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**INTERNATIONAL CIVIL LITIGATION: BALANCING FOREIGN INTERESTS
AND PRIVATE RIGHTS**

Richard Garnett

Submitted in total fulfilment of the requirements for the degree of Doctor of
Laws

July 2019

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APPLICATION FOR DOCTOR OF LAWS (LLD) by EXAMINATION

INTERNATIONAL CIVIL LITIGATION: BALANCING FOREIGN INTERESTS AND PRIVATE RIGHTS

RICHARD GARNETT

July 2019

[*Abstract:* Foreign elements, expressed in the form of laws, judgments and jurisdictional claims, should be given equal recognition to local interests in the adjudicative process but not so as to thwart the legitimate vindication of private rights. Hence, when defining the boundary of substance and procedure in private international law, procedure should be confined to matters of court process to give wide operation to foreign laws and in the context of jurisdiction, courts should decline to adjudicate where the defendant or action has slender links with the forum. Where however foreign interests operate to defeat the pursuit of legitimate private rights, such as in the case of state immunity and embassy employees or defendants who are victims of fraudulent court judgments abroad, then such interests should be accorded less deference.]

This application is based on a body of work that establishes that I have made ‘a substantial and original contribution to legal scholarship’ (see Part A below) and that my work is of such standard as to give (me) ‘authoritative standing in the field of study’ (International Civil Litigation) (see Part B below).

The scholarly work consists of a substantial, original monograph published by Oxford University Press in the Oxford Private International Law Series and six articles in leading international journals.

A. ‘A substantial and original contribution to legal scholarship’

The principal aim of my publications has been to identify complex issues in the field of international civil litigation that have been little explored in the academic literature but have great significance in legal practice. I seek to provide original frameworks of analysis directed at scholarly, practitioner and judicial audiences with the goal of shaping the development of the law in key areas.

Each of the publications supporting this application focuses on a key aspect of international civil litigation. My general thesis is that an approach should be taken to the resolution of cross border disputes that gives foreign interests, as expressed in the form

of laws, judgments and jurisdictional claims equal weight to local interests but not so as to preclude the legitimate vindication of private rights.

The monograph *Substance and Procedure in Private International Law*¹ focuses on the key distinction between substantive and procedural matters with procedural issues resolved by the law of the forum of adjudication and substantive issues by the law of the cause of action as selected by the forum's choice of law rules. In the work I argue that the traditional common law definition of 'procedure', which focuses on whether the issue involves enforcement of a right or the remedy (as opposed to the existence of the right which is substantive) leads to an excessively wide allocation of matters to the law of the forum. Instead, 'procedure' should be confined to matters relating to court process or the administration of justice to give more scope of operation to the choice of law rules and hence foreign law. I further argue in the monograph that the existing common law approach of exclusively applying forum law to procedural matters is unnecessarily restrictive and negates the possibility of foreign procedural rules being applied in such areas as foreign judgments, statutes of limitation and service and taking of evidence abroad. Again, such a view excessively favours local over foreign interests.

The monograph is the first major work in English to analyse the subject and examines the position in many jurisdictions including Australia, Canada, England, New Zealand, Singapore, Hong Kong, South Africa, the United States, the European Union and selected European civil law countries. The work has been cited three times by English courts, including the Court of Appeal,² has been widely referred to in extrajudicial³ and scholarly writing (including seven citations in the prestigious treatise *Dicey, Morris and Collins on The Conflict of Laws*⁴) and has received very positive reviews,⁵ extracts from which are included at C.2 below. Recently, the work was cited in an amicus brief of international law professors in the petition for certiorari to the United States Supreme Court in *Donziger v Chevron Corp.*⁶

A similar idea of regard for foreign interests can be seen in the second publication selected for this application, the article 'Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?'⁷ There, I suggest that Australian courts should adopt the English 'more appropriate forum' test from the *Spiliada* case⁸ in stay applications as opposed to the pro-plaintiff 'clearly inappropriate forum' test established by the High Court in *Voth*

¹ Oxford University Press, Oxford 2012 (lxvii + 384 pp)

² *Sophocleous v The Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167 at para 61; *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) at para 174; *Alseran v The Ministry of Defence* [2017] EWHC 3289 (QB) at para 896

³ See, for example, Justice Rares, 'The Far from *Halcyon Isle*: Maritime Liens, *Renvoi* and the Conflicts of Law' (2014) 28 *Australian and New Zealand Maritime Law Journal* 1 at 12.

⁴ Fourth Cumulative Supplement to the 15th ed 2017 chapter 7 'Substance and Procedure'

⁵ One author described the work as 'ground breaking', 'most valuable' and a 'major Australian contribution': Bates, *Conflict of Laws as Taxonomy* (Lexis Nexis 2015) 264, 267, 432. A Portuguese scholar recently cited the book nine times in an article: G Rocha Ribeiro, 'Ensaio Sobre o Problema da Delimitação da Lei Processual e da Lei Substantiva no Âmbito do Direito Internacional Privado Europeu' (2014) 57 *Boletim de Ciências Económicas* 3023 <<https://digitalis-dsp.sib.uc.pt/bitstream/10316.2/39862/1/Ensaio%20sobre%20o%20problema.pdf>>

⁶ <https://www.scotusblog.com/wp-content/uploads/2017/05/16-1178-cert-amicus-ILP.pdf>

⁷ (1999) 23 *Melbourne University Law Review* 30-64

⁸ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460

v Manildra Flour Mills.⁹ In a study of Australian decisions since *Voth* I argue that the interests of foreign defendants and foreign courts are given insufficient weight in the jurisdictional calculus.

This article formed the basis of the appeal to the High Court of Australia in *Puttick v Tenon Ltd*¹⁰ in which, as counsel, I sought (unsuccessfully) to persuade the court to overrule *Voth* or at least clarify its scope. Despite the plea in the article not being directly heeded by Australian courts, the *Voth* test has been legislatively replaced by *Spiliada* in cases involving New Zealand defendants¹¹ and the article has been frequently cited with approval by courts¹² and commentators.¹³ For example, the article has been described as ‘a careful analysis of the Australian jurisprudence’¹⁴ and ‘an excellent survey of the cases.’¹⁵ The Singapore Court of Appeal has cited the article in support of the proposition that the *Spiliada* test (which is applied in Singapore) is different in content to *Voth*.¹⁶

The need for recognition of foreign interests in international civil litigation is also expressed in the article ‘Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases’¹⁷. In this article I examine the case of online libel and the problem where cases are brought in English, Australian and Canadian courts involving parties (often American) with slender connections to the forum other than the fact of publication there. Much ‘sound and fury’ had been expressed on this issue on both sides of the Atlantic with English protectors of reputation set against American advocates of free speech. After considering the competing claims, I suggest an intermediate position where jurisdiction over libel claims should only be asserted where there was reasonable foreseeability of harm to the claimant in the forum by the publication. Such an approach would preclude the more egregious cases of forum shopping where United States celebrities have sued United States publishers in foreign courts despite the bulk of publication having occurred in the United States. The ‘foreign interests’ being protected here are the defendant publishers who are being forced to answer claims in courts with little connection to the subject matter or the parties and the foreign courts who are more suitably placed to adjudicate.

The article was cited by both parties in their written skeletons of argument (‘facta’) in the appeal to the Supreme Court of Canada in *Breedon v Black*,¹⁸ with the court in its judgment interestingly adopting a reasonable foreseeability of harm test for jurisdiction in cross-border libel cases. Also, the United Kingdom in section 9 of the Defamation Act 2013

⁹ (1990) 171 CLR 538

¹⁰ (2008) 238 CLR 265

¹¹ Trans-Tasman Proceedings Act 2010 (Cth) s 19

¹² *Murakami Takako v Wiryadi* [2008] SGCA 44 at para 33; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at para 49; *Navarro & Jurado* [2010] FamCAFC 210 at paras 141 and 149; *Puccini Festival Australia Pty Ltd v Nippon Express (Australia) Pty Ltd* (2007) 17 VR 36 at paras 46, 49 and 58; *Strohschneider v Ehlert* [2008] SADC 54

¹³ The article has received 40 citations:

<https://scholar.google.com/citations?user=PVBnGEAAAAJ&hl=en>

¹⁴ Briggs and Rees, *Civil Jurisdiction and Judgments* (3rd ed LLP 2002) at 280

¹⁵ Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) at 165

¹⁶ See *Murakami* and *JIO Minerals* cases above n 12.

¹⁷ (2009) 5 *Journal of Private International Law* 471-490 (joint publication—80% contribution)

¹⁸ [2012] 1 SCR 666

altered its position on jurisdiction, now requiring that the claimant must show that England is 'substantially the more appropriate forum' before the court can adjudicate. Both Canada and England have therefore moved to more moderate positions on jurisdiction in cross-border libel cases, consistent with the general thesis of the article. This article has been cited frequently,¹⁹ principally in United States and European publications.

The concern expressed above to adequately recognise foreign elements in international civil litigation must however be tempered where such interests operate to impede legitimate vindication of private rights, particularly of individuals. In the four other selected articles supporting this application the need to recognise private rights through preserving local access to adjudication in the forum is advocated. Three of the articles concern foreign state immunity and the other examines an aspect of recognition and enforcement of foreign judgments.

The first immunity article, 'State Immunity in Employment Matters', published in the leading journal the *International and Comparative Law Quarterly*,²⁰ was the first major article on the topic in English and involved a global examination of common law and civil law court decisions, legislation and reports of law commissions and advisory bodies. In the article a trend was identified where courts would deny foreign states immunity from jurisdiction where they were sued by employees in subordinate or routine positions, who were also residents of the forum state, but would grant immunity where the state's sovereignty or security was threatened. This approach was supported on the basis that it appropriately balances the rights of employer and employee in international litigation. A test, by contrast, that confers 'absolute' immunity on a foreign state unduly privileges such entities by denying redress to private individuals in all cases. This article has been widely cited and quoted by courts and commentators,²¹ including most significantly by the European Court of Human Rights in *Fogarty v the United Kingdom*,²² the England and Wales Court of Appeal in *Benkharbouche v Embassy of the Republic of Sudan*²³ and the Court of Appeal of Geneva in *Mohamed-Nour v Kuwait*.²⁴ One scholar described the article as 'giv[ing] the most exhaustive available survey of state immunity practice in this area.'²⁵

The second immunity article, 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?'²⁶ also published in the *ICLQ*, revisits the topic of immunity and employment disputes, almost 20 years after the first article above. The focus of this article is on recent developments in European law that have enabled employees of foreign states to challenge or evade immunity, in particular under the European Convention on Human Rights (the ECHR), the Brussels I Regulation (the Regulation) and the Charter of

¹⁹ 26 times: <https://scholar.google.com/citations?user=PVbDnGEAAAJ&hl=en>

²⁰ (1997) 46 *International and Comparative Law Quarterly* 81-124

²¹ 31 times: <https://scholar.google.com/citations?user=PVbDnGEAAAJ&hl=en>

²² (2002) 34 EHRR 12 at para 29

²³ [2015] EWCA Civ 33 at para 41

²⁴ 5 December 2002 at para 61; see also *United States of America v Nolan* [2009] UKEAT 0328_08_1505 at para 36.

²⁵ Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 2010) at 42

²⁶ (2015) 64 *International and Comparative Law Quarterly* 783-827

the European Union (the Charter). In the case of the ECHR and the Charter, the European Court of Human Rights and the English Court of Appeal have interpreted the right of access to a court to overcome state immunity in certain cases. Similarly, in the context of the Regulation, the European Court of Justice has recognised that an embassy of a non-EU member state located in an EU state may be an ‘establishment’ that would enable an embassy employee to sue his or her employer in the EU state’s courts. In the article I welcome such developments as measures to protect vulnerable employees of foreign states. The article has been prominently cited and quoted in the four years since publication, including by the National Labour Court of Israel in *United States of America v Bachbat*,²⁷ and by leading scholars on human rights and state immunity.²⁸

In the third immunity article ‘State Immunity Triumphs in the European Court of Human Rights’, published in the prestigious *Law Quarterly Review*,²⁹ I proceed one step further and argue for the *abolition* of foreign state immunity as a distinct doctrine and its replacement by a single test of *forum non conveniens* for jurisdictional challenges. The concern again is that foreign state defendants have used assertions of immunity as a blanket shield to preclude adjudication. Arguably, their sovereignty concerns can be adequately protected under a discretionary test of appropriate forum with the key difference being that the interests of both claimant and defendant are considered *on an equal basis* in the jurisdictional determination. I have further explored this issue in subsequent writing.³⁰

The fourth article submitted for this application on the theme of protection of private rights from foreign interests is ‘Fraud and Foreign Judgments: The Defence that Refuses to Die’,³¹ which examines the fraud defence to recognition and enforcement of foreign judgments. The traditional English common law approach has been to allow a claimant to argue in the enforcing court that a foreign judgment should not be enforced where it was procured by perjury or forgery even if he or she had the opportunity to raise such an allegation in the foreign court of origin. This view has been subject to sustained criticism by most commentators who argue that it conflicts with the principles of comity and finality that underlie the treatment of foreign judgments. Yet in the article I argue that where a foreign court suffers from corruption, bias or simply fails to accord a defendant due process on the issue of fraud, exceptionally that party should be entitled to re-adjudicate the matter at the stage of enforcement. Again, while deference to foreign interests and institutions is important in international civil litigation, the need to protect the rights of parties from unconscionable conduct is also compelling. The article has been

²⁷ 8 January 2016 at paras 33, 35 and 37

²⁸ See, for example, Sanger (2016) 65 *International and Comparative Law Quarterly* 213 esp at 226-227 and ‘Decisions of British Courts During 2017 Involving Questions of Public and Private International Law’ (2019) *British Yearbook of International Law* (online edition) n 241; Webb (2016) 27 *European Journal of International Law* 745 and Ziegler (2017) 17 *Human Rights Law Review* 127.

²⁹ (2002) 118 *Law Quarterly Review* 367-373

³⁰ ‘Foreign State Immunity: A Private International Law Analysis’ in Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015) 297-318; see also ‘Should Foreign State Immunity Be Abolished?’ (1999) 20 *Australian Yearbook of International Law* 175-190.

³¹ (2002) 1 *Journal of International Commercial Law* 161-186 republished in L Silberman and F Ferrari (eds), *Recognition and Enforcement of Foreign Judgments* (Edward Elgar 2017)

described as ‘an extremely instructive review of the law’³² and was cited with approval by the High Court of New Zealand.³³ While published in 2002, the article’s current significance has been recognised by its being included in a collection of essays on the enforcement of foreign judgments in 2017.

Hence, the main theme of the publications presented in this application is that domestic courts should seek to give foreign laws, parties and institutions equal recognition in the process of litigation but not at the expense of claimants’ or defendants’ right to a fair hearing.

B. ‘Recognition of authoritative standing in the field of study’

Citation and reference by courts

My authoritative standing in the field of international civil litigation can be seen in the extensive citation and approval of my work by leading Australian and international courts, including the European Court of Human Rights,³⁴ the International Court of Justice,³⁵ the England and Wales Court of Appeal (twice),³⁶ the Court of Appeal of Singapore (twice),³⁷ the English High Court³⁸ (Chancery and Queen’s Bench Divisions), the United States District Court for the District of Columbia,³⁹ the Court of Appeal of Geneva,⁴⁰ the United Kingdom Employment Appeal Tribunal,⁴¹ the High Court of New Zealand,⁴² the National Labour Court of Israel,⁴³ the Federal Court of Australia,⁴⁴ the Full Court of the Family Court of Australia⁴⁵ and the Supreme Courts of New South Wales,⁴⁶ Western Australia,⁴⁷ Victoria⁴⁸ and Queensland.⁴⁹

³² Briggs, ‘Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments’ (2004) 8 *Singapore Yearbook of International Law* 1 at 20

³³ *Gordhan v Kerdemelidis* [2011] NZHC 1808 at para 31

³⁴ *Fogarty v The United Kingdom* (2002) 34 EHRR 12 at para 29

³⁵ *Case Concerning the Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* 3 February 2012 at para 187 (Diss op Judge Cançado Trindade)

³⁶ *Sophocleous v The Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167 at para 61; *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 at para 41

³⁷ *Murakami Takako v Wiryadi* [2008] SGCA 44 at para 33; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at para 49

³⁸ *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) at para 174; *Alseran v The Ministry of Defence* [2017] EWHC 3289 (QB) at para 896

³⁹ *El-Hadad v Embassy of the United Arab Emirates* (1999) 69 F Supp 2d 69 at 75

⁴⁰ *Mohamed-Nour v Kuwait* 5 December 2002 at para 61

⁴¹ *United States of America v Nolan* [2009] UKEAT 0328_08_1505 at para 36

⁴² *Gordhan v Kerdemelidis* [2011] NZHC 1808 at para 31

⁴³ *United States of America v Bachbat* 8 January 2016 at paras 33, 35 and 37

⁴⁴ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21 at para 65

⁴⁵ *Navarro & Jurado* [2010] FamCAFC 210 at paras 141 and 149

⁴⁶ *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503 at para 261

⁴⁷ *Wolcott v Seeger* [2010] WASC 29 at para 73; *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290 at para 219

⁴⁸ *Puccini Festival Australia Pty Ltd v Nippon Express (Australia) Pty Ltd* (2007) 17 VR 36 at paras 46, 49 and 58; *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 at para 41

⁴⁹ *World Firefighters Games Brisbane 2002 v World Firefighters Games Western Australia Inc* (2001) 161 FLR 355 at 359-360

My work has also been frequently referred to in extrajudicial writing.⁵⁰

Citation and reference by scholars

Further evidence of my international reputation and standing appears in the citation of my work in leading international legal treatises, for example, Lord Collins (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Sweet and Maxwell 13th, 14th and 15th edns and Fourth Cumulative Supplement) (ten citations); Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (Hart Publishing 2017); van Alebeek and Pavoni (eds), *International Law in Domestic Courts: A Casebook* (OUP 2018); Bates, *Conflict of Laws as Taxonomy* (Lexis Nexis 2015); Beale (ed), *Chitty on Contracts* (Sweet and Maxwell 31st ed 2012); Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003); Briggs, *Private International Law in English Courts* (OUP 2014); Bucher, *Loi sur Le Droit International Privé* (andreasbucher-law.ch 2017); Collins, *Collins on Defamation* (OUP 2014); Crawford, *Brownlie's Principles of Public International Law* (OUP 8th ed 2012); Davies, Bell and Brereton, *Nygh's Conflict of Laws in Australia* (Lexis Nexis 9th ed 2014); Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018); Fawcett, Shuilleabhain and Shaw, *Human Rights and Private International Law* (OUP 2016); Fentiman, *International Commercial Litigation* (OUP 2nd ed 2015); Fox and Webb, *The Law of State Immunity* (OUP 3rd ed 2013); Gregoire, *Evidentiary Privileges in International Arbitration* (LGDJ Schulthess 2016); Grusic, *The European Private International Law of Employment* (CUP 2015); Hill and Shuilleabhain, *Clarkson and Hill's Conflict of Laws* (OUP 5th ed 2016); Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016); Keyes, *Jurisdiction in International Litigation* (Federation Press 2005); Kohl, *Jurisdiction and the Internet* (CUP 2007); McLachlan, *Foreign Relations Law* (CUP 2014); McParland, *The Rome I Regulation* (OUP 2015); Mills, *Party Autonomy in Private International Law* (CUP 2018); Nguyen, *Private International Law in Vietnam: on General Issues, Contracts and Torts in Light of European Developments* (Mohr Siebeck 2016); Nowak and McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008); O'Keefe and Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013); Peari, *The Foundation of Choice of Law: Choice and Equality* (OUP 2018); Roodt, *Private International Law, Art and Cultural Heritage* (Edward Elgar 2015); Shaw, *International Law* (CUP 8th ed 2017); Tilbury, Davis and Opeskin, *Conflict of Laws in Australia* (OUP 2002); Torremans (ed), *Cheshire, North and Fawcett Private International Law* (OUP 15th ed 2017); Van Lith, *International Jurisdiction and Commercial Litigation* (TMC Asser Press 2009); Wilber, *Schuldnerschutz im Europäischen Zwangsvollstreckungsrecht* (Mohr Siebeck 2015); Yang, *State Immunity in International Law* (CUP 2012).

⁵⁰ See for example, Chief Justice Spigelman, 'International Commercial Litigation: An Asian Perspective' (2007) 35 *Australian Business Law Review* 318 at 325; Justice Rares, 'The Far from *Halcyon Isle*: Maritime Liens, *Renvoi* and the Conflicts of Law' (2014) 28 *Australian and New Zealand Maritime Law Journal* 1 at 12; Chief Justice Keane, 'The Prospects for International Arbitration in Australia' (2013) 79(2) *Arbitration* 195 at 197-198; Chief Justice Bathurst, presentation at the 15th Conference of the Chief Justices of Asia and the Pacific (Singapore, October 2013) titled 'The Importance of Developing Convergent Commercial Law Systems' at 6; Justice Foster, *The Arbitrator and Mediator* (November 2012) at 1.

My work has also been cited and discussed in many law review articles.

Invited appointments and consultancies

Additional evidence of my authoritative standing in the field of intentional civil litigation appears in the invitations received for membership of government bodies and prestigious international research organisations.

In 2004 I was invited by the Australian government to be a member of its delegation to the Hague Conference on Private International Law to negotiate treaties as part of the Hague Judgments Project. In 2005 the Hague Convention on Exclusive Choice of Court Agreements was agreed and since 2012 negotiations for a convention on recognition and enforcement of foreign judgments have proceeded. My role has been to advise the delegation on the draft instruments and all aspects of Australian private international law relevant to the negotiations. I was also appointed as chair of the working group on intellectual property, one of the most fraught and contested issues. Andrew Walter, Assistant Secretary, Commonwealth Attorney General's Department and head of the Australian government delegation, said that he was 'very fortunate to have access to my wealth of knowledge on private international law, intellectual property and foreign state immunity matters and that [I have] been a real pleasure to work with as part of a very small team operating in a high pressure environment.'⁵¹ Participation by persons outside government in such high level delegations is rare and consequently highly prestigious.

My international standing has also been confirmed by invited consultancies and advisory positions with distinguished organisations such as the European Commission,⁵² the American Law Institute,⁵³ the International Law Association⁵⁴ and the Australian Law Reform Commission.⁵⁵

Such work has led to my being elected a member of the American Law Institute in 2006, a Fellow of the Australian Academy of Law in 2016, a member of the Asian Business Law Institute Advisory Board in 2017 and a Director of the Australian Centre for International Commercial Arbitration in 2001. I have also held visiting professorships at the National University of Singapore and Chulalongkorn University and received numerous invitations to deliver papers at conferences and seminars both within Australia and overseas.

Professional practice

As final evidence of my international standing I have maintained a practice in international litigation and arbitration for over 15 years. Such practice has included appearances as counsel in the High Court of Australia⁵⁶ and the Supreme Court of Victoria,⁵⁷ nomination as arbitrator in an arbitration under International Chamber of

⁵¹ Letter from Andrew Walter to Professor Carolyn Evans, Dean of Melbourne Law School, 10 March 2017

⁵² Australian National Report on Private International Law and Electronic Commerce (2000); the report was described by referees to the Commission as 'excellent' and 'clearly meeting the stated objectives'.

⁵³ American Law Institute, *Principles on Transnational Intellectual Property Adjudication* (2007)

⁵⁴ Report on Transnational Group Actions for ILA Committee on International Civil Litigation and the Interests of the Public (2008)

⁵⁵ Reference on the *Judiciary Act* 1903 (Cth) (2000)

⁵⁶ *Puttick v Tenon Ltd* (2008) 238 CLR 265

⁵⁷ *AED Oil Ltd v Puffin FPSO Ltd (No. 2)* [2009] VSC 534

Commerce rules and appointment as expert witness in two United States cases. I have also provided specialist advice to major corporations and governments on commercial disputes and given online pro bono assistance to embassy and consular employees from many countries.

C. Material Submitted for Examination for LLD

1. I am a graduate in arts and law from the University of New South Wales (BA LLB 1988) and Harvard University (LLM 1991) where I was a Lionel Murphy and Fulbright scholar.

See *Curriculum Vitae* in **Attachment 1**.

2. Publications: Monograph

See *Substance and Procedure in Private International Law* (Oxford University Press 2012) in **Attachment 2**.

Extracts from reviews of monograph

‘Quite simply, this is the most extended discussion of a seminal topic in the conflict of laws to be found anywhere in the common law world. It is an internationally significant work of great erudition and insight, written with a clarity that is worthy of acclamation’.

(2012) 86 *Australian Law Journal* 853

‘By presenting an accurate and intelligible analysis of the substance-procedure distinction in the area of private international law, this work provides an excellent guide for Commonwealth lawyers advising their clients on a broad range of issues. No lawyer who has carefully reviewed Professor Garnett’s book will be left with any unanswered questions. For this, private international law scholarship owes much to Garnett for such a wonderfully detailed and comprehensive work’.

(2013) 14 *Melbourne Journal of International Law* 304

‘*Substance and Procedure in Private International Law* is a major accomplishment. Its stated aim is to provide scholars and practitioners with clear guidance not only as to the current state of the law but also as to how it may develop and be applied in future cases. It achieves these aims admirably, striking a sophisticated balance between detailed description, incisive analysis, well-informed criticism and sensible proposals for the refinement and improvement of the law. This combination makes the book a valuable resource to lawyers engaged in and interested in the study of cross-border litigation.’

(2013) 35 *Sydney Law Review* 483

‘A welcome and timely treatise ... Professor Garnett’s book goes a long way towards minding the gap and suggesting what may fill it: both by what it does but also by the responses it ought to stimulate in others who will realise that though the formal strength of the common law is the doctrine of precedent, it derives its rational strength from

debate. Professor Garnett has defined his position, well and truly. We are very much better off as a result.'

[2012] *Lloyds Maritime and Commercial Law Quarterly* 633

'There can be little doubt that it is the only book that presently offers a proper and comprehensive examination of the question of whether and, more importantly why, something should be considered substantive or procedural It is certain that it will remain relevant and influential for a long time to come'.

(2013) 60 *Netherlands International Law Review* 489

3. Publications: six selected articles

- 'Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?' (1999) 23 *Melbourne University Law Review* 30-64
- 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5 *Journal of Private International Law* 471-490 (joint publication—80% contribution)
- 'State Immunity in Employment Matters' (1997) 46 *International and Comparative Law Quarterly* 81-124
- 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?' (2015) 64 *International and Comparative Law Quarterly* 783-827
- 'State Immunity Triumphs in the European Court of Human Rights' (2002) 118 *Law Quarterly Review* 367-373
- 'Fraud and Foreign Judgments: The Defence that Refuses to Die' (2002) 1 *Journal of International Commercial Law* 161-186 republished in L Silberman and F Ferrari (eds), *Recognition and Enforcement of Foreign Judgments* (Edward Elgar 2017)

See **Attachment 3.**

CURRICULUM VITAE

Name: GARNETT, Richard Lyndon

QUALIFICATIONS AND AWARDS

- 1999 Admitted as a Barrister and Solicitor of the Supreme Court of Victoria
- 1993 Admitted as a Solicitor of the Supreme Court of England and Wales
- 1991 Master of Laws, Harvard Law School
Minor thesis: 'Uniformity in Private International Law in Australia and the United States'
- 1990 Lionel Murphy Memorial Fellowship in Law
Fulbright Scholarship
- 1990 Admitted as a Solicitor of the Supreme Court of New South Wales
- 1988 Bachelor of Arts and Bachelor of Laws
University of New South Wales (ranked 7th out of 193 on graduation, equiv Hons Class I)
- 1987 Editor-in-Chief of the *University of New South Wales Law Journal*
Winner of the Michael Pandelis Prize for student who made the most significant contribution to the University of New South Wales Law School

EMPLOYMENT HISTORY

- 2006- Professor of Law, The University of Melbourne
(Associate Dean (Engagement) 2014-2017)
- 2005-2017 Consultant, Herbert Smith Freehills LLP (advisory and counsel role in private and public international law, cross-border litigation and arbitration matters)
- 2003-2005 Associate Professor of Law, The University of Melbourne
- 2001-2002 Senior Lecturer in Law, The University of Melbourne
- 1995-2000 Lecturer and Senior Lecturer in Law, Monash University
- 1992-1994 Solicitor, Linklaters (London UK), main practice area, international commercial litigation
- 1989-1990 Research Assistant and Associate to Justice Sheppard, Federal Court of Australia, Sydney
- 1988-1989 Articled Clerk, Coudert Bros Attorneys (Sydney office)

EXTERNAL APPOINTMENTS

- 2018 Visiting Professor, National University of Singapore (teaching: Cross Border Litigation)
- 2017- Appointed Member of the Asian Business Law Institute Advisory Board
- 2016- Appointed Fellow of the Australian Academy of Law (FAAL)
- 2015 Expert witness for the plaintiff in *Chin Kui Fah et al v Pacific Propeller International LLC* (Washington State Court, USA)
- 2014- Member of the Australian Government delegation to the Hague Conference on Private International Law, Foreign Judgments Project
- 2009-2012 Member, International Law Association Committee on International Civil Litigation and the Interests of the Public, Report on International Civil Litigation and Human Rights Violations
- 2009 Counsel for the defendant in *AED Oil Ltd v Puffin FPSO Ltd (No. 2)* [2009] VSC 534 (international arbitration, stay of court proceedings, taxation)
- 2008 Counsel for the respondent in the appeal to the High Court of Australia in *Puttick v Tenon Ltd* (2008) 238 CLR 265; [2008] HCA 54 (private international law, choice of law, place of the tort, *forum non conveniens*)
- 2008 Expert witness for the plaintiff in *Thornton v Hamilton Sundstrand Corp* (Circuit Court of Cook County Illinois, USA). Defendant's request for a stay of proceedings on *forum non conveniens* grounds was refused 5 September 2008
- 2005-2008 Co-Rapporteur, International Law Association Committee on International Civil Litigation and the Interests of the Public, Report on Transnational Group Actions
- 2007- National Correspondent, United Nations Commission on International Trade Law CLOUT (Caselaw on UNCITRAL Texts) database
- 2006- Elected Member, The American Law Institute
- 2004-2005 Member of the Australian Government delegation to the Hague Conference on Private International Law, Convention on Exclusive Choice of Court Agreements
- 2003-2007 Adviser, The American Law Institute, Project on Transnational Intellectual Property Adjudication
- 2002-2008 Visiting Professor, Chulalongkorn University, Bangkok,

Thailand

- 2002 Appointed Arbitrator in International Chamber of Commerce (ICC) Arbitration
- 2001- 2006 Member of the E-Commerce Standing Committee, Business Law Section, Law Council of Australia
- 2000 Consultant, Commission of the European Union, Project on Private International Law and Electronic Commerce
- 2000 Consultant, Australian Law Reform Commission, Reference on the *Judiciary Act* 1903 (Cth)
- 2000-present Director of the Board of the Australian Centre for International Commercial Arbitration (ACICA); Member of the ACICA Rules Sub-Committee

ACADEMIC PUBLICATIONS1. Books

- *Substance and Procedure in Private International Law* (2012) Oxford Private International Law Series, Oxford University Press, Oxford (lxvii + 384 pp).
- *Private International Law in Australia* (4th ed 2019, 3rd ed 2015, 2nd ed 2011) (co-authored with R Mortensen and M Keyes) Lexis-Nexis Butterworths (lxxx + 606 pp). Eight chapters written, amounting to a 40% contribution.
- *International Arbitration in Australia* (2010) (co-edited with L Nottage) Federation Press (xxxix + 296 pp). Five chapters written/co-written, amounting to a 40% contribution.
- *A Practical Guide to International Commercial Arbitration* (2000) (co-authored with J Epstein, H Gabriel and J Waincymer) Oceana Publications Inc (New York) (now Oxford University Press) (viii + 216pp). Three chapters written, amounting to a 40% contribution.

2. Book Chapters

- 'Intellectual Property and Private International Law: Strangers in the Night?' in *Interconnected Intellectual Property: Essays in Honour of Sam Ricketson* (forthcoming, 2019 CUP).
- 'The Australian Centre for International Commercial Arbitration (ACICA)' in *Encyclopedia of International Procedural Law* (joint publication) (forthcoming 2019 OUP).
- 'Invasion of Privacy: Cross-Border Implications' in J Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (2018) Hart Publishing 409-439. This chapter was described as 'provid[ing] an insightful comparison of the approaches in Australia, Canada, England and New Zealand'; E Foubister, *inform.org* 8 January 2019.

- 'Intellectual Property Remedies Across Borders' in E Siew-Kuan Ng and G Austin (eds), *International Intellectual Property and the ASEAN Way* (2017) CUP 128-151.
- 'Remedies' in J Basedow, F Ferrari, P de Miguel Asensio and G Ruehl (eds) *Encyclopaedia of Private International Law* (2017) Edward Elgar 1532-1537.
- 'Substance and Procedure' in J Basedow, F Ferrari, P de Miguel Asensio and G Ruehl (eds), *Encyclopaedia of Private International Law* (2017) Edward Elgar 1668-1675.
- 'Foreign State Immunity: A Private International Law Analysis' in A Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (2015) Edward Elgar 297-318.
- 'Australia's International and Domestic Arbitration Framework' in G Moens (ed), *Arbitration and the Resources Sector: A Comparative Perspective* (2015) Springer International Publishing 7-21.
- 'Uniformity of Outcome in Australian Choice of Law' in A Dickinson and M Keyes (eds), *Facing Outwards: Australian Private International Law for the 21st Century* (2014) Hart Publishing 85-110.
- 'Some Practical Aspects of International Commercial Arbitration: A Commentary' in N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (2014) Ross Parsons Centre of Commercial, Corporate and Taxation Law 349-355.
- 'Recognition and Enforcement of Foreign Judgments in Australia: An Outline and Appraisal' in X Fukuda (ed), *Kan-Taiheiyō shokoku (niche-kan-chuu-bei-gou) ni okeru gaikoku kanketsu no shounin - shikkou no genjou [The current state of the enforcement and recognition of foreign judgments in Pacific Rim countries (Japan, Korea, China, America and Australia)]* (2013) Japan: Shoji Homu Co, 182-191.
- 'Seeking Documentary Evidence in Transnational Litigation' in K Lindgren and N Perram (eds), *International Commercial Law, Litigation and Arbitration* (2011) Ross Parsons Centre of Commercial, Corporate and Taxation Law 65-83.
- 'Introduction' in *International Arbitration in Australia* (2010) (joint publication) Federation Press 1-37.
- 'The Legal Framework for International Arbitration in Australia: the Old and the New' in *International Arbitration in Australia* (2010) 38-61.
- 'Enforcement of Foreign Awards in Australia and New Zealand' in *International Arbitration in Australia* (2010) (joint publication) 62-78.
- 'ACICA's Expedited Arbitration Rules' in *International Arbitration in Australia* (2010) (joint publication) 103-121.
- 'State Jurisdiction and Immunities' in Mitchell and Beard (eds), *International Law in Principle* (2009) Thomson Reuters 115-140.
- 'Potter v Broken Hill: Misuse of Precedent in Cross-Border IP Litigation' in Kenyon, Richardson and Ricketson (eds), *Landmarks in Australian Intellectual Property Law* (2009) Cambridge University Press 1-14.

- 'Reform of Australian Jurisdiction and Judgments Law by International Treaty: the Lugano Option' in Groves (ed), *Law and Government in Australia: Festschrift for Enid Campbell* (2005) Federation Press 241-271.
- 'Australia' in *Dispute Resolution in Asia* (2nd ed 2002) Kluwer Publications 29-77 and (3rd ed 2006) 35-84 (joint publication—50% contribution).
- 'Cyberterrorism: A New Challenge for International Law' in Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (2004) Hart Publications 465-488 (joint publication—60% contribution)

3. Journal Articles—Refereed

- 'Increasing Co-operation Between Australia and China in the Recognition and Enforcement of Judgments' (2018) 19 *Melbourne Journal of International Law* 750-762.
- 'The Rights of Diplomatic and Consular Employees in Australia' (2018) 31 *Australian Journal of Labour Law* 1-21.
- 'Precarious Employment? Varying Approaches to Foreign Sovereign Immunity in Labor Disputes' (2018) 51 *The International Lawyer* 25-46. This article was described as 'provid[ing] a really interesting and useful overview of the cases and approaches to foreign sovereign immunity [in] ... claims brought by employees of foreign states': T Folkman, lettersblogatory.com 12 March 2018.
- 'Fraud and Foreign Judgments: The Defence that Refuses to Die' (2002) 1 *Journal of International Commercial Law* 161-186 republished in L Silberman and F Ferrari (eds), *Recognition and Enforcement of Foreign Judgments* (2017) Edward Elgar.
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- 'Sir Zelman Cowen and the Emergence of an Interstate Private International Law in Australia' (2015) 38 *Melbourne University Law Review* 1042-1060.
- 'State Immunity and Employment Relations in Canada' (2015) 18(2) *Canadian Labour and Employment Law Journal* 643-676.
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- 'The 2010 Amendments to the International Arbitration Act: a New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29-53 (joint publication—60% contribution).
- 'National Court Intervention in Arbitration as an Investment Treaty Claim' (2011) 60 *International and Comparative Law Quarterly* 485-498.
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- 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5 *Journal of Private International Law* 471-490 (joint publication—80% contribution).
- 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?' (2009) 5 *Journal of Private International Law* 161-180; also published online at (2011) 8(2) *Transnational Dispute Management* www.transnational-dispute-management.com
- 'Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand' (2008) 25 *Journal of International Arbitration* 899-912 (joint publication—90% contribution).
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- 'In Search of an Appropriate Standard for Reasons in Arbitral Awards' (2007) 10 *International Arbitration Law Review* 111-116 (joint publication—90% contribution)
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- 'The Enforcement of Arbitration Awards in Vietnam' (2006) 2 (2) *Asian International Arbitration Journal* 137-150 (joint publication—60% contribution).
- 'Cross-border Internet Trademark Litigation: Towards a Model of Co-existence and Parallel Use' [2006] *European Intellectual Property Review* 213-219.

- 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704-732.
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- 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205-226.
- 'The Enforceability of Online Arbitration Agreements' (2004) 15 *Australasian Dispute Resolution Journal* 239-247.
- 'Perils of Publishing on the Internet: Broader Implications of *Dow Jones v Gutnick*' (2004) 13 *Griffith Law Review* 74-93 (invited article for a festschrift for Michael Whincop) (joint publication-- 40% contribution).
- '*Dow Jones & Co Inc v Gutnick*: An Adequate Response to Transnational Internet Defamation?' (2003) 4 *Melbourne Journal of International Law* 196-216.
- 'International Arbitration: Progress towards Harmonisation' (2002) 3 *Melbourne Journal of International Law* 400-413.
- '*Renault v Zhang*: A Job Half Done?' (2002) 10 *Tort Law Review* 145-156.
- 'State Immunity Triumphs in the European Court of Human Rights' (2002) 118 *Law Quarterly Review* 367-373.
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- "Regulating Foreign-Based Internet Content: A Jurisdictional Perspective" (2000) 23 *University of New South Wales Law Journal* 227-231.
- 'Are Foreign Internet Infringers Beyond the Reach of the Law?' (2000) 23 *University of New South Wales Law Journal* 105-126.
- 'Should Foreign State Immunity Be Abolished?' (1999) 20 *Australian Yearbook of International Law* 175-190 (invited article for a festschrift for Don Greig).
- 'The Internet and Trademarks: Some Problems of Jurisdiction' (1999) 39 *Intellectual Property Forum* 18-26.
- 'The Current Status of International Arbitration Agreements in Australia' (1999) 15 *Journal of Contract Law* 29-57.
- 'Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?' (1999) 23 *Melbourne University Law Review* 30-64.
- 'The Perils of Working for A Foreign Government: Foreign Sovereign Immunity and Employment' (1998) 29 *California Western International Law Journal* 133-173.

- 'The Enforcement of Jurisdiction Clauses in Australia' (1998) 21 *University of New South Wales Law Journal* 1-26.
- 'The Defence of State Immunity for Acts of Torture' (1997) 18 *Australian Yearbook of International Law* 1-30.
- 'State Immunity in Employment Matters' (1997) 46 *International and Comparative Law Quarterly* 81-124.
- 'Enforcing International Arbitration Agreements in Australia' (1995) 2 *Commercial Dispute Resolution Journal* 88-104.

4. Book Reviews (Refereed)

- Whincop and Keyes, *Policy and Pragmatism in the Conflict of Laws* published in (2002) 26 *Melbourne University Law Review* 236-240.

5. Commissioned Reports (Government and Advisory Bodies)

- In 2008 I jointly prepared a report, as Co-Rapporteur, for the International Law Association titled "Guidelines of Best Practices for Transnational Group Actions". This report was accepted by the membership at the bi-annual ILA Conference in August.
- In 2003-4 as part of my work as a member of the Australian Government delegation to the Hague Conference on Private International Law on the jurisdiction and judgments treaty I prepared a paper (16,000 words) on the effect of the proposed treaty on Australian law and the utility of the treaty for Australia. This paper formed part of the brief for the Australian delegation during the Special Commission meeting in April 2004 and the Diplomatic Conference in June 2005 at The Hague. The head of the Australian delegation, First Assistant Secretary in the Commonwealth Attorney-General's Department, in subsequent correspondence, described my "expertise" as being of "great assistance to the delegation".
- In 2000-2001 the Australian Law Reform Commission conducted a reference on the Commonwealth *Judiciary Act* and I was invited by the Commissioner-in-Charge to be a consultant to the reference. A chapter on choice of law in federal jurisdiction (8,000 words) was completed which was included in the discussion paper published in December 2000. I was subsequently involved in preparing the Final Report that was submitted to the Attorney-General in June 2001. The Commissioner in Charge of the Reference, in subsequent correspondence, "expressed admiration" for my work, describing it as "invaluable".
- In 2000 the Commission of the European Union in Brussels conducted an analysis of the laws of leading countries on private international law and electronic commerce. I was invited to prepare the report on behalf of Australia (22,000 words) with the collected reports being the subject of a major international conference involving government, industry and academic representatives in Nice, France. The Australian report was described by referees to the Commission as "excellent" and "clearly meeting the stated objectives".

REDACTED VERSION OF THESIS

The following material has been deleted from this redacted version of the thesis for copyright reasons:

- *Substance and Procedure in Private International Law* (2012) chapters 3-11
- 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?' (2015) 64 *International and Comparative Law Quarterly* 783-827
- 'State Immunity Triumphs in the European Court of Human Rights' (2002) 118 *Law Quarterly Review* 367-373

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SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW

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General Editor's Preface

The *Oxford Private International Law Series* contains a number of works which fall within the ambit of what are referred to in the textbooks as preliminary or procedural matters. There is Richard Fentiman's *Foreign Law in English Courts* and Sophie Geerom's companion monograph, *Foreign Law in Civil Litigation*. There is also Georgios Petrochilos' *Procedural Law in International Arbitration*. What was needed was a monograph to examine procedural law in civil litigation. We now have Richard Garnett's *Substance and Procedure in Private International Law* to fill this gap. This book is not only welcome as dealing with one of the most fundamental and essential distinctions in private international law but is also very timely.

In Australia and Canada, the theoretical basis for drawing the distinction between substance and procedure has gone through a re-assessment in recent years. The differences in approach from that recently adopted at common law in England by the House of Lords makes particularly interesting reading. For the United Kingdom, the Europeanization of the law applicable to contractual and non-contractual obligations under the Rome Convention and Rome I and Rome II Regulations has meant that old classifications have had to be re-examined.

The emphasis in the book is on substance and procedure in common law jurisdictions and contains an impressively wider examination of the position not only in Australia, Canada, England (at common law), New Zealand, and the United States but also in Hong Kong and Singapore. At the same time, the position under the Rome Convention and Rome I and Rome II Regulations is fully considered. The book provides a practical guide for dealing with concrete situations but also a choice of law framework for procedural questions.

The stated aim of the *Oxford Private International Law Series* is to publish works of high quality and originality in a number of important areas of private international law. *Substance and Procedure in Private International Law* palpably fulfils these criteria and is an excellent addition to the *Series*.

James Fawcett
Nottingham
September 2011

Preface

Procedure has long been a significant factor in cross-border disputes, as can be seen from the increasing volume of decisions, particularly in the common law world, on matters such as service of process, jurisdiction, taking of evidence, interim measures of protection, and the recognition and enforcement of foreign judgments. The question of the law to be applied to procedural matters has always been assumed to be the law of the forum of adjudication of the dispute, given that forum's greater familiarity with and expertise in applying its own procedural rules. While granting the forum exclusive control over procedural matters may be generally accepted where procedure is narrowly defined, it becomes much more contentious where—as has traditionally occurred in common law countries—procedure has been expansively interpreted. The controversy arises from the fact that a wide view of procedure in private international law necessarily means a more restricted role for foreign law and greater opportunities for forum shopping. This book aims to explore the applicable law dimensions of procedure through three lines of inquiry. The first is the distinction between matters of 'substance' and matters of 'procedure', which remains inconsistent and contested across common law jurisdictions; the second examines procedure in the light of other approaches in private international law for referring matters to forum law, such as public policy and overriding mandatory rules; and the third considers, in the context of matters which are wholly 'procedural', whether the exclusive application of forum law is accurate and justified. A substantial part of the book involves an examination of these three inquiries in a number of situations commonly arising in transnational litigation, such as the admissibility and exclusion of evidence, service and jurisdiction, judicial administration, limitation of actions, and remedies.

The book aims to provide scholars and practitioners with clear guidance not only as to the current state of the law but also as to how it may develop and be applied in future cases. While the major focus of the book is the decisions of courts in England, Australia, Canada, New Zealand, Singapore, Hong Kong, Malaysia, South Africa, and the United States, important aspects of EU law, such as the Rome I and II Regulations and the literature and decisions of European civil law countries, are also examined. While the book is predominantly directed at lawyers from common law countries, the suggested framework for applicable law and procedure is equally relevant to a global audience.

This book has been enhanced by the discussions I have had with scholars and practitioners in England and Australia, many of whom also read and

commented upon the manuscript. I wish to acknowledge in particular the assistance of Andrew Bell SC, Andrew Dickinson, Dion Fahey, Perry Herzfeld, Kathryn Howard, Mary Keyes, James McComish, and Danielle Sirmai. I wish to thank the Honourable Sir Anthony Mason for writing such a gracious and insightful foreword and also Professor James Fawcett, the General Editor of the Series, who read the entire manuscript before publication and made many valuable suggestions. I also wish to thank Jessica Huntley at Oxford University Press whose patience and encouragement were unstinting. Finally, I would like to acknowledge the great support and encouragement provided by my family during the writing of this book, in particular my wife Linda and children Thomas and Isabelle. The book is dedicated to the memory of William Young, my grandfather, whose destiny is hopefully fulfilled in these pages. The law in this book is stated, as best known to me, as at 30 June 2011.

Richard Garnett
Melbourne
30 June 2011

ADDENDUM

Since the completion of this manuscript for publication, the European Court of Justice (ECJ) has delivered its judgment in Case C-412/10 Homawoo v GMF Assurance (17 November 2011) on the temporal effect of the Rome II Regulation (Regulation (EC) No. 864/2007). The ECJ held that the Regulation only applies to events giving rise to damage occurring after 11 January 2009.

Foreword

The publication of this work will fill a gap in the library shelf devoted to private international law. The distinction between substance and procedure, so fundamental in this area of law, is the central concern of the book. The author argues convincingly in favour of a narrow 'process' concept of procedure—the regulation of court proceedings—in preference to the broader concept of remedy; an argument which, if accepted, will promote uniformity across jurisdictions and inhibit forum-shopping, thereby achieving desirable policy goals at the expense of more parochial considerations.

Professor Garnett seeks also to establish a more comprehensive choice of law framework for the consideration of a broad range of procedural questions than that offered by the inadequate traditional law of the forum/law of the cause of action dichotomy. In doing so, the author maintains a focus on cross-border litigation excluding international commercial arbitration. Although the author's focus is mainly on the rules applicable in Commonwealth countries, he refers as well to United States and European materials.

This work is not just an admirable statement of the law as it currently stands; it identifies and engages with deeper underlying issues and offers persuasive solutions to them. In addition, it presents a penetrating analysis of the existing rules and the decided cases.

The Hon. Sir Anthony Mason AC, KBE
Chief Justice of Australia 1987–95
Justice of the High Court of Australia 1972–87
15 December 2011

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1

Introduction

Procedure is highly important in transnational disputes, both in the context of litigation and arbitration. Many cases are decided not on the basis of the applicable substantive law or the merits of the action but because one party has secured or been granted a procedural advantage over the other. Most of the legal literature and court decisions on procedural issues in private international law have focused on individual topics within the broad realm of procedure, such as service of process and jurisdiction, the taking of evidence, or interim or provisional measures. A question that has so far been little explored is the question of applicable law or choice of law in procedural matters. Indeed, the statement of one English commentator, made over 40 years ago, still remains valid: 'The basic question which has seldom been faced by English writers and courts is whether procedure in cases of private international law should be linked to rules of private international law or confined to those of municipal law or municipal jurisdiction. This question deserves consideration . . .'.¹ **1.01**

The principal reason for this gap in the discourse to date is that procedural matters have been governed by a single choice of law rule, common to all legal systems, whose status has been rarely, if ever, questioned. The rule provides that '*lex fori regit processum*', that is, the law of the forum governs procedure. Courts, legislatures, and writers (at least in the common law world) have been almost universal in their approval of this rule with the result that the choice of law dimensions of procedure have only been appreciated in one real respect: the need to distinguish between matters of procedure (governed by the law of the forum) and matters of substance (governed by the law of the cause of action). According to this view, the rule *lex fori regit processum* is absolute and the only issue to be resolved by a court is whether a matter falls within the rubric of 'procedure'. If a matter is classified as substantive, then the ordinary choice of law rules or approaches of the forum with respect to cases involving a foreign element will be employed to determine the applicable law; if considered procedural, then the law of the forum is applied. The distinction **1.02**

¹ R Graveson, 'Review of I Szászy, *International Civil Procedure: A Comparative Study*' (1968) 17 ICLQ 534; see also R Graveson, *Conflict of Laws* (Sweet & Maxwell, 7th edn, 1974) 593.

between substance and procedure will be analysed in detail in this book. In particular, there will be an examination of the rationale for the distinction and an assessment of whether a general classification is possible or whether the content of the distinction can only be elucidated on a case-by-case basis.² The argument will be made that the concept of procedure should be generally limited to matters relating to the mode, conduct, or regulation of court proceedings rather than being based on any concept of 'remedy'. A substantial part of the book considers how the distinction has been applied by courts and legislatures in important areas of doctrine such as evidence, damages, statutes of limitation, and matters concerning the process of the courts. The aim is to give practitioners a clear picture not only of the current state of the law but also as to how it may develop and be applied in future cases. The primary focus will be on the rules applicable in Commonwealth countries but reference will also be made to recent choice of law instruments of the European Union, as well as US commentary and decisions and some materials from European civil law countries.

- 1.03** Any examination of the distinction between substance and procedure must, however, also take into account the wider choice of law context in Anglo-Commonwealth private international law. Key objectives of private international law have long been the pursuit of uniformity of outcome in decisions of different national courts and the discouragement of forum shopping. Such aims are compromised when national systems of choice of law allow too wide a scope for the operation of forum law at the expense of foreign rules. Therefore, any consideration of the scope of the law of the forum in procedural matters must also examine the nature of forum interests in choice of law more generally, as well as other methods or devices of 'forum reference', such as *lex fori*-specific choice of law rules, overriding mandatory rules, public policy, mechanisms for displacing the applicable law, and the failure to plead and prove foreign law. Ultimately, therefore, any recommendation as to the appropriate scope of 'procedure' in Commonwealth choice of law must take into account the place of the law of the forum in Anglo-Commonwealth choice of law systems as a whole.
- 1.04** A further important point to note is that most writers, courts, and legislatures have largely assumed that no choice of law problems can ever arise *within* the context of procedure. Such a conclusion flows from the equation made at 1.02 between procedure and forum law. The implications of this view are that the procedural law of the forum can never come into

² See Ch 2.

conflict with another country's procedural rules and foreign procedural rules can never be admitted into the forum.³ Hence, if a matter is classified as procedural, then the reference to the law of the forum is absolute; there is no scope whatsoever for the recognition of other foreign laws by the forum. As will be argued in this book this position is flawed both in practice and principle. First, there are increasing instances where, in the context of applying forum procedural law, *foreign* procedural law is also applied or at least recognized by English and other Commonwealth courts, such as in the areas of taking of evidence abroad (where laws in the country where the evidence is located, which prevent disclosure, may call for recognition) and jurisdiction (where a court may, in determining whether to exercise jurisdiction, examine whether a foreign court would have done so under its laws). Secondly, there are circumstances where the scope and reach of the procedural rules of the forum are qualified and limited by reference to foreign laws, for example where a forum court refuses to allow service of process in a foreign country because it would violate the laws of that state or where a forum court will recognize service of process in a foreign country if it was effected according to the procedural rules governing service in that country. Some scholars have recognized that even where forum law is not *replaced* by foreign law but is modified to take account of foreign rules or elements, a type of choice of law process is at work. Kahn-Freund's doctrine of the 'enlightened *lex fori*'⁴ and Kay's concept of foreign law as 'datum'⁵ where the forum takes cognisance of foreign laws in the context of applying forum law, are examples of this idea, practical illustrations of which will be considered throughout this work.

A further aim of this book therefore, apart from identifying the precise scope of substance and procedure and considering its application in various practical situations, is to establish a more complete choice of law framework for procedural questions. In developing this framework it may be necessary to suggest further, more precisely tailored choice of law rules in addition to the traditional law of the forum/law of the cause of action dichotomy. Questions relating to the capacity of persons, the formal validity of documents and acts, rights to privilege, and quantification of damages are all areas where the dichotomy is arguably inadequate and alternative choice of law rules may be required. Relevantly, an examination will be made of the position in the United States, where the perceived

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³ See eg Australian Law Reform Commission, *Choice of Law* Report No 58 (1992) 122, para 10.2; *Hamlyn & Co v Talisker Distillery* [1894] AC 202, 210 (Lord Herschell LC): 'the parties cannot, in a case where the merits fall to be determined in the Scotch Courts, insist, by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure'.

⁴ O Kahn-Freund, *General Problems of Private International Law* (Sijthoff, 1976) 227.

⁵ H Kay, 'Foreign Law as Datum' (1965) 53 California L Rev 47.

limitations of the substance / procedure distinction has led to it being increasingly discarded and subsumed within a broader general choice of law inquiry, based on the concept of the law which has the 'most significant relationship' to an issue. The work of organizations such as the American Law Institute and UNIDROIT, which have proposed harmonized models of procedural rules for transnational cases, will also be considered to determine whether harmonization can overcome the problem of applicable law.

- 1.06** The focus of this book will be on cross-border litigation, excluding international commercial arbitration. Not only has the topic of procedure in international arbitration been thoroughly covered in a recent work in the present series⁶ but the choice of law analysis in arbitration, especially in procedural matters, is different from litigation due to the absence of a 'forum' and the interplay between arbitral tribunals and the courts.⁷ Overall, the aim of the book is to provide guidance to lawyers on a topic which has had only limited attention in the literature to date but which is of important practical significance.

⁶ G Petrochilos, *Procedure In International Arbitration* (OUP, 2004).

⁷ As was noted by an English judge: 'Arbitration law is all about a particular method of resolving disputes. Its substance and processes are closely intertwined. The Arbitration Act contains various provisions which could not be readily separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division'; *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, 541 (Toulson J).

