THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO *FORUM NON CONVENIENS* AND TORT CHOICE OF LAW IN SELECTED COMMONWEALTH JURISDICTIONS

William Tong Su Hern, LL.B, B.C.L.

Thesis submitted to the University of Nottingham
For the degree of Doctor of Philosophy

September 2006

University of Nottingham
Hallward Library

ABSTRACT

It is well known that in the early stages of legal development in Commonwealth jurisdictions, when these countries were still colonies of the British Empire, there was uniformity in their laws as the English common law was received by these countries and applied by their judiciaries with little or no modifications. As time passed, with the shift towards independence in these former British colonies, some Commonwealth countries have diverged from the English common law by providing for judicial solutions that are perceived to best fit their individual circumstances, values and needs. In other words, there has been a break up of Commonwealth common law.

Whilst there has been much academic discussion on this phenomenon in relation to for example, tort and contract, hardly any has been written on private international law. Accordingly, it is the purpose of this thesis to address the paucity of academic writing on this subject matter by undertaking a comparative study of two areas of private international law, namely the doctrine of *forum non conveniens* and tort choice of law in Australia, Canada and Singapore, with the relevant English common law positions as the key reference point.

Specifically, this thesis began by establishing the existence as well as the nature and extent of the break up of *forum non conveniens* and tort choice of law in our selected Commonwealth jurisdictions. It is then argued that one reason for this phenomenon is that there are differences in the judicial treatment of policies, concepts and other wider considerations relevant to these areas of private international law in these countries. Subsequently, the issue of how these jurisdictions should respond to this phenomenon was examined and we concluded that the prospects for the harmonisation of jurisdictional and tort choice of law rules at the global, regional and Commonwealth level has been largely unpromising. Accordingly, it is argued that the way forward is for our selected Commonwealth jurisdictions to develop their own rules on these areas of private international law with their own social, economic and political circumstances in mind.

PREFACE

Many have helped and supported me in the course of my research in writing this thesis.

It is difficult to overstate my gratitude to my supervisor, Professor James Fawcett who introduced me to the topic of private international law during my undergraduate days. Without his supervision, constant support, encouragement and of course, his decision to take me on as his PhD student, this thesis would not have been completed.

I would also like to thank the University of Nottingham for providing me with the substantial funding as well as the facilities necessary to undertake my comparative study. Thanks also goes to Professor Paul Roberts, Mr. Michael Bowman and Professor Peter Bartlett for their critical and helpful comments on the structure and methodology of my thesis.

I am also indebted to Professor Adrian Briggs and Mr Edwin Peel who continued my education in private international law after my time at the University of Nottingham. It is your lectures at the University of Oxford that has given me the inspiration for my doctoral research.

I am grateful to my friends most notably, KJ Chew, Don Low and Chelvin Sng for their support and encouragement all this time.

Lastly and most importantly, I would like to thank my parents, Dr Tong Teck Hwee and Lee Yeong, and my girlfriend, Melody for everything good in my life. To you all, I dedicate this thesis.

The law is stated as at 1 August 2006, but it has been possible to include some material since that date.

CONTENTS

PART I

WHAT IS THE NATURE AND EXTENT OF THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

PART III

HOW SHOULD OUR SELECTED JURISDICTIONS REACT TO THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW?

List of Abbreviations

ASEAN	Association of South East Asian Nations
LCAD	Law and Constitutional Affairs Division of the Commonwealth Secretariat
OAS	Organisation of American States
UNCITRAL	United Nations Commission on International Trade Law

List of Short Forms used in the Thesis

1995 Act	Private International Law (Miscellaneous Provisions) Act 1995
Brussels I Regulation	Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters
Cross-vesting Act	Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)
Draft Hague Convention	Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (October 1999)
Hague Conference	Hague Conference of Private International Law
Leuven/London Principles	Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters
Law Commissions	English and Scottish Law Commissions
Rome I Convention	European Council Convention on the Law Applicable to Contractual Obligations

Rome II Regulation	European Council Regulation on Non-contractual Obligations

CHAPTER 1: INTRODUCTION

1. OBJECTIVE OF THE THESIS: ANALYSING THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW

The Commonwealth is an "association of independent states"[1] made up of former dominions of the British Empire. These jurisdictions share the "same legal culture, the common law"[2] as exported from England during the "process of colonial expansion"[3] in the early days of the British Empire. The English common law can therefore be said to have "laid the foundation stones"[4] for the legal regimes in these countries.

Initially, the "notion that the common law might branch in different directions in different jurisdictions within the [British] Empire was anathema"[5] in Commonwealth jurisdictions. The English common law was applied by Commonwealth judiciaries with little or no modifications, as judicial attempts to form independent views on legal issues based on the individual jurisdiction's unique "circumstances, needs and values"[6] were hardly ever made. These Commonwealth judgments were thus seen as mere "elaborations on English solutions"[7] or "exercise[s] in conformity"[8] with the English common law position. Accordingly, at that point in time, it is "rationally arguable that there [was] only one common law"[9] in Commonwealth jurisdictions since case law in these countries was largely derived from English judicial precedents.

One key explanation for this situation was the presence of the Privy Council as the "final court of appeal for the commonwealth"[10] which meant that its decisions were binding on the local

---

[1] Dale, *The Modern Commonwealth*, Commonwealth Law Series (London: Butterworths) (1983), at 33.
[2] Orucu, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* Vol. 4.1 Electronic Journal of Comparative Law (June 2000), at 5.2.
[3] *ibid.*
[4] *ibid.*
[5] Clarke, *The Privy Council, Politics and Precedent in the Asia-Pacific Region* (1990) 39 International and Comparative Law Quarterly 741, at 741-742.
[6] Mason, *Australian Contract Law* (1988) 1 Journal of Contract Law 1.
[7] *ibid.*
[8] Cooke, *Divergences – England, Australia and New Zealand* (1983) New Zealand Law Review 297, at 298.
[9] *ibid*, at 297.
[10] Martin, *Diverging Common Law-Invercargill goes to the Privy Council* (1997) 60 Modern Law Review 94, at 95.

courts as a matter of *stare decisis*. Sitting at the apex of this "legal hierarchy,"[11] it was well placed to "enhance legal uniformity within the Commonwealth outside the United Kingdom."[12] Furthermore, as the Privy Council was hesitant to decide contrary to English authorities "even when local factors might dictate a different approach,"[13] Commonwealth courts, which took appeals to the Privy Council considered "themselves bound to follow judgments of the House of Lords on matters governed by the common law."[14] One must also note that underlying these legal explanations may be a prevailing psychological view that British laws were superior to those of other lands due to the dominance of Britain in the world then. There was thus "harmonisation of law on a Commonwealth...scale"[15] at this point in time.

After the end of the Second World War, there was a shift towards "self government and independence in most of the former British colonies"[16] and this eventually led to the "dissolution of the British Empire into today's Commonwealth."[17] One inevitable consequence of this occurrence was the abolition of the right of appeal to the Privy Council in an increasing number of Commonwealth jurisdictions. Free from the control of the Privy Council, the highest courts in these Commonwealth countries started to develop their own common law regimes "along divergent lines"[18] from the English common law. Put another way, the break up of Commonwealth common law had begun.

It is now clear that the previous Commonwealth subservience to English ready-made solutions has been shaken off as prominent members of the judiciaries in a number of Commonwealth countries have stated judicially and extra-judicially that it is time to seize control over their own legal destiny as they have a responsibility to "aim at [judicial] solutions best fitting the particular national way of life and ethos."[19] In other words, there is now

---

[11] Hiller, *The Law-Creative Role of Appellate Courts in the Commonwealth* (1978) 27 International and Comparative Law Quarterly 85, at 107.
[12] *ibid.*
[13] Martin, *supra,* n. 10, at 95.
[14] Beckman, *Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council* (1987) 29 Malaya Law Review 254, at 255.
[15] Hiller, *supra,* n. 11, at 86.
[16] Beckman, *supra,* n. 14, at 255.
[17] Clarke, *supra,* n. 5, at 742.
[18] Beckman, *supra,* n. 14, at 255. See also, Orucu, *The United Kingdom as an Importer and Exporter of Legal Models in the Context of Reciprocal Influences and Evolving Legal Systems,* in *UK Law for the Millennium Comparative Law Series,* No. 19 (1998), 206 – 243, at 217-224.
[19] See for example, Cooke, *supra,* n. 8, at 297. See also, Mason, *supra,* n. 6, *Tolofson v Jensen,* [1994] SCR 1022, *Pfeiffer v Rogerson* (2000) 203 CLR 503.

awareness on the part of these Commonwealth courts that their social, economic and political circumstances as well as the cultural values and "community expectations"[20] shared by their people may require that they depart from certain areas of the English common law.

Even the Privy Council itself has abandoned its role as the "unifier of commonwealth law"[21] with its acknowledgement that there is room for "divergent views in different commonwealth jurisdictions"[22] as they may adhere to different "policy considerations"[23] based on the local court's "perception"[24] of the individual country's conditions. It has also declared that "uniformity in certain areas of the [common] law"[25] is not "compelling"[26] and that the "ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root is not a weakness, but one of its great strengths."[27]

In short, Commonwealth common law can no longer be said to be a "uniform whole."[28] Although "English law is still exporting ideas and principles to...members of the common law family,"[29] it is important to note that in these modern times, Commonwealth judiciaries now "enjoy the luxurious advantage of freedom to ransack the case-law"[30] in England so as to cherry-pick the particular rules and approaches that they desire.

While the break up of Commonwealth common law has been documented particularly in relation to tort and contract law,[31] research on this phenomenon in relation to Commonwealth private international law has been lacking. The key objective of this thesis is thus to address the paucity of academic writing on this subject matter by undertaking a comparative study of two areas of private international law, namely the doctrine of *forum non conveniens* and tort choice of law in Australia, Canada and Singapore, with the relevant English common law positions as the key reference point.

---

[20] Martin, *supra,* n. 10, at 98.
[21] Orucu, *supra,* n. 2, at 5.2.
[22] *Invercargill City Council v Hamlin* [1996] 2 WLR 367, at 378.
[23] *ibid.*
[24] *ibid.*
[25] Clarke, *supra,* n. 5, at 298.
[26] *ibid.*
[27] *Invercargill, supra,* n. 22, at 376.
[28] Cooke, *supra,* n. 8, at 298.
[29] Orucu, *supra,* n. 18, at 220.
[30] Cooke, *supra,* n. 8, at 297.
[31] See for example, Mason, *supra,* n. 6, Finn, *Commerce, the Common Law and Morality* (1989) 17 Melbourne University Law Review 87, Cooke, *supra,* n. 8, Martin, *supra,* n. 10.

2. SCOPE OF THE THESIS

Ideally, an analysis of the break up of Commonwealth private international law should involve a comprehensive comparison of private international law regimes in every Commonwealth jurisdiction. However, bearing in mind the restrictions placed upon a thesis such as this, one would have to confine the study to a number of specific topics in private international law as well as to a few selected Commonwealth jurisdictions.

2.1 SELECTED AREAS OF PRIVATE INTERNATIONAL LAW

2.1.1 *Forum non conveniens*

In Commonwealth countries, a court can take jurisdiction over a dispute so long as the defendants are served with a claim form in accordance with the relevant legal rules on this matter.[32] That, however, is not the end of the process as that court has the discretion to decline jurisdiction by granting a stay of proceedings. One situation where such power can be exercised is where the doctrine of *forum non conveniens* is satisfied; i.e. where the "appropriate forum for trial is abroad or that the local forum is inappropriate."[33]

There are a number of reasons why *forum non conveniens* has been selected for our discussion of the break up of Commonwealth private international law.

1. First, the "topic of declining jurisdiction in private international law is one of enormous practical importance."[34] One consequence of the rapid globalisation of trade and commerce and thus the world economy is the rise in the frequency of cross-border disputes. Such litigation is said to have become "to some extent a commodity which prospective claimants shop for amongst the potentially available national legal

---

[32] For more details on these rules, see for example, Chapter 12, North, Fawcett, *Cheshire and North's Private International Law* (London: Butterworths) (13th ed., 1999).
[33] Fawcett, *General Report*, in Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press) (1995), 1-70, at 2.
[34] *ibid.*

systems"[35] thus bringing about a situation where the "scope for conflict between the courts of different countries is much increased."[36] One of the key techniques adopted by Commonwealth judiciaries to address this is the discretion to decline jurisdiction in accordance with the doctrine of *forum non conveniens.* If there were significant diversity in relation to this doctrine in Commonwealth jurisdictions, its effectiveness in resolving the above issues would have to be questioned.

2. Secondly, there is clearly diversity in relation to this doctrine in Commonwealth jurisdictions. The most famous divergence of them all is of course the High Court of Australia's decision to reject the English common law 'clearly more appropriate forum' test[37] for a 'clearly inappropriate forum' test.[38] However, that is not the only Commonwealth departure from the English common law position on this matter. Even though most Commonwealth jurisdictions have adopted the English common law 'clearly more appropriate forum' test, as this is a broad and discretionary approach, divergences have been generated by the decisions of Commonwealth judges on specific aspects of that test.

3. Thirdly, another reason why the doctrine of *forum non conveniens* is chosen for this study is that it is an area of Commonwealth private international law where the common law is still applicable. In particular, the English common law doctrine of *forum non conveniens* has not been completely removed by the drive towards the harmonisation of private international law in Europe. This is because the European *Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* is generally not applicable to defendants who are not domiciled in a Member State.[39] In these circumstances, it is up to the English common law rules to determine jurisdiction.

---

[35] International Law Association London Conference (2000), Committee on International Civil and Commercial Litigation, *Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, http://www.ila-hq.org/pdf/Civil%20&%20Commercial%20Litigation/CommLitigation.pdf#search=%22Third%20Interim%20Report%3A%20Declining%20and%20Referring%20Jurisdiction%20in%20International%20Litigation%22, at [1].
[36] *ibid.*
[37] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.
[38] *Voth v Manildra Flour Mill Pty* (1990) 171 CLR 538.
[39] Article 4, *Brussels I Regulation.*

Similarly, in Australia, Canada and Singapore, *forum non conveniens* is still predominantly a common law doctrine.[40]

2.1.2 Tort choice of law

In relation to an action in tort with a number of foreign elements, one of the private international law issues arising is: what is the law applicable to that dispute? This question is answered by examining a jurisdiction's tort choice of law rules. In general, Commonwealth courts look at the *lex fori*, the *lex loci delicti* or a mixture of the two laws to determine the applicable law.

On the reasons why tort choice of law has been chosen as a case study for this thesis:

1. Like the position for *forum non conveniens*, this topic is considered by some to be of some practical significance. Specifically, tort choice of law is seen as essential to the facilitation of litigant mobility across jurisdictions. By providing for tort choice of law regimes that encourage the free movement of persons, wealth and skills, it has been argued that "suitable conditions of interstate and international commerce"[41] would be promoted.

2. Tort choice of law is again one area of private international law where the common law is still relevant. For England, even though the British Parliament has legislated on tort choice of law by providing for the *Private International (Miscellaneous Provisions) Act 1995*, the English common law rules on tort choice of law are still preserved for certain torts, most notably, the tort of defamation.[42] In addition, English tort choice of law has not been replaced by a European convention or regulation as is the case for

---

[40] In British Columbia, Yukon and Saskatchewan, the common law doctrine of *forum non conveniens* has been replaced by *section 11* of the *Court Jurisdiction and Proceedings Transfer Act.* According to the Uniform Law Conference of Canada, the purpose of this section is to codify the Canadian common law doctrine of *forum non conveniens* as provided for in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897.
[41] See for example, Yntema, *Objectives of Private International Law* (1957) 35 Canadian Bar Review 721, at 741.
[42] Section 13, *1995 Act.*

contract choice of law.[43] It is perhaps a matter of time before the proposed European *Council Regulation on Non-contractual Obligations* is settled and adopted by the European Parliament[44] but even so, not all torts will fall within its scope.[45] Torts that are not covered by the *Regulation* will have to be addressed under the *1995 Act* or the English common law tort choice of law regime. As is the case in relation to the doctrine of *forum non conveniens*, tort choice of law in Australia, Canada and Singapore is still governed by the common law.

3. Most importantly, Commonwealth tort choice of law is an excellent example of the break up of Commonwealth private international law as its development has been in "a state of continual revolution."[46] Tort choice of law has been described as raising "one of the most vexed questions in the conflict of laws"[47] and as such, it is unsurprising that different Commonwealth judiciaries have formulated different answers to it throughout the history of its development.

2.2 SELECTED COMMONWEALTH JURISDICTIONS

In this thesis, we will examine the break up of Commonwealth private international law in Australia, Canada and Singapore with the English common law positions on *forum non conveniens* and tort choice of law as the key reference points. It is of course necessary for an analysis of this phenomenon that we use the English common law as the primary basis of comparison as it is the source of the private international law rules in these jurisdictions. However, our choice of Australia, Canada and Singapore for this study requires some explanation.

---

[43] *European Council Convention on the Law Applicable to Contractual Obligations* (Rome 1980).
[44] For the latest documents on the proposed *Rome II Regulation*, see for example, *Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-contractual Obligations* A06-211/2005, (26 June 2005) and the *Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations* COM(2006) 83 final, (21 February 2006).
[45] See Article 1(2), *Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations* COM(2006) 83 final, (21 February 2006).
[46] Briggs, *The Conflict of Laws* (Oxford: Oxford University Press) (2002), at 174.
[47] *Boys v Chaplin* [1968] 2 QB 1 (CA) per Lord Denning.

2.2.1 Reasons for selecting Australia, Canada and Singapore as the Commonwealth jurisdictions for this thesis

Why have we selected Australia, Canada and Singapore for this thesis? Australian and Canadian decisions have been cited by academics in their discussion of the break up of Commonwealth common law.[48] They have observed that there is a "growing awareness"[49] in these jurisdictions to "match the common law to [their own] circumstances, needs and values"[50] which has resulted in a "growing divergence of [their] common law from that of England."[51] Accordingly, it will be interesting to see whether these comments are equally applicable to Australia and Canada's private international law regimes.

In general, the High Court of Australia has effected a considerable number of divergences from the English common law rules on *forum non conveniens* and tort choice of law. Canada, however, provides a mixed picture. On the one hand, there is a clear Canadian departure from the English common law tort choice of law regime. On the other hand, the Supreme Court of Canada has endorsed the English common law 'clearly more appropriate' forum test. As for Singapore, her judiciaries have adopted the English common law approaches on *forum non conveniens* and tort choice of law. In all, these three Commonwealth countries provide a good balance of jurisdictions which have contributed, to varying extents, to the break up of Commonwealth private international law.

2.2.2 Canada and Australia: federations

It is important to note that Australia and Canada are federations whereas this is obviously not the case for Singapore and England. As such, one question that must be posed here is: is the use of these Commonwealth jurisdictions appropriate for a comparative study such as this when they are so different in terms of their political structure?

---

[48] See for example, Cooke, *supra,* n. 8, Mason, *supra,* n. 6, Orucu, *supra,* n. 2.
[49] Finn, *supra,* n. 31, at 89.
[50] *ibid.*
[51] *ibid*, at 90.

In particular, for the purposes of private international law, "a country is any territorial unit having its own separate system of law, whether or not it constitutes an independent state politically."[52] Thus, in the conflicts context, each of the states or provinces in Australia and Canada is treated as a separate jurisdiction. Traditionally, common law private international law regimes in Australia and Canada did not distinguish between disputes on an intra-national or international basis; the same private international law rules were applicable regardless of whether the dispute involved for example Ontario and British Columbia or Ontario and Singapore. However, in recent years, the view that federations are ultimately "one country and one nation"[53] began to emerge in the Australian and Canadian courts and a number of English common law rules on private international law were criticised for their inability to tackle issues arising from disputes within a federation. A division between international and intra-national cases was thus introduced to certain areas of private international law in these jurisdictions.

Some may say that a comparative study such as ours should be confined to the analysis of federal or non-federal Commonwealth countries due to the introduction of this distinction between international and intra-national disputes. It is obviously not possible to do the former as England is not a federation and for our analysis of the break up of Commonwealth private international law, it is essential that we include a comparison with the English common law. However, if we restricted our discussion to non-federal Commonwealth jurisdictions, we would be removing from our analysis an enormous source of Commonwealth diversity in relation to private international law since the Australian and Canadian judiciaries are clearly limiting the influence of English judicial precedents on their decisions on private international law.

Furthermore, it is the view of this author that differences in the political status of these countries do not necessarily render our comparative study impossible or ineffectual for the following reasons:

---

[52] Clarkson, Hill, *Jaffey on the Conflict of Laws* (London: Butterworths LexisNexis) (2nd ed., 2002), at 4.
[53] *Breavington v Godleman* (1988) 169 CLR 1, at 78.

1. First, the utilisation of such political reasoning in the Australian and Canadian decisions on private international law is a relatively recent trend. Accordingly, the comparison of private international law rules in the days before the emergence of this consideration in the courts of these countries will not be affected by the fact that Australia and Canada are federations.

2. Secondly, a direct comparison between our selected Commonwealth jurisdictions can still be made with regards to disputes which occur on an international basis. A dispute involving an Australian or Canadian state and a foreign jurisdiction such as France would involve the same broad considerations as a cross-border dispute involving England and Singapore.

3. Thirdly, even though England has strong legal and historical ties to Scotland, Wales and Northern Ireland, the English common law does not provide for any special rules for intra-UK disputes. For example, it has been said that an English court will treat a "tort committed in Scotland or Ireland in precisely the same way as it would one committed in China or Peru."[54] For Australia and Canada, there has been a transition from the English common law view, that such political considerations play no part in the formulation of the relevant private international law rules, to one where such matters necessitate a division between international and intra-national disputes for the purposes of their private international law regimes. As such, this is a good example of the break up of Commonwealth private international law. Furthermore, it is an excellent illustration of how Commonwealth jurisdictions have utilised their own individual circumstances (in this case, their political context) to break away from the relevant English common law position on private international law.

In all, we do not see the political nature of these Commonwealth jurisdictions, Australia and Canada as presenting significant methodological difficulties to our comparative study.

---

[54] Briggs, *supra,* n. 46, at 178.

As a final note, we will not be examining the private international law rules in the Canadian province of Quebec as it is a civil law jurisdiction, unlike the rest of the Canadian provinces which have inherited the English common law.

3. STRUCTURE AND METHODOLOGY OF THE THESIS

To examine the break up of Commonwealth private international law in a structured and analytical manner, this thesis will be divided subsequently into three parts with three broad questions corresponding to each of these sections. They are as follows:

Part I: What is the nature and extent of the break up of Commonwealth private international law in our selected jurisdictions?

Part II: What are the explanations from the case law for the break up of Commonwealth private international law in our selected jurisdictions?

Part III: How should our selected Commonwealth jurisdictions react to the break up of Commonwealth private international law?

We will now elaborate on each of these questions in the following subsections.

3.1 PART I: WHAT IS THE NATURE AND EXTENT OF THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

Specifically, Chapters 2 and 3 of our thesis will address the break up of Commonwealth private international law in relation to the doctrines of *forum non conveniens* and the tort choice of law regimes in Australia, Canada and Singapore with reference to the English common law positions on these areas of private international law. By looking at the relevant case law in these jurisdictions, we will ask whether there has, in fact, been a break up of

these areas of Commonwealth private international law. We will also analyse the nature and extent of this break up. One important point to note here is that, for the purposes of our discussion, this phenomenon will be deemed to have occurred so long as there is a departure in our selected Commonwealth jurisdictions from the relevant English common law position on tort choice of law and *forum non conveniens.*

To undertake a comprehensive analysis of this phenomenon, the language of *'divergences'* and *'convergences'* will be employed in this thesis. The word *'divergence'* is particularly apt for our research as it connotes a movement apart in different directions from a common point as well as the degree by which things deviate or spread apart. In other words, we can examine the extent to which a Commonwealth jurisdiction has departed from the English common law position on tort choice of law and *forum non conveniens,* the common point for our analysis. As for the word *'convergence,'* it is for situations subsequent to the divergence where there has been a shift back towards the English common law. In addition, for Commonwealth countries which have not diverged from the relevant English common law approaches on our selected areas of private international law, we can describe them as having *maintained their uniformity* with the English common law.

With the use of this terminology, we will be able to plot out the movements of the relevant law in these countries in reaction to the English common law as time goes by. All this will allow us to analyse in a critical manner, the nature and extent of the break up in relation to our selected areas of Commonwealth private international law. Our findings on this aspect of our analysis will be summarised in Chapter 4.

3.2 PART II: WHAT ARE THE EXPLANATIONS FROM THE CASE LAW FOR THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

The explanations as to why some judiciaries of our selected Commonwealth jurisdictions have decided to formulate certain rules with regards to their doctrines of *forum non*

conveniens and tort choice of law in divergence from the English common law will be examined in Chapters 5 and 6 of this study. If there has been a shift back towards the relevant English common law positions on these matters, the reasons for such convergence would be tackled as well. Similarly, we will also look at why certain Commonwealth jurisdictions have maintained their uniformity with the English common law position in relation to these areas of private international law.

To answer this second question of our thesis, a critical analysis of the principles, policies, concepts and other wider considerations that have had an impact on the decisions of our selected Commonwealth courts on *forum non conveniens* and tort choice of law is required. Examples of such considerations include: discouraging forum shopping, ensuring uniformity of judicial outcome, the historical influence of English judicial precedents and the globalisation of litigation.

In order to conduct a systematic and thorough study of the considerations relevant to our selected areas of private international law, each of these matters will be examined in their own designated sub-sections. Specifically, we will be looking at the judicial treatment of these considerations in each of our selected Commonwealth jurisdictions. For example, do the courts in these countries consider the protection of a litigant's right of access to local courts to be a significant factor in their decisions on *forum non conveniens*? Is there a divergence of opinion in our selected judiciaries as to the weight accorded to the policy of ensuring uniformity of judicial outcomes for their tort choice of law regimes? What is the compromise reached between the policies of certainty and flexibility in relation to the *forum non conveniens* and tort choice of law approaches in our selected jurisdictions?

To assist us in our analysis, these explanations will be grouped as follows:

a) Policy explanations

b) Structural explanations

c) Historical and comparative explanations

d) Contextual explanations.

A brief description of these categories will now be provided.

a) Policy explanations

In this section, we will examine "jurisprudential policy"[55] explanations, i.e. considerations that influence the courts in determining "what qualities are most desirable"[56] for their private international law rules. Examples of such policies in relation to private international law include: discouraging forum shopping, protecting the litigant's right of access to the courts, justice, certainty, flexibility and ensuring uniformity of judicial decisions. As the treatment of these policy considerations are affected by a particular Commonwealth judiciary's "beliefs on jurisprudential desiderata"[57] and may thus differ across Commonwealth jurisdictions, in particular from that of the English courts, this is a possible explanation for the divergences from the English common law doctrine of *forum non conveniens* and tort choice of law in our selected countries.

b) Structural explanations

This category is an acknowledgement that private international law in a jurisdiction does not exist in isolation. It can interact with domestic substantive law. For example, a country's domestic law on tort may influence the formulation of its tort choice of law regime. It can also interact with public international law as concepts traditionally employed in public international law may be imported into private international law. One example is the concept of comity. In addition, private international law consists of three components, namely jurisdiction, choice of law and the recognition and enforcement of foreign judgments. Since these three topics are

---

[55] Fawcett, *Policy Considerations in Tort Choice of Law* (1984) 47 Modern Law Review 650.
[56] *ibid.*
[57] *ibid.*

intertwined with one another, in that together they form the system that litigants will normally go through for the resolution of their cross-border disputes, the nature of the legal rules in one of these areas of private international law may have an impact on that of another. As the judicial treatment of these considerations can differ from Commonwealth jurisdiction to jurisdiction, this is a possible explanation for some of the divergences in our comparative study.

c) Historical and comparative explanations

In this category, we will be looking at the historical influence of English judicial precedents on our selected Commonwealth countries. To elaborate, one possible explanation for the refusal of Commonwealth courts to depart from the English common law in relation to our selected areas of private international law is that they are of the view that there should be uniformity in their laws with that under the English common law.

We will also examine the impact of comparative law on the doctrines of *forum non conveniens* and tort choice of law in our selected jurisdictions. If a number of common law judiciaries have provided for divergences from the English common law on these areas of private international law, this may be an explanation for the decision of our selected judiciaries to do so likewise.

d) Contextual explanations

In our above discussion of the break up of Commonwealth common law, we have observed from the academic writing on this phenomenon, that one reason for its occurrence is that Commonwealth judiciaries have taken a greater interest in their own individual circumstances in the formulation of their common law rules. This category is thus to examine such explanations in relation to our study of the break up of Commonwealth private international law. In particular, we will see whether the judiciaries in Australia, Canada and Singapore have reacted to their social, economic and political contexts in the relevant decisions on *forum non*

conveniens and tort choice of law. Specifically, we will look at whether social and economic circumstances such as the globalisation of litigation and the increase in the mobility of persons, wealth and skills have been taken into account by these Commonwealth courts. We will also examine whether political considerations, such as the fact that Australia and Canada are federations, have been utilised by the courts in these countries to justify any divergences from the English common law in relation to our selected areas of private international law.

Aside from examining the considerations relevant to our selected areas of private international law on an individual basis, we will also be looking at the interaction that goes on between them in each of our selected jurisdictions in a separate section. For example, some of our selected Commonwealth courts may regard the litigant's right of access to their judicial system as an important factor and may thus accord less weight to the policies of discouraging forum shopping and equal justice between litigants in relation to their *forum non conveniens* approaches. The social, economic and political context of a jurisdiction may be the reason why some of our chosen Commonwealth courts have adhered to certain policies and concepts while others have not. Arguably, if there were differences in the nature of this interaction between considerations in our selected jurisdictions, this might be an explanation for the break up of our selected areas of Commonwealth private international law.

It is important to note that throughout this whole inquiry, our focus is on the explanations that can be drawn out from the relevant cases. Obviously, the reasons explicitly provided for by the judges in relation to the formulation of their doctrines of *forum non conveniens* and tort choice of law regimes will be utilised in this comparative study. In addition, we will be breaking down the judgments themselves to tease out other possible explanations implicit from them to conduct our analysis. Accordingly, it should be clear that we are engaging in a doctrinal analysis of the break up of Commonwealth private international law in that this study is limited to the relevant cases on *forum non conveniens* and tort choice of law. In other words, we are not looking at wider sociological explanations such as the differences in the mindsets and backgrounds of the judges in our selected jurisdictions or the general social, economic and political climate of these jurisdictions aside from those that have been invoked by the judges

in the cases themselves. This limitation is imposed on this study because Commonwealth private international law has an abundance of case law. To conduct a proper and comprehensive analysis of the reasons in the cases for the break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law is, itself, a major undertaking and space constraints do not allow for a wider examination. It is hoped that others can build upon the explanations established in this thesis to provide for a complete answer to the question of why there has been a break up of Commonwealth private international law.

Concluding remarks on our discussion of the explanations from the relevant case law for the break up of our selected areas of Commonwealth private international law will be provided in Chapter 7 of this thesis.

3.3 PART III: HOW SHOULD OUR SELECTED JURISDICTIONS REACT TO THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW?

Finally, in Chapter 8, we will address the question: if there was a break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law, how should Australia, Canada and Singapore react to this phenomenon? Should they allow it to persist; that their courts "should develop [conflict of law] rules which vary according to their context?"[58] Or should they participate in the harmonisation of these areas of private international law?

To answer these questions, we will undertake a critical analysis of the advantages and disadvantages associated with diversity in Commonwealth private international law as well as the advantages and disadvantages arising from the harmonisation of private international law, with specific reference to our selected Commonwealth jurisdictions and areas of private international law. We will also attempt to paint a realistic picture of the obstacles that may

[58] Briggs, *supra*, n. 46, at 178.

hamper the success of the harmonisation of *forum non conveniens* and tort choice of law rules on a global, regional and Commonwealth scale.

PART I: WHAT IS THE NATURE AND EXTENT OF THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

CHAPTER 2: THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO THE DOCTRINE OF *FORUM NON CONVENIENS*

1. INTRODUCTION

As was mentioned in Chapter 1, the purpose of this chapter is to work out whether there has been a break up of Commonwealth private international law in relation to the doctrine of *forum non conveniens* in our selected jurisdictions and that, if this phenomenon has occurred, what is the nature and extent of this break up.

A cursory glance at the *forum non conveniens* tests in Australia, Canada, England and Singapore would reveal that there has indeed been a break up of this particular area of Commonwealth private international law, as the Australian courts have provided for an approach that inquires as to the inappropriateness of the local forum, whereas the English common law 'clearly more appropriate forum' test has been endorsed by the Canadian and Singaporean courts. On closer scrutiny, it is interesting to note that divergences from the English common law doctrine of *forum non conveniens* have also occurred in Canada and Singapore albeit not in relation to the 'clearly more appropriate forum' test itself. Instead, these departures are with regards to the application of that approach, such as the structural framework used by the courts to work out where the more appropriate forum is. It is thus arguable that the extent to which the doctrine of *forum non conveniens* in one of our selected jurisdictions has diverged from that of the English common law may not necessarily be the same as that of another.

To analyse the break up of Commonwealth private international law in relation to the doctrine of *forum non conveniens* in a critical and structured manner, the following framework will be utilised. We will first examine the divergences from and convergences with the English common law doctrine of *forum non conveniens* in our selected Commonwealth jurisdictions having regard to the following analytical points of comparison:

a) Structure of the tests (set out in 2.2 of this chapter);

b) Formulation of the tests (set out in 2.3 of this chapter);

c) Situations to which the tests are applicable (set out in 2.4 of this chapter);

d) Factors taken into account under the tests (set out in 2.5 of this chapter);

e) Weight attached to particular factors under the tests (set out in 2.6 of this chapter);

f) Difficulty in satisfying the tests (set out in 2.7 of this chapter);

g) *Forum non conveniens* in a federation (set out in 2.8 of this chapter).

Subsequently, these findings will be utilised to determine the nature and extent of the break up of this particular area of Commonwealth private international law in relation to our selected jurisdictions.

It should be noted that our analysis in this chapter is on the general aspects of the doctrine of *forum non conveniens*. While there are divergences that can be identified in relation to the application of the doctrine to specific circumstances such as where there are parallel or related proceedings abroad or where the dispute in question involves a non-exclusive jurisdiction clause, it is simply not possible to explore these situations within the space constraints of this thesis.

2. EXAMINING THE VARIOUS DIVERGENCES AND CONVERGENCES IN RELATION TO THE DOCTRINE OF FORUM NON CONVENIENS

2.1 THE OVERALL PICTURE

Before we begin our comparative study, it is important that we first provide for a general historical account of the doctrine of *forum non conveniens* in our selected jurisdictions so as to set the scene for our subsequent discussion.

Although the doctrine of *forum non conveniens* is well entrenched in Scottish[1] and American law,[2] its adoption under the English common law was a relatively modern development. Before 1974, a stay of proceedings was seldom granted in England due to the application of the principles provided for by Scott LJ in *St Pierre v South American Stores Ltd*[3] that:

> "[i]n order to justify a stay, two conditions must be satisfied...a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff."[4]

With the emphasis of this test on oppression and vexation, it is clear that *forum non conveniens* was not part of the English common law then. Similarly, this was the position in Australia,[5] Canada[6] and Singapore.[7] In other words, these jurisdictions were in conformity with the English common law at this point in time.

After 1974, in a number of English cases[8] culminating in the landmark case of *Spiliada Maritime Corporation v Cansulex Ltd*,[9] there was a gradual shift in the English common law

---

[1] See for example, *Longworth v Hope* (1865) 3 M 1049.
[2] See for example, *Gulf Oil Corp v Gilbert* 330 US 501 (1946).
[3] [1936] 1 KB 382.
[4] *ibid*, at 398.
[5] See for example, *Maritime Insurance Co Ltd v Geelong Harbour Trust Commrs* (1908) 6 CLR 194.
[6] See for example, *Empire Universal Films Ltd v Rank* [1948] OR 235.
[7] See for example, *Sea Breeze Navigation Co SA v The Hsing An* [1972 - 1974] 1 SLR 532.
[8] *The Atlantic Star* [1974] AC 436, *MacShannon v Rockware Glass Ltd* [1978] AC 795, *The Abidin Daver* [1984] AC 398.

towards the adoption of the doctrine of *forum non conveniens.* These cases inevitably "set off a chain reaction"[10] in our selected jurisdictions as their initial uniformity with the *St Pierre* approach became divergences from the *Spiliada* test. This was because the lower courts of these jurisdictions were still bound by their superior courts' adoption of the *St Pierre* approach. Despite this legal barrier, lower courts in these jurisdictions were quick to indicate their support of the doctrine of *forum non conveniens* in this context.[11] The scene was thus set for the penultimate courts in these countries to address the question of whether there should be an endorsement of the English common law doctrine of *forum non conveniens.*

In particular, the Supreme Court of Canada[12] and the Singapore Court of Appeal[13] responded by adopting the English common law doctrine of *forum non conveniens* which inquires as to whether there is a clearly more appropriate forum elsewhere in comparison to the local forum. Having said that, it is important to note that not all aspects of the English common law doctrine were adopted by these courts as there are still differences in the manner in which the *Spiliada* test is applied in Canada and Singapore. On the other hand, in *Oceanic Sun Line Special Shipping Co Inc v Fay*[14] and *Voth v Manildra Flour Mill Pty,*[15] the High Court of Australia provided for a departure from the *Spiliada* test as well as the *St Pierre* approach by adopting a "clearly inappropriate forum"[16] test.

In light of the above overview of the doctrine of *forum non conveniens* in our selected jurisdictions, it should be clear that the break up of this area of Commonwealth private international law has taken place primarily in reaction to the introduction of that doctrine in the English case of *Spiliada.* Accordingly, the following discussion of our analytical points of comparison will be undertaken with specific reference to this situation.

---

[9] [1987] AC 460.
[10] North, Fawcett, *Cheshire and North's Private International Law* (London: Butterworths) (13th ed., 1999), at 335.
[11] For Australia, see for example, *Ranger Uranium Mines Pty Ltd v BTR Trading (Qld) Pty Ltd* (1985) 34 NTR 1, *In the Marriage of Takach* (1980) 47 FLR 441, *The Courageous Coloctronis* [1979] WAR 19. For Canada, see for example, *Skagway Terminal Co v The Daphne* (1987) 42 DLR (4th) 200, *United Products Ltd v Royal Bank of Canada* [1988] 5 WWR 181, *Paterson v Hamilton* (1991) 115 AR 73. For Singapore, see for example *The Vishva Apurva* [1992] 2 SLR 175.
[12] *Amchem Products Inc v Workers Compensation Board* [1993] 1 SCR 897.
[13] *Brinkerhoff Maritime Drilling Corporation v PT Airfast Services Indonesia* [1992] 2 SLR 776.
[14] (1988) 165 CLR 197.
[15] (1990) 171 CLR 538.
[16] *ibid,* at 556.

2.2 STRUCTURE OF THE TESTS

Even though the doctrine of *forum non conveniens* is at its roots a discretionary approach in that it is up to the judiciary to determine whether there is another more appropriate forum elsewhere to resolve the dispute in question or whether the local forum itself is inappropriate, a systematic framework can be imposed upon it so as to structure that discretion. However, as will be seen below, not all our selected jurisdictions have opted for that approach.

English common law and Singapore

As was laid down by the House of Lords in *Spiliada*, the basic principle behind the English common law doctrine of *forum non conveniens* is that a stay will be granted "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."[17] It is however important to note that the above principle is not the specific formulation of *forum non conveniens* that is applied by the English courts. Instead, Lord Goff has held in *Spiliada* that the test is a two-stage process.

1. First, the defendant must show that "there is another available forum which is clearly or distinctly more appropriate than the English forum."[18] To ascertain the existence of such a forum, the courts will examine the various factors which connect the dispute with England and other jurisdictions. These include "factors affecting convenience or expense"[19] and other factors such as the choice of law for the dispute in question or the residence of the parties.

2. Secondly, once this requirement is satisfied, the court will normally grant a stay unless the claimant can establish that there are "circumstances by reason of which

---

[17] *Spiliada, supra,* n. 9, at 476.
[18] *ibid,* at 477.
[19] *ibid,* at 478.

justice requires that a stay should nevertheless not be granted."[20] For this inquiry, the court will take into account "all the circumstances of the case."[21]

On this particular point of comparison, the Singapore Court of Appeal has endorsed the two-stage structure of the *Spiliada* test.[22]

Canada and Australia

In *Amchem Products Inc v British Columbia (Worker's Compensation Board)*,[23] the Supreme Court of Canada adopted the basic approach in *Spiliada*: to ascertain the "existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice."[24] However, this endorsement was not extended to the structure of the *Spiliada* test itself. In particular, Sopinka J held that there is:

> "no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum."[25]

There is therefore no need for the "existence of two conditions."[26] This led Sopinka J to provide for a one-stage test which places the onus on the defendant to show that there is a "more appropriate jurisdiction based on the relevant factors."[27] Under this approach, both connecting factors as well as juridical advantages available to the parties will be examined together in determining whether a stay of proceedings should be granted.

---

[20] *ibid.*
[21] *ibid.*
[22] *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia supra*, n. 13, *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97, *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] SLR 253, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] SLR 49.
[23] [1993] 1 SCR 897.
[24] *ibid*, at [36].
[25] *ibid*, at [37].
[26] *ibid.*
[27] *ibid*, at [38].

One preliminary point to make here is that Sopinka J may have misinterpreted the second stage of the *Spiliada* test. In particular, the loss of juridical advantage is not treated as a separate and distinct condition under the English common law. Instead, the focus of the second limb of the *Spiliada* test is on the justice of the situation: whether justice requires that a stay should not be granted. Admittedly, legitimate juridical advantages to the claimant may be relevant to the application of this test but that would only be so in situations where substantial justice is not done in the alternative forum.

As was mentioned above, the High Court of Australia has opted for a divergence from the basic principles underlying the English common law doctrine of *forum non conveniens* by emphasising the appropriateness of the local forum. In relation to the structure of their test, the High Court has held that it is a one-stage process in that the onus is on the defendant to show that the Australian court is clearly inappropriate for the resolution of the dispute and that "connecting factors"[28] as well as the "legitimate personal or juridical advantage[s]"[29] available to the parties are relevant factors in the application of this test.

We now go on to examine the precise nature of the Canadian and Australian divergences from the two-stage *Spiliada* structure by examining the similarities and differences between the two frameworks.

1. Under the English common law scheme, there is a clear divide between factors examined at the first and second stage of the process. Under the first limb of the *Spiliada* test, the courts will look at connecting factors as opposed to the second stage of the test where the courts will consider all the circumstances of the case. As Lord Goff has commented in the case of *De Dampierre v De Dampierre,*[30] there are "factors which cannot evenly be weighed"[31] as "one class of factors"[32] may be relevant as "connecting the dispute with a particular forum"[33] whereas "another class

---

[28] *Voth, supra,* n. 15, at 565.
[29] *ibid.*
[30] [1988] AC 92.
[31] *ibid*, at 109.
[32] *ibid.*
[33] *ibid.*

of factors"[34] may point to injustice arising in the alternative forum. He thus saw it as necessary that the doctrine of *forum non conveniens* be structured so "as to differentiate between these two classes of factors, and to decide how each should be approached in relation to the other."[35] Accordingly, one difference between the *Spiliada* structure and the *Amchem* and *Voth* frameworks is that there is no such division of factors for the latter. Under these two flexible one-stage approaches, all relevant factors to the dispute will be balanced against one another.

2. On the one hand, under the English common law structure, there is a shift of onus from the defendant to the plaintiff once the former has established that the alternative forum is clearly more appropriate than the English courts. The role of the claimant and the defendant with regards to the test is thus clearly delineated in that the defendant has to rely on connecting factors to establish a clearly more appropriate forum whereas the claimant has to depend on considerations of justice to persuade the courts not to grant the stay. On the other hand, there is no such clarification of the litigants' role in establishing *forum non conveniens* under the Australian and Canadian structures.

3. Although connecting factors often constitute the most important consideration in the court's discretion to stay proceedings in both Australia and Canada, the structure of their one stage test does not inform us as to whether and when other considerations will be decisive. In contrast, the two-stage *Spiliada* test is explicit about this point. Even though there might be a preponderance of connecting factors pointing towards an alternative forum, if there were exceptional circumstances where justice would not be served, a stay would be refused.

It is therefore clear from the above that there is a difference in views between the English common law and the Australian/Canadian position as to how the flexibility inherent in a doctrine of *forum non conveniens* should be structured. The Canadian courts prefer a flexible

---

[34] *ibid.*
[35] *ibid.*

framework for their doctrine of *forum non conveniens* where they simply ask the question: is there a more appropriate forum elsewhere? The relevant question for the Australian approach is of course: whether the Australian forum is clearly inappropriate? In contrast, one can observe that the *Spiliada* framework provides for a more methodical approach with different factors relevant at different stages of the inquiry and the role of the parties in persuading the courts to grant or refuse a stay of proceedings clearly defined under each stage of the test.

2.3 FORMULATION OF THE TESTS

In granting a stay of proceedings, there are many ways to determine whether the local forum or another alternative forum is appropriate for the resolution of the dispute in question. One could inquire as to whether there is a clearly more appropriate forum elsewhere in comparison to the local forum or one could limit the test to whether the local forum itself is clearly inappropriate. These approaches could also be combined in that both would have to be established for the courts to decline jurisdiction.[36]

Generally, a stay of proceedings would be granted by the judiciaries in England, Canada and Singapore if there were a clearly more appropriate forum elsewhere. In contrast, the High Court of Australia has held that the Australian test is whether the local court is clearly inappropriate for the determination of the dispute.

To ascertain the nature of the Australian divergence on this point of comparison, it is necessary that we first determine what the differences between the two approaches are.

1. First, in order to obtain a stay under the 'clearly more appropriate forum' test, the defendant must show that there is an alternative forum elsewhere which is competent to hear the plaintiff's suit since the emphasis of this approach is on the appropriateness of that foreign forum. As the *Voth* test focuses only on the appropriateness of the Australian forum, members of the High Court of Australia have

[36] Article 22, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.* (October 1999).

admitted that "circumstances could well exist in which the local court was a clearly inappropriate one notwithstanding that there was no other tribunal which was competent to entertain the particular proceedings."[37]

That being said, there have been cases where Australian lower courts have held that the defendant must "identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff"[38] even though this would go against the statements of the High Court in *Voth*. According to these decisions, if this condition were not satisfied, there would be no need to ask whether the Australian forum in question were clearly inappropriate.[39]

2. Secondly, under the *Voth* approach, a stay might be refused even if "an available foreign tribunal were the natural or more appropriate forum."[40] So long as the local court is not clearly inappropriate, it does not matter that there is a clearly more appropriate forum elsewhere, the Australian courts will not grant a stay of proceedings.[41] The High Court of Australia has commented that this situation is probably rare especially since the "considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum"[42] In other words, the more appropriate the foreign forum is, the more likely the local forum will be inappropriate.[43] Conversely, the inappropriateness of the local forum is not the focus of the *Spiliada* inquiry and it is thus insufficient to convince the English courts to decline jurisdiction. There must be another clearly more appropriate forum elsewhere.

---

[37] *Voth, supra*, n. 15, at 558.
[38] *Schmidt v Won* [1998] 3 VR 435.
[39] See also, *Conagra International Fertiliser G v Lief Investment Pty Ltd* (1997) 141 FLR 1245.
[40] *Voth, supra*, n. 15, at 558.
[41] See for example, *WFM Motors Pty Ltd v Maydwell* (Unreported, New South Wales Supreme Court of New South Wales Equity Division, 23 April 1992) where the finding that the Hong Kong courts would be a "highly suitable forum for the disposition of the disputes between these parties" was not enough to amount to a conclusion that the New South Wales court was clearly inappropriate.
[42] *Voth, supra*, n. 15, at 558.
[43] See for example, *Amery v Coopers & Lybrand Actuarial Services Pty Ltd* (Unreported, Supreme Court of Victoria, 19 February 1999) where "there are so many factors connecting this litigation with Singapore by comparison with those connecting the litigation with Victoria that Victoria is clearly an inappropriate forum."

3. Thirdly and most importantly, the principles behind the Australian approach are that of oppression and vexation; concepts which have been abandoned by the English, Singaporean and Canadian courts in the formulation of their *forum non conveniens* principles. To elaborate, the *Voth* test is effectively an endorsement of the judgment of Deane J in the earlier High Court of Australia case of *Oceanic Sun* where he held that a stay would be granted if the defendant could establish that the local Australian forum was so inappropriate for the resolution of the dispute in question that "their continuation would be oppressive and vexatious."[44] It is important to note that this is not the old English common law *St Pierre* test. Instead, it is based on the approach in *The Atlantic Star*,[45] the English case that commenced the relaxation of the *St Pierre* approach with a liberal definition of oppression and vexation. In particular, Deane J held that "'oppressive' should, in this context, be understood as meaning seriously and unfairly burdensome, prejudicial or damaging while vexatious should be understood as meaning productive of serious and unjustified trouble and harassment."[46]

From the above analysis, it is clear that the High Court of Australia does acknowledge most of these differences between the 'clearly inappropriate forum' test and the 'clearly more appropriate forum' test but is careful to limit their impact by stating that:

> "[t]he 'clearly inappropriate forum' test is similar to and, for that reason, is likely to yield the same result as the 'more appropriate forum' test in the majority of cases. The difference between the two tests will be of critical significance only in those cases...probably rare."[47]

In other words, even though they do concede that in terms of the formulation of the test itself, there is an Australian divergence from the English common law position, they are of the view that these differences are unlikely to occur. However, this conclusion does not appear to be

---

[44] *Oceanic Sun, supra*, n. 14, at 248.
[45] [1974] AC 436.
[46] *Oceanic Sun, supra*, n. 14, at 247.
[47] *Voth, supra*, n. 15, at 558.

supported in subsequent Australian cases. As will be seen below, the nature of the *Voth* test especially its utilisation of the language of oppression and vexation has had a significant impact on the range of factors taken into consideration in the application of that test.

2.4 SITUATIONS TO WHICH THE TESTS ARE APPLICABLE

Running parallel to *forum non conveniens* is the doctrine of *forum conveniens* that a court would take jurisdiction over a particular dispute if "the local forum [were] the appropriate forum (or an appropriate forum) for trial or that the forum abroad [were] inappropriate."[48] From this definition, one can observe that the former is a "negative doctrine concerned with declining jurisdiction"[49] whereas the latter is "positive"[50] as it has to do with the assumption of jurisdiction. Despite these differences, the nature of the two doctrines is similar in that both examine the suitability of forums with reference to connecting factors, juridical advantages and considerations of justice. In addition, it should also be noted that even after jurisdiction has been assumed by the courts under *forum conveniens*, it is still possible for them to decline it under their *forum non conveniens* tests. However, this will seldom arise as a matter of practicality.

Traditionally, the doctrine of *forum non conveniens* is applicable where jurisdiction is taken as of right: where a claim form can be served on a defendant present within the local forum or where a defendant has submitted to the jurisdiction of the local court. In contrast, the doctrine of *forum conveniens* is used to determine whether service of a claim form out of jurisdiction can be made. This distinction is still preserved in England[51] and Singapore.[52] However, in relation to Australia and Canada, it has been eroded as the courts in these jurisdictions have extended the use of their doctrine of *forum non conveniens* to a specific category of *service ex juris* cases.

---

[48] Fawcett, *General Report*, in Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press) (1995), 1-70, at 6.
[49] *ibid.*
[50] *ibid.*
[51] Rule 6.20, *Civil Procedure Rules.* (England).
[52] Order 11, *Rules of Court.* (Singapore).

To elaborate, there has been a shift in Australia and Canada towards the removal of judicial permission as a prerequisite to the service of process out of jurisdiction. This is in contrast to England and Singapore where no such occurrence has taken place. Take for instance, *Part 10* of the New South Wales *Supreme Court Rules 1970*. There is no need to obtain leave from the courts prior to the service of originating process on a defendant not present in Australia. Instead, it is up to the defendant pursuant to the requirement in *Part 10, rule 6A(2)* of the *Supreme Court Rules* (NSW) to apply for the setting aside of the service on the ground that "the service of the originating process is not authorised by these rules"[53] or more importantly, for the purposes of our discussion that the New South Wales Court "is an inappropriate forum for the trial of the proceedings."[54] It is interesting to note that even though the *Supreme Court Rules* (NSW) provided for an 'inappropriate forum' test, a "less emphatic"[55] expression in comparison to a 'clearly inappropriate forum,' the High Court of Australia has pointed out in *Renault v Zhang*[56] that the "same concepts and considerations necessarily inform the test of 'inappropriate forum' in *par (b) of Pt 10, r6A(2)* as inform the clearly inappropriate forum test adopted in *Voth*"[57] and that "they inform it in the same way."[58]

A Canadian example is provided by *Rule 17.06* of the Ontario *Rules of Civil Procedure* which allows for service *ex juris* without leave from the Ontario courts. Under this rule, it is up to the party who has been served with an originating process to apply for an order staying the proceedings.[59] In these circumstances, the doctrine of *forum non conveniens* is used to decline jurisdiction as jurisdiction has already been taken by the courts.

Having said that, it is important to note that not all provinces, states and territories in Australia and Canada have dispensed with the requirement for prior leave in relation to service *ex juris*.[60] For this category of cases, the doctrine of *forum conveniens* is applicable. In other words, the creation of these two categories of service out of jurisdiction cases in Australia

---

[53] Part 10, Rule 6A(2)(a), *Supreme Court Rules* (NSW).
[54] Part 10, Rule 6A(2)(b), *ibid.*
[55] *Renault v Zhang* (2002) 187 ALR 1, at [24].
[56] *ibid.*
[57] *ibid.* at [25].
[58] *ibid.*
[59] Rule 17.06(1), *Rules of Civil Procedure*. (Ontario).
[60] For Australia, leave is still required for service out of Western Australia and the Australian Capital Territory. For Canada, leave is still required for service out of Alberta and Newfoundland.

and Canada has resulted in an expansion of the situations to which *forum non conveniens* is relevant to in these two jurisdictions. Not only is *forum non conveniens* applicable to jurisdiction taken as of right in these countries, it has also been extended to the situation where service out of jurisdiction can be made without prior permission from the courts. This is of course in divergence from the position in England and Singapore.

2.5 FACTORS TAKEN INTO ACCOUNT UNDER THE TESTS

A number of factors are taken into consideration by our selected Commonwealth judiciaries in the application of their individual doctrine of *forum non conveniens*. In particular, they are: factors which connect the dispute to the countries in question, legitimate juridical advantages available to the parties in the relevant forums, considerations of justice and public interest factors.

2.5.1 Connecting factors

All the courts in our selected jurisdictions will consider in the application of their doctrine of *forum non conveniens*, connecting factors such as the residence of the parties, the location of the evidence and witnesses or the law applicable to the dispute in question. However, this does not mean that these factors are regarded in the same manner by these judiciaries. Most notably, there are differences between the Australian courts and the rest of our selected judiciaries as to how connecting factors are to be treated within their doctrine of *forum non conveniens.*

In particular, as the *Voth* test inquires as to whether the Australian forum in question is clearly inappropriate, the High Court of Australia has held that the test "focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums."[61] What this means is that the Australian courts in examining the connecting factors relevant to the dispute

---

[61] *Voth, supra*, n. 15, at 558.

are compelled into "focusing upon the connections between the action and the Australian forum"[62] instead of examining *forum non conveniens* "from a truly transnational perspective and comparing the entitlements of both the Australian and foreign forums to try the action."[63] The latter is of course the position under the 'clearly more appropriate forum' test. Indeed, it was held by the majority Justices in *Renault v Zhang* that the application of the *Voth* test "was not a question of striking a balance between competing considerations."[64] Instead, "it was the task of the [defendants] to demonstrate that a trial in the [local forum] would be productive of injustice."[65]

It is important to note that the operative word here is 'focusing.' The High Court is not stating that the inquiry with regards to connecting factors is limited to those with Australia. Obviously, an Australian court "cannot merely consider the strength of the factors connecting the proceedings to Australia"[66] as these factors are but the converse of those which link the proceedings to another forum. In short, the Australian courts will examine the same range of connecting factors as the English, Canadian or Singapore judiciaries. The difference is that the Australian courts will pay much more attention to connecting factors that establish that the Australian forum is clearly inappropriate.

2.5.2 Legitimate juridical advantages to the parties

English common law and Singapore

In relation to legitimate juridical advantages, Lord Goff has held that the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive in relation to the second stage of the *Spiliada* test. Hence, an application for a stay of proceedings cannot be rejected based on the existence of this factor alone. This is because "an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to

---

[62] Garnett, *Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?* (1999) 23 Melbourne University Law Review 30, at 36.
[63] *ibid.*
[64] *Renault, supra*, n. 55, at [78].
[65] *ibid.*
[66] Brereton, *Forum Non Conveniens in Australia: A Case Note on Voth v Manildra Flour Mills* (1991) 40 International and Comparative Law Quarterly 895, at 898.

give the plaintiff his advantage at the expense of the defendant."[67] Lord Goff also stated in the later case of *Connelly v RTZ Corporation*[68] that the general principle with regards to such advantages is that if a more appropriate forum elsewhere had been located, the claimant would have to "take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum."[69] He would have to "accept lower damages,"[70] a less generous system of discovery as compared to the English model, the unavailability of financial assistance abroad, a shorter limitation period or different systems of court procedure. Ultimately, the laws of other jurisdictions "may display many features which distinguish"[71] themselves from English law such that English lawyers may find them "less advantageous to the plaintiff"[72] but that in itself is not "enough to refuse a stay."[73]

This is also the position for Singapore as in *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd,*[74] Yong Pung How CJ stated that after the first stage of the *Spiliada* test is satisfied, the "mere fact that the plaintiff has ... a legitimate advantage for proceeding in Singapore is not decisive and the interests of all the parties and the ends of justice must be taken into consideration."[75]

Canada

In *Amchem*, as was mentioned above, Sopinka J held that juridical advantages are not to be highlighted as a separate condition. Instead, they are to be examined with the other factors which are considered in identifying the appropriate forum. However, this does not mean that no significant weight can ever be attached to such factors. In particular, Sopinka J added that:

> "[t]he weight to be given to juridical advantages is very much a function of the parties' connection to the particular jurisdiction in question. If a party

---

[67] *Spiliada, supra*, n. 9, at 482.
[68] [1998] AC 854.
[69] *ibid*, at 872.
[70] *ibid.*
[71] *ibid.*
[72] *ibid.*
[73] *ibid.*
[74] [1998] SLR 253.
[75] *ibid*, at [11].

> seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as forum shopping. On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides."[76]

Some Canadian provincial courts have interpreted the above statements in *Amchem* as providing that "any loss to the plaintiffs of a juridical advantage is just one of the many factors to be weighed"[77] in the *forum non conveniens* inquiry and that "if more weight were given to the loss of the juridical advantage than to other factors, the *forum [non] conveniens* doctrine would become virtually useless since plaintiffs will ordinarily select that forum which offers them the most favourable advantage."[78]

Other Canadian lower courts have pointed out that Sopinka J did not require the Canadian courts to establish that the dispute has the *most* real and substantial connection to the jurisdiction in question. All that is required is that the case has *a* real and substantial connection with a forum. The latter position was eventually confirmed by the Supreme Court of Canada case of *Holt Cargo Systems Inc v ABC Containerline N V*[79] On the facts of the case itself, even though the courts acknowledged that the "dispute is *but weakly connected* to Canada,"[80] the fact that the claimant's *in rem* rights in Canada "could [not] subsist in one form or another under Belgian bankruptcy laws"[81] was still regarded as a "distinct legal advantage"[82] to the claimant in "having [his] claim determined by the Federal Court of Canada."[83] This was because the plaintiff could not be regarded as forum shopping for his claim arose "in the normal course of litigation"[84] by the arrest of the Belgium ship in Canadian territorial waters and accordingly, his "claim had a 'real and substantial connection' with

---

[76] *Amchem, supra,* n. 23, at [37].
[77] *Cortese (Next Friend of) v. Nowsco Well Service Ltd.* (1999) 234 AR 142, at [21]. See also, Ioannides v. Calvalley Petroleum Inc 2006 CarswellOnt 4581, at [51].
[78] *Barclays Bank plc v Inc Inc* (1999) 242 AR 18, at [58]. See also, *Wawanesa Mutual Insurance Co v Lindblom* (1999) 234 AR 333, *Hodnett v Taylor Manufacturing Industries Inc* (2002) 22 CPC (5th) 360, *Marchand (Guardian ad litem of) v. Alberta Motor Assn Insurance Co.* (1994) 71 WAC 178, *Nissho Iwai Co v Shanghai Ocean Shipping Co* (2000) 185 FTR 314.
[79] [2001] 3 SCR 907.
[80] *ibid,* at [93]. My italics.
[81] *ibid,* at [95].
[82] *ibid,* at [17].
[83] *ibid.*
[84] *ibid.*

Canadian maritime law."[85] In other words, if the courts did not regard the litigant as forum shopping, a real and substantial connection would be established. One must point out that the reasoning of the courts here appears to be circular as a person would normally be regarded as forum shopping if there were no real and substantial connection between the subject matter of the dispute and the jurisdiction itself.

Generally, the 'real and substantial connection' test has been satisfied in cases where claimants choose to litigate in the defendant's home jurisdiction as the courts have held that the defendant cannot contend that he is being forced to litigate in "a distant forum with which he or she has no connection."[86] In such circumstances, the claimant is "entitled to the juridical advantages that are associated with that forum"[87] and this is so even if he is "foreign [and] has no special claim to the juridical advantages of [that forum]."[88] A real and substantial connection has also been found in cases where the plaintiff "pursues his claim in the forum where the defendants have assets."[89]

The real and substantial connection test relating to juridical advantages would also be satisfied if *jurisdiction simpliciter* were established. What is *jurisdiction simpliciter?* For the service of a claim form out of a Canadian province where leave from the court is not required, it has been held that *jurisdiction simpliciter* i.e. a real and substantial connection between the litigant/dispute and the Canadian forum in question must be established before jurisdiction can be taken by the Canadian courts.[90] In particular, some Canadian provincial courts have stated that once this test is satisfied, significant weight would be accorded to the fact that the claimant would be deprived of juridical advantages available to him in the Canadian forum in question if a stay of proceedings were granted. For example, in *Elawar v Federation des Clubs de Motoneigistes du Quebec Inc*,[91] Timms J of the Ontario Supreme Court opined that Sopinka J "confirms the existence of the 'real and substantial connection' test as fundamental

---

[85] *ibid.*
[86] *RPC Inc v Fournell* (2003) 33 CPC (5th) 174, at [39]. See also, *Gotch v Ramirez* (2000) 48 OR (3d) 515, *Chuang v Schafgen* 2001 WL 446959.
[87] *RPC Inc, ibid,* at [39].
[88] *Jan Poulsen & Co v Seaboard Shipping Co* (1995) 10 BCLR (2d) 175, at [35].
[89] See for example, *Asaf Husain Jafferey v Sohai Hydrie* 2004 SKQB 111, at [15].
[90] See for example, *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, *Hunt v. T & N plc* [1993] 4 SCR 289, *Muscutt v Courcelles* (2002) 60 OR (3d) 20.
[91] (2001) 57 OR (3d).

to jurisdiction and to the question of juridical advantages"[92] and that "[w]ithout one, the other falls."[93] Accordingly, as *jurisdiction simpliciter* has not been established by the claimant, he considers that the "overall juridical advantage to the plaintiff to a suit in Ontario [is a] somewhat mixed factor."[94] Similarly, in *Aimtronics Corp v Fattouche*,[95] the British Columbian courts held that since *jurisdiction simpliciter* has been shown by the claimant; that there is a "real and substantial connection between the subject matter of both actions and British Columbia,"[96] the plaintiff has a "legitimate claim to the advantages British Columbia provides."[97]

There is some support for this position in the Supreme Court of Canada case of *Unifund Assurance Co v Insurance Corp of British Columbia*[98] where Bastarache J held that as the respondent had a real and substantial connection to Ontario thus satisfying the jurisdiction *simpliciter* requirements, it had "a legitimate claim to, and it is reasonable to expect that it will, take advantage of the inter-insurer indemnification scheme which Ontario provides."[99] It is important to note that Bastarache J was in dissent in *Unifund* in that the majority Justices were of the view that there was no real and substantial connection between the dispute and Ontario. Accordingly, they did not address the issue of whether jurisdiction should be declined under the Canadian doctrine of *forum non conveniens.* Bastarache J however thought that there was a real and substantial connection thus leading to his analysis of juridical advantages in relation to the declining of jurisdiction.

In short, the Canadian treatment of juridical advantages would clearly be a departure from the English common law position as the latter would not attach any importance to the existence of juridical advantages even if the party's action had a real and substantial connection to the jurisdiction in question. Instead, the focus of the *Spiliada* test is on the possible injustices that flow from the deprivation of such advantages.

---

[92] *ibid*, at [37].
[93] *ibid.*
[94] *ibid*, at [40].
[95] (2002) 6 BCLR (4th) 336.
[96] *ibid*, at [44].
[97] *ibid.*
[98] (2003) 227 DLR (4th) 402.
[99] *ibid*, at [138].

Australia

The point made above in relation to connecting factors in the Australian context is relevant here as well as the High Court of Australia has held that the decision to grant a stay on *Voth* principles does not "turn upon an assessment of the comparative procedural or other claims of the foreign forum."[100] Instead, the focus is on the legitimate juridical advantages available to the claimant in Australia. However, when it came down to the actual application of the test to the facts of *Voth* itself, it is interesting to note that the procedural rules in Missouri and New South Wales were compared. For example, the High Court of Australia stated that "there is evidence that the rules as to the awarding of damages by way of interest are less advantageous to a plaintiff in Missouri than in the Supreme Court of New South Wales."[101] Again, this inconsistency can be explained away by the observation that the High Court did not wish to exclude all comparison of legitimate juridical advantages available to the parties in the different forums. They were simply providing for an emphasis on the advantages that establish that the Australian forum in question is clearly inappropriate.

