Developments
in the
Private International Law Doctrine of Renvoi
since 1990

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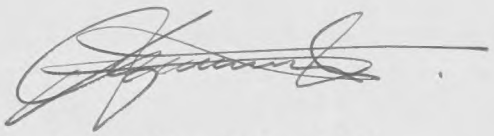
May 2010

A thesis submitted for the degree of
Doctor of Juridical Science
of The Australian National University

Declaration

I declare that I have not already submitted the substance of this thesis for a higher degree and it is not currently being submitted for any other degree or qualification.

I declare that this thesis is my original work and any help received in preparing it, and all sources used, have been acknowledged. I have cited direct quotes or paraphrased material from some jointly-published work in parts of Chapters 3, 4 and 5 which was previously published in A Lu and L Carroll, 'Ignored No More: Renvoi and International Torts Litigated in Australia' (2005) 1 *Journal of Private International Law* 35.



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Acknowledgments

I warmly acknowledge the valuable support and inspiration of my colleagues Mr David Goodman, Special Counsel of Freehills; fellow conflicts scholar Ms Lee Carroll; Mr Geoff Abbott, barrister-at-law of Francis Burt Chamber in Perth; Dr Gavan Griffith AO QC, lately Solicitor-General of the Commonwealth of Australia and my leader in *Neilson* before the High Court of Australia; Ms Lisa De Ferrari, barrister-at-law of Joan Rosanove Chambers Melbourne and my co-counsel in *Neilson*; Mr Robert Clynes, barrister-at-law of Blackburn Chambers Canberra; Mr Richard McQueen, Partner of Minter Ellison Melbourne and my instructor in *Neilson*; my Canberra dispute resolution partners Mr Nevin Agnew, Mrs Alice McCormick and Mr Mark Treffers; The Hon Justice Carmel McLure of the West Australian Court of Appeal for her eloquence; Sir Lawrence Collins, whose writings whilst a partner of Herbert Smith provided helpful insights from a practitioner's perspective; and The Hon Michael Kirby AC CMG, lately a Judge of the High Court of Australia, for his creativity. I respectfully acknowledge the great scholars of the past, including the late Dr Albrecht Mendelssohn-Bartholdy, author of the little book on renvoi and grandson of the musician Felix Mendelssohn-Bartholdy.

I also thank my supervisors Professor Kent Anderson and Professor Jim Davis of the ANU College of Law, for expert guidance and encouragement.

As ever, deepest thanks are reserved for Professor Geoffrey Lancaster AM, also of ANU.

Abstract

The theory of choice of law has received close attention in Australia since 1990. In 2000, the High Court of Australia chose the law of the place of the tort, without flexible exceptions, as Australia's new choice of law rule for intra-national torts. In 2002, it extended the rule to transnational torts litigated in Australia. Since 2002, problems inherent in the inflexible nature of the Australian choice of law rule have emerged. This prompted Australian courts to concede that, in the interests of justice and fairness, judicial discretion on choice of law may sometimes be appropriate. It is in this context that Australian courts have controversially revived debate on the doctrine of renvoi in the common law. Renvoi arises as an adjunct to choice of law. Australia's response to renvoi has provoked active debate among conflicts scholars internationally, because it applies renvoi to a tort case. Some of the debate has praised the Australian use of renvoi for its creativity, in other respects it has been critical of the High Court's unprincipled expansion of the doctrine contrary, firstly, to the traditional presumption against renvoi's application, and secondly, to the doctrine's contraction in other jurisdictions.

The High Court of Australia in *Neilson v Overseas Projects Corporation of Victoria Ltd* accepted that the scope of the renvoi was as a theory of potentially more general application in the conflict of laws.

This thesis is driven by a need to examine the doctrine of renvoi as it has arisen in Australia's highest court, in light of the historical writings by Albrecht Mendelssohn-Bartholdy and Jean Georges Sauveplanne, and to identify some guiding principles to assist courts and private lawyers in future cases that will inevitably be decided in this area.

The first part of this thesis will examine the theory of renvoi and the various forms of renvoi, trace the evolution of the doctrine and the extent to which the renvoi has been applied in selected law areas, and canvass some of the arguments why renvoi should and should not be accepted as constituting a general theory of the conflict of laws.

The second part of this thesis will develop and defend a principled basis for the rejection of renvoi as a theory applicable to tort by reference to the leading decision of *Neilson v Overseas Projects Corporation of Victoria Ltd.* With a focus on the practical example of

the *Neilson* application of renvoi to a civil claim in tort, this thesis will demonstrate that although the application of renvoi may produce the 'correct' result, the outcome is one of judicial pragmatism rather than any principled basis for renvoi's application in civil cases.

Instead of promoting uniformity and predictability for parties to a dispute, the obligation that a renvoi imposes on private lawyers and the courts to consider and apply the foreign choice of law rules – in addition to foreign rules governing the determination of substantive delictual liability, limitations and assessment of damages – introduces greater complexity and uncertainty in the resolution of transnational cases.

When courts are asked to interpret and apply both foreign rules of private international law and the foreign law of tort, renvoi further fails to support the conflict of laws goal of uniformity. The doctrine introduces a further element of the foreign law that may be misinterpreted and misapplied by the forum.

The instability of renvoi in the Australian context is heightened by the legal fiction of the presumption of identity that continues to be applied by forum courts whenever there is a gap in the pleading or proof of foreign law, as well as the adoption of a *lex loci delicti commissi* rule at common law without flexible exceptions: for intra-national tort in *John Pfeiffer Pty Ltd v Rogerson*, and for international tort in *Regie National des Usines Renault S.A. v Zhang*.

This thesis examines each of these issues in the context of the recent decision of the Full Court of the High Court of Australia in *Neilson v Overseas Projects Corporation of Victoria Ltd*. *Neilson* is the first decision of an ultimate common law court in which renvoi has been applied, as if it were a general theory of the conflict of laws, to decide an international tort claim. It also applies a new function to renvoi, that of an exception to a tort choice of law rule that the same court declared ought to contain no flexible exception.

This thesis critically evaluates the decision of the High Court of Australia to adopt a choice of law rule without flexible exceptions, then to elevate the doctrine of renvoi to the status of a flexible exception by stealth. Through characterising the *lex loci delicti commissi* as all of the laws of the foreign law area, and picking up the choice of law rules of the place of the tort, the High Court was able to remit the substance of the dispute to the *lex fori* to determine liability and damages.

In the context of the *Neilson* case, this thesis explores the development of the renvoi doctrine and the primarily legislative responses to it across some common law and civil jurisdictions since 1990, when Professor Jean Georges Sauveplanne published his chapter on Renvoi in Volume III of 'Private International Law'. It identifies the principal jurisdictions that have considered the operation of renvoi, and what might lie on the horizon for the renvoi as a general theory of the common law rules of choice of law in Australia, post-*Neilson*.

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Chapter 1: Introduction

Private international law is relevant only to the extent that law areas interact with other law areas. Its theories, and their application in practice, are concerned with the regulation of private relationships between companies and people.

The theory of the conflict of laws has acquired renewed importance in the early twenty-first century. Conflicts scholars have, for the first time, a *Journal of Private International Law* in which to publish their latest thoughts. Although choice of law rules have been settled through a combination of legislative intervention and judicial decisions in most jurisdictions including Australia, theoretical issues have again surfaced as adjuncts to choice of law.

Emerging global economies such as the People's Republic of China (China) are rapidly adapting to a world marketplace. China's growing sophistication and rapid modernisation is reflected in the significant improvements to Chinese legislative drafting, as the Chinese legislators within this ancient Civil system revise a framework for China's economic, social and political interaction with the world's other legal systems. China is positioning itself for a key role in international commerce, and has embarked on redrafting its entire civil code. This ambitious legislative program from 2008 to 2013 includes drafting the 'Law on the Application of Laws to Civil Relationships Involving Foreign Elements'. This new private international law statute will bring together the Chinese conflicts rules for civil matters, and draw on theories of private international law from other law areas in the reformulation and re-expression of China's choice of law rules. The aim of the legislators is a set of principles that may be judicially applied in a certain, consistent and just manner.

The internationalism of private relationships now features in everything from e-commerce to personal travel. As the ordinary interactions between individuals and entities in different jurisdictions continue to increase, so will the potential for disputes involving elements of foreign law.

It is not only the emerging economies such as China that have been reformulating their choice of law rules. Australia, which inherited its common law rules from the United Kingdom (UK), has only recently adopted a new choice of law rule for international and intra-national torts. The collision between the choice of law rules of the forum and of a

foreign law area, and how to respond appropriately to a conflict of conflicts rules, continues to be an unsettled corner of private international law. The doctrine of renvoi, which is directed to the very question of whether a choice of law reference to foreign law includes or excludes the foreign rules of the conflict of laws, had not been judicially settled by Australia's ultimate court. Practitioners and local scholars tended to accept, without testing, the presumption against the renvoi.

The presumption against the renvoi in all but the most exceptional cases has been retained in most common law jurisdictions, subject to some recent modifications that may suggest an expansion of the doctrine may be seen in Australia.

The renaissance in legal theory of conflicts jurisprudence in Australia has concentrated in the field of tort law, and in the formulation of a new common law choice of law rule for torts, the *lex loci delicti commissi* without flexible exceptions. The choice of law rule for tort in Australia has been left to evolve in quite a different way to the rules of the UK and the United States (US). That may be because there has been reticence on the part of the Australian Federal Government to enact legislation on the conflict of laws, because choice of law is private law and principally the responsibility of the States, and because the High Court of Australia as the ultimate Federal Court has the jurisdiction to pronounce a choice of law rule at common law that binds all states and territories in a way that the US Supreme Court cannot – although the federal courts have heard fewer private law cases in recent years.

The leading decision of the High Court of Australia for tort cases involving foreign elements, *Regie National des Usines Renault S.A. v Zhang*[1] (*Zhang*), has seen an apparent endorsement by the High Court of an inflexible and allegedly absolute choice of law rule for the determination of liability in tort claims. Certainty and predictability were cited among the noble aims of embracing a rule without flexible exceptions.

The decision of the High Court in *Zhang* runs against the prevailing recommendations of the academy, trends in the US and the UK, and the advice of Australia's own Law Reform Commission in its Report 58 of 1992. The Commission suggested that Australia's choice of law rule for tort should be the *lex loci delicti commissi*, but preserving a discretion to apply other law with a real, substantial or significant connection by way of a flexible

[1] *Regie National des Usines Renault S.A. v Zhang* (2002) 210 CLR 491, hereinafter '*Zhang*'.

exception. It also provided a draft text to the proposed conflict of laws legislation that was never debated or enacted.[2]

The paradox of the inflexible *Zhang* choice of law rule for international torts litigated in Australia is that a plaintiff before an Australian court may elect not to plead foreign law, yet their claim remains actionable and 'there is no obligation upon either party to plead foreign law in order to render a claim or cross-claim justiciable'.[3]

The *Zhang* rule expressly prevents an Australian court from considering factors other than the place of the tort, when choosing the applicable law. There will always be exceptional cases where justice and fairness can only be served by a flexibility to apply some other law. In the absence of some overt and principled way to reach the preferred decision, the common law is littered with case examples of how courts will adopt a pragmatic rather than principled approach to deliver a just result.

The inflexibility of Australia's choice of law rule for tort has provided a vehicle for the debate about the characterisation of foreign law as all of the substantive law of a foreign area, including the foreign rules of choice of law. Hence, the renvoi doctrine was controversially applied by the High Court of Australia in resolving *Neilson v Overseas Projects Corporation of Victoria Ltd*[4] (*Neilson*). *Neilson* was a foreign tort case in which the *lex loci delicti* was found to be China, and the forum was the Supreme Court of Western Australia.

By its decision in *Neilson*, the High Court has effectively acknowledged that the inflexibility of the *Zhang* rule is unworkable. However, the majority declined to use the case to introduce a flexible exception to clarify the tort choice of law rule. A flexible exception such as the proper law, better law or some other law approach might have allowed Australian law to apply to the Australian parties litigating in an Australian court. At least one member of the court was prepared to concede openly that flexibility would have assisted in reaching a just result.[5] In response to the need to bring about justice and fairness for Mrs Neilson, but to preserve the inflexible *Zhang* rule that mandated

[2] However, States have enacted Choice of Law (Limitation Periods) legislation to confirm that limitation law is substantive, in response to the Law Reform Commission's recommendations e.g. *Choice of Law (Limitation Periods) Act 1993* (NSW).
[3] *Zhang* (2002) 210 CLR 491 at 517 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[4] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (Gleeson CJ Callinan Gummow Hayne and Heydon JJ, Kirby and McHugh JJ dissenting), hereinafter '*Neilson*'.
[5] *Neilson* (2005) 223 CLR 331 per Callinan J at 413.

application of foreign law, the majority therefore introduced flexibility by stealth and through some intellectual acrobatics, by accepting renvoi could operate as a general theory of Australia's conflict of laws. It applied the renvoi doctrine to the tort claim to remit the question liability to the law of the forum, avoiding the foreign limitation period that would have barred the claim under the foreign law.

Through declaring that the renvoi theory may have broader application than in succession to property and to marriage, the High Court leaves open the prospect of renvoi's further spillage into contract and all areas of the law. The potential for the doctrine's expansion into contract law is a source of some concern for those observing what now stand as radical developments in the conflict of laws.

At best, *Neilson* gives litigants in a tort case false hope of an escape from the rigid and unjust application of foreign substantive law. At worst, it sets a troublesome precedent that potentially applies to *every* case with a foreign element that may be brought before an Australian court, and for every case brought in a foreign court that refers to Australian law. There could be a veritable explosion in work for conflicts lawyers to provide expert advice on Australian and foreign conflicts rules including renvoi, and their application in all cases with foreign elements. For conflicts practitioners, this would be financially rewarding but for litigants and their insurers, this will only magnify the already significant cost of bringing or defending a case in which foreign law must be pleaded and proved.

The High Court's diverse reasoning for applying the renvoi to tort fails to show consistency with their own rationale for selecting a rigid choice of law rule, and lacks all interest in or appreciation of the historical debates on the theory of renvoi. None of the critical debates on the merits and demerits of renvoi were referred to in the High Court judgment.

Renvoi theory has been advanced to promote certainty or uniformity of approach to resolving certain disputes involving foreign elements in certain circumstances. Certainty and uniformity are key ingredients in the juridical or legislative development of conflicts rules. However, renvoi has also historically been rejected generally by Anglo-American courts but given a narrow scope of application to promote a certainty of outcome of judicial decisions in matters of status, and to protect the legitimate interests of the parties,

and that the renvoi doctrine can sometimes promote a just outcome in these exceptional cases.[6]

The renvoi doctrine as a general rule of the conflict of laws cannot promote decisional harmony.[7] It cannot do so because it is fundamentally unstable and requires various adjuncts to operate at all. It requires firstly the guidance of expert evidence of the content of foreign law and of its application, and secondly the exercise of judicial discretion to apply the foreign law consistently with the proof of that foreign law as a fact. Both of these elements defy prediction. Later discussion will explore why.

The verdict in a renvoi case depends largely upon the pleading and proof of the foreign law, including the foreign choice of law rules of which foreign renvoi may or may not be a part.[8] To the extent that the foreign law is not pleaded or proved fully in an Australian court, a number of presumptions are available to the forum court to resolve the dispute. These presumptions may distort the application of foreign law by forum courts. There has been limited research into this aspect of conflicts scholarship, and its place in the broader analysis of the theory of renvoi either as a helpful tool or as a hindrance in practice. Only the presumption of identity or similarity will be discussed in this thesis as it was squarely raised in *Neilson*.

The uneven treatment of the renvoi by different jurisdictions is a fertile source of debate on the merits and demerits of applying the renvoi doctrine, and in which of its forms, to achieve certainty of outcome. Part of that debate includes the more focussed question of whether it is prudent for Australian courts and other common law courts to permit renvoi to encroach upon the law of tort and delict, and if so, then in which of its forms: single or total.

In the context of both tort and contract, the renvoi doctrine does not promote either certainty or uniformity in solving a conflict of laws problem. It fails to promote certainty and uniformity because once the foreign law is proven, harmony of solutions is only achievable in a practical sense if choice of law rules of the foreign law area reject a renvoi from the forum court.

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[6] Those cases are the status cases referred to at Chapter 2 below.

[7] That concept is based on the notion that if conflict of laws rules are uniform in all jurisdictions, the same substantive law will apply wherever the dispute arises or is litigated.

[8] Many jurisdictions do not recognise renvoi and therefore have no stated position on it. See Chapter 3 below.

There are such diverse approaches to renvoi across the conflict of laws of different countries; therefore, uncertainty of outcome is the inevitable consequence of the universally uneven approach to renvoi and, in some legal systems, a complete absence of recognition for the doctrine as part of the jurisprudence.

In Australia, which has embraced the *lex loci delicti commissi* choice of law rule for tort, without flexible exceptions, through the High Court decisions of *Zhang* and *John Pfeiffer Pty Ltd v Rogerson*[9] (*Pfeiffer*), there is an onus on lawyers to perceive and recognise the potential for problems when the foreign law of the place of the wrong may include a choice of law rule that remits the claim to the law of the forum, or transmits it to the law of a third area, to fully and accurately plead and prove foreign tort law, as well as the foreign rules of the conflict of laws. When Australia's choice of law refers to the foreign law, a plurality of the High Court in *Neilson* has defined this as the entire foreign law, including conflict of laws rules of the foreign law,[10] radically accepting that the doctrine of renvoi is part of the general rules of the Australian conflict of laws. The minority defined the foreign law as the foreign law applicable if the matter were litigated in the foreign law area, that is, the law applying domestically and excluding the conflict of laws rules.

The majority of the High Court in *Neilson* was consequently prepared to surrender to foreign law experts a pivotal role in the determination of tort conflict of laws cases that involve foreign elements, to the extent that the foreign law is actually pleaded by the parties. This contradicts the High Court's avowed aim to promulgate a choice of law rule that promotes both certainty and predictability, because not only must foreign tort cases be decided with the assistance of expert evidence on the substantive content of the foreign tort law, but they now also require expert evidence on the foreign rules of the conflict of laws including foreign renvoi in every instance when a party pleads foreign law. That will most often be pleaded by defendants. That gives the court licence to make its own choices on how to solve the infinite regression of a total renvoi, based on which evidence of the substantive foreign tort law and the foreign conflicts of law ought to be preferred to the extent that it has been sufficient proven.

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[9] *John Pfeiffer Pty Ltd v Rogerson* (2002) 203 CLR 503, hereinafter '*Pfeiffer*'.

[10] Other scholars have defined the substantive law to include the conflict of laws rules. This is the argument used by some conflicts scholars to argue in favour of defining the *'lex loci delicti'* as the whole of the *'lex'* including choice of law rules, and to justify the correctness of the High Court's approach to the Neilson's claim.

It needs to be recognised that courts prefer their own law; the forum court is able to apply its own law more efficiently than any foreign law. This explains what Dr Mortensen calls the forum bias in the conflict of laws,[11] and the myriad of homing devices in the doctrines and rules of the conflict of laws. The bias that the forum has for its own law cannot be eliminated whenever there is flexibility and discretion to choose the applicable law, but it can and should have its impact minimised.

Far from serving the noble cause of uniformity, which this thesis submits is unattainable, the renvoi in Australia has taken the form of yet another homing device to avoid the rigid application of foreign law contrary to the forum's *lex loci delicti* choice of law rule.

The majority in *Neilson* also affirm the fiction that in the absence of any or any adequate pleading and proof of the foreign law, it will be presumed to be the same as the law of the forum. That presumption of similarity does not operate in many other jurisdictions.[12] As a matter of evidence, the party seeking to rely upon the foreign law has the onus of pleading and proving the foreign law as a fact. In the absence of adequate proof of the content of the foreign law, the presumption of similarity applies. The extent to which the presumption may apply, in cases where there is some evidence that the foreign law is not the same as the forum law, has not been closely examined. Broadly construed, the presumption gives litigants in Australia a clear forensic advantage, if it is in their interests to abstain from pleading or bringing any or much evidence of foreign law.

The avowed rigidity of the Australian *lex loci delicti* choice of law rule contrasts with the permissive application of the rule. That is, when the parties choose to plead and prove foreign law, the foreign law must be rigidly applied without recourse to a flexible exception even if the result of strict application would be unjust. However, as a matter of principle under Australian law, it is not mandatory for either party to plead and prove foreign law at all. A plaintiff before an Australian court is not even required to plead that the cause of action arose in a particular law area.[13]

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[11] See e.g. R Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839.

[12] Detailed analysis is beyond the scope of this paper. See A Mills, 'Arbitral Jurisdiction and the Mischievous Presumption of Identity of Foreign Law' (2008) 67 *Cambridge Law Journal* 25.

[13] *Walker v W A Pickles Pty Ltd* [1980] 2 NSWLR 281, 284-5 per Hutley JA; approved in *Zhang* (2002) 210 CLR 491 at 517 per Gleeson CJ, Gaudron, Gummow, Hayne JJ.

It is often the case that it is to the mutual advantage of plaintiff and defendant that neither pleads the foreign law, so that the presumption of similarity can be left to do its work and the forum can apply the law it knows best, which will always be the *lex fori*. This will frequently occur in practice. Conversely, were a defendant wishing to rely on an aspect of foreign law for some forensic advantage, as is most often the case, it will bear the evidential burden[14] of qualifying foreign law experts[15] to prove the foreign law to a sufficient extent to displace the presumption of similarity.[16] However, when foreign law evidence is deficient and the presumption of similarity is left to do its work, the forum is left to apply an amalgam of foreign and forum law that promotes neither harmony between jurisdictions, nor an outcome that meets the legitimate expectations of the parties.

The Course of Recent Developments in Renvoi

In Australia and following the 2005 High Court decision of *Neilson* the door has been left ajar for the renvoi doctrine to be applied to multi-state contract cases when the parties have not chosen the law of the contract. In response, the remarks of McLure J and fellow Western Australian Court of Appeal judges in *O'Driscoll v J Ray McDermott S.A.*[17] (*O'Driscoll*) seem to beckon it.[18]

Although in the UK renvoi has been excluded from contract and tort by legislation enacted in the 1990 and 1995,[19] recently Sir Lawrence Collins in *Barros Mattos Junior v MacDaniels*[20] (*Barros Mattos*) has permitted scope for the renvoi doctrine to be applied to

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[14] Also in terms of the expense of qualifying an expert in foreign law, and the forensic risk that a Court may reject or misconstrue the evidence.

[15] This is discussed in considerable detail by Dr Anthony Gray, see A Gray 'Choice of Law: The Presumption in the Proof of Foreign Law' (2008) 31(1) *University of New South Wales Law Journal* 136. For a helpful survey of the pleading and proof of foreign law in Australia since 2000, see especially J McComish 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400. See Chapter 4 below for further discussion on who may be accepted by Australian courts as an expert and, in particular, a foreign law expert.

[16] What will constitute 'sufficient' proof of foreign law is an area in need of clarification by Australian courts, especially since *Neilson*.

[17] *O'Driscoll v J Ray McDermott S.A.* [2006] WASCA 25, hereinafter *'O'Driscoll'* at [12] and [59].

[18] The case of *O'Driscoll* was heard on 16 November 2005 shortly after the High Court delivered its judgment in *Neilson* on 29 September 2005. The Western Australian Court of Appeal's judgment in the *O'Driscoll* case was delivered on 22 February 2006. At the date of submitting this dissertation there has been no significant further judicial consideration in Australia on the renvoi doctrine either in tort or in contract. But the renvoi remains the one and only device of flexibility to Australia's rigid choice of law in tort that the High Court has expressly admitted in its judgments post-*Pfeiffer* and *Zhang*: see e.g. J Greene, 'Inflexibly Inflexible: Why Choice of Law in Tort Questions Still Won't Go Away' (2007) 33 *Monash University Law Review* 246, hereinafter 'Inflexibly Inflexible'.

[19] Respectively the *Private International Law (Miscellaneous Provisions) Act 1995 (UK)* s9(5), hereinafter *'PIL Act'* and *Contracts (Applicable Law) Act 1990 (UK)*, Schedule 1 Article 15.

[20] *Barros Mattos Junior v MacDaniels* [2005] EWHC 1323, hereinafter *'Barros Mattos'*.

international restitution cases in those exceptional situations where 'the object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflict rules of that law'.[21]

Since *Pfeiffer's* universal tort choice of law rule and strong policy against forum shopping, Australia has experienced the fitful evolution of a body of case law that has sought to distinguish it from its common law cousins the UK, the US, Canada, and New Zealand in a wholesale rejection of either a flexible choice of law rule, or flexible exceptions to permit the application of *lex fori* in cases where the rigid application of the *lex loci* delicti would be oppressive and offend notions of justice and fairness. The line of authority from *Pfeiffer* also confirms an express rejection by Australian courts of governmental interest analysis.[22]

Underpinning the selection of a rigid choice of law rule was the High Court's avowed aim to promote uniformity. However, where inflexibility can make a result predictable, that predictability comes at the expense of fairness.

The case of *Neilson* was one that would have had a different outcome if the Australian choice of law rule had not been dogmatically inflexible. The Court at first instance certainly felt that in the interests of fairness to the plaintiff, the substantive law of China should not apply and so the trial judge used the renvoi to apply *lex fori* and to award the plaintiff her damages.[23] The Full Court of the Supreme Court of Western Australia reversed his decision, on grounds that the doctrine of renvoi does not apply to torts in Australia.

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[21] Ibid at [108].

[22] Governmental interest analysis is accepted and applied in some jurisdictions of the United States: see for example the Supreme Court of New Jersey's decision in the renvoi case of *Pfau v Trent Aluminium Company* (1970) 263 A 2d 129. In *Pfau*, the plaintiff was domiciled in Connecticut and the defendant was domiciled in New Jersey. The plaintiff was injured by the defendant in a motor vehicle accident in Iowa. The Supreme Court of New Jersey was asked to consider the application of an Iowa 'guest statute' that purported to exclude the defendant from liability for 'ordinary negligence'. It was argued that Connecticut law applied, and that Connecticut choice of law rule was the *lex loci delicti* which in this case would be Iowa. The court held that Iowa was not interested in the suit, as to apply the Connecticut choice of law rule would frustrate the goal of governmental interest analysis. Dr Gray advocates for the eventual acceptance of interest analysis in Australia notwithstanding *Pfeiffer* and *Zhang*: A Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases' (2004) 23(2) *University of Queensland Law Journal* 435. He also suggests, citing American cases, that interest analysis theory and renvoi theory are compatible: A Gray, 'The Rise of Renvoi in Australia: Creating the Theoretical Framework' (2007) 30 *University of New South Wales Law Journal* 103, hereinafter 'The Rise of Renvoi'. However, his analysis does not overcome the illogicality of double renvoi and he has no answer to the infinite regression other than to concede that 'there is no easy answer to this difficulty, and logic does not assist us': Gray (2007) at 121.

[23] *Neilson v Overseas Projects Corporation of Victoria & Anor* [2002] WASCA 231 (unreported, McKechnie J), hereinafter *'Neilson v OPCV'* at [190].

On appeal, the 2005 decision of the Australian High Court has extended the application of renvoi to foreign torts litigated in Australia by endorsing the doctrine of renvoi in what some regard as an inspired move and others regard as a radical step, to provide flexibility to a rigid choice of law rule for tort. This has occurred without particularising a theoretical framework for the application of the renvoi doctrine in either its single renvoi or double/total renvoi form.

The problem of conflicts in choice of law rules is one of the few areas of conflicts scholarship characterised by significant and perennial ambiguity. The conflict between choice of law rules may be addressed by the doctrine of renvoi. That doctrine has never found universal acceptance as a general theory of the common law.

Until *Neilson*, the only common law authority (from Scotland) in fact told against the renvoi doctrine applying to tort.[24] Renvoi has otherwise had a peripheral existence as a device for exceptional cases. In the common law countries, it had been applied to address questions of validity in succession law. The policy of renvoi's utility in those peripheral cases is also open to doubt.[25]

Australia has the curious honour of hosting the present day renaissance of renvoi as a discipline of conflicts scholarship with more value than as historical curiosity. It is no longer an obscure corner of an arcane area of law.

Until 2003, the doctrine of renvoi in Australia had been addressed only fleetingly in exceptional cases and was not considered by the principal texts as a general theory of the conflict of laws. It was the subject of one of those slim chapters in textbooks on the conflict of laws that contained only antiquated citations from the nineteenth and early twentieth century. The only people who regularly focussed their attention on renvoi were coursework conflict of laws students, preparing for an undergraduate examination. Students were conscious that this was, to borrow from Dr Mortensen,[26] a troublesome and

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[24] *M'Elroy v M'Allister* (1949) SC 110 at 126.

[25] Renvoi was not addressed by the Western Australian Court of Appeal in *Singh v Singh* (2009) 253 ALR 575; [2009] WASCA 53 even though the case concerned a fraudulent transfer of immovable property in Malaysia, renvoi was pleaded, and evidence was put at hearing that the High Court of Malaya has exclusive jurisdiction to order the transfer of immovable property in Malaysia. See also H S Khaira, 'Can an Australian Court Decree the Transfer of Immovable Property Without the Need to Enforce the Foreign Judgment in Malaysia? (2009) http://www.scribd.com/doc/13403027/Can-an-Australian-Court-Decree-the-Transfer-of-a-Malaysian-Property (accessed 27 February 2010).

[26] R Mortensen, 'Troublesome and Obscure: The Renewal of Renvoi in Australia' (2006) 2 *Journal of Private International Law* 1, hereinafter 'Troublesome and Obscure'.

obscure area, and precisely the topic for a challenging essay question. That is precisely why the renvoi question has so actively engaged the minds of scholars and the academy – it is a difficult area of the conflict of laws. Mercifully for student and teacher, the area was so fraught with difficulty that there might never be a right or wrong answer and no case law to support or refute a particular thesis. Just as there can be no right or wrong answer to a renvoi essay question, there can be no right or wrong answer to the renvoi questions when they come before the courts. However, there are judgments that clearly address the intellectual challenge,[27] and those that seek to ignore it.[28] Australian lawyers have been able to ignore the problem by declining to plead renvoi, in which case an Australian court is free to ignore it as well.

It was therefore submitted on behalf of Mrs Neilson[29] that the law of the place ought to be interpreted to mean the entire law of the place, including any choice of law rules. However, the *Neilson* case is the only decision of an ultimate court of general jurisdiction on renvoi and tort in a common law jurisdiction, i.e. Australia where there is no choice of law statute and although there have been recommendations to enact one, no progress has been made for a decade in that direction, and none is intimated. The common law having been left to develop in response to the practicalities, the High Court failed to recognise the inherent difficulty with its inflexible choice of law rule and used the renvoi doctrine as a 'flexible exception by stealth.'[30] The reasoning in *Neilson* is a great disappointment to all who were expecting it to bring clarity and insight, and certainty on the operation of the doctrine of renvoi and its scope in the conflict of laws. It is also curious that the Western Australian Full Court's authorities, in support of its conclusions that the reference to the law of a place should be to the domestic law of the place excluding its choice of law or conflicts rules, seemed to have been dismissed by the High Court.

The observations of Lord Russell in that Scottish case *M'Elroy v M'Allister* (*M'Elroy*) set out a position that the High Court might have taken as persuasive:

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[27] McLure J in *Mercantile Mutual Insurance (Australia) Limited v Neilson* (2004) 28 WAR 206 before the Full Court of the Western Australian Supreme Court, hereinafter *'MMI v Neilson'* for example.
[28] McKechnie J in *Neilson v OPCV*, and the plurality in *Neilson*, excepting Kirby and McHugh JJ.
[29] Appellant's submissions to the High Court p 12 at [20].
[30] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 38.

> In referring to the *lex loci delicti* to ascertain by what rules the rights and liabilities of the parties to this action are regulated, the court refers to the internal domestic law of that locus and not to its private international law.[31]

What *Neilson* does open up is further scope for debate on renvoi in the common law world. The year 2003 brought the aftermath of the *Zhang* revolution in Australia choice of law for tort. *Zhang* marked the High Court's abolition of the double actionability rule from *Phillips v Eyre* and the introduction of *lex loci delicti commissi* as Australia's choice of law rule for international torts.

In the months after *Zhang*, a single judge of the Supreme Court of Western Australia delivered reasons in a personal injury tort claim with a foreign law element, the first *Neilson* decision. The judgment was remarkable because of an exercise of discretion by the Western Australia judge applying Western Australian law, to apply the entire Chinese law including a Chinese choice of law rule. The Chinese choice of law rule contained in the General Principles of Civil Law (*'General Principles'*) provided for judicial discretion to apply (in circumstances where both parties are nationals of or domiciled in the same country) the law of their own country of nationality or domicile. Without receiving evidence of how a Chinese court might exercise a discretion to remit the matter to Australia,[32] His Honour exercised discretion and applied renvoi techniques without referring to renvoi, with the effect that the plaintiff successfully avoided imposition of the substantive Chinese limitations period. Her tort claim was actionable and she was, in consequence, able to establish negligence and recover damages.

In 2004, when the Full Court of the Supreme Court of Western Australia delivered unanimous reasons in *Mercantile Mutual Insurance (Australia) Ltd v Neilson & Ors*[33] (*MMI v Neilson*), conflicts scholars took notice. In 2005, the High Court decided the appeal from the Full Court of the Supreme Court of Western Australia.

By way of response to *Neilson*, and also recognising the conflict of the conflict of laws as one of the last frontiers of the conflict of laws, an array of mostly Australian (with some

[31] *M'Elroy v M'Allister* [1949] SC 110 at 126.
[32] Or even acknowledging the need to receive such evidence.
[33] (2004) 28 WAR 206.

English and New Zealand) scholars have published a startling number of commentaries and other articles since 2004 on the doctrine of renvoi and its operation at common law.[34]

The development of the Australian conflict of laws has been characterised by the judicial pronouncements of the High Court in a sequence of cases starting with *Pfeiffer*, *Zhang*, and ending with *Neilson*. *Neilson* has raised much debate about whether history will scarify the Gleeson High Court on its decision to endorse the renvoi as a general theory of the conflict of laws, or acknowledge *Neilson* as a great case of landmark significance.

To quote the distinguished US jurist Oliver Wendell Holmes, *Neilson* is a good example of how hard cases make bad law:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.[35]

For *Neilson*, the Gleeson High Court of seven delivered a total of five separate judgments,[36] across which the court split 5-2 in favour of Mrs Neilson, and 6-1 in favour of the application of renvoi to address a conflict between the choice of law rules of Australia, and of China, and to decide Mrs Neilson's tort claim.

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[34] See for example M Davies, 'Renvoi and Presumptions about Foreign Law; *Neilson v Overseas Projects Corporation of Victoria*' (2006) 30 *Melbourne University Law Review* 244; R Mortensen, 'Troublesome and Obscure' (2006) 2 *Journal of Private International Law* 1; M Keyes, 'The Doctrine of Renvoi in International Torts: *Mercantile Mutual Insurance v Neilson* (2005) 13 *Torts Law Journal* 1; A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35; A Mills, 'Renvoi and the Proof of Foreign Law in Australia' (2006) 65(1) *Cambridge Law Journal* 37; R Yezerski, 'Renvoi Rejected? The Meaning of "the *Lex Loci Delicti*" after *Zhang*' (2004) 26(2) *Sydney Law Review* 273; A Briggs, 'The Meaning and Proof of Foreign Law' (2006) 1 *Lloyd's Maritime and Commercial Law Quarterly* 1; A Gray, 'The Rise of Renvoi' (2007) 30(1) *University of New South Wales Law Journal* 103; R Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839; A Dickinson, 'Renvoi: The Comeback Kid?' (2006) 122 *Law Quarterly Review* 183; N Bender, 'Renvoi – Case Note; *Mercantile Mutual Insurance (Australia) Ltd v Neilson*' (2004) 78(7) *Australian Law Journal* 450; J Greene, 'Inflexibly Inflexible' (2007) 33 *Monash University Law Review* 246; M Keyes, 'Foreign Law in Australian Courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2007) 15 *Torts Law Journal* 9; J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400; E Schoeman, 'Renvoi: Throwing (and Catching) the Boomerang – *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2006) 25(1) *University of Queensland Law Journal* 203.

[35] *Northern Securities Co v United States* 193 US 197, 400-401 (1904). The *MMI v Neilson* decision of the Western Australian full court is summarised in K Anderson & J L R Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2004' (2006) 25 *Australian Yearbook of International Law* 697 at 703.

[36] Gummow and Hayne JJ delivered a joint judgment.

The impracticality of applying renvoi as a tool to promote certainty and predictability in foreign tort case, and its inability to promote uniformity of decisions in practice because no forum court can ever apply the entire laws of a foreign law area, diminish many of the recently advanced arguments favouring the renvoi as a general theory of the conflict of laws.

The *Neilson* case highlights some of the theoretical and practical problems with the doctrine, and provides the basis for this thesis to advance an objection to a general acceptance of renvoi as a means of facilitating uniform decision making irrespective of the forum, and the position that renvoi is an inappropriate and unstable flexible exception to Australia's inflexible tort choice of law rule.

The Scholarly Views in Practice

The literature on renvoi is immense, but until Professor Briggs published his brief and eponymous essay in praise and defence of renvoi[37] in the 1998 volume of the *International and Comparative Law Quarterly*, the notion of applying renvoi in the context of tort and contract decision attracted little credence. However, there are echoes of the 'most significant contacts' challenge issued by Dr Morris[38] in 1951, and endorsed by the New York Court of Appeals deciding *Babcock v Jackson*[39] in 1963, during the US conflicts 'revolution'.[40]

Outstanding scholars, such as Professor Juenger, and practitioners have recognised that Professor von Savigny's multilateral framework for private international law to determine the seat of legal relationships and to achieve harmony of decisions through aiming for uniform results irrespective of the forum, is fundamentally flawed and overly ambitious. The selection of forum is in practice often driven by procedural rather than substantive advantage, and a uniformity of decisions is unattainable when different jurisdictions have different choice of law rules and different levels of recognition of the renvoi doctrine or approaches to it.

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[37] A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *International and Comparative Law Quarterly* 877.
[38] J H C Morris, 'The Proper law of a Tort' (1951) 64 *Harvard Law Review* 881.
[39] 191 NE 2d 279 (NY 1963).
[40] Borrowing the term of Professor Juenger in F K Juenger, *Choice of Law and Multistate Justice* (1992) at 18.

As Professor Juenger writes,[41] variations in classification and connecting factors give life to variations in connecting factors and characterisation, which in turn lead to conflicting conflict of laws rules, and thence to the problem of renvoi. The renvoi problem emerges when the laws of one country or territory encroach on the laws of another country, and this happens very frequently in this era of globalisation and in the rise of transnational disputes.

Renvoi in the international tort context has had limited analysis. Whether it should be allowed in international tort disputes and how it could and should be applied is relatively untrammelled ground. Whether it is apt as a flexible exception in the context of a rigid choice of law rule does not appear to have been the topic of academic writing either before or since *Neilson*, and now requires scrutiny.

The most recent comprehensive overview of the renvoi in the English language, and the doctrine's existence, acknowledgement or operation internationally was concluded in 1988 by Professor Sauveplanne.[42] His study provided a picture of the renvoi doctrine internationally up to 1987, in the context of how individual countries had treated the renvoi legislatively or in their case law. His survey did not reach any settled conclusions on how to facilitate renvoi's application to cases involving foreign elements, or whether it could or ought to be extended beyond the narrow ambit of marriage and immovable property cases, to become a general principle of the conflict of laws.

Many of the arguments for and against the renvoi in disputes between states or territories of the same nation are applicable to disputes involving foreign elements. Of course, cases involving foreign elements also highlight the intersection between private and public international law. The understanding of why, for example, it might be desirable for foreign judgments to be enforceable in Australia may require an examination of issues of comity and fidelity to the laws of a foreign state.

In the international context of civil partnership registers and a broader recognition of the rights of de-facto and civil partners to inherit property or to access pension entitlements of a deceased partner, some of the arguments why renvoi should operate in the exceptional context of marriage status cases may need to be revisited, in the context of civil

[41] Juenger, ibid.

[42] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopaedia of Comparative Law* (3rd vol, 1990). In the German language, see Dr Michael Sonnentag's doctoral thesis of 2000 for a summary of the European approach: M Sonnentag, *Der Renvoi im Internationalen Privatrecht* (2001).

partnerships that are available in a small number of jurisdictions including the UK, the Netherlands, Spain and some but not all of Australia's states and territories.[43]

This thesis will not focus on the 'exceptional' status cases involving succession to immovable property, and the status and validity of marriage in which renvoi's application has been accepted and is not controversial. It will focus on the controversial expansion of the doctrine, and on arguments against an expansion of the renvoi. What this thesis does contend is that renvoi is not desirable as a theory of general application in the conflict of laws, and in particular as a device to achieve flexibility for tort cases. That is because renvoi is inherently unstable and brings about inconsistent outcomes unless there is uniformity of the international rules on renvoi.

The Australian decision to apply renvoi to tort leads this thesis to examine and to inquire as to what extent Australia's choice of law rule requires parties to consider and apply the law of another jurisdiction.[44] This thesis also questions the inflexible choice of law rule for tort, which the High Court purported to endorse in *Pfeiffer* and *Zhang*.

This thesis will argue the following:

1. the question of whether the forum's choice of law rules require the forum to apply the whole body of law of the foreign area, including its rules of private international law, needs as a matter of principle only to be answered in the negative because of other conflict rules that operate within any choice of law regime;
2. that the instability of the renvoi makes it an unsuitable theory for broader application as a rule of the conflict of laws, as it leads to uncertainty in commercial contracts and tort cases as it can confound the legitimate expectations or intentions of the parties;
3. renvoi is inappropriate as a device to achieve flexible exceptions to an rigid *lex loci delicti* choice of law rule;

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[43] Presently Tasmania, New South Wales, Victoria and the Australian Capital Territory have civil partnership registration.

[44] For a look at interest analysis as potential framework to support renvoi, see A Gray, 'The Rise of Renvoi' (2007) 30(1) *University of New South Wales Law Journal* 103. Interestingly, at pp103-104 and to illustrate a hypothetical problem of renvoi, Dr Gray cites the example of a New South Wales citizen dying in a car accident caused by another New South Wales citizen in Quebec, Canada, for which suit is commenced in Australia. He then notes the Australian tort choice of law rule to determine liability and quantum is the *lex loci delicti*, and that Canadian law determines these by reference to the *lex domicilii*. In fact, Quebec has expressly rejected renvoi by legislation, so the internal Quebecois law would apply to liability and quantum.

4. that the general application of renvoi to substantive areas of law is radical and problematic and therefore to be discouraged;
5. the common law presumption against renvoi should be affirmed, so that renvoi should be disapproved except where rebutted in exceptional cases involving status; and
6. that the arguments advanced by Professor Beale to confine renvoi to status cases do not necessarily sit easily with the views of contemporary Australia or a socially-inclusive twenty-first century society.[45] The arguments against an expansion of renvoi can be expressed simply and in terms of the basic principle that the conflict of laws aims to promote certainty and predictability in the context of uniformity and decisional harmony, which renvoi does not promote.

Since courts may be prepared to interpret foreign law as the foreign law including choice of law rules, it is important for all lawyers who encounter cases involving foreign elements to be aware of the renvoi and to understand the effects of invoking it.

[45] J Beale, *A Treatise on the Conflict of Laws* (1935) states for example that 'Because of the paramount social importance of treating the existence of marriage, for instance, in the same way in all states, the law of the forum attempts to bring about a warranty of such treatment by providing in its law for a decision of the question in the way that the law, which in its opinion is the proper law would determine it; not because of any effect given to that law but simply as the rule adopted by the law of the forum for the determination of such problems. The same argument applies to a determination of the title of foreign land…' The territorialist renvoi arguments of Professor Beale and other scholars of the twentieth century has given way to the more fashionable purposive approaches of current scholars, that are variously based on policy and the scope to interpret foreign law using a number of techniques such as, for example, interest analysis. This thesis recognises that there is value in revisiting the earlier writings on renvoi to contrast the shift in approach.