2

The Substance and Procedure Distinction: Origins, Rationale, and Definition

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A. HISTORY AND ORIGINS

While choice of law in general is a highly contentious and disputed area in almost every national system of private international law, one rule is universally accepted and applied: matters of procedure are governed by the law of the forum. The corollary of this rule is that courts of the forum do not apply foreign procedural law and it is notable that in the majority of decisions from common law countries the focus has been on whether foreign law should be denied application because it is procedural¹ rather than **2.01**

¹ See eg *Harding v Wealands* [2007] 2 AC 1; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

whether 'forum law covers the field and . . . leaves no place for the application of foreign law'.²

1. THE EUROPEAN CIVIL LAW MODEL

- 2.02** The rule that forum law governs procedure has a long history, being apparently first pronounced by Balduinus of the 'glossator school' in the thirteenth century. He drew the distinction between norms which were '*ad ordinandam litem*'—the rules by which the judge conducted the proceedings—and those which were '*ad decidendam litem*'—the rules by which the judge resolved the dispute before the court.³ This is the first recorded articulation of what is now known as the procedure/substance distinction. The rule that forum law governs procedure was also applied in the thirteenth century by the Parlement de Paris where the defendant pleaded a foreign custom as a defence to non-appearance in a French court. The tribunal rejected the defence on the basis that the question of appearance was procedural and so governed exclusively by the law of the forum.⁴ Later writers such as the Italian Bartolus, in the fourteenth century, asserted the same principle, and it continued to be endorsed throughout the next four centuries by European writers on private international law and remains the 'universally admitted'⁵ position today in civil law countries. A number of such jurisdictions have even codified the 'forum law governs procedure' principle,⁶ although such a statement on its own is unenlightening; it is abstract and begs the question as to *which* issues are procedural,⁷ leaving the content of the concept to be determined by the courts on a case-by-case basis.⁸ Some codifications have sought to give examples of what is procedural but none are particularly comprehensive.⁹ The other

² M Keyes, 'Substance and Procedure in Multistate Tort Litigation' (2010) 18 Torts LJ 201, 214.

³ E Spiro, 'Forum Regit Processum' (1969) 18 ICLQ 949–50.

⁴ E Ailes, 'Substance and Procedure in the Conflict of Laws' (1941) 39 Michigan L Rev 392, 396–7.

⁵ B Audit, *Droit International Privé* (Economica, 3rd edn, 2005) para 14.

⁶ See eg Italy: Legge di 31 Maggio 1995 n218, art 12; Spain: Ley Enjuiciamiento Civil (2000) art 3; Venezuela: Ley de derecho internacional (1998) art 56; Bustamante Code (1928) art 314 (adopted by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela).

⁷ J Gonzalez Campos, 'Les Liens Entre La Compétence Judiciaire et La Compétence Législative en Droit International Privé' (1977) 156 *Hague Recueil* 227, 292–3.

⁸ Art 12 of the Italian law, for example, simply states that 'the civil trial that takes place in Italy is governed by Italian law'.

⁹ See eg Bustamante Code, art 314 which states that 'the law of each contracting state determines the competence of the courts, the organisation and forms of prosecution, the execution of judgments and appeals against such decisions'.

problem with these formulations is that they all rely on the false assumption that foreign law can never apply to procedural issues;¹⁰ this misconception will be fully examined in this work.

2. THE COMMON LAW RIGHT-REMEDY APPROACH

The acceptance of the rule that forum law governs procedure in English law came much later, in the eighteenth century, after a private international law jurisprudence, where foreign laws were recognized and applied, had emerged. Until that time the English courts heard few foreign cases due to the fact that the courts had no personal jurisdiction over a defendant resident abroad and uncertain subject matter jurisdiction over events outside English territory.¹¹ In addition, English courts did not recognize rights granted under foreign law: the law of the forum was applied to both substance and procedure in all cases.¹² Yet, even after a system of choice of law developed from the late eighteenth century, with scope for admission and reception of foreign laws, English courts provided their own interpretation of the *lex fori regit processum* rule. This approach can also be explained by historical factors. In the English common law, procedure has always occupied a highly central place in the legal system to the extent that a legal right was not recognized as existing in the abstract but only in the context of the procedural framework in which it could be enforced. The concepts of substance and procedure were therefore often blurred and overlapping, with *enforcement* of the substantive right (and remedy obtained thereby) being, in practice, more significant than the right itself. Such a view is confirmed in the comment by Maine that in English law ‘substantive law . . . [is] secreted in the interstices of procedure’.¹³ **2.03**

The central focus of English law on enforcement and remedy had a direct effect on the way in which English courts were to classify matters of substance and procedure in private international law. As noted above, Balduinus had originally drawn a distinction between rules relating to the conduct of proceedings and those relevant to the determination of the merits of the case. This analysis appears to have escaped the attention of English courts, which instead provided their own interpretation of **2.04**

¹⁰ P Carlier, *L'Utilisation de la Lex Fori dans La Résolution des Conflits de Lois* (doctoral thesis, Université de Lille 2 2008) para 43.

¹¹ Ailes (n 4 above) 400 citing J Beale, ‘The Jurisdiction of Courts over Foreigners’ (1913) 26 Harvard L Rev 283, 289.

¹² *ibid* 400.

¹³ H Maine, *Dissertations on Early Law and Custom* (first published 1886, Arno Press, 1975) 389; T Main, ‘The Procedural Foundation of Substantive Law’ (2009) 87 Washington L Rev 801, 807.

the dichotomy, driven by the primacy that English domestic law attached to remedy and enforcement. Consequently, instead of the concept of procedure having an administrative connotation, as something relating to judicial machinery or protocol (as Balduinus most likely intended), it was interpreted to embrace all aspects of relief and enforcement in a suit ('the remedy'). The consequence of such an approach was that a much *wider* definition of procedure was created; leading accordingly to a greater scope of operation for the law of the forum in actions brought before English courts. It was only matters involving the abrogation of 'the right', by contrast, which were classified as substantive and had the potential of being governed by foreign law.

- 2.05** Furthermore, in many cases the remedy or enforcement aspect of a legal action was considered indispensably connected with the substantive right which suggested, in practice, a limited role for the latter: 'if the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal'.¹⁴ So, with the practical 'remedy' being regarded as equally, if not more, significant than the right of action, and both being closely linked in any event, it is perhaps not surprising that English courts interpreted procedure so broadly. Indeed, the right-remedy dichotomy continued to be applied by English courts until at least the late twentieth century as can be seen in the endorsement by the House of Lords in 1975¹⁵ of the following statement by Tindal CJ in *Huber v Steiner*:¹⁶

The distinction between that part of the law of the foreign country where a personal contract is made, which is adopted and that which is not adopted by our English courts of law is well known and established; namely that so much of the law as affects the rights and merit of the contract, all that relates *ad litis decisionem* is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of that country where the action is brought.

- 2.06** What is noticeably absent from all these statements is any concern that a wide definition of procedure, with its large reservation of matters to the law of the forum, is undesirable because it would compromise uniformity of outcome and the discouragement of forum shopping. One explanation

¹⁴ *Ashby v White* (1703) 2 Ld Raym 938, 953; 92 ER 126 (Lord Holt); see also *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, 124 (Goulding J).

¹⁵ *Black-Clawson International Ltd v Papierwerke Waldhof-Asschaffenburg AG* [1975] 1 AC 591, 630 (Lord Wilberforce).

¹⁶ (1835) 2 Bing NC 202, 210; see also *Don v Lippmann* (1837) 5 Cl & Fin 1, 13 (Lord Brougham).

for the long adherence to the right-remedy view is that English courts preferred the easy accessibility and familiarity of local law over the uncertainty and difficulty of applying foreign rules, particularly from European civil law countries. The European states by contrast, all with a common Roman law inheritance, may have felt less unease in recognizing each other's laws.¹⁷ The retention (to this day) of the principle that the pleading and proof of foreign law is not mandatory but at the discretion of the parties is consistent with this traditionally 'hands off' approach to foreign law. By contrast, the much earlier development of choice of law rules on the European continent may well have influenced European scholars to provide a more confined and closely-tailored view of procedure—so as to allow greater scope for the operation of foreign law.

Considerable time has been spent describing the traditional English approach to substance and procedure because it is not clear that this position has been abandoned. Indeed, it is strongly arguable that the right-remedy approach to substance and procedure still represents the law in some Commonwealth countries, apart from Australia and Canada, and a number of states in the United States. By contrast, EU instruments on choice of law,¹⁸ which grant a wider field of operation to the substantive law, implicitly reject the forum-centredness of the right-remedy test. Recent attempts to redefine the substance / procedure distinction with a narrower field allocated to the law of the forum are discussed later in this chapter.¹⁹ **2.07**

As mentioned earlier, the key reason why the traditional English view remained uncontested for so long was that the uniquely English domestic law view of procedure based on remedy was applied, with little dissent, to cases with a foreign element. Yet in the past twenty years there has been a dramatic increase in transnational litigation in both English and other Commonwealth courts and with that a much greater awareness of foreign laws and institutions. The adoption of a more even-handed approach to the exercise of jurisdiction in the 1980s, as evidenced by the implementation of the Brussels Convention²⁰ (and later, the Brussels I Regulation²¹) **2.08**

¹⁷ E Lorenzen, 'The Statute of Frauds and the Conflict of Laws' (1923) 32 Yale LJ 311, 327.

¹⁸ See eg the Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). The temporal application of Rome I and II is discussed at 11.01 below.

¹⁹ See 2.21–2.30 below.

²⁰ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

²¹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters.

and the acceptance of a doctrine of *forum non conveniens*,²² as well as the emergence of more balanced, less forum-centric choice of law rules in tort,²³ have signalled a clear movement away from unqualified forum dominance. Such developments may suggest that it is time for a reconsideration of the traditionally wide view of procedure in English private international law. The link between the tradition of forum control in English private international law and the expansive view of procedure has been noted by Australian judges. Mason CJ said that an historically wide view of procedure was articulated at a time when ‘the importance of international judicial comity may not have been given the same recognition it nowadays commands and when the notion of forum shopping was not considered as objectionable a practice as it now is’.²⁴ By contrast, more recently there has been a greater concern to ensure that actions are brought in the most appropriate place to resolve them and that choice of law rules should operate to fulfil, not frustrate, foreign rights.²⁵ A narrow view of procedure is more consistent with this objective.²⁶ The impact of this new awareness in common law countries can arguably be seen in the profusion of new approaches to the substance / procedure distinction. Before examining these approaches in detail and assessing their value it is important to consider the rationale for matters of procedure being reserved to the law of the forum.

B. THE RATIONALE FOR FORUM LAW GOVERNING PROCEDURE

1. CONVENIENCE

- 2.09** Under the traditional right-remedy view, the rationale for forum law applying to procedure appears not to have been directly addressed by English courts, although English and foreign commentators and Australian judges have considered the issue. The most commonly cited modern rationale for procedural matters being governed by forum law is that it suits

²² *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

²³ See for the UK, Private International Law (Miscellaneous Provisions) Act 1995 and Rome II Regulation; for Australia, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (High Court of Australia); and for Canada, *Tolofson v Jensen* (1994) 120 DLR (4th) 289 (Supreme Court of Canada), all replacing the rule in *Phillips v Eyre* (1870) LR 6 QB 1 (with the exception of defamation claims in England).

²⁴ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 22–3.

²⁵ *ibid* 23 (Mason CJ), 50 (Deane J).

²⁶ R Fentiman, *Foreign Law in English Courts* (OUP, 1998) 36.

the convenience and efficiency of the forum court.²⁷ The idea is that courts are established according to local custom and tradition and a number of their practices and rituals would be difficult for foreign judges, unfamiliar with such rules, to replicate.²⁸ For example, it would be difficult for a court to adopt the language and etiquette of the foreign tribunal, particularly if it was significantly different from its own. More formal methods of trial, such as the use of juries, may also be impracticable to adopt in, for example, a civil law country. In addition, it is likely that there would be certain procedural rules the employment of which by a foreign court would be highly expensive, time-consuming, and burdensome.²⁹ Courts owe a duty not only to the state which constituted them but also to litigants to conduct proceedings efficiently and expeditiously.³⁰ The use of the same procedures in every case by courts will further these objectives; by contrast, the employment of unfamiliar foreign procedures may frustrate them.

Some writers have been critical of the focus on convenience and practicality as the rationale for applying forum law to procedural issues. It has been suggested that convenience gives undue weight to ‘administration of justice concerns’, which are normally downplayed in English private international law, and that this ‘displays an overtly parochial tendency’ inconsistent with the notion of judicial comity in private international law.³¹ While such observations have force, it must be acknowledged that there are some institutions of a country’s legal system (such as a jury) which simply cannot be replicated in another system and any attempt to do so would be at best artificial and at worst disastrous. More likely, requests to do so will simply be ignored. Further, it should also be remembered that all that is being considered at this stage is the *rationale* of the forum law governs procedure rule. As discussed at 2.18–2.30, courts and most writers have not suggested that convenience should be the sole test for determining whether a matter is procedural; it will be argued in this

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²⁷ See eg W Cook, “‘Substance’ and ‘Procedure’ in the Conflict of Laws” (1933) 42 Yale LJ 333, 343–4; L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th edn, 2006) para 7.004, citing a number of decisions including *Shaik Sahied v Sockalingam Chettiar* [1933] AC 342, 346 (PC); G Panagopoulos, ‘Substance and Procedure in Private International Law’ (2005) 1 JPIL 69, 71; J Carruthers, ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 ICLQ 691, 692–3; *Harding v Wealands* [2007] 2 AC 1, paras 9, 11 (Lord Woolf); and *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 22, 26–7 (Mason CJ), 49 (Deane J), and 56 (Gaudron J).

²⁸ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 22 (Mason CJ).

²⁹ US Restatement (Second) of Conflict of Laws, § 122 comment a.

³⁰ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 22 (Mason CJ); M Whincop and M Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate, 2001) 41.

³¹ Keyes (n 2 above) 217.

chapter that, at most, it remains useful as one factor to be considered in that determination.

2. NATURAL JUSTICE

- 2.11** Another suggested rationale for the forum law governs procedure rule, although less widely advocated, is natural justice. One writer has argued that 'it is a postulate of justice that the courts of a given country follow the general rules of procedure irrespective of whether the subject matter of the litigation is governed by foreign law or by the law of the country'.³² If the court were to apply foreign procedural laws this would 'not only be inconvenient . . . but would also entail injustice through the unequal treatment of the parties in the suit in question on the one hand and the parties in other lawsuits on the other'.³³ There are two distinct elements to this justification. The first is that the parties have an expectation that once the jurisdiction of a court is invoked, the procedures of that court shall apply. The second is that it is inequitable and discriminatory for different procedural rules to be applied to wholly domestic cases on the one hand and cases with a foreign element on the other. The 'expectation' argument has been supported by other writers who even argue that a choice of forum jurisdiction or court clause in a contract amounts to a selection by the parties of local procedural law.³⁴ The implication here is that if a court does not apply its own procedural rules it is not honouring the terms of the parties' agreement. Such a view, however, assumes that the preference for local procedures is the main factor in parties agreeing to enter a choice of jurisdiction clause. It is more likely that broader questions of convenience are influential, such as the costs for a party of having to litigate at great distance from its place of business or the greater risk of being subject to an unfamiliar or undesirable substantive law if a suit were brought in a court other than that of the party's choosing. 'Party expectations' in procedural law is therefore a difficult factor to assess accurately although it is probably true that if parties turned their minds to the issue, they would assume that local procedures would apply to a suit in the forum. Yet the 'party expectations' view is stretched too far when it is said that the application

³² M Wolff, *Private International Law* (OUP, 2nd edn, 1950) 230.

³³ *ibid.*

³⁴ *The Asian Plutus* [1990] 1 SLR 543, para 19 (Sing HC); *Telesis Technologies Inc v Sure Controls Systems Inc* 2010 ONSC 5288, para 9; and Keyes (n 2 above) 222, who argues that in such a circumstance 'it is less objectionable for forum law to be applied to matters of procedure'. cf E Crawford and J Carruthers, *International Private Law: A Scots Perspective* (Thomson West, 3rd edn, 2010) para 8.01, who reject the view that parties may make a choice of procedural law in a contract.

of forum law to procedure can be justified on the basis of the plaintiff's choice of forum and the defendant's submission to jurisdiction—particularly where the defendant has contested jurisdiction.³⁵

The further argument that the use of foreign procedures somehow amounts to inequitable or discriminatory treatment of the parties (when compared to domestic cases where local procedure is exclusively applied)³⁶ must be rejected since foreign and domestic cases are not identical. If it is generally accepted that cases involving a foreign element may require resolution by application of foreign substantive law, then it should equally be no surprise that in such cases foreign procedural rules may also be relevant. In principle, a party in a cross-border case has no greater right to have its local procedural law applied than its local substantive law. The comparison with wholly domestic cases, where there is no scope for foreign law of any kind to apply, is therefore flawed.³⁷ 2.12

3. PUBLIC LAW

A third rationale for the forum law governs procedure rule, which is not referred to in the common law literature or decisions but is frequently cited in French and Italian texts, is that procedure is part of the administration of justice of the state entrusted to the courts and so is a 'public law' matter which can only be governed by the laws of that state.³⁸ This approach is said to be supported by principles of public international law, pursuant to which the nation state has complete sovereignty over its organs, including the operation of its courts.³⁹ The problem with such an argument is that it ignores the interests of the parties to the litigation and their advisers, who (apart from the judge) are the principal actors in the process and who may have little or no connection with the state. Moreover, at least under common law rules of private international law, it is unlikely that foreign procedural rules would come within the rubric of foreign penal or public laws or 'governmental interests'⁴⁰ which are not recognized 2.13

³⁵ Keyes (n 2 above) 218; cf *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 22 (Mason CJ).

³⁶ *De la Vega v Vianna* (1830) 1 B & Ad 284.

³⁷ I Szászy, 'The Basic Connecting Factor in International Cases in the Domain of Civil Procedure' (1966) 15 ICLQ 436, 446–7.

³⁸ See especially P Mayer and V Heuze, *Droit International Privé* (Montchrestien, 9th edn, 2007) para 492; and R Baratta, 'Processo Civile (Legge Regolatrice)' in R Baratta (ed), *Dizionari del Diritto Privato Diritto Internazionale Privato* (Giuffrè Editore, 2010) 290.

³⁹ Carlier (n 10 above) para 47.

⁴⁰ *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

by the forum. As has been already noted, it is not accurate to describe such laws as solely embodying such interests.⁴¹ Rather, procedural rules are designed to smooth the conduct of business in the courts; while there is a state interest in this process in terms of providing just, efficient, and expeditious proceedings, in practice these concerns also reflect and respond to the needs of private litigants. The degree of intrusion of sovereignty on the forum state by applying the procedural rules of another country is therefore likely to be minimal.

4. TERRITORIAL SOVEREIGNTY

- 2.14** A final justification for the forum law governs procedure rule, which is referred to in some judgments from common law courts⁴² and European civil law texts,⁴³ is territorial sovereignty. The idea here is that the law of the forum exclusively applies because procedure is a matter wholly connected to acts or events within the forum's territory. While as an empirical observation it is true that most procedural acts relating to litigation occur within the territory of the adjudicating court, there is an increasing range of procedural conduct which has an extraterritorial aspect. As was mentioned in Chapter 1, many procedural acts either occur or have effects in foreign territories, for example service of process or the taking of evidence which may require consideration of the procedural rules of such territories *in combination with* local rules. Other examples would be where a court considers the jurisdictional rules of a foreign country before granting a stay of proceedings on appropriate forum grounds⁴⁴ or where it examines the rules on recognition and enforcement of foreign judgments of another country before certifying a class action involving claimants resident in such country.⁴⁵ Yet, as will be seen later,⁴⁶ questions of territoriality may be relevant in the context of substance and procedure, as a number of Canadian courts have relied upon the territorial scope of a statute as an alternative approach to the substance / procedure distinction in determining whether forum law applies.
- 2.15** A variant on the territorial sovereignty justification is to say that procedural rules of the forum are 'overriding mandatory rules' and so must be applied in every case. Yet in common law systems at least, the scope of

⁴¹ cf E Sykes and M Pryles, *Australian Private International Law* (LBC, 3rd edn, 1991) 267.

⁴² *Harding v Wealands* [2007] 2 AC 1, paras 73–75 (Lord Rodger); *Breavington v Godleman* (1988) 169 CLR 41, 136 (Deane J).

⁴³ For Italy see Baratta (n 38 above) 289.

⁴⁴ See eg for Canada 4.44–4.45 below.

⁴⁵ *Re Vivendi Universal SA Securities Litigation* 242 FRD 76 (SDNY 2007).

⁴⁶ See 2.30.

such rules in private international law is generally limited to forum statutes⁴⁷ with a clear and explicit intention to apply in transnational cases. Only some forum procedural rules would fall within this category. In those cases there is much to be said for the use of overriding mandatory rules as a transparent, policy-based method for applying forum law in procedural matters. This issue is explored further at 3.22.

To conclude on the question of rationale, while convenience is properly the most accurate justification for the rule that forum law governs procedure, in most cases, a number of the arguments are likely to reinforce one another. So, for example, the imposition of a jury trial on a court in a civil law country is not only likely to be inconvenient and impractical for the court but also a source of injustice, as parties have to employ a procedure with which the forum is completely unfamiliar. The identification of the appropriate rationale for the substance-procedure rule does not, however, resolve the key problems that may arise. The first and most obvious is the issue of how to determine what is substantive and what is procedural, a question which may require an answer both at the abstract level and in application in specific cases. A second question that may arise even if a matter is found to be procedural, is whether it is nevertheless appropriate to apply forum law exclusively without regard to other foreign laws that may be relevant to the dispute. The third question is whether further choice of law rules, beyond the law of the forum and the law of the cause of action, may need to be developed for specific issues. Finally, there may be circumstances where, although a matter is classified as substantive, there are compelling reasons of public policy for applying forum law to the case. **2.16**

C. CONTEMPORARY APPROACHES TO SUBSTANCE AND PROCEDURE

While modern text writers now almost unanimously condemn the right-remedy test as a basis for applying the substance / procedure distinction, it is not clear that all Commonwealth courts have rejected this view. Moreover, even among those writers and judges who have advocated **2.17**

⁴⁷ Some commentators have suggested that such overriding provisions may also include common law rules, see T Hartley, 'Mandatory Rules in International Contracts: The Common Law Approach' (1997) 266 *Hague Recueil* 337, 351–3, J Fawcett and J Carruthers, *Cheshire, North and Fawcett Private International Law* (OUP, 14th edn, 2008) 736–7, but so far there has been limited recognition of this view in judicial decisions.

different tests, there is no unanimity as to what approach should be taken.⁴⁸

1. CASE BY CASE

- 2.18** One view, which has the support of leading English and Canadian text writers⁴⁹ and the Australian Law Reform Commission,⁵⁰ is that it is impossible to elucidate a test in abstract terms, given the diversity of foreign laws and circumstances which may have to be considered. Consequently, courts must determine what is substantive and what is procedural on an issue-by-issue basis. Clear evidence of this approach appears in the following statement:⁵¹ ‘When is a question one of substantive law? When is a question merely one of evidence and procedure? I attempt no general answer to these questions for answer can only be made after an analysis of the specific questions calling for decision, its legal background and factual context.’ To the same effect are the comments of Lord Pearson:⁵² ‘I do not think there is any exact and authoritative definition of the boundary between substantive and procedural . . . law . . . the boundary remains to be settled by further decisions in particular cases.’ The argument in favour of this approach is that, as a matter of reality, substance and procedure cannot be relegated to clear-cut categories with a preordained line discoverable by logic.⁵³ If this position were widely adopted it would have the benefit of liberating English courts from the rigid right-remedy dichotomy and provide more flexibility to choose the rule which best meets the needs of the particular case. Yet the problem with this approach is that it provides no guidance or criteria as to where the distinction should be drawn and so uniformity and predictability will be hard to accomplish. Under this approach courts may be tempted to rely on their own often unarticulated policy assumptions as to whether local or foreign law should apply, with the risk that the historical dominance of forum law (at least in

⁴⁸ Consequently, it is interesting that some Australian writers have said, in relation to the substance / procedure distinction, that ‘what used to be a very controversial part of the conflict of laws is now likely to be regarded as both settled and sensible’; M Tilbury, G Davis, and B Opeskin, *Conflict of Laws in Australia* (OUP, 2002) 328. The material covered in this work will reveal, however, that, at least in the Commonwealth as a whole, the position remains fluid and contentious.

⁴⁹ *Cheshire, North and Fawcett* (n 47 above) 78; J Walker, *Castel & Walker Canadian Conflict of Laws* (LexisNexis Butterworths, 6th edn, 2005) para 6.2. See also Main (n 13 above).

⁵⁰ At least in respect of international, as opposed to intra-federal, conflicts, see *Choice of Law* Report No 58 (1992) para 10.15.

⁵¹ *Re Fuld’s Estate* (No 3) [1968] P 675, 695 (Scarman J).

⁵² *Boys v Chaplin* [1971] 1 AC 356, 395.

⁵³ Cook (n 27 above) 335–6; *Cheshire, North and Fawcett* (n 47 above) 78.

common law countries) will remain strong. Also, under this view, there is no recognition that a matter may be classified as procedural yet not subject to the law of the forum or that new choice of law rules may need to be created to resolve procedural disputes. Moreover, while the task of formulating an abstract test is certainly difficult, the great advantage of some general principle is that it provides at least some guidance for courts, parties, and their advisers in future cases; limits the potential for arbitrary and inconsistent decision-making; and promotes certainty and settlement.

2. CONVENIENCE

Other writers and courts have also sought to restrict the scope of procedure in private international law, motivated by an increasing concern to deter forum shopping and to give effect to foreign laws and institutions. The view of one US author, Cook, has recently been endorsed by leading English and Canadian text writers.⁵⁴ Cook⁵⁵ argues that as convenience is the most popularly accepted rationale for the rule that forum law governs procedure, so should it also constitute the test for determining when local law should apply. In his view, the forum should apply all the rules of the law of the cause of action as long as it is practicable and convenient to do so. The idea here, which has been acknowledged by some Australian judges,⁵⁶ is that a foreign rule which is 'readily available' and whose application does not 'depend on knowledge and reference to factors peculiar to the enacting state' should normally be applied by the forum. The cost and delay involved in having to prove foreign law as a fact by expert evidence probably also underlies this view. An example of readily transferable rules may be a foreign statute of limitation or a principle of admissibility of evidence, whereas the language, dress code in a foreign court, or method of assigning judges to a particular case would obviously be things more peculiar to that jurisdiction and so impractical, if not impossible, for the forum to replicate. 'A judge can never apply foreign rules which regulate the judge's office.'⁵⁷ Another example of impracticality would be where the law of the cause of action provided remedies which required a particular local infrastructure to administer or supervise. Such types of relief would be beyond the powers or competence of the forum court to order and so highly 'inconvenient'. Beyond these rather extreme and obvious examples, however, the notion of impracticality or inconvenience is difficult to apply. Indeed, on one view, inconvenience has the danger of

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⁵⁴ *Dicey, Morris and Collins* (n 27 above) para 7.004; *Walker* (n 49 above) para 6.2.

⁵⁵ *Cook* (n 27 above) 343–4.

⁵⁶ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 26 (Mason CJ).

⁵⁷ O Kahn-Freund, *General Problems of Private International Law* (Sijthoff, 1976) 294.

being elevated to a general test of ‘unfamiliarity’ which could have the effect of excluding the vast majority of foreign laws. Obviously, such an outcome would destroy Cook’s worthy intention of restricting the concept of procedure to allow wider operation of foreign law in the forum.

- 2.20** In summary, while convenience may be a useful, broad rationale for understanding why courts are keen to adhere to their local procedural rules, its vagueness and uncertainty render it problematic as the *sole* test for drawing the line between substance and procedure.⁵⁸ At most, it may be a useful factor (among a number of others) in resolving the classification. Moreover, some of the examples of foreign rules often suggested as too ‘inconvenient’ to apply may nevertheless demand to be recognized by forum courts on comity and sovereignty grounds. Matters such as service of process, jurisdictional rules, evidence, and the enforcement of judgments may all once have been regarded as wholly within the concern of the forum. As will be seen, however, in many of these issues forum law may come into contact with the procedural regimes of other countries, raising the question as to whether such laws should be applied by the forum or at least used as limits on the scope of operation of forum law. So, convenience is an inadequate concept, by itself, for defining what procedural laws should be admitted in the forum.

3. THE AUSTRALIAN REAPPRAISAL

- 2.21** Recognizing this problem, the High Court of Australia and the Supreme Court of Canada in a series of cases, have sought to create a new principle for classifying rules as procedural or substantive. While these courts have recognized the difficulty of identifying ‘some unifying principle’ or ‘bright line’⁵⁹ which would assist in making the distinction with ‘the dividing line [being] sometimes doubtful or even artificial’, they nevertheless see the task as important enough to warrant an attempt. In their view, the correct approach grows out of one of the primary reasons for the rule that forum law governs procedure, that is, the efficiency of litigation.

(a) Mode or Conduct of Court Proceedings (Procedural)

- 2.22** Applying this ethos, some Australian High Court judges, in particular Mason CJ in *McKain v RW Miller & Co (South Australia) Pty Ltd*,⁶⁰ have suggested

⁵⁸ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 26 (Mason CJ).

⁵⁹ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, paras 97 (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ) and 133 (Kirby J).

⁶⁰ (1991) 174 CLR 1, 26–7; see also 56 (Gaudron J).

that 'the essence of what is procedural may be found in those rules directed to governing or regulating the mode or conduct of proceedings' with all other rules or provisions to be classified as substantive. A distinguished US author had proposed a similar test almost eighty years earlier when he defined procedure as 'that branch of law which governs the process of litigation'.⁶¹ Such a test has the advantage of significantly reducing the number of cases which will be automatically referred to the law of the forum, when compared with the right-remedy distinction. It also supports one of the key objectives of private international law, namely, the pursuit of uniformity of outcome and deterrence of forum shopping. The test also arguably sits more comfortably with the idea of practicality or convenience,⁶² although, as some have argued,⁶³ convenience may be compatible with almost any definition of procedure. The test also appears similar to some observations in the US Second Restatement of the Conflict of Laws where it was suggested that rules relating to 'how the forum's judicial machinery functions and [the] administering [of] the court's processes' would normally be governed by the law of the forum.⁶⁴ Note, however, that the drafters of the Restatement did not intend these criteria to be the sole test by which all applicable law questions involving substance and procedure were to be determined. These elements were to be merely guidelines which could be departed from in an appropriate case such as where another country's law had a stronger claim to application. The Mason mode or conduct of proceedings test, by contrast, is expressed as a more universal, abstract standard to be applied in every case where delimitation between substance and procedure is required.⁶⁵

The concept of rules 'directed to regulating the mode of proceedings' will, however, not be easy to apply in every case. For example, rules regulating the assessment of damages while not obviously relating to the conduct of court proceedings, may nevertheless involve local features (for example the court appointment of an assessor or expert) unique to that particular jurisdiction and difficult to replicate elsewhere. In such a case application of forum law may be exceptionally justified either on the ground of practicality or, possibly, public policy. Another 'gap' in the test, which is common to all substance/procedure delineations, is that it again appears to preclude the possibility of laws other than that of the forum or the cause of action being applied or of foreign rules being used to modify the scope and operation of forum law, for instance, in cases of service or taking evidence

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⁶¹ Lorenzen (n 17 above) 325.

⁶² Tilbury (n 48 above) 333.

⁶³ E Schoeman, 'Rome II and the Substance-Procedure Dichotomy' [2010] LMCLQ 81, 89–90.

⁶⁴ Restatement (Second) of Conflict of Laws, § 122 comment a.

⁶⁵ The Australian Law Reform Commission recommended adoption of this test in intra-federal disputes within Australia (n 50 above) para 10.13.

abroad. Hence, even if it is accepted that procedure is best defined in terms of those rules which regulate court proceedings, in some cases forum law should not necessarily be automatically applied. Any test which is limited to substance and procedure does not allow for such possibilities. These arguments are reinforced when the second part or corollary of the rule is considered: any matter which does not involve the regulation of court proceedings will be classified as substantive and submitted to the law of the cause of action. Once again, such a view ignores the possibility of other laws being relevant: for example the law of the place of the act (for formal validity of certain documents), or the law of the domicile of the parties, or the law of the country of incorporation (for questions of capacity). This test therefore arguably gives too wide an operation to the law of the cause of action at the expense of other choice of law possibilities.

- 2.24** A slightly different version of this test was proposed by another Australian High Court judge, Callinan J, in *John Pfeiffer Pty Ltd v Rogerson*:⁶⁶ ‘what should be regarded as procedural are the laws and regulations which are reasonable and necessary in the *lex fori* for the conduct of the action only’. The judge then gives the following examples of such laws: ‘[those] relating to procedures such as the initiation, preparation and prosecution of the case, the recovery processes following any judgment and the rules of evidence’. Examining this version of the test, while again it is likely that the law of the forum will have predominant application to questions of ‘initiation, preparation and prosecution of the case’, this cannot deny the relevance of other laws, especially where those acts have an extraterritorial impact outside the forum. The same comment could be made about subjecting the whole body of the law of evidence to the law of the forum. First, as has been noted, there are often cases where the taking of evidence will involve acts and effects in another country. Secondly, there may also be situations where a rule of evidence is not necessary for the conduct of the action but still has a profound impact on the rights of the parties and the outcome of the litigation (for example a question of admissibility) and so should arguably be governed by a law other than that of the forum—for example the law of the cause of action.

(b) Outcome Determinative (Substantive)

- 2.25** Another recent version of the substance / procedure distinction seeks to define what is *substantive* as opposed to what is procedural. This approach, which emanates from the decision of the High Court of Australia in the

⁶⁶ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, para 192.

Pfeiffer case,⁶⁷ provides that ‘matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action’ are substantive, with everything else being (presumably) procedural.⁶⁸ Writers have interpreted the ‘existence, extent or enforceability of rights or duties’ test as an ‘outcome determinative’ formulation,⁶⁹ whereby any rule which has the effect of altering the result of a given case will be classified as substantive. Interestingly, the High Court in *Pfeiffer* suggested⁷⁰ that this ‘outcome determinative’ test may be the functional equivalent of (or at least lead to the same results as) the ‘mode or conduct of court proceedings’ test proposed by Mason CJ in the *McKain* case. As noted later,⁷¹ however, this conclusion is unlikely to be correct in all cases. There is some evidence of adoption of an ‘outcome determinative’ approach in the US Second Restatement where, for example, the issues of the burden of proof⁷² and presumptions⁷³ are referred to the law of the forum ‘unless the primary purpose of the relevant rule of the *lex causae* is to affect decision of the issue’. A similar approach is taken to the question of who should be a party to litigation.⁷⁴

While a number of European⁷⁵ and American⁷⁶ scholars have supported a test based on ‘outcome determination’ for substance and procedure, it has a clear flaw. This is that potentially any procedural rule in a given context may affect the rights and duties of the parties and so alter the result.⁷⁷ The decision to use a jury rather than have trial by judge alone may affect both the existence and extent of a defendant’s liability and the size of any award of compensation. A rule which requires each party to pay its own legal costs in a suit, regardless of the result, may encourage the commencement of actions which would otherwise not have been brought. It follows,

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⁶⁷ (2000) 203 CLR 503.

⁶⁸ *ibid* para 99 (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ).

⁶⁹ M Davies, A Bell, and P Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 8th edn, 2010) para 16.5.

⁷⁰ (2000) 203 CLR 503, para 99.

⁷¹ See 2.26.

⁷² Restatement (Second) of Conflict of Laws, § 133.

⁷³ *ibid* § 134.

⁷⁴ *ibid* § 125.

⁷⁵ H Niederländer, ‘Materielles Recht und Verfahrensrecht im Internationalen Privatrecht’ (1955) 20 *Rabels Zeitschrift* 1, 34.

⁷⁶ R Sedler, ‘The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws’ (1962) 37 NYU L Rev 813; G Stumberg, *Principles of the Conflict of Laws* (Foundation Press, 3rd edn, 1963) 155.

⁷⁷ Ailes (n 4 above) 408–9, 413; Australian Law Reform Commission (n 50 above) para 10.7; Main (n 13 above) 819, 826; L Brilmayer, ‘The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules’ (1995) 252 *Hague Recueil* 9, 95–6.

therefore, that many laws regulating the mode or conduct of court proceedings (for example for joinder of parties) may also have a material effect on the outcome of a case. Compared to the right-remedy test, the outcome determinative approach therefore goes too far in the opposite direction: it gives too much operation to the law of the cause of action. Consequently, in this work it will be argued that while the 'outcome determinative effect' is a useful factor in determining whether an issue or provision is substantive or procedural, it should not be applied in isolation. Nor should the concept generally be applied where to do so would conflict with the 'mode or conduct of proceedings' principle. It will be argued that where a matter clearly falls within the scope of 'mode or conduct of proceedings', the fact that it may also be outcome determinative should not disturb its primary procedural characterization. This contention is supported by one of the surprisingly few decisions in which the possible conflict between the two criteria was identified. In *Julia Farr Services Inc v Hayes*⁷⁸ the New South Wales Court of Appeal noted the problem in the context of classifying a provision permitting a right of appeal. The court held that the fundamentally procedural nature of the right, because of its intimate connection with court proceedings, should be recognized despite the fact that the issue may also have an outcome determinative effect.⁷⁹ A further concern with the outcome determinative test is that, in a similar way to the regulating court proceedings principle, it does not appear to contemplate the operation of rules other than the law of the cause of action or the law of the forum, nor of the possible application of foreign procedural rules in the forum.

- 2.27** The position of the High Court of Australia in failing to acknowledge the role and relevance of foreign procedural rules may, however, have changed recently. In 2005, in *Neilson v Overseas Projects Corporation of Victoria Ltd*,⁸⁰ the High Court adopted a novel approach to choice of law which requires an Australian court to seek uniformity of outcome to prevent parties from obtaining an advantage by suing in Australia. Consequently, where foreign law is selected as the law of the cause of action the Australian court should apply the choice of law rules of the foreign country and any approaches to *renvoi* under that law to ensure that the same result is reached. A likely consequence of this view⁸¹ is that where, for example, a foreign legal system classifies a matter as procedural but Australian law

⁷⁸ [2003] NSWCA 37.

⁷⁹ *ibid* para 52.

⁸⁰ (2005) 223 CLR 331.

⁸¹ The various interpretations of *Neilson* and their relevance to the substance and procedure distinction are discussed more fully at 3.09–3.14 below.

views it as substantive, the forum should nevertheless apply the foreign law because the foreign court itself would have done so had it adjudicated the same facts. Such a result may therefore be seen as an example of foreign procedural rules being applied in the forum—in the sense that the forum applies the same rules which the foreign court would apply if it were hearing the matter regardless of their characterization by the foreign court. It will be argued in this work that the *Neilson* approach does no harm when the Australian and foreign choice of law rules do not conflict. Where, however, a conflict does exist, for instance where under the choice of law rules of the law of the cause of action, a third country's law (and any *renvoi* doctrine) is selected, the position as to what law is to be applied by an Australian court becomes extremely complex.

4. CANADA TAKES A SIMILAR PATH

(a) Machinery Versus Outcome Determination

A slightly different version of the two Australian tests, although similar in effect, has been proposed by the Supreme Court of Canada in *Tolofson v Jensen*.⁸² According to this view, procedure and substance are fused into a single test but defined in a similar way to the formulations discussed at 2.22–2.25. Procedural rules are those which 'make the machinery of the forum court run smoothly' and substantive provisions are those 'determinative of the rights of both parties'.⁸³ While the 'machinery' test may be similar in effect to Mason CJ's 'mode, conduct and regulation of court proceedings' principle, it arguably lacks the precision of the Mason version. In addition, as has already been shown, many highly process-oriented rules can nevertheless determine the rights of parties. This last point shows the danger of combining these two elements in one test. Such an approach even more clearly assumes that there is a stark line of difference between the two elements, whereas again it is highly possible that a rule for smoothing the machinery may also determine the rights of the parties. In such a case, the test would be rendered meaningless. Finally, and in a similar way to the Australian models, the Canadian formulation of substance and procedure also appears not to recognize any scope for application of rules other than the law of the forum to procedural matters. The same general observations may be made about the later, more detailed version of the

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⁸² (1994) 120 DLR (4th) 289.

⁸³ *ibid* 321 (La Forest J) (with whom Gonthier, Cory, McLachlin and Iacobucci JJ agreed); this view was endorsed by Kirby J in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, para 133.

substance-procedure test articulated by the Court of Appeal of Ontario in *Somers v Fournier*.⁸⁴ According to the court:

Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated.

(b) Statutory Interpretation

- 2.29** There are two other Canadian decisions in which interesting observations have been made regarding the substance and procedure distinction. In *Block Bros Realty Ltd v Mollard*,⁸⁵ a 1981 decision of the British Columbia Court of Appeal which was referred to with approval by the Supreme Court in *Tolofson v Jensen*,⁸⁶ the rather radical view was expressed that, in determining whether a legislative provision was substantive or procedural, the enactment 'should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, [it] should be resolved by holding that the legislation is substantive'.⁸⁷ This statement is remarkable given that it was made at a time when the right-remedy position was well entrenched in Canada and so presumably had some influence on the Supreme Court in its reshaping of the law in the *Tolofson* case. Yet the comment does not provide an adequate test for drawing the line between substance and procedure since no guidelines are provided for determining in which category a provision must fall.
- 2.30** A possibly more instructive approach was suggested by a Saskatchewan court in *Toronto-Dominion Bank v Martin*.⁸⁸ In that case the court held a statutory provision of the forum to be substantive on the basis that application of the provision would destroy the claimant's rights to enforce a contract governed by foreign law. The court emphasized that the scope of procedure should be restricted 'so as not to frustrate the fundamental purposes of conflict laws',⁸⁹ one of which is the recognition of foreign rights. Such an approach certainly reflects the more contemporary Commonwealth view of substance and procedure. Of greater interest was the court's suggestion that statutory provisions of the forum should not be

⁸⁴ (2002) 60 OR (3d) 225, para 14.

⁸⁵ (1981) 122 DLR (3d) 323 (BCCA).

⁸⁶ (1994) 120 DLR (4th) 289, 318.

⁸⁷ *Block Bros Realty Ltd v Mollard* (1981) 122 DLR (3d) 323, 328.

⁸⁸ (1985) 39 Sask R 60 (Sask QB).

⁸⁹ *ibid* para 5.

subject to the substance and procedure classification at all but applied purely on the basis of whether, as a matter of construction, they were intended to govern. Similarly to the approach taken to determine whether a forum enactment may apply as an overriding mandatory rule, the court here suggested that a forum statutory provision may, by contrast, *not* be applied in the forum *even where it is classified as procedural under the forum's rules of private international law*.⁹⁰ There is some evidence of this approach being taken in later Canadian decisions,⁹¹ which is a beneficial development since unlike the traditional substance-procedure dichotomy, it focuses on the policy underlying the law rather than its abstract classification.

5. AUSTRALIA: FURTHER DEVELOPMENTS

The High Court of Australia in the *Pfeiffer* case also made two other general observations in relation to the substance / procedure distinction which are significant to note in this context. The Court said:⁹² **2.31**

... litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum.

The first part of this statement is uncontroversial. Obviously a plaintiff must accept the court and tribunal structure of the forum, including the allocation of subject matter jurisdiction between the courts, for example the fact that certain courts can only hear matters below a certain monetary limit or have exclusive jurisdiction over particular subject matter such as labour disputes. Presumably though, since it is the plaintiff who has invoked the jurisdiction of the forum's courts, it must be assumed that the party is aware of such conditions or else it would have sued elsewhere.

The second part of the passage requires closer examination, particularly the statement that the courts of the forum cannot adopt procedures or give remedies un contemplated by their constituting statutes. The clear intent of this statement is that an Australian court has no power to adopt foreign procedures or award foreign remedies. In the case of procedures, it has **2.32**

⁹⁰ *ibid* para 14.

⁹¹ *Investors Group Trust Co Ltd v Capital City Savings and Credit Union Ltd* (1991) 118 AR 254 (Alta QB); *Horseshoe Club Operating Co v Bath* [1998] 3 WWR 128 (BCSC).

⁹² (2000) 203 CLR 503 para 99 (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ).

already been noted that there are circumstances where a Commonwealth court may have regard to foreign procedural law and so this proposition is too wide. The final wording in the passage at 2.31, '... any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum' reveals the same misconception. In the case of remedies, as will be discussed in Chapter 10, it is true that the forum cannot award a remedy which does not exist in the forum's own armoury but once this is established then foreign law will govern all other aspects of whether the relief may be granted. The role of forum law in remedies is therefore now very circumscribed under both common law and EU law principles. The High Court may also have been adverting in the passage to the fact that certain practices or relief granted by a foreign court may be inconsistent with the forum's public policy and so not enforceable on that basis. This view is important, because it provides an explanation for the application of forum law based on inconsistency with local policies and interests of the forum rather than simply because an issue happens to fall within the category of 'procedure'. It will be argued in this work that public policy, particularly when expressed through overriding mandatory rules of the forum, has the advantage of transparency since it makes clear the basis for excluding the otherwise applicable foreign law.

(a) A Legislative Solution?

- 2.33** Before leaving the Australian material it is useful to note that a small legislative step has been taken towards weakening the forum law governs procedure rule. Section 11(1)(c) of the uniform cross-vesting legislation⁹³ provides:

(1) Where it appears to a court that the court will, or will be likely to, in determining a matter for determination in a proceeding be exercising [cross-vested] jurisdiction ... (c) the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia.

'Cross-vested jurisdiction' is a difficult concept, the intricacies of which are beyond the scope of this work, but it suffices to say that such jurisdiction normally only arises to fill the gap which occurs where an Australian court lacks subject matter jurisdiction over an action⁹⁴ or where a matter has been transferred from one Australian court to another under

⁹³ See eg Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth).

⁹⁴ D Kelly and J Crawford, 'The Cross-Vesting Scheme' (1988) 62 Australian LJ 589. The legislative vesting of state jurisdiction in federal courts (where not otherwise within the accrued jurisdiction of such courts) was declared unconstitutional in *Re Wakim; ex parte McNally* (1999) 198 CLR 511.

the cross-vesting legislation. It is important to note that section 11(1)(c) confers a discretion on an Australian court to apply the rules of evidence and procedure it considers appropriate in all the circumstances⁹⁵ rather than simply those of the forum under the traditional common law choice of law rule. For example, the provision could allow a transferee court to apply a rule of evidence or procedure under the law of the *transferor* court 'where there would be otherwise an unfair advantage for the party who obtained the transfer'.⁹⁶ Further, courts have recognized that a tribunal is not required to select 'a single set of rules of evidence and procedure' but may apply some rules from the forum and some from another jurisdiction.⁹⁷ It is clear, however, that a court of one Australian state exercising the jurisdiction of another state under the cross-vesting legislation is under no *obligation* to apply the rules of practice and procedure of the second state.⁹⁸

Therefore, section 11(1)(c) is certainly a statutory acknowledgement that 2.34 'it would not be unduly inconvenient to apply the procedural laws of the cause [of action]'.⁹⁹ It is apparent, also, that the common law choice of law dichotomy between substance and procedure 'does not necessarily control the interpretation of para (c)'.¹⁰⁰ A court may therefore give a very wide definition of procedure under the provision not, as has been normally the case, in order to restrict the admission of foreign laws into the forum but rather to expand their operation. The provision would also conceivably allow the application of the procedural laws of a third jurisdiction *other than* the laws of the cause of action or the forum, although in no decision has this occurred. Despite these encouraging sentiments about section 11(1)(c), the reality is that the provision has rarely been invoked, although this is probably a result of the limited number of occasions on which cross-vested jurisdiction has been exercised. The opportunity for greater importation of foreign procedural laws into the forum has therefore not been realized although one question does remain: would the Australian legislatures ever consider extending the principle in section 11(1)(c) to proceedings apart from cross-vested jurisdiction, including those involving non-Australian laws? Given the limited record in using the provision

⁹⁵ *Bell Group Ltd (in liq) v Westpac Banking Corp* (2000) 104 FCR 305, 356; *Activate No 1 Pty Ltd v Equuscorp Pty Ltd* [1999] FCA 619, para 15 (suggestion that provisions of Evidence Act 1995 (Cth) could be applied by the court instead of those under the Evidence Act 1958 (Vic) (the rules of the forum) under s 11(1)(c)); G Griffith, D Rose, and S Gageler, 'Choice of Law Rules in Cross-vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62 Australian LJ 698, 703.

⁹⁶ Australian Law Reform Commission (n 50 above) para 10.12.

⁹⁷ *In the Marriage of Wilton and Jarvis* (1996) 133 FLR 355.

⁹⁸ *Re DEF and the Protected Estates Act 1983* (2005) 192 FLR 92, paras 34–35.

⁹⁹ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 26 (Mason CJ).

¹⁰⁰ *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, para 54 (Gummow J).

to apply the procedural laws of other Australian states and territories, it seems unlikely that Australian legislatures or courts would rely upon it as a model more generously to apply foreign procedural laws.

(b) A Jurisdictional Solution?

- 2.35** Another relevant point which emerges from the Australian jurisprudence is the awareness that the problem of distinguishing substance from procedure can also be avoided, at least in common law countries, by jurisdictional strategies. Three judges of the Australian High Court, for example, have noted that a robust use of the mechanism for transferring cases from one Australian court to another (in the ‘interests of justice’)¹⁰¹ may be particularly justified where it has the effect that, in the transferee forum, the law of the cause of action and the law of the forum coincide. In such a case, no resort to the substance / procedure classification is required.¹⁰² This idea of jurisdictional control of choice of law in order to subject a matter to a single law in this context is worthy of consideration although, paradoxically, it may have limited operation in *international* cases in Australia, given the High Court’s restrictive ‘clearly inappropriate forum’ test¹⁰³ which is not only excessively weighted in favour of claimants but places little reliance on choice of law considerations.¹⁰⁴ By contrast, in other Commonwealth jurisdictions such as England,¹⁰⁵ Canada,¹⁰⁶ Singapore,¹⁰⁷ Hong Kong,¹⁰⁸ and New Zealand,¹⁰⁹ where the broader and more flexible ‘more appropriate forum’ test applies for stays of proceedings, there would seem to be greater scope for taking such a principle into account and so possibly reducing the instances where the classification has to be made.

6. ENGLAND: THE CONTEMPORARY POSITION

- 2.36** As discussed at 2.03–2.06, English courts, in their typically pragmatic way, have generally refrained from analysing the theoretical basis of the substance / procedure distinction or attempting to create a test based on any

¹⁰¹ See eg Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW), s 5(2)(b)(iii).

¹⁰² *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, para 99 (Gummow J), para 177 (Hayne J), and para 244 (Callinan J).

¹⁰³ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

¹⁰⁴ *Regie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491; *Puttick v Tenon Ltd* (2008) 238 CLR 265.

¹⁰⁵ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

¹⁰⁶ *Amchem Products Inc v British Columbia Workers’ Compensation Board* [1993] 1 SCR 897.

¹⁰⁷ *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 (CA).

¹⁰⁸ *The Adhiguna Meranti* [1987] 1 HKLR 904.

¹⁰⁹ *Club Méditerranée NZ v Wendell* [1989] 1 NZLR 216 (CA).

such rationale. Instead, as was noted, English courts rather uncritically applied the right/remedy distinction for many years before some individual judges¹¹⁰ replaced it with a test which made the classification depend entirely on the individual facts of each case. However in a recent decision, *Harding v Wealands*,¹¹¹ there is the first sign, particularly in the judgments of the Court of Appeal, of an approach to the substance / procedure distinction which is closer to that of the High Court of Australia in the *McKain* and *Pfeiffer* cases.

(a) *Harding v Wealands* Court of Appeal

Harding v Wealands involved an action for damages arising from a road accident in the state of New South Wales in Australia. One of the questions which the court had to resolve was, on the assumption that New South Wales law was the law of the cause of action of the tort, whether all the provisions in the New South Wales Motor Accidents Compensation Act 1999 should nevertheless apply in the English proceeding on the basis that they were substantive and not procedural. Significantly, however, the question of classification was not considered in the context of the common law rules of choice of law but in interpreting section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995 (UK). Section 14(3)(b) provides that ‘nothing in this Part [III] affects any rules of evidence, pleading or practice’ or ‘authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum’. The trial judge in the *Harding* case¹¹² acknowledged the various views expressed by the Australian High Court regarding the delineation of substance and procedure but expressed no clear preference for any particular approach, noting ‘the elusive nature of the . . . distinction and how far it depends on the context in which the issue arises’.¹¹³ To that extent, the judge could be said to support a Pearson-Scarman contextual analysis. On appeal to the Court of Appeal, a variety of opinions were expressed. Waller LJ noted that it was clear that under the provision ‘questions of procedure went beyond evidence, pleading and practice’ and so presumably a narrow view of procedure was not intended by the legislative drafters. Consistent with this approach, he rejected the analyses of the minority judges in *Stevens v Head* and the majority in *Pfeiffer* on the basis ‘that they were concerned only with the [Australian] federal context and not the

¹¹⁰ See 2.18 above.

¹¹¹ [2005] 1 WLR 1539 (revd [2007] 2 AC 1).

¹¹² [2004] EWHC 1957 (QB), para 52.

¹¹³ *ibid.*

international context'.¹¹⁴ Waller LJ also referred to the subsequent reservation expressed by the High Court in *Regie Nationale des Usines Renault v Zhang*¹¹⁵ as to the application of the *Pfeiffer* principle 'in cases of foreign tort'.¹¹⁶ Yet analysis of the High Court's statement in *Zhang* reveals that the reservation was solely directed at the remark in *Pfeiffer* that all questions relating to *damages* should be considered substantive *not* the revised definition of substance and procedure.¹¹⁷ Indeed, in Australian decisions since *Zhang* involving international torts or causes of action, the *Pfeiffer* test of substance and procedure (usually expressed in terms of the 'outcome determinative' principle) has been applied without question, and so confirms this view.¹¹⁸ Ultimately, however, Waller LJ avoided providing a general definition of 'procedure' in the *Harding* case. The judge decided the case on the basis of precedent to the effect that once heads of damages have been established all questions going to the assessment of damages are procedural and so governed by the law of the forum.

- 2.38** Arden LJ discussed the issue of how to define 'procedure' much more fully. She agreed with Waller LJ that the *Harding* case did not require a comprehensive definition of procedure but only one in the particular context of section 14 of the Private International Law (Miscellaneous Provisions) Act 1995. Moreover, the definition of procedure had to be elucidated 'on a case-by-case basis' with particular regard to the context in which it was being sought.¹¹⁹ Such a view is reminiscent of the Pearson-Scarman aversion to abstract definitions with the concept of procedure only capable of being understood in the context of the precise issue for determination by the court. Yet Arden LJ also expressed sympathy for the view of the majority in the *Pfeiffer* case that procedure should be 'reined in' in the context of choice of law, as a matter of principle. In a key passage her Ladyship states that:¹²⁰

In the context of section 14 a principled approach requires the court to start from the position that it has already decided that the proper law of the tort is not the law of the forum . . . On this basis a reference to the law of the forum must be the exception and it must be justified by some imperative which relative to the imperative of applying the proper law has priority.

¹¹⁴ [2005] 1 WLR 1539, para 25.

¹¹⁵ (2002) 210 CLR 491, para 76 (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ).

¹¹⁶ [2005] 1 WLR 1539 para 26 (emphasis added).

¹¹⁷ Lord Rodger clearly recognized this in the appeal to the House of Lords: [2007] 2 AC 1, para 69.

¹¹⁸ See eg *Garsec v The Sultan of Brunei* (2008) 250 ALR 682 (NSWCA).

¹¹⁹ [2005] 1 WLR 1539 para 52.

