2007 Annual Survey of Recent Developments in Australian Private International Law

Kent Anderson and *Kim Pham* with *Jim Davis**

I. Introduction

The second half of the first decade of the 21st Century has not provided as many major High Court of Australia decisions on private international law. Rather, 2007 like the years immediately before it has proven a truism: rarely are bright-line tests as easy to apply in practice as they are to declare. Thus, the most distinguishing feature of 2007 is how the lower courts continue to struggle in applying the High Court standards for discretionary exercise of jurisdiction and the choice of tort law rules. A second trend gaining steam in 2007 and ahead is the development of new statutory frameworks that bring Australia and New Zealand even closer, almost to the point where simple domestic civil procedure rules, rather than the traditional conflict rules, cover issues across the Tasman.

This review of 2007 developments in Australian private international law follows the same methodology as the previous reports. The review covers the period 1 January 2007 to 31 December 2007. Occasionally we note appeals and other developments we know unfold after that period, but our future gazing is not comprehensive. We identified developments through a mixture of modern and traditional research modes. Thus, we scanned Westlaw, Lexis, and AGIS databases for cases and commentary. We also monitored and reviewed print journals and reporters. In admitting the limitations of this method, we again call upon colleagues to alert us to any relevant materials including their own writings on conflicts and any other developments, reported or unreported, including cases, diplomatic exchanges, and private developments. It is always worth reminding readers that we take a qualitative rather than quantitative approach to this exercise and in this regard differ from the American annual reviews.[1] As we do not seek to review all cases, we apply a necessarily personal and idiosyncratic scrutiny to identifying the material that we believe either extends the law or provides useful examples of conflicts law in action. In defence of this approach, we believe that as three scholars covering a range of research, practice and teaching experience, our judgment is honed while not perfected.

The article is organized in standard fashion. Section II covers material on jurisdiction, particularly discretionary exercise of jurisdiction such as *forum non*

* ANU College of Law, Australian National University.

1 S C Symeonides, 'Choice of Law in the American Courts in 2007' (2008) 56 *American Journal of Comparative Law* 243.

conveniens and anti-suit injunctions. Section III reviews choice of law issues beginning with conceptual issues such as *renvoi* and characterization before considering choice of tort and other laws. Section IV concludes by examining enforcement of foreign judgments including regulatory developments between Australia and New Zealand. We briefly conclude by suggesting emerging trends and possible directions private international law may take.

II. Jurisdiction

(a) Discretionary Exercise of Jurisdiction

(i) Transfers under Cross-Vesting Scheme within Australia

As noted in the past two reviews,[2] the High Court's decision in *BHP Billiton Ltd v Schultz,*[3] while clarifying in a positive way the standard for discretionary transfers of cases across domestic jurisdictions under the cross-vesting scheme,[4] in practice has left the lower courts effectively applying two differing outcome-determinative approaches.[5] The decisions of 2007 provided no more clarity and merely reinforced the earlier identified de facto split.[6] Given the relatively recent decision of *Schultz*, it is perhaps too early to hope the High Court will resolve the confusion but pending that we encourage the lower courts to take the lead in following the Victorian courts in not privileging Dust Disease Tribunal parties over all other plaintiffs.

(ii) Forum Non Conveniens

The international equivalent of transfers under the cross-vesting scheme within Australia is the doctrine of *forum non conveniens.* As applied in Australia since the High Court 1990 decision in *Voth v Manildra Flour Mills Pty Ltd*, *forum non conveniens* enables a court to issue a stay on proceedings if the court is a 'clearly

---

2 K Anderson and J Davis, 'Annual Survey of Recent Developments in Australian Private International Law, 2005' (2007) 26 *Aust YBIL*, 425, 427–29; K Anderson, K Pham and J Davis, 'Annual Survey of Recent Developments in Australian Private International Law, 2006' (2008) 27 *Aust YBIL* 467, 469–70.

3 (2004) 221 CLR 400.

4 See, eg, Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) s 5(2).

5 While the effective split of decisions was identified in our earlier review, the extremely nuanced and insightful elucidation of the issues was provided by M de Garis, *In the Interests of Justice? Forum Transfer in Dust Disease Litigation: An Examination of BHP Billiton Ltd v Schultz and Section 5 of the Jurisdiction of Courts (Cross-Vesting) Act 1987* (Honours Thesis, Australian National University, 2008).

6 *Valceski v Valceski* [2007] NSWSC 440**;** *Fell v John Fell* [2007] WASC 157; *Volkswagen Financial Services Australia v City Prestige Service Centre* [2007] NSWSC 203**;** *PRD Realty v King* [2007] NSWSC 734; *Goldamere v Metso Minerals* [2007] NSWSC 980; *Resource Equities v Carr* [2007] WASC 246**;** *British American Tobacco Australia v Peter Gordon* [2007] NSWSC 230; *Bioag v Garry; Joseph Hickey* [2007] NSWSC 296; *Gray v Hill* [2007] WASC 123**;** *Amcor v Barnes* [2007] VSC 515; *Eden v Amaca* [2007] VSC 374; *Wallaby Grip v Gilchrist* [2007] NSWSC 1181**.**

inappropriate forum'.[7] This high threshold test was supposed to provide a bright-line standard more predictably applied than the English courts' 'most appropriate forum' standard.[8] Nevertheless, much of that initial clarity—and some would argue parochial bias—has been lost as Australian courts become more willing to stay cases particularly where the applicable law is not Australian.