More importantly, for the purposes of this subsection, the High Court of Australia has held in *Voth* that "relevant connecting factors"[102] and "legitimate and juridical"[103] advantages would provide "valuable assistance"[104] to the application of the 'clearly inappropriate forum' test. In addition, legitimate juridical advantages were considered to be of "diminished importance"[105] in relation to "competing connexions of the respective forums with the subject-matter of the proceedings."[106] Accordingly, the decision of the High Court of Australia here would appear to concur with the position under the English common law that mere legitimate juridical advantages available to one party in the local forum would not be sufficient to convince the courts to refuse a stay of proceedings.

---

[100] *Voth, supra,* n. 15, at 558.
[101] *ibid,* at 571.
[102] *ibid,* at 565.
[103] *ibid.*
[104] *ibid.*
[105] *ibid,* at 571.
[106] *ibid.*

However, lower Australian courts have adopted "a liberal view"[107] of the role of legitimate juridical advantages in the application of the *Voth* test by attaching significant weight to this factor in a number of cases. Stays of proceedings have thus been refused on the grounds that the claimant would be deprived of juridical advantages available to him in the Australian forum in question if the action were to proceed in an alternative forum.[108] Take for example, *Diethelm and Co Ltd v Bradley.*[109] The fact that "damages recoverable in Thai courts by the plaintiff against the defendant...may be far less than those available"[110] in the Australian courts was regarded as a juridical advantage to the claimant which in turn contributed to the Supreme Court of New South Wales' decision not to grant a stay of proceedings. In *Nicholas Pertsch v PT John Holland Constructions Indonesia,*[111] even though both claimant and defendant to the dispute had their own juridical advantages available to them in the forums that they wished to sue in, it was held that the claimant's juridical advantages in Queensland, the local forum, would be accorded more weight as it was his right to invoke the jurisdiction of the Supreme Court of Queensland.[112] This is unsurprising as the nature of the *Voth* test does compel the Australian courts to focus on factors that indicate whether the Australian forum in question is clearly inappropriate for the dispute and the fact that the claimant has certain juridical advantages in that Australian court is a strong indicator towards the appropriateness of that forum.

In all, it is clear that the weight attached to juridical advantages under the Australian doctrine of *forum non conveniens* is greater than that in relation to the English common law doctrine. The Australian treatment of juridical advantages is also different from the Canadian position due to the requirement that there must be a real and substantial connection between the dispute and the jurisdiction in question before juridical advantages available to the litigant in that forum can be considered under the *Amchem* test.

---

[107] Garnett, *supra,* n. 62, at 46.
[108] See for example, *CE Heath Underwriting & Insurance (Australia) Pty Ltd. v Barden* (Unreported, Supreme Court of New South Wales, Rolfe J, 19 October 1994), *In the Marriage of Gilmore* (1993) 16 Fam LR 285, *Astra AB v Delta West Pty Ltd.* (Unreported, Supreme Court of Victoria Industrial Property Jurisdiction, 5 December 1994), *Bannerton Holdings Pty Ltd. v Sydbank Soenderjlland* (Unreported, Federal Court of Australia, 9 February 1996), *Talacho v Talacho* (Unreported, Supreme Court of Victoria 26 March 1999).
[109] (Unreported, Supreme Court of New South Wales, 6 Feb 1995).
[110] *ibid.*
[111] [2001] QSC 127.
[112] *ibid*, at [55].

2.5.3 Considerations of justice

English common law and Singapore

In relation to the second limb of the *Spiliada* test,[113] even though Lord Goff made no attempt to define 'justice' itself, he did refer to Lord Diplock's comments on the concept in *The Abidin Daver*[114] that:

> "[t]he possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies."[115]

It has been commented that the "emphasis here is on the avoidance of bias, a basic level of judicial competence, and the court process not taking an unduly long time."[116] Provided there is cogent evidence for such allegations, the second stage of the *Spiliada* test would be satisfied by the claimant if he could establish that the foreign court did not "meet these basic criteria of natural justice."[117] Similarly, the Singapore courts would take into account such considerations of natural justice under the second stage of the *Spiliada* test if there were evidence for such criticisms of the foreign court.[118]

In addition, Lord Goff has held that if the deprivation of legitimate juridical advantages available to the claimant in England resulted in substantial injustice, the English courts could refuse to grant a stay of proceedings. The application of this approach can be observed in the

---

[113] *Spiliada, supra,* n. 9, at 478.
[114] [1984] AC 398.
[115] *ibid*, at 411.
[116] Beaumont, *Great Britain,* in Fawcett (ed) *Declining Jurisdiction* (Oxford: Clarendon Press) (1995), 207-233, at 211.
[117] *ibid.* For a recent example, see *Total E&P Soudan SA v Philippe Henri Edmonds, Andrew Stuart Groves White Nile Limited* [2006] EWHC 1136 (Comm), at [27].
[118] See for example, *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409, at [67].

cases of *Connelly* and *Lubbe v Cape plc*[119] where it was held that substantial justice would not be done if the unavailability of financial assistance to the claimant in the forum abroad meant that the case could not be tried at all. This approach has been endorsed by the Singapore Court of Appeal in *Brinkerhoff Maritime Drilling Corporation v PT Airfast Services Indonesia*[120] as well.

Canada

As was mentioned above, when Sopinka J examined the second stage of the *Spiliada* test in *Amchem*, he held that it treated the loss of a juridical advantage as a separate condition. He did not appear to see this limb of the test as one which examines whether there are any exceptional reasons of justice which requires the local courts to hear the case. More was said on this issue by Binnie J in the later case of *Holt Cargo* where he held that the relevant circumstances to the identification of the natural forum included the "potential loss to the plaintiff of a juridical advantage sufficient to work an injustice"[121] and that "any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed."[122] However, it is interesting to note that on the facts of the case itself, he did not examine whether the deprivation of the juridical advantage available to the claimant in Canada would be unjust. Instead, he applied the approach adopted by Sopinka J in *Amchem* that such juridical advantages will be considered under the *Amchem* inquiry so long as there is a real and substantial connection between the dispute and the Canadian forum in question. Accordingly, one can observe that in such cases, there is no need to determine whether the deprivation of the juridical advantages in question will result in substantial injustice.

As for considerations of natural justice, some Canadian provincial courts have taken into account such factors in the application of their *forum non conveniens* test. For example, a stay was refused in the Ontario case of *Crown Resources Corp SA v. National Iranian Oil*

---

[119] [2000] 2 Lloyd's Rep 383.
[120] [1992] 2 SLR 776, at 786 in relation to limitation periods.
[121] *Holt Cargo, supra,* n. 79, at [91].
[122] *ibid.*

Co[123] on the grounds that the claimant would not "receive a fair hearing in an Iranian court."[124]

Australia

It was held in *Voth* that the decision of whether a forum is clearly inappropriate does not require "the formation of subjective views about either the merits of [the foreign] forum's legal system or the standards and impartiality of those who administer it"[125] by the Australian judiciary as they are not to sit in judgment "upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case."[126] Accordingly, this can be considered to "represent a clear departure"[127] from the position in the rest of our selected jurisdictions.

However, some lower Australian courts have not taken such a stance. In particular, they have held that a submission that the foreign court's procedure is inefficient or untimely must be "approached with *considerable caution* and *in the absence of cogent evidence,* Australian courts will not sit in judgment on the capacity or willingness of the courts of another country to provide justice to the plaintiff."[128] In other words, these Australian judiciaries were of the view that such factors could be considered under the *Voth* inquiry if there were strong evidence for such injustice.

In relation to legitimate juridical advantages, as the Australian courts have attached significant weight to such factors in relation to the application of their doctrine of *forum non conveniens*, there is no need for them to rely on a substantial justice approach.

2.5.4 Public interest factors

---

[123] 2005 CarswellOnt 4383.
[124] *ibid*, at [44]. See also, *Semi Tech Corp v Enterprise Capital Management Inc* 1999 CarswellOnt 2296.
[125] *Voth, supra,* n. 15, at 558.
[126] *ibid,* at 559.
[127] Brereton, *supra,* n. 66, at 898.
[128] *Seereederei Baco Liner GmbH v Al Aliyu* (Unreported, Federal Court of Australia, New South Wales District Registry, 18 May 2000.) My italics. See also *Nicholas Pertsch v PT John Holland Constructions Indonesia* [2001] QSC 127.

It can be observed that the matters we have dealt with in the above subsections are private interest factors as they are to do with convenience from the perspective of the litigants in question. It is clear from the U.S. case of *Gulf Oil Corp v Gilbert*[129] that both private and public interest factors are considered in the American doctrine of *forum non conveniens.* The question which thus arises here is: to what extent can the courts of our selected jurisdictions in applying their doctrine of *forum non conveniens* take into account public interest factors such as "administrative difficulties from court congestion; local interest in having localized controversies decided at home; interest in applying familiar law; avoidance of unnecessary problems in conflict of laws or in the application of foreign law; unfairness of burdening citizens in an unrelated forum with jury duty."[130]

English common law and Australia

Under the *Spiliada* inquiry, there is no reference to public interest factors at any stage of the process. Even an examination of the underlying principles of the *Spiliada* doctrine is futile as they simply state that the location of the clearly more appropriate forum is to be made with regards to the interests of the parties and the ends of justice. Guidance comes instead from an earlier case, *MacShannon v Rockware Glass Ltd.*[131] In that case Lord Diplock stated that "the administration of justice within the United Kingdom should be conducted in such a way as to avoid any unnecessary diversion to the purposes of litigation, of time and efforts of witnesses and others which would otherwise be spent on activities that are more directly productive of national wealth or well being."[132] However, the rest of the Law Lords chose not to support his view. They did not consider that such "matters of general policy should play any part"[133] in the exercise of their discretion to grant a stay of proceedings. Further confirmation came in *Lubbe v Cape* where Lord Bingham held that "public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the Court has to make."[134]

---

[129] 330 US 501 (1946).
[130] Fawcett, *supra,* n. 48, at 14.
[131] [1978] AC 795.
[132] *ibid*, at 813-814.
[133] *ibid,* at 822 per Lord Salmon.
[134] *Lubbe, supra,* n. 119, at 394.

However, it is essential that we recognise that public interest considerations do "operate under the surface in English law."[135] To illustrate, on "delays arising from the import of litigation,"[136] it has been pointed out that the English courts have "never used the fact the courts are already crowded"[137] as a reason for granting a stay "where the dispute is essentially foreign."[138] Instead, the public interest concern here is that such foreign litigation should instead be encouraged for its benefits to the English economy as an invisible export. This is in contrast to the "emphasis placed in the United States on the clogging of local courts by foreign litigants."[139] In short, in relation to the rules and principles expressly applied by the court, public interest factors do not form part of the *Spiliada* inquiry. It is only if we delved deeper into the hidden policy considerations behind the decisions of the English courts that we could infer the use of such factors.

Similarly, in Australia, clear statements have been made by the Australian courts on the role of public interest considerations in relation to their doctrine of *forum non conveniens.* In *Oceanic Sun*, Deane J examined the private and public interest distinction as established by the Supreme Court of the United States in *Gulf Oil Corp v Gilbert* and concluded that matters of public interest are not to be taken into account by the Australian courts in declining jurisdiction.[140] It was also held in *James Hardie Industries Pty Ltd v Grigor*[141] that the fact that limited resources was available for the administration of justice in New South Wales would not be considered under the Australian *forum non conveniens* test.[142]

Canada

---

[135] Fawcett, *supra*, n. 48, at 15.
[136] Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations* (1989) 9 Oxford Journal of Legal Studies 205, at 224.
[137] *ibid.*
[138] Fawcett, *supra,* n. 48, at 15.
[139] *ibid,* at 16.
[140] *Oceanic Sun, supra,* n. 14, at 250-251, 253-254.
[141] (1998) 45 NSWLR 20.
[142] *ibid,* at 41.

In *Holt Cargo,* Binnie J held that public interest factors could be considered by the Canadian courts under the *Amchem* inquiry. *Holt Cargo* involved the question of "whether a maritime law proceeding by a US creditor against a Belgian ship in a Canadian court ought to have been stayed in deference to a Belgian court dealing with the subsequent bankruptcy of its Belgian ship-owner"[143] and it was recognised by the Supreme Court of Canada that such international bankruptcies have a "public aspect, because it is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse."[144] Even though "*Amchem* was a purely private piece of litigation,"[145] Binnie J held that this did not stop the courts from considering such factors when applying the *Amchem* test. In contrast, it is clear that the English courts do not consider such factors in the *Spiliada* inquiry, at least not explicitly.

Singapore

The position in Singapore is unclear as the Singapore Court of Appeal does not appear to have made any specific comments on the question of whether public interest factors can be taken into account under the Singapore doctrine of *forum non conveniens.*

2.6 WEIGHT ATTACHED TO PARTICULAR FACTORS UNDER THE TESTS

As the above analysis is on the legalistic and structural aspects of the respective doctrines of *forum non conveniens* in our selected jurisdictions, it is easy to forget that these principles are discretionary and that the court's decision to grant a stay of proceedings is very much dependent on how specific factors are viewed. Regardless of the differences between the structure and formulation of the doctrine of *forum non conveniens* in our selected jurisdictions, if the courts of these countries attached considerable significance to a foreign applicable law, it would be more likely than not that a stay of proceedings would be granted in all these jurisdictions. Conversely, if a particular factor were viewed differently by two Commonwealth courts that have provided for similar doctrines of *forum non conveniens,* a stay of proceedings might be granted in one jurisdiction but not in another.

---

[143] *Holt Cargo, supra,* n. 79, at [1].
[144] *ibid,* at [90].
[145] *ibid.*

Therefore, it is the purpose of this subsection to examine a number of factors commonly relied upon by the English, Singaporean, Canadian and Australian courts in the application of their *forum non conveniens* doctrine so as to establish that at this level of analysis, one can also observe divergences from the English common law position. They are as follows: choice of law (examined in 2.6.1 of this chapter); delays (2.6.2 of this chapter).

2.6.1 Choice of law

English common law, Singapore and Australia

One factor taken into account under the first limb of the *Spiliada* test is the "law governing the relevant transaction."[146] The importance to be attached to the question of governing law "varies greatly from case to case"[147] and the English courts have generally indicated that it is very much dependent on the ease in which a court can apply another country's law.

In particular, if the English courts had no difficulties applying a foreign law as the relevant legal issues were straightforward or that English law were similar to the foreign law on these issues, the fact that the applicable law was not English law would not be accorded much weight in determining whether a stay should be granted.[148] Unsurprisingly, the position would be the same if the choice of law were English and the foreign courts had no problems applying it for the reasons stated above.[149] On the other hand, if foreign judges had to apply legal concepts unfamiliar to them under an English choice of law, this might indicate to the English courts that that foreign jurisdiction might not be clearly more appropriate. This is because in such circumstances,[150] the English courts are of the view that "a court applies its own law more reliably than does a foreign court."[151] Conversely, "where a dispute involves

---

[146] *Spiliada, supra,* n. 9, at 478.
[147] *Mercury plc v Communication Telesystems Ltd* [1999] 2 All ER (Comm) 33, at 42.
[148] See for example, *The Rothnie* [1996] 2 Lloyd's Rep 206.
[149] See for example, *Nima SARL v The Deves Insurance Public Co Ltd (The Prestrioka)* [2003] 2 Lloyd's Rep 327.
[150] See for example, *Charm Maritime Inc v Kyriakou and Mathias* [1987] 1 Lloyd's Rep 433, *Du Pont v Agnew* [1987] 2 Lloyd's Rep 585.
[151] Collins (ed), *Dicey, Morris and Collins on The Conflict of Laws* (London: Sweet and Maxwell) (14th ed., 2006), at para. 12-029. See for example, *The Elefitheria* [1970] P 94, at 105.

addressing complex questions of foreign law, this is a strong pointer towards the relevant foreign court as the appropriate forum."[152]

Likewise, this approach has been adopted by the Singapore courts in relation to both situations involving foreign law[153] and Singapore law[154] as the applicable substantive law. Similarly, even though the formulation of the *Voth* approach is very much different from that of the *Spiliada* test, there are statements laid down by the High Court of Australia providing that the applicable substantive law is a "very significant factor in the exercise of the court's discretion"[155] although "[a]n Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the *lex causae*."[156] From the lower Australian court cases, the importance of this factor appears to be dependent on the ease in which judges can apply the foreign law in question as well.[157]

Canada

In reaction to the decision in *Amchem*, Canadian courts have laid down an array of factors to consider in the application of the Canadian doctrine of *forum non conveniens*. Unsurprisingly, the applicable substantive law to the dispute in question is always included in that list. However, it is important to note that not all provincial courts attach the same significance to this factor in determining whether another alternative forum is clearly more appropriate.

---

[152] *Tryg Baltica International (UK) Ltd v Boston Compania De Seguros SA* [2004] All ER (D) 439, at [42]. See also, *Ceskoslovenska Obchodni Banka AS v Nomura International plc* [2003] ILPr 320.
[153] See for example, *The Hooghly Mills Co Ltd* [1995] 1 SLR 773, *Oriental Insurance Co Ltd* [1998] 1 SLR 253, *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto* [1999] 2 SLR 427, *PT Hutan Domas Raya* [2001] 2 SLR 49, *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409.
[154] See for example, *Asia-Pacific Ventures II Ltd v PT Intimutiara Gasinda* [2002] 3 SLR 326.
[155] *Voth, supra,* n. 15, at 566.
[156] *Renault, supra*, n. 55, at [81].
[157] See for example, *Adeang v The Nauru Phosphate Royalties Trust* (Unreported, Supreme Court of Victoria, 8 July 1992), *Discovision Associates v Distronics Ltd* (1997) 39 IPR 140, *GNB Battery Technologies Ltd v Nichicon (Singapore) Pte Ltd* (Unreported, Supreme Court of Victoria, 23 June 1994), *Nicholas Pertsch v PT John Holland Constructions Indonesia* [2001] QSC 127, *Aloysius Amwano v Nauru Phosphate Royalties Trust* [2005] FCA 1804, *In the Marriage of Y N & C Y Chong* (1991) 15 Fam LR 629, *Green v Australian Industrial Investment Ltd* (1989) 90 ALR 500, *The Al Aliyu* [2000] FCA 656, *Raveh v KPMG Legal (A Firm)* [2001] WASC 288, *African Minerals Ltd v Pan Palladium Ltd* [2002] NSWSC 1150.

To illustrate, the applicable law is regarded by some lower Canadian courts as "just one factor to be considered along with all others in the determination of the [*Amchem* inquiry]."[158] Even if the choice of law in question were that of a foreign jurisdiction, there was a dominant view in these cases that the Canadian courts would have no problems applying that law regardless of whether it was the law of another Canadian province[159] or that of a jurisdiction outside of Canada altogether.[160]

On the other hand, there are cases where Canadian courts have regarded the applicable substantive law as a particularly important factor "depending upon the circumstances."[161] Most notably, in the application of the *Amchem* test in *Shell Canada Ltd v CIBC Mellon Trust Co,*[162] Fraser J endorsed the principle that it is preferable that the dispute should be tried in the country whose law governs the contract. He thus held that "the need to interpret and enforce Canadian law through a Canadian court is ... the *paramount* factor to be considered"[163] in a *forum non conveniens* inquiry. It has also been held in some cases that the factor would be particularly significant if there were "problems of language and translation"[164] in proving the foreign law or if the foreign law were codified and was significantly different to the laws of the relevant Canadian province. In these circumstances, "it is more appropriate that [the foreign law] be interpreted and applied by [the foreign court]."[165] One can observe that this is the same approach adopted by the English, Australian and Singaporean courts.

One interesting comparative point to note is that the applicable substantive law is categorised as a connecting factor under the English common law, Singaporean and Australian doctrine

---

[158] *Trepanier v Kloster Cruise Ltd* (1995) 23 OR (3d) 398, at [27]. See also, *Wong v Wong* (1995) 8 BCLR (3d) 66, *Barclay's Bank plc v Inc Inc* (1999) 242 AR 18, *Royal & Sun Alliance Insurance Co of Canada v Wainoco Oil & Gas Co* [2004] ILR I-4334.

[159] See for example, *Domstar Inc v Commonwealth Insurance Co* (1997) 48 CCLI(2d) 270, *Elawar v Federation des Clubs de Motoneigistes du Quebec Inc* (2001) 57 OR (3d) 232, at [27], *Toronto Dominion Bank v Hudye Soil Services Inc* 2000 MBQB 122, *Negrych v Campbell's Cabins (1987) Ltd.* [1997] MJ No. 284, *Pasareno v Pasareno* 2000 SKQB 41.

[160] See for example, *JP Capital Corp (Trustee of) v Perez* (1995) 36 CBR (3d) 57, *Loewen Group Inc v Continental Insurance Co of Canada* (1997) 44 BCLR (3d) 387, *Cytoven International N.V. v Cytomed Peptos* (1994) 58 CPR (3d) 163, *Multiactive Software Inc v Advanced Service Solutions Inc* (2003) 48 CPC (5th) 125, *Cresbury Screen Entertainment Ltd v Canadian Imperial Bank of Commerce* 2004 BCSC 349.

[161] *Ruggeberg v Bancomer SA* [1998] OJ No. 538, at [45].

[162] (2003) 349 AR 276.

[163] *ibid*, at [41]. My italics. See for example, *Hyundai Auto Canada v Bordeleau* (2002) 60 OR (3d) 641, *Kvaerner US Inc v Amec E & C Services Ltd* 2004 BCSC 635.

[164] *Ruggeberg, supra,* n. 161, at [44].

[165] *ibid.*

of *forum non conveniens.* Interestingly, some Canadian lower courts have held that the application of a foreign law by the judicial system providing for that law is a juridical advantage and that the defendant would be deprived of it if the local Canadian court in question were to apply that law.[166] Conversely, the claimant might be regarded as being deprived of a juridical advantage if the foreign court were to apply Canadian law.[167] All this is still subject to the ease in which the local court can apply that law. If it can be easily proven and applied in the Canadian court in question, Canadian courts have held that there would be "little juridical disadvantage"[168] to the relevant litigant.

2.6.2 Delays

English common law

One argument constantly raised under the second limb of the *Spiliada* test is that if a case were to proceed to the alternative forum and the "trial would be delayed for many years,"[169] this would amount to a "denial of justice"[170] to the claimant. This line of reasoning was successful in *The Vishva Ajay*[171] where "a substantial body of evidence"[172] indicated that "many actions do not reach trial in less than 10 years and that it would be wholly exceptional for an action to come on for trial in less than six years."[173] Accordingly, "delay of this magnitude"[174] was regarded as a denial of justice and thus the stay was refused.

As the delay in the *Vishva Ajay* was for an exceptional period of time, one must query as to the extent of the delay which would satisfy the justice limb of the *Spiliada* test in less extreme cases. Of some help to our discussion here are the statements of the court in *Vishva Ajay* where they pointed out that "it is in the interests of justice that actions should come to trial at

---

[166] See for example, *Cook v Parcel, Mauro, Hultin & Spaanstra* (1996) 136 DLR (4th) 414, *Progressive Holdings Inc v Crown Life Insurance Co* (2000) 9 WWR 79, *Butchart v EMC Corp of Canada* (2001) 148 OAC 297.
[167] See for example, *Cresbury Screen Entertainment Ltd v Canadian Imperial Bank of Commerce* 2004 BCSC 349.
[168] *Butchart v EMC Corp of Canada* (2001) 148 OAC 297, at [12]. See also, *Na v Renfrew Security Bank & Trust (Offshore) Ltd* (2003) 16 BCLR (4th) 345, *RM Maromi Investments Ltd v Hasco Inc* (2004) 3 CPC (6th) 324.
[169] *Vishva Ajay* [1989] 2 Lloyd's Rep 558, at 560.
[170] *ibid.*
[171] [1989] 2 Lloyd's Rep 558.
[172] *ibid.* at 560.
[173] *ibid.*
[174] *ibid.*

a time when the witnesses can reasonably be expected to have some recollection of the events in question."[175] In *The Rothnie*,[176] a clearer picture of the law was provided as it was held that it is only if the plaintiffs could show that "they [would] not be able to receive substantial justice"[177] in the alternative forum as a result of the delay that the stay would be refused at this stage. It was also pointed out in *Ceskoslovenska Obchodni Banka AS v Nomura International plc*[178] that delays of a certain magnitude are "capable of being a breach of Art. 6 of the *European Convention on Human Rights*"[179] but as the delay in the Czech Republic courts was not "dramatically greater"[180] than the "delays which would affect major commercial litigation in England,"[181] there was no substantial injustice.

Accordingly, the mere fact that there will be some delay in the dispute proceeding to trial in the foreign jurisdiction is not sufficient to convince the English courts to refuse a stay of proceedings at the second stage of the test. It is only in extreme situations where substantial justice would not be done such as where the delay would affect the quality of the evidence presented to the courts for litigation or its extent would amount to a breach of the *European Convention on Human Rights* that a stay would not be granted.

Canada

In *Semi Tech Corp v Enterprise Capital Management Inc,*[182] one of the rare Canadian cases on delays, even though the New York courts would not be able to hear the action on its merits by a certain date such that the "respondents would be deprived of a juridical advantage of a more timely determination of insolvency proceedings,"[183] the Canadian courts did not regard the extent of the delay there as causing a "injustice."[184] Ultimately, they

---

[175] *ibid.*
[176] [1996] 2 Lloyd's Rep 206.
[177] *ibid*, at 208.
[178] [2003] ILPr 20.
[179] *ibid*, at [16].
[180] *ibid.*
[181] *ibid.*
[182] 1999 WL 33191083.
[183] *ibid*, at [12].
[184] *ibid.*

considered the New York courts to be "efficient and timely"[185] and that they would not "tolerate delay or not be able to deal with it on a reasonably forthwith basis."[186]

Australia

In the case of *CE Heath Underwriting Insurance (Aus) Pty Ltd. v Bardens*,[187] in response to the claimant's assertion that "there will be delay if the matter is heard in the English court,"[188] Rolfe J simply pointed out that he would "proceed on the basis that whether the matter is heard in those Courts or in this Court it will proceed efficiently...and will be heard as soon as reasonably possible by the Court in which it is listed."[189]

Interestingly though, it was held by the Federal Court of Australia in *Seereederei Baco Liner GmbH v Al Aliyu*[190] that the inefficiency and "untimeliness"[191] of the Guinean court could be considered in the *Voth* inquiry but submissions of such criticisms "must be approached with considerable caution. In the absence of cogent evidence, Australian courts will not sit in judgment on the capacity or willingness of the courts of another country to provide justice to the plaintiff in a particular case as noted earlier in these reasons."[192] As evidence on whether there would be delays in the plaintiff's action in the Guinean court was "far from cogent,"[193] this would fall "short of establishing any substantial likelihood of injustice or incompetence to the detriment of [*Seereederei Baco Liner*] in the Guinea Court System if the case were to be heard in that forum."[194] One can easily observe that language similar to that of the substantial justice test under the English common law was employed in this case.[195]

Singapore

---

[185] *ibid.*
[186] *ibid.*
[187] (Unreported, Supreme Court of New South Wales Commercial Division, 19 October 1994).
[188] *ibid.*
[189] *ibid.*
[190] [2000] FCA 656.
[191] *ibid.*
[192] *ibid.*
[193] *ibid.*
[194] *ibid.*
[195] See also, *Australian Power and Water Pty Ltd v Independent Public Business Corporation of Papua New Guinea* (Unreported, Supreme Court of New South Wales, Equity Division, 19 December 2003).

In *Oriental Insurance,* Yong Pung How CJ stated that even if there were evidence of "substantial delay"[196] in the Indian courts, "this consideration, though valid, was not so weighty as to merit a stay of proceedings."[197] Furthermore, he went on to opine that "ultimately, any delay which might be occasioned by a stay ... would not represent a substantial injustice to the respondents."[198] In other words, he seems to be stating that delays can never be raised by claimants to satisfy the second limb of the *Spiliada* inquiry.[199] This is clearly not the approach under the English common law.

2.7 DIFFICULTY IN SATISFYING THE TESTS

Above all, the key issue litigants are most concerned with in relation to the doctrine of *forum non conveniens* is the difficulty involved in obtaining a stay of proceedings in our selected jurisdictions. In this subsection, we will examine the tests in Canada, Australia, Singapore and England to determine whether it is more difficult for a defendant to establish *forum non conveniens* in England as opposed to defendants in the rest of these countries.

Generally, with regards to England, Singapore and Canada, the default position is that the local proceedings will go ahead in the forum that the claimant chooses to bring his action in unless the defendant can establish that that the alternative forum is *clearly* more appropriate. Obviously, the word 'clearly' would indicate that the threshold for these tests is high.

As the formulation of the *forum non conveniens* tests for these three jurisdictions are identical, it can be argued that it is equally difficult for a defendant to obtain a stay of proceedings in any of these three jurisdictions. Besides a reminder that the 'clearly more appropriate forum' test is ultimately discretionary, it is also important, to recall that under the Canadian doctrine of *forum non conveniens*, significant weight can be attached to the juridical advantages relied upon by a litigant so long as there is a real and substantial connection between the forum and the dispute in question. In contrast, juridical advantages would only

---

[196] *Oriental Insurance, supra,* n. 74, at [44].
[197] *ibid.*
[198] *ibid,* at [45].
[199] See also, *Mala Shukla v Jayant Amritanand Shukla* [2002] 3 SLR 295.

be taken into account by the English and Singapore courts if the deprivation of these advantages resulted in substantial injustice to the claimant. From this difference, it is arguable that it is easier for a claimant in Canada to convince the courts to refuse a stay of proceedings.

As for Australia, it is the same starting position for the Australian doctrine of *forum non conveniens* in that the claimant's choice of an Australian forum to litigate his dispute will be supported by the Australian courts unless the defendant can establish that that forum is clearly inappropriate. It is however more difficult for a defendant to obtain a stay of proceedings under the *Voth* principles in comparison with the tests in Canada, Singapore and England as the test from this approach would only be satisfied if the local proceedings were shown to be oppressive or vexatious.

2.8 *FORUM NON CONVENIENS* IN A FEDERATION

Even though the relationship between Scotland, England and Ireland is analogous to that of a federation, the English courts have not modified the *Spiliada* test to take note of this situation. Likewise, in Canada, regardless of whether the dispute is inter-provincial or international in nature, it is still the *Amchem* principles which are applicable.[200] The fact that the case is inter-provincial may affect the weight accorded to particular factors relating to the dispute[201] but that is in relation to the Canadian court's exercise of its discretion and not with regards to the Canadian doctrine of *forum non conveniens* itself. In contrast, a distinction has been drawn between intra-Australian and international disputes in relation to this area of private international law.

In particular, where the question arises with regards to an intra-national dispute as to which Australian forum is appropriate for the dispute in question, we must first look at the statutory criteria encapsulated by two pieces of legislation namely, the *Jurisdiction of Courts (Cross-*

---

[200] See for example, *Frymer v Brettschneider* (1994) 28 CPC (3d) 84, *Dairy Producers Co-Operative Ltd v Agrifoods International Cooperative Ltd* [1994] 7 WWR 596, *Burton v Global Benefit Plan Consultants Inc* (1999) 543 APR 60, *Skrdla v Graham* [1999] BCJ NO. 1169, *Guarantee Co of North America v Crossley Carpet Mills Ltd* (2000) 181 NSR (2d) 197, *Skylink Express Inc v All Canada Express Ltd* (2001) 17 CPC (5th) 380, *Caspian Construction Inc v Drake Surveys Ltd* 2003 MBQB 86.
[201] See for example, *679927 Ontario Ltd v Wall* (1997) 71 CPR (3d) 512.

vesting) Act 1987 (Cth) and the *Service and Execution of Process Act 1992.* (Cth). Before we examine the nature of these statutory approaches, it is important that we address the situation where the intra-national dispute in question falls outside the scope of these statutes. There is some uncertainty under Australian private international law as to whether *Voth* is applicable to such circumstances. Some Australian courts have held that "the decision in *Voth*... is of application only to situations where the competing courts are a court within Australia and a court outside of Australia."[202] Others however adopt a more cautious approach by providing that the "*Voth* principle was and applicable where persons were served within the jurisdiction"[203] and that where the *1987* and *1992 Acts* do not apply, the *Voth* test is still relevant even though the application for a stay is for that of another Australian forum. Having said that, it must be noted that the frequency of such situations is low and that most cases would fall within the ambit of the two Acts.

2.8.1 *Jurisdiction of Courts (Cross-vesting) Act 1987*

Section 5(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* as enacted in the various Australian States and Territories would provide for the transfer of proceedings from one Supreme Court to another if conditions under one of three categories of cases, namely related proceedings under *section 5(2)(b)(i)*, jurisdiction only by reason of cross vesting under *section 5(2)(b)(ii)* and transfers in the interests of justice under *section 5(2)(b)(iii),* were satisfied. Generally, it has been held that:

> "the principles of *forum non conveniens,* applied in circumstances where the competition is between an Australian and a non-Australian court, have no role to play in the resolution of application made under the legislation or in its interpretation. Legislation prescribes the criteria whereby such applications are to be determined."[204]

---

[202] *Balescope Pty Ltd v Pegasus Leasing Ltd* (1991) 63 SASR 51, at 56.
[203] *Schmidt v Won* [1998] 3 VR 435. See also *McEntee v Connor* (1994) 4 Tas R 18 and *Julia Farr Services Inc v Hayes* (Unreported, Supreme Court of New South Wales, Court of Appeal 28 April 2003).
[204] *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711, at 726.

Nevertheless, one can observe that the principles of *forum non conveniens* albeit not in the form provided for by the High Court in *Voth* has been used in the interpretation and application of some of these statutory criteria.

a) Related proceedings

Under *section 5(2)(b)(i)* of the *Cross-vesting Act*, where proceedings between the same parties or concerning the same subject matter are pending in different superior courts and the proceeding to be transferred arises out of or is related to the other proceeding, if the Australian Supreme Court in question were of the view that it would be more appropriate that the relevant proceeding be determined by that other Supreme Court, that Supreme Court must transfer the proceeding to the other Supreme Court.

One can easily observe that this statutory test is not phrased in the same language as the *Voth* test. As was held by the New South Wales Court of Appeal in the case of *Bankinvest AG v Seabrook,*[205] the "questions posed by *Spiliada* and the legislation are the same"[206] as both are concerned with "what court is more appropriate and what court is pointed to by the interests of justice."[207] Accordingly, the "criteria laid down by Lord Goff...for the application of principles of principles of *forum non conveniens* [would] broadly correspond to the criteria designated by the Act."[208] The statutory test under *section 5(2)(b)(i)* of the *Cross-vesting Act* is clearly different from the *Voth* test as the plaintiff's argument based on *Oceanic Sun* that "there is a *prima facie* presumption that the court, the jurisdiction of which was properly invoked, should exercise it"[209] and that it is "up to the person moving to transfer to show some positive basis on which it could be contended that the entitlement of the other party to the exercise of jurisdiction should be displaced,"[210] was firmly rejected by the Justices in *Bankinvest.*

---

[205] (1988) 14 NSWLR 711.
[206] *ibid,* at 728.
[207] *ibid.*
[208] *ibid.*
[209] *ibid*, at 726-727.
[210] *ibid,* at 727. For the application of this statutory criteria, see for example, *Straightline Boring Pty Ltd v E & K Trenching & Boring Pty Ltd* (Unreported, Supreme Court of Victoria, 27 May 1999), *Challenger Group Holdings Ltd v Concept Equity Pty Ltd* (Unreported, Supreme Court of New South Wales Equity Division, 27 April 2005).

b) Exercise of cross-vested jurisdiction

In order to discuss the test applicable under *section 5(2)(b)(ii)* of the *Cross-vesting Act,* we must first examine what cross-vesting is. In particular, the *Jurisdiction of Courts (Cross-vesting) Act 1987* provides for the cross-vesting of the personal jurisdiction of each State Supreme Court in every other State Supreme Court. What this means is that each State Supreme Court can now exercise jurisdiction over a defendant who is amenable to the jurisdiction of any other State Supreme Court thus significantly widening the reach of the court in question.

As for *section 5(2)(b)(ii)* itself, a litigant would only be able to rely on this section to transfer the proceedings in question if he could satisfy a number of conditions. First, under *section 5(2)(b)(ii)(A),* the proceedings sought to be transferred must have been instituted as a result of "cross-vested jurisdiction, that is to say, jurisdiction which the forum can only exercise because of the cross-vesting legislation."[211] If the forum can "exercise the jurisdiction...by reason of its accrued or inherent jurisdiction,"[212] this requirement will not be satisfied. Secondly, the courts must go on to determine whether the proceedings in question will involve the "application, interpretation or validity of a law"[213] of another State or Territory. Thirdly, they must then consider the interests of justice.[214] Having regard to the above considerations, the court must then determine whether it is more appropriate that the relevant proceedings be determined by another Supreme Court.[215]

In contrast, there is no cross-vesting scheme in the United Kingdom and Canada. As for the test under this section, it can be observed once again that the statute is providing for a 'more appropriate forum' test instead of the 'clearly inappropriate forum' test under *Voth.* Most notably, it was held in *Bankinvest* by the New South Wales Court of Appeal that "the relevant matters and considerations are essentially the same as were specified by the House of Lords

---

[211] Nygh, *Conflict of Laws in Australia* (Sydney: Butterworths) (6th ed., 1995), at 89. See for example, *Kontis v Barlin* (1993) 115 ACTR 111.
[212] Nygh, *ibid*, at 89-90.
[213] Section 5(2)(b)(ii)(B), *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).
[214] Section 5(2)(b)(ii)(C), *ibid.*
[215] For the application of the statutory criteria, see for example, *Toren Fishing & Trading Pty Ltd v McKenzie Family Nominees Pty Ltd* (1995) 125 FLR 229.

in *The Spiliada*."[216] In particular, it was said that the "two considerations of 'more appropriate' and the 'ends' or 'interests' of justice are used in the same sense by Lord Goff"[217] in *Spiliada.*

c) Transfer in the interests of justice

Section 5(2)(b)(iii) provides for a residual category which operates "where the requirements of subcl. (i) and subcl (ii) are not satisfied."[218] Under this section, the phrase 'more appropriate' is not used. Instead, where it is "otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or Territory,"[219] the "first court shall transfer the relevant proceeding to that other Supreme Court."[220]

Initially, there was some confusion under Australian law in relation to the test applicable to such questions of transfer. On the one hand, in the Supreme Court of New South Wales case of *Bankinvest* [221], the search under *section 5(2)(iii)* was said to be for the more appropriate court in the interests of all the parties and the ends of justice;[222] an approach analogous to the *Spiliada* inquiry. This approach was endorsed by the Supreme Courts of Victoria,[223]Northern Territory[224] and Tasmania.[225] On the other hand, the Supreme Courts of the Australian Capital Territory[226] and Western Australia[227] have adopted a test that examines inconvenience and injustice in the forum and is therefore similar to the test under *Voth.* In particular, in the Supreme Court of the Australian Capital Territory case of *Waterhouse v Australian Broadcasting Corporation,*[228] Kelly J examined the decision in *Bankinvest* and

---

[216] *Bankinvest, supra,* n. 205, at 730.
[217] *ibid.*
[218] *ibid.*
[219] Section 5(2)(b)(iii), *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).
[220] *ibid.*
[221] For the application of the *Bankinvest* test in New South Wales, see for example, *Amor v Macpak Pty Ltd* (1989) 95 FLR 10, *James Hardie v Barry* (Unreported, Supreme Court of New South Wales Court of Appeal, 4 December 2000).
[222] *Bankinvest, supra*, n. 205, at 730.
[223] See for example, *Code v Allco New Steel Pty Ltd* (Unreported, Victoria Supreme Court, 28 November 1990), *Reicher v Reicher Holdings Pty Ltd* (Unreported, Victoria Supreme Court, 14 February 1991), *DG v Commonwealth Serum Laboratories* (Unreported, Victoria Supreme Court, 18 May 1992), *Lintergroup Ltd (in liq) v Price Waterhouse* (1992) 9 ACSR 346, *Bridge and Marine Engineering Pty Ltd v Taylor* (Unreported, Supreme Court of Victoria, Commercial and Equity Division, 8 March 2002).
[224] See for example, *Midland Montagu Australia Ltd v O'Connor* (1992) 2 NTLR 86 and *Toren Fishing & Trading Pty Ltd v McKenzie Family Nominees Pty Ltd* (1995) 126 FLR 229.
[225] See for example, *Anagnostis and Styl v Davies Brothers Ltd* (Unreported, Supreme Court of Tasmania, 12 September 1989), *McEntee v Connor* (Unreported, Supreme Court of Tasmania, 27 April 1994).
[226] See for example, *Baffsky v John Fairfax and Sons Ltd* (1990) 97 ACTR 1, *Kontis v Barlin* (1993) 115 ACTR 11.
[227] See for example, *Mullins Investments Pty Ltd v Elliot Exploration Co Pty Ltd* (1990) 1 WAR 531, *Platz v Lambert* (1994) 20 MVR 362.
[228] (1989) 86 ACTR 1.

pointed out that by using the phrase 'in the interest of justice' twice in *section 5(2)*, first as one requirement under *section 5(2)(ii)* to establish that the other Supreme Court is more appropriate and secondly as the key requirement under *section 5(2)(iii)*, the legislature may have wanted to provide for "a difference between the relevant considerations applicable in respect of paragraphs (i) and (ii) and those applicable in respect of paragraph (iii)."[229] In his view, the omission of the words 'more appropriate' in relation to the second category of cases is an indication that such a test is inapplicable here. Instead, he regarded the section as providing for a narrower ground for an order of transfer in that such an order would only be made "if having made all due allowance for the plaintiffs' right to bring their actions in this Court with such forensic advantages as may attend on that course, the expense and inconvenience which would fall upon the defendant will result in real injustice to it."[230]

Thankfully, the High Court of Australia has provided for a uniform interpretation of this section for the various Australian States and Territories. In the recent case of *BHP Billiton Ltd v Schultz*[231], the High Court first made clear that even though an application for transfer under the *Cross-vesting Act* "will often involve evidence and debate about matters of the same kind as arise when a court is asked to grant a stay of proceedings on the ground of *forum non conveniens*, there are differences between the two kinds of application"[232] as the *Cross-vesting Act* is "intended to operate and to be applied in a different juridical context."[233] They thus held that in the context of the Act, the courts are not concerned with "the problem of a court, with a *prima facie* duty to exercise a jurisdiction that has been regularly invoked."[234] Rather, the court is "required by statute to ensure that cases are heard in the forum dictated by the interests of justice."[235] In such circumstances, it is unnecessary that the first court be established to be a 'clearly inappropriate' forum. It is instead "both necessary and sufficient that, in the interests of justice, the second court is more appropriate."[236] In other words, the

---

[229] *ibid*, at 16.
[230] *ibid*, at 17.
[231] [2004] HCA 61.
[232] *ibid*, at [8].
[233] *ibid*, at [12].
[234] *ibid*, at [14].
[235] *ibid*.
[236] *ibid*.

High Court of Australia has endorsed the approach of the New South Wales Court of Appeal in *Bankinvest.*[237]

A few points of comparison can be made at this stage. It can be observed that the test adopted by the Australian courts for this category of cases is again very similar to the *Spiliada* test. Hence, one can read this as a move towards the English common law approach in the Australian federation context. However, from a wider perspective, there is an Australian divergence from the English common law scheme as a distinction has been drawn between intra-Australian cases, where this statutory scheme providing for the transfer of proceedings is applicable, and international disputes. For the former, the Australian courts apply a test similar to the *Spiliada* approach. As for the latter, they use the *Voth* test. In contrast, it is the same English common law *Spiliada* approach that is applied to both disputes within the United Kingdom and those involving jurisdictions outside of the United Kingdom.

2.8.2 *Service and Execution of Process Act 1992*

It is important to note that the above scheme would only apply if the Supreme Court of a State in Australia were the court of issue. It does not apply to lower Australian courts. In such circumstances, we have to look at the *Service and Execution of Process Act 1992.* (Cth) Essentially, this piece of legislation permits the originating process of State and Territory courts to be served anywhere in Australia with regards to any cause of action arising anywhere in Australia. The jurisdiction of the State or Territory in question is thus extended to wherever the defendant may be in Australia.[238] Therefore, for the purposes of the Act, Australia is transformed into a single jurisdiction for the service of initiating State or Territory process.

Where such process has been successfully served by the claimant, under *section 20* of the *Service and Execution of Process Act,* the person served with the process can apply to the court of issue for an order staying the proceeding. To determine whether such a stay of

---

[237] For subsequent application of the approach in *BHP Billion Ltd,* see for example, *MC v The State of South Australia* [2006] ACTSC 9.
[238] See for example, *Kontis v Barlin* (1993) 115 ACTR 11, at 18.

proceedings should be granted, the test provided in the Act is that the court must be "satisfied that a court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters."[239] This discretion is to be exercised with the help of a number of factors stipulated in *section 20(4)* of the Act and it is notable that the claimant's invocation of the court's jurisdiction is not one of the listed factors. With the section directing the inquiry at the appropriateness of the other court rather than the inappropriateness of the local court, it is clear that the *Voth* test is not relevant here. Rather, the test appears to be similar to the *Spiliada* approach.

3. EXAMINING THE NATURE AND EXTENT OF THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO THE DOCTRINE OF FORUM NON CONVENIENS

From the above discussion, it is clear that there has been a break up of Commonwealth private international law in relation to *forum non conveniens* in our selected Commonwealth jurisdictions as it can be observed that divergences from the English common law position on this subject matter have been generated by the decisions of the Australian, Canadian and Singaporean courts. However, it is important to note that not all of our selected countries have departed from the English common law to the same extent.

At one extreme, there has been an obvious departure from the English common law doctrine of *forum non conveniens* in Australia as the High Court of Australia has rejected the formulation of the English common law test, the 'clearly more appropriate forum' approach, for the 'clearly inappropriate forum' test. Unsurprisingly, this has resulted in other divergences from the English common law doctrine in relation to the other analytical points of comparison selected for this chapter. That being said, there has been a shift towards the English common law *forum non conveniens* approach in the federation context as the High Court of Australia has rejected the use of the *Voth* test by adopting a test analogous to the English common law *Spiliada* approach for the relevant statutory provisions.

---

[239] Section 20(3), *Service and Execution of Process Act 1992* (Cth).

Even though the Canadian courts have endorsed the basic principles underlying the English common law doctrine of *forum non conveniens* by adopting the 'clearly more appropriate forum' test, they too have played their part in the break up of this area of Commonwealth private international law albeit to a lesser extent in comparison to the Australian position. In particular, Canadian courts have provided for divergences from the English common law in relation to the structure of the *forum non conveniens* test as well as the sub-rules within the doctrine itself such as the ones on juridical advantages and public interest factors. Even though such departures from the English common law are not in relation to the nature of the *forum non conveniens* test itself, they are equally important to our study of the break up of Commonwealth private international law as at the end of the day, they do have an impact on the results of the case, i.e. a litigant may find it easier to obtain a stay of proceedings in the Canadian courts in comparison to the English courts due to, for example the Canadian rules on juridical advantages.

At the other extreme, Singapore has largely maintained its uniformity with the English common law doctrine of *forum non conveniens.* Like the Canadian judiciaries, the Singapore courts have adopted the English common law 'clearly more appropriate forum' test but unlike the rejection of the two-stage *Spiliada* structure by the Supreme Court of Canada in *Amchem*, the Singapore courts have endorsed that framework. However, that is not saying that the Singapore doctrine of *forum non conveniens* is identical to that of the English common law as it is still possible to observe some divergences from the relevant English common law position in the Singapore context.

4. CONCLUSIONS

1. There is an Australian/Canadian divergence from the English common law/Singapore doctrine of *forum non conveniens* in that the latter provides for a more structured approach with different factors relevant at different stages of the inquiry. The role of the parties in persuading the courts to grant a stay of proceedings is also clearly defined under the English common law structure. In contrast, the Australian and Canadian courts prefer a more general and flexible framework for their doctrine of *forum non conveniens.*

2. The formulation of the Australian doctrine of *forum non conveniens* inquires as to whether the Australian court in question is clearly inappropriate. This is obviously a divergence from the English common law approach which examines whether there is a clearly more appropriate forum elsewhere. More importantly, the Australian doctrine is premised on the concepts of oppression and vexation and these are principles which have been rejected by the English courts in relation to the *Spiliada* test. In contrast to the Australian position, the Singapore and Canadian courts have chosen to adopt the 'clearly more appropriate forum' test with no reference to oppression and vexation whatsoever.

3. The situations to which the doctrine of *forum non conveniens* are applicable in these jurisdictions have been expanded. Not only is *forum non conveniens* relevant in Australia and Canada to situations where a claim form can be served on a defendant within the jurisdiction, the doctrine is also applied to circumstances where service *ex juris* can be made without leave. The doctrine of *forum non conveniens* in Singapore and England, on the other hand, is restricted to the former situation.

4. In relation to the factors taken into account by the judiciaries in our selected jurisdictions in the application of their individual doctrine of *forum non conveniens,* all will consider connecting factors in the exercise of their discretion. However, one

important Australian divergence from the English common law position is that the Australian courts will focus their inquiry on connecting factors which indicate that the Australian forum in question is clearly inappropriate. In contrast, Canada and Singapore have adopted the same balanced approach as the English common law in examining the factors connecting the dispute to both the local forum and the alternative forum from a trans-national perspective so as to determine which of the fora in question is clearly more appropriate.

5. As for juridical advantages, at one end of the spectrum, the English and Singapore courts will not consider this factor in the exercise of their discretion unless the deprivation of such advantages in the alternative forum results in substantial injustice to the claimant. In the middle, the Canadian doctrine of *forum non conveniens* requires a real and substantial connection between the dispute/litigant and the forum before that litigant can rely on the juridical advantages available to him in a particular forum. At the other end of the spectrum, juridical advantages are freely considered in the Australian courts without any restrictions attached to them.

6. Under the doctrine of *forum non conveniens* in England, it is clear that considerations of natural justice will be taken into account by the English courts under the second stage of the *Spiliada* test to determine whether a stay of proceedings should be refused. This is also the case in Singapore and Canada. In contrast, the High Court of Australia has held that such factors will not be examined under the *Voth* inquiry.

7. English judges have stated explicitly that public interest factors are not to play any part in the exercise of their discretion to decline jurisdiction on *forum non conveniens* principles. Similarly, the Australian courts have ignored such considerations in the application of the *Voth* test. On the other hand, the Canadian courts have diverged from the English common law position by providing that such factors can be taken into account. The position in Singapore on this point of comparison is still unclear.

8. Even though the formulation of the doctrine of *forum non conveniens* may be the same in some of our selected jurisdictions, the courts of these countries may attach different weight to the relevant factors. To illustrate, even though there is a significant Australian divergence from the English common law position in terms of the formulation of their *forum non conveniens* tests, it is interesting to note that the courts of both jurisdictions have attached significant weight to the law applicable to the dispute in question depending on the circumstances of the case. In contrast, although Canada has adopted the 'clearly more appropriate forum' test, the applicable substantive law is regarded as a mere factor with no special weight attached to it in a considerable number of Canadian cases. Singapore, on the other hand, is in agreement with the English common law both in relation to the formulation of its doctrine of *forum non conveniens* as well as the weight attached to the applicable law.

9. Generally, litigants are much less likely to obtain a stay of Australian proceedings under the *Voth* principles in comparison to the situation in Canada, Singapore and England due to its emphasis on the inappropriateness of the local Australian forum. As Canada has a more relaxed approach towards juridical advantages unlike the English common law and Singapore position, it is arguable that the defendant's burden in satisfying the 'clearly more appropriate forum' test in Canada is more onerous as contrasted with the English common law and Singapore doctrine even though all three have adopted the same formulation for their *forum non conveniens* tests.

10. With regards to the doctrine of *forum non conveniens* in the context of a federation, it is still the same *Spiliada* test that governs disputes involving England and other jurisdictions within the United Kingdom. Likewise, in Canada, the doctrine of *forum non conveniens* is applicable regardless of whether the dispute is inter-provincial or international in nature. In contrast, the Australian common law rules on jurisdiction for intra-national disputes have been superseded to a large extent by statute. Where

such legislation is applicable, it is the statutory criteria within them that determine whether jurisdiction should be declined. Interestingly, it is not the 'clearly inappropriate forum' test that is applicable. Instead, the Australian courts have held that the relevant statutory test is analogous to the *Spiliada* test.

11. From the divergences and convergences we have observed in this chapter, it is clear that there has been a break up of Commonwealth private international law in relation to *forum non conveniens* in our selected jurisdictions. The Australian courts have contributed to this phenomenon to a very large extent as it has rejected the very formulation of the English common law doctrine of *forum non conveniens*. Even though the Canadian judiciaries have adopted the English common law 'clearly more appropriate forum' test, they have played a part in relation to this phenomenon by diverging from the English common law two-stage structure as well as providing for different sub-rules within the doctrine of *forum non conveniens* itself. The Singapore doctrine of *forum non conveniens*, on the other hand, is almost identical to the English common law *Spiliada* test.

CHAPTER 3: THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO TORT CHOICE OF LAW

1. INTRODUCTION

As was the case for our study of *forum non conveniens* in the previous chapter, there has been a break up of Commonwealth private international law in relation to tort choice of law in our selected jurisdictions. To illustrate, the Canadian and Australian courts have abandoned the traditional English common law *Phillips v Eyre*[1] approach, that there must be "actionability by the law of the forum and the law of the place of the tort,"[2] for a *lex loci delicti* rule.[3] In England as well, the introduction of the *Private International (Miscellaneous Provisions) Act 1995* has significantly limited the scope of the English common law tort choice of law regime.[4] In contrast, the English common law still has its adherents as the Singapore Court of Appeal has held that "the applicable choice of law rule in Singapore with respect to torts committed overseas is that laid down in *Phillips v Eyre.*"[5] One can thus say that there is diversity in Commonwealth tort choice of law regimes.

To examine the break up of this particular area of Commonwealth private international law, the structure utilised in our comparative analysis of *forum non conveniens* will be adopted here as well. The divergences and convergences in relation to key stages of the tort choice of law process will first be examined. They are as follows:

2.1 Characterisation: unknown foreign torts

2.2 Identifying the place of commission of the tort

---

[1] [1870] LR 6 QB 1.
[2] North, Fawcett, *Cheshire and North's Private International Law* (London: Butterworths) (13th ed., 1999), at 609.
[3] For Australia, see *Pfeiffer v Rogerson* (2000) 203 CLR 503, *Renault v Zhang* (2002) 187 ALR 1. For Canada, see *Tolofson v Jensen* [1994] 3 SCR 1022.
[4] Section 13, *1995 Act.* Note the difficulties arising from the interpretation of Section 10 of the *1995 Act* in relation to the abolition of the English common law tort choice of law regime. On this point, see Briggs, *Choice of Law in Tort and Delict* [1995] LMCLQ 519.
[5] *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579, at [36].

2.3 Tort choice of law rule

2.4 Exception to the tort choice of law rule

With these findings, we will then work out the nature and extent of the break up of Commonwealth tort choice of law regimes in our selected jurisdictions.

Before we begin our comparative study, a few preliminary points must be noted. First, the focus of this chapter is on torts committed outside of the local forum. While a separate tort choice of law regime may be applicable to torts committed within the forum, it is simply beyond the scope of this thesis to examine this. Secondly, even though the *1995 Act* is not a common law tort choice of law regime, for the sake of completeness, it is important that we address the changes that it has made to tort choice of law in England. Thirdly, Australia and Canada have provided for tort choice of law regimes that differ, depending on whether a tort is committed on an intra-national or international basis. In contrast, even though England has strong legal and historical ties to Scotland, Wales and Northern Ireland, the English common law does not provide for any special rules in relation to intra-UK disputes. Likewise, this is the position under the *1995 Act*.[6]

2. EXAMINING THE VARIOUS DIVERGENCES AND CONVERGENCES IN RELATION TO TORT CHOICE OF LAW

2.1 CHARACTERISATION: UNKNOWN FOREIGN TORTS

For tort choice of law rules to apply, the local forum's courts must first decide that the dispute in question is one relating to tort in accordance with its own private international law rules. In most cases, it will be clear to the courts that the claim is tortious in nature.[7] However, one area where difficulties have arisen is the classification of foreign torts which are conceptually unknown to the forum's courts.

---

[6] Section 9(7), *1995 Act*.

[7] For a discussion of the possible overlaps between tort and family law/contract law, see for example, North, *Private International Law Problems in Common Law Jurisdictions* (London: Martinus Nijhoff Publishers) (1993), at 158-164.

2.1.1 English common law and Singapore

Traditionally, there was no need to characterise unknown foreign torts as 'torts' for the English common law tort choice of law regime as such torts would fall foul of the *lex fori* limb of the *Phillips v Eyre* rule.[8] In recent years, however, doubts have been cast upon that position because of the decision in *Red Sea Insurance Co Ltd v Bouygues SA.*[9] In that case, even though under the first limb of the double actionability rule, the *lex fori* did not recognise any direct liability between the insurers and the parties alleged to be negligent, the Privy Council held that a flexible exception could be used to apply the *lex loci delicti* on its own.

Some have argued that one implication of this decision is that there is no need to show that the claim is a tort under domestic law in order for the double actionability rule to apply. "[C]lassification in foreign law will have to be taken into account, in order not to rule out in *limine* the exception to the *lex fori*."[10] Nonetheless, one must remember that there is still a presumption against unknown foreign torts as the *lex fori* limb of the double actionability rule has not been abolished by the English courts. Accordingly, the characterisation of such torts as 'torts' for the purposes of tort choice of law is contingent on the courts' discretion under the exception. It is thus important for us to work out the prevailing judicial attitudes towards them.

In commenting that it is not the intention of Lord Wilberforce to limit the flexibility of the exception by restricting its operation to the *lex fori*, Lord Slynn in *Red Sea Insurance* stated that "the fact that the forum is being required to apply a foreign law in a situation where its own law would give no remedy will be a factor to be taken into account when the court decides whether to apply the exception."[11] Similarly, in *Pearce v Ove Arup Partnership Ltd,*[12] Roch LJ, in applying Dutch law with the flexible exception, held that the case at hand did not involve a wrong which is conceptually unknown in English law thus indicating that the result

---

[8] See for example, Briggs, *The Conflict of Laws* (Oxford: Oxford University Press) (2002), at 181. "It follows from the *lex fori* limb that the only claims which can succeed are those in respect of torts known to English domestic law."
[9] [1995] 1 AC 190.
[10] Yeo, *Tort Choice of Law beyond the Red Sea: Whither the Lex Fori?* (1997) 1 Singapore Journal of International and Comparative Law 91, at 103.
[11] *Red Sea, supra*, n. 9, at 206.
[12] [1999] ILPr 442.

might be different if that were so.[13] On the other hand, in *Chagos Islanders v The Attorney General*,[14] it was held *obiter* that if the "tort of breaching a constitutional right"[15] existed under Mauritius law, it would not be "impossible for the [*Red Sea*] exception to be made out"[16] even though there was "no comparable tort"[17] in England and the claim would thus fail under the first limb of the double actionability rule. In all, one can only say that it is unclear whether unknown foreign torts would be caught by the English common law tort choice of law regime.

In relation to the Singapore position, the Singapore Court of Appeal has accepted the *Phillips v Eyre* rule and the *Red Sea* flexible exception as part of Singapore law in the case of *Parno v SC Marine Pte Ltd*.[18] Therefore, at least in principle, Singapore courts can adjudicate on unknown foreign torts as the formulation of the rules by the Privy Council in *Red Sea* does allow for that possibility. However, as there has been no discussion of unknown foreign torts in the Singapore courts, we simply do not know whether a Singapore judge will refuse to apply the flexible exception when such torts are involved.

2.1.2 England: *Part III* of the *1995 Act*

It is clear that the *1995 Act* can be applied to foreign torts, unknown under English domestic law. This is because, under *section 9* of the *Act*, characterisation is to be made "for the purposes of private international law"[19] thus indicating that English courts would have to "give effect to a law which is not in accordance with the law of England"[20] as "this is what private international law is about."[21] This was confirmed by Aikens J in the case of *Trafigura Beheer BV v Kookmin Bank Co*[22] where he stated that English courts "should examine relevant issues to decide whether they will be characterised as "*relating to tort*" not only by reference to English legal concepts and classifications, but by taking a broad "internationalist" view of

---

[13] *ibid*, at [68].
[14] [2003] EWHC 2222 (QB).
[15] *ibid*, at [422].
[16] *ibid*, at [423].
[17] *ibid*.
[18] *Parno, supra*, n. 5, at [36].
[19] Section 9(2), *1995 Act*.
[20] HL Paper 36 (1995), Part I, at 8 per Lord Mackay (the Lord Chancellor then).
[21] *ibid*.
[22] [2006] EWHC 1450 (Comm).

legal concepts."[23] He thus held that the word 'tort' under *section 9* of the *1995 Act* is to be "construed broadly, so as to embrace non-contractual civil wrongs that give rise to a remedy."[24]

One question however remains unanswered: how do we determine which unknown foreign tort would fall within the scope of the *1995 Act*? *Section 9* of the *Act* does not provide us with much information as to the criterion that is to be applied during the characterisation exercise except that it is a "matter for the courts of the forum."[25] Likewise, the Law Commissions did not provide for any clarification of this question but they did state that the tort of invasion of privacy was an example of such unknown foreign torts.[26] In *Douglas v Hello! Ltd (No 3),*[27] however it was held *obiter* by the English Court of Appeal that, as a privacy claim is "shoehorn[ed] ...into the cause of action of breach of confidence,"[28] a recent development in English substantive law[29], it is not "treated as a tort."[30] This is because "a claim for breach of confidence falls to be categorised as a restitutionary claim for unjust enrichment."[31] In other words, as a privacy claim is "found under English substantive law, which gives it a non-tortious characterisation,"[32] the courts were of the view that the *1995 Act* was not applicable to this case.

In the recent case of *Trafigura Beheer BV v Kookmin Bank Co,* Aikens J had to determine whether the acts of Trafigura in depriving Kookmin of a security interest in cargo was tortious for the purposes of the *1995 Act.* As a "matter of English law classification,"[33] Kookmin's claim was a matter relating to contract whereas under Korean law, it was a "non-contractual civil wrong."[34] In his reasoning, Aikens J commented that:

---

[23] *ibid,* at [68].
[24] *ibid,* at [70].
[25] Section 9(2), *1995 Act.*
[26] Explanatory Notes to Clause 1(4) of the Draft Bill, set out in Law Com No. 193 (1990), at 35.
[27] [2005] 3 WLR 881.
[28] *ibid*, at [96].
[29] See for example, *Campbell v MGN Ltd* [2004] 2 AC 457.
[30] *Douglas, supra,* n. 27, at [96].
[31] *ibid,* at [97].
[32] North, Fawcett, *supra,* n. 2, at 620.
[33] *Trafigura, supra,* n. 22, at [73].
[34] *ibid,* at [74].

> "even if an analysis using English legal concepts and classification would not characterise an issue as "*relating to tort*", the English court must take account of legal concepts and classifications in any other relevant system of law. How this is to be done in each case must depend on the relevant facts and issues."[35]

As Aikens J was of the view that he could not "ignore the way Kookmin puts its claim in Korean law and simply look at the matter through the eyes of English law,"[36] he held that the security claim was one relating to tort. One can thus observe that the characterisation of the issue as a 'tort' by the foreign legal system is an important consideration in Aikens J's decision. One question, however, remains unanswered: in what circumstances, will the foreign classification of the claim as a tort be ignored by the English courts? This was not a point addressed by Aikens J.

2.1.3 Australia and Canada

Initially, when the *Phillips v Eyre* rule was still the tort choice of law rule in Australia and Canada, there was uniformity in these countries with the English common law position with regards to unknown foreign torts due to the effect the *lex fori* limb of that rule has on such torts. In recent years, with the rejection of the English common law tort choice of law rule for the *lex loci delicti* rule in Australia and Canada, characterisation has been brought into the open rather than subsumed within the first limb of the *Phillips v Eyre* rule, as is still the case under the English common law. Having said that, as no relevant case appears to have been decided in these two jurisdictions on torts conceptually unknown to Australian and Canadian domestic law, we cannot say for sure that such torts would be caught by their respective tort choice of law regimes.

---

[35] *ibid*, at [68].
[36] *ibid*, at [74].

2.2 IDENTIFYING THE PLACE OF COMMISSION OF THE TORT

For all our selected jurisdictions, as the *lex loci delicti* is an essential component of their tort choice of law regimes, identifying the place where a tort is committed is necessary. Generally, the tests formulated by the judiciaries in Australia, Canada and England to achieve this objective are similar in that they are all discretionary and thus flexible approaches. The difference is in the wording of the individual tests and the factors that the courts can consider in the application of these approaches.

The English *1995 Act* however, provides an interesting contrast to the common law tort choice of law regimes as it identifies the applicable law "directly and without involving the fictional place of the tort or *delict*."[37] However, as was pointed out by *Cheshire and North*, this is not as "radical"[38] as it seems. All the *Act* does is to fuse the rules on locating the place of commission of the tort and the relevant tort choice of law rule into a single rule. Put another way, in determining the applicable law itself, it is inevitable that the tort be localised in some manner.

2.2.1 English common law

To determine where a tort is committed for choice of law purposes, the English common law position is provided for by the case of *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.*[39] where the general test enunciated by the Privy Council in *Distillers Co. (Biochemicals) Ltd v Thompson*[40] for the purposes of assuming jurisdiction was endorsed. This approach requires the courts to "to look over the series of events... and ask...where in substance did this cause of action arise."[41] As this test is phrased in such an open-ended manner, courts have "considerable room to manoeuvre as a consequence of which it is impossible to lay down hard and fast rules."[42]

---

[37] Law Com No. 193 (1990), at para 3.6.
[38] North, Fawcett, *supra*, n. 2, at 630.
[39] [1990] 1 QB 391, at 446.
[40] [1971] AC 458.
[41] *ibid*, at 468. See *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 for a recent endorsement of this approach.
[42] Clarkson, Hill, *Jaffey on the Conflict of Laws* (London: Butterworths LexisNexis) (2nd ed., 2002), at 260.

