

Commercial Issues in Private International Law

A Common Law Perspective

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FOREWORD

THE HON WILLIAM GUMMOW AC*

Professor Adrian Briggs has adverted to the view that the ‘pedagogic convenience’ which segregates the study of private international law from the study of the remaining body of the law ‘now does more harm than good’.¹

That observation stimulates further consideration of the basic issues reflected in the chapters in this book. First, the study of private international law, in particular choice of law, encourages the student (and subsequent practitioners) to appreciate that the legal system operates with some concepts the interaction between which might be described as vertical rather than horizontal. Other instances appear in the study of federalism in countries such as Australia, Canada, India and the United States. In Australia, in particular, the interplay between principles of law and equity, with the latter predominating in the event of conflict, provides another example, closer perhaps to everyday legal practice.

Are the issues presented by the facts of a dispute to be characterised as attracting the law of contract, or of tort, or breach of fiduciary duty, or perhaps all three? Where the facts have connections beyond the forum, the result of characterisation by the forum may lead to choice of a foreign law which differs from that of the forum. And, as Professor Yeo Tiong Min notes under the heading ‘Choice of Law for Fiduciary Duties’ in his chapter on The Rise of Party Autonomy, difficult issues of characterisation are presented where the forum has a particular body of legal norms which other legal systems lack.

A striking example is the holding in *Kuwait Oil Tanker Company SAK v Al Bader*² that the duties imposed by arts 264 and 267 of the Kuwait Civil Code were such that, although Kuwait had a civilian system, the articles were to be characterised by the English court as imposing fiduciary duties, breach of which attracted an award of compound interest.

The second consideration is that unless the modes of thought engaged by such situations are appreciated as a matter of pedagogic necessity, rather than mere convenience, the process of legal education will have miscarried. Therefore, it is a matter of regret that not only is private international law too often seen as a

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¹ A Briggs, *The Conflict of Laws*, 3rd edn (Oxford, Oxford University Press, 2013) 248.

² [2000] EWCA Civ 160, [2000] 2 All ER (Comm) 271, [187]–[193].

specialised area, segregated from the remaining body of the law, but in too many law schools either available only as an optional subject or even not at all.

This collection of papers is enhanced by the contribution of Justice Rares and Justice Brereton who are well-placed to emphasise the pervasive and enduring relevance of issues of private international law in the day-to-day work of the superior courts in Australia.

Attention is given in several of the chapters to the view that the principles of private international law have their source in the law of nations, as understood in customary international law. However that may be in other jurisdictions; it has long appeared to this writer that the source for us is in the common law of Australia. The matter has a particular importance where on its proper construction a statute of the forum prescribes a legal norm which differs from that which, left to itself, the common law would select as the *lex causae*.

Statutory regulatory regimes and consumer protection legislation may reach conduct which at common law would not be characterised in such a way as to render the law of the forum the *lex causae*. In her chapter, Professor Mary Keyes shows that Australian courts tend to apply forum legislation, if it be applicable, explicitly or by implication, rather than to apply choice of law rules. The disagreements between scholars which are in play are described by Dr Hook in her chapter as between ‘statutists’ and ‘traditionals’. She illustrates the considerations involved by reference to the recent decision of the New Zealand Supreme Court in *Brown v New Zealand Basing Ltd*.³ This concerned the application of local employment legislation to Cathay Pacific pilots based in New Zealand but with contracts governed by Hong Kong law.

Mr Michael Douglas writes in defence of statutory criteria and has the support of Dr FA Mann.⁴ It may be noted that the writings of Dr Mann have received great weight in recent times in the High Court of Australia.⁵ Mr Douglas writes with particular reference to the prohibition on misleading or deceptive conduct by s 18(1) of the Australian Consumer Law (Cth). In the *Valve Corporation* litigation in the Federal Court, both at first instance⁶ and on appeal⁷ the Australian statute was applied to a dispute concerning representations made to ‘videogamers’ who downloaded in Australia material sourced elsewhere. The defendant was incorporated in the Washington State in the USA and there were many other factors connected with that jurisdiction. The Federal Court accepted that the closest and most real connection was with Washington but applied s 67 of the Australian

³ [2017] NZSC 139, [2018] 1 NZLR 245.

⁴ ‘The Doctrine of Justification in International Law’ (1954) 111 *Reueil des Cours* 1, 70.

⁵ *Moti v The Queen* (2011) 245 CLR 456, [2011] HCA 50, [52]. See also C McLachlin, ‘The Foreign Relations Power in the Supreme Court’ (2018) 134 *Law Quarterly Review* 380, 392, 398–99, 404–06. For many years Dr Mann practised (like the future Lord Collins) as a solicitor (and partner) at Herbert Smith; their scholarship thus was leavened by practical experience at first hand.

⁶ [2016] FCA 196, (2016) 337 ALR 647.

⁷ [2017] FCAFC 224, (2017) 351 ALR 584.

law and disregarded contractual provisions dealing with choice of law and curial jurisdiction.

Statute may be the source of property rights rather than the imposition of prohibitions. Patents and copyrights are significant examples. It may be said that the monopolies they confer are territorial in scope. But, however this may be true of real property,⁸ the joint reasons of Lord Walker and Lord Collins, a formidable combination, in *Lucasfilm Ltd v Ainsworth*⁹ show that the forum may entertain an action for infringement of copyright conferred by the law of another jurisdiction, in this case, that of the United States.