Prior to addressing the softening standard of the 'clearly inappropriate forum' test, the first case we cover sought to clarify a technical but practically important procedural distinction in challenging *forum non conveniens* decisions. In *Puttick v Fletcher Challenge Forests Pty Ltd*,[9] a preliminary question faced by the Victorian Court of Appeal was whether leave is needed to appeal a *forum non conveniens* stay. As discussed last year, the plaintiff in *Puttick* contracted mesothelioma during visits to factories made in the course of his employment and sued his employer for negligence. The first instance judge granted a *forum non conveniens* stay primarily based on the fact that New Zealand law applied to the claim. The appellant appealed to the Court of Appeal.

In response the respondent argued that leave to appeal was required, because a *forum non conveniens* stay did not finally determine the rights of the parties and was therefore an interlocutory order. Adding to the confusion of what appears a straightforward issue, the three judges reached three different conclusions.

Maxwell P agreed with the respondent that leave to appeal was required, and granted leave. He commented:

> That is … an unsatisfactory state of affairs. … This case illustrates, once again, that the distinction between 'final' and 'interlocutory' is of limited utility in differentiating between those appeals which should proceed only by leave and those which should proceed as of right.[10]

Chernov JA also agreed that leave to appeal was required. However, he did not grant leave, considering that the applicant failed to show sufficient doubt in the correctness of the initial decision and that substantial injustice would result if the decision was not set aside.[11]

Warren CJ did not decide. She noted the conflicting authorities as to whether leave to appeal was required. However, because the practical effect of the order was to finally determine the rights of the applicant, and because the case raised the difficult question of locating the place of the tort, leave should be granted if required.[12]

Warren CJ and Chernov JA did, however, go on to find that the trial judge had not erred in identifying the place of the tort (discussed further below), and hence had not miscarried his discretion in granting a stay for *forum non conveniens*.

---

7 (1990) 171 CLR 538 ('*Voth*').
8 *Spiliada Maritime Corp v Cansulex* [1987] 1 AC 460.
9 (2007) 18 VR 70.
10 Ibid 85 [50].
11 Ibid 95 [96].
12 Ibid 73 [8]-[9].

Given that the practical effect of a *forum non conveniens* order is to prevent a plaintiff from taking any further action in that jurisdiction, it seems to fit uneasily into the category of interlocutory decisions. Nevertheless, any requirement to seek leave is likely to have little effect as a practical matter: given the final nature of the order, an appellant with a strong case on the merits should not have difficulty showing a court that injustice would occur should leave to appeal be refused. Similarly, an appellant who has difficulty meeting the requirements for leave to appeal would be less likely to be successful in the result of the appeal. In short, the entire debate by the judges in *Puttick* may be the proverbial 'tempest in a teacup'.

More interesting are those decisions that are struggling with the heretofore considered bright-line standard of 'clearly inappropriate forum' for granting a stay on proceedings. That seemingly difficult test for *forum non convieniens* was met where an Australian court again showed historically surprising restraint when faced with applying a foreign law standard. In *Garsec v Sultan of Brunei*,[13] Garsec brought proceedings in the NSW Supreme Court, alleging that the Sultan, acting through his private secretary, had agreed to buy a rare manuscript of the Koran from it. It sought specific performance or damages for breach of contract. The defendant argued under the various factors of the *Voth* that NSW was a clearly inappropriate forum based on matters related to Bruneian law.

Article 84B of the Bruneian Constitution provides that the Sultan can do no wrong and that the Sultan is not liable to any legal proceedings. McDougall J found that Bruneian law applied to the claim, and that the constitutional immunities would apply as part of the substantive Bruneian law (reviewed below) He continued:

> To the extent that a resolution of the dispute will involve the interpretation of Art 84B, or will involve the application of Art 84B to whatever facts may be found, that is a task properly to be undertaken by the Courts of Brunei. It is a task that this Court (or, in my view, any foreign court) should be slow to entertain.[14]

This was particularly the case given that art 86 of the Constitution designated an Interpretation Tribunal to resolve questions concerning the interpretation of the Constitution: 'The Sultan, the State and its citizens are entitled to have constitutional questions decided by the tribunal of their choice and not by a foreign court.'[15] Based solely on those grounds, McDougall J was willing to stay the proceedings.[16]

The application for the *forum non conveniens* stay was argued on the basis of the *Voth* factors. McDougall J noted that the defendants would be put to 'very substantial inconvenience and expense' if proceedings were to be held in Australia, including severe difficulties in the administration of Brunei during the Sultan's absence, accommodation costs for the Sultan and his entourage of up to fifty officials during the trial, and the need for significant security arrangements.

---

13 [2007] NSWSC 882 ('*Garsec*').
14 Ibid [107].
15 Ibid.
16 Ibid [111].

Conversely, there was no evidence of difficulty for many of the witnesses, who lived in Indonesia or Brunei, in attending the trial in Brunei. Further, there was no suggestion that the legal system of Brunei was unfair.

There were some connections with New South Wales. The plaintiff company was incorporated in New South Wales, and its director, one of the key witnesses, also lived in New South Wales. The Koran was located in New South Wales. Garsec further argued that it had a legitimate juridical advantage in New South Wales, as it would not be able to bring proceedings in Brunei because of the Sultan's constitutional immunities. There was also some question as to whether some of the facts alleged by Garsec were illegal under Bruneian law, and may expose Garsec to a risk of prosecution.

