But the question of what the lex causae is ceases to be relevant if it is impossible to say what it is. And the question remains irrelevant even if New Zealand law "might be" a candidate, or is "a very strong candidate", for ex hypothesi it is impossible to say whether New Zealand law is in truth the lex causae." At [49]*

Their Honours concluded that, even though "New Zealand is an appropriate forum, … other factors indicate that Victoria is not clearly inappropriate." At [51]

Although the course of argument in Puttick may not have been quite what the parties and some commentators were expecting — the decisive issues were not raised by the Court until after the conclusion of oral argument — on one level the result is unsurprising considering the High Court's previous decisions in the area of tort and private international law: as cases like Oceanic Sun, Zhang, Neilson and Puttick demonstrate, it is almost impossible for a defendant to succeed in a forum non conveniens application against an Australian-resident plaintiff in a

torts case, regardless of how slight the case's connection to Australia, and regardless of how compelling the apparent factual connection to an overseas jurisdiction may be. After all, the plurality in Puttick concluded that "even if the lex causae was later shown to be the law of New Zealand, that circumstance, coupled with the fact that most evidence relating to the issues in the case would be found in New Zealand, did not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum." At [32].

The more troubling aspect of the decision in Puttick is the practical interrelationship between the test for forum non conveniens and the rules about pleading and proving foreign law. Because plaintiffs in Australia have no obligations to allege, plead or prove foreign law — and because Australian choice of law rules are not mandatory — they have no incentive to draft a pleading that clearly discloses a foreign lex causae (whether expressly or by factual implication). To the contrary, they have every incentive to draft bland and incomplete pleadings that avoid clear references to a foreign lex causae.

Defendants are thereby placed in an invidious position: if they do nothing in response to such an unclear pleading, a successful forum non conveniens application will be precluded because of the plaintiff's lack of clarity; but if they elucidate the foreign lex causae by putting on a defence, they will have submitted to the jurisdiction, thereby rendering any jurisdictional challenge nugatory.

Heydon and Crennan JJ seem to have been alive to this difficulty and, citing *Buttigeig v Universal Terminal & Stevedoring Corporation* [1972] VR 626, observed that it will sometimes be possible to look through an artificial pleading to see the underlying substance:

> *"A conclusion reached on a stay application about what the proper law of a tort is will normally only be a provisional conclusion: it will be a conclusion open to alteration in the light of further evidence called at the trial. A judge considering a stay application may be able to determine the location of the alleged tort despite somewhat unreal or artificial contentions in the pleadings." At [36].*

By contrast, no such statement appears in the plurality judgment, which appears very much to focus on the literal words of a plaintiff's pleading.

Puttick therefore represents one more step in the slow death of forum non

conveniens in Australia. The references in both judgments to vexation and oppression suggest the likely direction of future cases: under the general law of civil procedure, a vexatious or oppressive pleading can be struck out independently of any jurisdictional complaint; but unless a pleading is so manifestly defective as to fall foul of the general tests of vexation and oppression it is now unlikely that a court will ever issue a stay on jurisdictional grounds.

Whether this state of affairs is desirable — and whether it is consistent with the decision in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 — is a topic on which minds may disagree. French CJ, Gummow, Hayne and Kiefel JJ flatly rejected the respondent's invitation to restate the test in Voth, but Heydon and Crennan JJ appeared to be more receptive to an invitation to reconsider Voth were it to arise in an appropriate case.

Likewise, unlike the plurality, Heydon and Crennan JJ seem to have recognised the apparent inconsistency between the Voth test and its subsequent treatment in *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, particularly the difference between a balancing exercise and a bright-line rule about vexation. Their Honours implicitly favoured the test as expressed in Voth (and not its reinterpretation in Zhang) by engaging in the very sort of contextual balancing exercise that had been disapproved of so strongly by the majority in Zhang.

If the High Court is presented with a case that squarely raises the issue of the correctness or desirability of the Voth test, it may be that these apparent differences of opinion will be highlighted more clearly.

