INTERNATIONALISM IN AUSTRALIAN PRIVATE INTERNATIONAL LAW

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The aim of this article[1] is to discuss themes of internationalism in Australian Private International Law. Before doing so, however, it is necessary to say something about the meaning of internationalism as employed herein.

1. The Nature of Internationalism

(a) Meanings

Internationalism is defined in the Shorter English Dictionary as "international character or spirit; the principle of community of interests or action between different nations". It may be a term of derision to a people or regime intent on espousing national or racial superiority, but it is generally regarded as a fine concept which evokes the highest ideals of an integrated world. Internationalism suggests harmony attained by mutual recognition as opposed to diversity and isolationalism founded on parochial attitudes. So far, well and good. Internationalism seems desirable in much the same way as understanding or friendship. But what is its precise legal significance? To a lawyer trained in the interpretation of legislation and drafting of documents, internationalism may appear a loose, vague, and I am tempted to say, "woolly" term. This paper considers internationalism in the context of Private International Law and it is necessary to be clearer as to its import in that area. I suggest that internationalism can be considered on at least four levels. These are what I term the international law theory of conflicts; the unification or harmonization of conflictual rules; the development of broad non-parochial conflictual rules and the practice of non-discrimination in laws. I shall now consider each of these in turn.

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(i) International law theory of conflicts

At its highest level, internationalism could be taken to denote the source of rules on Private International Law. There have been some writers who have maintained that Private International Law is in truth a branch of international law and is not merely a subject of municipal law. Professor Wortley pointed out that prior to Bentham the term "Law of Nations" comprised both Public International Law and Private International Law. He further observes that many rules that are common to Public and Private International Law stem from late Roman law and its medieval and post-medieval developments in Italy, France and Holland.[2] Indeed the early Italian and French writers on Private International Law who founded the theory of statutory intent were active prior to the formulation of the theory of territorial sovereignty. They sought to extract the relevant principles from the rules of Roman law which was regarded as a common or universal law. Even after the development of nation states and the acceptance of the doctrine of territorial sovereignty, an international school developed primarily in Germany in the 19th century. Von Bar asserted that Private International Law is "an independent department of law . . . not merely a part of the domestic law of each state".[3] Ernst Zitelmann maintained that Private International Law constituted an integral portion of the law of nations while Joseph Jitta of Amsterdam and the great German jurist Carl von Savigny advanced principles of Private International Law not derived from Public International Law but nonetheless principles which they claimed possessed universal validity.

The acceptance of the doctrine of territorial sovereignty first propounded by Bodin in 1576 had a profound effect on Private International Law and eventually led to its fragmentation. Despite the growth of an international school in Germany in the 19th century, it is difficult to take issue with Yntema's conclusion that by 1900 it was generally accepted that conflicts law was local law.[4] Certainly, the English writers espoused this view. They were much influenced by Austin's conception of the law as a command proceeding from a sovereign. On this basis, Public International Law was not truly law but Private International Law was law properly so called because it was articulated and enforced by the English courts. These views were accepted by the greatest of the English writers, Dicey, in the first edition of his *Conflict of Laws.*[5] Likewise another early English writer, and perhaps the most internationally minded, was forced to concede "the place of Private International Law is in the division of national law".[6] At the end of his work he lamented the lack

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[2] Wortley "The Interaction of Public and Private International Law Today" 85 *Recueil Des Cours* 1954 I at pp. 246-47.

[3] Von Bar as quoted by Beale, *A Treatise on the Conflict of Laws*, volume 3 at p. 1952.

[4] Yntema "The Historic Bases of Private International Law" (1953) 2 *Am.J. of Comp.L.* 297 at 312.

[5] Dicey, *A Digest of the Law of England with reference to the Conflict of Laws* 1896 at p. 14.

[6] Westlake, *A Treatise on Private International Law* (1880 edition) at p. 4.

of international agreement on the subject which he regarded as "a mischief to commence and to all other social international relations". The modern writers too, proclaim that Private International Law forms part of municipal law. Thus in the current edition of Cheshire and North's *Private International Law* it is stated "there are as many systems of Private International Law as there are systems of municipal law".[7]

Some scholars have sought to examine again the relationship between Public International Law and Private International Law. In his 1962 Hague Academy lectures on "The Relations between International Law and Conflict Law" Professor Edvard Hambro of Oslo makes the initial point that two important organizations consider Public International Law and Private International Law related. These are the Institut de Droit International and the International Law Association.[8] He then proceeds to examine the sources of Public International Law and Private International Law. There are treaties on Private International Law and this source ipso facto constitutes a part of Public International Law as well as Private International Law. Then he examines customary law including decisions of the Permanent Court of International Justice and its successor The International Court of Justice as well as decisions of Mixed Arbitral Tribunals which have raised questions of Private International Law. His conclusion is as follows:

> I believe that two conclusions can be drawn. The first is that the categorical statement of the P.C.I.J. to the effect that all contracts, which are not contracts between States must be subject to a national system of law is not tenable. It is perfectly possible that a contract between a State and an individual, between a State and an international organization, between two States, between two international organizations can be subject to public international law. It is also perfectly possible that the two parties can agree to be bound by general principles of conflict law or by generally admitted principles of substantive law in any special field. The material in this special respect is so abundant that there is no room for doubt.
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> The second conclusion which can be drawn is that all these tribunals try in one way or another to apply general principles of conflict law. There is, thus, a trend to recognize the existence of such general principles. There are probably very few of them.[9]

After examining certain generally accepted rules of Private International Law which he identifies as, inter alia, *locus regit actum, lex rei sitae* and autonomy of parties, he ends his lectures with a prediction that

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[7] Cheshire and North's *Private International Law* (11th edition 1987) at p. 12. See also Wolff, *Private International Law* (2nd edition 1950) p. 12; Schmitthoff, *The English Conflict of Laws* (3rd edition 1954) at p. 4.

[8] Hambro, "The Relations Between International Law and Conflict Law", 105 *Recueil Des Cours* 1962 I at pp. 7-8.

[9] Id. at pp. 45-46.

"modern doctrine is about to evolve an international conception of conflict law"[10] and concludes with a quotation from Sir Gerald Fitzmaurice who says:

> In the manner outlined above, it is possible to regard, and so to speak, account for, the whole of the rules of private international law as a reflection, or part application, of the public international law principle of the minimum standard of justice in the treatment of foreigners and of private foreign rights and interests; so that, if, in relation to this matter, public international law appears to retreat from the international scene, it nevertheless remains as an underlying regulative force. It may leave the stage, but goes no further than the wings. Yet—and here is the paradox—although the rules of private international law—that is to say the conflict rules of each State—discharge for that State an international duty, these rules have nevertheless undoubtedly been evolved by States, not specifically with a view to, or in the performance of, any international duty as such, but in their own national interest.[11]

The words of Sir Gerald Fitzmaurice are echoed in The Hague Academy Lectures of Dr F. A. Mann.[12] Referring to legislative jurisdiction he remarks that there is no room for distinguishing between criminal, public and private laws. Further the argument that there are no rules of international law limiting the legislative jurisdiction of states in questions of private law is untenable.[13] Examining the question of legislative jurisdiction, Dr Mann is of the view that it depends on contacts with the subject of the legislation and not on the interest of the forum in regulating the matter. Concerning the relationship between Public International Law and Private International Law he concedes that Public International Law is not normally the source of Private International Law but he goes on to say;

> However this may be, by its adoption of the test of closeness of contact public international law limits the reach of legislative jurisdiction and imposes a duty of making a choice. Public international law, therefore, does not prescribe the application of either the law of the nationality or of the law of domicile to questions of personal status. But it would not permit the law of the forum as the solely applicable law. (This, incidentally, is the reason why it is so misleading to say (as many courts have done, particularly in the United States) that foreign law has no extraterritorial effect or is being applied by the forum only by comity. As so often, comity

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[10] Id. at p. 65.

[11] Fitzmaurice "The General Precepts of International Law Considered from the Standpoint of the Rule of Law". 92 *Recueil Des Cours* 1957 II at pp. 221-222.

[12] F. A. Mann, "The Doctrine of International Jurisdiction Revisited After Twenty Years" 186 *Recueil Des Cours* 1984 III.

[13] Id. at p. 21.

> may in truth mean public international law, but if it does not have this meaning the dictum is wrong, for it would involve the conclusion that the forum would be entitled to apply its own law to all foreign facts,—a conclusion which in truth is wholly devoid of support.) Nor would public international law permit the application of any arbitarily selected system of law. Rather it requires a choice between two systems each of which may claim to be closely connected with the issue at hand. Public international law, therefore, has a limiting function in its relation to private international law.[14]

Thus Mann argues that Private International Law requires a state to have rules of choice of law and, moreover, to have rules which lead to the selection of a closely connected legal system.

In his 1954 Hague Academy Lectures, Professor Wortley examined the interaction of Public and Private International Law.[15] He concedes that Private International Law is now part of national law but notes a reaction against too nationalistic a view of Private International Law. Thus by the use of conventions, comparative studies and so on there has been an attempt to achieve some common ground between the national systems of Private International Law. He then notes that some rules or topics are common to both Public International Law and Private International Law including the questions of sovereign immunity and the recognition of new states. Like Dr Mann, Professor Lowenfeld has directed his attention to the problems of legislative jurisdiction[16] and argues that Public International Law and Private International Law have been too long separated. He argues that the attitude of states in giving effect to foreign private laws but refusing to enforce foreign public laws is indefensible today.

We can conclude the above review by remarking that the weight of opinion is against the view that Private International Law is supranational law. It is generally regarded as a facet of municipal law. However there are a number of qualifications to this proposition. In the first place some topics overlap both subjects and are common to them. We might list sovereign and diplomatic immunity as well as the problem of non-recognition of states. However in relation to the latter, it does not follow that the Public and Private International Law approaches coincide. For example it may be the case that a foreign state is denied recognition in the forum but that its laws are given effect under the principles of Private International Law.[17] Secondly, recent commentators have argued

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[14] Id. at pp. 31-32.

[15] Wortley, "The Interaction of Public and Private International Law Today" 85 *Recueil Des Cours* 1954 I.

[16] Lowenfeld, "Public Law in the International Law Arena: Conflict of Laws, International Law, and some suggestions for their interaction" 163 *Recueil Des Cours* 1979 II.

