Speech

The Future of PIL

1. Associate Professor Brown, thank you for your kind introduction and I thank the Sydney Centre for International Law, and in particular Professor Andrew Dickinson, for organising this important symposium on private international law that has attracted such a galaxy of participants.

2. I am grateful for the opportunity to speak about the future of private international law from the Department’s point of view.

[Introduction]

3. When speaking about the future of any subject matter, it is appropriate to look first to the past.

4. In 1953, Professor W I Prosser famously described private international law as:

   “a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”¹

5. In 2002, Tilbury, Davis and Opeskin have noted that:

   “In Australia [...] PIL [...] has generally inhabited a netherworld on the perimeter of the law school’s curriculum and the lawyer’s practice.”²

6. Now, my interest in private international law started during my studies in Germany.

7. But I can assure you that I never sought guidance from Hades or tried to pay Charon, the mythical ferryman, to bring me across the river Styx to access this netherworld.

8. For a German law student, every civil and commercial law subject requires the study of relevant conflict rules.

9. And German lawyers would find it difficult to practice without having a good understanding and working knowledge of such rules.

10. This was certainly my experience in the mid 1990’s. And, considering the further Europeanisation of the EU member states’ legal systems, I assume that this applies even more so today.

11. Still, when I arrived in Australia, I noted that conflict rules were not part of any of the subjects I took. There was the occasional reference to the Commonwealth’s Service and

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² M Tilbury, G Davis, B Opeskin, Conflict of Laws in Australia, Oxford University Press, 2002, p. v. It is acknowledged that Tilbury, Davis and Opeskin further note that such ‘marginalisation of the subject matter is increasingly difficult to justify’, a statement which captures the tenor of this paper. It is also acknowledged that the authors, too, refer to the W I Prosser quote as referred to above n1.
Execution of Process Act 1992, Australia’s intra-federal conflict law instrument, and sometimes I stumbled across a section that provided a conflict rule.

12. I found this surprising. Australia’s trade relations with Asia, the US and Europe and its large migrant population suggested that the study, and role, of “collision law” rules would be as important in Australia as it was in Germany.

13. After all, it allows lawyers to understand the way different legal systems interact with each other - whether these are interactions between the different laws in Queensland and New South Wales or Australia and Germany.

14. And understanding such interactions is very important:
   a. for businesses and individuals, as an essential tool to plan transactions that have connections to more than one jurisdiction — in this sense, understanding private international law can ensure that parties get what they bargained for and are able to shield themselves from surprises.
   b. for a government, as a way to better anticipate where expectations of businesses and individuals may be frustrated by overly complex and inconsistent rules — in this sense, understanding private international law can ensure that the government is able to adequately respond to these complexities through policy and legislative development.

15. Complicated and unclear conflict rules generate uncertainty — uncertainty, which then may translate, as the result of a holistic risk assessment, into a decision not to enter into transactions at all. In that sense, complicated and unclear conflict rules can be a genuine barrier to trade, mobility and international engagement.

16. It is this importance of certainty in international civil and commercial transactions that I would like to explore further. I will do so by presenting my paper in two parts:
   a. In Part I, I will explore two particular aspects of the Trans-Tasman Proceedings Project, and
   b. In Part II, I will look at two areas of (potential) future work.

[Part I — Trans-Tasman Proceedings Scheme]

17. The new Trans-Tasman Proceedings Scheme will set up a cooperative regime aimed at making trans-Tasman litigation significantly simpler, cheaper and more efficient.

18. It aims to reduce transaction and litigation risks and to assist successful litigants in vindicating rights without being faced with unsustainable expenses.4

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19. Features of this regime include, removing leave requirements from service of process rules, harmonising some private international law tests, broadening the range of enforceable judgments and promoting the greater use of teleconference and video-link technology in trans-Tasman litigation.

20. Time will not permit me to look at all these aspects, so I will focus on two specific ones – the harmonisation of the forum non conveniens test, and the regimes’ recognition and enforcement mechanism.

[Forum non conveniens]

21. Forum non conveniens is a doctrine according to which courts determine whether another court would be better positioned to hear a matter and decide the dispute.

22. Many of you will also be familiar with the High Court’s decision in *Voth v Manildra Flour Mills Pty Ltd.*, adopting the ‘clearly inappropriate forum test’ for Australia.