Conference on punitive damages at Vienna

A Conference on Punitive Damages, organised by the Institute for European Tort Law, was held last Monday in Vienna. Aiming to study the nature, role and suitability of punitive damages in tort law and private law in general, this one-day

conference got together a panel of scholars and practitioners from different countries: some where punitive damages are approved (England, the United States and South Africa), as well as others (France, Germany, Italy, Spain, Hungary and the Scandinavian countries) where they are rejected -at least, formally rejected. The position of EU law was considered too. The Conference also included a report on punitive damages from a Law and Economics perspective, another on the the insurability of such damages, and a brief presentention from a Private International Law point of view. The Conference will be published soon in a book titled "Punitive Damages: Common Law and Civil Perspectives" (H. Koziol and V. Wilcox eds).

As a PIL academic with a continental education, and also because I have already worked on the topics of service of process of punitive damages claims and the recognition of foreing punitive damage awards, the most interesting panels for me were those dedicated to England and USA and to the evolution of the figure in both jurisdictions. In this respect, a common feature in the recent past is the trend to rationalize and restrict the pronouncements of punitive damages. The constitutionaly of punitive damages has been (and is being) discussed in the USA, given the fact that despite their proximity to criminal issues, they are granted without the guarantees required in criminal contexts. In fact, a change is already taking place under 14th Amendment of the Constitution: the due process clause is being used in order to derive substantial and procedural limits to condemnations of punitive damages. The formula is articulated through judicial decisions of higher courts that correct those of lower courts. Several decisions can be pointed out as milestones: *BMW of North America v. Gore* (1996); *State Farm Mutual Automobile Insurance Co v. Campbell et al*. (2003); and *Philip Morris v. Williams (*2007). In the first decision the Federal Supreme Court ruled that the amount of the punitive damages award was disproportionate, and impossible that the defendant could have foreseen them as a result of his conduct: for these reasons the award would be contrary to the due process clause. Based on this finding, the Supreme Court proceeded to set three criteria for studying the constitutional compatibility of punitive damages: the degree of reproach of the defendant's conduct; the reasonableness of the relationship between the amount of compensatory damages and punitive damages; and the size of criminal penalties for comparable conduct. In *State Farm v. Campbell*, the Supreme Court set a rule concerning the ratio of punitive damages to compensatory damages: the former should not exceed the amount resulting of multiplying the latter by a figure

greater than 0 and less than 10 (rule of “single-digit multiplier”). The Court added that the wealth of the agent causing the damage should not be taken into account; and rejected the so-called “total harm theory”, under which when sentencing to punitive damages, damages that could have been suffered by victims other than the applicant’s are also to be considered.

Also in the UK punitive or exemplary damages have been called into question: the Law Commission impact study started in 1993 and completed in 1997 gives proof. But in fact, the restrictive pattern was identified in England long before the 90, and its results are more intensive than those reported for USA. Already in 1964, in the case *Rooker v. Barnard*, exemplary damages were described as “unusual remedy” that should be restricted as far as possible (meaning, if permitted by the respect due to the precedent). This will has lead to what sometimes may seem an excessive limitation: it is striking that a demand for punitive damages will not prosper in cases highly reprehensible according to current parameters, such as discrimination based on sex.