Chapter 2: The Theory Behind the Doctrine of Renvoi

Renvoi is a doctrinal basis for the application of foreign rules of the conflict of laws in the forum. This chapter aims to explore the theory behind the renvoi doctrine, and how the dogmatic and purposive arguments for and against the theory have been framed. The theory of renvoi should be approached with due deference to the generations of private international lawyers who have examined the problem, because it has captured the attention of so many of the leading conflicts scholars of the past and the present. It can easily be said that the historical arguments were more principled, and the contemporary arguments are more pragmatic, but the uniform conclusion that the renvoi is a problematic theory cannot be ignored in the debate about how to apply it.

It is helpful to begin with the theoretical arguments that have been admitted to the debate on whether and where renvoi belongs as a theory of the conflict of laws. This allows us to consider the theory applied in various law areas of the modern world, including Australia.

Background

Before embarking upon any analysis of the renvoi as a practical notion, whether it should be allowed in international disputes, and how it could or should be applied, renvoi must be viewed in the broader context of choice of law.

Choice of law questions in the conflict of laws are concerned with whether the court of the forum will determine the issues before it by reference to its own law, or the law of a foreign law area. This thesis will use the descriptors 'conflict of laws' and 'private international law' interchangeably. When referring to a conflicts or private international law problem, this thesis focuses almost exclusively on choice of law issues and the collision between the rules of the forum in international contexts. It is therefore necessary to address the following serially: (1) the theory of choice of law; and (2) the theory of the renvoi.

Theoretical Considerations of Choice of Law

Uniformity is the Object of the Conflict of Laws

All rules of private international law depend on justice, expediency or policy. According to Professor Lorenzen, the chief object of the science of the conflict of laws is to bring about international uniformity of law.[46] In saying this, he pays homage to Professor von Savigny, whose *Treatise on the Conflict of Laws* first outlined the scientific purpose of the conflict of laws, as part of his push for a uniform and universal rules of the conflict of laws.[47]

Professor von Savigny's description of private international law as a 'science' suggests it is highly principled and scholarly work. It also confirms why institutes of private international law have emerged as societies to host the work of private international law theorists and to guide private international lawyers.[48]

The tension between the principled approach to private international law problems as posited by the theorists, and the pragmatic approach taken by jurists as well as legislators to achieve a result – which is also an obvious function of choice of law rules,[49] will be one of the themes running through this thesis.

Professor Rabel also described uniformity of result, whatever the forum, to be the 'chief purpose of private international law'.[50] Like all goals, uniformity may be attainable in a theoretical sense if rules of the conflict of laws could be unified with international cooperation and made consistent across all jurisdictions. However, to suggest that such uniformity is practically achievable in any discipline of the law is far-fetched and has fallen out of fashion long ago. Dr Mortensen argues that pursuing the objective of consistency, in some cases, may subvert a just result.[51] The question to be examined, therefore, must be how the rules of the conflict of laws may *promote* the goal of uniformity, rather than practically achieve it.

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[46] E G Lorenzen, 'Renvoi in the Conflict of Laws – Meaning of "The Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509 at 519, 524.
[47] F C von Savigny, *A Treatise on the Conflict of Laws* (2nd edn, 1880) at 70.
[48] E.g. Hague Conference on Private International Law.
[49] See for example P E Nygh, *Conflict of Laws in Australia* (6th edn, 1995) at 234.
[50] E Rabel, *The Conflict of Laws: A Comparative Study* (2nd edn, 1958) Vol 1, 94.
[51] R Mortensen, *Private International Law in Australia* (2006) at [1.24].

Uniformity is also the Object of Choice of Law Rules

Choice of law rules that promote uniformity of result also assist the parties to achieve a reasonable degree of certainty that is an aim both in theory and in practice as it enables parties to know the consequences of their actions and facilitates a more expeditious resolution to disputes if problems do arise:

> Parties to a dispute should be able to ascertain their rights and liabilities readily, if possible, without the need for litigation. To achieve certainty, the [choice of law] rules need to be clearly and simply formulated and to be as specific as is compatible with the needs of justice.[52]

Consistent with Professors von Savigny and Rabel, Justice Jackson in *Lauritzen v Larsen*[53] declared that any choice of law doctrine to be applied to the choice of law rule must advance the rationale for the choice of law rule, 'to assure that a case would be treated the same regardless of the fortuitous circumstances which often determine the forum'.[54] Justice Jackson, like other jurists faced with choice of law problems, will always be required to balance pragmatism with the need to respond in a principled and intellectually satisfying way. It seems that where there is sufficient of the latter, the decision may make for good precedent.

Professor Pound writes that 'the very conception of law involves ideas of uniformity, regularity, predictability'.[55] Choice of law in cases with foreign elements is concerned only with when, why and how a court should respond to the laws of the foreign law area.

Where a renvoi arises, the theorist's spotlight focuses on its usefulness as a tool of uniformity. Uniformity is closely connected with the theory of comity, which traditionally is more closely associated with public than with the private international law, as well as with the discouragement of forum shopping by claimants who seek advantages by choosing a particular forum. In practice, judges who have accepted jurisdiction to hear a conflicts case are then happy to be persuaded by choice of law arguments that focus squarely on the very basis for a litigant favouring the application of certain law (whether of

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[52] Australian Law Reform Commission, *Choice of Law*, Report 58 (1992) at [2.5].
[53] *Lauritzen v Larsen* 345 US 571 (1953).
[54] *Ibid* at 591.
[55] R Pound, *Law and Morals* (2nd edn, 1926) 79; quoted with approval by Professor Griswold in E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1186.

the forum or of the foreign area) because it is more advantageous to her, or less advantageous to her opponent.

Uniformity in the choice of law context aims to promote certainty for the parties, allows their reasonable expectations to be met, as well allowing some measure of consistency for some regular stakeholders in conflicts cases. The obvious stakeholders in many disputes are the insurers, who must be able to evaluate their risk by reference to objective criteria.

Uniformity can facilitate the expeditious resolution of claims by focussing the parties and their finite resources on the substance of the dispute, rather than the differences that may be to a party's advantage and disadvantage. It also should discourage parties from forum shopping, by eliminating the forensic advantages to bringing or defending a claim in one jurisdiction over another.[56]

Much of the focus of conflicts scholarship has treated private international law as very separate from public international law. This is primarily due to the universality of public international law's treaties and other instruments that are not otherwise enforceable by the local courts of jurisdictions like Australia unless enacted by Parliament.[57] Australia's conflicts rules are, by contrast, rules of the common law or of Commonwealth and state legislation. Conflicts rules may be enforced as with any other rules of the common law or of statute. Conflicts disputes are disputes concerning private relationships.

Professor Nagan, amongst others, challenges the distinction between private and public international law as an artificial construct, since each body of rules is complementarily concerned with 'the myth and practice of responding to claims for the allocation of the good as well as the undesirable things in the world social processes'. [58] Yet, the division of the rules of the conflict of laws and rules of public international law has continued to serve scholars of both disciplines, practitioners seeking to present and construe the rules to

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[56] However, in Australia, forum shopping is addressed in jurisdictional challenges at the interlocutory stage of a private international law dispute and is seldom a theme in a choice of law dispute. Also see F K Juenger, 'What's Wrong with Forum Shopping?' (1994) 16 *Sydney Law Review* 5.

[57] Although international instruments into which Australia has had input have also influenced Commonwealth and state legislation on private international law: see for example the Hague Convention on the Civil Aspects of International Child Abduction 1980, United Nations Commission for International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985.

[58] W P Nagan, 'Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories' (1982-1983) 3 *Journal of International and Comparative Law* 343.

further the interests of their clients, and the jurists who may occasionally draw on the pool of scholarly work to interpret and shape the law.[59]

The 'Law' to which Forum Choice of Law Refers

According to Professor Beale, *the purpose of choice of law* is to find the jurisdiction whose substantive law will govern the adjudication of the case.[60] Before accepting the correctness of Beale's declared purpose of choice of law, it is necessary to define what is meant by the 'substantive law' to govern the adjudication of the case.

Substantive Law in the Choice of Law Context

The designation of law as 'substantive' is used in various different contexts within private international law. Primarily, substantive law in the conflict of laws is a reference to the body of law that determines rights and obligations, as distinct from procedural law that prescribes a mechanism for the application of the substantive law.[61]

In the context of choice of law questions, writers have also adopted a narrower description of substantive law as the body of law that determines liability and, in some cases, damages. On this narrower definition of substantive law, rules of private international law are intended to be excluded, because they are not rules directed to determine liability. In the narrow context, substantive law has been alternately referenced as internal, municipal, domestic or territorial law.

The distinction between the narrowly construed 'substantive' or 'internal' law of a foreign area, and the other laws of a foreign area (the latter including rules of civil procedure, but also the rules of the conflict of laws) has been described by Professor Briggs as but another 'pedagogic device', as if to deride the distinction.[62] Professor Briggs suggests that the whole of the foreign law should apply, on the speculative basis that this would be what a court of the foreign law area would do if it were hearing the same case.

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[59] Even though jurists will do this purposively and in a result-selective fashion.
[60] J Beale, *Treatise on the Conflict of Laws* (1935). As a territorialist and advocate of vested rights, Professor Beale was also strongly in favour of the *lex loci delicti* choice of law rule for torts with foreign elements.
[61] See e.g. *Pfeiffer* (2000) 203 CLR 503 at 528.
[62] A Briggs, *The Conflict of Laws* (2002) at 16.

Professor Westlake notes that broad distinctions between bodies of law including domestic and international law 'belongs only to the science of law but does not actually exist'.[63] What Professor Westlake may mean is that the distinction is one that has been devised to arrive at a principled solution to the problem, rather than a merely pragmatic one.

The narrow distinction between substantive/internal law and the rules of private international law emerges from early scholars of the science, in response to the ancient renvoi cases of *Collier v Rivaz*[64] in England in 1841, and *L'Affaire Forgo*[65] in France in 1882. Prior to these cases, it seems that law scholars did not closely engage with the problem of a collision between choice of law rules and notions of internality or externality. It certainly seems that judges assumed laws to be internal.

Pedagogic devices are not just necessary tools of teaching and therefore understanding the operation of private international law, but are tools of legal analysis and theoretical experimentation. To borrow Professor von Savigny's reference to conflicts as a science, any science experiment requires parameters to delimit the scope, and rules for identifying and resolving abstract problems, before applying them to a practical context of a real case with real and lasting impact on the stakeholders.

In reply to the suggestion that the distinction between the substantive/internal law of an area, and the 'laws' of an area does not really exist, it is suggested that the narrow definition of substantive/internal law can be a helpful concept for the purposes of the conflict of laws.

There are many examples of concepts that conflicts scholars and jurists have happily employed to address cases with foreign elements. In the context of other concepts that bear upon the outcome of Australian conflicts cases, for example, the distinction between substance and procedure for the purposes of applying laws to determine liability and damages, or the distinction between jurisdiction and choice of law, may be considered pedagogic devices as much as they are rules governing choice of law.[66]

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[63] Quoted in E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws –Meaning of "The Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509 at 513.
[64] (1841) 163 ER 608.
[65] [1883] Clunet 64.
[66] The rule that procedural matters are to be governed by the law of the forum may have its origins in Roman law. Dr Mortensen gives a very interesting summary of the history of the conflict of laws in R Mortensen, *Private International Law in Australia* (2006) at [1.9] – [1.21].

When compared with the conflict of laws concept of the presumption of identity,[67] drawing a distinction between substantive/internal law and the other laws of a foreign area (including choice of law) seems much less insidious. In contexts in which a choice of law unequivocally refers the forum to a foreign law area, a designation of the foreign rules governing liability and damages as substantive/internal law does at the very least facilitate a forum court's application of the law of the foreign area to the matters in issue. The presumption of identity, by contrast, facilitates a forum court's application of the law of the forum, [68] *even if* the forum's choice of law rule has expressly mandated the application of the foreign law once it is pleaded, without exception. Whilst the presumption is not unfettered,[69] it has broad scope.

To summarise, the understanding of the conflict of laws depends on pedagogic devices, and Professor Briggs' hesitation with the narrow definition of 'substantive/internal law' as the law of a country that governs liability and damages and to the exclusion of conflicts rules seems misplaced.

Internal Law Avoids the Problem of Renvoi: The Territorial Approach?

As Professor Lorenzen observes, the early writers on private international law prior to *L'Affaire Forgo*:

> appeared to have assumed that in the nature of things the rules of Private International Law were to point out the law which should itself distribute the property, determine the capacity, decide upon the validity of a marriage, etc., and thus called for the application of the internal ... law of the foreign State to the exclusion of its rules of Private International Law.[70]

It is accordingly easy to see why the early cases did not raise the problem of renvoi. It is also easy to see where the territorialists, maintaining that the laws of a state prevail only

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[67] Discussed below at Chapter 4 and sometimes called the 'presumption of similarity'.
[68] See, for example, *Dyno Wesfarmers v Knuckey* [2003] NSWCA 375, which confirms that Australian courts will apply the presumption of similarity in the absence of pleading and proof of the content of the foreign law.
[69] The presumption's limits are canvassed in *Damberg v Damberg* (2001) 52 NSWLR 492, and in *Neilson* (2005) 223 CLR 331, 397 at [204] per Kirby J, who regarded it as 'straining even credulity to impose on an Australian court the fiction' that Chinese law was the same as the Australian law.
[70] E G Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 *Columbia Law Review* 190 at 191.

within its boundaries and not beyond them, submit that with the aid of a choice of law rule one must determine where the event occurred. Once the location of the event is established, it follows that only the local law of the place of the occurrence can attach legal consequences to that occurrence. Thus, if the tort occurred in China, it is for the local law of China to determine liability and damages.

If the forum defines its choice of law rules as the forum's rules to choose the law to determine the issue, the problem of a conflict of conflicts rules does not arise. This is because, on this narrow definition, the forum is not concerned with the content of the foreign law area's rules of private international law. It is not concerned with the foreign conflicts rules, since the forum's choice of law rule has already been applied and has selected the *lex causae*. The forum only looks to the foreign law to the extent that it can be relevant to the substantive rights in dispute, and is then freed to receive fact evidence on the content and application of the law. It is from the originally narrow and pragmatic construction of what it means to point to foreign law, that the common law derives the presumption against the renvoi.

Presumption against Renvoi

The common law and civil jurisdictions share a common presumption against general application of the renvoi doctrine. This seems to be founded on the territorial consensus that choice of law rules are, as we have summarised, the forum's rules to choose the law to determine the issue.

Dr Mendelssohn-Bartholdy's summary of the English decisions of 1926 to 1931 succinctly examined the extent to which English courts applied the English private international law of that time;[71] Dr Mendelssohn-Bartholdy concludes that in 'the matter of conflict of laws sovereignty means not only that such a conflict can actually arise and often does arise, but that it has to be solved according to rules of law in every case which comes before the courts of the sovereign.' He suggests that is a *precursor* to the sovereign doing justice after it assumes jurisdiction.[72] A forum court, assuming jurisdiction over a case, supplies the rule of conflict of laws and 'determines finally all the facts constituting the connection

[71] A Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937).
[72] Ibid at 85.

between the disputed right and the law governing it'.[73] To the extent that foreign municipal law governs a case, that law should so far as is possible for a forum court, be interpreted in the same way as the foreign court would interpret it. According to this formulation, Dr Mendelssohn-Bartholdy argues for limitations to the doctrine of renvoi, and supports a general presumption against renvoi.

More recently, Sir Lawrence Collins observed that the presumption against renvoi is usually put in a way that suggests that none of the conflict of laws rules of the foreign area are to be applied.[74] His Lordship cites *Re United Railways of the Havana and Regla Warehouses Limited* in which Romer LJ observed (Willmer LJ agreeing) that the proper law of the case was the 'domestic law of Cuba and not the rules of the conflict of laws administered by the Cuban courts' and that 'renvoi finds no place in the field of contract'.[75] Sir Lawrence Collins also asserts that this formulation may be too wide, and the presumption against the doctrine of renvoi is in truth to be more narrowly construed as a presumption against the application of those conflicts rules of the applicable law, which lead to another legal system.

It does not appear that the concept of a broader or narrower conception of the presumption against renvoi has been judicially considered, and it appears immaterial to the broad debate about renvoi. In the common law cases since *Collier*, there has never been a need to narrow the presumption. Indeed, the courts have tended to enlarge it further and to suggest that the presumption against renvoi is a presumption against the application of *any* of the laws of the foreign area, other than the laws that are dispositive of the issues of liability and damages.

Themes of Private International Law

In all cases involving 'foreign elements', the overlaps and tensions between national and personal interests as distinct themes can surface. Professor Nagan summarises the many and varied themes of private international as theories that have been focussed upon various guiding principles including uniformity, territoriality, personality, political and cultural affiliation, sovereignty/political authority, comity/reciprocity, and vested rights/international obligations.

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[73] Ibid at 87.
[74] L Collins (ed), *Essays in International Litigation and the Conflict of Laws* (1996) at 399.
[75] [1960] Ch 52 CA, per Romer LJ at 96-97, per Willmer LJ at 115.

More recently, Dr Mortensen has insightfully suggested that the various objectives of private international law can be sorted into three 'themes',[76] which are (1) consistency,[77] (2) particular justice,[78] and (3) international and interstate comity.[79] Of all these themes, the theme of consistency has been judicially endorsed most often as a guiding principle for choice of law. It is certainly the judicially endorsed policy behind the choice of law rules of Australia.[80] Therefore, it is against the principle of uniformity that the merits and demerits of the doctrine of renvoi as an adjunct of choice of law shall be evaluated. The theory underpinning the doctrine of renvoi requires close consideration before one can fully appreciate just whether renvoi is in principle compatible with the policy behind conflict of laws rules.

Is Renvoi Compatible With Broad Conflicts Principles?

The question to be ultimately asked must be how the doctrine of renvoi, and an application of foreign rules on conflict of laws in the forum, may *promote* the goal of uniformity that is a platform of the conflict of laws. Professor Briggs, who argues in favour of renvoi, states that renvoi as a rule of foreign legal systems should not be sheared off because doing so is 'odd' and to treat conflicts rules as separate from the rest of the foreign law may be damaging to the coherence and integrity of the law.[81]

Renvoi, however, does not promote uniformity, but takes away from it. This is because, within the many foreign law areas with which the forum's citizens may interact, there are many different theories of renvoi, various different ways of applying conflict of laws rules,

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[76] R Mortensen, *Private International Law in Australia* (2006) at [1.22].
[77] That is, uniformity promotes certainty and predictability discourages forum shopping, though as in *Neilson*, its pursuit in practice might 'not always give either a predictable or certain result': ibid at [1.25].
[78] That is, fairness and justice in a particular case including the honouring of the parties reasonable expectations that their rights shall be determined in accordance with particular law: ibid at [1.28]. Also see P E Nygh, *Conflict of Laws in Australia* (6th edn, 1995) at 234.
[79] A court's discretion to recognise and to accommodate foreign laws by weighing international duty and convenience with the rights of those protected by its laws: ibid at [1.29].
[80] This is affirmed in *Pfeiffer* and *Zhang*. Note that the High Court of Australia has also held that the' ultimate aim of a court is the attainment of justice': *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146. But as to laws of procedure (specifically, case management principles) not being allowed to supplant the aim of attaining justice, the High Court has significantly reshaped the Australian position on what is a just resolution, requiring regard to the purposes of case management: see *Aon Risk Services Limited v Australian National University* (2009) 239 CLR 175 discussed in A Lu, 'Restricting Amendments in Australian Courts – Cost-effective Justice Through the Lens of Case Management: *Aon v ANU*' (2009) 25(1&2) *Australian Insurance Law Bulletin* 14.
[81] A Briggs, *The Conflict of Laws* (2002) at 16.

different rules of characterisation, different presumptions and rules of evidence, and different connecting factors that combine to frustrate the goal of uniformity.

This part of the chapter examines the renvoi doctrine, and the various theories of renvoi with their avowed aims, and concludes that because:

a) renvoi does not promote uniformity, and
b) in its most complete form, the renvoi can as a matter of principle only avoid creating an inextricable circle with no logical solution if the foreign law area and the forum do not both accept the renvoi,

it does not give the parties certainty, and is not helpful in practice as it cannot assist the early and commercial resolution of disputes.

The Renvoi Conundrum

Renvoi is a problem in conflict of laws methodology,[82] arising as an adjunct to the choice of law question. It is a theory that purports to assist jurists and scholars in defining the scope of choice of law, as well as functioning as a tool to facilitate the application of the relevant choice of law rule. As an adjunct to choice of law, it is therefore necessary to consider the renvoi theories in the context of a choice of law rule.

This thesis shall principally consider renvoi in the context of the *lex loci delicti* choice of law rule. This directs the forum court to apply the law of the place where the tort was committed. The thesis will focus on examination of the renvoi doctrine in the context of Australia's choice of law rule in tort because the doctrine's application to tort is controversial and yet to gain a general acceptance. However, the renvoi problem seldom arises in tort cases, perhaps because of the presumption against renvoi, and consequently there are few case examples.

The doctrine had its genesis in wills and status cases; therefore, that is where the analysis begins. As Dr Nygh observes, most civil legal systems refer matters of status to a party's national law.[83] At common law, this is known as the *lex domicilii*. However, common law

[82] M Tilbury, G Davis & B Opeskin, *Conflict of Laws in Australia* (2002) at 999.
[83] See P E Nygh, *Conflict of Laws in Australia* (6th edn, 1995) at 236.

and civil jurisdictions may have different interpretation of domicil, and consequently adopt different solutions to questions of status.

Cases Outlining Renvoi at Common Law

An English Wills Case of Single Renvoi Technique with Foreign Court Theory Rationale

For the purposes of English law, the single renvoi theory was first applied in the 1841 English case of *Collier v Rivaz*[84] (*Collier*), which concerned the formal validity of a testator's will and its six codicils. The testator was a British subject domiciled in England until 1802, when he moved to Belgium. He died in Belgium in 1829. He left movable and immovable property. Of the codicils, the four dealing with movables were valid under English law but were not valid under Belgian law. The choice of law rule for testate succession to movables in both England and Belgium was the law of the testator's domicil at the time of death. Belgium characterised the domicil at the date of death as England, because of his nationality. England treated his last domicil as the relevant domicil, and that was Belgium.

The English forum court was required to apply its English choice of law to select the law of Belgium. The Belgian law remitted the matter back to the English law. The English law deciding *'as it would if sitting in Belgium'* accepted the remission and applied internal English law to give effect to the testator's intention.

Renvoi was applied to uphold the validity of the testator's codicils. There is some scholarly disagreement about whether the English court applied the single renvoi theory in this case, or the foreign court theory because Sir Herbert Jenner declared he was deciding the issue as if in Belgium. What he probably meant was that he was deciding the case by acknowledging that Belgium also had a choice of law rule that was part of the foreign law that he was called upon to apply.

Had the foreign court theory been applied, Sir Herbert would have asked whether the foreign (Belgian) law would interpret English law as either the internal or domestic law of England, or the entire law of England inclusive of its choice of law. As His Lordship made

[84] *Collier v Rivaz* (1841) 163 ER 608.

no such enquiry, and applied only the internal English law, the technique he used was consistent with a single renvoi.

Another Wills Case: Single Renvoi Technique Foreshadowing Double Renvoi

The case of *Re Johnson*[85] appears to be the first of the English cases to judicially use the term 'renvoi'. The court used the single renvoi theory to apply the law of the domicil of origin. The deceased Mary Elizabeth Johnson was a British subject. Johnson's domicil of origin was Malta. She died in Baden, leaving movable property in England and Baden. The relevant choice of law of Baden directed that the succession to her property was governed by her national law.

Farwell J directed that Johnson's property be distributed according to her national law, i.e. Maltese law, on the following basis:

a) Although she had chosen to live in Baden, under English law she had not acquired domicil in Baden,[86] thus the fact that she lived in Baden had no effect on her status as a British subject. The law of her domicil remained the law of her domicil of origin, which was Maltese law.
b) When she died, Mary Johnson was living in Baden, and the law of Baden governed succession to movables. In accordance with that law, property that was not disposed of by her will was governed by the law of the country of which she was a subject when she died. Thus, when she died she was a British subject and the English choice of law rule referred to the law of the domicil or origin.

Farwell J observed that 'It is not for me to say how the Baden courts would interpret their rule of distributing according to nationality'[87] and declined to make full inquiry into the meaning of the Baden rules of choice of law. He then concluded that the law of the domicil is the law as it would be determined by the courts of that country having regards to the facts of the case. *Re Johnson* therefore approved of the reasoning in *Collier*, but with the

[85] *Re Johnson* [1903] 1 Ch 821.
[86] Because under English law, she needed to acquire domicile in Baden according to the law of Baden – which she had not done.
[87] *Re Johnson* [1903] 1 Ch 821 at 830.

added qualification that a reference to the domicil was not exclusively to domestic law of the domicil, thus foreshadowing the possibility of a double renvoi.[88]

An Australian Succession Case and the First Renvoi Case with Foreign Court Theory

The first of the Australian renvoi cases, *Simmons v Simmons*,[89] appears also to be the first of the common law renvoi cases to reach a decision by reference to the entire laws of the foreign area, including the choice of law rules of the foreign law area. The deceased, whose *lex patriae*[90] was the law of New South Wales, died intestate in New Caledonia, leaving assets in New South Wales. The deceased was a British subject. The question for determination was which law area for a British subject applied to distribute the New South Wales property.

The New South Wales judge was referred to French law (in force in New Caledonia) by the forum's choice of law rule. He then received evidence that French law governs succession by the deceased's national law, and that French law defines the national law as the domestic law. He thus applied New South Wales domestic law on the basis that this is what the French law would apply.

Although *Simmons* involves only one remission, from the foreign law to the forum, Street J in fact applied the foreign law as fully as he could based on the evidence before him, to remit the matter to be determined by the local law of New South Wales. It is therefore a case in which 'foreign court theory' techniques of double renvoi were applied to achieve a result.

Another English Wills Case: Double Renvoi

The first English case to clearly apply double renvoi to a remission was another wills case, *Re Annesley*.[91] It did not follow the single renvoi approved in *Re Johnson*. Russell J held that the 'question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English law as to domicil, irrespective

[88] Dr Nygh referred to this in P E Nygh, *Conflict of Laws in Australia* (6th edn, 1995) at 237.
[89] *Simmons v Simmons* (1917) SR (NSW) 419.
[90] Although Australia was a Federation by 1917, New South Wales remained a 'nation' for the purposes of determining the *lex patriae*.
[91] *Re Annesley* [1926] Ch 692.

of the question whether the person … has or has not acquired a domicil in the foreign country in the eyes of the law of that country'.[92]

The testatrix Sybil Annesley was a British subject who had lived in France with her husband since 1866. In 1884, her husband died, and by electing to remain in France upon his death, she acquired French domicil of choice. In 1897, she bought the Château de Quillebaudy, living there until 1924 when she died. She left a will disposing of movable property. The will was valid under the law of England, but the whole will was not valid under the law of France because it failed to make sufficient provision for Mrs Annesley's children.

The English law determined succession to movables on the basis of last domicil, the *lex domicilii*, which in this case was France. The French law determined succession by the law of the testatrix's nationality, which was English. Russell J applied the English choice of law rule to identify the French law as the law of the domicil. He appears to have favoured the application of the French internal law,[93] but felt constrained by some unspecified authority to consider the French choice of law rules.

At the time of *Annesley*, the French and English law responded quite differently to the concept of the domicil, highlighting a tension between the English common law that gave primacy to the testatrix's domicil rather than to nationality, and the French law.[94] The French Civil Code permitted an alien to obtain authorisation by decree to be domiciled in France and this provided the alien with five years' protection under the French law. To continue protection under the French law, they appeared to be required by Article 13 of the French Civil Code to be naturalised as a French citizen in that period. Expert opinion was divided on whether this was the exclusive approach to permit an alien to acquire a French domicil.

Russell J developed a rationale for applying the French law as the foreign court would, on the basis that the court received evidence that the French law recognised a single renvoi as established by *L'Affaire Forgo*[95] and confirmed in *L'Affaire Soulie*[96] although in *Annesley*

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[92] Ibid.
[93] [1926] Ch 629 at 708.
[94] The Nationality Act 1927 altered the position under Art 13 of the French Civil Code: see A Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) at 9-10.
[95] *L'Affaire Forgo* [1883] Clunet 64.
[96] *L'Affaire Soulie* [1910] Clunet 888.

there were three experts in French law, and two of the experts gave evidence that the French law rejected renvoi. Since a forum court can only take judicial notice of foreign law to the extent that it is factually proven by expert evidence in the proceedings, Russell J must have rejected the expert evidence even though he did not do so expressly.

His Lordship concluded that the French court would resolve the same case by referring the matter to English law, that the French court would recognise that the English law remitted the matter to French law, and that the French court would accept a remission to apply French law. He therefore applied French law to find the will invalid. This foreign court theory of double renvoi only produced a result in this case because Russell J preferred evidence that the French court would only have applied a single renvoi. If the French law had applied a double renvoi, no answer would have been reached.

The foreign court theory of double renvoi was affirmed by Luxmoore J in *Re Ross*[97] and has subsequently been applied by courts of first instance.[98]

Domestic and Internal Law

As already indicated, at the most basic level, renvoi is directed to whether a reference to the law of a particular country includes or excludes that country's conflict of laws rules. In a logical sense, a reference to a country's 'law' is taken to be a reference to the municipal or internal law of that country. The 'internal law', narrowly construed, does not refer to other bodies of law. Alternatively, the 'law' may be broadly interpreted as all of the laws of the foreign law area including conflict of laws rules of choice of law. As the eminent jurist Dr Baty stated:

> If England chooses the law of a person's domicil as the best one to apply to a certain relationship, does she mean the ordinary law for ordinary people, his friends and neighbours, in that domicil? Or does she include that country's rules for the choice of law? Common sense could answer that the last alternative is absurd and otiose: a rule for the choice of an appropriate law has already been

[97] *Re Ross* [1930] 1 Ch 377.
[98] Dr Nygh mentions Maugham J in *Re Askew* [1930] 2 Ch 259, Wynn-Parry J in *Re Duke of Wellington* [1947] Ch 506, and Scarman J *In the Estate of Fuld, deceased (No 3)* [1968] P 675: see P E Nygh, *Conflict of Laws in Australia* (6th edn, 1995) at 239.

applied, namely our own. To proceed to adopt a foreign rule is to decide the question twice over.[99]

At common law, it remains to be settled how much of the foreign law must be considered by a forum's choice of law rule, if its choice of law rule permits the application of foreign law. The most extreme solutions are to apply none, or to apply all of it.

Subject to how much of the foreign law should be considered by the forum court, whenever the forum is required to decide an international conflict of laws dispute, there may arise a conflict between the choice of law rules of the forum and the choice of law rules of one or more foreign law areas.

Some Questions to be Answered

The questions for conflicts scholars and the courts are:

1. Whether the doctrine of renvoi should be generally accepted in all situations in which conflicts rules differ.
2. The extent to which renvoi should be applied.

Some US theorists including Lorenzen argue that renvoi is but an escape device to apply forum law. Professor Lorenzen has bluntly observed that 'the renvoi doctrine appears to be a mere expedient to which the courts resort in order to justify the application of their own law'.[100]

This review of the theory of renvoi seeks to highlight some reasons why the application of the renvoi doctrine undermines some of the fundamental aims of the conflict of laws, and the policy behind an inflexible choice of law rule. It will firstly be reviewed as a device for achieving substantive uniformity and thereby to discourage forum shopping, and secondly as a homing device to give flexibility in the context of an inflexible choice of law rule but contrary to the expectations of the parties.

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[99] T Baty, *Polarized Law* (1914) at 116.
[100] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of "The Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509 at 521.

Rationale and Logical Considerations of Renvoi Doctrine

As it is a doctrine applying to choice of law, any approach to renvoi must accord with the rationale and objects behind choice of law. As already noted, uniformity is a central object of choice of law.

A renvoi can arise only in cases where a forum court is asked to consider foreign law when determining a conflicts problem. Even though the renvoi takes its name from the French *renvoyer* or to send back as in *L'Affaire Forgo* – and it therefore derives additional mystery from its exotic continental name as from its actual or potential defiance of logic – renvoi has been closely analysed by English and US scholars of the conflict of laws. It has been so closely analysed because it is objectionable on a theoretical as well as practical level, though it has seldom come for consideration by ultimate courts of general jurisdiction. None of what has been written about the doctrine has advocated its wholesale acceptance as a general theory of the conflict of laws.

For reasons of expediency or commerciality, the doctrine of renvoi may be (and has been) ignored unless a party to a dispute considers that its application to a case may provide a forensic advantage by selecting, as the *lex causae*, a law *other than* the law selected by the choice of law rule of the forum. That forensic advantage would need to outweigh the disadvantage and particularly challenging evidential burden of proving another choice of law rule, and foreign renvoi. The foreign law area to which this thesis refers may be another state, or another country. This thesis makes no distinction but will primarily discuss examples of international conflict of laws cases, because in the Australian federal system, choice of law rules are largely uniform.[101]

The Renvoi Reference

The renvoi doctrine embeds notions of two kinds of reference:

1. a return reference, remission, or *Rückverweisung*; and
2. a forward reference, transmission, or *Weiterverweisung*.[102]

[101] However, state legislation governing tort claims from motor accidents is an example of how choice of law rules may differ within Australia, depending on which state's law applies. For the difference between NSW and Victoria, see *Sweedman v TAC* (2006) 226 CLR 362.
[102] See e.g. M Sonnentag, *Der Renvoi im Internationalen Privatrecht* (2001).

The remission involves interplay between two legal systems: the forum's laws, and the laws of a foreign law area. The transmission involves interplay between at least three legal systems: the forum's laws, the laws of a foreign law area, and the laws of a third law or fourth law area.

This thesis discusses both the remission and the transmission, but primarily concentrates on the remission. The reasons for this focus on the remission, rather than the remission and the transmission co-equally, are that:

a) the remission is the form of renvoi that is most likely to arise in the context of tort claims to which the application of renvoi is controversial and therefore of particular scholarly interest; and
b) the remission is also the form of renvoi that may give rise to the notoriously challenging concept of the infinite regression.

Confronting the Renvoi Question

The renvoi theory asks whether a reference to 'the law' of a foreign law area includes or excludes the foreign rules on the conflict of laws. Professor Schreiber poses the renvoi question in the following terms:

> When the conflict-of-laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system; i.e., to the totality of the foreign law, minus its conflict-of-laws-rules?[103]

This question may be answered in the negative or in the affirmative. The first would result in rejecting any potential renvoi. The second would result in accepting that there may be a renvoi and mandate a response to the renvoi.

[103] E O Schreiber, 'The Doctrine of the Renvoi in Anglo-American Law' (1918) 31 *Harvard Law Review* 523, 525.

Renvoi Ignored

If the forum ignores the conflicts rules of the foreign law area, there can be no renvoi. The answer to Professor Schreiber's question would thus be in the negative, in which case the solution may be referred to as either the 'no renvoi' solution or 'ignoring the renvoi'.

Renvoi Acknowledged

If the answer is in the affirmative and the renvoi problem is acknowledged as existing, it is generally accepted that the forum may reject the renvoi, or accept it as a single (or partial) renvoi, or accept it as a double (total) renvoi. Accepting double renvoi can be either accepting the theory of renvoi proper, or the English foreign court theory. The foreign court theory holds that the foreign law, including choice of law rules, should be applied by a forum court having regard to how the foreign court would have applied its law to resolve the case. The solutions that respond to the renvoi problem necessarily involve the pleading and proof of the foreign law to varying degrees:

1. Foreign internal law to determine liability, and the existence of a foreign choice of law rule (when rejecting the renvoi);
2. Foreign internal law to determine liability, and the content of the foreign choice of law rules (but not foreign renvoi) (when adopting single renvoi); and
3. Foreign internal law to determine liability, foreign choice of law rules, foreign renvoi rules, and how the foreign court would apply those choice of law rules (when adopting the foreign court theory, or total renvoi).

The most intellectually and practically satisfying answer to the renvoi question depends upon striking the balance between the certainty and predictability that is at the heart of the conflict of laws, and the interests of justice and fairness. The goal of achieving a uniformity of result, irrespective of the forum that is called to determine the question, is embedded in the above rationales.

Opponents of the renvoi theory relate that it is logically difficult to defend in whatever form, single or total.[104] The renvoi as a theory of more general application in the conflict of laws is inherently unstable, and has a tendency to favour the application of *lex fori*. It favours the forum because it is the *lex fori* and its various rules of construction and characterisation that must be applied to fill all gaps in the pleading and proof of foreign law. Further, because the renvoi requires the forum court to consider the entire conflicts rules of the foreign law area 'without regard to any particular theory or to the particular law which may be deemed to control in the end',[105] it favours the law of the forum.

Thus, the result of a case with the application of a renvoi has the distinct potential to be entirely inconsistent with the stated and settled choice of law rule of the forum – whenever the choice of law rule of the forum is not the *lex fori* but one of the many other *lex causae* (for example, the *lex domicilii*, *lex situs* or *lex loci delicti*). In, say, the context of choice of law clauses in commercial contracts by which the parties agree to avoid the application of various laws that might be connected to the contract, a renvoi from foreign law chosen by the parties could defeat the choice of law clause and thereby defeat legitimate expectations and intentions.[106]

The need to plead and to prove foreign law including the foreign renvoi adds further uncertainty to the result for litigants and their counsel, and gives the foreign law expert considerable influence over the result.[107] It is a long established rule of the common law that the foreign law may be proved by an appropriately qualified expert rather than by direct evidence.[108] Whilst liability and quantum experts on the tort law of a foreign area are relatively easy to identify and qualify, true experts in the foreign conflict of laws may not

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[104] The Australian Law Reform Commission, *Choice of Law*, Report 58 (1992) at [9.12] said that the principle of the foreign court theory was hard to defend as a matter of logic but 'the principle…leads to a sensible result' at least in the case of *Simmons v Simmons* (1917) 17 SR (NSW) 419.

[105] E G Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 *Columbia Law Review* 190.

[106] E Rimmell, 'The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to an Impractical Doctrine' (1998) 19 *Holdsworth Law Review* 55 at 81. However renvoi in contract law is most likely to arise in cases where the parties have not expressly agreed on the governing law, and in jurisdictions like Australia that have not legislated to exclude renvoi and contract.

[107] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35.

[108] The court 'has not the organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it': Lord Brougham in the *Sussex Peerage Case* (1844) 8 ER 1034 at 1046; see also J McComish 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400 at 416.

be easily found.[109] Moreover, experts qualified for opposing parties have a tendency to disagree on at least some aspects of their evidence. As with any conflict of opinion between experts, courts may be tempted to resolve conflict either by reference to the superior expertise on the part of one of them, or greater eloquence of the expert. However, in the case of evidence of foreign law, it is a factual issue that the court must decide. The undoubtedly superior credentials and eloquence of, for example, Sir Lawrence Collins[110] on the conflict of laws when compared to someone less experienced does not necessarily mean that the evidence of Sir Lawrence should be preferred, if Sir Lawrence and the lesser qualified witness were briefed as experts for opposing parties to assist with the conflicts issue of renvoi and tort at common law. Yet in practice, this is what occurs when courts assess what weight to accord evidence.[111]

Further, the presumption of identity should not be permitted to fill the gap of when there is a failure to fully prove foreign rules on the conflict of laws. This is a complicated issue that will be discussed in the Australian context in later chapters. Since a party relying on foreign law bears the onus of proof, if foreign law is pleaded but either incomplete or unsatisfactory proof is laid before the court, there should be an inference and direction of a *Jones v Dunkel*[112] kind, i.e. that the evidence would not have assisted the party that failed to bring it.

Advocates of renvoi place much emphasis upon the substantive consistency of result that it apparently promotes, and therefore its potential to discourage forum shopping, on the basis

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[109] Experts on foreign law tend to be foreign qualified and trained practitioners, foreign academics, or local academics whose research and publication is in the law of the foreign area. For the foreign conflict of laws, the field narrows considerably because there are comparatively few practitioners who work exclusively in private international law. Experts tend to be commercial litigators who have a transnational aspect to their practices such as, for example, international commercial arbitration or trade disputes. They would therefore routinely be open to challenge as true private international law experts, so it is very likely that only conflicts scholars who have published in the field would be acceptable experts.

[110] Until 2000, Sir Lawrence Collins was a solicitor-advocate in private legal practice in the fields of litigation and the conflict of laws. He was also the general editor of *Dicey & Morris on the Conflict of Laws*, renamed *Dicey, Morris and Collins* in 2006. In 2000, he became a High Court Judge and then a Justice of Appeal. In April 2009, he was elevated to the peerage as The Rt Hon Lord Collins of Mapesbury and of the London Borough of Camden, and was appointed a Lord of Appeal in Ordinary. In October 2009 he became an inaugural member of the newly constituted Supreme Court of the United Kingdom.

[111] See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]. As to weight, see the NSW Court of Appeal in *Australian Securities and Investments Commission v Rich* (2005) 218 ALR 764. In *Holtman v Sampson* [1985] 1 Qd R 472 the Full Court held that evaluating and assessing the weight of expert evidence will involve the application of logic and commonsense to the best of a court's ability. Logic and commonsense will typically favour the evidence of the more eloquent and impressive witness.

[112] *Jones v Dunkel* (1959) 101 CLR 298.

that forum shopping is deplorable.[113] The proposition that renvoi produces consistent or more consistent results does not seem supported uniformly, and later chapters examining the recent application of renvoi will show that it is a messy process.

When renvoi is accepted, if the foreign law is to be applied as fully as possible, the forum court will need to closely consider the rules of the conflict of laws that apply in the law area to which the law of the forum refers, including the distinction between foreign laws of substance and of procedure, and any characterisation differences between the forum and foreign laws. In the accepted approach to a conflicts case, the primary characterisation must be done in the forum in accordance with the forum's principles of determining on the basis of a given set of facts what is a tort or a contract etc, and that happens *before* choice of law is applied.[114] Issues of characterisation may be split into two tiers. The first tier is what Dr Cheshire describes as primary classification and 'allocation of the issue to its correct legal category'.[115] The second tier he calls 'the process by which the juridical nature of some legal rule, institution, or transaction is determined',[116] or secondary classification. Renvoi as an adjunct to choice of law thus follows on from characterisation in the forum, but a broad conception of the chosen foreign law openly invites the potential for the chosen foreign law to re-characterise a claim.[117] The forum must receive evidence on so much of the foreign law as possible, including the foreign rules of characterisation, foreign conflict of laws, and foreign renvoi, and cannot immediately apply the substantive foreign law to determine the claim. A broad conception of foreign law reveals another level of inquiry for lawyers and parties to a conflicts case, and ultimately for a forum court selecting the proper law.

Supporters of renvoi say that theorists have over-complicated the process of proving the foreign law. In any case involving a reference to a foreign law area, the foreign law must be pleaded and proved as a fact in any event;[118] thus, proving foreign choice of law rules and foreign renvoi rules, in addition to foreign internal law, is not onerous. This observation does not acknowledge the considerable practical challenge as well as the additional expense that litigating parties may encounter in proving foreign law.

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[113] On an alternative argument, the selection of the most forensically advantageous forum may simply reflect the role of the solicitor in protecting and promoting the interests of her client as required of any diligent practitioner, and maximising the opportunity for an award that reflects the claimant's needs or expectations.
[114] G C Cheshire, *Private International Law* (2nd edn, 1938) at 30.
[115] Ibid.
[116] Ibid at 39.
[117] J Falconbridge, 'Renvoi, Characterization, and Acquired Rights' (1939) 17 *Canadian Bar Review* 369.
[118] Griswold; for a modern take see R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273.

Whilst renvoi in status cases may produce results that are more consistent irrespective of the forum, the theory of renvoi is broader than a clash between *lex domicilii* and *lex patriae*. If it is accepted as a general theory within the conflict of laws, it has the potential to be applied to all cases involving a foreign element. If the reference to foreign law were to include a reference to choice of law, this would directly conflict with the purpose of the forum's choice of law rule to select the rule that determines the substance of the dispute.

