Non-Justiciability and Political Questions in Australia

An interesting divided judgment of the Full Court of the Federal Court of Australia has considered the non-justiciability of political questions and the decision in *Buttes Gas* [1982] AC 888.

The appellant was a PNG national who sought joinder as a party to an Australian native title claim over an area in the Torres Strait abutting PNG. The respondents successfully opposed that joinder at first instance because of a concern that the appellant would use the proceedings to agitate political matters concerning the maritime boundaries treaty between Australia and PNG. Significantly, the Australian government did not oppose the joinder so long as those political questions were not raised.

Gyles J, with whom Sundberg J agreed, allowed the appeal and held that the appellant should have been joined. Gyles J held that:

> *The appellant does not need to put any argument based upon the [political issues] to establish his interests for the purposes of the case. The docket judge can control the proceeding to prevent truly irrelevant or inappropriate arguments or material being advanced by a party. Counsel for the Commonwealth indicated that there should be no problem if the case is approached along those lines. The Commonwealth should be in a good position to judge that situation. … An appropriate term could have been constructed imposing conditions upon a grant of leave to be joined.*

Kiefel J dissented. Her Honour summarised the non-justiciability principle as being that "negotiations and agreements between Australia and another country are not to be the subject of judicial determination for the reason that they might cause embarrassment and affect relations between the countries." Although the Australian government was not actually "embarrassed" by the potential joinder, her Honour considered that "it is the nature of the question for the Court which renders it non-justiciable", and not the presence of actual embarrassment.

Gamogab v Akiba [2007] FCAFC 74 (18 July 2007)

German Book on European Ordre Public

A German monograph on the evolving concept of the public policy exception from a national level into a European perspective has been recently published by Mohr Siebeck. It has been written by ***Ioanna Thoma*** (Brunel University, London): **Die Europäisierung und die Vergemeinschaftung des nationalen ordre public (The Europeanization and Communitarization of National Public Policy)**.

The English presentation reads as follows (a longer version is available in German on the publisher's website):

> *Ioanna Thoma deals with the influence of the ECHR and EU law on the public policy exception in private international law. In spite of the harmonization of substantive laws in many areas, especially within the context of the EU, there is still room for the application of the public policy exception. She portrays the way in which the content of national public policy is gradually changing under the normative effect of the ECHR and EU law. By referring to seminal decisions of the European and national courts, Ioanna Thoma proves that the public policy exception is no longer purely national.*

Ioanna Thoma, Die Europäisierung und die Vergemeinschaftung des nationalen ordre public, 2007. XX, 288 pages (*Studien zum ausländischen und internationalen Privatrecht 182*). ISBN 978-3-16-149351-5. Available from Mohr Siebeck.

French Conference on Rome II

Burgundy University in Dijon will host a conference on the Rome II Regulation on September 20th, 2007.

Speeches will be delivered in French. The speakers will be mostly French academics, but will also include a member of the European commission. The program can be found here.

The conference will take place in the castle of Saulon-la-Rue, in the vicinity of Dijon.

German Annotation on Referring Decision in FBTO Schadeverzekeringen N.V. v Jack Odenbreit (C-463/06)

An interesting annotation by *Angelika Fuchs* on the decision of the German Federal Supreme Court asking the European Court of Justice for a preliminary ruling on the interpretation of Article 11 (2) and Article 9 (1) (b) of Regulation No 44/2001/EC has been published in the latest issue of the German legal journal Praxis des Internationalen Privat- und Verfahrensrechts (IPRax 2007, 302 et seq.).

The facts of the case are as follows: The claimant, who is habitually resident in Germany, suffered an accident in the Netherlands and brought a direct action in Germany against the other party's insurer the latter of which is domiciled in the Netherlands. Here the question arose whether German courts have international jurisdiction for this claim on the basis of Articles 11(2), 9 (1) (b) Brussels I Regulation.

This question was answered in the negative by the first instance court

(*Amtsgericht Aachen*) dismissing the action on the grounds that German courts lacked international jurisdiction. However, the court of appeal (*Oberlandesgericht Köln*) held in an interim judgment that the action was admissible. The case was subsequently referred to the Federal Supreme Court (*Bundesgerichtshof*) which pointed out that the crucial question was whether the injured party can be regarded as a "beneficiary" in terms of Article 9 (1) (b) Brussels I Regulation or whether the term "beneficiary" refers only to the beneficiary of the insurance contract (this has been so far the point of view of the prevailing opinion in German doctrine). In the latter case, the injured party could not sue the insurer at his/her (i.e. the injured party's) domicile.

