Book Review

Substance and Procedure in Private International Law by Richard Garnett (2012) Oxford University Press 456 pp, ISBN 978-0-19-953279-7

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I Introduction

Every legal system distinguishes matters of procedure from matters of substance for various purposes. This distinction acquires particular significance in private international law, because in every legal system it is assumed[1] that the law of the forum governs all matters of procedure, even if substantive issues are to be determined by foreign law, according to the forum's choice of law rules. Given the scope that the substance/procedure distinction allows for the application of forum law, this distinction was attacked by American legal realists as one of several 'escape devices' which undermined choice of law rules by allowing the courts inappropriately to revert to the application of forum law.[2] The common law bore out this criticism; in many common law countries, procedure was defined very broadly until quite recently,[3] and in others, this broad definition persists, at least in some areas.[4] Like other techniques of forum-reference, applying forum law to procedural matters may encourage forum shopping, and creates an incentive for the parties to dispute whether a particular rule should be treated as procedural rather than substantive.

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1 More accurately, it *was* so assumed, before the publication of this excellent book. One of the central 'lines of enquiry' pursued by Garnett in it, and one of several original contributions the book makes, is that this fundamental assumption is false: *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 7.

2 B Currie, 'Notes on Methods and Objectives in the Conflict of Laws' in *Selected Essays on the Conflict of Laws* (Duke University Press, 1963) 181. In a survey of Australian, British and Canadian cases, Mortensen found that the only escape device that was used by the courts to justify the application of forum law was the characterisation of damages as procedural: 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 861–3, 874.

3 In Australia, the High Court adopted very broad definitions of procedure until 2000, when the definition was significantly narrowed in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*'), 543–4. In the later case of *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, the joint judgment of the High Court ambiguously stated that it reserved its position on whether quantum and types of damages should be regarded as substantive or procedural in international tort litigation: at 520.

4 In *Harding v Wealands*, handed down in 2006, the House of Lords refused to apply provisions of the *Motor Accident Compensation Act 1999* (NSW) on the basis that those provisions were procedural, even though New South Wales was the law of the cause: [2007] 2 AC 1. The common law position has been significantly affected by European law, in particular the Rome I and Rome II Regulations, on choice of law for contract and non-contractual obligations. Garnett discusses both in detail.

In private international law, as in other areas of law, procedural questions have historically attracted less scholarly attention than substantive questions,[5] particularly questions of choice of law. More recently, it has been recognised that procedural issues are often determinative in international litigation, and the literature addressing procedure has begun to expand accordingly. Richard Garnett's book, *Substance and Procedure in Private International Law*,[6] is a significant addition to that literature. In it, Garnett advocates an internationalist, cosmopolitan approach to private international law, in which the law of the forum should have only a limited role. This is the foundation of what Garnett identifies as 'two key objectives of private international law', namely, 'the pursuit of uniformity of outcome in decisions of different national courts and the discouragement of forum shopping'.[7] These two objectives dominate Garnett's analysis, although he refers also to others, including transparency, justice, recognition of foreign interests, clarity and precision.[8]

Most of the book is devoted to a detailed consideration of the treatment of procedural matters in Anglo-Commonwealth countries, although it also includes references to the law of some civil law countries and to the important contributions of leading civilian authors.[9] This book mainly focuses on English, Canadian, New Zealand and Australian law, but includes many references also to the law of Singapore, South Africa, Malaysia and Hong Kong. The impact of European instruments, particularly the Rome I and Rome II Regulations,[10] on the treatment of procedural issues is canvassed in detail. Because the *Restatement (Second) of Conflict of Laws* recognises the need for a choice of law determination for some procedural matters,[11] Garnett refers to US law in his analysis of the existing law, as well as in his proposals for the development of specific choice of law rules for various procedural issues.