There arises the potential for an infinite regression or *circulus inextrabilis*[119] from the foreign law to the law of the forum and back again, in effect providing no solution to the dispute and instead creating the problem of an endless loop from which there can be no principled escape. Any escape must be by the arbitrary and pragmatic cutting of the loop, at the election of the forum judge.

The infinite regression will not occur in all cases involving a total renvoi, but it can arise in theory if both the forum and the foreign law require the application of each other's entire laws. This represents the infamous consequence of applying the entire forum and foreign laws. How does one stop the regression, or flee the hall of mirrors?[120] Moreover, is the potential for illogical outcomes such as an infinite regression a sufficient reason to reject the renvoi doctrine in all cases?

The fact that a double renvoi may produce no result is a weak argument for the wholesale rejection of a doctrine that may, in its partial form and in the absence of other rules of the conflict of laws, facilitate an outcome that is 'correct'. Nevertheless, there are more principled theoretical objections to renvoi.

The Myth of the 'Entire Law' of the Foreign Area

Scholars who argue that defining the foreign 'law' to which a choice of law refers as the 'entire law' of the foreign area somehow permits the forum to apply the law selected by its choice of law rule 'more completely', seem to forget the fundamental premise that a court is *never* permitted, let alone required, to apply the entire body of foreign law to determine a conflicts case.

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[119] *Matter of Tallmadge*, 109 Misc 696, 712; 181 NY Supp 336, 346 (Surr Ct 1919).
[120] Variously called the hall of mirrors or the cabinet of mirrors i.e. *Spiegelkabinet*. See E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165.

By the time a choice of law question confronts the forum court, the rules of private international law of the foreign area and the forum itself will already be divided. All of the foreign rules of the conflict of laws that relate to jurisdictional issues will be ignored, because the forum court has assumed jurisdiction. The forum will have characterised according to the *lex fori* the various elements of the claim pursuant to its own rules. The distinction between substantive and procedural laws will also excise parts of the foreign law. Accordingly, once the foreign law arises for substantive consideration, such of the foreign law as is deemed procedural will be discarded by the forum, as will such parts of the foreign law that have not been pleaded in issue, or proved by any party, or proved fully and to the forum's standard of proof by the party seeking reliance. What the forum court is left to apply of the foreign law, whenever it is directed by the forum to apply foreign law, is a very small part of that law.

Any attempt to enlarge the corpus of foreign law to be applied by the forum to encompass foreign choice of law rules, based on the argument that the forum should apply as much of the foreign law as possible rather than arbitrarily discard the foreign rules of private international law, is contrived. The reality is that the foreign conflict of laws, like foreign rules of jurisdiction and procedure, have no work to do and therefore do not require consideration and application by the forum.

Under Professor Lorenzen's observations that the purpose of a choice of law rule is to choose the law to determine the dispute, applying the foreign rules of the conflict of laws is entirely unnecessary. Acceptance of renvoi is a mere expedient to permit the application of foreign conflicts rules; it finds no principled support from arguments constructed around the notion of applying the foreign law more fully or completely.

The Intrusion of the Renvoi into the Common Law

Traditionally, renvoi has not been accepted as a general theory of the conflict of laws in either common law or civil systems. It has had a particularly limited application to choice of law in the common law jurisdictions and although it has been admitted in the form of a single renvoi in certain civil jurisdictions such as Germany, there have been limits on renvoi. None of the principal conflicts scholars of the past generations has been prepared to

endorse the renvoi directly as a general conflicts theory or to recommend a single renvoi theory to govern all proceedings with foreign elements.

When US scholar Professor Griswold first revisited renvoi in 1938,[121] he observed that both the word and the doctrine as a part of the conflict of laws had belonged to English law since 1898.[122] He refrained from suggesting that it was a general theory of the conflicts of law. Professor Bentwich wrote in 1930 that renvoi had 'found a place' in the English law of succession.[123] By 1938, renvoi in English law had merely appeared in the context of certain wills cases that intersected with foreign law. The battle for or against renvoi appears to have proceeded on the basis of the *potential* for the renvoi theory to be given application in a broader range of cases, but reluctance to permit its intrusion into cases with foreign elements.

In his 1910 survey, Professor Lorenzen held that the French and Belgian cases 'support the doctrine that foreign law means the law in its totality only in the cases in which the *lex domicilii* and the *lex patriae* come into conflict and the judge is thereby enabled to apply his own law'.[124] He otherwise proffered a large representative list of texts for and against renvoi to conclude from this 'great mass of juristic literature' that 'the opinion of textwriters is overwhelmingly in favour of the doctrine that the rules of Private International Law refer to the internal or territorial law of the foreign country exclusive of its rules governing the Conflict of Laws'.[125]

The doctrine was first applied in *Collier v Rivaz* (1841) to decide the formal validity of a will,[126] although from that point onwards, the doctrine has been controversial. It is likely that it was not the court's intention in *Collier* to espouse a general renvoi rule, but to validate the disposition of the English testator. The court in *Collier* certainly did not

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[121] In his eponymous article: see E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165.
[122] T Baty (1899) 25 Law *Magazine & Review* 100.
[123] N Bentwich, 'The Development of the Doctrine of Renvoi in England in Cases of Succession' (1930) 4 *Zeitschrift fur Auslandisches und Internationalen Privatrecht* 433.
[124] E G Lorenzen, 'The Renvoi Theory and the Application of Foreign Law'(1910) 10 *Columbia Law Review* 190 at 194.
[125] Ibid at 194-195.
[126] There is some contention about whether *Collier* is in fact the first or merely one of the better known early renvoi cases decided in England. *De Bonneval v De Bonneval* 1 Curteis 856 (Ecc Ct 1838) concerning the conflict between French and English law in a case on the validity of a will, is older. The testator was domiciled in France. The matters for determination in the *De Bonneval* proceedings were also before the Cour de Cassation, and the English probate court agreed to suspend its proceedings to permit the French court to make its determination on the validity of the will. The French court found the will valid by application of the foreign (English) internal law.

consider the prospect of the logical problems such as a double renvoi and infinite regression, if the foreign law of Belgium had accepted the renvoi from the forum.

The Six Responses to Renvoi

Scholars agree that there are a number of potential responses to a renvoi problem. Some earlier conflicts scholars including Professor Lorenzen identified *four* responses. Recently, Dr Mortensen has identified *five* responses. This thesis has identified *six* responses to the renvoi, if the choice of law rule of the forum refers the matter to a foreign law area.

The six possible responses are:

1. Ignoring the renvoi as a potential problem and applying the municipal or internal law as to liability and damages in that foreign law area to determine the substantive issues in dispute. It requires no consideration of the foreign conflict of laws. This solution cannot be taken by a court if renvoi is actually pleaded and proved, but it will also be the most common response if renvoi is not pleaded.
2. Characterising the law of the foreign law area as the entire foreign law including the choice of law rules, but if the foreign choice of law rules remit back to the forum or transmit to a third law area, in each case rejecting the reference and applying the law of the foreign area to determine the substantive issues in dispute. Griswold and others call this 'rejecting the renvoi'.[127]
3. Characterising the reference to the foreign law as to the entire foreign law including the choice of law rules, accepting a reference from the foreign law back to the law of the forum, and applying the internal law of the forum to determine the substantive issue. This has been variously described as 'accepting the renvoi', 'accepting the remission',[128] 'partial renvoi' or a 'single renvoi' solution.
4. Finding that when there is a direct conflict or disagreement between the forum court and the foreign law area, the entire substantive law of the foreign law area has

[127] Ignoring the renvoi and rejecting the renvoi are distinct approaches although the effect is the same. Ignoring renvoi involves failing to engage with the problem on any level. Rejecting it involves acknowledging the forum's reference to the foreign area, but intentionally declaring the purpose of the forum's choice of law rule as a rule to determine the law to dispose of the liability issues in accordance with the foreign law. Therefore, in the case of the lex loci delicti rule, the forum's choice of law rule would refer to the tort law of the place of the tort. See R Mortensen, *Private International Law in Australia* (2006) at [7.19].

[128] As well as a remission or return of the reference back to the law of the forum, a renvoi can also arise on a transmission to the law of a third law area.

no solution to the problem, thus the forum court is left to apply the *lex fori*, i.e. internal law of the forum. This is referred to by Professor Griswold, Professor von Bar[129] and Professor Westlake[130] as the 'mutual disclaimer of jurisdiction theory' or, to use more of the French language, the *désistement* theory.[131] It has been discredited as merely a way of applying forum law whenever there is a conflict in cases of a remission, and being ineffective where there is a transmission.[132]

5. Applying the foreign law as it would be applied by a court in the foreign law area to a case such as the one to be determined. This requires evidence of how the foreign court would respond to the claim. If the foreign court would accept the renvoi and apply internal or municipal law to determine liability and quantum, then the forum court should apply the foreign internal law. If the foreign court would reject the renvoi and apply the law of the forum, then the forum court must apply the forum internal law. This is the 'foreign court theory', and Professor Sauveplanne notes that it is also a peculiarly English response to evade the potentially infinite regression of a double renvoi.[133] It is a species of total renvoi.
6. Characterising the forum's reference to the foreign law as a referent to the entire foreign *laws* including the choice of law rules, finding that the foreign choice of law refers to the forum law and accepting a reference from the foreign law back to the law of the forum and applying the entire law of the forum, establishing a 'renvoi proper', 'double renvoi' or 'total renvoi'. However, under a total renvoi, the answer depends not on the forum's renvoi, but on the foreign area's response. No answer can be reached if the choice of law rules of both the forum and the foreign law are actually applied in full at each remission, as this would mean an endless series of references or an infinite regression between the forum and foreign laws.

The following briefly considers the origin of each of these theories.

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[129] L von Bar, 'Die Rückverweisung im Internationalen Privatrecht' (1898) 8 *Zeitschrift für internationales Privat-und Strafrecht* 177-188; see also Dr Franz von Holtzendorff, *Encyclopädie der Rechtswissenschaft* (6th edn, 1904) 19.

[130] J Westlake, 18 *Annuaire de l'Institut de droit international*, 35-40.

[131] See E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1168; also J Westlake, *Private International Law* (5th edn, 1912) at 32-34; L von Bar, *I Theorie und Praxis des Internationalen Privatrechts* (2nd edn, 1889) at 278-81.

[132] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of "the Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509.

[133] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopaedia of Comparative Law* (3rd vol, 1990) at 6-4

Ignoring the Renvoi

This is the typical response of courts and parties to cases and contexts in which renvoi may arise.[134] It is the approach that prevailed until the other theories of renvoi were first developed in the nineteenth century.

Rejecting the Renvoi

Whenever the renvoi has been put in issue, it is not open for the forum court to ignore it. Therefore, where the forum is aware of the foreign law because it has been pleaded by a party, and the forum is also made aware of the potential problems that may flow from applying the foreign choice of law rules as well as the foreign municipal law that goes to the very issues in dispute, the forum must respond to the renvoi problem.

If the forum's response is to accept the problematic nature of a renvoi and to decline to apply the whole of the foreign law, the available solution is to reject the renvoi and to declare that renvoi does not apply to the matter in dispute. The forum is thus permitted to apply the law chosen by its choice of law rule to determine liability and damages. This is what this thesis has already identified as the territorialist's response. Professor Beale and his fellow territorialists would reject the renvoi. This presumption against renvoi operates in the common law jurisdictions, suggesting that the rejection of the renvoi will be the most appropriate response in the majority of cases where the doctrine is pleaded along with some of the demerits of accepting a renvoi.

Accepting the Renvoi: The Single Renvoi

Proponents of the single renvoi theory, such as Professor Cowan,[135] like the proponents of the foreign court theory, acknowledge a need to consider the foreign choice of law rule but are not confronted by the illogicality of the infinite regression that may arise from applying a total renvoi. A forum that adopts the theory of single renvoi requires its courts and parties to consider the foreign rules of private international law in a dispute with a foreign element, but not the foreign rules on renvoi. For example, in *Collier*, the English forum

[134] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of "the Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509.
[135] T Cowan, 'Renvoi Does Not Involve a Logical Fallacy' (1938) 87 *University of Pennsylvania Law Review* 34.

applying the English choice of law rule that referred it to Belgium, applied the Belgian choice of law rule to remit the matter back to England and applied the internal law of England to determine the validity of the testamentary disposition.

Since renvoi involves the consideration of foreign choice of law, but will avoid multiple references between the forum and the foreign law area by permitting only one remission to the law of the forum or to the law of a third area in the case of a transmission. Proponents of single renvoi therefore seek a logical result, but the rationality may come at the expense of uniformity.

Under the single renvoi, choice of law is regarded as a 'spent force' once the foreign law remits the matter to the forum. Accordingly, the single renvoi theory permits the application of choice of law rules twice in a dispute. Not only is the forum allowed to apply its choice of law to apply the foreign law, but permits the foreign law one remission back to the forum, and then requires the application of the internal law of the forum to resolve liability. The single renvoi has been accepted as part of many civil legal systems. Whilst it is rational, it is criticised as suffering from a certain arbitrariness. Upon the remission, the forum disapplies its own choice of law, even if the foreign law area may require the entire *lex fori* to be applied. It also highlights the problem with the renvoi if the forum's law and the law of the foreign area adopt different approaches to characterisation.

A single renvoi also appears to function like a homing device, to permit the application of *lex fori*, on each occasion the forum refers to a foreign law that includes a choice of law rule that permits the application of the law of the forum. Whilst this might be consistent with the conflicts rules of the foreign law area, it might be contrary to the forum's choice of law rule. Whilst rational, it therefore may fail to promote the policy of the forum's choice of law rule, or the uniformity that underpins choice of law.

Foreign Court Theory of Double Renvoi

Conflicts scholars including Professor Sauveplanne state that the solution of the foreign court theory might have been the English solution originally applied in *Collier*,[136] with the English court's observation that:

[136] *Collier v Rivaz* (1841) 163 ER 608.

> The Court sitting here decides from the evidence of persons skilled in the law, and decides as it would if sitting in Belgium [for an English case involving the foreign law area of Belgium].

However, there is some disagreement among the scholars as to whether Sir Herbert Jenner in *Collier* applied the foreign court theory, or merely the doctrine of single/partial renvoi with an allusion to the foreign court theory that would be developed by later jurists.

For example, Mr Rimmel wrote that prior to 1926 English law had only used the doctrine of single renvoi and cites *Collier* as the example of a single renvoi. Mr Rimmel then went on to suggest that the 1926 case of *Re Annesley*[137] 'established the doctrine of total renvoi'[138] but without the caveat that whilst *Re Annesley* may have established an acceptance of the double renvoi in England, the theory was already in use elsewhere. Dr Nygh agrees with this view[139] and extends his critique to suggest that evolution of the foreign court theory was not supported by precedent, and yet has been affirmed by English courts since *Re Ross*. One notes that the foreign court theory cases were first instance decisions, and were therefore persuasive but not binding authority. Mr Rimmel, Dr Nygh, and other scholars including Dr Mortensen[140] choose not to separate the foreign court and double renvoi theories.

Professor Sauveplanne concluded that *Collier* applied a form of double renvoi that later became known as the foreign court theory, and that only English law had applied that form of renvoi. The distinction between double renvoi and the foreign court theory is the latter recognises there may be an infinite regression between the laws of two jurisdictions, unless one of the law areas prescribes some way of terminating the references.

Foreign court theory is a species of double renvoi because both theories pick up the conflict of laws rules and the substantive legal rules of the forum and foreign law areas and in *stricto sensu* require the forum to consider the foreign renvoi rules. Both defer to the foreign law area to provide the solution to the dispute. The foreign court theory attempts to avoid the illogicality of an infinite regression through the principle that 'if the forum court

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[137] [1926] Ch 692.
[138] E Rimmell, 'The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to an Impractical Doctrine' (1998) 19 *Holdsworth Law Review* 55 at 57.
[139] P E Nygh, *Conflict of Laws in* Australia (6th edn, 1995) at 241 et seq.
[140] R Mortensen, *Private International Law in Australia* (2006) at [7.19], [7.31].

responds as the foreign court would', the foreign court should provide a substantive response to questions of liability and quantum. However, it also imposes:

1. the onerous requirement to prove how the foreign court would respond to the same facts in applying its conflicts rules including renvoi; and
2. an assumption that the foreign area will not require the application of all of the forum law, or if it does, that it has settled a response to renvoi.

It could lead to no solution, if the forum refers to a foreign area that also endorses the foreign court theory, as each of the forum and foreign law areas would defer to the other.

Quite apart from whether it was *Collier* or *Re Annesley* that first applied the foreign court theory, the double renvoi technique appears to have been applied at common law prior to 1926. For example, the English court in *Re Trufort*[141] clearly recognised a double renvoi in the context of a transmission to the law of a third law area. Further, the decision of *Simmons v Simmons*[142] in 1917 was a common law case in which Street J determined the case by reference to the foreign choice of law rules and how they would respond.

Collier is best regarded as an example of an English court's endorsement of the foreign court theory of deciding as a foreign court would, but actually applying a single renvoi technique to solve the dispute between English and Belgian law.[143] Sir Herbert Jenner's failure to explicitly mention renvoi suggests his keener interest in the policy of finding the testamentary disposition valid, rather than with furnishing a considered exposition on the doctrine of renvoi.

The foreign court theory does not solve the problem of the infinite regression if both forum and a foreign area both adopt the same theory. It therefore fails to provide a solution that overcomes the logical objections to double renvoi. The theory merely permits the forum court to defer to the foreign law for a solution to the renvoi problem. If there is no evidence about the foreign law area's response, the forum will be left to resolve the issue by the presumptive application of the law of the forum.

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[141] (1887) 3 Ch D 600.
[142] (1917) 17 SR (NSW) 419.
[143] Thus, whilst Sir Herbert Jenner declared that the forum court 'must consider itself sitting in Belgium under the particular circumstances of the case' he did not consider whether the Belgian law's reference to English law included or excluded English choice of law, and simply applied English internal law. See further A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 38.

The Mutual Disclaimer of Jurisdiction Theory: Renvoi's Orphan

One of the five theories of renvoi has rated no mention by contemporary renvoi scholars. The *désistement* theory proposed by Professor von Bar of the University of Göttingen and endorsed by Professor Westlake has fallen into abeyance since it was discredited by Professor Lorenzen as being too narrow to be generally applicable. It appears to have no champions among contemporary renvoi scholars. One can suppose this is because in theory it advocates the default application of the law of the forum in all cases where the forum and foreign conflict of laws rules are in disagreement. In practice, it mandates the rejection of a reference from the forum court to the foreign law area. Its effect is analogous to the sinister effects of the presumption of identity that arise when a plaintiff pleads foreign law but fails to prove it, or to prove it sufficiently.[144]

Professor Lorenzen writing in the *Yale Law Journal* in 1918 roundly discredits the von Bar and Westlake mutual disclaimer of jurisdiction theory of renvoi as both unsustainable and unsupported from an historical perspective. To quote Professor Lorenzen's own summary of the von Bar theory:

1. 'Every court shall observe the law of its country as regards the application of foreign laws.
2. Provided that no express provision to the contrary exists, the court shall respect:
    a. The provision of a foreign law which disclaims the right to bind its nationals abroad as regards their personal statute, and desires that said personal statute shall be determined by the law of the domicil, or even by the law of the place where the act in question occurred.
    b. The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law.'[145]

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[144] And yet the presumption of identity survives whilst the mutual disclaimer of jurisdiction theory has been discredited. For recent analysis of the presumption of identity in Australia, see especially J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400.

[145] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of 'The Law of a Country'' (1917-1918) 27 *Yale Law Journal* 509 at 512; quoting from J Westlake, 18 *Annuaire de l'Institut de droit international*, 41.

The above theory was always restricted to cases involving personal status, and in which there is difference between the law of nationality and the *lex domicilii.*

Professor Westlake develops his view in a different way, but essentially, he argues that there is no real distinction between internal law and international law, and the intention of the 'national legislator' is for the rules of the conflict of laws to define how the country's municipal or internal law is applied. Professor Westlake's theory suffers a fundamental deficit. It leads to internal law of the forum applying to *all* cases where there is a gap in the law, and there will be a gap in the law in cases when the conflicts rules of the forum and the foreign law area are divergent.

Professor Lorenzen concludes that the Westlake view is hopeless because it does not recognise a transmission or forward reference; it only acknowledges a remission or return reference.

> The object of the science of private international law of a particular country is to fix the limits of the application of the territorial law of such country, but its aim is not restricted to this. It includes also the determination of the foreign law applicable in those cases in which the *lex fori* does not control. Otherwise the courts of the forum would be left by the national legislator without a guide as to the applicatory law in that class of cases.[146]

As the Westlake theory has not been endorsed by renvoi advocates, because of its fundamental flaw, it may be discarded. This thesis examines the other renvoi theory that contains a logical flaw that emerges when theory and practice collide: the double or total renvoi, sometimes known as the theory of renvoi proper.

The Double or Total Renvoi

Renvoi has been attacked as a doctrine that defies logic, and that will be so when one examines the double or total renvoi and the problem of the infinite regression. This is the most controversial of the theories of renvoi, but also represents the renvoi in its pure form. Professor Lorenzen and others refer to the total renvoi as the *theory of renvoi proper.*

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[146] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of 'The Law of a Country'' (1917-1918) 27 *Yale Law Journal* 509 at 517-518.

It is the theory that seeks to apply the foreign law most completely, and it is therefore the source of the most serious theoretical and practical objections to renvoi. It is objectionable because the double renvoi doctrine may produce infinite regressions between the *lex fori* and *lex causae* if it is applied in its pure form.

The utility of the double renvoi depends upon several factors including sufficiently compelling reasoning as to how one might avoid an endless circle of references that the logicians have rightly identified whenever the forum and the foreign law area may both adopt a double renvoi solution. This in practice has been done very badly by the courts, so that no clear principle emerges from any of the common law decisions in which double renvoi has applied.

Where a forum court refers to the entire foreign law, and the foreign law refers to the forum law, the infinite regression between the foreign and the forum law will continue until logic or expediency intervene to break the endless loop. In theory, there is no logical place to stop the reference.

In practice it may be expedient to stop after two references but this cannot be justified except on the grounds of expediency and this smacks of an arbitrariness that intellectually is unsatisfactory for the scholar or logician. This is the approach that was suggested by Scrutton LJ in *Casdagli v Casdagli*[147] in his obiter reasoning that if the forum refers to the foreign law and foreign law refers to the forum law, the forum should apply the internal law of the forum. This is where the theory of renvoi as a tool to achieve uniformity and decisional harmony is deficient.

The potential for an infinite regression renders double renvoi the most compelling example of why the doctrine should not be admitted as a general theory of choice of law. The resolution of the infinite regression requires the forum court to intervene.

Some of the arguments in favour of double renvoi include the following:

1. The infinite regression does not arise in practice since choice of law is a spent force when the entire of the foreign law (inclusive of choice of law rules) remits a

[147] [1918] P89 at 111, in obiter reasoning.

question back to the law of the forum and, as a spent force, the choice of law rules have no further work to do so that the internal law of the forum will apply to determine the matter in dispute, as in the *Casdagli* dictum.

2. The double renvoi theory will be workable if the other country rejects or ignores the renvoi.[148]
3. The forum court may choose 'a point at which the circle should be squared'[149] and that is likely to occur when a party fails to prove or sufficiently prove the relevant foreign law as a fact.

The first reason permits each of the forum and the foreign law one opportunity to apply their choice of law rules to a dispute, viz, one turn on the merry-go-round. However, it is unprincipled when one remembers that in truth the entire foreign law is never applied to decide a case with a foreign element. The argument might be sustained on principle only if the policy behind the forum's choice of law rule is to apply as much of the foreign choice of law as is possible.

The last reason is particularly disturbing and unprincipled as an argument in support of the double renvoi approach. It asserts that the workability of a total renvoi solution depends upon such a deficiency in the evidence before the forum court that it cannot apply the foreign law, or disapplies the foreign law and must apply its own law. A doctrine of choice of law that may, on one view, depend on a deficiency in evidence to provide a solution to the illogicality of an infinite regression is no more logical than an arbitrary rejection of a regression after the first, second or tenth remission. An apparent reliance upon the forum court to fill an evidential gap with its own law shows up the deficiency of the total renvoi as a theory of general application in the conflict of laws.

The Scope of Renvoi in Anglo-Australian Law

Should renvoi be accepted as a theory of the Australian conflict of laws, which is a part of the Australian common law? This is similar to the question tackled by the distinguished scholars including Dr Cheshire,[150] Dr Mendelssohn-Bartholdy,[151] Dr Baty,[152] Dr Morris,[153]

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[148] See E G Lorenzen,'The Qualification, Classification or Characterisation Problem in the Conflict of Laws' (1941) 50 *Yale Law Journal* 743 at 753. Like its offspring the foreign court theory, double renvoi relies on the foreign law area solving the problem.

[149] E Rimmell, 'The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to an Impractical Doctrine' (1998) 19 *Holdsworth Law Review* 55 at 58.

[150] G C Cheshire, *Private International Law* (2nd edn, 1938).

Professor Cook,[154] Professor Beale,[155] and Professor Rheinstein,[156] writing in the early to mid-twentieth century. It is the analysis of the earlier scholars that has given rise to the immense literature on the renvoi doctrine.[157] They asked whether the renvoi was accepted as a *general* theory of the conflict of laws. The overwhelming answer was no.

There is extremely limited support for renvoi as a general theory of broad application, and even those scholars who have mapped its use in the exceptional cases have advocated steady caution in any attempt to expand its reach.[158] The answer depends upon the definition of what constitutes a theory either having a place in the common law or constituting a doctrine of the common law.

As Professor Griswold observed when summarising the literature that concluded renvoi was not part of Anglo-American law, 'the amount of microscopic hair splitting required along the way to this result, however, might possibly be a basis for some doubt as to its merits'.[159] He wrote this in the context of attempting to induce the spread of the renvoi beyond its petri dish of narrow exceptions whence it had incubated for decades. At the same time that renvoi was being employed to determine the wills cases and legitimation by marriage, the majority of scholars asserted that the renvoi was not part of the Anglo-American conflict of laws.[160] Thus, the declaration that renvoi was not a part of the English conflict of laws in the early to mid-twentieth century appears to have been wrong from the start.

From a survey of the materials, it appears that the renvoi doctrine *was* a part of the English conflict of laws dating back to Sir Herbert Jenner in *Collier*, albeit to a limited extent as renvoi was confined narrowly to exceptional cases. The narrow scope of the confinement does not exclude the doctrine from forming a part of the English conflict of laws, but it

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[151] A Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937).
[152] T Baty, *Polarized Law* (1914).
[153] J Morris, 'The Law of Domicil' (1937) 18 *British Yearbook of International Law* 32.
[154] W W Cook, *Logical and Legal Bases of the Conflict of Laws* (2nd edn, 1942).
[155] J Beale, *A Treatise on the Conflict of Laws* (1935).
[156] M Rheinstein, 'Michigan Legal Studies: A Review' (1942-43) 41 *Michigan Law Review* 83.
[157] For Professor Emil Potu's list as at 1913, see E Potu, *La question du renvoi en droit international privé* (1913).
[158] Which is why the decision in *Neilson* (2005) 225 CLR 331 was so extraordinary.
[159] E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1173.
[160] See e.g. G W Stumberg, *Conflict of Laws (*1937) at 11: 'It seems to be quite generally accepted that 'renvoi' is no part of American law'; E O Schreiber, 'The Doctrine of the Renvoi in Anglo-American Law' (1918) 31 *Harvard Law Review* 523 at 571: 'An examination into its merits and demerits will, it is believed, require its rejection in all but the most exceptional cases'.

does highlight the prevailing juridical opinion of where the renvoi belonged and where this thesis argues it still belongs – as an exception.

Though decades of strident academic and judicial criticism of renvoi managed to successfully marginalise the theory, it was never obliterated despite its relegation to obscurity. It has remained, as it were, in a state of hibernation and periodically wakes from its slumber to be troublesome and to attract a new generation of academic commentary. Its latest awakening within the common law world has been in the context of international torts in Australia, to which this thesis shall examine in detail. Jurisdictions such as the UK have commenced a process of legislating against the doctrine and removing it from contract and tort claims.

The American Law Institute, in its *Restatement (First) Conflict of Laws*, confirmed that when foreign law is to be applied to decide a conflicts case, it is only the 'law applicable to the matter in hand and not the Conflict of Laws of the foreign state'[161] except:

1. in cases relating to title to land, which will be governed by the situs of the land; and
2. the validity of a decree of divorce, which will be governed by the domicil of the parties.

Professor Griswold called these the 'exceptions begrudgingly admitted to an otherwise universal rule'.[162] That universal rule, by which a choice of law refers to the selection of a law of a foreign state that resolves the issue and not to foreign conflicts rules too, is the foundation of the presumption against renvoi.

The common law has maintained over the decades the presumption against renvoi, and confined its rare application to the succession to movables as well as to immovables, the validity of wills, and the legitimation of marriage, as mentioned above. In those cases, the commonality appears to be a rebuttal of the presumption because a matter of status was at issue and the courts were able to take a purposive approach to the problems.

The American Law Institute's *Restatement (Second) Conflict of Laws* confined the spread of the renvoi in the US by specifically excluding it from tort cases. That perhaps was a

[161] American Law Institute, *Restatement (First) Conflict of Laws* (1934) s 8.
[162] E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1176.

response to the one or two eminent scholars including Professor Griswold, who advocated for 'greater friendliness to renvoi'.[163] Professor Griswold theorised that characterising the law of a foreign area as the whole of that law, including its conflict of laws, would not propagate the infinite regressions and halls of mirrors[164] of the kind greatly feared.

To Professor Griswold, the arbitrariness or failure of logic in breaking the *circulus inextricabilis*, if and when it should appear, was not as important as the promotion of the dual concepts of certainty and predictability that are at the core of the conflict of laws. He suggested that a single renvoi solution or the foreign court theory is more likely to produce a uniform solution to cases involving *lex situs* or *lex domicilii* than would a no renvoi solution.

Professor Griswold's argument is that the foreign conflicts rules are not that difficult to prove, and the approach of the foreign court to solving this problem consistent with the 'foreign court theory' of renvoi is equally not that obscure. He examines an assortment of divorce, marriage and succession cases to propose that renvoi can be both a helpful and a viable part of the broader doctrine in the conflict of laws. It is a generalisation to write of the foreign conflicts rules not being difficult to prove.[165] Proving foreign law can be very difficult. With respect to Professor Griswold, even for cases where the foreign law is not especially exotic, pleading and proof is likely to be both difficult and costly.[166]

The apparent inconsistency of academic assertion that the renvoi theory was not a part of the twentieth century Anglo-American conflict of laws is visible in Professor Lorenzen's writings of 1918 in the *Yale Law Review*. Professor Lorenzen has submitted that 'a greater state of uncertainty in the law than that which arises from the theory of renvoi proper in its wider form is difficult to conceive' and that 'whatever strength this doctrine may gain temporarily because of the equivocal meaning of the term "law of a country" and the natural predisposition on the part of judges to apply their own law, that there can be no

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[163] E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1198.
[164] Griswold called them variously the merry-go-round or endless chain: ibid at 1208.
[165] Yezerski says the same thing: R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273.
[166] *Neilson* itself is a case in point. Much time and cost was taken up with the foreign law issue. The tort law reforms in Australia have attempted to curtail the cost of expert evidence, for example through practice directions that permit single expert to give evidence in civil matters for each head of damage. See, for example, New South Wales Supreme Court Practice Direction SC Gen 10 (17 August 2005). The kinds of expert contemplated by SC 10 include rehabilitation consultants, occupational therapists, nursing and domestic care providers. Conflict of laws experts would not be encompassed by these directions, as they are intended for quantum evidence only.

doubt of its overthrow. Its days ought to be few after its deceptive character is fully understood'.[167]

As to Professor Lorenzen's provocation that 'the general recognition of the renvoi doctrine in either of the forms ... would be fatal to the harmonious development of the rules of the conflict of laws in the future. No proper system of the conflict of laws can be built up among the civilised nations as long as this doctrine remains',[168] few writers have put the argument against renvoi in such forceful terms. However, his opposition lacked a leading decision to illustrate how troublesome the renvoi doctrine could be. The wills cases do not show the full extent of judicial reasoning to reach what, in most cases, appears the 'correct' result. Without a case example it has been difficult to defend on a principled basis the rejection of renvoi because the wills cases merely suggest but do not show what Professor Schreiber called the insidiousness of the renvoi doctrine.[169]

A range of common law cases decided since *Collier* therefore confirm that the renvoi has been a small part of the common law, but it has not merited much attention in the principal texts on the conflict of laws published before 2005. The evolution of the doctrine was thus limited until the *Neilson* case, which shall be analysed in detail as the leading case in the evolution of renvoi.

How is Renvoi a Part of the Anglo-Australian Law?

The caveat to this affirmation that renvoi is a part of the Anglo-Australian law can be found in the very narrow range of cases to which it had been applied until 2005, and its express exclusion from tort and contract in such common law jurisdictions as the UK[170] and the US.[171]

Historically, the renvoi was only admitted and recognised in England and in Australia as a double renvoi in its foreign court theory species, in a very narrow range of cases concerning status and succession. It was a rule to be applied only in exceptional

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[167] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of "The Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509, 528, 529.
[168] Ibid at 528.
[169] E O Schreiber, 'The Doctrine of the Renvoi in Anglo-American Law' (1918) 31 *Harvard Law Review* 523.
[170] *PIL Act* s9(5).
[171] American Law Institute, *Restatement (Second) Conflict of Laws* (1971) s8(1).

circumstances within a narrow range of circumstances.[172] As earlier discussed, *Simmons* was the first Australian renvoi case, and the first application of the foreign court theory of double renvoi.

As Professor Griswold resolved not to review all of the renvoi cases 'with painful thoroughness', this thesis supports Professor Griswold's opinion that such an approach would be unhelpful. As juristic speculation was almost infinite in 1922,[173] it has remained so to the present day nearly a century later. An overview of how renvoi has become part of Anglo-Australian law will help to put the current law in context.

As at 1938 when Professor Griswold summarised the verbal chorus against renvoi,[174] he noted that the case surveys of the early twentieth century by Professor Bate in 1904 concluded that "'the Renvoi-theory is inconsistent with" fundamental doctrines of English law'.[175] Its inconsistency with the fundamental doctrines of the English law emerge from the reality that the renvoi does not give a solution to a legal problem but, at best, may facilitate the choice of the law to solve a problem. Like any doctrine, it should not be applied mechanically. Unlike other doctrines, its full and faithful application could potentially produce the illogicality of no solution at all.

A summary by Professor Abbott in 1908 concluded that 'the renvoi cannot be considered a part of the Common Law, either on principle or on authority'.[176] Both Dr Morris[177] and Dr Cheshire committed to writing their disapproval of renvoi, with the latter commenting in *Private International Law* that:

> Despite the three most recent decisions (*Re Annesley*, [1926] Ch 692; *Re Ross* [1930] 1 Ch 377; *Re Askew* [1930] 2 Ch 59) it is submitted...that upon a right view of the authorities as a whole, English law recognizes neither the doctrine of renvoi nor the somewhat analogous doctrine that a reference to a foreign law means a reference to the whole of that law as it would be expounded and administered in its own country.[178]

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[172] *Macmillan Inc v Bishopsgate Investment Trust (Plc) (No 3)* [1995] 3 All ER 747; [1995] 1 WLR 978 at 1008.
[173] See also Anonymous Note, 'A Distinction in the Renvoi Doctrine' (1922) 35 *Harvard Law Review* 454.
[174] E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1170-1172.
[175] Ibid at 1170.
[176] E H Abbott, 'Is the Renvoi a Part of the Common Law?' (1908) 24 *Law Quarterly Review* 133, 146.
[177] J H C Morris, 'The Law of the Domicil' (1937) 18 *British Yearbook of International Law* 32.
[178] G C Cheshire, *Private International Law* (2nd edn, 1938) at 65.

From across the Atlantic, Professor Lorenzen reached the same conclusion, publishing in 1910 in the Columbia Law Review to assert in the context of the US law:

> [The renvoi doctrine's] introduction into our law would be most unfortunate on account of the uncertainty and confusion to which it would give rise in the administration of justice and its demoralizing effect upon the future development of the Conflict of Laws.[179]

Professor Lorenzen is the only conflicts scholar who appears to have described the effect of renvoi as 'demoralising,' when he declares that 'A mere statement of the operation of the "renvoi doctrine" should be sufficient to condemn it'.[180]

Less than a decade later, and in response to the growing number of US cases, Lorenzen comprehensively revised his opinion that renvoi was not a part of the conflict of laws of the US.[181] He accepted that it was. He used the decisions of *Guernsey v The Imperial Bank of Canada*[182] (an endorsement case) *and Lando v Lando*[183] (a validity of marriage case) as examples of cases in which US courts characterised the law of a foreign law area as the whole of the law, including conflict of laws rules. He also highlighted in *Lando* that the court appeared to misconstrue the foreign law in reaching a decision that the marriage was valid, and the quotation furnished from the judgment confirms it.

Professor Schreiber used even stronger language, calling the nature of renvoi 'insidious'.[184] Combining an insidious doctrine with an incredible fiction such as the presumption of identity can hardly make for a principled response to conflicts problems.

The very strong condemnation of the renvoi doctrine and the obvious intent of the academy to disavow the existence of renvoi as part of the English or US conflicts of law is curiously at odds with the concessions that, within certain contexts of necessity or expediency, there

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[179] E G Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 *Columbia Law Review* 190, 327, 344.
[180] E G Lorenzen, 'Renvoi in Divorce Proceedings based upon Constructive Service' (1921) 31 *Yale Law Journal* 191, 192.
[181] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of "The Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509.
[182] (1911, CCA 8 C) 188 Fed 300.
[183] (1910) 112 Minn 257; 127 NW 1125.
[184] E O Schreiber, 'The Doctrine of the Renvoi in Anglo-American Law' (1918) 31 *Harvard Law Review* 523, 570, 571.

would be exceptional cases where the law of the forum should include the entire foreign law inclusive of the foreign conflict of laws.[185] To make out an exceptional case, the party seeking the forum's indulgence to apply the renvoi must rebut the presumption against it.

The stern opposition by Professor Schreiber is similarly qualified by a concession that renvoi should be rejected in all but the most exceptional cases. The exceptional cases in which a renvoi will be admitted, or the law of a place defined as its whole law including conflicts of law, appear to be accepted as the succession and marriage cases. The exceptionality of those cases seems to be the need to uphold either the nature of marriage or testamentary gifts. One may say there is nineteenth century quaintness about exceptions seeking to uphold the sanctity of promises steeped in both ritual and tradition.

The fundamental divide between the scholarly response to renvoi and of the jurists who are prepared to apply it is evidenced by how willing a court is to engage with the intellectual heart of the problem. Academic writing seldom directly influences courts; courts take their lead from the evidence as presented by counsel for the parties.

Professor Rheinstein emphasised that the rules of the conflict of laws ought to be formulated to protect or not disappoint normal expectations as to the rule that would be applied.[186] To apply Professor Rheinstein's view in practice raises a great many questions; chief among these is where one draws the line. What are the normal expectations of an Australian who is not a conflicts lawyer, if she is injured in China because of a poorly designed Chinese building? Professor Rheinstein almost beckons a debate about what is normative in the context of the conflict of laws, and a discourse on that topic is outside the scope of this thesis.

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[185] E G Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of "The Law of a Country"' (1917-1918) 27 *Yale Law Journal* 509 at 529-531.

[186] See e.g. O Kahn-Freund, 'General Principles of Private International Law' (1974) 143 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 139; also M Glendon, 'The Influence of Max Rheinstein on American Law' in M Lutter, E C Stiefel & M H Hoeflich (eds), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993) 171.

Theoretical Frameworks for Renvoi

Renvoi and the Vested Rights Theory

In coining the theory of vested rights, Professor Beale declared that 'a right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.'[187] Accordingly, the duty to recognise the law of a foreign area does not depend upon comity and reciprocity; it depends only on the right being validly created under the law of their place of origin and therefore being 'vested rights'. Mr McComish observes by reference to two US cases that, in jurisdictions that have adopted the vested rights theory as part of choice of law, pleading and proof of foreign law is essential to maintain a cause of action else the claim be dismissed.[188]

The vested rights theory and the renvoi theory are complementary. Professor Sauveplanne confirmed that a link between the vested rights theory and the renvoi theory was explicitly recognised by Professor Meijers as long ago as in 1950. Professor Meijers took inspiration from the vested rights theory to formulate an approach to renvoi in the Netherlands. Before Professor Meijers, the Dutch law typically rejected renvoi, save for exceptional cases that referred back to the forum.[189]

Professor Meijers' basic proposition was that limits must be set on the application of conflicts rules of the forum, by the forum. Professor Sauveplanne observed that the vested rights theory affects renvoi because 'just as the conflicts rule delimits the scope of rules of substantive law, its own scope must be delimited as against conflicts rules of other systems. Applied to the doctrine of renvoi, the use of the [conflicts rules of a foreign law area] has been justified in the same way, with a view to avoiding ... "limping" situations caused by conflicting decisions of the countries concerned.'[190]

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[187] J Beale, *A Selection of Cases on the Conflicts of Laws* (3rd vol, 1902) at 517.
[188] J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) *Melbourne University Law Review* 200 at 408-409.
[189] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopaedia of Comparative Law* (3rd vol, 1990) p19 at s6-28; see also J Kosters & C W Dubbink, *Algemeen deel van het Nederlandse international privaatrecht* (1962) 287-329.
[190] Sauveplanne, ibid, p 5 at s5, s27; p8 at s6-12.

Professor Meijers advocated applying national law for questions of status, marriage and succession, on the basis that these should be universally recognised rights. He contributed his scholarship to both the drafting of a Uniform Act on Private International Law for the Benelux countries, which was an active project between 1950 and 1976,[191] as well as in drafting the Hague Convention on renvoi that was ratified only by Belgium and the Netherlands. However, Professor Sauveplanne notes that 'in most cases ... courts directly apply the law which they consider to present the closest connection – which may happen to be the most favourable law – without entering on the circuitous road of renvoi. In the present state of Dutch private international law renvoi appears to have lost its practical usefulness'.[192]

Rejection of Vested Rights Theory

The vested rights theory has been rejected by the High Court in *Zhang*.[193] For renvoi to be accepted as a general part of Australia's conflict of laws, it needs to be compatible with Australia's dogmatic *lex loci delicti* rule.

Sir Otto Kahn-Freund, affirming the principles espoused by Professor von Savigny,[194] also rejects the 'protection of vested rights' as a foundation principle of private international law.[195] Of the so-called 'general principle' of vested rights as a cornerstone of the conflict of laws, Professor von Savigny stated 'this principle merely leads to a circle. What rights are duly acquired we can only learn if we have already ascertained by what local law we have to decide whether they have been acquired.'[196]

In his 1938 essay in the *Harvard Law Review*, Professor Griswold observed that the original vested rights proponents, such as for example Dr Cheshire, were also leading opponents to the renvoi doctrine.[197] Yet, the vested rights theory is rooted in an attempt to ensure similar treatment regardless of the forum or, to put it another way, to achieve uniformity and consistency. So too is renvoi. Professor Griswold has suggested that in

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[191] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopaedia of Comparative Law* (3rd vol, 1990) p19 at s6-27.
[192] Ibid p20 at s6-28.
[193] *Zhang* (2002) 210 CLR 491 at 517.
[194] F K von Savigny, *A Treatise on the Conflict of Laws* (2nd edn, 1880).
[195] O Kahn-Freund, 'General Principles of Private International Law' (1974) *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 139 at 319.
[196] F K von Savigny *A Treatise on the Conflict of Laws* (2nd edn, 1880).
[197] E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1187.

response to conflicts cases involving foreign elements, the form of renvoi known as the 'foreign court theory' is a viable form of renvoi for Anglo-American law and will more often produce uniform results than a rejection of renvoi and the application of internal laws of the foreign law area.