2.2.2 Australia

Even though the *Distillers* substance test was endorsed by the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd*[43] in a choice of law context, it is interesting to note that the majority Justices in that case interpreted the *Distillers* approach as requiring the courts to ascertain "the place of the act of the part of the defendant which gives the plaintiff his cause of complaint;"[44] it is "some act of the defendant, and not its consequences, that must be the focus of attention."[45] In comparison, the English common law *Distillers* test does not provide for any limitations to the factors that the courts can take into account when determining the *locus delicti.* Accordingly, the Australian interpretation of the *Distillers* substance test is clearly a departure from the English common law position at this point in time.

Subsequently, however, this interpretation was rejected by the High Court of Australia in *Dow Jones & Company Inc v Joseph Gutnick*[46] where the majority Justices stated, "[a]ttempts to apply a single rule of location...have proved unsatisfactory."[47] One can thus observe a convergence with the English common law position with the court's decision that the question should simply be "where in substance did this cause of action arise."[48]

2.2.3 Canada

The Moran test

Initially, in *Moran v Pyle National (Canada) Ltd,*[49] Dickson J examined the English common law approach in *Distillers* and stated that it hinted at a 'real and substantial connection' test. Specifically, he regarded a "tort as having occurred in any country substantially affected by the defendant's activities ... and the law of which is likely to have been in the reasonable

---

[43] (1990) 171 CLR 538, at 566-569.
[44] *ibid*, at 567.
[45] *ibid.*
[46] (2002) 194 ALR 433.
[47] *ibid,* at [43].
[48] *ibid.*
[49] [1975] 1 SCR 393.

contemplation of the parties."[50] Before *Tolofson v Jensen*,[51] it was assumed that the *Moran* test was the approach for tort choice of law even though it was formulated in a jurisdictional context.[52]

In comparison, the wording of the *Moran* test is more specific in that it requires the courts to locate countries which are substantially affected by the defendant's activities. The *Distillers* test on the other hand, is more vaguely phrased in that it simply inquires as to where in substance the tort is committed. As the focus of the *Moran* test is on the consequences of the defendant's activities rather than his actions, judicial discretion is curtailed, as the Canadian courts are limited in the factors they can take into account. In contrast, the English common law approach has no such restrictions.

Furthermore, as more than one country can be affected by the defendant's activities in a substantial manner, the application of the *Moran* test may result in the "cumulative application of the law of two countries."[53] As *North* has pointed out, this can be justified by "expansionist attitudes to the assumption of jurisdiction"[54] but not in relation to the location of the tort in a choice of law context. There, we are to identify a law that would determine the substantive issues between the parties in relation to the tort. Accordingly, "there can only be one place of wrong."[55] In contrast, under the general wording of the *Distiller* test, it is quite unlikely that courts will identify two or more locations of the tort in determining the applicable law. It is thus clear that that the *Moran* test is in divergence from the English common law *Distillers* approach at this point in time.

The Tolofson approach

Subsequently, in *Tolofson v Jensen*, the Supreme Court of Canada rejected the English common law *Phillips v Eyre* rule and held that "as a general rule, the law to be applied in torts

---

[50] *ibid*, at [11].
[51] [1994] 3 SCR 1022.
[52] North, *supra*, n. 7, at 149.
[53] *ibid.*
[54] *ibid.*
[55] Nygh, Davies, *Conflict of Laws in Australia* (Sydney: LexisNexis Butterworths)(7th ed., 2002), at 421.

is the law of the place where the activity occurred."[56] However, where an "act occurs in one place but the consequences are directly felt elsewhere...it may well be that the consequences would be held to constitute the wrong."[57] In short, the place of the tort is either the place of injury or the place of the wrongful activity and it is up to the courts to determine which is applicable in a particular fact situation.

One difference between the *Tolofson* and *Distillers* approaches is that the former restricts the location of the tort to the place of the act and its consequences whereas there are no such limitations for the *Distillers* substance test. In practical terms, however, it is unlikely that the English common law test will be applied to identify the place of commission of the tort in one other than these two locations. Instead, one can say that the two approaches are similar in that they both provide the courts with a high degree of discretion in working out the *situs* of the tort.

Even though the *Tolofson* approach has been accepted by most lower Canadian provincial courts[58] as the test for determining the place of commission of a tort for tort choice of law purposes, Goldenberg J in *Prebushewski v Dodge City Auto*[59] has commented that there are still doubts as to whether the *Moran* test "will be confined to the negligent manufacture of products, or whether it will be applied to other cases of negligence or even perhaps to other torts."[60] In other words, there is still some uncertainty in relation to the Canadian rules on determining where a tort is committed.

2.2.4 England: *Part III* of the *1995 Act*

It is stated in the *Law Commissions Report* which the *1995 Act* is based on that "there is a fiction in identifying any particular country as the place of the tort or delict."[61] Rules which

---

[56] *Tolofson, supra,* n. 51, at [43].
[57] *ibid.*
[58] See for example, *Barclay's Bank plc v Inc Inc* (1999) 242 AR 18, *Integral Energy & Environmental Engineering Ltd v Schenker of Canada Ltd* (2001) 293 AR 327 but see *Ostroski v Global Upholstery Co*[1996] ACWS (3d) 990 where the *Moran* test was applied in a post *Tolofson* case.
[59] [1999] Sask R 76.
[60] *ibid*, at [8].
[61] Law Com No. 193 (1990), at para. 3.6.

directly locate the applicable law were thus preferred by the Law Commissions. These rules are provided for by *section 11* of the *Act.*

Under *section 11(1),* if all the events constituting a tort occurred in a single jurisdiction, that country would provide the applicable law. If these events were scattered across jurisdictions, we would have to look at *section 11(2)* of the *Act.* In particular, for torts involving personal injuries or death or torts in respect of damage to property, under section *11(2)(a)* and *(b),* we have to first work out the place where the "individual was when he sustained the injury"[62] or "where the property was when it was damaged"[63] in order to apply the law of that jurisdiction. For all other cases, *section 11(2)(c)* requires the courts to work out the "country in which the most significant element or elements"[64] of the events constituting a tort occurred before they can apply the law of that country.

At the outset, one structural point must be made before we enter into a detailed comparison of the individual sub-rules under the *1995 Act* and the approaches adopted by the rest of our selected jurisdictions. For these countries, a single, usually flexible, general rule is used to locate the place of commission of a tort. *Section 11(2),* on the other hand, employs two different rules: a place of injury/damage rule and a 'most significant element' rule.

a) *Sub-rules 11(2)(a) and (b): place of injury/damage rule*

It can be seen from the above that sub-rules *11(2)(a)* and *(b)* provide for a place of injury or damage rule for torts involving personal injury, death or property damage. This is a "simple, though sometimes arbitrary, rule"[65] and it is in stark contrast with the English common law *Distillers* substance test which provides for a high degree of judicial discretion. In the application of this statutory rule, judges can only rely on the place where the injury or damage occurred in working out the place of commission of torts involving personal injury, death or property damage, whereas under the English common law approach, there is no such

---

[62] Section 11(2)(a), *1995 Act.*
[63] Section 11(2)(b), *ibid.*
[64] Section 11(2)(c), *ibid.*
[65] Briggs, *supra,* n. 8, at 187-188.

limitation. In other words, for such torts, the English common law test "leaves a margin of appreciation to the judge"[66] to determine where they are committed. In particular, it has been observed that for personal injury cases, "in almost every instance, the [English] court was able to assemble the facts so that damage and the act complained of were located in a single place."[67]

b) *Sub-rules s11(2)(c): most significant element rule*

Section 11(2)(c) provides for a flexible sub-rule that "leaves it to the courts to work out a solution"[68] to the problem of locating the place of the tort as no definition of 'significant' is provided by the Act itself. It has been held by the English courts in the cases of *Morin v Bonhams & Brooks Limited*[69] and *Protea Leasing v Air Cambodge Co Ltd*[70] that no reliance should be placed on the English common law in applying *section 11(2)(c)*. Instead, the section requires "an analysis of all the elements constituting the tort as a matter of law, and a value judgment regarding their 'significance.'"[71]

Similar to the *Distillers* substance test and the *Tolofson* approach, the *section 11(2)(c)* "test is inherently vague and therefore permits considerable manipulation by the courts."[72] However, despite this similarity, there are still a number of differences between these approaches.

1. First, the test can only take into consideration, elements of events which constitute the tort and these are normally the "acts and consequences that make up the tort."[73] As seen above, the *Tolofson* test is similarly restricted. The English common law *Distillers* test, on the other hand, has no such limitations although it would be rare for the English courts to make use of factors other than these considerations.

---

[66] *ibid*, at 179.
[67] *ibid*.
[68] North, Fawcett, *supra*, n. 2, at 634.
[69] [2003] EWCA Civ 1802.
[70] [2002] All ER (D) 224.
[71] *Morin, supra*, n. 69, at [16]. See also, *Dornoch Ltd v The Mauritius Union Assurance Company Ltd* [2006] EWCA Civ 389, at [47]. *Trafigura, supra*, 22, at [77].
[72] Clarkson, Hill, *supra*, n. 42, at 272.
[73] North, Fawcett, *supra*, n. 2, at 634.

2. Secondly, as was pointed out by Moore Bick J in *Protea Leasing, section 11(2)(c)* provides for a more flexible approach in comparison to the *Distillers* substance test as it is "one which might yield different answers in different cases even in relation to the same kind of tort."[74] This flexibility is not shared by the English common law approach as it is used to "promote rule-creation for specific torts."[75] This appears to be the case for the Australian and Canadian tests as well. Accordingly, as a result of this difference, the *section 11(2)(c)* test is effectively the most flexible approach in our comparative study.

2.2.5 Singapore

No discussion of a general rule for working out the place of commission of a tort was made in the Singapore cases on tort choice of law. As such, we do not know what the Singapore approach is. The localisation of torts in these cases appears to have been made in a knee-jerk reaction to the tort in question without the application of any legal tests.[76]

2.3 TORT CHOICE OF LAW RULE

2.3.1 The overall picture

As there has been considerable activity in the evolution of the tort choice of law rule in our selected Commonwealth jurisdictions, a brief historical summary of these developments will first be provided before we embark on a detailed comparative examination of them.

The starting point for the English common law tort choice of law rule is in the judgment of Willes J in *Phillips v Eyre* where he held that:

---

[74] *Protea Leasing, supra,* n. 70, at [78].
[75] Harris, *Choice of Law in Tort – Blending in with the Landscape of the Conflict of Laws?* (1998) 61 Modern Law Review 33, at 39.
[76] See for example, *Goh Chok Tong v Tang Liang Hong* [1997] 2 SLR 641, at [78].

> "[a]s a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England... Secondly, the act must not have been justifiable by the law of the place where it was done."[77]

For most of the twentieth century, Australian,[78] Canadian[79] and Singaporean[80] judges applied the above approach as their tort choice of law rule in uniformity with the English common law. Nevertheless, it has been pointed out that the scope of application of the *Phillips v Eyre* rule "has never been clear and it has been subjected to endless scrutiny and speculation though the words themselves have been regarded with the veneration appropriate to the words of a statute."[81] It is thus unsurprising that a closer scrutiny of the relevant cases would reveal that divergences have occurred in relation to the interpretation of that rule in some of our selected jurisdictions. Furthermore, in recent years, Australia and Canada have departed from the *Phillips v Eyre* rule by adopting a *lex loci delicti* rule. Likewise, the *1995 Act* has introduced a similar tort choice of law rule as well. In sharp contrast, the *Phillips v Eyre* rule is still good law in Singapore.

Accordingly, we can examine the development of the tort choice of law rule in our selected Commonwealth jurisdictions at two different stages; first, before the rejection of the *Phillips v Eyre* rule, the divergences and convergences in relation to the interpretation of that rule and secondly, the divergences and convergences in relation to the *Phillips v Eyre* rule itself.

---

[77] *Phillips v Eyre, supra,* n. 1, at 28-29.
[78] There have been Australian lower court cases which applied the *Phillips v Eyre* rule before its endorsement by the High Court of Australia in *Koop v Bebb* (1951) 84 CLR 629 such as *Potter v Broken Hill Pty Ltd.* [1905] VLR 612 and *Varawa v Howard Smith Ltd* [1910] VR 509.
[79] Clear endorsement of the *Phillips v Eyre* rule was provided for by the Supreme Court of Canada in *Mclean v Pettigrew* [1945] 2 DLR 65. Before this, there have been earlier lower court cases which adopted the same approach such as *O'Connor v Wray* [1930] 2 DLR 899 and *Can. Nat'l SS Co v Watson* [1939] 1 DLR 273.
[80] *R J Sneddon v AG Shafe* [1947] 1 MLJ 197.
[81] Sykes, *A Textbook on the Australian Conflict of Laws* (Sydney: The Law Book Company Limited) (1972), at 222.

2.3.2 Divergences and convergences in relation to the interpretation of the *Phillips v Eyre* rule

In this subsection, the second limb of the *Phillips v Eyre* rule as well as its juridical nature will be used to illustrate the divergences and convergences that have occurred in relation to the interpretation of that tort choice of law rule in our selected jurisdictions.

a) The second limb of the *Phillips v Eyre* rule

English common law

Two interpretations of the second limb of the *Phillips v Eyre* rule have been made by the English courts. First, in *Phillips v Eyre*, it was held that that limb required that the act be not justifiable by the *lex loci delicti*. Subsequently, in *Machado v Fontes*,[82] Lopes and Rigby LJJ read that statement as providing that the act complained of must not be "innocent"[83] in the country where it was committed. If the act were contrary to the law of that country, though giving rise to no civil liability there, it would not be "justifiable"[84] for the purposes of the second condition. In *Boys v Chaplin*[85] however, the position in *Machado* was rejected and instead, Lord Wilberforce provided the second interpretation for this sub-section which is to consider both limbs of the test as requiring actionability.[86]

Australia

Since the beginning of the 20th century, Australian courts have criticised the *Machado* interpretation of the *Phillips v Eyre* rule in cases such as *Varawa v Howard Smith Ltd*,[87] *Koop v Bebb*[88] and *Anderson v Eric Anderson Radio & TV Pty Ltd.*[89] Although, these judicial statements were strictly *obiter*, it seems clear that *Machado* would not be followed if a dispute

---

[82] [1897] 2 QB 231.
[83] *ibid,* at 233 per Lopes LJ, at 235 per Rigby LJ.
[84] *ibid.*
[85] [1971] AC 356.
[86] *ibid,* at 387-389.
[87] [1910] VR 509, at 523-524.
[88] (1951) 84 CLR 629, at 642-643.
[89] (1965) 114 CLR 20, at 40.

required a resolution of the interpretation of the second limb of the *Phillips v Eyre* rule for the Australian context.[90] Interestingly, the High Court of Australia in *Koop v Bebb* has held that it:

> "may be the true view that an act done in another country should be held to be an actionable wrong in Victoria if, first it was of such a character that it would have been actionable if it had been committed in Victoria, and secondly, it was such as to give rise to a civil liability by the law of the place where it was done."[91]

In other words, the High Court may have interpreted *Phillips v Eyre* as providing for a double actionability rule a few years before *Boys v Chaplin*. In particular, Lord Wilberforce mentioned the above quote from *Koop v Bebb* in the process of formulating the double actionability rule in *Boys v Chaplin* and though he did not explicitly state that the inspiration for his interpretation came from the High Court of Australia, one would submit that it forms, at least part of it.[92] In subsequent Australian cases,[93] however, the Australian courts have held that "the plaintiff may succeed in his action if the defendant's conduct was actionable merely in the abstract under the *lex loci delicti*, even though there was in fact, in the circumstances of the case, no liability of any kind under that law."[94] It should be noted that this is not the case under the English common law position.[95]

In short, the *Machado* interpretation was probably not part of Australian law at this point in time. In addition, the Australian courts may have interpreted *Phillips v Eyre* as providing for a double actionability rule; a position that would only be reached by the English common law in the later case of *Boys v Chaplin*.

Canada

---

[90] This view is supported by the comments of Kelly J in *Carleton v Freedom Publishing Co Pty Ltd* (1982) 63 FLR 326, at 341 – 342 where he stated that "[i]n my opinion, *Koop v Bebb* left open the question considered by Cussen J in *Varawa's* case whether *Machado v Fontes* remains good law... it is, in my opinion, possible to say that the weight of authority in Australia is against its acceptance even though it has not been formally rejected."
[91] *Koop v Bebb, supra,* n. 88, at 643.
[92] *Boys v Chaplin* (HL), *supra,* n. 85, at 388-390.
[93] See for example, *Eric Anderson Radio supra,* n. 89, *Hartley v Venn* (1967) 10 FLR 151.
[94] Law Commission Working Paper No. 87 (1984), at para. 2.16.
[95] *ibid,* at para. 2.19.

In contrast to the Australian position, the *Machado* interpretation was endorsed by the Supreme Court of Canada in the case of *Mclean v Pettigrew.*[96] Accordingly, there was no Canadian divergence from the English common law position on this point of comparison at this point in time.

After the House of Lords' rejection of the *Machado* interpretation of the *Phillips v Eyre* rule for a double actionability rule in *Boys v Chaplin,* the Canadian courts continued to apply the former approach as they were still bound by the decision of the Supreme Court of Canada in *Mclean.* The scene was thus set for a debate in the Canadian courts on two questions, first, whether they should adopt the English common law interpretation in *Boys v Chaplin* and secondly, whether the *Mclean* authority would be an obstacle to the adoption of the double actionability rule. Unfortunately, the bulk of the discussion was centred upon the latter as most courts simply assumed that there should be convergence. It was only in *Grimes v Cloutier*[97] that the courts speculated *obiter* that the double actionability rule may not "necessarily afford the most desirable basis for resolving choice of law issues in tort cases."[98] We now turn to examine the judicial resolution of the *Mclean* authority.

Initial judicial reaction was tentative as lower courts "felt compelled by the constraints of the Supreme Court of Canada decision"[99] to apply the *Machado* interpretation[100] even though their reluctance was made clear by their express support for the English common law approach.[101] Eventually, judicial discontentment with *Mclean* would reach a climax with the case of *Grimes v Cloutier* where the Ontario Court of Appeal avoided the authority of *Mclean* by confining it to its factual matrix. They held that, in situations where the "two defendants live in the jurisdiction of the place where the tort occurred,"[102] the rule in *Boys v Chaplin* would apply. In contrast, if neither party lived in the jurisdiction where the accident took place, the Ontario courts would be bound by the *Mclean* decision.

---

[96] [1945] 2 DLR 65.
[97] (1989) 61 DLR (4th) 505.
[98] *ibid,* at [58].
[99] North, *supra,* n. 7, at 152.
[100] See for example, *Going v Reid Brothers Motor Sales Ltd* (1982) 136 DLR (3d) 254, *Lewis v Leigh* (1986) 12 OAC 113, at 122.
[101] See for example, *Going, ibid,* at [106].
[102] *Grimes, supra,* n. 97, at [30].

Later Ontario cases extended the scope of the decision in *Grimes* by providing that, so long as the residence of either one of the parties was that of the place of the tort, the *Boys v Chaplin* interpretation would operate.[103] However, this was then limited by the Ontario Court of Appeal in *Williams v Osei-Twum*[104] which restricted the relevant factual inquiry to the residence of the parties. In particular, the courts held that other factors such as the residence of third party insurers were unhelpful in determining whether to apply *Mclean.*

Hence, in effect, the Ontario courts have interpreted *Grimes* as providing for a two-tiered test, an initial factual analysis of the residence of the parties directly involved in the dispute followed by the application of either the *Machado* or the *Chaplin* interpretation. One point to note is that it is unclear as to whether courts of other provinces in Canada had adopted this approach. In particular, the British Columbia courts had been ambivalent as to its application.[105]

In comparison, there is no need for a preliminary examination of the residence of the parties under the English common law tort choice of law rule. For cases that do not fall on the *Mclean* side of the *Grimes v Cloutier* framework, it can be observed that the Ontario courts have adopted the double actionability rule. Conversely, the *lex fori* would be the applicable law if the actions of the defendant were at least punishable in the place where it was committed. The English courts have of course rejected this interpretation of the *Phillips v Erye* rule.

Singapore

Unlike the hostility of the Australian judiciaries towards the *Machado* interpretation of the *Phillips v Eyre* rule, Singapore courts have remained silent in this debate. In *RJ Sneddon v AG Shafe,*[106] the only Singapore tort choice of law case before the modification of the *Phillips v Eyre* rule in *Boys v Chaplin,* Brown J made no mention of the *Machado* interpretation. He

---

[103] See for example, *Prefontaine Estate v Frizzle* (1990) 71 OR (2d) 385, *Buchar v Weber* (1990) 71 DLR (4th) 544.
[104] (1992) 99 DLR (4th) 146.
[105] See for example, *Vo v Millard* (1994) 49 ACWS (3d) 461.
[106] [1947] 1 MLJ 197.

did not even have to apply the *Phillips v Eyre* rule as no tort choice of law issue arose in the case itself due to a further finding that there was no tort in the first place.[107]

After *Boys v Chaplin* was decided, Singapore tort choice of law was slow in keeping up with the rapid developments in the Commonwealth world. When the Singapore courts examined the tort choice of law rules for torts committed abroad in 1996, academic curiosity was momentarily piqued by the judgement of Chao Hick Tin J in *Frans Banbang Siswanto v Coutts*[108] where the *lex loci deliciti* was applied. Confusion was then generated by the later case of *Goh Chok Tong v Tang Liang Hong*[109] where adherence to the *Phillips v Eyre* rule as modified by *Boys v Chaplin* was maintained.[110] As Yeo had pointed out, this was a "conflict between two High Court decisions"[111] and that it was "clearly open to the Court of Appeal...to consider what is the best position to adopt for Singapore, in the light of recent developments in England and the Commonwealth."[112] The Singapore Court of Appeal[113] did deliberate on this issue and it opted for the English common law rule in *Phillips v Eyre* as well as the interpretation of that rule in *Boys v Chaplin*.

b) The juridical nature of the *Phillips v Eyre* rule

English common law and Singapore

One interpretation of the *Phillips v Eyre* rule is that it functions as a "preliminary or 'threshold' rule which defined the circumstances in which the forum could assume jurisdiction"[114] thus leaving "another rule, to govern choice of law."[115] Generally, the threshold interpretation attracted the most support in Australia and Canada. In England, it was only examined late in the development of the *Phillips v Eyre* rule in the case of *Boys v Chaplin*. In particular, in that case, Lord Diplock in the English Court of Appeal suggested the use of the threshold

---

[107] *ibid*, at 201.
[108] (Unreported, Singapore High Court, S/N 110/1996, 9 November 1996).
[109] [1997] 2 SLR 641.
[110] *ibid*, at [74].
[111] Yeo, *Private International Law: Recent developments in Singapore* (1997) 1 Singapore Journal of International and Comparative Law 560, at 587.
[112] *ibid*.
[113] *Parno, supra*, n. 5, at [36].
[114] Nygh, Davies, *supra*, n. 55, at 418.
[115] North, *supra*, n. 7, at 156.

interpretation.[116] However, when the dispute went up to the House of Lords, Lord Wilberforce rejected that approach altogether.[117] It is thus obvious that this interpretation has not since featured much under the English common law.

In Singapore, no mention of this interpretation was made till the case of *Goh Chok Tong* in 1997. In that case, the Singapore High Court examined the various interpretations placed upon the juridical nature of the *Phillips v Eyre* rule and commented that "such characterisations are unnecessary in practice."[118] Despite this dismissal, they went on to support Lord Wilberforce's rejection of the threshold interpretation. In addition, it should also be noted that the Singapore Court of Appeal in *Parno* has indicated that the "applicable *choice of law* rule in Singapore"[119] is provided for by *Phillips v Eyre.*

Australia

In comparison to the English common law and Singaporean position, the threshold interpretation of the *Phillips v Eyre* rule was raised at an early stage in the Australian courts in the cases of *Eric Anderson Radio*[120] as well as *Hartley v Venn.*[121] In both cases, it was held that the *Phillips v Eyre* rule was a threshold rule and that on the facts of the case, it was satisfied. They then moved on to apply the *lex fori* to the substantive issues in question. At this point in time, there was no mention of the threshold approach in the English courts.

Eventually, the threshold interpretation was raised and rejected by the English courts in *Boys v Chaplin.* In *Breavington v Godleman,*[122] the High Court of Australia made clear their preference for the interpretation of *Phillips v Eyre* as a choice of law rule.[123] Curiously, this was not followed in subsequent cases.[124] Most notably, Dawson J has held in the High Court

---

[116] *Boys v Chaplin* (CA) [1968] 2 QB 1, at 38-39.
[117] *Boys v Chaplin (*HL), *supra,* n. 85, at 385-387.
[118] *Goh Chok Tong, supra,* n. 109, at [76].
[119] *Parno, supra,* n. 5, at [36]. My italics.
[120] *Eric Anderson Radio, supra,* n. 89, at 23.
[121] *Hartley v Venn, supra,* n. 93, at 155.
[122] (1988) 169 CLR 1.
[123] *ibid,* at 110.
[124] See for example, *Gardner v Wallace* (1995) 184 CLR 95, *Thompson v Hill* (1995) 38 NSWLR 714.

case of *Gardner v Wallace*[125] that the *Phillips v Eyre* rule was only a threshold test,[126] in sharp contrast to the decision of the House of Lords in *Boys v Chaplin*. It should also be noted that there was uncertainty as to whether the *lex fori*[127] or the *lex loci delicti*[128] would be applied after the threshold rule was satisfied. In the end, this interpretation was rejected conclusively only at the start of this century when the High Court of Australia abandoned the English common law *Phillips v Eyre* rule.[129]

Canada

In Canada, the threshold interpretation was first raised by Lieff J in *Gagnon v Lecavalier*[130] where he held that the *Phillips v Eyre* rule "sets down the necessary conditions which must exist before an action can properly be entertained"[131] by the Canadian courts. However, the strength of the authority is doubtful as both counsel in the case were in agreement on the threshold interpretation and Lieff J simply concurred with that view.[132] As it was held that the *Phillips v Eyre* rule was not satisfied on the facts of the case and thus the Canadian courts had no "jurisdiction to entertain"[133] the action, Lieff J did not examine what the choice of law rule would be once the threshold was met.[134] As mentioned above, at this point in time, this interpretation of the *Phillips v Eyre* rule was not even examined by the English courts.

After the rejection of the threshold interpretation in *Boys v Chaplin*, there was some uncertainty as to whether this was the case as well in the Canadian courts.[135] Interestingly, in *Tolofson v Jensen* when the Supreme Court of Canada examined the judgment of Willes J in *Phillips v Eyre*, they commented *obiter* that the first limb "is strictly related to jurisdiction"[136]

---

[125] (1995) 184 CLR 95.
[126] *ibid*, at 98.
[127] See for example, *Gardner*, *ibid.*
[128] See for example, *Arrowcrest Group Pty Ltd v Advertiser News Weekend Publishing Co Pty Ltd* (1993) 113 FLR 57, *Wilson v Nattrass* (1995) 21 MVR 41.
[129] *Pfeiffer, supra,* n. 3, at [24] – [26].
[130] (1967) 63 DLR (2d) 12.
[131] *ibid,* at [10].
[132] *ibid.*
[133] *ibid*, at [12].
[134] It was only in the later case of *Ang v Trach* (1987) 57 OR (2d) 300 that Canadian courts applied the *lex fori* as the substantive law after the threshold was met.
[135] For cases supporting the threshold interpretation, see for example, *Northern Alberta Rail Co v K & W Trucking Co Inc* (1974) 62 DLR (3d) 378, *Ang v Trach*, *ibid.* For cases rejecting it, see for example, *Interprovincial Co-operatives Ltd v The Queen* [1976] 1 SCR 477, *Mason v Mason* (1988) 46 DLR (4th) 333, *Grimes v Cloutier, supra,* n. 97.
[136] *Tolofson, supra,* n. 51, at [26].

and the second, they would "normally think of as dealing with choice of law."[137] Their observation seems odd, as this was not the threshold approach adopted by lower Canadian courts in previous cases. All along, the Canadian provincial courts in support of such an interpretation have held that the entire *Phillips v Eyre* rule was a threshold rule.

In spite of this confusion, the threshold interpretation has been rejected by the Supreme Court of Canada in *Tolofson* along with the *Phillips v Eyre* rule.

2.3.3 Divergences and convergences in relation to the *Phillips v Eyre* rule

In this section, we move on to examine the Australian and Canadian divergences from the *Phillips v Eyre* rule when their respective judiciaries abandoned it for the *lex loci delicti*. In addition, the English statutory tort choice of law rule will be analysed as well.

English common law and Singapore

To reiterate, under the English common law, a "double limbed choice of law rule"[138] is applied by the English courts for torts committed abroad. Derived from *Phillips v Eyre* and modified by *Boys v Chaplin*, the rule requires that the claim be actionable "as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done."[139] In short, the applicable law is the overlap between the *lex loci delicti* and the *lex fori*.

As was mentioned above, the Singapore courts have adopted the English common law *Phillips v Eyre* rule. However, it must be noted that in the recent case of *Ang Ming Chuang v Singapore Airlines Ltd*[140], Woo Bih Li J, a High Court judge stated that if he were "not bound by the doctrine of precedent, [he] would have departed from the double actionability rule for

---

[137] *ibid.*
[138] North, Fawcett, *supra*, n. 2, at 610.
[139] *Boys v Chaplin*, *supra*, n. 85, at 389.
[140] [2005] 1 SLR 409.

the reasons"[141] provided by the Supreme Court of Canada in the case of *Tolofson* "in favour of the *lex loci delicti*."[142] In addition, he pointed out that "*Tolofson* was not drawn to the attention of [the Singapore] Court of Appeal"[143] and that they may "consider it time to depart from the double actionability rule."[144] Accordingly, there is a distinct possibility that this Singapore conformity with the English common law *Phillips v Eyre* rule may not be maintained in future cases.

Canada

After decades of Canadian adherence to the English common law tort choice of law rule, in 1994, the *Phillips v Eyre* rule was abandoned by the Supreme Court of Canada in *Tolofson v Jensen* and replaced by the *lex loci delicti* for both inter-provincial and international torts.[145] Clearly, this is a Canadian divergence from the English common law position.

However, despite the removal of the *lex fori* from the Canadian tort choice of law rule, it is important to note that the application of the two approaches may often generate the same result. To elaborate, it can be observed from tort choice of law cases that most claimants bring their action in a particular forum when the *lex fori* is more advantageous to their claim as compared to the *lex loci delicti*.[146]. However, if they brought their claim in England or Singapore, as the double actionability rule would provide for the application of the law that is common to both jurisdictions, the "claimant [could] never succeed to a greater extent than is provided for by the less generous of the two systems of law concerned."[147]

Take for example, *Boys v Chaplin*. The claimant wanted to avoid a particular rule of Maltese law which prevented the recovery of damages for non-pecuniary losses, in contrast to English law which allows for such heads of damages. However, as their claim for non-pecuniary damages would not be recoverable under Maltese law, the plaintiffs' claim was not actionable

---

[141] *ibid*, at [50].
[142] *ibid.*
[143] *ibid.*
[144] *ibid.*
[145] *Tolofson, supra,* n. 51, at [43].
[146] Usually, the forum will have higher caps on damages, less restrictions on the types of losses one can bring an action for or longer limitation periods as compared to the law where the tort was committed thus attracting the litigant to the forum.
[147] Law Commission Working Paper No. 87 (1984), at para. 3.9.

under the second limb of the double actionability rule. Effectively, this meant that the Maltese rule in relation to the non-existence of a specific head of damages was applied.[148] Likewise, if the double actionability rule were applied to the cases of *Pfeiffer v Rogerson*[149] and *Renault v Zhang*,[150] the end result would still be the application of the rule that the claimant wanted to avoid i.e. the *lex loci delicti*. Hence, at least in relation to claimants who engage in such forum shopping, the *lex fori* will not play any part under both tort choice of law rules unless an exception is used to apply that law.

Accordingly, it is only if an action were brought in the English courts when the *lex loci delicti* is more favourable to a litigant's claim that the application of the double actionability rule would generate a different result from the *lex loci delicti* rule.[151] Since this situation is rare, one could argue that in practical terms, the two tests are likely to produce the same result in the majority of cases. Nonetheless, it is important to note that significant differences lie in the policy objectives that the two tests are attempting to meet. This will be dealt with in greater detail in Chapter 6.

England: *Part III* of the *1995 Act*

As was mentioned above, to work out the applicable law under *section 11* of the *1995 Act*, we have to localise the tort in question before applying that jurisdiction's law to the legal issues at hand. As this involves identifying the place where the tort is committed, the tort choice of law rule under the *1995 Act* is effectively a statutory *lex loci delicti* rule.

Structurally, the Canadian tort choice of law rule is different from the *section 11* tort choice of law rule under the *1995 Act* as the rules identifying the place of the tort and the tort choice of law rule itself are separate from one another. In contrast, the *1995 Act* fuses these two rules

---

[148] It was only with the application of an exception to the double actionability rule that the claimants were able to recover their non-pecuniary losses in *Boys v Chaplin*. Another example is provided by *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14 where the *lex loci delicti*, German law was effectively applied as there was no liability under that law.

[149] (2000) 203 CLR 503.

[150] (2002) 187 ALR 1.

[151] See for example, *Red Sea Insurance* where the favourable law to the counter-claimants was the *lex loci delicti* instead of the *lex fori*. In that case, the *lex fori* would be the effective applicable law as it was the lowest common denominator between the *lex fori* and the *lex loci delicti*. This situation arose, in contrast to *Boys v Chaplin* and *Johnson*, only because the claimants brought the defendants to court in relation to the dispute but the defendants counter claimed on a tort choice of law issue.

into a single test. In practical terms, however they are the same as both sets of rules effectively apply the law of the place where the tort is committed. Accordingly, the observations made above on the *lex loci delicti* and the double actionability rule are relevant here as well.

Australia

After *Boys v Chaplin* was decided,[152] the High Court of Australia had to address the question of whether the double actionability rule was part of Australian tort choice of law in the case of *Breavington v Godleman.* In particular, a majority of the Justices applied the *lex loci delicti* to the substantive issue but the manner in which they came to that result differed drastically.[153] However, despite this uncertainty, it is clear from the case itself that most members of the High Court of Australia have rejected the English common law *Phillips v Eyre* rule. Oddly enough, in the later cases of *McKain v R W Miller*[154] and *Stevens v Head,*[155] the double actionability rule was once again adopted by the High Court of Australia. In other words, an Australian convergence with the English common law tort choice of law rule has taken place. It was only at the beginning of this century that the English common law *Phillips v Eyre* rule was abandoned by the High Court of Australia in the cases of *Pfeiffer v Rogerson* and *Renault v Zhang* and replaced by the *lex loci delicti for* both inter-state and international torts.

Accordingly, it can be observed that the *lex loci delicti* is now the tort choice of law rule in Australia, Canada and England with regards to the *1995 Act.* However, there is one important difference between the *lex loci delicti* rules in these countries that we have to take note of. In the recent High Court of Australia case of *Neilson v Overseas Projects Corporation of Victoria Ltd,*[156] the majority Justices have held that the Australian *lex loci delicti* rule for international torts is "not to be confined to reference to what the forum classifies as the domestic law of

---

[152] There were lower Australian court cases which have endorsed the double actionability rule. See for example, *Corcoran v Corcoran* [1974] VR 164, *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437. In contrast, some have refused. See for example, *Carleton supra,* n. 90.

[153] The issues in the case was first, whether the applicable law was to be found in a common law choice of law rule or in the provisions of the Australian constitution and secondly, whether the common law rule should follow the traditional choice of law rule in *Phillips v Eyre* or whether a new choice of law rule should be formulated for intra-Australian torts.

[154] (1991) 174 CLR 1.

[155] (1993) 176 CLR 433.

[156] [2005] HCA 54.

that jurisdiction: the law that that foreign jurisdiction would apply in case having no element foreign to it but otherwise identical with the facts under consideration."[157] Instead, the applicable law is "the whole of the law of that place"[158] including its tort choice of law regime. In other words, *renvoi* is part of the Australian tort choice of law rule.[159]

In comparison, it is unclear whether *renvoi* is applicable to the Canadian tort choice of law rule as the point has not yet arisen in the Canadian courts. It is however clear from *section 9(5)* of the *1995 Act* that that the applicable law as determined by *section 11* of the Act refers to the domestic law of the country in question. It does not refer to its private international law rules. Similarly, it has been said that there is no place for the doctrine of *renvoi* in relation to the English common law tort choice of law rule.[160]

2.4 EXCEPTION TO THE TORT CHOICE OF LAW RULE

2.4.1 English common law and Singapore

Under the English common law, it was accepted by a majority of the House of Lords in *Boys v Chaplin* that there should be an exception to the double actionability rule. However, no consensus was reached on its formulation. Lord Hodson and Lord Wilberforce preferred a significant relationship test based on the *American Second Restatement.*[161] Lord Pearson, in contrast, wanted an exception specifically designed to discourage forum shopping if the law of the forum were effectively the applicable law.[162] In subsequent cases, however, English judges have adopted Lord Wilberforce's definition of the exception despite the lack of a clear majority in the House of Lords for his approach.[163] Most notably, the Privy Council in *Red Sea Insurance* has held that:

---

[157] *ibid*, at [102].
[158] *ibid*.
[159] It is unclear from *Neilson* as to whether *renvoi* in the Australian context is single or total *renvoi.* Five Justices namely, Gleeson CJ, Kirby, Heydon, Gummow and Hayne JJ were of the view that it was unnecessary to determine this issue. Callinan J preferred a single renvoi doctrine whereas McHugh J rejected renvoi altogether in his judgment.
[160] Law Commission Working Paper No. 87 (1984), at para. 2.18.
[161] *Boys v Chaplin, supra,* n. 85, at 378 per Lord Hodson, at 389-393 per Lord Wilberforce.
[162] *ibid*, at 406.
[163] See for example, *Church of Scientology of California v Metropolitan Police Comr* (1976) 120 Sol Jo 690, *Pearce, supra,* n. 12, *Kuwaiti Airways Corp v Iraqi Airways Co* [2002] 2 WLR 1353.

> "a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties"[164]

and that this exception can be used to apply the *lex fori* or the *lex loci delicti* individually.[165]

Once again, the Singapore Court of Appeal has indicated its support of the English common law position by endorsing the flexible exception provided for in *Red Sea Insurance* in the case of *Parno*.[166]

2.4.2 Australia

When the question whether there should be an exception to the Australian tort choice of law rule first arose in the High Court of Australia in the case of *Breavington*, no resolution of this issue was possible due to conflicting judgments from the various Justices. Subsequently, when the double actionability rule was endorsed by the High Court of Australia in *Stevens v Head* and *McKain v Miller*, it was held that this rule was to be applied with no exceptions whatsoever.[167] As the two cases involved inter-state torts, it was unclear as to whether a flexible exception would be applicable to international torts. Australian lower courts have opted to extend the decision in *McKain* and *Stevens* to international cases.[168] The lack of a flexible exception in Australia at this point in time is clearly a departure from the English common law position.

The opposition of the High Court towards an exception to the Australian tort choice of law rule was maintained in *Pfeiffer* and *Renault*. In particular, *Pfeiffer* is authority that there is no flexible exception to the *lex loci delicti* rule with regards to inter-state torts. As for international torts, the flexible exception was also rejected by the Australian courts in *Renault*. However,

---

[164] *Red Sea, supra,* n. 9, at 206.
[165] See *In the Matter of T & N Ltd v In the Matter of the Insolvency Act 1986* [2005] EWHC 2990 for a recent discussion of the flexible exception.
[166] *Parno, supra,* n. 5, at [36]. For the application of the flexible exception by a Singapore court, see for example, *Ang Ming Chuang supra,* n. 140.
[167] *McKain, supra,* n. 154, at 38 - 39, *Stevens, supra,* n. 155, at 453.
[168] See for example, *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554.

this did not mean that no exception was available to the Australian tort choice of law rule for international torts. In particular, they pointed out that the purpose of the first limb of the double actionability rule when it was introduced in *The Halley*[169] was to refuse the application of a foreign law in circumstances where it is deemed to be manifestly contrary to public policy. Since "[p]ublic policy reservations ... cannot be contained in closed categories,"[170] they held that such issues should be confronted directly under a public policy exception.

It can be observed that the existence of an exception to the *lex loci delicti* in Australia is dependent on whether the tortious dispute in question is inter-state or international in nature. In contrast, the English common law does not distinguish between these two situations. Accordingly, in relation to inter-state torts, there is clearly an Australian divergence from the English common law position as there is no exception available in these circumstances. As for international torts, the Australian public policy exception is obviously different from the English common law flexible exception. In particular, the similarities and differences between the two exceptions are as follows:

1. On the one hand, the flexible exception is used to identify the law which has the most significant relationship to the issue in question. In applying this exception, the courts are concerned with the connections between the dispute and the jurisdictions in question or if they adopt the governmental interest analysis approach, the purpose of the relevant legal rules to work out which law has the most interest in the dispute. On the other hand, the public policy exception would be applied only if the "foreign law [were] manifestly incompatible with public policy."[171] The courts would thus consider the nature of the foreign law and whether it goes against the public policy of the forum.

2. Secondly, the public policy exception can only be invoked to apply the *lex fori* "in cases where foreign law is manifestly incompatible with public policy."[172] Essentially,

---

[169] (1868) LR 2 PC 193.
[170] *Renault, supra,* n. 150, at [53].
[171] North, Fawcett, *supra,* n. 2, at 124.
[172] *ibid.*

the Australian courts are looking for infringements of fundamental concepts such as morality, human liberty or even the interests of the country as a whole. The public policy exception is thus unlikely to be used against a foreign law, as the foreign judiciary will deem it as a criticism of their laws. Furthermore, a distinction is drawn between "all-pervading"[173] and "merely local"[174] rules of public policy and the latter will not be applied under the public policy exception. There is thus a high threshold that must be surmounted before the *lex fori* can be applied under the public policy exception.

Even though the threshold for the flexible exception is high; it is only applied when the connecting factors of the case are overwhelmingly in favour of applying another law and it is not as high as the threshold for the public policy exception. As Kirby J has pointed out, "public policy was not the criterion"[175] in the application of English law under the exception in *Boys v Chaplin*. Specifically, the Maltese law in question would not fall foul of English public policy and the claimant would only be able to obtain the meagre compensation of 53 pounds.

3. Thirdly, under the public policy exception, the *lex fori* is the only law that can be applied to replace the *lex loci delicti.* The exception cannot be used to apply any other law. In contrast, the starting point for the English common law rules is different as it provides for the application of a combination of the *lex fori* and *lex loci delicti.* Hence, it is not surprising that the flexible exception can be used to apply either the *lex fori* or the *lex loci delicti* on its own. Furthermore, it may be used to apply a law "which is neither the forum nor the place of the wrong."[176] Although there is no authority supporting this view, the flexible exception with its emphasis on connecting factors does appear to allow this stance. In contrast, a third country's law can never be applied under the public policy exception.

---

[173] *ibid.*
[174] *ibid.*
[175] *Renault, supra,* n. 150, at [122].
[176] North, Fawcett, *supra,* n. 2, at 613.

It is thus interesting to view the comments of Kirby J in *Renault v Zhang*. At first, he doubted that all issues addressed by the flexible exception could be adequately subsumed in considerations of public policy.[177] However, as he believed that in most cases the same result that comes with the use of the flexible exception could be reached by the public policy exception as well, he chose not to dissent on this point. In light of the analysis above, this is questionable. "Public policy will only exclude the *lex loci delicti* where applying such law would be repugnant to public morality or standards of justice."[178] It cannot be applied to the classic scenario of the Australian tourists who meet with a car accident while on holiday in a fortuitous foreign land.

It should also be noted that in relation to the English common law double actionability rule, litigants can rely on a public policy exception to apply the *lex fori*.[179] However, there is seldom any need for recourse to this exception in the English courts as it is easier for litigants to make use of the flexible exception to achieve the same result.

2.4.3 Canada

After *Boys v Chaplin* was decided, the Ontario courts developed a unique two-tiered tort choice of law regime to avoid the earlier ruling of the Supreme Court of Canada in *Mclean.* In relation to factual scenarios that do not fall on the *Mclean* side of the tort choice of law regime, the Ontario courts have held that a flexible exception is applicable to the double actionability rule.[180] However, on the other side of this framework, the Ontario courts are still compelled to apply the test provided for in *Mclean*, the *Machado* interpretation of the *Phillips v Eyre* rule. There is no flexible exception to the *Phillips v Eyre* rule in this situation as *Machado* and *Mclean* were decided before the introduction of an exception in *Boys v Chaplin.*

In relation to *Mclean,* it can be argued that the same result will be reached by the application of the flexible exception, as it is often the case where both parties are from the local forum,

---

[177] *Renault, supra,* n. 150, at [122]-[123].
[178] Duckworth, *Case Note: Regie Nationale des Usines Renault SA v Zhang, Certainty or Justice? Bringing Australian Choice of Law Rules for International Torts into the Modern Era* [2002] 24 Sydney Law Review 569, at 578.
[179] *Kuwaiti Airways Corp, supra,* n. 163.
[180] *Grimes, supra,* n. 97, at [38].

the *lex fori* will be applied to replace the double-limbed choice of law rule.[181] Hence, it is possible to say that the divergence as created by the lack of a flexible exception in *Mclean* is not as stark as it seems. However, on closer scrutiny, two differences can be discerned from a comparison of the two tests. Under the flexible exception, courts are to locate the law which "has the most significant relationship with the occurrence and the parties"[182] in relation to the particular issue in question. The factors that can be considered by the courts are not limited to the parties' residence. Furthermore, the application of the *lex fori* is also dependent on the issue in question[183] and under the *Mclean* scenario, regardless of the relevance of the applicable law to the dispute in question, so long as the factual requirements are met, the *lex fori* will be applied subject to whether the claim in the *locus delicti* is justifiable.

Subsequently, when La Forest J rejected the *Phillips v Eyre* rule and replaced it with the *lex loci delicti*, he held that "there is little to gain and much to lose in creating an exception to the *lex loci delicti* in relation to domestic litigation."[184] It can be observed that this is the position under Australian law as well. However, he did concede that there might be an exception for international torts although he failed to specify what exactly it is.[185]

Some Canadian provincial courts have held that, where there is a real and substantial connection between the action and the forum, it would be appropriate to apply the *lex fori* instead of the *lex loci delicti*.[186] This approach appears to be similar to the English common law flexible exception. Others have stated that a public policy exception is available where the application of the foreign law violates some fundamental principle of justice.[187] This is the approach that the Australian courts have taken in relation to international torts. Also, a

---

[181] This was the suggestion made in *Vo v Millard*, *supra*, n. 105, at [10] where the courts held that they were bound by *Mclean v Pettigrew* on the facts of the case at hand and even if *Boys v Chaplin* was to be applied, "this is likely a case in which the court would ultimately apply the flexibility rule."

[182] *Red Sea, supra*, n. 9, at 206.

[183] In *Boys v Chaplin*, if the issue in question is on the standard of driving, it can be argued that the connection to Malta would not be as weak, as it can be said that Maltese law would be interested in the standard of driving on their streets.

[184] *Tolofson, supra*, n. 51, at [67]. For Canadian provincial courts' endorsement of this position, see for example, *Bezan v Vander Hooft* (2004) 45 CPC (5th) 203, *Soriano (Litigation Guardian of) v Palacios* [2004] OJ No. 2178.

[185] *Tolofson, ibid*, at [67].

[186] See for example, *Hanlan v Sernesky* (1998) 38 OR (3d) 479, *Lebert v Skinner Estate* (2001) 53 OR (3d) 559.

[187] See for example, *Britton v O'Callaghan* (2002) 57 OR (3d) 644.

number of Canadian lower courts have held that they have a discretion to depart from the *lex loci delicti* if the application of that rule resulted in injustice.[188]

One can thus observe that Canadian law is still unclear as to the nature of the exception to the *lex loci delicti* for international torts. To illustrate this uncertainty, two of the exceptions provided by Canadian lower courts will be examined in greater detail, namely, the British Columbia exception and the Ontario exception.

a) British Columbia definition

A wide definition of injustice was provided in the case of *Wong v Wei*[189] where the courts held that there is injustice where both parties are from the local forum and there are "clear policy differences reflected by the competing"[190] laws.

Examining the judgment itself, one suspects that the British Columbian courts are applying the governmental interest analysis approach under the guise of the injustice exception. In particular, they held that it would be "unjust ... to apply any law of damages other than that of British Columbia to an action *involving any British Columbia residents*"[191] as it is "obvious that British Columbia is the only jurisdiction that will be *affected* by an award of damages."[192] More importantly, "the quantitative difference in the amount of damages available in Canada as opposed to the amount available in California is so significant that the laws are fundamentally incompatible."[193] In essence, the British Columbian courts appear to be saying that California has no interest in applying its damages rule to parties who are not Californians and instead, it is British Columbian law which has the most interest in the matter. British Columbian law was thus applied to the dispute in question.

---

[188] See for example, *Wong v Lee* (2002) 55 OR (3d) 398.
[189] (1999) 10 WWR 296.
[190] *ibid*, at [30].
[191] *ibid*, at [18]. My italics.
[192] *ibid*.
[193] *ibid*, at [19]. Under British Columbia law, there is a cap on non-pecuniary damages.

b) Ontario definition

In *Wong v Lee*,[194] Feldman JA of the Ontario Court of Appeal held that the Ontario exception to the *lex loci delicti* rule is to be limited to addressing "injustice in exceptional cases."[195] In particular, he stressed that the fact that all of the parties are from the forum was not enough to create an injustice and that the test is whether the differences between the "laws of the forums"[196] in question are "beyond ordinary."[197] "[M]ere differences in public policy"[198] would not qualify as an injustice.

Applying the exception, Feldman JA held that there was no injustice in relation to the fact that New York law, the *lex loci delicti* in the case, allows for the recovery of "pecuniary damages without a deductible, whereas under Ontario law, this would not be the case"[199] even though both parties are from Ontario. Applying Ontario law here would merely be "another way of applying the public policy of Ontario as defined in its law, and effectively treating the fact that all of the parties are from the forum as in itself creating an injustice."[200] This formulation of the injustice exception was endorsed and applied in *Somers v Fournier*[201] where the Ontario Court of Appeal held that the "denial of the opportunity to claim damages by reason of the expiration of a limitation period does not constitute injustice sufficient to support an exception to the *lex loci delicti* rule."[202]

What would be sufficient to satisfy the injustice exception laid out in *Wong v Lee?* One example provided for by Feldman JA is where there is "unavailability to an Ontario plaintiff of a complete category of claim or cause of action according to the *lex fori* – the claims of family members for damages pursuant to s. 61 of the Family Law Act R.S.O. 1990;"[203] a situation

---

[194] (2002) 55 OR (3d) 398.
[195] *ibid*, at [12].
[196] *ibid*, at [16].
[197] *ibid*.
[198] *ibid*.
[199] *ibid*, at [17].
[200] *ibid*.
[201] (2002) 60 OR (3d) 225.
[202] *ibid*, at [42]. For other examples on the application of the Ontario injustice test, see also, *Britton v O'Callaghan* (2002) 62 OR (3d) 95, *Roy v North American Leisure Group Inc* (2004) 73 OR (3d) 561.
[203] *Wong v Lee, supra,* n. 194, at [16].

which occurred in the case of *Hanlan v Sernesky.*[204] This is thus an example of a situation where there is an extraordinary difference between the *lex fori* and the *lex loci delicti.* Accordingly, it appears that in the application of the *Ontario* exception, foreign laws which do not provide for tortious liability in relation to the actions of the defendant unlike the position under the *lex fori* would fall foul of the justice exception. In contrast, foreign laws which impact upon the consequences of liability would not be considered unjust.

Comparing the Ontario exception with the Australian and English common law exceptions, a number of points can be made.

1. Both the Ontario injustice exception and the Australian public policy exception are similar in that they do not take into account connecting factors. In contrast, these are the key factors taken into account by the English courts in the application of the English common law flexible exception. Instead, the focus of the Ontario and Australian exceptions is on the nature of the foreign law. However, it is important to note that there are still differences even between these two exceptions. On the one hand, the Ontario exception focuses on the differences between the *lex loci delicti* and the *lex fori* and if the differences were extraordinary, the exception would be satisfied. On the other hand, the Australian public policy exception is invoked when the foreign law is manifestly incompatible with fundamental principles of justice and morality. Accordingly, it is clear that the Ontario injustice exception is not equivalent to the Australian public policy exception as it is unlikely that the example given by Feldman JA; "unavailability to an Ontario plaintiff of a complete category of claim or cause of action according to the *lex fori*"[205] would fall foul of any Canadian public policy categories.[206]

2. From the above, it can be seen that the threshold for the Ontario injustice exception is lower than that of the Australian public policy exception. It is probably easier to satisfy

---

[204] (1998) 38 OR (3d) 479.
[205] *ibid.*
[206] See for example, Castel, *Canadian Conflict of Laws* (Toronto: Butterworths) (4th ed., 1997), at 171. "essential public or moral interest" or "conception of essential justice and morality."

the English common law flexible exception in comparison with the Ontario exception as the litigant only has to establish that the connecting factors to the tortious dispute are overwhelmingly in favour of another country's laws. He does not have to show that there is an extraordinary difference between the competing laws.

3. Thirdly, as Feldman JA's utilisation of the Ontario injustice exception involves a comparison between the *lex fori* and the *lex loci delicti*, it is arguable that a third country's law cannot be applied under this exception. Similarly, the Australian public policy exception is subject to the same limitation. In contrast, the English common law flexible exception is likely to allow for the application of a third country's law.

2.4.4 England: *Part III* of the *1995 Act*

After *section 11* of the *1995 Act* is used to identify an applicable law, *section 12* of that *Act* can be used to displace that law with a different choice of law. Under this section, a complex process has to be followed through. First, we have to identify the issues arising for dispute. Secondly, we have to identify the factors which connect the tort with the country identified by *section 11* as well as the factors connecting the tort to any other country. *Section 12(2)* provides for a non-exhaustive list of such factors. Thirdly, we have to determine the significance of the above factors and compare them. After this comparison, the applicable law under *section 11* would only be displaced if it were "substantially more appropriate"[207] for the law of the other country to determine the issue in question.[208]

Comparing the *section 12* exception with the rest of our exceptions in this subsection, a few points can be made.

1. The *section 12* exception is similar to the flexible exception in that both require an examination of connecting factors. This is in contrast to the Australian and Canadian

---

[207] Section 12(1), *1995 Act*.
[208] For the application of section 12, see for example, *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, *Edmunds v Simmonds* [2001] 1 WLR 1003, *The Queen (On the Application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, *Trafigura, supra*, n. 22.

focus on the nature of the foreign law. However, *section 12* is "considerably wider than the position at [English] common law"[209] at least in one sense. For the latter, the relevant factors are limited to the occurrence and the parties involved. *Section 12*, on the other hand, includes all factors which connect the tort to a country. However, this appears to suggest that policy considerations and state interests cannot be utilised by the courts in applying *section 12* as they are unrelated to the tort itself. The English common law position does appear to allow such considerations as can be seen in *Johnson v Coventry Churchill International Ltd*[210] where Kay QC was obviously influenced by the fact that English workmen would be best protected by English law under the circumstances of the case. Furthermore, he stressed that German law was uninterested in either of the parties, as both the employer and the employee are non-German citizens.

2. Once again, the threshold for the Australian public policy exception as well as the Ontario injustice exception is higher than that for the *section 12* exception as these are exceptions not lightly invoked by the Australian and Ontario courts. The application of these exceptions often amount to criticisms of a foreign law. It is clear there are no such problems in relation to the *section 12* exception. However, the threshold for its operation is still uncertain. We do know that both the flexible exception and the *section 12* exception require the "overwhelming weight of factors"[211] to be with the "country other than the one whose law is applicable under the general rule."[212] However, we do not know whether the two exceptions share exactly the same threshold. In particular, there are some doubts as to whether *section 12* could displace Maltese law with English law when applied to the facts of *Boys v Chaplin*. In particular, we do not know whether the statutory exception requires all the factors other than the place of the accident to point to the other country's law. It cannot be said that this is the case under the flexible exception as applied to the facts of *Boys v Chaplin* as "both parties were temporarily stationed in

---

[209] North, Fawcett, *supra*, n. 2, at 638.
[210] [1992] 3 All ER 14.
[211] North, Fawcett, *supra*, n. 2, at 643.
[212] *ibid*.

Malta and this was not a fortuitous place of injury."[213] Garland J in *Edmunds v Simmonds*[214] has stated that *Boys v Chaplin* is "still good law"[215] even in relation to the application of the *section 12* exception. In *Roerig v Valiant Trawlers Ltd,*[216] however, Waller LJ appears to suggest that the place of accident should be fortuitous before the *section 12* exception can be used.[217]

3. Finally, *section 12* can be used to apply a third country's law as can be seen from the wording of the section.[218] It is likely that this is the position under the English common law exception as well. In contrast, the Australian and Canadian exceptions do not permit the application of a third country's law.

3. EXAMINING THE NATURE AND EXTENT OF THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO TORT CHOICE OF LAW

From our analysis above, a break up of Commonwealth private international law in relation to tort choice of law has clearly occurred in our selected jurisdictions. In particular, the judiciaries in Australia and Canada have adopted the *lex loci delicti* as their tort choice of law rule with extremely limited exceptions. In England, the role of the English common law tort choice of law regime has been significantly reduced with the enactment of the *1995 Act*. It should also be noted that even though the Australian and Canadian courts have adopted the *lex loci delicti* rule as their tort choice of law rule, we have established that there is no uniformity between the tort choice of law regimes in Australia, and Canada. Singapore provides for an interesting contrast as her tort choice of law regime is still that provided for by the English common law. All the above would indicate that the phenomenon we are studying in this thesis in relation to tort choice of law has occurred to a large extent in our selected jurisdictions.

It is also important to note that the break up of this particular area of private international law

---

[213] *ibid.*
[214] [2001] 1 WLR 1003.
[215] *ibid*, at 1010.
[216] [2002] 1 All ER 961.
[217] *ibid*, at [12].
[218] Section 12(1)(b), *1995 Act*, "the significance of any factors connecting the tort or *delict* with *another country*." My italics.

in relation to our selected Commonwealth jurisdictions has not been a modern occurrence in that it has been going on for most of the last century. The common law tort choice of law regime in Australia, in particular has been moving towards and away from the English common law position. In other words, the extent of the Australian divergence from the English common law tort choice of law regime can be described as having fluctuated throughout the passage of time. The rest of this section will be used to illustrate this point.

3.1 AUSTRALIA

For Australia, even though the English common law *Phillips v Eyre* rule was adopted by the High Court of Australia at the beginning of the last century, there was no Australian uniformity with the English common law as divergences may have been generated by the Australian courts' rejection of the *Machado* interpretation at this early point in time. It is however important to note that these divergences were not in relation to the English common law tort choice of law rule itself but with regards to its interpretation, most notably the second limb of the *Phillips v Eyre* rule. There is also some indication that the Australian courts may have provided for a double actionability rule before the English courts in the later case of *Boys v Chaplin.* Accordingly, it is arguable that the break up of this particular area of private international law is not a recent phenomenon.

In 1971, the House of Lords in *Boys v Chaplin* held that the *Phillips v Eyre* rule was to be interpreted as a double actionability rule. An exception was also held to be applicable to this rule. It is thus possible to read this change in English law as a shift towards the Australian position in relation to the tort choice of law rule although, it must be noted there was no clear statement by the High Court of Australia that the *Phillips v Eyre* rule was to be applied as a double actionability rule. The statements supporting this interpretation in the past were *obiter.*

Even though there was no clear statement emerging from the High Court of Australia case of *Breavington* on the nature of the Australian tort choice of law rule, a majority of the Justices did reject the continued application of the *Phillips v Eyre* rule. However, in the subsequent

cases of *Steven v Head* and *McKain v Miller*, the double actionability rule was reinstated by the High Court of Australia. While this was certainly a convergence with the English common law tort choice of law rule, there was a divergence from the English common law exception to that rule, as the majority Justices in these two cases refused to adopt a flexible exception.

Finally, at the beginning of this century, the *Phillips v Eyre* rule was abandoned and replaced by a *lex loci delicti* rule in *Pfeiffer v Rogerson* and *Renault v Zhang*. Furthermore, the High Court of Australia refused to provide for a flexible exception to their tort choice of law rule. In particular, they held that no exception was applicable to inter-state torts and for international torts, only a public policy exception was available. Recently, another significant contribution was made by the High Court of Australia towards the break up of Commonwealth private international law in relation to tort choice of law when they held in *Neilson v Overseas Projects Corporation of Victoria Ltd* that *renvoi* is now part of their tort choice of law rule.

3.2 CANADA

For most of the last century, there was uniformity with the English common law position on tort choice of law in Canada as the *Phillips v Eyre* rule and the *Machado* interpretation were adopted by the Supreme Court of Canada. It should however be noted that there was some suggestion that the *Phillips v Eyre* rule in Canada at that time, was a threshold rule.

When *Boys v Chaplin* provided for a double actionability rule, there was a Canadian divergence from the English common law tort choice of law regime as the *Machado* interpretation was still binding on the Canadian courts due to its endorsement by the Supreme Court of Canada in *Mclean v Pettigrew*. The situation in Canada was then further complicated by the decision of the Ontario Court of Appeal in *Grimes v Cloutier* to provide for a two-tiered test to avoid the problems generated by the *Machado* interpretation. Despite these divergences, it is notable that the Canadian departure from the English common law position was in relation to the interpretation of the *Phillips v Eyre* rule rather than a rejection of that rule itself at this point in time.

In 1994, with the decision of the Supreme Court of Canada in *Tolofson v Jensen* to abandon the *Phillips v Eyre* rule for a *lex loci delicti* rule for both inter-provincial and international torts, it is clear that the English common law tort choice of law regime is no longer part of Canadian law. Furthermore, the flexible exception was rejected by the Supreme Court of Canada. In particular, it was held that an exception to the Canadian tort choice of law rule was only available for international torts. Some Canadian provincial courts have held that the *lex loci delicti* could be displaced for such torts only if its application resulted in injustice

It should also be noted that the Canadian tort choice of law regime is different from that of Australia's as *renvoi* does not appear to be part of the Canadian *lex loci delicti* rule. In addition, the courts of these jurisdictions have provided for different exceptions to the tort choice of law rule for international torts.

4. CONCLUSIONS

1. It is unclear whether unknown foreign torts can be examined under the Australian, Canadian, Singaporean and English common law tort choice of law regimes. In contrast, it is clear that unknown foreign torts can be characterised as "torts" for the purposes of the *1995 Act.*

2. In identifying the location of a tort, variations of a broad and discretionary test have been employed by the judiciaries in England, Canada and Australia. In relation to the *1995 Act*, two rules are relevant. A place of injury/damage rule is applicable to torts involving injury, death and property damage. For all other torts, a 'most significant element of the tort' test is used. For Singapore, the courts do not appear to have endorsed any general approach for the identification of the place of commission of the tort.

3. As for the tort choice of law rule, early in the development of tort choice of law in Australia and Canada, there have been divergences from the English common law interpretation of the *Phillips v Eyre* rule such as in relation to the second limb of that rule and its juridical nature. Most notably, the Australian courts may have interpreted *Phillips v Eyre* as providing for a double actionability rule decades before the decision of the House of Lords in *Boys v Chaplin.* In recent years, both Australian and Canadian courts have abandoned the *Phillips v Eyre* rule for the *lex loci delicti.* Likewise, the *1995 Act* has provided for a similar tort choice of law rule. It must however be noted that *renvoi* is part of the Australian tort choice of law rule while it is certainly not the case in relation to the *section 11* tort choice of law rule. This point has not yet arisen in the Canadian courts. In striking contrast, the double actionability rule is still the tort choice of law rule in Singapore.

4. It was only in the later part of the last century that a flexible exception was introduced by the House of Lords to the English common law double actionability rule. This exception was not popular with the Australian and Canadian superior courts and they refused to adopt this exception even when the *Phillips v Eyre rule* was still part of their laws. When the *lex loci delicti* rule was adopted in these jurisdictions, a distinction was drawn between intra-national and international torts. For both countries, no exception to their tort choice of law rule was available to intra-national torts. As for international torts, the English common law flexible exception was conclusively rejected by their highest courts. For Australia, only a public policy exception was held to be available whereas for Canada, there is authority for an injustice exception. Once again, Singapore has maintained its uniformity with the English common law with its adoption of the flexible exception. As for the *1995 Act,* the *section 12* exception is similar to the exception under the English common law.

5. In short, we can observe that Commonwealth tort choice of law in relation to our selected jurisdictions has been well and truly fragmented. In addition, we have also noted that the break up of this area of private international law is not a recent

occurrence as it has been going on early in the development of tort choice of law in some of our selected jurisdictions. In particular, the common law tort choice of law regime in Australia has been diverging and converging subsequently with the relevant English common law position throughout the last century.

CHAPTER 4: CONCLUDING REMARKS FOR PART I

The purpose of Part I of this thesis as was stated in Chapter 1 is to examine the question: what is the nature and extent of the break up of Commonwealth private international law with the use of two areas of private international law, namely *forum non conveniens* and tort choice of law in Australia, Canada, Singapore and England as illustrations of this phenomenon. Specifically, we were to work out whether this phenomenon had actually taken place in these jurisdictions and if it had, to what extent it had occurred. We have sought to answer these questions in Chapters 2 and 3 of this thesis.

Comparing our findings on *forum non conveniens* in Chapter 2 with that in relation to tort choice of law in Chapter 3, one point we can make with regards to the break up of Commonwealth private international law is that this phenomenon has clearly occurred in both our selected areas of private international law. The Australian courts have adopted a 'clearly inappropriate forum' test for their doctrine of *forum non conveniens* as opposed to the 'clearly more appropriate forum' test in Canada, England and Singapore. For tort choice of law, a number of our selected judiciaries have abandoned the English common law *Phillips v Eyre* rule for the *lex loci delicti*. Does this then mean that this phenomenon is happening in most, if not, all areas of Commonwealth private international law? With just two examples in our comparative study, more research is necessary to provide for a conclusive answer to this question.