¹²⁰ *ibid.*

Hence, according to Arden LJ, under the scheme of the 1995 Act once foreign law has been chosen as the law of the cause of action it should only be in rare and exceptional circumstances that such law should be displaced because it is considered procedural. This view recalls the concern of Mason CJ at 2.08, that too wide a definition of procedure ultimately stultifies the operation of choice of law rules and limits the scope for admission and reception of foreign law.

Arden LJ then proceeded to identify the circumstances where the law of the forum may be entitled to 'priority' over the foreign law of the cause of action:¹²¹ **2.39**

It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself into the shoes of the foreign court. This would arise where it has no power to award damages on a structured basis, even though such a power exists in the court of the jurisdiction which is the proper law. It would also arise where the court cannot put itself into the shoes of the foreign court of the [lex causae] in the sense that it cannot do justice unless it applies its own law.

Here Arden LJ acknowledges the incapacity or incompetence point mentioned earlier: sometimes a foreign remedy or procedure will be so alien to the forum that it cannot be sensibly or realistically applied. Her Ladyship appears to make the same point later in her judgment where she says that¹²² 'in the context of conflicts of laws when the court says that a particular issue is one of procedure rather than substance . . . the court is really saying that it cannot, for whatever reason, apply the relevant foreign law to that issue'. While the logic of this argument is hard to refute on the basis that certain procedures may simply be beyond the practical competence of a court to adopt, it is hoped that such a test of incapacity would be narrowly construed and not used as a device simply to avoid any foreign law on the ground that it was different or unfamiliar. Interestingly and hearteningly, the trial judge in the *Harding* case was mindful of this danger, noting that unfamiliarity, by itself, is an insufficient basis for excluding foreign law.¹²³

Arden LJ also notes in the quoted passage at 2.39, that 'justice' may be a basis for applying forum law. While she does not expand on this idea it would be assumed that, again, such an exception should apply only rarely given the primacy Arden LJ attaches to the operation of choice of law rules. Significantly though, this comment is a frank acknowledgement that a decision to label an issue as 'procedural' as opposed to substantive **2.40**

¹²¹ *ibid.*

¹²² *ibid* para 60.

¹²³ [2004] EWHC 1957 (QB), para 61.

reflects a broader policy choice on the part of the court as to when forum law should apply.

- 2.41** Finally, it should be noted that Arden LJ expresses approval of both the majority of the High Court's approach in the *Pfeiffer* case and the minority opinion of Mason CJ in the *McKain* case. While noting that the central issue in *Harding* was the interpretation of section 14 of the 1995 UK legislation, Arden LJ nevertheless endorsed the principle in *Pfeiffer*, namely that substantive rules are those which 'bear upon the existence, extent or enforceability of remedies, rights and obligations'¹²⁴ and the view of Mason CJ 'that procedure covers matters as to the mode and conduct of trial'.¹²⁵ In Arden LJ's view, these observations on the common law position apply equally in the interpretation of section 14. So, while her Ladyship was at pains earlier in her judgment to stress that she was only making a contextual analysis of procedure in interpreting section 14, in fact her ultimate approach mirrors that of the Australian High Court.
- 2.42** By contrast, the judgment of Sir William Aldous in the *Harding* case is far more explicit in its adoption of the *Pfeiffer* approach. In interpreting the word 'procedure' in section 14 Sir William Aldous said that the expression 'should be given its natural meaning namely the mode or rules used to govern and regulate the conduct of court proceedings'. This view, he said, was supported not only by *Dicey and Morris* and 'persuasive authority' (namely the *Pfeiffer* case from which the quotation came) but also by the need to avoid 'forum shopping' which was 'an aim of the 1995 Act'. The *Pfeiffer*/Mason approach was preferable, the judge said, because it was 'consistent with the purpose of differentiating between substance and procedure'¹²⁶ and it was 'illogical' to suggest that this approach was not intended to apply in an international context. Sir William Aldous's primary concern, therefore, was with combating forum shopping and ensuring that, where possible, the same law should be applied wherever the case was litigated.¹²⁷ In his view the narrow approach to procedure taken by the High Court of Australia, in focusing on rules 'which regulate the mode or conduct of court proceedings', best supports that objective.

(b) *Harding v Wealands*: House of Lords

- 2.43** A further appeal in *Harding v Wealands* was taken to the House of Lords,¹²⁸ with Lords Hoffmann and Rodger delivering the leading speeches

¹²⁴ [2005] 1 WLR 1539, para 54.

¹²⁵ *ibid* para 61.

¹²⁶ *ibid* para 95.

¹²⁷ *ibid* paras 97, 105.

¹²⁸ [2007] 2 AC 1.

(with whom Lords Bingham, Woolf, and Carswell agreed). The approach taken by the House of Lords to the meaning of procedure was, in this author's respectful view, disappointingly regressive.¹²⁹ Both Lords Hoffmann and Rodger first found that the meaning of 'procedure' in section 14 had to be interpreted in the light of the common law meaning which existed at the time of the enactment of the Private International Law (Miscellaneous Provisions) Act 1995.¹³⁰ According to Lord Hoffmann 'the terms "remedy" and "procedure" had been regularly used interchangeably' in private international law and this view was intended to be codified in the Act.¹³¹ While procedure could be interpreted more narrowly on the lines of the approach in *Pfeiffer* and of Mason CJ in *McKain*, it was the clear intention of Parliament to adopt the 'equation between matters relating to remedy and matters of procedure' in the Act as, 'this is the sense in which the term has always been used in English private international law'. Significantly, Lord Hoffmann may have also thought that the *Pfeiffer* test of substance and procedure was of no application in the international context but one 'required by the constitutional imperatives of Australian federalism'.¹³² In support of this view his Lordship appeared to rely upon the subsequent reservation to the *Pfeiffer* position by the High Court in the *Zhang* case.¹³³ For the reasons mentioned at 2.37, this analysis was, with respect, mistaken.

Lord Rodger thought that, in the UK legislation, there was no warrant for reading the reference to 'questions of procedure' in section 14(3)(b) as an 'exception' to the general choice of law rule for torts in section 9(4) 'for which some overriding imperative must be found' before it could be applied, since such an approach would, in effect, relegate the law of the forum to secondary status. Secondly, while the *Pfeiffer* definition of procedure 'in many contexts might well be regarded as the appropriate meaning', here, however, the expression 'questions of procedure' is being used within a statute on *private international law* [and] it is a fair assumption that Parliament meant the expression to be understood in the way it would be understood in the field of private international law'.¹³⁴ Accordingly, Lord Rodger also found that the right-remedy test must be applied to resolve questions of substance and procedure both under the Act and at common law.

2.44

¹²⁹ A Briggs, 'Decisions of British Courts Involving Private International Law' (2006) 77 BYBIL 554, 568, 572.

¹³⁰ [2007] 2 AC 1, paras 32, 65.

¹³¹ *ibid* paras 32, 36.

¹³² *ibid* para 48.

¹³³ (2002) 210 CLR 491, para 76.

¹³⁴ [2007] 2 AC 1, para 65 (emphasis added).

- 2.45** Lords Carswell and Woolf agreed with Lords Hoffmann and Rodger in separate speeches. Lord Carswell however acknowledged that the *Pfeiffer* view of procedure was closer to the ‘natural meaning’ of the term but that a ‘special meaning’ of the word existed in private international law which Parliament intended to adopt.¹³⁵ Lord Woolf expressly disagreed with Lord Carswell on this point, finding that the meaning of the term ‘procedure’ adopted by their Lordships, as being codified in the 1995 Act, was the ‘natural’ rather than a special meaning.¹³⁶
- 2.46** The overall approach of the House of Lords to the definition of procedure was surprising, particularly in the light of Lord Wilberforce’s remark¹³⁷ thirty years earlier, that ‘for English law to abolish the distinction between substance and procedure . . . might be an intelligible objective’. Instead, the House of Lords in the *Harding* case chose to rehabilitate the right-remedy distinction for defining substance and procedure, which had seemed dead and buried. While their Lordships’ remarks were addressed to the statutory context of section 14 of the 1995 Act, it is clear that they saw the provision as codifying the common law definition of procedure existing in 1995, which in their view was the right-remedy dichotomy. According to the court, this approach had always been used in English private international law and so should inform the interpretation of the Act. Consequently, it is arguable that their Lordships’ definition of ‘procedure’ was intended to apply beyond the Act across all areas of choice of law. As has been discussed at 2.18, however, analyses of substance and procedure in English private international law by 1995 were far less monolithic than the House of Lords suggested, with a number of judges suggesting that the distinction should be considered on a case-by-case basis. In any event, to find that the development of the concept of ‘procedure’ under the Act was confined to its definition at the time of enactment would operate to stifle any possible judicial development in England of the substance-procedure rule in relation to torts,¹³⁸ unless new legislation appeared (which did, of course, happen with the Rome II Regulation).
- 2.47** Secondly, what is not clear from the speeches in the *Harding* case is whether the Lords would have taken a different approach if they had been considering the common law as it stood in 2006 (the time the appeal was heard in the House of Lords) rather than 1995 (the time of enactment of the legislation). Given their reluctance, however, even to consider the merits of

¹³⁵ *ibid* para 83.

¹³⁶ *ibid* paras 7–9.

¹³⁷ *Black-Clawson International Ltd v Papierwerke Waldhof-Asschaffenburg AG* [1975] 1 AC 591, 632.

¹³⁸ Briggs (n 129 above) 569.

an alternative approach to procedure or the wider choice of law policies involved (such as the deterrence of forum shopping and willingness to accept foreign law on the one hand compared with the need to protect local residents from alien procedures on the other) the adoption of an approach based on the mode or conduct of court proceedings (procedure) or outcome determination (substance) seems unlikely. Indeed, their Lordships' apparent reliance on the right-remedy distinction, without any attempt to support the test in principle, is highly reminiscent of the traditional approach to procedure in private international law. On one view, therefore, the House of Lords approach in *Harding* leaves the meaning of procedure in private international law completely unchanged since the nineteenth century, which is surprising given the developments outlined in this chapter. The effect of the decision is to create great uncertainty in both English and Commonwealth law.

7. A NEW APPROACH?

The modern tests for delineating substance and procedure such as have been provided by Mason CJ in *McKain*, the High Court of Australia in *Pfeiffer*, and the Supreme Court of Canada in *Tolofson* are significant improvements on the right-remedy distinction in their narrowing of the scope of procedure. Yet, as already noted, both old and new approaches suffer from the same weakness since they appear to contemplate the application of only two laws, the law of the cause of action (substance) and the law of the forum (procedure), to all questions. There is no scope for the application of other laws, such as the law of the domicile of an entity or the law of the place where an act is to be performed, or a recognition that choice of law problems may sometimes arise *within* the concept of procedure, possibly requiring the application of a law other than that of the forum. Civil law commentators, by contrast, have for many years shown a greater awareness of the relevance of foreign law to matters which may be clearly classified as procedural, noting that issues such as service of process abroad, parties to litigation, and the taking of evidence in a foreign country may all involve the forum court applying the procedural rules of a foreign country, if not exclusively, then in tandem with forum law.¹³⁹

¹³⁹ Gonzalez Campos (n 7 above) 295–6; M-L Niboyet, 'Contre le dogme de la *lex fori* en matière de procédure' in *Vers de nouveaux équilibres entre ordres juridiques mélanges en l'honneur d'Hélène Gaudemet-Tallon* (Dalloz, 2008) 363; A Caravaca and J Carrascosa González, *Derecho Internacional Privado: Vol 1* (6th edn, Editorial Comares, 2005) ch 13; M Feuillade, 'Ley que Rige el Proceso en Casos Iusprivatistas Internacionales' 72 (165) *La Ley* 28 August 2008, 1 (Argentina).

Given this empirical reality, some writers have argued that the forum law governs procedure rule is too restricted and should be replaced.¹⁴⁰

- 2.49** Acknowledgement of the deficiencies in the existing common law model may therefore require a new approach. One option would be to create further and additional choice of law rules to supplement the basic forum law governs procedure rule at the same time as redefining the circumstances in which forum law should be applied, for example where the issue concerns the mode or conduct of court proceedings. In determining the proper scope of forum law in procedural matters, reference would also be made to the other choice of law mechanisms or 'homing devices' for applying forum law, such as public policy. Another option would be to abolish the forum law governs procedure rule entirely and replace it with a series of distinct choice of law rules applying to specific issues, recognizing directly that many different laws can apply to procedural questions. A leading adherent of this second view is the Hungarian scholar, Szászy,¹⁴¹ whose writings were cited with approval by the English scholar Graveson.¹⁴² Szászy argues that procedural questions are currently excluded from mainstream private international law analysis because of the blanket acceptance of the procedure (forum)/substance (cause) dichotomy, particularly in common law countries. Yet, given the diversity of questions involving procedure frequently presented, it is too limited, imprecise, and arbitrary to apply only these two laws to all such issues. What is needed, therefore, is a more inclusive and nuanced set of choice of law rules to apply to procedural matters. Szászy proposes a rule based on the Savigny idea of 'centre of gravity', that is, the law which has the closest connection to the proceedings, the act or matter to be judged, or the legal relationship in question.¹⁴³ Szászy then applies this principle to a range of issues (evidence, limitation, capacity of parties, validity of documents, defences, service of process, jurisdiction, and provisional measures) which commonly arise before the courts. In some cases the law of the forum is found to be the law most closely connected to the issue, in others it is the law of the cause of action, in others it is the personal law of the party, and in yet others it is the law of the place where the act was performed.

¹⁴⁰ See Niboyet, (n 139 above) *ibid*, and especially I Szászy, *International Civil Procedure: A Comparative Study* (Sijthoff, 1967) and n 37 above.

¹⁴¹ *ibid*.

¹⁴² See (1968) 17 ICLQ 534 and *Conflict of Laws* (Sweet & Maxwell, 7th edn, 1974) 593. See also Cheshire, *North and Fawcett* (n 47 above) 75 n 1 and the review by M Cappelletti in (1968) 16 AJCL 624, 626, which describes Szászy's work as 'original and extraordinary'.

¹⁴³ Szászy (n 37 above) 449, 452.

The Szászy view has a logical attraction in that it directly addresses the policy reasons why forum law should be applied in a given case and also recognizes the possibility that other laws might apply to procedural questions. Yet a wholesale adoption of this approach is not recommended for a number of reasons. First, the forum law governs procedure rule is well entrenched not only in Commonwealth jurisprudence but also in civil law countries. It is unrealistic to expect such systems to reject this rule entirely; an approach, however, which redefines the scope of forum law in procedural matters and adds further choice of law rules where necessary is more likely to be accepted. Secondly, it is likely that the same results can be reached under the Szászy view as under a model which retains a version of the forum law governs procedure rule. Specifically, a court will refer a matter to forum law or the law of the cause of action in a similar manner to the Szászy model but where conflicts of law arise *within* the field of procedure, such as in service of process, jurisdiction, or the taking of evidence abroad, then new choice of law rules can be created where necessary or alternatively limitations placed on the exclusive application of forum law. Ultimately, therefore, it is preferable to retain the forum law governs procedure rule as a basic starting point while recognizing that it will not be the appropriate or exclusive choice of law rule in all cases involving procedure. **2.50**

8. EU INSTRUMENTS ON CHOICE OF LAW

Some evidence of lesser reliance on the generic substance-procedure classification model can be seen in a number of major EU instruments on choice of law, specifically the Rome I and Rome II Regulations. The provisions in both instruments dealing with choice of law in matters at the interface of substance and procedure are almost identical, with the drafters conspicuously not including a general definition of procedure. Instead, certain issues are subjected to the applicable law of the obligation under the instrument (for example the existence, nature and assessment of damage,¹⁴⁴ and limitation of actions¹⁴⁵) and others, for example formal validity, to the law of the obligation or the law of the country of performance of the act (*lex loci actus*).¹⁴⁶ Such a 'direct' approach creates greater certainty than the substance-procedure classification.¹⁴⁷ Matters relating **2.51**

¹⁴⁴ Rome II, art 15(c); Rome I, art 12(1)(c).

¹⁴⁵ Rome II, art 15(h); Rome I, art 12(1)(d).

¹⁴⁶ Rome II, art 21; Rome I, art 11(1).

¹⁴⁷ M Illmer, 'Neutrality Matters—Some Thoughts about the Rome Regulations and the so-called Dichotomy of Substance and Procedure in European Private International Law' (2009) 28 Civil Justice Quarterly 237, 241.

to ‘evidence and procedure’ are excluded from the scope of both instruments.¹⁴⁸ As will be discussed throughout this work, the overall effect of the EU instruments is to reduce the scope of the law of the forum, at least when compared to English common law private international law rules. Such an outcome is consistent with the intention of the drafters of the texts, namely ‘to promote uniformity of result [within the EU] and leave less [to] depend on the procedural peculiarities within a forum’.¹⁴⁹ This approach, at least in terms of outcome, conforms to the general trend in recent Australian and Canadian jurisprudence to classify more matters as substantive.

- 2.52** Note, however, that while the drafters of the EU texts have generally sought to avoid employment of the substance / procedure distinction, the classification is still relevant in the case of presumptions of law and the burden of proof,¹⁵⁰ where rules of the law of the obligation which are classified as procedural under such law will not be applied in the forum. Further, in some provisions (for example mode of proof¹⁵¹ and remedial measures¹⁵²) there is an awkward combination of forum law and law of the obligation, with little guidance as to how both should be applied. Finally, the limited scope of the instruments—confined to contractual and non-contractual obligations—means that many choice of law issues will continue to arise which will require resolution according to general principles.
- 2.53** This last observation is borne out by the exclusion of ‘evidence and procedure’ from the instruments and the lack of any autonomous definition provided for these terms.¹⁵³ The result is that national law will have to be applied to determine both the meaning to be given to these words and what law should be applied to an individual issue (assuming it falls outside the scope of the instrument). Significantly, the drafters do not stipulate that the law of the forum *must* be applied to matters falling within ‘evidence and procedure’, even though that would be the position in many cases under English common law principles. It is possible, therefore, that a national court may classify a matter falling outside the scope of either instrument (for example admissibility of evidence) as substantive and so governed by the law of the cause of action. Alternatively, a matter may be

¹⁴⁸ Rome II, art 1(3); Rome I, art 1(3).

¹⁴⁹ Schoeman (n 63 above) 88.

¹⁵⁰ Rome II, art 22(1); Rome I, art 18(1); *Cheshire, North and Fawcett* (n 47 above) 89, *Dicey, Morris and Collins* (n 27 above) paras 7-028, 7-029 Fentiman (n 26 above) 37; cf Schoeman *ibid*, 84–6, 91, who suggests that the substance-procedure classification has been entirely ousted from the Rome II Regulation.

¹⁵¹ Rome II, art 22(2); Rome I, art 18(2).

¹⁵² Rome II, art 15(d).

¹⁵³ Illmer (n 147 above) 242–3.

classified as procedural but still governed (even in part) by a law other than that of the forum, for instance in a case involving the taking of evidence in a foreign country. Considerable scope of operation is therefore left to national choice of law rules under the Regulations. Some writers, in particular Illmer, have bemoaned this position, saying that the application of national law to matters of evidence and procedure, where the law of the cause of action falls under the Regulations, will lead to disharmony of court decisions and is incompatible with a European system of private international law. Accordingly, Illmer argues, an autonomous view of 'evidence and procedure' is required, based on the idea of 'neutrality',¹⁵⁴ which means that a national court must apply the law of the cause of action to any issue which is 'concerned with' or 'directed at' 'the decision on the merits' (which apparently is different from 'affecting' the decision on the merits)¹⁵⁵ and requires the law of the forum to be applied to any matter which concerns the mode or conduct of court proceedings. A response to this view is that there is no evidence that the exclusion of 'evidence and procedure' from the Regulations was an oversight by the drafters but was arguably instead the result of a conscious policy to allocate such matters to national choice of law rules.¹⁵⁶ Until European drafters create a text specifically addressing choice of law issues in procedure it is perhaps premature to remove the matter from the laws of the Member States. Nevertheless, the present author considers that whether or not an autonomous definition of 'procedure' is adopted to matters falling outside the scope of the Regulation, it should be based on the narrow mode and conduct of court proceedings view espoused by the Australian courts rather than the right-remedy test.¹⁵⁷ It is hoped that English courts can reach this conclusion themselves without the need for it to be imposed from above ('autonomously') by the European Union. Finally, however, there remains the same problem mentioned at 2.48 with any test of choice of law and procedure based solely on the substance-procedure dichotomy: that is, there may be limited scope for a court to apply or recognize laws other than those of the forum or the cause of action.

¹⁵⁴ *ibid* 246–7.

¹⁵⁵ The present author finds this distinction difficult to draw.

¹⁵⁶ cf Dickinson, who sees the concepts of 'evidence' and 'procedure' as 'matters that define the scope of the Regulation' which must therefore be given a uniform, autonomous meaning, 'independent of the forum's notions'; A Dickinson, *The Rome II Regulation* (OUP, 2008) para 14.57.

¹⁵⁷ Dickinson suggests adoption of such a test: *ibid* para 14.60.

9. THE US POSITION

- 2.54** In US private international law it is true that there is no universally dominant approach to choice of law in procedural matters. For example, some states still adhere to the First Restatement of Conflict of Laws approach of the 1930s, under which the right-remedy version of the substance / procedure distinction is applied, although a clear majority of states and scholars now reject this view.¹⁵⁸ Perhaps the most widely accepted approach in the United States to choice of law in procedural matters is that taken in the 1971 Second Restatement of Conflict of Laws. Under the Second Restatement, no attempt is made to classify issues according to whether they are substantive or procedural but, instead, the focus is on defining the scope of operation of the law of the forum in respect of individual issues. It is necessary to 'face directly the question whether the forum's rule should be applied'.¹⁵⁹ It is likely that this approach was taken for a number of reasons. First, the categories of substance and procedure are difficult to define (as has been noted), secondly, they can be used as conclusory labels to conceal the real reason for applying forum law,¹⁶⁰ and thirdly, they prevent courts from applying laws other than the law of the forum and the law of the cause of action to a given issue. Matters such as limitations, the burden of proof, jurisdiction, etc are considered separately from the point of view of the law to be applied in each case. Yet interestingly, while the Second Restatement makes no express reference to the substance-procedure dichotomy, it nevertheless, in certain provisions, resembles key elements of the modern Australian/Canadian approach, discussed at 2.22–2.28, in determining the governing law. Hence, where the purpose of the provision is found to 'affect the decision of the issue' or 'the ultimate result' (ie is outcome determinative),¹⁶¹ it will be referred to the law of cause of action. Where instead, a provision merely concerns the 'conduct of the trial' or where the 'effort to apply the rules of judicial administration of another jurisdiction would impose an undue burden on the forum',¹⁶² then forum law will apply.

¹⁵⁸ See eg R Weintraub, *Commentary on the Conflict of Laws* (Foundation Press, 4th edn, 2001) E Scoles, P Hay, P Borchers, and S Symeonides, *Conflict of Laws* (Thomson West, 4th edn, 2004) and L McDougal, R Felix, and R Whitten, *American Conflicts Law* (Transnational Publishers, 5th edn, 2001).

¹⁵⁹ Restatement (Second) of Conflict of Laws, § 122 comment b.

¹⁶⁰ As one US commentator has noted, "'procedural'" in conflicts jargon is simply shorthand for saying that the forum's rule applies': R Weintraub, 'Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse' (2007) 42 Texas Intl LJ 311, 311.

¹⁶¹ Restatement (n 159) § 122 comment a.

¹⁶² *ibid.*

Another important matter which has been noted in the US literature is that the substance / procedure distinction has also been applied in areas outside private international law, in circumstances where the purposes are arguably very different. For example, a substance and procedure test is also used in the United States (and Commonwealth countries) to determine whether a provision in a statute should be applied retrospectively¹⁶³ (if the provision is classified as substantive then it will not be applied) and also in deciding whether an issue is governed by federal law (if it is classified as procedural) as opposed to state law (if it is classified as substantive).¹⁶⁴ It is obvious that these areas are very distinct from choice of law analysis in private international law, the purpose of which is to resolve conflicts between the laws of equal sovereigns: in the international context, nation states; and in the federal context, states or provinces. Cook, the US writer referred to earlier in this chapter,¹⁶⁵ warned correctly of the ‘heresy’ of automatically applying a definition of substance and procedure from a context or for a purpose outside choice of law to the choice of law inquiry. This point is of great significance and has been recognized by English,¹⁶⁶ US,¹⁶⁷ Canadian,¹⁶⁸ and Australian¹⁶⁹ judges, as well as common law¹⁷⁰ and civilian¹⁷¹ scholars—although it has also sometimes been overlooked.¹⁷² Consequently, it will be important in this work to identify decisions (in particular of Commonwealth courts) in which the ‘heresy’ has been employed.

2.55

The drafters of the US Second Restatement therefore sought to introduce more flexibility into the choice of law inquiry in procedural matters while at the same time limiting the scope of the law of the forum when compared to the traditional right-remedy formulation. In this last respect the objective

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¹⁶³ *Maxwell v Murphy* (1957) 96 CLR 261.

¹⁶⁴ *Erie Railroad Co v Tompkins* 304 US 64 (1938). Another possible example may be a rule which allows parties a right of appeal in respect of a judgment on the merits (substantive) but requires leave of the court for an appeal in respect of an interlocutory (procedural) judgment; Spiro (n 3 above) 951.

¹⁶⁵ Cook (n 27 above) 341–3.

¹⁶⁶ *Harding v Wealands* [2005] 1 WLR 1539, para 52 (Arden LJ).

¹⁶⁷ *Guaranty Trust Co of New York v New York* 326 US 99, 108 (1945) (Frankfurter J): ‘Neither “substance” nor “procedure” represents the same invariants. Each implies different variables depending upon the particular problem.’ The US Supreme Court has also rejected the idea of an ‘equivalence’ between what is substantive under *Erie v Tompkins* and what is substantive for the purposes of the conflict of laws: see *Sun Oil Co v Wortman* 486 US 717, 726 (1988).

¹⁶⁸ *Toronto-Dominion Bank v Martin* (1985) 39 Sask R 60, 63, paras 8–9; *Province of Alberta Treasury Branches v Granoff* (1984) 15 DLR (4th) 295, 302–3 (BCCA Esson JA).

¹⁶⁹ *Hamilton v Merck and Co Inc* (2006) 66 NSWLR 48, para 54 (Spigelman CJ).

¹⁷⁰ *Cheshire, North and Fawcett* (n 47 above) 79; Walker (n 49 above) para 6.2.

¹⁷¹ F Jaekel, *Die Reichweite der lex fori im internationalen Zivilprozeßrecht* (Duncker & Humblot, 1995) 62; Illmer (n 147 above) 246.

¹⁷² See, eg, *Hamilton v Merck and Co Inc* (2006) 66 NSWLR 48 paras 132–133 (Handley JA).

is similar to the modern Australian/Canadian approach; however, the technique employed is different. Instead of seeking to create a single, abstract principle to resolve all disputes, the US drafters have relied on guidelines for courts in the context of specific issues. The Second Restatement also envisages, to a greater extent than Commonwealth approaches, that laws *other than* the law of the forum and the law of the cause of action may apply in a given situation. This second aspect of the US experience will be recommended in this work for adoption in Commonwealth countries.

- 2.57** A further important approach adopted in the United States for resolving choice of law disputes concerning procedural questions is the doctrine of interest analysis.¹⁷³ While there are a variety of different versions of this principle, in broad terms, the forum court is required to select and apply the law which has the greatest interest or whose policies will be most affected in respect of the particular issue in dispute. Such a test, being expressed at such a high level of generality, obviously provides much less certainty than the Second Restatement model, given the absence of any specific guidelines as to what law should be applied. However, what interest analysis has in common with the Second Restatement approach is a capacity to consider the claims of all possibly relevant countries to having their laws applied. Again, unlike the position in England and other Commonwealth countries, it is not simply a matter of choosing between the law of the forum and the law of the cause of action; potentially any law may be relevant. The interest analysis model, however, provides little certainty and guidance for courts and litigants in choosing the applicable law and for this reason has not generally been embraced outside the United States.
- 2.58** Finally, of possible interest to Commonwealth lawyers may be two recent US decisions from jurisdictions in which the substance-procedure dichotomy is applied where it has been suggested that it may be possible for parties to 'contract out of' the substance / procedure distinction. Suppose, for example, that parties agree a choice of a law clause that provides that 'the law of X governs this contract without regard to conflict of laws rules'. One interpretation of such a clause would be that it excludes the doctrine of *renvoi* so that when a court seeks to apply X law it is directed to apply X's domestic law, not X's choice of law rules. Such an approach would be logical in that it would prevent another country's law applying in circumstances which might defeat the parties' expectations. By contrast, in two US decisions,¹⁷⁴ courts took the view that the above choice of law clause

¹⁷³ The leading work is B Currie, *Selected Essays on the Conflict of Laws* (first published in 1963, William S Hein & Co, 1990).

¹⁷⁴ *Education Resources Institute Inc v Orndorff* (Circ Ct Virginia 18 December 2008); *Orbusneich Medical Co Ltd v Boston Scientific Corp* 694 F Supp 2d 106 (D Mass 2010).

operated to exclude the substance / procedure distinction from the choice of law rules of the forum. The effect of this interpretation was that the law of X in its entirety, both substantive and procedural, applied in the forum. While in both decisions the approach had the relatively uncontroversial effect that a foreign statute of limitations was admitted into the forum, the potential was created for a much wider transplant of foreign procedural rules. Would, for example, these American courts have adopted the language, court attire, and rituals of the courts of the law of the cause of action? Intriguing as this approach is, it may be wondered whether its full implications were appreciated by the courts.

D. CONCLUSION

The substance-procedure dichotomy continues to be a central plank in Commonwealth choice of law doctrine, although its precise scope remains contested. The recent steps taken to restrict the scope of procedure in Australia and Canada are welcome in that they provide more scope for the operation of foreign laws and consequently further the goals of uniformity of outcome and deterrence of forum shopping. Yet all tests based on substance and procedure insufficiently recognize the possibility of applying a law other than that of the forum or the cause of action or that conflicts may arise within procedure. A preferable approach may therefore be to retain the substance-procedure classification for most cases with a narrow referral of matters to forum law but at the same time, where necessary, to develop discrete choice of law rules for individual issues. In Chapters 4–11 this suggestion will be further considered in the context of providing a detailed analysis of how the substance / procedure distinction applies in Commonwealth law in important areas of doctrine such as evidence, damages, statutes of limitation, and matters concerning the process of the courts. Where the current law is considered to be outdated, such as where it involves the application of the right-remedy test rather than the modern consensus as to what is procedural, then this will be noted. Also, where the appropriate basis for applying forum law rests on another ‘homing device’, such as public policy or overriding mandatory rules rather than a procedural classification, this will also be identified. An important objective of this work, therefore, is to provide practitioners with a clear framework for addressing issues that arise in this area. 2.59

12

Conclusion

The primary focus of this work has been on the distinction between substance and procedure in private international law. All legal systems have long acknowledged a distinction between procedural and substantive matters, with the former governed by forum law and the latter category by the law of the cause of action. Common law countries have traditionally taken a very wide view of procedure based on the right / remedy distinction, with all matters pertaining to the rights of the parties being deemed substantive and any issue concerning the 'remedy' regarded as procedural. The result of such an approach has been to expand significantly the scope and reach of forum law in cross-border litigation, particularly in the areas of damages, non-monetary remedies, and statutes of limitation. By contrast, in civil law countries, the concept of procedure has long been linked to the processes of the court and the mechanics of litigation, which has resulted in a narrower subjection of matters to forum law. Nevertheless, as noted throughout this work, there is clear evidence in some Commonwealth countries, such as Australia and Canada (and possibly also Singapore), of the more restrictive civilian view of procedure now being accepted, although the approaches which have been taken by courts and legislatures in those countries have not always been uniform. A similar trend in expanding the reach of substance relative to procedure is also occurring in English law, although unlike Australia and Canada the impetus for such change has come less from the courts and more through the United Kingdom's implementation of EU instruments on choice of law, particularly in the areas of contractual and non-contractual obligations, which have allocated a wider range of matters to the substantive law. While in the United States a single, universally accepted position on choice of law in procedure is difficult to identify, there is an increasing general acceptance of the view that the application of forum law in a given case should depend less on whether a matter is classified as procedural as such and more on the forum's connections and interests with the issue. While such an analysis may not have resulted in a lesser application of forum law overall, this is at least a more transparent approach than simply applying forum law because the issue concerns 'the remedy'. For Commonwealth lawyers the proper delineation of substantive and procedural matters remains critical and so much of this work has been devoted

12.01

to this question. The narrow mode or conduct of court proceedings definition of procedure was endorsed and applied in various circumstances with the aim of providing practitioners with clear guidance not only as to the current state of the law but also as to its likely future application.

- 12.02** In determining the appropriate division between procedure and substance it is also important to examine the choice of law system as a whole, in particular the other methods by which an issue may be subjected to forum law, apart from the procedural classification. Concepts such as public policy, overriding mandatory rules, and rules for the displacement of the applicable law are important reminders of the various and diverse interests which the forum seeks to protect in the choice of law process in parallel with, and in addition to, procedure. Also, it is valuable to consider these doctrines alongside procedure, to ensure that the classification does not exceed its proper scope. Hence, where the application of forum law to a particular question may be more appropriately justified on a ground other than the procedural classification (for example public policy in the context of foreign law limits on damages), then this has been suggested. Awareness of the other bases of reference to forum law is also important because in a number of cases the procedural classification has arguably been used as a device to conceal other, unarticulated policy bases for applying forum law, such as in the House of Lords decision in *Harding v Wealands*.¹ The goals of transparency and clarity therefore also demand that procedure should receive an appropriate interpretation.
- 12.03** It was also noted in this work that the substance-procedure dichotomy alone cannot resolve all choice of law questions that may arise in the area of procedure. There is a need for other choice of law rules or approaches to be developed where an issue cannot easily be subjected to either the law of the forum or the law of the cause of action. Examples given in this work include the capacity of individuals and corporations, legal professional privilege, formal validity of documents, and (possibly) the quantification of damages. A second category of cases where the substance / procedure distinction does not provide a complete coverage in terms of choice of law is where a conflict occurs within the domain of procedure itself. Issues such as service of process, taking of evidence abroad, or issue estoppel in relation to a foreign judgment are all clearly procedural due to their link to the mode or conduct of the forum court's proceedings, yet it will often not be appropriate to apply the law of the forum *exclusively* in each case. Foreign law may also be relevant, for example the law of the country where service is to be performed, where the evidence is located, or where

¹ [2007] 2 AC 1.

the judgment said to give rise to the estoppel was rendered. While it is not suggested in these cases that forum law should be displaced by foreign law, the application of forum law may have to be modified or qualified to take account of the foreign system to produce a hybrid or 'enlightened' version of forum law. Such a result is motivated by the same concerns which justify the need for choice of law rules more generally, namely, recognition of foreign interests and comity, uniformity of outcome, and doing justice equally between local and foreign parties. While the enlightened forum law analysis does not strictly involve a choice between the law of country A and country B, an analogous process is at work which is important to recognise.

It is to be hoped that through a consideration of these different perspectives a realization can be reached of the complex and varied choice of law issues in procedure, with an understanding gained of the practical relevance and importance of these principles to the modern era of transnational litigation. **12.04**

STAY OF PROCEEDINGS IN AUSTRALIA: A 'CLEARLY INAPPROPRIATE' TEST?

RICHARD GARNETT*

[A new Australian test for stay of proceedings in transnational cases was laid down by the High Court in 1990 in Voth v Manildra Flour Mills. From that point on, an Australian court would only decline jurisdiction where it considered itself a 'clearly inappropriate forum' to resolve a dispute. At the time of the decision it was suggested by some writers and judges that the new test would encourage Australian courts to exercise jurisdiction in cases where there was little connection to the country, with the result that harm would be done to international relations. The purpose of this article is to examine the decisions since Voth v Manildra Flour Mills to determine if these criticisms have proven justified and also to provide a framework in which the cases can be analysed.]

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I INTRODUCTION

In 1990, in the case of *Voth v Manildra Flour Mills Pty Ltd*,¹ the High Court of Australia propounded a new principle governing the stay of Australian proceedings in transnational cases. Henceforth, an Australian court would only order a stay of its proceedings where the court considered itself a 'clearly inappropriate

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¹ (1990) 171 CLR 538 ('*Voth*').

forum'. In proposing this test, the High Court consciously departed from the principles established in England by the House of Lords in *Spiliada Maritime Corporation v Consulex Ltd*² and followed in other Commonwealth countries, where the doctrine of *forum non conveniens* has been adopted. Briefly stated, this test requires that local proceedings be stayed where there exists a 'more appropriate' court for trial.

Although the High Court claimed in *Voth* that the difference between the 'clearly inappropriate' and the 'more appropriate' tests was slight,³ a few commentators warned that the effect of the High Court decision may be to encourage Australian courts to exercise jurisdiction over matters which have little connection with Australia.⁴ The purpose of this article will be to examine whether subsequent decisions have proven the sceptics to be correct, and consequently, whether the *Voth* test should be retained. At first glance it would appear that *Voth* has had a prodigious effect on the extent to which Australian courts exercise jurisdiction in transnational cases. Of the 51 cases decided since *Voth*, orders for a stay of proceedings have been issued in only 10 — or approximately 19 per cent — of those cases. However, it is suggested that a closer examination of the circumstances present in those cases is required before any clear conclusions can be drawn. At the same time, an attempt will be made in this article to create a framework for analysing the decisions in which *Voth* has been applied.

II BACKGROUND: THE *VOTH* DECISION

In considering the issue of stay of proceedings in Australia, two situations have been traditionally distinguished. First, where a defendant has been served with process within the jurisdiction under the common law rules of service and secondly, where a defendant has been served outside the jurisdiction under the statutory provisions applicable in all State and Territory Supreme Courts and the Federal and Family Courts. The traditional position in both England and Australia was that, in the case of common law service upon a defendant within the forum, jurisdiction had been established by the plaintiff as a matter of right and so should not be lightly declined by the nominated court.⁵ By contrast, in the case of service outside the jurisdiction, it was required that before the court would

² [1987] 1 AC 460 ('*Spiliada*').

³ *Voth* (1990) 171 CLR 538, 558.

⁴ See especially Lawrence Collins, 'The High Court of Australia and *Forum Conveniens*: The Last Word?' (1991) 107 *Law Quarterly Review* 182, 187; Ellen Hayes, 'Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation' (1992) 26 *University of British Columbia Law Review* 41, 54. A New Zealand judge has also expressed similar concerns about the effect of *Voth* in *Primesite Outdoor Advertising Ltd v City Clock (Australia) Ltd* (1991) 4 PRNZ 472, 476 (Thorp J). Other academic commentators doubted that the respective tests would lead to opposite results: Peter Brereton, 'Forum Non Conveniens in Australia: A Case Note on *Voth v Manildra Flour Mills*' (1991) 40 *International Comparative Law Quarterly* 895, 898; Judd Epstein, 'Australia' in J J Fawcett (ed), *Declining Jurisdiction in Private International Law* (1995) 79, 86–7.

⁵ For a defendant to avoid the assertion of jurisdiction it had to show that the institution of proceedings in the forum by the plaintiff was 'oppressive or vexatious': *St Pierre v South American Stores Ltd* [1936] 1 KB 382, 398.

agree to hear the case, it had to be persuaded in advance, in an application for leave to serve the writ, that the action or the defendant had some territorial or other connection with the forum. Additionally, in service out cases, it was also well established that the court had a discretion to stay the action on the basis that there existed a more appropriate forum elsewhere.⁶

However, in England from the 1970s onwards, the House of Lords began to erode the distinction between common law cases (in which jurisdiction was rarely declined) and service out cases (in which jurisdiction was less easily assumed). Hence, a movement developed towards amalgamation of the tests.⁷ This trend culminated in the *Spiliada* decision in 1986, in which it was recognised that a general doctrine of *forum non conveniens* now applied to both common law and service out cases. In other words, where a defendant in either case could show that a foreign tribunal was a *more appropriate* forum for trial, that is, 'with which the action ha[s] the most real and substantial connection',⁸ then a presumption would arise in favour of a stay. In determining which forum was 'more appropriate', attention would be paid to matters such as the location and accessibility of witnesses, the law governing the transaction, and the places of business and residence of the parties.⁹ However, in a special case, if the plaintiff was able to show that they would be denied a 'legitimate juridical advantage' by a stay being ordered, then, in the interests of 'justice',¹⁰ a stay may be refused. Examples of such advantages would include: better recovery of damages under the law of the forum, a more generous limitation period, greater scope for discovery and the presence of assets within the forum to satisfy a judgment.¹¹ However, the primary elements in the 'more appropriate forum' test were the connections between the respective jurisdictions, the action and the parties. The result of *Spiliada* was therefore the creation of a unified approach to stay of proceedings in England, regardless of whether the defendant was served within or outside the jurisdiction.

Although *Spiliada* was followed in New Zealand,¹² in 1988 in *Oceanic Sun Line Special Shipping Co v Fay*¹³ the High Court of Australia, by a majority, refused to adopt its principles. Although three different views were expressed in that case as to the correct approach to be taken to stay applications, it was the judgment of Deane J (with whom Gaudron J concurred) which proved to be the most significant, as it was to form the basis of the later High Court decision in *Voth*.¹⁴

⁶ *Voth* (1990) 171 CLR 538, 562.

⁷ This movement was hardly surprising given the number of cases where common law jurisdiction had been exercised over defendants who had been only fleetingly present in the forum. See, eg, *Baroda v Wildenstein* [1972] 2 QB 283.

⁸ *Spiliada* [1987] 1 AC 460, 478, quoting *The Abidin Daver* [1984] AC 398, 415.

⁹ *Spiliada* [1987] 1 AC 460, 478.

¹⁰ *Ibid.*

¹¹ *Ibid* 482–4.

¹² *Club Mediterranee NZ v Wendell* (1987) 1 NZLR 216.

¹³ (1988) 165 CLR 197 ('*Oceanic Sun*').

¹⁴ (1990) 171 CLR 538, 550–1.

Oceanic Sun involved a defendant who had been served out of the jurisdiction, and so, strictly speaking, did not involve an inquiry into the correctness of *Spiliada*, since apparently Australian courts had always applied the doctrine of *forum non conveniens* to such cases.¹⁵ Nevertheless, Deane J assumed that a defendant who had been served out of the jurisdiction was to be treated in the same way as one who was subject to the common law jurisdiction of the court. That is, in both cases, the defendant was subject to the plaintiff's 'prima facie right to insist upon' the exercise of jurisdiction.¹⁶

Deane J went on to state that for a defendant to obtain a stay, they must

satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings ... Otherwise, that onus will ordinarily be discharged by a defendant ... if he persuades the local court that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties.¹⁷

Two points should be noted. Firstly, to obtain a stay, the defendant must show that there is an alternative forum available which is competent to hear the plaintiff's suit. Secondly, while in *Spiliada* the House of Lords spoke of a stay being granted where a foreign tribunal was 'more appropriate', Deane J's test in *Oceanic Sun* requires proof that the local forum is 'clearly inappropriate'. Deane J himself confirmed this point later in his judgment when he noted that 'the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding does not necessarily mean that the local court is a clearly inappropriate one.'¹⁸

Deane J also gave some further guidance as to the application of the 'clearly inappropriate forum' test. As the court must start with a recognition of the prima facie right of the plaintiff to choose its forum,¹⁹ the test will not be easy for a defendant to satisfy. In particular, where any significant connection between the action and the forum exists, such as that the defendant resides there or the law of the forum applies to the action, then it would be difficult to describe the forum as clearly inappropriate.²⁰

In *Voth*, a majority of the High Court adopted the 'clearly inappropriate forum' test proposed by Deane J in *Oceanic Sun*.²¹ *Voth* involved two New South Wales

¹⁵ This point was made by Collins, above n 4, 186, and was effectively conceded by four members of the High Court in *Voth* (1990) 171 CLR 538, 562-3 (Mason CJ, Deane, Dawson and Gaudron JJ), in their reference to the Victorian case of *Lewis Construction Co Pty Ltd v Tichauer SA* [1966] VR 341.

¹⁶ *Oceanic Sun* (1988) 165 CLR 197, 243.

¹⁷ *Ibid* 248.

¹⁸ *Ibid*.

¹⁹ *Ibid* 241.

²⁰ *Ibid* 245.

²¹ *Voth* (1990) 171 CLR 538, 564.

corporations suing a Missouri resident for allegedly providing negligent advice to a Missouri subsidiary regarding its liability to tax under US law, which led to a loss being suffered by the plaintiff companies in NSW. The plaintiffs were granted leave to serve the defendant out of the jurisdiction. The defendant then sought a stay of proceedings, which was granted by a 5:1 majority of the High Court, on the basis that (according to four of the five majority judgments) NSW was a 'clearly inappropriate forum'.²²

According to the joint judgment, NSW was a clearly inappropriate forum because the action was overwhelmingly connected to Missouri.²³ This followed from the fact that the basis of the plaintiffs' claim was negligent advice which occurred in that State, its law was likely to apply, Missouri was the place of residence of the defendant, and the professional standards of accountants practising in that State would be relevant to liability. In addition, a large part of the damage was referable to US tax law and the bulk of the evidence was located in Missouri. By contrast, the connections between the action and NSW were slight; it was really only the plaintiffs' place of residence and the jurisdiction in which much of the damage was suffered. However, the judges did acknowledge that the plaintiff possessed two 'juridical advantages' when suing in NSW: greater recovery of legal costs and the award of interest on damages. However, in the view of the court, these matters were of 'diminished importance'²⁴ given the very strong connections to the foreign jurisdiction.

What principles can be extracted from the joint judgment regarding the 'clearly inappropriate forum' test?

The first point made by the court is that the test must be applied in all cases whether the defendant was served within or beyond the jurisdiction. The only difference is that the onus of proof shall vary in each case. In the case of service out of the jurisdiction — where prior leave of the court is required — the onus of showing that the Australian forum is *not* clearly inappropriate shall rest on the plaintiff. In the case of common law service or service out of the jurisdiction — where leave is not required — the onus of persuading the court that it *is* clearly inappropriate shall rest on the defendant.²⁵

The second point to note is that, whilst the *Spiliada* 'more appropriate forum' test necessarily involves a comparative, balancing exercise as to the suitability of one forum over the other, the 'clearly inappropriate forum' test focuses only upon the suitability of the local jurisdiction. So, while the availability of an alternative forum and whether it would give the plaintiff adequate relief will be relevant to determining whether the local forum is clearly inappropriate, it was possible (according to the majority), that an Australian forum could conceivably be found to be 'clearly inappropriate' even if no other forum was available to the plain-

²² Mason CJ, Deane, Dawson and Gaudron JJ wrote a joint judgment endorsing the 'clearly inappropriate forum' test: *ibid.* Toohey J, while agreeing that a stay should be granted, chose to follow his view in *Oceanic Sun*, that is, that the 'more appropriate forum' test should be applied: *ibid.* 590.

²³ *Voth* (1990) 171 CLR 538, 570–1.

²⁴ *Ibid.* 571.

²⁵ *Ibid.* 564–5.

tiff.²⁶ This observation qualifies the statement of Deane J in *Oceanic Sun*²⁷ referred to earlier, in that it suggests that the identification of an alternative, competent forum is not a precondition of a stay being granted, at least not in all cases. By contrast, the grant of a stay under the *Spiliada* 'more appropriate forum' test would seem to require the identification of another available forum.²⁸

Thirdly, whilst the majority in *Voth* reaffirmed that the plaintiff has a prima facie right to the exercise of jurisdiction by the forum under either the common law or statutory rules of service, this right was not to be given too much weight.²⁹

Fourthly, the court in *Voth* indicated that the discussion by Lord Goff in *Spiliada* as to 'relevant connecting factors' and 'legitimate personal or juridical advantage' would be equally valuable in applying the 'clearly inappropriate forum' test.³⁰ The connecting factors, most of which had been referred to by Deane J in *Oceanic Sun*, encompassed any significant connection between the forum and the subject matter of the action, the places of business of the parties and (especially) the law governing the transaction. To recap, examples of 'personal or juridical advantage' would include: the availability of greater damages in the forum, the existence of a more favourable limitation period, or the existence of assets within the forum for the satisfaction of any judgment obtained.

In terms of the relationship between connecting factors and juridical advantages, Lord Goff had suggested that the issue of connections was to be given priority when considering whether to order a stay. In his view, where a foreign jurisdiction was found to be the 'natural' forum on the basis of connecting factors, then it would be a rare case where specific juridical advantages to the plaintiff would preclude a stay being awarded.³¹

The attitude of the High Court in *Voth* to the relationship between connections and advantages is less clear. While it may appear at first glance that a 'clearly inappropriate forum' test, as opposed to a 'more appropriate forum' test, could give more weight to a plaintiff's advantages, the actual decision on the facts in *Voth* suggests otherwise. The court, despite stating that such advantages were of 'valuable assistance', nevertheless chose to ignore clear benefits to the plaintiff (by way of recovery of costs and damages) which would have been attained by suing in NSW because of the action's much closer connection to the US.³²

²⁶ Ibid 558. An example of such a situation would be where an action was time barred in a foreign jurisdiction but had no connections with the Australian forum. However, more recently, Brennan CJ has suggested that such an outcome 'could be contemplated only in an extreme case': *Henry v Henry* (1995) 185 CLR 571, 578 ('Henry').

²⁷ (1988) 165 CLR 197, 248.

²⁸ Hayes, above n 4, 52-3.

²⁹ *Voth* (1990) 171 CLR 538, 566, 571. This marks a divergence from the views of Deane J in *Oceanic Sun* (1988) 165 CLR 197, 241.

³⁰ *Voth* (1990) 171 CLR 538, 564-5.

³¹ *Spiliada* [1987] 1 AC 460, 478.

³² Nygh suggests that the High Court's reasoning is 'internally inconsistent' on this point: P E Nygh, *Conflict of Laws in Australia* (6th ed, 1995) 108.

Finally, the High Court stated that the distinction between the 'clearly inappropriate forum' and 'more appropriate forum' tests was only slight and that the same result would be likely to be reached in most cases by applying either test.³³

In this article, when considering the cases which have applied *Voth*, it is this last statement by the High Court which will be tested. In particular, would the same result have been achieved in a given case had the *Spiliada* principles been applied instead of *Voth*? It will be argued that, in a number of cases, a stay would most likely have been ordered had the 'more appropriate forum' test been applied. Part of the reason for this conclusion is that the *Voth* test may have forced Australian courts into the position of focusing upon the connections between the action and the Australian forum, or on the advantages enjoyed by the plaintiff when suing here, rather than looking at the issue from a truly transnational perspective and comparing the entitlements of both the Australian and foreign forums to try the action. Any test which professes almost to ignore one half of the equation (the foreign forum) in inter-jurisdictional conflicts is unlikely to yield the same results as one which takes into account, on a relatively equal basis, the claims of both jurisdictions.³⁴ This observation is interesting in light of the High Court's declaration in *Voth* that the difference between the *Voth* and *Spiliada* tests is slight.³⁵

As has been noted, in the overwhelming majority of cases since *Voth*, orders for stay have been refused. In analysing the decisions, attention will be paid to the criteria referred to in *Voth* as relevant to stay applications, namely: (i) the right of the plaintiff to choose its forum; (ii) the existence of an alternative forum abroad; (iii) the balance of connecting factors; and (iv) any legitimate juridical advantage to the plaintiff. In addition to these matters, two other factors will be examined: the existence of pending proceedings in a foreign court; and the presence of a jurisdiction clause in an agreement between the parties.

These last two criteria, in particular, have been very significant in a number of the cases in which stays of proceedings have been granted by Australian courts, and arguably, have themselves become exceptions to the *Voth* principle.

³³ *Voth* (1990) 171 CLR 538, 558. The majority did, however, accept that where it could be said that a foreign tribunal was the 'more appropriate' forum, but it could not be said that the local tribunal was 'clearly inappropriate', a stay may be awarded under the *Spiliada* principle but not under *Voth*: at 558.

³⁴ In this regard, it is rather surprising that one commentator has said that the *Voth* test provides Australian courts with a 'wider discretion than exists in English Law': Lakshman Marasinghe, 'International Litigation: Choice of Forum' (1993) 23 *University of Western Australia Law Review* 264, 271. The more common defence of the *Voth* test (when compared to *Spiliada*) is that it provides a simpler and more certain standard to apply because the court is not required to balance the competing merits of the local and foreign forums and their respective legal systems. Instead, the court only has to consider the appropriateness of the Australian tribunal in isolation. In this regard see Peter Prince, 'Bhopal, Bougainville and OK Tedi: Why Australia's *Forum Non Conveniens* Approach Is Better' (1998) 47 *International and Comparative Law Quarterly* 573, 588; Epstein, above n 4, 87. However it will be argued in this article that, regardless of whether the *Voth* or *Spiliada* tests are applied, a comparison of the competing jurisdictions and their entitlement to hear the action is inescapable.

³⁵ Even among commentators supportive of *Voth*, it is acknowledged that different results between the tests are likely to occur where the connections between the jurisdictions are equally divided: see, eg, Brereton, above n 4, 899. There seems to be a consensus, however, that on the facts of *Voth*, the result would have been the same whichever test was applied: Collins, above n 4, 187.

III THE ONUS OF PROOF IN STAY APPLICATIONS

Before considering the way in which the *Voth* test has been applied by Australian courts, a comment should first be made about which party bears the onus of proof in cases in which it is alleged that an Australian court is a 'clearly inappropriate forum'.

In *Voth*, the High Court noted that a distinction was to be drawn in terms of the onus of proof between cases involving service out of the jurisdiction, where prior leave of the court is required, and those in which prior leave is not required or the defendant was served within the jurisdiction. In cases where prior leave was required, the onus was said by the court to be on the plaintiff both at the stage of the application for leave and on any subsequent appearance by the defendant to set aside service. The onus here extends to showing: (i) that the action is connected to the forum in one of the ways specified in the applicable rules of court;³⁶ and then (ii) that the forum is not a clearly inappropriate one to hear the matter. By contrast, in cases of service out of the jurisdiction where prior leave is not required or where jurisdiction has been invoked as of right under the common law rules, the onus lies on the defendant to bring an application to stay proceedings on the basis that the forum is clearly inappropriate.³⁷

Interestingly however, despite the High Court's seemingly clear statement that where prior leave to serve is required, the onus shall rest on the plaintiff in a subsequent application to set aside service, courts in later decisions have taken differing views on the question of where the onus lies. Order 8 Rule 2 of the *Federal Court Rules*, for example, still provides for prior leave to be obtained before a plaintiff may serve a defendant out of the jurisdiction. Nevertheless, some judges have taken the view that while the plaintiff has the onus of showing that the action falls within one of the categories enumerated under the rules of court to establish jurisdiction, once this requirement is satisfied, the onus then shifts to the *defendant* to show that the Australian forum is clearly inappropriate.³⁸

However, other judges of the Federal Court have maintained (and, it is submitted, correctly) that *Voth* requires that the onus remain on the plaintiff in all aspects of the application to set aside service, including showing that the forum is

³⁶ For example, in a contract action, that the contract was made or breached within the forum, or governed by the law of the forum.

³⁷ *Voth* (1990) 171 CLR 538, 564-5. In the case of service out of the jurisdiction, where prior leave is not required, it seems that the plaintiff would bear the onus of showing, on an application for leave to proceed, that the action falls within one of the designated categories for service out. However, the onus would rest upon the defendant to prove that the Australian court is a 'clearly inappropriate forum'. In decisions since *Voth*, Australian courts have unanimously taken this approach. See, eg, *WFM Motors Pty Ltd v Maydwell* (Unreported, Supreme Court of New South Wales, Bryson J, 23 April 1993); *Melban Pty Ltd v Eu Chin Nominees Pty Ltd* (Unreported, Supreme Court of Victoria, Ormiston J, 16 March 1992) ('*Melban*'); *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Barden* (Unreported, Supreme Court of New South Wales, Rolfe J, 19 October 1994).