In analysing the practical implications of endorsing the foreign court theory, Professor Griswold acknowledges that looking at the whole law of the foreign law area requires a forum court to grapple with the overarching question 'how can a forum court know what conclusion a foreign court would reach?' Professor Griswold attempts to answer this question by asserting that:

1. The foreign conflicts rule may be very simple, especially if there are statutory rules such as those in place for the validity of wills.
2. The question may have already been decided by the foreign court.
3. If the foreign court has not decided, the question might come before the foreign court.
4. If there are no proceedings pending before the foreign court, it may be possible to institute such proceedings.

Professor Griswold also states the obvious point that the problem of the infinite regression is by no means a certainty; it therefore ought not operate as an impediment to a broader endorsement of the foreign court theory. His primary argument is that the recognition of foreign conflicts law will not lead to an infinite regression and therefore will not raise any problems of logic if, at any point, the forum court is referred to the law of a country that, by its own choice of law rule, would apply its own internal law. That might need two or more references either remission or transmission.[198] He submits that approaching conflicts problems in an abstract or theoretical sense magnifies the fear of the infinite regression 'into a generalisation'.[199] Further:

> The important thing to bear in mind is that the endless chain is a remote possibility, not the central theme of renvoi, and the possibility of its appearance

[198] E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1190. But this argument only operates in what I will broadly call the 'succession cases' as long-established exceptions to the generally accepted rule/presumption that renvoi should be rejected.
[199] Ibid at 1192.

should not be allowed to distort the law in the many cases where it is not present.[200]

Professor Griswold's reasoning, that the forum can rely on the foreign law's response to answer a double renvoi case, is unsatisfying because it relies on the forum abdicating responsibility for choosing the law that disposes of the substantive issues in dispute. Problems arise when attempting to extend Professor Griswold's arguments beyond wills cases and into the general realm of tort. A forum may either have only a very loose statutory tort law regime, or there may be no statutory regime.[201] The rejection of the theory by the High Court in *Zhang* means that it does not mandate further consideration in the current Australian context.

Returning to the cacophonous music of the twentieth century scholars who rejected renvoi, the comments of Professor Goodrich on the renvoi doctrine are insightful:

> On common law principles of Conflict of Laws there is no occasion for using the doctrine ... out of harmony as it is with our principles of Conflict of Laws, it seems important to know chiefly to avoid its unconscious acceptance.[202]

The Theoretical Merits and Demerits of Renvoi

Harmony

The doctrine of renvoi derives its strongest support from the arguments around its utility as a device to achieve uniformity and consistency of result, irrespective of the forum. The foreign court theory of renvoi appears to promote this kind of substantive decisional harmony, subject to the adequate pleading and proof of what the foreign court would do in response to the conflicts problem. Mr Rimmel has identified this as a total renvoi's mirroring of the conditions of the foreign court.[203]

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[200] Ibid at 1193.

[201] Until quite recently Australia's various states and territories did not have a statutory tort law regime. This now exists and continues to develop but the guiding principles are at common law; however, there is no overarching Federal statute.

[202] H F Goodrich, *Conflict of Laws* (1927) 24, 25; see also E Griswold, 'Renvoi Revisited' (1937-1938) 51 *Harvard Law Review* 1165 at 1172.

[203] E Rimmel, 'The Place of Renvoi in Transnational Litigation' (1998) 19 *Holdsworth Law Review* 55 at 60.

The difficulty with the use of the total renvoi is that unless it is rejected by the law to which the conflict rule of the forum refers, it can give rise to an infinite regression. In addition, the renvoi cannot precisely mirror the conditions of the foreign court because the forum cannot apply all of the foreign law.

By way of example, an Australian forum court distinguishes the foreign substantive law from the foreign procedural laws, and the Australian *lex loci delicti* choice of law rule requires the forum court to apply only the foreign substantive law. Where the forum court must construe foreign legislation, and no evidence of the foreign principles of statutory construction has been adduced by the parties, a forum court will use Australian principles of statutory construction to construe the foreign law – the result may be quite different from how a foreign court would construe its own law.[204] The presumption of identity, which is an accepted part of the Australian conflict of laws and will operate in the face of insufficient proof of the foreign substantive law, or in the absence of proof, may also lead the forum court to construe the foreign court's approach to the foreign law in a manner that is not consistent with how a foreign court would actually solve the problem.[205] Each of these factors tell against a double renvoi producing the coveted result of substantive decisional harmony irrespective of the forum.

The so-called "Rome II" on non-contractual obligations, including tort cases, commenced 11 January 2009[206] and has the aim of providing a similar framework to that provided by Rome I on contractual obligations for the member states of the EU. Both conventions purport to provide a framework to discourage forum shopping further and to promote decisional harmony by prescribing a choice of law rule.

However, in the context of tort claims, a myriad of choice of law rules continue to abound in the common law jurisdictions and these include:

1. *Lex loci delicti* without flexible exceptions (as in Australia[207])
2. *Lex loci delicti* with flexible exceptions (as in the UK[208] and Canada[209])

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[204] *Neilson* (2005) 223 CLR 331 per Callinan J at 411, Heydon J at 420.
[205] The presumption of identity has also been said to favour application of the forum law as it is a default position. See A Briggs, *The Conflict of Laws* (2002) at 6.
[206] Rome II Regulation EC 864/2007 of the European Parliament and of the Council of 11 July 2007 Applicable to Non-Contractual Obligations.
[207] See *Pfeiffer* (2000) 203 CLR 503 and *Zhang* (2002) 210 CLR 491.
[208] *Private International Law (Miscellaneous Provisions) Act 1995 (UK)* s9(5) and cases following the statute. There are only a small number of reported decisions because it only had prospective operation to

3. Double actionability with a flexible exception as in *Boys v Chaplin*[210] (as in New Zealand, which confirmed the double actionability rule in *Baxter v Group RMC plc.*[211])

In any case where the common law rules apply, there is scope for much uncertainty for a plaintiff who brings her action in an Australian court, for although the Australian choice of law rule is one without flexible exceptions, applying all of the foreign law including foreign conflicts laws and renvoi can permit a claimant before an Australian forum court to escape the rigidity of the forum's choice of law rule. Therefore, a most unexpected use of the renvoi doctrine could be to add flexibility to an otherwise inflexible choice of law rule for tort.[212]

Interest Analysis Theory

Professor Cavers observes that it is a question of policy for the forum whether it applies forum law or foreign law, even if the foreign law is disinterested.[213] Therefore, renvoi does not support the policy of the forum by interfering with the forum's choice of law.

Dr Gray, in a series of essays, has posited the interest analysis as a viable framework to contextualise renvoi.[214] He suggests that it allows for the balance of necessarily flexibility, and control. He seeks to accommodate renvoi in the Australian conflict of laws, whist at the same time recognising that a total renvoi can be problematic but that on balance it is better to have renvoi than not. The problem inherent in his thesis is that both interest

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events since 1 May 1996: see e.g. R Mortensen, 'Homing Devices in Choice of Tort Law' (2006) 55 *International and Comparative Law Quarterly* 839 at 849. For claims arising before the 1995 Act, the *Boys v Chaplin* modified form of double actionability with the exception still applies: see e.g. *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 3 All ER 209.

[209] See *Tolofson v Jensen; Lucas v Gagnon* (1995) 120 DLR (4th) 289.

[210] *Boys v Chaplin* [1971] AC 356, which endorsed the double actionability rule of *Phillips v Eyre* with a flexible exception to applying both *lex fori* and *lex loci delicti*. The modified double actionability of *Boys v Chaplin* permits the application of either *lex fori* or *lex delicti* alone. But as Mortensen observes, an English court has not yet invoked the exception so as to apply the law of the place of the tort alone. The case of *Red Sea Insurance Co v Bouyges SA* [1995] 1 AC 190 was an appeal from Hong Kong to the Privy Council, so it does not actually reflect position in the United Kingdom, even though may be regularly cited as representing the position in the United Kingdom. A more complete discussion is in R Mortensen, 'Homing Devices in Choice of Tort Law' (2006) 55 *International and Comparative Law Quarterly* 839 at 864.

[211] [2003] 1 NZLR 304.

[212] But note it is excluded by statute in the UK: s9(5) *Private International Law (Miscellaneous Provisions) Act 1995 (UK)*.

[213] D F Cavers, *The Choice of Law Process* (1965) at 106.

[214] A Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia' (2004) 23(2) *University of Queensland Law Journal* 435; also A Gray, 'The Rise of Renvoi In Australia: Creating the Theoretical Framework' (2007) 30(1) *University of New South Wales Law Journal* 103.

analysis and the doctrine of renvoi are uncertain. To combine the uncertainty of interest analysis that forces a forum court to consider a conflict of laws without rules, with for example a total renvoi that defers to the foreign law area to solve the problem, is another recipe for inconsistency and uncertain consequences.

Proof of Foreign Law

Although the foreign law must be pleaded and proved as a fact, the common law forum court is theoretically only able to take notice of the evidence of the foreign law as presented to it by relevant experts. Unless the evidence is improbable,[215] the general principle appears to be that courts should accept uncontradicted expert evidence of foreign law. This principle seems to vest the outcome in 'the doubtful and conflicting evidence of foreign experts'.[216] At the very least, it places an extravagant influence over the outcome of the case in the hands of expert witnesses. Although experts owe a duty to the court, they tend to be partial. They are briefed and paid by one or other of the parties to an action. An expert is frequently only as good as the assumptions posed to him by solicitors and counsel in the context of his original instructions.[217]

Jurisprudential Issues

Mr Rimmel theorises that whether renvoi is rejected or accepted in whatever form, the forum court will always apply the choice of law rule of the forum. Thus:

> Whether we reject renvoi, or apply single or total renvoi, we are still applying [the law of the forum], albeit with varying degrees of information of foreign rules of law.[218]

Linking the jurisprudential and theoretical issues of renvoi and of choice of law, the Dutch scholar Professor Asser observed that:

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[215] *Neilson* (2005) 223 CLR 331, 349, Kirby J at 389-90, Callinan J at 404-6.
[216] *Re Askew* [1930] 2 Ch 259 at 278.
[217] *R v Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006), as an example of where the expert evidence on foreign law failed to satisfy the basic requirements of expert evidence.
[218] E Rimmel, 'The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to an Impractical Doctrine' (1998) 19 *Holdsworth Law Review* 55 at 64.

> The science of Private International Law ... must designate the law applicable to each jural relationship. We have no hesitancy in declaring that in our opinion the learned juris-consults who have opposed the system of renvoi have proved in an irrefutable manner that the science of Private International Law has for its aim the direct designation of the very law which is to govern the legal relationship and that its aim must not consist merely in referring to the rules governing the Conflict of Laws in such country ... The science, in declaring applicable the national law, or the law of the situation of the property, or any other law, has been guided by considerations derived from the nature of the legal relationship in question. It is, therefore, the law itself indicated by it that must be applied, and not another law to which it refers and could not have been considered by the science.[219]

It was by this and similar reasoning that Professor Asser and his fellow members of the Institute of International Law rejected renvoi by majority at Neuchâtel in 1900,[220] resolving that:

> When the law of a State governs a conflict of laws in the matter of private law it is desirable that it should designate the rule of law to be applied in each case and not the foreign rule governing the conflict in question.[221]

The sufficiency of proof of foreign law, and how much evidence of the foreign choice of law rule is 'just enough'[222] for an Australian court, remains undefined.

Summary

The foregoing makes it clear that there are many arguments both for and against renvoi. However, serious doubts must be raised whether the decisional harmony or conformity with legitimate expectations of parties can be served by renvoi even in traditional contexts

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[219] T M C Asser, (1906) 32 *Journal du droit international privé* 40-41.

[220] See E Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 Columbia Law Review 190 at 197.

[221] 18 *Annuaire de l'Institut de droit international* 179.

[222] In *Neilson* (2005) 223 CLR 331, 343 at [17] Gleeson CJ seemed to consider the evidence of Chinese renvoi sufficient even though the expert did not refer to how a Chinese court would approach the problem and whether it would exercise discretion to remit the matter to Australia. It suggests a standard substantially less than 'on the balance of probabilities' applying to causation in international tort claims: cf *Amaca Pty Ltd v Ellis* (2010) 263 ALR 576.

where it has been accepted. For example, the application of renvoi in *Re Askew* appears to reinforce legitimate expectations, whereas in *Re O'Keeffe* it seems to confound them. Where the place of a tort is fortuitous, and where the connecting factors vary markedly between legal systems, renvoi appears to serve neither decisional harmony nor legitimate party expectations.

Chapter 3: The Renvoi Theory in the Modern World

Introduction

The increasing globalisation of trade and commerce has brought with it more frequent civil and commercial cross-border disputes. These commercial transactions, together with the ease with which people traverse state and national borders for work as well as play, makes the conflict of laws a dynamic field of scholarship. An understanding of the conflict of laws is a requirement for lawyers practising in commercial law firms.

Litigation is not the primary course adopted by parties to cross-border disputes. As with all forms of dispute resolution, the cost and time involved is a vital consideration with a swift and just resolution the goal for most parties. The cost of litigation functions as a disincentive to litigating cases with foreign elements. Commercial contracts typically provide for a dispute resolution process such as arbitration or mediation or a binding expert determination, rather than litigation. International arbitration provides parties with a binding determination that is enforceable internationally pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 i.e. the New York Convention, which is in force in 144 states.[223] The United National Commission on International Trade Law (UNCITRAL) developed the Model Law on International Commercial Arbitration (Model Law), which is part of Australian law by virtue of the *International Arbitration Act 1974 (Cth)*. Commercial arbitrations without an international element or which are other than in accordance with the Model Law are regulated within Australia by commercial arbitration legislation at the state and territory level.[224] Jurisdiction and enforcement difficulties are avoided in disputes arbitrated under the Model Law.

Accompanying an international growth in arbitral proceedings, globalisation also brings an increase in disputes with a transnational element generally. For those international disputes that are litigated or arbitrated, private lawyers with a working knowledge of the conflict of laws regularly advise on the validity and operation of jurisdiction and dispute resolution

[223] United National Commission on International Trade Law, *Status of conventions and model laws* A/CN.9/601 39th session, New York, 19 June – 7 July 2006.
[224] *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1990* (Qld).

clauses, and advise on the applicable law, which may involve commencing or defending litigation.[225]

In a dark corner of the conflict of laws, renvoi remains one of the unsettled and controversial areas of legal scholarship. As Professor Briggs states, one formulation of the renvoi question is: 'is the issue to be resolved by applying the domestic law, or by permitting a reference on – a renvoi – from that law to another?'[226] It has found limited practical application in the transnational cases since 1990, yet is defended by writers who see the doctrine as a tool to attain uniformity of solutions to transnational disputes, which is what makes it so interesting. This thesis considers legislative and judicial approaches to it in the private international law of the UK, the US, the EU,[227] and in the emerging private international law of China. The US and UK have been chosen as they are major common law jurisdictions. China and the EU have been chosen as they are newer law areas in the civil tradition.

Summary of Developments

There have continued to be very few renvoi cases determined by the common law courts of first instance, and even rarer are decisions by appeal courts. This may be because the renvoi has been seldom pleaded, and only strictly arises for judicial consideration if it is pleaded. Thus, courts and parties have been able to reach practical and just solutions without invoking the renvoi, and it could be regarded as redundant. In commercial litigation practice, it is not a commonly encountered doctrine.

There had been no significant expansion of the renvoi in the common law world until 2005.[228] The common law position was always unclear because of courts tending to adopt inconsistent approaches in the cases where renvoi has been discusser or applied. In the US and the UK, it has so seldom been judicially applied even in the exceptional cases that have been cited in the writings of Dr Mendelssohn-Bartholdy and Professor Sauveplanne.

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[225] For a typical example, in *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1, an exclusive jurisdiction clause read with an arbitration clause nominated the law of Florida to determine claims under a franchise agreement. Civil claims brought by the Nicolas, including under the *Trade Practices Act 1974 (Cth)* were filed in the Federal Court, which granted a stay of the proceedings through applying Australian law presumptively on the construction and interpretation of the arbitration clause.

[226] A Briggs, *The Conflict of Laws* (2002) at 114.

[227] As the EU incorporates the main economies of Continental Europe.

[228] *Neilson* (2005) 223 CLR 331 was decided in 2005.

With statutory refinements to succession law in the UK, the scope for decisions in the so-called 'exceptional' cases has narrowed even further.[229] The question is now rare even in the status cases to which it had been historically applied.

When viewed through the lens of other legislative reforms in the UK and the EU, the development of the renvoi doctrine in the broader context of contract[230] and tort law[231] has been blocked as part of reforms to choice of law rules in the 1990s. Legislation that has been enacted to clarify the common law rules for contract and tort has also rejected expressly and in unambiguous terms the renvoi doctrine for all cases that are characterised as tortious or contractual. Whilst the policy considerations and rationale for legislative rejection of renvoi is not always clear, the effect is clear. Legislation in the UK that enacts the Rome I Regulation expressly rejects the doctrine for contract. Even without searching inquiries into the views of the law reform commission, it may be said that the demerits of the doctrine as a general conflict of laws rule have been found by the UK legislators and their advisors to outweigh its merits. This appears to continue a UK trend of legislating away the common law conflicts rules, abolishing everything from double actionability to the *Moçambique* rule.[232]

Since Professor Sauveplanne surveyed the UK, US, Continental European and Chinese law areas in 1990 for their attitudes to renvoi, methods of legal research and information exchange have changed substantially. Technology has vastly accelerated the relay of information. The publication of journals, cases and legislation in cyberspace is helpful for practitioners, courts and scholars. The legal discipline of the conflict of laws even has its own blog.[233] Along practical and case management lines, electronic filing of pleadings, video-link evidence for witnesses located outside the jurisdiction, and digitalised discovery in complex commercial matters help parties to litigation to overcome the limitations of geography and in theory to assist efficient and cost-effective case management that has

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[229] The Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions 1961 applies in the UK as well as Germany and France. The enabling legislation in the UK is the *Wills Act 1963 (UK)*, it repeals the old *Wills Act 1861 (UK)* and sets out the rules on formal validity of wills based on execution in accordance with 'the internal law in force in the territory where it was executed': s1. The reference to 'internal law' eliminates renvoi.

[230] *Contracts (Applicable Law) Act 1990 (UK)*, Schedule 1, Art 15.

[231] *Private International Law (Miscellaneous Provisions) Act 1995 (UK)* s9(5).

[232] *Moçambique* [1893] AC 602. Note that even in Australia, legislators in New South Wales and the Australian Capital Territory have abolished the Moçambique rule by statute: see e.g. the *Jurisdiction of Courts (Foreign Land) Act 1989 (NSW)* permitting New South Wales courts the discretion to deal with foreign land. A recent case on point is . See also *Civil Law (Wrongs) Act 2002 (ACT)* s 220.

[233] See www.conflictoflaws.net for the global 'news and views in private international law'.

become a priority of Australian courts.[234] The American Bar Association has aptly described this as the internationalisation of domestic law.[235] Theoretically, it should be easier to prove the content of foreign law in a foreign law area and then apply it in the forum if foreign law is pleaded and requires proof. Thus, it might be argued that when a case with a foreign element calls upon the parties to prove the foreign substantive law of liability and damages, it is but a small additional burden on parties and courts to address evidence of foreign rules of conflict of laws, and how they are to be applied.

Yet, in practice, what technology facilitates is merely an opportunity to access some information about foreign law such as part of its content. The foreign law must still be interpreted if it is to be applied in the forum, thus lawyers acting on such cases will still need to find foreign law experts to strategically advise on the content that is related to the matter in dispute, and application of foreign law, before a party can evaluate whether to plead and rely on the foreign law. Once pleaded, and if it is to be relied upon, an appropriate expert must introduce evidence to a court, and the court must be assisted by the expert's evidence to interpret and apply the foreign law. The expert must give her opinion in a manner consistent with the rule in *Ocean Marine v Jetopay*[236] and *Makita v Sprowles*.[237]

This chapter will address how three of the four identified jurisdictions are retreating from renvoi as a tool to resolve conflicts of law, and how the fourth jurisdiction is clarifying its rules of private international law by learning from the response of more developed modern legal systems in its efforts to evolve its own modern legal system. The conclusions of Professor Asser and his contemporaries that renvoi should be rejected has been heard by legislators who recognise the theoretical and practical difficulties and what it means to apply the doctrine to its full extent or even partially. Its rejection is not just the outcome of what Professor Briggs suggests is febrile academic imagination.[238]

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[234] In Australia the importance of case management was starkly highlighted in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 where the High Court confirmed that just but timely and cost-effective dispute resolution is a fundamental consideration even on the question whether late amendment to pleadings ought to be permitted.

[235] As in the title of the American Bar Association Section of International Law conference 'Cross-Border Collaboration, Convergence and Conflict – The Internationalization of Domestic Law and Its Consequences' Banco Court, 184 Phillip Street, Supreme Court of New South Wales, 9 February 2010.

[236] *Ocean Marine Mutual Insurance Assn (Europe) v Jetopay Pty Ltd* (2000) 120 FCR 146.

[237] *Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705.

[238] A Briggs, *The Conflict of Laws* (2002) at 16.

The US and its Response to Renvoi

US conflicts scholarship has evolved within a context of multiple approaches by the state courts. In relation to tort, it has evolved not only at common law, but also in the context of the *Federal Tort Claims Act (US)*. It is noteworthy that the largest body of common law conflicts scholarship in respect of renvoi comes from the US. That has mostly emerged through conflicts between the laws of different states within the US, each of which has been allowed to devise and implement its own choice of law regime.

The Absence of Federal Judicial Jurisdiction

As the Australian conflicts scholars Mr Lu and Ms Carroll (Lu and Carroll) observe, the large number of states as well as the differences between state legislation means that most US conflict of laws cases address interstate conflicts.[239] The US Supreme Court, as that country's ultimate court of federal jurisdiction, does not have general jurisdiction to determine a national choice of law rule.

Accordingly, the US states respond in diverse ways to the choice of law question, and in 1997, Professor Symeonides[240] identified *seven* main approaches to choice of law in tort by the 50 states. That remains the current position. The *lex loci delicti* choice of law rule does not apply in most US states.

Restatement First

Lu and Carroll recognise that the prevailing academic and judicial view concerning the application of foreign conflicts rules, and therefore the renvoi in the US in 1934, is set out in the American Law Institute's *Restatement (First) of Conflict of Laws* ('*Restatement (First)*').[241] The *Restatement (First)* declared that:

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[239] See A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 40.
[240] See S C Symeonides, 'Choice of Law in American Courts in 1997' (1998) 46 *American Journal of Comparative Law* 233; for Prof Symeonides' most recent annual update see S C Symeonides, 'Choice of Law in American Courts in 2009: Twenty-Third Annual Survey' (2010) *American Journal of Comparative Law* 227.
[241] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 40.

The foreign law to be applied is the law applicable to the matter in hand, and not the conflict of laws of the foreign state. [242]

Lu and Carroll identified the 1962 case of *Richards v United States*[243] ('*Richards*') as an exception to the rule in the *Restatement (First)*. [244] As a decision of the US Supreme Court, *Richards* is a rare example of that court interpreting the *Federal Tort Claims Act* ('FTCA'). The FTCA refers to the law of 'the place where the wrong or omission occurs'.[245] The US Supreme Court held that the 'law of the place where in the act or omission occurred' in the context of the US *Federal Tort Claims Act* was the 'whole of that law', and that includes the rules on conflict of laws.[246] That decision in *Richards* was followed most recently in the 2004 US Supreme Court decision of *Sosa v Alvarez-Machain*[247] again in the context of a Federal choice of law statute. Lu and Carroll submitted that 'because it determined only the construction of a federal choice of law statute, *Richards* has been and should continue to be treated as entirely distinguishable from other more generalised tort cases'.[248]

Restatement Second

In 1971, the American Law Institute restated the US conflicts law in the *Restatement (Second) of Conflict of Laws*;[249] Lu and Carroll write that, like the *Restatement (First)*, this 'introduced caveats on the application of the renvoi. The areas in which the renvoi doctrine should be applied are enunciated with greater clarity in the *Restatement (Second)*'.[250] section 8, Application of Choice-of-Law Rules of Another State (Renvoi), provides:

1. When directed by its own choice-of-law rules to apply 'the law' of another state, the forum applies the local law of the other state, except as stated in Subsections (2) and (3).
2. When the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the

[242] American Law Institute, *Restatement (First) of Conflict of Laws* (1934) at 7(b).
[243] *Richards v United States* 369 US 1, 12-13, 82 SCt 585, 592, 593 (1962).
[244] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 40.
[245] *Federal Tort Claims Act* 28 USC section 1346 b.
[246] For a discussion of the inconsistent application of the FTCA, see T M De Boer, *Beyond Lex Loci Delicti – Conflicts Methodology and Multistate Torts in American Case Law* (1987).
[247] *Sosa v Alvarez-Machain* 124 S Ct 2739; 159 L Ed 2d 718 (2004).
[248] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 40.
[249] American Law Institute, *Restatement (Second) of Conflict of Laws* (1971).
[250] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 40.

forum will apply the choice-of-law rules of the other state, subject to considerations of practicality and feasibility.

3. When the state of the forum has no substantial relationship to the particular issue or the parties and the courts of all interested states would concur in selecting the local rule applicable to this issue, the forum will usually apply this rule.

Sub-paragraph (j), on considerations of practicability and feasibility, states that those:

> Objectives cannot be obtained in areas where choice-of-law rules are imprecise. For this reason, among others, *the forum will not seek to apply foreign choice-of-law rules in the area of torts* [emphasis added].

Lu and Carroll point out that, as well as excluding tort and contract from the application of renvoi, the *Restatement (Second)* 'states clearly that renvoi should be rejected in tort because it is neither practical, nor feasible, in view of the imprecision of choice of law rules in tort.'[251]

The imprecision of the US choice of law rules for tort is, as Ms Greene suggests,[252] not a product of the flexible or the inflexible choice of law rules in that country, but the combination or conflation of:

a) differing common law approaches in the 50 states;
b) the absence of an over-arching rule such as that which the High Court of Australia has the jurisdiction to pronounce for Australia, but which the US Supreme Court has no jurisdiction to pronounce for the US;
c) the use of jury trials in some cases to decide tort claims; and
d) robust and continuing academic and judicial debate around governmental interest analysis.

Some American conflicts scholars including Professor Symeonides suggest that a third restatement is now overdue, especially for tort conflicts.[253]

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[251] Ibid.
[252] J Greene, 'Inflexibly Inflexible' (2007) 33 *Monash University Law Review* 246 at 258.
[253] S C Symeonides, 'The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)' (2000) 75 *Indiana Law Journal* 437.

As Professor Symeonides observes, 42 states have endorsed the proper law of the tort approach to interest analysis, in deciding tort cases.[254] By contrast, interest analysis has been expressly rejected by the High Court of Australia in its decisions of *Pfeiffer* and *Zhang*. Writers like Dr Gray have suggested that the High Court of Australia, taking the lead from US scholarship and experience, might eventually want to reconsider interest analysis as a framework for renvoi.[255] It is therefore interesting to note that whilst interest analysis has flourished in the US, there are not many examples of judicial efforts to apply interest analysis to renvoi.

One rare case from the state of Montana might give hope to the renvoi advocates. In *Phillips v General Motors Corporation*[256] (*'Phillips'*), the Supreme Court of Montana used an approach similar to renvoi, in the context of this tort case. *Phillips* was a products liability claim against General Motors. General Motors is a Michigan company. The claimants were resident in Montana, and were survivors of a car accident that occurred in Kansas. The car was bought in North Carolina from a General Motors dealer. The claim was actionable in Montana and the law of Montana also excluded liability caps that would otherwise have applied hence the plaintiffs preferred that Montana law as the governing law. The claim was not actionable in Kansas but had it been actionable there, Kansas law would have capped the available damages.

The court held that the law of North Carolina did not apply because its choice of law rule would have applied the law of Kansas. On the basis of interest analysis, the court also held that the purpose of Kansas law would not be advanced by the application of the law of Kansas, and that Michigan law did not apply as Michigan was not interested in having its law applied to actions where the only connection to Michigan was the place of manufacture of the car. The forum thus applied its own law to award the plaintiffs their damages. The *Phillips* case starkly illustrates the forum bias of renvoi techniques in practice, and can equally be cited by renvoi's critics.

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[254] S C Symeonides, 'Choice of Law for Products Liability: The 1990s and Beyond' (2004) 78 *Tulane Law Review* 1247 at 1252.
[255] A Gray, 'The Rise of Renvoi' (2007) 30(1) *University of New South Wales Law Journal* 103.
[256] *Phillips v General Motors Corporation* 298 Mont 438 (2000).

Renvoi in Chinese Law

The central role that Chinese trade and investment is playing in the Australian economy in the twenty-first century is undisputed. The rapidly growing trade between the two countries has meant that China has become Australia's largest foreign trading partner.[257] China is also presently reforming its own rules of private international law and of obligations, as discussed in chapter one of this thesis.

Everything Old is New Again

Before any close analysis of the contemporary Chinese approach to rules of private international law, it is essential to summarise the historical position of the Chinese private law. Chinese private law has two branches, the law of the National Republic (Taiwan), and the law of China. The legal systems of both Chinas draw on the Confucian philosophy, blending with the socialist or nationalist framework.

The Taiwanese approach reflects the legal position prior to the Chinese civil war that ended with the socialist victory over the nationalists in 1949. After the civil war, the nationalist government was exiled to Taiwan, and China isolated itself from the international community. Until the beginning of more outwardly focussed foreign policy in 1978, China was a closed social system.

As a consequence of the closing off of China, private law was fundamentally static from 1949 to 1978. During this closed period, China was heavily influenced by Soviet Marxist theory to the exclusion of other theories.[258] The influence of Confucian philosophy was suppressed.

Private International Law in the National Republic of China (Taiwan)

The Nationalist Government established in Taiwan in 1949. Taiwan inherited its legal system from pre-revolutionary China. China had a choice of law statute from 1918, the

[257] As at April 2010, China is Australia's largest two-way trading partner. See www.dfat.gov.au/trade/focus/081201_top10_twoway_exports.html (accessed 29 April 2010).
[258] H Wang, 'A Review of China's Private International Law During the 30-year Period of Reform and Opening Up', ASLI Working Paper, No. 002, May 2009, www.law.nus.sg/asli/pub/wps.htm.

'Statute Governing the Application of Laws'[259] (1918 Statute) that dealt independently with conflicts problems. It remained in place until the conclusion of the Chinese civil war, at which point it ceased to have effect in China, but continued to apply in Taiwan.

As Dr Ma observes, for more than a century, most foreigners operating within the Chinese territories were beyond the jurisdiction of Chinese courts and the Chinese law.[260] Accordingly, the Chinese conflict of laws cases from the nineteenth and early twentieth centuries concerned a very narrow range of foreign elements, and provided narrow scope for the development of conflicts scholarship. Before the nineteenth century, China was also a closed system and did not have rules of private international law as presently understood.

The drafting of the 1918 Statute was an inspired attempt by the legislators of that time to modernise China and create a framework for private relationships involving Chinese and non-Chinese. The drafters used the German and Japanese laws as a starting point. The 1918 Statute contained 27 articles grouped into seven chapters. Chapter 1, entitled 'General Provisions', includes Articles 1 to 4, in the nature of exceptions to the application of laws, rather than general principles concerning the application of law:

1. The exceptions to application of foreign law;
2. Multiple nationality, statelessness, lack of a unitary system of law;
3. The recognition of foreign juristic persons; and
4. Renvoi

Dr Ma observes that Taiwan's government found the 1918 Statute, inherited from pre-revolutionary China, unworkable in respects and in need of modernisation. In 1952, Taiwan's government commenced preparing a new draft of the legislation governing Taiwanese conflict of laws. This was again based on the Japanese and German legislation, and contained 31 articles. Article 28 of the new Law addressed a lack of unitary system of

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[259] As Ma observes, the title of the 1918 Statute gives a misleading impression that the statute governs the application of laws in all matters, and not exclusively in matters involving foreign elements. In fact the Statute has restrictive operation and is expressly confined to cases with foreign elements. See e.g. H Ma, *General Principles of Conflict of Laws* (12th edn, 1997).

[260] H P Ma, 'Private International Law of the Republic of China: Past, Present and the Future' in *Private Law in the International Arena – From National Conflict Rules Towards Harmonization and Unification* (2000) 413 at 416.

law, Article 29 addressed renvoi, and Article 30 addressed an absence of provisions in the law.[261]

For ease of reference, the conflicts laws were modelled on the five books of Taiwanese domestic law, that is, the five books of the Civil Code of Taiwan. This may or may not reflect the interdependency of the national conflicts laws and the domestic law; it certainly emphasises to practitioners the distinction drawn by the Taiwanese law as between its domestic law, and its conflict of laws rules.

This new law with the much improved title 'Law Governing the Application of Laws to Civil Matters Involving Foreign Elements' was passed by the Taiwanese Legislature in 1953,[262] and laid the groundwork for further legislative changes through the investment laws, to encourage economic growth through foreign investment in Taiwan. As an industrial hub and seat of manufacturing in Asia, Taiwan required laws that allowed for the regulation of relationships with foreign elements, particularly in key commercial areas of the law, such as contract.

The 'Law Governing the Application of Laws to Civil Matters Involving Foreign Elements' has been described by Dr Ma as taking on 'a strong tincture of nationalism',[263] which is hardly surprising as a set of laws drafted by nationalists. The effect was that in matters of personal law in which a Taiwanese national is involved, the Taiwanese law frequently applies. The policy behind the new laws was to respect foreign rights and interests, to protect the rights of Taiwanese nationals within Taiwan and abroad, and to maintain public order.[264] These could be regarded as equally important policies. Article 28 provides that 'the law of the domicil within the person's national country shall apply. If the person's domicil within his national country is not known, the law of the capital of his national country shall apply.'[265]

By Article 9, the *lex loci delicti commissi* was chosen as Taiwan's choice of law rule for torts. However, the Taiwan law also limited the tort liability under the law of the place of the wrong to the standard applying to the *lex fori* in Article 9 at paragraph 1. Further, and

[261] Ibid at 418 citing Explanations of the Draft of the Law Governing the Application of Laws to Civil Matters involving Foreign Elements, documents related to Bills of the first Legislative Yuan, Yuan Tsun Tze No. 98, Government Bill No. 55, 1952.
[262] Ibid at 416-417.
[263] Ibid at 426.
[264] Ibid at 418, 3.3
[265] Ibid at 422, 3.4.1

in a nod to double actionability, 'claims for compensation or for taking other measures arising from a wrongful act, shall be limited to those acceptable by the law of the (National) Republic of China'.[266] Dr Ma declares that 'this means that the local law is applied when determining the existence of liability as well as the measure of damages'.[267] The Taiwanese law thus requires that a claim for tort is firstly actionable under the law of the forum.

Renvoi in Taiwan

Dr Ma addresses the Chinese renvoi at section 3.4.6 of his paper.[268] As this thesis has already discussed, renvoi is prescribed by statutory provisions of some countries, and is recognised as part of other countries where the common law prevails and there is no statutory response. It may be said that those countries that accept the renvoi doctrine as part of their law show considerable variation in both the form and extent to which they adopt renvoi, with the form ranging from partial to total renvoi, but the extent always limited to something less than the doctrine's acceptance as a general theory of the conflict of laws.[269] Other countries of course have rejected renvoi unequivocally.[270]

Dr Ma observes that the Taiwanese law of 1953 is unique in that 'it adopts the renvoi doctrine in its widest possible form', that is remission, transmission or what Dr Ma calls a third form extending beyond transmission to a third foreign law, or permits reference back to Taiwan's law from a second foreign law in a single or double renvoi. The 1918 statute it replaced recognised only a remission or single renvoi. The progressive Taiwanese renvoi provisions endorsing the total renvoi approach appear to be untested.

The Taiwanese law also includes an *ordre public* concept whereby the foreign law normally applicable is excluded for reasons including where the application of the foreign law would be to bring about some result that was fundamentally inconsistent with a principle of the law of the forum. As Dr Ma states, the Taiwanese conflicts rules provide for the exclusion of foreign law when its application contravenes the *ordre public* of Taiwan. When the foreign law is excluded, which will rarely occur, it is replaced by the *lex*

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[266] Ibid, see also Article 9 Para 2.
[267] H P Ma, ibid, at 425. This confirms that Chinese law regards the rules determining liability and damages as both substantive.
[268] Ibid at 425, 3.4.6.
[269] Article 13, Private International Law Reform of Italy.
[270] E.g. Article 32 of the Civil Code of Greece; Article 1 of the Benelux Convention.

fori. This *ordre public* principle is vaguely expressed and defined and it is up to the judicial officer to exercise discretion in applying the principle.

Conflicts Reform in the People's Republic of China

The wider construction of renvoi in Taiwan, and the relative sophistication of the drafting of the Taiwanese conflict of laws, contrasts sharply with the private international law of China. As we have noted, the heavy influence of Soviet theories and approaches meant that China redrafted its civil code three times since 1949, but did not enact its civil code until 1986. Private International Law was immaterial to China during its closed period until 1978. The evolution of Chinese legislative drafting has been slow even though its increasing modernity as an international trading hub has been swift. Reform of Chinese rules of private international law commenced only in this decade, when the standing committee of the National People's Congress released the 2002 discussion draft revisions to the Chinese civil code.

According to Professor Sauveplanne, at the time of his 1988 survey, the law of China was silent on renvoi.[271] That appears to have been correct, as the General Principles[272] referred to Chinese choice of law rules for cases involving foreign elements, but did not refer to renvoi. The omission of renvoi appears to have been more of a legislative oversight rather than by design, and is one of many deficiencies in the General Principles.

As already observed, prior to the relocation of the Nationalist government to Taiwan, the Chinese did draft a civil code that addressed renvoi - the judicial sovereignty Statute of 1918 that remained in force until 1949 when China repealed its six legal codes. The Statute of 1918 has been closely studied by Chinese conflicts scholars Professor Xu[273] and Dr Ma, and was sophisticated for its time. Dr Ma, reflecting on the history of Chinese private international law, has observed that from the dawn of the Qing dynasty when China had no private international law, the current private international law of Taiwan evolved from the Statute of 1918.[274]

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[271] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopaedia of Comparative Law* (3rd vol, 1990).
[272] The 1986 Civil Code, enached by the 6th National People's Congress, and remaining in force today.
[273] G Xu, 'Contract in Chinese Private International Law' (1989) 38 *International and Comparative Law Quarterly* 648.
[274] H P Ma *General Principles of Conflict of Laws* (12th edn, 1997) at 140-148.

Chinese civil reforms in the context of globalisation, and the modernisation of Chinese legislative drafting and growth in legal scholarship has culminated in Chapter IX of the draft Civil Code of China released in 2002, endorsed by the National People's Congress, and synthesising Chinese private international law in theory and practice.

However, the Chinese legislature has not followed the recommendations of the independent Chinese Society of Private International Law in their 'Model Law on Private International Law', which was the Society's ambitious proposal for the comprehensive codification of China's private international law rules. The Model Law draft, released by scholars of the Society of Private International Law in 2000, brought together jurisdiction and choice of law rules and rules on their application, to the broad range of legal relationships, in the one document. If adopted, it would have been one of the most comprehensive statutes of private international law enacted in the modern day.

The draft Civil Code of China released in December 2002 included as Chapter IX 'The Application of Laws to Civil Relationships Involving Foreign Elements'. In 2008, the National People's Congress committed to the drafting of a statute on 'The Application of Laws to Civil Legal Relationships Involving Foreign Elements'. That project is much narrower in scope than the Chinese scholars of private international law may have proposed. Yet, Dr Chen of the Tsinghua University School of Law notes that it should be acknowledged as an important step in the necessary and overdue process of codifying the conflict of laws of China.[275] Modern China has never had a suite of properly drafted rules of private international law, and no previous attempts seriously considered the full range of issues.

The program of statutory drafting for the current parliamentary period running from 2008 to 2013 includes drafting the 'Law on the Application of the Laws to Civil Relationships Involving Foreign Elements' as one of six statutes forming part of the civil laws. Its potential for positive impact on the application of Chinese law to civil and commercial

[275] W Chen, 'The Necessity of Codification of China's Private International Law and Arguments for a Statute on the Application of Laws as the Legislative Model', Asian Society of International Law, Second Biennial General Conference of the Asian Society of International Law – International Law in a Multi-Polar and Multi-Civilizational World: Asian perspectives, challenges and contributions, Tokyo 1-2 August 2009 (http://www.asiansil-tokyo2009.com/pdf/A-4/CHEN%20Weizuo.pdf (accessed 14 August 2009).

cases with foreign elements, which are increasing before the Chinese courts year on year,[276] is much anticipated by practitioners.

The current drafting program will be the first codification of the conflict of laws in modern Chinese history. It is confined to civil and commercial relationships. The drafting program apparently grew out of scholarly debate in the 1990s that culminated in the 2000 scholarly draft of the codification of Chinese conflict of laws. The Model Law prepared by the Chinese Society of Private International Law has no official status with the national legislators, but is nevertheless influential as a recognised private scholarly society. As with scholarly conflicts debate in the common law world, the precise impact of Chinese academic commentary on the development of the conflict of laws of China is difficult to assess.

The Model Law comprises 17 articles in the *Model Law of Private International Law of the People's Republic of China* (6th Draft),[277] of which Article 8 states:

> The applicable law provided under this law means the current effective civil and commercial substantive law and does not include conflict rules unless otherwise provided by this law.
> In matters concerning personal or family status, a reference back (renvoi) to the People's Republic of China law by the foreign conflict rules shall be accepted.

Thus, China will accept a single remission in status cases, but endorses the general presumption against renvoi for all other cases. The Chinese law excludes renvoi for immovable property disputes, and uses familiar language to Western conflicts scholars by calling the law that determines the issues in dispute the 'substantive law' of China. It also happily acknowledges the forum bias of the single renvoi.

There has been limited discussion in the West, or in English, on the approach to and utility of the renvoi doctrine in the context of Chinese law. In 2005, at the US-China Private International Law Roundtable, published in the Chinese Yearbook of Private International Law and Comparative Law, Wuhan University China, Professor Chen spoke on 'the renvoi

[276] J Huang & H Du, 'Chinese Judicial Practice in Private International Law 2003' (2008) 7(1) *Chinese Journal of International Law* 227.
[277] See further *Model Law of Private International Law of the People's Republic of China (6th Draft)*, Chinese Society of Private International Law, 2000. The Society has published the 6th Draft in mandarin and in a good English translation.

in the choice of law rules of the Hague Conventions'. His insightful published research includes *The Renvoi in the Rules of Conflict of Laws in International Treaties*[278] and he has addressed the question of renvoi in both the forms of remission and transmission in US and Chinese law, comparing to international treaties, especially to the Hague Conventions on Private International Law. That extensive survey of the Chinese law's interaction with the laws of its trading partners is published in German and therefore is of limited value to scholars in Australia and the US, as these jurisdictions are notoriously monolingual.

Globalisation continues to have an effect on private international law and its current trends. China continues its ascent as a major force in the global economy has also raised greater awareness about its laws. Professor deLisle has noted the importance of developing private international law as the Chinese economy grows, as companies based in China become a more significant international presence, and as foreign companies increase their presence within China and their dealings with Chinese businesses.[279]

China is assiduously reforming its rules on the conflict of laws,[280] and as Professor Zhu notes, the draft text of the Model Law recognises a single or partial renvoi as part of Chinese law in matters concerning personal or family status only. The very limited scope of renvoi proposed in the Model Law is in keeping with the doctrine's treatment in all other jurisdictions.