[17] See *Hesperides Hotels Ltd.* v. *Aegean Turkish Holidays Ltd.* [1977] 3 W.L.R. 656 at 665-66. (Court of Appeal). The House of Lords did not consider this point on appeal—[1979] A.C. 508. See also *Adams* v. *Adams* [1971] P. 188.

that the principles of Public International Law require states to have rules on choice of law and do not permit a state to apply its own laws to all transactions, particularly those unconnected with the forum state. Consequently while the principles of Private International Law may not derive from Public International Law the latter demands their very existence as part of municipal law. Thirdly, there may be considerable identity between states on the rules, or some of the rules, of Private International Law as administered in those states. Of course, this principle applies *a fortiori* where a state is a party to a convention on Private International Law. In this case the relevant Private International Law rule has a Public International Law aspect.

(ii) The unification or harmonization of conflictual rules.

At its next level, internationalism can be taken to denote the unification or harmonization of conflictual rules. On this view the municipal nature of Private International Law is accepted, but considerations of convenience and justice are taken to require that there be considerable similarity or identity between the national rules of Private International Law. Such harmonization can be achieved in several ways including the enactment of uniform legislation, particularly international conventions (which of course stamp the rules with an international rather than municipal character) and by the sharing of a common doctrine as a result of the acceptance of the same theories or approaches. In his 1954 Hague Academy lectures Professor Wortley noted a recent reaction against a rigid nationalist view of Private International Law and remarked "even if different national courts still enforce mutually conflicting rules about jurisdiction and the choice of law, the tendency will be for those conflicts between the systems of conflicts of laws to be ironed out by the rationalizing influence of truly international action by conferences, studies and co-operation".[18] Forty years before Thomas Baty in his lectures on Polarized Law treated Private International Law as a branch of English law but considered there was a need for unification of rules of Private International Law to meet the demands of increasing contacts among people of all nations.[19]

Uniformity is most readily attained through the formulation of international conventions. In this regard the Hague Conference on Private International Law, a permanent inter-governmental organization, has played a leading role. The Conference has been active since 1893 and has concluded numerous conventions in the field of Private International Law. On a regional level, mention must also be made of the member states of the European Economic Community which have formulated two conventions of significance. The first is the Convention on Jurisdiction

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[18] Wortley, op. cited at p. 257.

[19] See the discussion of this point by Graveson "Philosophical aspects of the English conflict of laws" 1962 78 *L.Q.R.* 337 at 345-46.

and the Enforcement of Judgments in Civil and Commercial Matters 1968 and the second is the Convention on the Law Applicable to Contractual Obligations of 1980.

The comparative method offers another vehicle for the harmonization of national conflicts rules. Beale expressed the view that comparative study of the national rules of Private International Law was an essential pre-requisite to the conclusion of international agreements seeking to unify the law.[20] The great jurist Ernst Rabel foresaw the need to turn choice of law rules from provincial to world-wide thinking utilizing the comparative method.[21] Other writers have also sought to advance the comparative method as a means of achieving a degree of harmonization amongst national rules of Private International Law. The work by Kuhn entitled *Comparative Commentaries on Private International Law or Conflict of Laws* (1937) was written with the avowed purpose of trying to keep American law internationalist in spirit following the promulgation of the first Restatement of the Law of Conflict of Laws by the American Law Institute in 1934.

It should not be forgotten that the classic common law writers on Private International Law referred to developments in foreign countries and frequently quoted from the works of foreign jurists. The late Professor Kahn-Freund, in his lectures on "The growth of Internationalism in English Private International Law"[22] observed that Contintental legal thought penetrated English law partly through the direct influence of authors and partially through intellectually open minded judges in the early formative cases on choice of law.[23] Story, who wrote the first great common law treatise, cited numerous Continental authors in his book. He could have hardly done otherwise because there was a dearth of Anglo-American writings for him to rely upon.[24] The great English writer A. V. Dicey also cited many foreign jurists, including Continental jurists, but particularly relied on Story's treatise.[25] So too the other great classic English

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[20] Beale op. cited vol. 3 at p. 1922.

[21] Rabel, The Conflict of Laws (2nd edition 1958) vol. 1 at p. 105.

[22] The lectures were published in 1960 by the Magnes Press, Jerusalem. In preparing this paper I have found Professor Kahn-Freund's lectures particularly valuable and I acknowledge my debt to him.

[23] Kahn-Freund at p. 9.

[24] The list of authors listed by Story are:
D'Aguesseau, Henry Francis; Alexander AB Alexandro; D'Argentré, Bernard; Baldus, Ubaldus; Bartolo, or Bartholus; Bouhier, J.; Boullenois, Louis; Bretonnier, Bartholemew Joseph; Burgundus, Burgundius, or Bourgoigne, Nicolaus; Bynkershoek, Cornelius van; Casagegis, Joseph Laurentitus; Christinaeus, Paulus; Cochin, Henry; Coquille, Gui; Cujas, James; Denisart, J. B.; Domat, John; Dumoulin, Charles; Duranton, A.; Emérigon, Baltazard Marie; Erskine, John; Everhard, Nicholas; Froland, Louis; Gaill, Andrew; Grotius, Hugo; Heineccius, Johannes Nicolaus; Huberus, Ulricus; Kaims, Lord, (Henry Home); LeBrun, Denis; Livermore, Samuel; Mascardus, Josephus; Merlin, M. (de Douai); Mornac, Antoine; Pardessus, J. M.; Pothier, Robert Joseph; Peck, Peter; Puffendorf, Samuel; Rodemburg; Stockmans, Peter; Strykius, Samuel; Voet, Paul; Voet, John.

[25] The authorities cited by Dicey in his first edition are:
Arnould; Austin; Bar; Bell; Bishop; Blackstone; Browne; Bullen & Leake; Carver; Chalmers; Clode; Cockburn; Code Civil; Codice Civile Del Regno D'Italia; Coke; Cooley; Cruise; Dicey; Dowell; Duer; Fiore; Foote; Fraser; Freeman; Freeth; Goudy; Hall; Hanson; Holland; Jacobs; Kent; Leake; Lewin; Lindley;

writer, Westlake looked to foreign authorities but unlike Dicey, Westlake, was more attracted to European jurisprudence than to American writings and he frequently referred to European laws at some length.[26] Professor Kahn-Freund has explained that the early English borrowing from abroad occurred because Private International Law developed late in England. When problems first began to appear there was little in English jurisprudence to guide the courts and the most obvious solution was to borrow.[27] This cross-fertilization of ideas was not all one way. Dicey's first edition was intended for use in the United States of America as well as in England and Story's great treatise was referred to on the Continent. The French writer Foelix cited Story with approval as did Schäeffner in Germany.

The point is that there was an interchange of ideas between countries, an examination of developments and approaches to problems of Private International Law that transcended national boundaries. It may be true to conclude, as Graveson has,[28] that this interchange of ideas tended to develop more vigorously between the common law countries themselves, but it cannot be denied that at the early formative period, the common law writers referred to the works of civilian jurists. In more modern times, the comparativists, particularly Rabel, have urged a study of foreign legal systems with a view to achieving harmonization.

(iii) The development of broad, non-parochial conflictual rules.

At its third level, the concept of internationalism can be taken to denote the development of broad, non-parochial conflictual rules; rules which are generous in giving effect to foreign laws and institutions and in conceding validity to foreign judgments and decrees. Thus, even if we concede that Private International Law is municipal law and if we recognize that national conflictual rules do vary, the very fact of giving effect to foreign laws and judgments in particular situations demonstrates a spirit of internationalism. On this level the subject itself is necessarily internationalist because it concedes effect to foreign laws and judgments, but the broader the rules the more internationalist they will be and, conversely, the narrower the rules (or subject to qualifications and exceptions) then the less internationalist in character. In his Lionel Cohen lectures, Professor Kahn-Freund spoke of "internationalism" as "a policy of the law so to shape itself to fit into an internationally workable system. One aspect of this is the willingness to apply foreign substantive law

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[25] *continued*
Lowndes; Mackay; Maclachlan; McLaren; Mayne; Nelson; Norman; Paterson; Phillimore; Piggott; Pollock; Report of Royal Commission on the Laws of Marriage (1868); Roscoe; Savigny; Smith; Spence; Stephen; Story; Sugden; Tristam & Coote; Vattel; Walker & Elgood; Westlake; Wharton; White & Tudor; Wilberforce; Williams R.V.; Williams E.V.; Williams J.; Williams & Bruce; Woolsey.

[26] See e.g. Westlake *A Treatise on Private International Law* (1880 edition) at p. 24. Note also Westlake's comments in his Preface at p. vi.

[27] Kahn-Freund at p. 11.

[28] Graveson 78 *L.Q.R.* 337 at 367-68.

and to recognize foreign judicial acts".[29] Referring to English Private International Law, he discerned "a nationalist tendency in the reluctance to apply foreign substantive law, and an internationalist tendency in the readiness to recognize and to enforce foreign judgments".[30] Sometimes the word "comity" is employed in Private International Law in this sense. As Professor Graveson has remarked, comity may refer to "general standards of international courtesy, co-operation and the recognition of both public and private acts in the law".[31] It is not only in the width of the choice of law rules or the generousness of the recognition of judgments rules that we may evaluate internationalism in this sense. The attitude of the courts of the forum in dealing with foreign legal institutions that have no counterparts in the domestic law of the forum is often an interesting test of this attitude. The English courts faced this question in *National Bank of Greece and Athens* v. *Metliss*[32] and *Adams* v. *National Bank of Greece*[33] where they were presented with a foreign system of universal succession that had no domestic equivalent. So too in *Phrantzes* v. *Argenti*[34] an English court had to consider a claim for a dowry, founded on foreign law, which was unknown to English law. More usually, however, the spirit of internationalism is tested simply by examining the forum's choice of law rules and its rules on the recognition and enforcement of foreign judgments and decrees. As far as choice of law rules are concerned, the inquiry focuses on the nature of those rules and the exceptions to the application of foreign law, particularly the doctrine of public policy. The Anglo-Australian approach is to narrowly confine the scope of public policy and is therefore internationalist because it keeps within a narrow compass the rule which prevents the recognition and enforcement of foreign laws.[35] Also in relation to choice of law a question of equality of foreign laws is relevant. The 19th century writers sometimes spoke in terms of only giving effect to the laws and judgments of "civilized countries".[36] Thus general principal No. 1 of Dicey's book declared that "any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English courts . . ." Dicey defines civilized country as including any of the Christian states of Europe, and certain colonies of such states. He declared that England, France, Mexico, the United States and British India, insofar as governed by British law, were civilized countries but that Turkey and China were not. This attitude is decidedly anti-internationalist in spirit. More recently the theories propounded by Albert Ehrenzweig and Brainerd Currie in

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[29] Kahn-Freund at p. 12.