The book follows three central 'lines of enquiry';[12] for reasons of space, this review focuses on them.[13] The first is that procedure should be narrowly defined, and therefore that reference to forum law by this technique should be limited. The second compares the technique of applying forum law to matters of procedure with other techniques of private international law that also lead to the application of forum law. The third line of enquiry refutes the conventional assumption that forum law is always applied to matters of procedure,

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5 A S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) 273.

6 Garnett, above n 1.

7 Ibid 2. These objectives are referred to repeatedly, eg at 264.

8 Ibid 362–3.

9 In particular, to the seminal work of Szászy. See, eg, 'The Basic Connecting Factor in International Cases in the Domain of Civil Procedure' (1966) 15 *International and Comparative Law Quarterly* 436.

10 Respectively, Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations and Regulation (EC) 864/2007 on the Law Applicable to Non-Contractual Obligations.

11 For example, § 171 of the American Law Institute's *Restatement (Second) of Conflict of Laws* (1971) provides that 'the law having the most significant relationship to the issue determines the measure of damages'.

12 Garnett, above n 1, vii.

13 The book also addresses some important and interesting issues which do not neatly fall within these lines of enquiry, such as a detailed discussion of the question of characterisation: ibid 46–57.

demonstrating that this assumption is both inaccurate and unjustified. Each of these lines of enquiry is briefly outlined below.

II A Narrow Definition of Procedure

The first line of enquiry the book pursues is that procedure ought to be narrowly defined. As is well known, in common law jurisdictions 'procedure' was historically defined broadly.[14] This led to a wide scope for the application of forum law; controversially, limitation periods and rules relating to quantum of damages were regarded as procedural, and therefore were governed by forum law. Some, but not all, common law countries have recently narrowed the scope of procedure,[15] a development which Garnett applauds, and which he relates to a more general 'trend towards diminution in the status of the law of the forum across the wider choice of law system'.[16] He endorses the view that 'procedure should be generally limited to matters relating to the mode, conduct, or regulation of court proceedings.'[17] That is now the view generally taken in Australia and in some other Commonwealth countries. Garnett urges those jurisdictions that have not yet adopted a narrow definition to do so, suggesting that the 'clear movement away from forum dominance' in the last 20 years 'may suggest that it is time for a reconsideration of the traditionally wide view of procedure in English private international law'.[18]

While in 2000 the High Court adopted a narrow definition of procedure for intra-Australian cases,[19] in an international case decided in 2002, the Court specifically 'reserved for further consideration, as the occasion arises' whether all issues relating to quantum and types of damages should be regarded as substantive in international cases.[20] This remains an open question in Australia, although as Garnett notes, lower courts invariably treat issues relating to quantification of damages as substantive.[21] The question of quantum of damages also arose in the much-criticised decision of the House of Lords in *Harding v Wealands*,[22] which Garnett joins in criticising, after careful analysis.[23] Applying the narrow definition

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14 Particularly, by reference to a further distinction between matters affecting the right (regarded as substantive) and those affecting only the remedy (procedural). This was the basis of the Australian law until 2000.

15 See, eg, *Tolofsen v Jensen* (1994) 120 DLR (4th) 289 (discussed in Garnett, above n 1, 23–4); *Pfeiffer* (2000) 203 CLR 503.

16 Garnett, above n 1, 63.

17 Ibid 2. This formula is based on Mason CJ's dissenting judgment in *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 26–7, which was subsequently approved by the court in *Pfeiffer* (2000) 203 CLR 503, 543–4.

18 Garnett, above n 1, 10.

19 *Pfeiffer* (2000) 203 CLR 503.

20 *Regie Nationale des Usines Renault SA v Zhang* (2002) 201 CLR 491, 520. These issues are certainly regarded as substantive in intra-Australian cases. All questions relating to quantum and types of damages are regarded as a matter of substance in intra-national tort litigation: *Pfeiffer* (2000) 203 CLR 503, 544.

21 Garnett, above n 1, 335–6.

22 [2007] 2 AC 1.