As a civil legal system, the Chinese law depends upon the current reforms to provide signposts to certainty of outcome for litigants within China as well as litigation concerning Chinese law wheresoever this may occur. Dr Huang and Dr Du's research on judicial practices in China in the context of the conflict of laws has shown that Chinese courts are principally concerned with the protection of the rights and interests of Chinese citizens.[281] That is logical. Drs Huang and Du also note judicial reluctance in China to decide cases in a manner that would be inconsistent with the best interests of Chinese citizens, and the state. These interests include economic interests of state and individually owned businesses, some of which have deep relationships with foreign enterprise or benefit from substantial foreign investment. China also has substantial foreign investment of its own,

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[278] W Chen, *The Renvoi in the Rules of Conflict of Laws in International Treaties* (2004).
[279] See e.g. J deLisle, 'China's Approach to International Law: A Historical Perspective' (2000) 94 *American Society of International Law Proceedings* 267.
[280] W Zhu, 'China's Codification of the Conflict of Laws: Publication of a Draft Text' (2007) 3(2) *Journal of Private International Law* 283.
[281] J Huang & H Du, 'Chinese Judicial Practice in Private International Law 2003' (2008) 7(1) *Chinese Journal of International Law* 227.

with sovereign funds invested in the international market, including in China's special administration region of Hong Kong, and notably in the US but also in Australia, which is a nation of strategic importance to China because of the reliance of Chinese industry on Australian resources.

Renvoi in the UK

The developments of the renvoi doctrine in the UK has combined legislative intervention and incremental common law developments to reinforce a presumption against the doctrine in all but exceptional cases in which there is sufficient evidence to rebut the presumption. Since 1990, the English legislature has introduced statutes that exclude renvoi for both contract and tort. Cases decided in parallel have supported the legislator's disapproval of the doctrine in commercial cases.

Exclusion from Contract Cases

The *Contracts (Applicable Law) Act 1990 UK* affirms the common law position outlined by Jenkins, Romer and Willmer LJJ in *Re United Railways of the Havana and Regla Warehouses Ltd*[282] that 'the principle of renvoi finds no place in the field of contract'.[283] Lord Diplock also observed in *Amin Rasheed Shipping v Kuwait Insurance*[284] that the proper law of the contract was 'the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission that the court of that country might themselves apply if the matter were litigated before them'. His Lordship's expanded example suggests that for a contract made in England and expressed to be governed by French law, an English court would apply French substantive law excluding French rules of private international law that might accept a renvoi.

The *Contracts (Applicable Law) Act 1990 (UK)* enacted the Rome I Regulation ('Rome I') to which the UK is party. Article 15 of Rome I definitively excludes renvoi in the following express terms:

Exclusion of renvoi

[282] [1960] Ch 52.
[283] Ibid at 115 per Jenkins LJ.
[284] [1984] AC 50 at 61- 62 per Lord Diplock.

> The application of the law of any country specified by this Convention means the application of the rule of law in force in that country other than its rules of private international law.[285]

The exclusion of renvoi for contract cases in the UK is thus clearly settled and has been judicially followed. In a shipping case before the Scottish Court of Session, *Marodi Service D. Mialich & C.s.a.s v Mikkal Myklebusthaugh Rederi AS,*[286] the Italian plaintiffs suing a Norwegian defendant in a Scottish court sought to have the Italian law applied to govern the contract. The Norwegian defendant owned a vessel that was flying the Panamanian flag, and the dispute concerned that vessel. It was argued that Article 8 of Rome I directed the application of Italian law as the law of the putative contract, and the Italian law permitted a renvoi to the law of the flag. The possible renvoi was excluded by the UK law. This case and others like it illustrate the use of the international convention to achieve the decisional harmony that was historically an argument in favour of total renvoi.

Exclusion from Tort Cases

The *Private International Law (Miscellaneous Provisions) Act 1995 (UK)* ('*PIL Act*'), governing English choice of law for tort and delict, explicitly excluded renvoi for tort claims in the UK. Even though this was a step to confirm the common law position in legislation, the scholarly reaction to this legislative step has been mixed. The application of section 9(5) of the *PIL Act* has been the subject of several articles, with scholars including Professor Briggs[287] mourning a lost opportunity for renvoi.

Section 9 of the *PIL Act* provides that:

> '(1) The rules in this Part apply for choosing the law (in this part referred to as 'the applicable law') to be used for determining issues relating to tort…

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[285] See the *Contracts (Applicable Law) Act 1990 (UK)*, Schedule 1, Art 15. Also Rome I Regulation EC No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.
[286] *Marodi Service di D. Mialich & C.s.a.s. v. Mikkal Myklesbusthaug Rederi AS* [2002] ScotCS 111.
[287] E.g. A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *International and Comparative Law Quarterly* 359.

(5) The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the country or countries concerned.'[288]

Accordingly, whether the governing law is the *lex fori* or the *lex loci delicti*, it is clear that the UK treats the governing law for tort as the internal substantive law of an area. The English response to any reference to foreign law in claims that are characterised as tort claims must be to ignore the choice of law rules of the other law area and therefore ignore the renvoi. Renvoi cannot apply in the UK tort case except in cases where the double actionability rule remains applicable. Since January 2009, the doctrine has been excluded from tort by Rome II, which merely confirms the position already settled in the UK.[289]

Renvoi and Restitution

Dr Panagopoulos has observed that there may be a general common law principle that renvoi does not apply to obligations,[290] based on the doctrine's application only to status cases. He also argues against its application to proprietary restitution, on the basis that proprietary restitution should still be characterised as restitutionary notwithstanding that a proprietary remedy is sought.[291] The UK's position on renvoi is clear only in relation to contract and tort, because of the express legislative exclusion of the doctrine. At common law, the position is ambiguous or, as Sir Lawrence Collins has put, the application and scope of the doctrine in English law is controversial so that:

In all but exceptional cases the theoretical and practical difficulties involved in applying renvoi outweigh any supposed advantages it may possess, and it should not be invoked unless it is plain that the object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflicts rules of that law: as a practical matter it would seem that a court should not undertake the onerous task of trying to ascertain how

[288] *PIL Act*, s 9, sub-sections (1)-(5).
[289] Rome II Regulation EC 864/2007 of the European Parliament and of the Council of 11 July 2007 Applicable to Non-Contractual Obligations, Article 24.
[290] G Panagopoulos, *Restitution in Private International Law* (2000) 106.
[291] But the English High Court has recently observed that renvoi may be applied to restitution, see *Barros Mattos* [2005] EWHC 1323 Ch.

> a foreign court would decide the question unless the situation is an exceptional one and the advantages of doing so clearly outweigh the disadvantages.[292]

In the absence of authority that compelled him to do so, Millet J in *Macmillan v Bishopsgate Investment Trust Plc (No 3)* refused to extend the renvoi doctrine to determine priority between some claims to shares in a case about tracing money and what law governed priority to the shares. His Lordship declared that the renvoi doctrine had not been applied in contract or commercial cases and that:

> It has often been criticised, and it is probably right to describe it as largely discredited. It owes its origin to a laudable endeavour to ensure that like cases should be decided alike wherever they are decided, but it should now be recognised that this cannot be achieved by judicial mental gymnastics but only by international conventions.[293]

In *Barros Mattos*,[294] when granting leave to amend pleadings, Sir Lawrence Collins was prepared to accept that there was at least an arguable case that the doctrine of renvoi might apply to restitution on a renvoi from Swiss law to Nigerian law. The case concerned a fraud on Banco Noroeste SA, a Brazilian bank that involved funds transfers to bank accounts in Geneva, Switzerland. The recipient of the funds that were fraudulently transferred from the Brazilian bank, Mr Vaswani, was living in Nigeria at the time of the fraud, but was a British national. The claimants were seeking to trace the funds into the Swiss account. Mr Vaswani asserted that the proper law was Swiss and on the evidence of the Swiss law expert qualified by Mr Vaswani's lawyers, Mr Vaswani would not be liable in Switzerland for unjust enrichment because Swiss law does not recognise equitable tracing/ownership of money in a bank account and would not recognise the claimants as having property in the money in the Geneva account. The claimants argued that although the proper law of the claims was not clear and even if it Swiss law applied, the English court would or should apply renvoi and consider the Swiss conflict of laws rules to determine the proper law of the claim, which (on the view of the claimant's Swiss law expert) was probably Nigerian law. Article 133 of the Swiss Federal Code on Private International Law characterised the claim against Mr Vaswani as a claim for damages in tort.

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[292] [2005] EWHC 1323 Ch per Collins J at [108].
[293] *Macmillan v Bishopsgate Investment Trust Plc (No. 3)* [1995] 1 WLR 978 at 1008.
[294] [2005] EWHC 1323 Ch.

Mr Vaswani relied on the exclusion of renvoi for tort claims under the *PIL Act*, section 9(5), and argued that even if renvoi was possible in theory, there was no real prospect that a Swiss court would apply Nigerian law because the Swiss law required the tort to have been committed in Switzerland and not Nigeria.

The claimants argued that the claims are restitutionary and not tortious, for the *PIL Act* does not apply to exclude a renvoi. The enrichment should be regarded as occurring in Nigeria so that Nigerian law applies to the restitution claim as it is the law most closely connected to the events; the fact that the money passed through a law area (Switzerland) that does not recognise equitable tracing does not affect the claimants' ability to trace the money in equity. Thus, that the claimants argued was that in deciding the claim that the English forum court regarded as restitutionary, the forum court should apply the Swiss law that would characterise the claim as tortious, including its choice of law rule that might then transmit the matter to Nigerian law which would also have regarded the claim as restitutionary (and for practical purposes was the same as English law). This was a single renvoi because the claimants ignored the Swiss renvoi rules.

Although the renvoi question was difficult and controversial, Sir Lawrence Collins gave leave to amend to plead it, thereby preserving the prospect of renvoi in common law restitution cases. This is an area for future development of the renvoi doctrine.

Rejecting Renvoi for Succession to Movable Property in the UK

Renvoi is developing in the so-called exceptional cases as well as being revisited in the non-exceptional cases. A reference to exceptional and non-exceptional cases of renvoi might seem confusing when the focus of this thesis is that renvoi does not serve its purported ends and ought not be applied at all, certainly not as a general theory of the conflict of laws.

Perhaps it would be better to say that there are areas of the law in which renvoi has been granted a place as one of a range of tools available to a forum court to reach the 'correct' result within the policy framework of a choice of law rule. The renvoi cases that have been regarded as 'non-exceptional' are cases involving status and succession to immovables. Those cases have been the cornerstone of the renvoi doctrine and its development or lack

of development. In the succession context, there have been several unsuccessful attempts to extend renvoi. Although it has been long accepted as probably applicable to validity of marriage,[295] it was not until 2003 that English courts expanded the application of renvoi to international child abduction, in *Re JB (Child Abduction)(Rights of Custody: Spain).*[296]

Renvoi and Movable Property: *Iran v Berend*

The application of renvoi to movable property, and what the British Institute of International and Comparative Law has called an illustration of the shifting boundaries, was addressed by the English High Court on 1 February 2007, in *Islamic Republic of Iran v Berend*[297] a choice of law dispute between the law of France and the law of Iran. The court acknowledged in that case that there is no over arching doctrine of renvoi, but that renvoi may be a useful tool to achieve the policy objectives of a particular choice of law rule. In *Berend*, the court refused to extend renvoi to cases concerned with deciding title to movable property, restricting renvoi to immovables (to the extent that it applies to property law) and reaffirmed the decision of *Macmillan v Bishopsgate.*[298]

The context of this English decision was the recovery of an object of cultural heritage, a fragment of fifth century Achaemenid limestone relief from Persepolis, in what is contemporary Iran. The fragment was acquired by Mme Denyse Berend in 1974, at auction in New York, from whence it was shipped by the auction house to France, where Mme Berend took delivery and thus obtained title. She displayed it in her Paris residence. In 2005 when she attempted to sell the fragment through Christies London, Iran obtained an injunction to prevent the sale. Iran also sought return of the fragment on grounds that it retained title to the fragment as an object of cultural heritage.

In her defence, Mme Berend submitted that since the limestone fragment was movable, and she had obtained title to it in France, the English conflicts rules mandated the application of French law to resolve all matters relating to title of the movable property - including the right to sell. Mme Berend acquired title to the fragment in 1974 in good faith. Alternatively, the French Civil Code, Article 2262, provided that Mme Berend acquired

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[295] Although renvoi was not actually applied to reach a decision in *Taczanowska v Taczanowski* [1957] P301.
[296] [2003] 1 FLR 976; see also L Collins (ed.), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2006) 505.
[297] *Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB), hereinafter *Berend.*
[298] *Macmillan v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978 per Millett J.

title by prescription. Since she had possessed the fragment for over 30 years, the relevant limitation period had expired and Iran was not entitled to call for the fragment's return.

Iran argued that the English court should apply the entire French law, including its rules on the conflict of laws, to resolve the case. The French conflicts rules for movable property include the doctrine of renvoi. Iran submitted that a French court would, in this case, apply an exception to the *lex situs* rule and apply Iranian law as the law of the place where the fragment originated. The Iranian law required the fragment to be returned to Iran.

Eady J in *Berend* stated the following broad principle on renvoi in English law:

> Whether or not [renvoi] should apply in any given circumstances is largely a question of policy. To take examples, it has been applied most frequently in the context of the law of succession; on the other hand, it is not applied in the fields of contractual relations or tort. It seems that the modern approach towards *renvoi* is that there is no over-arching doctrine to be applied, but it will be seen as a useful tool to be applied where appropriate (i.e. to achieving the policy objectives of the particular choice of law rule): see e.g. *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825, at [26]-[29], *per* Mance LJ; *Neilson v Overseas Projects Corporation of Victoria Ltd.*[299]

The decision also quoted, with approval, the following passage from the 14th edition of *Dicey, Morris and Collins on the Conflict of Laws*:

> As a purely practical matter it would seem that a court should not undertake the onerous task of trying to ascertain how a foreign court would decide the question, unless the advantages of doing so clearly outweigh the disadvantages. In most situations, the balance of convenience surely lies in interpreting the reference to foreign law to mean its domestic rules.

His Lordship stated:

> English law has held for many years, in order partly to achieve consistency and certainty, that where movable property is concerned title should be determined by the

[299] *Berend* [2007] EWHC 132 (QB) at [20].

lex situs of the property at the time when the disputed title is said to have been acquired.[300]

In *Berend*, Iran seemed anxious that the *lex situs* should be broadly characterised to include not only French domestic law, but the conflict of laws rules as well. The English court found for Mme Berend and that as a matter of English law, there is no good reason to introduce the doctrine of renvoi to movable property cases or as a theory of general application. It left title to the fragment to be determined according to the French domestic law, without renvoi. This is quite apart from the fact that since *L'Affaire Forgo*[301] and *L'Affaire Soulie,*[302] France had accepted the doctrine of renvoi.

The English court was not convinced that a French court would have applied Iranian law in any event. That may have been due to a deficiency in the evidence of how the French court might act. The English court was not prepared to infer beyond the available evidence.

Renvoi in Europe and the EU[303]

Where the renvoi doctrine has been applied in Europe, the single renvoi has been favoured. Austria, France, Germany and Switzerland have all applied single renvoi,[304] as has Belgium.[305] The laws of France[306] and of Germany[307] generally apply renvoi. In the case of French law, it may be displaced if there are arguments that it should be excluded. In the case of German law, it will be displaced if the parties choose the applicable law. Each is also a civil jurisdiction and does not recognise the doctrine of *stare decisis*. Although Professors Batiffol and Lagarde[308] suggest that in the French context, renvoi may apply in theory to tort, it does not appear that it has been so applied in practice.

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[300] Ibid at [23]; discussed in D Fincham, 'Rejecting Renvoi for Movable Cultural Property: *The Islamic Republic of Iran v Denyse Berend*' (2007) 14 *International Journal of Cultural Property* 111.
[301] *L'Affaire Forgo* [1883] Clunet 64.
[302] *L'Affaire Soulie* [1910] Clunet 888.
[303] This and the following three headings are adapted from A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 41.
[304] E F Scoles & P H Hay, *Conflict of Laws* (2nd edn, 1992) at 69.
[305] See e.g. E G Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 *Columbia Law Review* 190.
[306] P Mayer, *Droit International Privé* (1997) at 643.
[307] German Civil Code, Article 4 Introductory Law.
[308] H Batiffol & P Lagarde, *Droit International Privé* (1993) at 509.

Legislating to eliminate renvoi for torts cases within the EU has been suggested by the EU Commission[309] and takes the form of Rome II. However, the *Institut de Droit International* as recently as 1999 resolved that renvoi should not be excluded in its entirety, and ought to be considered where uniform treatment of an act or transaction can be achieved and is desirable.[310]

Conflict of Laws harmonisation

As summarised by Lu and Carroll, 'the process of harmonising the rules on conflicts of laws within the EU commenced with the 1968 Brussels Convention,[311] now superseded for all member states – excepting Denmark – by the 2001 Council Regulation (Brussels I).[312] Brussels I regulates jurisdiction, and the recognition and enforcement of judgments in commercial and civil matters, both contractual and non-contractual'.[313] A uniform approach to the conflict of laws for contracts in the EU took effect from 1991, in the form of the Rome I Regulation.[314]

In 1991, the Irish Law Reform Commission published its report on the Hague Convention on the law applicable to the succession of estates of deceased persons,[315] and at chapters 3 and 4 addressed the scope for renvoi[316] in Irish private law on succession, and the treatment of renvoi in the Hague Convention on Succession.[317] Acknowledging that several common law jurisdictions were interested in the renvoi doctrine and citing the views of Professor Falconbridge, Professor Bentwich and other scholars active in the 1940s and earlier, the commission noted that Irish law recognised a renvoi, citing *Re Adams (deceased); Bank of Ireland Trustee Co v Adams*.[318] The court in *Re Adams* applied the Irish choice of law rule (that referred to the law testator's domicil at the time of death) as the law to determine succession to moveables, which was French law, and then considered the content of French law.

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[309] See also A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 41.
[310] K Lipstein (rapporteur), 'The Taking Into Consideration of Foreign Private International Law' (1999) *Annuaire de l'Institut de Droit international*, vol 68-II, 371.
[311] Consolidated in OJ C 27, 26.1.1998, at 1.
[312] Council Regulation (EC) No 44/2001 of 22 December 2000, OJ 12, 16.1.2001, at 1.
[313] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 41.
[314] Ibid. See also Council Regulation (EC) No 44/2001 of 22 December 2000, OJ 12, 16.1.2001.
[315] The Law Reform Commission, Ireland, Report on the Hague Convention On the Law Applicable to Succession to the Estates of Deceased Persons, (LRC 36-1991) [1991) IELRC 3 (May 1991).
[316] Ibid at 18.
[317] Ibid at 78.
[318] [1967] IR 424.

Conflict of Laws Harmonisation for Non-contractual Obligations

The Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations[319] (Rome II) is the next phase of the conflict of laws reforms for EU member states.[320]

Lu and Carroll[321] note that whilst Rome II is underpinned by certainty:

> the wording of Rome II preserves a degree of flexibility to the *lex loci delicti* choice of law rule at Article 3 sub-articles (2) and (3).[322] Since flexibility introduces unforeseeability regarding the applicable law, the flexible exception is only intended for use in exceptional cases - where a court must adapt the rigid rule to reflect 'the centre of gravity of the situation'.[323]

That is consistent with the use of flexible exceptions at common law. Even though they are discretionary, their application to the general choice of law rule will be rare.

Exclusion of Renvoi for Torts Litigated in the EU

The Rome II regulation was adopted on 11 January 2009, with the renvoi provisions left undisturbed. From the proposal to the regulation, Article 20 was renumbered Article 24 but the substance is identical. Article 24 of Rome II regulation states:

> The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

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[319] COM (2003) 427 final; Regulation (EC) 864/2007 (11 January 2009)
[320] That is reflected in the Commission Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation (COM (2002) 654 final). See further A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 41.
[321] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 41.
[322] COM (2003) 427 final, at 34.
[323] Ibid at 12.

The wording of Article 24 is identical to Article 15 in the Rome Convention. Renvoi is clearly excluded from any cause of action that is characterised as tortious. The Proposal for the Rome II regulation noted that:

> Consequently, designating a law under uniform conflict rules means designating the substantive rules of that law, but not its rules of private international law.[324]

The EU trend, and that of the UK, US and even China, is towards curtailing renvoi.

[324] COM (2003) 427 final, at 28.

Chapter 4: Renvoi in Australia – The Recent Developments of *Neilson*

Introduction

When Lu and Carroll first prepared a predictive case note for the *Journal of Private International Law* on how the Australian High Court might decide the appeal of the Western Australian Full Court's decision in *MMI v Neilson*, the note foreshadowed that the High Court would counsel the same caution in a conscious or unconscious extension of the renvoi doctrine.[325] Lu and Carroll did not predict a radical extension and application of the doctrine to tort cases. No common law court had ever stated, even in *obiter*, that there was a sensible place for the doctrine of renvoi in deciding tort cases.

Without the shift in Australia's choice of law rule for international tort that preceded *Neilson* by a matter of months– signalled by the abolition of the double actionability rule of *Phillips v Eyre* in favour of the *lex loci delicti*– Australia might never have hosted a renaissance of renvoi. That renaissance has excited some conflicts scholars, offended others, but most importantly reminds us of some of the critical considerations in what it means to exercise a choice of law.

Clarifying Choice of Law in Australia

The Australian position on tort choice of law rules was clarified in 2001, when the Gleeson High Court confirmed that for torts involving a foreign element, Australian courts should choose the law of the place where the tort was committed as the relevant law. This was consistent with recommendations made by the Australian Law Reform Commission in 1992 that brought praise from the academy.[326] Thus, the High Court abolished the double actionability rule of *Phillips v Eyre*, with its *Boys v Chaplin* flexible exception, as interpreted by the Mason High Court in *McKain v Miller.*[327] The Gleeson High Court endorsed the *lex loci delicti* as Australia's common law choice of law rule for intrastate as well as international torts. However, it did not permit Australia's new choice of law rule to be modified by any flexible exceptions. Therefore, in every case where foreign law is

[325] See A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35.
[326] See M Goode, 'Dancing on the Grave of Phillips v Eyre' (1983-1985) 9 *Adelaide Law Review* 345.
[327] *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1.

pleaded and proved, it must be applied by the forum court to the extent of that pleading and proof. Thus, to the extent that the foreign law is not pleaded or shows up gaps in proof, forum law applies.

This chapter refers to international torts, transnational torts, intra-Australian torts and torts involving a foreign element interchangeably. This is because what this thesis is principally concerned about examining is the relationship between the laws of the forum and those of a foreign law area.

The decision to settle upon the *lex loci delicti* rule was the consequence of *Zhang*, a personal injury case involving a plaintiff claiming against a French company without an office in Australia. It, and the renvoi case of *Neilson*, appear to be the only foreign tort cases to be decided by the High Court.

Simmons[328] represented early judicial acceptance of the renvoi doctrine as part of the Australian common law within the confines of an immovable property case. The doctrine has therefore been recognised as part of the Australian law since Street J's first instance *Simmons* decision of 1917 in New South Wales. As already observed, *Simmons* was the first reported common law application of the foreign court theory species of double renvoi. That case does not appear to have been known to Dr Mendelssohn-Bartholdy when his text on renvoi was published in 1937.[329]

The Function of Choice of Law Rules in Australia

As previously discussed, renvoi is a doctrine that addresses the conflict between choice of law rules. The function of choice of law rules in Australia has attracted limited consideration by its courts, and is beyond the scope of this thesis.

In 1992, the Australian Law Reform Commission called the rules of choice of law the 'rules which determine which law should be applied when a fact situation is linked to more than one legal system'.[330] That is certainly consonant with the outcome of the *Pfeiffer* and *Zhang* choice of law cases at common law.

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[328] *Simmons v Simmons* (1917) 17 SR (NSW) 419.
[329] A Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937).
[330] Australian Law Reform Commission, *Choice of Law Report 58* (1992) at [1.3].

The Commission's definition did not contemplate that Australia's choice of law rules should operate as rules to determine *which rules of choice of law* should apply to the issues in dispute. This may be inferred from other parts of the Commission report, specifically the response it recommended to the problem of renvoi, i.e. to reject the renvoi doctrine, by legislative intervention.

It stated that to 'prevent the problems of renvoi arising within Australia, the Commission recommends that it should not apply and that in the legislation implementing [its recommendations] the word 'law' should be defined to mean the internal or domestic law'.[331] The Commission's recommendations were never implemented, thus Australia is without choice of law legislation. Its position therefore contrasts with the UK, US, EU and the developments in China. The Australian common law has been left to evolve interpret and respond to both the choice of law rule for tort, and to renvoi.

Over twelve years passed between the Commission's recommendations, and the first major Australian renvoi decision that, at the same time, is the first renvoi and tort decision of any ultimate common law court. Australia, as the host of the common law revival of the renvoi and its radical extension to tort, also enlivens the potential for this challenging doctrine to be accorded a much broader application at common law as a general theory of the conflict of laws.

Renvoi as a Flexible Exception to the Tort Choice of Law Rule

The fundamental divide between the scholarly response to renvoi, and of the jurists who are prepared to apply it, is evidenced by how willing a court is to engage with the intellectual heart of the problem. This thesis submits that the Law Reform Commission was correct when it defined choice of law in a manner that neither endorsed nor contemplated the renvoi as a part of Australia's choice of law rules. Renvoi is not a choice of law rule, but may be seen as a doctrine that reinterprets the chosen law. It may also be seen as another common law rule that shows forum bias, serving as it does as an escape device from a rigid application of the tort choice of law rule in the High Court's decisions of *Pfeiffer* and *Zhang*.

[331] Ibid at [4.12].

By *Pfeiffer* and in the context of multi-state torts, without undertaking an exhaustive overview of those decisions, the High Court swept away the double actionability requirement of *Phillips v Eyre*. It found some constitutional support for the *lex loci delicti* rule. It also outlined the Australian domestic policy considerations behind the *lex loci delicti* choice of law rule. These considerations included territoriality, party expectations, predictability, the discouragement of forum shopping, and certainty of outcome.[332] As part of the incremental approach, it then extended the choice of law rule to international tort cases through deciding for the claimant in *Zhang*. However, the judgment in *Zhang* left at large the meaning of 'law' in 'the law of the place where the wrong was committed', and how widely it should be drawn. The policy behind *Zhang* was certainty and predictability, and consistency with the decision reached for intrastate torts in *Pfeiffer*.[333]

Neilson concludes that the 'law' selected by the Australian choice of law rule includes *all* of the foreign law, including foreign rules on choice of law. The reasoning of *Neilson* purports to advance the policy objective of a uniform result irrespective of the forum.[334] Party expectation, certainty and predictability, territoriality, and the discouragement of forum shopping are, to varying degrees, raised by the different members of the High Court in their six separate reasons for decision in *Neilson*. However, the result reached by the plurality is inconsistent with these factors. With the exception of Gummow and Hayne JJ, whose reasons are joint, all members of the Court adopted a different route to decide *Neilson*. Uniformity appears to be the thread that links the plurality's reasons.

The application of renvoi has found support from such eminent writers as Professor Briggs,[335] and his disciple Mr Dickinson.[336] Professor Briggs can take credit for having mooted the extension of renvoi to tort in his 1998 provocation, and full acknowledgement must be given to him as the principal advocate of a strand of thought that has extended to contemporary Australian conflicts scholarship through Dr Bell, also a pupil of Professor Briggs at Oxford[337] and junior counsel for Mrs Neilson.

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[332] See e.g. *Pfeiffer* (2000) 203 CLR 203 at [44].
[333] See e.g. *Zhang* (2002) 210 CLR 491 at [66].
[334] See e.g. *Neilson* (2005) 223 CLR 331 at [113].
[335] E.g. A Briggs, 'The Meaning and Proof of Foreign Law' (2006) *Lloyd's Maritime and Commercial Law Quarterly* 1.
[336] A Dickinson, 'Renvoi: The Comeback Kid?' (2006) 122 *Law Quarterly Review* 183.
[337] In the context of globalisation and technology, the extension of this strand of thought may have less significance than it did for renvoi advocates and detractors of the late nineteenth century.

The High Court's attempt to treat the *Neilson* case as a case of statutory interpretation of the Chinese law, and to avoid engaging with the renvoi question except in the decisions of Kirby and McHugh JJ, is telling. Ms Greene[338] speculates that the court in *Neilson* has shown its contempt for the difficulties of this area of law by dismissing the logical conundrums raised by scholars of the past and present in arguments about the doctrine of renvoi. The contempt may explain selection of the *Pfeiffer-Zhang* inflexible choice of law rule for Australia in the first instance. This invokes unease because it suggests gaps in the decision making process that led Australia's highest court to use the renvoi doctrine to disapply the substantive foreign law.

To return to the theme of pragmatism, the plurality in *Neilson* endorsed a pragmatic, results-based response that ignored the principled objections to the renvoi doctrine. Mr Ahern rightly calls the *Neilson* decision a wholly unexpected departure from accepted common law practice.[339] For the High Court to depart from the long established presumption against renvoi was both radical and unprincipled.

It also appears to have ignored the policy behind choice of law, as espoused in its own decisions of *Pfeiffer* and *Zhang*. The court regarded itself free to depart from the policy of certainty and predictability in pursuit of uniformity alone, both in terms of extending the doctrine of renvoi to tort, and in permitting an escape device or what Lu and Carroll described as a flexible exception by stealth[340] to an otherwise inflexible tort choice of law rule.

The Argument for Uniformity or Results-based Justice

The Gleeson High Court's *Neilson* endorsement of renvoi as part of Australia's choice of law rules, and application to resolve a claim in tort, was a creative but reactionary approach to resolve the tension between Australia's inflexible choice of law rule, and a potentially unjust result to the plaintiff. The Court also elevated the pursuit of uniformity to

[338] J Greene, 'Inflexibly Inflexible' (2007) 33 *Monash University Law Review* 246 at 255.
[339] J Ahern, 'Renvoi's Australian Outing' (2007) 15 *Irish Students Law Review* 89 at 90.
[340] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35, the first article to argue against renvoi after the *Neilson* decision in the Western Australian Full Court, and prior to the High Court appeal hearing.

pre-eminence within the suite of policy considerations that informed its recent development of Australia's intra-national and international choice of law rules.

It provides conflicts scholars with a great deal to write about, because the *Neilson* judgment, perhaps more than any other post-1990 decision referring to renvoi, highlights the actual problems with renvoi in practice. Whether the troublesome doctrine of renvoi is justifiable and therefore sustainable on the grounds of uniformity alone will be explored in detail; this thesis submits that it is not justifiable. The High Court put considerable emphasis on uniformity,[341] and placed less emphasis upon what this thesis argues are equally significant policy considerations such as certainty and predictability, territoriality, and the expectations of the parties – all of these other considerations are *actively undermined* by the application of renvoi.

A Result Desired for its Own Sake

Whilst judicial radicalism has its place, some members of the High Court did not even refer to renvoi in their judgments and if they did apply renvoi, did not expressly set out what form of renvoi theory they were applying, that is, whether they were subscribing to the single or double renvoi or the foreign court theory. With the exception of McHugh J,[342] and although it was a particular question raised in the appeal,[343] there was limited judicial analysis of the practical problem of the infinite regression.[344] The decision is a purposive one, but undisciplined because it applied the renvoi where it seemed a useful means of reaching a result 'desired for its own sake'.[345]

The doctrine of renvoi was an indirect mechanism for achieving the flexibility that the High Court vehemently rejected for Australia's tort choice of law rule, by its decisions of *Pfeiffer* and *Zhang*. However, can it be reconciled with the principle behind Australia's choice of law rule for tort? It cannot be, because the principle behind choice of law has many policy considerations, whereas the sole policy of renvoi is uniformity. In disapproving of a flexible exception to Australia's choice of law rule, the majority in *Pfeiffer* asserted that 'any flexible rule or exception to a universal rule would require the

[341] See e.g. *Neilson* (2005) 223 CLR 331, 363 per Gummow and Hayne JJ; 380 per Kirby J; 413 per Callinan J.
[342] Ibid, 351 at [40]-[43]; 353 at [48] per McHugh J.
[343] Ibid, 361 per Gummow and Hayne JJ.
[344] Ibid, 342 per Gleeson CJ.
[345] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopaedia of Comparative Law* (3rd vol, 1990) 29 at [6-41].

closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms such as "real and substantial" or "most significant" connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule'.[346]

A Contradiction within a Contradiction

The High Court's absolutist notion of a rigid choice of law rule for tort, that is not a mandatory rule because the parties may choose not to plead or prove foreign law, is contradictory. The approval of renvoi in Australia is thus a contradiction within a contradiction.

The majority's assertion in *Pfeiffer* that it wished the Australian courts, parties, and insurers, to be able to order their affairs by Australia's choice of law rule[347] seems irreconcilable against the High Court's endorsement of total renvoi. Total renvoi imports uncertainty. Total renvoi is the most controversial and unstable of renvoi doctrines, and has the capacity to confound expectations by remitting or transmitting a dispute to be determined by the law of a second, third or fourth area. In its widest form, it leaves the question of what law is to govern the dispute entirely to the foreign law area's choice of law rule. To any ordinary claimant or defendant, and to his insurer, this may be unknown or unknowable.[348]

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[346] *Pfeiffer* (2000) 203 CLR 503 at 538 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[347] Ibid at 540; see also *Zhang* (2002) 210 CLR 491, 517 at [66] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[348] Unlike defendants to negligence claims, whose exposure may be limited by liability and causation issues and notions of foreseeable harm, an insurer's exposure can be much broader depending on the extent of cover and what jurisdictional limitations may exist on the policy. But insurers need to rate their maximum potential loss and would not favour a choice of law rule that encourages forum shopping or allows a claimant to duck and weave through statutory caps on damages and apply the law that guarantees their highest award of damages. Admitting the renvoi doctrine to Australia's choice of law rule for tort gives parties precisely that sort of flexibility, to plead the doctrine when it suits and to disclaim it when it does not. It is incumbent upon the solicitor to examine whether it is advantageous to plead the foreign conflict laws – but before he can advise on its advantages he must have evidence of it, and that means the time and expense of qualifying an expert on foreign conflicts law concurrent with seeking evidence on foreign internal law of liability and of quantum.

Choice of Jurisdiction

Australian choice of law rules adopt the 'jurisdiction selecting' approach referred to by the Law Reform Commission.[349] It requires a court first to characterise the cause of action as either contract or tort, before then applying connecting factors to determine applicable law. If a renvoi is applied, foreign law may sometimes re-characterise the cause of action. In order to decide a case as a foreign court would or might, it is imperative that the forum submits the cause of action to re-characterisation by the foreign law – even if that, for example, transforms a restitution claim into a tort claim. An example of this in recent practice was *Barros Mattos*,[350] in which a renvoi meant that a restitution claim was re-characterised by foreign (Swiss) law as tortious. This does not promote certainty or uniformity and does not uphold party expectations.

Applying Foreign Law in the Forum

Whenever foreign law is to be applied, the forum requires rules to define both the scope and application of foreign law. This is something that only the forum should define. The renvoi doctrine permits the forum to abdicate its responsibility for defining how much of the foreign law it should apply. It purports to leave that choice with the law of the foreign area.

Local courts regulatly use international law to inform local approaches to legal problems with foreign elements.[351] Therefore, to the extent that local courts are asked to give effect in the context of public international law, to Australia's international obligations via treaties, international law is part of Australian domestic law. Australian courts are required to interpret and apply international law in a domestic context. The objections raised against renvoi include comity and fidelity to the laws of a foreign state. These remain valid objections because, although international law is part of domestic law, it is part of domestic law by virtue of the various treaties and obligations to which Australian courts are

[349] Australian Law Reform Commission, *Choice of Law Report 58* (1992) at [1.7].
[350] [2005] EWHC 1323 Ch at [34] per Collins J, where there was expert evidence that an unjust enrichment claim brought in the United Kingdom would be characterised by the foreign law area (Switzerland) as a claim for damages in tort.
[351] An obvious example is in the field of migration law. In *Al-Kateb v Godwin* (2004) 219 CLR 562, the High Court held the indefinite detention of a stateless person was lawful under the *Migration Act 1958 (Cth)* and the Constitution. In his dissent, Kirby J was prepared to openly look to international law and decisions from other jurisdictions for jurisprudential guidance. That appears sensible for cases with what can loosely be called international elements, including conflict of laws cases.

regularly called to give effect. Examples include the migration cases, whether before the Migration Review Tribunal or on appeal, in which Australian courts are asked to make determinations on status. As Mr McComish observes, the migration cases have received scant attention by conflicts scholars, even though these routinely use foreign law for guidance in the making of determinations.[352]

Lost in Translation

In more general terms, members of the High Court noted the ambiguity of Article 146 of the General Principles. As observed in chapter three on Chinese conflicts law, this example of early Chinese legislative drafting is unclear, and became less clear when translated into English. The English versions of the translation as published electronically by the National People's Congress and the CCH version as cited by the High Court and the parties in *Neilson* are not the same.

Both English translations are correct but differ in subtle but potentially significant ways from the Chinese text.[353] The CCH translation states the parties' law of nationality or domicil '*may be applied*'; however, the National People's Congress translation states the parties' law '*may <u>also</u> be applied*'. Since the General Principles are drafted with a parochial focus, and Chinese judicial discretion is discouraged, it is more probable than not that a Chinese court would decline the exercise of discretion to apply foreign law.

The distortion of the Chinese law through an imperfect translation illuminates one of the practical problems with foreign law cases litigated in Australia. Monolingual Australian courts rely upon the accuracy and durability of translated foreign law; that reliance may even be greater than the court's reliance upon the extent to which the party proving the foreign law has adequately briefed its expert. The test for admissibility of expert evidence is set out in *Makita v Sprowles*.[354] Evidence must include the facts and the means by which the expert reaches their opinion. Qualifying a fluent speaker of the language of the foreign law area is a vital part of proving foreign law.

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[352] See J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400 at 406.
[353] There was only one member of the Australian legal team for any party in *Neilson* able to read sinographs, other than the foreign law expert.
[354] (2001) 52 NSWLR 705.

In the case of a brief to experts, within the Australian Capital Territory, it is routine for parties in the interlocutory stages and certainly before a certificate of readiness for hearing is filed, to call for all briefing materials furnished to an expert to be served with that expert's report. Practice Direction 2 of the ACT *Court Procedure Rules 2006*[355] for example requires that experts set out the basis of their report including briefing materials, letters of instruction, chronologies and assumptions, and also include written acknowledgment of the Expert Witness Code of Conduct. By doing this, an incomplete set of assumptions to an expert witness, or the omission of key factual issues, will be obvious to all including the court. Service of a deficient brief has the prospect of causing not only significant embarrassment under cross-examination of the witness, but leaves a strong prospect that a court may attach little weight to the evidence, or reject it entirely.

Subtle nuances of drafting may be lost in the process of translation by legal publishers and may leave foreign law experts in an even stronger position to influence decision making,[356] because they may be the only participants in litigation with the capacity to read and interpret the foreign law and give it a particular complexion.

In *Neilson*, only one foreign law expert was qualified - an English-speaking Chinese lawyer in private practice holding a first degree in law from China, and an Australian Masters degree in law. Although he spoke English, it was his second language and there were deficiencies in his capacity to express his opinions fully or eloquently whilst under cross-examination.[357]

The Context of *Neilson*

Presumptions and Principles that Mean Australia's *Lex Loci Delicti* Rule is not Absolute

An Australian court is not bound to take judicial notice of the law of a foreign area unless a

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[355] This is replicated to a large extent in other Australian jurisdictions: see for example NSW *Uniform Civil Procedure Rules 2005*, rule 31.23. Specifically rule 31.23(3) provides that 'Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it'. The code of conduct is in Schedule 7 to the *Uniform Civil Procecure Rules*.

[356] By both solicitors and counsel preparing a matter, and by the court hearing a claim.

[357] See e.g. *Neilson* (2005) 223 CLR 331 at [245] per Callinan J.

party pleads it. Although a wrong may occur in a foreign law area, this fact does not need to be pleaded. Whilst Australia may have an apparently absolute choice of law rule for torts, it is a permissive and not mandatory rule. Pleading foreign law is optional.[358] Once it is pleaded, the foreign law becomes an issue in the proceedings, but a court is required to take notice of its content only to the extent that this is proven as fact. Accordingly, when conducting a tort case with a foreign element, a lawyer with carriage of a matter before an Australian court shall choose from at least these three options:

a) not plead foreign law;
b) plead foreign law but not prove it; or
c) plead and prove foreign law.

A lawyer will only plead and prove the foreign law to the extent that it assists his client's case, and his opponent will only plead and prove foreign law to the extent that it damages his opponent's case.

Substance and Procedure

At common law, presumptions – including those presumptions that apply to foreign law – are intended to give a court the necessary factual matrix upon which to ground a decision.[359] Whether presumptions should be characterised as substantive or procedural is not entirely clear. However, as Dr Mortensen has observed, the characterisation of presumptions as substantive to determine *lex causae* is more broadly consistent with *Pfeiffer*.[360] It would also be consonant with Australia's very broad characterisation of substantive matters for tort claims, encompassing liability, damages and limitations of actions. The Australian common law characterisation of what is substantive in the conflict of laws is broader than that of the UK courts, because the UK's common law is delimited by choice of law legislation. The House of Lords in *Harding* held that quantification of damages for international torts in the UK is a question of procedure, in accordance with the *PIL Act* s14(3)(b), and should therefore follow the forum.[361]

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[358] But cf M Keyes, 'Foreign Law in Australian Courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2007) 15 *Torts Law Journal* 9, 27-28 where Dr Keyes asserts that Australian choice of law is mandatory. This thesis disagrees, as do others: see e.g. J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400 at 408.
[359] R Mortensen, *Private International Law in Australia* (2006) 182 at [6.40]
[360] (2000) 203 CLR 503.
[361] *Harding v Wealands* [2007] 2 AC 1.

Australia has not followed the UK.[362] In Australia, the presumption of similarity, i.e. that foreign law will be the same as forum law unless proven otherwise, is a matter for the rules of evidence. Callinan J in *Pfeiffer* affirms that rules of evidence are procedural and not substantive.[363]

Proof of Foreign Law for Party Relying on It

Dr Mortensen devotes a chapter of his post-*Neilson* conflicts text on the proof of foreign law, to confirm that this issue remains one of central importance in conflicts cases.[364] Despite endorsing an inflexible *lex loci delicti* rule, Australian law imposes no positive obligation on parties to actually prove foreign law even if it is pleaded. The onus of proving foreign law is borne by the party alleging that it differs from the *lex fori,*[365] or by the party seeking to rely on the foreign law because it is forensically advantageous.[366] Thus, the High Court in *Zhang* confirmed that a party wishing to rely on foreign law must plead it, but the proof of foreign law is no adjunct to the pleading of it.[367]

If it is to be relied upon, the content and treatment of foreign law needs to be proved as a fact. That may be most expeditiously done by tendering through an expert witness the relevant portions of that law, if codified or contained in cases that may stand either as precedents in the foreign law area, or as Civil teachings of experience that help in the process of judicial decision-making. However, it is likely that a party seeking to rely on foreign law 'as an exculpatory fact'[368] would wish to lead detailed evidence through an expert to add weight rather than merely tendering documents, and the expert evidence is likely to be admitted by way of an expert report satisfying the forum's procedural requirements.[369]

Proof of the law as a fact through a witness seems to remain a requirement for any Australian case in which foreign law has been pleaded. The tendering of sections of

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[362] *Harrison v Melham* (2008) 72 NSWLR 380.
[363] *Pfeiffer* (2000) 203 CLR 503 at 574 per Callinan J.
[364] R Mortensen, *Private International Law in Australia* (2006) 225.
[365] *King of Spain v Machado* (1827) 38 ER 790 at 795; see R Mortensen, *Private International Law in Australia* (2006) 255 at [8.1].
[366] *Zhang* (2002) 210 CLR 491 at 519; see R Mortensen, ibid, 226 at [8.1].
[367] *Zhang*, ibid.
[368] Ibid at 518.
[369] For example the ACT *Court Procedure Rules 2006* require an expert report to refer to the Expert Witness Code of Conduct being Schedule 2 of the *Court Procedure Rules* and to include a statement that the witness has read the code and agrees to be bound by it.

foreign legislation alone would not appear sufficient. This is notwithstanding Kirby J's assertion that 'means should be found by courts and our law to receive evidence about foreign law in a way that is economic, efficient and manageable'.[370] The court has more recently emphasised timely and just resolution of real issues in civil cases with minimum expense as a goal of Australian courts.[371] The persuasiveness of the foreign law expert will be paramount in such circumstances. As Dr Mortensen asserts, this can lead to different conclusions about the foreign law.[372]

The Presumption of Identity

The failure to plead and prove the foreign law, or the selective presentation of evidence of the foreign law, may intentionally invoke legal fictions to improve a weak case or, at worst, cause the court to be misled as to the facts and issues. That raises an ethical dilemma for lawyers whose duties include a positive obligation not to mislead the court. As Dr Mortensen observes,[373] Professor Briggs describes the 'presumption of identity' as a 'truly grotesque proposition'[374] that gives rise to the forum's contrived solutions to cases involving foreign law.