One of the main arguments in favour of the jurisdiction of the courts at the injured party's domicile is Recital 16a of Directive 2000/26/EC which has been suggested in Directive 2005/14/EC and reads as follows:

> *Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled.*

Even though the Supreme Court attached some importance to this recital, the Court had nevertheless doubts whether an autonomous and uniform interpretation of the rules in question was possible on this basis. Thus, the Federal Supreme Court referred with judgment of 26 September 2006 the following question – its first on the Brussels I Regulation – to the ECJ:

> ***Is the reference in Article 11 (2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9 (1) (b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?***

Fuchs examines in her annotation whether the well-established methods of

interpretation militate in favour of the jurisdiction of the courts in the State where the injured party is domiciled and argues that the wording of Articles 11(2), 9 (1) (b) Brussels I Regulation does not support the assumption of jurisdiction since – while the injured party is referred to in Article 11 (2) – this is not the case in Article 9 (1) (b) Brussels I Regulation. In her opinion also a historic interpretation does not lead to another result since the Jenard Report illustrated that a *forum actoris* of the injured party was not intended. This situation had not been altered in the course of the communitarisation of the Brussels Convention. With regard to teleologic arguments, *Fuchs* states first that there was no need to protect the injured party by admitting direct actions before the courts of his/her domicle and secondly that this additional head of jurisdiction might have undesirable consequences such as forum shopping or a race to the court. With regard to a systematic interpretation she refers *inter alia*, in addition to the mentioned Recital 16a of Directive 2000/26/EC (which, however, is not regarded as a conclusive argument), to the Rome II Regulation. Here a special rule for traffic accidents had been discussed – but not been accepted (see for the adopted version of Rome II our older post which can be found here). Thus, according to *Fuchs* only the systematic argument which is based on an analogous application of Article 9 (1) (b) Brussels I Regulation might be used – notwithstanding substantial reservations – in favour of admitting direct actions before the courts of the injured party's domicile.

The referring decision can be found (in German) at the Federal Supreme Court's website. See with regard to the reference also our older post which can be found here.

Aberdeen Lectureship in Private

International Law

The University of Aberdeen invites applications from suitably qualified candidates for a post at Lecturer level in the School of Law. The Law School received a rating of 5B in the 1996 and 2001 Research Assessment Exercises and candidates should demonstrate an aptitude for research commensurate with that high ranking. In the 2001 RAE a 'substantial' proportion of those submitted produced publications of 'international' quality. The Law School will welcome applications from candidates in any field of law but **will give a preference to someone who can teach on the new LLM programme in Private International Law** that commences in February 2008. The starting date is **1 February 2008**.

Informal enquires may be made to Professor Beaumont (tel: 01224 272439, e-mail p.beaumont@abdn.ac.uk).

Online application forms and further particulars are available from **here**. Alternatively email jobs@abdn.ac.uk or telephone (01224) 272727 (24-hour answering service) quoting reference number **FLS426A** for an application pack.

The closing date for the receipt of applications is 27 July 2007.

Choice of Law and Contribution Claims in Australia

The Supreme Court of Victoria has recently addressed the choice of law implications of claims for contribution within the Australian federal context. The decision will be of particular interest to UK readers. The Victorian contribution statute under consideration, Part IV of the *Wrongs Act 1958* (Vic), is materially identical to the *Civil Liability (Contribution) Act 1978* (UK), but the Court declined to follow the view of the UK courts regarding the choice of law consequences of the statute.

The case concerned a claim for contribution brought in Victoria by Fluor Australia Pty Ltd against ASC Engineering Pty Ltd, relating to the breach of a contract governed by the law of Western Australia. In Victoria, as in the UK, the statutory right to contribution covers all forms of liability. In contrast, in WA (and all Australian jurisdictions except Victoria) contribution is governed by equitable principles in conjunction with a limited and gap-filling statutory right to contribution between tortfeasors.

Section 23B(6) of the Victorian Act provides that:

> *References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against that person in Victoria by or on behalf of the person who suffered the damage and it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Victoria.*

Fluor argued that this constituted a statutory choice of law rule in favour of the Victorian lex fori, notwithstanding that common law rules of private international law might have directed the application of WA law. This reasoning was said to be supported by a series of decisions on the equivalent section of the UK Act. In each of those cases, English courts applied the UK Act to claims for contribution regardless of whether those claims would have been governed by English law according to the common law choice of law rule for contribution claims.