McDougall J rejected Garsec's arguments with respect to juridical advantage. First, he noted that under the *Voth* test, New South Wales could be a clearly inappropriate forum, notwithstanding that the plaintiff would be unable to bring proceedings in Brunei. Second, he noted that, Bruneian law applied to the claim, so the Sultan's constitutional immunities would be applied by a New South Wales court hearing the case in any case. If the immunities did not apply, then this would be oppressive to the Sultan: 'the counterpart of Garsec's legitimate juridical advantage is an equivalent juridical disadvantage to the Sultan.'[17] Finally, he rejected the argument that the concept of legitimate juridical advantage should be extended to protect a litigant from the consequences of illegal acts.

Accordingly, McDougall J concluded that New South Wales was a 'clearly inappropriate forum' based on the *Voth* factors as well as the factors relating to Bruneian law. This conclusion was further strengthened if the arguments were considered cumulatively. He stayed the proceedings.

In granting the stay based on Bruneian law, McDougall J referred to *Amwano v Parbery*,[18] in which Finkelstein J granted a *forum non conveniens* stay on the grounds that Australian courts should be reluctant to interpret the Constitution and statutes of a foreign state.[19] As such, McDougall J's decision in this case appears part of a broader trend, discussed in last year's review, of courts granting a *forum non conveniens* stay in cases in which foreign law governs the claim.[20] As this trend develops, the strict and therefore straightforwardly applied 'clearly inappropriate forum' standard moves closer to the more substantive and therefore less predictably applied 'most appropriate forum' standard. In other words, the difficult struggle the Court in *Garsec* shows in application of the High Court's test will likely only increase as the lower courts pursue this application. The benefit, of course, is a much less parochial default setting.

---

17 Ibid [129].
18 (2005) 226 ALR 767.
19 Ibid [70]-[72].
20 See Anderson, Pham and Davis, above n 2, 470–472, discussing *Murakami v Wiryadi* [2006] NSWSC 1354 and *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370.

Garsec appealed to the New South Wales Court of Appeal, which unanimously dismissed the appeal.[21] The High Court granted leave to appeal,[22] but the case was discontinued. These decisions will be discussed in next year's review.

Another case this year offered a reminder that in some circumstances *forum non conveniens* may not apply at all. In *Karim v Khalid*,[23] the issue faced by the Family Court was whether the doctrine of *forum non conveniens* was relevant to an application to return a child to Pakistan. A husband and wife had a child in Australia. The family moved to Pakistan, where the husband and wife separated. The wife returned to Australia with the child, without the husband's knowledge or consent. The husband came to Australia and began proceedings in the Family Court for the return of the child to Pakistan. Pakistan is not a party to the Hague Convention on International Child Abduction.

At the hearing, there was a question as to whether the Family Court had jurisdiction over the matter. The husband argued that, although the Australian court had jurisdiction, it should refuse to exercise it because the court in Lahore was the proper jurisdiction to hear the proceedings. The parties thereafter proceeded to make submissions on *forum non conveniens* principles, with the best interests of the child as a relevant factor. The judge dismissed the objection to jurisdiction and went on to dismiss the husband's application to return to Pakistan with the child. On appeal, the husband argued that the trial judge had erred by having regard to *forum non conveniens* principles.

In a unanimous decision, the Court[24] began by emphasising the importance of identifying the relief sought.[25] The factual circumstances of the cases relied on by the trial judge were 'markedly different' to the present case, involving children who were *not* present in Australia.[26] The Court distinguished between an application for the return of a child in Australia to a non-Hague Convention country, and an application for a stay of proceedings in an Australian court on the basis of *forum non conveniens*.

In cases concerning an application for the return of a child to a non-Hague Convention country, the relevant principles were set out in the High Court's decision in *ZP v PS*,[27] from which the Court quoted at length.[28] Despite intervening changes to the Family Law Act, *ZP v PS* was still good law.[29] Thus, 'the sole principle which governs the determination of an application for the return of a child from Australia to a foreign non-Convention country is ... the best interests of the child. *Forum non conveniens* principles are not relevant to such an

---

21 [2008] NSWCA 211.
22 See Transcript of Proceedings, *Garsec Pty Ltd v His Majesty Sultan of Brunei Darussalam* (High Court of Australia, Gummow, Heydon, Kiefel, 13 February 2009).
23 (2007) 38 Fam LR 300.
24 Finn, Coleman and May JJ.
25 *Karim v Khalid* (2007) 38 Fam LR 300, 308 [49].
26 Ibid 313 [60].
27 (1994) 181 CLR 639.
28 *Karim v Khalid* (2007) 38 Fam LR 300, 309–311 [51].
29 Ibid 312 [52]–[59].

application.'[30] By way of commentary, even as private international law lawyers we endorse this sensible and considered approach.

Despite finding that the trial judge had erred in applying *forum non conveniens* principles, the Court nevertheless found that he had also completed an exhaustive analysis of the requisite matters under the Family Law Act in determining the best interests of the child and dismissed the appeal.

(iii) Anti-suit Injunctions

The flip side of the discretion not to exercise jurisdiction is the anti-suit injunction: a discretionary order restraining a party from initiating or continuing proceedings in another jurisdiction. The principles relating to the grant of anti-suit injunctions in Australia were set out in 1997 by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd,*[31] and while not as clear-cut as the *foreign non conveniens* standard, they have proved to cause relatively little difficulty in application over the years.