Interestingly, when a comparison of the nature and extent of this phenomenon for tort choice of law and that for *forum non conveniens* in relation to our selected jurisdictions is undertaken, we can observe that there are no common elements between the two. In particular:

1. The break up of Commonwealth tort choice of law in our selected jurisdictions is greater than the corresponding phenomenon for *forum non conveniens*. As was mentioned above, the Australian and Canadian tort choice of law regimes are in

divergence from the relevant English common law position. Even between Australia and Canada, their laws on tort choice of law are not identical. Furthermore, in England herself, the influence of the English common law on this area of private international law has been significantly curtailed as a result of the enactment of the *1995 Act.* It is only Singapore that continues to adhere to the English common law tort choice of law regime.

In contrast, for *forum non conveniens,* only Australia has provided for a clear departure from the English common law doctrine of *forum non conveniens* with the adoption of the 'clearly inappropriate forum' test. Canada and Singapore, on the other hand have adopted the English common law 'clearly more appropriate forum' test. Even though there are divergences in these jurisdictions from the English common law doctrine of *forum non conveniens*, the 'clearly more appropriate forum' test has not been rejected for the adoption of a different test altogether which is the position in relation to the Australian doctrine of *forum non conveniens.* Instead, the divergences in Canada and Singapore are only in relation to the application of the 'clearly more appropriate forum' test, such as its structure and the sub-rules within it.

2. We have also observed that the break up of Commonwealth private international law in relation to tort choice of law in our selected Commonwealth jurisdictions has not been a linear process. In Chapter 3, we described the common law tort choice of law regime in Australia as being in a state of flux throughout its development as it has been moving towards and away from the English common law position. To illustrate, an initial divergence from the English common law *Phillips v Eyre* rule may have been generated by the High Court of Australia's disapproval of the *Machado* interpretation of that approach. There were also some judicial statements at that point in time, indicating that the Australian courts may have adopted a double actionability rule. In *Boys v Chaplin*, the *Machado* interpretation of the *Phillips v Eyre* rule was rejected and a double actionability rule was endorsed by the House of Lords thus indicating a possible shift by the English common law towards the Australian position. Yet, after a

number of years, the *Phillips v Eyre* rule was rejected by a majority of the High Court of Australia in *Breavington v Godleman*. This divergence was however short-lived as the double actionability rule was subsequently reinstated in *McKain v Miller* and *Stevens v Head*. Finally, in the recent cases of *Pfeiffer v Rogerson, Renault v Zhang* and *Neilson v Overseas Projects Corporation of Victoria Ltd*, the *lex loci delicti* was adopted as the Australian tort choice of law rule, thus indicating an Australian departure from the English common law tort choice of law regime.

In comparison, the nature of the break up of Commonwealth private international law in relation to *forum non conveniens* in our selected Commonwealth jurisdictions has been relatively straightforward in that we have not seen much movements of the relevant law in these countries back towards the English common law position after an initial divergence. However, this is not to say that there has been no shift back towards the English common law in our selected jurisdictions. In particular, the High Court of Australia has rejected the view that the test relating to the transfer of proceedings within Australia under the *Cross-vesting Acts* is the 'clearly inappropriate forum' test. Instead, they have held that it is analogous to the 'clearly more appropriate' forum test.

3. We have noted in Chapter 3 that the break up of Commonwealth tort choice of law regimes has not been a recent occurrence in that it has been going on for most of the last century. One illustration of this is the hostility displayed by the High Court of Australia towards the *Machado* interpretation of the *Phillips v Eyre* rule at the beginning of the 20th century.

In contrast, our selected judiciaries do not appear to have called for the introduction of a *forum non conveniens* approach for stays of proceedings at a time when the English common law position was still the 'oppressive and vexatious' test in *St Pierre*. The break up of this area of private international law only occurred after the decision of the House of Lords in the 1980s to introduce a 'clearly more appropriate forum'

test.

Extrapolating from the comparison above, it is possible to suggest that the break up of Commonwealth private international law is a complex process in that the nature and extent of this phenomenon in one area of private international law may be different from that of another.

Now that we have addressed the question of how the break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law has occurred, we will proceed in the next part of this thesis to examine the explanations from the cases for this phenomenon.

PART II: WHAT ARE THE EXPLANATIONS FROM THE CASE LAW FOR THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

CHAPTER 5: EXPLANATIONS FOR THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO THE DOCTRINE OF *FORUM NON CONVENIENS*

1. INTRODUCTION

In Chapter 2, we established the existence of a break up of Commonwealth private international law in relation to the doctrine of *forum non conveniens* in England, Australia, Canada and Singapore as well as its nature and extent. The next question we must address is: why has this phenomenon occurred?

Looking at the relevant judgments, we can observe that the judges of our selected jurisdictions have been influenced by a number of policies, concepts and other wider considerations in their decisions on *forum non conveniens*. In this situation, our judiciaries may not treat these considerations in the same way. To illustrate, a policy may be utilised in one jurisdiction but not in others as our judiciaries may disagree on whether that consideration should have an impact on their doctrine of *forum non conveniens.* Even if the same concepts such as comity, forum shopping and justice were used by these courts in the formulation of their *forum non conveniens* test, the rules that emerge might not be the same. This is because the weight accorded to each of these considerations may be different in each jurisdiction. In addition, the reaction of our selected judiciaries to these policies and concepts may not be identical. Delving in further, the manner in which courts are influenced by their economic, social and political context can have a powerful effect on the determination of which of these policies or concepts may be employed, the strength of their usage and how they are to work with one another. Again, this interaction between considerations may not be the same in our selected jurisdictions.

Arguably, if our selected judiciaries did not provide for the same treatment of these considerations as illustrated above, they might formulate different *forum non conveniens* approaches. There

would thus be a break up of this particular area of Commonwealth private international law. To confirm this hypothesis, a systematic analysis of the specific explanations underlying the decisions of the courts in our selected jurisdictions to diverge from or converge with the English common law doctrine of *forum non conveniens* is required. The relevant considerations are as follows:

2. Policy explanations

2.1 Judicial chauvinism and the litigant's right of access to the courts

2.2 Litigant's right of access to the courts versus the prevention of forum shopping

2.3 Equal justice and the litigant's right of access to the courts

2.4 Certainty versus flexibility

3. Structural explanations

3.1 Interaction with other areas of private international law: bases of jurisdiction

3.2 Interaction with public international law: comity

4. Historical and comparative explanations

4.1 Historical influence of English judicial precedents

4.2 Comparative influence of foreign doctrines of *forum non conveniens*

5. Contextual explanations

5.1 Social and economic context

5.2 Political context

Each of these considerations will first be looked at in their own designated sub-sections. Specifically, we will examine how they have been utilised by the courts in England, Australia, Canada and Singapore in relation to their *forum non conveniens* tests. After each consideration has been discussed, we will move on to address the complex interaction that goes on between concepts, policies and other wider considerations in each of our selected jurisdictions in a separate section.

2. POLICY EXPLANATIONS

2.1 JUDICIAL CHAUVINISM AND THE LITIGANT'S RIGHT OF ACCESS TO THE COURTS

Historically, English courts have espoused the view that the litigant's "right of access to the Queen's court must not be lightly refused"[1] as "[n]o one who comes to these courts asking for justice should come in vain."[2] If a "plaintiff [came] into an English court,"[3] that court would be bound "not to refuse to hear his case, or to put him under difficulties in the way of having his action brought to a conclusion"[4] as it would be an "inadequate performance"[5] of the court's duty to say, "You can to our way of thinking get perfectly satisfactory justice elsewhere."[6]

---

[1] *The Atlantic Star* (HL) [1974] AC 436, at 453.
[2] *The Atlantic Star* (CA) [1973] QB 364, at 381-382.
[3] *Peruvian Guano Co v Bockwoldt* (1883) 23 ChD 225, at 233.
[4] *ibid.*
[5] *The Atlantic Star* (HL), *supra,* n. 1, at 471 per Lord Morris (dissenting).
[6] *ibid.*

However, no matter how noble the statement "to no one will we deny justice"[7] may sound, it is not difficult to work out that the English courts are effectively providing for a "presumption in favour of English justice;"[8] that they are the best forum for the resolution of legal disputes irrespective of how tenuous the connection may be between the litigant/dispute and the forum. This is unsurprising as for most of the 20th century the dominant English judicial view was that "English justice is superior to that administered in other countries and so ought not to be denied even to foreigners."[9] In other words, the declaration that the claimant has a right of access to the English courts may be nothing more than a façade for the "parochial or nationalist"[10] attitudes of the English courts. The result of all this was the approach in *St Pierre v South American Stores Ltd*:[11] that a stay of proceedings would only be granted if the defendant could show that there had been an abuse of that right by the claimant such that there would be injustice done to the defendant.[12]

As time passed, English courts began to regard the *St Pierre* approach as chauvinistic. In *The Atlantic Star*,[13] Lord Reid criticised the *St Pierre* test as recalling the "good old days...when inhabitants of this island felt an innate superiority over those unfortunate to belong to other races."[14] He considered it to be "insular"[15] and thus advocated for a more liberal interpretation of the phrase "oppression and vexation."[16] To him, "there is no injustice in telling a plaintiff that he should go back to his own courts"[17] as the English "system of administration of justice"[18] was no longer "superior to that in most other countries."[19] Similarly, in *The Abidin Daver*,[20] Lord Diplock stated that "judicial chauvinism has been replaced by judicial comity"[21] to such an extent that it was time to admit that the English common law legal regime on the stay of proceedings is now

---

[7] *ibid*, at 472 per Lord Morris (dissenting).
[8] Weiler, *Forum Non Conveniens – An English Doctrine?* (1978) 41 Modern Law Review 739, at 742.
[9] Schuz, *Controlling Forum-Shopping: The Impact of MacShannon v Rockware Glass Ltd* (1986) 35 International and Comparative Law Quarterly 374.
[10] Pryles, *Internationalism in Australian Private International Law* [1989-1990] 12 Sydney Law Review 96, at 106.
[11] [1936] KB 382.
[12] *ibid*, at 398.
[13] [1974] AC 436.
[14] *ibid*, at 453.
[15] *ibid*.
[16] *ibid*, at 454.
[17] *ibid*.
[18] *ibid*.
[19] *ibid*.
[20] [1984] 1 AC 398.
[21] *ibid*, at 411.

"indistinguishable from the Scottish legal doctrine of *forum non conveniens*."[22] The House of Lords in the landmark case of *Spiliada Maritime Corporation v Cansulex Ltd*[23] has also endorsed this view by confirming that a stay of proceedings would only be granted if the 'clearly more appropriate forum' test were satisfied.[24]

It is important to note that there has been no complete shift away from judicial chauvinism under the English common law doctrine of *forum non conveniens* as there would still be a presumption that the action would be fought in England if the claimant could invoke the jurisdiction of the English courts as of right. The English courts may no longer be implying that the English forum is a perfectly good place to litigate claims regardless of the factors connecting the dispute to England. However, the current position would still be parochial in the sense that "if there [were] no other country which [could] be regarded as being the natural forum for trial,"[25] the English court would be automatically regarded as the natural forum for the dispute.

Overall, we can observe that there has been an English common law movement away from judicial chauvinism in recent years. Accordingly, the purpose of this subsection is to determine whether the views of our selected Commonwealth judiciaries on this matter have contributed to the divergences and convergences in relation to their doctrines of *forum non conveniens* as discussed in Chapter 2.

2.1.1 Australia

In the High Court of Australia case of *Oceanic Sun Line Special Shipping Co Inc v Fay*,[26] there was no consensus amongst the Justices on the policy of discouraging judicial chauvinism. Wilson and Toohey JJ were in agreement with the House of Lords that the protection accorded to the litigant's right of access to the English courts under the *St Pierre* test is chauvinistic and

---

[22] *ibid.*
[23] [1987] AC 460.
[24] *ibid*, at 477.
[25] Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations* (1989) 9 Oxford Journal of Legal Studies 205, at 217.
[26] (1988) 165 CLR 197.

should be abandoned.[27] In striking contrast, Brennan J opined that the true principle that should govern Australian law on the stay of proceeding is that provided for by Lord Simon in his dissenting judgment in *The Atlantic Star* that: "a plaintiff who founds jurisdiction will not be denied a hearing unless he is misusing the forensic process so as to perpetrate injustice."[28] In response to criticisms that support for the claimant's right of access to the Australia courts is "chauvinistic,"[29] Brennan J countered by stating the "law applied in many other countries preserves local jurisdiction even more jealously"[30] and that if the Australian judiciary were "confident of the quality of justice administered in Australian courts, there would be no reason why [they] should defer to other *fora*, who have it within their power to grant or refuse recognition to and enforcement of the judgments of Australian courts according to their municipal laws."[31] He thus supported the continued application of the *St Pierre* test.[32]

In yet another contrast, even though Deane J stated that it is a "basic tenet of [Australian] jurisprudence that, where jurisdiction exists, access to the courts is a right"[33] and that "it is not a privilege which can be withdrawn otherwise than in clearly defined circumstances,"[34] he went on to adopt a broader definition of oppression and vexation; the approach provided for by the English courts at the early stages of the English common law shift away from the *St Pierre* test towards the *Spiliada* approach. This is clearly a weakening of the litigant's right of access to the Australian courts as can be contrasted with Brennan J's reasoning above. In addition, unlike Brennan J, there was no response from Deane J on the criticism that judicial adherence to such a right is nothing more than judicial chauvinism. Could it be that Deane J has some sympathy for the argument that the *St Pierre* approach is parochial but not to the extent of abandoning the test altogether? His decision for a 'clearly inappropriate forum' test instead of the *St Pierre* test may

---

[27] *ibid*, at 212.
[28] *ibid*, at 239.
[29] *ibid*, at 240.
[30] *ibid*.
[31] *ibid*.
[32] For criticism of this position as chauvinistic, see for example, Pryles, *Judicial Darkness on the Oceanic Sun* (1988) 62 Australian Law Journal 774, at 782, Briggs, *Wider Still and Wider: The Bounds of Australian Exorbitant Jurisdiction* (1989) 2 Lloyds Maritime and Commercial Law Quarterly 216, at 222.
[33] *Oceanic Sun, supra*, n. 26, at 252.
[34] *ibid*.

be a compromise between the protection of a litigant's right of access to the Australian courts and the rejection of judicial chauvinism altogether.[35]

The above uncertainty was eventually resolved in the case of *Voth v Manildra Flour Mill Pty*[36] with the High Court of Australia's endorsement of Deane J's 'clearly inappropriate forum' test. In particular, the appellant's argument that the replacement of judicial chauvinism with judicial comity requires the application of a 'clearly more appropriate forum' test was rejected as having "little force."[37] However, as it is Deane J's 'clearly inappropriate forum' test that is endorsed by the High Court rather than the *St Pierre* approach,[38] this may be an indication that the High Court is not taking the extreme stance provided for by Brennan J in *Oceanic Sun.*

In short, it is arguable that the High Court of Australia does not wish to embrace wholeheartedly the English common law shift away from the parochial *St Pierre* test. Instead, they prefer a compromise position i.e. the 'clearly inappropriate forum' test to a broader doctrine of *forum non conveniens* as represented by the English common law 'clearly more appropriate forum' test.

2.1.2 Canada and Singapore

In contrast to the Australian position, Canadian and Singaporean judges are in agreement with the English common law view that the law on stays of proceedings should not give effect to judicial chauvinism. In *Amchem Products Inc v British Columbia (Worker's Compensation Board),*[39] Sopinka J criticised the basis of the *St Pierre* approach that on the grounds that in a climate where litigation is increasingly internationalised, "courts have had to become more tolerant of the systems of other countries."[40] The "parochial attitude...that the substantial ends of justice would require that this Court should pursue its own better means of determining both the

---

[35] Thankfully, Gaudron J, the final judge on the case proceeded on a different line of analysis and ventured forth no discernible view on this matter.
[36] (1990) 171 CLR 538.
[37] *ibid*, at 560.
[38] *ibid.*
[39] [1993] 1 SCR 897.
[40] *ibid*, at [25].

law and the fact of the case is no longer appropriate"[41] in such conditions. Similarly, the Singapore Court of Appeal in *Eng Liat Kiang v Eng Bak Hern*[42] chose to endorse the English common law doctrine of *forum non conveniens* as it "[cuts] down local parochialism as regards judicial adjudication."[43] Accordingly, this is one explanation for the Canadian and Singaporean adoption of a 'clearly more appropriate forum' test.

It is important to note that the pronouncements in the highest courts of these two jurisdictions that there is a presumption of trial in the forum in question unless the defendant can establish a clearly more appropriate forum elsewhere leads one to question the extent to which judicial chauvinism can be said to have been eradicated in relation to their doctrines of *forum non conveniens*. Similar to the English common law position, there is no complete shift away from judicial parochialism with regards to this area of private international law.

2.2 LITIGANT'S RIGHT OF ACCESS TO THE COURTS VERSUS THE PREVENTION OF FORUM SHOPPING

What is forum shopping? In a neutral sense, a claimant is said to be shopping for a forum when he has the option of bringing his action in a number of jurisdictions and he chooses the one venue which provides him with the most favourable outcome.[44] This phenomenon largely stems from a lack of uniformity "in terms both of internal laws and choice of law rules and the procedural rules developed by different countries to facilitate the enforcement of these laws"[45] as well as the legal climate of a particular jurisdiction such as the "speed and mode of litigation,"[46] and "the quality and ability of the judiciary and the legal profession."[47]

---

[41] *ibid.*
[42] [1995] 3 SLR 97.
[43] *ibid*, at 105. See also, *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494, at [14] – [18].
[44] Law Commission Working Paper No. 87 (1984), at para. 3.14.
[45] Bell, *Forum Shopping and Venue in Transnational litigation*, Oxford Private International Law Series (Oxford: Oxford University Press) (2003), at para. 2.07.
[46] *ibid*, at para 2.04.
[47] *ibid.*

In England, respect has historically been accorded to the claimant's choice of forum to the extent that it is "often couched in terms of a right."[48] A claimant is said to have "the right to bring an action"[49] and that correspondingly, the English courts have a duty "to award him the redress to which he is entitled."[50] One consequence of this right is that it encourages litigants to engage in forum shopping. This is because, "even though the parties and the case [have] no connection with England"[51], so long as a writ can be served on the defendant within that jurisdiction, the claimant will be able to bring an action against him as a matter of right.

In the past, the claimant was also aided by the rule that a stay of proceedings would only be granted if the defendant could establish that the continuation of those proceedings would be vexatious or oppressive. As the words 'oppressive' and 'vexatious' "connote a lack of bona fides or an improper motive on the part of the plaintiff,"[52] a defendant would "rarely [be] able to bring the plaintiff's conduct within the scope of one of these grave allegations even if there [were] blatant forum shopping."[53] Accordingly, if a claimant were of the view that litigation in an English court offered him certain procedural and substantive advantages, he could easily bring an action against the defendant there despite the lack of connecting factors. Furthermore, so long as the litigant could invoke the jurisdiction of the English courts, it was said that the courts had "no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage."[54] This was reflected in the English common law rule that if there were some procedural or substantive advantage to the claimant deriving from his action in the English courts, "it [would] not [be] right for the other party to say that the bringing of it is vexatious and oppressive as against him."[55]

---

[48] *ibid*, at para. 3.74.
[49] *Peruvian Guano Co, supra*, n. 3, at 230.
[50] *The Atlantic Star* (CA), *supra*, n. 2, at 381 per Lord Denning MR.
[51] Pryles, *supra*, n. 10, at 124.
[52] Schuz, *supra*, n. 9, at 377.
[53] *ibid*.
[54] *Peruvian Guano Co*, *supra*, n. 3, at 234.
[55] *Hyman v Helm* (1883) LR 24 ChD 531, at 538.

It can thus be observed that forum shopping for both procedural and substantive advantages was regarded as an acceptable practice implicitly "sanctioned"[56] by the English courts as "a plaintiff could resist an application for a stay of proceedings by demonstrating the efficacy of its forum shopping expedition."[57] In fact, some judicial statements have indicated that English judges were positively encouraging such litigant behaviour, the most notorious of these being, Lord Denning's declaration at the Court of Appeal stage of *The Atlantic Star*[58] that:

> "[n]o one who comes to [the English] courts asking for justice should come in vain...You may call this "forum shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."[59]

However, as time passed, English judges began to find such behaviour "undesirable"[60] and this led them to weaken the claimant's right of access to the English courts thus resulting in a shift towards the identification of the natural forum as the basis for their laws on stays of proceedings. That being said, not all the jurisdictions in our comparative study share the same hostility towards forum shopping. It is thus the purpose of this subsection to examine the treatment of this policy in our selected Commonwealth jurisdictions.

2.2.1 Australia

The formulation of the doctrine of forum non conveniens

Only Toohey and Wilson JJ in *Oceanic Sun* highlighted the problem of forum shopping as a result of applying the *St Pierre* approach. As for the rest of the judges, this critique of the *St Pierre* test was not mentioned in their decision to reject the formulation of the English common law doctrine

---

[56] Bell, *supra*, n. 45, at para. 3.74.
[57] *ibid.*
[58] [1973] QB 364.
[59] *ibid*, at 381-382.
[60] *The Atlantic Star* (HL), *supra*, n. 13, at 454.

of *forum non conveniens*. This is unsurprising bearing in mind the strong support of Brennan and Deane JJ for the policy of allowing "any plaintiff bona fide seeking relief to have unrestricted access to the seat of judgment."[61] In other words, the implication here is that they have opted to protect the litigant's right of access to the Australian courts rather than to discourage his forum shopping. Similarly, in *Voth* and *Renault v Zhang*,[62] none of the majority Justices made any mention of the policy of discouraging forum shopping.

However, it is important to note that a vocal minority of the High Court of Australia has continued to voice out support for the policy of discouraging forum shopping. Take for example, *Renault v Zhang*. Kirby J in dissent expressed his desire that "[o]ne day *Voth* may be overruled"[63] on the ground that it increases forum shopping. Similarly, Callinan J indicated his dislike for the *Voth* approach by pointing out that the "deterrence of forum shopping"[64] requires that in general, suits should not be determined in a jurisdiction which has, with respect to the relevant events, no real connexion with the defendant. To him, "[t]he days have passed since a judge of a common law country"[65] could declare his support for forum shopping the way Lord Denning did in *The Atlantic Star*.

In short, a fierce debate is raging in the ranks of the High Court of Australia as to which policy should be utilised in the formulation of their rules on stays of proceedings. For now, it is the proponents of the litigant's right of access to the Australian courts who have prevailed.

Juridical advantages

In Australia, judicial preference for the policy of protecting the claimant's right of access to the Australian courts instead of the policy of discouraging forum shopping has also resulted in differences between England and Australia on the treatment of juridical advantages. In particular,

---

[61] *Oceanic Sun, supra*, n. 26, at 233.
[62] (2002) 187 ALR 1.
[63] *ibid*, at [96].
[64] *ibid*, at [194].
[65] *ibid*.

Australian lower courts, in applying the 'clearly inappropriate forum' test have a tendency of denying an application for a stay of proceedings if the claimant could establish the loss of a legitimate juridical advantage. As was mentioned above, this would encourage litigants to bring their actions in the Australian courts if certain procedural or substantive advantages were available to them in that forum. This is no longer the case under the English common law.

It is interesting to note that the Australian position on juridical advantages was heavily criticised in the case of *Goliath Portland Cement Company Ltd v Bengtell.*[66] In particular, counsel for Goliath challenged the "contention that the availability of a more favourable limitation law in New South Wales was a legitimate personal or juridical advantage"[67] upon which Mr Bengtell could rely on for his case on the grounds that such an approach would encourage forum shopping. In particular, forum shopping was criticised in the following terms:

> "There can be no rule of law without certainty as to the rights and obligations of persons under the law. If different consequences could flow from the uncontrolled privilege of a party to bring proceedings in different jurisdictions of Australia, this would inject a high measure of uncertainty into the law...It would diminish the predictability of the application of the law to particular facts. It would interfere in the capacity of parties and their insurers to organise their affairs in a rational manner...It would effectively destroy decisional harmony and put a premium on legal inventiveness in invoking jurisdictions having no other connection or relevance save for a beneficial limitation or other procedural regime."[68]

---

[66] (Unreported, New South Wales Court of Appeal, 13 May 1994).
[67] *ibid.*
[68] *ibid.*

Counsel for Mr Bengtell then responded by asserting that it was the "privilege of the plaintiffs to sue Goliath ...anywhere in Australia they chose;"[69] an argument that flows from *Voth's* emphasis on the claimant's choice of forum.

Interestingly, Kirby P of the New South Wales Court of Appeal (as he then was) was sympathetic to Goliath's arguments. He had earlier pointed out in a pre-*Voth* case that "the prospect of forum shopping with success of the plaintiff's endeavour would clearly encourage is one which common law principle...should discourage or even defeat."[70] He was also of the view that the *Spiliada* principles with its identification of the natural forum should be endorsed for that very principle. However, as he was bound by the decision of the High Court in *Voth*, he held that he had no choice but to adopt a test which is "less favourable to an applicant such as Goliath and more favourable to the maintenance of asserted jurisdiction."[71]

Intra-Australian disputes: section 5(2)(b)(iii) of the Cross-vesting Act

Under the cross-vesting legislation as enacted in each State of Australia, the "personal jurisdiction of each State Supreme Court is cross-vested in every other State Supreme Court."[72] One problem that may arise from such a scheme is the danger of forum shopping for "[i]f the Supreme Court of State X had the jurisdiction of the Supreme Court of State Y, why not institute proceedings there in pursuit of some real or imaginary advantage, notwithstanding that the dispute as such bore no relation to State X?"[73] The Australian Parliaments were aware of this problem as *section 5(2)* of the *Cross-vesting Act* which provides for the circumstances in which the Supreme Court of one Australian State or Territory can transfer proceedings to another such Supreme Court, was introduced to address this issue.

---

[69] *ibid.*
[70] *ibid.*
[71] *ibid.*
[72] Tilbury, Davis, Opeskin, *Conflict of Laws in Australia* (South Melbourne: Oxford University Press) (2002), at 485.
[73] *Bankinvest AG v Seabrook* (1988) 92 FLR 153, at 165.

In particular, in the explanatory memorandum to each State Act, it is stated that courts would need to be "ruthless in the exercise of their transferral powers to ensure that litigants do not engage in forum-shopping by commencing proceedings in appropriate courts."[74] In the *Report of the Advisory Committee to the Constitutional Commission on the Australian Judicial System,* it has also been pointed out that "transfer and removal provisions will ensure that cases are heard in the court in whose ordinary jurisdiction they belong"[75] and that the "aim of the cross-vesting provisions"[76] is not to "give litigants a free choice of forum for initiating proceedings."[77] In other words, the purpose of the transfer provisions is to locate the most appropriate forum for the dispute in question rather than to protect the claimant's choice of forum.

As was discussed in Chapter 2, initially, the Australian lower courts were not in agreement on the nature of the discretion under *section 5(2)(b)(iii)* of the *Cross-vesting Act*, where proceedings could be transferred if it were in the interests of justice to do so. One explanation for this lack of unanimity is a judicial disagreement as to whether the "litigant invoking the jurisdiction had an entitlement and the court had a corresponding obligation to exercise jurisdiction."[78]

On the one hand, Rogers A-JA of the New South Wales Court of Appeal held in the case of *Bankinvest AG v Seabrook*[79] that there is no "*prima facie* presumption that the court, the jurisdiction of which was properly invoked, should exercise it"[80] with regards to *section 5(2)* of the *Cross-vesting Act*. The consequence of the warning against forum shopping in the legislative material leading up to the enactment of the Act was that full effect should be given by the courts to the "imaginative and detailed code for ensuring that throughout Australia disputes are dealt with by the one court and that be the court most appropriate for the particular dispute."[81]

---

[74] Commonwealth of Australia, *Parliamentary Debates*, HR 2556 (Oct. 22 1986).
[75] *Report of the Advisory Committee to the Constitutional Commission on the Australian Judicial System*, (1987), at para. 3.113.
[76] *ibid.*
[77] *ibid.*
[78] *Bankinvest, supra,* n. 73, at 167.
[79] (1988) 92 FLR 153.
[80] *ibid*, at 167.
[81] *ibid*, at 166.

Accordingly, he went on to hold that the *Voth* approach should "have no role to play in the resolution of applications made under the legislation or in its interpretation."[82]

On the other hand, the Supreme Court of the Australian Capital Territory in the case of *Waterhouse v Australian Broadcasting Corporation*[83] chose to base the discretion under *section 5(2)(b)(iii)* on the "plaintiff's undoubted right to bring his action in this Court"[84] thus providing for the application of the *Voth* test to the *Cross-vesting Act.* Furthermore, they suggested that in the context of an inter-state dispute, a claimant could not be said to have been forum shopping due to the close ties of the states and territories within the Australian Federation.[85]

For a while, there was uncertainty in this area of the law in Australia. Thankfully, in the recent High Court of Australia case of *BHP Billiton Ltd v Schultz*[86] the issue was put to rest with the endorsement of the reasoning of the New South Wales court in *Bankinvest* by the majority Justices.[87] In particular, they reasoned that the "starting point for a consideration of a transfer application under the *Cross-vesting Act*"[88] is not the "Australian *forum non conveniens* approach, which begins from the premise that a court whose jurisdiction has been regularly invoked needs to justify a refusal to exercise that jurisdiction."[89] The basis for this is that *section 5(2)* of the *Cross-vesting Act* "assumes the regular invocation of jurisdiction"[90] and accordingly, this act itself "does not favour the disposition of a transfer application by refusing it on the basis that to allow it could not be in the interests of justice."[91] Instead, the court is "simply applying a statute without any kind of presumption as to where the balance of the interests of justice might come down."[92]

---

[82] *ibid.*
[83] (1989) 86 ACTR 1.
[84] *ibid*, at 18.
[85] *ibid*, at 17.
[86] [2004] HCA 61.
[87] *ibid*, at [13] - [14].
[88] *ibid*, at [25].
[89] *ibid.*
[90] *ibid*, at [72].
[91] *ibid.*
[92] *ibid*, at [25].

Specifically, Gummow J pointed out that the *Second Reading Speech* and the preamble to the *Cross-vesting Act* indicate that "the State Parliament in enacting the *Cross-vesting Act*, in particular the provisions of s5, was concerned to provide a means of ensuring that, by use of the transfer mechanism, proceedings be dealt with by the appropriate court."[93] Accordingly, he stated that *section 5* of the *Cross-vesting Act* "does not manifest a legislative policy in favour of any species of forum shopping...which it is for defendants to displace on a transfer application."[94]

Callinan J stated that the first paragraph of the recital to the *Cross-vesting Act* identifies the consequences of forum shopping, namely that the Act is enacted to prevent "inconvenience and expense"[95] that has "occasionally been caused to litigants by jurisdictional limitations in federal State and Territory courts."[96] To him, it is clear that "the legislature did, in enacting the *Cross-vesting Act*, indicate that it regarded forum shopping as an evil."[97] Subsequently, he opined that there "should be no presumption in litigation in favour of any party"[98] and that "it is wrong to say that proceedings should be conducted in the, or indeed any Tribunal because a plaintiff, or for that matter a defendant, is likely to have a better chance of winning or more easily winning there."[99] Accordingly, he held that the concept of the natural forum should be utilised in the interpretation of the statutory requirements for the transfer of proceedings under the Act.

Therefore, one may argue that it is the replacement of the policy of protecting the litigant's right to bring an action in the Australian courts with the policy of discouraging forum shopping that has resulted in this particular shift towards the English common law *Spiliada* approach.

---

[93] *ibid*, at [72].
[94] *ibid*.
[95] *ibid*, at [216].
[96] *ibid*.
[97] *ibid*, at [217]
[98] *ibid*, at [258].
[99] *ibid*.

2.2.2 Canada

The formulation of the doctrine of forum non conveniens

In *Amchem*, Sopinka J pointed out that the law on stays of proceedings "has become of increasing modern importance as a result of factors including the greater ease of communication and travel; the tendency of courts in many countries to extend their jurisdiction over events and persons outside their territory; and a greater awareness of foreign laws and procedures."[100] In such circumstances, it is not surprising that there has been an increase in the frequency of litigants engaging in forum shopping. He was clearly opposed to such litigant behaviour as he stated that even in such an environment, this does not "mean, however that forum shopping is now to be encouraged."[101] Instead, he held that the choice of the appropriate forum is to be made on the "basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate."[102] In other words, Canadian courts are to search for the natural forum for the dispute in question: "one with which the action has the most real and substantial connection."[103]

Effectively, this is the approach adopted by the English courts to counter the undesirable problem of forum shopping: to "draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends."[104]

> "In the former, the plaintiff should not be driven from the judgment seat without very good reason, but in the latter, the plaintiff should ... be expected to offer

---

[100] *Amchem, supra,* n. 39, at [2].
[101] *ibid,* at [26].
[102] *ibid.*
[103] *ibid,* at [33].
[104] *The Atlantic Star* (HL), *supra,* n. 13, at 454.

> some reasonable justification for his choice of forum if the defendant seeks a stay. If both parties are content to proceed here there is no need to object."[105]

In short, one explanation for the Canadian adoption of the 'clearly more appropriate forum' test is that Canadian courts are in agreement with the English courts' view that forum shopping must be controlled.

Juridical advantages

Under the Canadian doctrine of *forum non conveniens*, juridical advantages would be relevant to the identification of the natural forum if the dispute in question had a real and substantial connection with a forum. The explanation for this approach is that "[i]f a party [sought] out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction"[106] his actions would be condemned as forum shopping. If on the other hand, there were a real and substantial connection between the case and a forum, the claimant would have a "legitimate claim to the advantages that that forum provides"[107] as in such circumstances, the claimant would have a "reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages [would] be available."[108] In contrast, the English courts have held that juridical advantages cannot be taken into account in the application of the *Spiliada* test unless the loss of such advantages to the claimant would bring about substantial injustice.

Why did Sopinka J provide for a departure from the English common law approach on juridical advantages? One suspects that the answer lies in his interpretation of the second stage of the *Spiliada* test. As was highlighted in Chapter 2, he appears to have read Lord Goff's decision in *The Spiliada* as allowing judges to take into account juridical advantages in determining whether

---

[105] *ibid.*
[106] *Amchem, supra,* n. 39, at [37].
[107] *ibid.*
[108] *ibid.*

a stay of proceedings should be granted. However, Lord Goff has actually held that it is only if the loss of a juridical advantage caused substantial injustice to the claimant that a stay would be denied. Accordingly, as Sopinka J was of the view that juridical advantages can be taken into account under the doctrine of *forum non conveniens*, a 'real and substantial connection' test is required to ensure that the litigant is not forum shopping. It is thus submitted that it is the combination of a concern for forum shopping and the misinterpretation of the *Spiliada* test that has resulted in this particular Canadian divergence.

2.2.3 Singapore

The only indication that the policy of preventing forum shopping is an explanation for the Singapore adoption of the English common law doctrine of *forum non conveniens* is in the case of *Eng Liat Kiang* where the Singapore Court of Appeal implicitly accepted the submissions of the counsel that *Spiliada* was formulated to "prevent forum shopping when the parties had little or no connection with the forum in which the case was brought."[109]

2.3 EQUAL JUSTICE AND THE LITIGANT'S RIGHT OF ACCESS TO THE COURTS

One criticism of a judicial adherence to the policy of protecting a claimant's right of access to the court he decides to bring his action in as well as the consequence that it has of encouraging forum shopping under the *St Pierre* approach is its "pro-claimant bias."[110] To elaborate, judicial support for such a policy creates inequality between the parties in that the plaintiff is able to "unilaterally ... enhance his prospects of success by his choice of forum"[111] as he is not to be denied his right to sue in the chosen forum. As a "matter of abstract justice,"[112] it seems "intuitively offensive to notions of procedural fairness that the action goes for trial in the

---

[109] *Eng Liat Kiang, supra,* n. 42, at 105.
[110] Fawcett, *supra,* n. 25, at 218.
[111] Bell, *supra,* n. 45, at para. 3.86.
[112] *ibid.*

country thus selected by the plaintiff...[who] chooses the country which suits him best."[113] Furthermore, it is also "unfair to defendants, who may be put to unwarranted expense and inconvenience in defending actions brought somewhere other than the 'natural' forum of the dispute."[114]

Accordingly, the objective of this sub-section is to determine whether this critique of the *St Pierre* test has had an influence on the development of *forum non conveniens* in our selected jurisdictions. In particular, it can be observed that there is some judicial agreement with this policy of ensuring greater equality between litigants in some Commonwealth jurisdictions but not in others. As a preliminary note, no mention was made of this formulation of justice in the decision of the Singapore courts to adopt the English common law doctrine of *forum non conveniens.*

2.3.1 Canada

There is some judicial support for this formulation of justice in the Canadian cases as it was pointed out by Sopinka J in *Amchem* that the "choice of the appropriate forum"[115] is not to be made in order "to secure a juridical advantage to one of the litigants at the expense of others."[116] Rather, it is to be identified on an objective basis: to ensure that the case is tried in the "jurisdiction that has the closest connection with the action and the parties."[117] We can observe that the language used by the Canadian courts here is similar to that utilised by the English courts.

In particular, the adoption of a doctrine of *forum non conveniens* by the House of Lords can be said to be an attempt to address the pro-claimant imbalance inherent in the *St Pierre* test. This is done by providing for the identification of the "appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the *interests of all the parties* and the ends of

---

[113] *ibid.*
[114] Guthrie, *'A Good Place to Shop': Choice of Forum and the Conflict of Laws* (1995-1996) 27 Ottawa Law Review 201, at 207.
[115] *Amchem, supra,* n. 39, at [26].
[116] *ibid.*
[117] *ibid.*

justice"[118] and not just for the benefit of the litigant who is the first to initiate the action. Specifically, it was stated by Lord Goff in *The Spiliada*, "simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in *Sim v Robinow*;"[119] an important Scottish case on *forum non conveniens*. This is because an approach that enables the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in England to be decisive in the court's decision to grant a stay of proceedings cannot be seen as "endeavouring to conciliate and promote the interests of both [antagonists]."[120] This formulation of justice was further confirmed by Lord Goff yet again in the case of *De Dampierre v De Dampierre*[121] where he held that the purpose of the *Spiliada* principle is to "assess the *balance of fairness as between the parties*, in order to consider whether it is appropriate for a stay to be granted."[122] Effectively, one can observe that that it is a policy of ensuring greater equality between litigants that has shaped the formulation of the doctrines of *forum non conveniens* in Canada and England.

However, it is important to note that there is no equal justice between claimants and defendants as the doctrine of *forum non conveniens* in England and Canada is still inherently pro-claimant.[123] To illustrate, emphasis is accorded to the fact that jurisdiction has been founded as of right in that it is up to the defendant to establish that there is a clearly more appropriate forum abroad. Where there is no single forum that satisfies this test, there is an "automatic assumption being made that England is at least a natural forum for trial."[124] The position would be less biased against the defendant if the claimant had at least some obstacles placed in front of him in his invocation of the court's jurisdiction. Of course, this is not so as all he needs to do is to serve a claim form on the defendant when he was present in the forum in question. Similarly, there is no equality between the claimant and the defendant in relation to the Canadian doctrine of *forum non*

---

[118] *Sim v Robinow* (1892) 19 R 665, at 668. My italics.
[119] *Spiliada, supra*, n. 23, at 482.
[120] *ibid.*
[121] [1988] AC 92.
[122] *ibid*, at 108. My italics.
[123] Fawcett, *supra*, n. 25, at 218-220.
[124] *ibid*, at 218.

conveniens as there is a "presumption in favour of the forum selected by the plaintiff which wins by default if there is no clearly preferable alternative."[125]

2.3.2 Australia

The High Court of Australia is not in support of equal justice between litigants as it has opted for the protection of the claimant's choice of forum. They have thus provided for jurisdictional rules that are heavily slanted against the defendant.

Interestingly, equal justice has been used as an explanation for the adoption of the *Spiliada* principles in relation to the transfer criteria in *section 5* of the *Cross-vesting Act*. In the High Court of Australia case of *BHP Billiton*, Kirby J pointed out that the phrase 'interests of justice' in the section involves "justice to all parties"[126] and that it would be "incompatible with [Australian] notions of justice to apply the [New South Wales] *Cross-vesting Act* in a way that favoured the rights of one party to litigation over others, rewarding the party selecting the initial venue with significant substantive (as distinct from purely procedural) advantages for doing so."[127] Accordingly, the claimant's own choice of forum must be regarded as "neutral."[128] Callinan J too argued that "there should be no presumption in litigation in favour of any party"[129] and that "[c]ourts are required to do equal justice."[130] It is "wrong to say that proceedings should be conducted in the, or indeed any Tribunal because a plaintiff, or for that matter a defendant, is likely to have a better chance of winning or more easily winning there."[131] It is thus an agreement with the policy considerations under the English common law doctrine of *forum non conveniens* that has resulted in this particular Australian shift towards the *Spiliada* principles.

---

[125] *Spar Aerospace Ltd v American Mobile Satellite Corp* [2002] 4 SCR 205, at [75].
[126] *BHP Billiton, supra*, n. 86, at [169].
[127] *ibid.*
[128] *ibid*, at [168].
[129] *ibid*, at [258].
[130] *ibid.*
[131] *ibid.*

2.4 CERTAINTY VERSUS FLEXIBILITY

"Legal certainty requires clear, equal and predictable rules of law which enable those who are subject to them to organise their affairs in an orderly manner to protect their justified expectations. Equally relevant is the need for flexible and just solutions which take into consideration the unique circumstances of each case."[132]

Certainty and flexibility are policy objectives fundamental to all legal systems. From the above definitions of these concepts, it is axiomatic that the two are participants in an unending struggle for "supremacy."[133] On the one hand, it is important that there is a degree of clarity and predictability in the law to provide adequate guidance to the courts in determining whether a stay of proceedings should be granted and in turn enable legal practitioners to "advise their clients with reasonable certainty as to the forum in which they should launch proceedings."[134] On the other hand, the doctrine must provide sufficient flexibility for the courts to ensure fairness on the facts of each case. A rigid *forum non conveniens* test would only give rise to arbitrary and unfair decisions. Accordingly, Neuhaus has observed that:

> "[i]n different countries and at different times, the one or the other of these twin objectives of the law will dominate; there is no permanent solution. Especially neither goal can replace the other."[135]

In this sub-section, we will examine the differences between the compromises set between the two concepts in relation to the doctrines of *forum non conveniens* in our selected jurisdictions to determine whether this provides for an explanation for any of the divergences in our study.

---

[132] Castel, *Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?* (1995) 33 Osgoode Hall Law Journal 35, at 41.
[133] Neuhaus, *Legal Certainty versus Equity in the Conflict of Laws* (1963) 28 Law & Contemporary Problems 795, at 796.
[134] *Voth, supra,* n. 36, at 580.
[135] Neuhaus, *supra,* n. 133, at 796.

2.4.1 Australia

One explanation for the lack of a "precise and authoritative statement of the principles that should be applied in dealing with an application to stay proceedings"[136] in *Oceanic Sun* was that the members of the High Court were unable to agree on the balance that should be struck between certainty and flexibility in this area of the law.

On the one hand, Wilson and Toohey JJ were of the view that the *St Pierre* test "places such a tight rein on the discretion of a court"[137] that it prevents the courts from dealing "with the problem of forum shopping, even in blatant cases."[138] Impliedly, one reason for their endorsement of the *Spiliada* test was that it provides for a higher degree of flexibility. On the other hand, Brennan and Deane JJ were hostile to the idea of greater flexibility in the Australian regime on stays of proceedings. In particular, there are three reasons as to why they have taken this stance.

1. First, in Brennan J's view, Australian jurisprudence is "designed to protect the litigant against an unnecessarily wide discretionary power"[139]: "[t]hat system of law is the best which leaves least to the discretion of the judge."[140] From this basic principle, he held that when a legal right is vested in a litigant, he is "entitled to invoke the State's power to enforce it."[141] For that objective, the Australian courts "are at the service of litigants, and the rule of law rests on the court's duty to exercise their jurisdiction when litigants invoke it."[142] That right should not be "provisional"[143] and "dependent on a discretionary judgment."[144]

---

[136] *Oceanic Sun, supra,* n. 26, at 220.
[137] *ibid*, at 212.
[138] *ibid.*
[139] *ibid*, at 239.
[140] *ibid.*
[141] *ibid.*
[142] *ibid.*
[143] *ibid*, at 238.
[144] *ibid.*

2. Secondly, Brennan J observed that "[i]mplicit in [the *Spiliada*] approach is the absence of fixed guidelines and the consequent uncertainty of the decision in particular cases."[145] Accordingly, it "can offer little guidance to a judge"[146] in determining whether to grant a stay of proceedings. Similarly, Deane J was also reluctant to expand the scope of judicial discretion to decline jurisdiction, as he believed that "it is likely to lead to increased uncertainty for litigants and more litigation about where to litigate."[147]

3. Thirdly, as Deane and Brennan JJ were not in support of the policies advocated by Wilson and Toohey JJ such as judicial comity and the discouraging of forum shopping, they appear to be of the view that there is no need for a higher degree of flexibility in their chosen doctrine of *forum non conveniens* to take account of these policies.

Subsequently, when the High Court of Australia was again asked to adopt the *Spiliada* test in the case of *Voth*, they were in agreement with Brennan and Deane JJ's views on certainty and flexibility. In particular, they expressed doubts with the proposition that:

> "[t]o say, in line with the *Spiliada* approach, that the selected forum is justified in refraining from exercising its jurisdiction when it concludes no more that another available and competent forum is more appropriate is to acknowledge that a court can decline to perform its *obligation ... to exercise jurisdiction* even though it is an appropriate or not inappropriate court."[148]

To them, this is a statement that "is by no means easy to sustain as a matter of legal principle."[149]

It should be pointed out this line of reasoning has in fact been utilised in European countries such as Germany, Greece and Italy. For example, in Germany, there are "constitutional difficulties in

---

[145] *ibid.*
[146] *ibid.*
[147] *ibid*, at 254.
[148] *Voth, supra*, n. 36, at 559-560. My italics.
[149] *ibid*, at 560.

introducing a doctrine of *forum non conveniens*"[150] as there is a "constitutional commitment"[151] towards guaranteeing a "predictable jurisdiction which must not be manipulated under any circumstances."[152] Similarly, the Italian Constitution provides for such a position as well in that the provision "no one shall be denied the right to be tried by his natural judge pre-established by statute"[153] has been relied upon to refuse the adoption of a doctrine of *forum non conveniens*. In other words, the Australian approach is "halfway to the civilian view"[154] as it does contemplate a grant of a stay of proceedings on a narrow doctrine of *forum non conveniens*. In contrast, it is notable that the courts in the rest of our selected jurisdictions do not seem to find this a difficult argument to sustain as they have broadened their discretion in relation to the grant of a stay of proceedings without even considering this criticism.

To conclude, one explanation for the Australian departure from the formulation of the English common law doctrine of *forum non conveniens* is that more weight is attached by the Australian courts to the concept of certainty in comparison to flexibility.

2.4.2 Canada

Unlike the High Court of Australia in the cases of *Oceanic Sun* and *Voth*, no mention of the concepts of certainty and flexibility was made by the Supreme Court of Canada in *Amchem*. Implicitly, their decision in *Amchem* to adopt the 'clearly more appropriate forum' test can be regarded as a move towards greater flexibility as that very quality is inherent in that approach.

However, it is important to note that the compromise between certainty and flexibility for the Canadian doctrine of *forum non conveniens* is not the same as that for the English common law doctrine. As was mentioned in Chapter 2, one of the key Canadian divergences from the English

---

[150] Fawcett, *General Report*, in Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press) (1995), 1-70, at 23.
[151] *ibid.*
[152] *ibid.*
[153] *ibid.*
[154] Briggs, *The Conflict of Laws* (Oxford: Oxford University Press) (2002), at 94.

common law doctrine of *forum non conveniens* is the refusal of the Supreme Court of Canada to adopt the two stage *Spiliada* framework. Instead, they provided for a more discretionary approach in that the test is simply: is there a more appropriate jurisdiction based on the relevant factors?

One possible explanation for this decision is that Canadian courts were of the view that the two-stage *Spiliada* test is "overly legalistic,"[155] thus preferring a more flexible test with no structural limits on the courts to exercise their discretion under the Canadian doctrine of *forum non conveniens*. In contrast, the House of Lords were alert to the dangers of too much flexibility in the English common law doctrine of *forum non conveniens.* In *De Dampierre v De Dampierre*, Lord Goff stated that some "structuring of the approach in cases of *forum non conveniens*"[156] is "desirable in the interests of justice"[157] as:

> "[i]f this is not so, decisions in particular cases may depend so much on the individual reactions of particular judges as to lead to different results in different cases, and indeed to results not only unpredictable but so inconsistent as to lead to a perception of injustice."[158]

Put another way, Lord Goff was aware of the need for a balance between certainty and flexibility in relation to the English common law doctrine of *forum non conveniens.* He recognised that on the one hand, there must be sufficient flexibility to do justice on the facts of individual cases and on the other hand, certainty is required by way of a structural framework to ensure that these cases are approached consistently.

In conclusion, one can observe that the Supreme Court of Canada has opted for a compromise between flexibility and certainty that is more slanted towards the former. This is thus an

---

[155] *Amchem, supra,* n. 39, at [36].
[156] *De Dampierre, supra,* n. 121, at 108.
[157] *ibid.*
[158] *ibid.*

explanation for the structural divergences of the Canadian doctrine of *forum non conveniens* from that of the English common law.

2.4.3 Singapore

No discussion of the concepts of certainty and flexibility was made in the decision of the Singapore Court of Appeal to adopt the *Spiliada* test. Impliedly, their acceptance of the 'clearly more appropriate forum' test and the *Spiliada* structure provides some indication that they have accepted the balance between certainty and flexibility under the English common law doctrine of *forum non conveniens.*

3. STRUCTURAL EXPLANATIONS

3.1 INTERACTION WITH OTHER AREAS OF PRIVATE INTERNATIONAL LAW: BASES OF JURISDICTION

As one stage of the private international law process can have an impact on another stage, this may be an explanation for the divergences and convergences established in Part I of this thesis. In particular, before the doctrine of *forum non conveniens* is utilised by our Commonwealth judiciaries to decline jurisdiction, jurisdiction must first be taken over the dispute in question. If there were differences in relation to the bases of jurisdiction in our selected Commonwealth countries, this might result in differences between their doctrines of *forum non conveniens.*

3.1.1 Wider bases of jurisdiction

It must be recalled that the situations to which the doctrine of *forum non conveniens* is applicable in Canada and Australia is wider than that in England and Singapore. Not only is the doctrine

relevant to "presence-based jurisdiction"[159] and "submission-based jurisdiction"[160] in Canada and Australia, it is also applicable to "assumed jurisdiction"[161] where service of process on a defendant out of the jurisdiction can be made without leave from the courts.

This divergence stems from the fact that a number of provinces and states in Australia and Canada have, by way of legislation, removed the need for judicial permission for a claim form to be served on a defendant *ex juris*. In such circumstances, jurisdiction is taken as of right and it is up to the defendant to apply for a stay of proceedings thus extending the doctrine of *forum non conveniens* in these two countries to this category of cases. In contrast, in Singapore and England, permission must be obtained from the courts before service *ex juris* can be made. The doctrine of *forum non conveniens* is therefore not applicable as the courts are asked to establish jurisdiction instead of declining it. In other words, it is the differences in the manner in which this particular basis of jurisdiction is formulated in our selected jurisdictions in the relevant statutory provisions that has resulted in the divergences on this point of comparison.

3.1.2 Excessively wide bases of jurisdiction

Presence-based jurisdiction is regarded by the Canadian, Singaporean and English courts as being an "excessively wide"[162] basis of jurisdiction in that so long as the defendant is present in the forum in question, no matter how transient or fortuitous that presence may be, jurisdiction can be taken by the courts as of right. Coupled with the *St Pierre* test in the past, there was "an obvious risk of injustice"[163] as jurisdiction would not be taken on the basis that the court in question was an appropriate if not the most appropriate forum.

While this position may be tenable in those days under the guise of a policy of protecting the claimant's right of access to the courts, it is no longer the case nowadays with the greater

---

[159] *Muscutt v Courcelles* (2002) 60 OR (3d) 20, at [19].
[160] *ibid.*
[161] *ibid.*
[162] Fawcett, *supra*, n. 150, at 19.
[163] *ibid.*

significance attached to discouraging forum shopping and ensuring greater equality between litigants. The situation in Canada is further exacerbated by the fact that there are "few occasions when a Canadian court is absolutely precluded from taking jurisdiction over an action"[164] as most provinces no longer require leave from the courts to serve a claim form on defendants who are out of their jurisdiction. The introduction of the doctrine of *forum non conveniens* in Canada, England and Singapore can thus be seen as an "antidote to excessively wider bases of jurisdiction."[165] Put another way, by exercising jurisdiction only if there were no clearly more appropriate forum elsewhere, this would help to ensure that the forum in question is implicitly appropriate.

In contrast, the Australian courts do not share the views of the above Commonwealth courts on presence based jurisdiction and assumed jurisdiction. Specifically, it must be recalled that in *Oceanic Sun*, Brennan J held that when a legal right is vested in a litigant, he or she is "entitled to invoke the State's power to enforce it"[166] and that this right should not be "provisional"[167] and "dependent on a discretionary judgment."[168] Similarly, the High Court of Australia in *Voth* has held that there is an "obligation ... to exercise jurisdiction"[169] when the relevant jurisdictional rules are satisfied.

One possible implication flowing from these comments is that the Australian courts do not consider presence-based jurisdiction and even assumed jurisdiction as being too broadly formulated for the taking of jurisdiction unlike the rest of the courts in our selected jurisdictions. Instead, the objective of their narrower doctrine of *forum non conveniens* is to ensure that such bases of jurisdiction are adhered to. This is thus one explanation for the Australian divergence from the formulation of the English common law doctrine of *forum non conveniens.*

---

[164] *ibid.*
[165] *ibid.*
[166] *Oceanic Sun, supra,* n. 26, at 239.
[167] *ibid,* at 238.
[168] *ibid.*
[169] *Voth, supra,* n. 36, at 559.

3.2 INTERACTION WITH PUBLIC INTERNATIONAL LAW: COMITY

Comity has had an important role in public international law. At times, it has been described as "rules of politeness, convenience and goodwill observed by states in their mutual intercourse without being legally bound by them;"[170] "mere courtesies"[171] in that the concept is only a consideration in the decisions of the courts. At others, comity has been used to refer to "binding rules of public international law"[172] such as the doctrine of sovereign immunity and the rule that the "English court should not normally make a determination that a foreign state is in breach of its international obligations to a third state."[173]

In private international law, too, we can see its influence on the "development of particular rules and attitudes in the resolution of international disputes."[174] For instance, the reason why service of a claim form out of jurisdiction is considered to be an exorbitant forum of jurisdiction is that it is "necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected."[175] Accordingly, it is said that "[a]s a matter of international comity,"[176] service would only be allowed if it were clearly within the spirit of the relevant civil procedure rules.

It is not surprising therefore to see comity utilised as an explanation for the purposes of our discussion in this chapter. On the one hand, comity has been employed as an argument for the departure from judicial chauvinism in England, Canada and Singapore in relation to their doctrines of *forum non conveniens*. On the other hand, the Australian courts have refused to follow suit as they do not share the same views as these countries on this concept.

---

[170] Collins, *Comity in Modern Private International Law*, in Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford: Oxford University Press) (2002), 89-110, at 95.
[171] *ibid*, at 96.
[172] *ibid*.
[173] *ibid*, at 97.
[174] *ibid*, at 91.
[175] *George Monro Ltd v American Cyanamid* [1944] KB 432, at 437.
[176] *ibid*.

3.2.1 Canada

In *Amchem*, Sopinka J first provided for a definition of the concept of comity[177] by citing La Forest J's comments in the case of *Morguard Investments Ltd v De Savoye*.[178]

> "Comity in the legal sense is neither a matter of obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[179]

Subsequently, he agreed with Lord Goff in *The Spiliada* that the law on stays of proceedings is a "subject where comity is of importance."[180] He also observed that the English approach has "gone through several stages of evolution tending to a broader acceptance of the legitimacy of the claim of other jurisdictions to try actions have connections to England as well as to such other jurisdictions."[181] In particular, he appears to be referring to Lord Diplock's comments in *The Abidin Daver* that:

> "the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that has been achieved step by step during the last ten years as a result of the successive decisions of this House in *The Atlantic Star*, *MacShannon* and *Amid Rasheed* is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is

---

[177] *Amchem, supra*, n. 39, at [28].
[178] [1990] 3 SCR 1077.
[179] *ibid*, at 1096.
[180] *Amchem, supra*, n. 39, at [31].
[181] *ibid*.

concerned, indistinguishable from the Scottish doctrine of *forum non conveniens*."[182]

All this has had a powerful influence on his decision to abandon the *St Pierre* approach for the English common law 'clearly more appropriate forum' test. In other words, it is an "emphasis on comity"[183]as shared by the English courts in *The Abidin Daver* and *The Spiliada* that has encouraged the Supreme Court of Canada to be "less forum-centric"[184] in the formulation of their doctrine of *forum non conveniens*.

3.2.2 Australia

As the proponents of the *Spiliada* approach in *Oceanic Sun*, Wilson and Toohey JJ opined that the *St Pierre* principle was "inappropriate to modern conditions"[185] as greater importance is now attached to "considerations of international comity as the nations of the world become more closely related."[186] In such circumstances, they wanted to cut down "local parochialism as regards judicial adjudication"[187] as this would be "consistent with a spirit of international legal cohesion and integration."[188]

As for the rest of the Justices in *Oceanic Sun*, there is clearly a disagreement with the English courts on the significance of comity to the law on stays of proceedings. In particular, even though Deane J acknowledged that the "desire for judicial comity has played a significant role in the acceptance of the broader *forum non conveniens* doctrine in England"[189] and that "international comity supports the approach that the courts of this country should refrain from hearing actions in circumstances corresponding to those in which courts of other countries would refrain from

---

[182] *The Abidin Daver, supra,* n. 20, at 411.
[183] Blom, *Reform of Private International Law by Judges: Canada as a Case Study,* in Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford: Oxford University Press) (2002), 31-49, at 42.
[184] *ibid.*
[185] *Oceanic Sun, supra,* n. 26, at 212.
[186] *ibid.*
[187] *ibid.*
[188] *ibid.*
[189] *ibid,* at 250.

entertaining them on the ground that they should more appropriately be brought in Australia,"[190] he questioned this appeal to comity in the light of "circumstances where some leading western countries, particularly in relation to actions by their own residents, decline to observe even the judicial restraint shown by common law courts under traditional doctrine."[191] Put another way, he seems to be of the view that international comity is only an ideal and in reality, it is not shared by all jurisdictions. Under such circumstances, he appears to be saying that there is no need to adhere to this concept.

Brennan J did not mention the concept of comity in his decision to endorse the *St Pierre* test but it is interesting to note his comments that the "established rule does not call for an assessment by the courts of this country of the quality of justice administered elsewhere: an assessment which would be often of dubious validity, if not a source of grave embarrassment."[192] One can argue that in his view, judicial restraint is what comity requires.

One important point to note is that that Brennan J had misinterpreted the nature of the *Spiliada* test as it is clear that English courts do not compare the justice administered in local courts with that administered in foreign courts. Lord Wilberforce, for example has stated in *Amin Rasheed Corp v Kuwait Insurance Co*[193] that it is not appropriate "to embark upon a comparison of the procedure, or methods, or reputation or standing of the courts of one country as compared with those of another."[194]

Both Deane and Brennan JJ's views can be observed in the decision of the majority Justices in *Voth*. First, one explanation as to why the High Court chose to focus on the inappropriateness of the Australian proceedings is that there are "powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country

---

[190] *ibid*, at 253 – 254.
[191] *ibid*, at 254.
[192] *ibid*, at 240.
[193] [1984] AC 50.
[194] *ibid*, at 72.

to accord justice to the plaintiff in the particular case."[195] This is said to be the "principle of judicial restraint or abstention."[196] Secondly, Deane J's views on comity were endorsed as in reaction to the appellant's argument that judicial comity should replace judicial chauvinism, even though the High Court conceded that "it would obviously be desirable in the interests of international comity that this Court, in common with the courts of other countries, should adopt a uniform approach"[197] they held that they were not "persuaded that there exists any real international consensus favouring a particular solution to the question. Nor are [they] persuaded that any consensus exists among countries of the common law world."[198]

To sum up, as the Australian courts do not agree with the judicial views on comity in Canada and England, there has been an Australian departure from the doctrines of *forum non conveniens* in these countries.

3.2.3 Singapore

The Singapore courts have held that the *Spiliada* test is a "more liberal approach which cut[s] down local parochialism as regards judicial adjudication and attaches greater importance to considerations of international comity"[199] thus indicating that they are in support of the views of the Canadian and English judges on this concept. Recently, Andrew Phang JC has stated in the High Court case of *Q & M Enterprises Sdn Bhd v Poh Kiat*[200] that the "importance of international comity cannot be underestimated."[201] As the alternative forum in relation to the application of the *Spiliada* test was the Malaysian courts, he stated that the need to respect comity in this situation

---

[195] *Voth, supra,* n. 36, at 559.
[196] *ibid.*
[197] *ibid,* at 560.
[198] *ibid.*
[199] *Eng Liat Kiang, supra,* n. 42, at 105. See also the comments of VK Rajah J in *Peters Roger May v Pinder Lillian Gek Lian* [2006] SGHC 39, at [19] and Andrew Phang JC in *Q & M Enterprises, supra,* n. 43, at [20] – [27].
[200] [2005] 4 SLR 494.
[201] *ibid,* at [25].

was particularly acute as a result of the "[c]ommon geographical, political and even legal ties in the past"[202] between the two jurisdictions.

4. HISTORICAL AND COMPARATIVE EXPLANATIONS

4.1 HISTORICAL INFLUENCE OF ENGLISH JUDICIAL PRECEDENTS

Initially, as was highlighted in Chapter 2, there was no doctrine of *forum non conveniens* in any of our selected Commonwealth jurisdictions. Instead, the *St Pierre* 'oppression and vexation' test was utilised by the judiciaries of these countries to determine whether a stay of proceedings should be granted. One key explanation for this uniformity at this point in time is the prevailing judicial view that "conformity with the common law as declared in England was desirable."[203] This is unsurprising as the legal systems of these jurisdictions are derived from a time when "Great Britain was the metropolitan state for many colonies"[204] and the Privy Council was entrenched as the ultimate court of appeal which vested in Great Britain "sovereign legislative power and superintending judicial authority"[205] over its dominions. Even when these jurisdictions became independent, their courts remained heavily reliant on English judicial precedents as the Privy Council was still the final court of appeal for these jurisdictions. This "proclivity"[206] of judiciaries to "apply unthinkingly the decisions of English courts in a strict positivist, black letter manner"[207] has been deplored by numerous academics as it may often result in a "complete denial of justice to the parties due to rigid adherence of the court to decisions made on considerations completely alien"[208] to the social, economic and political context of the jurisdiction in question. It was only with the demise of the right of appeal to the Privy Council that these judiciaries become more willing to shape their common law to accord with their own "circumstances, needs and values."[209]

---

[202] *ibid*, at [26].
[203] Mason, *Australian Contract Law*, (1988) 1 Journal of Contract Law 1, at 2.
[204] *Tolofson v Jensen* [1994] 3 SCR 1022, at [48].
[205] *ibid.*
[206] Palmer, *Torts in the Inter-Provincial Conflict of Laws* (1959) 17 University of Toronto Faculty of Law Review 1, at 6.
[207] *ibid.*
[208] *ibid.*
[209] Mason, *supra*, n. 203, at 1.

Accordingly, one possible explanation for the divergences observed in relation to the various doctrines of *forum non conveniens* in our selected Commonwealth jurisdictions is that the influence of English judicial precedents on the courts of these countries has waned in recent years. It is thus the purpose of this section to ascertain the veracity of this statement.

4.1.1 Canada

English common law was received into Canada by a number of statutes in the 18th century.[210] Prior to the severance of the link between the Canadian legal system and the Privy Council in 1949, the Supreme Court of Canada and lower Canadian provincial courts considered themselves bound by the decisions of the House of Lords under the doctrine of *stare decisis*.[211] As the key Canadian decision namely *Empire-Universal Films Ltd v Rank*[212] that endorsed the English common law *St Pierre* rule was decided before 1949, one explanation for this uniformity is simply that this was the English precedent that Canadian courts were bound to follow. After the right of appeal to the Privy Council was abolished in 1949, the *St Pierre* test remained part of Canadian law for the next few decades as the Supreme Court of Canada was not called upon to rule on the law pertaining to stays of proceedings until 1993 in the case of *Amchem*. Therefore, even though "*forum non conveniens* was held by the House of Lords in 1984 to be the law of England, [it did not] automatically lead to its becoming the law to be applied"[213] in Canada.

In *Amchem*, the Supreme Court of Canada endorsed the English common law 'clearly more appropriate forum' test. It is important to note that this is not the result of a blind adherence to English judicial precedents. Sopinka J did examine the policies and concepts underlying *The Spiliada* before deciding that the Canadian courts should follow these concepts as well. In addition, not every aspect of the judgment in *The Spiliada* was adopted. In particular, Sopinka J

---

[210] See Chapter 3, Gail, *The Canadian Legal System* (Toronto: Carswell) (3rd ed., 1990).
[211] *ibid*, at 58.
[212] [1947] OR 775.
[213] *BC Ltd. v Thrifty* (1998) 168 DLR (4th) 602, at [33].

acknowledged that "there are differences in the language used"[214] between the Canadian and English common law doctrine due to his rejection of the *Spiliada* two stage structure.