[30] Kahn-Freund at p. 13.

[31] Graveson 78 *L.Q.R.* 337 at 364.

[32] [1958] A.C. 509.

[33] [1961] A.C. 255.

[34] [1960] 2 Q.B. 19.

[35] Graveson 78 *L.Q.R.* 337 at 366.

[36] Graveson "The inequality of the applicable law" (1980) 51 *B.Y.B.I.L.* 231 at 232.

the United States which place a great emphasis on the *lex fori* are not internationalist in spirit because they accord sparing recognition to foreign laws.

(iv) The practice of non-discrimination under domestic laws.

At its lowest level, internationalism denotes non-discrimination against foreigners under the laws of forum. This strictly speaking may not be a matter of Private International Law because it contemplates a situation where foreign law is not applied and where the court proceeds in accordance with local law. However, insofar as the local law discriminates against foreigners, it may be regarded as anti-internationalist and insofar as it places foreigners on an equal footing with local nationals, it can be regarded as internationalist. The Anglo-Australian rules on adjucatory jurisdiction can be regarded as internationalist in this sense. The nationality of the plaintiff is irrelevant and a foreign citizen is in the same position as a local national when it comes to instituting proceedings in the courts.[37] By contrast, in the French courts a French citizen enjoys a great advantage over foreign citizens by virtue of Article 14 of the Code Napoleon. Kahn-Freund cites as another instance of internationalism the change in the English adoption laws after the war. The Adoption of Children Act 1949 (U.K.) for the first time enabled the adoption of children resident in England or Wales irrespective of whether they were British subjects or not.[38] Likewise in the administration of estates, it is established in Anglo-Australian law that foreign creditors can lodge proof of their debts. The nationality of a creditor is not relevant and local creditors are not preferred to foreign creditors.[39] These are all examples of equality of treatment of foreigners and local persons under domestic laws.

(b) Countervailing Considerations

Of course the spirit of internationalism is not the only force in Private International Law and there are countervailing considerations. It is necessary to have some awareness of them before we proceed. The first matter to note is that there may sometimes be a conflict between international considerations. Take for example the case of a man and woman, H and W, who contract a marriage in state X. H is a citizen of that state and is domiciled there while W is a citizen and domiciliary of state Y. The marriage is valid by the law of state X and not by the law of state Y. At first sight it might appear obvious that the spirit of internationalism requires a court in Australia to recognize the marriage. The

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[37] An exception exists in wartime where enemy aliens are denied the right to institute proceedings. However the status is determined not by nationality but by residence in or carrying on business in enemy occupied territory. See *Porter* v. *Freudenberg* [1915] 1 K.B. 857 at 869.

[38] Kahn-Freund at p. 67.

[39] *Re Kloebe* (1884) 28 Ch.D. 175.

marriage is valid by the laws of the state in which it was celebrated and by the laws of the state of one of the parties. Moreover the recognition of the marriage means that it avoids a limping marriage situation. But why should Australia disregard the laws of the state of Y, the state of citizenship and of domicile of one of the parties? Doesn't internationalism require deference to the laws of that state as well? It might be thought that the laws of the state of X have a greater claim to application because that is the state where the marriage was celebrated and where one of the parties is domiciled and a national thereof. However let us change the facts slightly. Assume that the marriage is not valid by the laws of state X but is valid by the laws of state Y. Here the place of celebration of the marriage and the personal law of one of the parties does not regard the union as valid but the personal law of the other party does. In these circumstances should the marriage be recognized in order to prevent a limping marriage and to give effect to the laws of state Y, or should the invalidity of the marriage be conceded under the laws of state X?

Leaving aside these interesting and complex questions of what the spirit of internationalism may require in a particular case, let us consider some of the matters which may work against a spirit of internationalism. The most noteworthy and endemic is a natural tendency on the part of judges and lawyers to prefer their own laws and legal institutions to those of foreign countries. This parochial or nationalist attitude is sometimes referred to as the homeward bound trend of judges. It is well described by Kahn-Freund:

> All over the world, judges are inclined to apply their own law whenever they can, and this *favour legis fori* will always stand in the way of international harmony or uniformity and will therefore be obnoxious to an academic layer's desperate sense of tidiness. But it is inevitable and to seek to combat it is quixotic. The tendency can be stronger or weaker, in accordance with historic circumstances, the judge's intellectual training and environment, the atmosphere of the age, and it can seek realization through any number of technical devices: the principle of *ordre public*, the classification of issues as procedural or jurisdictional, the acceptance of renvoi, the rules about allegation and proof of foreign law,—the list is not exhaustive. If you compare the practice of, say, the French with that of the English courts you can see that such though processes as applying *ordre public* and procedural classification are sometimes almost interchangeable as means to an end, alternative routes to the destination of the *lex fori*.[40]

Through the devices enumerated by Kahn-Freund, a judge may justify applying the *lex fori* in the place of foreign law. Some of these

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[40] Kahn-Freund at p. 13.

devices are institutional and rigid and, once the necessary classification is made, necessarily lead to the application of the *lex fori*. Instances include matters of procedure and jurisdiction. In other instances the *lex fori* may be applied as a result of a judicial discretion or determination which may or may not result in application of the local law. Thus, for example, under a choice of law rule which may or may not result in application of the *lex fori*, a judge may conclude that the case is in fact governed by the local law. For example, the Anglo-Australian rule is that a contract is governed by the legal system most closely connected with the contract, absent a choice of law by the parties. In evaluating all the facts and circumstances the judge may conclude that the most closely connected legal system is the *lex fori*.

The national or parochial inclination of judges is not the only factor which may result in application of the *lex fori*. There are a number of legitimate and more significant domestic principles which may conflict with the spirit of internationalism. We can identify several of them. One, pointed out by Kahn-Freund, is the struggle between the spirit of internationalism and the welfare principle in cases concerning the guardianship and custody of children. Here, the over-riding principle of the welfare of a child is often considered the first and paramount consideration which over-rides international factors such as the recognition of foreign guardianship and custody orders.[41] Another principle is that of justice. The forum will not give effect to a foreign law, decree or status which it regards as immoral. Thus from the 18th century the English courts refused to recognize the status of slavery.[42] As Graveson notes[43] the English judges have been so concerned with the protection of liberty that they have sometimes refused to recognize foreign statuses imposing limitations on people in circumstances that are hard to justify.[44]

Another consideration which has been thought to prevail over internationalism is that of freedom of contract. The Anglo-Australian courts have permitted the parties to select the proper law of a contract and thereby to avoid the law of a state which might otherwise be applicable.[45] On the other hand, it can be argued that certainty in international commercial transactions is important and that the only way to achieve certainty as to the governing law is to permit the parties to choose it. On this view a choice of law rule which permits party autonomy is internationalist in that it fosters international transactions.

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[41] Kahn-Freund at p. 25.

[42] See *Somerset* v. *Stewart* [1772] Lofft.1.

[43] Graveson (1962) 78 *L.Q.R.* 337 at 356.

[44] See *Worms* v. *De Valdor* (1880) 49 L.J.Cth. 261; *Re Selot's Trust* [1902] 1 Ch.488 where the French status of a prodigal was denied recognition. See also *Re Langley's Settlement Trusts* [1962] Ch. 561 (C.A.) where the Californian status of a "incompetent" was refused recognition.

[45] See Kahn-Freund p. 39 and Graveson (1962) 78 *L.Q.R.* 337 at 356.

2. The English Heritage

European settlement in Australia was essentially a 19th century phenomenon though the earliest settlements date from the late 18th century. Various colonies were established in Australia and English law was applied in these jurisdictions, both common law and certain Imperial legislation. In due course legislatures were established in all the colonies but the influence of English law remained great. In 1901 the Australian colonies federated under a formal and rigid constitution which was enacted by the United Kingdom parliament. The new federal legislature was given defined and enumerated powers while the residue remained with the legislatures of the colonies which henceforth were known as states. In form, therefore, the Australian constitution resembled that of the United States with the major difference being the adoption of the system of responsible government (the Westminster system) in preference to the American Presidential system.

The influence of English law remained all-pervasive in Australia both before and after federation. Not only were English cases authoritative in Australia, but much Australian legislation was based on British counterparts. Indeed the United Kingdom parliament retained legislative competence for Australia after the establishment of local legislatures in Australia and even after federation. Some power was withdrawn in 1942 after the adoption of the Statute of Westminster, but the last vestiges were only taken away in 1986 with the simultaneous enactment of the Australia Act by the Imperial, Federal and State legislatures.

Perhaps in no subject did the Australian rules more closely correspond to the English rules than in Private International Law. Until recently, the only point of departure was the existence in Australia of certain special provisions to deal with problems of conflict of laws between the Australian states. Thus section 118 of the Australian Constitution provides that "full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State". This is directly based on Article IV, section 1 of the United States Constitution. This constitutional "full faith and credit" provision is complemented by section 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth.) which provides that "all public Acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken." This federal legislation was enacted under section 51(xxv) of the Constitution which empowers the Commonwealth Parliament to make laws with respect to "the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States". The proceeding provision, section 51 (xxiv), empowers the Commonwealth Parliament to make laws with regard to "the service and execution throughout the Commonwealth of the civil and criminal

process and the judgments of the courts of the States". In reliance upon this power, the federal legislature enacted the Service and Execution of Process Act 1901 (Cth.) which deals with the service of process of the courts of the states and territories and the execution of their judgments in other states and territories of the federation. This legislation has had a profound effect on the rules relating to jurisdiction and enforcement of judgments within the federation. However, in relation to choice of law, the courts have generally applied the traditional English private international law rules to interstate conflicts as well as international conflicts. They have rarely referred to the full faith and credit provisions and have not employed them to create a distinctive body of rules for interstate questions of choice of law.[46]

The adoption of English principles in Australia means that until recently any analysis of internationalism in Australian Private International Law was hardly distinguishable from a similar analysis of the English rules. This has been done by others, notably Professor Kahn-Freund and it will suffice here to summarize some of the conclusions.