Bongiorno J declined to follow this view, holding that it would "encourage forum shopping to the detriment of the whole Australian legal system [and] would be antipathetic to the federal compact itself, with obvious consequences for state sovereignty and the integrity of individual state legal systems." Rather, common law choice of law rules for contribution applied. Section 23B(6) of the Victorian Act was held to be merely "facultative", its role being to confirm that if the common law choice of law rules for contribution directed the application of the Act, the fact that the "underlying liability" of the person from whom contribution is sought to the person who suffered the loss would be governed by the law of another jurisdiction would not preclude application of the Act.

Although there is uncertainty in Australia as to the applicable common law choice of law rule – both a delictual analysis (favouring the contribution law of the place

of commission of the wrong by the person from whom contribution is sought) and a restitutionary analysis (favouring the contribution law of the place with the closest connection to the contribution claim) having been previously posited by Australian courts –his Honour considered that whichever rule applied, the Victorian Act did not apply to Fluor's claim against ASCE. Consequently, his Honour did not express a preference for either possible rule and Australian lawyers are therefore no closer to knowing the applicable common law rule for choice of law in contribution claims.

Fluor Australia Pty Ltd v ASC Engineering Pty Ltd [2007] VSC 262 (17 July 2007)

(Note: Both Perry Herzfeld and I were involved in this case while at Allens Arthur Robinson.)

Article on Jurisdiction and Choice of Law in Economic Perspective

An article by *Katrin Lantermann* and *Hans-Bernd Schäfer* (both Hamburg) has recently been released on SSRN:

"**Jurisdiction and Choice of Law in Economic Perspective**".

Here is the abstract which can be found on the SSRN website:

> *This article looks at choice of law rules from an economic perspective.The aim is to understand whether particular choice of law norms are wealth creating or wealth destroying and which of different norms should be preferred from this point of view. In this article we do not try to understand the forces that generate and sustain particular choice of law rules. We restrict ourselves to an efficiency analysis of existing or proposed choice of law rules. In the first part of the paper we argue that a free choice of law should be granted, whenever the choice causes no third party effects. We show that this criterion would extend free choice beyond the present scope. Free menu choice of law increases the*

wealth of the parties and creates institutional competition. It should be extended to fields of the law other than contract and tort law. In the second part we proceed with choice of law rules if the choice leads to positive or negative third party effects. To take care of these effects mandatory choice rules are sometimes but not always necessary. Methodologically choice of law rules should be market-mimicking rules, which reflect the interests of a grand coalition of the parties and all third parties affected by the choice rule. In the third part of the paper we discuss existing rules for the choice of tort law and refer to the discussion on a draft proposal for a European Council regulation of the law applicable to non-contractual obligations . In the fourth part we discuss whether the German or the US approach of international comparative law is preferable from an economic perspective. The US approach gives more judicial discretion for the choice of law than the German approach. We argue that the choice of law rules should lead to precise and clear legal commands with escape clauses for the judiciary only in exceptional and obvious cases. As Guzman pointed out it is striking that choice of law scholars have paid virtually no attention on how choice of law rules affect individual behaviour. But any economic analysis has to focus on this aspect as otherwise the social consequences of legal norms remain unknown and consequently little can be said about whether the consequences of one rule are socially better than those of another rule .

The full PDF version of the article can be downloaded here.

EC Regulation Establishing a European Small Claims Procedure Adopted

In its last meeting under the German Presidency (12/13 June 2007), the JHA Council has adopted the text of the **Regulation establishing a European Small**

Claims Procedure (ESCP), accepting in their entirety the amendments voted by the European Parliament at first reading.

The reasons for the successful outcome of the negotiations at the very first stage of the codecision procedure are expressed in a Council's note, stressing that

> *In accordance with the joint declaration on practical arrangements for the codecision procedure, informal talks have been held between the Council, the European Parliament and the Commission with a view to reaching an agreement at first reading. The European Parliament delivered its first-reading opinion on 14 December 2006, adopting 105 amendments to the Commission proposal. The outcome of voting in the European Parliament broadly reflects the compromise agreement reached between the institutions […].*

The main features of the ESCP are presented as follows in a summary of the Parliament's amendments (see the OEIL page of the Regulation):

> *[T]he procedure should apply only to cross-border cases, rather than be available also for claims within individual Member States as originally proposed by the Commission. […]*
>
> *Accordingly, the Regulation will apply, in cross-border cases, where the value of a claim does not exceed EUR 2000 at the time when the claim is received by the competent court or tribunal, excluding all interest, expenses and outlays. It shall not apply, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of state authority ("acta iure imperii"). The Regulation will not apply, inter alia, to maintenance obligations; tenancies of immovable property, except actions on monetary claims; violations of privacy and rights relating to personality, including defamation.*
>
> *The ESCP will be a written procedure. The Regulation provides for a specific form, available in all EU official languages, to be used to submit a claim under the ESCP. It would also facilitate the recognition and the enforcement of an ESCP judgment in all Member States by eliminating any intermediate measures required by a Member State to enforce the decision. The claim form will include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents. The claim form, the*

response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language of the court or tribunal. If any other document received by the court or tribunal is in a language other than the language in which the procedure is conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for rendering the judgment. The Member States shall ensure that the parties can receive practical assistance in completing the forms.