23. According to this test, an Australian court will decline its jurisdiction in favour of another court only where it is clearly inappropriate for the Australian court to decide the dispute.\(^5\)

24. This Australian version of the *forum non conveniens* test was most recently confirmed in *Puttick v Tenon*.\(^6\)

25. The decision in *Voth v Manildra Flour Mills Pty Ltd* clarified the Australian *forum non conveniens* jurisprudence, but it also initiated a departure from the more widely used ‘more appropriate forum test’.\(^7\)

26. And it poses two challenges:

   a. first, the ‘clearly inappropriate forum test’ is rather narrow in that Australian courts will find it difficult to decline jurisdiction in favour of other jurisdictions, and

   b. second, it is different from the ‘more appropriate forum test’ that is applied in many other common law jurisdictions, including New Zealand.

27. The resulting incompatibility between the Australian and the New Zealand tests can result in a significant level of uncertainty for litigants when faced with competing proceedings in different jurisdictions. Imagine for example that:\(^8\)

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\(^7\) Following the UK case *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 WLR 972. The test applies, amongst others, in New Zealand, the UK and Singapore. See for example: G S Teo, ‘Choice of law in forum non convenience analysis’, (2010) 22 Singapore Academy of Law Journal 440.

\(^8\) This example is based on the Gilmore cases, reported in Australia as *In the Marriage of Gilmore* (1993) 100 FLR 311 and in New Zealand as *Gilmore v Gilmore* [1993] NZFLR 561.
a. an Australian and a New Zealand party both simultaneously commence court proceedings in their respective jurisdictions.

b. both apply to have the foreign court to declare itself as *forum non conveniens*

c. both courts, after applying their jurisdiction’s *forum* test, dismiss the parties respective applications:
   i. the Australian court on the basis that ‘it is clearly not the inappropriate forum’,
   ii. the New Zealand court on the basis that it is ‘the more appropriate forum’.

d. The end-result is that both courts would exercise jurisdiction in this matter, and both parties are faced with parallel proceedings in different jurisdictions in the same matter.

28. This situation is clearly unsatisfactory. As Dixon J observed in Union Steamship:

    "(t)he inconvenience and embarrassment of allowing two independent actions involving the same question of liability to proceed contemporaneously in different courts needs no elaboration."\(^9\)

29. Consequences include the race to – potentially conflicting – judgments because the first court to hand down a decision gives the judgment creditor the tactical advantage of being able to enforce first.

30. For transactions that will fall within the scope of the Regime, this uncertainty will be removed by applying a common statutory *forum non conveniens* test.\(^10\)

31. As recommended by the Trans-Tasman Working Group, this test will be the ‘*more appropriate forum test*’, complemented by a list of factors that courts will take into consideration when deciding whether to stay proceedings.\(^11\)

32. And we anticipate that this harmonisation across the Tasman will improve certainty for parties where such forum questions arise.

33. In addition, the Regime will allow parties to choose, with more certainty, the elimination of *forum* questions.

34. In cases where parties have made an express choice of court agreement, primacy will generally be given to that agreement over the statutory *forum non conveniens* test and seized courts must stay proceedings in favour of the expressly chosen *forum*.\(^12\)

35. This measure is designed to achieve two things:

\(^9\) *Union Steamship Co of New Zealand Ltd v The Caradale* (1937) 56 CLR 277

\(^10\) Section 19(1)(b) of the TTP Act.

\(^11\) Trans-Tasman Court Proceedings and Regulatory Enforcement, A Report by the Trans-Tasman Working Group, Attorney-General’s Department (Australia) and Ministry of Justice (New Zealand), December 2006, p. 16.

\(^12\) Section 20 of the TTP Act. NB: Section 20(2) contains certain exceptions to this primary rule.
a. first, it will increase transactional certainty by ensuring that the parties’ contractual agreements are fulfilled, and

b. second, the measure lays the groundwork for both countries to accede to the Hague Conference on Private International Law’s Choice of Court Convention.