In 2007, these principles set out in *Cigna* were emphasized by the Family Court in *Lederer v Hunt*.[32] A husband and wife separated, and the wife commenced proceedings in the Family Court for the division of marital property. The husband was a director and shareholder of Primo Meats. Meanwhile, one of the other shareholders in the company died. The wife sought, among others, orders in the family law proceedings relating to ownership of the deceased's shares in Primo Meats. Primo Meats for its part commenced proceedings in the New South Wales Supreme Court under the Corporations Act 2001 (Cth), seeking to correct its share register in respect of the shares previously held by the deceased.

In response, the wife sought and the Family Court judge granted an anti-suit injunction against the Supreme Court proceedings. On appeal, the appellants argued that the trial judge had failed to follow the test in *Cigna* by failing to ask first whether the Family Court was a clearly inappropriate forum.

In their joint judgment, Bryant CJ, Finn and Boland JJ emphasised the distinction drawn by the High Court in *Cigna* between the two situations in which an Australian court could grant an anti-suit injunction.[33] Courts can grant anti-suit injunctions, first, in the exercise of their inherent jurisdiction (for example, to protect their processes), and second, in equitable jurisdiction, to prevent unconscionable conduct such as vexatious or oppressive suits. The High Court had further distinguished between the requirements for each kind of anti-suit injunction. Comity and the requirement that the Australian court is not a clearly inappropriate forum were only relevant in equitable jurisdiction. Where the anti-suit injunction is to protect the processes of the court, 'no question arises whether

---

30 Ibid 312 [59].

31 (1997) 189 CLR 345 ('*Cigna'*).

32 (2007) 36 Fam LR 587.

33 Ibid 598–602.

that court is an appropriate forum … : it is the only court with any interest in the matter.'[34]

The Court considered that it was clear from the trial judge's reasons that he had granted the anti-suit injunction both under the inherent power to protect the court's processes, and under equitable jurisdiction to restrain unconscionable conduct. Thus, while the judge had not considered whether his was a clearly inappropriate forum, this had no effect on the anti-suit injunction insofar as it was granted under inherent jurisdiction.[35] While the trial judge did not expressly refer to comity, this was 'not necessarily fatal'.[36] Satisfied that the trial judge had considered the relevant matters, the Court dismissed the appeal.

While the *Lederer* decision does not shift the anti-suit injunction standard, it is useful in providing clarity regarding the branches of the test and will guide future practice. More significantly but tentatively, along with the *forum non conveniens* cases, it also suggests an increasing willingness of Australian courts to engage in the difficult and less predictable task of weighing the competing merits of potential parallel proceedings through the discretionary jurisdiction tools. While these courts are still acting squarely within the application of the High Court's standards, their approach suggests a perhaps inevitable movement away from the strict, bright-line clarity originally set down.

III. Choice of Law[37]

(a) Renvoi

Despite ours and other's warnings,[38] the High Court's decision in *Neilson v Overseas Projects Corporation of Victoria Ltd*[39] has in 2007 yet to usher in a flood of *renvoi* cases. In England, however, the High Court in *Iran v Berend*[40] grappled with the question of whether *renvoi* should apply in determining ownership of movable property. The defendant bought a fragment of a relief dating from the 5th century BC at an auction in New York in 1974. The fragment was delivered to her in Paris. In 2005, the defendant sent the fragment from Paris to London to be auctioned. Iran sought an injunction in the English courts against the sale, claiming title over the fragment as a national monument.

The claim concerned movable property. Thus, under English conflict of law rules, the question of title to the fragment was governed by French law as the place where the property was currently located. The general choice of law rule under

---

34 Ibid 602 [46], citing *Cigna* (1997) 189 CLR 345, 398.
35 Ibid 604.
36 Ibid 605 [59].
37 For commentary on choice of law, see A Gray, 'Remedy issues in multinational tort claims: substance and procedure and choice of law' (2007) 26 *University of Queensland Law Journal* 1.
38 See A Gray, 'The Rise of Renvoi in Australia: Creating the Theoretical Framework' (2007) 30 *University of New South Wales Law Journal* 103.
39 (2005) 223 CLR 331.
40 [2007] EWHC 132 (QB) ('*Berend*').

French law was that title to a movable object is governed by *lex situs*. However, Iran argued that a French judge was likely to introduce an exception to *lex situs* for cultural property and apply Iranian law to the fragment. The English court should apply *renvoi* and thus apply Iranian law to the question of title.

Eady J began by noting that there was no English authority directly on point. Thus, 'whether or not [renvoi] should apply in any given circumstances is largely a question of policy.'[41] He referred to *Macmillan v Bishopsgate Investment Trust plc (No 3)*,[42] in which Millett J had rejected *renvoi* in determining the priority claims of ownership over intangible property (shares). The defendant sought to distinguish title to movables from title to shares, pointing his Lordship to *Glencore International AG v Metro Trading International Inc*,[43] in which Moore-Bick J commented that 'there was something to be said' for deciding questions of ownership of property as the courts of that state would decide the question. Eady J was unconvinced, considering that the aims of consistency and certainty underlying the doctrine of *lex situs* better supported Millett J's view.[44]

The defendant also pointed to some support for the application of *renvoi* to movable property in Dicey, Morris and Collins. However, again Eady J was unconvinced. He pointed to other sections of that text warning of the practically 'onerous' task of trying to ascertain how a foreign court would decide the question,[45] as well as to Gummow and Hayne JJ's warning in *Neilson* that '[w]henever reasonably possible, certainty and simplicity are to be preferred to complexity and difficulty.'[46] Finally, although he conceded that it might be desirable to apply the law of the state of origin to determine ownership of national treasures, this was 'a matter for governments to determine and implement if they see fit'[47] rather than a matter to be 'achieved by mental gymnastics'.[48]