³⁸ See, eg, *Westpac Banking Corporation v P & O Containers Ltd* (1991) 30 FCR 320, 324; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539, 552.

not clearly inappropriate, regardless of the particular rules of court.³⁹ While it is unclear whether this difference of opinion on the issue of onus has led to courts reaching different results on the question of whether a stay should be granted, this remains a possibility. The issue of onus of proof in cases where prior leave to serve out of the jurisdiction is required must therefore be clarified.

IV THE PLAINTIFF'S RIGHT TO CHOOSE THE FORUM

It will be recalled that in *Voth* the High Court warned that the plaintiff's right to choose the forum was to be given only modest weight in stay applications. Generally speaking, courts seem to have heeded this warning,⁴⁰ although occasionally, in rather extreme circumstances, the principle has been relied upon to overcome an absence of connections to the forum.

In *Teare v British Nuclear Fuels plc*,⁴¹ the plaintiff brought a claim in Victoria for personal injuries arising out of his employment in England over 20 years previously. All evidence apart from some expert medical testimony lay in that country. Nevertheless, his action was allowed to proceed on the basis that because he was unfit to travel abroad and close to death, Victoria was the only jurisdiction in which he would have a chance to attend the trial of the proceeding. The court also referred to the plaintiff's prima facie right to invoke the jurisdiction as a 'powerful' factor in its decision to refuse a stay. A similar approach was taken in two more recent cases involving employee claims,⁴² where in both a stay was refused because NSW was likely to be the only jurisdiction where the plaintiff's case could be heard before they died.

Such cases, however, are not likely to be common, and given the extremity of the facts, the same result may also have been reached by applying the *Spiliada* principle.

³⁹ See, eg, *Phosphate Co-operative Company of Australia Ltd v SGS Supervision Services Inc* (Unreported, Federal Court of Australia, Gray J, 7 April 1993); *Century Insurance Ltd v New Zealand Guardian Trust Ltd* (Unreported, Federal Court of Australia, Lee J, 16 May 1996).

⁴⁰ It is interesting to note, however, that some courts have referred to the *Voth* test as evidencing the 'reluctance of the courts to grant a stay of proceedings and affirm[ing] a plaintiff's right to proceed in the ordinary way. For the court to impose a stay on proceedings impairs the right ordinarily enjoyed by a plaintiff. It is a bold step and should be taken only with great care': *Dart Industries Inc v Buckley & Nunn Ltd* [1991] AIPC ¶90-838, 37,948 (Ashley J). It is suggested that this conclusion overstates the significance of the plaintiff's right to suit and goes beyond what the High Court intended in *Voth*. Interestingly, Nygh has argued that it was this type of 'unfortunate interpretation of *Voth* which led to the denial of a stay in almost all cases decided in lower courts since': P Nygh, 'Voth in the Family Court Re-Visited: The High Court Pronounces on *Forums Conveniens* and *Lis Alibi Pendens*' (1996) 10 *Australian Journal of Family Law* 163, 169. A recent example of inappropriate reliance on the principle that a plaintiff has a right to choose its forum occurred in *Chan Wing (Vanuatu) Ltd v Moti* (Unreported, Supreme Court of Queensland, Chesterman J, 26 March 1998). There, an action between two foreign residents was allowed to proceed in Queensland despite the existence of only slender connections between the forum, the parties and the action.

⁴¹ (Unreported, Supreme Court of Victoria, Harper J, 19 October 1993).

⁴² *Port Line Ltd v Lacey* (Unreported, Supreme Court of New South Wales, Court of Appeal, Priestley, Meagher and Beazley JJA, 26 July 1996); *James Hardie & Co Pty Ltd v Coyle* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Sheller and Cole JJA, 5 May 1998).

V THE EXISTENCE OF AN ALTERNATIVE FORUM ABROAD

While the High Court stated in *Voth* that the availability of an alternative forum abroad capable of giving the plaintiff relief would be relevant to determining whether a forum is clearly inappropriate, it also suggested that this may not be an absolute requirement in all cases. Nevertheless, there have been at least two cases since *Voth* in which Australian courts have refused to grant a stay primarily on the basis that another available forum had not been identified by the defendant.

In *Schmidt v Won*,⁴³ the defendant, while arguing that the Australian forum should decline jurisdiction in favour of a court in South Korea, did not identify any particular court in that country which would have jurisdiction over the matter or the parties. Similarly, in *Conagra International Fertiliser Co v Lief Investments Pty Ltd*,⁴⁴ the defendant was refused a stay when it failed to show that a Chinese court would undertake jurisdiction in respect of a dispute between two non-Chinese parties.⁴⁵

According to the courts in both these cases, the identification of an alternative forum was a necessary precondition of a stay being ordered, so that, presumably, issues such as connecting factors and juridical advantages would not even be considered if this requirement was not met. While it is not clear that the approach in these cases directly accords with that of the High Court in *Voth*, it is unlikely that a different result in these decisions would have been reached had the *Spiliada* principle been applied.

VI CONNECTING FACTORS

Lord Goff had indicated in *Spiliada* that the critical factor in determining whether a local court or foreign tribunal was more appropriate was the degree of connection between the forum, the transaction and the parties. As part of this inquiry, the location of witnesses and other evidence, and the governing law of the transaction were all important. As the High Court noted in *Voth*, the issue of connecting factors was also to be of great significance in ascertaining whether an Australian court was a 'clearly inappropriate forum', and in cases decided since *Voth* courts have given most emphasis to this issue. While it will be asserted that in a number of Australian cases, a stay may have been granted had the *Spiliada* test been applied on the basis of inadequate connections to the Australian forum, it is submitted that there have also been decisions, falling into four groups, in which the results would not have been different under *Spiliada*.

A Stay Refused: Foreign Plaintiff/Australian Defendant

The first group of cases, in which the same result would have been achieved under *Spiliada*, involved proceedings in which a foreign plaintiff has entered the Australian forum and commenced proceedings against an Australian resident. In

⁴³ [1998] 3 VR 435.

⁴⁴ (Unreported, Supreme Court of New South Wales, Rolfe J, 27 October 1997) ('*Conagra*').

⁴⁵ *McEntee v Connor* (1994) 4 Tas R 18, 25 contains statements to the same effect.

this situation, courts have been reluctant to order a stay of proceedings on the basis that a resident sued in its home jurisdiction cannot seriously complain that the proceedings are oppressive and vexatious. It is the defendant's connection with the forum therefore, which is given most weight in the stay determination.⁴⁶

Thus, in *Banque Paribas v Jarrett*,⁴⁷ the court refused to order a stay, even though most of the evidence for trial was situated in England and the governing law was likely to be English, because these were advantages to the foreign plaintiff which it had chosen to forego by bringing proceedings in Victoria rather than England; a Victorian defendant could not be heard to complain of the plaintiff's choice. A similar result was reached in a defamation action in NSW by a New Zealand politician against an Australian company, arising through the publication of the offending material in that State.⁴⁸ In fact, the court felt that there was an even stronger case for refusing a stay because not only was the defendant Australian, but the cause of action arose entirely here.⁴⁹

More recently, in *James Hardie Industries Pty Ltd v Grigor*,⁵⁰ a majority of the NSW Court of Appeal⁵¹ relied on the fact that the defendant was a company resident in NSW to refuse a stay of personal injury proceedings brought by a New Zealand plaintiff. In reaching this conclusion, the majority suggested that in a product liability action by a foreign defendant against a local plaintiff, there were strong reasons of policy for an Australian court to exercise jurisdiction:

Any modification of the existing law should not overlook the scenario of an Australian manufacturer of a dangerous product seeking to dump it in a foreign market with less stringent controls ... any legislative restriction of a foreign plaintiff's resort to a local court through the application of the forum non conveniens doctrine should at least address those issues.⁵²

It is suggested that the logic of this reasoning would apply equally to resolution of a stay application under either the *Voth* or *Spiliada* principles.

B Stay Refused: Australian Plaintiff/Australian Defendant

The second category of case in which Australian courts have refused to order a stay of proceedings, but in which, arguably, the same result would have been reached by applying *Spiliada*, is where an action has been brought between two

⁴⁶ One commentator has however suggested that, in the case of a foreign plaintiff suing a local defendant, application of the *Voth* and *Spiliada* principles would yield different results with a stay much more likely under *Spiliada*: Prince, above n 34, 586–8. However the writer fails to support this assertion by reference to any English case. Therefore, his claim that *Spiliada* 'discriminates against foreign plaintiffs' seems unjustified.

⁴⁷ (Unreported, Supreme Court of Victoria, Ormiston J, 25 July 1991).

⁴⁸ *Prebble v Australian Broadcasting Corporation* (Unreported, Supreme Court of New South Wales, Levine J, 6 September 1996).

⁴⁹ *Conagra* (Unreported, Supreme Court of New South Wales, Rolfe J, 27 October 1997) can also be included in this category.

⁵⁰ (Unreported, Supreme Court of New South Wales, Court of Appeal, Spigelman CJ, Mason P and Beazley JA, 18 June 1998) ('*Grigor*').

⁵¹ Mason P and Beazley JA; Spigelman CJ dissenting.

⁵² *Grigor* (Unreported, Supreme Court of New South Wales, Court of Appeal, Spigelman CJ, Mason P and Beazley JA, 18 June 1998) 7.

Australian resident parties in relation to a tort which occurred fortuitously in a foreign country. Here, the courts' willingness to allow proceedings to remain in Australia has been based upon the assumption that, because the foreign jurisdiction has few continuing connections with the claim, its interest in asserting jurisdiction is unlikely to be great. Related to this point, the other reason relied upon by courts to refuse a stay in this context is that it has often been unclear whether a foreign court has or would exercise jurisdiction over the claim. It is therefore likely that, even applying *Spiliada* to this example, the combination of the absence of connections with the foreign jurisdiction and doubt as to its amenability for suit would also preclude a stay.

Thus, in *McEntee v Connor*,⁵³ a claim by one Australian resident against another relating to personal injury arising out of an incident which occurred while the parties were temporarily resident in Japan, was not stayed. In the court's view, not only was it unclear whether a Japanese court was available or that the defendant would be amenable to its jurisdiction, but there were also 'no or insufficient connecting factors' to Japan. In particular, the parties had no connection to that country, nor were there any witnesses there.⁵⁴

Similarly in *Millett v Hookham*,⁵⁵ an action between two Australian residents for personal injury arising out of an accident in Poland was not stayed as the parties lived only 100 kilometres apart and much evidence as to the plaintiff's ongoing loss was situated in Australia. The only possible continuing connection to Poland was that the defendant may have had a contribution claim against a third party there, but this was dismissed as too speculative and weak to overcome the overwhelming connection with Australia based on the parties' shared place of residence.

More recently, in *Schmidt v Won*,⁵⁶ the point was made even more emphatically by the Victorian Court of Appeal. There, an action between two Australian residents arising out of the misappropriation of the proceeds of the sale of land in a foreign country was not stayed. In the court's view, the fact that the parties to the action were both Australian residents meant that for all practical purposes, the *Voth* test was incapable of being satisfied — that is, it could never be shown that an Australian court was a 'clearly inappropriate forum'. An application to stay proceedings under *Voth* by one Australian resident against another was therefore inappropriate because it was likely to be futile.⁵⁷

A slightly different scenario, but one which deserves to be considered under this category, occurs in relation to a foreign tort action, where the plaintiff is an

⁵³ (1994) 4 Tas R 18.

⁵⁴ Ibid 25.

⁵⁵ (Unreported, Supreme Court of Australian Capital Territory, Connolly M, 19 April 1996) 4.

⁵⁶ [1998] 3 VR 435. The failure of the defendant to identify an alternative foreign court to which the matter could be submitted has already been discussed at above nn 43–45 and accompanying text.

⁵⁷ The court noted that, where parties reside in different States of Australia, the appropriate relief for a defendant who wished to challenge the forum's jurisdiction would be an application to transfer the case to another Australian forum under the cross-vesting legislation: ibid 450 (Ormiston JA). Presumably, where the parties reside in the same state or territory, even this relief would be unlikely to be granted.

Australian resident, and the defendant, although not an Australian resident, has close connections with this country. So too, all evidence relating to the action is located in Australia. Hence, in *Placer (PNG) Pty Ltd v Anderson*⁵⁸ and *Diethelm & Co Ltd v Bradley*,⁵⁹ actions were allowed to proceed in Australia arising out of accidents which occurred abroad, the first in the context of employment and the second during a holiday. In both cases, the plaintiff was initially 'recruited' by the defendant in Australia, immediately returning there after the accident, wherein all relevant witnesses were located in that country. A perceived inequality of commercial power between the plaintiff individual and the defendant corporation may also have influenced the decision about whether to order a stay in each case on the basis that the cost of litigating abroad would be far more onerous for an individual. It is likely that application of the *Spiliada* test would have yielded a similar result.

C Stay Refused: No Connections with Abroad

The third category of case in which stays of proceedings have not been granted under the *Voth* principle, in circumstances in which arguably a similar result would have been achieved under *Spiliada*, has arisen where the plaintiff is an Australian resident and the defendant from abroad, but all the connections with the case are in this country, apart from the defendant's residence. In *Merpro Montassa Ltd v Conoco Specialty Products Inc*,⁶⁰ a claim for breach of s 52 of the *Trade Practices Act 1974* (Cth) ('TPA') by an Australian resident against a US corporation was allowed to proceed where all the alleged unlawful conduct by the defendant was performed in Australia, all witnesses were here and the case concerned the interpretation of an Australian statute. The only 'international' aspect of the case was therefore the defendant's place of residence, which was insufficient to make Australia a 'clearly inappropriate forum' in the terms of *Voth*, or, it is submitted, a less appropriate forum in the terms of *Spiliada*.⁶¹

To the same effect was *Century Insurance Ltd (In Liq) v New Zealand Guardian Trust Ltd*.⁶² This case concerned a claim by an Australian resident individual and a company being wound up in Australia against a New Zealand bank for allegedly misappropriating funds deposited with it at its place of business in Australia. This case was allowed to proceed in this country because, similar to

⁵⁸ (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams and McKenzie JJ, 18 April 1997).

⁵⁹ [1995] ATPR ¶41-388 (NSWSC).

⁶⁰ (1991) 28 FCR 387 ('*Merpro*').

⁶¹ Other cases involving actions for breach of s 52, in which stays were refused because the only real connection with a foreign jurisdiction was that it happened to be the defendant's place of residence, include: *Sedgwick Ltd v Bain Clarkson Ltd* (1994) 56 FCR 578; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 28 FCR 387; *News Corporation Ltd v Lenfest Communications Inc* (1996) 21 ACSR 553. It is suggested that, as the Australian court was the more appropriate forum in each case, the result would have been no different under *Spiliada*.

⁶² (Unreported, Federal Court of Australia, Gray J, 7 April 1993).

Merpro, all connections with the action were Australian and the only foreign aspect of the case was the place of incorporation of the defendant.⁶³

D Stay Refused: Tenuous Connection with Australia

There have also been a number of cases involving an Australian plaintiff and a foreign defendant where stays have been refused, even though the claims have had only a slight connection with this country. Typically, in such cases, almost all of the factors relating to the defendant's liability have arisen in the foreign jurisdiction but due to the fact that some loss or damage has been suffered in Australia, the Australian proceedings have been allowed to continue. It is highly debatable, in this category of case, whether the same result would have been achieved by application of the *Spiliada* principles.

Hence, in *Al-Ru Farm Pty Ltd v Hedleys Humpers Ltd*,⁶⁴ a local plaintiff was entitled to bring claims against a foreign shipper of goods, notwithstanding the fact that all events upon which the causes of action were founded arose in England and were likely to be governed by English law and that almost all witnesses were located in England. The court noted that the only factor in favour of suit in Australia was that the goods which were the subject of the action were now in the forum, and 'it would be absurd' if they were returned to England for litigation there.⁶⁵ It is suggested that this is a case in which a different result would have been reached under *Spiliada*; there being no juridical advantage to the plaintiff in suing in Australia, England was undoubtedly the more appropriate forum based on connecting factors.

Another case which smacks of excessive protection of local residents is *Phosphate Co-operative Company of Australia Ltd v SGS Supervision Services Inc.*⁶⁶ There, another Australian importer of goods was held to be entitled to sue a Canadian company in Australia for negligence in relation to the inspection of a ship which was to carry the plaintiff's goods to Australia. Again, it was admitted by the court that given the connections between the claim and the foreign jurisdiction, Canadian law would be likely to govern, and also, that the bulk of the more significant evidence would come from there. The only evidence which

⁶³ To the same effect was *Bell Group Ltd (in liq) v Westpac Banking Corporation* (1996) 20 ACSR 760 ('*Bell Group*'), where claims against a number of former directors of an Australian company for breaches of duty in relation to the affairs of that company were allowed to proceed. The fact that the defendants had become overseas residents by the time of the suit was treated as an almost fortuitous circumstance. See also *Chapman v Gooch Ware Travelstead* (Unreported, Federal Court of Australia, French J, 25 August 1998) where a stay was refused because the foreign defendant had entered a 'transaction with a strong Australian connection'. Similarly, in *Hyde v Agar* (Unreported, Supreme Court of New South Wales, Court of Appeal, Spigelman CJ, Mason P and Stein JA, 19 October 1998) 65-6, it was said that it would 'take quite exceptional circumstances' for an action against a foreign defendant relating to a tort committed in Australia to be stayed. See also, to the same effect, *HIH Casualty & General Insurance Ltd v Meados Indemnity Co Ltd* (Unreported, Supreme Court of New South Wales, Rolfe J, 16 December 1998).

⁶⁴ (Unreported, Supreme Court of South Australia, Matheson J, 10 January 1991).

⁶⁵ *Ibid* 19.

⁶⁶ (Unreported, Federal Court of Australia, Gray J, 7 April 1993).

lay in Australia was again the damaged goods. There was, in addition, no juridical advantage pleaded by the plaintiff to justify suit in Australia.⁶⁷

An extreme example of generosity to local plaintiffs under *Voth* occurred in *WFM Motors Pty Ltd v Maydwell*.⁶⁸ That case involved an action to enforce a guarantee entered into in Hong Kong, in which that region's law would almost certainly apply. The court frankly acknowledged the tenuous contacts with NSW but felt that, because the plaintiff had a very strong prima facie case and the issues were of 'extreme simplicity', a stay would be inappropriate.⁶⁹

One last comment on the cases in which stays have been awarded even though the preponderance of connecting factors lies with a foreign jurisdiction is that, in a number of cases,⁷⁰ courts have sought to address the problem of evidence being located in another jurisdiction by noting technological developments in Australian courts, whereby witnesses can be examined by way of video link and documents can be sent instantaneously. This means that the defendant will be put to less inconvenience than previously would have been the case if a stay were refused. While this point has substance, it still remains the case that the tribunal which has the closest connection to the subject matter of the action is in the best position to adjudicate and to dispense justice, of course any legitimate juridical advantage to the plaintiff aside.

Overall then, it is suggested that, in these cases, there is a strong chance that a stay would have been awarded had *Spiliada* been applied, on the basis that the foreign jurisdiction would have been considered a 'more appropriate' forum.

E *Stay Refused: Equal Connections between Jurisdictions*

Interestingly, of the cases which have applied *Voth* there has only been one in which it can be clearly said that the connections were almost equal between the Australian and the foreign jurisdictions. *Shepherd Woolskins Pty Ltd v Bighorn Sheepskin Company*⁷¹ involved an action to recover the purchase price of goods supplied by an Australian company to a Texas company. The court noted that, while the entirety of the negotiations between the parties leading up to the conclusion of the contract for the supply of goods occurred in Texas, almost all of the performance of the contract, in particular, the manufacture and delivery of the goods, occurred in Australia. Ultimately, the court felt that in a situation of almost evenly split contacts, what determined the issue was the fact that the *Voth* test favoured jurisdiction in Australia, by requiring that the defendant show that

⁶⁷ A further case involving receipt of damaged goods in Australia, in which a plaintiff was entitled to proceed here — even though all relevant events relating to liability occurred abroad — was *GNB Battery Technologies Ltd v Nichicon (Singapore) Pty Ltd* (Unreported, Supreme Court of Victoria, Ashley J, 23 June 1994).

⁶⁸ (Unreported, Supreme Court of New South Wales, Bryson J, 23 April 1993).

⁶⁹ Ibid 18. *Westpac Banking Corporation v P & O Containers Ltd* (1991) 30 FCR 320 would seem to fall into the same category. There, the foreign defendant was denied a stay even though all wrongful acts occurred abroad and all relevant witnesses were located there.

⁷⁰ See, eg, *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Barden* (Unreported, Supreme Court of New South Wales, Rolfe J, 19 October 1994) 58–9; *News Corporation Inc v Lenfest Communications Inc* (1996) 21 ACSR 553, 575.

⁷¹ (Unreported, Supreme Court of New South Wales, James J, 9 December 1993).

an Australian forum was clearly inappropriate, not merely less appropriate. However, the defendant could not show this and so a stay was refused. Hence, the incidence of equal connections between jurisdictions may be another type of case in which application of *Spiliada* would yield a different result. However, as the Australian experience shows, such cases are not likely to be common.

F Stay Ordered: Little or No Connection with Australia

In a number of cases, Australian courts have granted a stay of proceedings under the *Voth* principle, on the basis that the action and parties have little or no connection with the Australian forum. It will be recalled that the *Voth* decision itself was an example of such a case. Needless to say, it is unlikely in this category of case that there would be a different result achieved by application of the *Spiliada* principles.

The case of *Adeang v The Nauru Phosphate Royalties Trust*⁷² involved an action by a Nauruan resident against a Nauruan Government instrumentality for breaches of duty in relation to a fund, administered by the defendant, located in Nauru. The court stayed the action because neither the action nor the parties had any connection with Australia,⁷³ and all issues relating to liability would be governed by Nauruan law, in particular Nauruan statutes. As the case was a matter between Nauruans about the disposition of Nauruan money when that disposition is governed by Nauruan law, Australia was unmistakably a 'clearly inappropriate forum'.

To the same effect was *Williams v The Society of Lloyd's*.⁷⁴ This case concerned an action by a Victorian resident arising out of the conduct of business in the London insurance market by the defendants, who were both English companies. A stay was granted, again because the action related to conduct almost entirely performed in a foreign jurisdiction, and which went 'to the very foundation of the conduct of the Lloyd's market in London.'⁷⁵ As a result, virtually all evidence, both oral and documentary, lay in England and since such evidence was 'likely to be extremely large' in amount, it would be 'vexatious and oppressive' to the defendants if the trial were to take place in Victoria.⁷⁶ Similarly, in *Bank of America v Bank of New York*,⁷⁷ a stay was granted over a claim by one American bank against another, arising out of a contract between the parties which had been negotiated and concluded in the US and was governed by US law. The only connection with NSW was that, under the contract, the plaintiff agreed to purchase loans owing to an Australian subsidiary of the defendant. Finally and most recently, in *Laminex (Australia) Pty Ltd v Coe Manufacturing Co*,⁷⁸ claims by an Australian company against two American companies arising out of the

⁷² (Unreported, Supreme Court of Victoria, Hayne J, 8 July 1992) ('*Adeang*').

⁷³ The fact that the defendant held assets in Australia was irrelevant.

⁷⁴ [1994] 1 VR 274.

⁷⁵ Ibid 325.

⁷⁶ Ibid.

⁷⁷ [1995] ATPR ¶41-390 (NSWCA) ('*Bank of America*').

⁷⁸ (Unreported, Supreme Court of New South Wales, James J, 19 December 1997) ('*Laminex*').

supply of goods were stayed, where the entire conduct giving rise to the causes of action occurred in the US.

In considering the cases in which the issue of connecting factors has been relevant to the exercise of the discretion to grant a stay under the *Voth* principle, the conclusion is reached that in only two types of case would the result perhaps have been different had the *Spiliada* principle been applied instead: where the connections with the foreign jurisdiction were equal to, or greater than, those with Australia.

VII JURIDICAL ADVANTAGE

The High Court in *Voth* recognised that advantages to a plaintiff in suing in the foreign forum, such as a more favourable limitation period, greater scope for recovery of damages, and better trial procedures, may all be relevant factors in determining whether a local action should be stayed. However, as discussed above, the court, in a manner similar to that of the House of Lords in *Spiliada*, appeared to place such matters second in priority to the connecting factors between the action, the parties and the forum so that where a case was overwhelmingly connected to a foreign jurisdiction, any advantages under local law would be irrelevant.⁷⁹

However, it is interesting to note that Australian courts in subsequent decisions have taken a liberal view of what constitutes a juridical advantage to a plaintiff as well as giving the factor great weight in their decisions *not* to stay proceedings, sometimes even where the action has been more closely connected with a foreign tribunal.

A Juridical Advantage I: Relief under the Trade Practices Act 1974 (Cth)

The first type of juridical advantage which has been recognised has been where a plaintiff has brought a claim for breach of s 52 of the *TPA*, and an Australian court has refused a stay of proceedings because it is unclear whether a foreign tribunal would allow the claim to be brought. On this issue, Australian courts have been strongly influenced by the comments of an English judge, Browne-Wilkinson V-C in *Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd*.⁸⁰ The judge, in considering whether an English court could hear a claim under the Australian *TPA*, confessed that he had

considerable doubts whether the English court if called on to adjudicate this matter would apply the ... Act ... as part of the applicable law in this action ... [but that] [e]ven if ... [it did] it is manifest that the Australian courts are very much better qualified to deal with that Act than any English court would be.⁸¹

⁷⁹ This view has been confirmed in a recent English decision, where a stay was granted because of the action's greater geographical connection with a foreign forum, even though suing in England would have been advantageous to the plaintiff: *The Rothnie* [1996] 2 Lloyd's Rep 206 (QBD).

⁸⁰ [1989] 3 All ER 65 (Ch D).

⁸¹ *Ibid* 72.

This passage was referred to with approval in *DA Technology Australia Pty Ltd v Discreet Logic Inc*,⁸² where a Canadian company was denied a stay of proceedings on the basis that the plaintiff may have been unable to rely on s 52 had the case been heard before a Canadian court. Significantly, the Australian court also relied upon the fact that no equivalent relief to s 52 would be available to the plaintiff under Canadian law. The court also stated that reasons of comity militated against placing the Canadian court in the position of having to decide whether to apply the *TPA* when an Australian court had stayed a proceeding in which essentially the same relief was sought. So in this case an attempt at least was made to ascertain whether the plaintiff would indeed have suffered an injustice had the matter been stayed by considering whether equivalent relief was available in the foreign forum; the court did not simply decline the stay upon the mere pleading of a breach of s 52 alone.

Unfortunately, the same praise cannot be bestowed upon the decision of Rolfe J of the Supreme Court of NSW in *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Barden*.⁸³ There, it seems that jurisdiction was allowed to be exercised over a number of English resident defendants, seemingly only because, amongst a number of claims pleaded, there were added claims for breach of s 52 of the *TPA* and s 42 of the *Fair Trading Act 1987* (NSW). While the court conceded that the plaintiff's action was much more closely connected with England than Australia, the fact that the English tribunal 'would not apply' the Australian statutes, meant that the plaintiff would suffer a loss of juridical advantage if a stay were ordered.⁸⁴ What was disappointing about the judgment was the fact that the court refused to *consider* evidence from the defendant that other causes of action existed under English law which equated to the Australian statutory claims. It is suggested that such an approach is oppressive to foreign defendants before Australian courts and creates the impression that Australian plaintiffs can carry their rather unique statutory protection with them whenever they engage in international commercial transactions. Certainly, it will encourage plaintiffs to plead breaches of the *TPA* before Australian courts simply to secure the exercise of jurisdiction here.

Fortunately, however, in a recent decision of the Supreme Court of NSW, *Laminex (Australia) Pty Ltd v Coe Manufacturing Co*,⁸⁵ an approach closer to that in *DA Technology* was taken to the issue of juridical advantage based on the *TPA*. There, in response to an argument that an American State court would not apply the provisions of the Australian *TPA*, the NSW court referred to legislation of that State⁸⁶ in order to show that the plaintiff would have relief equivalent to

⁸² (Unreported, Federal Court of Australia, Gummow J, 10 March 1994) ('*DA Technology*').

⁸³ (Unreported, Supreme Court of New South Wales, Rolfe J, 19 October 1994).

⁸⁴ In fact, the court set aside a number of claims in the writ which had been served out of the jurisdiction on the basis that they lacked the requisite nexus (under the statutory rules) to NSW. The only claims which survived were those for negligence (because some damage was suffered in NSW) and the claims under the *TPA* and the *Fair Trading Act 1987* (NSW) (because NSW was the place where the allegedly unlawful representations were received).

⁸⁵ (Unreported, Supreme Court of New South Wales, James J, 19 December 1997).

⁸⁶ *Unlawful Trade Practices Act*, OR REV STAT ch 646, ss 605–56 (1997).

that available under the *TPA*. It is suggested that such an approach is far more consistent with both what the High Court in *Voth* and the House of Lords in *Spiliada* intended regarding the treatment of juridical advantages. Where a plaintiff would be able to obtain relief in a foreign forum broadly equivalent to that available at home, it could not be said that it had suffered a denial of 'justice'.⁸⁷

B *Juridical Advantage II: Avoidance of Multiple Proceedings*

Another type of case in which the notion of juridical advantage has been invoked, is that involving a party to an action in Australia (usually against another Australian resident), seeking to join a foreign third party to the existing proceeding. This category of case may be divided into two sub-groups: firstly, where a defendant to an action in Australia wishes to bring a 'third party' action for contribution or indemnity against a foreign entity; and secondly, where a plaintiff to an action in Australia seeks to join a second, foreign defendant to an existing proceeding.

In both these contexts, the party seeking to join the foreign defendant will normally argue that, if the Australian court was to refuse the application and stay the proceeding, then it would be forced to bring a further and additional claim in a foreign country against this party, even though the substance of the proposed action is closely connected to that already pending before the Australian court. Australian courts have generally been receptive to this version of the juridical advantage argument, on the basis that 'splitting' of proceedings arising out of the same substratum of fact between jurisdictions is undesirable, both for reasons of duplication of judicial time and effort, and injustice to the party who must bring the second action in the foreign jurisdiction.

However, it will be argued that of the two types of case described above in which the avoidance of dual proceedings defence has been relied upon, in only the former example, that is, where the defendant is seeking to implead a third party, should the defence be accepted as legitimate. The reason for this view is that, in this case, the third party is sought to be joined to the Australian proceeding almost as a defensive measure by the defendant to the principal proceeding to offset any successful claim by the plaintiff. Conversely, in the latter case, it is the plaintiff to the Australian proceeding which has chosen, often simply as a matter of its own convenience, to add the foreign party as a second defendant to the action. It could therefore be argued that the conduct of the defendant in seeking to join a foreign third party is, in general, less oppressive to that party than that of

⁸⁷ *Spiliada* [1987] 1 AC 460, 482. As has been said by English commentators, the juridical advantage to the plaintiff must be 'real': P M North and J J Fawcett, *Cheshire and North's Private International Law* (12th ed, 1992) 228. An example of a more 'real' juridical advantage may be s 25(3) of the *Dust Diseases Tribunal Act 1989* (NSW), which was relied upon by a majority in *Grigor* (Unreported, Supreme Court of New South Wales, Court of Appeal, Spigelman CJ, Mason P and Beazley JA, 18 June 1998) 5 to refuse a stay. This provision allows for the admission of certain evidence concerning dust exposure and disease in a suit where it has already been admitted in other proceedings, not necessarily between the same parties. The result is significant savings in cost and time to plaintiffs.

the plaintiff seeking to add a second, foreign defendant. Nevertheless, Australian courts, failing to draw this distinction, have routinely ordered stays under the *Voth* principle in both types of case. Again, it is submitted, this approach is an example of the juridical advantage defence being taken beyond what was intended in *Voth* and *Spiliada*, where its application was supposed to be limited to parties who could not obtain 'justice' in a foreign jurisdiction.

An example of the first type of case, that is, where a defendant sought to implead a third party, arose in *Melban*.⁸⁸ In the principal proceeding, the plaintiff, M, had sued the defendant, E, for breach of contract and negligence in the delivery of defective goods. E then brought third party indemnity proceedings against a Scottish manufacturer, S, in the event E was found liable to M. The court refused to stay the third party proceeding on the basis that it was 'desirable to have issues of fact common to the litigation between plaintiff and defendant and defendant and third party heard at the same time and by the same tribunal.'⁸⁹ This factor therefore amounted to a juridical advantage to E in favour of proceeding against S in Victoria, which overcame the relative lack of connections between S and the forum. Moreover, the court noted, this was not a case where the defendant (or third party claimant) had 'picked on this court for reasons of mere convenience to itself. It [chose] this Court because it [was] sued here and wish[ed] to seek indemnity from [another] person.'⁹⁰ In other words E's suit against S only arose because it had itself been sued, and so amounted to a defence to the original proceeding brought by M.

An even clearer case of a court favouring a local defendant against a foreign third party in an indemnity action was *Diethelm & Co Ltd v Bradley*.⁹¹ Again, the court repeated the view from *Melban*, that where third party and original proceedings involve common issues of fact and law, it is undesirable for them to be split between jurisdictions, as '[t]he added cost and inconvenience of this procedure is manifest.'⁹² What made this case a clearer one for refusal of a stay, was that, unlike *Melban*, the connecting factors between the NSW forum and both the original and third party actions were significant.⁹³

There have also been examples of the second type of case mentioned above, that is, where a plaintiff has sought to join a foreign defendant to proceedings already on foot in the forum. It will be recalled that, in this category, it was suggested that the justification for recognising the juridical advantage defence is

⁸⁸ (Unreported, Supreme Court of Victoria, Ormiston J, 16 March 1992).

⁸⁹ *Ibid* 13.

⁹⁰ *Ibid* 14.

⁹¹ [1995] ATPR ¶41-388 (NSWSC).

⁹² *Ibid* ¶41-388, 40,327.

⁹³ Another decision in which a defendant was entitled to bring indemnity proceedings against a foreign third party in NSW was *Sunbeam Corporation Ltd v MTI Qualos Pty Ltd* (Unreported, Supreme Court of New South Wales, Giles CJ Comm D, 14 December 1995). Although the third party proceeding lacked a connection with the forum and would most likely be governed by Swiss law, these factors were outweighed by the inconvenience to the defendant of having to bring subsequent proceedings abroad. Again, this is another case of juridical advantage under the law of the forum being used to overcome a predominance of connections to the foreign jurisdiction. See also, most recently and to the same effect, *University of South Australia v G N B Battery Technologies Ltd* (1997) 192 LSJS 1.

less apparent. In *James Rolfe Transport (Vic) Pty Ltd v Livdon Engineering Ltd*,⁹⁴ a Victorian court refused to order the stay of a claim for indemnity brought by an Australian resident plaintiff against a New Zealand resident insurance company arising out of the supply of a defective product by the defendant, an Australian company. The court held that, even though the policy was made in New Zealand and the New Zealand company had had no contact with Australia, because '[t]he territorial limits imposed by the policy include[d] Australia',⁹⁵ the company could be subject to Australian jurisdiction. It is suggested that this case represents a misuse of the juridical advantage principle. Here, a foreign defendant was dragged into proceedings in Victoria, with which it had little connection, essentially because the plaintiff merely wanted to sue a second defendant in the same proceeding. The court failed to take into account the likelihood of inconvenience to the defendant and should have stayed the action and directed the plaintiff to sue the company in New Zealand.

The same criticism can be made of *Gem Plastics Pty Ltd v Satrex Maritime t/a South African Express Line*.⁹⁶ Here, an Australian plaintiff was held to be entitled to join a foreign defendant insurer to an existing marine cargo claim brought against a local carrier in NSW, even though the foreign party's connection with the forum was negligible. Again, the issue of convenience was seen only through the eyes of the plaintiff, with the fact of pending proceedings in NSW making it manifestly more convenient for all the actions to be heard in one court in one set of proceedings.⁹⁷

VIII PENDING PROCEEDINGS IN A FOREIGN COURT

An interesting question, which has been raised by a number of recent cases, is whether the 'clearly inappropriate forum' test in *Voth* applies where a defendant seeks a stay of proceedings in the forum on the basis that litigation is pending in respect of the same subject matter in a foreign court. The first point to note is that, in this example, if a stay is not given, there is a heightened danger of parallel proceedings continuing in both jurisdictions, with the prospect of inconsistent results. Such an outcome has the potential not only to give rise to confusion and excess costs for the parties involved, but also to harm transnational judicial relations.

⁹⁴ (Unreported, Supreme Court of Victoria, McDonald J, 4 March 1991).

⁹⁵ *Ibid* 15.

⁹⁶ (Unreported, Supreme Court of New South Wales, Rolfe J, 9 June 1995) ('*Gem Plastics*'). See also the subsequent decision: *Gem Plastics Pty Ltd v Satrex Maritime t/a South African Express Line* (1995) 8 ANZ Insurance Cases ¶61-283, where Rolfe J was forced to reconsider matters in light of the test in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, as opposed to the *Voth* test which he originally applied.

⁹⁷ See also *Bell Group* (1996) 20 ACSR 760, 776 where an additional factor relied upon to refuse the stay of the action against the English defendants was that proceedings in respect of the same subject matter had already been instituted in the forum against a number of Australian parties. The court therefore felt that to stay the action against the foreign parties would result in an undesirable splitting of proceedings at significant extra cost. However, while this aspect of the court's reasoning may be questioned, it is suggested, as was noted above, that given that the action was overwhelmingly connected with Australia, the stay was justifiably refused.

Two cases must be distinguished: firstly, where a party has instituted proceedings in a foreign jurisdiction and then that party, as defendant to an action in Australia, seeks to rely upon the foreign proceeding as the basis for a stay of the local action; and secondly, where a party faces suit both in Australia and abroad and seeks to rely upon the foreign action as the basis for stay of the local proceeding. The cases are distinct because, in the first example, the plaintiff to the Australian action is the defendant abroad, while the defendant in Australia is the plaintiff abroad whereas in the second category, the defendant is being sued twice in different jurisdictions.

A Foreign Pending Proceedings: Defendant Suing Plaintiff Abroad

While courts in decisions since *Voth* have assumed that *Voth* principles apply to the situation where a stay of an Australian action is sought by the defendant in reliance upon proceedings commenced by it in another jurisdiction in respect of the same subject matter, there is a clear discernible trend in the more recent decisions to give great weight to the existence of pending proceedings in the exercise of the discretion to grant a stay.

In decisions before *Voth*, courts treated the existence of pending proceedings as a matter to be considered vis-à-vis the court's overall discretion to stay proceedings, but, at the same time, as a matter which could be offset by other considerations. Hence, in *In The Marriage of Gilmore*,⁹⁸ a stay of a wife's action for a property settlement was refused, notwithstanding the fact that the husband, three months later, instituted identical proceedings in New Zealand. In the court's view, the fact that parallel proceedings may result from a failure to stay the Australian action had to be 'disregarded'⁹⁹ because, on the facts of the case, there were other factors which established that Australia was not a 'clearly inappropriate forum'.¹⁰⁰ It is suggested that, even though the foreign proceedings were commenced after the Australian action, the court gave insufficient weight to this issue and consequently paved the way for an unfortunate jurisdictional conflict with a New Zealand court on the matter.¹⁰¹

A more receptive approach to the issue of pending proceedings as a basis for a stay, although not itself leading to that result, was evident in *The Daeyang Honey*.¹⁰² There, a court refused to stay the proceedings because of connections between the action and the Australian forum. The defendant sought to rely upon the fact that it had, two months prior to the commencement of proceedings in Australia by the plaintiff, itself commenced an action in Japan against the plaintiff in relation to the same issue. The court noted that the foreign proceedings, being earlier in time, should be entitled to considerable weight in the process of determining whether a stay should be granted. However, in this case,

⁹⁸ (1993) 16 Fam LR 285 ('*Gilmore*').

⁹⁹ *Ibid* 293.

¹⁰⁰ In particular, there were significant connections between the action, the forum and the parties and there existed a juridical advantage to the wife under Australian law.

¹⁰¹ *Gilmore v Gilmore* (Unreported, High Court of New Zealand, McGechan J, 3 May 1993).

¹⁰² (1993) 120 ALR 109.

their significance was diminished because the foreign action involved a claim for a negative declaration, which the court felt had a 'degree of artificiality'.¹⁰³ The court also approved statements made in a number of English decisions, in which it was said that the seeking of negative declarations in transnational cases can involve 'improper attempts at forum shopping'.¹⁰⁴ In *The Daeyang Honey*,¹⁰⁵ the court was sceptical about the foreign proceedings because their object appeared to be to deny the plaintiff in the Australian proceeding the benefit of a more favourable limitation period under Australian law.¹⁰⁶ Hence, the court reasoned that the plaintiff would be denied a juridical advantage if forced to sue in Japan. The foreign proceedings therefore amounted to a tactical manoeuvre by the defendant, rather than a serious attempt to resolve the dispute and, thus, were given little weight in the exercise of the discretion.¹⁰⁷

In the case of *Rocklea Spinning Mills Pty Ltd v Consolidated Trading Corporation*,¹⁰⁸ the importance of pending proceedings in another jurisdiction as a factor to consider in the decision to grant a stay was again downplayed. Here, the foreign proceedings were commenced three weeks after the action in Victoria and were in respect of the same subject matter. The court firstly rejected the view that the mere existence of pending proceedings *by themselves* amounted to conclusive evidence that an Australian forum was clearly inappropriate.¹⁰⁹ Nor did the fact that the foreign court had refused to stay its own proceedings have 'any bearing on the question'¹¹⁰ whether the Victorian court was clearly inappropriate. At most, the court said the pendency of foreign proceedings will be a relevant factor in the exercise of the discretion to stay, as proof of what the High Court in *Voth* had referred to as 'the availability of relief in the foreign forum'.¹¹¹ In this case, however, the weight to be given to the foreign pending proceeding was reduced because the Victorian proceedings had been commenced first and would therefore be likely to be concluded before those in the foreign country.¹¹² There were also 'connecting factors' between the action and Victoria which justified the refusal of a stay.

The status of pending proceedings must, however, be seriously reassessed following the decision of the High Court in *Henry*.¹¹³ That case involved an application by a wife to stay proceedings for divorce in Australia brought by her husband, the principal basis relied upon being that she had commenced identical proceedings in Monaco some three months earlier. While the Full Court of the

¹⁰³ Ibid 115, 117.

¹⁰⁴ See, eg, *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361, 371 (Kerr LJ).

¹⁰⁵ (1993) 120 ALR 109.

¹⁰⁶ Ibid 115.

¹⁰⁷ Ibid 117.

¹⁰⁸ [1995] 2 VR 181 ('*Rocklea*').

¹⁰⁹ Ibid 183.

¹¹⁰ Ibid.

¹¹¹ *Voth* (1990) 171 CLR 538, 558.

¹¹² Ibid.

¹¹³ (1995) 185 CLR 571.

Family Court, relying upon *Gilmore*,¹¹⁴ refused to stay the proceeding, a unanimous High Court, on appeal, reversed the decision. However, while all judges agreed on the result, there were, in the two judgments delivered, two very different approaches taken to the issue of the status of pending proceedings.

In the first judgment, given by Brennan CJ, an approach was taken very similar to that of the Victorian Court of Appeal in *Rocklea*. In his view, the existence of a pending proceeding in a foreign jurisdiction, even where it was instituted first, amounts to no more than a demonstration that an alternative forum exists to which the defendant would be amenable, as required by the High Court in *Voth*. To give the proceeding greater weight than this, however, would be to infringe the High Court's injunction in *Voth* that the comparative merits of the competing fora were not to be focused upon, and so, in effect, convert the 'clearly inappropriate' forum test into a *Spiliada*-type 'more appropriate' forum approach. Instead, in applying *Voth*, 'the focus' must be solely upon 'the advantages and disadvantages of proceeding in the selected forum.'¹¹⁵

Nevertheless, Brennan CJ still ordered a stay of proceedings in *Henry* for the reason that there was no connection between the marriage of the parties and Australia.¹¹⁶ Therefore, in the view of Brennan CJ, this was a case similar to those described above,¹¹⁷ in which stays were granted on the basis of a near total absence of connecting factors with the forum.

By contrast, in the joint judgment of Dawson, Gaudron, McHugh and Gummow JJ, much greater priority was assigned to the existence of pending proceedings in the exercise of the discretion to stay a local action, to the extent that, arguably, an exception to the *Voth* test has been created. What is particularly noticeable about the judgment is the much more significant concern with issues of comity and transnational judicial relations, factors which underlay the *Spiliada* 'more appropriate forum' test.

Their judgment begins by noting that, even where foreign proceedings are pending which involve the same or related factual issues as those involved in the local proceedings, but not the same legal issue or not the same parties, a temporary stay of the local proceedings should be issued to enable the foreign court to determine the factual issues. The joint judgment approved a decision in which

¹¹⁴ (1993) 16 Fam LR 285.

¹¹⁵ *Henry* (1995) 185 CLR 571, 581. However, Brennan CJ did note one exceptional situation where a foreign pending proceeding may be decisive in rendering a local forum 'clearly inappropriate', that is, where 'the institution of ... those [the local] proceedings was delayed until the proceedings in the foreign forum were nearing completion': at 581. In essence, this is a bad faith exception, that is, where the local action has no objective other than to frustrate the defendant's proceeding abroad. *Henry*, however, was not such a case; both parties had instituted separate proceedings in different countries within three months of each other, both genuinely desiring the exercise of jurisdiction by each one's chosen tribunal.

¹¹⁶ *Ibid* 580. In particular, they had never lived in Australia as husband and wife, there were no children of the marriage here whose custody and welfare would have been relevant and there was little property of the spouses which would have been affected by a divorce decree.

¹¹⁷ *Bank of America* (1995) ATPR ¶41-390, 40,334 (NSWCA); *Adeang* (Unreported, Supreme Court of Victoria, Hayne J, 8 July 1992).

such a remedy had been granted.¹¹⁸ The concern to minimise the possibility of overlapping jurisdiction is manifest.

However, the judges said, 'more compelling considerations in favour of a stay' arise where 'there are proceedings in another country which has jurisdiction to entertain those proceedings and the proceedings are between the same parties and with respect to the same issue or controversy.'¹¹⁹ In this context, the judges noted, there is likely to be significant 'inconvenience and embarrassment to parties'¹²⁰ given the possibility of 'entirely different outcomes'.¹²¹ Therefore, it was necessary to give pending proceedings much greater prominence when applying the *Voth* test. Henceforth, it would be 'prima facie vexatious or oppressive in the *Voth* sense of those words' to commence a second or subsequent action in an Australian court, if an action is already pending with respect to the matter in issue between the same parties.¹²² Seemingly, the presumption in favour of a stay could be rebutted in a case where the connecting factors with the Australian forum were much more numerous than with another jurisdiction, but this is likely to be a rare situation.

However, the judgment noted that no question of a stay can arise unless the courts of the respective countries both have jurisdiction with respect to the parties and the action. If there is a question as to the jurisdiction of the foreign court, it may be necessary to adjourn the local proceedings to enable the foreign court to determine the question. Where both courts have jurisdiction, then the following factors may be relevant in determining whether a stay should be ordered. Firstly, it must be determined whether each court will recognise the other's orders and judgments. If the orders of the foreign court would not be recognised in Australia, then 'that will ordinarily dispose of any suggestion that the local proceedings should not continue.'¹²³ If, however, the orders of the foreign court would be recognised in Australia, it will then be relevant to consider the extent to which 'any orders need to be enforced in other countries and the relative ease with which this can be done.'¹²⁴ On this point, it will also be relevant to consider 'which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy.'¹²⁵ Secondly, focus should be placed upon the order in which the proceedings were instituted,¹²⁶ the stage which they have reached, and the costs which have been incurred. Thirdly,

¹¹⁸ *Sterling Pharmaceuticals Pty Ltd v The Boots Co (Australia) Pty Ltd* (1992) 34 FCR 287, cited in *Henry* (1995) 185 CLR 571, 590.

¹¹⁹ *Henry* (1995) 185 CLR 571, 590.

¹²⁰ *Ibid.*

¹²¹ *Ibid* 591.

¹²² *Ibid.*

¹²³ *Ibid* 592.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ The court suggests, however, that, if a foreign proceeding was instituted first, it should be given greater weight in the discretion to grant a stay. This is not a mandatory requirement and so a foreign action, even where commenced after the Australian proceeding, may be the basis for a stay. There is English authority to the same effect: *The Coral Isis* [1986] 1 Lloyd's Rep 413, 416-17.

it will also be relevant to examine the connection of the parties and the action with each of the jurisdictions and whether 'having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing'.¹²⁷

It is suggested that the combined effect of these comments is to create an exception to the *Voth* test where foreign pending proceedings exist, in respect of the same subject matter and parties, as a local action. In determining whether an Australian forum is clearly inappropriate in this context, it is not enough, contrary to Brennan CJ's exhortations, to focus merely on the advantages and disadvantages of suit in this country. A much wider comparative examination of the merits of litigating both here and abroad is required, so as to give proper weight to the fact that parallel proceedings are on foot with a much greater risk of conflicting results between courts. Not only is such an approach more conducive to comity between courts, it also reduces the cost and inconvenience incurred by parties when having to simultaneously defend and pursue identical proceedings in different countries, which may be a great distance from each other. It is an approach, it could be argued, which is much more similar to the *Spiliada* 'more appropriate forum' test.

In a broader sense, it may also be said that the comments in the joint judgment illustrate the unworkability of the *Voth* test more generally, particularly regarding its insistence that an Australian court disregard the comparative suitability of the forums, and look only at the advantages and disadvantages of litigating in this country. The problem with this reasoning, as *Henry* illustrates, is that it is impossible to determine the advantages and disadvantages of litigating here *without* undertaking an examination of the comparative merits of suing abroad. Thus, while Brennan CJ was correct in suggesting that the effect of the joint judgment is to move toward a *Spiliada*-type test, it is suggested that, in any stay application, with or without pending proceedings, some sort of comparative analysis of the claims of the competing jurisdictions is inescapable.

Not surprisingly, the four judges who formed the joint judgment in *Henry* reached the conclusion on the facts that a stay must be granted. Here, proceedings were pending in Monaco in respect of the same subject matter and parties, and a divorce decree granted in those proceedings could be enforced in Australia. Secondly, in accord with the views of Brennan CJ, the judges held that the Australian court had little connection with the action or the parties.¹²⁸

The High Court decision in *Henry* has been considered in a number of subsequent decisions. In *News Corporation v Lenfest Communications Inc*,¹²⁹ the Supreme Court of NSW had to consider the effect of foreign pending proceedings on an application to stay a local action. Here, the foreign proceeding was in respect of the same subject matter and parties, and the foreign court was capable of granting the plaintiff the same relief it was seeking locally. However, the proceedings had been brought a month *after* the NSW action had been com-

¹²⁷ *Henry* (1995) 185 CLR 571, 592-3.

¹²⁸ *Ibid* 593.

¹²⁹ (1996) 21 ACSR 553 ('*News Corporation*').

menced. The court distinguished *Henry* on this basis, saying that there the foreign pending proceeding was brought well before the Australian action. Here, by contrast, the obvious conclusion to draw was that the foreign 'litigation was clearly ... a response to the bringing of proceedings by ... [the defendant]'¹³⁰ and so must be discounted. Secondly, the court noted that the foreign proceeding was, as in *The Daeyang Honey*,¹³¹ a claim for a negative declaration. Although such proceedings were not to be 'necessarily ... deprecated as forum shopping or as a tactic to influence a jurisdictional contest', the 'timing and nature' of the foreign litigation here suggested that, in fact, this was the case.¹³² Accordingly, the existence of the foreign action would not weigh heavily in the exercise of the discretion to stay the local proceedings.

It is submitted that the decision in *News Corporation* is interesting because it qualifies the reasoning in *Henry* in two main respects. Firstly, *News Corporation* asserts that the order of commencement of proceedings may in fact be of decisive significance in determining whether the local action should be allowed to proceed, rather than merely one factor to be balanced in the equation.¹³³ Secondly, the nature of the relief sought in the foreign proceeding may also be of great significance, such as where an Australian court considers that an action abroad has not been brought in good faith or only with the aim of precluding Australian jurisdiction. The seeking of a negative declaration by a party in a foreign action may more readily lead to this conclusion. In this regard, the reasoning of Gummow J in *The Daeyang Honey*¹³⁴ appears to have survived *Henry*.¹³⁵

Most recently, the High Court has once again had occasion to consider the issue of the effect of foreign pending proceedings in *CSR Ltd v Cigna Insurance Australia Ltd*.¹³⁶ In that case, CSR, a company incorporated in Australia, had been engaged in the sale and production of asbestos to companies in Australia and the US. Subsequently, a number of personal injury claims were commenced against CSR in both countries and CSR sought indemnity from Cigna Australia, its insurer, who denied liability.

CSR then sued Cigna and its parent company, Cigna Corporation, (which was incorporated in the US) in the US. In the American action, CSR sought (i) declarations against both Cigna Australia and Cigna Corporation that it was

¹³⁰ Ibid 573.

¹³¹ (1993) 120 ALR 109.

¹³² *News Corporation* (1996) 21 ACSR 553, 573.

¹³³ This conclusion seems to be supported by two recent cases where stays of Australian actions were awarded on the basis that competing foreign proceedings, in respect of the same subject matter, had been instituted earlier: *In the Marriage of Kemeny* (1998) 23 Fam LR 105 ('*Kemeny*'); *Ainsworth v Aristocrat Leisure Ltd* (Unreported, Supreme Court of New South Wales, Macready M, 28 August 1998). In fact, in *Kemeny*, the foreign court had already delivered judgment in respect of the matter in dispute. Nevertheless, one writer has suggested that giving the order of proceedings too much weight in stay applications may lead to an undesirable 'race to the filing counter': Nygh, 'Poth in the Family Court Re-Visited', above n 40, 170.

¹³⁴ (1993) 120 ALR 109.

¹³⁵ This conclusion may be supported by the fact that Gummow J was one of the four judges who authored the joint judgment in *Henry* (1995) 185 CLR 571.

¹³⁶ (1996) 189 CLR 345 ('*CSR v Cigna*').

entitled to an indemnity in respect of the US asbestos claims, and (ii) damages from Cigna Corporation in tort and under the US antitrust legislation. Approximately three weeks after the commencement by CSR of proceedings in the US, Cigna Australia brought suit in NSW against CSR seeking, inter alia, negative declarations to the effect that they were not liable to indemnify CSR in respect of the Australian and US asbestos claims.

CSR then applied to stay the proceedings of Cigna, and the High Court, by a majority of 6:1 (Brennan CJ dissenting), granted the order. The judgment of the majority commenced by noting that this case was similar to *Henry*, in that it involved an application for a stay based on the existence of pending proceedings in another jurisdiction. However, unlike *Henry*, where both local and foreign proceedings were in respect of the same subject matter, in *CSR v Cigna*, there was no 'correspondence' between the proceedings, for two reasons: firstly, because the NSW proceedings, in contrast to the US proceedings, extended to the Australian as well as the US asbestos claims; and, secondly, and 'more importantly', correspondence was lacking because the US proceedings, unlike the NSW action, involved a claim against Cigna Corporation which (both parties agreed) could not be pursued in Australia — that is, for damages under US antitrust legislation.¹³⁷

The majority then commented that, had the question of whether NSW was a 'clearly inappropriate forum' been answered solely by reference to the issues pleaded in the NSW proceeding, a strong argument would have existed for saying that it was not. Most of the connections with the indemnity claim lay in Australia. Since it was the place of issue of the insurance policies, Australian law was likely to determine liability and 'the main protagonists' in the litigation were two Australian companies which carried on business here.¹³⁸

However, when the US proceedings were focused upon, the suitability of the Australian forum for resolution of the dispute became more doubtful. As the US action involved the further issue of the liability of Cigna Corporation under the US antitrust law, and this matter could not be tried in Australia, it followed that Australia was a 'clearly inappropriate forum' for the litigation of the issues raised in the US proceeding.¹³⁹

The majority then laid down the following proposition:

[W]here different issues are involved in the local and foreign proceedings, albeit that the different proceedings arise out of the same sub-stratum of fact, the question is not whether the Australian court is a clearly inappropriate forum for the litigation of the issues involved in the *Australian* proceedings. Rather, the question must be whether, *having regard to the controversy as a whole*, the Australian proceedings are vexatious or oppressive in the *Voth* sense of those terms.¹⁴⁰

¹³⁷ Ibid 399.