4.1.2 Australia

After the Australian reception of the English common law, decisions of the English courts aside from the Privy Council were deemed as "decisions pronounced outside the Australian hierarchy"[215] and they were only of persuasive authority. Nevertheless, Australian courts were still heavily influenced by non-binding English decisions with early nineteenth century statements in the High Court of Australia[216] declaring that they and all lower Australian courts should follow decisions of the House of Lords subject to the ruling of the Privy Council for it provided the final settlement of the "law for the Empire."[217] This would of course explain the endorsement of the *St Pierre* test in the High Court case of *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners,*[218] that it "rested simply on an acceptance of what Sir Gorell Barnes P had said in *Logan v Bank of Scotland (No.2).*"[219]

Subsequently, the Australian right of appeal to the Privy Council was removed with the *Privy Council (Limitation of Appeals) Act 1968* and the *Privy Council (Appeals from the High Court) Act 1975* and it was held in *Viro v The Queen*[220] that the High Court was no longer bound by Privy Council decisions. However, *St Pierre* remained very much part of Australian law as there was no High Court pronouncement on this case till 1988. At this point in time, the English common law had moved on to a doctrine of *forum non conveniens.* Accordingly, one question arising in the

---

[214] *Amchem, supra,* n. 39, at [39].
[215] Smith, Pose, *Maher, Waller and Derham's Legal Process – Commentary and Materials* (Sydney: The Law Book Company Ltd) (5th ed., 1988), at 151.
[216] See for example, *Webb v Outrim* (1907) 4 CLR 356.
[217] Smith, Pose, *supra,* n. 215, at 152.
[218] (1908) 6 CLR 194.
[219] *Voth, supra,* n. 36, at 553. *Logan v Bank of Scotland (No. 2)* [1906] 1 KB 141.
[220] (1978) 52 ALJR 418.

High Court of Australia case of *Oceanic Sun* was whether the courts in Australia should follow this "English development."[221]

On the one hand, Tooley and Wilson JJ were in support of Lord Goff's approach in *The Spiliada*. Like Sopinka J's judgment in *Amchem*, it is interesting to note that this was not a blind adherence to English judicial precedents as these Justices did examine the policies and concepts underlying the English common law doctrine of *forum non conveniens* before making the decision to call for an adoption of the English common law approach.[222]

On the other hand, Brennan, Deane and Gaudron JJ chose to reject the English common law *Spiliada* test. Instead, reliance was placed on the Australian authorities on this matter as Deane J was of the view that "the statement of principle in *Maritime Insurance Co* was that of a unanimous Court"[223] and it had "stood as authority in this country for almost eighty years."[224] Accordingly, he held that it would "require strong and clear policy considerations to prevail against the considerations of principle and the authority of the long-standing decision in *Maritime Insurance Co* which favour adherence to traditional doctrine."[225]

Gaudron J pointed out that where "developments in the common law of England reflect underlying changes which may not be matched in Australian law or society, care must be exercised in determining the extent to which changes in the English common law should be reflected in the common law of this country."[226] In particular, he opined that the English common law preference for " 'judicial comity' rather than 'judicial chauvinism' ...is readily understandable when it is borne in mind that England is a member of the European Community, which is not merely an alliance of similarly minded sovereign nation states, but a community with its own

---

[221] *Oceanic Sun, supra,* n. 26, at 212.
[222] *ibid.*
[223] *ibid,* at 253.
[224] *ibid.*
[225] *ibid.*
[226] *ibid,* at 263.

parliament, its own laws and its own court."[227] It should be noted that Wilson and Tooley JJ were opposed to this view, as they did not regard the evolution of English law since *The Atlantic Star* as being dependent on "local considerations such as the incorporation of the United Kingdom into the European Economic Community."[228]

Subsequently, in *Voth*, the majority Justices were clearly in support of Brennan, Deane and Gaudron JJ's views on the relevant English judicial precedents as they again pointed out the strength of the authority of *Maritime Insurance*.[229] In addition, they agreed with Deane J's refusal to follow the English development as they regarded the "policy considerations"[230] underlying the *Spiliada* test as "persuasive but not compelling."[231]

Nevertheless, the rejection of the approach in *The Spiliada* does not necessarily mean that English judicial precedents are no longer relied upon by the Australian courts. First, it is interesting to note how certain aspects of Lord Goff's judgment in *The Spiliada* were utilised in the application of the *Voth* principles. For example, it was stated that "the discussion of Lord Goff in *Spiliada* of relevant connecting factors and a legitimate personal or juridical advantage provides valuable assistance."[232] Secondly and more importantly, it must be recalled that the 'clearly inappropriate forum' test is based on the approach in *The Atlantic Star* which provided for a broader definition of oppression and vexation at the start of the English common law shift towards the *Spiliada* test. Therefore, it is not that no English judicial precedents were utilised in the formulation of the Australian doctrine of *forum non conveniens*; it is that the English courts have overruled the case in question.

---

[227] *ibid.*
[228] *ibid*, at 212.
[229] *Voth*, *supra*, n. 36, at 552-553.
[230] *ibid*, at 560.
[231] *ibid.*
[232] *ibid*, at 565.

4.1.3 Singapore

Before 1994, under *section 5(1)* of the *Civil Law Act 1988,* a Singapore court deciding issues with respect to mercantile law had to decide such issues in the same manner as an English court unless there were contrary provisions or case law in force in Singapore. Accordingly, it is not surprising that the endorsement and adoption of the *Spiliada* test in the Singapore Court of Appeal case of *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia*[233] was made without any discussion of the relevant policies and principles.

In 1994, Singapore severed its ties with the Privy Council under the *Judicial Committee (Repeal) Act 1994* and as such, English precedents could no longer bind the decisions of the Singapore court. Having said that, the *Application of the English Law Act 1993* does provide for the continued application in Singapore of common law and rules of equity so far as it was part of Singapore law immediately before 12 November 1993, and is applicable to the circumstances in Singapore. In other words, *Spiliada* is still the relevant authority on stays of proceedings in Singapore at this point in time and only the Singapore Court of Appeal can overrule it.

In the later Singapore Court of Appeal case of *Eng Liat Kiang*, counsel for the appellant attempted to convince the court that it should "depart from the principles enunciated in *Spiliada*"[234] for the "test in *Oceanic Sun* ...and approved in *Voth*."[235] In response, LP Thean JA held that "[o]n authority and on principle [they] cannot agree"[236] as they preferred the *Spiliada* test for its "more liberal approach which cut[s] down local parochialism as regards judicial adjudication and attaches greater importance to consideration of international comity."[237] Accordingly, even though the Singapore courts are still very much influenced by English judicial authority in this

---

[233] [1992] 2 SLR 776.
[234] *Eng Liat Kiang, supra,* n. 42, at 105.
[235] *ibid.*
[236] *ibid.*
[237] *ibid.*

area of private international law, one can observe that it is not without any understanding of the policies underlying it.[238]

4.2 COMPARATIVE INFLUENCE OF FOREIGN DOCTRINES OF *FORUM NON CONVENIENS*

Since the 19th century, there has been a doctrine of *forum non conveniens* in Scotland in that a stay of proceedings can "never be sustained unless the court is satisfied that there is some other tribunal having competent jurisdiction, in which the case may be tried more suitably for the interests of the parties and for the ends of justice."[239] Similarly, the United States of America has provided for such a doctrine as well.[240] These comparative developments were well documented in a number of House of Lords cases. Initially, the English courts resisted the introduction of such an approach. However, in the case of *Abidin Daver*, they acknowledged that as a result of the modifications made to the *St Pierre* test in *The Atlantic Star* and *MacShannon v Rockware Glass* Ltd,[241] the English common law position on the stays of proceedings was "indistinguishable from the Scottish legal doctrine of *forum non conveniens*."[242] Put another way, English judges were influenced by the shift towards such a test in Scotland and the United States to adopt a similar approach as well.

Correspondingly, the question arising here in this sub-section is whether the courts of our selected jurisdictions have been affected by developments in other common law countries in relation to the doctrine of *forum non conveniens* to adopt or reject the English common law 'clearly more appropriate forum' test.

---

[238] See also *Peters Roger May, supra,* n. 199, *Q & M Enterprises Sdn Bhd, supra,* n. 200.
[239] *Sim v Robinow, supra,* n. 118, at 668. See also *Longworth v Hope* (1865) 3 M 1049, *Clements v Macaulay* (1866) 4 M 583.
[240] *Gulf Oil Corp v Gilbert* 330 US 501 (1947).
[241] [1978] AC 795.
[242] *The Abidin Daver, supra,* n. 20, at 411.

4.2.1 Canada

Another explanation for the adoption of the 'clearly more appropriate forum' test in *Amchem* was that the Supreme Court of Canada was of the view that "the law in common law jurisdictions is...remarkably uniform"[243] on this matter. Specifically, Sopinka J stated that this is an area of the law where there is a "broad consensus among major common law jurisdictions."[244] While there are differences in the formulation of these rules, "each jurisdiction applies principles designed to identify the most appropriate or appropriate forum for the litigation based on factors which connect the litigation and the parties to the competing *fora*."[245] As examples, he pointed out that both the New Zealand courts and the United States Federal courts "apply similar principles"[246] on *forum non conveniens.* Interestingly, he also observed that the Australian courts "while not adopting all of the wording of *Spiliada*, has enunciated principles that the court acknowledged would likely yield the same results in the majority of cases."[247]

4.2.2 Australia

One reason provided by Wilson and Toohey JJ for their declaration in *Oceanic Sun* that "the *Spiliada* approach should henceforth chart the course for the common law of Australia in relation to the inherent jurisdiction of a court to stay proceedings when there is a more appropriate forum in a foreign country"[248] is that "in an area of the law involving the courts of other countries it is expedient to preserve as much consistency as possible between the common law countries."[249] In particular, they pointed out that the doctrine of *forum non conveniens* has long been part of the law in Scotland and the United States. They also observed that England and Canada have rejected the *St Pierre* test for such an approach as well.[250]

---

[243] *Amchem, supra,* n. 39, at [39].
[244] *ibid,* at [31].
[245] *ibid,* at [39].
[246] *ibid,* at [35].
[247] *ibid.*
[248] *Oceanic Sun, supra,* n. 26, at 213.
[249] *ibid.*
[250] *ibid.*

Deane J acknowledged that "the weight of authority in the common law would seem increasingly to favour the acceptance of the broader *forum non conveniens* discretion"[251] and that in this area of the law, he recognised that it is "incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions [in] ...striving to achieve...a careful analysis and weighing of the relevant competing considerations."[252] However, he then pointed out that "some leading western countries, particularly in relation to actions by their own residents, decline to observe even the judicial restraint shown by common law courts under traditional doctrine."[253] Brennan J has also stated that the "law applied in many other countries preserves local jurisdiction even more jealously."[254] In short, as these two Justices did not think that there was any consensus in the common law world on the formulation of the doctrine of *forum non conveniens*, they were not persuaded by this comparative point to adopt the English common law test.

Similarly, in *Voth*, the High Court of Australia was not convinced that "there exists any real international consensus"[255] in this area of private international law. Using the United States of America as an example, they pointed out that the US approach differs from the *Spiliada* test in that it is "more favourable to the plaintiff than *Spiliada* and, perhaps, is closer to the 'clearly inappropriate forum' test but differs in that it takes account of the selected forum's administrative problems."[256]

It can thus be observed that even though the Australian and Canadian courts were presented with the same comparative scene at a point in time when they had to make a decision whether to diverge from or converge with the English common law doctrine of *forum non conveniens*, two differing interpretations of that scene were made. The Canadian courts chose to see common law jurisdictions as having broadly similar doctrines of *forum non conveniens* whereas, the Australian

---

[251] *ibid*, at 253.
[252] *ibid*.
[253] *ibid*, at 254.
[254] *ibid*, at 240.
[255] *Voth*, *supra*, n. 36, at 560.
[256] *ibid*, at 561.

judiciaries were of the view that there is no consensus amongst these jurisdictions in relation to this area of private international law as there are specific differences between these doctrines.

4.2.3 Singapore

For Singapore, the Australian doctrine of *forum non conveniens* was examined by the Singapore courts in the case of *Eng Liat Kiang*. As they did not agree with the policies underlying the 'clearly inappropriate forum' approach, that test was rejected.[257] No mention was made however of the developments in other common law jurisdictions on *forum non conveniens* such as New Zealand, Scotland, Canada or the United States.

5. CONTEXTUAL EXPLANATIONS

5.1 SOCIAL AND ECONOMIC CONTEXT

The wider social and economic context in which international civil and commercial disputes are litigated has been taken into account by some of our selected judiciaries. In particular, this consideration has had an impact on the policy decisions made in this area of private international law. In this sub-section, we will examine how our selected judiciaries have taken into account the increasing globalisation of litigation and the fact that international litigation can be an invisible export in their decisions on *forum non conveniens.*

5.1.1 Globalisation of litigation

Significant technological advances have been achieved particularly in relation to transportation and telecommunication in recent decades. There is greater "labour mobility"[258] as individuals can now travel around the world at lesser time and cost for business purposes. Communication with

---

[257] *Eng Liat Kiang, supra,* n. 42, at 105.
[258] Bell, *supra,* n. 45, at para. 1.04.

business counterparts has also become less expensive and more convenient especially with the creation of the Internet which has enabled parties to negotiate and conduct business deals in 'cyberspace' with the virtual spaces that it provides as well its facilitation of the electronic transfer of funds. Accordingly, as a result of these developments, companies have become more globalised as their assets, "commodity portfolios"[259] and "geographical spheres of operation"[260] are increasingly located in a number of different jurisdictions depending on the labour costs and infrastructure of the country in question. Furthermore, with an increasing number of free trade agreements being signed between individual governments or on a worldwide basis as facilitated by international trade organisations, this has meant that "primary and secondary products are regularly penetrating new markets."[261] All this has led to the "emergence of a truly global economy."[262]

This has serious implications for private international law, as "in a world where daily transactions routinely involve multiple countries, litigants are increasingly likely to find themselves embroiled in simultaneous contests in several theatres."[263] More and more contracts will now involve parties from a number of jurisdictions and in the process of negotiating these international contracts, parties will attempt to negotiate for choice of law and jurisdiction clauses that are most beneficial to their cause. Product liability cases have become internationalised as the product in question may be negligently manufactured in one jurisdiction and may then inflict injury on the victim in another. With holiday travel on the rise, accidents may occur more frequently in countries other than the claimant's residence. In short, litigation has become globalised as well.

In light of this phenomenon, pressure was placed on the courts of our selected jurisdictions to reject the *St Pierre* test as it was fashioned in the nineteenth century at a time when international civil litigation was a rarity. Its parochial nature and pro-claimant bias in the guise of the policy of

---

[259] *ibid*, at para. 1.05.
[260] *ibid*.
[261] *ibid*, at para. 1.04.
[262] *ibid*.
[263] Teiz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings* (1992) 26 The International Lawyer 21, at 22.

protecting a litigant's right of access to the courts in question and the fact that it served as an inducement to the litigants to forum shop was seen as "inappropriate to modern conditions."[264] Accordingly, the purpose of this sub-section is to examine how the courts of our selected jurisdictions have interpreted and reacted to this particular social and economic phenomenon. As a preliminary note, the Singapore courts have not examined the globalisation of litigation in their decisions on *forum non conveniens.*

Canada

Setting the scene for the rejection of the *St Pierre* approach, Sopinka J highlighted in *Amchem* that the "business of litigation, like commerce itself"[265] has becoming "increasingly international"[266] with the "greater ease of communication and travel."[267] With increasing "free trade"[268] and the "rapid growth of multi-national corporations"[269] he pointed out that it has become "more difficult to identify one clearly appropriate forum"[270] for litigation. Similarly, with "multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide"[271] and plaintiffs residing in different jurisdictions, it is difficult to pinpoint one place where the transaction giving rise to the action took place.

Under such circumstances, Sopinka J stated that courts have to become more tolerant of the systems of other countries and that the judicial chauvinism inherent in the *St Pierre* test can no longer be maintained. He also recognised that litigants are likely to engage in forum shopping in order to acquire an edge over their opponents where many forums are likely to be suitable alternatives for the dispute in question. There is thus a need to ensure that the "action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a

---

[264] *Oceanic Sun, supra,* n. 26, at 212.
[265] *Amchem, supra,* n. 39, at [25].
[266] *ibid.*
[267] *ibid,* at [2].
[268] *ibid,* at [25]
[269] *ibid.*
[270] *ibid.*
[271] *ibid.*

juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate."[272] Having established the context and the policies that the Canadian court should adhere to in relation to such international civil litigation, he went on to endorse the 'clearly more appropriate forum' test.

To sum up, one can observe that the shift away from judicial chauvinism towards judicial comity and the adherence to the policies of discouraging forum shopping and ensuring equal justice between litigants in relation to the Canadian doctrine of *forum non conveniens* is tied to the Supreme Court of Canada's recognition of the increasing globalisation of litigation.

Australia

In *Oceanic Sun,* Gaudron J was of the view that it was the integration of England into the European Community that has resulted in the adoption of the 'clearly more appropriate forum' test by the English courts. Consequently, he did not regard it as appropriate for the Australian courts to endorse that approach. This view was challenged by Wilson and Toohey JJ as they did not think that the introduction of the doctrine of *forum non conveniens* in England can be "ascribed to local considerations such as the incorporation of the United Kingdom into the European Economic Community."[273] Instead, they were of the view that social circumstances for the entire world have changed since the formulation of the *St Pierre* test in that there has been an enormous "transformation in communications and travel."[274] They opined that this has resulted in closer ties being developed between the "nations of the world"[275] and that a "greater importance"[276] should now be attached to "considerations of international comity."[277] Consequently, they held that the *St Pierre* principle, "fashioned as it was in the nineteenth

---

[272] *ibid,* at [26].
[273] *Oceanic Sun, supra,* n. 26, at 212.
[274] *ibid.*
[275] *ibid.*
[276] *ibid.*
[277] *ibid.*

century"[278] is now inappropriate for modern circumstances particularly since it is "unable to deal justly with the problem of forum shopping, even in blatant cases."[279]

Interestingly, when *Voth* was decided, the High Court of Australia recognised that there has been a globalisation of litigation in that the "complexity of modern transnational transactions and relationships between parties is such as to indicate that in a significant number of cases, there is more than one forum with an arguable claim to be the natural forum."[280] In addition, they even acknowledged that from an "international standpoint,"[281] there is "much to say for the more appropriate forum test"[282] to deal with this situation in that it is designed to ensure that litigation proceeds in the natural forum. However, instead of focusing on the need for international comity between nations and discouraging forum shopping, they held that the internationalisation of commercial transactions and disputes has made the *Spiliada* test "a question by no means easy to answer."[283] Instead, they preferred to "discourage the litigation of such a difficult issue as an interlocutory question by means of what has been described as a war of affidavits"[284] by adopting a 'clearly inappropriate forum' test as it avoids the "need to make a comparative judgment"[285] between the laws of two forums. In cases "in which the ascertainment of the natural forum is a complex and finely balanced question, the court may more readily conclude that it is not a clearly inappropriate forum."[286]

Even though the above response to the globalisation of litigation has become the dominant view in the High Court of Australia, there is again a minority that has continued to advocate the view put forth by the Canadian courts. For example, Toohey J in dissent in *Voth* has pointed out the *Spiliada* test "recognises that in the modern world, particularly in the modern commercial world,

---

[278] *ibid.*
[279] *ibid.*
[280] *Voth*, *supra*, n. 36, at 558.
[281] *ibid*, at 557.
[282] *ibid.*
[283] *ibid*, at 558.
[284] *ibid.*
[285] *ibid.*
[286] *ibid.*

there may be more than one forum available to a plaintiff."[287] In these circumstances and "in the context of an international dispute,"[288] a plaintiff should no longer have "an unrestricted right to choose the venue of an action."[289] Likewise, in *Renault v Zhang*, Kirby J expressed the hope that "[o]ne day *Voth* may be overruled and a principle of the common law may be established more appropriate to the contemporary circumstances of global and regional disputes in which Australia courts, like those of every country, must now operate."[290] Similarly, Callinan J commented that "globalisation...required that, in general, suits should not be determined in a jurisdiction which has, with respect to the relevant events, no real connexion with the defendant."[291]

5.1.2 Litigation as an invisible export

England, Canada and Singapore

It is important to reiterate that even in England, Canada and Singapore, there is no equal justice between litigants in relation to their doctrines of *forum non conveniens*. If their judiciaries truly desired equality between litigants, their *forum non conveniens* tests would not begin with a presumption in favour of the claimant; it would not be up to the defendant to establish a clearly more appropriate forum elsewhere. Instead, it would be something analogous to the "Scots position of neutrality under which there is no presumption in favour of the plaintiff."[292] Accordingly, one question we can pose here is: why did these courts adopt such a pro-claimant position?

Under the English common law, the explanation given by Lord Goff for placing a heavy burden on the defendant to show that there is another forum abroad which is clearly more appropriate for trial was that "proper regard [must be] paid to the fact that jurisdiction has been founded in

---

[287] *ibid*, at 586.
[288] *ibid*.
[289] *ibid*.
[290] *Renault*, *supra*, n. 62, at [96].
[291] *ibid*, at [194].
[292] Fawcett, *supra*, n. 25, at 219.

England as of right."[293] If there is no clearly more appropriate forum elsewhere, Lord Goff has held that he could "see no reason why the English court should not refuse to grant a stay in such a case."[294]

Fawcett has pointed out that there are two reasons for allowing trial in England in these circumstances. First, it is "undoubtedly a matter of judicial pride that foreign litigants not infrequently choose England, and in particular its Commercial Court, as the venue for trial"[295] and this may have led to an "automatic assumption being made that England is at least a natural forum for trial of complex commercial disputes."[296] Secondly, in today's globalised world economy, England has "an economic interest in trial taking place in England [as there] are obvious export benefits to the nation in having an open door policy."[297] Furthermore, people who initiate their actions in England are likely to "bring trade to this country as well."[298] It has also been commented that this is not "mere "insular pride" but genuine superiority in specialised areas."[299]

This economic rationale has been endorsed by the Singapore courts. In particular, in the case of *Q & M Enterprises Sdn Bhd*, Andrew Phang JC stated that one reason for the Singapore adoption of the 'clearly more appropriate forum' test was that "[w]hen foreigners litigate in [Singapore], this forms a valuable invisible export."[300] In Canada, however, there is no indication in *Amchem* that there is support for this line of reasoning. Sopinka J simply stated that he "agree[d] with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff."[301]

---

[293] *Spiliada, supra,* n. 23, at 477.
[294] *ibid.*
[295] Fawcett, *supra,* n. 25, at 217-218.
[296] *ibid,* at 218.
[297] *ibid.*
[298] *ibid.*
[299] Guthrie, *supra,* n. 114, at 222.
[300] *Q & M Enterprises, supra,* n. 200, at [17].
[301] *Amchem, supra,* n. 39, at [38].

Australia

As for Australia, while the result of a 'clearly inappropriate forum' test would be to encourage forum shoppers to initiate their action in Australia and thus bring in litigation as an invisible export, it does not appear that the reasoning of the Australian courts on this subject matter is based on this particular point. Instead, it seems to be premised on the avoidance of the many problems that might arise from the globalisation of litigation as a phenomenon if a broader doctrine of *forum non conveniens* were introduced.

In addition, it has been said that "Australian jurisdictions are...unlikely to attract international forum shoppers by reason of the munificence of their procedural law"[302] for a number of reasons namely, "[j]uries in civil trials tend to be comparatively modest in their awards, use of contingency fees is unethical or unlawful in all Australian jurisdictions, and rules of pre-trial discovery are not unduly generous."[303] In other words, Australia simply does not have a reputation of being a centre for international civil and commercial litigation.

5.2 POLITICAL CONTEXT

5.2.1 Federation

In *Bankinvest AG v Seabrooks*, the intention behind the enactment of the cross-vesting scheme in Australia was closely relied upon by the New South Wales Court of Appeal in their rejection of the *Voth* principles with regards to the interpretation of the relevant provisions on the transfer of proceedings from one Supreme Court of a State or Territory in Australia to another.

In particular, Kirby P (as he then was) pointed out a number of factors that have "propelled the Parliaments of Australia into the exceptional machinery provided by the Act and its

---

[302] Opeskin, *The Price of Forum Shopping: A Reply to Professor Juenger* (1994) 16 Sydney Law Review 14, at 19.
[303] *ibid.*

counterparts."[304] First, he stated that there is the "growing integration of the Australian community and economy."[305] Secondly, significant advances in "[t]elecommunications, air transport and other developments"[306] now "permit readier management and control of litigation started in other jurisdictions of Australia than was possible in earlier times."[307]

Similarly, Street CJ commented on the value of the cross-vesting legislation that:

> "[t]he introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional, that have in the past obstructed the courts in meeting the requirements of the Australian public."[308]

Rogers JA too, opined that Australia has become "more and more one market, and there was more extensive movement of people and goods around the nation."[309] In these circumstances, "restrictions imposed by State boundaries became more burdensome"[310] and "contrary to the concept of federalism"[311] particularly with the High Court of Australia's view ruling in *Laurie v Carroll*[312] that "for the purposes of principles of private international law, all other States in Australia should be regarded as 'foreign' countries by the courts of a State."[313] In essence, one can observe that these Justices were of the view that the political context of the Australian federation has led to the enactment of the *Cross-vesting Act*.

Subsequently, the New South Wales Court of Appeal went on to hold that *Voth* has "no role to play"[314] in relation to the interpretation of *section 5(2)* of the *Cross-vesting Act*. In particular, the

---

[304] *Bankinvest, supra,* n. 73, at 157.
[305] *ibid.*
[306] *ibid.*
[307] *ibid.*
[308] *ibid,* at 154.
[309] *ibid,* at 163.
[310] *ibid.*
[311] *ibid.*
[312] (1958) 98 CLR 310.
[313] *Bankinvest, supra,* n. 73, at 163.
[314] *ibid,* at 166.

basis of the *Voth* test; the "*prima facie* presumption that the court, the jurisdiction of which was properly invoked, should exercise it"[315] was firmly rejected. In their view, if this presumption were accepted, "it would entrench the concept of one Australian jurisdiction being 'foreign' to another"[316] and "[n]o allowance would be made for the fact that the Australian States are a federation."[317] As for the approach that should be adopted, Rogers JA held that assistance can be obtained from the English common law *Spiliada* test as they are "driven by the same principles as the Australian legislation;"[318] both the "House of Lords in *Spiliada* and the Parliaments enacting the cross-vesting legislation were responding to the same needs."[319] Obviously, he was not referring to the political context that *Spiliada* was decided in, as England is not a federation. Instead, he appears to be saying that the concern with equal justice, judicial comity and the prevention of forum shopping in the English cases is particularly relevant to the question of what Australian courts should do in a dispute that involves factors connecting it to two or more Australian States or Territories.

In contrast, in *Waterhouse v Australian Broadcasting Corporation*, one can observe a different reaction by the Supreme Court of the Australian Capital Territory to this political consideration. Even though Kelly J did recognise that the statement in *Pederson v Young*[320] that "[t]he [Australian] States are separate countries in private international law"[321] should not be applied "too liberally"[322] and that the "States and Territories are not entirely foreign to one another,"[323] he was of the view that this adherence to the policy of protecting a claimant's right of access to the Australia courts would not be regarded as "chauvinistic."[324] Furthermore, it implied that "plaintiffs were at liberty to choose any one of eight courts in which they might have brought their actions [and that they] could hardly have been said to be forum shopping when they made their choice of

---

[315] *ibid*, at 167.
[316] *ibid*.
[317] *ibid*.
[318] *ibid*, at 168.
[319] *ibid*.
[320] (1964) 110 CLR 162.
[321] *Waterhouse, supra*, n. 83, at [17].
[322] *ibid*.
[323] *ibid*.
[324] *ibid*.

this Court."[325] Accordingly, it is in Kelly J's view that the *Voth* principles can be justified in relation to Australia's political context.

When the High Court of Australia in *BHP Billiton Ltd v Schultz* held that it is the *Spiliada* principles which are relevant to *section 5(2)* of the *Cross-vesting Act*, it is notable that their emphasis was on policy considerations such as the rejection of the litigant's right of access to the Australian courts, discouraging forum shopping and equal justice. There was however no discussion of the Australian political context in the case itself. That being said, as the High Court is effectively endorsing the decision of the New South Wales Court of Appeal in *Bankinvest*, it is possible to infer that they are in agreement with the New South Wales court's reaction to this contextual point.

While Canada is also a federation, it is interesting to note that they have not enacted any legislation to deal with disputes of an inter-provincial nature. One possible explanation is that the Canadian doctrine of *forum non conveniens* is sufficiently discretionary and flexible to take account of the considerations relevant to the political makeup of Canada unlike the Australian situation which is restricted by the 'clearly inappropriate forum' test.

6. INTERACTION BETWEEN THE ABOVE EXPLANATIONS

When analysing the policies, concepts and other wider considerations relevant to the doctrines of *forum non conveniens* in our selected jurisdictions in separate categories, one must be careful not to lose sight of the fact that they do not exist in isolation in that they can interact with one another. For example, the existence and strength of one policy may be dependent on the existence and strength of another. If a jurisdiction accorded great significance to the policy of discouraging forum shopping, this would indicate a weakening of the policy of protecting a litigant's right of access to its courts. Such policy decisions may also be influenced by other

---

[325] *ibid.*

considerations such as the relationship between the doctrine of *forum non conveniens* and other areas of private international law, the fact that other jurisdictions have adopted a similar doctrine of *forum non conveniens* as well as the social, economic and political context that international litigation is fought in. In the above sections, we have alluded to this particular aspect of the comparative analysis but it is essential that we bring together these observations and present them as a coherent whole.

6.1 CANADA

In Canada, it is clear from the above comparative study that a number of policies and concepts have worked in tandem to weaken the policy of protecting the claimant's right of access to the Canadian courts and that this has led to the adoption of the doctrine of *forum non conveniens*. In particular, they are: the policy decision to effect a shift away from judicial chauvinism, discouraging forum shopping, greater equality between claimants and defendants and judicial comity.

The reasons why these considerations have been used to dilute the litigant's right of access to the Canadian courts are as follows:

1. First, at a structural level, it has become easier for Canadian courts to take jurisdiction over international civil and commercial disputes as of right since in some Canadian provinces, leave is no longer required from the courts for the service of a claim form out of jurisdiction. Furthermore, as jurisdiction can be established simply by serving a claim form on a defendant in a Canadian province, Canadian judges are of the view that Canadian bases of jurisdiction are excessively wide and can act as an incentive for litigants to forum shop. In such circumstances, a 'clearly more appropriate forum' test was adopted to ensure that the relevant dispute would be brought in an appropriate forum.

2. Secondly, as a matter of comparative law, the Canadian courts have been swayed by the fact that other Commonwealth judiciaries have also adopted the English common law 'clearly more appropriate forum' test. In addition, the Canadian judiciaries may have regarded these Commonwealth courts to be in support of the policy considerations underlying the English common law doctrine of *forum non conveniens.*

3. Thirdly, at the contextual level, Canadian courts are aware that litigation has become increasingly globalised and that there is now a higher degree of interaction between people and countries all around the world. Under these circumstances, the Supreme Court of Canada is of the view that greater emphasis should be placed on judicial comity and correspondingly, a shift away from judicial chauvinism was necessary. Furthermore, this environment is regarded as conducive to forum shopping thus leading them to provide for greater litigant equality in relation to their doctrine of *forum non conveniens.* However, it is important to note that the adherence to these policies is incomplete in the sense that there are still elements of judicial parochialism and claimant favouritism in relation to the Canadian test. One possible explanation is that the Canadian judiciaries are of the view that litigation can be an important export and encouraging claimants to bring their actions in Canada can bring enormous benefits to Canada's economy. However, it is important to note that there is no confirmation from the relevant cases that this economic rationale has been utilised by the Canadian courts.

As the above interaction of policies, concepts and circumstances in relation to the Canadian doctrine of *forum non conveniens* is similar to that in the relevant English cases, it is unsurprising that the Canadian divergence from the English common law in this area is lesser in extent in comparison to the Australian position.

6.2 AUSTRALIA

The key explanation as to why the Australian doctrine of *forum non conveniens* differs from the English common law doctrine on a large number of points is that the Australian judiciary does not agree with most of the policy choices made by the English courts in this context. In particular, there is still a strong Australian adherence to the policy of protecting the claimant's right of access to the Australian courts and in conjunction with this policy decision, the majority Justices in the relevant High Court decisions appear to be unconcerned with discouraging forum shopping or ensuring greater equality between claimants and defendants. Furthermore, as the Australian courts regard judicial comity as an ideal rather than a practical reality, they are not compelled by the concept to push for a greater reduction of judicial chauvinism in their doctrine of *forum non conveniens*. Consequently, as the emphasis of the Australian doctrine of *forum non conveniens* is on protecting the litigant's right of access to the local courts, there is no need for a flexible test to ensure that litigation is conducted in an appropriate forum.

There are a number of explanations as to why the Australian courts have made the above policy decisions.

1. First, Australian judiciaries do not think that their bases of jurisdiction are excessively wide even though they are similar to those in Canada. This is perhaps why unlike the rest of our selected jurisdictions, the Australian courts do not see any problems with according significant strength to the right of the litigant to have access to the Australian courts. Their only concern here is to ensure that the Australian bases of jurisdiction are adhered to unless injustice is perpetuated by the actions of the claimant. Accordingly, they do not see any need for a high degree of flexibility in their *forum non conveniens* test.

2. Secondly, the High Court of Australia does not agree with the Supreme Court of Canada's view that Commonwealth jurisdictions have similar doctrines of *forum non conveniens*. Accordingly, they do not see a consensus in the policies adhered to by Commonwealth courts in this context. In particular, they do not perceive judicial comity as a practical reality as they are of the view that many jurisdictions in the world provide for chauvinistic jurisdictional rules. Less weight is thus accorded to this consideration in the formulation of the Australian doctrine of *forum non conveniens* which has allowed significant strength to be attached to the claimant's right of access to the Australian courts.

3. Thirdly, even though the Australian courts do acknowledge that litigation has become increasingly globalised, their reaction to this phenomenon is very different from the Canadian courts. In particular, the focus of their judgments appears to be on avoiding the difficulties that might arise from this situation if a broad doctrine of *forum non conveniens* were introduced. Little attention is thus paid to policies such as discouraging forum shopping, achieving greater equality between the litigants and judicial comity.

It is important to note that the above interaction of policies, concepts and wider considerations has not been adopted in relation to the principles governing the transfer of proceedings from one Australian court to another under the *Cross-vesting Act*. The reasons provided by the courts for this decision is that the political nature of the Australian federation requires adherence to the policies of preventing judicial chauvinism, discouraging forum shopping and inducing greater equality between litigants. There is thus a weakening of the claimant's right of access to the Australian courts in this context. In turn, this has led to the adoption of a test analogous to the 'clearly more appropriate forum' test in relation to these statutory provisions.

6.3 SINGAPORE

The Singapore doctrine of *forum non conveniens* is almost identical to the English common law doctrine. This is because the Singapore courts are in agreement with the policies underlying the English common law clearly more appropriate forum' test. Like the English courts, they are of the view that judicial chauvinism should be replaced by judicial comity and that forum shopping should be discouraged with regards to their law on stays of proceedings. Furthermore, they have provided for a pro-claimant bias in the formulation of their *forum non conveniens* test as they believe that the bringing of international litigation in Singapore by foreigners can be an invisible export beneficial to the Singapore economy.

7. CONCLUSIONS

Initially, there was no doctrine of *forum non conveniens* in our selected jurisdictions as the English common law *St Pierre* test was adopted by the courts in these countries with no examination of whether this approach is appropriate for their individual circumstances. However, after the House of Lords provided for a 'clearly more appropriate forum' test, there was no automatic endorsement of this approach by the Canadian and Australian courts. This is because there was no longer an acceptance of English judicial solutions at face value in these jurisdictions. Instead, there is now a greater willingness on the part of the judiciaries in Canada and Australia to adopt a critical analysis of the policies, concepts and other wider considerations that are relevant to this area of private international law. As the policy choices made by these courts have not concurred with that of the English judges, this has resulted in either the modification of the English common law doctrine of *forum non conveniens* or its rejection altogether.

In short, it is arguable that the break up of Commonwealth private international law in relation to *forum non conveniens* is the result of differences across our selected jurisdictions in relation to the judicial treatment of policies, concepts and other wider considerations. In this chapter, we have sought to illustrate this point with reference to our analytical points of comparison as established in Chapter 2. Specifically, these differences are as follows:

1. Even though our selected jurisdictions are of the view that there should be a policy shift away from judicial chauvinism, they are not in consensus as to the extent to which such judicial attitudes should be abandoned in relation to their doctrines of *forum non conveniens*. On the one hand, it is arguable that the High Court of Australia is of the view that the *St Pierre test* is too insular but not to the extent that it should be abandoned altogether. They have thus provided for a compromise position; the 'clearly inappropriate forum' test. On the other hand, Canada and Singapore are in consensus with the English judicial view that there should be a substantial shift away from judicial chauvinism thus necessitating the rejection of the *St Pierre* approach for a 'clearly more appropriate forum' test.

2. One explanation for the Canadian and Singaporean adoption of the formulation of the English common law doctrine of *forum non conveniens* is that the judiciaries of these jurisdictions are of the view that the policy of protecting the litigant's right of access to the courts in question should be significantly weakened. Correspondingly, the policy of discouraging that litigant's forum shopping should be strengthened. The Australian courts, however, do not share such a view as they have continued to accord substantial weight to the claimant's right of access to the Australian courts.

3. It appears that the Canadian adoption of the 'clearly more appropriate forum' test can be explained by a Canadian judicial adherence to the policy of ensuring greater equality between the litigants in the context of a stay of proceedings. Similarly, this is one

explanation provided by the English courts for their weakening of the right of litigants to have access to the English courts due to its overly pro-claimant stance. Australia, on the other hand, has continued to adhere to the claimant's right of access to the Australian courts and has thus provided for a doctrine of *forum non conveniens* that is more biased against the defendant.

4. Among our selected jurisdictions, there is some judicial disagreement as to the compromise that should be set between certainty and flexibility in relation to their individual doctrines of *forum non conveniens.* The Australian courts are not in support of the flexibility inherent in the English common law doctrine of *forum non conveniens* and have opted for the more restrictive 'clearly inappropriate forum' test on the grounds that it provides more certainty to litigants. While the Canadian courts have adopted the English common law 'clearly more appropriate forum' test, they have chosen not to adopt the two-stage structure provided for in *Spiliada* as they appear to be of the view that it is overly legalistic. Instead, they prefer a more flexible approach in that the question is simply: is there a 'clearly more appropriate forum' elsewhere? As Singapore has adopted the *Spiliada* test and structure, one can assume that they are in agreement with the English common law balance between certainty and flexibility.

5. One explanation for the adoption of the English common law 'clearly more appropriate forum' test in Canada and Singapore is that this approach serves as an antidote to excessively wide bases of jurisdiction. Australian judges however do not appear to be of the view that that such bases of jurisdiction are overly broad. Instead, their doctrine is aimed at ensuring that these bases of jurisdiction are adhered to.

6. On the one hand, comity has been employed as an argument for the departure from judicial chauvinism in England, Canada and Singapore in relation to their laws on stays of proceedings. On the other hand, the Australian courts have refused to follow suit as they

do not think that judicial comity exists to a large extent in the developed world. They may also be of the view that comity is best served by judicial restraint, i.e. focusing on the suitability of the local Australian forum in question rather than an inquiry into the appropriateness of the alternative foreign jurisdiction.

7. The key explanation for the lack of a doctrine of *forum non conveniens* in Australia, Canada and Singapore in the early stages of their legal evolution was their adherence at that time to English judicial precedents and English solutions. Subsequently, even though the English common law 'clearly more appropriate forum' test was adopted by the Canadian and Singaporean courts, it is notable that this is not an unthinking adherence to the relevant English authorities as these judiciaries did examine the policies and concepts underlying the English common law *Spiliada* test before endorsing that approach. In sharp contrast, the Australian courts do not consider the utilisation of English judicial precedents as appropriate for the Australian context as they are of the view that the English common law doctrine of *forum non conveniens* is based on a separate set of social and political circumstances.

8. In recent decades, Commonwealth jurisdictions have generally adopted *forum non conveniens* approaches to deal with the application for a stay of proceedings. This broadly uniform comparative scene has been used by the Canadian courts to justify their adoption of the English common law 'clearly more appropriate forum' test. In contrast, the Australian judiciaries emphasised the differences between the doctrines of *forum non conveniens* in common law jurisdictions to refuse a shift towards a broader *forum non conveniens* test as provided for in Canada, Singapore and England.

9. Underlying the Canadian support for a shift from judicial chauvinism towards judicial comity, a policy of discouraging forum shopping and greater equality between litigants, is the view that international civil and commercial litigation has become increasingly

globalised and that these policies and concepts are now necessary for these modern conditions. Even though the Australian courts are aware of this particular social and economic phenomenon, they have not reacted in the same manner as the Canadian courts. Instead, they seemed to be fixated on the problems that might occur if a broader doctrine of *forum non conveniens* were adopted in such circumstances.

10. In conjunction with the growing globalisation of the world economy and thus international litigation, the English courts have for many years regarded litigation as an invisible export, one that can bring enormous benefits to their country's economy. It is clear that the Singaporean endorsement of the English common law presumption in favour of trial in the local forum is a result of this view. It is however unclear as to whether this is so in relation to the Canadian doctrine. The tenor of the Australian judgments, on the other hand, seems to be more on the protection of Australian bases of jurisdiction and avoiding the difficulties that may arise from a broader doctrine of *forum non conveniens* in today's globalised conditions rather than on a policy of attracting international litigation.

11. The fact that Australia is a federation has led law-makers to enact the cross-vesting legislation so as to facilitate the transfer of proceedings from the Supreme Court of one State or Territory to another. This consideration has persuaded the High Court of Australia to reject the *Voth* test for the *Spiliada* approach in relation to the interpretation of the relevant statutory requirements for allowing such transfers of proceedings. In particular, they regard the policies of discouraging forum shopping and equal justice as necessary for the Australian political context. As Canada is already adhering to these policies under their broader doctrine of *forum non conveniens*, the fact that she is a federation has not made its way into the reasoning of the Supreme Court of Canada in relation to the formulation of its doctrine of *forum non conveniens.*

12. Looking at the list of explanations laid out above, it is clear that there is a whole range of influences on the decisions to diverge from or converge with the English common law doctrine of *forum non conveniens* in our selected jurisdictions. It is important to note that these considerations do not operate in isolation and that they can interact with one another. In particular:

a. With regards to Canada, a shift away from judicial chauvinism for judicial comity, the policy of discouraging forum shopping as well as ensuring greater equality between litigants has been particularly influential on the Supreme Court of Canada's decision on *forum non conveniens*. These policy considerations are deemed necessary as litigation has become increasingly globalised. As the above interaction of policies and other wider considerations in the Canadian cases is similar to that in the relevant English decisions, the Canadian doctrine of *forum non conveniens* is similar to the English doctrine.

b. As for Singapore, it is again a combination of policies and concepts, namely discouraging forum shopping and judicial comity, that has led to the weakening of the litigant's right of access to the Singapore courts and thus the endorsement of the English common law doctrine of *forum non conveniens*. The retention of the pro-claimant bias in the 'clearly more appropriate forum' test is the result of a judicial view that litigation can be an invisible export to the Singapore economy.

c. As for Australia, it is clear that there has been a marked Australian divergence from the English common law doctrine of *forum non conveniens* as there is little agreement between the Australian and English courts on the relevant policies, concepts and principles in this area of private international law. In general, the Australian judges do not agree with the extent of the English common law shift away from judicial chauvinism. There is little discussion of forum shopping and

equality between claimants and defendants by the majority judges in the key High Court of Australia cases on stays of proceedings. They disagree strongly with the increased flexibility in the English common law doctrine of *forum non conveniens* thus opting for a more restrictive 'clearly inappropriate forum' test. They see judicial comity as an ideal rather than a practical reality. Even though they do acknowledge that litigation has become increasingly internationalised, they are more concerned with the problems resulting from the application of a broader doctrine of *forum non conveniens*.

CHAPTER 6: EXPLANATIONS FOR THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO TORT CHOICE OF LAW

1. INTRODUCTION

The purpose of this chapter is to continue our analysis of the break up of Commonwealth tort choice of law in Chapter 3 by examining the explanations for this phenomenon. As was brought out in our discussion of the same issue in Chapter 5, differences in the judicial treatment of policies, concepts and other wider considerations relevant to this area of private international law have resulted in the development of diverging *forum non conveniens* approaches in our selected jurisdictions. To examine whether this proposition is equally applicable to tort choice of law, the methodology adopted in Chapter 5 will be used in this chapter as well.

In particular, the considerations utilised by the courts of our selected jurisdictions in diverging from or converging with the English common law tort choice of law regime are as follows:

2. Policy explanations

2.1 Certainty and flexibility

2.2 Choice of law justice and judicial chauvinism

2.3 Equal justice

2.4 Uniformity of judicial decisions

2.5 Forum shopping and litigant convenience

3. Structural explanations

3.1 Interaction with the substantive law of torts

3.2 Interaction with public international law: territoriality and comity

3.3 Interaction with other areas of private international law

4. Historical and comparative explanations

4.1 The historical influence of English judicial precedents

4.2 The influence of foreign tort choice of law regimes

5. Contextual explanations

5.1 Economic and social context

5.2 Political context

Two preliminary points must be made here. First, besides the views of our selected judiciaries on these explanations, we will also be looking at the reasoning of the Law Commissions and the UK Government with regards to their decision to provide for *Part III* of the *Private International Law (Miscellaneous Provisions) Act 1995*. In other words, we will be going beyond an analysis of the common law tort choice of law regimes for this chapter. Once again, we see this as necessary for a complete picture of the tort choice of law situation in England. Secondly, aside from a policy of adhering to English judicial precedents, the Singapore courts have not provided any explanations for following the English common law tort choice of law regime.

2. POLICY EXPLANATIONS

2.1 CERTAINTY VERSUS FLEXIBILITY

At the initial stages of tort choice of law development in our selected jurisdictions, there was little judicial discussion of certainty and flexibility in relation to the divergences and convergences that resulted then. However, as time passed, especially in the last decade or so, this position was reversed as judiciaries reformed their tort choice of law regimes depending on their views on where the compromise between the two concepts should be set.

2.1.1 Tort choice of law rule

In general, the Australian and Canadian courts as well as the Law Commissions are in support of a *lex loci delicti* rule as it is "clear, simple and certain"[1] and "its results are easily predictable."[2] Similarly, there is no problem of uncertainty and unpredictability with the English common law double actionability rule.

However, because of the decision in *Neilson v Overseas Projects Corporation of Victoria*[3] to include *renvoi* as part of the Australian *lex loci delicti* rule, some certainty in the Australian tort choice of law regime has been sacrificed. This is because Australian courts must, in addition to the application of the *lex loci delicti*, identify "the foreign country's choice of law rules and its attitude to *renvoi*"[4] before the applicable law can be located.

To elaborate, it is often difficult to obtain reliable information on whether a foreign country has a doctrine of *renvoi* especially, if the court of that country has not provided for any conclusive

---

[1] Law Commissions Working Paper No. 87 (1984), at para. 4.56. For Australia, see *Pfeiffer v Rogerson* (2000) 203 CLR 503, at [83], *Renault v Zhang* (2002) 187 ALR 1, at [66]. For Canada, see *Tolofson v Jensen* [1994] 3 SCR 1022, at [44].
[2] Working Paper, *ibid.*
[3] [2005] HCA 54.
[4] *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206, at [48]. (Supreme Court of West Australia).

pronouncements on that doctrine.[5] In addition, depending on whether the doctrine of *renvoi* in Australian tort choice of law is single or double *renvoi*, further uncertainty may be generated. Double *renvoi* would pick up "the foreign court's substantive law, choice of law rules and *renvoi* rule"[6] such that if the foreign court "also applies double *renvoi*, the forum court is denied a certainty of result because of the potential for an endless oscillation backwards and forwards."[7] Moreover, even though single *renvoi* does provide for some certainty of result in that it stops at the reference by the foreign court back to the *lex fori* or another country's law, the forum court will be applying a law when it regards the "law of another country [as] more appropriate to determine the matter."[8] It is thus interesting to note that the High Court of Australia has chosen to side-step this issue.

2.1.2 Exception to the tort choice of law rule

In *Red Sea Insurance Co Ltd v Bouygues SA*,[9] Lord Wilberforce's exception to the tort choice of law rule in *Boys v Chaplin*[10] was endorsed by the Privy Council. They first stated that they recognised:

> "the conflict which exists between, on the one hand, the desirability of a rule which is certain and clear on the basis of which people can act and lawyers advise and, on the other, the desirability of the courts having the power to avoid injustice by introducing an element of flexibility into the rule."[11]

Subsequently, the Privy Council provided for a balance between the policies of certainty and flexibility by agreeing with Lord Wilberforce's view that "[t]he general rule must apply unless clear

---

[5] See for example, *In re Duke of Wellington* [1947] Ch 506. Similarly, it was not clear in *Neilson, supra*, n. 3 as to whether China has a doctrine of *renvoi*.
[6] Lu, *Ignored no more: Renvoi and International Torts Litigated in Australia* (2005) 1 Journal of Private International Law 35.
[7] *ibid*, at 58.
[8] *ibid*.
[9] [1995] 1 AC 190.
[10] [1971] AC 356.
[11] *Red Sea, supra*, n. 9, at 206.

and satisfying grounds are shown why it should be departed from"[12] thus indicating a compromise slanted more towards certainty but still with a degree of flexibility to do justice in the individual case. However, not all our selected judiciaries were satisfied with this balance and this has resulted in divergences from the English common law exception.

England: *Part III* of the *1995 Act*

In relation to the English statutory tort choice of law regime, the Law Commissions declared in their *Working Paper* on tort choice of law that its objective is "ideally to select the law which in all the circumstances it would be most appropriate to apply."[13] Accordingly, this would necessitate a "balance between certainty and refinement"[14] where the former would have to be sacrificed in certain situations to give effect to that purpose. However, the Law Commissions pointed out that the new tort choice of law regime should still "possess a high degree of certainty."[15] Hence, their final position in the *Working Paper* was to further refine the *lex loci delictl* rule which would provide the "most appropriate law"[16] in many cases with an exception so as to ensure that the selection of an "appropriate system of law in as high a proportion of cases as possible."[17] Furthermore, the exception was to displace the *lex loci delicti* only if a threshold requirement is met:[18] that the occurrence and the parties must have an insignificant connection with the *locus delicti* and a substantial connection with another country's law before the *lex loci delictl* can be replaced by another law.[19]

It is interesting to note that there has been a gradual shift towards 'refinement' with the whittling down of the above threshold in the *Law Commissions' Report* as well as the introduction of *depecage* in the *Proceedings of the Special Public Bill Committee.* When the *Law Commissions'*

---

[12] *ibid.*
[13] Working Paper, *supra,* n. 1, at para. 4.16.
[14] *ibid,* at para. 4.18.
[15] *ibid.*
[16] *ibid,* at para. 4.59.
[17] *ibid,* at para. 4.18.
[18] *ibid,* at para. 4.122.
[19] *ibid,* at para. 4.123.

Report was released, the threshold was watered down and all that was required for the exception to operate was a substantial connection with another country's law.[20] The explanation provided for this lowering of the threshold[21] was that the former threshold and its balance between certainty and refinement would prevent:

> "the displacement of the law selected by the general rules where there is some significant connection with this law even though there is a much stronger connection with another law."[22]

This balance was further shifted when the Special Public Bill Committee decided in favour of introducing *depecage* to the *section 12* exception[23] which was rejected previously by the Law Commissions, as it would introduce too much uncertainty.[24] After these changes were made, it is interesting to note that the *section 12* exception has become very similar to the English common law flexible exception.

Canada

In *Tolofson v Jensen*,[25] La Forest J declared that the "underlying principles of private international law are order and fairness"[26] and that "order comes first"[27] as a "precondition to justice."[28] As Castel has commented, "these expressions are merely other ways of describing the general objectives of legal certainty and flexibility."[29] It is thus clear that the Canadian judiciary is in agreement with the Law Commissions as well as the Privy Council in *Red Sea Insurance* that

---

[20] Law Com No. 193 (1990), at para. 3.11.
[21] *ibid.*
[22] *ibid.*
[23] HL Paper 36 (1995), Part II, at col. 31.
[24] Law Com No. 193 (1990), at para. 3.52.
[25] [1994] 3 SCR 1022.
[26] *ibid,* at [57].
[27] *ibid.*
[28] *ibid.*
[29] Castel, *Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?* (1995) 33 Osgoode Hall Law Journal 35, at 41.

certainty is more important than flexibility. However, one question remains: do they share the same compromise between the two concepts?

Concerning inter-provincial torts, La Forest J held that "[o]ne of the main goals of any conflicts rule is to create certainty in the law"[30] as it "promotes settlement"[31] of tortious disputes. "Any exception adds an element of uncertainty"[32] which would then inhibit that settlement. He is also "unconvinced"[33] that flexibility to apply a law other than the *lex loci delicti* could "better [meet] the demands of justice, fairness and practical results."[34] In his view, justice in the individual case is simply an indication that the "court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt"[35] preferring "forum notions of public policy or justice"[36] instead. He considers this "underlying rationale of the "justice" theory"[37] to be a blatant violation of the territoriality principle, a concept which will be examined in a later sub-section in this chapter. In essence, he is of the opinion that optimum certainty should be pursued in the Canadian federal context with no exception attached to a clear and simple tort choice of law rule, as flexibility in a tort choice of law regime will only be misused in an application of domestic notions of justice.

La Forest J's hostility towards individual justice is also directed at international torts as he stated in general terms at the beginning of his critique of the English common law tort choice of law regime, that the rules themselves are based on a "sense of 'fairness' about the specific case;"[38] a reaction "which seems to be born of a disapproval of the rule adopted by a particular jurisdiction."[39] However, when he addressed the question of whether an exception should be available to the *lex loci delicti* rule for international torts, he conceded that over-emphasis on certainty in this context could result in rigidity and possibly injustice. Again, a strong preference

---

[30] *Tolofson, supra*, n. 25, at [65].
[31] *ibid*, at [66].
[32] *ibid*, at [65].
[33] *ibid*, at [57].
[34] *ibid*, at [54].
[35] *ibid*, at [57].
[36] *ibid*, at [55].
[37] *ibid*.
[38] *ibid*, at [36].
[39] *ibid*.

for certainty is indicated in his judgment as he remarked that he could "imagine few cases"[40] where an exception would be necessary. Unfortunately, he did not elaborate on these cases.

Some courts, notably the British Columbia Supreme Court, have provided for a degree of flexibility in their use of the interest analysis to work out whether the *lex fori* should be applied instead of the *lex loci delicti.*[41] In contrast, in *Wong v Lee*[42] and *Somers v Fourier,*[43] the Ontario Court of Appeal has held that the justice exception should only be available in exceptional cases[44] to "recognise and give effect to the policy behind the enunciation of the rule [in *Tolofson*], which emphasises the importance of certainty in the choice of law rules."[45] An indication that their compromise between certainty and flexibility is more slanted towards the former than that by the English courts and the drafters of the *1995 Act* is provided by their statement that the exception is "necessary only in a very unusual case"[46] where the *lex fori* and the *lex loci delicti* are "beyond ordinary differences."[47]

Australia

In the High Court of Australia case of *McKain v Miller,*[48] the flexible exception was jettisoned by the majority judges on the grounds that it generates uncertainty,[49] a view that was continued in *Pfeiffer v Rogerson*[50] with specific reference to inter-state torts. In particular, the use of a flexible rule with terms such as "real and substantial"[51] or "most significant"[52] was not seen as being capable of giving "sufficient guidance to courts, to parties or to those, like insurers, who must

---

[40] *ibid,* at [50].
[41] *Wong v Wei* (1999) 45 CCLT (2d) 105, at [18].
[42] (2002) 58 OR (3d) 398.
[43] (2002) 60 OR (3d) 225.
[44] *Wong v Lee, supra,* n. 42, at [16].
[45] *ibid,* at [12].
[46] *ibid,* at [16].
[47] *ibid.*
[48] (1991) 174 CLR 1.
[49] *ibid,* at 38-39.
[50] (2000) 203 CLR 503.
[51] *ibid,* at [79].
[52] *ibid.*

order their affairs on the basis of predictions about the future application of the rule."[53] Such exceptions would only "led to very great uncertainty"[54] with the consequence of increasing "the cost to parties, insurers and society at large."[55] One can observe that this is the same reason given by the Supreme Court of Canada for its decision not to have any exceptions to the tort choice of law rule for inter-provincial torts.

In relation to international torts, the English common law flexible exception was rejected by the High Court of Australia in *Renault v Zhang*.[56] No clear explanation was given for this decision except that the "reasoning and conclusion in *Pfeiffer*"[57] that there should not be a flexible exception for inter-state torts should be extended to international torts. In other words, it appears that this exception was again rejected because it was seen as too uncertain. Confirmation came in *Neilson* where Gummow and Hayne J held that the flexible exception was rejected as it was too uncertain.

A public policy exception to the *lex loci delicti* rule for international torts was provided for by the High Court of Australia in *Renault* possibly because they were of the view that it would provide certainty to Australian tort choice of law, as it would only be applied in exceptional circumstances. One must be reminded of Carter's warning that the abolition of the *lex fori* may increase "resort and actual resort"[58] to public policy as an escape device thus introducing "new sources of uncertainty and unpredictability."[59]

To sum up, the Australian rejection of the English common law flexible exception is the result of a stronger preference for certainty by the Australian courts in comparison to the English courts. This is also why the Australian and Canadian positions on the exception to their tort choice of law

---

[53] *ibid.*
[54] *ibid.*
[55] *ibid.*
[56] (2002) 187 ALR 1.
[57] *ibid*, at [75].
[58] Carter, *Choice of Law in Tort and Delict*, (1991) 107 Law Quarterly Review 405, at 408.
[59] *ibid*, at 409.

rule are similar as it is arguable that their courts share similar views on the policy of ensuring legal certainty.

2.2 CHOICE OF LAW JUSTICE AND JUDICIAL CHAUVINISM

In the process of reforming the English tort choice of law regime, the concept of 'choice of law justice' was referred to by the Law Commissions. In particular, they were of the view that a distinction must be drawn "between justice at the substantive level and justice at the choice of law level."[60] Substantive tort law which represents a forum's "ideas of justice,"[61] is entirely appropriate for cases that involve "no foreign element."[62] However, in the converse situation, it may be in the interests of justice to apply a foreign law even if that law differs drastically from the *lex fori* as it would be "wrong to permit the wrongdoer to be subjected to liability"[63] under the *lex fori* simply because "the claimant chose to bring his action in the United Kingdom."[64] The "automatic application of the *lex fori*"[65] may thus work an injustice for a claimant "whose only chance of recovery may for reasons beyond his control"[66] lie in suing in a forum which does not impose any liability for the activities of the defendant.

Up until this point, we can observe that our discussion of choice of law justice is negative in nature as we are merely saying that if a tortious dispute requires the involvement of private international law, it would be unjust to apply domestic notions of justice. In other words, the main concern here is that a tort choice of law regime should not give effect to judicial chauvinism. Even though choice of law justice was not explicitly referred to in the Australian and Canadian cases, it is interesting to note that the judiciaries of both countries have utilised the concept of parochialism in their divergence from the double actionability rule. Nonetheless, it will be seen below that positive definitions of what justice would require at the choice of law level have been

---

[60] Working Paper, *supra*, n. 1, at para. 3.5.
[61] *ibid.*
[62] *ibid.*
[63] *ibid*, at para. 3.8.
[64] *ibid.*
[65] *ibid*, at para. 4.27.
[66] *ibid.*

provided by the Law Commissions in relation to the tort choice of law rule itself. This has not been done in the relevant Australian and Canadian cases.

2.2.1 Tort choice of law rule

England: *Part III* of the *1995 Act*

The Law Commissions were of the view that the *lex fori* limb of the *Phillips v Eyre*[67] rule should be abandoned as it enables the courts to "give judgment according to its own ideas of justice."[68] This was said to be against choice of law justice as it "bears a parochial appearance."[69] Furthermore, the Law Commissions saw no reason why this position "should prevail in the field of tort and *delict* but not in other fields."[70]

While their call for the abolition of the *lex fori* was based on the removal of judicial chauvinism from tort choice of law, a positive definition of what justice should entail in a tort choice of law scenario was provided for by the Law Commissions in relation to their decision to adopt a *lex loci delicti* rule. In particular, they considered that if one party to the dispute is "independently connected with the *locus delicti*"[71] which in practice is likely, it is right that he should be "able to rely on his own local law for his rights and be subject to such liabilities as are prescribed by that law."[72] This is because:

> "the legal position of a person who, in his own country, acts or is affected by an act, or takes part in a transaction, should not be adversely affected by a foreign element... which it was not open to him to avoid."[73]

---

[67] [1870] LR 6 QB 1.
[68] *Boys v Chaplin*, *supra*, n. 10, at 400.
[69] *ibid*, at 387.
[70] Working Paper, *supra*, n. 1, at para. 3.5.
[71] *ibid*, at para. 4.57.
[72] *ibid*.
[73] *ibid*.

In other words, the fundamental injustice to be avoided here is the "arbitrary diminution"[74] of rights based on factors which are "unforeseeable and, in the context, immaterial."[75] To elaborate, in most circumstances, one party to the dispute is likely to be from the *locus delicti* and he would have conducted his own affairs on the premise that his own law would apply to whatever litigation he is involved. Yet simply because the other party is not from the *locus delicti*, a tort choice of law regime which accords a significant role to the *lex fori* would deprive him of his remedy or impose liability upon him. The residence of the parties is not of "an exculpatory nature"[76] as the parties to the dispute cannot be said to be responsible for this factor or to possess the power to prevent its occurrence. The statutory *lex loci delicti* rule under *section 11* of the *1995 Act* was thus adopted, as it was capable of addressing the above concerns.

Canada and Australia

In *Tolofson*, La Forest J alluded to the dichotomy between substantive justice and choice of law justice with his criticism that the evolution of the English common law tort choice of law rule with its inclusion of the *lex fori* was based on the judiciary's "disapproval of the rule adopted by a particular jurisdiction"[77] as it "involves a court's defining the nature and consequences of an act done in another country."[78] In his view, courts should not engage "in that kind of interest balancing"[79] as a "system of law built on what a particular court considers to be...fair...does not bear the hallmarks of a rational system of law."[80] Tort choice of law is "structural"[81] in nature. Accordingly, it should not take into consideration, domestic notions of justice. In other words, La Forest J is of the view that the *Phillips v Eyre* rule is parochial and should be abandoned.

---

[74] Jaffey, *Choice of Law in Tort: a Justice Based Approach* (1982) 2 Legal Studies 98, at 103.
[75] *ibid.*
[76] *ibid.*
[77] *Tolofson, supra*, n. 25, at [36].
[78] *ibid*, at [47].
[79] *ibid*, at [36].
[80] *ibid.*
[81] *ibid.*

Similarly, the Australian courts have observed that the first limb of the *Phillips v Eyre* rule favours a "stringent domestic policy"[82] and that in the tort choice of law context, there are "no compelling policy considerations"[83] which require an "exceptional role to be accorded to the substantive domestic law of the forum."[84] In their view, the *lex fori* limb was "intended to operate as a technique of forum control"[85] and in this time and age, such matters should be dealt with directly under a public policy exception.

To sum up, one explanation for the Canadian and Australian divergence from the English common law is that the courts in these jurisdictions are of the view that the double actionability rule is parochial and that a shift from that position is necessary. In relation to their adoption of the *lex loci delicti* rule, no mention of choice of law justice was made by these judiciaries.

2.2.2 Characterisation: unknown foreign torts

According to the Law Commissions, the characterisation of unknown foreign torts as 'torts' under the *1995 Act* is "an inevitable consequence of getting rid of the rule in *The Halley.*"[86] Hence, the reasons for including unknown foreign torts within the ambit of that statutory regime are inextricably linked to the explanations for the rejection of the *lex fori.* In particular, they argued that a bar on unknown foreign torts would indicate an English classification of torts and thus an English perception of what actions should incur liability simply because the case was brought in an English court. As Dr North has commented in the *Proceedings of the Special Public Bill Committee*, to do so would be to give effect to a "very nationalistic view."[87]

---

[82] *Renault, supra,* n. 56, at [53].
[83] *ibid,* at [55].
[84] *ibid.*
[85] *ibid.* at [60].
[86] HL Paper 36 (1995), Part I, at 39 per Dr North. *The Halley* (1868) LR 2 PC 193.
[87] HL Paper 36 (1995), Part I, *ibid.*

The strength of this rationale is evident from the Government's rejection of the United Kingdom proviso.[88] The Law Commissions, in response to the comment that the English common law tort choice of law regime has the advantage of preventing the "courts from attaching conclusive significance to foreign laws having radically different purposes"[89] from English law, introduced a proviso to allow a person acting within a part of the United Kingdom in accordance with English law, to avoid liability under a foreign law which might "reflect substantially different purposes from our own law."[90] The implication of the proviso in relation to unknown foreign torts was that even though such torts are deemed to fall within the scope of the *1995 Act*, they would not be applied if the defendant acted in the United Kingdom. In providing for such a proviso, it is submitted that the Law Commissions were of the view that protection under English notions of justice should be extended to defendant-actors in the United Kingdom even though to do so, would be to weaken the choice of law justice rationale.

The Government, however, responded with a reassertion of the basic justification by stressing that the United Kingdom proviso would "reintroduce the nationalistic attitude which the law commissions are otherwise seeking to obviate"[91] and thus with that criticism, they rejected the proviso. In other words, it appears that they are refusing any weakening of the choice of law justice rationale in this context.