Nevertheless, Eady J went on to consider whether, should *renvoi* apply, a French court would create an exception to *lex situs* as suggested by the defendants. He noted that an English judge 'must tread with care when it appears that a particular result would not only be unprecedented but also involve the application of new principles'.[49] His job was to determine, based on the evidence, the relevant law '*as it stands*'.[50] He considered that, based on the evidence, it was 'highly unlikely' that a French judge would create such an exception. Finally, Eady J also

---

41 Ibid [20].
42 [1995] 1 WLR 978.
43 [2001] 1 Lloyds Rep 284.
44 *Berend* [2007] EWHC 132, [23]-[24].
45 Ibid [26], citing Dicey, Morris and Collins, *The Conflict of Laws* (14th ed) [4-034].
46 Ibid, citing *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 364 [92].
47 Ibid [30].
48 Ibid [30], citing *Macmillan v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, 1008 (Millett J).
49 Ibid [49].
50 Ibid (emphasis in original).

noted that there might be an issue as to whether the Iranian law would be excluded as a foreign public law, but did not need to decide the issue.[51]

By way of commentary, the English court's conservative response to the invitation to introduce *renvoi* is refreshing. The decision reflects both the practical difficulties opened when asked to interpret a foreign jurisdiction's law and the comity-based reasons why the reflection approach might be less than ideal. It is only hoped that other courts—including those in Australia operating under the *Neilson* precedent—seek to apply *renvoi* in a similarly suspicious way.

(b) Characterisation of Substance and Procedure[52]

Of course, even if Australian choice of law rules determine that foreign law applies to a claim, only the foreign substantive, rather than procedural, law applies.[53] Somewhat surprisingly after the clear indications of where the line lies in this characterization problem by the High Court in *John Pfeiffer Pty Ltd v Rogerson*[54] and *Regie National des Usines Renault SA v Zhang*,[55] the lower courts occasionally are still having to address how to apply the Court's seemingly clear standard.

In the course of the *forum non conveniens* analysis in *Garsec v Sultan of Brunei*,[56] discussed above, McDougall J found that the proper law of the contract was Bruneian law, as the contract was concluded in Brunei. He then had to determine whether the sovereign immunity of the Sultan under the Bruneian constitution was a matter of substance or procedure. He applied the test established by the High Court in *Pfeiffer*: a law is substantive if it affects the 'existence, extent or enforceability of the rights or duties' of the parties.[57] Although the defendant stressed the majority's statement in *Pfeiffer* that the principles may require further elucidation, McDougall J considered that sovereign immunity from suit fell squarely within the High Court's test; ie, it was substantive.[58]

(c) Torts

More problematic than applying the substance-procedure distinction has been how the lower courts are resolving the seemingly simple question of determining the applicable tort law by identifying where a tort occurred under the High Court's strict *lex loci delicti* rule. Although the general principles to be applied in

---

51 Ibid [54]–[56].
52 For commentary on the UK case of *Harding v Wealands* [2006] 4 All ER 1, discussed last year, on the UK characterisation of substance and procedure, see C Dougherty and L Wyles, 'Private international law: *Harding v Wealands*' (2007) 56 *International and Comparative Law Quarterly* 443.
53 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*').
54 (2000) 203 CLR 503, 543 [99].
55 (2002) 210 CLR 491.
56 [2007] NSWSC 882.
57 *Pfeiffer* (2000) 203 CLR 503, 543 [99].
58 *Garsec* [2007] NSWSC 882, [95]–[97].

determining the place of a tort are well-settled, judges continue to disagree on their application to specific fact situations.

As discussed above, *Puttick* concerned a negligence action by an employee against his employer. The plaintiff, who was employed in New Zealand, was ordered to inspect asbestos factories in Belgium and Malaysia, where he was exposed to asbestos, contracting mesothelioma as a result. He alleged that his employer had been negligent by causing or permitting him to be exposed to asbestos, failing to provide and maintain a safe system of work, and failing to warn or instruct him about the need for protective clothing.[59]

Warren CJ began by setting out authorities emphasizing that an omission is considered to occur where the positive act should have taken place.[60] Applying these authorities, she found that the place of the tort was New Zealand: if the respondent was going to fulfil its duty of care by providing a safe work place or by giving a warning, the act would have been done in New Zealand.[61] Similarly, if the negligence was said to be constituted by the positive act in exposing the plaintiff to asbestos dust, 'the applicant [could not] point to an act committed by the respondent in Belgium or Malaysia.'[62]

Because of the 'imperative of conformity between jurisdictions in private international law', Warren CJ also considered a line of New South Wales Court of Appeal decisions: *James Hardie & Co Pty Ltd v Hall*,[63] *James Hardie Industries Pty Ltd v Grigor*[64] and *Amaca Pty Ltd v Frost*.[65] All three decisions concerned actions for negligence by employees who had been exposed to asbestos in the course of their work against their employers. The plaintiff had relied on the cases as establishing the general proposition that the place of tort in such cases was the place where exposure to the asbestos occurred. Warren CJ carefully examined the facts of each case and concluded that, while the breach of duty was 'temporally concomitant' with the exposure to the asbestos, the cases did not stand for any such general proposition.[66] She emphasized again that each case turns on its facts.