¹³⁸ Ibid 400.

¹³⁹ Ibid.

¹⁴⁰ Ibid 400–1 (emphasis added).

In determining whether, having regard to the controversy as a whole, the NSW proceedings were vexatious or oppressive, the majority noted that the 'central purpose' of Cigna in instituting this action was 'to prevent the continuation of the US proceedings'.¹⁴¹ The judges reached this conclusion on the basis that the NSW proceedings were commenced after the US action, they involved claims by Cigna for negative declarations, and they were done in the knowledge that less than full relief would be available to CSR in NSW. Thus, the court concluded, where Australian proceedings are 'brought for the dominant purpose of preventing another party from pursuing remedies available in the courts of another country and not available in this country [they] are oppressive in the *Voth* sense'.¹⁴²

The action which clearly illustrated that Cigna had such a purpose was the claim it made for a negative declaration in the Australian proceeding, which had 'the appearance of one brought in the hope of concealing that the dominant purpose of the NSW proceedings ... [was] to prevent CSR from pursuing its ... [antitrust] claim in the US proceedings'.¹⁴³ Once again, a court has taken a sceptical view of negative declarations, treating them as tactical measures designed to attract jurisdiction, although in this case such relief was sought by the plaintiff in the Australian proceeding, rather than by the defendant (to the Australian proceeding) in a foreign action.

Finally, the majority said that there was nothing to suggest that the relief sought by Cigna in NSW would be unavailable to it in the US proceeding by way of cross-claim or defence. Thus, the court concluded that a stay of the NSW action should be granted, on the basis that such proceedings were oppressive, having had the object of trying to thwart the defendant from obtaining more complete relief in the US. Australia was therefore a 'clearly inappropriate forum' for resolution of the dispute as a whole, taking into account both the Australian and American proceedings.

In commenting upon this case, three main points can be put forward. Firstly, *CSR v Cigna* continues the trend begun in *Henry* towards modification, and (possibly) erosion, of the *Voth* principle in the context of stays based on foreign pending proceedings. While in *Henry*, the new principle that a presumption in favour of a stay would arise where foreign proceedings were on foot in relation to the same subject matter and parties as a local action was stated, *CSR v Cigna* went a step further by indicating that foreign pending proceedings, even those not in respect of an identical subject matter as a local action, may be grounds for a stay, where the purpose of the local proceeding is to deprive the defendant of rights only available in the foreign action. Again, as was noted in *Henry*, the focus has shifted from the suitability of the Australian forum in isolation, to a concern with the comparative appropriateness of the foreign and local jurisdictions.

¹⁴¹ Ibid 401.

¹⁴² Ibid.

¹⁴³ Ibid 402.

A second comment which may be made about *CSR v Cigna* is that it seemingly allows a plaintiff to a foreign proceeding to preclude Australian jurisdiction over a matter by simply adding causes of action (however weak) under foreign statutory law, which it knows could not be pleaded before an Australian court. In this sense, the High Court's reasoning is reminiscent of the decisions discussed in Part VII, in which the plaintiff to an Australian action was able to *avoid* a stay of local proceedings on the basis that it had pleaded a claim under section 52 of the *TPA* which a foreign court would not recognise.¹⁴⁴

The third issue which arises from *CSR v Cigna* is the extent to which its principles may be applied beyond the context of pending proceedings, so as, in effect, to give rise to a new, separate test for restraint of local actions based on the motives of the plaintiff. It is suggested that, in the absence of a foreign pending proceeding in which fuller relief is sought than would be available in an Australian action, it would be almost impossible for a defendant to prove that the plaintiff's purpose in commencing an action in Australia was to deprive the defendant of rights under foreign law. Conceivably, a defendant would have to argue that, if a trial were to take place before a foreign court, its rights would be more fully protected than if the action in Australia were allowed to proceed. The advancement of such a speculative argument would place an Australian court to whom application for a stay was made in a very difficult position. It would be forced to assess what rights a defendant may have had, had a case gone to trial before a foreign court, and then to determine whether the plaintiff was aware of such (hypothetical) rights, and whether, by commencing an action in Australia, it had sought to thwart them.

Furthermore, it is argued, to extend the principle from *CSR v Cigna* to the situation where no foreign action is pending would be to place an enormous restriction on the right of the plaintiff to choose its own forum. Although this factor was downplayed in *Voth* as having only slight weight in the exercise of the discretion to restrain local actions, in this context it could play an important role.

Fortunately, in the two cases decided since *CSR v Cigna* involving applications to stay local proceedings — both before the Supreme Court of NSW — any argument that the principle from that case may apply outside the context of pending proceedings was firmly rejected. In the first of the cases, *Conagra*,¹⁴⁵ it was argued by the defendant that the dominant purpose of the plaintiff in commencing proceedings in NSW was to ensure that the case would not be heard in China. The court however held that the applicability of the reasoning in *CSR v Cigna* was limited to the situation where proceedings were on foot in a foreign jurisdiction, and these had been instituted before the Australian action.

While the court in *Conagra* accepted that the motive of a plaintiff in suing in Australia may, in many cases, be to deprive a defendant of access to the courts of another country or rights under its law, this is part and parcel of the strategic nature of international litigation. To apply the reasoning of *CSR v Cigna* to every

¹⁴⁴ See above nn 80–87 and accompanying text.

¹⁴⁵ (Unreported, Supreme Court of New South Wales, Rolfe J, 27 October 1997).

case in which a stay was sought would mean that not only would a court have to determine whether it was a 'clearly inappropriate forum', but 'also the purpose ... for bringing the proceedings ... and whether that was to deprive the defendant of some juridical advantage it would have in another court had it instituted proceedings in that court'.¹⁴⁶ The focus would therefore shift from an analysis of connecting factors with the forum to more intangible and difficult to assess criteria, such as a party's motivation in its choice of forum. Ultimately, the court said, all that could be required of a plaintiff, in terms of motivation, was that it must have 'regularly instituted [its proceedings] in good faith in pursuit of a legitimate advantage'.¹⁴⁷ However, there would be a *prima facie* presumption that this had occurred.

Nevertheless, even assuming that the principle from *CSR v Cigna* could be applied outside the context of pending proceedings, the court thought that the test was not satisfied on the facts of *Conagra*. Here, the defendant had not pointed to any aspect of Chinese law which would have provided it with a juridical advantage, nor any matter which it would not be able to raise by cross-claim in NSW which would be available to it in a Chinese court.¹⁴⁸

As further proof that it is unlikely *CSR v Cigna* will be extended beyond the ambit of pending proceedings, the very recent decision in *Laminex*¹⁴⁹ should be noted. There it was confirmed, with little reasoning, that the principle from *CSR v Cigna* did not apply in general stay cases.

Returning to the question posed earlier in the article about whether application of the *Spiliada* test to a given type of case would lead to a different result, it is suggested that, in the case of pending proceedings, the answer would be in the negative. Firstly, this is so because where such proceedings are in respect of the same subject matter and parties, the High Court in *Henry* has effectively replaced the *Voth* test with a *Spiliada*-type approach which focuses upon the comparative merits of the two forums.¹⁵⁰ Secondly, in the context of proceedings not involving the same claims and parties, the High Court in *CSR v Cigna* has maintained that the proceedings 'as a whole' must be considered, while at the same time introducing a new element which concentrates on the motivation of the plaintiff in bringing the Australian action. Whether this new principle will result in the more frequent restraint of Australian proceedings in transnational cases remains to be seen.

¹⁴⁶ Ibid 74.

¹⁴⁷ Ibid 75.

¹⁴⁸ Ibid.

¹⁴⁹ (Unreported, Supreme Court of New South Wales, James J, 19 December 1997).

¹⁵⁰ In this regard, it is interesting to note the similarities between *Henry* and the House of Lords decision in *de Dampierre v de Dampierre* [1988] AC 92 in which *Spiliada* was applied to stay an English divorce action on the basis that proceedings in respect of the same subject matter and parties were pending in France.

B Foreign Pending Proceedings: Plaintiff Suing Defendant Abroad

It appears that, where the defendant seeks a stay of an Australian action based on the fact that it is also being sued in respect of the same subject matter in another jurisdiction, courts will be more sympathetic to the grant of such an order. In such a situation, the defendant is said to be 'doubly vexed'¹⁵¹ and therefore, more arguably a victim of vexation and oppression in the terms of *Voth*. Hence, in *The Sentry Corporation v Peat Marwick Mitchell & Co*,¹⁵² a court ordered the stay of a cross-claim by a defendant against a plaintiff in Australia, on the basis that the defendant had commenced the same claim against the same party abroad. More recently, in *Discovision Associates v Distronics Ltd*,¹⁵³ an action in Victoria was stayed where the plaintiff had instituted proceedings against the same defendant in two other jurisdictions. What is interesting about this decision is that although the claims in the Australian and the foreign proceedings were not identical,¹⁵⁴ they did arise out of the same substratum of facts, and so, according to the court, the broad 'issues' were the same.¹⁵⁵ Thus, the local action would be stayed, owing to the fact that the prosecution of multiple actions against the defendant imposed an 'unfair burden'¹⁵⁶ on that party.¹⁵⁷

It is also worth noting a number of cases in which the problem of 'double vexation' for a defendant has been resolved, not by a stay of local proceedings being granted, but on the basis of the plaintiff undertaking to the Australian court that it will not prosecute its foreign action.¹⁵⁸ This provides something of an alternative remedy for the defendant, although it is perhaps less attractive than a stay, particularly if the defendant is resident abroad.

It is likely that, in this type of case, application of the 'more appropriate forum' test would yield similar, if not identical, results.

IX JURISDICTION CLAUSES

Parties, particularly those in commercial relationships, will often try to provide for some certainty, in the event of a dispute arising, by including a jurisdiction

¹⁵¹ *McHenry v Lewis* (1883) 22 Ch D 397, 399 (Jessel MR).

¹⁵² (1990) 24 FCR 463.

¹⁵³ (1997) 39 IPR 140 ('*Discovision*').

¹⁵⁴ The Australian action was for breach of a licensing agreement, whereas the actions in the UK and the US were for breach of patent.

¹⁵⁵ *Discovision* (1998) 39 IPR 140, 145 (Beach J).

¹⁵⁶ *Ibid* 146.

¹⁵⁷ The action also had little connection with Australia, and foreign law would almost certainly have applied. In this respect, *Discovision* possesses some similarities with the cases discussed earlier in which stays were awarded: above nn 72–78 and accompanying text.

¹⁵⁸ See, eg, *Enzacor Technology Pty Ltd v Ko* (Unreported, Supreme Court of Victoria, Smith J, 22 March 1993); *Bell Group* (1996) 20 ACSR 760. In *Bell Group*, the court also noted that the commencement by the plaintiff of the same action against the same defendant in a foreign forum may not be oppressive where the institution of these proceedings is designed to protect the plaintiff from expiry of a limitation period in that jurisdiction. However, the plaintiff must undertake to discontinue the foreign action as a condition of being allowed to proceed in the forum: *Bell Group* (1996) 20 ACSR 760, 774.

clause in any concluded agreement. This, in essence, is a provision in a contract whereby parties agree to submit any disputes between them to a designated court. The precise status of jurisdiction clauses regarding the *Voth* test for stay of proceedings has not been completely resolved.¹⁵⁹

The traditional view of jurisdiction clauses was that a distinction was to be drawn between 'exclusive' and 'non-exclusive' clauses. An exclusive clause involved parties having intended not only to confer jurisdiction on a particular court in respect of a dispute, but also to preclude any other court from exercising jurisdiction. A non-exclusive clause, by contrast, did not prevent a party from suing in an alternative forum. The result of this distinction was that, where an Australian court was confronted with a claim which had been brought in contravention of a foreign exclusive jurisdiction clause, it was required to stay the proceeding, in the absence of strong reasons to the contrary.¹⁶⁰ However, in the case of a non-exclusive clause, the application for a stay was to be resolved by the general principles governing restraint of local proceedings.¹⁶¹

In *Oceanic Sun*¹⁶² the High Court had to consider the effect of a Greek jurisdiction clause on an application to stay proceedings in NSW. Although the court found that the clause had not been incorporated into the parties' contract, and thus was not relevant to the stay question, it will be recalled that two members of the court in that case (Deane and Gaudron JJ) went on to propound a general principle governing stay of local proceedings, namely, the 'clearly inappropriate forum' test, which was ultimately approved in *Voth*. However, one judge in *Oceanic Sun*, Brennan J, did consider, in obiter, which test would have been applied to resolve the stay issue, had the exclusive jurisdiction clause been found to have been incorporated. He suggested that the 'strong cause' test from *Huddart Parker* still represented the law, at least as far as exclusive clauses were concerned.¹⁶³

After *Oceanic Sun* and *Voth*,¹⁶⁴ there have been a number of cases in which courts had to consider jurisdiction clauses and, generally, the traditional distinction between exclusive and non-exclusive described above has been maintained. In other words, 'strong reasons' have been required to prevent a stay where a foreign exclusive jurisdiction clause was present.¹⁶⁵ However, where only a non-

¹⁵⁹ For a more detailed discussion of the treatment of jurisdiction clauses by Australian courts, see generally Richard Garnett, 'The Enforcement of Jurisdiction Clauses in Australia' (1998) 21 *The University of New South Wales Law Journal* 1.

¹⁶⁰ *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 ('*Huddart Parker*').

¹⁶¹ *Contractors Ltd v MTE Control Gear Ltd* [1964] SASR 47.
¹⁶² (1988) 165 CLR 197.

¹⁶³ *Ibid* 224.

¹⁶⁴ The status of jurisdiction clauses was not considered by the High Court in *Voth* as no such clause was present on the facts.

¹⁶⁵ See, eg, *Williams v The Society of Lloyd's* [1994] 1 VR 274; *Leigh-Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88; *CSP Computer Security Products Pty Ltd v Security Dynamics Technologies Inc* (Unreported, Federal Court of Australia, Heerey J, 12 March 1996); *Apscore International v Grand Canyon Technologies* (Unreported, Federal Court of Australia, Lehane J, 12 December 1996).

exclusive clause was involved, a stay would only be granted where the Australian forum was 'clearly inappropriate' within the terms of the *Voth* principle.¹⁶⁶

A notable dissident from this view was Rolfe J of the Supreme Court of NSW, who took the view that *Voth* had created one test for stay of proceedings in transnational cases which was to be applied regardless of any jurisdiction clause, exclusive or otherwise.¹⁶⁷ In his view, the presence of an exclusive jurisdiction clause was only one of many factors to be considered when exercising the overall discretion to stay proceedings, with no special weight attached.

However, the approach of Rolfe J has not been adopted by other courts,¹⁶⁸ and in the recent High Court decision, *Akai Pty Ltd v The People's Insurance Co Ltd*,¹⁶⁹ the view that 'strong reasons' are required to prevent a stay of proceedings where parties have entered into an exclusive clause, was reaffirmed unanimously.¹⁷⁰ Two judges went further, emphasising that 'an application for a stay to enforce an exclusive jurisdiction clause ... [should not] be assimilated to a case in which a stay is sought on the principle of forum non conveniens'.¹⁷¹ Hence, it appears that an application to stay proceedings based upon an exclusive jurisdiction clause will not be considered as falling under the *Voth* principle. The status of non-exclusive clauses was not discussed by the High Court in *Akai*, although presumably, the presence of such a clause would remain one factor to be considered under the *Voth* test when determining whether an Australian forum was clearly inappropriate.

X CONCLUSION

How then can the position of Australian courts with respect to stay of proceedings be described? It should be remembered that commentators were split at the time of the *Voth* decision, as to whether the 'clearly inappropriate' test would lead to fewer restraints on plaintiff suits than existed under the *Spiliada* 'more appropriate forum' test.¹⁷² In a sense, the case law has proven both the optimists and the sceptics correct. While it was argued above that only in a relatively small number of cases would a different result have been achieved by application of the *Spiliada* principle, it could be argued that this is because, to a certain extent, the High Court has chosen to amend or replace the *Voth* test in contexts where it was felt to be unworkable, notably in cases involving pending proceedings and exclusive jurisdiction clauses.

Moreover, it is suggested that the High Court may well decide to depart from *Voth* completely in the near future, due to a realisation that its principles are too

¹⁶⁶ *Armitage Brick Ltd v Thiess Contractors Pty Ltd* (Unreported, Supreme Court of Queensland, Court of Appeal, 25 August 1992); *Enzacor Technology Pty Ltd v Ko* (Unreported, Supreme Court of Victoria, Smith J, 22 March 1993).

¹⁶⁷ *Gem Plastics* (Unreported, Supreme Court of New South Wales, Rolfe J, 9 June 1995).

¹⁶⁸ See, eg, *Oceanic Sun* (1988) 165 CLR 197, 224 (Brennan J), 259 (Gaudron J).

¹⁶⁹ (1996) 188 CLR 418 ('*Akai*').

¹⁷⁰ *Ibid* 445 (Toohey, Gaudron and Gummow JJ); 427-8 (Dawson and McHugh JJ dissenting on other grounds).

¹⁷¹ *Ibid* 428 (Dawson and McHugh JJ).

¹⁷² See generally above n 4.

rigid and narrow to deal with the variety of situations that can arise in transnational disputes. In particular, it may be argued that a test which states that inter-jurisdictional disputes should be resolved only by focusing upon the appropriateness of the local forum is excessively myopic. Surely, the claim of a foreign jurisdiction to trial of a matter is entitled to recognition which is at least equal to that of the forum and any decision on the place of litigation which fails to accord this will serve only to foster a lack of respect and disharmony between courts. While a balancing exercise such as that required under the *Spiliada* test is not easy for a court to perform, it is suggested that this remains the best approach for fully representing all relevant interests in a jurisdictional dispute. Domestic courts can no longer see themselves as only having a responsibility to develop the law of a particular country. Now, with the expansion of international trade and commerce, they must act as part of an integrated global network of adjudication. It is submitted that the adoption of the 'more appropriate forum' test in Australia would better accord with this objective.¹⁷³

¹⁷³ It is interesting that the High Court admitted in *Voth* that the *Spiliada* test was more desirable 'from an abstract (and international) viewpoint': *Voth* (1990) 171 CLR 538, 557 (Mason CJ, Deane, Dawson and Gaudron JJ).

Fraud and Foreign Judgments: The Defence that Refuses to Die

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Introduction

It is always interesting to examine an important legal rule that has survived despite having been almost universally savaged by commentators for a long period of time. An observer is left to wonder why the courts or legislature have chosen to ignore the howls of criticism and to inquire whether there exists a reasoned basis for such (in)action.

The fraud defence in the recognition and enforcement of foreign judgments would appear to be an excellent example of such a rule. It is a doctrine that, in its broadest form, has been strongly criticised by academic writers (and some courts) yet remains solidly entrenched in the jurisprudence of most common law countries. Moreover, even in jurisdictions such as Canada and the United States, which have traditionally taken a limited view of the scope of the defence, there is a perceptible recent trend towards expansion.

In this article it will be asserted that the vast majority of common law courts continue to allow defendants to challenge foreign judgments on the ground of perjury in the foreign proceedings without requiring the defendant to produce fresh evidence of the fraud. It will be further argued that such an approach, while conflicting with the need for finality of litigation and comity between courts, has in fact a sound policy justification. That is, it may be necessary in certain situations to protect defendants from dishonest conduct that they are ill equipped to challenge, given that they have usually been forced to litigate outside their place of residence.

Enforcement of Foreign Judgments - Background

According to common law doctrine, the main principle underlying the recognition and enforcement of foreign judgments is *res judicata*. This has been defined as a 'rule of evidence ... that where a final decision has been

pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject matter of the litigation any party to such litigation as against any other party is estopped in any subsequent litigation from disputing or questioning such decision on the merits'.¹

The essence of this principle, therefore, is that the merits of a foreign judgment may not be reopened or reviewed by an enforcing court.² In particular, no errors of fact or law in the decision may be reconsidered.³ The rationale for this approach lies in the need for finality of litigation and willingness among national courts to recognise each other's laws and orders.⁴ Consequently, it is well established that a foreign judgment is *prima facie* entitled to recognition and enforcement if it satisfies two conditions: first, the foreign court is a court of competent jurisdiction, that is the court has jurisdiction in the international sense according to the conflict of laws rules of the enforcing forum;⁵ second, the judgment is final and conclusive.⁶ However, out of a concern to protect parties from particularly egregious conduct by foreign courts, the common law does recognise certain limited defences to recognition and enforcement. The most significant defences are that the foreign court acted contrary to the principles of natural justice,⁷ that the judgment was contrary to the public policy of the forum⁸ or that it was obtained by fraud.⁹

Before considering the fraud defence in detail, a brief comment should be made about the concepts of 'international jurisdiction', natural justice and public policy. It is important to examine the ambit of these principles to appreciate the context in which the fraud exception operates.

The requirement that the foreign court have jurisdiction in an international sense focuses on the manner in which the court established jurisdiction over the defendant. The two principal recognised bases of

¹ *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, 933 (HL) citing Spencer Bower, *The Doctrine of Res Judicata* (1933) 3.

² *Bank of Australia v Nias* (1851) 16 QB 717; *Goddard v Gray* (1870) LR 6 QB 139.

³ *Bank of Australia v Nias* *ibid* at p 735; *Goddard v Gray* *ibid* at p 150.

⁴ *Morguard Investments Ltd v De Savoye* (1991) 76 DLR (4th) 256, 269 (Supreme Court of Canada).

⁵ *Pemberton v Hughes* [1899] 1 Ch 781, 790 (Eng CA); *Adams v Cape Industries plc* [1990] Ch 433, at pp 517-18 (CA).

⁶ *Nouvion v Freeman* (1889) 15 App Cas 1.

⁷ *Jacobson v Frachon* (1927) 138 LT 386.

⁸ *Re Macartney* [1921] 1 Ch 552.

⁹ *Abouloff v Oppenheimer* (1882) 10 QBD 295.

jurisdiction are (1) service on a defendant physically present or carrying on business within the jurisdiction of the foreign court¹⁰ and (2) submission by the defendant to the jurisdiction of the court either by appearance in the proceedings¹¹ or by advance contractual stipulation.¹² Where neither (1) nor (2) is found to be present by the enforcing court, the foreign judgment may not be enforced.

Common law courts have generally taken a narrow view of the ambit of the public policy defence. That which needs to be shown is that the foreign judgment offends essential principles of justice and morality in the place of enforcement.¹³ This contravention may be found in the nature of the law applied, the manner in which the judgment was obtained (for example, duress against a party) or the procedures adopted by the foreign court. The defence of natural justice focuses on the procedures employed by the foreign court, concentrating on two main issues. The first is that each party had an adequate opportunity to present its case before an unbiased tribunal and the second is that each had adequate notice of the proceedings.¹⁴

The justification often cited for all these bases of review of foreign judgments is that the forum court is only scrutinising the procedural conduct of the foreign tribunal but not investigating the merits of the decision. Consequently, the principle of *res judicata* is not compromised. However, in practice, particularly in the context of the public policy and natural justice defences, an enforcing court often goes close to reviewing the merits of the foreign judgment.

For example, under the public policy defence the defendant may object to the particular law applied by the foreign court on the basis that it leads to a grossly unfair or unreasonable outcome. Similarly where denial of natural justice is pleaded the defendant may argue that it was unable to present its case because the court interfered with the examination of its witnesses. In both of these examples it may be necessary for the enforcing court to examine the reasoning of the foreign tribunal in some detail and to investigate whether the particular issue complained of had significance in

¹⁰ *Adams v Cape Industries plc* loc cit fn 5.

¹¹ *Schibsby v Westenholz* (1870) LR 6 QB 155, at p 161.

¹² *Feyerick v Hubbard* (1902) 71 LJKB 509.

¹³ *Loucks v Standard Oil Co of New York* 224 NY 99, at p 111 (1918 Supreme Court of New York).

¹⁴ *Jacobson v Frachon* loc cit fn 7.

the overall case before reaching a conclusion on the availability of the defence.

Consequently to say, as most textwriters do,¹⁵ that the defence of fraud operates as an 'anomalous exception' to the rule that an enforcing court does not review the merits of a foreign judgment is not entirely accurate. In fact, the dividing line between review of procedural and substantive issues in a foreign judgment can be difficult to draw, even where other defences are pleaded.

The Defence of Fraud

In all common law jurisdictions, a well-recognised defence to enforcement of a foreign judgment is that it was obtained by fraud of one of the parties, usually the plaintiff. In this context, the term fraud is used to refer to conduct that the perpetrator either knew to be false or was recklessly indifferent to the truth or falsity thereof. While there is consensus among common law jurisdictions that fraud should be an independent ground for impeachment, there is less agreement on the scope or content of the defence. In examining the defence, it will be useful to consider the particular situations in which it has been alleged that fraud has procured a foreign judgment and consider each separately.

A clear and obvious case of fraud procuring a judgment would be where it was found that the foreign court was itself fraudulent, for example, because it was corrupted by bribery. In such a situation it is beyond question that the judgment is unenforceable. However since the numbers of such cases have been very few¹⁶ (particularly in recent times) this example is not of great present significance.

There are two main instances in which it has been alleged that fraud has procured a foreign judgment. The first is where the foreign court has been misled or deceived by the plaintiff in the conduct of its case, for example through presentation of perjured or forged evidence. In the context of this article, the term perjury will be used to refer to evidence given by a plaintiff that is either knowingly false or given with reckless indifference to the truth. The second situation in which fraud has been

¹⁵ See, for example, Nygh, *Conflict of Laws in Australia* 6th ed (1995) 153, at p 155; Hill, *The Law Relating to International Commercial Disputes* 2nd ed (1998) 360.

¹⁶ A rare example was *Price v Dewhurst* (1837) 8 Sim 279.

alleged in relation to a foreign judgment is where the defendant argues that it has been precluded from presenting its case to the tribunal by the deceit or false representations of the plaintiff.¹⁷

Jurisdictional Fraud

It is proposed to examine the second category of fraud first because it is the less controversial. In all common law countries, it is well established that fraud that prevents a defendant from adequately presenting its case to the foreign tribunal will prevent enforcement of a judgment. A common example of such a case is where the plaintiff has tricked or deceived the defendant into not defending the action by, for example, falsely promising not to sue. A second example is where the foreign court has been persuaded to accept jurisdiction on a basis known by the plaintiff to be false. In both cases the court's jurisdiction has been improperly invoked due to the plaintiff's deception and so may be described as 'jurisdictional' fraud.

An example of the first type of jurisdictional fraud arose in the old English case of *Ochsenbein v Papelier*.¹⁸ There, the plaintiff commenced an action in France but then led the defendant to believe that he had terminated the proceedings by burning the writ in the defendant's presence. However, the plaintiff continued with the French action and secured a default judgment. Such a judgment was considered by the English court to be tainted with fraud.

There have been a number of United States cases where a similar approach has been taken. In *US v Throckmorton*,¹⁹ the US Supreme Court recognised that a foreign judgment would not be enforced 'where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff'.²⁰

In a number of recent decisions, the above principle has been applied to deny enforcement of foreign judgments. For example, in *Tamimi v*

¹⁷ See Hill, *op cit* fn 15 at p 362.

¹⁸ (1873) LR 8 Ch App 695.

¹⁹ 98 US 61 (1878).

²⁰ *Ibid*, p 65.

Tamimi,²¹ a foreign divorce decree was not enforced in New York where the plaintiff, before obtaining the decree, had falsely represented to the defendant that he would not pursue proceedings in the foreign court if she left the country.²²

A similar approach has also been taken in Canada and also, it seems Australia. In *Delaporte v Delaporte*,²³ a foreign divorce decree was not enforced in Ontario where the plaintiff deliberately gave no notice of the proceedings to his wife (the defendant). In *Res Nova Inc v Edelsten*,²⁴ the plaintiff was found to have misled the defendant into thinking that he would not be sued in a foreign court in his personal capacity but that action would only be taken against the corporation of which he was a director. The plaintiff then obtained a default judgment by misrepresenting to the tribunal that the defendant had been served personally. The foreign judgment was not enforced in New South Wales.

The key element in all these cases then is that the defendant has obtained its judgment by deception practised upon the defendant.

The second type of jurisdictional fraud is where a foreign court is persuaded to accept jurisdiction on a basis known by the plaintiff to be false. In this situation, the plaintiff has not tricked the defendant into not appearing in the action but has put false evidence before the court to show that its jurisdictional requirements have been satisfied.

In an Australian decision, *Norman v Norman (No 2)*,²⁵ an English divorce decree was not enforced where it was found that the plaintiff had misrepresented its domicile to the foreign court and so persuaded it to exercise jurisdiction on a false premise. Similarly, the Supreme Court of Canada in *Powell v Cockburn*²⁶ refused to enforce a Michigan divorce decree on the basis that the foreign court had been misled by the plaintiff as to his proper domicile.²⁷ There is English authority to the same effect.²⁸

²¹ 3 AD 2d 197; 328 NYS 2d 477 (NY App Div 1972).

²² See also *Shaw v Shaw* 97 AD 2d 403; 467 NYS 2d 231 (NY App Div 1983).

²³ (1927) 4 DLR 933 (Ontario Court of Justice).

²⁴ Unreported, Supreme Court of New South Wales, 7 May 1985.

²⁵ (1968) 12 FLR 39.

²⁶ [1977] 2 SCR 218.

²⁷ More recently, in *Selbst v Lax* (1998) 79 OTC 146 an Ontario court refused to enforce a foreign judgment where the plaintiff misrepresented to the court that it had served the defendant with originating process.

²⁸ *Middleton v Middleton* [1967] P 62; *Bonaparte v Bonaparte* [1892] P 402.

The common thread that runs through the jurisdictional fraud cases is that the defendant was unable to present its case in the foreign proceeding due to the plaintiff's fraud. It should be recalled at this point that the defence of denial by natural justice in relation to a foreign judgment is also premised on the defendant's being prevented from pleading its case before the foreign court. It may be argued, therefore, that the category of jurisdictional fraud is already accommodated under the natural justice defence. In addition, given that the essence of jurisdictional fraud is that the foreign court exercised jurisdiction on a flawed basis, it is likely that the defence of lack of 'international jurisdiction' would equally cover this type of fraud.

These observations are important because in any consideration of the scope of fraud exception it seems desirable to avoid duplication with existing defences to enforcement. Ideally the fraud defence should apply to conduct that is not covered under other grounds. This last assertion of course assumes that common law jurisdictions want to retain a fraud defence at all, which seems to be the case.

With these remarks in mind, it is now necessary to consider the other species of fraud procuring a foreign judgment referred to earlier. That is, where the foreign court was misled or deceived by the plaintiff in the conduct of its case, such as where perjured evidence is presented. It is this situation that has proven to be the most controversial with commentators arguing, almost universally,²⁹ that such fraud should not be a recognised

²⁹ See, in addition to the writers cited at fn 15 above, North and Fawcett, *Cheshire and North's Private International Law* 13th ed (1999), 444; Fassberg, 'Rule and Reason In the Common Law of Foreign Judgments' (1999) 12 *The Canadian Journal of Law and Jurisprudence* 193 at p 207; Collier, 'Fraud Still Unravels Foreign Judgments' [1992] *Cambridge Law Journal* 441. A notable dissentient from this view is Briggs, see for example, 'Foreign Judgments, Fraud and the Brussels Convention' (1991) 107 *LQR* 531 at pp 532-3 and 'Foreign Judgments: More Surprises' (1992) 109 *LQR* 549 at pp 550-1. The editors of the most recent edition of *Dicey and Morris* appear to maintain conspicuous neutrality in the debate. While noting that the *Abouloff* rule 'stands in square opposition to the principle of conclusiveness' [of foreign judgments] they then proceed to offer a justification for the differential treatment of foreign and local judgments in respect of perjury. The editors note that the effect on a domestic judgment of a fraud challenge is more drastic than in the case of a foreign judgment. In the case of a domestic judgment, the decision will be destroyed and incapable of enforcement anywhere whereas in the case of a foreign judgment, the only effect is to prevent its enforcement in England. See Collins (ed), *Dicey and Morris on the Conflict of Laws* 13th ed (2000) at pp 519-20.

defence, at least in the absence of new evidence of the fraud since trial. The principal objection of writers to the perjury defence is that it permits review of the merits of a foreign judgment and so conflicts with the principle of *res judicata*. However, as noted above, examination of the merits of a foreign decision can also arise in the context of other recognised defences to enforcement.

Moreover, it will be noted below that, despite the protestations of commentators, a growing trend in support of this version of the fraud defence can be detected in common law jurisdictions. In addition, it will be argued that this development can be justified on strong policy grounds.

Perjury Fraud

Perjury Fraud - England. In assessing the current position with respect to this category of fraud, it is best to examine each country individually. In England it remains the law that a defendant may challenge a foreign judgment on the ground of perjured evidence even though it did so or may have done so before the foreign court. Significantly, the defendant may rely on the same evidence that was tendered in the foreign proceedings and is under no obligation to produce 'fresh evidence' of fraud, newly discovered after the foreign judgment has been delivered.³⁰ This principle is referred to in the cases and literature as the *Abouloff* rule, after the name of the decision in which it was first stated.³¹

The effect of the *Abouloff* rule, in not requiring a defendant to produce fresh evidence of fraud when challenging a judgment, is to draw a distinction between foreign and domestic judgments. To impeach a domestic judgment on the ground of perjured evidence, a defendant must produce 'evidence, newly discovered since the trial which could not have been produced [there] with reasonable diligence' and which is so material that its production would likely have altered the result.³²

It has been further held in England that a claimant may raise a fraud allegation even where the supporting facts were known to the claimant at the time of the original trial and could have been raised as a defence in

³⁰ *Abouloff v Oppenheimer* (1882) 10 QBD 295 (CA); *Vadala v Lawes* (1890) 25 QBD 310 (CA).

³¹ *Ibid.*

³² *Dicey and Morris op cit* fn 29, 519; *Boswell v Coaks (No. 2)* (1894) 86 LT 365n (HL); *Birch v Birch* [1902] P 130 (CA).

those proceedings.³³ This outcome has been justifiably criticised by writers for allowing a defendant to a foreign action to "reserve a defence of fraud available" to him or her with the intention of pleading it if enforcement of the judgment is sought in England.³⁴

However, as has been noted by the New Zealand Court of Appeal,³⁵ it could be argued that the above statement of principle by the court in *Syal v Heyward*³⁶ was unnecessary given the facts of the case. The English defendants in *Syal* claimed that they had not defended the foreign proceedings because the plaintiff had promised to adjourn the action for six months. In fact proceedings were commenced a month later 'behind their backs'.³⁷ Conceivably then, the English court could have applied the principles of jurisdictional fraud here to refuse enforcement of the judgment without having to examine the question of perjury in the foreign proceedings at all.

Nevertheless, despite this observation, the authority of the *Abouloff* rule has been confirmed in a number of recent English cases.³⁸ While the majority of English commentators remain hostile to the retention of the rule, it is suggested that these writers have paid insufficient attention to the strict standards imposed by the courts in application of the doctrine and also to the invidious position of defendants forced into foreign litigation. Firstly, it is now clear that where a defendant to a foreign judgment seeks to have it set aside for fraud before the courts of the rendering jurisdiction and fails, this creates an estoppel that precludes the English court from considering the fraud defence at the stage of enforcement.³⁹ In a later decision this estoppel was extended to include actions to set aside the judgment brought in a country other than the place of rendition.⁴⁰ Secondly, for a defendant to be successful in an application to set aside a judgment for fraud based on perjury in the original trial, he or she must establish a *prima facie* case that the plaintiff's conduct was fraudulent. In

³³ *Syal v Heyward* [1948] 2 KB 443 (CA).

³⁴ Cowen, 'Foreign Judgments and the Defence of Fraud' (1949) 65 *LQR* 82, 84 cited with approval in *Cheshire and North*, *op cit* fn 29 at p 445.

³⁵ *Svirskis v Gibson* [1977] 2 NZLR 4, 9-10.

³⁶ *Loc cit* fn 33.

³⁷ *Ibid.*, 444.

³⁸ See, for example, *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL); *Jet Holdings Inc v Patel* [1990] 1 QB 335 (CA).

³⁹ *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 (CA).

⁴⁰ See *Owens Bank Ltd v Bracco* [1991] 4 All ER 833 (CA) *aff'd* without considering this point [1992] 2 AC 443 (HL).

other words the defendant must show, at least to the civil standard of proof, that fraud occurred in the foreign proceedings. In *Owens Bank Ltd v Etoile Commerciale SA*,⁴¹ the Privy Council stated that this requirement may be enforced by use of the court's inherent power to prevent misuse of its process by striking out unmeritorious defences.

Accordingly where an allegation of fraud has been made and determined in a foreign court and the defendant in the enforcement proceeding fails to produce 'plausible evidence disclosing at least a *prima facie* case of fraud',⁴² a striking out order will be appropriate. The Privy Council took this course in the *Etoile* case.

In a series of decisions since *Etoile* English courts have heeded this direction and demanded clear evidence of fraud before accepting the defence.⁴³ In *Alexandra Claims Trust v Fennoscandia Bank Ltd*,⁴⁴ it was emphasised that when seeking to impugn a foreign judgment on the basis of perjury, the defendant must show that the plaintiff's evidence at trial was dishonest rather than merely unreliable or lacking in credibility. In another recent case,⁴⁵ it was reiterated that a defendant, given the gravity of the accusation of fraud, must show a 'high degree of probability' that the relevant conduct occurred. Fraud here was defined to mean evidence that the plaintiff either knew to be false, or was recklessly indifferent to the truth or falsity thereof. In addition, the evidence must be shown to have been an 'operative cause' of the foreign court's decision to give judgment for the plaintiff. It is insufficient that the fraudulent evidence 'merely strengthened the defendant's case where the foreign court would anyway have arrived at the same result'. The evidence must have procured the result.

Not surprisingly, given the high standard of proof required, the court rejected the allegations of fraud based on perjury in this case, as well as in

⁴¹ [1995] 1 WLR 44 (PC).

⁴² *Ibid* at p 51.

⁴³ There is also evidence of English courts taking a strict approach to proof of fraud in earlier cases. In *Blohn v Desser* [1962] 2 QB 116 the court refused to make a finding of fraud in respect of a plaintiff's conduct before a foreign court even though there were 'many grounds of deep suspicion' (at p 122).

⁴⁴ Unreported, 17 May 1996 (CA) (available at www.casetrack.com).

⁴⁵ *Tuvyahu v Swigi* (unreported, 26 October 1998, QBD) (available at www.casetrack.com).

another recent decision.⁴⁶ In all these cases, the conclusion of the court seemed to be that the defendant's case amounted to proof of no more than that its witnesses were more credible than those of the plaintiff. Such a result is a long distance from proving fraud. The overall effect of these decisions therefore, is that while the courts do not want to give completely free rein to the *Abouloff* principle, they are keen to retain it for use in serious cases. While academic hostility to the defence remains unabated, based principally on its alleged inconsistency with the principle of *res judicata*, English courts have remained undeterred. It seems that dishonesty in relation to procurement of a judgment is considered more obnoxious than errors of fact or law because it is something that is fundamentally offensive to justice. Although comity would suggest that a court defer to the deliberations of a foreign tribunal on any issue going to the merits of the case (including fraud) the reliability and capacity of a foreign court to detect such conduct cannot be taken for granted. In any event, it is suggested that the strict requirements applied by English courts before accepting this defence show that it is unlikely to produce harm to transnational judicial relations or be a source of harassment for plaintiffs.

Moreover, it is not satisfactory to say, as most critics do, that perjury may only be a defence to a foreign judgment where fresh or newly discovered evidence since trial is produced. While such an approach has the advantage of bringing the fraud defence more comfortably within the confines of *res judicata*, it is suggested that this view is inadequate because it fails to take into account of the unique difficulties facing defendants to foreign judgments. In the majority of such cases not only will the defendant be foreign to the place of litigation and so have to contend with unfamiliar procedures and great expense but he or she will also likely have been impleaded against their will.⁴⁷ If, in addition to these matters, the defendant to the foreign proceedings is required to locate fresh evidence of the plaintiff's perjury (most likely located in the foreign jurisdiction) before an enforcing court can intervene, then an excessive burden would seem to have been placed on that party. It is suggested that English courts have been mindful of these factors and hence sought to retain the *Abouloff* rule for clear cases of perjury that cannot be otherwise corrected. As will be

⁴⁶ *Formosa Plastics Corporation USA v Chauhan* (unreported, 6 April 1998, CA available at www.casetrack.com.) Compare these cases with *Habib Bank Ltd v Mian Aftab Ahmed* [2001] EWCA Civ 1270 where the Court of Appeal ordered a retrial of the issue of fraud after the trial judge had rejected the allegation.

⁴⁷ Briggs (1991) *op cit* fn 29 at p 532.

discussed below, they find themselves in good company with the courts of almost all other common law countries, which have also retained the defence.

Commentators have often misstated the position in other common law countries with respect to perjury fraud. For example, Australia and Canada are frequently cited as examples of jurisdictions in which the rule has been rejected.⁴⁸ As will be discussed, this statement is certainly wrong in the case of Australia and arguably misleading in the case of Canada. Moreover, it is clear from recent decisions in New Zealand, Malaysia and Hong Kong that the *Abouloff* rule remains well entrenched in those countries.

Perjury Fraud - Australia. Considering the position in Australia first, it is now apparent that its courts, after some equivocation, have accepted that a foreign judgment may be challenged on the ground of perjury in the original proceedings, with no new evidence of the fraud required. Part of the equivocation has likely stemmed from the influence of commentators who, similar to their English counterparts, have been almost universally critical of the *Abouloff* rule.⁴⁹

In two cases mentioned earlier, *Norman v Norman (No 2)*⁵⁰ and *Res Nova Inc v Edelsten*,⁵¹ the cases of *Abouloff* and *Vadala* were cited with approval, although strictly speaking such references were *obiter dicta* since those cases concerned jurisdictional fraud rather than perjury.

The first Australian case in which the *Abouloff* rule squarely arose for consideration was the decision of the Supreme Court of New South

⁴⁸ Cheshire and North, *op cit* fn 29 at p 444; Fassberg, *op cit* fn 29 at p 206; 'Canada' in Campbell (ed), *Enforcement of Foreign Judgments* (1997), 67, at p 72; Horton, 'Canada' in Platto and Horton (eds), *Enforcement of Foreign Judgments Worldwide 2nd ed* (1993), 97, at pp 107-8.

⁴⁹ See, for example, Nygh, *op cit* fn 15 at pp 153, 155 who describes the principle as 'anomalous' and 'illogical'. See, also, to the same effect, Sykes and Pryles, *Australian Private International Law* (3rd ed 1991) 120. Caffey favours limiting the fraud defence to jurisdictional fraud cases; *International Jurisdiction and the Enforcement of Foreign Judgments in the Lawasia Region* (1985) 208-209. Brereton argues that the *Abouloff* principle is undesirable from a 'policy' perspective; 'Refusing to Enforce Foreign Judgments on the Grounds of Fraud' (1993) 10 *Australian Bar Review* 224, 227, 231.

⁵⁰ *Loc cit* fn 25.

⁵¹ *Loc cit* fn 24.

Wales in *Keele v Findley*.⁵² In that case, the court concluded, after a detailed examination of the authorities, that Australian law would only recognise the defence of fraud based on perjury where new and material facts were produced that had emerged since the original judgment. The court strongly felt that the rule governing challenges to domestic judgments on the ground of perjury should equally apply to foreign judgments. Three principal reasons were given for the court's conclusion. First, writers have unanimously condemned the *Abouloff* rule. Secondly, the *Abouloff* line of cases started at a time before the English court had adopted the 'fresh and material evidence rule' for domestic judgments. Thirdly, there was a clear line of Canadian authority in support of the view that 'fresh and material evidence' was required to upset a foreign judgment on the ground of perjury.

While it is true that commentators have been hostile to the *Abouloff* rule, the two other reasons given by the court to support its decision are open to question. In relation to the first, surely it does not matter if *Abouloff* was decided at a time when the present rule regarding domestic judgments had not yet been clarified if it has been endorsed in later cases. This argument would only have strength if the English courts since *Abouloff* that have applied the rule had only done so out of deference to precedent. In fact, as has been already been argued, English courts have continued to apply the principle for sound reasons of policy.

The second reason given by the court in *Keele* for rejecting the *Abouloff* rule, that it has been rejected in a clear line of Canadian decisions, is also questionable in light of more recent developments. As will be discussed later, the Canadian law with respect to fraud and foreign judgments is now highly confused, not least because in some recent cases, support has been expressed for an *Abouloff*-style rule.

The other comment to be made about *Keele* concerns its requirement that a defendant produce fresh or newly discovered evidence of perjury before a challenge can be made at the enforcement stage. It was argued above that this approach fails to give adequate weight to the position of defendants to foreign trials and the likely great logistical difficulties in obtaining new evidence of the fraud, particularly where the defendant is not a resident of the jurisdiction in which the judgment is rendered.

These criticisms of the *Keele* case are significant because the decision has been held up by many commentators as a clear (and desirable) statement of the Australian position, yet a number of its premises are

⁵² (1990) 21 NSWLR 444.

flawed. Moreover, as will be discussed below, there have been a number of more recent Australian decisions that have severely weakened the authority of *Keele* in Australia. The effect of these decisions, it is argued, has been to reinstate the *Abouloff* rule.

The case of *Close v Arnot*⁵³ represented the first retreat from *Keele*. This decision involved an Australian defendant who was served with a writ while visiting New York. He failed to enter an appearance in the New York court due to his inability to afford legal representation owing to the strength of the US currency at the time. Default judgment was given and, in proceedings to enforce the judgment in New South Wales, he challenged the judgment on the ground of perjury.

The court had to determine whether it would follow *Keele* and require fresh evidence of fraud before the defence could be raised, or accept the English authorities which allow the evidence at trial to be reassessed. In the event the court found both tests satisfied. The 'fresh evidence' of fraud lay in the admissions of the plaintiff in the Australian proceedings that much of his evidence at trial was false and misleading. However, the court said that even if it had been unable to find fresh evidence it would not have applied the rule in *Keele* to bar the defence in any event. According to the court, the English rule should continue to apply in Australia in respect of actions to enforce judgments obtained in undefended proceedings in a foreign court where the defendant has, for good reason, been unable to meet the plaintiff's case in court. Here the court found that the defendant did have good reason for not defending the foreign proceedings. He had given consideration to the question but had reasonably concluded that he could not afford to do so.

In this respect, it could not be said that the defendant had colluded in the deception of the foreign court by refraining to take exception to the evidence presented against him. This case was not a situation where he had 'improperly kept his complaint in reserve', which, it will be recalled, was the criticism levelled at the English decision in *Syal v Heyward*. Accordingly, the court said, even if fresh evidence of fraud was not available to the defendant, he could still plead perjury based exclusively on the evidence tendered at trial.

Hence, the *Close v Arnot* decision represents the first step toward rehabilitation of the *Abouloff* rule in Australia. In two very recent cases this trend has continued.

⁵³ Unreported, Supreme Court of New South Wales, 21 November 1997.

*Yoon v Song*⁵⁴ involved another challenge to a foreign judgment on the ground of the plaintiff's perjury, but again, similar to the *Close* case, the defendant was able to produce fresh evidence of the fraud since the judgment was delivered. Consequently, the court could have avoided the whole issue of the correctness of *Abouloff* and its status in Australia since the requirements of *Keele* were satisfied. Nevertheless, the court went out of its way to state its preference for the *Abouloff* principle, stating that the present facts 'demonstrate good reason' for retention of the rule. In the *Yoon* case, the court found that the oral evidence of the plaintiff in the foreign proceedings to be lacking all credibility and contradicted by the documentary evidence yet that material was still accepted by the foreign court both at trial and on appeal. In such a situation the defendant's only protection from great injustice was to have the opportunity to raise the fraud allegations in another forum.

It is true that retention of the *Abouloff* rule does create a different standard of review for domestic and foreign judgments and may be seen to involve a comment on the competence and credibility of the foreign court. Yet, the court in *Yoon* seems to suggest that there is something particularly opprobrious and unconscionable about a judgment procured by dishonest evidence. While recognition of the *Abouloff* principle does compromise the doctrine of *res judicata*, the qualification is justified given the extremity of the allegations and the difficulties facing a defendant, foreign to the place of adjudication, in producing new evidence of such fraud to satisfy the *Keele* test. As the English cases above showed, it is also a defence that is likely to succeed rarely, given the high standards of proof to establish fraud required. Certainly in both *Yoon* and *Close*, the evidence of dishonesty was glaring.

The judicial insistence on strict standards of proof for fraud is illustrated by the most recent Australian decision on perjury fraud, *De Santis v Russo*.⁵⁵ In *De Santis*, the court first noted, with little discussion, that under Australian law it was not necessary to produce fresh evidence since the original trial to establish fraud. It was 'sufficient to show that the foreign court was misled into coming to a wrong decision by evidence which was false'.⁵⁶ However, the court said, for a tribunal to find fraud, proof had to be 'clear and cogent, such as to induce, on a balance of

⁵⁴ Unreported, Supreme Court of New South Wales, 8 December 2000 available at [2000] NSWSC 1147.

⁵⁵ (2001) 27 Fam LR 414.

⁵⁶ *Ibid* at p 418.

probabilities, an actual persuasion of the mind as to the existence of the fraud'.⁵⁷ This test for the existence of fraud recalls the approach taken in the English authorities discussed above.

The test was found not to be satisfied in the *De Santis* case. The most that could be said was that the plaintiff's evidence was in conflict with the defendant. Moreover, since the evidence in question consisted entirely of opinion, upon which differences could be readily expected, it would be very difficult to show dishonesty. Accordingly there was no 'clear and cogent evidence' of fraud.

This case therefore reinforces the point made above that the perjury exception is likely only to be successful in rare cases of actual plaintiff dishonesty. However, on a broader level, these cases show clearly that the Australian courts have decided to retain the *Abouloff* rule. Given the gravity of the allegation and the consequent injustice to defendants of such conduct going unchecked, it is felt appropriate to relax the strictures of *res judicata*. As will be seen below, courts in other common law countries have taken the same approach.

Perjury Fraud - New Zealand, Hong Kong and Malaysia. In New Zealand the *Abouloff* rule is well established. In *Svirskis v Gibson*,⁵⁸ the Court of Appeal allowed a defendant to raise a plea of fraud in relation to a foreign default judgment even though no newly discovered evidence since the trial had emerged. The court did, however, say that a defendant's right to plead the defence was not automatic. All the circumstances of the case must be considered, including 'whether the defendant is merely seeking to try again on substantially the same evidence issues already adjudicated on in the overseas court and whether the defendant deliberately refrained from appearing in that court'.⁵⁹ Moreover 'if a defendant had adequate notice of the nature of the evidence likely to be given to the plaintiff yet did not avail himself of the opportunity of contradicting it'⁶⁰ then the defence would likely fail. In this regard the court in *Svirskis* rejected the suggestion in *Syal v Heyward*⁶¹ that a defendant may keep its fraud complaint in reserve

⁵⁷ *Ibid.*

⁵⁸ *Loc cit* fn 35.

⁵⁹ *Ibid* at p 10.

⁶⁰ *Ibid.*

⁶¹ *Loc cit* fn 33.

until enforcement proceedings. This view is consistent with that expressed by the Supreme Court of New South Wales in *Close v Arnot*.⁶²

In *Svirskis*, on the facts, the court found that while the defendant's non-attendance in the foreign proceedings was 'blameworthy',⁶³ this conduct was outweighed by the plaintiff's failure to supply any evidence to support its claims in the foreign action. Accordingly, the defendant was held entitled to raise the fraud defence.

In two more recent cases, New Zealand courts have maintained their adherence to *Abouloff*. In *Richards v Cogswell*⁶⁴ the High Court refused to enforce a foreign default judgment on the basis of fraud. Here the plaintiff's pleading alleged facts which 'bore little reality to the dealings between the parties' and was so recklessly inaccurate as to amount to fraud. The court also considered the significance to be attached to the defendant's non-attendance at the foreign trial. While noting, consistently with the comments in *Svirskis*, that a defendant that 'deliberately refrained from appearing' would not be well regarded, the court found that the defendant had received sub-standard legal advice here which had encouraged him not to defend the foreign action. Again, it was emphasised that defendants should not be allowed to keep their allegations of fraud in reserve until the enforcement stage. In the most recent New Zealand decision,⁶⁵ the *Abouloff* rule was applied but fraud was not found established on the facts.

The *Abouloff* doctrine is also accepted as the law in both Hong Kong and Malaysia. However, the courts in both countries, consistently with the other common law jurisdictions discussed above, have stressed that the defendant has a high standard of proof to satisfy before a finding of fraud will be reached in respect of a foreign judgment.

In *WFM Motors Pty Ltd v Maydwell*,⁶⁶ the Hong Kong Court of Appeal accepted that a court may refuse to enforce a foreign judgment based on perjury even where evidence and arguments have already been considered and dismissed by the foreign court. However the court noted that 'an allegation of fraud is always serious and the defendant must particularise the fraud with precision and then establish it to the appropriate standard'. As to what that standard was, the court said that the defendant had a 'heavy burden' and must show a *prima facie* case of fraud, given the

⁶² *Loc cit* fn 53.

⁶³ *Loc cit* fn 35 at p 11.

⁶⁴ (1995) 8 PRNZ 383.

⁶⁵ *Dymock v Bilbie* (1999) 13 PRNZ 158 (HC).

⁶⁶ [1996] 1 HKC 444.

gravity of the allegation. The court found on the facts of *WFM* that the defendant had failed to establish fraud on the part of the plaintiff. The Court's decision and reasoning were expressly upheld on appeal to the Privy Council.⁶⁷

Malaysian courts have been similarly willing to accept the *Abouloff* principle but only on the condition that the defendant establishes a strong case or triable issue of fraud. In *See Hua Daily News Bhd v Tan Thien Chin*,⁶⁸ the court dismissed allegations of fraud in relation to a foreign libel judgment as frivolous and made in bad faith.⁶⁹

Perjury Fraud - North America. It is now necessary to consider the status of the *Abouloff* rule in North America. Canada is an important jurisdiction to examine because it is regularly cited by commentators as a country that has, for a long time, clearly rejected the English approach. Upon closer inspection, however, it will be seen that the Canadian position is less clear and consistent.

The most often quoted statement of the Canadian approach to fraud and foreign judgments is found in the judgment of Garrow JA of the Ontario Court of Appeal in *Jacobs v Beaver*.⁷⁰

The fraud relied upon must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the court and so passed on into the limbo of estoppel by the judgment. This estoppel cannot be disturbed except upon the allegation of new and material facts, or newly discovered material facts which were not before the former court and from which are to be deduced the new proposition that the former judgment was obtained by fraud.

This statement has been highly significant in the area of fraud and foreign judgments. Not only has it been relied upon in a number of subsequent Canadian decisions but foreign courts and commentators have also

⁶⁷ *Maydwell v WFM Motors Pty Ltd* [1997] 2 HKC 244.