Proof of foreign law, under the orthodox rule of the common law, is a matter requiring the party who wishes to rely on it to plead that law and support it by expert evidence.¹⁰ In their chapter on proof of foreign law Justin and Dominique Hogan-Doran criticise that position. The task of the court is to evaluate the evidence as a fact-finding exercise. The number of nation states with their own legal systems has greatly increased since the common law rule was propounded. Experts may be hard to find. Their evidence may appear incomplete. Justice Brereton, in his chapter, indicates that in practice where there is doubt or conflict judges prefer to look at the foreign sources, informed by the expert evidence as far as it goes, and draw their own conclusions.

The Supreme Court of Canada recently observed that ‘the natural habitat of the internet is global’.¹¹ Further, corporate structures are increasingly multi-jurisdictional, not the least to utilise the advantages of tax havens. The upshot is seen in the growth of duplicative litigation and the responses thereto of, on the one hand, the forum declining jurisdiction on the basis that it is an ‘inappropriate forum’, or some other such formulation, and, on the other hand, the issue by the forum of an anti-suit injunction.

Further, as Lockhart J explained 25 years ago in *Sterling Pharmaceuticals Pty Ltd v Boots & Co (Aust) Pty Ltd*,¹² an appropriate exercise by the forum of case management may be a temporary stay to enable the other court to try a common issue, for example, of fact. The doctrine of issue estoppel applies in multinational litigation, as decided in the celebrated *Carl Zeiss* litigation.¹³ But it operates in sequential not concurrent litigation. Hence the importance of the temporary stay. Professor Mortensen in the chapter ‘The Case Management Stay in Private International Law’ surveys the subject both in Europe (including the tangled relationship of the United Kingdom with the EU) and in the common law jurisdictions of Australia, Canada, Hong Kong SAR, Singapore and New Zealand.

⁸ *British South Africa Co v Companhia de Mozambique* [1895] AC 602.

⁹ [2012] 1 AC 208, [95]–[110]. See also *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179.

¹⁰ *Neilson v Overseas Projects Corporation of Victoria* [2005] HCA 54, (2005) 223 CLR 331, [115]–[116], [125].

¹¹ *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, [41]. See further M Douglas, ‘Extraterritorial Injunctions Affecting the Internet’ (2018) 12 *Journal of Equity* 34.

¹² (1992) 34 FCR 287.

¹³ [1967] 1 AC 853, 918, 927, 948, 965–67.

Another aspect of modern dispute resolution is the choice by the parties of arbitration rather than curial litigation. Dr Hayward discusses no less than nine categories where choice of law clauses in arbitration agreements are inadequate or defectively drafted, leaving various issues which arise in the subsequent arbitration to be determined under substantive laws selected by the arbitrators.

In Australia, recent revisions to the Rules of Court respecting 'long-arm' jurisdiction, initiated by the Rules Committee of the Council of Chief Justices are now in operation in the Supreme Courts of several States and are likely to be adopted by the Federal Court.

Professor Dickinson raises a number of issues, jurisprudential, substantive and procedural, respecting the growth of 'long-arm' jurisdiction over defendants not present in the forum, with or without the requirement of prior leave. It should be noted, however, as Justice Brereton emphasises, that with respect to grounds outside the traditional categories the court may grant leave only if satisfied that the claim has a real and substantial connection 'with Australia' (not confined to the State in question) and 'Australia' is the appropriate forum for the trial. In her chapter, Professor Bath explores the question whether the prospective enforcement in the relevant foreign jurisdiction of a judgment obtained in the forum after the exercise by it of such 'long-arm' jurisdiction is a matter to be taken into account initially when leave is sought to serve *ex juris*. She makes the point that prospects for international enforcement of judgments should increase as parties hold assets and carry on business in more locations than their headquarters. Her research has yielded *Wilson v Adda Investments Pty Ltd*¹⁴ where the issues in play were given canny and insightful consideration by Garling J.

The remaining chapters in this collection deal with aspects of recognition in the forum of foreign judgments. In Australia, the Foreign Judgments Act 1991 (Cth) (with its analogues in some 30 jurisdictions, excluding the United States and Mainland China but including Hong Kong SAR) displaces the common law in respect of judgments for a sum of money, other than taxes, fines or penalties. In that setting, Dr Huang deals with reciprocal recognition and enforcement of foreign judgments in Mainland China. The 2005 Hague Convention on Choice of Court Agreements seeks to achieve the uniform treatment of 'exclusive' jurisdiction agreements and of judgments rendered in the exercise of jurisdiction based on such an agreement. There are some 23 EU Member States which are parties to the Convention but in Australia do not benefit from recognition under the 1991 Act. Ms Brooke Marshall brings to her chapter on the Convention her experience at the Max Planck Institute and the University of Hamburg. She points out that the projected Free Trade Agreement between Australia and the EU is likely to increase the occasions for the engagement of the Convention if the proposed accession of Australia to the Convention comes to pass. The chapter thus provides valuable material for those Australian lawyers who look ahead.

¹⁴[2014] NSWSC 381.

Enough had been said above to emphasise that the editors are to be congratulated in bringing together contributions to the commercial aspects of private international law, seen from a common law perspective. Legal advisers, advocates, judges, scholars and students will find in these pages much to engage them and stimulate further thought.

William MC Gummow
Sydney
November 2018