[…] The court or tribunal must render the judgment within 30 days of any hearing or after having received all information necessary for delivering the judgment. The court may hold a hearing through a video conference or other communications technology if the technical means are available.

Parliament substantially amended the enforcement procedure, the refusal of enforcement and stay of enforcement. The enforcement procedures will be governed by the law of the Member State of enforcement. A judgment delivered in a European Small Claims Procedure will be enforced under the same conditions as a judgment handed down in the Member State of enforcement. Under no circumstances may the judgment be reviewed as to its substance in the Member State of enforcement.

After the signature by the President of the European Parliament and the President of the Council, the ESCP Regulation will be soon published in the Official Journal. **It will apply in all Member States, with the exception of Denmark, from 1 January 2009**.

German Article on the Procedure for a Declaration of Enforceability

under the Brussels Regulation

Burkhard Hess and *David Bittmann* (both Heidelberg) have published a very interesting article on the possibilities for an increase of efficiency of the procedure for a declaration of enforceability according to the Brussels I-Regulation ("Die Effektuierung des Exequaturverfahrens nach der Europäischen Gerichtsstands- und Vollstreckungsverordnung") in the latest issue of the "Praxis des Internationalen Privat- und Wirtschaftsrecht" (IPRax 2007, 277 et seq.).

An English abstract has kindly been provided by *David Bittmann*:

> *The article evaluates possible ways to increase the efficiency in cross-border enforcement proceedings according to the Brussels I-Regulation. This contribution is based on a comparative study of the application of the Regulation in 25 Member States conducted by the Institute for Private International Law and Business Law of the University of Heidelberg (Prof. Dr. Burkhard Hess and Prof. Dr. Thomas Pfeiffer) in cooperation with Prof. Dr. Peter Schlosser (University of Munich). The study has been supervised by the European Commission. In the first part of the article, the authors show possible ways forward to accelerate the time for obtaining a declaration of enforceability by shifting the competence for granting the declaration from the presiding judge of the Landgericht (Regional Court) to a court's clerk (Rechtspfleger). A comparison is drawn with the proceedings according to the Regulation creating a European Enforcement Order for uncontested claims and to the national proceedings for obtaining a warrant of execution. These proceedings lie already, in most of the Member States evaluated in the article, in the hands of a court's clerk. As a consequence, the same procedure should be chosen for the declaration of enforceability. The second part deals with possible improvements of the procedure of exequatur. The authors suggest an extension of the standard form in Annex V of the Brussels I-Regulation. The standard form should be drafted in accordance with the standard form of the new Regulation creating a European Payment Order, which entails all necessary details for an immediate enforcement of the foreign title, such as interest or the maturity of the claim. The result of such an extension was, that the time-consuming procedure for obtaining a declaration of enforceability would no longer be necessary, at least for the enforcement because of money debts. The foreign bailiff could start enforcement proceedings without the interference of the*

court, because all details concerning the foreign claim can be taken directly from the form. The standard form would have the effect of a "judicial passport".

Ontario: Jurisdiction and Family Law

In *Okmyansky v. Okmyansk*, 2007 ONCA 427 (available here) the court answered three questions about its jurisdiction to hear different types of family law issues.

It held that under the (federal) *Divorce Act* it did not have jurisdiction to hear an application for spousal support following a valid divorce in a foreign jurisdiction (in this case Russia). The divorce had to have been a Canadian divorce for the court to be able to address support. On this issue the court's decision is in line with recent British Columbia authority and is contrary to recent authority from Quebec.

It held that under the (provincial) *Family Law Act* it equally did not have jurisdiction to hear an application for spousal support following a foreign divorce.

It held that under the *Family Law Act* it did have jurisdiction to hear a claim for equalization of the family assets following a foreign divorce. Accordingly, this claim was allowed to proceed in Ontario.

On each issue the analysis focuses mainly on statutory interpretation and the fact that under the Canadian constitution the federal government's ability to make laws governing support (otherwise a provincial matter) is only ancillary to its exclusive ability to make laws about divorce.