We need not be concerned about internationalism in the first sense because the common law writers took the view that Private International Law was a branch of local law. Likewise, there is not a great deal to be said about internationalism in the second sense as denoting the unification or harmonization of conflictual rules. As a substantial body of case law developed in England and Australia, the common law courts looked less and less to foreign sources and the common law principles of Private International Law tended to increasingly diverge from those applied in the civil law countries. Thus, for example, the common law countries retained domicile, which was originally a Roman law concept, as the personal connecting factor even though a number of civil law countries adopted nationality. The separate development of Private International Law in England and Australia from that in civil law countries meant that there was little harmonization or unification between the two. Not even the large number of civilian jurists who fled to England and the United States during the Nazi era and who made such an outstanding contribution to legal thought in their adopted countries were able to arrest this trend.[47] It may be, however, that they were influential in modifying entrenched attitudes and in thus preparing the ground for British and American participation in the Hague Conference.

While the common law rules diverged from those of the civil law, as between the common law countries themselves there was substantial harmonization. The principles as applied in England and the other British common law countries were similar to those administered in the United

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[46] For an analysis of the interstate situation in Australia see Pryles "Interstate Conflict of Laws in Australia" (1979) 43 *Rabels Zeitschrift* 708.

[47] The list of European private international lawyers who fled to Britain and the United States is long and impressive. It includes: Ehrenzweig, Kuhn, Kahn-Freund, Lipstein, Mann, Nadelmann, Rabel, Reinstein, Schmithoff, Wolff and Yntema.

States though they were not identical. Within the British common law countries themselves (England, Australian, New Zealand, Canada) the principles were virtually identical. Not only were the English decisions followed in these other jurisdictions, but United Kingdom legislation (which was relatively rare in the area of private international law) was also copied. Thus the increasing divergence between the common law and the civil law countries was matched at the same time by considerable similarity and, in many cases, identity of the rules applied in the various common law jurisdictions.

It is interesting to observe that the British common law jurisdictions whose laws were virtually identical relied on English cases and frequently copied British legislation but rarely referred to cases decided in sister jurisdictions. Thus there are relatively few references in the Australian cases to decisions of the Canadian and New Zealand courts. Interestingly enough, though, the American treatise of Story seems to have been relied on in Australia in the early years (particularly prior to the publication of Dicey) in much the same way as it was employed in England. Thus in one of the earliest Australian cases on Private International Law, a colonial era decision of the Supreme Court of New South Wales given in 1849, we find extensive references to Story's book. The case is *Gilchrist* v. *Davidson*.[48] It concerned an action brought by an indorsee of a promissory note against the person who had made it in London. The defence was that the note was insufficiently stamped as required by English legislation and was therefore invalid. Chief Justice Stephen quoted at length from Story, *Conflict of Laws* sections 237-243 and 260-262 to the effect that a contract which was void by the law of the place which it was made was void everywhere and gave judgment for the defendant.

We now pass on to internationalism in the third sense as connoting the development of broad, non-parochial conflicting rules. We can in fact divide the Anglo-Australian rules on Private International Law into three categories. In the first place, there are a number of rules which are clearly internationally spirited. Many of the choice of law rules would be regarded as acceptable from the point of view of internationalism. Thus the rules on assignment of property which largely looked to the *lex situs* are reasonable, do not give an undue preference to the *lex-fori*, and select as the governing law the rules of a state which has a reasonable relationship to the issue. So too the traditional choice of law rule applicable to marriage which refers the formal validity of a marriage to the *lex loci celebrationis* and the essential validity of a marriage to the ante-nuptial laws of domicile of the respective parties are satisfactory from an international viewpoint. They test the validity of a marriage by reference to the laws of states that are reasonably connected to the parties and have an interest in their status. It might be objected that a double choice of law rule for essential validity means that a marriage is less likely

[48] (1849) 1 Legge Rep. 539.

to be recognized than if one law governed the matter, and consequently, the incidence of a limping marriage is correspondingly greater. But there is some authority to the effect that only one law governs at least some aspects of the essential validity of a marriage—the law of the intended matrimonial home. This development was no doubt prompted by the desire to uphold the validity of a marriage and is demonstrated by cases such as *Radwin* v. *Radwin (No. 2)*.[49]

The narrow scope accorded to the public policy doctrine is another instance of internationalism in Anglo-Australian Private International Law. Judges have rarely resorted to that doctrine to override the normal rules of conflict of laws and to deny the application of a foreign law or judgment. Likewise, the English and Australian judges have been prepared to recognize foreign systems of community property which have no counterpart in the domestic law of the forum.[50] But perhaps the outstanding illustration of internationalism in Anglo-Australian Private International Law concerns the rules on foreign judgments. At common law, foreign judgments are recognized without any requirement of reciprocity and a foreign judgment is conclusive as to its merits (in the absence of fraud) so that the reasoning of the foreign court cannot be impugned. This is the case even if the foreign court purported to apply the law of the recognizing forum and did so incorrectly.[51] In relation to matrimonial decrees, the recognition rules were quite limited and originally reflected the narrow bases of jurisdiction claimed by the courts of the forum. But when the legislature intervened to broaden the jurisdiction of English and Australian courts in divorce, the common law courts readily conceded such wider jurisdiction to foreign courts.[52] The spirit of internationalism was particularly evident in decisions whereby English courts decided to recognize divorces effected in accordance with foreign law even though they were actually pronounced in England.[53] These decisions also establish that a foreign non-judicial divorce can be recognized. Again, a spirit of internationalism was displayed because the only mode of divorce available under English and Australian Law is by judicial decree.

Another instance of internationalism concerns polygamous marriages. While, originally, judicial relief would not be granted in respect

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[49] [1973] Fam. 35. The common law principles have now been partially superceded by legislation. See the *Marriage Amendment Act* 1985 giving effect to the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

[50] See Sykes and Pryles *Australian Private International Law* (2nd ed. 1987) ch. 24.

[51] See *Godard* v. *Gray* (1870) L.R. Q.B. 139.

[52] See *Travers* v. *Holley* [1953] P 246 (C.A.). Note however that the Supreme Court of Victoria doubted the correctness of this principle in *Fenton* v. *Fenton* [1957] V.R. 17.

[53] See *Har-Shefi* v. *Har-Shefi* (No. 2) [1953] P.220; *Qureshi* v. *Qureshi* [1972] Fam. 173. This may no longer be the case in England under the Recognition of Divorces and Legal Separations Act 1971 (U.K.). See e.g. *R.* v. *Secretary of State for the Home Department; Ex parte Fatima* [1984] 2 All E.R. 458 (C.A.). However it is still the position in Australia. See Sykes & Pryles, *Australian Private International Law* at p. 436.

of such unions they were recognized for other purposes such as rights of succession.[54]

A second category consists of rules which may be described as parochial and contrary to the spirit of internationalism. As Professor Kahn-Freund observes, the narrow common law concept of public policy as opposed to the broad French principle of *ordre-public* is counterbalanced by the much broader common law characterization of procedural matters. Of course matters of procedure are governed by the law of the forum and the broader the category of procedure then the greater the scope of the *lex fori* and the more diminished will be the role of foreign law. Kahn-Freund also refers to the tort choice of law rule as parochial. The first rule in *Phillips* v. *Eyre*[55] provides that damages cannot be recovered in respect of a foreign tort unless it is actionable by the *lex fori*. Though the rule in *Phillips* v. *Eyre* also refers to the *lex loci delicti*, the Australian courts have given primacy to the *lex fori*. This is a particularly parochial choice of law rule and its persistence in Anglo-Australian law has been cogently critized by the text writers. Kahn-Freund also refers to the common law rules for ascertaining the domicile of a person. The principle of revival of domicile of origin is insular and frequently led to English law being applied. This has now been overturned by legislation. Bentwich[56] refers to the peculiar kind of domicile which arose from the presence of British subjects in India and in Oriental countries. These domiciles known as Anglo-Indian domiciles were attached to British subjects who lived permanently in India and were used to justify the application of English law. They have now disappeared. Kahn-Freund further refers to the principle that an English judge will not and cannot consider the application of foreign law *ex officio* and that foreign law must be pleaded and proved by the party relying upon it. While this can be construed as an insular and anti-internationalistic rule, it can be justified on practical grounds.

Of great consequence, too, has been the English tendency to see certain conflictual problems in jurisdictional rather than choice of law terms. Indeed Kahn-Freund describes the merger of choice of law questions in problems of jurisdiction as "the most outstanding characteristic of English private international law."[57] As he notes in many areas of family law the court applies the *lex fori* and will not consider the application of foreign law (examples include divorce and maintenance). In essence the relevant connecting factor is contained in the jurisdictional rule and not in the choice of law rule. He regards the underlying assumption, that

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[54] *Bamgbose* v. *Daniel* [1955] A.C. 107; *Coleman* v. *Shang* [1961] A.C. 481 (P.C.). See generally Sykes & Pryles pp. 377-80.

[55] (1870) L.R. 6 Q.B. 1.

[56] Bentwich "Recent Developments of the Principle of Domicile in English Law" 87 *Recueil des cours* 1959 I at p. 129.

[57] Kahn-Freund at p. 15.

if foreign law is applicable the suit has to be brought elsewhere, as entailing the very denial of private international law.

The former rule about staying actions was also parochial. Until recently the Anglo-Australian courts were extremely reluctant to withhold the exercise of their jurisdiction even if the case had little or no connection with the forum and even if jurisdiction was fortiously assumed by service of a writ on a transient visitor or vessel.

A third category of rules consists of principles which are not necessarily international in character and may be based on domestic considerations. However these domestic considerations represent important local policies and are not merely instances of parochial or homeward bound attitudes. The outstanding example concerns children where it is accepted that foreign judicial orders relating to the custody and guardianship of children are generally subject to the welfare principle which may induce a court to disregard a foreign order. Kahn-Freund also refers to contracts where the principle of party autonomy is accepted. This may be viewed as an instance of the principle of freedom of contract being regarded as paramount even though the law of another state may have a great claim to regulate the contract. On the other hand, the principle of party autonomy is internationalistic in the sense that it furthers and encourages international transactions by enabling the parties to be certain as to the law governing their agreement. Further the principle of party autonomy has been tempered by the rule that an English/Australian court will not enforce a contract, valid by its proper law, if it contemplates the doing of an act that is illegal under the laws of the place where it is to be performed.[58]

The conclusion which emerges is that the traditional Anglo-Australian system of Private International Law possesses a good measure of internationalism interspersed with some pockets of parochialism and some rules which, while not perhaps internationally minded, are based on sound principles of domestic law.