Kirby J stated that:

> Pretending that the content of the applicable substantive law and, equally important, the practice by which that law is applied by courts in the place of the wrong is the same as it would be in Australia, involves an unconvincing exercise. Effectively, it shifts the burden of proving the foreign law to the defendant, who may…contest its content.[375]

The forum law is applied by default, but as Heydon J remarked, in the New South Wales Court of Appeal decision of *Damberg v Damberg*, courts are averse to pronouncing

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[370] *Neilson* (2005) 223 CLR 331, 397 at [205] per Kirby J. His Honour suggested that the court's receipt of academic articles tendered by a party may be acceptable.
[371] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; see also A Lu, 'Restricting Amendments in Australian Courts – Cost effective Justice Through the Lens of Case Management: *Aon v ANU*' (2009) 25(1&2) *Australian Insurance Law Bulletin* 14.
[372] See *Simmons v Simmons* (1917) 17 SR (NSW) 419, and contrasting *Re Ross* [1930] 1 Ch 377, both reaching a different result as to how a French court would respond to renvoi.
[373] R Mortensen, *Private International Law in Australia* (2006) 226 at [8.2].
[374] A Briggs, 'The Meaning and Proof of Foreign Law' [2006] *Lloyd's Maritime and Commercial Law Quarterly* 1 at 4.
[375] *Neilson* (2005) 223 CLR 331, 397 at [206] per Kirby J. In the same paragraph, His Honour also describes the presumption as 'incredible'.

judgments on hypotheses that are not correct, and 'a similar caution appears to apply in relation to an assumption or agreement that foreign law is the same as the lex fori'.[376]

Dr Davies calls the presumption of identity 'an invitation to forum shopping, if ever there were one', and points out that the presumption undermines the choice of law rule and leaves a plaintiff with 'a positive incentive simply to ignore foreign law, unless it is in some way more favourable than Australian law'.[377] Dr Davies observes that the US has been able to discard the presumption of identity by amending the *Federal Rules of Civil Procedure 2004 (US)* Rule 44.1.[378] The purpose of Rule 44.1 is to prevent unfair surprise, by requiring a party to give notice of its intention to raise foreign law. It states that 'a party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law'. By Rule 44.1, a court is able to undertake its own research into foreign law, instead of relying upon the parties to bring that evidence.

Just *Lex Fori*

In the Australian context, it is difficult to conceive of a solution to the presumption, except to suggest that court procedure rules may benefit from amendments similar in intent to those in the US. It is a question about what Australian courts are prepared to acknowledge as acceptable pleading. But the forum will be reluctant to curtail the forum bias that is embedded in the presumption, and is likely to argue that it facilitates an answer to liability and quantum issues when a solution might not otherwise be available.

Dr Mortensen goes further in his declaration that 'the eccentricity of *Neilson* ...might itself show what desperate measures judges are prepared to take to get to the *lex fori*'.[379]

Whether the High Court was taking 'desperate measures' in desperate times would seem to depend on how anxious the Court was to ensure the 'just' result that Neilson, an individual

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[376] *Damberg v Damberg* (2001) 52 NSWLR 492 at 522.
[377] Ibid.
[378] M Davies, '*Neilson v Overseas Projects Corporation of Victoria*: Renvoi and Presumptions about Foreign Law' (2006) 30 *Melbourne University Law Review* 244, 263-265.
[379] R Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 873.

plaintiff in a personal injury claim, was not in theory visited with the substantial costs of bringing the case before Australia's ultimate Court, if her appeal was to fail.

The Proposition in *Neilson*

The High Court in *Neilson* advanced the proposition that the Australian choice of law rules require application of the *entire* foreign law, *including* choice of law rules. The court also endorsed the inflexible choice of law rules established for Australia in *Pfeiffer*, and reiterated in *Zhang*. *Neilson* demonstrates how the High Court's express rejection of the flexible exception of *Boys v Chaplin*[380] ultimately prevented the court from achieving the 'correct' result by administering 'fairness and justice' through an exercise of judicial discretion to apply the substantive law of the forum. Callinan and Heydon JJ's assumption that the foreign law was the same as the forum law, in the absence of contrary evidence and in order to justify the application of the forum law – including the Australian limitation period – strains the boundaries of credulity in the face of the obvious and omnipresent differences between the civil legal system of China and the Australian common law.

Renvoi has been applied in a legitimation case,[381] and in a case of marriage after divorce.[382] Renvoi has not been applied to contract disputes at common law. This principle was stated expressly by both the English Court of Appeal in *In re United Railways of the Havana and Regla Warehouses Ltd* [383] and the House of Lords in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.*[384] Since *United Railways* and *Amin Rasheed* were decided in the UK, renvoi has been expressly excluded by the *Contracts (Applicable Law) Act 1990 (UK)*.

For the Australian context, in general, it is presumed that the parties to a contract intend only municipal law to apply. By selecting the governing law of the contract, the choice of law is made. Where a choice of law clause is absent, Australian courts select the system of law to which the contract has 'the closest and most real connection'.[385]

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[380] [1971] AC 356.
[381] *Re Askew* [1930] 2 Ch 259.
[382] *R v Brentwood Marriage Registrar* [1968] 2 QB 956.
[383] [1960] Ch 52 at 97, 115.
[384] [1984] AC 50 at 61-62.
[385] *AKAI Pty Ltd v The People's Insurance Company Ltd* (1996) 188 CLR 418 at 434.

Nor has renvoi been applied by an ultimate common law court to decide a tort claim.[386] The uncertainty that renvoi brings to the *Zhang* choice of law rule for tort is undesirable, having regard to the reasoning in that case which fixed upon the need for an inflexible rule,[387] and the flexible exceptions that might otherwise have been endorsed to permit justice and fairness without the radical instability of renvoi.

There is a strong and growing body of scholarly opinion that regards the *Neilson* case important for various reasons. Although this thesis submits that the High Court's reasoning suffered from deficiencies, the outcome is formal recognition by the High Court that its decision to select an inflexible choice of law rule was misconceived, and uniquely interprets *lex loci delicti* as the entire law of the place of the tort.

[386] The basis for this assertion lies in American authorities, subject to the divergent view of the US Supreme Court in *Richards v United States* 369 US 1, 12-13, 82 SCt 585, 592, 593 (1962); also often cited in the same vein is *M'Elroy v M'Allister* 1949 SC 110 at 126 per Lord Russell.

[387] See also R Anderson, 'International Torts in the High Court of Australia' (2002) 10 *Torts Law Journal* 132 at 139.

Chapter 5. The *Neilson* Cases

The question of whether renvoi should be extended to international torts in Australia came before the Full Court of the Supreme Court of Western Australia in 2004, and was unanimously resolved in the negative, only to be reversed by a plurality of the High Court of Australia in 2005, when it endorsed the renvoi as part of the common law rules on the choice of law.

The High Court has so far declined to admit flexible exceptions to the Australian tort choice of law rule, by reference to connecting factors. Australian courts are not permitted to consider the connections between the jurisdiction, the parties, and the issues when applying the governing law to transnational tort cases. Australian courts are required to apply the law of the place of the tort, even if the place of the tort is fortuitous.[388]

This chapter examines the decisions of *Neilson v OPCV*[389] at trial, *MMI v Neilson*,[390] before the Full Court, and *Neilson*[391] in the High Court. The chapter concludes that while the doctrine of renvoi and tort has never been exhaustively considered prior to *Neilson*,[392] renvoi ought not be elevated to a general conflicts theory, and the High Court should

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[388] For analysis of four tort choice of law cases decided by the High Court since intra-national and international tort choice of law rules were changed in Australia, see J Greene, 'Inflexibly Inflexible' (2007) 33 *Monash University Law Review* 246. Ms Greene's point is that 'back door' flexibility is allowing the Court to avoid the strict application of the *Pfeiffer/Zhang* tort choice of law rule. The cases reviewed by Greene were: the defamation case of *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 where the place of the tort was not easily ascertained and ultimately depended on the technicalities of defamation law, the tort on the high seas case of *Blunden v Commonwealth* (2003) 218 CLR 330 where the place of the tort was a legal vacuum with no law, personal injury tort of *Neilson* (2005) 223 CLR 331 where the place of the tort was China and a substantive Chinese limitation period barred the claim, and the motor accident tort in *Sweedman v TAC* (2006) 226 CLR 362 where the court characterised a tort claim as contractual and applied the law of the contract.

[389] [2002] WASC 231.

[390] (2004) 28 WAR 206.

[391] (2005) 223 CLR 331.

[392] The Australian writers are in agreement that the tort choice of law rule as it stands is more certain than the *Phillips v Eyre* rule that it replaced, but has deficiencies. Dr Keyes agitates for a re-examination of the rigid choice of law rule in her case note on *Neilson* in the Full Court. See M Keyes, 'The Doctrine of Renvoi in International Torts: *Mercantile Mutual v Neilson*' (2005) 13(1) *Torts Law Journal* 1. So does Ms Greene in her note: J Greene, 'Inflexibly Inflexible' (2007) 33 *Monash University Law Review* 246. Dr Mortensen, Dr Gray and Dr Davies all share the writer's objection to the inflexible tort choice of law rule. The common theme among the contemporary Australian conflicts scholars is that the High Court will at some future point be obliged to admit an exception to the tort choice of law rule. The closest connection (advanced by the Commonwealth in *Blunden v Commonwealth* (2003) 218 CLR 330), interest analysis (proposed by Dr Gray) or the proper law of the tort (a species of interest analysis, proposed by Dr Morris but rejected by the High Court in *Pfeiffer, Zhang* and *Blunden*) are among the available options. All of these options allow a court to consider the purpose of the law of tort and the broader context of the dispute and connecting factors, to determine whether the context of the claim means that the generally applicable choice of law rule should be displaced.

reverse the effects of *Neilson* at the next available opportunity, by introducing a flexible exception to the inflexible choice of law rule for tort.

Specifically, renvoi should not be applied to transnational tort cases since this would radically contradict the reasonable expectations of parties, and be inconsistent with the policy of certainty and predictability underlying the High Court's endorsement of the *lex loci delicti* choice of law rule in *Zhang*.

Setting the Stage for Renvoi: *Renault v Zhang*

In 2000, the stage was set for a renvoi case in Australia. The High Court in *Pfeiffer*[393] by majority and with Kirby J agreeing on choice of law, confirmed the *lex loci delicti* as Australia's choice of law for intra-Australian torts.[394] By its 2002 decision in *Zhang*, the High Court extended the *lex loci delicti* rule to international torts.

Chinese citizen Mr Zhang came to Australia in 1986. Early in 1999, he travelled to New Caledonia to apply for an Australian permanent residency visa at the Australian Consulate there. Mr Zhang hired a Renault sedan in New Caledonia, and sustained serious injuries in an accident, after losing control of the Renault. After two weeks in hospital in New Caledonia, Mr Zhang returned to Australia where he was a patient for some months in the spinal unit of a Sydney hospital. He sued Renault in the Supreme Court of New South Wales. The Renault group was a French company; at the time of the action it did not conduct business in Australia and did not have an office in New South Wales.

The High Court found that the place of the tort was France, and the choice of law rule for international torts litigated in Australia was the *lex loci delicti commissi*.[395] The High Court was resolute in its rejection of flexibity in Australia's choice of law rule for tort:[396]

> Adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing a flexible rule in terms such as 'real and substantial' or 'most

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[393] (2000) 203 CLR 503.
[394] *Zhang* (2002) 210 CLR 491, 533 – 534 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); 559 (Kirby J). Callinan J dissented and preferred *Phillips v Eyre*.
[395] *Zhang* (2002) 210 CLR 491, 520. See also discussion in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 37.
[396] See further A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 38.

> significant' connection with the jurisdiction will not give sufficient guidance to courts, to parties or to those, like insurers, who must order their affairs on the basis of predictions about the future application of the rule.....Whatever may be the advantages of a flexible rule or a flexible exception to a universal rule in the case of international torts, the practical disadvantages are such that neither approach should be adopted with respect to Australian torts which involve an interstate element.[397]

The Court followed the inflexible *Zhang* approach to choice of law in December 2003, affirming that the choice of law rule for all torts litigated in Australia inclusive of those torts that occur outside the territorial waters of Australia or another law area, is the *lex loci delicti*. In *Blunden v Commonwealth,*[398] a tort case in which the place of the wrong was some 30 kilometres off the coast of Jervis Bay on the high seas,[399] the Court confirmed that the plaintiff was entitled to commence proceedings in any relevant state or territory Supreme Court and would be subject to the limitation period of the forum.

Any solution in *Neilson* other than to reject renvoi would introduce an exception to the *Zhang* choice of law rule. Lu and Carroll observe that just prior to *Neilson*, Drs Nygh and Davies reiterated the view 'that renvoi is a device to soften the rigidity of the formal choice of law rules, much more than a device promoting uniformity'.[400] Of course, one of the observations of the inflexible *Zhang* choice of law rule in practice is that it embeds an assumption that the parties first plead and then prove foreign *lex loci delicti*. If it is not pleaded and proven, the default presumption of similarity applies the *lex fori*.

Authority for Foreign Court Theory Species of Double Renvoi

Anglo-Australian authorities strongly prohibit any doctrine of renvoi other than the 'foreign court theory' from the English status cases already discussed, and *Simmons*,[401] which admit the foreign court theory as a part of the common law. As to other cases considering renvoi and having Australian connections, in 1933, the English Court of

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[397] *Pfeiffer* (2000) 203 CLR 503 at 538; approved in *Zhang* (2002) 210 CLR 491 at 517 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; quoted in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 37-38.
[398] *Blunden v Commonwealth* (2003) 218 CLR 330.
[399] Jervis Bay is part of the Australian Capital Territory.
[400] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 38, referring to P E Nygh & M Davies, *Conflict of Laws in Australia,* (7th edn, 2002) at 234-246.
[401] (1917) 17 SR (NSW) 419.

Appeal in *Broken Hill Proprietary Company Ltd v Latham*[402] was required to determine whether debenture contracts issued by a Victorian company mandated payment in England either in Australian pounds or in Sterling pounds. At first, Maugham J found that the Australian contracts should be construed in accordance with Australian law as to legal tender, excluding Australian choice of law. The Court held that a payment of the debentures in England should be in Sterling pounds but of a sum equal to the amount in Australian pounds. However, the House of Lords reaffirmed Maugham J's reasoning in *Adelaide Electric Supply Co Ltd v Prudential Assurance Co*[403] overruling the House of Lords in *Latham* by holding that the law governing the payment of the debentures was the Australian law as to legal tender for payment in Australian pounds, not the Australian law on the conflict of laws.[404]

A requirement to prove the foreign conflicts rules, including the foreign law's position on renvoi, is common to the common law cases that endorse the foreign court theory species of renvoi. This requirement is a precursor to the forum court being able to decide the matter in a manner approximating the approach of the foreign court. Where foreign law has not articulated a position on renvoi, foreign law experts called to assist the forum judge have seldom been able to advise on what solution a foreign court would have adopted unless the foreign area has an overarching choice of law statute or other guidance from prior cases that addresses renvoi. Without some guiding legislation, decisions by common law forum courts attempting to approximate the decisions of civil foreign courts are, at worst, arbitrary.

Where no certain position on renvoi exists under the foreign law – as it was for the court deciding *Re Duke of Wellington*[405] in a contest between English and Spanish law – in the absence of evidence on the foreign law, Australian courts may presume that it is the same as the law of the forum. If renvoi's operation extended to international torts, there might arise in every context where a foreign legal system's choice of law rule is *lex loci delicti* – but whose rules on renvoi are not proved or provable – the conundrum of the infinite regression, based on the assumption that the foreign law and the forum law are the same.

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[402] (1933) 49 TLR 137.
[403] [1933] 50 TLR 147 (HL).
[404] A Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) at 51.
[405] [1947] Ch 506 at 515 per Wynn-Parry J.

Neilson v OPCV: The First Case

Australia's revival of renvoi creates unhelpful ambiguity for litigants before the Australian courts, whose tort cases include a foreign element. This was in spite of the High Court's attempts to steer away from the renvoi controversy and the potential for the 'hall of mirrors' or the infinite regression[406] between forum and foreign law that arises when the renvoi is applied, in this case to tort. Ignoring a problem does not make it go away, and refusing to address it by its correct name does not mean renvoi is not in issue.

The reason for Australia's pivotal role in the survival of renvoi in the context of the law of obligations,[407] including tort, is two-fold. Firstly, the position in *Zhang* created inflexibility out of keeping with the UK, US, Canada and the EU. Secondly, an inflexible choice of law rule can and does incubate injustice. The common law is able to facilitate a 'just' or 'correct' result by engaging escape devices to soften the rigidity of a rule that, if applied strictly, brings about the incorrect result. That is a consequence of the inherent creativity of lawyers and judges, who predominantly serve the interests of justice and fairness.

Mr Yezerski argues that a complete rejection of renvoi is inconsistent with the tort choice of law rule endorsed by the High Court.[408] In response, Lu and Carroll observe that his argument 'rests upon the notion that the High Court's quest for certainty and predictability in both *Pfeiffer* and *Zhang* was neither to ensure that cases could be dealt with easily, nor for evidentiary simplicity. It is sustained by a submission that the High Court took up the *lex loci delicti* approach to a choice of law in tort because that rule affords certainty which would "facilitate international transactions"[409] and "remove impediments to settlement".[410] It is claimed that applying the renvoi principle to tort does not defeat those objectives'.[411]

Mr Yezerski's point is that there is 'no basis in policy or precedent for rejecting renvoi'.[412] As discussed earlier, the renvoi doctrine has not been permitted to evolve as part of the common law. The common law development of renvoi has been interrupted in the US and

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[406] See Gleeson CJ in *Neilson* (2005) 223 CLR 331 at 341-42.
[407] G Panagopoulos, *Restitution in Private International Law* (2000) at 106-108.
[408] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273. See also A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 42.
[409] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 289.
[410] Ibid at 292.
[411] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 42.
[412] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 292.

the UK by legislative intervention, and that legislative intervention has been to abolish the renvoi doctrine because it is unstable and adds confusion to choice of law.

The decision in *Neilson v OPCV*, that single renvoi should apply to tort, was reversed on appeal. The Full Court rejected the trial judge's application of the *lex fori* and held that renvoi did not apply to tort claims in Australia.[413] The High Court granted Mrs Neilson special leave to argue whether renvoi, as an interesting and undecided point of law, should apply.[414] Thus, the renvoi issue that assumed very little importance at trial had, by the time of the High Court special leave application, become the central question for determination. Within an otherwise inflexible choice of law framework, renvoi responded to the legal significance of the practical conundrum that the place of an international tort can be fortuitous.

The High Court was reluctant to characterise *Neilson* as a renvoi case. Gleeson CJ and his brethren attempted to refer to renvoi as seldom as possible.[415] This did not disguise the purport of the reasoning, and many leading conflicts scholars have published a reaction to the decision.[416] *Neilson* represents the intersection between conflicts theory on choice of law, and legal practice, culminating in its interpretation and application in an otherwise unremarkable personal injury claim.

The Facts of *Neilson*

OPCV were engaged to deliver an education project to assist the Chinese to improve their steel manufacturing industry. It employed a West Australian, Mr Neilson, to lecture in business studies at a university of technology in Wuhan, China. It agreed to provide Mr Neilson and any 'accompanying person' with accommodation. He received and signed a written employment contract. Mrs Neilson accompanied her husband to China and lived with him in a two storey apartment in Wuhan. At the top of the stairs, there was no balustrade. The light switch for the stairs was near the void.

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[413] See A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 43, footnote 50, referring to *MMI v Neilson* (2004) 28 WAR 206 at [74].

[414] Ibid, footnote 51, referring to the special leave application *Neilson v Overseas Projects Corporation of Victoria Ltd* [2004] HCA Trans 528 at [360]. The matter was argued before the Full High Court of Australia on 6 and 7 April 2005: see [2005] HCA Trans 192 and [2005] HCA Trans 194.

[415] For the most significant renvoi case in the common law world, the High Court referred to renvoi a total of only 126 times in its over 100 page reasons for decision. The Chief Justice only mentioned renvoi twice.

[416] As elsewhere outlined, the reactions are either supportive or critical. Where they are supportive as with Dr Gray, the commentaries are supportive of renvoi in the context of the tort choice of law without flexible exceptions, but suggest there are better ways of achieving flexibility. This thesis agrees.

One night, whilst making her way in darkness from the upstairs bedroom to the downstairs kitchen, Mrs Neilson fell through the void and down the stairs, cutting her head and injuring her back.[417]

Mr and Mrs Neilson sued OPCV in the Supreme Court of Western Australia for Mrs Neilson's injuries. They claimed in contract and tort that OPCV failed in its duty to provide safe and suitable accommodation in China.[418] The parties accepted that the apartment in China was provided pursuant to a Memorandum of Understanding between the Chinese and Australian Governments.[419] The Chinese Government had been responsible for constructing and maintaining the apartment.[420]

Renvoi was open to be considered in *Neilson* for the reasons that:

a) in 2002 and before the hearing of Mrs Neilson's claim, *Zhang* established Australia's choice of law rule for tort as the *lex loci delicti*;
b) Mrs Neilson was injured in China due to negligence in China, so the *lex loci delicti* was China and Chinese law included Article 146; and
c) Article 146 of the General Principles[421] is a choice of law provision with several limbs, one of which permits a claim for damages between two foreign nationals of common nationality or domicil to be resolved according to their national law.[422]

Article 146 is not a well-drafted choice of law rule for torts involving foreign elements. It is confusing even in the original Mandarin, and it appears to contain three distinct elements of choice of law: a general *lex loci delicti* rule, with something akin to double actionability,

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[417] See *Neilson v OPCV* [2002] WASC 231 at [41] per McKechnie J; *Neilson* (2005) 223 CLR 331, 345 at [22]-[23] per McHugh J; see also A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 43.
[418] *Neilson v OPCV*, ibid, at [107].
[419] *MMI v Neilson* (2004) 28 WAR 206 at [11].
[420] Ibid at [10].
[421] Adopted at the Fourth Session of the Sixth National People's Congress, Promulgated by Order No. 37 of the President of the People's Republic of China on 12 April 1986 and effective as of 1 January 1987. It was one of the earlier examples of Chinese legislative drafting. Only the CCH Translation was used in the *Neilson* cases, although other translations exist. This and the other translations lack clarity, as does the original drafting effort of the Chinese legislators.
[422] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 44-45. The trial judge accepted that OPCV and Neilson shared the same national law. However, as OPCV was a Victorian company and Mrs Neilson was Western Australian, the parties did not share the same *lex patriae*. The trial judge and the High Court holding that the parties had a common *lex patriae* appears to have been wrong. This point was not pressed for OPCV. Had it been, this might have dissuaded the High Court from applying Article 146.

and a discretionary flexible exception. Lu and Carroll state that, 'both *Zhang* and Article 146 affirm *lex loci delicti* as the choice of law rule for tort'.[423] More precisely, it is only the first limb of Article 146 that adopts the *lex loci delicti* rule. The Chinese law which applied to Mrs Neilson's claim pursuant to *Zhang* prescribed a twelve month limitation period, which had expired by the time Mrs Neilson commenced proceedings. The Chinese law gave no judicial discretion to extend the limitation period.

As Lu and Carroll write,[424] when the *Neilson* claim was actually commenced on 20 June 1997, the double actionability rule of *Phillips v Eyre*[425] was still part of the common law of Australia.[426] The double actionability rule from *Phillips v Eyre*, as modified for Australia by Brennan J in *Breavington v Godleman*,[427] declared that a party may sue in the forum for a wrong committed outside the forum provided that a cause of action would have accrued if the same circumstances occurred in the forum, and if those same circumstances also enlivened liability in the place where the wrong happened.

Foreign Law in Australian Courts

The *Zhang* rule mandates that a party seeking to rely on foreign law must plead and prove it as a matter of fact.[428] In *Neilson*, the relevant foreign law was Chinese.[429] The content of the Chinese law, as a question of foreign law, was a question of fact. A foreign law expert's role was confined to identifying the source and content of foreign law.[430]

As discussed in chapter three of this thesis, and as noted by Lu and Carroll in the *Journal of Private International Law*,[431] Chinese law embeds Confucian values in 'an amalgam of the civil system created under the Qing Dynasty and the Nationalist Republic (First Republic), and the Soviet law with its Marxist theories on the determination of civil liability – such as delictual liability based on the Roman law concepts of *culpa* and

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[423] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 44.
[424] Ibid, at 44-45.
[425] (1870) LR 6 QB 1.
[426] But see the dissenting judgments in *Breavington v Godleman* (1988) 169 CLR 41 at 93-100 per Wilson and Gaudron JJ; *Stevens v Head* (1993) 176 CLR 433 at 461 per Deane J and at 367 per Gaudron J; *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1 at 55 per Gaudron J.
[427] *Breavington v Godleman* (1988) 169 CLR 41 at 110 per Brennan J.
[428] *Zhang* (2002) 210 CLR 491, 517 at [68].
[429] *Neilson* (2005) 223 CLR 331.
[430] *Nicola v Ideal Image Development Corporation Inc* (2009) 269 ALR 1, 8 at [16] per Perram J.
[431] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 45.

injuria,[432] which protect from violation a person's personality, dignity, reputation and honour'.[433] Conciliation is a strong aspect of dispute resolution in China; the People's Conciliation Committees still resolve most claims in accordance with political ideology.[434] Chinese law is undergoing modernisation during the current People's Congress; the drafting program includes choice of law.

Chinese law has been drafted in conformity with socialist ideals, which discourage general damages claims.[435] This approach sharply contrasts with the position adopted in common law jurisdictions including Australia.[436] With global influence, the Chinese position is being softened.[437]

The Supreme People's Court has issued a judicial interpretation that 'in every case with [a] foreign element, the court should apply the 8th chapter of the Civil Code to decide the applicable law of the case'. Dr Wang observes that this has been interpreted to mean that China does not accept renvoi because the reference is purely to a chapter dealing with Chinese internal law, but the judicial interpretation is itself ambiguous.[438] As the parties to *Neilson* were required to consider two law areas with ambiguous rules on renvoi in tort claims, the case 'illustrates the tension resulting from this uncertainty and provides strong support for accepting a no-renvoi approach'.[439]

Neilson v OPCV at Trial

McKechnie J's decision to award Mrs Neilson her damages appears to be based upon a purposive approach[440] to her claim:

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[432] K Wang & D Mendelson, 'An Overview of Liability and Compensation for Personal Injury in China under the General Principles of Civil Law' (1996) 4 *Torts Law Journal* 137 at 139.
[433] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 45. See also R W Lee, *The Elements of Roman Law* (1956) 390.
[434] Also called People's Mediation Committees: see H Fu, 'Understanding People's Mediation in Post-Mao China' (1992) 6 *Journal of Chinese Law* 212.
[435] See e.g. *Neilson* (2005) 223 CLR 331, 379 at [150] per Kirby J.
[436] For a detailed discussion see A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 45-46.
[437] Historically, civil claims were generally discouraged in China as a matter of public policy: see S E Hilmer, *Mediation in the People's Republic of China and Hong Kong (SAR)* (2009).
[438] H Wang, 'A Review of China's Private International Law During the 30-year Period of Reform and Opening Up' (2009) 2 *ASLI Working Paper*, www.law.nus.sg/asli/pub/wps.htm (accessed 11 October 2009).
[439] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 46.
[440] Ibid.

> I am not a People's Court. I am a Western Australian judge applying Chinese law as my criterion and in accordance with principles of justice and fairness, I am not bound by any precedent.[441]

At the High Court special leave application in 2004, OPCV's counsel observed that McKechnie J 'rejected the applicant's own case, because it had a problem which would have resulted in her not being successful before him. What, in effect, he did, was to take the course necessary to obtain a result that judgment would be entered in her favour notwithstanding the expiration...of the plainly applicable limitation period'.[442]

Although the claim was framed both in tort and contract, the contract claim failed. McKechnie J was not prepared to imply a term about adequate accommodation into Mrs Neilson's oral contract with OPCV to work as a secretary in China. The privity of contract doctrine prevented her from relying on her husband's written contract with OPCV, which did include a term about accommodation.

McKechnie J applied *Distillers Co (Biochemicals) Ltd v Thompson*[443] and *Voth v Manildra Flour Mills Pty Ltd*[444] to determine Mrs Neilson's tort claim. McKechnie J received and accepted the evidence of the defendant's Chinese law expert on the context of the General Principles,[445] to find that the *lex loci delicti* choice of law rule was part of China's substantive law. However, not only did McKechnie J hold that the General Principles set out the domestic law of China imposing civil liability on OPCV, but that they also included Article 146. Article 146 was a choice of law provision, which McKechnie J interpreted as affording him discretion to apply the law of Western Australia, as the *lex fori*.[446] As Lu and Carroll observe, His Honour was able to do this 'by implicitly endorsing the notion that

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[441] *Neilson v OPCV* [2002] WASC 231 at [190]. Moreover the doctrine of precedent does not apply to foreign law that is proved in Australian courts, because the Australian rules of pleading will treat foreign law as fact evidence. So even if another Australian court had interpreted Article 146 more fully by reference to more fulsome expert evidence in that other case, McKechnie J would not have been obliged to take judicial notice when deciding *Neilson v OPCV*.

[442] *Neilson v Overseas Projects Corporation of Victoria* [2004] HCA Trans 528 (3 December 2004) at [200]; see also A Lu & L Carroll, 'Ignored No More' 1 *Journal of Private International Law* 35 at 46.

[443] [1971] AC 458.

[444] (1990) 171 CLR 538.

[445] Indeed, McKechnie J found the expert 'an honest and impartial witness': *Neilson v OPCV* [2002] WASC 231 at [125]-[126].

[446] *Neilson v OPCV* [2002] WASC 231 at [204].

conflict of laws rules form part of the *lex loci delicti* as espoused in *Zhang*, and by applying a single renvoi to the Chinese choice of law rule'.[447]

The Chinese law expert gave evidence that Article 146 was a '(rule) of conflict laws'[448] and therefore ought not be applied. The expert's implication in giving this evidence was that under Chinese law, choice of law is regarded as 'spent' if the Australian law refers to Chinese law. Article 146 has elsewhere been acknowledged as a choice of law provision.[449] Senior Chinese conflicts scholars including Professor Zhang confirm that Article 146 is the choice of law provision for civil cases involving foreign elements.[450]

McKechnie J's reasoning has been criticised by Lu and Carroll as misconstruing the foreign court theory of renvoi, if indeed His Honour was seeking to apply it.[451] When faced with expert evidence that Chinese limitation periods are substantive and the plaintiff's cause of action was extinguished under Chinese law, there was no basis for McKechnie J to look to the other provisions of foreign law. Nevertheless, His Honour applied the longer Western Australian limitation period of six years, instead of the shorter Chinese limitation period of 12 months, to overcome OPCV's argument that the claim was time barred by Article 137 of the General Principles.[452]

McKechnie J also distinguished between aspects of the Chinese law expert's evidence on the content as opposed to the application of the General Principles. The plaintiffs did not prove the General Principles or how they might be applied. Consistent with the High Court decision of *All State Life Insurance Co v ANZ*,[453] proving the content of law is not enough, and a party submitting that the law should be applied in a particular way needs to prove that as well.[454]

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[447] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 47.
[448] Mr Liu was misquoted in the transcript of trial as stating the phrase 'lieu of conflict laws': *Neilson v OPCV* [2002] WASC 231 at [202].
[449] J Huang & L Guomin, 'New Developments in Chinese Private International Law' (1999) 1 *Yearbook of Private International Law* 135 at 147.
[450] M Zhang, 'International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System' (2002) 25 *Boston College International and Comparative Law Review* 59. See also discussion in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 48.
[451] See e.g. A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 48. His Honour did not refer to renvoi at all, let alone in a specific form, even though His Honour used some renvoi principles.
[452] The parties agreed the quantum of Western Australian damages at $300,000 during the trial so it did not fall to the trial Judge to assess damages either under the forum law or under the Chinese law: *Neilson v OPCV* [2002] WASC 231 at [277].
[453] *All State Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1996) 137 ALR 138.
[454] Ibid at 141. At trial in *Neilson,* Mr Liu was only able to give evidence of the Chinese law, not of its application to the facts. Accordingly, the trial Judge said 'While I note Mr Liu's opinion, his opinion cannot

Lu and Carroll[455] assert that

> when the plaintiffs failed to persuade the trial judge of what a Chinese court was likely to do when faced with conflicting conflicts of law rules – ie the foreign country's position on renvoi – the plaintiffs failed to prove a critical aspect of their case

They also recognise that this additional burden on expert witnesses to prove foreign renvoi illustrates a problem with any general endorsement of renvoi.[456] Lu and Carroll[457] go on to state that

> in finding that the lex loci delicti included the foreign country's choice of law rules, the trial judge purported to extend the scope of renvoi under Anglo-Australian law to encompass the tort of negligence. His Honour used the very generality of the Chinese law, and absence of both precedent and extra-judicial guidance, to apply the foreign law in a liberal manner which prefers the Chinese conflict of laws rule to that of the *lex fori*. That is self-evident because the *lex loci delicti* rule in *Zhang* allows the trial judge no flexibility to apply *lex fori*

or disapply the foreign law once it has been pleaded and proven.

As Lu and Carroll[458] also point out

> it would appear that the trial judge did not like the inflexibility of the rule in *Zhang* which he was bound to apply. In effect, this application of renvoi was in the vein of what Professor Juenger called an 'evasionary tactic',[459] ie allowing the trial judge to apply *lex fori* in a result-selective fashion, in much the same way as jurists in the US

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supplant that of the Judge trying the action to do justice and fairness:' *Neilson v OPCV* [2002] WASC 231 at [230]. Whether a foreign law expert is entitled to stray beyond content evidence, and bring application evidence, exceeds the scope of this paper. It is picked up in an exchange between Gummow J and Walker SC at [2005] HCA Trans 192 at 31.

[455] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 48.

[456] Ibid. In each case where foreign law is pleaded, it might be necessary to obtain expert evidence from a foreign conflicts lawyer who also understood and was expert in foreign renvoi.

[457] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 49.

[458] Ibid.

[459] F K Juenger, 'Tort Choice of Law in a Federal System' (1997) 19 *Sydney Law Review* 529 at 538; see also *Haumschild v Continental Casualty Co* (1959) 7 Wis 2d 130 at 141.

have justified its application by characterising a foreign rule as procedural,[460] or classifying a tort cause of action as contractual.[461] Applying renvoi to reflect back to the lex fori is inconsistent with the High Court's inflexible, universal tort choice of law rule in *Zhang*.

Lu and Carroll highlight the shortcomings of an inflexible tort choice of law rule, and how the inflexibility can lead to unfairness.

MMI v Neilson: The Full Court Decision

Consistent with Lu and Carroll,[462] this thesis endorses the Full Court decision[463] over the High Court's decision, as the Full Court approach is far less radical in its treatment of renvoi, and is consistent with an incremental approach to the development of the law.

In its analysis of the appeal, the Full Court recognised three options: (1) to reject renvoi and apply Chinese domestic tort law, (2) adopt a single renvoi solution through accepting a renvoi from Chinese to West Australian law, or (3) adopt a double renvoi solution to determine the claim consistently with the approach that a Chinese court would adopt if seised of the matter. Had McKechnie J rejected the renvoi, His Honour would have been bound by the twelve month limitation period in Article 137 of the General Principles, which barred the claim, and would not have applied the choice of law Article 146 giving a discretion to apply *lex fori*.[464]

The single renvoi approach was actually applied by McKechnie J. His Honour considered all of the General Principles and exercised the discretion provided by Article 146 to apply *lex fori* as a 'pragmatic rather than principled solution'[465] to award Mrs Neilson her damages.

Neither party brought direct evidence about Chinese renvoi, so a double renvoi solution was not open on the evidence.[466] However, it is the double renvoi solution that may give

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[460] *Grant v McAuliffe* (Cal 1953) 264 P2d 944; F K Juenger, ibid, at 539.
[461] *Levy v Daniels U-Drive Auto Renting Co* (Con 1928) 143 A 163; F K Juenger, ibid, at 538.
[462] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 49.
[463] See discussion of renvoi in *MMI v Neilson* (2004) 28 WAR 206 at [26]-[49].
[464] *MMI v Neilson* (2004) 28 WAR 206 at [30].
[465] Ibid at [31].
[466] Ibid at [33].

rise to an infinite regression if the forum and foreign law mirror each other – which then results in no solution to the substance of the dispute. The trial judge's single renvoi response was the only option available to him to make an award of damages to Mrs Neilson,[467] but a single renvoi has not previously been applied to tort claims in Australia, and is a radical departure from the traditional exclusion of any form of renvoi in tort cases.[468]

In reversing the trial judge's decision, the Full Court recognised that the Chinese law expert should have been followed, as his evidence about the twelve month limitation period for personal injury claims in China had been accepted.[469] Accepting the expert evidence on Article 137, the plaintiff had commenced her claim out of time, and the court had no discretion to extend the limitation period.[470]

The Full Court's orthodox approach was to construe the *Zhang* reference to the *lex loci delicti* as a reference to the domestic law of the place of the wrong that governs liability, and to construe the *lex loci delicti* as including a reference to foreign choice of law would not be in accordance with the reasonable expectation of the parties, nor would it promote certainty and predictability,[471] but would be inherently illogical.[472]

Lu and Carroll declare that the court 'took judicial notice of, and respected the deliberate rigidity of, the *lex loci delicti* rule in *Zhang*. The two decisions do not conflict. Whether or not such rigidity adequately promotes the certainty and predictability on which it is premised remains untested. There are arguments that a lack of flexible exception to the Australian tort choice of law rule may be unduly harsh'.[473] The Full Court put it thus:

> It would be inconsistent with the reasoning and result in *Zhang* to superimpose a renvoi doctrine the purpose and effect of which was to soften or avoid the rigidity

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[467] Ibid at [31].
[468] Ibid at [34].
[469] It should be noted, a rejection of uncontroverted expert evidence is appropriate only in exceptional circumstances: *James Hardie & Co Pty Ltd v Putt* (1998) 43 NSWLR 554 per Shellar JA such as where evidence is patently absurd or inconsistent with superior authority from the foreign country: *MMI v Neilson* (2004) 28 WAR 206 at [62]. *Zhang* (2002) 210 CLR 491, 520 at [76] is also clear authority for the proposition that limitations periods are substantive and are governed by the *lex loci delicti*.
[470] *MMI v Neilson* (2004) 28 WAR 206 at [74].
[471] Ibid at [48].
[472] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopedia of Comparative Law* (3rd vol, 1990) at [11]. See also A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 50.
[473] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 50-51.

> of choice of law rules. Further, the implication in the reasons and reasoning of the majority in *Pfeiffer* and *Zhang*, particularly relating to certainty and territoriality, is that the chosen choice of law rule identifies or defines the law applicable to the determination of the relevant substantive rights in dispute (the lex causae) not the jurisdiction or law area which in turn will identify (or facilitate the identification of) the lex causae. It follows that the no renvoi solution should apply and lex loci delicti be construed as a reference to the domestic law of the place of the wrong. In summary, I am satisfied that the reasoning of the High Court in *Pfeiffer* and *Zhang* is inconsistent with the application of the renvoi doctrine to international torts. Accordingly, the trial judge erred in applying Australian domestic law to Mrs Neilson's tort claim.[474]

Lu and Carroll's detailed analysis of the Full Court decision[475] confirms that McLure J's robust reasoning is consistent with the orthodox approach to renvoi endorsed by many scholars including Dr Nygh,[476] and approved in leading texts such as *Dicey and Morris*[477] and *Cheshire*.[478] According to Lu and Carroll, the only other notable renvoi and tort case, the US decision of *Richards*, is distinguishable because it involved the construction of an overriding federal choice of law statute.[479] Although the US case law includes a number of lesser known cases involving renvoi such as *Phillips v General Motors Corporation,*[480] the vast body of US jurisprudence lacks a renvoi decision by an ultimate court.

Did the Full Court Err?[481]

Mr Yezerski has criticised the Full Court's reasoning by suggesting that the Court's decision has 'three significant flaws'.[482] It was submitted both by Lu and Carroll when writing in the *Journal of Private International Law* in 2005,[483] and in this thesis based on what the High Court has determined, that Mr Yezerski has not identified flaws in judicial reasoning, and this thesis argues that Mr Yezerski is misplaced by suggesting that

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[474] Ibid, quoting McLure J in *MMI v Neilson* (2004) 28 WAR 206 at [49].
[475] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 51.
[476] See e.g. P E Nygh & M Davies, *Conflict of Laws in Australia* (7th edn, 2002) at [15.9] – [15.12].
[477] See e.g. L Collins (ed), *Dicey and Morris on the Conflict of Laws,* (13th edn, 2000) at [4-032].
[478] See e.g. P North & J Fawcett, *Cheshire and North's Private International Law* (13th edn, 1999) at 55-56.
[479] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 40.
[480] *Phillips v General Motors Corporation* 298 Mont 438 (2000).
[481] This subheading and the following seven subheadings are derived from the headings applied in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35, 51-64.
[482] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 282.
[483] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 51.

examples of other jurisdictions rejecting renvoi are 'simply inapposite in the context of Australian choice of law rules'.[484]

As well as acknowledging that most academic commentary rejects renvoi, the Full Court also recognised the UK's *PIL Act* (s 9(5)) to which chapter three of this thesis refers.[485] It also related its resolute rejection of any proposed extention of renvoi to international torts litigated in Australia to the recommendations and draft legislation proposing the abolition of renvoi from the Australian Law Reform Commission 1992 Report into Choice of Law.[486]

First Alleged Flaw: The Breavington Case

Breavington v Godleman[487] was a 1988 intra-national tort case where the applicable law was reached by applying *lex loci delicti*, rather than the double actionability rule. Mr Yezerski uses that decision to argue that the Full Court went too far when it stated that there is 'no binding (or any other) authority that renvoi is applicable in torts cases'.[488]

However, on the one hand, Australia's choice of law rule is a rule of the unified common law of Australia,[489] and the Australian Law Reform Commission explicitly notes that renvoi does not apply to intra-Australian torts.[490] It could only arise if, through legislative modification, the uniformity of choice of law rules across the States is disturbed.[491]

If the *Neilson* facts were transposed to an intra-Australian tort case, the *lex loci delicti* rule in *Pfeiffer* would apply, and whichever State court was the forum would receive evidence of and then apply the *lex loci delicti* to determine liability and damages.[492]

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[484] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 285.
[485] Ibid at 280. Section 9(5) has been heavily criticised by Briggs as a piece of gratuitous vandalism to sever the operation of jurisdictional rules from choice of law rules. See A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *International and Comparative Law Quarterly* 877 at 880.
[486] Australian Law Reform Commission, *Choice of Law Report 58* (1992).
[487] (1988) 169 CLR 41.
[488] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 282.
[489] *Lipohar v The Queen* (1999) 200 CLR 485; see also *Pfeiffer* (2000) 203 CLR 503.
[490] Australian Law Reform Commission, *Choice of Law Report 58 (*1992) at 30, para [4.11].
[491] Ibid. However, the *Transport Accident Act 1986 (Vic)* does alter choice of law rules for motor vehicle accidents e.g. *Sweedman v TAC* (2006) 226 CLR 362.
[492] It is however possible to conceive of situations where there are forensic advantages to arguing that tort law of one Australian jurisdiction applies over the rules of another jurisdiction in the context of thresholds and caps e.g. the indexed maximum for the recovery of economic loss and restrictions on recovery for pure mental harm. Despite the national framework for tort reform recommended by the Ipp Committee's *Law of Negligence* final report, released in September 2002, the Commonwealth and the states and territories rejected uniform tort law reform. Individual legislation was enacted by the states and territories to achieve a

Whilst none of the High Court in *Breavington* distinguished between intra-national and international torts, Dr Mortensen[493] and others such as Lu and Carroll[494] write that implicit in *Breavington* is the Court's recognition of an obligation to acknowledge the federal constitutional structure of Australia and the consequent need treat choice of law for intra-national and international torts as distinct branches. The evolution of the High Court's endorsement of Australia's current tort choice of law from the intra-national to the international context demonstrates this serial approach.