[Recognition and enforcement]

36. Part 7 of the Australian Trans-Tasman Proceedings Act 2010 provides the recognition and enforcement mechanism for NZ judgments in Australia.¹³

37. The mechanism is similar to those currently available under the Commonwealth’s Foreign Judgments Act 1992 and Service and Execution of Process Act 1992, and is based on a simplified and cost efficient registration of a foreign judgment.

38. However, the Regime will take this to the next step by broadening the range of enforceable judgements.

39. The range is listed in s66(1) of the Act. There you will find:¹⁴

   a. both monetary and non-monetary judgments, such as injunctions and orders for specific performance, as well as

   b. decisions made by certain types of tribunals¹⁵ and certain cost orders.¹⁶

40. This range of judgments will go well beyond what is currently possible.¹⁷

41. This will reduce the risk for parties that their judgment will not be recognised and enforced and, in turn, will increase the certainty that rights can be vindicated more easily, cheaply and efficiently.

42. Of course, certainty in this area will be welcomed by judgment creditors.

43. But a careful balance must be struck between providing such certainty and providing appropriate protection to judgment debtors.

44. The Regime will strike such a balance by providing limited grounds on which judgments would not be enforced,¹⁸ their enforcement would be stayed,¹⁹ or in which registrations may be set aside.²⁰

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¹³ Based on reciprocity, the NZ mirror legislation allows, mutatis mutandis, for the recognition and enforcement of Australian judgments in NZ.

¹⁴ NB: Section 66(2) contains exceptions, including orders relating to probate, guardianship and other exclusions as specified in regulations. As an aside I note that the Regime will also, with a view to improving compliance with regulatory regimes, allow for the enforcement of judgments: in criminal matters ordering compensation, damages or reparation, and certain regulatory criminal fines.

¹⁵ NB: Under s66(4), these tribunal orders must be enforceable without an order of a court is made in connection with the performance of an adjudicative function

¹⁶ Including orders for the payment of certain witness and remote appearance expenses.

¹⁷ As under the Commonwealth’s Foreign Judgments Act 1992 and Service and Execution of Process Act 1992, as soon as a judgment is registered, it will have the same force as if the judgment had been given by the registering court

²⁰ Including orders for the payment of certain witness and remote appearance expenses.
45. But these grounds are indeed limited, and so, by broadening the range of enforceable judgments, and by limiting the grounds upon which judgments may be held unenforceable or upon which registrations may be set aside, the Regime will improve certainty in the enforcement process.

46. In particular, it will allow parties:

   a. during their negotiations — to assess more easily the recognition and enforcement risks associated with their transaction, and

   b. after litigation — to vindicate their rights more easily, in more circumstances and without facing disproportionate enforcement costs.

[Part II – Future work]

47. Having looked at some of our current implementation work, let me now look — very briefly — further into the future.

[Choice of Court]

48. The majority of you will be familiar with the 2005 Choice of Court Convention.

49. It aims to provide certainty about where court proceedings will be heard in instances where litigants have made a prior contractual arrangement designating the courts of a specific country to hear disputes arising under the contract.21

50. Mexico has ratified the convention, whilst the European Union and the United States have signed it. Along with Canada, both the European Union and United States are taking active steps to accede to this Convention.

51. In Australia, an initial round of consultation with stakeholders took place towards the end of 2008.

52. These consultations indicated that there was considerable stakeholder support for Australia’s accession.

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18 During a particular period if notice of registration has not been given to each judgment debtor – an important due process requirement (sub74(2) of the TTP Act)
19 Courts may stay enforcement proceedings to allow judgments debtors to appeal a judgment in the original jurisdiction Section 76 of the TTP Act.
20 Section 72 of the TTP Act. Registrations may be set aside where the enforcement of a judgment would be contrary to public policy or would contravene the Act or the Mozambique Rule. The Working Group did not recommend the abolition of the Mozambique rule, finding such recommendation premature at this stage. Instead, the Working Group forecast that ‘independent domestic reform will progressively abolish this rule.’ (Trans-Tasman Court Proceedings and Regulatory Enforcement, A Report by the Trans-Tasman Working Group, Attorney-General’s Department (Australia) and Ministry of Justice (New Zealand), December 2006, p. 11). The ACT and NSW have legislated to abolish the Mozambique rule, but see the comments in Nygh’s Conflict of Laws in Australia, p. 172.
21 Or, as Professors Winship an Teitz described it, it is “first and foremost a tool for transaction planning and for subsequent dispute resolution, validating party autonomy through upholding choice of court agreements and enforcing judgments resulting from exclusive choice of court agreements, not all judgments.”. P Winship, L E Teitz, ‘Developments in Private International Law: facilitating cross-border transactions and dispute resolution’, (2006) 40(2) The International Lawyer 505, p. 507.
53. This was, perhaps, not surprising given that, in the absence of a multilateral judgments convention, this is perhaps the closest the international community has gotten to the highly successful 1958 Convention on the Recognition and Enforcement of Arbitral Awards, the New York Convention.22