⁶⁸ [1986] 2 MLJ 107 (Supreme Court of Malaysia).

⁶⁹ See also *Bank of India v Krishna Kumar Triyugi Narain Sharma* [1994] 3 CLJ 294 (High Court of Malaya) (available at <http://www.cljlaw.com>) where no fraud was established on the facts.

⁷⁰ (1908) 17 OLR 496, 506.

recognised its authority.⁷¹ However, an important question that arises at the outset is the precise meaning of the above passage.

The first comment to be made is that it seems clear that Garrow JA intended to reject the *Abouloff* rule, which allows a defendant to allege perjury or forgery on the part of the plaintiff based on the same evidence tendered at the trial. This point is not only made clear in the passage itself but also in the judge's approval of the earlier Ontario Court of Appeal decision in *Woodruff v McLennan*.⁷² In that case, a defendant was precluded from raising the defence of perjury in relation to a Michigan judgment on the basis that no new evidence since trial was adduced.

On the basis of the *Woodruff* case, what Garrow JA may have been suggesting is that a defence of fraud based on perjury may be raised where fresh and material evidence is produced. If so, then he was proposing a unification of the tests for domestic and foreign judgments similar to the approach taken in the Australian case of *Keele v Findley*. However, there is another aspect of the passage that suggests that the judge may have intended to propound an even more restrictive approach to fraud and foreign judgments.

In the first sentence he states that the fraud 'must be something collateral or extraneous and not merely the fraud which is imported from alleged false statements at the trial'. In later cases this comment has been interpreted as requiring a defendant, in order to make out the defence of fraud, to produce 'extrinsic' evidence of the dishonesty. This concept of 'extrinsic evidence' has itself been further interpreted in two ways. The first construction is that 'extrinsic' means no more than evidence that was not available at the trial; in other words, fresh and newly discovered material. This interpretation would be consistent with the view stated in the *Woodruff* case above and has been adopted in the later decisions of some Canadian provinces, for example Alberta⁷³ and Nova Scotia.⁷⁴

⁷¹ This passage was referred to by the Supreme Court of New South Wales in *Keele v Findley* (1990) 21 NSWLR 444, 455-456 and Dicey and Morris, *op cit* fn 29 at p 520.

⁷² (1887) 14 OAR 242.

⁷³ *Union of India v Bumper Development Corporation* [1995] 7 WWR 80 (Alberta Court of Queen's Bench).

⁷⁴ *Manolopoulos v Pnaiffe* [1930] 2 DLR 169 (Nova Scotia Supreme Court) but see, to the contrary, *Boga v Chamberlen* [1936] 1 DLR 660 (same court) where the *Abouloff* rule was applied.

The second possible interpretation of 'extrinsic' is that it refers to material external to the merits or substantive issue in the case. On this view, a defendant is never allowed to allege fraud based on perjury occurring during the trial because such an issue relates to the merits and so is 'intrinsic' to the foreign proceedings. According to this approach, the only situation in which a defendant can raise an allegation of fraud is where the plaintiff has engaged in procedural misconduct of such a kind that the defendant is unable to present its case.

The category of 'jurisdictional' fraud mentioned above would be the principal example of this type of fraud but other conduct occurring during the course of proceedings (for example, bribery of witnesses) would also likely suffice. The British Columbian courts have consistently taken this view of the fraud defence, emphasising that it is limited to procedural matters.⁷⁵ There are also *obiter dicta* passages in the judgment of the Supreme Court of Canada in *Powell v Cockburn*⁷⁶ which lend support to this position.⁷⁷

What is interesting to note is that this conflict of interpretation regarding Garrow JA's statement in *Jacobs v Beaver* has largely escaped the attention of commentators. Moreover, there has been a recent development of even greater possible significance in the Canadian jurisprudence on fraud and foreign judgments. That is, that a number of judges in Ontario have suggested that Canadian law should recognise a version of the *Abouloff* rule.

This development can be first detected in the Ontario Court of Justice decision in *Howard Bank v Garland*.⁷⁸ In that case, in proceedings to enforce a foreign default judgment, the court allowed the defendant to lead evidence to show that the plaintiff's witnesses were lying, even though the evidence was not fresh. In doing so, the Court noted the 'somewhat uncertain caselaw' on the issue.

⁷⁵ See, for example, *Roglass Consultants Inc v Kennedy* (1984) 65 BCLR 393 (Court of Appeal); *Clancy v Beach* [1994] 7 WWR 332 (Supreme Court) and *Mueller v Starcraft Aviation Ltd* (unreported, Supreme Court, 24 March 1997).

⁷⁶ [1977] 2 SCR 218.

⁷⁷ For example, the court notes that 'if the fraud in obtaining the foreign decree goes to the merits of the petition, domestic courts will not pay heed to it as the substantive grounds upon which the decree have been granted have never been of concern to the recognising court... Fraud going to the jurisdiction of the foreign court is another matter'. *Ibid* at p 228.

⁷⁸ Unreported, Ontario Court of Justice General Division, 16 April 1992.

In *Ontario v Mar-Dive Corporation*⁷⁹ an Ontario court again allowed evidence relating to possible perjury in foreign proceedings to be challenged. In that case the court found that the plaintiff had tendered a substantial amount of misleading information to the foreign court such that it could be said that the foreign judgment was 'obtained by means of half truths and artificiality'. Although the Court was not convinced that such evidence showed clear dishonesty on the part of the plaintiff, it nevertheless refused to enforce the judgment on the ground of public policy.

Most recently in *Beals v Saldanha*,⁸⁰ an Ontario Court made a full consideration of the status of the fraud defence in Canada. It began by noting that the traditional position under Canadian law had been represented in the passage from the judgment of Garrow JA in *Jacobs v Beaver* extracted above. However, the court recognised that the words of the judge were ambiguous, particularly as to the meaning of 'extrinsic' evidence. In particular, as was mentioned above, it was not clear whether 'extrinsic' referred to additional, newly discovered evidence of fraud (which would include perjury) or only evidence relating to the procedural conduct of the plaintiff at trial (which would not include perjury).

The court in *Beals* thought that the interpretation of 'extrinsic' taken by the British Columbian courts, that is limited to procedural conduct, was too restrictive. Moreover, the court said, such matters would likely already be covered by the defences of lack of international jurisdiction and natural justice. If fraud is to be a recognised defence, therefore, it has to have a distinct coverage. However, the court said, it was unable to accept the full force of the *Abouloff* rule because of the weight of the Canadian authority against it. Nevertheless, it is suggested that, despite the court's expressed denials, it did in fact apply a version of the *Abouloff* rule. To appreciate this point, some reference to the facts of the case is required.

The *Beals* case concerned a contract for the sale of land in Florida, which the plaintiff, before a local court, alleged that it had entered into due to the defendant's fraud. The action was originally dismissed but then recommenced with an additional claim for vastly increased damages. The defendant received notice of the fresh proceeding but did not make an appearance on the basis that it thought that the matter would be resolved identically to the first trial. Default judgment was, however, awarded against the defendant for an enormous sum, grossly in excess of the original purchase price.

⁷⁹ (1996) 141 DLR (4th) 577 (Ontario Court of Justice General Division).

⁸⁰ (1998) 42 OR (3d) 127 (Ontario Court of Justice General Division).

Upon the plaintiff seeking to enforce the judgment in Ontario, the defendant pleaded fraud on the basis that the Florida jury, which assessed the damages had been misled by perjured evidence. While the Ontario court agreed that the damages award had been procured by fraud, the problem, as has been noted, was that Canadian law prevented a defendant from alleging perjury based on the original evidence at trial. Either fresh evidence must be tendered (on the *Woodruff* view) or perjury can never be challenged because it is a substantive, not procedural matter (on the British Columbian view).

The court overcame the problem of conflicting authority by ignoring it and applying a version of the *Abouloff* rule. It stated that, in the context of a foreign default judgment, while liability was a finally concluded and resolved matter, a foreign court's assessment of damages could be reopened. Consequently it was possible for the Canadian court to examine the damages award for fraud. Upon doing so, the court had no hesitation in finding fraud and declining enforcement. This reasoning would seem to be a direct application of *Abouloff*. While the court tries to conceal this fact by distinguishing between the foreign court's determinations as to liability and remedy, the plain truth is that the evidence put before the foreign court was reviewed for fraud. In this case, it was clear that the jury's ruling on damages was outrageous and that it had been misled by the plaintiff. Accordingly, the only way in which injustice to the defendant could be avoided was to refuse enforcement.⁸¹

As noted above, the courts of other common law countries have seemingly reached a similar conclusion on the utility of the *Abouloff* rule: it should be maintained but preserved for extreme cases, such as where there are factual conclusions of a foreign court that are suspicious or irrational. While conscious of the possible conflict of the *res judicata* doctrine, courts nevertheless see a greater injustice in allowing a dishonest plaintiff to succeed.

The decision in *Beals* was very recently the subject of a successful appeal to the Ontario Court of Appeal.⁸² By a 2-1 majority, the Court found that the trial court erred in refusing enforcement of the foreign judgment. The principal reason for this conclusion was, according to the

⁸¹ The court gave, as an alternative basis for decision, that the judgment should not be enforced because it contravened public policy. In doing so, the court expressly approved the statement of principle from the *Mar-Dive* case referred to at fn 79 above.

⁸² See (2001) 54 OR (3d) 641.

majority judges, that the court applied an incorrect version of the fraud defence. In their view, Canadian law allows a defendant to challenge the merits of a foreign judgment on the ground of fraud in only two situations. The first such case is where the defendant relies upon 'new and material facts' that were not before the foreign court and only came into existence after the judgment was obtained. The second is where the defendant produces 'newly discovered and material facts', that is, facts that existed at the time the foreign judgment was obtained but were not known to the defendant and could not have been discovered through the exercise of reasonable diligence.⁸³

According to the majority, the trial judge erred by treating any fact that was not before the foreign court as a 'newly discovered and material fact' rather than limiting such facts to those that could not have been discovered through the exercise of due diligence. In this case, the facts said to constitute fraud all would have been reasonably ascertainable by the defendant. Consequently, the judgment should have been enforced.

It may be argued that the effect of the majority reasoning in *Beals* is to narrow, but not eliminate, the scope for defendants to allege fraud based on perjured evidence in foreign proceedings. While the court clearly goes beyond the view expressed in the British Columbian decisions that fraud should be limited to procedural issues only, the principle also appears to be broader than that stated in the *Woodruff* decision. According to the court in the latter case, the fraud defence is restricted to the situation where fresh evidence of fraud, not in existence at the time of trial, subsequently appears. However, under the *Beals* view, a defendant could conceivably allege perjury by the plaintiff in relation to the identical evidence and material presented in the foreign proceeding where proof of the fraud underlying that evidence may have existed at the time of trial but was not readily obtainable. If so, then a limited version of the *Abouloff* principle remains available to Canadian defendants.

Before leaving the *Beals* case it is also worth noting the forceful dissent by Weiler JA. Given the strength and compelling nature of the judge's arguments, it is suggested that the debate surrounding the fraud defence in Canada will continue at least until the Supreme Court addresses the issue.

Briefly stated, Weiler JA drew attention to the fact that the *Beals* case involved enforcement of a foreign *default* judgment and that, consequently, a more liberal test for impeachment on the ground of fraud

⁸³ *Ibid* at p 653.

should apply. This approach is similar to the views expressed by courts in other countries.⁸⁴ In particular, the judge said, a wider examination of the circumstances of the case should be undertaken in determining whether the defence should be accepted. Relevant matters include the reasons why the defendant did not defend the action, whether a remedy existed before the foreign court in respect of the judgment, why no steps were taken to seek such remedy and the time at which the fraud became or should have become known to the defendant. According to Weiler JA, the defendant in *Beals* had good reasons both for not participating in the foreign proceeding and for failing to challenge the judgment in the courts of the foreign country. The fraud defence should therefore have been available to the defendant, even though it meant examining evidence already considered by the foreign court. The judge therefore considered that the *Abouloff* principle could apply in the default judgment context.

To conclude on the Canadian position, the best that can be said is that there remains a divergence of views on the scope of the fraud defence. What is apparent, though, is that there exist pockets of support for the *Abouloff* principle.

The position in the United States regarding perjury fraud should be briefly considered. The generally, although not universally, accepted approach adopted by United States courts is to limit the fraud defence to 'extrinsic' fraud in the sense used in the British Columbian cases. That is, procedural acts of the plaintiff designed to deprive the defendant of the opportunity to present its case, such as the jurisdictional fraud example earlier discussed. Allegations, for example, that the plaintiff committed fraud on the foreign court by wilfully concealing the material evidence, are not admissible.⁸⁵

However, interestingly, not all United States courts observe this principle with some allowing defendants to challenge foreign judgments on the ground of perjured evidence.⁸⁶ In addition, the authors of the 1980 Second Restatement of the Law on Judgments reject the extrinsic/intrinsic

⁸⁴ See, for example, *Close v Arnot* loc cit fn 53.

⁸⁵ See, for example, *Laufer v Westminster Brokers Ltd* 532 A 2d 130 (DC Ct App 1987); *Massie v Minor* 307 Ill App 3d 115; 716 NE 2d 857 (App Ct Ill 1999).

⁸⁶ See, for example, *Schwartz v Schwartz* 113 Ohio App 275 (1960) applied in *Trimax Holdings Inc v Larson* (unreported, Ohio Court of Appeals, 30 June 1998). The distinction between extrinsic and intrinsic fraud has been described by one court as 'shadowy, uncertain and somewhat arbitrary'; *Howard v Scott* 225 Mo 685, 714; 125 SW 1158, 1166 (Sup Ct Mo 1910).

distinction. The authors make the valid point that the criterion that the defendant is unable to present its case can conceivably equally apply in the case of perjured evidence as in the case of procedural deception prior to the trial.⁸⁷

So, in summary, while the bulk of United States authority rejects the *Abouloff* rule, there are nevertheless signs of support for the principle.

Conclusion

The purpose of this article has been to consider a legal doctrine that has been retained by the clear majority of common law courts despite having received widespread and consistent academic criticism. At first glance, it would seem that to allow a defendant to challenge a foreign judgment on the ground of perjury, in respect of the same evidence tendered at the original trial, would be to compromise the objectives of finality and conclusiveness of litigation. However, viewed from another perspective, recognition of such a defence may be seen as an important protection for defendants forced to litigate outside their places of residence. All legal systems generally treat dishonesty and deception more severely than other types of conduct (for example, negligence) and so it is arguably appropriate that a more liberal rule apply in the case of challenges to a foreign judgment on the ground of fraud. Moreover, to require a defendant alleging perjury to produce fresh evidence of such fraud would seem to impose an onerous forensic burden, particularly where (as is likely) the defendant is foreign to the place of litigation.

It is suggested that it has been factors such as these that have influenced common law courts to retain the defence of perjury fraud. However, the courts have been careful to place strict safeguards on the defence to prevent it acting as a source of harassment to plaintiffs. For example, a defendant must prove a strict *prima facie* case of fraud against the plaintiff and where the issue of fraud has been previously litigated in separate proceedings then it cannot be raised again at enforcement. In addition, in all jurisdictions apart from England, a defendant may not, without good justification, avoid appearing in the foreign trial and then raise the issue of fraud for the first time at enforcement. Consequently, it is fair to say that the defence will be rarely available although the courts have shown a definite intent to employ it in clear cases. In this regard, the recent

⁸⁷ See sections 68, 70 comment c.

developments in Canada and Australia are of particular interest. In those countries, some courts have opted to *reintroduce* the defence after having previously rejected it. Given these trends, it is likely that the pleas of academic commentators for the abolition of the *Abouloff* rule will continue to go unheeded.

STATE IMMUNITY IN EMPLOYMENT MATTERS

RICHARD GARNETT*

I. INTRODUCTION

AN area which has received little attention in the academic literature of foreign State immunity to date is that concerning immunity in employment matters.¹ This omission can probably be explained by the scant case law which has hitherto existed on the subject. However, in recent years the number of decisions has increased due to the fact that employment by States of foreign nationals has become far more common. Developing countries in particular, as they seek to create new industries, have become increasingly reliant on advisers and technicians from the developed world.

In the event of a dispute arising between the parties in which the employee seeks redress from the foreign State employer, a balancing of a number of interests is involved. In particular, the interests of the forum in protecting its own labour force (where the employee is a national or resident) and in adjudicating upon matters occurring within its territory have to be weighed against the interest of preserving good relations with the foreign State by not exercising jurisdiction over sensitive, sovereign matters. A foreign State would not consider it appropriate, for example, that another State's courts investigated its policy with regard to the hiring of heads of diplomatic missions. It will be the object of this article to assess

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1. Among the major works on State immunity the issue of employment is either (i) referred to briefly as a separate category for consideration or (ii) discussed under the rubric of commercial transactions without any recognition of its distinct nature. See, as examples of (i), S. Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), pp.240-242, 322; G. Badr, *State Immunity: An Analytical and Prognostic View* (1984), pp.94-95, 117-119; C. Lewis, *State and Diplomatic Immunity* (3rd edn, 1990), pp.48-51 (looking at the British immunity legislation); D. Greig, "Specific Exceptions to Immunity Under the International Law Commission's Draft Articles" (1989) 38 I.C.L.Q. 560; J. Seyersted, "Jurisdiction Over Organs and Officials of States, the Holy See and Governmental Organisations" (1965) 14 I.C.L.Q. 31, 36-40 and V. Morris, "The International Law Commission's Draft Convention On the Jurisdictional Immunity of States and their Property" (1989) 17 Denver J.I.L. & Poly. 395, 421-423. As examples of (ii), see C. Schreuer, *State Immunity: Some Recent Developments* (1988), pp.13-14, 36, 39; I. Sinclair, "The Law of Sovereign Immunity: Recent Developments" (1980) 167 Hag. Rec. 113; P. Trooboff, "Foreign State Immunity: Emerging Consensus of Principles" (1986) 200 Hag. Rec. 235; L. Lowe, "The International Law Commission's Draft Articles On the Jurisdictional Immunity of States and their Property: the Commercial Contract Exception" (1989) 27 Col. J. Transnat. L. 657 and J. Donoghue, "Taking the 'Sovereign' Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception" (1992) 17 Yale J.I.L. 489.

how effectively international law reconciles these competing interests. However, this article will be concerned only with the immunity of foreign States from the *jurisdiction* of another State; there exists also immunity from *execution*, which may be raised as a defence by a foreign State to the enforcement of a judgment. In the context of employment matters, however, the main area of contention has been that of jurisdiction.

In attempting to ascertain the current position in international law reference will be made to both judicial and legislative practice of States, the bulk of which is found in Europe, North America, Australia and New Zealand. Draft conventions of various advisory bodies such as the International Law Commission and the International Law Association will also be considered.

II. BACKGROUND

THE area of public international law known as foreign State immunity has become particularly contentious in the last 60 years. Before that time, it was a well-established customary rule that States could never be impleaded before foreign courts; they were said to enjoy absolute immunity from adjudication.² The rationale for this view was that of State sovereignty and equality. It was considered incompatible with its sovereignty for a State to be subject to the jurisdiction of another State's courts without its consent. The rule of absolute immunity began to come under pressure after the Second World War as States (particularly developing countries) began to engage increasingly in commercial activities, commonly with corporations of the developed world.

The idea appeared in the jurisprudence of some European States that it was no longer appropriate for a State to enjoy all the privileges of Statehood where it was acting in a similar manner to a private entity, for example as a party to a commercial transaction.³ It was felt that the interests of the private parties which dealt with the States had also to be considered. In particular, it was unreasonable for such entities to have to depend on their State of nationality to bring a claim on their behalf in international law in the event of a wrong being inflicted upon them by the foreign State.

Accordingly, a new rule of "restrictive immunity" emerged based on the distinction between acts *jure imperii* and acts *jure gestionis*. Acts *jure imperii* were those acts of a particularly sovereign or governmental nature which no private person would ordinarily perform, whereas acts

2. See e.g. in English practice the decisions of the Court of Appeal in the *Parlement Belge Case* (1880) 5 P.D. 197 and *Krajina v. Tass Agency* [1949] 2 All E.R. 274. It should be noted, however, that there were Italian decisions dating from the 1920s which suggested that immunity for foreign States was not unqualified; see cases cited in Sucharitkul, *idem*, p.322, nn.22-23.

3. In particular Belgium and Italy, see Badr, *op. cit. supra* n.1, at chap.2 and I. Brownlie, *Principles of Public International Law* (4th edn, 1990), p.327.

jure gestionis were those acts which, although performed by governments, were or could be equally performed by private persons. Although this distinction had originated in European civil law countries, it was accepted by common law courts in the 1970s.⁴ The distinction between sovereign and commercial acts was first applied in the context of more obvious commercial transactions such as contracts for the sale of goods or loan agreements to impose liability on foreign States which would not have been possible under the previous doctrine of absolute immunity.⁵

In the area of employment disputes it has also been the case that, until recently, foreign States enjoyed absolute immunity from suit.⁶ Recent practice shows, however, that the restrictive trend noted in State immunity generally has now entered the area of employment.⁷ This change can be explained by the increasing number of persons employed by foreign States and a concern on the part of the employee States that their nationals and residents be adequately protected. Nonetheless, a diversity of views has been expressed as to what form this restrictive immunity should take, and it will be the object here to examine the practice and assess what view or views currently represent(s) customary international law.

Perhaps the most common approach in the judicial practice of States in relation to employment claims has been to apply the *jure imperii/jure gestionis* distinction and to consider whether the foreign State, in entering into the contract of employment, is engaging in "private" or "sovereign" activity. However, in resolving this question courts have taken different approaches. First, there is the view which states that in determining whether a foreign State should claim immunity, primary regard should be had to the *context* or *location* of the employment. Therefore if an employee, at whatever level, is employed in a highly sovereign context such as a military base or an embassy, immunity should be granted on the basis that any enquiry into a foreign State's activities in such places would be excessively intrusive. By contrast, a foreign State-owned school or trading corporation is little different from an equivalent entity in the private sector and allowing an employee's claim to proceed would have little impact on the State's sovereignty. Such an approach has been favoured in the judicial practice of common law countries such as Ireland and New Zealand and civil law countries such as Germany and, until recently, Italy.

4. *Alfred Dunhill of London Inc. v. Republic of Cuba* (1976) 15 I.L.M. 735 (US Supreme Court); *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria* [1977] 2 W.L.R. 356 (English Court of Appeal).

5. The *Trendtex* case, e.g., involved a contract for the sale of concrete to a foreign State.

6. This was certainly the view of academic writers. See Seyersted, *op. cit. supra* n.1; Sucharitkul, *op. cit. supra* n.1, at p.242 (although noting that some Italian courts have denied immunity in cases involving employment by foreign State railway companies).

7. This can be seen both in terms of the judicial practice of States and in recent national legislation and multilateral treaties on State immunity (e.g. the European Convention on State Immunity of 1972).

Other States, such as the United Kingdom, South Africa, Singapore, Pakistan and Australia, have enacted legislation on State immunity but, although not adopting the private/sovereign act distinction, have nonetheless recognised that the context or place of employment should be a significant factor in resolving employment disputes. Under this approach the focus is on the nature of the employer.

In other judicial practice courts have, also in applying the sovereign/commercial act test, chosen to determine the issue of immunity primarily on the basis of the *status of the employee*. The premise of this approach is that a finding of immunity should be made only in the case of senior employees with great responsibility on the basis that, by their position, they are closer to the sovereign core of the foreign State. By contrast, employees engaged in routine or menial duties are little different from their counterparts in the private sector and so should be entitled to sue. Under this approach, then, the focus is on the employee. Swiss courts, for example, have taken this position.⁸

A third approach evident in State practice, particularly in the national legislation and multilateral conventions on immunity, is to place emphasis on the *territorial nexus* between the forum and (i) the employee and (ii) the employment contract. This approach has its origins in the doctrine of State jurisdiction, in particular the idea that under international law every municipal forum must have an adequate connection with the subject matter or parties to a claim before it can exercise jurisdiction in either civil or criminal matters. The approach of territoriality is advocated by a number of commentators⁹ as a more certain and predictable method of representing the various interests at stake in a dispute over State immunity. This principle typically involves a State making provision for protection of its own nationals and residents by assuming jurisdiction in cases in which such persons are suing as employees of a foreign State and where the employment contract has some connection with the forum. Conversely, this principle recognises that it will be in very few cases that a forum will wish to exercise jurisdiction over a dispute between a foreign State and one of *its* nationals. Such a situation attracts no interest of the forum in protecting the employee but may certainly offend its interest in comity and good relations with the foreign State.¹⁰ There is similarly little interest

8. See e.g. *S v. Republic of India* (1984) 82 I.L.R. 13 (Swiss Federal Tribunal).

9. E.g. J. Crawford, "A Foreign State Immunities Act for Australia?" (1983) 8 Aust. Y.I.L. 71, 90; Brownlie, *op. cit. supra* n.3, at p.333; M. Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis In Terms of Jurisdiction to Prescribe" (1985) 26 Harv. I.L.J. 1, 3 *et passim*. A territorial approach certainly eliminates the difficulty of having to differentiate between commercial and sovereign acts.

10. Unless, possibly, if the foreign national has a significant residential tie to the forum; see the Australian Foreign States Immunities Act 1985, s.12(3), where such persons are entitled to sue. Cf. the State Immunity Act 1978 (UK), s.4(2).

in protecting a national of a third State without any residential ties to the forum.

This principle of exercising jurisdiction in employment matters on the basis of territorial connection has been adopted, most significantly, in the European Convention on State Immunity 1972 ("the Basle Convention") and to a degree in national legislation (for example, the UK State Immunity Act 1978, the Singapore State Immunity Act 1979 and the Australian Foreign States Immunities Act 1985). The US Foreign Sovereign Immunities Act 1976 also requires a link between the employment, as "commercial activity", and the forum.¹¹

A fourth approach apparent in the practice is to resolve the immunity issue in employment cases by reference to the *nature of the claim*. Under this head may be distinguished actions the nature of which may intrude upon the sovereignty of the foreign State and actions which relate only to the "economic aspects of the employment relationship". As examples of the former category may be included actions by trade unions seeking union protection for certain employees,¹² and actions which may involve investigation into matters of State security.¹³ All these situations involve a court having to enquire into hiring practices and policies of a foreign State to an extent incompatible with that State's sovereignty. By contrast, an action for unpaid wages, for example, would involve little questioning of a State's power to organise its offices.¹⁴

These four approaches are not to be considered mutually exclusive of one another as courts and national parliaments have often relied upon a combination of the above factors, for example a finding of immunity may be made where an employee is a national of the foreign State (and so lacks sufficient territorial nexus with the forum), is in a senior position (and so satisfies the status test) and is working in a highly sovereign area, such as a military installation. Even within the same legislative provision a mixture of the four approaches is apparent. For example, the UK State Immunity Act, as will be noted, relies upon the elements of both context of employment and territorial nexus. The US position, as reflected in its judicial and legislative practice, also considered below, reveals the influence of all four approaches.

However, it is the approach taken by a State with regard to according immunity to another that determines how well the competing interests of employee protection and international comity are balanced. The variety

11. A detailed consideration of the various legislative practices is made below.

12. *United States v. The Public Service Alliance of Canada* (1992) 94 I.L.R. 264 (Supreme Court of Canada).

13. *Van Hulst v. United States of America* [1990] Neth. Y.I.L. 379 (Supreme Court of the Netherlands); *Saudi Arabia v. Nelson* 113 S.Ct. 1471 (1993) (US Supreme Court).

14. The Italian practice, in particular, has drawn the distinction between economic and non-economic aspects of a dispute; see *infra* nn.68–74 and accompanying text.

of approaches suggests that States have difficulty in agreeing where the line should be drawn and whether it should be adjusted according to the context of employment.

It is now proposed to consider the extent to which each of the approaches described above is represented in the legislative and judicial practice of States and to discover to what extent State immunity still exists in the employment context. The employee claims to be considered consist of actions either for breach of the contract of employment itself or for infringement of a statute of the forum governing labour relations. In terms of structure the practice will be examined in relation to the typical places of employment of the foreign State: (i) embassies and consulates, (ii) military bases and (iii) other foreign State-owned entities, including representative commercial or cultural offices, schools or universities and trading corporations.

III. CLAIMS BY EMPLOYEES AT DIPLOMATIC AND CONSULAR MISSIONS

A. *Practice Favouring Absolute Immunity for Foreign States*

There is a considerable body of practice across a number of jurisdictions supporting the view that, in the case of disputes involving employment contracts at embassies and consulates, a policy of *de facto* absolute immunity is in existence on the basis that the embassy or consulate is the most sovereign instrumentality of a foreign State. The context or place of employment is the decisive factor, with criteria such as the nationality or residence status of the employee and his or her rank in the hierarchy given little weight in resolution of the immunity question.¹⁵ The practice of common law countries such as the United Kingdom, South Africa, Pakistan, Ireland and New Zealand and civil law States such as Germany (and, formerly, Italy) supports this approach. In the view of these States, the interest in international comity must take priority over employee protection in this area. By contrast, there is a growing number of countries which advocate a relaxation of this strict exclusion of local jurisdiction in the case of mission employment. The practice of Australia, the United States and most European civil law countries falls into this category. In the view of these States, immunity should be recognised only (if at all) where the

15. This point was made by Seyersted, *op. cit. supra* n.1, at p.36, who argued that, in the context of employment at diplomatic and consular offices, even involving subordinate employees, "the organic jurisdiction of the sending state ... supersedes the combined territorial and personal jurisdiction of the host state. The relationship of employment between the sending state and the employee is subject to the public law of that state and not to the administrative or labour law of the host country."

employee is in a senior position at a diplomatic or consular mission or else the interest of the employee is not adequately taken into account.

1. *Common law countries*

In the United Kingdom, as has been noted, questions of State immunity are governed by the State Immunity Act 1978, with contracts of employment being specifically provided for in section 4. Before considering this provision it is worth noting an English judicial decision in the area of embassy employment which was based on the pre-statutory law of State immunity (said by the court to represent customary international law). In *Sengupta v. Republic of India*¹⁶ an Indian national employed as a low-grade clerical officer at the Indian Embassy in London was precluded by State immunity from bringing an action against his employer for unfair dismissal. The court acknowledged that a contract of employment by itself was a private act but that a contract to work in a diplomatic mission "at however lowly a level" was "a contract to participate in the public acts of the foreign sovereign". The court considered diplomatic representation to be "one of the classic forms of sovereign acts by a foreign state" and any adjudication upon the fairness of the dismissal of a mission employee would involve an investigation into the internal management of the Embassy, which would be an interference with the sovereign functions of the State.¹⁷ A total exclusion of local jurisdiction over embassy employment was therefore justified.

The approach of section 4 of the UK Act is very similar to that taken in the *Sengupta* decision. The provision begins with a general presumption of non-immunity for a foreign State where an entity of that State is a party to an employment contract made or to be performed, in whole or in part, in the United Kingdom. However, immunity is restored under certain circumstances, including pursuant to section 16(1)(a), where the employee is a "member of a diplomatic or consular mission" within the meaning of the Vienna Conventions on Diplomatic Relations of 1961 and Consular Relations of 1964. Article 1 of both Conventions defines "member of the mission" to include "administrative and technical staff", not merely personnel with diplomatic status.

The intent of the UK legislation is to maintain immunity in respect of all employment contracts at foreign embassies and consulates regardless of the nationality of the employee or the position held. This view is confirmed by examining recent English judicial practice in interpretation of these provisions. The following employees have been held to constitute "administrative and technical staff" and so not entitled to bring proceedings for unfair dismissal against their foreign State employers:

16. [1983] I.C.R. 221 (English Employment Appeal Tribunal).

17. *Idem*, pp.228-229.

- (1) an Egyptian national with British residency, recruited in the United Kingdom and employed as a driver at the Medical Office of the Egyptian Embassy;¹⁸
- (2) a British national employed as an accountant and an Emirates national employed as a medical interpreter (both locally recruited) at the United Arab Emirates Embassy;¹⁹
- (3) a British national, locally recruited, employed as a secretary at the Saudi Arabian Embassy;²⁰
- (4) a British national, locally recruited, employed as an accounts clerk at the High Commission of the Bahamas.²¹

Hence the intention behind section 16(1)(a) is to create a form of absolute immunity from suit for foreign States in respect of all actions by employees at consular and diplomatic missions. The intention is effected by defining members of the mission as "administrative and technical staff" so as to include persons in quite insignificant and menial positions as well as those who happen to be British nationals or residents. In the *Ahmed* case, for example, the Court of Appeal expressly rejected the argument that foreign States could claim immunity only in the case of actions brought by employees entitled to diplomatic immunity or non-British nationals. The Court, however, did express concern that the effect of section 16(1)(a) was "almost completely to emasculate [the denial of immunity] in section 4"²² and that "a locally employed person of British nationality without official status was left with no right to complain of unfair dismissal merely because of her place of employment". The Court therefore seems concerned that, in the context of diplomatic and consular missions, the executive's interest in comity towards foreign States has been excessively favoured at the expense of the interest of the employee in obtaining redress. However, the British position is not an isolated one. It is noteworthy that similar provisions imposing absolute immunity in the case of suits by mission employees have been enacted in South Africa (Foreign Sovereign Immunity Act 1981, section 5) and Pakistan (State Immunity Ordinance 1981, sections 6 and 17(1)(a)). The principle therefore has some weight in practice.

Ireland is a common law jurisdiction which has recently emphasised the significance of the place of employment in the context of a suit for damages for unfair dismissal by an Irish national employed as a chauffeur at

18. *Arab Republic of Egypt v. Gamal-Eldin* [1996] 2 All E.R. 237 (English Employment Appeal Tribunal).

19. *United Arab Emirates v. Abdelghafar & Abbas* (unrep., 10 July 1995, English Employment Appeal Tribunal).

20. *Ahmed v. Kingdom of Saudi Arabia* [1996] 2 All E.R. 248 (English Court of Appeal).

21. *Jayetilleke v. Bahamas* (unrep., 14 Dec. 1994, English Employment Appeal Tribunal).

22. *Ahmed*, *supra* n.20 at p.256 (*per* Hutchison LJ).

the Canadian Embassy in Dublin.²³ Ireland has no legislation governing State immunity and so the Supreme Court had to resolve the dispute by applying the principles of the Irish common law, which incorporate customary international law.

A majority of the Court²⁴ held that the *jure imperii/jure gestionis* distinction represented customary law and so immunity would be found "where the relevant act fell within the sphere of governmental or sovereign activity", that is, where the employee was engaged in the sovereign activities of the foreign State. It is suggested that, in applying this test and deciding that immunity should be recognised, the Court here was strongly influenced by the location of employment, namely that it was an embassy. In the words of one of the judges: "I think once one approaches the embassy gates one must do so on an amber light. *Prima facie* anything to do with the embassy is within the public domain of the government in question."²⁵

Accordingly, in the case of a chauffeur of an ambassador, his employment was *prima facie* sovereign by virtue of its being located at the diplomatic mission. The Court noted that the connection between the employee and the sovereign activities of the mission was particularly strong in the case of a chauffeur because he was in a position of trust and confidentiality. The fact that the individual in question was not in a senior or official position at the embassy or that he had the nationality of the forum State was irrelevant to the decision on immunity. It can be seen, therefore, that this decision, in effect, achieves the same result as that under the British legislation referred to above; one of total exclusion of jurisdiction in the case of mission employees.

In New Zealand a recent decision of the country's highest court appears to have taken a similar approach to employment at diplomatic or consular missions.²⁶ New Zealand is in the same position as Ireland in that there is currently no legislation on State immunity and so such questions have to be resolved by application of the common law of New Zealand, which again incorporates the principles of customary international law.

The case of *Sutton* involved a New Zealand national, locally recruited, employed as a secretary/typist at the office of the Governor of Pitcairn, a British colony under the jurisdiction of the UK government. The office was similar to the consulate of a foreign State. The Court again saw the relevant question as whether the employee was engaged in the sovereign

23. *Canada v. The Employment Appeals Tribunal and Burke* [1992] I.R. 484 (Supreme Court of Ireland).

24. Justices McCarthy and O'Flaherty.

25. *Burke*, *supra* n.23, at p.500 (*per* Justice O'Flaherty).

26. *Governor of Pitcairn v. Sutton* [1995] 1 N.Z.L.R. 426 (New Zealand Court of Appeal).

functions of the foreign State. In upholding the claim to immunity by the British government, the Court admitted that the place of employment was a crucial factor. It would be a rare case when an employee at an embassy or consulate would be entitled to bring suit for the reason that, in such locations, almost all activity involves the sovereign functions of the foreign State in that the individual in question is placed in a position of trust and confidence. It mattered not that such employees had no responsibility for decision-making.²⁷ The only exception to this principle, the Court said, would be in the case of persons "engaged to maintain the physical fabric", for example those contracted to do repairs.²⁸ As a result, domestic staff as well as administrative and clerical support staff of a mission would all have difficulty in bringing suits against their employer. Accordingly, the employee in this case, as a typist/clerk, was barred by State immunity from bringing her action. Similar to the *Burke* case, it seems that the location of employment was the decisive factor and criteria such as the nationality of the employee and the level of her position were ignored.

2. *Civil law countries*

German practice in the area of consular/embassy employment disputes also supports the approach of absolute immunity for foreign States based on the location of employment. In one decision²⁹ a court granted immunity to the United Kingdom in an action brought by a German national employed at the British consulate as a receptionist, switchboard operator, clerical assistant and interpreter. In reaching this decision, the court gave weight to the place of employment in resolving the characterisation: "the performance of duties in a consulate is an exercise of the sovereign rights of the state and so a sovereign act". No reference was made by the court to the status of the employee or the fact that she was a German national. This decision is therefore consistent with the position noted in the common law countries mentioned above.

B. *Practice Favouring Restrictive Immunity*

1. *Common law countries*

In Australia legislation has been enacted on State immunity which makes special provision for employment at an embassy or consulate but, unlike the British and other legislation referred to above, attempts to steer a middle course between employee and foreign State by allowing certain categories of mission employee to sue. Section 12(1) of the Australian

27. *Idem*, p.431 (*per* President Cooke).

28. *Idem*, p.436 (*per* Justice Richardson). The question of immunity with respect to such persons is discussed in more detail at *infra* nn.82–84 and accompanying text.

29. *Conrades v. United Kingdom* (1981) 65 I.L.R. 205 (Hanover Labour Court).

Foreign States Immunities Act 1985 creates a general presumption of non-immunity in the case of employment contracts where the contract is made in Australia or to be performed (partly or entirely) in Australia. Under subsection (3) immunity is restored where the employee is a national of the foreign State but not a resident of the forum State. Immunity is also reimposed under subsection (5) where the employee is (a) a "member of the diplomatic staff of a mission" as defined by Article 1(d) of the Vienna Convention on Diplomatic Relations 1961 ("the Diplomatic Relations Convention")³⁰ or (b) a "consular officer" as defined by the Vienna Convention on Consular Relations 1961 ("the Consular Relations Convention").³¹ Under subsection (6) immunity is also recognised where (a) the employee is a "member of the administrative and technical staff of a mission" as defined in Article 1(f) of the Diplomatic Relations Convention³² or (b) a "consular employee" as defined in Article 1(e) of the Consular Relations Convention³³ "*unless the member or employee was at the time the contract was made a permanent resident of Australia*" (emphasis added). Under subsection (7) "permanent residence" includes Australian nationality and persons whose continued presence in the country is not subject to time limitation.

The Australian legislation therefore adopts an intermediate position in the area of embassy and consular employment based on the status of the employee. Instead of imposing immunity in the case of suits by all employees at diplomatic or consular missions, whatever the rank, these provisions make an attempt to divide the employees into two groups: those in executive, policy-related positions and those in routine administrative, clerical or maintenance roles.

In the first group, immunity is absolute on the basis that such persons will almost certainly be engaged in matters of a policy-related or sovereign nature. In the second group, however, immunity will apply only where the employee is not a permanent resident of the forum. This provision is based on the fact that such employees are normally only marginally involved in the sovereign functions of the mission and so, where the employee is a permanent resident of the forum, the interest in protection of the local labour force should prevail over the need for comity.³⁴

30. I.e. "a member of staff having diplomatic rank".

31. I.e. a "member of staff having consular rank".

32. I.e. a "member ... employed in the administrative and technical service of the mission".

33. I.e. "any person employed in the administrative or technical service of a consular post".

34. One commentator has, however, criticised this provision on the basis that an employee's status is not always coincident with his or her proximity to the sovereign functions of the foreign State. There may be situations, it is argued, where immunity may be appropriate even where an employee is in the subordinate category. See Greig, *op. cit. supra* n.1, at p.563, n.8.

In the Report of the Australian Law Reform Commission on Foreign State Immunity³⁵ upon which the legislation was based, attention was also drawn to a third category of mission employees, domestic servants. It was expressly stated in the Report³⁶ that such employees should come within the general presumption of non-immunity under section 12(1), provided that, under subsection (2), they were permanent residents of Australia at the time the contract was made. It was felt by the Commission that such employees should be given as much, if not more, protection than administrative and technical staff.

In the case of embassy and consulate employment, therefore, the Australian legislation relies to some extent on three of the criteria mentioned above for resolving immunity questions. First, it relies partly on the criterion of place of employment in that absolute immunity is preserved in the case of suits by diplomatic and consular officers. However, the status of the employee is also taken into account in that all other employees at the mission may sue their employer provided that they have sufficient residential connection to the forum. In requiring a connection with the forum before such an employee can sue, the criterion of territorial nexus is used.

Both the United States and Canada have had, rather surprisingly, no judicial practice in the area of embassy and consular employment. Both States have, however, enacted legislation on State immunity which would apply to the situation. In the case of the United States, questions of State immunity are governed by the Foreign Sovereign Immunities Act 1976³⁷ and in Canada the State Immunity Act 1981.³⁸ Both statutes provide an exception to immunity for a foreign State where it has engaged in "commercial activity". Such activity is to be distinguished from that which is "public or governmental in nature". The legislative history to the US legislation states that "the employment of diplomatic, civil service or military personnel" would be public or governmental in nature but not "the employment of American citizens or third country nationals by the foreign state in the United States".³⁹ The "engagement of laborers, clerical staff or public relations or marketing agents" is also considered a "commercial activity". Given the similar terms of the Canadian legislation, these guidelines may also be applicable in respect of its provision.

A middle view therefore seems to be taken in the US legislation on the issue of granting immunity to foreign States in the context of actions arising from embassy/consular employment. The reference to "diplomatic and civil service personnel" on the one hand and "laborers and clerical

35. No.24 (1984).

36. Paras.100, 59.

37. S.1605(a)(2).

38. S.5.

39. House Report No.94-1487 as extracted in UN Legislative Series, *Materials on Jurisdictional Immunities of States and their Property* (1982), pp.107-108.

staff" on the other suggests a distinction based on the status and position of the employee. What seems certain is that all diplomatic and senior staff at such missions would be unable to bring actions (in any event, such persons would almost invariably have the nationality of the foreign State). The position of subordinate or ancillary staff such as clerks and secretaries is not clear. Where such persons have the nationality of the forum or a third State then jurisdiction would probably be upheld, but where they have the nationality of the foreign State it is arguable that immunity would still be found. The legislature appears to have considered that the United States has no interest in adjudicating upon disputes between foreign States and their own nationals, an approach which shows a concern for territorial nexus.

2. *Civil law countries*

The practice of the vast majority of European countries of the civil law tradition in regard to employment at diplomatic and consular missions now clearly supports the restrictive immunity theory. To some extent this is a legacy of the Basle Convention, which has been ratified and adopted into municipal law by the following countries: Austria, Switzerland, the Netherlands, Belgium and Cyprus.⁴⁰ The Basle Convention specifically provides for employment contracts in Article 5, which creates a presumption of non-immunity where the contract is to be performed in the forum State. Immunity is, however, restored where the employee is a national of the foreign State at the time of the proceedings or was not a national or permanent resident of the forum at the time of entering into the contract. Unlike the British legislation and its progeny, however, immunity is not expressly restored in the case of employment at consular or diplomatic missions. The general principle of non-immunity therefore applies in respect of such contracts provided that the territorial nexus requirements are fulfilled. In reality, however, because foreign States rarely admit non-nationals to their diplomatic or consular corps, it is possible that the requirement (to avoid immunity) that the employee not be a national of the employing State may have the effect of allowing routine or menial workers to sue but denying such rights to senior employees. The introduction of an implied distinction based on the status of the employee may well have been accomplished unintentionally.

The Netherlands, which ratified the Basle Convention in 1988, is an example of a State which has changed its attitude to employment contracts at diplomatic and consular missions and now embraces a policy of restrictive immunity. As recently as 1978, however, an approach of absolute immunity based on the place or location of employment was adopted. In the

40. The UK is also a party to the Basle Convention but its State immunity legislation departs significantly from the Convention in the case of employment contracts.

Gootjes case⁴¹ it was held that Belgium was entitled to immunity from a suit by a Dutch national employed in the administrative service of the Belgian consulate on the basis that a consulate was "a public body in which the state of Belgium was acting in a public capacity".

In 1985, however, another court allowed a claim to proceed by a Dutch national employed as a secretary at the Turkish Embassy.⁴² In its reasons the court stated that questions of immunity had to be resolved by determining whether the act in question was "sovereign" or "commercial". In applying this test, however, the court did not focus on the place of employment but instead placed emphasis on the status and position of the employee. Here the employee had no civil service or diplomatic status and was not in a position of responsibility and so the court concluded that the contract involved the foreign State "acting on the same footing as a private individual". Principles of territorial connection were also relied upon by the court in rejecting the plea of immunity. Here, the employee was Dutch and had been recruited in the Netherlands; the Dutch court therefore had an interest in her protection.

The most recent Dutch decision, in 1989, confirms the trend away from immunity in the case of low-level embassy employees evident in the *MK* case, despite the court holding, in the particular circumstances of the case, that the foreign State be granted immunity.⁴³ *Van Hulst* involved a Dutch national employed as a secretary in the US Embassy. However, her appointment was subject to a security clearance, which was not granted and so resulted in her dismissal. She sought compensation but the court upheld the United States' plea of immunity. Although the general customary international law rule in relation to employment contracts was that a foreign State party could not claim immunity, this rule was subject to an exception *where the foreign State terminated such a contract for work at an embassy or consulate for security reasons*.⁴⁴ Allowing a claim to proceed in such circumstances would involve the court investigating the most highly sovereign and sensitive material of the foreign State. So, the key factor for the court in recognising immunity in this case was not so much the place of employment or the status of the employee as the nature of the claim.

Switzerland is a jurisdiction in which support can also be found for a rule of restrictive immunity in the context of employment at diplomatic and consular missions. In a decision in 1984⁴⁵ an Italian national employed at

41. *Gootjes v. Kingdom of Belgium* (1978) 65 I.L.R. 372 (Local Court of Rotterdam).

42. *MK v. Turkey* (1985) 94 I.L.R. 350 (Sub-District Court of The Hague).

43. *Van Hulst*, *supra* n.13.

44. The court did not apply the provisions of the Basle Convention to this case because it involved a suit against a non-contracting party, the US. However, Art.5 was relied upon as evidence in support of the existence of a customary law rule of restrictive immunity in the context of employment agreements.

45. *S v. India*, *supra* n.8.

the Indian Embassy as a radio telegrapher and clerk was held to be entitled to bring an action for damages against his employer. Although Switzerland had ratified the Basle Convention at the time the case was decided its provisions did not directly apply in the case because India was not a party to the Convention. The court saw the question again as whether the conclusion of the contract by the foreign State was a sovereign or private act. In holding the contract to be a private act, it noted that although a diplomatic mission was a particularly "sovereign" place of employment, less weight should be given to this fact and more to the issue of the status and position of the individual employee. For the purposes of immunity, a distinction had to be drawn between the hiring of persons to senior policy posts and the recruitment of subordinate employees,⁴⁶ on the basis that the former are more likely to be involved in sensitive matters concerning the foreign State with consequent harm to that State if such an employee's claim were entertained by a local court. By contrast, in the case of junior staff, there was less harm to the foreign State in adjudication, particularly when the employee had no residential or national connection to the foreign State. The court noted that the employee in the case in question was in a subordinate role, had been recruited in the forum where he was a resident and was a national of a third State, Italy. Therefore, on the basis of the employee's status and his territorial nexus to the forum, immunity was denied.

A more recent Swiss decision continues the trend from the *S v. India* case in adopting a focus on the status of the employee in immunity determinations.⁴⁷ In this decision a plea of immunity was refused in the case of a telephone operator at the US Embassy in Geneva on the ground that the position and work of the employee were not connected with diplomatic or sovereign functions.

In Austria there have been two recent decisions which confirm that it adopts a restrictive approach to immunity in mission employment, so that generally an employee will be entitled to sue where he or she is an Austrian national and is employed in routine or low-level functions. Such an approach is consistent with its ratification of the Basle Convention. In the *British Embassy Driver Case*⁴⁸ it was conceded by an Austrian court that an Austrian national employed as a driver at the British Embassy would be entitled to sue his employer on the basis that the contract of employment had not been concluded by the foreign State in the exercise of its sovereign rights. More recently, it was held by an administrative tribunal that an interpreter employed at a foreign embassy in Vienna was entitled to bring proceedings against the foreign State for compensation for unfair

46. *Idem*, p.18.

47. *Landano v. United States* [1988] *Jahrbuch des Schweizerische Arbeitsrechts* 424, 433.

48. (1978) 65 I.L.R. 20 (Superior Provincial Court of Vienna).

dismissal as the contract of employment was a matter of private law.⁴⁹ Even more radically, another recent Austrian decision suggests that its courts may even go further and exercise jurisdiction over suits by *consular officials holding senior posts*. In the *French Consular Employee Claim*⁵⁰ a French national employed as head of the visa section was entitled to sue his employer on the basis that all contracts of employment entered into by foreign States, to be performed in the forum, are private acts. This decision represents a high-water mark in restricting the grant of immunity to foreign States in the area of mission employment.

Greek courts also appear to have taken a restrictive view of immunity claims in the context of employment contracts at embassies. In a recent decision⁵¹ it was held that a labour contract between a Greek national and a foreign embassy was subject to the jurisdiction of the Greek courts on the basis that foreign States enjoy immunity only for "sovereign not contractual acts".

In Belgium the restrictive approach also seems to have been accepted, at least in the situation where subordinate employees are involved. In one decision a court refused to grant a State immunity in the context of a suit by a Belgian chauffeur employed at a foreign embassy on the basis that the employment involved manual labour and "so was an act of ordinary affairs rather than an act of public power".⁵² This decision is consistent with the Basle Convention, even though its provisions were not applied by the Belgian court because the foreign State (Upper Volta) was not a contracting party. In a more recent decision,⁵³ again where the court was not obliged to apply the Basle Convention, a Portuguese national employed as a language teacher at the Portuguese Embassy in Brussels was allowed to bring a claim for compensation for unfair dismissal. The court's reasoning was that, under customary international law, immunity is not to be accorded in the context of contracts of employment to be performed in the forum *even where the employee had the nationality of the foreign State*. On the question whether an employee holding the nationality of the foreign State may be able to sue, the court explicitly departed from the terms of Article 5(2) of the Basle Convention. It said that the forum had an interest in protecting employees in general, without regard to nationality, particularly those engaged in subordinate roles (as in this case) and in activities only loosely related to the functions of the embassy. For Belgian courts,

49. This case is noted in (1991) 2 J. de Dr.Int. 441.

50. (1989) 86 I.L.R. 583 (Supreme Court of Austria).

51. *Areios Pagos* 1398/86, noted in (1989-90) 43 Rev. Hell. de Dr.Int. 389.

52. *Rousseau v. Republic of Upper Volta* (1983) 82 I.L.R. 118 (Labour Court of Brussels).

53. *De Guieros Magalhaes Abrantes v. Republic of Portugal* (1992) 27 Rev. Belge de Dr.Int. 698 (Labour Court of Brussels).

then, the status of the employees is the decisive issue and immunity can still be overcome where the employee holds the nationality of the employing State.

Spain is also a jurisdiction which allows suits to be brought by employees at diplomatic and consular missions. In two recent decisions the Spanish Supreme Court upheld the claims of a Spanish national employed as a driver at the Equatorial Guinean Embassy⁵⁴ and a national of a third State (i.e. not of the employer or forum) employed as a secretary at the South African Embassy.⁵⁵ In both cases the Court declared that the conclusion of a contract of employment by a foreign State to be performed in the forum was a private, not a sovereign, act. In reaching this conclusion the Court relied on Article 5 of the Basle Convention, even though Spain was and is not a party to the treaty, as indicative of a customary trend. The Court noted the presumption of non-immunity in Article 5(1) for employment contracts and the exception where the employee had the nationality of the foreign State as provided in paragraph (2).

Spanish academic writers, while agreeing with the results of these cases, have been critical of the reasoning. In their view, it is not correct to suggest, as the Court does in these two cases, that the position in customary international law is that all employees at embassies and consulates should be entitled to sue their employer. They point to legislation in other countries such as the United Kingdom, Pakistan and South Africa, to argue that employment at embassies and consulates is in a special category and requires the application of rules more protective of the foreign State's interest than in other contexts of employment.⁵⁶ As has been noted, the approach of these countries has been to impose a standard of near absolute immunity in the case of virtually all employees at missions. However, the Spanish writers consider such a position to be too pro-immunity. In their view a better approach would be to use a test which determines immunity on the basis of the status of the employee:⁵⁷

In our view it will be necessary to focus on the rank of the employee. The position obviously will not be the same in the case of a person employed as a domestic servant or forming part of the administrative or technical staff, performing secretarial duties, as in the case of a person exercising the prerogatives of public power or involved in sovereign activities.

In essence, then, the authors propose a middle view between holding that all employees at diplomatic or consular missions be unable to sue

54. *EBM v. Equatorial Guinea* (10 Feb. 1986), extracted in A. Chueca Sancho and J. Diez-Hochleitner, "La Admision de La Tesis Restringida de Las Inmunidades del Estado Extranjero En La Reciente Practica Espanola" (1988) 40 *Rev. Espanola de Derecho Int.* 7, 10.

55. *DA v. Republic of South Africa* (1 Dec. 1986) extracted in *idem*, p.12.

56. *Idem*, pp.28-30.

57. *Idem*, p.29 (my translation).

their employers and the Basle Convention approach which allows any employee, not a national of the foreign State but a resident of the forum, to bring an action. This position would equate to the Australian and US positions referred to above. It is significant that in its most recent decision on the issue, the Supreme Court of Spain has again refused to uphold a plea of immunity by a foreign State in the context of an employment dispute at a diplomatic or consular mission—this time involving an American national employed as a secretary at the South African Embassy.⁵⁸ The exact basis of the decision is not clear but the result would be consistent with a test based on the status of the employee.

Italy is a jurisdiction in which there has been a very recent movement towards relaxing immunity in the context of employment at diplomatic and consular missions, although its practice remains inconsistent. Apart from being one of the few jurisdictions with scholarly writing in the area,⁵⁹ Italy has the greatest amount of judicial practice. However, it has no immunity legislation nor is it a party to the Basle Convention. In the context of employment at missions Italian courts, until recently, invoked the *jure imperii/jure gestionis* test to assess whether the employment relationship was a private or a public act.⁶⁰ In applying this test Italian tribunals seem to have adopted a similar approach to the common law countries mentioned above (Ireland and New Zealand) in giving primary emphasis to the place of employment. Immunity has therefore been recognised in all cases of employment at an embassy or consulate with the exception of manual or temporary workers engaged in activities extraneous to the organisation of the mission, such as local contractors providing services. Certainly no distinction is drawn between senior or diplomatic officials and other, more subordinate employees such as clerical staff. Little regard, either, seems to have been paid to the nationality of the employee (in particular that he or she may have been an Italian).