In a brief judgment, Chernov JA also found that the place of the tort was New Zealand. It was irrelevant where the plaintiff actually contracted the disease; what was relevant was that the respondent had failed to give the plaintiff proper

---

59 See Anderson, Pham and Davis, above n 2, 471. For commentary on this case, see A Gray, 'Getting it Right: Where is the Place of the Wrong in a Multinational Torts Case?' (2008) 30 *Sydney Law Review* 537, arguing that the place of the tort was where the defendant failed to provide a safe place of work and where the plaintiff was injured.

60 *Voth* (1990) 171 CLR 538; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

61 *Puttick v Fletcher Challenge Forests Ltd* (2007) 18 VR 70, 78 [20] ('*Puttick*').

62 Ibid 78 [21].

63 (1998) 43 NSWLR 554 ('*Hall*').

64 (1998) 45 NSWLR 20 ('*Grigor*').

65 (2006) 67 NSWLR 635 ('*Frost*'). We discussed the case in last year's review: Anderson, Pham and Davis, above n 2, 478.

66 *Puttick* (2007) 18 VR 70, 82 [35].

instructions, and that occurred in New Zealand.[67] In his opinion, the three New South Wales cases supported that conclusion.

Maxwell P disagreed with the Chief Justice and Chernov JA. In his view, the direction given by the employer in New Zealand to travel to Malaysia and Belgium was merely one element in the claim; the cause of action was not complete until the plaintiff was actually exposed to asbestos in the overseas factories and suffered harm. Like Warren CJ, Maxwell P considered that 'this court should not depart from the approach of another intermediate court of appeal … on an important issue in private international law.'[68] But while Warren CJ distinguished the New South Wales cases, Maxwell P saw the 'powerful line of authority' as leading to the finding that the tort occurred at the asbestos factories.[69]

The plaintiff appealed to the High Court.[70] The Court unanimously held that there was insufficient evidence and/or insufficient agreed facts to make even a provisional ruling about the place of the tort. It allowed the appeal and set aside the *forum non conveniens* stay. The judgment will be discussed further in the next year's review.

A second choice of tort law case in 2007 — that harkens back to the quintessential choice of tort law factual scenario — was *McNeilly v Imbree.*[71] As with the characterization issue in *Garsec* discussed above, the greatest surprise is that despite the seemingly clear standards asserted by the High Court these issues continue to be raised in the lower courts in application of the law. *McNeilly* concerned a car accident in the Northern Territory. A passenger in the car sued the driver for negligence in a New South Wales court. The first question for the court was what law applied to determine the assessment of damages. Section 123 of the Motor Accidents Compensation Act 1999 (NSW) provided that: 'A court cannot award damages to a person in respect of a motor accident contrary to this Chapter.' However, neither party argued that that provision altered the common law choice of law rules. Accordingly, Northern Territory law, being the law of the place of the tort, applied.

The Court then considered whether, in applying Northern Territory law to the assessment of damages, it should apply provisions of the Compensation Act 2004 (NT). Section 5 of the Act provided that 'An action for damages shall not lie *in the Territory*' in respect of certain types of losses. The plaintiff argued that s 5 had no operation in the New South Wales proceedings, as the action was not 'in the Territory'.

Basten JA, with whom Beazley and Tobias JJA agreed, perhaps gave more thought and attention to the issue than it warranted in light of the case law on essentially identical issues. Nevertheless, he approached the plaintiff's argument in

---

67 Ibid 96.
68 Ibid 92 [80].
69 Ibid.
70 *Puttick v Tenon Ltd (formerly called Fletcher Challenge Forests Ltd*) (2008) 250 ALR 582.
71 [2007] NSWCA 156.

two ways. First, it was arguable that the geographical limitation excluded the provision from being picked up outside the Territory. However, Basten JA considered that it was clear from High Court authority on the Judiciary Act that a geographical limitation did not prevent a provision from being 'picked up'.[72]

Second, the plaintiff could also be taken as arguing that 'in the Territory' was an express indication that the Territory did not intend the provision to apply in other jurisdictions. Basten JA also rejected this approach as being:

> at odds with the fundamental principle that there is but one common law operating in Australia … [which] will have the effect of maximizing the likelihood that proceedings will be decided according to the same rules, regardless of the court in which they are commenced.[73]

Thus, he unsurprisingly upheld the trial judge's ruling that s 5 of the Territory Act applied. The passenger did appeal to the High Court in relation to the Court's ruling on contributory negligence, but the High Court's judgment did not need to mention the choice of law issue.[74]

(d) Contribution

Applying traditional choice of law rules to statutory claims, particularly when the claims sit somewhere between classic conceptions of tort and contract issues, always proves difficult for private international law which assumes choice of law rules will follow simple characterizations. The most recent case of this nature involved a claim for contribution. *Fluor Australia v ASC Engineering*[75] involved a claim for contribution arising out of defective autoclaves at an ore treatment facility in Western Australia. Fluor Australia was engaged by MMO Ltd as a contractor for the construction of an ore treatment facility. One of the autoclaves for processing the ore was faulty and MMO Ltd brought a successful claim against Fluor for breach of contract. Fluor then sued ASC Engineering (ASCE), the supplier of the defective autoclave, in Victoria for contribution under s 23B of the Wrongs Act 1958 (Vic). There was no connection with Victoria. However, whereas other Australian contribution provisions only allowed a plaintiff to bring contribution claims for liability in tort, the Victorian contribution provision allowed contribution regardless of the cause of the underlying liability.