54. However, the consultations also highlighted some difficulties, which we are now trying to work through — subject of course always to available resources and competing priorities.

55. One of the difficulties is the difference between the definition of “consumer” in the Convention and Australia’s current concept of “consumer”.

56. Briefly, the Convention defines consumers as natural persons acting primarily for personal, family or household purposes. Australia has a broader definition, set out in the Competition and Consumer Act 2010, which includes persons and legal persons who have acquired goods at a value of less than $40,000.23

57. To find ways to resolve this particular inconsistency, we continue to work with other agencies and areas within the Department, and we consult regularly with other jurisdictions where a similar issue has arisen.

58. Protecting parties’ valid choice of court agreements, as I noted before, is important to ensure that the parties’ expectations of their contractual relationship is not frustrated.

59. The Choice of Court Convention can provide such protection and we will continue to actively consider accession to this Convention, including through further consultations with Stakeholders.

[Private International Law and the EU]

60. In March 2009, the Attorney announced in a speech to the European Business Council that the Australian Government was pursuing a bilateral agreement with the European Commission on the recognition and enforcement of judgments between Australia and the European Community.

61. However, our budding discussions with Europe were cut short in late 2009 when the European Union announced the overhaul of one of its key recognition and enforcement instruments, Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also referred to as Brussels I.24

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22  Ibid., p. 507. The 1958 New York Convention ensures enforceability of arbitration awards where parties chose to resolve their dispute by arbitration.

23  Until the end of 2010, the Trade Practices Act 1974 (Cth) provided this definition. It is now included in Schedule 2 “the Australian Consumer Law” to the Competition and Consumer Act 2010, which commenced on 1 January 2011.

24  On 14 December 2010, the EC released a first draft proposal for a reformed Brussels I, and consultations on this in EU member states have recently concluded recently.
62. For a considerate analysis of the various aspects of this reform, I would happily defer to Professor Dickinson.

63. But there is one key aspect of the reform of Brussels I in which we are particularly interested.

64. Brussels I currently applies to intra-European cross-border civil and commercial transactions.

65. However, the current proposal would expand the Regulation’s operation beyond EU boundaries by creating a harmonised or ‘universal jurisdiction’ by excluding the application of national laws, and by ensuring Brussels I exclusive application to all cross-border civil and commercial transactions, including those involving parties in non-EU countries.

66. The creation of a single set of EU jurisdiction and enforcement rules may have the potential to improve certainty for Australian litigants whilst reduced market distortions may also make the design of cross-border transactions simpler and thus cheaper.

67. However, the devil, as usual, may be in the detail and the next instalment of the proposal is likely to give us a clearer indication of the impact of a revised Brussels I on individuals and businesses in Australian

**Conclusion**

68. I have already taken up far too much of your precious time, however, I would like to conclude my presentation with one more quote.

69. In a recent Article in The Australian, David Childs, Global Managing Partner of Clifford Chance, observed that:

   “The ultimate effect of globalisation is that it is increasingly rare to see a piece of work which does not involve more than one jurisdiction. [...] The days when you have a piece of work only involving one jurisdiction are reducing year by year, and the same goes for disputes.”

70. We agree that globalisation is a driving factor for the proliferation of multi-jurisdictional transactions and disputes.

71. And we believe that this proliferation will provide fertile ground for the further evolution of private international law in Australia as it will provide some of the answers to challenges posed in a global marked.

72. Using private international law, we continue to seek out ways to respond to these challenges and to ensure that Australia provides the legal frameworks that provide the transactional certainty that both businesses and individuals require in the 21st century.

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