23 Garnett, above n 1, 32–5, 327–30. He notes that 'On one view, the House of Lords' approach in *Harding* leaves the meaning of procedure in private international law completely unchanged since

of procedure, he commends the conclusion of the joint judgment of the High Court in *Pfeiffer* that all issues as to type and quantum of damages should be treated as substantive,[24] as 'sensible' and as avoiding 'difficult and artificial questions of delineation within the concept of damages.'[25] He therefore suggests that the same approach should be applied in international as domestic cases. This is certainly correct. The High Court's hesitation on this point may well indicate perceived problems with an overly rigid choice of law rule for torts, or concerns better dealt with by reference to public policy, as Garnett develops in his second line of enquiry.

III Techniques of Forum Reference

Garnett's second 'line of enquiry' considers the substance/procedure distinction as one of several techniques of private international law which lead to the application of forum law. In the third chapter, Garnett introduces five other techniques of forum reference: the public policy exception to application of foreign law; overriding mandatory rules of the forum; choice of law rules which directly require the application of forum law;[26] rules concerning the pleading and proof of foreign law; and the 'no-advantage'/uniformity of outcome approach to choice of law taken by the High Court in *Neilson v Overseas Projects Corporation of Victoria*.[27] Garnett suggests that it may be more appropriate to justify the application of forum law by reference to some of these techniques than to the substance/procedure distinction. In particular, he recommends the public policy exception as a more principled basis for giving forum law an overriding effect than the traditionally broad definition of procedure, 'because the reasons for applying forum law are more transparent.'[28] This is an interesting proposition, and not an entirely uncontroversial one. It is not universally accepted that public policy ought to be used to control the application of foreign law. For example, Carter expressed reservations about the public policy doctrine, describing it as 'the easy escape to the familiar comforts of the lex fori'.[29]

The majority of the book contains detailed discussion and analysis of seven particular areas conventionally characterised as procedural: service; jurisdiction;[30] the parties to litigation; judicial administration; evidence; limitation statutes; and remedies.[31] In the discussion and analysis of the role of forum law in these areas, Garnett refers again to the other techniques of forum reference, especially to the

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the nineteenth century', and concludes that the decision creates 'great uncertainty in both English and Commonwealth law': at 35.

24 (2000) 203 CLR 503, 544.

25 Garnett, above n 1, 335.

26 As Garnett explains, in common law systems, these have included tort, equity, family law and aspects of insolvency: ibid 62–3.

27 (2005) 223 CLR 331.

28 Garnett, above n 1, 60.

29 P B Carter, 'Rejection of Foreign Law: Some Private International Law Inhibitions' (1984) 55 *British Yearbook of International Law* 111, 125.

30 Service and jurisdiction are, of course, very closely related in the common law. These topics are addressed in the same chapter, in separate sections: Garnett, above n 1, ch 4.

31 Ibid chs 4 (service and jurisdiction), 5 (parties), 6 (judicial administration), 7 and 8 (evidence), 9 (statutes of limitation), 10 and 11 (remedies).

public policy exception, mandatory rules, and choice of law rules which select the law of the forum. Sometimes, this is done in order to better justify the application of the law of the forum. For example, he suggests that the application of forum, rather than foreign, law to the issue of quantum of damages may be better justified by reference to the public policy exception, reiterating his view that it 'is often a more transparent and principled basis for applying forum law than the traditional procedural characterization, which can mask unarticulated policy concerns'.[32] Garnett also notes that some of these other techniques may lead to the application of forum law without the need for the substance/procedure distinction, without suggesting that this is a desirable outcome.

The consideration of the operation of the substance/procedure distinction in this broader context is highly valuable from a practical perspective. Similarly, Garnett emphasises the inter-relationship between jurisdiction and choice of law rules. Courts of common law countries have the ability to stay or transfer proceedings to the court whose law is the law of the cause, and thereby avoid a divergence between forum law and the law of the cause,[33] and therefore any dispute about what law determines matters of procedure. However, in the context of the discussion of quantum of damages, Garnett observes that the courts of several Commonwealth countries seem disinclined to stay proceedings in personal injuries cases[34] and therefore the law of the forum may differ from the law of the cause in such cases. This is just one of many reasons that choice of law for matters of procedure is likely to remain relevant.