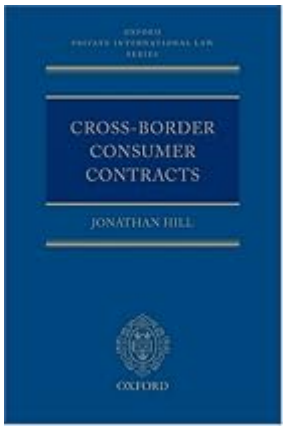
A better knowledge and understanding of punitive damages is certainly required when it comes to PIL. One of the main differences between the two major current civil liability models (those of Anglo-Saxon origin, and the so-called “civil” systems) lies in the fact that where the “civil” systems limit the function of civil liability to repairing or compensating for damages, the commn-law model admits other purposes: sentences must show that damaging conduct is not worth the risk (*tort does not pay*) and discourage its repetition. The relationship between civil liability and compensation, and nothing more than compensation, is so deeply rooted in the Continent, that it not only excludes the possibility of pronouncing sentences of punitive damages in domestic cases: the idea is projected beyond, to cross-border cases. European jurisdictions have therefore refused recognition of foreign judgments awarding punitive damages, arguing that it would be contrary to public forum. In some countries even service of process of a claim raised in the USA has been refused, thus denying basic cooperation with foreing justice. Nevertheless, we can not talk of a unique, unanimous attitude throughout Europe: whilst recognition of a USA punitive damage award has been rejected in both Germany and Italy, Greece (lower Greek courts) and Spain have reacted the other way round.

I seriously doubt whether German or Italian posture could still be held against an English request of service of process, or a request for recognition of an English

punitive damage award. Nowadays, service of process cannot be refused: Regulation 1393/07 applies, and there is no escape device (the public policy clause is no longer included). As for recognition, the scene is a little bit more complicated. Two EC Regulations may apply. The ordre public exception has disappeared in Regulation 805/04. It still survives under EC Regulation 44/01: but this that does not mean that the public policy clause will easily be applied. On the contrary: we are in a European context; and mutual trust prevails on European contexts. In this respect, we should also bear in mind the interesting development undergone by the punitive damages issue in the "Rome II" preparatory works: firstly, punitive damages where said to be contrary to a Community public policy; that is, the Community (the Commission) itself backed the doctrine against punitive damages. Nevertheless, this position was later abandoned, and replaced for a nuanced solution: I quote "Considerations of public interest justify giving the courts of the member States the possibility, in exceptional circumstances, of applying exceptions based on public policy (…). In particular, the application of a provision of the law designated by this Regulation which would cause non-compensatory, exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum".

Publication: Hill on Cross-Border Consumer Contracts

The very successful *Private International Law Series* by Oxford University Press adds yet another book to its impressive line-up with Jonathan Hill's **Cross-Border Consumer Contracts**. Here's the blurb:



> *Until relatively recently, almost all contracts were domestic: both the consumer and the supplier were from the same country and the situation involved no substantial foreign elements. Technological changes (in terms of international travel, means of communication and information technology) have meant that it is a more frequent occurrence for consumer contracts to involve a cross-border dimension.*
>
> *This book explores the legal regimes which seek to deal with disputes which arise out of such cross-border consumer contracts. In terms of private international law, English law traditionally treated consumer contracts no differently from commercial contracts. However, at European level, jurisdictional and choice of law issues arising out of certain consumer contracts are subject to specific rules. The first part of the book focuses on these European developments and seeks to explain why the private litigation model for the resolution of disputes arising out of cross-border consumer contracts has failed to deal adequately with the problems generated by such contracts. Subsequent to these failures, alternative mechanisms for resolving contractual disputes have a particular significance in the consumer context. The second part of the book focuses on an evaluation of these alternative dispute resolution mechanisms, including online dispute resolution.*

A table of contents can be found on the OUP website. ISBN: 978-0-19-927654-7. Price: £95. Available for £90.25 from the Conflict of Laws .net bookshop (powered by Amazon) or for £95 from OUP.

Assistant in Private International Law in Luxembourg

The Faculty of Law of the University of Luxembourg is seeking to recruit an Assistant (PhD student) in Private International Law.

The candidate should be a PhD student who will be expected to work on his doctorate, to teach a few hours per week (one to three) and to contribute to research projects in private international law, mostly under my supervision. It is a 2-year fixed-term contract, renewable once.

The full text of the advertisment can be found here. The deadline for the application is 15 January 2009.