Lu and Carroll have acknowledged that, whilst the High Court's decision in *Breavington* was the Court's first exposition on a shift towards the *lex loci delicti* choice of law rule to apply to torts within Australia, nothing in that case was directed towards the renvoi question. Lu and Carroll have also recognised that 'Deane J considered that the Constitution excluded the application of choice of law rules to resolve inconsistencies between state or territory laws,[495] thereby excluding from the definition of *lex delicti* the choice of law rule'.[496] Lu and Carroll note that only Mason CJ held that, within Australia, choice of law rules could be differently interpreted.[497]

Second Alleged Flaw: Existing Case Law on Renvoi

Mr Yezerski is also critical of the orthodox approach to renvoi adopted in the extremely limited number of cases that have considered the renvoi doctrine.[498] He notes the deficiencies of Lord Russell's obiter comments in *M'Elroy*[499] even though that case was not one where renvoi actually arose.[500]

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kind of quasi-consistency in two respects – the limiting of personal liability particularly for medical practitioners rendering emergency assistance, and the introduction of thresholds, caps and restrictions on recoverable damages to reduce the financial exposure of insurers in the context of public liability and professional indemnity claims. We now see that the tort law reforms have resulted in a significant reduction in the number of claims and in a reduction of public liability insurance premiums (as the Commonwealth intended): see e.g. Insurance Council of Australia, *Tort Law Reform*, 18 August 2006, citing the APRA National Claims and Policies Database showing a 13.4% reduction in average premiums for public and product liability in 2004-2005; the District Court of New South Wales *Annual Review 2005*, p15, cites a substantial reduction in civil cases from over 23,000 in 2001, to less than 8,000 by the end of 2005.

[493] See e.g. R Mortensen, 'Homing Devices in Choice of Tort Law' (2006) 55 *International and Comparative Law Quarterly* 839, 844.

[494] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 53.

[495] *Breavington v Godleman* (1988) 169 CLR 41 at 135.

[496] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 53.

[497] Ibid, and referring to *Breavington v Godleman* (1988) 169 CLR 41 at 77-79 per Mason CJ.

[498] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 283.

[499] 1949 SC 110.

[500] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 54.

The Full Court also referred to *Haumschild v Continental Casualty Co*,[501] an American case that rejected renvoi for tort claims. Although Mr Yezerski declares that Currie J's reasoning in *Haumschild* was 'hardly convincing,'[502] a review of the judgment reveals that the *Haumschild* decision is sound. Currie J's reasoning that applying renvoi to a tort case 'is likely to result in the court pursuing a course equivalent to a never ending cycle'[503] is coherent and conforms to the orthodox view of renvoi generally, not just in relation to the orthodox view that renvoi should not apply in tort cases.

The territorialists such as Professor Beale would also agree. This 'never-ending cycle' noted by Currie J is one of the most insidious aspects of the renvoi doctrine. Lu and Carroll[504] identify this quote from Mr Yezerski's own research, in which he openly recognises the potentially circular response of double renvoi:

> Were we to apply the foreign state's choice of law rules, those rules may require the application of Australian law, at which point Australia's own choice of law rules would once more require the application of foreign law. Thus, taking the *Neilson* case as an example, Australian law requires the application of the *lex loci delicti* but Chinese law requires (or at least permits) that the law of the nationality be applied. The cycle does not stop there, however, because if the 'law of the nationality' incorporates Australian choice of law rules, we are once again sent back to Chinese law and the cycle continues *ad infinitum.* [505]

The circularity of a double renvoi is avoidable only with a no renvoi or single renvoi solution.

Third Alleged Flaw: Proper Law of the Tort

Lu and Carroll note that when Dr Morris described the proper law of the tort as 'the law which, on policy grounds, seems to have the most significant connection with the chain of

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[501] (1959) 7 Wis 2d 130.
[502] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 284.
[503] *Haumschild v Continental Casualty Co* (1959) 7 Wis 2d 130 at 141-143.
[504] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 55.
[505] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 276-277; quoted in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 55.

acts and consequences in the particular situation before us,'[506] he introduced to the world a highly unstable concept.

Lord Denning MR applied Dr Morris's theory in *Sayers v International Drilling Co NV*[507] which demonstrated the unpredictability of the doctrine in the case of an English worker injured whilst working for a Dutch employer on an oil rig off the coast of Nigeria. Lu and Carroll[508] observe that the proper law doctrine

> was given practical application in *Babcock v Jackson.*[509] In this case, the New York Court of Appeals preferred to give controlling effect to the law of the jurisdiction which, because of its relationship with the impugned act or the parties, has the strongest link with the specific issue raised in the litigation.[510]

Furthermore, Lu and Carroll[511] go on to submit in relation to the proper law, that

> it is a theory much criticised over the past decade for its high degree of uncertainty and unpredictability.[512] The concept does not facilitate predictable outcomes, and is not defined with sufficient precision to facilitate determination of what the proper law of the tort should be.[513]

The proper law approach has been rejected by the High Court in *Zhang.*[514] The *lex loci delicti* choice of law rule applies inflexibly to foreign torts in Australian courts.

Compelling arguments around justice and fairness favour introducing some flexibility to Australia's current choice of law rule for tort,[515] such as an exception that permits a court

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[506] J Morris, 'The Proper Law of a Tort' (1951) 64 *Harvard Law Review* 881 at 888; quoted in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 55-56.
[507] [1971] 1 WLR 1176.
[508] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 56.
[509] (1963) 191 NE 2d 279.
[510] Ibid at 283.
[511] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 56.
[512] See, for example, Lord Slynn in *Red Sea Insurance Co v Bouygues SA* [1991] 1 AC 190.
[513] J J Gow, 'Delict and Private International Law' (1949) 65 *Law Quarterly Review* 313, 316.
[514] See e.g. *Zhang* (2002) 210 CLR 491, 532 at [115].
[515] And some of these are covered by Dr Keyes in M Keyes, 'The Doctrine of Renvoi in International Torts: *Mercantile Mutual v Neilson*' (2005) 13(1) *Torts Law Journal* 1. This thesis acknowledges but does not wholly adopt the views of Dr Keyes. See also J Harris, 'Choice of Law in Tort – Blending in with the Landscape of the Conflict of Laws?' (1998) 61(1) *Modern Law Review* 33.

to apply the law with the closest connection to the parties in dispute.[516] Scholars including Dr Gray have openly advocated for an exception to the tort choice of law rule ever since *Pfeiffer,*[517] along the lines of the *Boys v Chaplin*[518] flexible exception.

Even when an unjust or harsh outcome might result from applying the *lex loci delicti* to determine liability and damages, this thesis asserts that renvoi should not be used to disapply foreign substantive law.[519] The application of renvoi counteracts party expectations that are, or should be, at the heart of choice of law. This thesis favours introducing flexibility to the tort choice of law rule in Australia,[520] through legislative intervention promulgating clear statutory exceptions to current *Zhang* rule. Legislated choice of law and legislated flexibility was viably introduced in the EU and UK by Article 3 sub-articles (2) and (3) of Rome II, and section 11(2) of the *PIL Act.*[521]

In the alternative, if the courts wish to define a common law flexible exception rather than to invite the intervention of legislators, then an express set of flexible exceptions should be set out in the next major choice of law case to come before the appellate courts. In this respect, this thesis endorses Dr Gray's proposition that to admit a *Boys v Chaplin* style of flexible exception may be desirable, to displace the choice of law rule when it fails to refer the dispute to the law that has the strongest and most real connection with the parties.[522] In Mrs Neilson's case, that is likely to have been Australia.

Whilst it may be a creative response, many contemporary writers and practitioners agree that the use of renvoi to achieve flexibility in the Australian choice of law rule for tort is unsatisfactory.[523] It would be of more practical value to shape a rule that included a flexible exception to mitigate harsh results in exceptional cases. It would also be more satisfactory if renvoi was avoided as a means of avoiding the harsh application of the *lex loci delicti* rule.

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[516] Australian Law Reform Commission, *Choice of Law Report 58* (1992) 6.59-6.62. The uniform Defamation Acts, for example the *Defamation Act 2005 (Vic)* s11(2) declare that the for the tort of defamation and for material published in Australia, the applicable law will be the law of the place with which the harm has the 'closest connection'.

[517] A Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases' (2004) 23(2) *University of Queensland Law Journal* 435 at 463.

[518] [1971] AC 356, which endorsed the proper law of the tort approach.

[519] See also A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 56.

[520] That proposition is moot, because the High Court so recently and so clearly excluded flexibility in its *Zhang* decision.

[521] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 56.

[522] See e.g. A Gray, 'The Rise of Renvoi in Australia: Creating the Theoretical Framework' (2007) 20 *University of New South Wales Law Journal* 103 at 111.

[523] Notable exceptions are Professor Briggs, and Mr Dickinson.

Policy Analysis of the Full Court Decision

According to Lu and Carroll,[524] '[t]o formulate any position on renvoi and its extension to international torts litigated in Australia, one must consider whether the application of the doctrine of renvoi would promote or hinder the policy considerations that the High Court relied upon in both *Zhang* and *Pfeiffer* to fix *lex loci delicti* as Australia's choice of law rule'.[525] Lu and Carroll cite[526] Professor Juenger's recognition that the *lex loci delicti* choice of law rule 'at first blush looks simple and even-handed' but 'soon reveals its complexities and capriciousness'.[527]

Through choosing the *lex loci delicti* rule for international torts, the High Court strove to accommodate justice within a broader recognition that rules of law must be certain and predictable.[528] Kirby J in *Zhang* further emphasised the rule as encouraging uniformity,[529] as a means of promoting comity,[530] to meet reasonable expectations of parties,[531] and to be a disincentive to forum shoppers.[532] Each of these points is identified and discussed by Lu and Carroll.[533] Mr Yezerski is critical of the Full Court's focus on certainty and predictability, and implies that the other points underpinning *Zhang* were given considerably less attention and weight.[534]

The Full Court in *MMI v Neilson* explored the High Court's view in *Zhang* that tort choice of law rules should support the themes of certainty and predictability,[535] in the context firstly of the amount of foreign law to be pleaded and proven,[536] secondly in determining

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[524] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 57.
[525] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 285.
[526] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 57.
[527] F K Juenger, *Choice of Law and Multistate Justice* (1992) 51.
[528] See *Pfeiffer* (2000) 203 CLR 503 at [136] per Kirby J; *Chaplin v Boys* [1971] AC 356 at 389 per Lord Wilberforce.
[529] *Zhang* (2002) 210 CLR 491, 537 at [128]. His Honour emphasises the approach taken by foreign legal systems, notwithstanding that (i) choice of law rules are part of Australia's municipal legal system and (ii) are properly driven by factors relevant to formulating domestic laws such as the interests of the community, the state, and the parties: see also P Kincaid, 'Justice in Tort Choice of Law' (1996) 18 *Adelaide Law Review* 191 at 195-6.
[530] *Zhang* (2002) 210 CLR 491, 528 at [105].
[531] Ibid 537 at [130].
[532] Ibid 533 at [118].
[533] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 57.
[534] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 285.
[535] *MMI v Neilson* (2004) 28 WAR 206; [2004] WASCA 60 at [41]-[50].
[536] Ibid at [48].

the *lex causae*,[537] and thirdly in discouraging forum shoppers.[538] These three contexts are closely discussed by Lu and Carroll.[539]

Certainty and Predictability: Three Contexts

Certainty of Result

As Professors Tilbury, Davis and Opeskin recognise, the Full Court was concerned that renvoi 'would require identification of Australia's choice of law rules, the foreign country's choice of law rules and its attitude to renvoi, from which a conclusion can then be reached as to the domestic law of which country applies. This exercise has the potential to be an "extraordinarily complex, unwieldy, phantasmagorical journey"'.[540]

Due to the requirement to consider the foreign approach to renvoi, certainty of result is frustrated by applying renvoi in tort. A single renvoi runs the risk of facilitating the application of *lex fori*, whilst double renvoi may, in the most extreme case, result in the infamous infinite regression by selecting foreign choice of law and renvoi.[541]

Comity and Fidelity to the Law of the Foreign State

Professor Sauveplanne observed that mutual respect for sovereignty requires one state to respect the decisions of another.[542] Nevertheless, although members of the High Court in *Zhang* observed that the *lex loci delicti* choice of law rule shows comity,[543] foreign choice of law rules are not applied by a forum court out of comity to another State.[544] Choice of law rules are private law rules of the forum, developed and implemented to serve the interests of the forum and not the interests of a foreign law area.

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[537] Ibid at [47].
[538] Ibid at [46].
[539] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 58.
[540] *MMI v Neilson* (2004) 28 WAR 20 at [48]; M Tilbury, G Davis & B Opeskin, *Conflict of Laws in Australia* (2002) at 1005; quoted in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 58.
[541] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 58.
[542] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopedia of Comparative Law* (3rd vol, 1990) at 7, para [10].
[543] *Zhang* (2002) 210 CLR 491, 516 (per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); 538 (per Kirby J).
[544] Cf *Zhang* (2002) 210 CLR 491, 524 (per Kirby J).

To illustrate this point, Lu and Carroll refer to *Tolofson v Jensen*[545] (*Tolofson*).[546] In that case, La Forest J addressed 'the territorial limits of law under the international legal order' and 'comity' as vital considerations for a tort choice of law rule,[547] making it self-evident that 'the law to be applied in torts is the law of the place where the activity occurred'.[548] Lu and Carroll[549] observe that Kirby J's reasons in *Zhang* declare that 'comity, reciprocity and mutual respect between different legal jurisdictions exist at the very foundation of choice of law'.[550]

As this thesis argues that choice of law rules are part of the forum's municipal law,[551] it challenges the application of comity and sovereignty as concepts that help either to accept or reject the doctrine of renvoi in tort. Whilst this thesis recognises the broad influence of international law,[552] comity and fidelity are directed to regulating acts of states and are key components of public rather than private international law. Professor Kincaid notes that private conduct within a state's own territory does not necessarily raise that state's interest in seeing that its law is applied.[553] A forum court does not apply foreign law out of courtesy to a foreign state, but to resolve the private dispute between litigants in a just manner.

Uniformity

Some states are silent on renvoi. The differences between renvoi rules and choice of law rules across foreign states prohibits the renvoi doctrine from promoting uniform outcomes in tort claims.[554]

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[545] *Tolofson v Jensen* [1994] 3 SCR 1022.
[546] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 59.
[547] *Tolofson v Jensen* [1994] 3 SCR 1022; see also P Kincaid, '*Jensen v Tolofson* and the Revolution in Tort Choice of Law' (1995) 74 *Canadian Bar Review* 537 at 540.
[548] *Tolofson v Jensen* [1994] 3 SCR 1022 at 625; cited in A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 59.
[549] See A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 59-60.
[550] Ibid at 59. See further *Zhang* (2002) 210 CLR 491, 528 at [105] per Kirby J. See also *Pfeiffer* (2000) 203 CLR 503 at [123] per Kirby J.
[551] P Kincaid, 'Justice in Tort Choice of Law' (1996) 18 *Adelaide Law Review* 191 at 195; H E Yntema, 'Basic Issues in Conflicts Law (1963) 12 *American Journal of Comparative Law* 474 at 481.
[552] *Zhang* (2002) 210 CLR 491, 528 at [106] per Kirby J, referring to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419.
[553] P Kincaid, 'Jensen v Tolofson and the Revolution in Tort Choice of Law' (1995) 74 *Canadian Bar Review* 537 at 542, 544.
[554] Discussed by R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 286.

Although the *lex loci delicti* choice of law rule has been endorsed by many legal systems, that does not provide sufficient justification for its acceptance as part of Australia's private domestic law. Accordingly, Lu and Carroll agree with Professor Kincaid,[555] when they recognise that 'the same factors that are important in formulating other domestic laws, such as for example, the interests of the state, the interests of the community, and the interests of the parties to disputes, are also relevant to formulating the Australian choice of law rule'.[556]

Even through legislative efforts to codify choice of law rules, uniformity remains elusive. Lu and Carroll[557] endorse Professor Juenger's argument that it is futile to strive for uniformity in choice of law rules in all states.[558]

Differences in the classification of substantive rules between countries also renders uniformity, at the very least, elusive in a practical sense. For example, Australian law characterises the assessment of tort damages as substantive.[559] However, the House of Lords in *Harding v Wealands*[560] unanimously characterised the assessment and quantification of damages for UK tort claims as procedural, and thus a matter for the English forum law alone. Lord Hoffman held that applicable law governs only questions of whether a right exists to bring a claim in tort, and to recover for a specific head of damage. The Lords distinguished between 'damage' constituting an actionable injury, and 'damages' that are a remedy. *Harding* confirms that s12 of the *PIL Act* has no relevance to assessment of damages in UK cases with foreign elements.[561] It also confirms that characterisation of the action occurs in the forum. *Harding* may be regarded as another case in which the notion of justice to the plaintiff was elevated to a guiding principle of the Lords to maximise the plaintiff's recovery under UK law.

Lu and Carroll recognise that 'although the *Zhang* decision achieves harmonisation of Australia's choice of law rules for intra-national and international torts, there is a different Australian choice of law rule for torts occurring within the forum and for torts occurring

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[555] P Kincaid, 'Justice in Tort Choice of Law' (1996) 18 *Adelaide Law Review* 191 at 196.
[556] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 60.
[557] Ibid.
[558] F K Juenger, 'What's Wrong with Forum Shopping?' (1994) 16 *Sydney Law Review* 5.
[559] Indeed, Australian law characterises substantive issues broadly, including limitation periods.
[560] *Harding v Wealands* [2007] 2 AC 1.
[561] In *Harding* the foreign law was the law of the Australian state of New South Wales, and in particular the *Motor Accidents Compensation Act 1999 (NSW)* which, if it applied, would have capped Mr Harding's damages.

outside the forum. Where a tort that has foreign elements occurs in the forum, the *lex fori* is applied'.[562]

Facilitating the Identification of the *Lex Causae*

The Australian choice of law rule in *Zhang* defines the *lex causae* as the substantive law applicable to determine substantive rights.[563] The inflexible *lex loci delicti* rule in *Zhang* may lead to harsh outcomes, but this inflexibility at least assures certainty of the *lex causae*.

Any choice of law rule that requires the parties to look beyond the *lex fori*[564] is likely to introduce the challenge of pleading and proving foreign law. Parties may choose to plead and prove the foreign *lex causae*,[565] but this is not mandated by *Zhang* and a failure to prove foreign law does not invalidate an action. The forum court may presume, in the absence of pleading and proof, that the *lex causae* is the same as the *lex fori*.[566]

Double Renvoi *versus* No-renvoi

In his paper advocating the application of renvoi to decide tort claims, Mr Yezerski does not clearly articulate his support of the single or double renvoi doctrine. As Lu and Carroll have observed in the *Journal of Private International Law*,[567] Mr Yezerski submits:

> Indeed, a state may have legitimate reasons for resolving such disputes by reference to foreign law. For example, foreigners who have sustained tortious injury in China have often been paid compensatory damages well above those available under the Chinese law of civil liability because the Chinese Government is concerned that paying compensation at local rates would deter foreign investment and tourism. In light of this policy, it would not be surprising if the Chinese government selected a choice of law rule that applied foreign law

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[562] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 60; see also *Szalatnay - Stacho v Fink* [1947] 1 KB 1; *Union Shipping New Zealand v Morgan* [2002] NSWCA 124.
[563] *Zhang* (2002) 210 CLR 491 at 504.
[564] For even if a party decides not to plead and prove foreign law, a party's solicitor has a professional obligation to consider the content of foreign law so as to discharge the duty to advise their client fully of their rights, and to make sound recommendations. Failing to do so may constitute professional negligence.
[565] *Zhang* (2002) 210 CLR 491, 519 at [72].
[566] *Neilson* (2005) 223 CLR 331, 343 at [16] per Gleeson CJ; 372 at [125] per Gummow and Hayne JJ.
[567] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 61.

in tort cases involving foreigners, thereby ensuring that the law of civil liability does not discourage international trade.[568]

Mr Yezerski's arguments blend public international law concepts of comity with private law rules on choice of law.[569] This thesis rebuts Mr Yezerski's submission that a double renvoi response 'will usually ensure that the full extent of a tortfeasor's liability is referable to a single legal system.'[570] A double renvoi response obliges the forum court to apply the *lex loci delicti* consistent with the approach that would be taken by the court of the foreign law area. A no-renvoi response merely requires the forum court to apply the foreign tort law to determine liability.

If it is to be relied upon, the law of the foreign law area must be pleaded and proven in either case. This thesis endorses Lu and Carroll's approach and opinions[571] that when a claimant chooses to commence proceedings before an Australian court, and her case involves damage occurring in a foreign law area, that litigant should have her rights determined according to foreign law. The Australian law in *Zhang* has selected the *lex loci delicti* as the *lex causae* to determine liability.[572]

This thesis endorses Lu and Carroll's observation that the decision of McKechnie J does not seem to be a firm foundation for declaring double renvoi as an appropriate methodology for identifying the *lex causae* in tandem with the *lex loci delicti* rule in *Zhang*, 'not least because even on a result-selective approach, a double renvoi could not have assisted Mrs Neilson's claim that was statute barred'[573] pursuant to the Chinese substantive limitations period of twelve months.

Renvoi does not reinforce the expectations of parties to tort claims; it introduces greater uncertainty.[574] As for Australian companies operating in foreign jurisdictions, Lu and Carroll recognise that legal uncertainty will be added to the commercial risk of doing business overseas, because the *lex loci delicti* rule imposes a foreign *lex causae*.[575] Superimposing a requirement for parties to consider and prove (if desired) the foreign

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[568] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 286.
[569] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 61.
[570] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 286.
[571] A Lu & L Carroll, Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 62.
[572] *Zhang* (2002) 210 CLR 491 at 571.
[573] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 62.
[574] *Neilson* (2005) 223 CLR 331, 350 at [39] per McHugh J.
[575] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 62.

domestic law and the foreign conflicts rules on renvoi to decide whether to defend or settle a common law claim only magnifies uncertainty. Even within Australia, the test for causation in tort cases has been approached slightly differently across the states, for example in asbestos-related lung cancer cases.[576]

In order for double renvoi to promote certainty for foreign tort claims litigated in Australia, it is imperative that no foreign *lex causae* adopt both the *locus delicti* choice of law rule, and double renvoi.[577] To put it another way, there must be evidence that the foreign law area rejects the transmission from the forum. Lu and Carroll recognise that

> should the situation arise where two jurisdictions both embrace the *locus delicti* rule for tort along with the double renvoi approach, the result would be 'an engagement in *la danse macabre d'Alphonse et Gaston*, each bowing politely but unrelentingly to the other'.[578]

McHugh J's avowed objection to the infinite regression that caused him to cast aside the double renvoi as an option in *Neilson*.[579] In proposing that Australian courts endorse the foreign court theory to decide tort cases, [580] Mr Yezerski seems to avoid or ignore the conundrum of the infinite regression.

Protection against Forum Shopping

The efficacy of the *lex loci delicti* rule in *Zhang* as a deterrent to forum shoppers is in no way enhanced or diminished by the exclusion of choice of law from the meaning of *'lex'* in *lex loci delicti*.[581] As Dr Altaras notes, forum shopping is often used pejoratively but it is

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[576] But a series of very recent High Court restatements are affirming a single common law test for causation in negligence cases: see A Lu, 'Towards a Unified Approach to Causation in Asbestos-related Lung Cases: *Amaca v Ellis*' (2010) 25(6) *Australian Insurance Law Bulletin* 74.

[577] It was for this reason that Lord Russell in *Re Annesley* [1926] Ch 692 expressed his personal preference for the simple and rational solution of avoiding the renvoi doctrine altogether. See also *Barcelo v Electrolytic Zinc Company of Australasia Ltd* (1932) 48 CLR 391 at 437 per Evatt J (albeit a contract case).

[578] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 62; endorsing the *danse macabre* concept from B Welling & R Hoffman, '"The law of" in choice of law rules: *Renvoi comme nostalgie de la boue*' (1985) 23 *University of Western Ontario Law Review* 79, 80.

[579] *Neilson* (2005) 223 CLR 331, 353 at [46] per McHugh J.

[580] R Yezerski, 'Renvoi Rejected?' (2004) 26(2) *Sydney Law Review* 273 at 285.

[581] Ibid at 286. See also A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 62-63.

entirely understandable that litigants and their lawyers seek to litigate in the most convenient forum or the forum that is most likely to give the relief sought.[582]

By refusing jurisdiction, or granting an injunction to stay proceedings, courts already have the power to deprive litigants of the juridical advantages of carefully choosing one forum over another. The test is whether the litigant commenced suit in the forum with which the parties or damage have the closest or most real connection.[583] If the forum is clearly inappropriate, it can be challenged. The doctrine of *forum non conveniens* and whether a forum is clearly inappropriate is outlined in *Voth v Manildra Flour Mills* and *Puttick v Tenon*.[584] Admittedly, the clearly inappropriate forum test is quite narrow and, as Dr Mortensen has rightly observed, parochial[585] such that it embeds clear forum bias. However, renvoi also embeds its own forum bias, so its durability as a tool to discourage forum shopping is doubtful.

Neilson v OPCV: The High Court Decision

The Australian Law of Renvoi as Established in *Neilson*

Upon full examination of the High Court's pronouncements in *Zhang*, an argument for applying either single or double renvoi to tort is internally flawed. This is so, quite simply, because extending the renvoi doctrine to tort constitutes the introduction by stealth of a flexible exception to the *lex loci delicti* choice of law rule.[586] It defies the High Court's policy to do away with flexible exceptions. It also perverts the reality and the position submitted in this thesis that the Australian choice of law rule for transnational torts must be tempered by the introduction of flexible exceptions so as to be capable of responding, in the interests of justice and fairness, to the unduly harsh effects of absolutism and inflexible application of foreign law once pleaded and relied upon. The extension of the renvoi to

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[582] D Altaras, 'The Anti-Suit Injunction: Historical Overview' (2009) 75(3) *Arbitration* 327.

[583] The first record of an anti-suit injunction by an English court was *Love v Baker* (1665) 1 Ch Cas 67. The relief is directed at the defendant and not the foreign court. In the nineteenth century, anti-suit injunctions were endorsed by the House of Lords in *The Carron Iron Co v MacLaren* (1855) 5 HL Cas 416: see D Altaras, 'The Anti-Suit Injunction: Historical Overview' (2009) 75(3) *Arbitration* 327 at 329-330.

[584] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564 per Mason CJ, Deane, Dawson, Gaudron JJ following the principles stated by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-248. Reaffirmed in *Henry v Henry* (1996) 185 CLR 571 at 586-587; *Agar v Hyde* (2000) 201 CLR 552 at [112]-[115]; *Zhang* (2002) 210 CLR 491, 503 at [24]-[25] of joint reasons; also *Puttick v Tenon Ltd* (2008) 238 CLR 265; but cf *BHP Billiton v Schulz* (2004) 221 CLR 400.

[585] R Mortensen, 'Troublesome and Obscure: The Renewal of Renvoi in Australia' (2006) 2 *Journal of Private International Law* 1 at 26.

[586] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 38.

international torts litigated in Australia represents a radical departure from the traditionally cautious treatment of renvoi. Whilst the foreign court theory is an accepted part of the common law in the limited sphere of status cases, circumspection has been exercised at common law whenever there has been any attempt to affirm renvoi's use as a general tool for uniformity.

As *Neilson* aptly demonstrates, the extra evidential burden for litigants to plead and prove both (a) the foreign domestic law, and (b) the foreign conflicts law on renvoi, is a practical objection. Under Australian law, where courts cannot take judicial notice of foreign law unless it is pleaded and proved, the *lex loci delicti* choice of law rule itself surrenders to the expert witnesses an extravagant influence over the outcome of conflicts cases. A requirement to plead and prove foreign renvoi merely adds another dimension of unprincipled complexity and uncertainty to litigating transnational torts in Australia.

Unprincipled at First Instance

McKechnie J's decision to apply a renvoi, ultimately, was engineered to bring about a fair result for the plaintiff. His Honour conceded this point in his decision. Perhaps in another case, renvoi would result in a decision that, for a plaintiff, was manifestly unjust and unfair. McLure J was justified in holding McKechnie J's solution was not principled.[587]

Neilson v OPCV[588] illustrates the purposive rather than principled approach of a forum court faced with a rigid choice of law rule. *MMI v Neilson*[589] rejects the extension of renvoi to torts and reiterates the orthodox position of Anglo-Australian courts, and the majority of commentators, that renvoi ought not be a general theory of the conflict of law for broad application to decide claims involving foreign elements. The Full Court respected the policy of certainty and predictability in a choice of law rule,[590] and briefly brought Australia's position on renvoi in line with that of the UK. Reference to foreign law as including foreign conflicts rules is inherently illogical. However, a no renvoi solution is a logical solution. It is principled, promotes evidentiary certainty, and respects the court's assertion that Australia's choice of law rule for international torts should contain no

[587] *MMI v Neilson* (2004) 28 WAR 206 at [31] 'pragmatic rather than principled' per McLure J.
[588] [2002] WASC 231.
[589] (2004) 28 WAR 206.
[590] Ibid at [46]-[47] per McLure J.

flexible exception. Which only rendered the High Court's radical affirmation of renvoi more surprising.

Approaching the Appeal to the High Court of Australia

The Neilson High Court submissions were intended to illuminate a purposive and pragmatic approach to the problems thrown up by an inflexible choice of law rule, and addressed the practical operation of the *Zhang* rule. The issue of principle was the meaning of the '*lex*' in '*lex loci delicti*' and whether it encompassed all of the law of the place of the wrong.

On renvoi, they advanced this quotation from the 13th edition of *Dicey*:

> Down to 1926, the few decisions and dicta which recognise the renvoi doctrine were all consistent with a theory of partial or single renvoi. That is to say, the English Court first referred to the conflict rules of the relevant foreign law and, where there was a reference back to English law, applied the domestic rules of English law, without considering the possibility that the law of the foreign country might accept the renvoi from the English law and apply its own domestic law.[591]

The Neilsons argued for double or total renvoi theory, referencing *Re Annesley*[592] and *Re Duke of Wellington.*[593] Dr McClean and Ms Beevers note that *Re Duke of Wellington* is 'not an impressive authority in favour of the doctrine' because 'neither the judge nor the reporter indicated any difference between the domestic rules of English law and the relevant foreign law, nor why it was necessary to choose between them'.[594]

The Neilsons also relied on the dissenting judgment of Scrutton LJ in *Casdagli v Casdagli,*[595] approved in the House of Lords.[596] They quote the following observation:

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[591] D McClean & K Beevers (eds.), *Morris: The Conflict of Laws* (6th edn, 2005) 103.
[592] [1926] Ch 692.
[593] [1947] Ch 506.
[594] D McClean & K Beevers (eds.), *Morris: The Conflict of Laws* (6th edn, 2005) 69-70.
[595] [1918] P 89 at 111.
[596] [1919] AC 145 at 169, 175, 194 and 202.

> Practical and theoretical difficulties arise from the fact that, whiles England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicil, and the country of domicil looks to or sends back (renvoyer) the decision to the law of nationality, there is an inextricable circle in 'the doctrine of renvoi' and no result is reached. I do not see that this doctrine is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law to the subject-matter of the dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of the domicil, *which part would have spent its operation in the first remittance*. The knot may be cut in another way, not so logical, if the country of domicil says, 'We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects'.[597]

High Court's Decision – Extending Renvoi to International Tort

The High Court's pronouncements in *Neilson* radically extend the renvoi doctrine to tort cases involving foreign elements. It seems that the use of the renvoi doctrine was engaged to achieve justice and fairness to the plaintiff, because in its endorsement of the *lex loci delicti* choice of law rule in *Zhang*, the Court had excluded the *Chaplin v Boys*[598] flexible exception of balancing various connecting factors, which it might otherwise have applied to decide the *Neilson* claim.

Neilson is highly significant because it is the first decision of an ultimate common law court that uses the renvoi doctrine overtly. The High Court rejected the distinction between foreign domestic law and foreign conflicts rules, by characterising the '*lex*' in Australia's '*lex loci delicti*' choice of law rule as the entire law, including conflicts rules. In so doing, the plurality applied Australian principles of statutory construction with a double renvoi. Callinan J applied a single renvoi to achieve the same result with particular reference to the

[597] [1919] AC 145 at 169.
[598] [1971] AC 356.

need for a flexible exception to achieve a just and fair result.[599] Kirby J accepted that the double renvoi theory could apply to torts in Australia, but dissented because the plaintiff failed to prove that Chinese law would have referred the matter back to Western Australian law.[600]

With the exception of McHugh J,[601] the other members of the Court in substance accepted that it is a matter of applying the whole of the foreign law, when the choice of law rule in Australia selects the law of that place as the *lex loci delicti*.

Once the plurality (expressly, in the judgment of Gummow and Hayne JJ and impliedly, in the judgments of Gleeson CJ, Callinan and Heydon J, and also Kirby J) decided that it was not possible coherently to distinguish between choice of law rules and the entire body of law of a foreign system, each of the members of the court engaged in their own interpretation of:

a) what was the Chinese law, and in particular what was the interpretation to be given to Article 146;
b) what was the expert evidence below, about that law (to the extent that the court thought it necessary to consider that evidence to clarify interpretation).

In essence, Mrs Neilson succeeded because the plurality found that the entire law of the foreign legal system should be taken into account (with Kirby J also agreeing in this regard) [602] to find that the trial judge was entitled to take Article 146 into consideration.

The plurality (Kirby J then disagreeing at this point)[603] found that, in considering Article 146, it was correct for an Australian court to apply that provision of Chinese law and the flexible part of Article 146 (with its discretion to refer the matter to the national law of the parties) for reasons that include:

a) judicial assessment of the expert evidence on Article 146 under cross-examination and in particular the expert evidence on why the Chinese court would exercise the

[599] *Neilson* (2005) 223 CLR 331, 413 at [254]-[255] per Callinan J.
[600] Ibid, 401 at [219] per Kirby J.
[601] Ibid, 344-356 per McHugh J.
[602] Ibid, 387 at [171], 389 at [176] per Kirby J.
[603] Ibid, 393 at [192] per Kirby J.

discretion to apply Australian law as 'barely sufficient' but 'just enough' (Gleeson CJ);[604]

b) an obvious lacuna in the evidence and scant information available to inform the trial judge that included the text of Article 146 and expert evidence of the mere possibility that a Chinese court might apply Article 146 (Gummow and Hayne JJ);[605] and

c) the presumptive application of Australian principles of statutory construction (Callinan J and Heydon J).[606]

Kirby J dissented from the approaches of the majority as to what was the expert evidence below and what an Australian court should do if it considers that the expert evidence has relevant gaps. His Honour's opinion was that Mrs Neilson should lose for onus reasons, and specifically because she failed to demonstrate that the Chinese limitation period, which the respondent's expert proved was a substantive part of Chinese law, should not apply to bar her claim.[607]

In essence, OPCV failed because although they alone adduced evidence of Chinese law (with the appellant consistently, until the High Court, adopting the approach that the entire dispute was to be determined on the basis of Australian law, with no need to consider Article 146 or Chinese law at all), in doing so, they did not bring sufficient evidence to rebut the presumption that the Chinese court might apply Australian law, although the Neilsons did not plead the presumptive application of a discretion under Article 146, nor did the Neilsons discharge their onus to bring evidence of when and how a Chinese court would exercise the discretion under Article 146. Put in the alternative, the High Court effectively reversed the onus by its finding that OPCV did not conclusively prove that a Chinese court would *not* have applied the permissive limb of Article 146 and, by reference to that, go on to select and apply Australian tort law.

In the absence of sufficient proof by the appellant, the High Court was left to presumptively apply Australian principles of statutory construction to the Chinese statute. The presumption of identity thus permitted the Court to construe the Chinese law in the

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[604] *Neilson* (2005) 223 CLR 331, 343 at [17] per Gleeson CJ.
[605] Ibid, 370 at [117] per Gummow and Hayne JJ: 'evidence of Mr Liu about Art 146 was brief;' 371 at [121] per Gummow and Hayne JJ: 'an overtly abstract articulation by an expert of a foreign court's approach to the exercise of a power or discretion will be of little assistance;' 373 at [131] per Gummow and Hayne JJ.
[606] Ibid, 411 at [249] per Callinan J; at 416 at [266] per Heydon J.
[607] Ibid, 401 at [215] per Kirby J.

Neilson's favour. With the perfect vision of hindsight Gleeson CJ, Gummow and Hayne JJ had regard to the expert conceding the possibility that a Chinese court might 'possibly' apply general principles of justice and fairness in the interpretation of Article 146 notwithstanding those principles are in the nature of a flexible exception, and elevated the mere possibility to the 'sufficiency' to which the Chief Justice expressly referred.[608]

Even though there was sufficient evidence from both parties to conclude that the Chinese and Australian law were quite different, Callinan and Heydon JJ took the somewhat bizarre approach that an Australian court might apply principles of Australian statutory interpretation to a Chinese statute. It is little comfort that McHugh J, in dissent, convincingly derided this latter assumption.

The compelling traditional analysis constituted by McHugh J's concise and powerful dissent stands in contrast to the majority's unconventional and loose reasoning that has attracted scholarly criticism for its lack of intellectual discipline, or any real attempt to bring clarity to an area of the conflict of laws that remains cloaked in darkness.

The High Court's Rationale for Renvoi

To identify what each of the seven members of the court used as their rationale to conclude that double renvoi is compatible with Australia's choice of law rule for tort, this thesis has examined each of the six judgements individually.

No Renvoi: McHugh J

McHugh J identified the central question as whether renvoi is part of the Australian choice of law rule for tort.[609] His Honour noted the issue to be determined was whether Australian or Chinese law set the limitation period for Mrs Neilson's tort claim.[610] If Chinese law applied, the claim was statute barred by Article 137 of the General Principles, subject to any 'special circumstances' that might have extended the limitation period for personal injuries in China. Mrs Neilson failed to discharge the burden of proving special circumstances and could not rely on the special circumstances averted to in Article 137.[611]

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[608] Ibid, 395 at [201] per Kirby J; 411 at [247] per Callinan J.
[609] Ibid, 344 at [19] per McHugh J.
[610] Ibid, 347 at [33] per McHugh J.
[611] Ibid, 348 at [35] per McHugh J.

The Chinese choice of law provision at Article 146 mandates in its first limb that the law of the place where the infringement occurs shall apply, but in its second limb permits a flexible exception for foreigners. The law of the parties' place of domicil may also be applied. Mrs Neilson sought to rely on the flexible exception but McHugh J found that she also failed to discharge the burden of proving that the Chinese choice of law rule would choose to apply Australian law.[612]

McHugh J rejected the default presumption that Australian and Chinese choice of law are the same,[613] because Australian choice of law has no counterpart to the flexible exception in Article 146. Faced with a gap in the evidence, the presumption operated against Mrs Neilson. She tendered Article 146 into evidence, and on the balance of probabilities but without expert evidence, His Honour found that a Chinese court would apply Chinese law.[614]

An analysis of the doctrine of renvoi then followed. His Honour found that the appellant contended for single renvoi, and turned to whether the *lex loci delicti* should be characterised as the entire law, including choice of law rules.

McHugh J found that the 'infinite regression' of a double or total renvoi could only be avoided if Mrs Neilson had tendered evidence to show that Chinese renvoi rules are not total renvoi. There was no evidence on Chinese renvoi. The analysis underpinning the joint judgment of Gummow and Hayne JJ was faulted. Their joint judgment characterised Australian tort choice of law as the entire law, including choice of law. Chinese law would be presumed to select the entire law. McHugh J advocated rejecting total renvoi for tort, to avoid the 'infinite regression'.[615]

His Honour clearly asserted that it is logically impossible to apply the entire *lex loci delicti*.[616] Of the remaining options, either to reject renvoi or apply single renvoi, McHugh J favoured rejecting renvoi to allow for application of the *lex loci delicti* as to liability as fully as possible.[617] His Honour found that the plurality's view of the construction of

[612] Ibid, 348 at [35] per McHugh J.
[613] Ibid, 356 at [60] per McHugh J.
[614] Ibid, 349 at [37] per McHugh J.
[615] Ibid, 355-356 at [59] per McHugh J.
[616] Ibid, 353 at [48]-[49] per McHugh J.
[617] Ibid, 354 at [55]; 355 at [59] per McHugh J

Article 146 was flawed because it fixed upon 'the law of their own country or of their place of domicile' as meaning the substantive law and not the whole law of the parties' country or place of domicil. There was no evidence supporting that construction of Chinese law, and no evidence that a Chinese court would apply Australian substantive law and principles of statutory construction.[618]

Double Renvoi and Onus to Prove Foreign Law: Kirby J

Kirby J fixed upon his reading of the Chinese limitation periods at Articles 136 and 137 of the General Principles, and found that there was no basis for the trial judge to reject the expert evidence of Mr Hongliang Liu on the interpretation of Article 137, and to extend the limitation period even though Mrs Neilson brought no evidence of an 'objective barrier' that prevented her from commencing her claim within twelve months.[619] There was nothing patently absurd about the uncontradicted expert testimony, and it should have been accepted.[620]

On the interpretation and application of the Chinese law, Kirby J agreed with Gummow and Hayne JJ that it was unnecessary to fix a single theory of renvoi for foreign torts litigated in Australia.[621] The case turned on the meaning of Article 146. He purported to find a solution that was in harmony with the principle of certainty in *Zhang*, that *lex loci delicti* must be characterised as the entire foreign substantive law including any choice of law element. In that regard, he found that the Full Court erred in addressing Article 146 as a choice of law rule akin to renvoi.

His Honour also found that McKechnie J misconstrued the extent of his discretion to exercise the powers of a Chinese judge as if sitting in a foreign court. Asserting a right to choose the law of Australia in those circumstances was wrong, and McKechnie J's approach to Articles 137 and 146 were in error. The role of the forum judge was to ascertain, *from evidence*, how the foreign court would itself have resolved the substantive rights of the parties. McKechnie J was not at liberty to invoke his own interpretation that favoured one or other result, in the absence of any evidence.

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[618] Ibid, 355 at [58] per McHugh J.
[619] Ibid, 386 at [167] per Kirby J.
[620] Ibid, 391 at [185] per Kirby J.
[621] Ibid, 388 at [175] per Kirby J.