2.3 EQUAL JUSTICE

According to the Law Commissions, "another injustice"[92] generated by the double actionability rule is that it is "considerably to the advantage of the wrongdoer."[93] In particular, the claimant has

---

[88] Law Com No. 193 (1990), at para. 3.16, "where the act or omission which gives rise to the cause of the action occurs in the United Kingdom, including those cases where loss or damage occurs abroad as a result of conduct which occurs in the United Kingdom, the law of the relevant part of the United Kingdom shall apply."
[89] *ibid.* at para. 2.10.
[90] *ibid*, at para. 3.16.
[91] Hansard, (HL) 6 Dec 1994, Vol. 837, col. 833.
[92] Working Paper, *supra*, n. 1, at para. 3.8.
[93] *ibid.*

the "worst of both laws"[94] as he has to satisfy both the *lex loci delicti* and the *lex fori* in order to succeed in his claim whereas the alleged wrongdoer can simply rely on any of the defences available under the two laws to avoid liability.[95] In short, he can "never succeed to a greater extent than is provided for by the less generous of the two systems of law concerned."[96]

The consequences of the double actionability rule are also unfair to the claimant. In most cases, "a plaintiff will [want to] sue in its own jurisdiction"[97] as it is the "natural instinct to sue at home where the advisers are, where the law is familiar, and there is no question of security for costs."[98] However, under the double actionability rule, particularly in circumstances where the *lex fori* does not impose any liability on the wrongdoer in contrast to the *lex loci delicti,* the claimant would be compelled to bring his action in another jurisdiction most likely, the *locus delicti.* This seems terribly unfair to the claimant, as he has to be subjected to the expense and trouble of suing in another country and be deprived of the protection of his own judicial system.

In addition, with the European rules on recognition and enforcement in place, all the double actionability rule does is to require the litigant to "go through a foreign court, possibly that may have jurisdiction, and then have enforceability"[99] in the English courts "under rules which are pretty generally in favour of enforcement."[100] At the end of the day, the claimant will have his remedy but the process by which he obtains it is expensive and arduous. Furthermore, in the worst case scenario, if the jurisdiction he is compelled to bring his action in is not part of the European Union, he may be left without a remedy as "although he may in theory have a choice of forum, he may in practice have no such choice if the wrongdoer or his assets are located"[101] in England. Therefore, particularly in the case of an English plaintiff, it is regarded as preferable that such actions be brought in the English courts in accordance with English "notions of justice and

---

[94] *Boys v Chaplin, supra,* n. 10, at 405 per Lord Pearson.
[95] Working Paper, *supra,* n. 1, at para. 3.8.
[96] *ibid,* at para. 3.9.
[97] HL Paper 36 (1995), Part I, at 69 per Sir Lawrence Collins.
[98] *ibid.*
[99] *ibid,* at 9 per Lord Mackay (the Lord Chancellor then).
[100] *ibid.*
[101] Working Paper, *supra,* n. 1, at para. 4.27.

procedure."[102] Accordingly, it is an adherence to the policy of ensuring equal justice between litigants which has led the Law Commissions to call for the abolition of the double actionability rule.

Interestingly, in Australia, equal justice was cited as an explanation for discouraging forum shopping. In particular, Kirby J in *Neilson,* stated that the "law must be even-handed in its operation. It must be just to defendants as well as plaintiffs."[103] Accordingly, this is "a reason why a party should not normally be able to pick and choose the applicable law (and thus in many cases the outcome) according to the forum selected by that party for the commencement of proceedings."[104] In other words, he is of the view that there is a need to adhere to the policy of discouraging forum shopping by ensuring the uniformity of judicial outcomes regardless of the forum the action is litigated in so as to do equal justice between the parties to the dispute. This line of reasoning led him to hold that *renvoi* is part of the Australian tort choice of law rule.

In contrast, the Singaporean and Canadian judiciaries have not considered this concept in the relevant cases.

2.4 UNIFORMITY OF JUDICIAL DECISIONS

Many conflict scholars have ventured forth the view that "a measure of uniformity in the judicial settlement of disputes no matter where there are litigated"[105] is an important goal of conflict of laws. They have thus criticised the *Phillips v Eyre* rule for bringing about a situation where the judicial result would depend on the forum that the action is brought in. To elaborate, if a court must apply its own law, the *lex fori* "in deciding the existence, extent or enforceability of rights and obligations,"[106] but the courts of another jurisdiction would not give effect to those rules, "the

---

[102] HL Paper 36, (1995), Part I, at 73 per Sir Lawrence Collins.
[103] *Neilson, supra,* n. 3, at [173].
[104] *ibid.*
[105] See for example, Hancock, *Torts in the Conflict of Laws: the First Rule in Phillips v Eyre* (1940) 3 University of Toronto Law Journal 400.
[106] *Pfeiffer, supra,* n. 50, at [17].

existence, extent or enforceability of the parties' rights and obligations will differ according to where the litigation is conducted."[107] Accordingly, one possible explanation for the divergences in our selected jurisdictions from the English common law tort choice of law rule is that their judiciaries are of the view that greater importance should be accorded to the policy of ensuring the uniformity of judicial decisions in comparison to the position under the English common law.

England: *Part III* of the *1995 Act*

One explanation given by the Law Commissions for the adoption of the *lex loci delicti* rule is that it would "promote uniformity"[108] in two ways. First, as a matter of comparative law, the *lex loci delicti* is a "widely accepted choice of law rule"[109] and there would thus be a certain degree of uniformity in the decisions across countries which use the same tort choice of law rule. Secondly, the *lex loci delicti* would provide for the same judicial result as that of an "action brought in the country where the tort or *delict* occurred"[110] as the courts there are likely to apply their own *lex fori*. Nevertheless, it is important to note that the Law Commissions have cast doubt upon the efficacy of this policy by pointing out that:

> "uniformity of result can never be wholly achieved without agreement, as regards foreign countries and in the absence of such agreement it is not possible to do more than bear this factor in mind."[111]

It is thus submitted that the other rationales offered by the Law Commissions for their decision to adopt the *lex loci delicti* are probably stronger. In addition, it should be noted that immediately after the Law Commissions made clear their views on uniformity in the *Working Paper*, they stated that "*renvoi*, will in principle, be excluded"[112] from the *1995 Act*.

---

[107] *ibid.*
[108] Working Paper, *supra*, n. 1, at para. 4.59.
[109] *ibid.*
[110] *ibid.*
[111] *ibid*, at para. 4.22.
[112] *ibid*, at para. 4.23.

Canada

The Supreme Court of Canada in *Tolofson* has commented that the nature of the Canadian Constitution requires that an act committed in one part of Canada be given the same legal effect throughout the country and they thus held that this consideration "militates strongly in favour of the *lex loci delicti* rule"[113] for inter-provincial torts.

Even though La Forest J's description of the policy of ensuring uniformity of judicial outcomes above is based on Canada's constitutional arrangements, he held that it is equally applicable to the international context. In particular, he chose to overrule *Mclean v Pettigrew*[114] on the ground that if the *Phillips v Eyre* rule was applied, in practice, it would mean that the "courts of different countries would follow different rules in respect of the same wrong."[115] The key difference between this policy for the inter-provincial and international context is that instead of a constitutional basis to this policy objective in the latter situation, La Forest J focused on the consequence of forum shopping which he argued would arise if the policy were not adhered to.[116]

Australia

In *Breavington v Godleman*,[117] one reason for Wilson and Gaudron JJ's decision to endorse a *lex loci delicti* rule was that "one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication."[118] However, it is interesting to note that in *Mckain v Miller*,[119] a majority of the Justices in that case chose not to attach much weight to this policy.[120]

---

[113] *Tolofson, supra*, n. 25, at [70].
[114] [1945] 2 DLR 65.
[115] *Tolofson, supra*, n. 25, at [47].
[116] *ibid.*
[117] (1988) 169 CLR 41.
[118] *ibid*, at 98.
[119] (1992) 174 CLR 1.
[120] *ibid*, at 36.

Accordingly, this is one possible reason why the double actionability rule was reinstated in that case.

Subsequently, the policy of ensuring uniformity of judicial outcomes was again accorded significant strength by the High Court of Australia. In particular, bearing in mind the nature of the Australian federation,[121] the High Court of Australia held in the case of *Pfeiffer v Rogerson* that Australian tort choice of law rules should provide "uniformity of outcome no matter where in the Australian federation a matter is litigated."[122] As the *Phillips v Eyre* rule could not give effect to this policy, it was replaced by the *lex loci delicti* rule.

Similarly, for international torts, a majority of the High Court of Australia in *Neilson* was of the view that the "object of a choice of law rule is to avoid differences in outcomes according to selection of forum."[123] To fulfil this purpose, it was necessary to "have an Australian court decide the...case in the same way as it would be decided"[124] in the place where the tort was committed. They thus confirmed their decision in *Renault v Zhang* to adopt the *lex loci delicti* rule and in addition, they held that *renvoi* is part of that tort choice of law rule. Like the Supreme Court of Canada in *Tolofson,* even though the federation argument does not extend to international torts, the High Court has stated that the policy of uniformity was necessary to discourage forum shopping.

A few points can be made here. First, while the Canadian courts are in agreement with the Australian courts that the policy of ensuring uniformity of judicial outcomes is necessary to discourage forum shopping, it is important to note that the treatment of this policy by the two judiciaries is not the same. In particular, all that the Canadian courts did to give effect to the policy of uniformity was to provide for a forum-neutral *lex loci delicti* rule. This meant that so long as the court of the jurisdiction where the tort is committed applies its own law to the dispute in question,

---

[121] *Pfeiffer, supra,* n. 50, at [44].
[122] *ibid.*
[123] *Neilson, supra,* n. 3, at [13] per Gleeson CJ. See also, at [89] –[91] per Gummow and Hayne JJ, at [172]-[174] per Kirby J and at [271] per Heydon J.
[124] *ibid,* at [13].

the application of the *lex loci delicti* would provide for decisional harmony. The Canadian courts have not however gone as far as to state that they want to decide a tortious dispute as if it is decided in that foreign court. If the foreign court chooses to apply a law other than their domestic tort law to the relevant dispute, the application of the Canadian tort choice of law rule would not provide for uniformity. The decision in *Neilson* to include *renvoi* as part of the Australian *lex loci delicti* rule was to ensure that there would be decisional harmony in such circumstances as well. It is thus clear that the emphasis on uniformity in the Australian courts is greater than the Canadian courts in relation to their tort choice of law rules.

Secondly, it is interesting to note that before *Neilson* was heard by the High Court of Australia, the Supreme Court of West Australia was of the view that the *lex loci delicti* should be taken to exclude the private international law of that jurisdiction as that would "promote certainty and predictability."[125] This, they stated, was a conclusion that flowed from the decision in *Renault*; that the "selection of the *lex loci delicti* as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law."[126] When *Neilson* was decided by the High Court of Australia, one issue arising was whether certainty or uniformity should be adhered to in circumstances where these two policies are in conflict. In particular, a strong judicial adherence to the policy of ensuring uniformity of judicial outcomes would necessitate the use of the doctrine of *renvoi*; a move that would generate uncertainty.

On the one hand, Gleeson CJ and Kirby J were of the view that the key objective of their tort choice of law regime was to ensure uniformity of judicial outcomes thus indicating that certainty should be sacrificed to some extent to give effect to that policy.[127] On the other hand, Gummow and Hayne J argued that there is no clash between the two policies as to "take no account of what a foreign court would do when faced with the facts of [the] case does not assist the pursuit

---

[125] *Mercantile Mutual Insurance, supra,* n. 4, at [48].
[126] *Renault, supra,* n. 56, at [66].
[127] *Neilson, supra,* n. 3, at [13] per Gleeson CJ, at [171-[174] per Kirby J.

of certainty and simplicity."[128] This is because to omit *renvoi* from the Australian tort choice of law rule would require "the law of the forum to divide the rules of the foreign legal system between those rules that are to be applied by the forum and those that are not."[129] This would in turn force the forum to "impose on a foreign legal system, which must be assumed is intended to constitute an integrated system of interdependent rules, a division which that system may not make at all."[130] The "pursuit of certainty and simplicity"[131] would not be aided in such circumstances.

2.5 FORUM SHOPPING AND LITIGANT CONVENIENCE

In the tort choice of law context, the emphasis on the *lex fori* under the *Machado*[132] interpretation of the *Phillips v Eyre* rule has been criticised as encouraging forum shopping as it allows a claimant to by-pass his natural forum so as to bring his action in some "alien forum which would give him relief or benefits which would not be available to him in his natural forum."[133] Accordingly, one explanation for the decision of the House of Lords in *Boys v Chaplin* to accord more weight to the *lex loci delicti* by adopting a double actionability rule was to discourage this situation from occurring.

However, there are some who view the English common law tort choice of law rule as going too far with its adherence to this policy as under this rule, claimants have to satisfy both the *lex loci delicti* and the *lex fori* in order to succeed in their claim. This has made the English courts an unattractive forum to litigate tortious disputes for both English and foreign claimants. It is because of this disagreement that divergences have emerged in our selected jurisdictions. On a different note, some of our selected jurisdictions are against a flexible exception to their tort choice of law rules, as they believe that it would encourage litigants to engage in forum shopping.

---

[128] *ibid*, at [94].
[129] *ibid.*
[130] *ibid.*
[131] *ibid.*
[132] *Machado v Fontes* [1897] 2 QB 231.
[133] *Boys v Chaplin, supra*, n. 10, at 401 per Lord Pearson.

2.5.1 Tort choice of law rule

England: *Part III* of the *1995 Act*

In the *Law Commissions Working Paper*, the prevention of forum shopping was cited as one of the reasons for their proposed departure from the double actionability rule.[134] At first sight, this comment seems odd, as the double actionability rule does not encourage forum shopping. Litigants still have to satisfy the requirements of the *lex loci delicti* even if the *lex fori* is more beneficial to their claims. On closer scrutiny, it is apparent that the Law Commissions were not so much concerned with litigants using the English courts as a possible venue. Rather, they were worried about the converse; that the potential claimant may be influenced by the double actionability rule to litigate his claim in another forum thus increasing forum shopping as a "global activity."[135] To curb such litigant behaviour, the Law Commissions went on to call for the adoption of the forum-neutral *lex loci delicti* as the statutory tort choice of law rule.[136]

Interestingly, no mention of forum shopping was made in the subsequent *Law Commissions Report* in relation to the abolition of the double actionability rule. However, one cannot take from this an indication that forum shopping no longer has any impact on the *1995 Act*. Instead of the previous focus on forum shopping as a global activity, it is possible to observe a certain willingness on the part of the Law Commissions and the Special Public Bill Committee[137] to dissect the concept of forum shopping in order to distinguish between acceptable and unacceptable forum shopping. To elaborate, the double actionability rule does help to discourage forum shoppers who exploit choice of law rules to obtain a beneficial result for their action. However, beyond that, it also discourages forum shoppers who prefer the English legal system for its procedures, the famous impartiality of its judges or its "considerable experience with many

---

[134] Working Paper, *supra*, n. 1, at para. 3.14.
[135] *ibid*.
[136] *ibid*, at para. 4.59.
[137] See for example, HL Paper 36 (1995), Part I, at 8 per Lord Mackay, at 73 per Sir Lawrence Collins.

aspects of commercial litigation."[138] The actions of this second category of forum shoppers are considered acceptable by the Law Commissions and the Special Public Bill Committee as in their view, the abolition of the *lex fori* is part of the "process of internationalisation"[139] where litigants can bring their foreign cause of action in any country they desire for their own convenience subject to the satisfaction of the relevant jurisdictional rules.

Arguably, this is not a view shared by the English courts in relation to the English common law tort choice of law regime. Although this is not explicit in their judgments, it is submitted that their views are likely to concur with Lord Wilberforce's comments in the *Proceedings of the Select Public Bill Committee* that disputes closely linked to a foreign country should be litigated there[140] even if it is more convenient to do so in the English courts.

Canada

Initially, forum shopping was used primarily in the Canadian courts as a critique of the forum-centric *Mclean v Pettigrew* rule. Most notably, Morden JA's reinterpretation of *Mclean* in *Grimes v Cloutier*[141] can be construed as a response to the forum shopping of the claimant in question. Subsequently, in adopting the *lex loci delicti* as Canada's tort choice of law rule, La Forest J commented that the *Mclean* rule would, in practice, mean that "the courts of different countries would follow different rules in respect of the same wrong and invite forum shopping by litigants."[142] This problem is particularly acute in a federal state like Canada due to the "constant mobility between the provinces as well as similar legal regimes."[143]

As was mentioned above, it is clear that both the double actionability rule and the *lex loci delicti* discourage forum shopping and in *Tolofson*, it was the latter which was chosen. Did the policy of

---

[138] Guthrie, *'A Good Place to Shop': Choice of Forum and the Conflict of Laws* (1995-1996) 27 Ottawa Law Review 201, at 222.
[139] HL Paper 36 (1995), Part I, at 73 per Sir Lawrence Collins.
[140] *ibid*, at 73 per Lord Wilberforce. "If it is privacy in the law of France then let them go and sue in France."
[141] (1989) 61 DLR (4th) 505. The claimant in that case wanted Ontario law to apply as it would award her with a greater amount of damages.
[142] *Tolofson, supra*, n. 25, at [47].
[143] *ibid.*

discouraging forum shopping play a part in that choice? For the *1995 Act*, the selection of the *lex loci delicti* in divergence from the double actionability rule was designed to encourage "acceptable forum shopping."[144] There is some indication of a similar view in *Tolofson* as La Forest J commented that a consequence of the removal of the *lex fori* limb of the double actionability rule is that:

> "individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience."[145]

Australia

As was seen in the Canadian context, forum shopping was employed as a criticism of the Australian tort choice of law emphasis on the *lex fori*[146] and in due course, these comments were endorsed unanimously by the High Court of Australia in *Breavington*, at least in relation to inter-state torts. However, with regards to the choice of law regime Australian law should adopt to address this problem, there was no judicial consensus. In *Breavington*, a narrow majority of the High Court adopted a *lex loci delicti* rule. However, in the subsequent High Court cases of *McKain* and *Stevens v Head*,[147] the double actionability rule was restored.

In *Pfeiffer*, even though the *lex loci delicti* rule was adopted for inter-state torts, only one Justice based his decision on forum shopping. In particular, Kirby J rejected the view that forum shopping is a "means of furthering the ends of material justice"[148] at least as far as inter-state torts are concerned as he did not regard it as reasonable that "such a choice, made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the

---

[144] Guthrie, *supra*, n. 138, at 224.
[145] *Tolofson*, *supra*, n. 25, at [40].
[146] See for example, *Corcoran v Corcoran* [1974] VR 164.
[147] (1993) 176 CLR 433.
[148] *Pfeiffer*, *supra*, n. 50, at [128].

disadvantage of its opponents."[149] In his opinion, forum shopping would be "obstructive to the integrity of a federal nation, the reasonable expectations of those living within it and the free mobility of people, goods and services within its border."[150] This was also the case for the adoption of the *lex loci delicti* rule for international torts in *Renault v Zhang* as Kirby J was again the only judge who based his decision on forum shopping.[151]

Is forum shopping an explanation for the Australian divergence from the English double actionability rule? Unlike the Law Commissions and the Canadian courts, neither Kirby J nor the rest of the Justices in *Pfeiffer* made any mention of litigant convenience in their decision to endorse the *lex loci delicti*. In light of this, it is arguable that the policy of discouraging forum shopping is merely an explanation for a departure from the former forum-centric tort choice of law rules as represented by *Machado v Fontes.*

Nonetheless, in *Neilson,* the policy of discouraging forum shopping was an important consideration in the decision of the High Court of Australia to include *renvoi* as part of the Australian tort choice of law rule. In particular, Kirby, Gummow and Hayne JJ were of the view that the application of the *lex loci delicti* rule would encourage forum shopping "if the forum were to choose to apply only some of the law of that foreign jurisdiction"[152] as that would "permit a party to gain some advantage by litigating in the courts of the forum, rather the courts of the jurisdiction whose law provides the governing law."[153] To prevent this situation from arising, it was necessary to introduce the doctrine of *renvoi* to ensure that "as far as possible, the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum."[154] In comparison, the Law Commissions and the Canadian courts do not appear to be concerned with discouraging such litigant behaviour.

---

[149] *ibid.*
[150] *ibid.*
[151] *Renault, supra*, n. 56, at [118].
[152] *Neilson, supra*, n. 3, at [91] per Gummow and Hayne JJ. See also, at [172] per Kirby J.
[153] *ibid*, at [91].
[154] *ibid*, at [90].

2.5.2 Exception to the tort choice of law rule

Canada

Forum shopping was a crucial consideration in La Forest J's decision in *Tolofson* that no exception be available to apply another jurisdiction's law in the inter-provincial context. In his view, "[a]ny exception adds an element of uncertainty, and leaves the door open to a resourceful lawyer to attempt to change the application of the law."[155] The introduction of a flexible rule may thus "encourage frivolous cross-claims and joinders of third parties"[156] in order to locate a factual matrix that would satisfy the flexible exception. In other words, La Forest J is of the view that any avenue available to apply a law other than the *lex loci delicti* would enable litigants and their advisors to exploit these lacunas to achieve a result beneficial to their cause. Furthermore, he is "unconvinced"[157] that it is inherently just that the law of the parties' common residence should apply, particularly in the inter-provincial context. For international torts, the above considerations are arguably weaker as La Forest J does concede that a limited degree of flexibility to apply the *lex fori* may be required to do justice in exceptional circumstances, even though to do so, in accordance with his reasoning, would be to allow litigants to engage in some form of forum shopping.

In comparison, the Law Commissions do not consider the *section 12* exception under the *1995 Act* to be an incentive to litigants to forum shop. Likewise, the English courts do not share this view as well in relation to the flexible exception. One explanation is that the English courts have a different definition of what constitutes acceptable forum shopping. In particular, they consider there to be forum shopping when it is the natural forum that is by-passed.

---

[155] *Tolofson, supra*, n. 25, at [65].
[156] *ibid*, at [64].
[157] *ibid*, at [57].

> "What is envisaged in Lord Pearson's definition is a polarised situation where all the connections are with one country (the natural forum) and there are no substantial connections with the country selected for trial (the alien forum)."[158]

The corollary of this definition is: where the parties are from England and the remaining connections aside from the place of commission of the tort are with England, the natural forum would be England. Accordingly, the application of the flexible exception to apply English law would not be considered as forum shopping by the English courts as the plaintiff cannot be said to have avoided the natural forum. In contrast, La Forest J has a different definition of what is considered unacceptable forum shopping: to him, the place of commission and not the natural forum is the key reference point and any attempt to convince the judiciary to apply another country's law would be denounced as forum shopping. This difference would explain the Canadian divergence from the English common law flexible exception.

Australia

In *Breavington v Godleman*, it was held that there should not be an exception to the tort choice of law rule for inter-state torts as this allowed for the continuing possibility that "one set of facts occurring within Australia could give rise to different legal consequences depending on the venue of the action;"[159] a situation which would only act as an "incentive to forum shopping."[160] This is of course a view shared by La Forest J in Canada.

Subsequently, in *Pfeiffer*, the High Court, again refused to adopt an exception for inter-state torts. However, only Kirby J was explicit in the use of forum shopping as an explanation for this divergence from the English common law exception with his comments that a "variable rule"[161] would allow parties to manipulate the results of the proceedings to their own advantage. Similarly,

---

158 Fawcett, *Forum Shopping – Some Questions Answered* (1984) 35 Northern Ireland Law Quarterly 141.
159 Pryles, *The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?* [1989] Australian Law Journal 158, at 169.
160 *Breavington, supra*, n. 117, at 114.
161 *Pfeiffer, supra*, n. 50, at [129].

for the rejection of the flexible exception for international torts in *Renault*, Kirby J was the only member of the High Court of Australia to base his decision to do so on the grounds that any departure from the *lex loci delicti* would result in forum shopping. In other words, he appears to share La Forest J's views that so long as a law other than the *lex loci delicti* is applicable to the dispute in question, it would encourage litigants to engage in unacceptable forum shopping. This is of course in sharp contrast to the views of the Law Commissions and the English courts.

3. STRUCTURAL EXPLANATIONS

3.1 INTERACTION WITH THE SUBSTANTIVE LAW OF TORTS

A State's substantive tort law can have an impact on its tort choice of law regime. For example, a common argument employed by the Law Commissions and the courts of our selected jurisdictions in advocating for a divergence from the double actionability rule is that the law of tort is no longer seen as having a "punitive deterrent or "admonitory" function."[162] Instead, it is viewed as compensatory and more concerned with distributive justice rather than retributive. As it can no longer be regarded as "closely allied to the criminal law,"[163] the *lex fori* is considered irrelevant. Although, the English judiciary has not commented upon this matter in relation to the double actionability rule, their refusal to abandon the *lex fori* may be construed as a judicial disagreement with the above view. It may be that Briggs' view of torts as standing halfway between criminal and contract law is the prevailing doctrine in the English courts.[164]

In relation to the rules on identifying the place of commission of a tort, differences in opinions with regards to the objective of tort law in our selected Commonwealth jurisdictions has led to divergences from the English common law position on this point of comparison.

---

[162] Working Paper, *supra*, n. 1, at para. 3.3. For Australia, see for example, *Renault v Zhang*, *supra*, n. 56, at [43]–[60], *Neilson*, *supra*, n. 3, at [100]. For Canada, see for example, *Tolofson*, *supra*, n. 25, at [36].
[163] Working Paper, *ibid.*
[164] Briggs, *Memorandum by Mr Adrian Briggs*, Written Evidence, HL Paper 36 (1995), 4-11, at 6.

3.1.1 Identifying the place of commission of the tort

England: *Part III* of the *1995 Act*

In endorsing the place of injury/death rule as the solution to the problem of identifying the place of commission of torts involving personal injury or property damage, the Law Commissions emphasised that the purpose of substantive tort law is to "provide a means whereby the equilibrium between the claimant's interests and the wrongdoer's interests may be maintained and, if upset, readjusted."[165] Since it is the claimant's interest that is detrimentally affected, the Law Commissions were of the view that the law of the place where the claimant was harmed should be applied.

In contrast, no discussion of the objectives of substantive tort law was made in *Metall und Rostoff AG v Donaldson Lufkin & Jenrette Inc*[166] where the *Distillers* substance test[167] was adopted as the English common law rule for locating the place where a tort is committed. All that was mentioned was that:

> "[a]doption of such a test avoids the mechanical solution inherent in an outright choice between the place of acting and the place of harm. It is also sufficiently flexible to take account of factors such as the nature of the tort alleged to have been committed and the material elements of the relevant tort, and will, without undue rigidity, enable the court to locate the tort in one place for choice of law purposes."[168]

For other torts particularly torts which do not require any proof of damage, the Law Commissions have conceded that they may not conform to the objective of addressing harm done to the

---

[165] Working Paper, *supra*, n. 1, at para. 4.70.
[166] [1990] 1 QB 391.
[167] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.
[168] *Metall, supra*, n. 166, at 444.

claimant and in such cases, they may properly be regarded as "admonitory"[169] rather than "compensatory."[170] Consequently, the focus placed upon such torts for the purposes of identifying their place of commission would be the conduct of the wrongdoer. However, in an acceptance of the English Court of Appeal's rationale in adopting the *Distillers* substance test in *Metall*, the Law Commissions commented that, beyond personal injury and property damage torts, there is a higher chance that these other torts will involve complex facts where there is "no single place of conduct and no single place of result."[171] Identifying the place of the defendant's conduct and the place where the claimant is harmed may become increasingly difficult as well. Bearing these considerations in mind, the Law Commissions decided that a discretionary rule would be the best way to address these concerns.

Canada and Australia

As for the Canadian position, no discussion of the purposes of substantive tort law was made in relation to the approach developed in *Tolofson* to identify the place of commission of a tort. La Forest J simply highlighted the "thorny issues"[172] involved in locating the place where a multi-state tort is committed much like what the Law Commissions did in coming up with the *section 11(2)(c)* approach.

Likewise, for Australia, all that was said in *Dow Jones & Company Inc v Joseph Gutnick*[173] in relation to the *Distillers* substance test was that "[a]ttempts to apply a single rule of location"[174] have been unsatisfactory as the rules pay "insufficient regard to the different kinds of tortious claims that may be made."[175] In other words, the High Court of Australia is also of the view that it

---

169 Working Paper, *supra*, n. 1. at para. 4.74.
170 *ibid.*
171 *ibid*, at para. 4.84.
172 *Tolofson, supra*, n. 25, at [43].
173 (2002) 194 ALR 433.
174 *ibid*, at [43].
175 *ibid.*

is "impracticable"[176] to construct a rule which would identify the *locus delicti* with certainty in every case.

Accordingly, one can observe that the emphasis placed on the purpose of domestic tort law in relation to torts involving personal injury, death and property damage has led the Law Commissions to propose a place of injury rule for such torts. In contrast, the Australian, Canadian and English common law rules on identifying the place of the tort were not formulated with these considerations in mind.

3.2 INFLUENCES FROM PUBLIC INTERNATIONAL LAW: TERRITORIALITY AND COMITY

The principle of territoriality provides that each state has "exclusive jurisdiction within its own territories;"[177] a fact given credence by public international law. In its earlier incarnation, as the basis for the vested rights theory, it was savagely criticised for its numerous flaws[178] and was thoroughly discredited. Yet, in recent years, it is possible to observe its resurgence in Australian - and Canadian tort choice of law; albeit not in the form traditionally associated with "vested rights thinking"[179] but one closely connected with comity, a concept we have examined in Chapter 5. In particular, the territoriality principle has been used by a number of our selected courts as an argument for their departure from the English common law tort choice of law rule as well as its exception. As a preliminary note, there was no mention of the territoriality principle by the Law Commissions and the Singapore courts in relation to their tort choice of law regimes.

---

[176] Working Paper, *supra*, n. 1, at para. 4.86.
[177] *Tolofson, supra*, n. 25, at [43].
[178] See for example, North, Fawcett, *Cheshire and North's Private International Law* (London: Butterworths) (13th ed., 1999), at 20 - 22.
[179] Walsh, *Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims* (1997) 76 Canadian Bar Review 91, at 129.

3.2.1 Tort choice of law rule

Canada

The territorial principle was used in the case of *Grimes v Cloutier* as a critique of the traditional Anglo-Canadian rule in *Mclean* for its *lex fori* emphasis: that it was "essentially an extra-territorial extension of the law of the forum to conduct in another province."[180] In particular, it was held that as the Canadian polity is one of "comity between provinces,"[181] to ignore the Quebec legislation would be an "officious intermeddling with the legal concerns of a sister province."[182] Accordingly, *Mclean* was limited to its facts and a two-tiered tort choice of law regime was developed by the Ontario courts in that case.

Subsequently, *Tolofson* was decided with La Forest J adopting the territoriality principle as the theoretical foundation of the modern Canadian tort choice of law regime. In reformulating Canadian tort choice of law, La Forest J highlighted the principle of territoriality as the "underlying reality"[183] in which choice of law rules should operate and stated that the concept of comity would require states to respect the exercise of territorial sovereignty of a particular state and not interfere with what that "state chooses to do within those limits."[184] As the *Mclean* rule "involves a court's defining the nature and consequences of an act done in another country,"[185] this "flies against the territoriality principle."[186] The English double actionability rule is subject to this criticism as well as the first limb of the rule would bar a claim so long as there is no liability under the *lex fori*. In line with these considerations, he concluded that it is "axiomatic"[187] that the new choice of law rule should be the *lex loci delicti* rule.

---

[180] *Grimes, supra,* n. 141, at [41].
[181] *ibid.*
[182] *ibid,* at [55].
[183] *Tolofson, supra,* n. 25, at [37].
[184] *ibid.*
[185] *ibid,* at [47].
[186] *ibid.*
[187] *ibid,* at [43].

There is, though, a difference in the formulation of the territoriality principle depending on whether the tortious dispute is inter-provincial or international in nature. For the former, it is the nature of Canada's federal system, its "constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction"[188] and the need for choice of law rules to conform to the territorial limits imposed upon provincial legislative power by the Canadian Constitution rather than comity *per se* that requires a judicial adherence to the territorial principle. Both versions of the territoriality principle would still provide for the *lex loci delicti* as the tort choice of law rule.

Australia

In *Phillips v Eyre*, Willes J commented that "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law."[189] As a critique of the *Machado* interpretation of the *Phillips v Eyre* rule, the Australian courts have inferred from this statement that it probably did not occur to Willes J that anyone would construe the judgment as "indicating that an act which in no circumstances imposed any liability in the foreign country might found an action in England."[190] Instead, they suggested that the true interpretation of the *Phillips v Eyre* rule might be the double actionability rule.

In *Breavington*, the territoriality principle was utilised by some members of the High Court of Australia in their decision to adopt the *lex loci delicti* rule as the Australian tort choice of law rule for inter-state torts. In particular, Deane J held that the determination of the applicable law could be found either in the "territorial confinement"[191] of a State law or "in the case of multi-State circumstances, in the determination of predominant territorial nexus."[192] He thus rejected the *Phillips v Eyre* rule and its various interpretations as it ignored the nature of the Australian

---

188 *ibid*, at [70].
189 *Phillips v Eyre, supra*, n. 67, at 28.
190 *Varawa v Howard Smith Co. Ltd* [1910] VR 509, at 527.
191 *Breavington, supra*, n. 117, at 125.
192 *ibid*.

Federation with its "undue preference for the substantive law of the forum."[193] It can be noted that this analysis of the territorial principle and its relationship with the Australian federation bears a "marked similarity to that of La Forest J."[194]

In the later case of *McKain v Miller*, it is interesting to note that territoriality was ignored by the High Court of Australia as can be seen from their decision to reintroduce the *lex fori* to the Australian tort choice of law rule with their reinstatement of the *Phillips v Eyre* rule. More importantly, in *Pfeiffer v Rogerson*, even though the majority Justices stated that the application of a *lex loci delicti* rule for inter-state torts would "recognise and give effect to the predominant territorial concern of the statutes of State and Territory legislatures,"[195] they commented that:

> "[r]esort to notions of sovereignty, however, suffers no sure and simple basis for preferring one choice of law rule to another. Especially is that so in a federal system, like Australia, where "sovereignty" is shared between the federal, State and Territory law areas, each with its own legislature and its own distinct democratic process."[196]

In other words, unlike the Canadian courts, the Australian courts do not appear to be attaching much weight to the territoriality principle in their decision to diverge from the English common law *Phillips v Eyre* rule in relation to inter-state torts. The explanation for this difference can be found in the political make up of the two countries, a point which will be dealt with in a later sub-section.

As for international torts, the comity-based territorial analysis utilised by the Supreme Court of Canada in *Tolofson* has been relied upon by the High Court of Australia to adopt the *lex loci delicti* as the Australian tort choice of law rule.[197]

---

193 *ibid.*
194 Walsh, *supra*, n. 179, at 106.
195 *Pfeiffer*, *supra*, n. 50, at [86].
196 *ibid*, at [74].
197 *Renault*, *supra*, n. 56, at [63] – [64].

3.2.2 Exception to the tort choice of law rule

Canada

Generally, La Forest J saw the application of an exception to the *lex loci delicti* as an expression of disapproval by the forum's court in relation to the "law that the legislature having power to enact it within its territory has chosen to adopt."[198] However, as the territoriality principle would require the respect of that legislature's exercise of its sovereign powers, particularly in relation to residents of that jurisdiction, he was unconvinced of the arguments for an exception. It may be unfortunate that a claimant would receive higher compensation if the tort had occurred in another jurisdiction but these differences he commented are a "concomitant of the territoriality principle."[199]

In relation to inter-provincial torts, La Forest J has held that the existence of an exception to the *lex loci delicti* "might well give rise to constitutional difficulties"[200] as a provincial court, in applying another law to the *lex loci delicti*, would be going against the limits imposed on that court by the Canadian Constitution. Furthermore, he added that he does not foresee that his decision will create much difficulty in the inter-provincial context as "many areas of law in Quebec and the other provinces are not so dissimilar;"[201] the provinces are ultimately part of the federation of Canada. He thus held that no exception to the *lex loci delicti* is available for such torts.

As the territoriality principle for international torts is premised on comity and not constitutional imperatives, La Forest J's concession that a justice exception may be available to the *lex loci delicti* for such torts is enlightening as it implies that comity is not the only principle for tort choice of law in this context. In particular, there may be instances where a strict adherence to territoriality and comity would cause injustice to the parties involved. Nevertheless, it is clear that significant

---

198 *Tolofson*, *supra*, n. 25, at [57].
199 *ibid.*
200 *ibid*, at [72].
201 *ibid*, at [70].

weight has been attached to the territoriality principle in this context as La Forest J has said that he "can, however, imagine few cases where [the exception] would be necessary."[202]

Australia

In contrast, the territorial principle was not utilised by the High Court of Australia in their decisions on the exception to the *lex loci delicti* for both international and inter-state torts.

3.3 INFLUENCES FROM OTHER AREAS OF PRIVATE INTERNATIONAL LAW

One criticism of recent Commonwealth reforms of tort choice of law regimes is that they are often made with little consideration of their impact on "other areas of the Conflict of Laws"[203] and that this has led to a gross distortion of the nature of the subject as a whole.[204] These comments are astute but it does not mean that there has been no discussion whatsoever of the various stages of private international law in the development of Commonwealth tort choice of law regimes. In particular, some of our Commonwealth tort choice of law regimes have been influenced by the formulation of their own rules on jurisdiction.

3.3.1 *Brussels I Regulation* and the abolition of the *lex fori*

One explanation provided by Lord Mackay (the Lord Chancellor then) in advocating for the abolition of the *lex fori* and the corresponding characterisation of unknown foreign torts as 'torts' for the *1995 Act* is that no purpose is served by the retention of the *lex fori.*

To elaborate, the claimant can simply bring his action in the courts of another European state whose laws are more likely to impose liability, so long as he satisfies the jurisdictional rules

---

[202] *ibid*, at [50].
[203] Harris, *Choice of Law in Tort – Blending in with the Landscape of the Conflict of Laws?* (1998) 61 Modern Law Review 33, at 34.
[204] *ibid*, at 55.

provided for by the *Brussels I Regulation.*[205] Under this *Regulation*, a person domiciled in a contracting state may be sued in another contracting state "in matters relating to tort, *delicti* or *quasi delicti*"[206] provided that that contracting state is the "place where the harmful event occurred."[207] The European Court of Justice has held that 'tort' should be given an autonomous meaning and that it covered "all actions which seek to establish the liability of a defendant and which are not related to contract within the meaning of *Art 5(1).*"[208] This definition is extremely broad and would conceivably include most, if not all, torts unknown to English domestic law. If jurisdiction is established under the *Regulation*, the resulting judgment would be directly enforceable in the English courts. In that case, the English tort choice of law process would be irrelevant to the claimant. This is, of course, subject to certain exceptions[209] but it is clear that mere differences between English and foreign substantive tort law would not be sufficient to trigger those exceptions.

In comparison, it is obvious that the *Brussels I Regulation* cannot be an explanation for the Australian and Canadian divergences from the double actionability rule as these countries are not part of the European Union.

3.3.2 *Forum non conveniens* and the *lex fori*

In *Tolofson*, La Forest J was of the view that the first limb of the *Phillips v Eyre* rule is one relating to jurisdiction rather than choice of law;[210] a rule analogous to the *Mocambique*[211] rule that "common law courts will not normally entertain proceedings relating to title to foreign land."[212] With the recent developments in Canadian law on jurisdiction, La Forest J was of the view that a *lex fori* requirement in Canadian tort choice of law may no longer be necessary as the jurisdiction

---

[205] HL Paper 36 (1995), Part I, at 9 per Lord Mackay.
[206] Article 5(3), *Brussels I Regulation.*
[207] *ibid.*
[208] *Kalfeis v Schroder* [1988] ECR 5565, at 5585.
[209] See Articles 34, 35 and 45, *Brussels I Regulation*.
[210] *Tolofson, supra*, n. 25, at [26].
[211] *British South Africa Co v Companhia de Mocambique* [1893] AC 602.
[212] North, *Private International Law Problems in Common Law Jurisdictions* (London: Martinus Nijhoff Publishers) (1993), at 156.

of Canadian courts is already confined to matters where there is *jurisdiction simpliciter:* a "real and substantial connection"[213] with the forum. Accordingly, he opined that claims which do not incur liability under Canadian substantive tort law may be a "factor better weighed in considering the issue of *forum non conveniens*"[214] rather than dealt with by a *lex fori* limb at the choice of law stage.

Likewise, the High Court of Australia has held that the purpose of the *lex fori* in the *Phillips v Eyre* rule is best reflected in the jurisdictional context rather than at the tort choice of law stage. In particular, where the forum" does not provide curial relief of the kind provided by the law of the State or Territory in which the events occurred,"[215] in certain cases, the courts will find that the forum is clearly inappropriate and will thus stay the proceedings. However, if there are other reasons indicating that the forum is appropriate, it would be difficult to hold that the litigant's claim should be rejected simply on the ground that "there would not be a remedy if the events happened"[216] within the forum.

This argument was repeated in *Renault* for international torts where the High Court stated that the *lex fori* limb "was intended to operate as a technique of forum control"[217] and that the question is really about public policy. They then went on to hold that:

> "[i]t is sufficient to say that, should a question arise as to whether public policy considerations direct that an action not be maintained in Australia, that question is appropriately resolved as a preliminary issue on an application for a permanent stay of proceedings."[218]

---

[213] See Chapter 2 of this thesis for the discussion of *jurisdiction simpliciter.*
[214] *Tolofson, supra,* n. 25, at [51].
[215] *Pfeiffer, supra,* n. 50, at [95].
[216] *ibid,* at [96].
[217] *Renault, supra,* n. 56, at [60].
[218] *ibid.*

It should also be noted that in *Renault*, one reason for the rejection of the English common law flexible exception was that the majority Justices were of the view that "[q]uestions which might be caught up in the application"[219] of such an exception "may often be subsumed in the issues presented on a stay application, including one based on public policy grounds."[220]

In short, one explanation for the removal of the *lex fori* from the tort choice of law rule in Canada and Australia is that the judiciaries in these countries are of the view that the issues necessitating the application of the *lex fori* should be dealt with at the *forum non conveniens* stage rather than at the tort choice of law stage.

4. HISTORICAL AND COMPARATIVE EXPLANATIONS

4.1 HISTORICAL INFLUENCE OF ENGLISH JUDICAL PRECEDENTS

In this section, we will examine the treatment of English judicial precedents by the courts of our selected jurisdictions.

Canada

As *Mclean v Pettigrew* was decided before 1949,[221] one explanation for the Canadian endorsement of the *Phillips v Eyre* rule is simply that at this point in time, the Supreme Court of Canada was bound by the decisions of the House of Lords under the doctrine of *stare decisis*.

However, it is important to note that as *Machado v Fontes* is an English Court of Appeal case, there was no compulsion on the Supreme Court of Canada to endorse the *Machado* interpretation of the *Phillips v Eyre* rule in *Mclean*. Therefore, this decision cannot be attributed

---

[219] *ibid*, at [73].
[220] *ibid*.
[221] *Mclean v Pettigrew, supra*, n. 114. The Canadian right of appeal to the *Privy Council* was abolished in 1949.

to a technical adherence to English precedents. Instead, there appears to be a policy of adopting English judicial solutions even if they do not bind the Canadian courts as a matter of law.[222] The problem with this position is that most conflicts cases in Canada tend to arise in the inter-provincial context and since the relevant English tort choice of law rule was devised for international torts, the application of English approaches in such circumstances may result in an "improper decision."[223] In Hancock's words, this is a "blind adherence to a verbal formula without any regard for policies or consequences."[224]

After 1949, the *Machado* version of the *Phillips v Eyre* rule remained part of Canadian law for some time, as the Supreme Court of Canada was not called upon to rule on this matter till 1995. When *Machado* was overruled by the House of Lords in *Boys v Chaplin,* there was a Canadian divergence from the English common law tort choice of law rule as Canadian lower courts were still bound by *Mclean*. Subsequently, in *Grimes v Cloutier*, the *Phillips v Eyre* rule was heavily criticised by the Ontario courts and the judicial solution then was to confine *Mclean* to its facts. In other words, the Ontario courts had manoeuvred themselves into a position where they had the freedom to adopt whatever tort choice of law rule they saw fit for situations that do not fall within the scope of the *Mclean* test. However, instead of undertaking a careful examination of whether the double actionability rule is suitable for the Canadian context, they simply adopted that approach. Once again, we can observe a judicial willingness to follow English authorities to resolve the dispute at hand.

It was only in *Tolofson* that one can argue that the policy of ensuring uniformity with the English common law has been considerably weakened. In particular, La Forest J pointed out the "social considerations"[225] that "militated in favour of the English rule"[226] are all gone now and hence, there is no reason for the Canadian courts to continue their adherence to the *Phillips v Eyre* rule. In other words, he is saying that it is time to construct Canadian tort choice of law rules in

---

[222] Palmer, *Torts in the Inter-Provincial Conflict of Laws* (1959) 17(1) University of Toronto Faculty of Law Review 1, at 12.
[223] *ibid*, at 6.
[224] Hancock, *Torts in the Conflict of Laws* (Chicago: Ann Arbor, University of Michigan Press, Callaghan & Co.) (1942), at 89.
[225] *Tolofson, supra*, n. 25, at [48].
[226] *ibid*.

accordance with the Canadian context as ready-made English solutions can no longer be seen as suitable for Canadian needs in all circumstances. This declaration of judicial independence can thus be regarded as an explanation for the divergences effected by the Supreme Court of Canada in that case.

Australia

Similarly, the *Phillips v Eyre* rule was first endorsed by the High Court of Australia as Australian courts were effectively bound by the decisions of the House of Lords subject to the judgments pronounced by the Privy Council. However, as *Machado* is an English Court of Appeal case, Australian courts were free to ignore it and ignore it they did, as it is highly unlikely that *Machado* was part of Australian law with the hostility displayed towards its interpretation of the *Phillips v Eyre* rule by the High Court of Australia. Furthermore, in *Koop v Bebb,*[227] the High Court may have provided for a double actionability rule almost thirty years before the House of Lords in *Boys v Chaplin.*

It is possible to argue that Australian adherence to English judicial precedent is not as strong as the Canadian judiciaries' at least in relation to this point of comparison. The Australian judiciaries appear to be more willing to undertake a critical examination of the relevant English common law rules at this point in time. However, it is important to note that their analysis is still rooted more in the question of whether *Machado* was supported by the English authorities that precede it rather than a discussion of whether the rule is appropriate for the Australian context.[228]

Even though the Australian right of appeal to the Privy Council was effectively removed in 1975, the *Phillips v Eyre* rule remained very much part of Australian law as there was no High Court pronouncement on tort choice of law till 1988. The first substantial challenge to that rule came in

---

[227](1951) 84 CLR 629.

[228] *Varawa, supra,* n. 190, at 523 per Hodges J. There is "doubt as to whether that judgement [Machado v Fontes] is consistent with that of Willes J in *Phillips v Eyre.*" *Koop v Bebb, ibid,* at 642-643 per Dixon, Williams, Fullagar, Kitto JJ. After examining past English authorities, they pointed out that these "judgments fall short of supporting the doctrine of *Machado v Fontes.*"

the case of *Breavington*. Two of the Justices who supported the double actionability rule based their decisions primarily on the doctrine of *stare decisis*.[229] However, the remaining Justices displayed recognition of the "freedom and the responsibility"[230] they now possess in the "moulding"[231] of Australian law as they engaged in an examination of whether the English rule was suitable for the Australian context. What followed was, of course, a bewildering range of rationales invoked to support their individual approaches. However, regardless of this "considerable cleavage of opinion,"[232] one thing is clear; the relevant English judicial precedents on tort choice of law were not accepted at face value by a majority of the High Court judges.

In *McKain v Miller*, though, the *Phillips v Eyre* rule was reinstated by the High Court of Australia. Despite a detailed discussion of why an approach based on the Australian Constitution should be rejected,[233] no explanation was given for their decision to re-adopt the *Phillips v Eyre* rule. It is possible to read this case as a resurgence of Australian adherence to English judicial solutions.

Thankfully, this was temporary as the *Phillips v Eyre* rule was rejected and replaced by the *lex loci delicti* rule in the case of *Pfeiffer v Rogerson* for inter-state torts. Most notably, the High Court of Australia stressed that "*Phillips v Eyre* was given in a context far removed from that of the Australian federal compact"[234] and that it was an "inappropriate borrowing from English law."[235] It may be natural enough in "colonial and post-colonial times"[236] to adopt an "unquestioning acceptance of English jurisprudence that occurred in the days of Empire."[237] However, with the ruling of the High Court in *Lange v Australian Broadcasting Corporation*,[238] the "common law of Australia must adapt to the Constitution"[239] in order to provide practical solutions to particular legal problems which occur in the federal system.

---

[229] *Breavington, supra,* n. 117. See the judgments of Dawson J and Toohey J.
[230] Finn, *Commerce, the Common Law and Morality* (1989) 17 Melbourne University Law Review 87, at 90.
[231] *ibid.*
[232] Pryles, *supra,* n. 159, at 162.
[233] *McKain, supra,* n. 48, at 34-37.
[234] *Pfeiffer, supra,* n. 50, at [22].
[235] *ibid,* at [109].
[236] *ibid,* at [110].
[237] *ibid.*
[238] (1997) 145 CLR 96.
[239] *Pfeiffer, supra,* n. 50, at [34].

The *lex loci delicti* rule was adopted for international torts in *Renault* and again, we can observe a greater willingness on the part of the Australian judiciary to examine the nature of the English common law rules in order to determine whether they should continue to follow English precedents on tort choice of law. In particular, the *lex fori* limb of the *Phillips v Eyre* rule was analysed for its "purpose and function"[240] and it was eventually abolished on the ground that it favoured a "stringent domestic policy."[241] The rule may have been relevant in England "a century and a half ago"[242] but today, it can no longer be supported "as anything more than an arbitrary rule."[243]

In short, one explanation why the Australian tort choice of law regime is so different from that of the English common law is that English judicial precedents no longer exert a powerful influence on Australian judges.

Singapore

Similar to the situation in Canada and Australia, the endorsement of the *Phillips v Eyre* rule in the Singapore case of *R J Sneddon v AG Shafe*[244] in 1947 was the result of the doctrine of *stare decisis*. After Singapore severed its ties with the Privy Council in 1994, the Singapore courts first faced a tort choice of law case in *Goh Chok Tong v Tang Liang Hong.*[245] Even though English judicial precedents could no longer bind the decisions of the Singapore court, the Singapore High Court simply endorsed the English common law double actionability rule without providing any explanations for their decision aside from a statement that:

---

[240] *Renault, supra,* n. 56, at [49].
[241] *ibid,* at [53].
[242] *ibid.*
[243] *ibid.*
[244] [1947] 1 MLJ 197.
[245] [1997] 2 SLR 641.

"[t]he present law in Singapore on the applicable choice of law rule is based on a passage from the judgment of Willes J in *Phillips v Eyre*."[246]

This unquestioning adherence to English judicial precedents can again be seen in relation to the Singapore Court of Appeal's decision in *Parno v SC Marine Pte Ltd*.[247] Once again, no explanation was given for the adoption of the double actionability rule. Arguably, the Singapore courts are still heavily reliant on English precedents for their tort choice of law rules and this would form a powerful explanation for their uniformity with the English common law double actionability rule.

4.2 INFLUENCE OF FOREIGN TORT CHOICE OF LAW REGIMES

With the waning influence of English judicial precedents on Australian and Canadian tort choice of law regimes, the judiciaries in these countries have taken greater notice of other foreign models of tort choice of law regimes particularly from Europe and United States. Similarly, the Law Commissions have undertaken a survey of the tort choice of law regimes in several foreign jurisdictions. Accordingly, it is the purpose of this section to examine the use of comparative law in the decisions of our selected jurisdictions to diverge from the English common law tort choice of law regime.

4.2.1 Tort choice of law rule

England: *Part III* of the *1995 Act*

As a matter of comparative law, when the Law Commissions published their findings in their *Working Paper*, they cited Lord Wilberforce's comments in *Boys v Chaplin* that the *Phillips v Eyre*

---

[246] *ibid*, at [68].
[247] [1999] 4 SLR 579, at [36].

rule was hardly found "outside the world of the English–speaking common law."[248] In particular, their research indicated that none of the European systems of law aside from Hungary provided for the involvement of the *lex fori* in their tort choice of law rule[249] and instead, it is the *lex loci delicti* that "forms the basis of the choice of law rule"[250] in these countries. It was also noted that under the United States' *Second Restatement*, there is a concession that "in many cases the *lex loci delicti* will be the appropriate law to apply, or at least to take as a starting point."[251]

With all this comparative support for the *lex loci delicti*, it is unsurprising that the Law Commissions have chosen to adopt this rule for their statutory tort choice of law regime. In addition, one practical explanation given for this decision is that the adoption of the *lex loci delicti* would promote uniformity as "the results of an action in the United Kingdom on a foreign tort or *delict* would therefore tend to be the same as if the action had been brought"[252] in these countries.

Canada

The fact that most jurisdictions "favoured exclusive reference to the *lex loci*"[253] was also a consideration in the decision of the Supreme Court of Canada in *Tolofson* to adopt the *lex loci delicti*. Specific reference was made to the memorandum to the *Hague Convention on Traffic Accidents* that signatories of the Treaty have mostly "ruled in favour of recourse in principle to the *lex loci actus* in cases of automobile collisions occurring abroad."[254] The United States support for the *lex loci delicti* was also "attested"[255] to with La Forest J's discussion of *Babcock v Jackson.*[256]

---

[248] *Boys v Chaplin, supra,* n. 10, at 387 per Lord Wilberforce.
[249] Appendix to the Law Commissions Working Paper No 87 (1984), at 280 -291.
[250] Working Paper, *supra,* n. 1, at para. 4.55.
[251] *ibid.*
[252] *ibid,* at para. 4.59.
[253] *Tolofson, supra,* n. 25, at [45].
[254] *ibid.*
[255] *ibid.*
[256] 12 NY 2d 743 (1963).

More importantly, the Australian case of *Breavington* has had a very strong comparative influence on the judgment in *Tolofson*. La Forest J clearly regarded that the Australian jurisprudence on this matter must be "accorded considerable weight"[257] as:

> "so much of [Australia's] history and [its] social, practical and constitutional environment is of a nature akin to those with which [the Canadian courts] are faced in dealing with conflict of laws within [Canada]."[258]

Key passages in *Breavington* were cited by La Forest J, in particular, the support of various Australian Justices for the "underlying policy considerations"[259] of uniformity. To him, this policy is "surely relevant in the development of common law rules for choice of law"[260] within the Canadian federation.

One point to note is that when *Tolofson* was decided by the Supreme Court of Canada, the decision to reject the double actionability rule in *Breavington* was overruled by the High Court of Australia in *Stevens v Head* and *McKain v Miller*. Yet these subsequent cases were absent in La Forest J's judgment. Was this omission an oversight on the part of La Forest J or was it deliberate so as to achieve the conclusion he wanted? The answer is not immediately discernible from the case itself.

Australia

Similarly, some reliance was placed on the global trend towards the *lex loci delicti* in Australian tort choice of law cases. In relation to inter-state torts, the High Court of Australia pointed out in *Pfeiffer* that in "Europe, reference has usually been made to the *lex loci delicti* as the law

---

[257] *Tolofson, supra*, n. 25, at [68].
[258] *ibid.*
[259] *ibid.*
[260] *ibid*, at [69].

governing delictual liability."[261] Furthermore, even though the proper law of the tort was utilised by some courts in the United States, the majority Justices observed that recently, "there has been a revival of support for the *lex loci delicti*."[262]

With regards to international torts, the majority of Justices in *Renault* were impressed by La Forest J's reasoning in *Tolofson* as the explanations provided for their adoption of the *lex loci delicti* rule were supported with quotations of key passages from that case.[263] In particular, they agreed with the criticisms levelled at the *lex fori* limb of the *Phillips v Eyre* rule in *Tolofson* as well as La Forest J's utilisation of the territoriality principle to justify a departure from the English double actionability rule.

4.2.2 Exception to the tort choice of law rule

England: *Part III* of the *1995 Act*

To establish the case for an exception in the English statutory tort choice of law regime, the experiences in the United States with regards to the "universal application, without exception, of the *lex loci delicti*"[264] was used by the Law Commissions to illustrate the inadequacy of such a rule to cope with all the unpredictable circumstances in which tort and *delicti* cases arise. Most notably, after examining a number of American cases, they highlighted the possible circumvention of the *lex loci delicti* rule with the use of escape devices.[265] Ultimately, this was to emphasise the need for flexibility and thus an exception to the *lex loci delicti* rule. In addition, the Law Commissions also observed "a trend away from a rigid *lex loci delicti* rule"[266] in many European jurisdictions and were clearly influenced by this comparative phenomenon to do so likewise.

---

[261] *Pfeiffer, supra,* n. 50, at [74].
[262] *ibid,* at [77].
[263] *Renault, supra,* n. 56, at [63] – [64].
[264] Working Paper, *supra,* n. 1, at para. 4.92.
[265] *ibid.*
[266] *ibid,* at para. 4.93.

Canada

In considering whether an exception should be available to the *lex loci delicti*, La Forest J in *Tolofson* examined the United States approach: the proper law of the tort which accords "controlling effect to the law of the jurisdiction which, because of its relationship and contact with the occurrence and the parties has the greatest concern with the issue raised in the litigation."[267] He pointed out its "obvious defect"[268] – its "extreme uncertainty"[269] as well as the tendency of judges to apply the *lex fori* with it and subsequently decided against endorsing such an exception for Canadian tort choice of law.

La Forest J also referred to the *Hague Convention on Traffic Accidents*, even though Canada has not signed up to that Treaty. Under the *Convention*, the *lex fori* was to be applied "where all parties involved in the accident are from the forum."[270] Again, La Forest J was not convinced of the efficacy of such an exception in the tort choice of law context. In particular, the reason provided in the memorandum to the *Convention* was that the exception helps to guard sovereignty and it is thus considered "appropriate that in an accident involving only residents of a single country, that country should apply its law to the resolution of disputes without regard to the place where the tort took place."[271] With regards to the federal context, La Forest J regarded the sovereignty argument as relevant only to the international context and he fails to "see its application within a single country."[272] In relation to the international sphere, he stated that such an exception is "not without its problems and does not appear to afford [Canada] most of the advantages that Europeans may gain from it."[273]

---

[267] *Tolofson, supra*, n. 25, at [53].
[268] *ibid*, at [54].
[269] *ibid*.
[270] *ibid*, at [61].
[271] *ibid*, at [62].
[272] *ibid*.
[273] *ibid*, at [67].

It can thus be observed that the Supreme Court of Canada has opted not to follow the general trend towards a less rigid *lex loci delicti* rule. Despite that, as La Forest J's comments on the exception for international torts were *obiter* and he did not actually define the exception in *Tolofson* itself, this legal vacuum has allowed some Canadian lower courts to draw implicit support from the more flexible exceptions in other jurisdictions.[274]

Australia

Similarly, in *Pfeiffer*, the High Court of Australia undertook an analysis of the American proper law approach flowing from the *Second Restatement* before concluding that an exception to the *lex loci delicti* rule for inter-state torts was unnecessary. They pointed out that although, the approach has achieved widespread use in America, recently, there has been a "revival of support for the *lex loci delicti*"[275] and that the governmental interest analysis (the technique used to locate the law which has the most significant connections with the parties or events) "has been doubted."[276] Furthermore, they highlighted the difficulties of determining the significance of connecting factors. They also observed that the exception is often a guise to give effect to the American court's homing instinct. Likewise, for international torts, the Australian courts have refused to be influenced by the American approach for the same reasons.[277]

5. CONTEXTUAL EXPLANATIONS

5.1 ECONOMIC AND SOCIAL CONTEXT

5.1.1 Free movement of persons, wealth and skills

Canada

---

[274] See for example, *Hanlan v Sernesky* (1998) 41 CCLT (2d) 168.
[275] *Pfeiffer, supra*, n. 50, at [77].
[276] *ibid.*
[277] *Renault, supra*, n. 56, at [75].

Underlying the Supreme Court of Canada's concern with territoriality and litigant convenience is an awareness that the Canadian tort choice of law regime must respond to the modern mobility of persons, wealth and skills, a consequence of the numerous "advances in transportation and communication."[278] To elaborate, in *Tolofson v Jensen*, aside from the concept of comity between nations, one other explanation for respecting "the territorial limits of law under the international legal order"[279] is that it is necessary to "accommodate the movement of people, wealth and skills across state lines."[280] How does territoriality achieve this aim? According to La Forest J, the application of the *lex loci delicti*, the natural tort choice of law rule that flows from the application of the territoriality principle will facilitate the "convenience"[281] of litigants:

> "[c]onsequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience."[282]

Conversely, a forum-centric tort choice of law regime would cause litigant inconvenience for it may "force or persuade litigants who are within the territorial jurisdiction of the court to sue elsewhere even though it may be more convenient"[283] for them to sue in that court. This would inhibit the mobility of litigants as in the situation where the *lex fori* does not recognise the cause of action the claimant is relying upon, he would be compelled to sue in the jurisdiction which provides him with that claim. La Forest J's attempts to minimise the role of the *lex fori* in the Canadian tort choice of law regime must thus be seen in the light of this rationale.

One interesting question arising from the use of this rationale is: why must the free movement of persons, wealth and skills be encouraged? The only clue we have in *Tolofson* is that it aids in the

---

[278] *Tolofson, supra,* n. 25, at [48].
[279] *ibid,* at [37].
[280] *ibid.*
[281] *ibid,* at [40].
[282] *ibid.*
[283] *ibid,* at [51].

"emergence of a global economic order"[284] but the case does not explain exactly how that is accomplished. As *Tolofson* is a continuation of La Forest J's attempt to place Canadian private international law on a unified theoretical basis, it is necessary for us to examine another landmark case in Canada, namely, *Morguard Investments Ltd v De Savoye*[285] which deals with the recognition and enforcement of foreign judgments.

In that case, a more thorough discussion of litigant mobility was undertaken. Specifically, after stating that the purpose of private international law is to "facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner,"[286] La Forest J cited a key passage[287] from one of Yntema's articles that:

> "[i]n a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce."[288]

Applying this to the Canadian context, he pointed out that the business community of Canada "operates in a world economy"[289] and that private international law rules that accommodate litigant mobility has now become "imperative"[290] especially in light of the "obvious intention of the Canadian Constitution to create a single country."[291] This is because the "mobility of Canadians across provincial lines [is necessary] to foster economic integration so as to create a common market."[292]

---

[284] *ibid*, at [44].
[285] [1990] 3 SCR 1077.
[286] *ibid*, at [31].
[287] *ibid*, at [32].
[288] Yntema, *Objectives of Private International Law* (1957) 35 Canadian Bar Review 721, at 741.
[289] *Morguard, supra*, n. 285, at [34].
[290] *ibid*.
[291] *ibid*, at [36].
[292] *ibid*.

In other words, what La Forest J appears to be saying is that, with the "rapid evolution of a globalised world economy,"[293] it is essential for Canadian private international law rules to "reinforce the efficient internal operation"[294] of their "federalised economy"[295] so as to "enhance the competitiveness of that economy in a globalised international marketplace."[296] One way of doing this is to structure Canadian tort choice of law such that it does not overly inhibit the mobility of litigants in the federation.

Australia

In *Pfeiffer*, Kirby J examined the "[i]ncreased mobility of persons, goods and services"[297] in the inter-state context and pointed out that:

> "[i]n Australia, the consideration of the mobility of people goods and services within a federation therefore encourages both the broadest possible access to the available courts within the unified Judicature of the nation and the adoption of a choice of law rule which *helps to promote an identical outcome for the parties substantive rights, wherever in that nation those rights fall to be determined by a court of law.*"[298]

He opined that the existence of the *lex fori* in a tort choice of law scheme would only interfere with the above objectives and thus provided for the rejection of the *Phillips v Eyre* rule in the inter-state context. As the *lex loci delicti* rule would help to provide for uniformity of judicial decisions so as to encourage the free movement of persons, wealth and skills, Kirby J held that it should be adopted as the Australian tort choice of law rule.

---

[293] Herbert, *The Conflict of laws and Judicial Perspectives on Federalism: A Principled Defence of Tolofson v Jensen* (1998) 56 University of Toronto Faculty of Law Review 3, at 35.
[294] *ibid.*
[295] *ibid.*
[296] *ibid.*
[297] *Pfeiffer*, *supra*, n. 50, at [125].
[298] *ibid*, at [130]. My italics.

Nonetheless, it is important to note that this consideration was not mentioned by the rest of the Justices in *Pfeiffer.* Some doubt must thus be cast on its strength as an explanation for the divergences effected in that case.

However, there is no such problem in relation to the Australian tort choice of law rule for international torts as La Forest J's reliance on the "modern phenomenon of the movement of people, wealth and skills across state lines"[299] to justify his adherence to the territoriality principle in *Tolofson* was endorsed by a majority of the High Court of Australia in *Renault v Zhang.*[300]

England: *Part III* of the *1995 Act*

In relation to the *1995 Act*, it is important to note that the *lex fori* was considered a threat to the Law Commissions' vision of a "united world, a global world"[301] where litigants can bring their actions in any country they prefer for their own convenience subject to the satisfaction of the relevant jurisdictional rules. The rejection of the English common law double actionability can thus be interpreted as a move to encourage litigant mobility.

Unlike the Canadian courts, the Law Commissions did not link litigant convenience to the promotion of appropriate circumstances for international commerce and trade. However, there is still an economic dimension to their analysis in that they are of the view that the removal of the *lex fori* would encourage more litigants to bring their actions in the English courts famous in the world for its procedures, impartial judges as well as its "considerable experience with many aspects of commercial litigation."[302] This is thus an indication that the invisible export argument as mentioned in Chapter 5 has been utilised by the Law Commissions in their deliberations on *Part III* of the *1995 Act*. This is not however an argument that can be inferred from the relevant Canadian and Australian cases.