New Service Regulation No 1393/2007 and Denmark (Update)

Following our recent post on the application of Reg. No 1393/2007 since 13 November 2008, and the issue of the participation of Denmark, we would like to point out an item published on the newsletter of the Danish Ministry of Justice (No 119 of 21 December 2007). The newsletter refers to an Administrative Order (*Bekendtgørelse*) issued by the Danish Minister for Justice, on the implementation of changes to the provisions of Reg. No 1348/2000 (that were already applicable in Denmark by virtue of the "parallel" agreement with the EC), starting from 13 November 2008.

Here's an **automatic translation** (by *Google Translate*, not further revised) from Danish:

> ***Order No. 1476 of 12 December 2007 implementing changes to the Service Regulation***

The notice is published in the Government Gazette on 21 December 2007 and will enter into force on 30 December 2007. The Order shall not apply to service, conducted on 13 November 2008 or later.

The notice states that the codified Regulation No 1393/2007 on the service of judicial and extrajudicial documents in civil and commercial matters applies in this country. The consolidated Service Regulation comes into force on 30 December 2007 but must first apply from 13 November 2008. The notice also contains a number of detailed provisions similar to some of the provisions of the current Order No. 423 of 8 May 2007 on certain issues concerning the implementation of a parallel agreement on the service regulation, which lifted from 13 November 2008.

The Administrative Order can be found here (in Danish). Here's an **automatic translation** (by *Google Translate*, not further revised) of its Articles 1 and 6 (on the entry into force and application):

Order on the implementation of changes to the Service Regulation

[…]

§ 1 – *1.The provisions of the European Parliament and Council Regulation No. 1393/2007 on the service of judicial and extrajudicial documents in civil and commercial matters and repealing Council Regulation No. 1348/2000 applies in this country.*

2. Regulation reference to "Member States" also includes Denmark.

[…]

§ 6 – *1. These Regulations shall come into force on 30 December 2007 and applies to service carried out on 13 November 2008 or later.*

2. Decree No. 423 of 8 May 2007 on certain issues concerning the implementation of a parallel agreement on the service be abolished, 13 November 2008.

Even from this very rough translation, it *seems* that Denmark has implemented administratively the provisions of the new Service Regulation, setting for its

implementing measures the same dates of entry into force (30 December 2007) and application (13 November 2008) as those provided for by Art. 26 of Reg. No 1393/2007. This condition is required by Art. 3(4) of the "parallel" agreement (text) between the EC and Denmark on Reg. No 1348/2000, which reads as follows:

> *4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.*

The same condition was recalled in the document available on the European Judicial Atlas in Civil Matters that we mentioned in our previous post:

> *In accordance with Article 3(4) of the Agreement, the necessary administrative measures will take effect on the date of entry into force of Regulation (EC) No 1393/2007.*

So, while the situation *would* appear quite clear on the Danish side (Denmark having fulfilled its obligations under the "parallel" agreement), there are still uncertainties on the EC side, at least from the information currently available to the public.

Rome I: Commission's Opinion on the Opting-In by the UK

Following the formal notification of 24 July 2008 by the United Kingdom of its wish to participate in Reg. No 593/2008 (Rome I), the Commission has expressed its opinion – doc. COM 2008(730) fin. of 7 November 2008 – pursuant to the procedure set out in Art. 11*a* TEC (former Art. 11(3) TEC, which is made applicable to the opting-in procedure, *mutatis mutandis*, by Art. 4 of the Protocol

on the Position of UK and Ireland). Here's the conclusion:

> *The Commission welcomes the request from the United Kingdom to accept Regulation 593/2008 which is a central element of the Community acquis in the area of civil justice. It therefore gives a positive opinion on the said participation.*
>
> *The Regulation should enter into force for the United Kingdom on the day of the notification to the United Kingdom of the Commission's decision on its request. As in the case of the other Member States, it should apply from 17 December 2009, except for Article 26 which should apply from 17 June 2009.*

(Many thanks to Federico Garau, Conflictus Legum blog, for the tip-off)