Finally we come to internationalism in the fourth sense, meaning the practice of non-discrimination under domestic laws. In this sense it is fair to say that the Anglo-Australian rules are internationalist. Where the *lex fori* applies there is rarely discrimination against persons domiciled or resident in, or citizens of, a foreign state. Thus in relation to access to the courts, it is established that a plaintiff can institute an action *in personam* irrespective of his nationality, domicile or residence. So too in the administration of an estate on death or bankruptcy, the *lex fori* will govern but foreign creditors are permitted to lodge proof of their debts as well as domestic creditors.[59] Likewise, there is no rule that local creditors are to be paid in priority to foreign creditors.

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[58] *Ralli Bros.* v. *Compania Naviera Sota Y Aznar* [1920] 2 K.B. 287. C.f. *Regazzoni* v. *K. C. Sethia* (1944) Ltd [1958] A.C. 301.

[59] See *Re Kloeve* (1884) 28 Ch.D. 175.

3. The Modern Era

I should perhaps begin by explaining what I mean by the modern era. It certainly refers to the period after the second world war and I will primarily be concerned with developments which have occurred since 1970. There is no special significance in the selection of that date and it is a little arbitrary. Some of the matters I will be referring to predate that year, but the majority of them belong to the last decade and a half.

Two significant developments have occurred in Australian Private International Law in the modern era. The first is the divergence of the rules as applied in Australia for those as administered in England. This is not to say that the Australian rules are now wholly different to the English rules. There is still much similarity. However there has been a parting of the ways in several important areas, and there are now significant differences between the Australian rules and the English rules. This has been caused by three factors. In the first place, legislation has been enacted in Australia which is of significance to Private International Law and which is not directly based on English counterparts. Some of the legislation is federal (enacted by the parliament of the Commonwealth of Australia) and some is regional (enacted by the legislatures of the component states and territories of Australia). I might cite as examples the Family Law Act 1975 (Cth.) which inter alia defines the jurisdiction of the family court of Australia in matrimonial causes, and codifies the rules on the recognition of foreign divorces and annulments; the Marriage Act 1961 (Cth.) which, as a result of important amendments in 1985, deals with the validity of local and foreign marriages; the Domicile Act which is uniform legislation which has been enacted by the Commonwealth and the constituent states; and the Foreign Judgments Act 1971 of South Australia which is unique and which, unlike the legislation of the other states, is not based on an English precedent.

A second reason for the divergence between the Australian and English rules is a subtle but nevertheless perceptible difference in judicial attitudes which has meant that common law rules on Private International Law are not necessarily identical in the two countries. The difference does not lie in the formulation of the rules themselves but rather in their interpretation and application. Thus in relation to the tort rule enunciated in *Phillips* v. *Eyre*,[60] there is a substantial body of judicial opinion which holds that the rule is jurisdictional in nature, an interpretation not accepted in England. So too, in relation to particular tortious issues such as wrongful death and inter-spousal liability and in relation to issues that fall within a rather hazy area between torts and quasi-contracts, there is a large and impressive body of Australian authority which is in advance of developments in England.[61]

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[60] (1870) L.R. 6 Q.B. 1.

[61] See Sykes and Pryles *Australian Private International Law* pp. 519-528.

A third reason for the divergence between Australian and English Private International Law is the enactment in the United Kingdom of legislation which has not been adopted in Australia. The most important legislation in this regard gives effect to international obligations of the United Kingdom within the context of the European Economic Community. It is the Civil Jurisdiction and Judgments Act 1982 (U.K.) which implements the E.E.C. Convention of September 27, 1986 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Further, the United Kingdom's accession to the E.E.C. Convention of 19 June 1980 on the Law Applicable to Contractual Obligations will result in legislation which will change the English rules on choice of law in contracts.

I mentioned that there are two significant features of Australian Private International Law in the modern era. The first is the divergence of Australian Private International Law from the principles administered in England. The second is the growth of internationalism in Australian Private International Law. There have been important developments in the latter regard. Not all are unique to Australia and some are shared with England. But many of the Australian initiatives have no English counterpart. In the remaining part of this paper, I wish to look at various aspects of internationalism in the modern era.

(a) *Australia's participation in international fora concerned with the unification and harmonization of Private International Law, International Trade Law and International Judicial Assistance.*

Australia is now a member of the Hague Conference on Private International Law, the International Institute for the Unification of Private Law at Rome (UNIDROIT) and the United Nations Commission for International Trade Law (UNCITRAL). Over the past decade or so Australia has actively participated in the work of these bodies and has therefore had an input into the formulation of international conventions on Private International Law, international trade law and international judicial assistance and has actually adopted a number of them. A foreign observer may not regard this as remarkable but it must be remembered that Australia's activity in relation to the formulation and ratification of international legislation in the areas under consideration is of recent origin. Twenty years ago there was little or no interest in such activities and Australia had not ratified or acceded to a single international convention in the field of Private International Law. The turnabout is therefore quite remarkable. In addition to Australia's participation in the international bodies mentioned above, it should be noted that the federal Attorney-General's Department has conducted an annual International Trade Law Seminar since the early 1970s at which many of the international developments have been discussed. These seminars have been very well attended by judges and practitioners as well as academic and government lawyers, and have fostered an awareness and understanding of international

legal problems and of current activities (particularly the drafting of international legislation) which aim to improve the existing situation. In 1984 the Eleventh International Trade Law Seminar was incorporated into a special Asian Pacific regional trade law seminar. The speakers invited to give papers included Professor Sono of UNICTRAL, Dr Sami of the Asian-African Legal Consultative Committee, Dr Herber of the Institute for the Law of the Sea and Maritime Commercial Law, Hamburg, Professor Honnold formerly to UNICTRAL, Mr Evans of UNIDROIT, Mr Pelachet of the Hague Conference on Private International Law, Mr Basnayake of UNICTRAL, Mr Broches of Washington, Mr Chu of Beijing and Dr Hartono of Indonesia. I suspect that 25 years ago there would have been little support, particularly on the part of the Australian Government, for such a conference. The point I am making is that Australia's participation in international fora is strong and vibrant, particularly having regard to the fact that just a little while ago there was little or no interest and certainly no participation.

The first convention on Private International Law to be incorporated into Australian law was the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Legislation giving effect to the convention was passed by some of the state parliaments as early as 1964.[62] Australia was not a party to the convention at that time, but the Australian states simply copied legislation which had been enacted in the United Kingdom giving effect to the convention. Australia has now acceded to the Convention, some twenty years after the first state legislation was enacted.

In more recent years, other conventions have been incorporated into Australian law. The principles of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations are contained in Part XII of the Family Law Act 1975 (Cth.). The grounds for recognizing an overseas divorce or annulment as there set out extend beyond the recognition bases established at common law and prescribed by the former legislation—the Matrimonial Causes Act 1959 (Cth.). However the Family Law Act also incorporates the common law rules in a cumulative sense by providing that a dissolution or annulment of marriage that would be recognized under the common law rules of Private International Law will continue to be recognized. The original common law rule applicable to divorces was confined to the domicile principle so that a foreign divorce would only be recognized if granted by the state of domicile. But additional recognition bases came to be accepted, including the "real and substantial connection" test enunciated in *Indyka* v. *Indyka*.[63] The recognition bases established by the convention and incorporated into the Family Law Act, together with the recognition bases established at common law and saved

[62] See the Wills (Formal Validity) Act 1964 of Victoria and Tasmania.

[63] [1969] 1 A.C. 33. See Sykes & Pryles p. 432.

by the legislation, provide a generous range of grounds upon which a foreign divorce may qualify for recognition. The policy of Australian law is, therefore, in favour of recognizing foreign divorces as demonstrated by the numerous recognition rules which ensure that a divorce decreed by a state with just about any significant relationship to the parties will be given effect in Australia. Australia has now formally ratified the 1970 convention though, as mentioned above, it was incorporated into Australian law some years previously.

Australia was one of the first countries to adopt the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages. This was done by the Marriage Amendment Act 1985 (Cth.).

Australia has also ratified the 1956 United Nations Convention on the Recovery Abroad of Maintenance, and provisions to give it effect are contained in Part IV of the Family Law Regulations made pursuant to Section 111 the Family Law Act 1975. In addition, Part III of the Family Law Regulations (made pursuant to section 110 of the Family Law Act) establish an elaborate scheme for the registration in Australia of overseas custody orders and for the transmission fo Australian custody orders to overseas jurisdictions for their enforcement abroad. Part III is not based on a convention but rests on informal bilateral agreements between Australia and the foreign countries concerned. It is clear, therefore, that there has been a strong impetus on Australia's part towards internationalism in the family law area through the implementation of international conventions and formal international agreements.

In addition to the conventions mentioned above, it should be noted that Australia signed the 1980 Hague Convention on the Civil Aspects of International Child Abduction on 20th October 1986 and it will come into effect on 21 January 1987.[64] Interestingly enough this Convention was considered relevant by the Full Court of the Family Court of Australia at a time when it had not yet been adopted by Australia. The case is *In the Marriage of H and H.*[65] There the parties were married in West Germany in 1980 and came to Australia to settle permanently in 1981. They subsequently purchased a house in Adelaide and enlisted as part-time students at Flinders University. In April 1983 the only child of the marriage was born. In the same year the wife visited Germany to see her parents and later returned to Australia. In December, 1984 the wife again visited Germany with the intention of spending Christmas with her parents and informed her husband that she would return in January 1985. On this basis he consented to her taking the child with her. However in January 1985 the husband received a letter written by the wife stating that she had decided not to return and would stay in West Germany.

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[64] Regulations have been made to give effect to the Convention pursuant to section 111B of the Family Law Act. See 1986 Commonwealth Statutory Rules No. 85.

[65] (1985) F.L.C. 91-640.