---

[299] *Neilson, supra,* n. 3, at [100] per Gummow and Hayne JJ.
[300] *Renault, supra,* n. 56, at [61]-[65].
[301] HL Paper 36 (1995), Part I, at 72 per Lord Wilberforce.
[302] Guthrie, *supra,* n. 138, at 222.

5.2 POLITICAL CONTEXT

For tort choice of law, states or provinces in Australia and Canada have traditionally been regarded as independent sovereign jurisdictions with no distinction drawn between torts that occur in the inter-provincial sphere or in the international arena. In recent years, "a sense of ...nationhood came somewhat belatedly to the... judiciary"[303] in Canada and Australia and a view that a federation is ultimately "one country and one nation"[304] emerged in the Australian and Canadian courts. In particular, the *Phillips v Eyre* rule was attacked for its "inappropriateness"[305] in tackling the issues and problems arising from intra-national tort disputes. No such view has however arisen in the English courts in relation to intra-UK disputes.

It is clear from the above sub-sections that the Australian and Canadian courts are of the view that uniformity and territoriality should be adhered to in relation to their tort choice of law regimes for intra-national torts as states or provinces within these federations cannot be seen as foreign to one another. One can thus observe that the political context of these two countries have been employed in a general sense.

At a different level, as the nature of the Australian and Canadian federation is established by their individual constitutions, their judiciaries have accorded some importance to specific constitutional provisions in their decision to reform their respective tort choice of law regimes for intra-national torts. One important example is the 'full faith and credit' clause. In Australia, federal jurisdiction has also been employed as a consideration in the formulation of the Australian tort choice of law rule.

---

[303] Davis, *John Pfeiffer Pty Ltd v Rogerson: Choice of Law in Tort at the Dawning of the 21st Century* (2000) 24 Melbourne University Law Review 982, at 990.
[304] *Breavington, supra,* n. 117, at 78.
[305] *Pfeiffer, supra,* n. 50, at [109].

5.2.1 Full faith and credit provision

Australia

The recognition that the *Phillips v Eyre* rule is not an appropriate borrowing from English law with regards to the inter-state context has led the Australian judiciary to embark on a search for principles to guide them in the creation of a suitable tort choice of law regime. One source of inspiration is *section 118* of the Australian Constitution which provides that: "[f]ull faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State."

In particular, the key question the High Court of Australia had to address in a number of cases was whether the 'full faith and credit' clause had a substantive effect on the Australian tort choice of law regime or whether it was procedural; merely "directing the courts of the several states and territories to take judicial notice of the laws, records and judgments of their sister states and territories."[306] In addition, if the answer is positive for the former, what is the exact nature of that substantive effect? In response to these questions, the Australian Justices are clearly divided on their answers. Accordingly, the purpose of this section is to highlight the different interpretations of this provision.

a) *Section 118* as procedural

Those who view *section 118* as procedural regard the provision as relevant only after the Australian tort choice of law rules have identified the applicable law. In the words of Dawson J in *Breavington*, the clause "affords no assistance where there is a choice to be made between conflicting laws."[307] It is only when that choice has been made that the 'full faith and credit' clause

---

[306] Nygh, *Conflicts of Laws within a Federation: Anderson v Eric Anderson (Radio and TV) Pty. Ltd* [1966] Australian Yearbook of International Law 35, at 40.
[307] *Breavington, supra,* n. 117, at 150.

can be used to compel the forum to apply that law thus effectively removing from the forum, the residual power of public policy.[308] It is thus clear that this interpretation would give no role to the clause as an explanation for the Australian divergences except in relation to the rejection of a public policy exception to the tort choice of law rule in the inter-state context.

b) *Section 118* as substantive: territoriality

Some Australian Justices disagree with the procedural interpretation of the 'full faith and credit' clause and have opted for one which "mandated a change to the common law choice of law rule"[309] for inter-state torts. In particular, Deane J in *Breavington* observed that the Australian Constitution "divides legislative competence horizontally as between the Commonwealth and the states and vertically as between the states and the territories."[310] He then went on to state that integral to this constitutional scheme is *section 118*, which can be used to resolve conflict between state laws on the basis that "as between the States and in the absence of some overriding territorial nexus, legislative competence with respect to what happens within the territory of a particular State lies with that State."[311] Therefore, because of this provision, the laws made within one State must be recognised and applied in the courts of other States. It can thus be observed that *section 118* has been used to establish a constitutional basis for Deane J's support of the territorial principle.

Deane J's argument, however, is subject to a serious flaw. There is no requirement under Australian law that an Australian state must have a "predominant territorial nexus before it can legislate extraterritorially."[312] Instead, the reality is: under the *Cross-vesting Act*, Australian constitutional doctrine allows States "to extend the reach of their legislation to interstate activities and conduct even if the subject matter nexus is a remote and general one and even if the result is

---

[308] *ibid*, at 81 per Mason CJ.
[309] Davis, *supra*, n. 303, at 991.
[310] Nygh, *Full Faith and Credit: A Constitutional Rule for Conflict Resolution* (1991) 13 Sydney Law Review 415, at 422.
[311] *Breavington*, *supra*, n. 117, at 137.
[312] Nygh, *supra*, n. 310, at 430.

to subject persons to the conflicting laws of more than one state."[313] Consequently, his analysis holds no weight in the Australian federation context. It has thus been suggested that it is this "reasoning that persuaded a differently-constituted majority of the High Court to later abandon the *lex loci delicti* rule"[314] in *McKain* and *Stevens.*

In *Pfeiffer v Rogerson*, the *lex loci delicti* rule was reinstated and the question which now arises is: did Deane J's interpretation of *section 118* play a part in the High Court's decision to diverge from the double actionability rule? Unfortunately, what emerged from the majority judgement in that case was a regurgitation of all the key interpretations of the section devoid of any clear indication as to the view that the High Court was in support of. On the one hand, the majority Justices commented that it "may well be"[315] that *section 118* is procedural. On the other hand, they stated that it "may also be that"[316] *section 118* suggests that:

> "[t]he constitutional balance which should be struck in cases of intranational tort claims is one which is focused more on the need for each State to acknowledge the predominantly territorial interest of each in what occurs within its territory."[317]

Ultimately, the High Court did not consider it "necessary"[318] to resolve the uncertainty surrounding *section 118* and its link with territoriality and therefore, this would indicate that the strength of this explanation for the divergences effected in *Pfeiffer* is doubtful, to say the least.

c) *Section 118* as substantive: uniformity of judicial outcomes

In essence, Wilson and Gaudron JJ in *Breavington* agreed with Deane J that *section 118* is substantive in nature and that it prevailed over State laws and legislatures. Their focus was not

---

[313] Walsh, *supra*, n. 179, at 106.
[314] *ibid.*
[315] *Pfeiffer, supra*, n. 50, at [63].
[316] *ibid*, at [64].
[317] *ibid.*
[318] *ibid*, at [65].

on territoriality. Instead they emphasised that the section necessitated the consequence that "one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication."[319] In other words, they are of the view that *section 118* provides a constitutional basis for the policy of ensuring the uniformity of judicial outcomes.

Interestingly, in reinstating the double actionability rule in *McKain v Miller*, a new majority in the High Court chose to disregard uniformity as a guiding policy in Australian tort choice of law as they were of the view that the nature of the federation encouraged diversity instead.

> "Yet it is of the nature of the federation created by the Constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications. The laws of the States, though recognised throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts."[320]

Accordingly, *section 118* was not seen as "eliminating the differential operation of State laws"[321] and thus could not be used to "prescribe the selection of the *lex loci delicti*"[322] in the manner advocated by Wilson and Gaudron JJ.

As the reaction of the High Court of Australia in *Pfeiffer v Rogerson* to this interpretation of *section 118* can only be described as equivocal, it is simply unclear as to whether *section 118* can be considered the source for their support of the policy of ensuring uniformity of judicial outcomes within Australia. An Australian commentator has suggested that Wilson and Gaudron JJ's views on uniformity have:

---

[319] *Breavington, supra,* n. 117, at 98.
[320] *McKain, supra,* n. 48, at 36.
[321] *ibid.*
[322] *ibid,* at 37.

"further developed so that it is no longer necessary to employ a direct constitutional command, supposedly discernible in the words of *s 118* or other constitutional norms, in order to achieve the result that her Honour favours and to endorse her conception of unity."[323]

Canada

It is important to note that even though there is no 'full faith and credit' clause in the Canadian Constitution, there is some discussion of the provision in *Tolofson.* In particular, the comments made on *section 118* of the Australian Constitution in *Breavington* were referred to by La Forest J. He pointed out that even though the two jurisdictions adhere to different theories concerning their "constitutional arrangements,"[324] the policies flowing from the High Court of Australia's interpretation of that clause are still relevant to the Canadian tort choice of law regime for inter-provincial torts. Thereafter, he held that:

> "[t]he nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country."[325]

It can be observed that the focus of La Forest J's analysis is on the policies of certainty and uniformity as derived from the Australian interpretation of their 'full faith and credit' clause rather than the clause itself.

---

[323] Taylor, *The Effect of the Constitution on the Common Law as Revealed by John Pfeiffer v Rogerson* (2002) 30 Federal Law Review 69, at 88.
[324] *Tolofson, supra,* n. 25, at [69].
[325] *ibid*, at [70].

In addition, it must be noted that no provision of the Canadian Constitution was relied upon by La Forest J. In particular, when he went into the specifics of the Canadian Constitution, he was very "careful in his choice of words."[326] He highlighted the "largely unexplored nature"[327] of the "interplay of choice of law rules and constitutional imperatives"[328] and held that it was preferable not to engage in a comprehensive discussion of its role in informing his decision on Canadian tort choice of law rules. Instead, he felt that it was safer to "avoid devising a rule that may possibly raise intractable constitutional problems."[329]

Arguably, all this appears to indicate that La Forest J "may not be ready to entrench the *lex loci delicti* in the Constitution"[330] as yet. He is only willing to permit "constitutional values to influence the development of the common law rather than allowing constitutional rights to determine (or disfigure) the content of the common law."[331]

5.2.2 Federal jurisdiction

For all its importance to tort choice of law for inter-state torts, we must not ignore the fact that *Pfeiffer v Rogerson* was ultimately a case decided under the "distinct non common law concept of federal jurisdiction"[332] where the "authority to adjudicate"[333] is "derived from the [Australian] Constitution"[334] and not from the states themselves. In such circumstances, the High Court has held that Australia is to be regarded as a single law area where jurisdiction is exercised in Australia and not in a State or Territory and does not entail any choice between the laws of competing jurisdictions. Taking all this into consideration, the High Court saw the application of the double actionability rule as "unusual"[335] as it would result in the situation where the "outcome

---

[326] Castel, *supra*, n. 29, at 64.
[327] *Tolofson*, *supra*, n. 25, at [71].
[328] Castel, *supra*, n. 29, at 64.
[329] *Tolofson*, *supra*, n. 25, at [72].
[330] Castel, *supra*, n. 29, at 64.
[331] Taylor, *supra*, n. 323, at 76.
[332] Gummow J, *Full Faith and Credit in Three Federations* (1994-1995) 46 South Carolina Law Review 979, at 984.
[333] *ibid*, at 985.
[334] *ibid*.
[335] *Pfeiffer*, *supra*, n. 50, at [59].

of an action for tort may be affected significantly by where the court sits."[336] This is thus one reason why the *Phillips v Eyre* rule was rejected by the High Court of Australia in this case.

At first sight, as litigation under such jurisdiction does not involve choice of law issues, federal jurisdiction would appear to be irrelevant as an explanation for the Australian divergence from the double actionability rule in relation to non-federal jurisdiction. On closer scrutiny of the judgment, however, one can observe that the High Court has provided for a link between federal and non-federal jurisdiction. In particular, the majority judges considered it undesirable to restrict the reconsideration of tort choice of law rules in federal jurisdiction as:

> "[o]rdinarily, the question whether a matter falls within federal jurisdiction will depend on the identity of the parties or their State of residence, not the events which are said to give rise to tortious liability. For example, the rights of a plaintiff who is struck by a motor vehicle should not differ according to whether it was driven by an employee of the Commonwealth or by a private individual. So, too, they should not differ according to whether it was driven by a person resident in the same State or by a person resident in a different State."[337]

In other words, as the High Court, "with justification, could see no reason for different approaches to be taken depending on whether a matter arose in federal or no federal jurisdiction,"[338] the tort choice of law rules for non-federal jurisdiction were made to conform to the approach under federal jurisdiction.

---

[336] *ibid.*
[337] *ibid*, at [60].
[338] Davis, *supra*, n. 303, at 998.

5.2.3 Conclusions on the political context in Australia and Canada

From the above sub-sections, it is submitted that Gary Davis is surely right to conclude that the "joint judgment refrains from providing a constitutional solution"[339] and that by elimination, federal jurisdiction has become the "convenient linchpin for reforming the common law generally"[340] in relation to Australian tort choice of law for inter-state torts.

For Canada, no specific constitutional provision was utilised by Supreme Court of Canada in their formulation of the Canadian tort choice of law regime for inter-provincial torts. Arguably, the political context in Canada was employed only in a general sense to justify the weight attached to the concepts of territoriality and uniformity in their decision to depart from the English common law tort choice of law regime for intra-national torts.

6. INTERACTION BETWEEN THE ABOVE EXPLANATIONS

In this section, the interaction between the above policies, concepts and other wider considerations will be examined with specific reference to the tort choice of law rule and its exception.

6.1 CANADA

6.1.1 Tort choice of law rule

There are a number of explanations for the decision of the Supreme Court of Canada to reject the English common law double actionability rule for a *lex loci delicti* rule. The *lex fori* limb of the English common law tort choice of law rule was seen as parochial and would thus be a violation of the territoriality principle as it enabled a court to define the nature and consequences of an act

---

[339] *ibid*, at 996.
[340] *ibid*, at 998.

committed in another sovereign country. The application of this tort choice of law rule would not provide for uniformity, as judicial outcomes would be dependent on the forum that the action is brought in. The public policy objectives of the *lex fori* limb of the double actionability rule were also considered to be better met at the *forum non conveniens* stage.

Removing the *lex fori* from the Canadian tort choice of law rule and retaining the *lex loci delicti* was thus seen as the solution to these problems. Furthermore, the *lex loci delicti* rule has the advantage of providing for certainty and predictability in judicial decisions. It also discourages forum shopping by ensuring uniformity of judicial outcomes. Litigant convenience would also be promoted under this rule. As a matter of comparative law, the Canadian courts were also influenced by the fact that many jurisdictions in the world apply a *lex loci delicti* rule.

Why did the Canadian courts adhere to these policies and concepts? The answer to this question is dependent on whether the tort is committed on an inter-provincial or international basis.

Inter-provincial context

1. Underlying the Supreme Court of Canada's concern with territoriality and litigant convenience is the view that the Canadian tort choice of law regime should encourage the free movement of persons, wealth and skill across provinces. The economic rationale for encouraging litigant mobility is that with the rapid globalisation of the world economy, it is essential for Canadian private international law rules to reinforce the internal operations of Canada's economy so as to enhance its competitiveness in a global market.

2. As Canada is a federation, adherence to a number of policies and concepts were thought to be necessary as a result of this political consideration. In particular, since Canada is effectively one country and one nation; it could not be said that its provinces are foreign

to one another, it was felt that an act committed in one part of this country should be given the same legal effect throughout the country. Furthermore, as each province in Canada exercises its own legislative jurisdiction, this meant that the different provincial courts have to respect the territorial limits imposed upon provincial legislative power by the Canadian Constitution.

International context

1. As Canada's political context is obviously irrelevant to the formulation of the Canadian tort choice of law rule for international torts, there must be a different reason for an adherence to the territoriality principle in this context. In particular, the Canadian courts were of the view that it is the concept of comity between nations that requires them to respect the exercise of territorial sovereignty of a particular state and not interfere with what that state chooses to do within its territorial limits.

2. There is some indication that the Supreme Court of Canada was also concerned with encouraging the free movement of persons, wealth and skill outside of Canada to promote the growth of international trade and commerce in today's globalised economy. Accordingly, the use of the territoriality principle and the policy of encouraging litigant convenience in the formulation of the Canadian tort choice of law rule for international torts can be linked to this social and economic consideration.

6.1.2 Exception to the tort choice of law rule

As for the exception to the tort choice of law rule in Canada, in general, the Canadian courts were against the English common law exception as they felt that it provided for too much flexibility and thus uncertainty. To them, this would encourage forum shopping, as litigants are likely to make use of this exception to avoid the *lex loci delicti*. Furthermore, allowing the courts discretion to

apply a law other the *lex loci delicti* would be a violation of the territoriality principle as there is a danger that Canadian courts would utilise that exception whenever they disapproved of the *lex loci delicti.*

Specifically, in relation to inter-provincial torts, no exception was provided for the *lex loci delicti* rule as the Supreme Court of Canada was of the view that a provincial court, in applying another law to the *lex loci delicti*, would be going against the limits imposed on that court by the Canadian Constitution. The strength of the territoriality principle here is thus based on Canada's political context.

For international torts, as the territoriality principle in this context is now based on comity rather than the Canadian Constitution, an exception was held to be available to the *lex loci delicti* rule in exceptional circumstances. This was because the strict application of the *lex loci delicti* may give rise to injustice to the parties in some instances and if such situations should arise, the Canadian courts were of the view that considerations of justice should take precedence over comity.

6.2 AUSTRALIA

6.2.1 Tort choice of law rule

The explanations provided for the Australia divergence from the English common law double actionability rule by the Australia courts are largely similar to that utilised by the Canadian courts in that policies and concepts such as judicial chauvinism, uniformity, forum shopping and territoriality were utilised by both courts to abandon the *Phillips v Eyre* rule for the *lex loci delicti.* The interaction between these considerations is similar in both countries as well.

However, that is not to say that there are no differences whatsoever in the judicial treatment of the relevant considerations in these jurisdictions. First, territoriality was not an important

consideration in the decision of the High Court of Australia to provide for a *lex loci delicti* rule for inter-state torts. Secondly, the High Court of Australia does not appear to be concerned with promoting litigant convenience in the relevant cases. Thirdly, it is important to recall that *renvoi* is part of the *lex loci delicti* rule in Australia while it is not yet the case in Canada. Arguably, this is because the Australian courts have attached significant weight to the policy of ensuring uniformity of judicial outcomes whereas in Canada, this has not been done. In addition, the reason for according such weight to uniformity in Australia was that the Australian courts wanted to discourage litigants from avoiding, not only the *lex loci delicti* but also the private international law rules of the place where the tort was committed. There is no indication in the Canadian courts that they intend to stop the activities of such forum shoppers.

What are some of the reasons for the above policy decisions by the Australian courts?

Inter-state torts

1. For inter-state torts, there is some indication that the policy of ensuring uniformity of judicial decisions was adhered to by the High Court of Australia in order to encourage the free movement of persons, goods and services within the Australian federation. However, as this argument is utilised by only one Justice in the case of *Pfeiffer v Rogerson,* its strength is questionable. The rest of the Justices in that case have stated that the policy of uniformity is linked directly to the fact that Australia is a federation; that the very nature of Australia's political context requires an act committed in one Australian State or Territory be given the same legal effect throughout the country.

2. Another point to note is that the territoriality principle does not hold much weight in the jurisprudence of the Australian courts for inter-state torts as the Australian *Cross Vesting Acts* has resulted in a situation where sovereignty is shared between the federal, State and Territory law areas. In comparison, the territoriality principle is accorded significant

strength in relation to the Canadian tort choice of law rule as each province in Canada has its own legislative sovereignty.

International context

As for international torts, the territoriality principle can be utilised by the High Court of Australia in their decision to adopt the *lex loci delicti* rule as it is based on comity between nations. For the policy of ensuring uniformity of judicial outcomes, the Australian courts have indicated that this is to encourage litigant mobility as a global phenomenon.

One can observe that the interaction between these considerations is the same as that in the relevant Canadian cases. One reason for this situation is that the Australian courts were heavily influenced by the judgment of La Forest J in *Tolofson v Jensen* in their decision to adopt the *lex loci delicti* rule in the case of *Renault v Zhang*.

6.2.2 Exception to the tort choice of law rule

On the exception to the tort choice of law rule, it is again a strong preference for certainty instead of flexibility that has led the Australian courts to reject the English common law flexible exception for both inter-state and international torts. Similar to the Canadian reasoning, it is because they were of the view that flexibility would encourage forum shoppers to manipulate the factual matrix so as to avoid the application of the *lex loci delicti*. Another reason why the exception was rejected in Australia is that the concerns requiring the application of a law other than the *lex loci delicti* were thought to be better considered at the stage of any application for a stay of proceedings. Interestingly, there was no mention of the territoriality principle in the discussion of the High Court of Australia on the exception.

Specifically, for international torts, even though injustice may be the result of the application of the *lex loci delicti* in exceptional cases, the Australian courts do not appear to be concerned with this consequence. Their focus is on the problem on forum shopping as stated above. Therefore, unlike the Canadian tort choice of law regime, there is no injustice exception available to the *lex loci delicti* rule.

6.3 ENGLAND: *PART III* OF THE *1995 ACT*

6.3.1 Tort choice of law rule

In relation to the *1995 Act*, the Law Commissions, the Special Public Bill Committee and the UK Government were of the view that the English common law double actionability rule should be rejected as it is parochial and would not do equal justice between claimants and defendants. Furthermore, there is little point to the retention of the *lex fori* in the English common law tort choice of law rule as claimants can simply obtain a judgment in another European country and reap the benefit of automatic recognition and enforcement in the English courts under the *Brussels I Regulation*.

As for the decision to apply the law of the place where the tort was committed, it was said that this rule would provide for certainty and choice of law justice. It would also promote litigant convenience and ensure that the most appropriate law would be identified in most cases. Another consideration is that most European jurisdictions have such a tort choice of law rule as well. As the drafters of the *1995 Act* have not attached much weight to the policy of ensuring uniformity of judicial outcomes, they have not gone as far as the Australian courts in declaring that *renvoi* is part of their tort choice of law rule.

One reason why the Law Commissions saw a need to promote litigant convenience was that they wanted to encourage litigant mobility. There is also an economic dimension to this decision in that

the removal of the *lex fori* limb of the double actionability rule would encourage more litigants to bring their actions in the English courts. There is thus some indication of the invisible export argument in this context.

6.3.2 Exception to the tort choice of law rule

As for the *section 12* exception in the *1995 Act*, the Law Commissions were of the view that a balance should be struck between certainty and flexibility in order to locate the most appropriate law to the tortious disputes. If the *lex loci delicti* is incapable of generating such a result, the exception with its flexibility would be applied to do so. This is in sharp contrast to the Canadian and Australian courts as their focus is clearly not on obtaining justice in the individual case. Instead, it is to discourage forum shopping.

6.4 SINGAPORE

No explanation was provided by the Singapore courts for their decision to adopt the *Phillips v Eyre* rule and the flexible exception. It is likely that the reason for this uniformity with the English common law tort choice of law regime is a strong adherence by the Singapore courts to English judicial solutions.

7. CONCLUSIONS

As was the case in Chapter 5, we have sought to establish in this chapter that the break up of Commonwealth private international law in relation to tort choice of law in our selected jurisdictions is the result of differences across these countries on the treatment of policies, concepts and other wider considerations. In particular, the following are the differences we have brought out from our analysis in this chapter. They are as follows:

1. As the objective of the English statutory tort choice of law regime is to identify the most appropriate law to apply to cross border tortious disputes, a compromise between certainty and flexibility was seen as necessary. Australia and Canada, in contrast, consider the purpose of their tort choice of law schemes to be the generation of certainty for litigants.

2. In general, the judiciaries and legislators in our selected jurisdictions see a need for a shift from judicial chauvinism and this has led to them to conclude that the English common law double actionability rule, in particular its *lex fori* limb should be abandoned. Only the Law Commissions attempted a positive definition of *choice of law justice* in their adoption of the *lex loci delicti*. No such concept was employed by the Australian and Canadian courts.

3. One powerful critique of the double actionability rule is that it is biased against the claimant as he has to satisfy the requirements of the *lex fori* and the *lex loci delicti* before he can succeed in his claim. The defendant need only rely on the defences of either law to avoid liability. Furthermore, in circumstances where the *lex fori* does not impose any liability for the harm done against him, the claimant will be forced to travel to another jurisdiction in order to bring an successful action against the wrongdoer. This inconvenience is considered by the Law Commissions to be an injustice to the claimant and it thus forms an important explanation for the rejection of the English common law double actionability rule in relation to the *1995 Act*. In contrast, there was no reliance on this line of reasoning in the Australian and Canadian rejection of the double actionability rule.

4. The Canadian and Australian judiciaries are of the view that their tort choice of law regimes should give effect to the policy of ensuring the uniformity of judicial outcomes and the *lex loci delicti* is seen as the best rule to give effect to this policy. However, the Australian courts appear to have attached greater weight to uniformity in comparison to the Canadian courts. In particular, the Canadian courts have not gone as far as to say that they want to decide a tortious dispute as if it is decided in the foreign court. In contrast, the Law Commissions have

stated that it is extremely difficult to attain uniformity of judicial outcomes particularly in the international context. Accordingly, this policy was only a mere consideration in the decision of the Law Commissions to provide for a *lex loci delicti* rule.

5. The Law Commissions have advocated a departure from the double actionability rule to encourage litigant convenience. This would also have the effect of encouraging forum shopping based on a jurisdiction's legal climate and procedures as opposed to its choice of law rules. The Supreme Court of Canada has adopted the *lex loci delicti* for these reasons as well. It is however not a consideration in the relevant decisions of the High Court of Australia. Instead, the Australian courts were concerned with forum shoppers aiming to avoid the private international law rules of the forum where the tort is committed. *Renvoi* was thus introduced to prevent such activity by litigants. As for the exception to the tort choice of law rule, one reason why the flexible exception was rejected by the Australian and Canadian courts is that they were of the view that it would encourage forum shopping. The Law Commissions and the English courts, on the other hand do not share such a view.

6. As a result of their analysis of the purpose of substantive tort law in relation to torts involving personal injury, death and property damage, the Law Commissions provided for a place of harm rule to identify the place of commission of these torts. As there is no such examination of domestic tort law in our selected judiciaries, no such rule was provided.

7. Unlike the English statutory tort choice of law regime, Canadian tort choice of law was constructed with territoriality and comity as its key theoretical foundations. The High Court of Australia has been heavily influenced by the views of La Forest J in *Tolofson* particularly in relation in international torts and has reformed its tort choice of law regime on similar terms. It follows that the similarities between the Australian and Canadian tort choice of law regimes for international torts can be attributed to their adherence to territoriality.

8. Most of the jurisdictions selected for this study have considered other areas of private international law in the formulation of their tort choice of law regimes. In particular, the Canadian and Australian judiciaries are of the view that the purposes behind the *lex fori* limb of the double actionability rule are better met at the *forum non conveniens* stage. In contrast, there has been no mention of this consideration by the Law Commissions and the English courts. Instead, the Law Commissions do not see much point to the retention of the *lex fori* limb under the English common law double actionability rule as claimants can avoid its operation under the European rules on recognition and enforcement of foreign judgments. This is obviously irrelevant to the Australian and Canadian courts.

9. Canada's initial adoption of the English common law tort choice of law approach can be attributed to an adherence to English judicial precedents and solutions. Interestingly, the Australian courts are more independent early on in the evolution of their tort choice of law regime, as can be seen from their criticism of the *Machado* interpretation of *Phillips v Eyre* rule at the beginning of the last century. In recent years, a critical analysis of the *Phillips v Eyre* rule was undertaken by the courts in Australia and Canada as they recognised that English judicial solutions may not be appropriate for their individual circumstances, values and needs. This eventually led to the rejection of the double actionability rule in these countries. As for the Singapore tort choice of law regime, there is still a strong adherence to English judicial precedents with the Singapore court's adoption of the *Phillips v Eyre* rule and the flexible exception.

10. Judges and legislators of our selected jurisdictions have sought guidance from other countries in the formulation of their tort choice of law regimes. For example, they were influenced by the fact that most countries are using the *lex loci delicti* as their tort choice of law rule in their decisions to diverge from the English common law double actionability rule.

11. Generally, one explanation for the adoption of the *lex loci delicti* rule by the Australian courts and the Canadian courts is that they are of the view that tort choice of law regimes should help facilitate the free movement of goods, wealth and skills across state lines in order to promote suitable conditions for international commerce and trade.

12. It is clear that the political nature of the Australian and Canadian federation has been utilised in a general sense by the judiciaries of these countries in the relevant cases on tort choice of law. Specifically, for Australia, despite the apparent use of the full faith and credit clause, closer scrutiny of the judgments have revealed the ambivalence of the Australian courts towards this provision. Instead, it is the concept of federal jurisdiction that has influenced them in their decision on the tort choice of law rule for inter-state torts. In contrast, no specific constitutional provision was utilised by the Supreme Court of Canada in the formulation of their tort choice of law rules for inter-provincial cases.

13. From the list of explanations laid out above, it is possible to see which of these policies and concepts were emphasised or omitted in the individual jurisdictions. One must remember that there is a whole range of influences on the decisions to diverge from or converge with the English common law tort choice of law regime and it is the fact that some explanations are used in one jurisdiction and not in others and that the adherence to some of these policies are of varying strengths in the different jurisdictions which has given rise to the many tort choice of law divergences in our study.

a. For Singapore, English judicial precedent still exerts a powerful influence on her tort choice of law regime. This is thus the primary explanation for her uniformity with the English common law tort choice of law scheme.

b. With regards to Canada, a number of policies and concepts namely discouraging judicial chauvinism, preventing forum shopping, ensuring uniformity of judicial

outcomes, legal certainty and the territoriality principle have been influential on the Supreme Court of Canada's reform of the Canadian tort choice of law regime. Generally, in the view of the Canadian courts, adherence to these considerations is necessary to facilitate litigant mobility and convenience especially in the inter-provincial context so as to boost the internal efficiency of the Canadian economy. It is also to respect the concept of comity between nations. Specifically for inter-provincial torts, the Canadian courts have held that these policies and concepts are essential as Canada is a federation.

c. As for Australia, the policies and concepts employed by the Canadian courts were also relied upon by the Australian courts in their decisions on tort choice of law. However, there are some differences between the treatment of these considerations by the courts of these two jurisdictions. First, territoriality was not accorded much weight in the decisions of the High Court of Australia to provide for a *lex loci delicti* rule for inter-state torts. Secondly, the Australian courts do not appear to be concerned with litigant convenience. Thirdly, there is a stronger adherence to the policy of uniformity in the Australian courts in comparison to the Canadian position and this has led the High Court of Australia to provide for *renvoi* as part of the Australian tort choice of law rule. In general, these policy decisions were made by the Australian courts to encourage the free movement of persons, wealth and skills to facilitate international trade and commerce and for comity between nations to be respected. Similar to the Canadian position, the nature of the Australian federation has been influential on the relevant Australian decisions on inter-state torts. However, as the prevailing Australian constitutional doctrine provides for the sharing of sovereignty between federal, State and Territory law areas, the territoriality principle does not hold much weight for inter-state torts. This is in contrast to Canada where each province has its own legislative sovereignty.

d. Similarly, the drafters of the *1995 Act* were concerned with the policies of discouraging judicial chauvinism, promoting litigant convenience, ensuring equal justice between litigants and doing choice of law justice. It is interesting to note that territoriality and uniformity were not given much weight in their deliberations, unlike the position in Canada and Australia. In addition, there is a focus in the *1995 Act* on identifying the most appropriate applicable law for the tortious dispute in question by striking a balance between certainty and flexibility. In contrast, the emphasis in Australia and Canada is on ensuring legal certainty for litigants. In the view of the Law Commissions, these policies and concepts are considered necessary for the promotion of litigant mobility so as encourage more litigants to bring their actions in the English courts as an invisible export.

CHAPTER 7: CONCLUDING REMARKS FOR PART II

In Part I of this thesis, we established that there has been a break up of Commonwealth private international law in relation to tort choice of law and *forum non conveniens* and that interestingly, the nature and extent of this phenomenon is not the same between these two areas of private international law. The purpose of Part II of this study is to work out from the relevant cases in England, Australia, Canada and Singapore the explanations for this phenomenon.

At a general level, as was brought out from our analysis in Chapters 5 and 6, one key explanation for the break up of Commonwealth tort choice of law and *forum non conveniens* in our selected jurisdictions is that there are differences in the judicial treatment of policies and other wider considerations relevant to these areas of private international law in our selected jurisdictions and this has led to the divergences established in Part I of this thesis.

As regards our specific findings in Chapters 5 and 6, it is possible to analyse them at two different levels. First, we can compare and contrast the individual considerations utilised by our selected judiciaries in relation to *forum non conveniens* and that for tort choice of law. For example, we can examine whether the utilisation of the policy of discouraging forum shopping in relation to tort choice of law is the same as that for *forum non conveniens* in each of our selected jurisdictions. Secondly, we can make a general comparison of these considerations as a whole between our selected areas of private international law. To illustrate, we can determine whether our selected judiciaries are generally in agreement on the relevant policies and concepts for *forum non conveniens* and tort choice of law.

Comparing the individual considerations utilised by our selected jurisdictions for forum non conveniens and tort choice of law

Examining the considerations utilised by our selected judiciaries in their decisions on *forum non conveniens* and tort choice of law, it is clear that some of these matters are peculiar to

the area of private international law that we are looking at. For example, substantive tort law is a consideration unique to tort choice of law. Likewise, the litigant's right of access to the courts is only examined in relation to *forum non conveniens*. Nevertheless, there are factors common to both of our selected areas of private international law such as judicial chauvinism, forum shopping, certainty, flexibility, equal justice, comity and the federation context. Comparing the judicial treatment of these individual considerations for tort choice of law with that in relation to *forum non conveniens* for each of our selected jurisdictions, it is interesting to note that our selected judiciaries have not been consistent on this point. To elaborate:

1. For Australia, one reason for the rejection of the English common law double actionability rule was that the *lex fori* limb of that tort choice of law rule was considered parochial. In comparison, for the formulation of the Australian doctrine of *forum non conveniens*, the High Court of Australia chose not to accord much weight to this consideration thus providing for a 'clearly inappropriate forum' test that is premised on the concepts of 'oppression' and 'vexation.' In Singapore, the endorsement of the English common law 'clearly more appropriate forum' test was to reduce judicial chauvinism but in relation to tort choice of law, no criticism that the first limb of the English common law *Phillips v Eyre* rule was parochial, was made by the Singapore courts. The Canadian courts, on the other hand, have been consistent in treating the policy of discouraging judicial chauvinism as an important consideration for both our selected areas of private international law.

2. The Australian courts refused to adopt the English common law 'clearly more appropriate forum' test as they were of the view that it was too uncertain. Similarly, certainty was accorded considerable strength in relation to the Australian tort choice of law regime particularly in the decision of the Australian courts not to have an exception to the Australian tort choice of law rule for intra-national torts and only a very limited exception for international torts. The Canadian courts, on the other hand were in favour of flexibility for their doctrine of *forum non conveniens* with their rejection of the *Spiliada* structure. In contrast, huge emphasis was placed on certainty

and predictability in relation to their tort choice of law regimes. This resulted in exceptions to the Canadian tort choice of law rule which are similar to that under the Australian position. No discussion of the certainty vs. flexibility debate for these two areas of private international law was made in the Singapore courts.

3. Discouraging forum shopping is an important policy utilised by the Canadian courts in their decisions on *forum non conveniens* and tort choice of law. For Australia, enormous weight was attached to this policy in relation to their tort choice of law regime particularly in the decision of the High Court of Australia to provide for *renvoi* as part of their *lex loci delicti* rule. Interestingly, their doctrine of *forum non conveniens* has the opposite effect of encouraging forum shopping due to its emphasis on the inappropriateness of the local forum. Reducing forum shopping was a reason for the Singapore court's adoption of the 'clearly more appropriate forum' test but this policy was not looked at in relation to their decision to endorse the English common law tort choice of law regime.

4. For the doctrine of *forum non conveniens* in Canada, the policy of doing equal justice between claimants and defendant was one of the explanations for the adoption of the 'clearly more appropriate forum' test by the Supreme Court of Canada. However, this policy was not examined by the Canadian courts in relation to their tort choice of law regime. The Australian doctrine of *forum non conveniens* is clearly in favour of the claimant as the claimant's right of access to the Australian courts has been accorded significant weight. However, for the Australian tort choice of law regime, equal justice was one reason cited by some members of the High Court of Australia for the inclusion of *renvoi* as part of their tort choice of law rule. The Singapore courts have not examined this concept in relation to their doctrine of *forum non conveniens* as well as their tort choice of law regime.

5. The Australian courts have utilised the concept of comity as an explanation for why territoriality should be respected in relation to their tort choice of law rules for

international torts. Strangely, for *forum non conveniens*, some members of the High Court of Australia were of the view that comity between nations is just an ideal and not a practical reality. For Canada, comity was adopted by the Supreme Court of Canada as the theoretical basis for Canadian private international law. This is why the concept was an important consideration in the Canadian decisions on *forum non conveniens* and tort choice of law. As for Singapore, while adherence to judicial comity is one explanation for the adoption of the 'clearly more appropriate forum' test by the Singaporean courts, this concept was not examined in relation to the Singapore tort choice of law regime.

6. For Canada's tort choice of law regime, the political nature of the Canadian federation has led their courts to provide for a distinction between intra-national and international torts. This is however not the case for their doctrine of *forum non conveniens*. In contrast, such a distinction has been drawn in relation to both these areas of private international law in Australia as a result of this political consideration.

It is quite clear from the above comparison that our selected Commonwealth judiciaries have not been consistent in their treatment of considerations relevant to private international law as a whole across the different stages of the conflict of laws process. One policy may be an important consideration in the decision of a Commonwealth court in relation to their doctrine of *forum non conveniens* but it may then be ignored with regards to tort choice of law. Why is this so?

One explanation is that Commonwealth courts tend to decide on the policies, concepts and circumstances relevant to a particular area of private international law in isolation with little examination of the considerations underlying an earlier stage of the conflict of laws process. Of our selected jurisdictions, only the Canadian courts have made some attempt at providing some congruity between the policies adhered to in relation to their doctrine of *forum non conveniens* and tort choice of law regime particularly in their decision to provide for comity as

a unifying element for their private international law rules. The Australian and Singapore courts have clearly not done so explicitly in relevant cases.

Another possible explanation is that some of our selected Commonwealth courts may have implicitly provided for some form of balance between the considerations in different areas of conflict of laws such that if a policy is attached little weight in one area of private international law, considerable weight may be accorded to it in another area of private international law. For example, Briggs has suggested that the reason for the introduction of *renvoi* to the Australian tort choice of law regime was because the High Court of Australia has "sharply curtailed its power to prevent forum shopping"[1] in relation to the Australian doctrine of *forum non conveniens* which "leaves little in the court's armoury to prevent a claimant forum shopping (i.e. inappropriately bringing) his or her claim in tort to an Australian court."[2] In order for an Australian court to discourage such litigant behaviour in relation to cross-border tort disputes, they have to "dispose of a claim arising out of a foreign tort as nearly as possible to the manner in which a judge at the *locus delicti* would have adjudicated it"[3] as this would make forum shopping pointless. In other words, as little weight was attached to the policy of discouraging forum shopping in relation to the Australian doctrine of *forum non conveniens*, the Australian courts had to accord this policy with considerable significance with regards to their tort choice of law regime.

Comparing the judicial treatment of considerations relevant to forum non conveniens in general with that in relation to tort choice of law

Moving on the reasons for the differences between the nature and extent of the break up of Commonwealth tort choice of law in our selected jurisdictions from that in relation to *forum non conveniens*, from our analysis in Chapters 5 and 6, it is clear that there are differences between the judicial treatment of considerations in relation to tort choice of law in our selected

---

[1] Briggs, *The Meaning and Proof of Foreign Law: Neilson v Overseas Projects* [2006] Lloyds Maritime and Commercial Law Quarterly 1, at 2.
[2] *ibid*, at 3.
[3] *ibid*.

jurisdictions as a whole in comparison to that with regards to *forum non conveniens.* In particular:

1. For *forum non conveniens,* as the Canadian and Singaporean courts are generally in agreement with the English judiciaries on most of the policies, concepts and other wider considerations relevant to this area of private international law, they have adopted the English common law 'clearly more appropriate forum' test. While there are some differences in the judicial treatment of these considerations between these countries, they were not significant enough to convince the Canadian and Singaporean judges to reject the 'clearly more appropriate forum' test altogether. Instead, the divergences effected by these judiciaries were limited to various aspects of the English common law approach. The Australian courts, on the other hand are largely opposed to the policy choices made by the English courts thus leading them to adopt the 'clearly inappropriate forum' test.

In contrast, there is more diversity in the judicial treatment of policies and other wider considerations relevant to tort choice of law regimes in our selected jurisdictions. In particular, the Australian and Canadian judiciaries as well as the *Law Commissions* in the United Kingdom do not agree with the policies and considerations embodied by the English common law tort choice of law regime and have thus provided for diverging approaches to reflect their differences of opinion. Neither do they agree entirely with one another on these matters. Interestingly, the Singapore courts do not appear to have considered the policies and concepts underlying the English common law tort choice of law regime. Their decision to maintain uniformity with the English common law seems to be based on a strong adherence to English judicial precedents.

Accordingly, one can observe that it is because of a sharper diversity of views in our selected jurisdictions in relation to the considerations relevant to a tort choice of law regime that the break up of this area of Commonwealth private international law has

occurred to such a large extent. In comparison, as there are two Commonwealth judiciaries namely, the Canadian and Singaporean courts that are in agreement with the English courts on most of the considerations relevant to the doctrine of *forum non conveniens*, the break up of this area of private international law in relation to our selected jurisdictions has not been as comprehensive as the phenomenon in relation to tort choice of law.

2. In Part I of this thesis, we observed that fluctuations in the extent of the divergences from the English common law position on tort choice of law have occurred in relation to our selected jurisdictions, most notably Australia. Looking at the policies and concepts that have influenced the decisions of the courts of these countries while these movements in their tort choice of law regimes are taking place, it is possible to see that the judicial treatment of these considerations in our selected jurisdictions have changed as time goes by.

To illustrate this point, take for example, the evolution of the Australian tort choice of law regime. In *Breavington v Godleman*, the policy of ensuring uniformity of judicial outcomes especially in a federation context was an important consideration in the decision of a majority of the High Court of Australia to reject the *Phillips v Eyre* rule thus bringing about a divergence from the English common law position on tort choice of law. Subsequently, in *Mckain v Miller* however, the majority Justices in that case held that disparities in legal outcomes depending on the State or Territory in Australia that the action is brought in is the hallmark of a federation. Accordingly, the policy of uniformity was not seen as an obstacle to the reinstatement of the double actionability rule. In *Pfeiffer v Rogerson*, uniformity was again accorded significant weight in the reasoning of the High Court of Australia, a decision that flowed from the nature of the Australian federation. This has thus led to another rejection of the English common law *Phillips v Eyre* rule in Australia for intra-national torts.

As for *forum non conveniens,* there has been little movement back towards the English common law after the initial divergences from the English common law doctrine of *forum non conveniens* in our selected jurisdictions. In comparison with the situation for tort choice of law, it is notable that the judiciaries in these countries have not differed much on their treatment of policies and wider considerations relevant to the grant of a stay of proceedings as time goes by.

3. Generally, for most of the last century, there was a strong adherence to English judicial precedents in our selected jurisdictions in that English common law private international law approaches were adopted by the judiciaries in these countries with little or no discussion of relevant policies, concepts and other wider considerations. *Forum non conveniens* is a good example of this and this is thus one reason why the break up of this area of private international law as we have pointed out in Part I of this thesis is a recent occurrence.

For tort choice of law however, while the relevant English judicial precedents were mostly followed by the Canadian and Singaporean courts, this was not the case for Australia. In particular, even though the English common law *Phillips v Eyre* rule was endorsed by the High Court of Australia, we have seen that they were unhappy with the *Machado* interpretation of that rule early on in the development of their tort choice of law regime. Most notably, they were of the view that that interpretation went against the territoriality principle. This, as was highlighted in Chapter 6, may have led them to interpret the *Phillips v Eyre* rule as a double actionability rule before the House of Lords in *Boys v Chaplin.* In other words, as early as the beginning of the last century, the High Court of Australia was already in divergence from the English courts on some of the policies and concepts relevant to a tort choice of law regime. This is thus an explanation why the break up of Commonwealth tort choice of law had occurred at such an early point in time in comparison to the phenomenon for *forum non conveniens*

We have now provided for an analysis of the break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law with regards to our selected jurisdictions as well as the explanations from the cases for this occurrence. In the final part of this thesis, we will examine the question of how these Commonwealth countries should react to this phenomenon.

PART III: HOW SHOULD OUR SELECTED JURISDICTIONS REACT TO THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW?

CHAPTER 8: HOW SHOULD OUR SELECTED JURISDICTIONS REACT TO THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN RELATION TO *FORUM NON CONVENIENS* AND TORT CHOICE OF LAW?

1. INTRODUCTION

From our analysis in Part I of this thesis, it is clear that Australia and Canada have contributed towards the break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law as their judges have effected a considerable number of divergences from the relevant English common law positions on these matters. In striking contrast, there is uniformity with the English common law approaches on these areas of private international law in Singapore.

In Part II, we observed that in recent years, the Australian and Canadian judges have become increasingly aware of the limitations of the English common law approaches on *forum non conveniens* and tort choice of law in that these tests were given in a context far removed from the social, economic and political circumstances in Australia and Canada. In response, they have undertaken a critical analysis of the policies, concepts and principles relevant to these areas of private international law to determine which of these considerations are most appropriate for their individual circumstances. As some of these policy decisions do not concur with that of the English courts, this has resulted in either the modification of the English common law private international law approach in question or its rejection altogether. In other words, it is the differences in the judicial treatment of policy, structural, historical, comparative and contextual considerations in these Commonwealth jurisdictions from that of the English courts that has resulted in the Australian and Canadian divergences from the English common law doctrine of *forum non conveniens* and tort choice of law. The Singapore courts, in contrast, are still heavily influenced by English judicial precedents particularly in relation to their tort choice of law regime. This is the reason why they have continued to apply the English common law approaches on our selected areas of private international law.

In this chapter, we will address the final question for this thesis namely: how should our selected Commonwealth jurisdictions respond to the break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law. To examine this issue in a structured and analytical manner, we will first undertake a critical examination of the key arguments in the diversity versus harmonisation debate. Subsequently, we will ask whether there should be some form of harmonisation of *forum non conveniens* and tort choice of law for our selected countries on a worldwide, regional or Commonwealth basis or whether the national development of these areas of private international law in these jurisdictions should be encouraged.

2. DIVERSITY VERSUS HARMONISATION

We will now examine the key arguments in the debate between the advocates of diversity and those of harmonisation, in the field of private international law. It is important to note that our analysis here is of general application to all Commonwealth jurisdictions and in some circumstances, all countries regardless of their legal systems. Nonetheless, to illustrate the relevance of these arguments to the subject matter of our thesis, specific reference will be made to the *forum non conveniens* and tort choice of law approaches in our selected Commonwealth jurisdictions when appropriate.

2.1 DIVERSITY

2.1.1 Arguments in support of diversity in Commonwealth private international law

First, the initial uniformity in Commonwealth common law was the result of a "slavish adherence to [English judicial] precedents"[1] by Commonwealth judges. These judicial solutions were fashioned by English judges who had no familiarity with the conditions in these jurisdictions. In those early days, the English courts were probably unconcerned with identifying the most appropriate legal rules for all Commonwealth jurisdictions; it is much

[1] Hiller, *The Law-Creative Role of Appellate Courts in the Commonwealth* (1978) 27 International and Comparative Legal Quarterly 85, at 104.

more likely that they were only concerned with formulating the best approaches for England. This is the case in our comparative study as the 'clearly more appropriate' forum test for granting a stay of proceedings and the *Phillips v Eyre* tort choice of law rule were devised by English judges with no consideration whatsoever of the circumstances in Australia, Canada and Singapore. And so the argument arises that a more critical judicial examination of the Commonwealth jurisdictions' unique social, economic and political circumstances would have the advantage of ensuring more optimal approaches for that Commonwealth jurisdiction in question. This is because "local judges with their fingers on [that] jurisdiction's pulse are in the *best position* to make informed decisions as to the most appropriate direction for the common law in that particular jurisdiction."[2]

One important point to note is that even though there has been a more critical examination of policies and circumstances relevant to their own jurisdictions by the judiciaries in Australia and Canada in relation to the formulation of their approaches on *forum non conveniens* and tort choice of law, it is not possible to say with complete certainty that the tests that they devised are necessarily the best for their jurisdiction even though these judges are obviously well placed to decide on them. For instance, it is questionable whether the 'clearly inappropriate forum' test is suitable for Australia particularly in today's "contemporary circumstances of global and regional disputes in which Australian courts, like those of every country, must now operate."[3] However, it should be noted that Australian law on stays of proceedings is still evolving as can be seen from the recent rejection of the *Voth* test by the High Court of Australia in relation to the *Cross-vesting Act*. Perhaps, in the near future, there will be a modification of the Australian doctrine of *forum non conveniens* to take account of Australia's position in the global economy. It should also be noted that Commonwealth judges are still in a *better* position to decide on the formulation of their own private international law approaches in comparison to the English judges.

Secondly, it has been observed that "Courts across the Commonwealth now look not just to England but *inter se*, for guidance, and indeed from time to time the English courts

---

[2] Clarke, *The Privy Council, Politics and Precedent in the Asia-Pacific Region* (1990) 39 International and Comparative Legal Quarterly 741, at 746. My italics.
[3] *Renault v Zhang* (2002) 187 ALR 1, at [96] per Kirby J.

themselves look overseas for guidance as to the true state of the common law of England, even where persuasive English authority exists."[4] As such, from a Commonwealth wide perspective, diversity in Commonwealth common law encourages a "plurality of approach[es]"[5] to deal with difficult legal issues which can be a "positive benefit"[6] to the common law as a whole. Indeed, it has been said that the "discovery of new and better ways of solving legal problems"[7] will always attract the "interest and admiration"[8] of other jurisdictions.

To elaborate, when there are no domestic authorities directing them on complex issues in the common law, Commonwealth courts can rely on judicial precedents in other Commonwealth countries where such issues have been "sharpened for decision by the reasoning and sense of values of Courts and writers who have already broken the ground."[9] The High Court of Australia's reliance on the Supreme Court of Canada's decision on tort choice of law in *Tolofson* to adopt the *lex loci delicti* rule is one example of this. Even "when there are domestic solutions but these are old and unsatisfactory in dealing with contemporary problems,"[10] courts can refer to experiences in these foreign Commonwealth jurisdictions to adopt a more modern approach. This is especially so in cases where Commonwealth "countries have in a sense become specialists in certain areas of the [common] law."[11] The content of these laws would "set the standard for development"[12] and would thus be "available for export."[13] Australian judges can claim to be experts on tort choice of law litigation as owing to the federal nature of their country; there has been a higher frequency of such cases arising in the Australian courts in comparison to the English position. It is thus unsurprising that the House of Lords' decision to adopt the double actionability rule was based to some extent on the fact that the Australian courts had arguably endorsed that approach beforehand. In all, it

---

[4] Clarke, *supra,* n. 2, at 752.
[5] Martin, *Diverging Common Law – Invercargill goes to the Privy Council* (1997) 60 Modern Law Review 94, at 101.
[6] Cooke, *Divergences – England, Australia and New Zealand* [1983] New Zealand Law Review 297, at 301.
[7] Hiller, *supra* n. 1 at 111.
[8] *ibid.*
[9] Cooke, *supra* n. 6, at 300.
[10] Orucu, *The United Kingdom as an Importer and Exporter of Legal Models in the Context of Reciprocal Influences and Evolving Legal Systems* in *UK Law for the Millennium Comparative Law Series,* No. 19 (1998), compiled by the United Kingdom National Committee of Comparative Law, 206 - 243, at 218.
[11] Hiller, *supra* n. 1, at 110.
[12] *ibid.*
[13] *ibid.*

is arguable that there are enormous "gains that a national body of law can achieve by learning and borrowing from the experience"[14] of another country.

It should also be noted that "one can learn without borrowing"[15] as "a conscious rejection by one country of a principle, rule, application or interpretation found appropriate in another may be the result of or occasion for a clearer articulation of the national policy goals by the judges of the former."[16] The rejection of the *Spiliada* test for the clearly inappropriate forum test by the High Court of Australia is a good illustration of this as in the relevant Australian cases on this subject matter, the Australian judges found themselves compelled to explain why they chose such a narrow approach for their law on stays of proceedings.

2.1.2 Arguments against diversity in Commonwealth private international law

First, a legal relationship would be "regulated in a contradictory way on either side of Pyrenees, of the Alps, of the English Channel, or the Carpathians"[17] if choice of law regimes differ across jurisdictions. The different Commonwealth tort choice of law regimes selected for our study would clearly have this effect particularly when the policy of ensuring uniformity of judicial outcomes is only accorded significant weight by the High Court of Australia. In this situation, there would be unequal treatment between parties involved in cross-border-litigation which may in turn encourage litigants to act "opportunistically, such as by claiming a default and filing suit in a jurisdiction known for its eccentric rules and practices."[18] The doctrine of *forum non conveniens* in England, Singapore and Canada would act to some extent to discourage such litigant behaviour although, this is clearly not the case for Australia with its 'clearly inappropriate forum' test.

---

[14] *ibid*, at 86.
[15] *ibid*.
[16] *ibid*.
[17] Sacco, *Diversity and Uniformity in the Law* (2001) 49 American Journal of Comparative Law 171, at 179.
[18] Stephan, *The Futility of Unification and Harmonization in International Commercial Law* (1999) 39 Virginia Journal of International Law 743, at 746.

Similarly, differences in jurisdictional rules may lead to a number of different courts taking jurisdiction over the same dispute which could result in the "duplication of litigation"[19] as well as the "generation of multiple conflicting decisions."[20] Even though the bases of jurisdiction in our selected jurisdictions are largely the same, jurisdiction is taken if a claim form is served on a defendant who is present in forum in question; this does not prevent a multiplicity of proceedings as different parties to the dispute may be 'tagged' in different Commonwealth jurisdictions. Furthermore, with the removal of the requirement to seek leave from the courts for the service of a claim form out of jurisdiction in Australia and Canada, it has only become easier for the courts in these countries to take jurisdiction as of right. Accordingly, the pressure is on the doctrine of *forum non conveniens* to resolve the problems that may arise in such circumstances. However, significant differences between our selected jurisdictions in relation to this area of private international law can again hamper the success of this doctrine in this context.[21]

Secondly, diversity in private international law forces litigants to study the differing conflict rules of all courts that might have jurisdiction in a case. Commonwealth tort choice of law is a good illustration of this as can be seen from the numerous divergences from the English common law tort choice of law regime in our selected jurisdictions. Similarly, not only do litigants have to compare the doctrines of *forum non conveniens* in Australia and England, they have to be careful not to be caught out by the subtle differences between the 'clearly more appropriate forum' tests in England, Canada and Singapore. For example, there are significant differences between the treatment of juridical advantages in Canada and England in relation to their doctrine of *forum non conveniens.* In all, litigants may find it difficult to anticipate the law applicable to their dispute with any reasonable certainty and this would have an impact on the predictability of the outcome of their case. In such circumstances, parties will not have any clear idea of their situation and as such, they may find it hard to reach a settlement on their dispute.

---

[19] Duncan, *Jurisdiction to Make and Modify Maintenance Decisions- The Quest for Uniformity* in Einhorn, Siehr (eds), *Intercontinental Cooperation through Private International Law – Essays in Memory of Peter E. Nygh* (The Hague, The Netherlands: TMC Asser Press) (2004), 89-106, at 103.
[20] *ibid.*
[21] It must be noted that specific rules under the various doctrines of *forum non conveniens* in our selected jurisdictions have been constructed to address the problem of parallel or related actions abroad and in the local forum. Unfortunately, there is again diversity in relation to these rules and as such, multiplicity of actions can still arise.

Thirdly, in the eyes of business parties, all the above inconveniences of diversity in private international law are considered to be legal risks which they have to "invest in ways to protect themselves"[22] from. This would obviously increase the cost of cross-border litigation and may cause businesses to turn away from "otherwise profitable transactions."[23] Business confidence in the stability of transactions and legal relationships would thus suffer as a result of this. In economic terms, these risks are regarded as "obstacles to cross-border trade and movement of persons"[24] across jurisdictions which hamper "*national and international* economic growth."[25] This point is certainly relevant to our selected Commonwealth jurisdictions and other Commonwealth countries in general.

Fourthly, in the hope of "capturing the benefits"[26] of cross-border litigation for a jurisdiction, judges may formulate rules which may "lead to the promulgation of lax standards."[27] In private international law terms, the concern here is that there may be a rush towards, for example a rule which allows for courts to take jurisdiction over disputes on grounds which have little to do with whether the dispute has any connection with the forum in question so as to attract litigation as an invisible export. This can be observed in our comparative study of the different doctrines of *forum non conveniens* in our selected jurisdictions. In particular, the English and Singaporean judiciaries have adopted the 'clearly more appropriate' forum test which is loaded in favour of trial in the local forum in question. As we have discussed in Chapter 5, it is arguable that the key explanation for this presumption is that they wanted to reap the economic benefits from increased international litigation in their courts.

---

[22] Stephan, *supra,* n. 18, at 746.
[23] *ibid.*
[24] Dickinson, *Cross-Border Torts in EC Courts – A Response to the Proposed "Rome II" Regulation* [2002] European Business Law Review 369, at 371.
[25] Tetley, *Uniformity of International Private Maritime Law – The Pros, Cons and Alternatives to International Conventions – How to Adopt an International Convention* (2000) 24 Tulane Maritime Law Journal 775, at 798.
[26] Ogus, *Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law* (1999) 48 International and Comparative Legal Quarterly 405, at 416.
[27] *ibid.*

2.2. HARMONISATION

2.2.1 Arguments in support of harmonisation in Commonwealth private international law

First, "uniform [private] international law"[28] is said to "promote international trade and investment"[29] by removing a number of the disadvantages of diversity in private international law as discussed above. To elaborate, harmonisation of conflict of law rules would "assist in making commercial and financial dealings...more predictable"[30] as litigants embarking on cross-border litigation would only have to look at a single set of rules. It would also ensure that the same law is applied irrespective of the country in which the decision is given. Similarly, harmonisation of jurisdictional rules may help to prevent a multiplicity of proceedings from arising as well as to lower "existing obstacles to transfrontier judgment enforcement."[31] All this is said to reduce "transaction costs"[32] and provide "stability in international commercial relations"[33] thereby resulting in the "[r]eduction of legal risk"[34] for business parties. At a global level, harmonisation of private international law would thus be a "boon to international commerce"[35] and would "contribute substantially to creating conditions that foster both national and international economic growth."[36]

This argument in favour of harmonisation can be seen in relation to a number of Hague Conventions. Take for example, the *Hague Convention on Choice of Court Agreements.* The key objective of this convention is to "promote international trade and investment through enhanced judicial cooperation"[37] by the use of uniform rules that provide certainty and ensure

---

[28] Tetley, *supra.* n. 25, at 798.
[29] *Preamble to the Hague Convention of 30 June 2005 on Choice of Court Agreements.*
[30] *Legal Developments – The Hague Conference on Private International Law*, Paper prepared for the Commonwealth Secretariat by Hans van Loon, Secretary General of the Hague Conference, SOLM (04) 12, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/27079329-7580-40F7-A3F1-80C19F37ED9D_solmdoc4.pdf, at [25].
[31] Black, *Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention* (2000) 38 Osgoode Hall Law Journal 237, at 243.
[32] Hans van Loon, *supra* n. 30, at [25].
[33] Stephan, *supra*, n. 18, at 746.
[34] *ibid.*
[35] Tetley, *supra*, n. 25, at 798
[36] *ibid.*
[37] *Preamble to the Hague Convention of 30 June 2005 on Choice of Court Agreements.* See also, the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.*

the "effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements."[38] Likewise, it is stated in the *Preamble* to the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* that it would "facilitate the international flow of capital and access to capital markets" and be "beneficial to States at all levels of economic development."

Secondly, harmonisation may result in the "substitution of better rules for those extant in the legal systems of individual states."[39] 'Better' here does not mean rules for the benefit of the individual jurisdiction's circumstances and needs. Instead, we are looking at rules that benefit the region targeted for harmonisation with respect to "some normative social goal, such as redistributive justice or enhancing economic welfare."[40] For example, for a number of Hague Conventions, such goal would be that of promoting international trade and commerce. In particular, Castel has praised the work of the Hague Conference on Private International Law that its work is "scientific and impartial"[41] and that the discussion between important players "usually results in the adoption of very constructive solutions to the problems under study."[42] He has also observed that the "discourse employed in hammering out Hague conventions was that of lawyers pursuing principled solutions, not of states engaged in horse trading."[43] While his comments may be outdated and may no longer be an apt description of what goes on today, the point that can be made here is that harmonisation initiatives *can* lead to better rules if the right conditions are present.[44]

A related point is that "[c]ooperative rulemaking by representatives of many states"[45] in a harmonisation exercise "may solve collective action problems that deter individual states from enacting optimal rules."[46] An ideal choice of law regime would "specify clear and precise...rules to allocate the authority to resolve legal claims to the jurisdiction with the

---

[38] *Preamble to the Hague Convention of 30 June 2005 on Choice of Court Agreements.*
[39] Stephan, *supra*, n. 18, at 748.
[40] *ibid.*
[41] Black, *supra*, n. 31, at 264.
[42] Castel, *Canada and the Hague Conference on Private International Law: 1893-1967* (1967) 45 Canadian Bar Review 1, at 7.
[43] Black, *supra*, n. 31, at 264.
[44] The Hague conventions on international child abduction and international adoption are said to be good examples of this. See Black, *supra*, n. 31, at 265.
[45] Stephan, *supra*, n. 18, at 749.
[46] *ibid.*

greatest interest in each transaction."[47] It would also "discourage discrimination against foreign claimants."[48] However, "absent coordination among states,"[49] it is said that each nation will naturally have an "incentive to adopt rules that, on the margin, favour nationals over foreigners."[50] And so the argument goes, an "international regime might increase overall welfare by giving every state a stake in a system that eliminates such discrimination."[51] That being said, harmonisation of private international rules may not be necessary to achieve these goals. In our discussion of the evolving tort choice of law regimes and doctrines of *forum non conveniens* in England, Canada and Singapore, we have observed that there has been a natural shift towards more liberal rules on these matters. While, the *Voth* test in Australia does smack of judicial chauvinism, it is notable that in recent years the High Court of Australia has modified some aspects of that approach to make it less parochial.[52]

2.2.2 Arguments against harmonisation in Commonwealth private international law

First, harmonisation has been criticised as reflecting a "misguided view that the world would be a better place if that amalgam of cultural, social, economic, and sometimes spiritual or religious factors which we call law had not developed in such markedly diverse ways in different societies."[53] Such reactions to legal diversity, it is argued, may simply be a "disguised form of cultural imperialism, where one vision of law becomes the new, international vision, and gradually marginalises or eliminates the other."[54] Those who voice out this opposition also point out that with the plurality of solutions generated by diversity in laws, when there is a significant change in international values and needs, there would be "wide possibilities for experimentation, transplant and so on."[55] However, with harmonisation, lawmakers would be forced to search for a new solution from only one perspective such that the "chances of effective innovations would be much reduced."[56]

---

[47] *ibid.*
[48] *ibid.*
[49] *ibid.*
[50] *ibid.*
[51] *ibid.*
[52] See for example, the test in relation to the cross vesting legislations in Australia in Chapter 2.
[53] Evans, *Uniform Law: a Bridge too Far?* (1994) 3 Tulane Journal of International and Comparative Law 145, at 146.
[54] Tetley, *supra*, n. 25, at 804.
[55] Sacco, *supra*, n. 17, at 180.
[56] *ibid.*

Secondly, one of the most powerful arguments put forth by opponents of harmonisation is that the "compulsory unification of opinion achieves only the unanimity of the graveyard"[57] as the final harmonised legal product may be the result of "political manoeuvring rather than the work of the careful legal draftsman."[58] The drafting of the relevant instrument may not be directed at formulating the best possible rule for the jurisdictions in question. Instead, it may be aimed at ensuring consensus from the different states in relation to the final-product. This criticism of harmonisation is further strengthened by the very nature of conflict of laws itself. Commenting on the work of Hague Conference of Private International Law, Reese has pointed out that "it is very difficult to formulate satisfactory rules of conflict of laws"[59] due to the "vastness of the subject"[60] and the fact that many areas of private international law "remain relatively unexplored."[61] Furthermore, different jurisdictions will already have their "own approaches to and preconceptions of the subject"[62] and they will be reluctant "to agree to any complete departure from their existing rules and principles."[63] Any harmonisation initiative is likely to be "in the nature of a compromise which, not being completely satisfactory to any state, may never come into force for lack of the necessary ramifications and even if it does, may not work well in practice."[64] This is why, according to Reese, the Hague Conference has had little success in dealing with topics such as the "enforcement of foreign judgments, adoption, and the law governing traffic accidents, product liability, agency and marriage."[65]

Thirdly, another problem with harmonisation is that the finished product may "lack coherence and consistency"[66] and may even "introduce uncertainty where no uncertainty existed

---

[57] *Board of Education v Barnette* (1942) 319 US 624, at 641.
[58] Crawford, Carruthers, *Conflict of Loyalties in the Conflict of Laws: The Cause, the Means and the Cost of Harmonisation* [2005] Juridical Review 251, at 275. See also, Girsberger, *The Hague Convention on Indirectly held Securities – Dynamics of the Making of a Modern Private International Law Treaty* in Einhorn, Siehr (eds), *Intercontinental Cooperation through Private International Law – Essays in Memory of Peter E. Nygh* (The Hague, The Netherlands: TMC Asser Press) (2004), 139-153, at 150-152.
[59] Reese, *The Hague Conference on Private International Law: Some Observations* (1985) 19 The International Lawyer 881, at 884.
[60] *ibid.*
[61] *ibid.*
[62] *ibid.*
[63] *ibid.*
[64] *ibid.*
[65] *ibid*, at 885.
[66] Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity* (1990) 106 Law Quarterly Review 530, at 533.

before."[67] On the one hand, the wording of the relevant instruments may be too broad or too vaguely worded such that they can only provide a "general guide to decisions"[68] which will of course defeat the very purpose of ensuring uniformity in private international law. This would normally occur when there is difficulty reaching an agreement on the final text of the relevant law. On the other hand, the drafting of the relevant harmonisation instruments may be too precise such that the "provisions would compel the courts to reach unfortunate results in situations that either are known or, although currently unforeseen, would fall within their literal scope of application."[69] In particular, the reduction of legal risks arising from cross-border litigation by the process of harmonisation of private international law would entail "[g]reater clarity in legal rules [which] means providing more precise instructions covering a greater number of eventualities."[70] This, however, has its costs. As these rules become "more exact and all-encompassing,"[71] they may "cramp the relationships they govern with excessively detailed requirements."[72] This may "lead to outcomes that parties to a transaction would like to avoid."[73] Legal certainty may be achieved but only at the price of inflexibility and arbitrariness, consequences that may be damaging to cross-border commerce as well.