So, immunity has been granted to foreign States from actions for compensation by Italian nationals employed as:

- (1) an inspector of luggage of emigrants from Italy at the American Consulate;⁶¹
- (2) a "disinfector" of emigrants from Italy at the same consulate;⁶²
- (3) an "assistant" at the Brazilian Embassy;⁶³

58. *Abbott v. Republic of South Africa* referred to in the Proceedings of the 66th Conference of the ILA (1994), p.470.

59. See in particular L. Sbolci, *Controversie di Lavoro con Stati Stranieri e Diritto Internazionale* (1987).

60. Italian courts are authorised under Art.10 of the Constitution to apply principles of customary international law in domestic cases.

61. *Calvaruso v. Byington* (1928) in Hackworth, *Digest of International Law IV*, p.731.

62. *Mazzucchi v. American Consulate* (1931) in *Annual Digest of International Law Cases* (1931-2) Case No.186.

63. *Velloso v. Borla* (1979) 65 I.L.R. 328 (Court of Cassation).

- (4) a secretary, accountant and switchboard operator at the Romanian Commercial Office (which was an office of the Embassy);⁶⁴
- (5) a clerk at the Panamanian Consulate whose responsibilities involved writing and translating letters;⁶⁵
- (6) a commercial officer at the British Consulate involved in promoting the sale of British goods in Italy;⁶⁶
- (7) a chancery usher at the West German Embassy.⁶⁷

It is noteworthy that, in the case of the employees in (1) to (6), the action brought was for unfair dismissal. In the case of (7), the chancery usher, the claim was for an unpaid pension entitlement. The type of claim was therefore different, although the courts, in their reasoning, placed no importance on the distinction.

Recently, however, this approach focusing on the context of employment has come under attack by a number of Italian scholars who have argued that, in order truly to implement a doctrine of restrictive immunity, greater attention should be paid to the status of the employee within the institution employing him or her and to the nature of the claim brought by the employee.⁶⁸ The view of these writers is that Italian courts have maintained a policy of almost absolute immunity in the area of employment contracts, particularly where diplomatic and consular missions are concerned. Sbolci, in particular, has argued that application of the new criteria is required to give appropriate weight to the interest of the employee in immunity cases.⁶⁹ The idea of focusing on the status of the employee has already been considered above and, in essence, involves the court or legislature drawing a distinction between senior officials in official or policy-related positions and subordinate or ancillary staff, such as clerical or secretarial staff.

The idea of focusing on the nature of the claim, however, is new in that it involves drawing a distinction between the economic and non-economic aspects of an employment dispute. Where an employee's claim is solely related to his or her wage or pension entitlement, for example, there can be no question of intrusion into the sovereign activities of the foreign State. Where the claim relates to the merits or otherwise of an act of dismissal, however, entertaining the claim may well implicate a State's sovereignty. This would be particularly the case where an employee is seeking

64. *Luna v. Socialist Republic of Romania* (1974) 65 I.L.R. 313 (Court of Cassation).

65. *Rubin v. Consul General of Panama* (1977) 77 I.L.R. 593 (Court of Cassation).

66. *Bulli v. Foreign and Commonwealth Office of the United Kingdom* (1981) 65 I.L.R. 343 (examining magistrate).

67. *Panattoni v. Federal Republic of Germany* (1987) 87 I.L.R. 42 (Court of Cassation).

68. See in particular L. Sbolci, "Jurisdictional Immunity of Foreign States with Regard to Employment" (1980-81) 5 Italian Y.I.L. 227, 238-239; G. Gaja, "Quale immunità degli Stati Esteri per le controversie di lavoro?" [1991] Riv. di Dir. Int. 920; B. Conforti, *Diritto Internazionale* (4th edn, 1992), pp.222 *et seq.*

69. Sbolci, *idem*, p.238.

reinstatement. It must be said, though, that given that the vast majority of cases involve suits for unfair dismissal, either seeking compensation or (less commonly) reinstatement, the practical application of this principle will be limited, although it would have assisted the chancery usher above.⁷⁰

Nevertheless, in three recent Italian cases involving employment contracts at a consulate or embassy, the Court of Cassation chose to rely on both of these "new" criteria. In the first decision⁷¹ an Italian national employed as an administrative assistant at the British Consulate in Naples was held entitled to a transfer to a higher wage classification owing to the functions he was performing in the Consulate. In the second decision⁷² an Italian national employed as a secretary at the Norwegian Embassy was held entitled to a similar wage increase. In the third decision⁷³ a Sri Lankan national employed at the Embassy of Zaire as a chauffeur and interpreter was allowed to bring a claim for unpaid wages. In all three cases the Court noted that the employee carried out functions of an ancillary or secondary character and that the claim concerned only the economic aspects of the employment relationship; it did not involve any investigation into the merits of the employee's dismissal. A significant trend in Italian practice toward restricting immunity in the context of mission employment therefore seems to have appeared.⁷⁴

C. *Practice of International Bodies in the Area of Embassy and Consulate Employment*

In July 1991 the International Law Commission ("the ILC") completed its work in relation to State immunity and adopted, on second reading, a number of draft articles. The articles have now been presented to the General Assembly of the United Nations for possible adoption as an international convention.⁷⁵ The ILC Draft Articles included a specific provision for employment contracts in Article 11. Similar to Article 5 of the Basle Convention, it provides for a general presumption of non-immunity when the contract is to be performed in the forum and restores immunity when the employee is neither a national nor resident of the forum at the time the contract was made (subparagraph (2)(c)) or was a national of the foreign State at the time of proceedings (subparagraph (2)(d)).

70. *Panattoni*, *supra* n.67.

71. *United Kingdom v. Toglia* [1991] Riv. di Dir. Int. Privato e Processuale 687 (Court of Cassation).

72. *Norway v. Quattri* [1991] Riv. di Dir. Int. 993 (Court of Cassation).

73. *Republic of Zaire v. Sendanayake* [1992] Riv. di Dir. Int. 402 (Court of Cassation).

74. However, it should be noted that in a recent decision of the Court of Cassation the traditional reasoning based on the sovereignty of the workplace was relied upon to reject a claim by an employee for transfer to a higher wage classification. See *Libyan Arab Jamahiriya v. Trobbiani* [1990] Riv. di Dir. Int. 402.

75. (1991) II(2) Y.B.I.L.C. 13.

However, unlike Article 5, immunity is also imposed where "the employee has been recruited to perform functions closely related to the exercise of governmental authority" (subparagraph (2)(a)).

Although there is no explicit reference to employment at diplomatic or consular missions in these provisions, the commentary indicates that subparagraph (2)(a) was intended to apply to such a context and that all employees at such missions would be precluded from bringing suit on the basis of State immunity. An absolutist approach, basing immunity entirely on the place of employment, was therefore the intention in respect of mission employees, with no allowance to be made for the status of the employee or his or her nationality or residence. This position can be seen from the examples of employees considered to "exercise functions closely related to the exercise of governmental authority": "private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to state security or basic interests of the state ... [as well as] officials of established accreditation".⁷⁶ The intention to exclude all staff at missions from the right to sue their foreign State employer is also made clear from comments by the Special Rapporteur of the ILC where he said that subparagraph (2)(a) was aimed at "exclud[ing] administrative and technical staff of a diplomatic mission from the application of paragraph (1)".⁷⁷

Pressure to include the subparagraph had come from a number of representatives of developing countries who felt that, without its inclusion, they would have been exposed to a plethora of suits by employees of their missions who held the nationality of the forum under paragraph (1). These representatives noted that developing countries, unlike developed countries, did not have the resources to employ their own nationals in their overseas missions and had to rely to a much greater extent on locally recruited labour, which meant that they were more vulnerable to actions. Accordingly, a clause providing for immunity from suit in the context of employment at missions was required.⁷⁸

The Committee on State Immunity of the International Law Association ("the ILA") adopted in 1982 its Draft Convention on State Immunity ("the Montreal Draft") which included a specific provision dealing with contracts of employment: Article IIIC. The provision was similar to Article 5 of the Basle Convention in that it relied on a basic presumption of non-immunity (where the contract was to be performed in the forum) which was rebutted where the employee had the nationality of the foreign

76. *Idem*, pp.42-43.

77. *Idem*, p.34.

78. See the comments of Chief Akinjide, Balanda and Mahiou in (1984) I Y.B.I.L.C. 323-324.

State at the time the proceedings were brought or was not a resident or national of the forum State at the time the contract was entered into. Also like Article 5, Article IIIC made no specific reference to employment at embassies or consulates, the drafters having apparently intended that the above territorial criteria be used to resolve immunity in this instance as well.

However, at the most recent conference of the ILA in 1994, in which the work on State immunity was concluded, an amendment was made to Article IIIC to add a clause (4), providing for immunity to be granted where "the employee was appointed under the public (administrative) law of the foreign state such as, *inter alia*, members of the mission, diplomatic, consular or military staff".⁷⁹ In the explanatory commentary to the amendment, the Committee stated that it wished "to make clear that the employment relationship of *any and all* diplomatic and consular staff and *other members of the mission* should be immune from the jurisdiction of the courts of the forum state".⁸⁰ It seems, therefore, that the ILA has opted for the approach of *de facto* absolute immunity in the case of all employment at missions similar to the British legislation and its progeny referred to above.

The International Law Institute has also adopted a resolution on State immunity at its 1991 Conference which provides, in Article 2(2)(c), a general presumption of non-immunity for foreign States in respect of employment contracts.⁸¹ However, under Article 2(3)(d) this presumption is qualified by the direction that the courts of the forum should not "assume competence to inquire into the content or implementation of the foreign, security and defence policies of the foreign state". Such a provision is of potentially very wide scope and could easily be interpreted to embrace all employees at a diplomatic or consular mission. It is not clear, however, from the deliberations of the Institute whether this conclusion was intended by the text.

On balance, then, the work of international bodies tends to support the view that local jurisdiction should be completely excluded in the case of suits by employees at diplomatic and consular missions. As to the position overall, it seems fair to say that there is an almost equal split between countries favouring absolute immunity and those supporting a restrictive approach. However, even among those which take a restrictive view there is no single form of reasoning which is followed. Some States rely on the status of the employee, drawing a distinction between those in senior and

79. ILA Proceedings 1994, *supra* n.58, at pp.24–25.

80. *Idem*, p.495 (emphasis added).

81. The resolution was passed by 29 votes to 2 with 17 abstentions; see (1991) 64(II) Ann. Inst. Dr. Int. 214, 276–278.

those in subordinate positions, while others focus on the connection of the employee to the forum (for example, whether he or she is a resident or national). Still others concentrate on the nature of the particular claim brought by the employee; in particular whether it will involve the court in adjudicating upon sensitive questions of employment policy of a foreign State or whether it is simply about amounts of money. Other States restrict immunity still further by suggesting that all contracts of employment at diplomatic or consular missions, whatever the status or nationality of the employee involved, should be subject to the jurisdiction of the local courts.

D. Claims by Contractors for Services Rendered to a Diplomatic or Consular Mission

So far we have considered the situation of the rights of an employee who is physically located at an embassy or consulate. However, there are often individuals employed by a mission as contractors to perform occasional services to the mission, such as repairs. Would it be possible for a State to rely on the principles of State immunity to defeat a claim for payment by such a contractor? The overwhelming majority of State practice considers that immunity cannot be relied upon in this context. For example, individuals have been allowed to bring claims against the Iranian Embassy for recovery of payments for repairs to the Embassy⁸² and the US Mission for unfair dismissal in relation to the organisation of an exhibition at the Mission.⁸³ In addition, the legislative practice of many States denies immunity to foreign States in respect of contracts for the supply of services.⁸⁴

E. The Relationship Between State Immunity and Diplomatic/Consular Immunity in the Context of Employment Contracts

So far we have been considering the situation where a foreign State has entered into a contract of employment with an individual to work at an embassy or consulate and the employee seeks to bring an action against the State employer. Suppose, however, that a domestic servant, for example, entered into a contract of employment with a consular officer or diplomat *personally*, rather than with the foreign State itself, and then seeks to

82. *Claim Against the Empire of Iran Case* (1963) 45 I.L.R. 57 (Federal Constitutional Court of Germany); see also *Singh v. Union of India* (1987) 27 Indian J.I.L. 96 where the Supreme Court of India allowed a similar claim to proceed against the Algerian Embassy.

83. *Tsakos v. United States* (1972) 75 I.L.R. 78 (Labour Tribunal of Geneva).

84. See e.g. State Immunity Act 1978 (UK), s.3(2)(a); State Immunity Ordinance 1981 (Pakistan), s.5(3)(a); Foreign States Immunities Act 1985 (Australia), s.11(3)(a); State Immunity Act 1979 (Singapore), s.5(3)(a) and Foreign Sovereign Immunity Act 1981 (South Africa), s.4(3)(a). A contract to supply services is also very likely to be "commercial activity" under the US and Canadian legislation.

bring an action against *the particular officer*. In this situation the traditional view is that principles of State immunity do not apply as the defendant is not a foreign State.⁸⁵ What is involved here is a question of diplomatic or consular immunity. The problem with this conclusion, however, is that the coverage of immunity for diplomats and consular officials is possibly wider than that for the foreign State which they represent, and this has led some commentators to argue that the doctrines should be amalgamated into one test.⁸⁶

For example, Article 31(1)(c) of the Diplomatic Relations Convention provides that a diplomat shall be immune from the civil jurisdiction of the receiving State except in the case of "an action relating to any professional or commercial activity exercised by the diplomat in the receiving state outside his official functions".⁸⁷ Such a provision effectively acts as a form of absolute immunity from suit for diplomats because the conclusion of a contract of employment with a domestic servant would rarely be considered an act "outside the officer's official functions". This conclusion receives support from the recent US decision of *Talbion v. Mufti*,⁸⁸ where an action by a Filipino domestic servant against a Jordanian diplomat failed. Those favouring amalgamation argue that, unless a test of *de facto* absolute immunity is applied in the context of a suit by an employee at a mission against his or her foreign State employer (which, as has been noted above, is the case in only a few jurisdictions), the scope of immunity granted to the State would be narrower than that granted to a diplomat or consular officer employer and so would be discriminatory as between employees. It is illogical, it is argued, that two employees engaged in virtually the same job (for example, a domestic servant) may be subjected to different legal standards merely by accident of employer, and so the principles of State and diplomatic/consular immunity should be merged, at least in the context of civil claims.⁸⁹

The State Immunity Committee of the ILA recently considered this issue but decided that the two regimes, of State immunity on the one hand

85. *Portugal v. Goncalves* (1982) 82 I.L.R. 115 (Civil Court of Brussels); *Talbion v. Mufti* 877 F. Supp 285 (ED Va. 1995).

86. ILA Proceedings 1994, *supra* n.58. See e.g. the views of J. Crawford at p.479, C. Dominic at pp.479-480, H. Van Houtte at pp.480-481 and J. Salmon at pp.481-482.

87. Art.43 of the Consular Relations Convention is to the same effect.

88. *Supra* n.85; see also *Goncalves*, *supra* n.85, where a Belgian court refused to allow a translator to sue his employer, an accredited diplomat at the Portuguese Mission, again on the basis that the conclusion of the contract of employment had been within the diplomat's "official functions".

89. Another problem is that national courts have, on occasions, confused the doctrines of State and diplomatic/consular immunity. E.g. in the context of a suit by an Italian national employed as the commercial secretary of the Belgian Consul-General in Milan, the Italian Court of Cassation applied the principles of both State and consular immunity to resolve the claim even though the State of Belgium was not a party to the litigation; see *Esposito v. Belgian Consulate* (1987) 7 Italian Y.I.L. 298.

and diplomatic and consular immunity on the other, should remain distinct. In the view of the majority of the Committee⁹⁰ the rationales of the two areas were different and so it was not relevant if the scope of diplomatic and consular immunity were, for example, wider than State immunity. The aim of diplomatic immunity is to allow the agent to exercise functions without any restraint or coercion on the part of the receiving State and so a principle of absolute immunity is appropriate. The basis of State immunity, on the other hand, is to prevent a State's sovereign functions being subjected to the scrutiny of another State's courts. Interestingly, however, as noted above, the ILA did amend its provision on employment contracts to provide for a form of absolute immunity for States from suits by employees of missions. In effect, then, the ILA has achieved an amalgamation of State and diplomatic immunity (at least in terms of result) while maintaining that such a conclusion was not warranted in principle.

IV. CLAIMS BY EMPLOYEES AT MILITARY ESTABLISHMENTS

EMPLOYMENT at military establishments is an area where national practice is similarly split but, on balance, probably favours the view that immunity from jurisdiction should apply in the case of suits by both military personnel and civilian employees working on military bases operated by the foreign States in the forum. As with diplomatic and consular missions, the major reason relied upon to uphold immunity in the case of military establishments is their sovereign character. A foreign State's conduct and organisation of its military institutions are areas in which no other States should intrude. The interest of the foreign State in having its sovereignty respected takes precedence over the interest of the forum in enforcing its own labour laws or protecting its own nationals or residents.

In a number of Italian decisions courts have declared that immunity should be recognised in the case of suits by civilian employees of military establishments even where they are nationals or residents of the forum. For example, jurisdiction was declined in an action brought by an Italian citizen in respect of his employment by a US military base established in Italy in accordance with the NATO Treaty⁹¹ and in respect of a suit by an Italian national employed as a lift attendant and messenger at a US naval base in Italy.⁹² The court again concluded in both cases that the United States, in establishing and maintaining the bases, had acted in a sovereign capacity and so all its activities there were non-justiciable.

90. ILA Proceedings 1994, *supra* n.58, at p.482. See in particular the views of Lady Fox and P. Nygh at p.480 and H. Hillgenberg and M. Leigh at p.481.

91. *Department of the Army of the United States v. Savellini* (1956) 23 I.L.R. 201 (Court of Cassation).

92. *Francischiello v. Government of the United States* (1959) 28 I.L.R. 158 (Tribunal of Naples).

A similar approach was taken by a West German court in the *Immunity of United Kingdom from Jurisdiction* decision.⁹³ In that case a German civilian was employed as a haulage contractor by the British army of occupation in Germany to enter the Soviet zone and recover arms and military plans. He sought damages from the British army for injuries suffered but the court upheld the plea of immunity on the basis that the army was engaged in the sovereign functions of military intelligence.

Practice also supports the view that suits by military personnel, even where they hold the nationality of the forum, should not be entertained by a local court. In *Friedar v. Government of Israel*⁹⁴ a US court held that a US citizen was unable to sue the Israeli government for injuries suffered while serving in the Israeli army. The court said that his service in the army did not constitute "commercial activity" within the terms of the US Foreign Sovereign Immunities Act 1976 because government recruitment and training of an army were sovereign activities as only governments could conduct them. This decision also relied on the legislative history to the US statute, in which it was stated that the employment of military personnel was "public or governmental in nature". In the case of military personnel, immunity would seem to be based on the sovereign context of employment.

In the British legislation on State immunity (and other national statutes which adopted its provisions) no specific provision is made for employment at a military establishment, which suggests that such employment falls within the general principle of non-immunity in section 4(1) of the State Immunity Act 1978.⁹⁵ However, in each of these statutes it is also provided that the terms of the legislation do not apply to proceedings relating to armed forces of a foreign State while present in the forum (section 16(2) of the British Act).⁹⁶ The effect of this provision is to exclude any suit by an employee of such forces, even a national of the forum, from the scope of the legislation. Presumably, however, an employee of foreign armed forces operating outside the forum, whether civilian or military, would be able to bring an action against his or her employer, provided that the employment contract and the employee were sufficiently territorially connected to the forum.

In the context of suits by employees of visiting forces in the forum, however, any question of State immunity may also be affected by application of the principles of any relevant treaty which had been entered into between the forum State and the State of the visiting forces. In the case of

93. (1957) 24 I.L.R. 207 (Court of Appeal of Schleswig).

94. 614 F. Supp 395 (SDNY 1985).

95. This is the conclusion drawn by academic writers. See Badr, *op. cit. supra* n.1, at p.94. Art.5 of the Basle Convention is identical to the British provision on this point.

96. For the equivalent provision in other jurisdictions, see the Singapore State Immunity Act 1979 (s.19(2)(a)) and the Canadian State Immunity Act 1982 (s.15).

Europe there does exist the Agreement Regarding the Status of Forces to the North Atlantic Treaty 1951 ("SOFA"), which has been enacted into the domestic law of most NATO countries, although not the United Kingdom. The provisions of SOFA divide employees of visiting armed forces into three categories: military, civilians having the nationality of the employing State and local civilian workers, with the courts of the forum having jurisdiction over claims brought by the local employees. Typically, employees in the third category are engaged in routine or menial duties. Italian courts have accordingly upheld jurisdiction in the case of claims brought by Italian nationals employed at US military bases as firemen⁹⁷ and wage controllers.⁹⁸

In the area of military personnel, however, particularly where the employee is a foreign national, local courts remain reluctant to assume jurisdiction. In the recent case of *Littrell v. United States (No.2)*⁹⁹ an English court refused to allow a US serviceman to sue his employer, the US government, for medical negligence caused by another serviceman at a US military base hospital in England. Because the United Kingdom had not enacted SOFA into its law, the court had to apply the principles of customary international law to determine the immunity question. In granting the immunity, the court relied strongly on the fact that the context in which the acts took place was the operation by the United States of an air force base, which is "about as imperial an activity as could be imagined".¹⁰⁰ Also significant was the fact that the suit involved only members of the visiting forces and not nationals of the forum.

The practice of international bodies seems to support the view that employment at military establishments is an immune activity. As discussed above, the ILC grants immunity where the employee is "recruited to perform functions closely related to the exercise of governmental authority".¹⁰¹ The commentary to such provision suggests that among such employees would be "private secretaries, code clerks, interpreters, translators and other persons entrusted with functions relating to state security or basic interests of the state".¹⁰² Such an inclusive description suggests that all military and most civilian employees at a base would be barred from suit, apart from possibly those engaged as contractors performing occasional services, such as repairs, at the base. By contrast, the ILA Draft

97. *Bruno v. United States* (1977) 65 I.L.R. 316 (Court of Cassation).

98. *United States v. Gereschi* (1977) 77 I.L.R. 598 (Court of Cassation). These cases may be contrasted with a recent decision of the District Court of Tokyo where a Japanese civilian employed by the US Armed Forces in Japan was held unable to sue his employer for compensation on the basis that the decision to dismiss him was an act within the "official duties" of the employer; see *X v. Y1 and Y2* (1992) 35 Japanese Ann. Int. L. 151.

99. [1995] 1 W.L.R. 82 (English Court of Appeal).

100. *Idem*, p.95 (per Hoffmann LJ).

101. Draft Art.11(2)(a).

102. See *supra* n.76.

explicitly refers only to "military staff" as being within the scope of immunity, which may suggest that all civilian employees are to be allowed to sue.¹⁰³

On balance, overall, the customary law position would be that local jurisdiction would be likely not to exist over military personnel, whatever their nationality. However, the position with respect to civilian employees of a military establishment, particularly where they are nationals or residents of the forum, is unclear.

V. CLAIMS BY EMPLOYEES AT OTHER STATE-OWNED ENTERPRISES

IN workplaces other than diplomatic and consular missions and military organisations, legislative and judicial practice now shows a general trend towards withholding immunity from foreign States generally on the basis that the context of employment is insufficiently "sovereign". However, as with the case law in the diplomatic and consular field, at times courts have also supported their conclusions on the immunity question in this area by reference to reasons other than the sovereignty (or lack of sovereignty) of the workplace, such as the status of the employee claimant or the extent to which the nature of the claim impacts upon a State's sovereignty. States which have enacted legislation on State immunity have, almost without exception, additionally made a finding of non-immunity dependent on there being an adequate territorial nexus between the forum and (i) the contract of employment and (ii) the employee in respect of a particular action.

Apart from diplomatic and consular missions and military establishments, foreign State enterprises exist in a number of forms, the common thread being that the entity in question is owned by the State.¹⁰⁴ Among the other common foreign State enterprises may be included institutions run by foreign States to carry out certain policy aims, such as information and commercial offices and cultural agencies, educational bodies such as schools and universities and, finally, trading corporations.

Information and cultural offices, because they often fulfil governmental purposes of the State, are close to the borderline in terms of sovereign or commercial status while trading corporations are often indistinguishable from organisations in the private sector, their only connection with the foreign State being in terms of ownership of capital. However, most overseas offices of a foreign State are, in general, no longer accorded immunity

103. See *supra* n.79.

104. Most national legislation on State immunity (e.g. in the UK, US and Canada) distinguishes between the foreign State itself and "separate entities" or "agencies" of the foreign State. Although such entities are capable of being sued in their own right, they are also entitled to claim the immunity of the foreign State, on the basis of their ownership by the State. However, their often close resemblance to entities in the private sector has made some courts reticent about granting them immunity.

from suit in employment disputes, according to the majority of judicial practice.¹⁰⁵ Again the reasons for granting or denying immunity are varied. Sometimes the nature of the workplace is emphasised; in other decisions the status of the employee.

So, in the Netherlands, an Italian clerical worker at the Italian Cultural Institute, a body administered by the Italian government, was held entitled to bring proceedings for reinstatement.¹⁰⁶ In its reasons, the court found that the conclusion of the contract of employment by an entity such as the Institute was a private law transaction and not a "typically governmental act". The court's reasoning seemed to focus on the *nature of the workplace* rather than the *status of the employee*.

Similarly, in Belgium, it has been held that a Portuguese national employed at the Portuguese Commercial Office in Brussels could sue for damages for wrongful dismissal¹⁰⁷ on the basis that the act of entering into such a contract by the Office was private and commercial and not an exercise of public power.

In Italy, although there was an early line of authority which suggested that employees of trade delegations or commercial bureaux could not sue their employer,¹⁰⁸ in more recent decisions such suits have been allowed. So, it has been held that an Italian national employed as a clerk in routine administrative duties at the Bulgarian Commercial Bureau could sue her employer on the basis that her duties were of a routine administrative nature and that she was not in an official position.¹⁰⁹ The status of the employee was therefore the decisive factor.

In the context of cultural institutions, the case law of Italian courts has not been consistent on the issue of whether immunity should be accorded. In one decision an Italian national employed at the Hungarian Academy in Rome was held to be entitled to sue his employer.¹¹⁰ The Academy was responsible for promoting Hungarian painting and sculpture in Italy. The court stressed the fact that although the Academy had sovereign tasks the employee was not in an official position, being responsible only for maintaining the premises and paying the domestic staff. The status of the

105. Cf. the decision of the Supreme Court of Poland in *Maria B v. Austrian Cultural Institute* (1987) 82 I.L.R. 1 where immunity was accorded to the Institute on the basis that Austria granted Poland reciprocal immunity before its courts. Given the established trend in Austria towards restrictive immunity, this conclusion seems mistaken.

106. *BV v. L'istituto Italiano di Cultura per i Paesi Bassi and the Republic of Italy* (1990) Neth. Y.I.L. 447 (District Court of Amsterdam). Although the Netherlands is a party to the Basle Convention its provisions could not be applied against Italy, a non-contracting State.

107. *Castanheira v. Portugal* (1980) 82 I.L.R. 100 (Labour Court of Brussels). Again, Belgium is a party to the Basle Convention but Portugal is not, so its provisions were not applied.

108. *Tani v. Soviet Trade Delegation* (1953) 15 Ann. Digest and Report of Public Int. Law Cases 141.

109. *Parravicini v. Commercial Bureau of the People's Republic of Bulgaria* (1969) 65 I.L.R. 282 (Tribunal of Milan).

110. *Hungarian People's Republic v. Onori* (1956) 23 I.L.R. 203 (Court of Cassation).

employee was therefore the key factor in denying immunity. More recently, however, a dual Danish and Italian national employed by the Danish Cultural Institute as a secretary was prevented from seeking compensation arising out of her dismissal.¹¹¹ The view of the court was that the Institute exercised sovereign functions of the Danish State in that its mission was to spread knowledge of Danish life and culture throughout the world. In effect, then, a cultural institute was placed on the same footing as a military base or an embassy, a result which does seem at odds with the preponderance of State practice in the area.

However, in the context of a purely political office which is engaged in work very similar to, if not indistinguishable from, that of an embassy or consulate (such as the gathering of sensitive information for a foreign State), two decisions, one from Belgium and the other from Italy, suggest that immunity would also be recognised. Both cases involved persons employed as assistant librarians at the US Information Agency, one a Belgian national¹¹² and the other a US citizen,¹¹³ who were denied the right to sue for compensation for unfair dismissal. According to the courts, the important factor in both decisions was that the Information Agency was engaged in sovereign activities of the American State under the direct control and supervision of the State Department. Its director was also appointed by the US President. It mattered not that a person employed as an assistant librarian was in an administrative rather than executive position, because of the highly sovereign environment in which she worked. This approach is reminiscent of the absolute immunity view expressed in the diplomatic and consular mission cases. Overall, then, it seems that political offices may be in a special immune category, similar to diplomatic and consular missions.¹¹⁴

However, near-universal consensus seems to have been reached that immunity cannot be claimed in the context of employees' actions against State-funded educational institutions. In Austria it was held that an Austrian national was entitled to bring suit for wrongful dismissal against an Indonesian State-owned university after his contract was terminated by government decree.¹¹⁵ The court held that the conclusion of a contract to teach at a university was a private act not giving rise to State immunity and suggested that the context of employment (being analogous to a private institution) was the main basis for reaching this decision. Likewise, a Dutch court allowed a claim for salary arrears by a Portuguese national

111. *Danish Cultural Institute v. Hansen* (1979) 65 I.L.R. 325 (Court of Cassation).

112. *De Decker v. United States* (1956) 23 I.L.R. 209 (Court of Appeal of Leopoldville).

113. *De Ritis v. United States* (1971) 65 I.L.R. 283 (Italian Court of Cassation).

114. Further support for this principle comes from a 1958 Swedish decision in which the Soviet Union was granted immunity in a suit for unfair dismissal by a Swedish translator employed at the Soviet Information Office; see UN Legislative Series, *supra* n.39, at p.603.

115. *Neustein v. Republic of Indonesia* (1958) 65 I.L.R. 3 (Supreme Court of Austria).

who had been employed by the Portuguese Ministry of Education as a teacher at the Portuguese School of Amsterdam to proceed,¹¹⁶ on the basis that the process of hiring teachers was the same in State-owned schools as it was in private institutions. No reference was made to the fact that the employee had the nationality of the employing State.

Italian courts have also allowed claims to be brought by employees of educational institutions, again without regard to the nationality of the worker. For example, a French national employed to study the vocational and academic training of pupils at a State-funded high school in Italy was entitled to sue for reinstatement,¹¹⁷ on the basis that she was not a member of the French public service and the school was not an entity pursuing sovereign objectives of the French State. It was, in fact, indistinguishable from a private school. In reaching its decision on immunity, the court therefore relied on both the private nature of the employer and the relatively insignificant status of the employee.¹¹⁸

There have been surprisingly few European cases involving employees of State-owned trading corporations but this is probably because such employment contracts would be considered private acts. This observation is vindicated by a French decision in which a French national company director was granted jurisdiction to sue his employer, the SNTA, an Algerian State-owned company, on the basis that the contract was private.¹¹⁹

In the legislative practice on State immunity, no specific reference is made to cultural, political or economic institutions of a State, educational bodies or trading corporations. In the Basle Convention on State Immunity, however, as well as in the legislation of a number of States (for example, the United Kingdom, Singapore and Pakistan), a distinction is drawn between entities of a foreign State "established for commercial purposes" in the forum State and those which are not.¹²⁰ However, the difference in

116. *Portugal v. De Sousa* (1981) 94 I.L.R. 314 (District Court of Amsterdam).

117. *Mallaval v. French Ministry of Foreign Affairs* (1974) 65 I.L.R. 303 (Examining Magistrate of Rome).

118. In a more recent decision an Italian court rather dubiously granted immunity to the same school in a suit by an Italian national employed as a teacher merely on the basis that the school was publicly funded and that its financial management was controlled by the French Treasury. A finding of immunity based on these criteria seems, however, to extend the scope of protection for foreign States too widely and is inconsistent with other practice on educational institutions. See *Republic of France v. Jacuzio* (1987) 87 I.L.R. 53.

119. *Société Nationale des Tabacs et Allumettes v. Chaussois* (1969) 65 I.L.R. 44 (Court of Cassation). There were also a number of Italian cases dating from the 1930s in which Italian employees were allowed to bring suits against foreign State-owned railway companies; see Sucharitkul, *op. cit. supra* n.1, at p.322.

120. One writer has suggested that an information service of a government in which no bookings were taken or fees charged would not be an office "established for commercial purposes"; see Lewis, *op. cit. supra* n.1, at p.50. In *Gamal-Eldin, supra* n.18, it was held that a medical office attached to the Egyptian Embassy in London was not "established for commercial purposes".

treatment between commercial and non-commercial organisations is only in terms of the territorial nexus required for a claim by an employee to be brought, with an employee of a commercial entity operating in the forum having a lesser burden to satisfy.

For example, under Article 5(1) of the Basle Convention the general principle is that there is no immunity under a contract of employment to be performed in the forum. Immunity is restored where the employee is a national of the employing State at the time of suit (Article 5(2)(a)) or is neither a national nor habitual resident of the forum at the time of entering into the contract (Article 5(2)(b)). Under Article 5(3), however, where the work is done for an office or agency, engaged in the same manner as a private person in an industrial, commercial or financial activity in the territory of the forum, then subparagraphs (2)(a) and (2)(b) do not apply unless the employee was a habitual resident of the foreign State at the time of entering into the contract.

A similar approach has been taken in section 4 of the UK State Immunity Act with regard to relaxing the territorial nexus requirements for commercial entities operating in the forum. However, the British legislation goes further in extending the general principle of non-immunity in section 4(1) to encompass contracts of employment "made or to be partly performed" in the forum provided that the employee satisfies the same territorial criteria laid down in Article 5(2)(a) and (b) of the Basle Convention. The effect of this extension is to grant a British national, locally recruited but employed abroad with a foreign State entity, rights to sue his or her employer.¹²¹ This provision has been adopted in the legislation of Singapore¹²² and Pakistan.¹²³

In Australia and South Africa, however, no distinction has been drawn between commercial and non-commercial State employers, but the British extension of non-immunity to contracts made in the forum has been adopted with similar territorial link requirements to be satisfied by the employee.¹²⁴ Relevant to the issue of commercial and non-commercial

121. In the parliamentary debates on the British legislation it was emphasised that a large number of British nationals are employed abroad "by reason of their special scientific or technological knowledge or administrative capability ... particularly in less developed countries ... but [apart from their nationality] their only link with the United Kingdom is the fact that they have been recruited here". Adequate protection of such persons required that they be allowed to sue their employer merely when their contract of employment has been made in the forum. See speech of Baroness Elles, *H.L. Hansard*, Vol.389, cols.1512, 1513 (16 Mar. 1978). Such a principle was also supported because it accorded with the English Rules of Court as to when a court may assume jurisdiction; see speech of Lord McCluskey, *idem*, col.1513.

122. State Immunity Act 1979, s.6.

123. State Immunity Ordinance 1981, s.6.

124. For South Africa, see Foreign Sovereign Immunity Act 1981, s.5. In the case of the Australian provision (s.12 of the Foreign States Immunities Act 1985) the nexus required to be satisfied by the employee is arguably relaxed still further. Under para.(3) the employee need show only that, at the time the contract was made, he or she was not a national of the

employers, however, there is an Australian case decided under the pre-statutory law of State immunity. In this decision it was held that an Australian national employed as a pilot with the State-owned airline of Nauru was entitled to bring an action for breach of his employment contract.¹²⁵ The court found that, in concluding the contract of employment with the pilot, the airline had acted no differently from a private, commercial airline and so was therefore not engaged in sovereign activity. In particular, the duties to be performed by the employee were indistinguishable from those carried out by pilots working in the private sector. This was therefore a decision which emphasised the commercial nature of the foreign State employer.

In the US and Canadian State immunity legislation, as has been noted, there is no specific exception for employment contracts although many of these agreements have been interpreted to fall under the exception for "commercial activity". (In the United States, for immunity to be overcome, an employee's action must be "based upon" a commercial activity of the foreign State and in Canada it must "relate to" such an activity.) To examine whether distinctions are drawn between cultural and political offices on the one hand and trading corporations on the other judicial practice must be considered, the bulk of which comes from the United States. It is also important to consider whether the nature of the employer has been the key feature in resolving the immunity question or if the status of the employee or the particular nature of the action brought has been more significant.

An additional requirement to be established to overcome immunity, which exists in the United States but not in Canada, is that, where the commercial activity did not take place in the United States, it nonetheless must have had a "direct effect" there. The American legislation therefore demands, in addition, a form of territorial nexus.

A US decision denying immunity to a government office abroad was *Segni v. Commercial Office of Spain*.¹²⁶ In this case an Argentine national was allowed to sue his employer, an agency of the Spanish government responsible for promoting Spanish exports to the United States, on the basis that his employment was a commercial and not sovereign activity. The court took an approach focusing on the status and position of the employee rather than the nature of the employing entity. Although the Office had a number of sovereign tasks, the employee was engaged in merely providing services in the area of product marketing. As the court said, "he had no role in the creation of government policy or its administration ... he simply carried it out". Immunity was therefore

foreign State (although if also a permanent resident of Australia this bar does not apply) or a habitual resident of the foreign State.

125. *Reid v. Republic of Nauru* [1993] 1 V.R. 251 (Supreme Court of Victoria).

126. 835 F.2d 160 (7th Cir. 1987).

inappropriate. This decision is consistent with the European practice referred to above.

Likewise, in a recent Canadian decision, a Canadian national employed as a marketing officer for a foreign State tourist board was not precluded by State immunity from suing his employer for compensation for wrongful dismissal.¹²⁷ Without much reasoning, the court held that the contract of employment in this case was a "commercial activity" and, as the proceedings "related to" such activity, no immunity could be claimed. Such a conclusion is also consistent with the European and common law practice in relation to commercial offices, above.

In the area of educational institutions it has been recently held by a US court that the dismissal of a US national employed as a lecturer in chemistry at a foreign State-owned university was an actionable "commercial activity".¹²⁸ The court's reasoning emphasised the nature of the claim, noting that "there was nothing peculiarly sovereign about unilaterally terminating an employment contract. Private parties often repudiate contracts in everyday commerce and may be held liable therefor."¹²⁹ In effect, then, the court focused entirely on the cause of action here, breach of contract, to deny immunity to the university. No reference was made to the nature of the workplace or the status of the employee. Although the reasoning differs from the European cases on educational institutions discussed above, the finding of non-immunity is in accord.

The great majority of US case law has, however, involved claims by employees against foreign trading corporations. Because there has been little practice of other countries in this area, it is likely that the American case law will be very authoritative as to what represents the customary international law position with regard to employment claims against such entities. In *Gazder v. Air India*¹³⁰ a US-resident employee of a foreign State-owned airline operating in the United States was not precluded by State immunity from bringing an action against his employer for statutory age discrimination. The court held that the airline was a commercial enterprise, largely indistinguishable from its private sector counterparts, and so engaged in "commercial activity". The nature of the workplace was therefore the determining factor in denying immunity. This case has been applied in a later decision, again involving an action by an American national for employment discrimination against a foreign State-owned airline.¹³¹

127. *Covell v. New Zealand Tourist Board* (unrep., 22 Dec. 1992) (British Columbia Supreme Court).

128. *Janini v. Kuwait University* 43 F.3d 1534 (DC Cir. 1995).

129. *Idem*, p.1537.

130. 574 F. Supp 134 (SDNY 1983).

131. *Starrett v. Iberia Airlines of Spain* 756 F. Supp 292 (SD Tex. 1989); see also to the same effect, *Grappo v. Alitalia Linee Aeree Italiane SpA* 56 F.3d 427 (2nd Cir. 1995).

The status of the employee was the key factor in denying immunity to a foreign State-owned navigational shipping corporation in *Zveiter v. Brazilian National Superintendency of Merchant Marine*,¹³² where a dual American/Brazilian national was held entitled to bring a claim of sexual harassment against her employer. The court's view was that the employment of a secretary was a "commercial activity", on the basis that clerical staff, even in highly sovereign places of employment, tend to be engaged in routine duties. The court referred to the legislative history to the American statute as support for this conclusion.

In a number of cases, however, where employment has taken place abroad, employees have established an actionable commercial activity but have failed to show a "direct effect" of such activity in the United States sufficient to give the court jurisdiction. For example, in *Zedan v. Saudi Arabia*¹³³ an American national employed by the Saudi Ministry of Communications as an engineer on a roadway in Saudi Arabia was unable to show that his work (conceded to be a commercial activity) had a direct effect in the United States. Financial hardship suffered by him after returning home through the Ministry's breach of contract was insufficient. Similarly, in *Ebrahim v. Syrian National Petroleum*¹³⁴ an American oil rig employee was unable to sue his employer, a Syrian trading corporation, for injuries suffered during employment because although his employment was a "commercial activity" there was no direct effect of such activity in the United States. The fact that the accident happened to an American national and so reduced the "healthy American workforce" was too remote and tangential a connection.

Perhaps the most interesting North American case is the decision of the Supreme Court of the United States in *Saudi Arabia v. Nelson*.¹³⁵ *Nelson* involved a US national employed as a systems engineer at a Saudi Arabian State hospital in Riyadh who brought an action for compensation for personal injury arising from the Saudi government's unlawful detention and torture of him after he had made complaints about safety defects at the hospital. The employee argued that the action arose out of his employment and therefore was "based upon a commercial activity" in the terms of the US statute. The Supreme Court disagreed, stating that, although the contract of employment between the parties was "commercial activity" and that any action for breaches of such a contract would be permissible, the basis of the claim here was not breach of contract but tort, that is, the abuse of power by the police of the Saudi government. Actions in tort for

132. 833 F. Supp 1089 (SDNY 1993).

133. 849 F.2d 1511 (DC Cir. 1988).

134. 847 F. Supp 65 (SD Tex. 1994).

135. 113 S.Ct. 1471 (1993).

personal injury were outside the scope of the commercial activity exception and so the foreign State was immune from suit. The reasoning of the majority in this case can probably be best explained in terms of the *nature of the claim*. In their view the case was about personal injury caused by one of the most sovereign parts of the foreign State—the police force—not about breach of an employment contract by the hospital.¹³⁶

Before leaving the area of employment at government offices, educational or medical institutions and trading corporations, the work of international bodies should be noted. As discussed above, the ILC accords immunity to a foreign State where the employee is “recruited to perform functions closely related to the exercise of governmental authority”.¹³⁷ It is possible that this clause may apply to prevent an employee at a governmental office from suing his or her employer, especially where the employee is in an official position, but the commentary on the Article is not entirely clear.¹³⁸

Based on the national practice referred to above, however, it seems unlikely that employees at schools or trading corporations would fall under this exclusion. The question whether immunity would be accorded in these contexts would therefore be resolved on the basis of the territorial nexus between the forum and (i) the employment contract and (ii) the employee, the same approach taken in the national legislative practice referred to above. Likewise, the ILA Draft Convention allows any employee (outside the context of diplomatic and consular missions and the military) to bring an action against a foreign State provided that adequate territorial nexus exists.

Apart from those jurisdictions without immunity legislation, the criterion of territoriality is therefore likely to be the most significant factor in determining whether immunity applies in the case of employment in areas which are typically considered to be “non-sovereign”. This conclusion is consistent with the view that a forum State will have a greater interest in exercising jurisdiction over employment contracts made or performed within its borders and involving its residents or nationals as employees.

VI. COLLECTIVE CLAIMS BY TRADE UNIONS AND STATE IMMUNITY

So far we have considered the situation where an individual employee has brought an action against a foreign State employer, either (most

136. Justice White, although concurring in the result, took a different but, it is suggested, preferable approach. He argued that the action arose out of the performance of the employee's duties under his contract in that his injuries were suffered as a result of his complaints about the quality of his workplace. The action therefore was based upon commercial activity. However, no claim could be brought in any case, because the activity had no “direct effect” in the US and so failed the territorial nexus requirement.

137. Draft Art.11(2)(a).

138. See *supra* n.76.

commonly) for breach of the employment contract or for infringement of a labour relations statute of the forum. A different type of case is where a trade union registered in the forum State brings an action against a foreign State employer on behalf of a body of employees, almost always nationals of the forum State. In resolving the question of immunity in this instance, a court has to undertake a slightly different balancing exercise: the forum's interest in the protection of a segment of its workforce has to be weighed against the interest of maintaining good relations with the foreign State.

In the legislative practice of States on employment matters and State immunity, the position of collective claims is ambiguous, since no express reference is made to them. This omission can be explained either by oversight or because no distinction was thought to exist in substance between individual and collective claims. For example, in section 4 of the UK legislation¹³⁹ a foreign State is granted no immunity "as respects proceedings relating to a contract of employment between the state and an individual". None of the preparatory materials to the enactments sheds any light on whether collective actions were intended to be covered but there must be some doubt if recent judicial practice is considered.

There have been court decisions involving collective employee claims in the United States, Canada and Italy. In the United States and Canada, as has been noted above, there is no specific provision in their legislation on immunity for employment contracts but there is an exception to immunity for "commercial activity" which has been interpreted as extending to certain types of employment relationships.

In the United States there have been two decisions concerning an application by a trade union for certification of certain American nationals employed by foreign States. The *State Bank of India*¹⁴⁰ case involved a union claim for representation of employees of a foreign State-owned bank in the United States. The claim was brought before a labour tribunal, the National Labor Relations Board (NLRB). The Bank objected to the jurisdiction of the tribunal on the basis of State immunity. In resolving the immunity question it was necessary for the court to decide whether the action arose out of a "commercial activity" on the part of the Bank under section 1605 of the Foreign Sovereign Immunities Act 1976. The court answered this question in the affirmative, on the basis that the Bank "engaged in the same full range of commercial banking services usually provided by American banks and had employed American residents in furtherance of these commercial activities".

139. To similar effect, note s.6 of the Singaporean State Immunity Act 1979, s.6 of the Pakistani State Immunity Ordinance 1981, s.5 of the South African Sovereign Immunity Act 1981, s.12 of the Australian Foreign States Immunities Act 1985 and Art.5 of the Basle Convention.

140. *State Bank of India v. National Labor Relations Board* 808 F.2d 526 (7th Cir. 1986).

What is interesting about this decision is that attention is focused on the place of employment and the nature of the activities engaged in by the employer to resolve the immunity question, with little regard being paid to the nature of the claim, that is, that it was a collective union action rather than a suit by an individual employee. In effect, then, the court considered there to be no difference between individual and collective actions for the purposes of establishing immunity.

The same result was reached by the Court of Appeals for the Second Circuit in the *Goethe House* case.¹⁴¹ This case involved a petition to the NLRB for union representation on behalf of non-German employees at Goethe House, a non-profit organisation for cultural, educational and information exchange subsidised by the German government. Goethe House pleaded immunity to jurisdiction. The Court of Appeals rejected the immunity plea in a rather perfunctory way without even referring to the legislation on State immunity. The Court said that the claim by the union did not involve German workers and would not “interfere with Goethe House’s implementation of West German cultural foreign policy”. All that was involved in the union’s petition were economic issues—wages, hours and other conditions of employment—and so the cultural mission of the centre would be unaffected.

The Court therefore took a different approach from the *State Bank* case. Rather than focusing on the place of employment and the extent to which the State entity was engaged in sovereign activities, here the Court gave primary significance to the nature of the claim, in particular whether the action in question would intrude upon sovereign activities of the State employer. Here the action touched only upon the economic aspects of the relationship between employer and employee and so a finding of immunity was felt inappropriate.

Since these two cases there has been the recent decision of the Canadian Supreme Court in *United States v. The Public Service Alliance of Canada*.¹⁴² This case concerned a military base in Canada controlled by the United States in which, in addition to US and Canadian military personnel, a number of Canadian civilians were employed. The civilian staff were engaged in routine maintenance support although the base itself was a highly sensitive communications installation. In 1987 the Canadian public service union filed an application for union certification of the civilian personnel to a labour tribunal, the Canada Labor Relations Board. The United States pleaded immunity from jurisdiction. The Supreme Court of Canada, on appeal, upheld the claim to immunity by a majority of three to two.¹⁴³

141. *Goethe House (German Cultural Center) v. National Labor Relations Board* 869 F.2d 75 (2nd Cir. 1989).

142. *Supra* n.12.

143. LaForest, L’Heureux-Dube and Gonthier JJ; Sopinka and Cory JJ dissenting.

The issue for the Court was, in the terms of section 5 of the Canadian State Immunity Act, whether the proceedings "relate[d] to any commercial activity of the foreign state". The Court first noted that the entry by the United States into a contract of employment with an individual Canadian civilian maintenance worker was a commercial activity, on the basis that a "bare" contract of employment was commercial in nature.¹⁴⁴ This conclusion was not affected by the sovereign context of the base. Therefore, had the present action involved a suit by an individual employee against the United States for, say, unfair dismissal, no plea of immunity could be maintained. However, the issue in this case was different: here a trade union was making a *collective* claim for certification on behalf of *all* civilian workers at a highly sensitive place of employment. While an action by an employee in respect of an individual contract may have little impact on the management of military operations at the base, the imposition of a scheme of collective bargaining in respect of all employees could be highly intrusive.¹⁴⁵ For example, under such a scheme the employer would be powerless to terminate a strike called by employees and the Labor Relations Board would have extensive powers to enquire into aspects of the internal affairs of the base.¹⁴⁶

In the Court's view, then, the decisive factor here for granting immunity was the *nature of the claim*: a collective action on behalf of all employees in such a sensitive place would interfere far more substantially in the sovereign activities of the employer than a claim brought by a single individual. The trade union had also sought to rely on the *Goethe House* case to rebut the plea of immunity but the Court distinguished this decision on the ground that a military base and a cultural centre "involve state activities of a completely different order", with the base operating "in an environment of secrecy, discipline and security".¹⁴⁷ It was therefore the combination of sovereign context of employment and intrusive nature of claim which led to the grant of immunity.¹⁴⁸

In a recent Italian decision another type of collective trade union claim was found to give rise to a finding of State immunity, this time in the context of a consulate.¹⁴⁹ In this case an action was brought by a union against the United States on behalf of Italian administrative and clerical workers at the consulate. The claim alleged that the United States had

144. *Supra* n.12, at p.283.

145. *Idem*, p.284.

146. *Idem*, p.285.

147. *Idem*, p.288.

148. By contrast, the minority judges, in denying immunity, focused on the status of the civilian workers at the base. In their view, because the employees were neither privy to sensitive information nor secure personnel and "served no purpose critical to the operation of the base", jurisdiction over their claim should have been granted. See *idem*, p.303.

149. *Italian Trade Union for Embassy and Consular Staff v. United States* (1981) 65 I.L.R. 338 (examining magistrate).

discriminated against union members in contravention of Italian labour law. The examining magistrate upheld the plea of State immunity on the basis that, if such a claim were allowed to proceed, the court would be required under Italian labour law to conduct investigations into employment practices of the foreign State and issue mandatory orders with respect to them. The effect would be to interfere substantially in the power of the employer to organise its offices and hence erode its sovereignty, particularly in the context of a consulate. This case is therefore similar to the *Canadian Civil Service* decision in the magistrate's reliance on the particular nature of the claim and the place of employment as factors pointing to immunity.

So, overall, in the case of collective claims it is suggested that a customary rule may exist that where such a claim is brought in a highly sovereign context, immunity will be accorded to the foreign State.

VII. MISCELLANEOUS ISSUES

A. *Exclusion of Forum Jurisdiction and Local Mandatory Rules*

It is provided in a number of national immunity statutes, as well as in the Basle Convention, that an employee and foreign State employer may choose, in their contract, to exclude the jurisdiction of the forum State which would otherwise have existed. For example, under section 4(2)(c) of the UK State Immunity Act 1978 the general rule of non-immunity for contracts made or performed in the forum is displaced where the parties have otherwise agreed in writing. The intention behind such a provision would seem to be to preserve freedom of contract and enable parties to opt for an alternative jurisdiction for resolution of their disputes. Clauses conferring exclusive jurisdiction upon a foreign court are common in commercial agreements and regularly enforced,¹⁵⁰ and it is possible that clauses *depriving* a local court of jurisdiction would be similarly interpreted.¹⁵¹

However, the right of parties to exclude the jurisdiction of the forum is not unqualified. In both the Basle Convention and the UK immunity legislation there is a recognition of the inequality of bargaining power between foreign State employer and individual employee and a concern that an

150. See e.g. *The Eleftheria* [1970] P.94.

151. However, in the European context, the European Convention on Jurisdiction and Enforcement of Judgments of 1968 (enacted in the UK in the Civil Jurisdiction and Judgments Act 1982) may be relevant. Art.5(1) grants an employee the right to sue his or her employer in the jurisdiction "where the employee habitually carries out his or her work". Art.17(5) then provides that an agreement conferring exclusive jurisdiction upon a foreign court will not be enforced in a suit involving an individual contract of employment unless the agreement was entered into after the dispute had arisen. These provisions may, possibly, provide an employee with a basis for avoiding a clause in an employment contract conferring immunity from local jurisdiction on a foreign State employer.

employee should retain the protection of his or her local courts in certain situations.¹⁵²

So, section 4(4) of the UK legislation provides that the right of parties to exclude the jurisdiction of the forum "does not apply where a law of the UK requires the proceedings to be brought before a court of the UK". Article 5(2)(c) of the Basle Convention is similar, in allowing parties to contract out "unless in accordance with the law of the state of the forum the courts of that state have exclusive jurisdiction by reason of the subject matter". Article 11(2)(e) of the ILC Draft Articles is to the same effect although, interestingly, the ILA Draft grants parties a totally unqualified right to contract out.¹⁵³

The effect of these provisions is to render void any contractual stipulation of the parties excluding the jurisdiction of the forum where a local statute confers upon its courts exclusive jurisdiction in respect of the matter which is the subject of the dispute between the parties. In practice, however, it is rare for a legislature (at least in the common law system) to make a positive grant of exclusive jurisdiction to its courts in relation to an issue; what is more common is for a statute to prohibit parties from *ousting* the jurisdiction of the local courts.¹⁵⁴ Although the wording of the Basle Convention and the UK provisions suggests that the forum has to be *granted* exclusive jurisdiction by a statute before the parties' decision to contract out can be overridden, it is to be hoped that statutory provisions prohibiting the ouster of the forum's jurisdiction will also be interpreted to have that effect or else the aim of protecting employees may be thwarted.¹⁵⁵

B. The Position of Foreign-State and Third-State Nationals where Immunity Is Retained

Under both Article 5 of the Basle Convention and section 4 of the UK State Immunity Act, where an employee is a national of the foreign employer State at the time of suit or is a national of the employer State or a third State (and not a resident of the forum) at the time the contract of employment was made, the employer State retains immunity.

152. Report of the Australian Law Reform Commission No.24 (1984), p.58 (para.99).

153. ILA Draft Art.III.C.3. It is not clear from the Commentary why this position was taken; see Proceedings of the 60th Conference of the ILA (1982), p.331.

154. Greig, *op. cit. supra* n.1, at pp.565-566; Lewis, *op. cit. supra* n.1, at p.51. In the employment context there are many examples of statutory provisions precluding the ouster of jurisdiction of certain industrial tribunals, e.g. in the UK, s.140 of the Employment Protection (Consolidation) Act 1978.

155. The equivalent Australian provision is perhaps better expressed: parties are entitled to exclude the local jurisdiction by contractual provision "where a law of Australia does not avoid the operation of, or prohibit, or render unlawful the inclusion of the provision" (Foreign States Immunities Act 1985, s.12(4)(b)).