In May 1985 the husband applied to the Family Court for an order that he have custody and guardianship of the child. He alleged that he had a close relationship with the child and that he had been more involved with the day-to-day care of him than had his wife. In April 1985 the wife obtained an interim order from a West German Court giving her custody of the child but she did not disclose to the court all the circumstances and in particular her promise to the husband that she would return to Australia with the child. The husband, apparently, had not been served with any documents or made aware of the West German proceedings. The Full Court of the Family Court decided that the husband should have custody of the child. The wife had been served with the process of the Australian Court and had an ample opportunity to appear but had chosen not to do so. The evidence before the Court was that there was a child born in Australia who had lived substantially in Australia and who was an Australian Citizen. That child had been taken by the wife to Germany upon a promise to return, which she did not, and had procured the husband's consent to her departure with the child by that fraudulant promise. The fact that the child was presently out of the jurisdiction did not deter the Family Court from making the order in favour of the husband. Before the Court the husband had made reference to the Hague Convention on the Civil Aspects of International Child Abduction. The Family Court noted that the Convention had not yet come into force but that it had been prepared during 1980 by an International Commission which included delegates from the Federal Republic of Germany and from Australia. The Court stated that while the Convention had not yet come into force and had not yet been ratified by Australia it was entitled to take account of the principles underlying the Convention as indicating an international consensus at least as between the States which participated in the work of the Commission. One of the objects of the Convention was to secure the prompt return of children wrongfully removed to or retained in a Contracting State. Wrongful removal was defined as one done in breach of rights of custody of the person under the law of the State in which the child was habitually resident immediately before the removal. This included a joint right to custody. The Court noted that if the Convention were applicable as between Australia and West Germany it was obvious that the child's retention by the mother following her arrival in Germany was wrongful and that an obligation would have arisen on the authorities in West Germany to ensure the child's prompt return to Australia. While there was no such obligation in the absence of ratification the court was of the view that the terms of the Convention strongly supported two conclusions (a) that as a general principle courts should act in comity to discourage the abduction across national borders. (b) that the forum which has the pre-eminent claim to jurisdiction is the place where the child habitually resided immediately prior to the time when it was removed. These considerations, in the Court's view strengthened the conclusion that the husband should receive the guardianship and custody of the child.

The decision of the Family Court was not internationalist in the third sense discussed above because the order of the German Court was disregarded. However there were special circumstances in that the wife did not make a full disclosure to the German Court and the husband was unaware of the proceedings. But the case is an interesting illustration of the principles of internationalism in the first and second senses because the Court relied on an international convention in circumstances where it had not yet come into force and had not been ratified by Australia.

Beyond family law, Australia is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The legislation giving it effect is the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth.). This important convention which has been ratified by so many countries, not only provides for the recognition and enforcement of foreign arbitral awards, but also for the enforcement of arbitration agreements. Under the Act, and the Convention, a court must stay legal proceedings brought in breach of a defined arbitration agreement. Previously to the implementation of the convention, such arbitration agreements did not give rise to a mandatory stay and the court had a discretion. It could permit a plaintiff to proceed with the litigation in breach of the arbitration agreement. Consideration is also being given to adopting the 1985 U.N.C.I.T.R.A.L. Model Law on International Commercial Arbitration.

Australia has also ratified the important 1980 United Nations Convention on Contracts for the International Sale of Goods (the "Vienna Sales Convention"). The Standing Committee of Attorneys-General has agreed in principle to accession by Australia to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and the Standing Committee is giving consideration to the accession by Australia to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

(b) Reform and change of the personal connecting factor.

The traditional personal connecting factor employed in English and Australian Private International Law is domicile. It has been used both as a jurisdictional rule and as a choice of law rule. As far as the former is concerned, domicile was formerly the sole basis of jurisdiction in divorce and still remains one of the alternative bases of jurisdiction. It is also employed as a choice of law rule, particularly in relation to succession to movable property on death. There have been profound changes concerning the personal connecting factor in Australian law in recent years and these changes are, I think, consistent with and demonstrate a spirit of robust internationalism.

The first change is the amendment to the rules on domicile which are contained in the Domicile Acts of the Commonwealth and the State parliaments. These Acts are largely identical and are part of a uniform

scheme. Prior to their enactment some changes had been effected at the federal level in the Family Law Act and the Marriage Act, but the Domicile Act goes beyond the changes there made and substantially reforms the law of domicile. The Act does not constitute a complete code and the common law rules still apply in respect of matters not covered by the legislation.

The Domicile Act abolishes some archaic rules such as the dependent domicile of a married woman. Two provisions of significance to the present discussion are the abolition of the doctrine of revival of domicile of origin and the lightening of the burden of proof necessary to establish the acquisition of a domicile of choice which displaces a domicile of origin. At common law, a person's domicile of origin occupied a special place. It was never entirely extinguished but could be displaced by a domicile of choice. If, however, the domicile of choice was abandoned, then the domicile of origin revived. Moreover, a heavy burden of proof rested on a person who sought to establish that a domicile of origin had been displaced by a domicile of choice. It can be argued that the rules on domicile of origin were parochial in nature. Their basis may have rested on the assumption that an Englishman who journed to a foreign land and who lived there for many years never really contemplated being governed by the laws of that land and still intended to be governed by the laws of his domicile of origin which was England.[66] The parochial attitude established at common law, which is understandable in the context of the 19th century, is well illustrated in the judgment of Mr Justice Isaacs of the High Court of Australia in *Fremlin* v. *Fremlin*[67] where he emphasized the exceptional position which a domicile of origin occupied at common law and the heavy burden of proof required to establish its displacement by the acquisition of a domicile of choice. In relation to the latter question, Isaacs J. was clearly of the view that the nature of the new domicile was a relevant consideration. He remarked " . . . the voluntary abandonment of one civil community for another is never a light step, but it is a question of degree. It would be most serious for an Australian to exchange his domicile of birth for that of a domicile in China, but less serious in the United States, still less in England, and least of all in a neighbouring State of the Commonwealth . . .".[68] In summary, the common law rules as primarily developed and administered in England displayed an overwhelming tendency to hold an Englishman governed by English laws even though he may have left his homeland many years previously and established firm roots in another part of the Empire or in a foreign land. Now, however, the Domicile Acts abolish the doctrine of revival of domicile of origin so that a domicile of choice

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[66] See the discussion of this point by the Supreme Court of Iowa in *In Re Estate of Jones* 182 N.W. 227 (1921).

[67] (1913) 16 C.L.R. 212.

[68] Id. at pp. 233-34.

cannot be abandoned without the acquisition of a new domicile of choice. Moreover, it is provided that the acquisition of a domicile of choice in place of a domicile of origin may be established by evidence that would be sufficient to establish the domicile of choice if the previous domicile had also been the domicile of choice. Thus the burden of proof required to establish the acquisition of a domicile of choice which displaces the domicile of origin has been considerably lightened.

I have mentioned that there are two aspects of internationalism as far as the personal connecting factor is concerned. The first is the important reform to the law of domicile abolishing old parochial rules. The second is the displacement of the law of domicile in limited areas. At common law, domicile was the main personal connecting factor though residence was used for minor matrimonial proceedings and in relation to in personam jurisdiction. In contract, many civil law countries came to employ nationality instead of domicile. This resulted in an important divergence between the common law and civil law principles of Private International Law. There were some attempts to deal with this, such as the 1951 Hague Convention on Conflicts between the Law of Nationality and the Law of Domicile and the development of the principle of *renvoi*.[69] In recent times the Australian legislatures have adopted nationality as a connecting factor, albeit to a limited extent and in pursuance of the implementation of international conventions. Thus nationality is one of the alternative choice of law rules for the formal validity of a will[70] and, in relation to divorce, Australian citizenship is a jurisdictional ground for the institution of divorce proceedings in Australia[71] and foreign nationality either alone or in combination with other factors is one of the bases for the recognition of foreign divorces.[72] It is true that these provisions were enacted in compliance with Hague Conventions which they implement in Australia. Nevertheless the acceptance of nationality as a connecting factor represents an important departure in Australian Private International Law and demonstrates a willingness to depart from firmly entrenched local rules and to adopt foreign rules in the interests of achieving international uniformity and harmony.

(c) Recognition of foreign judgments and arbitral awards.

I have already noted that the common law rules applicable to the recognition and enforcement of foreign judgments are liberal and are internationalist in spirit. There is no requirement of reciprocity and a foreign judgment is conclusive as to the merits of the case. The common law rules are complemented in all the states by legislation. Excepting

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[69] See Sykes and Pryles p. 197.

[70] See for example Wills (Formal Validity) Act 1964 (Vic.).

[71] Family Law Act 1975 (Cth.) s. 39(3)(a).

[72] See Family Law Act s. 104(3).

in South Australia, the legislation is based on the Foreign Judgments (Reciprocal Enforcement) Act 1933 of the United Kingdom. This legislation does not greatly depart from the common law rules and its main advantage is procedural. The legislation only applies to judgments of proclaimed countries and a proclamation will only be made if the government is satisfied that there will be substantial reciprocity of treatment as regards the enforcement in the foreign country concerned of judgments given in the forum. Thus the legislation introduces a degree of reciprocity. However, reciprocity is not a *sine qua non* for the enforcement of a foreign judgment in Australia. If there is no reciprocity in the sense that the foreign country will not recognize and enforce Australian judgments, then the legislation will not be extended to that foreign country. However judgments rendered in that foreign country are not necessarily denied effect in the forum. They are still enforceable under the common law rules of Private International Law unless a proclamation has been made under the foreign judgments legislation prohibiting the enforcement of such judgments in the forum. I am not aware of any such negative proclamations having been made.

While the state legislation, patterned on the 1933 United Kingdom Act, is largely a codification of the common law rules, there is legislation in one state which is unique. The state of South Australia passed its own Foreign Judgments Act in 1971. It differs from the other Acts in a number of respects. Most importantly, the grounds of recognized foreign jurisdiction are much wider. Under section 5(1), a foreign judgment is registerable if (a) the foreign court had jurisdiction under the rules of Private International Law; (b) the circumstances in which jurisdiction was assumed by the foreign court justify recognition of the judgment on the basis of comity; or (c) it is in the opinion of the court just and equitable that the judgment be enforced. In the case of *Malaysia-Singapore Airlines Ltd* v. *Parker*[73] the Supreme Court of South Australia thought that the second situation [(b)] required the recognition of a foreign judgment where the foreign court assumed jurisdiction in circumstances where a court of the forum would have also been competent. At common law, and under the legislation of the other states, a foreign courts jurisdiction is basically confined to circumstances where the defendant was served with process in the foreign state or had voluntarily submitted to its jurisdiction. In contrast, the jurisdiction claimed by the courts of the forum is considerably wider and extends to all those circumstances set out in the rules of the Supreme Court where service of process upon a defendant out of the jurisdiction is authorized. In effect, the Supreme Court of South Australia conceded to foreign courts a jurisdiction coextensive with that claimed by the courts of the forum. This is a remarkable development and one which displays a great measure of internationalism. A second

[73] (1972) 3 S.A.S.R. 300.

point of departure of the South Australian legislation is that it may permit the enforcement of a foreign judgment that is not final and conclusive.[74]

Thirdly the South Australian legislation is not confined to judgments of proclaimed countries. Proclamations can be made under section 6 but the existence of such a proclamation is not a condition precedent to registration. Judgments of proclaimed countries are merely presumed, in the absence of evidence to the contrary, to be registrable under the Act (i.e. to have fulfilled the section 5 jurisdictional conditions). I venture to suggest that the rules for the enforcement of foreign judgments in South Australia are amongst the most liberal in the world and certainly go considerably beyond the common law rules and the rules established under the legislation of the other states.