3. ANALYSIS: HARMONISATION OR NATIONAL DEVELOPMENT OF FORUM NON CONVENIENS AND TORT CHOICE OF LAW IN RELATION TO OUR SELECTED COMMONWEALTH JURISDICTIONS?

From our above discussion of the diversity versus harmonisation debate, it is clear that there are strong arguments for the national development of *forum non conveniens* and tort choice of law in our selected Commonwealth jurisdictions. However, we have also seen that this would give rise to its own set of difficulties as well.

Nevertheless, the answer is not in an adoption of the English common law approaches on *forum non conveniens* and tort choice of law by Australian, Singaporean and Canadian

---

[67] *ibid.*
[68] Reese, *supra,* n. 59, at 885.
[69] *ibid,* at 885-886.
[70] Stephan, *supra,* n. 18, at 747.
[71] *ibid.*
[72] *ibid.*
[73] *ibid.*

judges for the following reasons. First, the English common law rules on private international law are devised by judges who are unfamiliar with conditions in our selected Commonwealth jurisdictions. These rules are formulated purely for English circumstances and needs and therefore uniformity with the relevant English common law may not necessarily produce the best approach for these countries. Secondly and more importantly, there has been an "increasing Europeanisation of [English] private international law."[74] Various aspects of English common law private international law now reflect or will reflect "underlying changes which may not be matched"[75] in the society of our selected Commonwealth countries. It is thus essential that care be exercised in determining the extent to which the English common law should continue to influence the law in these countries. Accordingly, even if there is a policy of strict adherence to English judicial precedents on private international law matters in a Commonwealth jurisdiction, for example, Singapore, she will eventually have to develop these areas of private international law "unaided by English decisions at common law."[76]

Under these circumstances, there are two remaining alternatives available to our selected jurisdictions: the negotiation and drafting of conventions to harmonise the relevant areas of private international law or to leave things as they are now: the national development of private international law regimes.

3.1 HARMONISATION OF *FORUM NON CONVENIENS* AND TORT CHOICE OF LAW IN RELATION TO OUR SELECTED COMMONWEALTH JURISDICTIONS

In an ideal world, the various inconveniences arising from diversity in private international law such as uncertainty, unpredictability or the lack of uniformity of judicial outcomes would be mitigated by the harmonisation of private international law on a worldwide, regional or Commonwealth basis. More importantly, unlike uniformity with the English common law, the coming together of interested parties to draft a convention on our selected topics of private international law would mean that it is not entirely up to English judges with their inherent

---

[74] Fawcett, *The Europeanisation of Private International Law: The Significance for Singapore* [1997] 1 Singapore Journal of International and Comparative Law 69.
[75] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, at 263.
[76] Fawcett, *supra*, n. 74, at 84.

limitations as discussed above to devise conflict of law rules. Instead, there would hopefully be a proper impartial discussion on the most appropriate private international law rule for nations within the relevant grouping with reference to a social or economic objective. In the process of working out the relevant rules, elements of parochialism and discrimination against foreigners in conflict of law rules would also be addressed. Nonetheless, it must be acknowledged that diversity has an important role to play in the development of laws by encouraging the discovery of new and better ways of solving legal problems.

In the view of this author, if it can be shown that there is a need for certainty and uniformity in a particular area of private international law for achieving a worthy social or economic goal, diversity should be sacrificed for it. This view is subject to a number of qualifications. First, a convincing case must be put forth for uniformity. In relation to jurisdictional rules and in particular, *forum non conveniens*, harmonisation is probably desirable for the promotion of international trade and commerce.[77] However, the case is somewhat weaker in relation to tort choice of law as it is not entirely clear whether its diversity in different jurisdictions would be a significant obstacle to cross-border trade as its interaction with international commerce and trade is arguably peripheral unlike contract choice of law. It is thus unsurprising that attempts are seldom made to harmonise this area of private international law.[78] Secondly, even if the case for harmonisation is made out, we have noted in earlier sections that the advantages of harmonisation are often perceived and may not be easily realised.

We will now examine the progress of harmonisation in relation to our selected areas of private international law on a worldwide, regional and commonwealth scale with specific reference to our selected Commonwealth jurisdictions. This is to paint a realistic picture of the difficulties involved in such projects. As a preliminary note, any harmonisation of *forum non conveniens* rules normally forms part of a project to unify jurisdictional rules as a whole.

---

[77] See for example, the *Draft Hague Convention on Jurisdiction and Judgments*, the *Brussels I Regulation*, the *1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*.
[78] There have been earlier attempts. See the *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, the *Hague Convention of 2 October 1973 on the Law Applicable to Product Liability*. Few jurisdictions have ratified these conventions.

3.1.1 Harmonisation on a worldwide basis

Obviously, a worldwide convention ratified by major commercial jurisdictions and trading partners would provide for the advantages flowing from the harmonisation of private international law as mentioned above at a global level. Nonetheless, there are significant obstacles hampering the realisation of these advantages due to the massive scale of such a project. In particular, negotiators will have to reconcile a wide range of private international law regimes which may be fundamentally different from one another. Compromises, as part of the drafting process will have to be sought. Under such circumstances, the chances of formulating the best possible private international law approach for the purpose of achieving a social or economic objective would be greatly diminished. In the worst case scenario, the differences between the various private international law approaches may simply be too complex for a compromise to be reached.

The key international organisation which has conducted such harmonisation of private international law rules is the Hague Conference on Private International Law. Canada, Australia and England are member states of this organisation. Even though Singapore is not a member of the Hague Conference, she has signed up to a number of Hague Conventions such as the *Hague Convention on the Taking of Evidence Abroad on Civil and Commercial Matters*. Accordingly, any attempts by the Hague Conference to harmonise our selected areas of private international law would obviously be of great interest to these countries.

On jurisdictional rules (including *forum non conveniens*), the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*[79] was produced by the Hague Conference in October 1999. Unfortunately, no consensus was reached in relation to its text[80] and it was decided eventually that this harmonisation project was to proceed on a more modest scale by its limitation to "certain areas on which an agreement still seems

---

[79] For more details about the *Draft Hague Convention*, see for example, Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project succeed?* (2001) 49 American Journal of Comparative Law 191, Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments* (2002) 37 Texas International Law Journal 467, O'Brian Jr, *The Hague Convention on Jurisdiction and Judgments: The Way Forward* (2003) 66 Modern Law Review 491.

[80] Brand, *supra*, n. 79, at 492. An Interim Text on the Convention was subsequently produced in 2001 but it is "full of alternatives, variations and bracketed language; indicating failure to agree on many specific matters."

possible."[81] In relation to tort choice of law, conventions such as the *Hague Convention on the Law Applicable to Traffic Accidents* and the *Hague Convention on the Law Applicable to Product Liability* have been adopted by the Hague Conference. However, few countries have ratified them due to perhaps a lack of interest in such projects.

A few points can be made here in relation to the work of the Hague Conference.

1. Especially on a worldwide scale, there are significant difficulties in reaching consensus between states in relation to the harmonisation of private international law where "national ideas of justice, social purpose, or public order/policy"[82] may be so different that the countries involved "may not be ready for uniform ideas."[83] In relation to the *Draft Hague Convention*, it has been observed that the "difficulties that the negotiators at the Hague have faced are largely the result of differences over appropriate jurisdictional reach"[84] as the "range of countries and cultural and legal traditions make consensus on a wide range of required and prohibited bases of jurisdiction unfeasible."[85]

While one may assume that the question of the adoption of the common law doctrine of *forum non conveniens* in the draft convention was one of the issues where a consensus was difficult to reach based on the "dramatic"[86] differences between the common law and civil law approaches to jurisdiction, this was surprisingly "one of the areas of early compromise in the Hague Conference negotiations."[87] In particular, the *Draft Hague Convention* provides for a "limited form of *forum non conveniens*"[88] in that the court first seised can "suspend its proceedings if ... it is clearly inappropriate for that court to exercise jurisdiction and if a court of another state has jurisdiction and

---

[81] O'Brian, *supra*, n. 79, at 492 referring to the *Preliminary Result of the Work of the Informal Working Group on the Judgment Project*, Preliminary Document No. 8. The *Hague Convention of 30 June 2005 on Choice of Court Agreements* has emerged from this.
[82] Tetley, *supra*, n. 25, at 801.
[83] *ibid.*
[84] Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?* (2002-2003) 52 DePaul Law Review 319, at 348.
[85] *ibid.*
[86] Brand, *supra*, n. 79, at 492.
[87] *ibid.*
[88] O'Brian, *supra*, n. 79, at 501.

is clearly more appropriate to resolve the dispute."[89] While this bodes well for the harmonisation of *forum non conveniens* on a worldwide scale, it should be noted that this compromise was achieved by providing for a "test considerably narrower than that used in most common law jurisdictions"[90] in that the litigant has to satisfy both the Australian 'clearly inappropriate forum' test and the English 'clearly more appropriate forum' test for the courts to decline jurisdiction. In other words, consensus on the text of the provision was reached only by formulating a test that allows the courts to stay the proceedings in "exceptional circumstances."[91] In addition, it must not be forgotten that *forum non conveniens* forms but one component of the rules on jurisdiction and that difficulties in harmonisation may lie in other aspects of these rules.

Indeed, the key disputes on the drafting of the convention are said to be "primarily between proponents of the European approach expressed in *the Brussels I Regulation* and the United States which favours its own somewhat unique approach to issues of jurisdiction."[92] There has been a "constitutionalization of jurisdictional rules in the United States via the Due Process Clause"[93] of the Fourteenth Amendment to the United States Constitution which meant that "the rules of required jurisdiction adopted in a proposed convention cannot impair the due process rights of the defendant as understood in the US Supreme Court's most recent jurisprudence."[94] These "constitutional limits...stress the relationship between the individual defendant and the forum"[95] which is in sharp contrast to the approach of civil law countries "where the focus is on the relationship between the dispute and the forum and usually carries no constitutional overlay."[96] As the American delegates to the Hague considered the Supreme Court's case law to be "non-negotiable"[97] and the European countries were unwilling to give in to a number of the United States'

---

[89] Article 22, *Draft Hague Convention.*
[90] O'Brian, *supra*, n. 79, at 501.
[91] Article 22, *Draft Hague Convention*
[92] O'Brian, *supra,* n. 79, at 492-493.
[93] Silberman, *supra,* n. 84, at 330.
[94] *ibid.*
[95] *ibid.*
[96] *ibid.*
[97] Juenger, *A Hague Judgments Convention?* (1998) 24 Brooklyn Journal of International Law 111, at 118.

demands on the various grounds of jurisdiction, the *Draft Hague Convention* was not adopted by the Hague Conference.

2. In the attempt to reach consensus among diverse jurisdictions especially at a worldwide level, the advantages of harmonisation may be diluted by the negotiating process itself. This can be observed in the attempts to reconcile the legal and political differences between the United States and the European countries on jurisdictional rules in relation to the *Draft Hague Convention*. After much negotiation, it was concluded that the draft judgments convention could not be in the form of a double convention; a convention that "prescribes both rules of jurisdiction and rules of recognition of judgments, and with certain exceptions requires that all judgments based on permitted bases of jurisdiction be recognised and enforced"[98] as the negotiating parties at the Hague were not able to agree on a *definitive list of permitted* bases of jurisdiction. Such a convention would clearly provide for the advantages of certainty, predictability and the uniformity of judicial outcomes as if the basis of jurisdiction employed by a particular judiciary is not within that list, the judgments pronounced as a result of it will simply not be recognised and enforced by another court. In fact, this was said to be the type of convention that most members of the Hague wanted for the *Draft Hague Convention*[99] but to accommodate the United States' refusal to budge on their views on jurisdictional rules, there was a shift towards a mixed convention; "one that had both jurisdictional rules and recognition rules but that did not require recognition and enforcement of all judgments that were based on permissible grounds of jurisdiction."[100]

In particular, the *Draft Hague Convention* provides for three lists of grounds for jurisdiction. First, there is the white list which provides for mandatory bases of jurisdiction where "each country is required to take jurisdiction if one of these grounds is present."[101] Secondly, "courts are generally forbidden from exercising

---

[98] O'Brian, *supra*, n. 79, at 498.
[99] *ibid.*
[100] *ibid.*
[101] *ibid.*

jurisdiction"[102] on the grounds specified in the black list. Thirdly, the grey list provides for grounds where "courts *may* exercise jurisdiction."[103] Essentially, this final list is there for bases of jurisdiction where consensus cannot be reached as to whether they should be placed in the white or the black list. In other words, in the attempt to achieve consensus between the different jurisdictions in relation to the drafting of the relevant convention, the advantages flowing from harmonisation such as certainty, predictability and the uniformity of judicial outcomes had to be sacrificed to some extent. It is important to note that even so, no consensus was reached in relation to the text of the *Draft Hague Convention* as the negotiating parties at the Hague were unable to agree on the scope of the grey list itself.[104]

3. It has been observed that "Hague Conferences tend to be dominated by the European countries"[105] and that they will "naturally press for Hague Conventions which are similar to harmonised European rules."[106] In particular, European countries already enjoy "the benefit of a well-functioning regional arrangement"[107] in relation to jurisdictional rules, the *Brussels I Regulation* and it has thus been pointed out the "very presence of this group is bound to complicate negotiations in The Hague."[108] Indeed, the *Brussels I Regulation* has had a "strong and pervasive effect"[109] on the *Draft Hague Convention* as the "European Union countries displayed an increasing tendency towards block voting"[110] in relation to the negotiation of the draft convention. Of course, the *Draft Hague Convention* is not entirely based on the *Brussels I Regulation* as to accommodate the diverse range of different legal systems and jurisdictional regimes, departures from the structure and content of *Brussels I Regulation* had to be made. Nonetheless, under such circumstances, one must still query whether this harmonisation project provides for the best private international law approach on a worldwide scale since it is one that is heavily influenced by the

---

[102] *ibid*, at 499.
[103] *ibid*. My italics.
[104] For a more comprehensive discussion of double conventions and mixed conventions, see Von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions* (1998-1999) 24 Brooklyn Journal of International Law 17.
[105] Fawcett, *supra*, n. 74, at 89.
[106] *ibid*.
[107] Juenger, *supra*, n. 97, at 116.
[108] *ibid*.
[109] Von Mehren, *supra*, n. 79, at 202.
[110] *ibid*.

interests of the European countries. There appears to be no impartial search for constructive solutions to private international law problems at an international level.

4. Another concern is that unlike the *Brussels I Regulation*, "there will not be a single court performing the role of the Court of Justice of the European Communities of assuring uniformity of interpretation"[111] of the *Draft Hague Convention*. Accordingly, even if the text of the *Convention* could be agreed upon by the different Member States, the advantages of harmonisation in particular, the uniformity of judicial outcomes would still be adversely affected if divergent approaches were taken by different jurisdictions on its application.

3.1.2 Harmonisation on a regional basis

Particularly in relation to jurisdictional rules, we have observed that there are significant obstacles faced by the Hague Conference in relation to the worldwide harmonisation of our selected areas of private international law. One question that can be posed here is: is the harmonisation of private international law rules on a regional basis a more realistic project to undertake in relation to our selected jurisdictions especially since the scale of the project is relatively smaller?

In relation to Canada, one would ask whether there should be some inter-American harmonisation of private international law under the auspices of the Organization of American States. In particular, the Inter-American Juridical Committee of the OAS has had some success with such harmonisation. A convention was produced on jurisdictional rules namely the *1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*. It was adopted to aid in the interpretation of the *1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards*.[112] However, it is notable that common law jurisdictions belonging to the OAS

---

[111] O'Brian, *supra*, n. 79, at 503.
[112] For a discussion of the two Inter-American conventions, see for example, Siqueiros, *Enforcement of Foreign Civil and Commercial Judgments in the Mexican Republic* [1986] Arizona Journal of International and Comparative Law 149, Amado,

such as the United States and Canada have not ratified either of these conventions. As for Singapore, the Association of South East Asian Nations is the relevant regional grouping. Even though it has been declared that it is in the "interests of ASEAN countries to work towards a convergence of their laws as much as possible to facilitate trade and commerce amongst themselves in order to make ASEAN more attractive to foreign direct investments,"[113] little progress has been made in relation to the harmonisation of private international law rules in this region despite calls to do so by some commentators.[114] In particular, with regards to jurisdictional rules, it has been said that the "prospects for a harmonised ASEAN legal regime and uniform laws similar to that found in the European Union remain, for the moment somewhat bleak."[115] Similarly, for Australia, no convention has been produced by the Pacific Islands Forum on the harmonisation of private international law in that region. Furthermore, the Political, International and Legal Affairs Division of this Forum does not appear to be in the process of implementing any such programmes. In short, none of our selected jurisdictions have ratified any conventions in relation to the harmonisation of private international law rules in their respective regions and that it is only the OAS which has actually produced a number of conventions on this subject matter.

Arguably, the obstacles arising in the context of worldwide harmonisation of private international law are still very much relevant to the harmonisation of such rules on a regional basis. Most importantly, there is still significant diversity in legal systems in the relevant regional groupings. For example, in ASEAN, Malaysia, Brunei and Singapore are common law jurisdictions whereas Indonesia and Thailand are civil law jurisdictions. The Philippines has a "hybrid common law/civil law system"[116] and Vietnam has a legal system which is based on "communist legal theory and French civil law."[117] Obviously, there would be significant difficulties in reconciling the private international law rules of these jurisdictions. It should also be pointed out that one reason why common law jurisdictions such as the US and Canada

---

Recognition and Enforcement of Foreign Judgments in Latin American Countries: An Overview and Update (1990-1991) 31 Virginia Journal of International Law 99.

[113] Joint Press Statement, Seventh ASEAN Senior Law Officials Meeting (2001) 10-11 September 2001, Singapore, http://www.aseansec.org/5650.htm, at [4].

[114] See Gautama, *Recognition and Enforcement of Foreign Judgments and Arbitral Awards in the ASEAN Region* (1990) 32 Malaya Law Review 171, Koh, *Foreign Judgments in ASEAN – A Proposal* (1996) 45 International Comparative and Legal Quarterly 844.

[115] Koh, *ibid*, at 859.

[116] *ibid*, at 846-847.

[117] *ibid*.

have not ratified the *1984 Inter American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments* is that the Inter-American Juridical Committee at the time of the drafting of the convention wanted to restrict the "unification work"[118] to Latin America and had made "no effort to make them acceptable also to the United States"[119] perhaps because of the difficulties in reconciling the common law rules in the US on jurisdiction and the civil code approaches of the other Latin American jurisdictions.

It has been said that successful harmonisation of laws is likely to occur "between states with significant commercial relations with each other"[120] as they are more willing to look beyond their differences in terms of their legal systems and individual circumstances so as to facilitate the growth of cross-border trade and commerce between them. Within the above regional groupings, there is certainly a high degree of economic co-operation between the relevant jurisdictions and one may thus assume that this would aid in the harmonisation of private international law rules in these regions. Nevertheless, as the lack of significant progress in such harmonisation demonstrates, "economic integration and commercial ties alone do not assure success"[121] in harmonising private international law. To illustrate, one suggested reason for this situation in relation to ASEAN is that its focus is on facilitating economic activity rather than "economic integration."[122] In particular, ASEAN nations are wary of integration along the lines of the European Union which has as its "ultimate goal ... a "Community of Nations, an economic and political union[123]" as this is seen as a "loss of sovereignty."[124] Accordingly, they are unlikely to embark on an ambitious project such as a "multilateral jurisdiction and judgments Convention"[125] which requires "considerable trust between Contracting States"[126] to negotiate and draft. However, it is important to note that ASEAN is still in its early stages of development and that it "cannot be expected to launch into

---

[118] Nadelmann, *Clouds over International Efforts to Unify Rules of Conflict of Laws* (1977) 41 Law & Contemporary Problems 54, at 79.
[119] *ibid.*
[120] Gaa, *Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible?* (1993) 27 The International Lawyer 882, at 896.
[121] *ibid.*
[122] Koh, *supra*, n. 114, at 857.
[123] *ibid.*
[124] Joint Press Statement, Seventh ASEAN Senior Law Officials Meeting (2001) 10-11 September 2001, Singapore, http://www.aseansec.org/5650.htm, at [4].
[125] Fawcett *supra*, n. 74, at 89.
[126] *ibid.*

a comprehensive programme of...legal harmonisation as yet."[127] As time passes, with greater expansion in economic co-operative activities within ASEAN, there may be more political will to embark on projects harmonising private international law in the region. Indeed, in the recent 2005 Meeting of ASEAN Law Ministers, a Working Group has been established to work on an *Agreement on Service Abroad of Judicial and Extra Judicial Documents amongst ASEAN Member Countries.*[128]

3.1.3 Harmonisation on a Commonwealth basis

Another option available to our selected Commonwealth jurisdictions is to participate in the harmonisation of our selected areas of private international law on a Commonwealth basis. One question must be posed here: what is the relevant organisation to conduct such harmonisation? In 1964, the Commonwealth Secretariat was established to assist Commonwealth jurisdictions "consisting of a variety of races and representing a number of interests and points of view, to exchange opinions in a friendly, informal and intimate atmosphere."[129] In particular, Commonwealth Prime Ministers at that time were of the view that the Commonwealth Secretariat "should develop as a unifying element within the Commonwealth"[130] particularly in relation to international and economic affairs. To aid this organisation in the performance of its functions, one of the departments set up within it is the Legal and Constitutional Affairs Division whose objectives are to "foster the legal framework in Member Countries so as to achieve international peace and order, global and economic development and the rule of international law"[131] and to "monitor and participate in areas of evolving and developing law, thus being responsive to the needs of the Member Countries in these areas."[132] Towards these ends, the LCAD organises yearly meetings of Law Ministers from Commonwealth jurisdictions which consider "legal problems of common interest"[133] and model legislation developed to aid countries in addressing these issues. Accordingly, the

---

[127] Koh, *supra*, n. 114, at 859.
[128] Joint Communique of the 6th ASEAN Law Ministers Meeting, Ha Noi, Viet Nam, 19-20 September 2005, http://www.aseansec.org/17738.htm, at [9].
[129] *Agreed Memorandum on the Commonwealth Secretariat* (1965) Cmnd. 2713, at [4].
[130] *ibid*, at [14].
[131] See the Mission Statement of the LCAD at http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=38064.
[132] *ibid.*
[133] Dale, *The Modern Commonwealth*, Commonwealth Law Series (London: Butterworths) (1983), at 78.

LCAD would appear to be the most appropriate organisation to undertake the harmonisation of Commonwealth private international law.

However, it is important to note that in 1977, Commonwealth Law Ministers decided that "rather than develop their own competence in intra-Commonwealth private international law, they would work with the Hague Conference."[134] In particular, the Commonwealth Law Ministers were of the view that such integration of private international law would occur "at the expense of global co-ordination and co-operation"[135] and they wanted to avoid "any such potential conflict."[136] This decision has meant that the LCAD is more involved in the negotiations of new Hague Conventions for the harmonisation of private international law on a worldwide basis rather than in the harmonisation of Commonwealth private international law.[137]

In light of the failure of the negotiating parties at the Hague to reach an agreement on the text of the *Draft Hague Convention*, it is submitted that this decision of the Commonwealth Law Ministers should be reconsidered at least in relation to jurisdictional rules. In particular, harmonisation of private international law rules on a Commonwealth basis would be easier to accomplish in comparison to their harmonisation on a worldwide or regional scale as Commonwealth jurisdictions share the same common law background. There would be no "clash of legal different cultures"[138] as delegates involved in the negotiations would "speak the same (legal) language"[139] and would use "the [same] law making techniques."[140] Certainly, such "similarity in legal principles and legal systems can enhance efforts to harmonise...laws and practices."[141]

However, the following points must be noted.

---

[134] *Commonwealth Action in the Field of Private International Law,* Paper by the Commonwealth Secretariat at the Meeting of Commonwealth Law Ministers and Senior Officials, Accra, Ghana, 17-20 October 2005, LMM(05)21, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/D4CE789F-3814-42F3-8DCB-A47F49FBC478_lmm0521.pdf, at [1].
[135] Hans van Loon, *supra*, n. 30, at [6].
[136] *ibid.*
[137] Dale, *supra*, n. 133, at 78.
[138] Girsberger, *supra*, n. 58, at 150-151.
[139] *ibid.*
[140] *ibid.*
[141] Gaa, *supra*, n. 120, at 896.

1. First, we must not underestimate the fact that there are still significant social, economic and political differences between these countries and that these considerations may still hamper any harmonisation attempts. In our comparative study, we have seen how these differences have resulted in different judicial treatment of policies and thus differences in the formulation of *forum non conveniens* and tort choice of law in our selected jurisdictions. Any convention on these areas of private international law will have to reach a compromise between different Commonwealth jurisdictions on such policies. The general observation that "where different approaches to jurisdiction operate in different systems, where both are supported by principle and where both seem to work well in practice and give satisfaction within their respective contexts, it may be extremely difficult to reach consensus on a uniform approach"[142] is still applicable here. Even though our comparative research is limited to the judicial perception of policies and circumstances and it may not necessarily be the case that these considerations will be seen in the same way during the negotiations on a draft convention since the players involved are not confined to members of the various Commonwealth judiciaries, it is interesting to note that the Commonwealth Law Ministers in their 2005 Meeting in Accra, Ghana were of the view that there is enormous difficulty "reaching a similar level of agreement between countries which do not have the geographical contiguity, developed internal market and strong legal and political institutions of the EU."[143] They have thus stated that it would be "unwise to devote resources to a search for agreed bases of jurisdiction to be adopted by Commonwealth countries."[144]

2. Secondly, the increasing interaction between English common law private international law and European law may have an enormous impact on any proposed conventions on Commonwealth private international law. In particular, if the proposed

---

[142] Duncan, *supra*, n. 19, at 104.
[143] *Commonwealth Action in the Field of Private International Law*, Paper by the Commonwealth Secretariat at the Meeting of Commonwealth Law Ministers and Senior Officials, Accra, Ghana, 17-20 October 2005, LMM(05)21, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/D4CE789F-3814-42F3-8DCB-A47F49FBC478_lmm0521.pdf, at [16].
[144] *ibid.*

Rome II Regulation does become law, that may prevent England from entering into a Commonwealth convention on tort choice of law unless other Commonwealth jurisdictions can be convinced to sign up to a convention that is identical to *Rome II*. It is of course doubtful that this will occur as it is unlikely that *Rome II* will be considered appropriate for Commonwealth nations since it is based on a completely different "political, economic and legal background."[145] In such circumstances, it may be necessary that Commonwealth jurisdictions contemplate the harmonisation of tort choice of law without England's involvement. This then begs the question of whether there is any point to the harmonisation of Commonwealth private international law when England, with which other Commonwealth jurisdictions have very significant trade and commercial relations is missing from the process itself. There is at least no such difficulty in relation to *forum non conveniens* as in general, the *Brussels I Regulation* does not apply to defendants who are not domiciled in a member state.[146] In such circumstances, the English bases of jurisdiction and the doctrine of *forum non conveniens* would still be relevant.

3. Thirdly, similar to the situation under the Hague Conventions, there is no Commonwealth entity analogous to the European Court of Justice to rule on the interpretation of conventions harmonising private international law rules on a Commonwealth scale. As we have seen in our comparative study, the judiciaries of our selected jurisdictions have their own views on *forum non conveniens* and tort choice of law and they may not necessarily agree with the compromises reached in the relevant Commonwealth conventions. There is a danger then that they may interpret the provisions differently so as to give effect to their own policy views on the subject matter. The whole point of harmonising Commonwealth private international law would be defeated in such circumstances.

---

[145] Fawcett, *supra*, n. 74, at 88 in relation to the *Rome I Convention*.
[146] Article 4, *Brussels I Regulation*.

3.1.4 Other means of harmonisation: Model Laws?

It can be observed that the convention is the key instrument employed by the organisations mentioned above for their harmonisation of *forum non conveniens* and tort choice of law. That however is not the only way to bring about harmonisation. Model laws have been utilised by for example, the United Nations Commission on International Trade Law[147] in their harmonisation of private international law. Accordingly, one question which arises here is: should model laws be used instead of conventions to harmonise our selected areas of private international law?

What are the differences between model laws and conventions? A model law is "created as a suggested pattern for law-makers in national governments to consider adopting as part of their domestic legislation."[148] In "[i]ncorporating the text of the model law into its system, a State may modify or leave out some of its provisions."[149] This approach is dependent on the "persuasive power of example, whereby those States which demonstrate their willingness to make voluntary changes to their laws in the interests of improving the workings of [their legal regimes] can generate a steady momentum of support which, given time and experience, should induce more States to overcome their initial reluctance to participate."[150] In contrast, a convention is an "instrument that is binding under international law on States and other entities with treaty-making capacity that choose to become a party to that instrument."[151] The "possibility of changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted."[152] In other words, "participating States must commit themselves to intrusive legal obligations"[153] which may be "difficult for them to accept."[154] Accordingly, the key difference between the two instruments is that in relation to model laws, States are "at liberty to incorporate into their domestic laws to the extent that they

---

[147] The best example of the UNCITRAL's use of model laws is the *UNCITRAL Model Law on Cross-Border Insolvency*.
[148] http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html.
[149] *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, http://www.iiiglobal.org/organizations/uncitral/model_law.pdf#search=%22Guide%20to%20Enactment%20of%20the%20UNCITRAL%20Model%20Law%20on%20Cross-Border%20Insolvency%22, at [12].
[150] Fletcher, *Insolvency in Private International Law*, Oxford Private International Law Series (Oxford: Oxford University Press) (2nd ed., 2005), at para. 8.04.
[151] http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html.
[152] *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, http://www.iiiglobal.org/organizations/uncitral/model_law.pdf#search=%22Guide%20to%20Enactment%20of%20the%20UNCITRAL%20Model%20Law%20on%20Cross-Border%20Insolvency%22, at [12].
[153] Fletcher, *supra*, n. 150, at para. 8.04.
[154] *ibid.*

themselves consider acceptable, and in whatever form best accords with the traditions and process of [their legal] system."[155] The benefit of such flexibility is that it would be easier for negotiators from different legal, social, economic and political backgrounds to reach a consensus on the model law in comparison to a convention. If they do not agree with certain aspects of the model law, their jurisdictions can simply choose not to adopt the relevant rules as part of their individual private international law regimes.

Obviously, all this would mean that the "degree of, and certainty about, harmonisation achieved through a model law is likely to be lower than in the case of a convention."[156] In addition, it is inevitable that there will be a "lack of uniformity in terms of the elements selected for internal enactment by the States which choose to participate"[157] as well as in relation to the "approach followed by domestic courts and officials when interpreting and applying the particular version of the model law as enacted by the State in which they function."[158] This is of course a problem for conventions as well. The only difference is that the "broad margin of self-determination conceded to any State which elects to adopt the model law"[159] would indicate that these problems are more significant in relation to model laws.

In an ideal world, conventions would be preferred to model laws as they provide for a much higher degree of certainty and predictability in comparison to the latter. However, as our discussion of the *Draft Hague Convention* has revealed, the reality of the situation is that these advantages are not easily achieved for various reasons; the most important of which is the difficulty in reconciling the disparities that exist between jurisdictions in terms of their legal culture and their policies and approaches towards private international law. In areas of private international law where such difficulties are significant, "producing a [convention] to which all participating states will commit themselves under terms requiring full reciprocity, and also uniformity and consistency in matters of application"[160] may simply be impossible. Under these circumstances, a model law approach can be a "[l]ess ambitious, but more practicable,

---

[155] *ibid.*
[156] *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, http://www.iiiglobal.org/organizations/uncitral/model_law.pdf#search=%22Guide%20to%20Enactment%20of%20the%20UNCITRAL%20Model%20Law%20on%20Cross-Border%20Insolvency%22, at [12].
[157] Fletcher, *supra*, n. 150, at para. 8.05.
[158] *ibid.*
[159] *ibid.*
[160] *ibid*, at para. 8.03.

solution."[161] As it is arguably easier for negotiators to come to an agreement on the drafting of a model law on private international law, at least this approach can provide some degree of harmonisation. Naturally, the degree of incorporation of a model law into a jurisdiction's legal system would differ but if enough states participate in its adoption, these states will eventually "develop a *corpus* of mutually compatible legislative provisions"[162] and will thus be able to reap some of the advantages of harmonisation. Accordingly, it is submitted that international bodies such as the Hague Conference should look into the use of model laws as a "short-to-medium term"[163] solution to the problems arising from diversity in jurisdictional rules.

3.1.5 Conclusion for the harmonisation of *forum non conveniens* and tort choice of law in relation to our selected Commonwealth jurisdictions

It is clear that the Hague Conference's efforts in harmonising jurisdictional rules on a worldwide basis have largely been unsuccessful and accordingly, the use of the *Draft Hague Convention* is not an option for our selected Commonwealth jurisdictions. As for regional harmonisation, there has generally been a lack of interest and political will in embarking on such projects by the relevant organisations, namely ASEAN, OAS and the Pacific Islands Forum. The problems faced by the Hague Conference in harmonising jurisdictional rules are applicable in this context as well despite the differences in the scale of the project. Arguably, harmonisation of jurisdictional rules on a Commonwealth basis would stand the best chance of success for our selected Commonwealth countries but this would require the Commonwealth Law Ministers to reconsider their decision to leave the harmonisation of private international law to the Hague Conference. In other words, the prospects for the harmonisation of jurisdictional rules at any level remain for the moment, unpromising. It should also be noted that there has been no interest in the harmonisation of tort choice of law regimes aside from the conventions on product liability and traffic accidents produced by the Hague Conference in the 1970s.

---

[161] *ibid*, at para. 8.05.
[162] *ibid*, at para. 8.14.
[163] *ibid*, at para. 8.04.

3.2 NATIONAL DEVELOPMENT OF *FORUM NON CONVENIENS* AND TORT CHOICE OF LAW IN OUR SELECTED COMMONWEALTH JURISDICTIONS

As it is highly unlikely that there would be any successful attempts at harmonising *forum non conveniens* and tort choice of law in the near future, we are left with the default position of *ad hoc* development of these areas of private international law in our selected Commonwealth jurisdictions.

While our Commonwealth courts must address the disadvantages of diversity in private international law, these criticisms should not be overstated. Generally, it is important to note that when we refer to diversity in Commonwealth private international law, it does not mean that every Commonwealth jurisdiction will have a different approach to a specific area of private international law. In particular, some commentators have argued that the "process of looking outward...for inspiration...may well result in a valuable integration or harmonisation of law on a Commonwealth or broader scale"[164] or at least "uniformity among those faced with similar problems."[165] This is said to arise from the "borrowing of principle and precedent among ... members of the Commonwealth"[166] by the "notable process of cross-pollination."[167] In economic terms, it has been said that in the competition for cross-border trade and investment with the increasing "globalisation of markets and the elimination of barriers to trade,"[168] lawmakers may be motivated to import or imitate rules from another jurisdiction if those rules "better meet the preferences of [market] actors"[169] in comparison to their old rules thus inducing "some convergence"[170] in certain jurisdictions "towards least-cost legal principles."[171] In other words, by encouraging diversity in Commonwealth private international law, there may be a shift towards uniformity in the form of an optimal rule at least in jurisdictions with similar social, economic and political circumstances. This particular argument can be substantiated to some extent by our comparative study. For instance, we have observed that Australia and Canada's tort choice of law regimes are similar to one

---

[164] Hiller, *supra*, n. 1, at 86.
[165] *ibid*, at 111.
[166] *ibid*, at 109.
[167] *ibid*, at 108.
[168] Ogus, *supra*, n. 26, at 408.
[169] *ibid*, at 409.
[170] *ibid*, at 415.
[171] *ibid*.

another. Both adhere to the *lex loci delicti* and both have narrow exceptions to it. Arguably, this convergence of tort choice of law regimes is the result of judges in Australia and Canada opining that both jurisdictions have similar circumstances; they are both federations and therefore, they should learn from each another's experiences in the formulation of their tort choice of law rules. While in recent months the doctrine of *renvoi* was introduced into the Australian tort choice of law rule by the High Court of Australia thus resulting in a significant divergence from the relevant Canadian position, it is entirely possible that the Supreme Court of Canada may rely on this Australian decision to include *renvoi* as part of the Canadian tort choice of law rule in the near future.

Obviously, such convergences would not remove all the disadvantages inherent in the national development of Commonwealth private international law but they should go some way in alleviating them. There is however one key argument that we have to examine in greater detail which is that such diversity in Commonwealth private international law will "lead to the promulgation of lax standards."[172] In our comparative study, we have examined the 'invisible export' argument that has led England and Singapore to provide for a presumption in favour of trial in the local courts in their doctrine of *forum non conveniens.* While this is obviously a classic case supporting this criticism of diversity in legal regimes, it is important to note that things were worse in the past. In particular, the *St Pierre* test was so parochial that a stay of proceedings would only be granted if the defendant can establish oppression or vexation on the part of the claimant. The doctrines of *forum non conveniens* in Singapore and England have clearly shifted away from that extreme position which implies a degree of self restraint on the part of their judiciaries.

Accordingly, to facilitate the evolution of Commonwealth private international law towards greater uniformity in the form of sound and principled rules, our selected Commonwealth courts must be more "outward-looking and ready to borrow than ever before."[173] They must be "familiar with the growth of [private international] law in other parts of the world"[174] and

---

[172] *ibid,* at 416.
[173] Hiller, *supra,* n. 1, at 117.
[174] *ibid,* at 118.

"especially within the Commonwealth."[175] They must also determine whether the solutions devised in these jurisdictions are appropriate for their individual circumstances values and needs. This has clearly been the case in Australia and Canada as seen from our comparative study. There is however limited reliance on comparative private international law in the formulation of these areas of private international law in Singapore; a situation that should be remedied.

Under these circumstances, the *Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters*[176] as formulated by the International Law Association's Committee on International Civil and Commercial Litigation can be of assistance. In particular, these principles are not in the "form of a draft model law, still less a draft international convention."[177] All they do is to provide for a "general approach for the resolution of ...problems"[178] arising in the context of international civil and commercial litigation. It is meant to "assist courts and law reformers, both at a national and international level, by giving guidance as to potential solutions."[179] Sadly, no such principles have been provided for tort choice of law.

On the principles themselves, it is important to note that they "do not determine the rules of original jurisdiction in civil and commercial matters."[180] Instead, they deal with the circumstances in which a court should decline jurisdiction such as where there is *lis pendens*[181], related actions[182] as well as in cases where a court is "satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on

---

[175] *ibid.*
[176] These principles were adopted by the International Law Association Conference in London in 2000.
[177] International Law Association London Conference (2000), Committee on International Civil and Commercial Litigation, *Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, http://www.ila-hq.org/pdf/Civil%20&%20Commercial%20Litigation/CommLitigation.pdf#search=%22Third%20Interim%20Report%3A%20Declining%20and%20Referring%20Jurisdiction%20in%20International%20Litigation%22, at [40].
[178] *ibid.*
[179] *ibid.*
[180] Principle 1.2, *Leuven/London Principles*. See, *Annexure to Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, http://www.ila-hq.org/pdf/Civil%20&%20Commercial%20Litigation/CommLitigation.pdf#search=%22Third%20Interim%20Report%3A%20Declining%20and%20Referring%20Jurisdiction%20in%20International%20Litigation%22.
[181] Principle 4.1, *ibid.*
[182] Principle 4.2, *ibid.*

grounds of nationality."[183] In other words, the principles provide for a specific formulation of the doctrine of *forum non conveniens*. In addition, these principles also introduce the concept of referring jurisdiction in that a procedure is provided to transfer litigation to the alternative court when the "originating court"[184] decides to decline jurisdiction. This process is to address the concern that some jurisdictions have with declining jurisdiction "namely the prospect that it could lead to a denial of justice in which a plaintiff is left without an effective forum in which to secure relief."[185] The adoption of such a referral system by Commonwealth jurisdictions can thus go a long way in addressing the policy concerns of the High Court of Australia with regards to the litigant's right of access to a judicial system.

As these principles were drafted in an academic setting unlike the negotiations under the Hague Conference where a certain degree of political horse-trading was taking place, it appears that there was at least a proper attempt in identifying the best approach to the problems faced by litigants in the context of international litigation. In particular, the International Law Association's Committee on International Civil and Commercial Litigation took a "functional approach"[186] by examining the "way in which issues of declining jurisdiction actually arise in international litigation and the practical problems which arise for litigants in the conduct of cases which span national boundaries."[187]

It is submitted that our selected Commonwealth judiciaries should seriously consider these principles and work out how they can guide them in the formulation of their doctrines of *forum non conveniens.* In general terms, there would be a shift towards greater uniformity in the various Commonwealth doctrines of *forum non conveniens* if more Commonwealth judges rely on these principles. If there is sufficient consensus amongst Commonwealth jurisdictions on them, the principles can even be adopted as a convention. Furthermore, such harmonisation may extend beyond Commonwealth countries as these principles are equally applicable to civil law jurisdictions. In particular, these principles were prepared by a

---

[183] Principle 4.3, *ibid.*
[184] Principle 5.6, *ibid.*
[185] *Third Interim Report, supra*, n. 177, at [46].
[186] *ibid,* at [39].
[187] *ibid.*

Committee composed of experts from both civil law and common law jurisdictions and a consensus was actually reached amongst them in relation to it.

4. CONCLUSION

To sum up, on the question of how our selected Commonwealth jurisdictions should react to this phenomenon, *while the view of* this author is that the harmonisation of jurisdictional rules and in particular, the various doctrines of *forum non conveniens* can probably be justified on the grounds of promoting international trade and commerce, it is much more difficult to identify a social or economic objective for tort choice of law. It is also important to note that there are significant legal, social, economic and political obstacles hampering the harmonisation of private international law at the worldwide, regional or Commonwealth level and currently, the prospects for such projects of which our selected jurisdictions may be involved in, are unpromising. As such, we are left with the default position: the national development of our selected areas of private international law in each of our chosen Commonwealth jurisdictions. While there are disadvantages inherent in such a phenomenon, it is arguable that their significance can be reduced as our Commonwealth jurisdictions learn from one another's experiences as well as from other Commonwealth countries to adopt similar principles at least among Commonwealth nations with similar social, economic and political circumstances.

CHAPTER 9: CONCLUSION TO THE THESIS

As set out in Chapter 1, the objective of this thesis is to undertake a critical analysis of the break up of Commonwealth private international law in Australia, Canada, Singapore and England with reference to two areas of private international law namely the doctrine of *forum non conveniens* and tort choice of law. To examine this phenomenon in a structured manner, we have divided this thesis into three parts with the following questions corresponding to each of these sections:

1. Part I: What is the nature and extent of the break up of Commonwealth private international law in our selected jurisdictions?

2. Part II: What are the explanations from the case law for the break up of Commonwealth private international law in our selected jurisdictions?

3. Part III: How should our selected jurisdictions react to the break up of Commonwealth private international law?

A brief summary of our findings for these questions will now be provided in this final chapter.

1. PART I: WHAT IS THE NATURE AND EXTENT OF THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

It is clear from our analysis in Part I of this thesis that there has been a break up of Commonwealth private international law in relation to both *forum non conveniens* and tort choice of law in our selected Commonwealth jurisdictions. For the former, the Australian courts have adopted a 'clearly inappropriate forum' test whereas the English, Canadian and Singaporean judiciaries have provided for a 'clearly more appropriate forum' test. As for the latter, the English common law *Phillips v Eyre* rule is no longer part of the law in Australia and Canada. The Singapore courts, however are still utilising that approach.

While the phenomenon has clearly occurred in both of our selected areas of private international law, it is interesting to note that the nature and extent of the break up of Commonwealth private international law for *forum non conveniens* is different from that in relation to tort choice of law in our selected jurisdictions. In particular:

1. The break up of Commonwealth tort choice of law in our selected countries is much more comprehensive when compared with the corresponding phenomenon for *forum non conveniens.* Most of our selected judiciaries have abandoned the English common law *Phillips v Eyre* rule whereas the 'clearly more appropriate forum' test is still the adopted approach in most of our selected jurisdictions.

2. We have noted in our comparative study that the break up of Commonwealth private international law in relation to tort choice of law in our selected jurisdictions has not been a linear process. In particular, we described the Australian tort choice of law regime as being in a state of flux in that it has been moving towards and away from the English common law position throughout its development. This is clearly not the case for the doctrines of *forum non conveniens* in our selected jurisdictions.

3. The break up of Commonwealth private international law in relation to tort choice of law has not been a recent occurrence in that it has been going on for most of the last century in some of our selected jurisdictions. In relation to *forum non conveniens,* the break up of this area of private international law only occurred after the introduction of the 'clearly more appropriate forum' test in England in the 1980's.

In short, the break up of Commonwealth private international law is a complex process in that the nature and extent of this phenomenon in one area of private international law may be different from that of another.

2. PART II: WHAT ARE THE EXPLANATIONS FROM THE CASE LAW FOR THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW IN OUR SELECTED JURISDICTIONS?

In Part II of this thesis, we undertook a critical analysis of the explanations in the relevant cases for the divergences from the English common law in Australia, Canada and Singapore in relation to their doctrines of *forum non conveniens* and tort choice of law regimes. We noted that the Singapore courts have largely maintained their uniformity with the English common law position on our selected areas of private international law as arguably, English judicial precedents are still exerting a powerful influence on Singapore judges in their adjudication of these matters. In contrast, this is no longer the case in Australia and Canada. A long list of policy, structural, historical, comparative and contextual considerations has been taken into account by the courts in these jurisdictions in their decisions whether to diverge from the relevant English common law private international law approach.

In general, from our analysis of these considerations, one reason for the break up of Commonwealth private international law in relation to *forum non conveniens* and tort choice of law in our selected jurisdictions is that there are differences in the judicial treatment of policies, concepts and other wider considerations relevant to these areas of private international law in these countries.

To elaborate, if the judicial treatment of considerations relating to an area of private international law in a Commonwealth jurisdiction is similar to that adopted by the English courts, the resulting divergences are often fairly small. The Canadian doctrine of *forum non conveniens* is a good illustration of this. As the Canadian courts are in agreement with the English courts on most of the considerations relevant to this area of private international law, they have adopted the 'clearly more appropriate forum' test albeit with some modifications. In contrast, if the judicial treatment of policies, concepts and circumstances in any Commonwealth jurisdiction were significantly different from that of the English courts, the judiciaries in these two countries would be likely to provide for differing private international

law approaches. This can be observed in relation to the tort choice of law regimes in Australia and Canada where there is a clear departure from the English common law position. This is also the case for the Australian doctrine of *forum non conveniens.* In particular, the High Court of Australia did not support the policy decisions made by the English courts in relation to the 'clearly more appropriate forum' test. They thus adopted a different approach; the 'clearly inappropriate forum' test as they were of the view that it better reflected the policies that they wanted adhered to for Australian circumstances, values and needs.

On a separate note, in Part I of this thesis, we observed that there are differences between the nature and extent of the break up of Commonwealth tort choice of law in our selected jurisdictions and that in relation to *forum non conveniens.* In Part II, we have established that this is due to the corresponding differences between the judicial treatment of considerations relevant to tort choice of law and that with regards to *forum non conveniens* in our selected jurisdictions. To elaborate:

1. For *forum non conveniens*, most of our selected courts are generally in agreement with the English judiciaries on the policies, concepts and other wider considerations underlying the 'clearly more appropriate forum' test. In contrast, there is less consensus amongst our selected jurisdictions on the considerations relevant to tort choice of law. This is why the break up of Commonwealth tort choice of law is greater in extent than the break up of Commonwealth *forum non conveniens.*

2. Fluctuations in the extent of the divergences from the English common law position on tort choice of law has occurred in our selected jurisdictions, most notably in Australia as the judicial treatment of considerations relevant to this area of private international law has changed in these countries as time goes by. However, for the doctrine of *forum non conveniens,* it is notable that the judiciaries in our selected jurisdictions have not differed much on their treatment of the policies and considerations relevant to this area of private international law after the introduction of that doctrine in England. There has thus been little movement back towards the

English common law after the initial divergences from the English common law doctrine of *forum non conveniens* in these jurisdictions.

3. Generally, for most of the last century, English common law private international law approaches were adopted by the judiciaries in our selected countries with little discussion of the relevant policies, concepts and other wider considerations. *Forum non conveniens* is a good example of this and this is thus one reason why the break up of this area of private international law is a recent occurrence. In contrast, as early as the beginning of the last century, the High Court of Australia was already in divergence from the English courts on some of the considerations relevant to tort choice of law. This is thus an explanation why the break up of Commonwealth tort choice of law has occurred at such an early point in time in comparison to the phenomenon for *forum non conveniens.*

3. PART III: HOW SHOULD OUR SELECTED JURISDICTIONS REACT TO THE BREAK UP OF COMMONWEALTH PRIVATE INTERNATIONAL LAW?

With increasing diversity in Commonwealth private international law in relation to *forum non conveniens* and tort choice of law, our selected Commonwealth jurisdictions have to decide on how they should respond to this phenomenon. Should they participate actively in projects to harmonise these areas of private international law on a global, regional or Commonwealth basis or should they leave things as they are now; the individual development of these laws in the various Commonwealth jurisdictions?

In Chapter 8, we established that there are strong arguments for either harmonisation or diversity in Commonwealth private international law. Harmonisation in an ideal world would provide for certainty, predictability and uniformity in judicial outcomes, all of which would help in the promotion of international trade and commerce. It would also result in the formulation of better private international law rules for the benefit of the region targeted for harmonisation. In

contrast, diversity has the advantage of encouraging a plurality of approaches to deal with difficult legal private international law issues.

In general, it is the view of this author that if a convincing case for uniformity and certainty can be established for a particular area of private international law for the purpose of achieving a worthy social or economic goal, we should be willing to sacrifice diversity and its advantages for it. Harmonisation of jurisdictional rules of which the doctrine of *forum non conveniens* is a component part is said to be desirable for the promotion of international trade and commerce. This argument is however somewhat weaker in relation to tort choice of law. It is thus unsurprising that few attempts have been made to harmonise this area of private international law.

There is also an issue of whether harmonisation can actually be achieved. In Chapter 8, we examined the progress of the harmonisation of jurisdictional rules on a worldwide, regional and Commonwealth basis in order to paint a realistic picture of the difficulties involved in such projects. One key hurdle faced by the relevant decision makers regardless of the scale of the harmonisation project is the difficulty in reaching consensus between states with different national ideas of justice, social objectives and public policy. As they do not appear to be able to overcome this problem, we have concluded that the prospects for the harmonisation of jurisdictional rules at any level remain for the moment, unpromising. As for tort choice of law, there has been no interest in the harmonisation of tort choice of law regimes in relation to our selected Commonwealth jurisdictions aside from the conventions on product liability and traffic accidents produced by the Hague Conference.

As the harmonisation of tort choice of law and jurisdictional rules has been largely unsuccessful, we are left with the default position of *ad hoc* development of private international law rules in individual Commonwealth jurisdictions. Such diversity will of course give rise to various inconveniences such as uncertainty, unpredictability and the lack of uniformity in judicial outcomes. However, it is important that these criticisms are not overstated. As more Commonwealth judiciaries and lawmakers look towards other

Commonwealth countries for innovative solutions to private international law problems that are more relevant to their individual circumstances and needs, there may be a shift towards uniformity in the form of an optimal private international law rule in Commonwealth jurisdictions with similar social, economic and political circumstances. This will certainly go some way in alleviating the problems resulting from the break up of Commonwealth private international law.

To facilitate the evolution of Commonwealth private international law towards such uniformity, Commonwealth jurisdictions must be encouraged to be more outward looking and be ready to adopt alternative approaches to private international law if they perceived them as appropriate to their circumstances and needs. They must thus be familiar with private international law developments in other jurisdictions particularly within the Commonwealth. This has been the case in Australia and Canada. There is however, limited reliance on comparative private international law in Singapore and it is submitted that this situation should be remedied. The *Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters* can be a useful guide to Commonwealth judges in the development of their jurisdictional rules. Sadly, there are no such principles available for tort choice of law.

4. FINAL COMMENTS

This thesis has identified a growing phenomenon, the break up of Commonwealth private international law and the problems that may arise from it. It has explained from the relevant cases how this occurrence came about and examined the responses that can be made towards it by Commonwealth jurisdictions.

At one level, this thesis can provide Commonwealth courts in our selected jurisdictions and more generally with a better understanding of the policies, concepts and other wider considerations underlying the development of *forum non conveniens* and tort choice of law so that they are able to determine which of these policies they should adhere to for their own individual jurisdictions' circumstances, values and needs. At a wider level, it is hoped that this

thesis will alert Commonwealth jurisdictions and the Commonwealth Secretariat to the break up of Commonwealth private international law so that steps can be taken to determine their responses particularly when diversity in such laws can have a material and adverse effect on international trade and commerce.

BIBLIOGRAPHY

ARTICLES

Amado, *Recognition and Enforcement of Foreign Judgments in Latin American Countries: An Overview and Update* (1990-1991) 31 Virginia Journal of International Law 99.

Beckman, *Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council* (1987) 29 Malaya Law Review 254.

Black, *Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention* (2000) 38 Osgoode Hall Law Journal 237.

Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments* (2002) 37 Texas International Law Journal 467.

Brereton, *Forum Non Conveniens in Australia: A Case Note on Voth v Manildra Flour Mills* (1991) 40 International and Comparative Law Quarterly 895.

Briggs, *The Meaning and Proof of Foreign Law: Neilson v Overseas Projects* [2006] Lloyds Maritime and Commercial Law Quarterly 1.

Briggs, *Wider Still and Wider: The Bounds of Australian Exorbitant Jurisdiction* [1989] 2 Lloyds Maritime and Commercial Law Quarterly 216.

Castel, *Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?* (1995) 33 Osgoode Hall Law Journal 35.

Castel, *Canada and the Hague Conference on Private International Law: 1893-1967* (1967) 45 Canadian Bar Review 1.

Carter, *Choice of Law in Tort and Delict* (1991) 107 Law Quarterly Review 405.

Clarke, *The Privy Council, Politics and Precedent in the Asia-Pacific Region* (1990) 39 International and Comparative Law Quarterly 741.

Crawford, Carruthers, *Conflict of Loyalties in the Conflict of Laws: The Cause, the Means and the Cost of Harmonisation* [2005] Juridical Review 251.

Cooke, *Divergences – England, Australia and New Zealand* [1983] New Zealand Law Review 297.

Davis, *John Pfeiffer Pty Ltd v Rogerson: Choice of Law in Tort at the Dawning of the 21st Century* (2000) 24 Melbourne University Law Review 982.

Dickinson, *Cross-Border Torts in EC Courts – A Response to the Proposed "Rome II" Regulation* [2002] European Business Law Review 369.

Duckworth, *Case Note: Regie Nationale des Usines Renault SA v Zhang, Certainty or Justice? Bringing Australian Choice of Law Rules for International Torts into the Modern Era* (2002) 24 Sydney Law Review 569.

Evans, *Uniform Law: a Bridge too Far?* [1994] 3 Tulane Journal of International and Comparative Law 145.

Fawcett, *Forum Shopping – Some Questions Answered* (1984) 35 Northern Ireland Law Quarterly 141.

Fawcett, *Policy Considerations in Tort Choice of Law* (1984) 47 Modern Law Review 650.

Fawcett, *The Europeanisation of Private International Law: The Significance for Singapore* [1997] 1 Singapore Journal of International and Comparative Law 69.

Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations* (1989) 9 Oxford Journal of Legal Studies 205.

Finn, *Commerce, the Common Law and Morality (1989) 17* Melbourne University Law Review 87.

Garnett, *Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?* (1999) 23 Melbourne University Law Review 30.

Gautama, *Recognition and Enforcement of Foreign Judgments and Arbitral Awards in the ASEAN Region* (1990) 32 Malaya Law Review 171.

Guthrie, *'A Good Place to Shop': Choice of Forum and the Conflict of Laws* (1995-1996) 27 Ottawa Law Review 201.

Hancock, *Torts in the Conflict of Laws: the First Rule in Phillips v Eyre* (1940) 3 University of Toronto Law Journal 400.

Harris, *Choice of Law in Tort – Blending in with the Landscape of the Conflict of Laws?* (1998) 61 Modern Law Review 33.

Herbert, *The Conflict of laws and Judicial Perspectives on Federalism: A Principled Defence of Tolofson v Jensen* (1998) 56 University of Toronto Faculty of Law Review 3.

Hiller, *The Law-Creative Role of Appellate Courts in the Commonwealth* (1978) 27 International and Comparative Law Quarterly 85.

Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity* (1990) 106 Law Quarterly Review 530.

Gaa, *Harmonisation of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible?* (1993) 27 The International Lawyer 882.

Gummow, *Full Faith and Credit in Three Federations* (1994-1995) 46 South Carolina Law Review 979.

Jaffey, *Choice of Law in Tort: a Justice Based Approach* (1982) 2 Legal Studies 98.

Juenger, *A Hague Judgments Convention?* (1998) 24 Brooklyn Journal of International Law 111.

Koh, *Foreign Judgments in ASEAN – A Proposal* (1996) 45 International Comparative and Legal Quarterly 844.

Lu, *Ignored no more: Renvoi and International Torts Litigated in Australia* [2005] 1 Journal of Private International Law 35.

Martin, *Diverging Common Law-Invercargill goes to the Privy Council* (1997) 60 Modern Law Review 94.

Mason, *Australian Contract Law* (1988) 1 Journal of Contract Law 1.

Nadelmann, *Clouds over International Efforts to Unify Rules of Conflict of Laws* (1977) 41 Law & Contemporary Problems 54.

Neuhaus, *Legal Certainty versus Equity in the Conflict of Laws* (1963) 28 Law & Contemporary Problems 795.

Nygh, *Conflicts of Laws within a Federation: Anderson v Eric Anderson (Radio and TV) Pty Ltd* [1966] Australian Yearbook of International Law 35.

Nygh, *Full Faith and Credit: A Constitutional Rule for Conflict Resolution* (1991) 13 Sydney Law Review 415.

O'Brian Jr, *The Hague Convention on Jurisdiction and Judgments: The Way Forward* (2003) 66 Modern Law Review 491.

Ogus, *Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law* (1999) 48 International and Comparative Legal Quarterly 405.

Opeskin, *The Price of Forum Shopping: A Reply to Professor Juenger* (1994) 16 Sydney Law Review 14.

Orucu, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* Vol. 4.1 Electronic Journal of Comparative Law (June 2000).

Palmer, *Torts in the Inter-Provincial Conflict of Laws* (1959) 17 University of Toronto Faculty of Law Review 1.

Pryles, *Judicial Darkness on the Oceanic Sun* (1988) 62 Australian Law Journal 774.

Pryles, *Internationalism in Australian Private International Law* (1989-1990) 12 Sydney Law Review 96.

Pryles, *The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?* [1989] Australian Law Journal 158.

Reese, *The Hague Conference on Private International Law: Some Observations* (1985) 19 The International Lawyer 881.

Sacco, *Diversity and Uniformity in the Law* (2001) 49 American Journal of Comparative Law 171.

Schuz, *Controlling Forum-Shopping: The Impact of MacShannon v Rockware Glass Ltd* (1986) 35 International and Comparative Law Quarterly 374.

Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?* (2002-2003) 52 DePaul Law Review 319.

Siqueiros, *Enforcement of Foreign Civil and Commercial Judgments in the Mexican Republic* [1986] Arizona Journal of International and Comparative Law 149.

Stephan, *The Futility of Unification and Harmonization in International Commercial Law* (1999) 39 Virginia Journal of International Law 743.

Taylor, *The Effect of the Constitution on the Common Law as Revealed by John Pfeiffer v Rogerson* (2002) 30 Federal Law Review 69.

Teiz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings* (1992) 26 The International Lawyer 21.

Tetley, *Uniformity of International Private Maritime Law – The Pros, Cons and Alternatives to International Conventions – How to Adopt an International Convention* (2000) 24 Tulane Maritime Law Journal 775.

Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project succeed?* (2001) 49 American Journal of Comparative Law 191.

Von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions* (1998-1999) 24 Brooklyn Journal of International Law 17.

Walsh, *Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims* (1997) 76 Canadian Bar Review 91.

Weiler, *Forum Non Conveniens – An English Doctrine?* (1978) 41 Modern Law Review 739.

Yeo, *Private International Law: Recent developments in Singapore* [1997] 1 Singapore Journal of International and Comparative Law 560.

Yeo, *Tort Choice of Law beyond the Red Sea: Whither the Lex Fori?* [1997] 1 Singapore Journal of International and Comparative Law 91.

Yntema, *Objectives of Private International Law* (1957) 35 Canadian Bar Review 721.

BOOKS

Bell, *Forum Shopping and Venue in Transnational litigation*, Oxford Private International Law Series (Oxford: Oxford University Press) (2003).

Briggs, *The Conflict of Laws* (Oxford: Oxford University Press) (2002).

Castel, *Canadian Conflict of Laws* (Toronto: Butterworths) (4th ed., 1997).

Clarkson, Hill, *Jaffey on the Conflict of Laws* (London: Butterworths LexisNexis) (2nd ed., 2002).

Collins (ed), *Dicey, Morris and Collins on The Conflict of Laws* (London: Sweet and Maxwell) (14th ed., 2006).

Dale, *The Modern Commonwealth*, Commonwealth Law Series (London: Butterworths) (1983).

Einhorn, Siehr (eds), *Intercontinental Cooperation through Private International Law – Essays in Memory of Peter E. Nygh* (The Hague, The Netherlands: TMC Asser Press) (2004).

Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press) (1995).

Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford: Oxford University Press) (2002).

Fletcher, *Insolvency in Private International Law,* Oxford Private International Law Series (Oxford: Oxford University Press) (2nd ed., 2005).

Gail, *The Canadian Legal System* (Toronto: Carswell) (3rd ed., 1990).

Hancock, *Torts in the Conflict of Laws* (Chicago: Ann Arbor, University of Michigan Press; Callaghan & Co) (1942).

North, *Private International Law Problems in Common Law Jurisdictions* (London: Martinus Nijhoff Publishers) (1993).

North, Fawcett, *Cheshire and North's Private International Law* (London: Butterworths) (13th ed., 1999).

Nygh, *Conflict of Laws in Australia* (Sydney: Butterworths) (6th ed., 1995).

Nygh, Davies, *Conflict of Laws in Australia* (Sydney: LexisNexis Butterworths) (7th ed., 2002).

Orucu, *The United Kingdom as an Importer and Exporter of Legal Models in the Context of Reciprocal Influences and Evolving Legal Systems*, in *UK Law for the Millennium Comparative Law Series*, No. 19 (1998), compiled by the United Kingdom National Committee of Comparative Law, 206 – 243.

Smith, Pose, *Maher, Waller and Derham's Legal Process – Commentary and Materials* (Sydney: The Law Book Company Ltd) (5th ed., 1988).

Sykes, *A Textbook on the Australian Conflict of Laws* (Sydney: The Law Book Company Limited) (1972).

Tilbury, Davis, Opeskin, *Conflict of Laws in Australia* (South Melbourne: Oxford University Press) (2002).

INTERNET PUBLICATIONS

Commonwealth Action in the Field of Private International Law, Paper by the Commonwealth Secretariat at the Meeting of Commonwealth Law Ministers and Senior Officials, Accra, Ghana, 17-20 October 2005, LMM(05)21.

http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/D4CE789F-3814-42F3-8DCB-A47F49FBC478_lmm0521.pdf.

Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, International Insolvency Institute, United Nations, New York (1999).

http://www.iiiglobal.org/organizations/uncitral/model_law.pdf#search=%22Guide%20to%20Enactment%20of%20the%20UNCITRAL%20Model%20Law%20on%20Cross-Border%20Insolvency%22.

Joint Press Statement, Seventh ASEAN Senior Law Officials Meeting, 10-11 September 2001, Singapore.

http://www.aseansec.org/5650.htm.

Joint Communiqué of the 6th ASEAN Law Ministers Meeting, 19-20 September 2005, Ha Noi, Vietnam.

http://www.aseansec.org/17738.htm.

Legal Developments – The Hague Conference on Private International Law, Paper prepared for the Commonwealth Secretariat by Hans van Loon, Secretary General of the Hague Conference, SOLM (04) 12.

http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/27079329-7580-40F7-A3F1-80C19F37ED9D_solmdoc4.pdf,

OTHER PUBLICATIONS

Agreed Memorandum on the Commonwealth Secretariat (1965) Cmnd. 2713.

International Law Association London Conference, Committee on International Civil and Commercial Litigation, *Third Interim Report: Declining and Referring Jurisdiction in International Litigation* (2000).

Law Commission No 193 and Scottish Law Commission No 129 (1990), *Choice of Law in Tort and Delict* (London: HMSO).

Law Commission Working Paper 87 (1984), *Choice of Law in Tort and Delict* (London: HMSO).

Special Public Bill Committee Report (1994-95), *Private International Law (Miscellaneous Provisions) Bill*, HL Paper 36, Session 1994-95.

Report of the Advisory Committee to the Constitutional Commission on the Australian Judicial System, (1987).