Finally, Kirby J was unconvinced by the efficacy of the presumption that the foreign law, if unproved, may be presumed the same as Australian law. His Honour called that presumption an 'unrealistic fiction'.[622] Kirby J found that Mrs Neilson failed because she has brought no evidence about Article 146 and how its discretion would be applied by a Chinese court, and in absence of how Article 146 would be applied in her favour, Article 136 applied to bar her cause of action.[623]

Double Renvoi: Gummow and Hayne JJ

Gummow and Hayne JJ declared that there was no authority on the meaning of the '*lex*' in '*lex loci delicti*'.[624] Their Honours considered the general principles on renvoi and noted the immense amount of scholarship in this area focussed more on theory than practical concerns for courts.[625]

Their Honours examined some of the reasons behind the rigid *lex loci delicti* choice of law rule and fixed upon three key premises: (1) that the parties should not obtain advantage from litigating in Australia versus China; (2) where possible, certainty and simplicity in a choice of law rule are to be embraced in a context of personal and professional mobility and that is a reason for avoiding exceptions or qualifications; and (3) the significant theories of renvoi whether total or single assume a dialogue between legal systems that does not in fact occur.[626] However, Their Honours rejected the general presumption that unproved foreign law is the same as Australian law, and found that it was not apt to presume a Chinese court would interpret and apply Chinese law in the same way as an Australian court construing that law.[627]

Gummow and Hayne JJ acknowledged their sharp departure from dominant views in Anglo-Australian law, most particularly in the vein of leading scholars including Dr Morris and his successors.[628] Their Honours fundamentally disagreed on the division of foreign law as 'domestic law' on the one hand, and 'choice of law' on the other.[629] They held such a classification to be artificial. Rejecting the distinction between domestic law and choice

[622] Ibid, 396 at [203] per Kirby J.
[623] Ibid, 401 at [219] per Kirby J.
[624] Ibid, 357 at [65] per Gummow and Hayne JJ.
[625] Ibid, 362 at [87] per Gummow and Hayne JJ.
[626] Ibid, 363 at [88] per Gummow and Hayne JJ.
[627] Ibid, 372 at [125]-[126] per Gummow and Hayne JJ.
[628] Ibid, 367 at [109] per Gummow and Hayne JJ.
[629] Ibid, 365 at [97] per Gummow and Hayne JJ.

of law, and fixed instead upon the entire foreign law as the law to be applied. Referring to only part of the law of the place of the tort did not, in their view, give proper effect to the Court's reasoning in favour of *lex loci delicti*.[630]

The parties did not bring evidence of how Article 146 is administered by Chinese courts. What little evidence there was did not represent an account of all principles relevant to Article 146.[631] Therefore, there was a gap in the evidence at trial. Faced with only the translated Chinese text, and a comment by the witness on cross-examination that Chinese courts examine principles of justice and fairness and might possibly apply Article 146, Their Honours held it was open for the trial judge to construe Article 146 and he was right to apply that article.

To dispose of the potential for a hall of mirrors, Their Honours interpreted Article 146 as providing a 'once (and) for all reference of the problem out of Chinese law and into the law of (Australia)'. Article 146 in its terms does not require a Chinese court to have regard to Australian choice of law.[632]

Single Renvoi and the Need for a Flexible Exception: Callinan J

Callinan J held that McKechnie J erred in his reasoning on the Chinese limitations period, but nothing turns on that. His Honour also identified the gap in evidence on Article 146 and found that notwithstanding the limitations period under Article 136 had expired, a Chinese court would apply Article 146 to apply Western Australian law, including a Western Australian limitations period, and that a Chinese court would not 'read and apply *Zhang* as part of Australian law, requiring it to apply Chinese law only (double renvoi)'.[633] That passage of the judgment is ambiguous.

Since no evidence was brought on the Chinese approach to construing Article 146, Callinan J applied Australian principles of construction on the presumption that the Chinese and Australian approach was the same. His Honour held that 'on balance' a Chinese court was likely to prefer the application of Australian law.[634]

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[630] Ibid, 369 at [110]-[111] per Gummow and Hayne JJ.
[631] Ibid, 372 at [126] per Gummow and Hayne JJ.
[632] Ibid, 373 at [131] per Gummow and Hayne JJ.
[633] Ibid, 410 at [244] per Callinan J.
[634] Ibid, 413 at [254] per Callinan J.

Callinan J found no circularity because in this case, all parties were Australian and were in Australian and, further, there was no contest between courts. These told against an infinite rebounding between Chinese and Australian law.[635] Callinan J stated that choice of law rules are part of a country's domestic law and should not be applied mechanically.[636] Callinan J concluded that if the evidence showed that a foreign court would likely apply Australian law, Australian law should govern the action on a single renvoi.

Heydon J

Heydon J adopted Australian principles of statutory construction,[637] presumptively, to find that a Chinese court would have exercised the discretion to apply the second limb of Article 146, if the proceedings had commenced in China.

His Honour stated it would be 'absurd' to apply Chinese law absent Article 146,[638] and it would be equally absurd for an Australian court to exclude the provision of Chinese law expressly applying to foreigners in favour of Chinese law, in circumstances where a Chinese court would not apply Chinese law. Applying Article 146 was not a flexible exception to the rigid Australian *lex loci delicti* position, but merely a consequence of the specific application of Chinese law.[639] Heydon J avoided the circularity of renvoi by construing Article 146 as leading to an application of domestic Australian law.

Gleeson CJ

The Chief Justice was reluctant to approach the *Neilson* case as one of renvoi. His Honour identified the gap in evidence, and noted that if Article 146 applied to remit the matter to the law of the forum, then the Chinese limitations periods under Article 136 and 137 were irrelevant.[640]

Where both parties are nationals of the same country, Article 146 was permissive in saying the law of their country *may* be applied.[641] His Honour accepted the appellant's arguments on Article 146 and there was no evidence that applying Article 146 would establish an

[635] Ibid, 413 at [257] per Callinan J.
[636] Ibid, 414 at [257]-[258] per Callinan J.
[637] Ibid, 417 at [268] per Heydon J.
[638] Ibid, 418 at [271] per Heydon J.
[639] Ibid, 421 at [283] per Heydon J.
[640] Ibid, 341-342 at [12] per Gleeson CJ.
[641] Ibid, 342 at [15] per Gleeson CJ.

infinite regression by requiring Chinese law to accept a reference back from Australia.[642] In the Chief Justice's view, directing the Western Australian court to Chinese law but requiring that it ignore the Chinese choice of law rule for foreigners at Article 146, which was part of the respondent's argument, ensured a difference of outcome depending on where proceedings were commenced.

Whether a Chinese court would resolve the dispute by applying Western Australian law and exercising its discretionary power under Article 146 was a question of fact. If the Western Australian court decided in the affirmative, it would apply Western Australian law to govern the dispute. As to whether the Western Australian court was entitled to decide the question affirmatively, the Chief Justice rejected the general presumption that, absent evidence, foreign law is the same as Australian law. Moreover, the Chief Justice found that the second limb of Article 146 was a flexible exception to the *lex loci delicti* rule in the first limb, and Australia does not accept flexible exceptions.[643]

Gleeson CJ found that a 'possibility' that a Chinese court would use its discretion under Article 146 was barely sufficient evidence from the foreign law expert[644] to support McKechnie J's conclusion that Article 146 depended on general principles of justice and fairness.[645] His Honour agreed a Chinese court would apply Australian law because Chinese authorities were unaffected by the outcome, and had no reason to resist the application of Western Australian law to resolve this dispute.

Summary

The diverse High Court decision in *Neilson* illustrates the direct application of a number of assumptions and devices to arrive at a pragmatic decision that would not otherwise have been open to the Court without renvoi. *Neilson* presented very strong connections with China, as that was the place of the tort and the place of work and residence of the plaintiff at the time of injury. The only connection with the law of Western Australia was that she resided there by the time of filing her claim. The renvoi from the *lex causae*[646] to the *lex domicilii/lex patriae*,[647] including the principles of statutory construction of the forum,

[642] Ibid, 341-342 at [12] per Gleeson CJ.
[643] Ibid, 341 at [10] per Gleeson CJ.
[644] Of the respondent.
[645] *Neilson* (2005) 223 CLR 331, 343 at [17] per Gleeson CJ.
[646] Chinese law.
[647] Australian law.

filled gaps left in the evidence of foreign law. The *lex domicilii* of Western Australia could be reached only with a renvoi from the laws of China, but was more favourable to the interests of Mrs Neilson to assure her a valid action,[648] and in terms of damages.[649]

Despite the noble goals of uniformity, certainty and predictability espoused in *Zhang* and *Pfeiffer*, and the supposedly absolute choice of law rule for intra-national and international tort where the parties have elected to plead and prove foreign law, the High Court was prepared to apply judicial creativity without regard to the development of the doctrine of the renvoi and its broader implications.

The Case for a No Renvoi Solution

This thesis endorses the approach taken by Lu and Carroll in the *Journal of Private International Law*, where it was observed that by defining the law of the wrong as the municipal or domestic law, to exclude choice of law rules, the no renvoi approach would have been simple, logical and more consistent with the High Court's *lex loci delicti* rule without flexible exceptions.[650] A narrowed definition of *lex loci delicti* would have been more readily administered. As Lu and Carroll observe, '[t]he *lex loci delicti* rule already requires parties to an international tort dispute to prove foreign domestic law as a fact by the adduction of expert evidence'.[651] The parties to international tort claims are now confronted by an additional obligation, to plead and prove foreign conflict of laws. The *lex loci delicti* rule, as Lu and Carroll have identified, 'arguably places a considerable burden upon foreign law experts, and provides them with a high degree of influence over forum judges applying foreign law. The ambit of a foreign law expert's influence over the forum court should be limited where possible'.[652]

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[648] Australian law characterises limitation periods as substantive for intra-national torts: see *Pfeiffer* (2000) 203 CLR 503, 544, 554, 570, cf *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. It was then extended to international torts by *Zhang* (2002) 210 CLR 491.

[649] Although the parties had by trial agreed Mrs Neilson's damages, so the quantification of her damages did not arise for judicial determination. Australian law characterises the assessment of damages as substantive for intra-national torts in *Pfeiffer* (2000) 203 CLR 503, cf *Stevens v Head* (1993) 176 CLR 433.

[650] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 63.

[651] Ibid.

[652] Ibid.

Respecting the High Court: Rejection of the Flexible Exception[653]

The High Court's decision to resolve *Neilson* by applying renvoi meant that an opportunity to introduce a true flexible exception to Australia's tort choice of law rule was lost. *Zhang* remains authoritative, and it may be some time[654] before another tort choice of law or renvoi case reaches the High Court.

Renvoi is a device to prefer *lex fori,* which is not the High Court's enunciated choice of law rule for tort. Its application also confounds party expectation by picking up foreign choice of law rules and applying them in the forum.

Simple and Logical Operation

The no renvoi solution is one which Lu and Carroll recognise 'proceeds upon the common-sense approach that a choice of law rule should not be applied more than once to resolve a conflicts dispute. The rejection of renvoi's application to tort is as simple as defining *lex loci delicti* as the domestic law of the place of the wrong',[655] as the Western Australian Full Court did in *MMI v Neilson.* The conundrum of the infinite regression is thus avoided, due to the exclusion of choice of law rules from the definition of domestic law.

Callinan J conceded that any renvoi solution applied to the inflexible choice of law will not be entirely logical:

> No matter which solution is adopted by Australian courts, the result will not be entirely satisfactory intellectually and in logic. This does not stem wholly however from the unwillingness of the Court to recognise in *Zhang* what in hindsight might have resolved this case, a flexible exception in special circumstances of the kind which [is contemplated by Article 146], but from the fact that absolute rules however apparently certain and generally desirable they may be, almost always in time come to encounter a hard and unforeseen case.[656]

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[653] This and the following two headings are adopted from A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 63-64.
[654] Although *Puttick v Tenon Ltd* (2008) 238 CLR 265 was an international tort case to reach the High Court after *Neilson*, the results in *Puttick* were not conclusive.
[655] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 64.
[656] *Neilson* (2005) 223 CLR 331, 413 at [256] per Callinan J.

Evidentiary Certainty

As recognised by Lu and Carroll,[657] Professor Sauveplanne's survey of renvoi in various civil and common law countries as at 1988 recognises that many legal systems have considered renvoi but many others have not.[658] Since Professor Sauveplanne completed his survey, many jurisdictions have enacted private international law legislation.[659] However, Maugham J's observations from *Re Askew,*[660] that the application of renvoi depends on the 'doubtful and conflicting evidence of foreign experts', remains true.[661] Wynn-Parry J deciding *Re Duke of Wellington* clearly articulates the point:

> It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would have been expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction.[662]

The *lex loci delicti* rule mandates application of foreign law in each transnational tort dispute where the *locus delicti* is not Australia, and when the foreign law is raised.[663] In each case where foreign law is pleaded and proved as a fact, there is the possibility of competing evidence or gaps in evidence as each party seeks either to emphasise the aspects of the foreign law that are of maximum advantage to its cause, or to de-emphasise what is forensically unhelpful.

Although much has been written about the proof of foreign law, it was Professor Falconbridge who best summarised the common law position on who is entitled to act as

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[657] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 64.
[658] J G Sauveplanne, 'Renvoi' (ch 6) of 'Private International Law' *International Encyclopedia of Comparative Law* (3rd vol, 1990).
[659] Discussed in chapter three e.g. the United Kingdom: see s 11 of the *PIL Act* which, unlike the recently enunciated Australian position in *Zhang*, preserved a flexible exception to the choice of law rule in tort (s 11(2)). However, the Act only applied to tort claims that would have been governed by the *Phillips v Eyre* rule, so parties seeking to involve the Act must always start with *Phillips v Eyre*. It also preserved the *Phillips v Eyre* double actionability rule in the case of defamation: see s13. The *PIL Act* has now been replaced by the Rome II Regulation.
[660] [1930] 1 Ch 259 at 278.
[661] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 64.
[662] [1947] Ch 506 at 515; quoted also in A Lu & L Carroll, ibid.
[663] This extends the point raised by A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 65.

an expert in foreign law cases.[664] He put them in two categories. The first category is the practitioners such as lawyers and judges who have practical experience applying the foreign law. Their evidence is likely to be preferred as best evidence. The second category is academics, civil servants, and others with an understanding of the foreign law.

This thesis has earlier outlined the need for an expert to satisfy any prescriptive criteria of court procedure on what constitutes expert evidence. The treatment of the evidence is subject to the relevant procedural rules including rules of evidence of the forum. Lu and Carroll[665] state that

> Where more than one party to litigation brings an expert on foreign law before a forum judge, who is unfamiliar with foreign legal rules and parameters, there is much scope for the foreign law to be misapplied. Fentiman[666] points out that in a survey of 40 US cases in which foreign law was pleaded, 32 of those cases show that foreign law was misapplied.

Where the forum court might have applied the foreign law in a particular manner to determine a dispute, the Australian characterisation of foreign law as a question of fact means that the doctrine of precedent does not apply to bind any court, contrary to a statement of Harper J in *Puttick v Fletcher Challenge Forests Ltd.*[667] Further, erroneous interpretation of foreign law and its application will be considered as errors about a finding of fact, and not as errors of law, so may not be revisited when appealing errors of law.[668]

Previous decisions on foreign law are therefore not admissible in Australian courts even if it is asked to determine a foreign law that has previously been decided upon by the same or a different Australian court.[669] Tort claims with foreign elements are common to Australian

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[664] J Falconbridge, 'Renvoi, Characterization and Acquired Rights' (1939) 17 *Canadian Bar Review* 369 at 400.
[665] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 65.
[666] R Fentiman, 'Foreign Law in English Courts' (1992) 108 *Law Quarterly Review* 142 at 151. As to this figure, Kirby J comments that 'Justice normally likes to be concerned with getting a decision right': see *Neilson v Overseas Projects Corporation of Victoria* [2005] HCA Trans 194 at p29.
[667] *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 at [35]. Reversed by the High Court in *Puttick v Tenon Ltd* (2008) 238 CLR 265.
[668] *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402 per Hargrave J.
[669] *Neilson* (2005) 223 CLR 331 at 370 per Gummow and Hayne JJ.

courts,[670] thus it is conceivable that at least some foreign law may come before Australian courts for determination on multiple occasions.[671]

This thesis does not argue for a change in the conceptualisation of foreign law as law rather than fact. The conceptualisation of foreign law as a fact to be proved is adequate to guard against further appeals on errors of law. It also controls the impact upon professional indemnity insurance regimes for foreign law experts. If they were giving evidence of foreign law as law rather than foreign law as fact, this could expand tensions between the expert's obligations to the court and the expert's obligations to his clients.[672]

As Lu and Carroll highlight, 'the comments of Mendelssohn-Bartholdy,[673] to the effect that so-called foreign law experts on German law have been known to quote judgments of the German courts "which are freely criticised in Germany as bad law and are in contradiction with the authorities there", are not comforting.[674] Within the non-inquisitorial system, the forum judge is in an awkward position because he or she is bound to take judicial notice only of expert evidence before him or her'.[675] The additional influence surrendered to, or burden imposed upon, foreign law experts who must be able to give evidence of foreign renvoi as part of the *lex loci delicti* applicable in the forum, is considerable.

The single or double renvoi approaches, both of which introduce the need for pleading and proof of foreign conflict of laws and foreign renvoi, interpose an extra layer of uncertainty for the parties to foreign tort litigation.[676] Whereas an expert who is a legal practitioner in the area of tort law may prove the domestic *locus delicti*, it will be more onerous to prove conflicts rules and renvoi.

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[670] For example, since *Zhang*, the foreign tort claims litigated in Australia include *Garsec Pty Ltd v His Majesty the Sultan of Brunei & Anor* [2008] NSWCA 211; (2008) 250 ALR 682 (Brunei); *Mills v Commonwealth* [2003] Aust Torts Reports ¶81-714, [2003] NSWSC 794 (Cambodia); *Neilson* (2005) CLR 331 (People's Republic of China); *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690 (New Zealand); *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 (New Zealand), *Puttick v Tenon Ltd* (2008) 238 CLR 265 (New Zealand), *Dyno Wesfarmers v Knuckey* [2003] NSWCA 375 (Papua New Guinea).

[671] There have been a number of cases involving New Zealand law, for example in *Amaca v Frost* and *Puttick v Tenon* the New South Wales and Victorian courts interpreted section 394 of the *Accident Insurance Act 1998 (NZ)* as substantive (NSW) and procedural (Vic). This observation is made also by J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400 at 416.

[672] Australian jurisdictions have expert witness codes of conduct that must be acknowledged by experts giving factual evidence. If a foreign legal practitioner were advising a plaintiff or defendant on foreign law, query whether an expert's misconstruction of foreign law that leads the court to make an error of fact may be sufficient grounds for a professional negligence claim or the reporting of the foreign practitioner to their relevant professional association.

[673] A Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) at 29.

[674] Ibid.

[675] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 65.

[676] Ibid.

Dramatic technological developments in the electronic and on-line delivery of information on foreign legal systems might assist parties to international tort cases to plead and prove foreign law. However, this is not necessarily the case, given that expert evidence is still required to avoid the default presumption of identity and therefore the default application of the forum law to determine the issue.[677] The presumption has been the subject of separate criticism, and *Neilson* is a valuable case for discussions around the onus of proving foreign law and who might be entitled to prove foreign law. The presumption still applies whenever there is a gap in the proof of the foreign law unless enough of the foreign law has been proved to displace the presumption.[678] The construction of foreign law and the application of foreign law will be uncertain because it depends on the robustness of the evidence of the foreign law, and its interpretation, and of how any discretion might be applied by the forum.[679] If the proof of foreign law was incomplete but insufficient to displace the presumption of identity, the forum will apply its own law or techniques of interpretation to overcome the deficiencies in that proof.

For the purposes of the *Neilson* trial, McKechnie J accepted that a practitioner from China was appropriately qualified to prove the law of China, by reading from the text of the General Principles. The High Court in *Zhang* affirms that position.[680] Finally, even if the foreign law is pleaded and proved at first instance, foreign law is a question of fact, as Mr McComish has called it, 'of a peculiar kind'.[681]

Exceptions Revisited

The use of renvoi as a device to achieve flexibility in the absence of flexible exceptions is unique to the Gleeson High Court. This thesis submits that it is undesirable and inappropriate, and contradicts *Zhang*. Other jurisdictions such as Canada and the UK with *lex loci delicti* as the choice of law rule have incorporated flexible exceptions.[682] The UK

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[677] A Lu & L Carroll, 'Ignored No More' (2005) 1 *Journal of Private International Law* 35 at 66.
[678] But exactly how much evidence is sufficient to displace the presumption of identity is unclear.
[679] *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209 per Gummow J.
[680] *Zhang* (2002) 210 CLR 491, 518 – 519 at paras [70]-[72]; *Dyno Wesfarmers Ltd v Knuckey* [2003] NSWCA 375 at paras [54]-[55] per Young CJ. See also *Walker v WA Pickles Pty Ltd* [1980] 2 NSWLR 281 per Hutley JA: 'a fact presumed to be true does not have to be pleaded'.
[681] J McCormish, 'Pleading and Proof of Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400 at 415. The phrase 'a question of fact of a peculiar kind' is acknowledged as coming from Cairns J in *Parkasho v Singh* [1968] P 233, 250.
[682] For an analysis see R Mortensen, 'Homing Devices in Choice of Tort Law (2006) 55 *International and Comparative Law Quarterly* 839.

has done so through legislation[683] for claims after 1 May 1995 and at common law through the *Boys v Chaplin* double actionability with flexible exception, and Canada has done so at common law through precedent.[684]

In the US, the flexible 'most significant contracts' formula was espoused by the New York Court of Appeals in *Auten v Auten*[685] to moderate the harsh effects of the *lex loci contractus* choice of law rule for contract. *Lex loci contractus*, from the *Restatement (First)*, initially found favour with most states and with the US Supreme Court. In his essay on the distinction between unilateral and multilateral methodologies around choice of law, Juenger[686] characterises this as 'soft multilateralism', or rather, unilateralism with multilateral elements.

Professor Juenger recognises[687] that it was Dr Morris, publishing in the *Harvard Law Review*, who first proposed extending the flexible connecting factor to choice of law in tort.[688] The New York Court of Appeals endorsed this approach in *Babcock v Jackson*[689] with the 'most significant contacts' test. The 'most significant contacts' test is mirrored in the *Restatement (Second)*,[690] thus confirming flexible connecting factors and a 'soft multilateral' approach to choice of law in the US.

In his essay, *'The Problem with Private International Law'*,[691] Professor Juenger applies Professor Batiffol's term 'methodological pluralism' to describe the strained coexistence of unilateralism and multilateralism. As Dr Schoeman observes,[692] it is important in the pursuit of conflicts justice in international tort cases to attain certainty and predictability, and that is achieved through promoting uniformity of decisions across jurisdictions. Harmonisation is desirable, if not practically achievable, and the utility of a theory in the conflict of laws must be balanced against whether and to what extent it is able to support the goals of certainty and harmony.

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[683] *PIL Act* s12; now replaced by the Rome II Regulation.
[684] *Tolofson v Jensen* (1994) 120 DLR 4th 289; P Kincaid, *'Jensen v Tolofson* and the Revolution in Tort Choice of Law' (1995) 74 *Canadian Bar Review* 537.
[685] 124 NE 2d 99 (NY 1954).
[686] F K Juenger, *Choice of Law and Multistate Justice* (1993) at 13.
[687] F K Juenger, '*The Problem with Private International Law*', Centro di studi e ricerche di diritto comparator e straniero, Saggi, conferenze e eminari 37, Rome 1999, at 16.
[688] J Morris, 'The Proper Law of a Tort' (1951) 64 *Harvard Law Review* 881.
[689] 191 NE 2d 279 (NY 1963).
[690] American Law Institute, *Restatement (Second) Conflict of Laws* (1971) §§ 145 (torts), 188 (contract).
[691] F K Juenger, '*The Problem with Private International Law*', Centro di studi e ricerche di diritto comparator e straniero, Saggi, conferenze e eminari 37, Rome 1999, at 20.
[692] E Schoeman, 'Renvoi: Throwing (and Catching) the Boomerang – *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2006) 25 *University of Queensland Law Journal* 203 at 211.

Application of *Neilson* to Other International Tort Cases in Australia

Whilst *Neilson* has not been directly applied on the renvoi point to reach a substantive decision in any subsequent international tort claim, it has left open for contract cases by *O'Driscoll*[693] and cited in the context of anti-suit injunctions and as authority for the proposition that the when Australia's choice of law rule requires the application of foreign law, the entire foreign law should be applied. This reinforces the notion that foreign law is more frequently pleaded defensively at an interlocutory stage in Australian courts.

Authority for Applying the Entire Foreign Law

For example, in *Garsec v His Majesty the Sultan of Brunei*,[694] the claimant alleged a breach of contract to purchase a manuscript of the Koran by the Sultan, and his Private Secretary. Garsec sought specific performance of the contract. In the alternative, Garsec pleaded a breach of warranty and the tort of negligent misstatement, and sought damages. Article 84B of the Bruneian Constitution granted the Sultan immunity from suit. He applied for a *forum non conveniens* stay of the New South Wales proceeding. The *lex causae* was Bruneian law, being the proper law of the contract.

A stay was granted at first instance, and upheld by the New South Wales Court of Appeal, which found that the characterisation of a foreign law as either substantive or procedural is done by the forum law of Australia, not by the *lex causae*. Thus, it was not relevant how the Bruneian law might have characterised the immunity conferred on the Sultan by the Bruneian Constitution. The statutory immunity then being characterised by the Australian law as substantive because it was a matter that went to 'the existence, extent or enforceability of rights',[695] it should then be applied by the forum court as a part of the *lex causae*. In relation to the immunity, Garsec gained no juridical advantage by claiming in New South Wales or Brunei. The forum is not required to balance advantages and disadvantages in determining if the forum is clearly inappropriate.

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[693] [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA, Murray AJA, 22 February 2006).
[694] (2008) 250 ALR 682.
[695] In accordance with *Pfeiffer*.

Garsec sought special leave to appeal to the High Court on the characterisation point; it was heard on 17 February 2009.[696] It was referred to an enlarged bench of the court for further written submissions, but the appeal was discontinued before hearing.

The case affirms that forum law will be used to characterise the foreign law, and follows *Neilson* to the extent that Gummow and Hayne JJ submitted that the entirety of the foreign law should be considered, and that 'to take no account of what a foreign court would do when faced with the facts of [a] case does not assist the pursuit of certainty and simplicity. It does not assist the pursuit of certainty and simplicity because it requires the law of the forum to divide the rules of the foreign legal system between those rules that are to be applied by the forum and those that are not'.[697] Australian courts may on the one hand be required to consider the whole of the foreign law, and yet may not find the spectre of renvoi in any way a challenging concept in this context.

As Authority for the Default Application of Australian Law

Neilson has also become general authority for the proposition that if the content of foreign law is not proven, the forum law applies. That is notwithstanding the various observations of the plurality that the presumption of identity should not be applied mechanically if there is evidence that the forum and foreign laws are substantially different. In *Nicola v Ideal Image*,[698] Perram J of the Federal Court accepted that where the evidence adduced by a foreign law expert is rejected, Australian law should be applied presumptively to construe an arbitration clause in a contract.

Renvoi as a General Theory of the Conflict of Laws: *O'Driscoll*

Since the High Court extended renvoi to tort, there has been abundant academic commentary on renvoi. There have also been a few noteworthy judicial developments within and without Australia. Within Australia, there remains the prospect of renvoi's broader application.

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[696] Gummow, Heydon and Kiefel JJ.
[697] *Neilson* (2005) 223 CLR 331, 364 at [94] per Gummow and Hayne JJ; quoted in *Garsec Pty Ltd v His Majesty Sultan of Brunei Darussalam & Anor* [2009] HCA Trans 021 (13 February 2009).
[698] *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1, 9 at [23].

The majority in *Neilson* treated renvoi as a doctrine of general application. The judgments contain clear statements by Gummow and Hayne JJ[699] that renvoi could be applied as a general theory. This and the rest of the majority's remarks are a bold assertion, but unprincipled - there is no statement of the principle that underpins the assertion and no supporting authority.

The obiter remarks of McLure J in *O'Driscoll* may provide scope for the future expansion of renvoi into Australian contract disputes involving foreign elements.[700] However, such expansion depends upon the renvoi advocates overcoming a lack of theoretical or practical support for the doctrine's extension, especially in contract, and finding a principled basis for its expansion.

Future Direction of Renvoi

The future of renvoi at common law remains as uncertain as it has always been, although there is a trend towards legislative intervention to abolish the doctrine. Australia has no choice of law legislation, contrary to recommendations of the Law Reform Commission. Thus, the merits and demerits of the theory continue to be debated at common law. As a general theory of the Australian conflict of laws, it remains to be seen whether Australian courts and any other common law courts may be prepared to apply the renvoi in the manner sanctioned by the High Court in *Neilson* to another tort case.

As the UK, the EU, and the US have all legislated to exclude the renvoi doctrine from tort and contract, the theory's potential application in law tort and contract cases is restricted to those cases to which the common law still applies. The most recent case in the UK that touches upon the renvoi is the international arbitration case of *Dallah Estate and Tourism Holding Company v Government of Pakistan,*[701] which at the time of writing was on appeal to the Supreme Court of the UK.[702] The choice of law rules of England and of France were raised for consideration. The dispute concerned recognition and enforcement of an award under the 1958 New York Convention and whether the English forum court had discretion to refuse enforcement of a foreign arbitral award. Section 103(2)(b) of the *Arbitration Act 1996 (UK)* permits refusal of recognition or enforcement of a New York Convention

[699] *Neilson* (2005) 223 CLR 331 at 367-368 per Gummow and Hayne JJ.
[700] *O'Driscoll* [2006] WASCA 25 at [12] – [13].
[701] [2009] EWCA Civ 755.
[702] Leave granted December 2009.

arbitral award if it is proven that: 'the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made'. The arbitration agreement was governed by French law. At first instance[703] Aikens J contemplating renvoi asked 'does the phrase "within the law of the country where the award was made" in section 103(2)(b) include a reference to the conflict of laws of that country?'[704]

The expert evidence of French law was unclear. Both the *Arbitration Act 1995 (UK)* and the New York Convention are silent on renvoi. Aikens J, taking the expert evidence as he found it, held that he was bound to apply French substantive law. His Lordship left open the possibility of applying French choice of law rules, if evidence of them had been adduced, with obiter remarks that:

> As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law...The statement cannot, of course, identify any principles of 'transnational law' by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a 'transnational law' expert; none gave evidence before the court.[705]

Whether the UK could in the future find some basis to admit renvoi in the enforcement of arbitration awards is a matter of contention. Such a step would be radical and, in the context of a general disapproval of renvoi in the UK, will require compelling arguments. The High Court's radicalism in *Neilson* may provide support for such arguments.

Renvoi Doctrine as Part of the Australian Common Law

The dying light of the common law remains brightest in Australia. It follows that if the renvoi doctrine is to develop further in tort and contract and other areas of the common law such as unjust enrichment and restitution, it is more likely to occur here. Australian judges have also shown originality in their approach to achieve the correct outcome, even with unprincipled and unorthodox methods. This is the pragmatic rather than principled theme

[703] [2008] EWHC 1901 (Comm).
[704] Ibid at [78].
[705] Ibid at [93].

that runs through the judicial approaches to the *Neilson* case from McKechnie J at first instance to the diverse majority of the High Court.

The general comments of Gummow and Hayne JJ in the High Court do not restrict renvoi to international tort cases litigated in Australia. Accordingly, *Neilson* has revived renvoi and rendered it susceptible to application in any conflict of laws case in any Australia court where general principles of 'fairness and justice' may be served. This includes where the forum's law can only be reached by a renvoi from foreign law, and where the forum court perceives the foreign law as unduly harsh or productive of the wrong result by strict application. The High Court considered itself unfettered by precedent or other constraints to endorse the renaissance of renvoi. The decision was undisciplined because the principles of renvoi were not judicially analysed, and do not appear to have been considered within a justifiable theoretical framework.

Dr Gray suggests that *Neilson* invites development of a theoretical framework for the expansion of renvoi.[706] This thesis argues against promoting renvoi's expansion and advocates its rejection. Either way, much future work will need to be done by courts. To respond to *Neilson*, future courts must distil some principles from the judgment that are worth developing. The minority views of Kirby and McHugh JJ will be of greatest assistance. Australian courts have been slow to adopt interest analysis in the way of US courts. Only Kirby J alluded to interest analysis, in his dissenting references to the Chinese economy and its interest in promoting Western investment.

Two possible responses to the peculiar Australian position are that future courts regard *Neilson* as entirely distinguishable on its facts, or represents approval of renvoi as a general common law theory, available to judges searching for a basis to apply *lex fori* and to therefore soften the inflexible tort choice of law rule. For those wishing to escape the application of *lex loci* on liability, it is authority for applying choice of law rules of the *lex loci delicti*.

In practice, the *Neilson* case shows that the court was prepared to be responsive to the claim by an individual plaintiff, whose award of damages was dependent on a finding that the internal law of the foreign law area, and the Chinese limitation period, did not apply. The renvoi was the forum's sole means of avoiding the strict application of the law of

[706] A Gray, 'The Rise of Renvoi in Australia' (2007) 30(1) *University of New South Wales Law Journal* 103.

China as to liability; that law having pleaded by the defendant and proved for the defendant's purposes, it had to be applied for all purposes. It is apparent that had the court been able to apply *lex fori*, or were it able to apply a true flexible exception to the *lex loci delicti* choice of law rule, the same outcome for the plaintiff could have been reached without invoking renvoi. As Mr McComish observed, a 'consistent and probably deserved criticism of the traditional English presumption of identity is that it is systematically unfair to defendants' in that it may 'compel the defendant to incur the expense of disproving the presumption'.[707]

The *Neilson* decision does not represent the full and proper application of double renvoi, because the High Court did not fully consider or provide reasons for its application of Chinese law to remit the claim for determination by the *lex fori*. Although it stated that it would interpret the *lex loci delicti* to mean all the laws of the foreign law area, including rules of the conflict of laws, it could not - and did not - apply all of the Chinese laws in its response. It applied only the permissive limb of choice of law Article 146 and presumed, in absence of proof, that Article 146 would be construed in Neilson's favour. It therefore applied something less than the *lex loci delicti*, although it accepted that it should apply as much of the Chinese law as possible.

The plurality appeared to be comfortable shearing off the Chinese limitation period from the substantive Chinese law even though this was fully proved by uncontested expert evidence, and to progress straight to the conflict of laws rules that provided discretion to remit the matter to the forum. In spite of the fact that OPCV clearly adduced evidence that the Chinese limitation period was regarded in China as substantive law and not procedural, and notwithstanding the absence of an extension to the limitation period which operated to objectively bar the claim, the court approached its problem solving by presuming that the Chinese court would apply Australian law and the Australian limitation period.

Only the minority considered the Chinese limitation period. McHugh J applied the Chinese substantive law on a no renvoi approach, and accepted the clear expert evidence of the Chinese limitation period.[708] Of the judges in favour of renvoi, only Kirby J seems to have been prepared to accept the foreign law expert's evidence that (a) Chinese limitations were substantive and (b) he was not aware of cases where exceptions to the limitation period had

[707] J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400 at 440.
[708] *Neilson* (2005) 223 CLR 331 at 355-356 per McHugh J.

been applied because the appellant brought no such evidence before the court. He was thus bound to apply the Chinese limitation.[709]

By ignoring the limitation period and proceeding to the choice of law rule, the plurality was able to decide that the Chinese law referred the question back to Australia, even though there was no evidence on how Chinese courts would interpret the poor drafting of Article 146 containing three different choice of law rules, and how it might permit the application of Australian law. The plurality applied Australian principles of statutory construction to interpret the permissive limb of Article 146 as importing a discretion to remit the matter for determination by Australian law, and was prepared to exercise that discretion to achieve justice and fairness for Mrs Neilson.

Neilson demonstrates the problem of the renvoi as an exception to an inflexible choice of law rule. Whilst this is a novel use of renvoi, it also harshly illuminates the tendency of renvoi to favour *lex fori*. In the context of the inflexible *lex loci delicti* choice of law rule, the undisciplined way in which the High Court embraced renvoi as an escape device surprised many and has gathered steady criticism of a decision that was ill considered and wrong in principle. Unfortunately, inferior courts are bound to take judicial notice of *Neilson* as an acknowledgement that the renvoi doctrine may be a general theory of Australian law. As to the double renvoi approach, this thesis affirms the observations of Sir Lawrence Collins in *Dicey* that 'it is hardly an argument for the doctrine of total renvoi that it is workable only if the other country rejects it'.[710]

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[709] Ibid per Kirby J at 414. The plaintiff did not bring any application to extend the relevant limitation period, since her case had relied on the application of the Western Australian limitation period of six years. The Australian position on limitation periods is clear. The basic principle is that there is no presumptive right for an applicant to be granted an extension of time, and applicants for extensions of time have the onus to prove that a respondent will not be prejudiced by the Court's exercise of discretion to extend time. In *Web Scaffolding Pty Limited v Laws* [2009] ACTSC 78 (10 July 2009), the Court cited with approval the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. It confirms that any discretion to extend time is a discretion to grant, and not to refuse. Accordingly, the onus of satisfying a Court that its discretion to extend time should be exercised rests on the applicant. In *Web Scaffolding*, Master Harper granted an extension of time and reinstated the proceedings on grounds that the defendant had not demonstrated that the plaintiff's delay had either caused the defendant significant prejudice, or prevented the defendant from receiving a fair trial. On appeal, Buchanan J found an error of principle as the application to extend time 'was not assessed by reference to the onus which he carried. Rather, the onus was imposed on the defendant'. Buchanan J held that the plaintiff had a clear and positive onus to explain his delay in bringing proceedings, and to prove that the defendant would not be significantly prejudiced if an extension of time was granted. The plaintiff failed to discharge that onus. The appeal was upheld and the extension of time refused.

[710] L Collins (ed), *Dicey and Morris on the Conflict of Laws* (13th edn, 2000) at 78.

Since *Neilson* was decided, the dicta of the Western Australian Court of Appeal in *O'Driscoll*[711] has left open the theoretical possibility of renvoi applying to contract. McLure J seems to build on the dicta of Lord Wright in *Vita Foods Products Inc v Unus Shipping Company Ltd (in liq),*[712] and Walsh J of the New South Wales Full Court in *Kay's Leasing Corporation v Fletcher.*[713] *O'Driscoll* is also consonant with the majority judgments of Gummow and Hayne JJ in *Neilson*, that renvoi may be a general principle in the Australian conflict of laws.

Thus far, the invitation has not been accepted. There is a risk that it could be. For commercial contracts in which the parties elect the governing law of the contract, the renvoi is not likely to arise.[714] However, many contract cases do not involve a written contract with a choice of law clause. For those contract cases in the transnational context, it remains to be seen whether any court is prepared to interpret the governing 'law' of the contract as the entire law including the conflict of laws rules. There is no scholarly support for this, even amongst writers in favour of renvoi in tort.[715] As renvoi is excluded for English contracts by the *Contracts (Applicable Law) Act 1990 (UK)*, it seems that further developments in the doctrine of renvoi and its extension to contract is likely to occur in Australia, if at all.

The theoretical objections to the renvoi remain undisturbed by the judicial reasoning of the High Court in *Neilson*. The judgment lacked any searching theoretical analysis of the renvoi problem and is less satisfactory than the Full Court decision. It also appears that the infinite regression problem that arises on the application of a double renvoi was sidestepped in the High Court's decision in *Neilson*, except by McHugh J in dissent.

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[711] *O'Driscoll* [2006] WASCA 25.
[712] *Vita Foods Products Inc v Unus Shipping Company Ltd (in liq)* [1939] AC 277 at 291.
[713] (1964) 64 SR (NSW) 195 at 207.
[714] Although it may arise in relation to the dispute resolution clauses within contracts: see e.g. *Dallah Estate and Tourism Holding Company v Government of Pakistan* [2009] EWCA Civ 755.
[715] See e.g. E Rimmell, 'The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to an Impractical Doctrine' (1998) *Holdsworth Law Review* 55.

Chapter 6: Conclusion

What may be learned from *Neilson* and from the experience of an inflexible common law choice of law rule for international torts is that the conflict of laws remains a fertile area of the law for considerable judicial creativity. The inflexibility of Australia's tort choice of law rule is problematic and will in future require explicit revision by the High Court.[716] It is hoped that the court might use aspects of *Neilson*, and in particular the statements of Callinan and Kirby JJ on fairness and justice, to introduce flexible exceptions by reference to connecting factors.

The doctrine of renvoi, as an accepted part of the Australian conflict of laws, has assumed the unexpected guise of an exception to a dogmatic choice of law rule. However, it was only successfully applied because the forum court presumed discretion to remit the matter from the *lex causae* to the *lex fori* and was not confronted by foreign conflicts rules that included endorsement of the double renvoi theory. This thesis concludes that the Court in *Neilson* made inferences not open to it on the evidence of the foreign law. After surveying cases from the UK, US and Australia, this thesis also concludes that renvoi actually operates with an inherent forum bias.

Accepting that the rules of choice of law, and the doctrines that support the rules of choice of law, are to select the law to substantively dispose of the matters in issue, it is necessary to exclude procedural rules. Therefore, what is left to apply will paradoxically be something less than the 'laws' of a foreign area. Maintaining a distinction between substantive law and procedural law in applying foreign law to a tort conflict of laws case only supports the argument through this thesis that what a choice of law rule does is choose the law that can address, in substance, the issues of liability. The foreign law applied to every international conflict of laws case litigated in Australia axiomatically applies something less than the entire 'laws' for the foreign area. There is nothing improper in a construction of the *lex loci delicti* as the 'tort law of the place of the tort', even though it is apparent that such a construction represents a narrowing of the definition preferred by the High Court.

The foregoing proceeds from the thesis that the purpose of a choice of law rule is to point to the law area for determining rights and obligations, and not to be a mode of finding a

[716] Or by legislative enactment.

mode or, to quote Dr Gray, 'to indicate the mode in which a choice of law question must be solved'.[717]

The imputation is that foreign choice of law rules by themselves do not help the forum to answer questions of liability, and nor do the foreign rules governing court procedure in the foreign law area. The court's election in *Neilson* to adopt the widest possible characterisation to what is the law of the place of the wrong for the purposes of international tort claims litigated here creates an uncertainty in Australian law that is discordant with the approaches taken in the UK, US, Canada, the EU and China.

There is a simpler argument that choice of law exercised from the forum is a spent force. The forum having chosen the applicable law to govern the substantive issues of liability, including in the Australian context limitation periods but also assessment of damages, the foreign choice of law rules have nothing to do and warrant no further consideration. A reference to a country's law should in general terms be taken to mean the municipal and internal law without the conflicts rules. That is the no renvoi solution put by the Full Court of the Supreme Court of Western Australia in *MMI v Neilson*. A no renvoi solution is apt if the choice of law from the forum is characterised as choosing the applicable law to dispose of the real issue to be determined: whether it be the tort, the contractual dispute, or whatever the cause of action. The High Court in *Aon Risk Services v Australian National University*[718] sharply criticised a party for failing to plead and address the real issues in litigation at the earliest available opportunity, elevating the cost-effective resolution of real issues and sound case management as imperatives of litigation in Australia. Its *Neilson* approach to international tort claims, dwelling on choice of law rules by interpreting Australia's as a 'choice of choice of law rule' instead of moving swiftly to apply the law that may determine the real issue between the parties, is clearly inconsistent with the principles espoused unanimously in *Aon v ANU*. It is equally inconsistent with the inflexible tort choice of law rule endorsed by it in *Pfeiffer* and *Zhang*.

It is facile to fix upon the benefits of renvoi if the theoretical objections are ignored. Any choice of law solution that imports a requirement to plead foreign choice of law rules and

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[717] A Gray, 'The Rise of Renvoi in Australia: Creating the Theoretical Framework' (2007) 30 *University of New South Wales Law Journal* 103 at 119; in support, Dr Gray cites P North & J Fawcett, *Cheshire and North's Private International Law* (13th edn, 1999) at 56.
[718] (2009) 239 CLR 175.

to prove foreign renvoi will always be more problematic in its implementation than a rule that requires only the application of *lex fori*.

In the process, *Neilson* reminds current scholars of some of the fundamental tenets of the conflict of laws and of legal principles generally, of why renvoi's inability to promote certainty means it is not compatible with a rigid tort choice of law and is dangerous in that context, and why the difficult cases can – and do – make bad law. It behoves the diligent practitioner to plead and prove the foreign law to be relied upon to determine the legal dispute. But she must, at least whilst *Neilson* stands as good law in Australia, be ever mindful that Australian courts show themselves prepared to adopt unprincipled but pragmatic solutions that demonstrate a lack of familiarity with the historical debates on the doctrine of renvoi that have informed its legislative abolition or marginalisation elsewhere.

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