The main issue for the court was whether s 23B of the Wrongs Act applied. ASCE argued that Fluor was engaged in forum shopping. It sought to characterize the contribution claim as a claim in restitution, under which the applicable law would be the place having the closest connection to the facts – that is, Western Australia. Based on the interpretation of a similar UK provision, Fluor contended that the Victorian legislation acted as a mandatory choice of law rule for any claim

---

72 Ibid [131]–[132].

73 Ibid [134].

74 *Imbree v McNeilly* (2008) 236 CLR 510; see also *Imbree v McNeilly (No 2)* (2008) 249 ALR 441, concerning the costs orders.

75 (2007) 19 VR 458 ('*Fluor*').

in a Victorian court and that no other factual connection with Victoria was required.

Bongiorno J rejected Fluor's argument, considering that it was inconsistent with the principles of certainty and uniformity given primacy by the Court in *Pfeiffer*. If Fluor's interpretation of the Wrongs Act was accepted, then a plaintiff could access remedies in State or Territory legislation simply by commencing proceedings in that jurisdiction:

> not only would such [an interpretation] encourage forum shopping to the detriment of the whole Australian legal system, it would be antipathetic to the federal compact itself, with obvious consequences for state sovereignty and the integrity of individual state legal systems.[76]

Rather, the interpretation of the provision consistent with *Pfeiffer* was that contribution should be available only in cases in which the appropriate common law choice of law rule for the contribution was Victoria.[77] No matter how Fluor's claim was characterized, and whatever common law choice of law rule applied to the claim, there was no way in which the applicable law of the contribution claim would be Victoria. As such, it was not necessary to determine what the applicable law of the contribution claim would be.[78] Given the clarity with which the High Court has set down choice of law principles, the most surprising thing about this decision is that the argument was pursued by counsel to the degree that it warranted a formal written judgment.

IV. Enforcement of Foreign Judgments[79]

(a) Foreign Judgments Act

The clarity and definitiveness that characterizes Australian enforcement of foreign judgments was even further refined in *Ellis v Dariush-Far*.[80] The case arose in the Queensland Court of Appeal and provides greater clarification of the Foreign Judgments Act 1991 (Cth) . A company had won judgment against the appellant in the New Zealand District Court. The company then assigned the judgment debt to the respondent. The respondent next successfully registered the judgment in Australia.[81]

The private international law matter arose when the appellant argued that the trial judge erred in registering the judgment. Section 6(1) of the Foreign Judgments Act provides that a judgment creditor may apply to have a judgment registered 'at any time within 6 years after … the date of the judgment'. Section 6(6) provides that '[a] judgment is not to be registered if at the date of application … it could not

---

76 Ibid 473 [53].

77 Ibid 474 [54].

78 Ibid 474.

79 On enforcement of foreign judgments, see P Smart, 'Conflict of Laws: Enforcing a Judgment on a Judgment?' (2007) 81 *Australian Law Journal* 349; I Molloy, 'Registering a Registered Foreign Judgment' (2007) 81 *Australian Law Journal* 760.

80 (2007) 242 ALR 635 ('*Ellis*').

81 (2007) 212 FLR 20.

be enforced in the country of the original court.' The appellant argued that the 'date of application' referred to in s 6(6) was the date of application under s 6(1) – that is, the date that the application was first made by the respondent, rather than the date that the application was heard by the court – and that the judgment was not enforceable in New Zealand at the date that the application was made.

The Court of Appeal agreed with the trial judge that the judgment was enforceable in New Zealand at the date that application was first made. However, it also went on to consider the argument regarding the construction of the Foreign Judgments Act because it was 'an important point of practice.'[82] It held that s 6(6) was directed to a court deciding whether to register a judgment: hence, the 'date of application' in s 6(6) is the date that the application is heard and decided.[83] Conversely, s 6(1) was directed to the making of the application, and referred to the date the application was made.[84] In short, the decision is a useful, if unspectacular, refinement of the law in application.

(b) Final and conclusive judgment

The twists and turns of *Benefit Strategies Group Inc v Prider*[85] continue to provide entertainment. First reviewed in our 2005 edition,[86] *Prider* concerned the enforcement of a very large default judgment from a Californian court. In earlier proceedings, the South Australian Supreme Court entered summary judgment against the defendants based on the Californian judgment.[87] The defendant had since successfully instituted proceedings in California to have the default judgment set aside. Accordingly, the defendant applied to set aside the enforcement of the foreign judgment.

Gray J agreed that the setting aside of the Californian default judgment meant that the requirement that a foreign judgment be final and conclusive was no longer met. He set aside the summary judgment:

> where a judgment is made entirely on the basis of a foreign judgment, and the foreign judgment is later overturned and set aside, good reason exists to set aside the judgment that relied on it.[88]

The decision was not opposed by any of the parties and provides a useful confirmation of what would seem to be an obvious result.