As far as foreign arbitral awards are concerned, I have already mentioned the adoption in Australia of the 1958 New York Convention. I do not propose to examine its rules on the recognition and enforcement of foreign arbitral awards. That has been done by many others.[75] I should also mention at this point a recent English case dealing with the enforcement of foreign arbitral awards at common law. It demonstrates a degree of internationalism in two senses—reliance on Public International Law and the development of broad non-parochial conflictual rules. In *Dallal* v. *Bank Mellat*[76] Hobhouse J. held that international comity required English courts to recognize the validity of decisions of foreign arbitral tribunals whose competence was derived from international law and practice.

(d) Jurisdiction

An outstanding development in England which has been followed in Australia is the acceptance of a doctrine of *forum non conveniens.* Until the 1979 decision of the House of Lords in *The Atlantic Star,*[77] a defendant who sought a stay of proceedings had to demonstrate that the continuation 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, furthermore, that any stay would not cause an injustice to the plaintiff.[78] This proved a very heavy burden for a defendant to discharge. The fact that an action had little or no connection with England did not ipso facto demonstrate vexation. For example, in *H.R.H. Maharanee of Baroda* v. *Wildenstein*[79] an action was

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[74] See ss. 5(1)(c) of the Act.

[75] See also in this regard Pryles and Iwasaki, *Dispute Resolution in Australia-Japan Transactions* (Law Book Company 1983) Chapter 4.

[76] [1986] 2 W.L.R. 745.

[77] [1979] A.C. 508.

[78] *St Pierre* v. *South American Stores (Garth and Chaves) Ltd* [1936] 1 K.B. 382 at 398.

[79] [1972] 2 Q.B. 283 (C.A.).

instituted in England in connection with the sale of a painting in France which was alleged to be a forgery. Both the plaintiff and the defendant resided in France and the defendant was served with process while on a visit to England to attend the races at Ascot. Lord Denning M.R. was of the view that both parties were citizens of the world and that there might be difficulties in litigating in France. He could see no reason why the case should not continue in England.

The parochial attitude of English and Australian courts in refusing to stay actions which properly belonged to foreign tribunals is well illustrated by the approach formerly taken to *lis alibi pendens*. It is clear that a plaintiff who commenced two actions in different courts in England would find one of them stayed.[80] But where one of the actions was brought in a foreign jurisdiction, the courts were traditionally reluctant to grant the defendant relief for example by staying the local action. Thus where there were foreign proceedings pending between the parties, the institution of a second action in England did not *ipso facto* constitute vexation so as to justify a stay of the English proceedings. Where, however, the foreign proceedings were instituted in another British jurisdiction, some authority indicated that the institution of a second action was *prima facie* vexatious.[81] Thus a plaintiff who instituted two actions in England would find the latter one stayed. But if the earlier action was pending in a foreign country, it was unlikely that the English action would be stayed. However if the earlier action was proceeding in another British jurisdiction then there was a good likelihood of the English action being stayed. This curious result can only be explained on the basis of a parochial attitude founded on the assumption that the local courts were able to dispense superior justice to foreign courts and that as between foreign courts, those of other British jurisdictions were to be preferred.

The parochial attitude of exercising jurisdiction once a court was siezed of a case, and of refusing to stay proceedings except in extreme situations, encouraged forum shopping. It encouraged foreign plaintiffs to litigate in England even though the parties and the case had no connection with England and the plaintiff could be secure in the knowledge that the English courts would proceed to hear the case. However a change was instituted in *The Atlantic Star* where the House of Lords decided that the traditional rule for staying actions should be more liberally interpreted in the future. Reform was carried further in the case of *Rockware Glass Ltd.* v. *MacShannon*[82] where the House of Lords held that the words "oppressive" and "vexatious" should no longer be employed as the criteria for staying actions. The new rule imposes on a defendant who seeks a stay of proceedings the obligation of establishing that there is another

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[80] *McHenry* v. *Lewis* (1882) 22 Ch.D. 397 at 400.

[81] See e.g. *Moore* v. *Inglis* (1976) 9 A.L.R. 509 at 513-14 (High Court of Australia).

[82] [1978] A.C. 795.

forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense. If the defendant fulfills this condition, then the burden shifts to the plaintiff to show that he would loose a legitimate personal or juridicial advantage if the action does not proceed in England. This advantage must be demonstrated objectively and a plaintiff's honest belief that it is to his advantage to litigate in England is not sufficient. A further development was effected in the important decision in *Spiliada Maritime Corp.* v. *Cansulex Ltd.*[83] where the rule was re-formulated. These English developments were accepted and applied in Australia[84] and the rule was extended to cover the situation of lis alibi pendens by the House of Lords in *The Abidin Daver.*[85] As a result it is now much easier to persuade an English or Australian court to stay an action and one only has to look at the law reports particularly the Lloyd's Reports to see the number of applications that are now made for such relief. The liberalising of the rule for staying local actions is strongly internationalist in spirit and acknowledges that proceedings which appropriately belong to foreign courts should proceed in those courts and not in the forum.

I have mentioned that these English developments have been accepted and applied in Australia and the new internationalist spirit is well illustrated by the judgment of Rogers J. in *Entrad Ltd* v. *Blaikie.*[86] There the court emphasized that the tests propounded for staying actions were not to be construed as words of a statute and that essentially the decision for the court is predicated on weighing the considerations advanced by the defendant in favour of a stay against those adduced by the plaintiff for the action to continue in the forum. *Entrad* concerned an agreement entered into by Proformance Tyre Co. Inc., a United States corporation wholly owned by Honeyway Ltd, a United Kingdom corporation, which was to issue shares to a New South Wales company, I.T.S. Holdings Pty Ltd. That company, in turn was owned by another New South Wales company, Entrad Ltd and Mr and Mrs Semsei. The agreement called for an auditor's report to be prepared by the firm of Arthur Anderson & Co.

Firms bearing the name Arthur Anderson & Co. exist in many countries but it was common ground between the parties that the oral contract of engagement of the auditors was made in California. It was there that the work necessary for the preparation of the auditor's report was carried out; Californian law was the proper law of the contract and

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[83] [1987] A.C. 460.

[84] *Ranger Uranium Mines Pty Ltd* v. *B.T.R. Trading (Qld) Pty Ltd* (1985) 34 N.T.R. 1; *Muller* v. *Fencott* (1981) 37 A.L.R. (Fed. Ct); *Garseabo Nominees Pty Ltd* v. *Taub Pty Ltd* [1979] 1 N.S.W.L.R. 663. See also *Marple* v. *David Syme & Co. Ltd* [1979] N.S.W.L.R. 97 applying *The Atlantic Star*).

[85] [1984] A.C. 398.

[86] Unreported, N.S.W. Supreme Court, Rogers J., 24 December 1985.

any breach of any contractual obligation and the commission of any wrongful act took place in California.

Arthur Anderson & Co. prepared an audit of Performance Tyre Co. Ins. as at 31 December 1980. In May 1983 proceedings were instituted in California by I.T.S. Holdings Pty Ltd A.B.E.G. Hydrocarbons Inc. and Mr and Mrs Semsei against Arthur Anderson & Co. for misrepresentation, negligence and malpractice. In November 1985 a similar action was instituted in the Supreme Court of New South Wales. A statement of claim nominated Entrad Ltd, Multi Tyre International Pty Ltd, Entrad Tyres Inc., Entrad International Pty Ltd as plaintiffs, in addition to the plaintiffs in the United States actions. Further, the defendant was the partnership known as Arthur Anderson & Co. in New South Wales and not the American firm. The New South Wales firm was sued on the basis, alleged by the plaintiffs, that the partners in New South Wales were in partnership with the American firm. In the New South Wales proceedings the defendants sought a permanent stay of proceedings, alternatively a stay pending final resolution of the proceedings in California. They contended that at no time were they partners of the American firm of Arthur Anderson & Co. In addition, the defendants in the United States made an application to the California court for an order that the plaintiffs in the United States be restrained from prosecuting the New South Wales actions. This case, therefore, presents an all too familiar problem of conflicting jurisdiction.

The main argument advanced on behalf of the plaintiffs was that the application for a stay should fail because the defendants had failed to prove that there was another forum to whose jurisdiction they were amenable. Indeed, they relied on the defendant's allegation that they were not in partnership with the members of the American firm.

Rogers J. emphasized that the test for staying proceedings was not to be construed as a statute. He further noted that in the United States proceedings there was no question as to whether or not a partnership existed between the various Arthur Anderson organizations and that the action was brought against the alleged contracting party. He observed that it would be a waste of scarce judicial resources in New South Wales to indulge in a lengthy and time-consuming exercise to determine an unnecessary issue.

Rogers J. then proceeded to examine the arguments adduced by the plaintiffs against granting a stay. Of central importance was the fact that the plaintiffs in New South Wales, who were not already parties to the U.S. proceedings could no longer be joined because the statute of limitations period had run in the United States. They also adduced various juridicial advantages to suit New South Wales. For the defendants the principal considerations in favour of granting a stay rested on the facts that the contract itself, the work done pursuant to it, the alleged breach and the damages which were involved, had nothing to do with New South Wales and all related to matters overseas. Evaluating all these

factors the court concluded that the natural forum of the action was the United States. However to safeguard the position of the plaintiffs, and because the additional plaintiffs could no longer be joined in the United States proceedings, Rogers J. determined that the stay should not be a permanent one and that the plaintiffs were at liberty to seek a variation in the order in the event that a change of circumstances or an evolution of matters of major proportion justified it.

In cases concerning the custody of children the *forum non conveniens* principle has been qualified by the overriding consideration of the welfare of the child. This is the main matter to be considered rather than the convenience of the parties. But this avowed welfared principle is not a parochial rule. Sometimes the welfare of a child may dictate that the issue of custody should be determined outside Australia as the Full Court of the Family Court of Australia held in *In the Marriage of Schwarz and Schwarz.*[87]

(e) Arbitration

There has been a remarkable change in attitude in Australia towards commercial arbitration in recent years. It is probably not going too far to characterize the former attitude as one of judicial hostility or extensive interference. The profound changes that have subsequently been made and the consequent acceptance of commercial arbitration is, I feel, consistent with the spirit of internationalism for two reasons. In the first place, commercial arbitration is often a favoured method of international dispute resolution by parties to international contracts. Secondly, the new attitude in Australia brings the country more into line with liberal attitudes to arbitration adopted in many other countries.