Commentators have been critical of this restriction, saying that in a world of increased mobility of labour differential treatment of employees on the basis of nationality is hard to justify.¹⁵⁶ Other writers, however, have argued that the forum has little interest in protecting employees with only a slender connection to the jurisdiction and that the forum's concern for comity with the employer State should take priority in such situations.¹⁵⁷

The question which arises, however, is whether an employee in either of the above categories (national of the foreign employer State or third State) who is denied jurisdiction to sue under the Basle Convention and the UK legislation may have a right to challenge these provisions (or judicial decisions taken under them) as discriminatory, under principles of international or European law. This is a difficult question which, for reasons of space, can be dealt with only in outline here.

There would seem to be two possible bases for a challenge: that the provisions discriminate against aliens by (a) denying them equal access to the tribunals of the forum and (b) by subjecting them to conditions of employment which are worse than those granted to nationals of the forum.

Considering the issue of access to adjudication first, in the area of international human rights there exist convention provisions which require a contracting State to grant equality before its law to aliens and nationals alike; for example, Article 26 of the International Covenant on Civil and Political Rights 1966. The scope of this provision may well extend to guaranteeing equality of access to tribunals, since this latter principle has itself been said to form part of customary international law.¹⁵⁸ The importance of access to adjudication is reinforced by Article 2(3)(a) of the Covenant, which requires contracting States to grant individuals an effective remedy for breaches of the Covenant's provisions. In practice, however, it is difficult for individuals to obtain redress for breach of a convention provision, even where the offending State is a party to the instrument, unless the convention has been incorporated into the municipal law of a country.¹⁵⁹

Under European human rights law Article 6 of the European Convention on Human Rights of 1950 states that "everyone is entitled to a fair and

156. See the comments by G. Ress in Proceedings of the 65th Conference of the ILA (1992), p.316.

157. J. Crawford, Australian Law Reform Commission Research Paper No.3, "Basic Principles of Foreign State Immunity", p.53.

158. F. Dawson and I. Head, *International Law: National Tribunals and the Rights of Aliens* (1971), p.110.

159. In most cases, the individual would have to rely upon the doctrine of diplomatic protection, i.e. that his or her State of nationality take up the claim against the offending State, which is far from certain. Although under the Optional Protocol to the ICCPR an individual may bring a claim directly before the Human Rights Committee against a contracting State, such a process is also protracted and uncertain.

public hearing by a tribunal in the determination of his civil rights", which has been interpreted to include a right of access to a State's courts.¹⁶⁰ Again, this right of access to adjudication is strengthened by the requirement, under Article 13, on contracting States to provide an effective remedy for breaches of the Convention. With regard to enforcing the provisions of the Convention, if the forum State is a party to the Convention but has not incorporated its provisions into domestic law (for example, the United Kingdom),¹⁶¹ an aggrieved employee would have to bring his or her complaint before the European Commission on Human Rights.

In the area of conditions of employment, there exist universal treaties which provide that States parties must endeavour to provide equal treatment in working conditions between nationals and aliens, which includes rights of redress.¹⁶² In the absence of domestic incorporation of these instruments, however, an individual employee would have difficulty in bringing an action based upon them.¹⁶³

Under European law there is an obligation on all member States of the European Union to provide for free movement of workers within the Union, although this protection extends only to EU and European Economic Area nationals. Under Article 48(2) of the EC Treaty the right to free movement includes the right to non-discrimination on the basis of nationality in working conditions. This provision has been held by the European Court of Justice to prohibit national legislation which attaches different terms to the conditions of employment of national and alien employees.¹⁶⁴ Article 48 has also been held to be "directly applicable" in the domestic law of member States¹⁶⁵ and so would provide an employee with a more secure basis for challenging the forum's retention of immunity.

VIII. CONCLUSION

In conclusion, it is unlikely that the area of employment contracts will remain neglected in the literature on State immunity, given the significant increase in recent State practice. An attempt has been made here to consider the practice of a number of jurisdictions in the various contexts in

160. *Golder v. UK* (1975) 57 I.L.R. 200 (European Court of Human Rights).

161. In *Jayetilleke*, *supra*, n.21, an attempt was made before an English court to rely upon the ECHR to overturn a decision granting a foreign State employer immunity. The court rejected the argument on the basis that the ECHR had not been incorporated into English law.

162. E.g. ILO Convention (No.97) Concerning Migration for Employment (1949), Art.6; UN International Convention on Protection of All Migrant Workers (1990), Art.54. See J. Niessen, "Immigrants and Migrant Workers", in A. Eide *et al.* (Eds), *Economic, Social and Cultural Rights* (1995), p.323.

163. Given the uncertainty of the doctrine of diplomatic protection, see *supra* n.159.

164. *Marsmann v. Roskamp* [1972] E.C.R. 1243 (ECJ).

165. *Commission v. French Republic* [1974] E.C.R. 359 (ECJ).

which employee claims against foreign States have arisen. The underlying issue now evident is the existence of competing interests which must be balanced. Not only do the interests of employer and employee have to be considered in respect of the particular case but also the forum's concern for protection of its own labour force as against its interest in good relations with foreign States. These interests are rarely articulated in either the legislative or judicial practice of States but nonetheless underlie the various approaches adopted by them for resolving disputes in this area.

Given the diversity of approaches, is it possible to discern a customary law position with regard to employment claims? Considering the practice as a whole, there is a discernible trend towards restricting State immunity to the situation in which a claim is brought by a senior employee at a highly sensitive place of work, such as a diplomatic or military establishment. This conclusion is unsurprising because rarely would such an employee have the nationality or residence of the forum State and so engage any of its protective interests. For most States the value placed on international comity is too great to be sacrificed by entertaining the claims of all employees. Reciprocity is also an influential factor. Every State has its own particularly sovereign places of employment which it would prefer to keep free from other States' adjudication. A cautious approach by a State to exercising jurisdiction over another is therefore likely to be reciprocated.

Outside the area of senior employment in sensitive locations, practice remains divided as to which precise approach to follow, although in terms of outcome there seems a general trend in favour of withholding immunity. The nation States which have enacted legislation on immunity, as well as those which are party to the Basle Convention, would, in addition, make the grant of immunity dependent on the existence of a territorial nexus between the action and the forum. This approach has the advantage of simplicity, certainty and consistency with the principles of State jurisdiction but limits the scope for creative approaches or any future development of customary law on the topic. The Italian experience shows that leaving the law of State immunity in the hands of judges and scholars, while not always conducive to consistency, is perhaps the best way of maintaining novelty and dynamism in the area.

LIBEL TOURISM OR JUST REDRESS? RECONCILING THE (ENGLISH) RIGHT TO REPUTATION WITH THE (AMERICAN) RIGHT TO FREE SPEECH IN CROSS-BORDER LIBEL CASES

RICHARD GARNETT* and MEGAN RICHARDSON**

A. BACKGROUND

The application of private international law rules in cross-border libel cases has long been a controversial issue with little international consensus. The matter has flared with particular intensity recently in a number of English decisions involving US defendant publishers. In such cases English courts have applied domestic jurisdictional and choice-of-law standards without regard to international instruments such as the European Union Regulation on Jurisdiction and Judgments (Brussels I)¹ or The Regulation on the Law Applicable to Non-Contractual Obligations (Rome II).²

What are these standards? First, in terms of jurisdiction, an English court will allow a claimant to serve a non-EU foreign publisher out of the jurisdiction in respect of publications in England based on the fact that the local publications involve damage suffered arising from a tortious act committed in the forum.³ The existence of a local tort, when accompanied by a local reputation, means that in practice a defendant will rarely, if ever, be able to have proceedings dismissed on the ground that a foreign court is a more appropriate forum.⁴ Secondly, each act of publication creates a separate cause of action.⁵ Thirdly, in terms of choice of law, English law is exclusively applied to publications occurring in England.⁶ Finally, the English domestic law of libel focuses predom-

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¹ Regulation (EC) No 44/2001.

² Regulation (EC) No 864/2007

³ Civil Procedure Rules r 6.20(8).

⁴ *Berezovsky v Michaels* [2000] 1 WLR 1004.

⁵ *Loutchansky v Times Newspapers Ltd (Nos 4 and 5)* [2002] QB 783.

⁶ *Szalatnay-Stacho v Fink* [1947] 1 QB 1.

inantly on vindicating the claimant's right to reputation (whether a public or private figure) rather than protecting the defendant's right to freedom of expression and so is generous to plaintiffs by international and certainly US standards.

Moreover, while we have expressed these rules as the English rules of jurisdiction and choice of law, there has been little questioning of these standards throughout the Commonwealth. For instance, courts in Australia and Canada have, with few exceptions, also employed a similarly liberal approach to resolving jurisdictional questions in cross-border defamation actions. Indeed, the Australian *Gutnick* case⁷ contributed to the process with its finding that the place of publication in Internet defamation cases is "ordinarily" any place where material is downloaded and read. Commonwealth courts have also accepted the "separate publication" rule, apply a strict law of the place of the publication rule to determine the applicable law and consider the protection of reputation as the key element in their domestic tort of defamation.

The approach in England and other Commonwealth countries, however, sharply contrasts with the United States where the "minimum contacts" and "effects" tests have been applied to resolve jurisdictional questions in libel actions. Minimum contacts may be established by a substantial circulation of publications in the forum state⁸ or where the publication in the forum was accompanied by other significant contacts such as soliciting subscriptions and responses from forum residents.⁹ The effects test requires that the claimant show that the forum was targeted by the defendant's publications, in other words, that there was intent to harm the claimant there.¹⁰ The content of the article and the proportion of publication in the forum will be key evidence to resolve this question. The US jurisdictional tests have proven generally difficult for claimants to satisfy.

Furthermore, US law does not recognise that multijurisdictional acts of libel create separate publications; instead, they are considered a "single" publication. In terms of choice of law, the US does not apply a strict law of the place of publication rule but instead seeks the law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties.¹¹ Such an approach once again reveals much less forum control over

⁷ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 626.

⁸ *Keeton v Hustler Magazine Inc* 465 US 770, 773–74 (1984).

⁹ *Blumenthal v Drudge* 992 F Supp 44 (DDC 1998).

¹⁰ *Calder v Jones* 465 US 783, 789–90 (1984); *Young v New Haven Advocate* 315 F 3d 256 (4th Cir 2002); *Fielding v Hubert Burda Media Inc* 415 F 3d 419 (5th Cir 2005); *Remick v Manfredy* 238 F 3d 248 (3rd Cir 2001).

¹¹ *Restatement of the Law, Second, Conflict of Laws* (1971) s 150(1). It should be acknowledged that a number of US states (eg California and Pennsylvania) do not follow the Second Restatement but instead apply an "interests analysis" approach to choice of law in defamation cases. Under this approach, the forum court applies the law of the state or country with the greatest interest in the dispute. Interestingly, courts employing this test have generally applied the law of the defendant publisher state where the plaintiff has sued outside its state of domicile. Such an outcome is

transnational libels than in the Commonwealth countries. Finally, the US law of libel is strongly influenced by the free speech protection of the First Amendment and the “public figure” doctrine from *New York Times v Sullivan*,¹² under which a public figure can only sue for libel if he or she can show actual malice. But even the jurisdictional and choice-of-law standards can to some extent be seen as influenced by First Amendment free speech concerns – ie it is not purely accidental that they serve to protect most the interests of defendants who would argue that their free speech will be adversely affected unless the liberal US libel law standards are applied, and preferably by a US court.

Until recently, transnational libel actions did not occur often and so the scope for conflict with legal regimes which were less generous to claimants was limited. However, the huge increase in Internet publications in the past ten years has led to a proliferation of libel litigation particularly before English courts. Where such actions are wholly domestic in nature they have been rarely controversial but where foreign parties have been involved in English actions, particularly from the US or from the Middle East, as in a number of more recent cases, a transnational battleground has emerged. To understand this development more fully, a more detailed examination of recent English decisions on transnational libel will be made as well as the US reaction, both judicial and legislative, to such cases. Proposals will then be considered for bridging the transatlantic divide in libel cases.

B. THE ENGLISH APPROACH TO TRANSNATIONAL LIBEL

As noted above, jurisdiction in libel cases has traditionally been freely exercised by English courts due to the view that any acts of publication in the forum constitute a local tort, and further, where a claimant can show a local reputation, no foreign court can be a more appropriate forum.¹³ Moreover, once jurisdiction is accepted, English law is exclusively applied to any local acts of publication.

These principles have been applied to assume jurisdiction in a number of factual contexts, with varying levels of justification as will be discussed below. Clearly US publishers, accustomed to enjoying their rights to free speech under the First Amendment in the US, are perturbed that such rights are also not recognised by foreign courts in *all* cases. Hence, in their view, jurisdiction should never be exercised by English tribunals in libel cases against US defendants. Yet, from the English (and Commonwealth) perspective, vindicating a claimant’s

arguably more consistent with a “most significant relationship” choice of law test than a strict place of publication rule. See J Pielemeier, “Choice of Law for Multistate Defamation: The State of Affairs as Internet Defamation Beckons” (2003) 35 *Arizona State Law Journal* 55, 105–06.

¹² 376 US 254 (1964).

¹³ *Berezovsky v Michaels* [2000] 1 WLR 1004 applying *The Albaforth* [1984] 2 Lloyd’s Rep 91.

right to reputation is the core of a libel action and such a policy should not depend upon whether the defendant is local or foreign. Indeed, the right to reputation is enshrined in Article 8 of the European Convention on Human Rights (ECHR)¹⁴ which has been implemented in the UK in the Human Rights Act 1998.

Furthermore, the fact that a claimant in an English court would have no chance of recovery under US law (eg where he or she is a public figure) is itself a powerful reason to adjudicate not only to afford the claimant a right to redress but also to prevent US free speech law having global or “imperialist” effect – as was made clear in the recent case of *Mardas v New York Times*.¹⁵ There, Eady J said that for an English court to refuse to hear the case, and apply English law, would be to fail to offer Mardas the opportunity to “vindicate” his right to reputation under the Article,¹⁶ noting also that Article 6 guarantees a claimant the right of access to a court in pursuit of a remedy.¹⁷

Protection of claimant reputation and preservation of English legal sovereignty from US domination are therefore twin forces influencing the approach of English courts. But such decisions have fuelled a sharp divide between English and US approaches to transnational libel, with associated criticisms on the US side of English imperialism.

Are the criticisms warranted? In one category of cases, we would suggest, English (and Commonwealth) courts appear to have struck an appropriate balance between free speech and reputation: where, although the amount of publication in the forum may be small as a proportion of the total, the claimant nevertheless has strong geographical, financial and social connections with the forum as well as a substantial reputation there. In addition, he or she has sued only in relation to publication and damage occurring in the forum. The High Court of Australia decision in *Gutnick*¹⁸ is the seminal example of this type of case, but there have been other decisions, both in England¹⁹ and Canada,²⁰ in

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Art 8. See also inter alia *Lindon v France* [2007] ECHR 21279/02 (Judge Loucaides concurring) and *Pfeifer v Austria* [2007] ECHR 12566/03.

¹⁵ *Mardas v New York Times* [2008] EWHC 3135 (QB).

¹⁶ *Ibid*, [13]–[14].

¹⁷ *Ibid*, [13].

¹⁸ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

¹⁹ See eg *Harrods v Dow Jones & Co Inc* [2003] EWHC 1162 (QB) (English claimant corporation with strong forum connection and local reputation), *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) (English resident and citizen claimant with strong local reputation) and *Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EWHC 359 (claimant with strong historical and residential connections to England entitled to sue Scottish publisher in England).

²⁰ See eg *Burke v NYP Holdings* (2005) 48 BCLR (4th) 363 (British Columbia resident with an established reputation in that province permitted to sue a New York newspaper in BC despite only a small circulation there); *Banro Corporation v Editions Ecosociete Inc* 2009 CanLII 7168 (ON SC) (Ontario corporation entitled to sue Quebec company in Ontario, the claimant’s “home jurisdiction . . . where the damage to that person’s reputation may be the greatest” [65]); and, most recently, *Black v Breedon* 2009 CanLII 14041 (ON SC), where the claimant, who had spent most of his life in and had “long standing” ties to Ontario, was entitled to sue a US publisher there.

which jurisdiction was properly exercised in such circumstances. We would say “properly” because in such a case it should have been reasonably foreseeable to the defendant that its publication would be downloaded and cause harm to the claimant in his or her “home” jurisdiction.²¹

Such cases might even include the *Mardas* decision itself – notwithstanding Eady J’s particular emphasis on vindicating Mardas’s “right” to reputation and granting access to English courts. The article in question there concerned a claimant who was a former friend of the British pop group The Beatles and his alleged role in the Beatles’ falling out with the Maharishi during the group’s visit to India. Despite the judge noting that only 177 hard copies and 31 Internet hits to the newspaper’s article had circulated in England, there were other factors that connected this case with the forum. Specifically, Mardas, although now living in Greece, had formerly lived in England for many years, was well known locally and had children still there. Therefore, the court found, “[t]here is no artificiality about seeking to protect his reputation within this country”²² – making the important point that effect on reputation, or even the degree of knowledge of a publication, cannot solely be assessed according to the amount of Internet hits.

Exercising jurisdiction is arguably less balanced and justified, however, where neither party has any significant link to the forum, publication is minimal there yet the tribunal has simply been chosen to provide relief which would otherwise be unavailable in the – more reasonably foreseeable – alternative forum. This situation arises in practice because in an increasingly globalised world there are politicians, sporting stars, business persons and other celebrities with truly multi-national reputations. Such persons, particularly if they are US residents, may seek to avoid the strictures of the First Amendment by crossing the Atlantic to sue in a claimant-friendly jurisdiction such as England. Because such persons are “known” in England they have a reputation there to vindicate by litigation. It is this situation which is most commonly decried as “libel tourism” and appears to have received its strongest support from the 2000 House of Lords decision in *Berezovsky v Michaels*.²³

In *Berezovsky*, a US publisher was sued in England in respect of an article allegedly defamatory of a Russian businessman, suggesting that he had been engaged in organised crime and corruption in that country. Two thousand copies of the article circulated in England as compared to almost 800,000 in the US and 13 in Russia. Despite the plaintiff having only limited connections with England – gained largely through business visits – a majority of the House of Lords allowed the matter to proceed on the basis that Berezovsky had acquired a

²¹ See further M Richardson and R Garnett, “Perils of Publishing on the Internet: Broader Implications of *Dow Jones v Gutnick*” (2004) 13 *Griffith Law Review* 74, 80.

²² *Mardas v New York Times* [2008] EWHC 3135 (QB) [38].

²³ [2000] 1 WLR 1004.

reputation in the forum. Yet, as Lord Hoffmann noted in dissent, connections with a country and reputation therein are not at all the same thing. While Berezovsky had a “truly international reputation”, his reputation in England “was merely an inseparable segment of his reputation worldwide”.²⁴

The *Berezovsky* decision no doubt came as an even greater shock for writers and publishers in the US, operating under their liberal standards of free speech, since not only were there minimal publications in England but the claimant himself had such limited connections to the country. The impact of this case has been felt in number of subsequent libel cases in England, all involving US defendants and non-English claimants – some of whom were even US residents. Henceforth, such publishers must anticipate being sued in England by anyone with an English reputation – an extraordinary burden and one which hardly balances the competing US and English interests referred to above. These cases, in which US claimants have sued US defendants in England, must particularly raise the ire of US media interests and free speech advocates. From their perspective, such actions likely, and in our view may justifiably, appear as a cynical attempt by US residents to forum shop internationally to evade their own freedom of expression laws – laws which, on other occasions, they themselves may choose to seek the protection of while at home.

The case of *Lewis v King*²⁵ clearly illustrates this phenomenon. There, a libel action was allowed to proceed in England despite the fact that both parties were US residents and the material was hosted on US websites and concerned events and persons in that country. Significantly, the English Court of Appeal rejected an argument that a US “targeting” type analysis should be adopted in England. Such a test would not only “encourage manipulation and uncertainty”, according to the Court, adding that, in the Internet context, a defendant could be said to have targeted every jurisdiction in which the material could be downloaded.²⁶ In effect, then, if this analysis is applied strictly, the forum court should have little or no regard for the defendant’s circumstances and foresight in publishing the material. Such a view appears far too unbalanced in favour of claimants and almost renders the jurisdiction inquiry a mere formality.²⁷

Similarly, in 2003, it was reported that Richard Perle, a former US government adviser, had filed a libel suit in England against Seymour Hersh, a US journalist with the *New Yorker* magazine, arising from an article describing Perle’s

²⁴ *Ibid*, 1022–23. See also C Hare, “Forum Shopping: From Russia with Love” [2000] *Cambridge Law Journal* 461, 463–64.

²⁵ [2005] EMLR 4; [2004] EWCA Civ 1329.

²⁶ *Ibid*, [34]. See also *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) [31].

²⁷ See O Bigos, “Jurisdictional Discretion in Defamation on the Internet” [2005] *Lloyd’s Maritime and Commercial Law Quarterly* 129. Interestingly, in an earlier case, *Chadha v Dow Jones & Co Inc* [1999] EMLR 724, the English Court of Appeal declined to hear an action brought by a US resident against a US publisher based on a small circulation in England because the defendant had no “substantial reputation to protect” in the forum. The weight of this authority seems to have diminished after *Berezovsky* and *Lewis* however.

alleged dealings with Saudi businessmen. Perle himself admitted that the only reason he had chosen to sue in England was because "it is easier to win such cases there".²⁸ More recently, it has been suggested that up to eight US celebrities (mainly Hollywood actors) have filed libel suits in England against US publishers, with numbers expected to rise in the future.²⁹ English courts clearly have become a magnet for celebrity litigation.

The second category of cases spawned by *Berezovsky*, where a non-US/non-English resident sues a US publisher in England, has also particularly angered US groups because of its undermining of the US free speech protections but also, even more emotively, for its possible condoning or encouragement of terrorism.

In one, now notorious, case the decision by an English court to allow a foreign claimant to proceed with a libel action against a US publisher was said to be an encouragement of terrorism. This was the *Ehrenfeld* case, where New York-based writer Rachel Ehrenfeld found herself subject to defamation proceedings in an English court arising from publication of her book *Funding Evil*.³⁰ In the book the defendant argued that Saudi billionaire Khalid bin Mahfouz was giving financial support to terrorism. The book was published in the US and 23 copies found their way into the UK through Internet orders. Interestingly, the defendant chose not to appear in the proceedings or contest jurisdiction. The defendant's failure to appear meant that the defamation action was sustained and damages of £30,000 (the maximum level of compensation available under the statutory scheme) were ordered.³¹ An injunction enjoining any publication in England of Ehrenfeld's allegedly defamatory statements was also granted. Costs were also awarded against Ehrenfeld, as the losing party, in accordance with normal English practice.

There was a widespread public outcry following the case, including even from some English politicians alarmed at the thought of their country becoming a target for libel tourism, especially by supporters of terrorism.³² English courts were described as a "Soviet-style organisation of censorship" who are engaged in "a major assault on freedom of information".³³ To be sure, the defendant had virtually guaranteed this result by her failure to appear, either to challenge juris-

²⁸ A Daifallah, "Richard Perle Suing over *New Yorker* article", *New York Sun* 12 March 2003, 2. While the action was subsequently discontinued by Perle there is little indication in more recent English decisions that the scope for US claimants to sue for libel in England has been significantly reduced.

²⁹ R Verkaik, "London Becomes Defamation Capital for World's Celebrities", *The Independent* 13 October 2008.

³⁰ R Ehrenfeld, *Funding Evil* (Los Angeles, Bonus Books, 2003).

³¹ *Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB) and for further details *Ehrenfeld v Mahfouz* 9 NY 3d 501 (NY Court of Appeals 2007).

³² See House of Commons Debate on Libel Laws, Hansard 17 December 2008 <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm081217/halltext/81217h0001.htm>.

³³ *Ibid*, Mr Denis MacShane (Lab).

diction or to strike out the proceedings as an abuse of process, but if anything her sentencing in absence simply added fuel to the public outcry that she was a victim of libel tourism. It is also noteworthy that to date Ehrenfeld's book still remains in print in the US and there has been no effort made by Mahfouz to enforce the order – although, as discussed further below, there is good authority to indicate that enforcement would be unlikely.

All in all, there is little evidence that authorities such as *Ehrenfeld* have directly “chilled” free speech in the US. That said, however, there is some evidence that such authorities have had some effect on publications in the UK – and in some cases the results have been felt indirectly in the US. Ehrenfeld, for instance, commented that after Mahfouz's successful judgment against her in the English High Court, that “Mahfouz's libel tourism in London led American publishers with assets abroad to cancel several books under contract or consideration”.³⁴ Indeed, in another case just the prospect of a libel claim seems to have been enough to preclude publication of the book: when Cambridge University Press (CUP) was threatened with defamation proceedings over one of its titles, *Alms for Jihad*,³⁵ published in 2007, it simply pulped the book.³⁶ CUP also wrote to librarians, including some in the US, asking for the book to be removed from their collections so as to avoid litigation.³⁷

C. THE US REACTION

The US reaction to the English courts accepting jurisdiction and awarding judgments against its publishers in libel cases was relatively muted until recently. Certainly it has been well established, since *Bachchan v India Abroad Publications Inc*,³⁸ that a claimant seeking to enforce a foreign (especially English) libel judgment in the US will be barred by public policy, where such judgment does not meet the standards of the US constitutional right to freedom of speech.

Some have criticised even this position as too far-reaching. For instance, Linda Silberman has pointed out that traditionally US courts did not refuse enforcement of foreign judgments on public policy grounds unless US interests were actively engaged and questions whether a mere difference in legal standards should be sufficient.³⁹ In particular, cases such as *Telnikoff*, where the links with

³⁴ Testimony to House of Representatives, February 2009.

³⁵ J Millard Burr and R Collins, *Alms for Jihad: Charity and Terrorism in the Islamic World* (Cambridge University Press, 2007).

³⁶ C Stilwell, “Libel Tourism: Where Terrorism and Censorship Meet”, *San Francisco Chronicle* 29 August 2008.

³⁷ See R Houbeck, Jr, “*Alms for Jihad*”, Democracy Project 15 October 2007, <http://www.democracy-project.com/archives/003498.html> (last visited 10 March 2008).

³⁸ 585 NYS 2d 661 (NYSC 1992). See also *Matusевич v Telnikoff* 877 F Supp 1 (DDC 1995).

³⁹ Statement of Professor Linda Silberman before House of Representatives Committee, February 2009.

the US were very slender, should not have attracted the public policy defence.⁴⁰ The problem however, is that in some more recent transnational libel cases, such as those covered in the present article, the connections with the US are much greater and so the US interest in not enforcing such judgments is more compelling. Also, the fact that differences in law in the libel tourism context may now be viewed as reflecting fundamentally different approaches to human rights, as between the US and the UK, means that the application of public policy to deny enforcement is more defensible.

US courts have not, in any event, gone further and issued declaratory or anti-suit injunctive relief to restrain a claimant from suing a US publisher in England.⁴¹ According to the US courts, such a right is not needed since the US publisher can simply wait and resist enforcement of any English judgment in the US. To be fair also, such a right would only be effective if the claimant in the English action was a US resident or had assets in the US; otherwise that party could simply ignore the US court orders, knowing that an English court would be unlikely to enforce them.⁴²

Yet the power to deny enforcement of foreign libel judgments under current US law seems to have been ignored by US legislators, despite prompting by conflicts scholars.⁴³ Hence, the New York legislature has recently passed the Libel Terrorism Protection Act⁴⁴ and the US Congress is currently considering the Libel Tourism Bill,⁴⁵ both of which give a US publisher, who has been sued for libel abroad, the right to obtain a declaration that any foreign judgment will be unenforceable in the US where it fails to accord with the First Amendment standard of free speech.⁴⁶

Such action may have been prompted by further developments in the *Ehrenfeld* case where the New York Court of Appeals refused to entertain Ehrenfeld's application for a declaratory judgment that the English judgment against her was unenforceable in the absence of actual proceedings to enforce by Mahfouz.⁴⁷

⁴⁰ See also P Berman, "Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era" (2005) 153 *University of Pennsylvania Law Review* 1819, 1872; M Rosen, "Exporting the Constitution" (2005) 53 *Emory Law Journal* 171, 172 and A Mills, "The Dimensions of Public Policy in Private International Law" (2008) 4 *Journal of Private International Law* 201, 233.

⁴¹ *Dow Jones & Co Inc v Harrods Ltd* 237 F Supp 2d 394 (SDNY 2002) aff'd 346 F 3d 357 (2nd Cir 2003).

⁴² Note that English courts do not generally enforce orders or judgments for non-monetary relief granted by courts outside the European Union; see J Fawcett and J Carruthers (eds), *Cheshire, North and Fawcett Private International Law* (Oxford University Press, 14th edn, 2008), 600.

⁴³ Silberman, *supra* n 39.

⁴⁴ Libel Terrorism Protection Act 2008 (S6687A9652).

⁴⁵ Libel Tourism Bill 2008 (HR 6146) (sponsor Steve Cohen).

⁴⁶ Similar legislation has been passed in Illinois, see Libel Terrorism Protection Act SB 2722 Public Act 095-0865 (August 2008). Some commentators have strongly supported this legislation, see eg T Moore, "Note: Untying Our Hands: The Case for Uniform Personal Jurisdiction over 'Libel Tourists'" (2009) 77 *Fordham Law Review* 3207.

⁴⁷ *Ehrenfeld v Mahfouz* 9 NY 3d 501 (2007). See also *Ehrenfeld v Mahfouz* 518 F 3d 102 (2nd Circuit 2008), affirming the decision of the NY Court of Appeals.

Yet, such a decision does not deny the correctness of the *Telnikoff* doctrine above; it simply states the correct procedural posture for a defendant is to resist enforcement by way of a defence rather than bringing a pre-emptive negative declaratory action to prevent enforcement. Hence, the legislation is of limited value: it merely codifies the existing position on US (non)-enforcement of English libel judgments.

More extreme is the Free Speech Protection Bill ("the FSP Bill") currently in the US Senate, which confers a cause of action on a US defendant in a foreign defamation suit to sue the claimant in a US court for damages where the publication would be protected by the First Amendment standard of free speech.⁴⁸ The motivation for this legislation is the perception that a strategy based on simple non-recognition of foreign judgments in the US is not enough; claimants have to be deterred from commencing such actions and so "chilling" speech in the first place. The damages that may be awarded by US courts under the FSP Bill include (i) the amount of the foreign judgment; (ii) the costs of the foreign lawsuit which have been borne by the US defendant; and (iii) the harm caused to the US defendant "due to decreased opportunities to publish, conduct research or generate funding". Further, a US court may award treble damages if it is found that the claimant brought the lawsuit with the aim of intentionally suppressing First Amendment rights.⁴⁹

What comments may be made about this FSP Bill? First, it certainly provides US defendants with another weapon against libel claimants, a weapon which some US commentators have suggested will seriously deter libel tourism.⁵⁰ Yet it is suggested that the legislation, although inspired by the *Ehrenfeld* case, is ironically unlikely to prevent that situation arising again. One problem is that unless the claimant in the foreign action has US residence or assets, no US judgment will likely be enforceable against that party. While English courts routinely enforce US judgments for monetary damages, in this situation they may invoke *English* public policy to block enforcement on the ground that such legislation offends basic principles of justice and fairness by imposing liability on a claimant who has sought to vindicate and protect its right to reputation under English law.⁵¹ A further problem is that if the US defendant has assets in England, then they may be seized long before an action in the US under the Bill has even been launched. While *Ehrenfeld* was not in that position, other US publishers may well have assets in London and so are vulnerable to enforcement without the claimant ever having to enter the US.

⁴⁸ Free Speech Protection Bill 2008 (HR 5814—S 2977) (sponsors King, Specter, Lieberman, Schumer).

⁴⁹ *Ibid*, see also Testimony of Rep Peter T King, Subcommittee on Commercial and Administrative Law Hearing on Libel Tourism, 12 February 2009.

⁵⁰ D Siegel, "Libel Terrorism' Bill" (2002) 239 *New York Law Journal* 2 col 3; S Staveley-O'Carroll, "Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment" (2009) 4 *NTU Journal of Law and Liberty* 252.

⁵¹ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 [18].

Hence, the “Hollywood” libel suits, where a US claimant sues a US publisher, may be deterred by the FSP Bill because the publisher will be able to obtain enforcement of any US judgment against the celebrity in US territory. Actions by non-US claimants, however, will generally be unaffected since such persons are unlikely to have assets in the US. The truth is that the US cannot unilaterally stop English libel litigation and attempts to do so may simply further inflame the sense of conflict between English and US standards – a point that Linda Silberman made in her evidence before the House of Representatives Committee.⁵² Such actions can only be prevented by a change to English jurisdictional, choice-of-law or substantive rules of libel. Legislation such as the FSP Bill, unfortunately, is likely only to be seen as further evidence of US “free speech imperialism” and having only symbolic effect.

D. PROPOSALS FOR BRIDGING THE DIVIDE

1. International Model Law

Given that there are credible arguments on both sides of the Atlantic on many aspects of this issue, the question is how to bridge the divide. One suggestion would be to design an internationally acceptable model law dealing with jurisdiction and choice of law in transnational defamation cases. This seemingly modest proposal would be to identify the circumstances in which the assumption of jurisdiction in transnational libel cases is proper and what law should be applied. In that way, some degree of balance could be created as a US publisher would only face suit in a foreign court under foreign law where the action had a strong connection with the forum. The American Law Institute’s 2007 Principles on Jurisdiction, Choice of Law and Judgments in transnational intellectual property disputes could be a useful analogy here.⁵³

The problem with such a suggestion, however, is that not only will the content of such a model law have to be determined but also the support of the US and UK governments will be required to make such a law effective. Such agreement, while highly desirable in the longer term, is unlikely to be reached in the short term given the profound philosophical differences on the issues of free speech and jurisdiction.⁵⁴

⁵² Silberman, *supra* n 39.

⁵³ The American Law Institute, *Intellectual Property Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes* (St Paul, MN, American Law Institute Publishers, 2008). See also *Mardas v New York Times* [2008] EWHC 3135 [37]: “It may well be that in due course international agreement will be reached as to the appropriate way of resolving claims arising out of Internet publication. That is plainly desirable.”

⁵⁴ Law Commission of England and Wales, *Defamation and the Internet: A Preliminary Investigation* (2002), para 4.54.

2. Restraints on the Exercise of English Jurisdiction

(a) Abuse of Process

More immediately, however, the solution to the particular problem of libel tourism may rest with English courts. So far they have only offered two methods for curbing the jurisdictional excesses created by *Berezovsky* and its progeny. The first such measure was proposed in *Jameel v Dow Jones*⁵⁵ where the English Court of Appeal held that defamation proceedings could be struck out on abuse of process grounds or jurisdiction declined where there was an insufficient level or quantum of publication in the forum. In effect, the claimant must show a “real and substantial tort” in the forum.

Jameel involved a foreign claimant who sued a US newspaper publisher for libel in England (a similar fact pattern to the *Ehrenfeld* and *Mardas* cases above). The offending article was accessible on the Internet by subscribers in England although there were very few there – probably only five (of which some were the claimant’s representatives). Here the court found that given the very limited publication in the forum and the consequent slight impact on the claimant’s reputation the action should be dismissed as an abuse of process. There was, in essence, no “real and substantial” tort committed in England and so, if jurisdiction had been in issue, it also would not have been exercised. In reaching this conclusion the Court said that it was influenced by the right not only to reputation under Article 8 of the ECHR but also the right to freedom of expression under Article 10 of the ECHR which required the court to balance this right against the claimant’s right to vindication of his or her reputation.

Of course, though, given the absurdly small number of Internet hits in *Jameel*, the litigation was clearly an abuse on any objective measure. More difficult cases are those like *Berezovsky* where the volume of hits or publications in the forum is larger than in *Jameel* yet still very small as a proportion of the total global subscriber base. Indeed in the *Mardas* case the limited evidence of access to Internet and print publications in the UK was deemed insufficient by Eady J to warrant striking out the defamation claim on the basis of abuse of process. As the judge put it:⁵⁶

“It is plainly desirable that some sensible accommodation should be reached, so as to avoid a time-consuming and expensive trial, but that is in the hands of the parties. I am satisfied that the circumstances here cannot be characterised as an abuse of process. . . . Thus, although it is fashionable to rail against ‘libel tourism’, there is no reason in law why the courts of England and Wales should decline jurisdiction.”

⁵⁵ *Jameel v Dow Jones* [2005] QB 946.

⁵⁶ *Mardas v New York Times* [2008] EWHC 3135 [36]–[38].

(b) No “Presumption” of Publication

Another, similar, measure to limit English jurisdiction in libel cases was proposed in *Al Amoudi v Brisard*.⁵⁷ That case also concerned libel proceedings arising out of an Internet publication. The claimant argued that it was entitled to rely on a presumption in an Internet libel case that “substantial publication” had occurred in the forum. The court disagreed, saying that it was for the claimant to prove that the material in question had been accessed and downloaded. There was no “presumption” of publication. Interestingly, a similar approach was recently taken in a Canadian case, *Crookes v Holloway*.⁵⁸ The court there held that the mere fact that a statement was posted on a website group with access restricted to subscribers did not support a presumption that the article was published in the forum. *Crookes* is therefore consistent with *Al Amoudi* in requiring clearly identified evidence of accessing and downloading in the forum.⁵⁹

Nevertheless, it seems that even these rather modest limitations on jurisdiction are not always strictly applied. In *Gregg v O’Gara*⁶⁰ the court, while noting the principles in *Jameel* and *Al Amoudi* above, nevertheless found “substantial publication” to have occurred in the forum based on evidence that the claimant’s son and a work colleague of the claimant had accessed the material on the Internet. Since such persons were unlikely to be “disinterested downloaders” it can only be concluded that English courts will not relax their hold on transnational Internet libel cases too readily.

(c) Real and Substantial Connection

Recent decisions in Canada already suggest a more balanced approach to jurisdiction in transnational libel cases. Instead of requiring simply that the libel occurred in the forum and that the claimant enjoyed a reputation there, Canadian courts have insisted also that there be a real and substantial connection between the forum and the action before jurisdiction can be exercised. To determine whether such a connection exists, the court will examine all the factors surrounding the action and the parties including where the publication had its greatest impact.⁶¹ The court will also consider the intention of the person posting the material and, if it were “satisfied that the person who posted the material had no intention to harm, nor could they have reasonably anticipated

⁵⁷ [2007] 1 WLR 113.

⁵⁸ 2008 BCCA 165; (2008) 77 BCLR (4th) 201. Compare *Wiebe v Bouchard* 2005 BCSC 47 (posting on a Canadian government website held to be publication throughout Canada).

⁵⁹ The New Zealand courts appear to have taken a similar approach, see *Nationwide News Pty Ltd v The University of Newlands* [2005] NZCA 317.

⁶⁰ [2008] EWHC 658 (QB).

⁶¹ *Barrick Gold Corporation v Blanchard and Company Inc* unreported, Ontario Superior Court of Justice 9 December 2003 [53].

that a person in the . . . [forum] would be harmed by such material”, then jurisdiction may be declined.⁶²

Such an approach, in looking at the entire circumstances of the case as well as any intention to harm (or, as we would argue, reasonable foreseeability of harm⁶³) in the forum by the defendant may be seen as a type of middle ground between the US and English views of jurisdiction. Application of this “real and substantial connection” view can be seen most starkly in the *Bangoura* case.⁶⁴ This case involved an action brought by a person who was not a resident of the forum at the time of publication but only became so three years later. Publication by the US defendant was limited to seven subscribers, with the claimant’s lawyer being the only person proven to have accessed the article as a paid subscriber. The Ontario Court of Appeal refused to allow the action to proceed because the connection between the plaintiff’s action and Ontario was minimal. First of all, the claimant had limited residential connection with the forum and there was no evidence that he had suffered significant harm there. The defendant also had little connection with Ontario and, significantly, it would not have been able to reasonably foresee that the claimant would settle in Ontario three years after publication. The consequence of the claimant’s argument would be that a defendant could be sued in any place which the claimant chose to live even if the change of residence occurred long after publication. Such a view would not equally balance the interests of claimants and defendants.

The focus on balancing claimants and defendants’ rights and interests is something that we have argued for in the context of interpreting the Australian High Court’s decision in *Gutnick*,⁶⁵ but is noticeably absent in the subsequent English jurisprudence on libel jurisdiction. It is not so much a matter of weighing the right to reputation against the right to free speech but rather, in terms of jurisdictional analysis, accepting that domestic courts must exercise restraint when dealing with foreign defendants and limit jurisdiction to cases where harm to the claimant in the forum was reasonably foreseeable. To that extent, the Canadian approach bears some similarity to the US targeting analysis referred to above.

⁶² *Ibid.* See also *Olde v Capital Publishing Ltd Partnership* unreported, Ontario Court of Justice (General Division) 22 July 1996 (aff’d Ontario Court of Appeal 22 January 1998) where the court suggested that the amount of publication in the forum (as a proportion of the whole) and the degree of connection between the allegedly defamatory statements and the forum were important considerations in determining whether jurisdiction would be exercised. See also, more recently, *Paulsson v Cooper* 2009 Can LII 38795 (ON SC), where the claimant’s action was stayed because of its limited connection with the forum, specifically, the very small distribution of the article there.

⁶³ Reasonable foreseeability of harm to the plaintiff’s reputation in the forum was the test applied in *Black v Breiden* 2009 Can LII 14041 (ON SC) [48]–[49].

⁶⁴ *Bangoura v Washington Post* (2005) 258 DLR (4th) 341 (Ontario Court of Appeal) (application for leave to appeal to the Supreme Court of Canada dismissed 2006 Can LII 4742 (SCC)).

⁶⁵ Richardson and Garnett, *supra* n 21.

The English discretionary doctrine of *forum non conveniens* is used effectively to balance claimant and defendant interests in other jurisdictional disputes;⁶⁶ it is time that it be applied more rigorously in libel cases.⁶⁷ In particular, such an approach would offer an appropriate way to address the “Hollywood” celebrity libel suits where the English forum is selected simply as the most favourable forum compared to the more obvious, and reasonably foreseeable, US alternative. English courts could usefully follow the example of another UK court, the High Court of Justice in Northern Ireland, which applied a “real and substantial connection” approach to decline jurisdiction in a website libel suit by a US businessman against a New York newspaper.⁶⁸ While the court acknowledged that the claimant’s action was limited to damage to his reputation in Northern Ireland, the fact remained that 93 per cent of the hits on the site were from US users and only 0.7 per cent were from Northern Ireland. In addition, the claimant had little connection with Northern Ireland and the content of the article concerned American matters and was clearly directed at persons in the US.

3. Rethinking Choice of Law

The problem of choice of law is rarely discussed in the English and Commonwealth context since it is unquestionably accepted that the law of the forum is applied to any acts of publication that occur in that jurisdiction. The consequence therefore of a very wide exercise of jurisdiction by English courts is not only that US defendant publishers will have to litigate at great distance from home but they will also be subject to a foreign, claimant-friendly libel law.

Hence, another possible strategy for protecting US defendants in transnational libel cases would be to reform the English choice-of-law rules for defamation. Rome II, mentioned above,⁶⁹ held out some promise here. In one of the original proposals it was provided that the law of the country in which damage arises would govern a libel claim unless (i) at the time when the damage occurs the habitual residences of the claimant and defendant were in the same country; or (ii) from all the circumstances of the case the action is “manifestly more closely connected with another country” in which case the law of that other country will apply. After disagreement between the European Commission, the European Parliament and Member States, this provision was dropped from the final version of Rome II, leaving the current English choice-of-law rule

⁶⁶ *Spiliada Maritime Corp v Cansulex* [1987] 1 AC 460.

⁶⁷ This view has support among English and Commonwealth commentators: see Bigos, *supra* n 27; Richardson and Garnett, *supra* n 21; G Smith, “Here, There or Everywhere? Cross-border Liability on the Internet” (2007) 13(2) *Computer and Telecommunications Law Review* 41 (all supporting a targeting analysis) and Hare, *supra* n 24.

⁶⁸ *Tracy v O’Dowd* (unreported, High Court of Justice in Northern Ireland, 28 January 2002).

⁶⁹ See *supra* n 2.

unchanged. However, had the above provision been included, then it is possible that many of the cases above, such as *Berezovsky* and *Lewis v King*, may never have come before an English court.

The reason for this conclusion is that even though the liberal English rules of jurisdiction would still allow the case to proceed, the new choice-of-law rules would mean that the English court could not automatically apply its own law as the country of publication. Instead, the court would be forced to apply the law of the common habitual residence of the parties or the law with which the action is most closely connected. Such tests would increase the potential for application of foreign law considerably and are similar in effect to the US Second Restatement position referred to above. Interestingly, one Australian judge, Kirby J, expressed concern with the law of the place of publication rule in Internet defamation cases. In his view, a better rule to apply would be the law of the country that has the strongest connection with or is in the best position to control or regulate the conduct that is to be influenced.⁷⁰

In the cases of *Lewis v King* and Richard Perle, application of the original provision in Rome II would have led to selection of US law as the country of common residence. In the case of *Berezovsky*, an argument could be made that US law would have been more closely connected with the claimant's action than English law since the US was the place of the principal volume of publication and the residence of the defendant. English law would also arguably not apply to the *Ehrenfeld* case, where neither party was resident in England and the place of principal publication and residence of the defendant was the US.

The result, then, is that if the existing choice-of-law rule, which favours application of the law of the forum, were changed to one which focused on the wider connections with the action, much of the incentive for claimants to sue in England would disappear since English law would apply in fewer cases. Yet, there are some problems with such a suggestion. First, a test based on closest connection would be difficult to apply in some cases where the links are evenly spread. Secondly, application of foreign law in England would still be subject to local public policy and so an English court may not apply such law where it was inconsistent with English standards for protection of reputation and the UK's obligations under Article 8 of the ECHR. Thirdly, since there was strong disagreement between the European institutions and Member States on the issue of choice of law in libel originally, such a change may be unlikely in the future.

⁷⁰ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 626 [114]. In addition, the Australian uniform defamation legislation adopts a "closest connection" choice-of-law rule in respect of "multiple publication in more than one Australian jurisdictional area", specifically, "the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection" is applied: *Defamation Act* 2005 (NSW) s 11(2).

4. Abuse of Rights and English Domestic Law

Another approach to bridging the divide would be to look beyond the rules of private international law to considering directly the protection of reputation under English libel laws. While we are not making specific proposals in this paper for altering the English substantive law of libel so as to bring it closer to the US position, one thing at least is clear. As to the content of a revised English libel law, it would not be appropriate simply for English courts to adopt the US position, since, despite the views of US publishers, it is no less extreme than the English view. As Kirby J pointed out in *Gutnick*,⁷¹ the US “public figure” doctrine in *New York Times v Sullivan* represents a peculiarly American conception of the overwhelming importance of free speech vis-à-vis reputation. By contrast, it may be thought that recognising the right to reputation as enshrined alongside free speech in the ECHR allows for a more moderate English position to emerge – namely that reputation is not necessarily trumped by free speech and the two must be considered together in an effort to determine which should prevail in a particular case.

This suggested equilibrium is a fine aspiration for the longer term but the problem at present is that under English defamation law reputation is given an overwhelming status vis-à-vis free speech. Indeed, a claimant merely has to prove that reputation had been impugned and the onus is then on a defendant to bring any free speech arguments within specific highly tailored heads of defences – although these may be expanding slightly in a post-*Reynolds v Times Newspapers Ltd* era.⁷² Moreover, given the traditional importance attached to reputation in English libel law, it is not surprising that English judges have treated the language of a “right” to reputation in the ECHR as simply reinforcing the inviolability of reputation, at the same time paying less attention to the ECHR’s language about the (additional) “right” to free speech. One way around this is to insist that balancing should be more even-handed as was suggested by Eady J in *Mardas*.⁷³ Another, related, option is to consider the possibility of arguing *abuse of rights* as a vehicle to intervene where a claimant’s motives in invoking a right may be questioned – and in particular where it may be argued that the right is being used “for the purpose of destroying or limiting [the] rights and freedoms [of] others”.⁷⁴

⁷¹ *Ibid*, [74].

⁷² See *Jameel v Wall Street Journal* [2007] 1 AC 359 (broadly construing the *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 qualified privilege defence to function as a public interest defence operating in accordance with Article 10 ECHR).

⁷³ *Mardas v New York Times* [2008] EWHC 3135 [13] and see also *Pfeifer v Austria* [2007] ECHR 12566/03, the Court at [37]–[38]. Arts 8 and 10 expressly provide for their specified rights to be limited in accordance with, *inter alia*, other rights under the Convention.

⁷⁴ P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (Dordrecht, Kluwer, 2nd edn, 1990), 563. Abuse of rights, based on the notion that rights are not totally discretionary, is of Continental origin and entails ‘the use of a right in the absence of a legitimate

Abuse of rights is referred to specifically in Article 17 ECHR⁷⁵ and there is a small but developing jurisprudence in the European Court of Human Rights to suggest that where a complaint about a rights violation is motivated by concerns which have more to do with furthering political causes than vindicating the right, this may be a basis to strike out the complaint.⁷⁶ While these cases have been particularly concerned with Article 10 and attempts to use this to justify politically motivated hate speech, the provision might equally be drawn on with respect to Article 8 where the right to reputation is used as a tool of political censorship. Indeed it has been argued by some commentators that “[t]he importance of Art 17 in balancing apparently competing ECHR rights cannot be overstated”, and the provision will be an area of potential development for future cases including claims under Article 8.⁷⁷ Such development might include the *Ehrenfeld*-type case where a non-US claimant (or for that matter a US claimant) seeks to prevent a US publisher from releasing material which there is a very high public interest to know – such as allegations of supporting terrorism.

The proposed approach seems to us to offer some scope for addressing questions of when it is appropriate to recognise a rights-based claim under law. The suggestion goes beyond the transnational cases we have been discussing (including *Ehrenfeld*) to embrace, for instance, the more squarely English-focused case of *Alms for Jihad* written for publication in the UK being pulped by CUP under threat of defamation proceedings. Indeed we suggest that it is these kinds of case that English judges, considering their role in protecting freedom of speech under the ECHR, as well as more generally, should be especially concerned to address.

interest in exercising the right’ (Cass civ 1st, 19 November 1996, Bull civ I no 404; RTD civ 1997, 156, note Gautier). The doctrine has been applied in an open-ended fashion to include, for instance, the exercise of property rights (including intellectual property rights), moral rights and contractual rights: see Dalloz edn of French Code civil, 103rd edition (Paris, 2004), 1182ff and further W van Gerven, *Beginselen van Belgisch Privaatrecht I Algemeen Deel* (Antwerpen-Utrecht, Standaard, 1973), 164ff.

⁷⁵ Art 17 (Prohibition on Abuse of Rights) states that the ECHR may not be interpreted as implying any right “to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention”.

⁷⁶ See eg *Garaudy v France* [2003] ECHR 65831/01 (motivation for using Art 10 to justify Nazi-like politics was an abuse of rights with result that reliance on Art 10 ruled inadmissible) – although note also *Vajnal v Hungary* [2008] ECHR 33629/06 (application to strike out failed on basis that the expression sanctioned in instant case “was unrelated to racist propaganda”) and *Soulas v France* [2008] ECHR 1548/03 (argument of abuse of rights dismissed as narrowly linked to substance of grievances raised by complainants). See also *Norwood v Director of Public Prosecutions* [2002] EWHC 1564 (Admin) where Auld J states “[t]here are . . . considerations under arts 9 and 17, weighing against permitting the appellant to rely on his right under art 10.1 in the circumstances of this case” [40] and generally, van Dijk and van Hoof, *supra* n 74.

⁷⁷ H MacQueen and D Brodie, “Private Rights, Private Law and the Private Domain” in A Boyle, C Himsworth, A Loux and H MacQueen (eds), *Human Rights and Scots Law* (Oxford, Hart Publishing, 2002), 141, 151.

E. IMPLICATIONS FOR EUROPEAN PUBLISHERS

A brief comment should also be made about the position of European publishers facing libel suits in England. Jurisdiction in an action against an EU-domiciled publisher in England is determined by the provisions of the Brussels I Regulation.⁷⁸ The relevant provision for libel cases is Article 5(3), which provides that a defendant may be sued in the place where the harmful event occurred, which includes both the place of the event giving rise to the harm and any place of damage.⁷⁹ In the context of libel, the claimant may therefore sue either in the country where the publisher is established, as the place of the event causing harm, or any place where the material is published.⁸⁰ While in the first case, there will be jurisdiction to adjudicate in respect of all the claimant's harm suffered, in the second situation the claimant will only be able to sue to recover in respect of damage in that state.

While such an approach appears balanced and reasonable, arguably the *Shevill* test is even more generous to libel claimants than the English common law rules of jurisdiction, since there is no doctrine of *forum non conveniens* available to defendants to mitigate excesses of jurisdiction.⁸¹ For this reason *Shevill* has been criticised for encouraging forum shopping,⁸² a point which seems to be borne out by a recent libel suit in England between two Icelandic residents, although the website which was the subject of the action was hosted in England.⁸³ Moreover, as English law will again be exclusively applied to any local publications, the only real strategy for European defendants seeking to avoid suit in England would be to employ the "abuse of rights" argument discussed above.⁸⁴

F. CONCLUSION

The different approaches to free speech and reputation in England and the US have existed for many years, yet it is only recently, with the great increase in transnational libel cases, that the divide has become a source of tension and conflict.

⁷⁸ See *supra* n 1.

⁷⁹ *Bier BV v Mines de Potasse D'Alsace SA* C-21/76 [1976] ECR 1735.

⁸⁰ *Shevill v Presse Alliance SA* C-68/93 [1995] ECR I-415.

⁸¹ *Owusu v Jackson* C-281/02 [2005] 2 WLR 942.

⁸² See A Reed and T Kennedy, "International Torts and *Shevill*: the Ghost of Forum Shopping Yet to Come" [1996] *Lloyd's Maritime and Commercial Law Quarterly* 108, although other writers have been more supportive: see eg Y Farah, "Jurisdictional Aspects of Electronic Torts, In the Footsteps of *Shevill v Presse Alliance SA*" (2005) 11 *Computer and Telecommunications Law Review* 196.

⁸³ *Olafsson v Gissurarson* [2008] EWCA Civ 152.

⁸⁴ Interestingly, the *Shevill* doctrine has been applied in a number of Irish decisions to confer jurisdiction over UK publishers in libel suits by Irish claimants; see *Murray v Times Newspapers Ltd* [1997] 3 IR 97 (Supreme Court), *Ewins v Carlton* [1997] 2 ILRM 223 and *Hunter v Gerald Duckworth & Co Ltd* [2000] 1 IR 510 (High Court).

This article has examined the nature of the transatlantic divide and the strategies which may be employed to bridge it. The main conclusion is that, despite the views of some American commentators, a unilateral legislative solution by the US is unlikely to be effective in deterring English libel actions with a US dimension and will most likely only inflame the situation further. Instead, what must be realised is that there are two distinct problems needing attention: the “Hollywood celebrity” suits and the political censorship cases. However, both situations do not involve the same interests and so require different solutions. In the case of the Hollywood suits, a more rigorous use of jurisdictional controls by English courts would be an appropriate response, while in the political censorship category a greater recognition of the abuse of rights doctrine in English libel law would be beneficial.

In the same spirit, US courts and legislators must also be prepared to moderate some aspects of their own law. They need to accept that claimants with strong residential, social and financial connections to England should be entitled to sue to protect their reputation there, even if the defendant is a US publisher. They should also acknowledge that any resulting judgment in such a case should be enforceable in the US without the intrusion of public policy. (English judgments in Hollywood celebrity or political censorship cases, however, should be entitled to much less deference.)

In our view, the adoption of such compromise measures on both sides of the Atlantic will hopefully move both jurisdictions to a middle ground—one which better accommodates the English right to reputation with the US right to free speech.