(c) Exception: judgment obtained by fraud

Courts will not enforce a foreign judgment if the judgment was obtained by the fraud of one of the parties. Traditionally, a party could allege that a foreign

---

82 *Ellis* (2007) 242 ALR 635, 640 [30].
83 Ibid 641 [34].
84 Ibid 641 [36].
85 (2007) 211 FLR 113 ('*Prider*').
86 Anderson and Davis, above n 2, 445.
87 See *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544; see also Transcript of Proceedings, *Prider v Benefit Strategies Group Inc* (High Court of Australia, Gummow, Hayne, Crennan, 2006) (special leave refused).
88 *Prider* (2007) 211 FLR 113, [17].

judgment was obtained by fraud even if that issue had been raised in the foreign proceedings and there was no new evidence of fraud.[89] The current position in Australia, however, is unnecessarily unclear. In *Keele v Findley*,[90] the New South Wales Supreme Court sagely held that the same rules should apply to fraud of a foreign judgment as fraud of a domestic judgment – that is, that fresh evidence was required if the issue was raised in the foreign proceedings. However, the later case of *Yoon v Song*,[91] stated, somewhat inexplicably, that *Keele* was incorrectly decided and affirmed the antiquated position.

In a triumph for comity and rationality, *Trainor Asia Ltd v Calverley*[92] provides an elegant and intellectually appealing way of dealing with the unfortunate decision of *Yoon* while ensuring that every single enforcement case is not reopened to relitigate the essential matter determined by the foreign court. In *Trainor* the defendant argued that the plaintiff had committed fraud against a Norwegian court by falsely claiming that the defendant had agreed to extend a contract between the parties, and by claiming losses that the plaintiff had not in fact suffered. Principal Registrar Gething examined the case law and found that '[n]otwithstanding the intellectual force of the decision in *Keele*, the balance of the authority supports the view that the decisions in *Abouloff*[93] and *Vadala*[94] represent the law in Australia.'[95] However, 'fraud must still be established.'[96] In relation to the plaintiff's claims of fraud with respect to the extension of the contract, Principal Registrar Gething found that the defendant had not produced any evidence of fraud:

> There may well have been conflicting evidence and contrary legal submissions. The fact that one party's evidence and legal assertions are not accepted at trial does not of itself lead to the conclusion the foreign court was induced by fraud to come to a wrong decision by evidence which was false. If this was the case, then the losing party in every foreign judgment could resist enforcement on the ground of fraud.[97]

While we have argued in the past that it would be best to simply endorse the approach of *Keele* over the parochial approach of *Yoon*,[98] the subtlety and same substantive impact of the Court in *Trainor* is appreciated.

(d) Cross-Border Regulatory Enforcement

Over the last half of the first decade of the 21st century, the private international law issues between Australia and New Zealand are coming substantially closer

---

89 See, eg, the discussion in P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 189–91.
90 (1990) 21 NSWLR 444.
91 (2000) 158 FLR 295.
92 [2007] WADC 124 ('*Trainor*').
93 *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295.
94 *Vadala v Lawes* (1890) 25 QBD 310.
95 [2007] WADC 124, [28].
96 Ibid [29].
97 Ibid [54].
98 Kent Anderson and Jim Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2000-2003' (2005) 24 *Aust YBIL* 443, 461.

thanks to statutory reforms on the back of encouraging diplomatic efforts. As such, cross-border cooperation is increasingly a matter of statute law rather than case law. The Corporations (New Zealand Closer Economic Relations) and Other Legislation Amendment Act 2007 (Cth) contains a number of mechanisms to support cross-border relations between Australia and New Zealand, as well as enhancing the powers of the Australian Competition and Consumer Commission (ACCC). First, the Act establishes a mutual recognition regime for the issue of securities in Australia and New Zealand to 'facilitate investment, enhance competition and … provide greater investor choice'.[99] The scheme allows a New Zealand entity to offer securities in Australia based on compliance with New Zealand laws and vice versa. The Australian Securities and Investments Commission (ASIC) and its New Zealand equivalent have responsibility for taking action against entities breaching the requirements in their respective countries, with investor remedies available in courts of both jurisdictions. Second, the Act provides for ASIC to share documents with foreign regulators, so that companies wishing to be registered in Australia do not need to lodge documents already lodged with foreign regulators. Third, the Act enacts provisions for the ACCC to share information with foreign governments and regulators and to protect information obtained from foreign governmental bodies. As foreshadowed in earlier reviews, these 2007 developments are but part of a number of major trans-Tasman developments that will fundamentally change private international law issues between Australia and New Zealand into straightforward civil procedural rules.

V. Conclusion

While 2007 has not provided any radical departures from the existing Australian approaches to private international law, it has shown how the practical application of the seemingly straightforward bright-line rules of the High Court continue to trouble both practitioners and courts. Some of this is merely refinement around the edges, such as the decisions concerning enforcement of foreign judgments. The decisions on choice of laws, particularly tort law, however, suggest real difficulty in practically applying what in theory seems straightforward, no exception standards. The 2007 cases around discretionary exercise of jurisdiction—whether that be cross-vesting transfers, *forum non conveniens*, or anti-suit injunctions—however, seem to portend something more radical than refinement or practical difficulty. In this area, the High Court standards have left much space for case-by-case, factually dependant weighting, and the lower courts have taken that window to move the de facto rules towards a more nuanced and flexible approach. The same is true for the exception of fraud in enforcement of foreign judgments. While a strict legal constructionist might be concerned by this looser interpretation of precedent, we welcome the more subtle and progressive approach. The most obvious changes in private international law are those statutory additions bringing

---

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 2007, 15 (Christopher Pearce, Parliamentary Secretary to the Treasurer).

Australia and New Zealand closer which will only accelerate over the next few years. In sum, 2007 was not a year that will pull the attention of those only tangentially interested in private international law, but for conflicts lawyers there was a wealth of intriguing developments.