The changed attitude to commercial arbitration in Australia is illustrated by several developments. One of the developments has already been mentioned, namely Australia's adoption of the 1958 New York Convention by the enactment of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth.). In addition, a number of states have passed a new Commercial Arbitration Act[88] which, like the Arbitration Act 1979 (United Kingdom), makes arbitration more attractive by restricting judicial intervention. By section 38(1), of the Commercial Arbitration Act a court can no longer set aside or remit an award on the ground of error of fact or law on the face of the award. While an appeal lies to the Supreme Court on any question of law arising out of an award (section 38(1)) and a preliminary point of law can be determined by the Supreme Court in the course of arbitration if an application is made by one of the parties with the consent of the arbitrator or all the other parties, these rights can be excluded by the parties under section 40. Thus parties to an inter-

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[87] (1985) F.L.C. 91-618.

[88] See for example Commercial Arbitration Act 1984 (Victoria).

national contract who desire to resolve disputes by arbitration and who may wish to limit judicial interference can take advantage of this provision by concluding an exclusion agreement.

Legislation to implement the UNCITRAL Model Law on International Commercial Arbitration has been introduced into the House of Representatives.[88a] It will further restrict judicial intervention and will consolidate the 1974 legislation with the Model Act.

Another development concerns the judicial attitude to granting a stay of court proceedings instituted in breach of an arbitration agreement. Where the arbitration agreement falls within the 1958 New York Convention as implemented in Australia by the Arbitration (Foreign Awards and Agreements) Act a stay is mandatory. But with regard to other arbitration agreements a stay is discretionary.[89] However the Australian Courts have become fairly internationalist in this regard and have said that arbitration agreements should generally be enforced if they are contained in international contracts. Thus in *Joy Manufacturing Co.* v. *A.E. Goodwin Ltd.*[90] Street J. of the Supreme Court of New South Wales remarked:

> Where parties to an agreement regulating international trading activities make provision for the arbitration of disputes by an international organization, such as this Chamber of Commerce, the domestic courts of the countries concerned, so far from allowing their own processes to be invoked in disregard of the arbitration agreement, should lend their aid to its enforcement. Although the court has a discretion to grant or refuse an order staying proceedings in an action commenced in disregard of such an arbitration agreement, it is a discretion to be exercised with this consideration to the forefront. Parties to international trading agreements should be able to be confident that, if they deliberately and advisedly stipulate for arbitration by a tribunal of their choice, this stipulation will be respected.[91]

Likewise in Qantas Airways Ltd. the *Dillingham Corporation*[92] Rogers J. remarked that:

> It is now more fully appreciated than used to be the case that Arbitration is an important and useful tool in dispute resolution. The former judicial hostility to Arbitration needs to be discarded and a hospitable climate for Arbitral resolution of disputes created. It used to be thought that difficult questions of law or complex questions of fact presented a sufficient reason for relieving a party

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[88a] *International Arbitration Amendment Bill* 1988 (Cth).

[89] See Sykes & Pryles, *Australian Private International Law* p. 150.

[90] (1969) 91 W.N. (N.S.W.) 671.

[91] Id. at 674.

[92] [1985] 4 N.S.W.L.R. 113.

> from the obligation to abide by an arbitration clause . . . that approach should be treated now as a relic of the past. The Court should be astute in assuring that, where parties have agreed to submit their disputes to arbitration, they should be held to their bargain even if this may involve additional cost and expense.[93]

The Dillingham case involved an action by an Australian plaintiff against six defendants, one of whom was an American Corporation. Two of the defendants sought a stay of proceedings on account of an arbitration agreement but the difficulty was that other defendants were not parties to the agreement and a stay of proceedings therefore involved the possibility of simultaneous arbitration proceedings against some defendants and judicial proceedings against others. Rogers J. resolved this dilemma utilising the Rules of the Supreme Court of N.S.W. which empowered the Court of its own motion to make orders referring any questions arising in proceedings in the Court to an arbitrator. Using that procedure the Court ordered that the whole dispute between the plaintiff and all the defendants should be referred to Arbitration.

I have sought to outline above some important aspects of internationalism which can be discerned in Australian private international law today. Before concluding, however, I should point out some negative aspects which still exist in this modern era. The first is the continued retention of the rule in *Phillips* v. *Eyre* as the principle governing choice of law in torts. As mentioned previously, this rule has been trenchantly criticised and its heavy emphasis on the law of the forum is parochial and inconsistent with an internationalist spirit. While the courts have not been slow to reform many aspects of the law they have consistently refused to jettison the *Phillips* v. *Eyre* approach and to abandon the *lex fori* rule. Another negative influence concerns jurisdiction. I have mentioned the development of a doctrine of *forum non conveniens* which I regard as an outstanding example of internationalism. But against this we must put in the scales two other developments. One is the expansion on the rules of jurisdiction. The rules of the various State Supreme Courts authorise the service of process upon a defendant outside the jurisdiction. The N.S.W. rules, which were changed in 1970, authorise such service in a wide variety of cases. One rule permits service *exjuris* "where the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in the state caused by a tortious act or a mission wherever occurring". In *Flaherty* v. *Girgis*[94] it was held that a person who was injured and hospitalised in the state of Queensland and who subsequently returned to Sydney had suffered damage in New South Wales because she was in continuing need of medical treatment and had a claim for future economic loss based on the diminution of her earning capacity there. The rule, as interpreted by the court, comes close to claiming

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[93] Id. at 118.

[94] [1985] 4 N.S.W.L.R. 248.

universal jurisdiction in tort cases. A potential plaintiff who is injured anywhere in the world can sue in the courts of New South Wales providing that the plaintiff journeys to that state and is subjected to continuing pain and suffering, the need for medical attention or diminution of earning capacity there.

Another recent development which may be lamented is the jurisdiction now claimed by English and Australian courts to restrain a person from instituting proceedings in a foreign court.[95] Such injunctive relief is often seen as an aspect of *forum non conveniens* in circumstances where the foreign court is the inappropriate forum and the local court is the appropriate venue. But such an injunction can be regarded as an interference with a foreign courts jurisdiction and should only be sparingly granted in exceptional circumstances. Fortunately the recent decision of the Privy Council in *Societe Nationale Industrielle Aerospatiale* v. *Lee Kui Jak*[96] indicates a restriction on the circumstances where such an injunction will lie. Finally I should mention the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth.). That legislation empowers the federal Attorney-General to prevent the enforcement in Australia of certain foreign judgments given in foreign antitrust proceedings. The Legislation is not really parochial but is protective and aims to counter the very wide jurisdiction claimed by the United States in antitrust proceedings, a jurisdiction which many would argue exceeds the legislative competence accepted under the principles of public international law.

4. Conclusion

1. In the context of private international law, internationalism can be used in several senses. It may denote an international law foundation of conflictual rules, the unification or harmonisation of conflictual rules, the development of broad, non-parochial conflictual rules and the practice of non-discrimination under domestic laws. Not all these meanings are mutually exclusive and some overlap. For example the unification or harmonisation of conflictual rules when achieved by international conventions necessarily gives those rules an international law basis. So too the unification or harmonisation of conflictual rules will generally aim to achieve fairly liberal conflictual rules. Perhaps the most common usage is the third sense where internationalism denotes the development of broad, non-parochial rules.

2. In the last fifteen years Australian private international law has developed strong internationalist tendencies in all these senses.

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[95] See e.g. *Smith Kline and French Laboratories Ltd.* v. *Bloch* [1983] 2 All E.R. 72; *Tracomin S.A.* v. *Sudan Oil Seeds Co. Ltd* (No. 2) [1983] 2 All E.R. 129; *British Airways Board* v. *Laker Airways Ltd.* 1984 Q.B. 142 (E.A.), [1984] 3 W.L.R. 413 (H.L.); *South Carolina Insurance Co.* v. *Assurantae Maatschappij De Zevn Provincien N.V.* [1985] 2 All E.R. 1046 (E.A.), [1986] 3 W.L.R. 398 (H.L.).

[96] [1987] A.C. 871.

3. Australia has actively participated in international fora charged with the promulgation of conventions on private international law, international trade law and international judicial assistance. It has also implemented a number of these conventions particularly in the family law area where Australia is now a party to three conventions. Australia has therefore joined in creating and introducing into her own law common rules founded on international conventions.

4. In order to achieve international harmonization and unification Australia has displayed a willingness to modify its traditional choice of law rules on private international law. Thus nationality has been introduced as a connecting factor into Australian private international law and domicile has lost much of its former significance particularly in relation to marriage and divorce.

5. It is not only the Australian legislatures which have been active but some important developments have resulted from judicial creativity. Thus the spirit of internationalism in the third sense has been displayed by the development of a doctrine of *forum non conveniens* which reduces the ability of plaintiffs to forum shop and tends to assign litigation to its appropriate forum.

6. Australian private international law also discloses a strong policy in favour of recognising foreign legal acts namely marriages, divorces and annulments, maintenance obligations, judgments and arbitral awards.

Endnote

Since the above article was written the High Court has handed down judgement in *Oceanic Sun Line Special Shipping Company Inc.* v. *Fay* (30 June 1988). By a slender majority of 3 to 2 the High Court refused to follow the English developments concerning the principle of *forum non conveniens.* Of the majority Brennan J. was most dogmatic and espoused the view that the traditional rule for granting a stay of proceedings which requires a showing of vexation, oppression or an abusive process should continue to be the rule in Australia. Deane and Gaudron JJ. were not quite as hostile to the English developments and the latter Justice intimated that a more liberal rule on staying proceedings could be accepted in circumstances where it was clear that foreign law governed the substantive rights of the parties. In a strong dissent Wilson and Toohey JJ. thought that the principle of *forum non conveniens* as developed in the more recent English decisions should be accepted in Australia.

The decision of the High Court is certainly a setback. It is anti-internationalist in spirit and is parochial. It evokes the days when our courts felt their justice and laws were superior to those of foreign countries. However, perhaps the last word has not been said on the subject and one can only hope that the High Court will soon have an opportunity to reconsider its decision and to adopt a more enlightened attitude. If this happens then the decision in the *Oceanic Sun Line* case can be regarded as a mere aberration.