IV Choice of Law for Matters of Procedure

The third, and most substantial, 'line of enquiry' of the book is that the orthodox assumption — that forum law exclusively and invariably determines matters of procedure — is false. Garnett meticulously analyses the law, to show that, for some issues that are typically classified in common law systems as procedural, the courts *do* have regard to foreign law, and that sometimes they apply or refer to foreign law to resolve those issues. He shows that this tendency has increased over time, supporting his overall observation as to the diminishing relevance of forum law in international litigation.

As noted above, Garnett endorses a narrow definition of procedure. He then proposes that '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'.[35] He suggests that for some procedural issues, tailored choice of law rules should be developed. [36]

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[32] Ibid 339.

[33] He notes that this is possible in jurisdictions such as England, Canada, Singapore and New Zealand and in intra-Australian litigation: ibid 28, referring to the principle of *forum non conveniens* applicable in those jurisdictions, and to the transfer mechanism of the cross-vesting legislation. However, he notes that this method would have 'limited application' in international cases in the Australian courts, given the Australian version of the principle of *forum non conveniens*.

[34] Ibid 347–8, referring to cases from Australia, Canada, England and Singapore.

[35] Ibid 37.

[36] Ibid 43.

The book provides a more accurate and precise description of the current law, which, as he shows, already does recognise a role for foreign law in regulating matters of procedure, as well as a normative argument, suggesting that for some issues for which the law does not presently permit reference to foreign law, it ought to do so.

In the second part of the book, for each of the seven procedural areas referred to above,[37] Garnett identifies and explains the respective roles of forum and foreign law. In some areas, particularly those concerning judicial administration, forum law remains dominant. For others, Garnett demonstrates that in some situations the law of the cause or of another legal system might be applied or otherwise taken into account by the judge, for example by modifying the forum rule 'to take account of foreign rules or elements'.[38] In this context, Garnett endorses Kahn-Freund's notion of the enlightened lex fori;[39] for example, in the context of a choice of law rule for questions of legal professional privilege.[40] In yet other situations, the court may apply the law of a legal system other than forum law or the law of the cause, as for example in the case of evidence that has to be obtained in a third country for litigation in the forum.[41] In addition to this insightful and useful description of the law, Garnett makes suggestions for the further refinement of the law; proposing that tailored choice of law rules might be developed for different issues of procedure.

V Conclusion

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'.[42] It achieves this aim 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 this book a valuable resource to lawyers engaged in and interested in the study of cross-border litigation. The book will be of particular interest to practising lawyers in Commonwealth jurisdictions, and is especially recommended to Australian lawyers, given its comprehensive coverage of the Australian law. It is a thoughtful, original and provocative contribution to the literature on the treatment of procedure in private international law.

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37 See above n 31.

38 Ibid 3.

39 Otto Kahn-Freund, *General Problems of Private International Law* (Sitjhoff, 1976) 227, cited in Garnett, above n 1, 3. Garnett also refers in this passage to Professor Herma Hill Kay's 'concept of foreign law as "datum"': H H Kay, 'Foreign Law as Datum' (1965) 53 *California Law Review* 47. This method of synthesising foreign and forum law is reminiscent of Falconbridge's 'via media', proposed in 'Conflicts Rules and Characterization of Question' (1952) 30 *Canadian Bar Review* 103 and 264. This is referred to by Garnett in his discussion of the use of this term in South African cases including *Society of Lloyds v Price* [2006] SCA 87 (RSA) [26]: Garnett above n 1, 265–7.

40 Garnett, above n 1, 242.

41 Ibid ch 8.

42 Ibid 4.