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PRIVATE INTERNATIONAL LAW IN PRACTICE ACROSS THE DIVISIONS: SOME RECENTS DEVELOPMENTS AND CASE LAW

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Introduction

1 During my early years at the Bar, at a lunch in the old Bar Common Room, I was talking, perhaps overenthusiastically, about anti-suit injunctions when an eminent silk said to me, "Tell me, Andrew, who is the other person interested in this topic?" Fast forward two decades and the rise of globalisation has meant that whether or not you share my level of enthusiasm for the subject, a working knowledge of private international law is not only useful to the practice of law, but, increasingly, is essential.[1]

2 So much commercial and social activity now transcends national boundaries, facilitated by e-commerce, new technologies and even new currencies, and on a personal level, the ease of international travel as well as labour mobility. Speaking on the topic of "The Future of Private International Law in Australia" a number of years ago, I made the observation that:

> "… it follows, as night follows day, and as the world becomes more and more integrated – through technology; through electronic payment systems; through improved and vastly cheaper travel; through the liberalisation of trade barriers – that there will be more international movement and more international trade and, of course, as there is more international movement

* The invaluable assistance of my Research Director, Ms Alice Zhou, in the preparation of this paper is greatly acknowledged.

[1] See, eg, Andrew Dickinson, 'The Future of Private International Law in Australia' (2012) 19 *Australian International Law Journal* 1, 2; Michael Douglas, 'A Consideration of Current Issues in Private International Law' (2017) 44 *Australian Bar Review* 338, 338.

> and more international trade, there will be more and more disputes of an international character. It is inevitable."[2]

And so it has proved.

3 It is, however, not just the *quantity* of transnational disputes that has grown in recent years. The pace and dynamic nature of change in the global economy, including the phenomenon of "disruption", has also transformed the *nature* of many transnational disputes. Globalisation has gone arm in arm with the opening up of new markets, both from behind what was once the Iron Curtain and in formerly closed economies such as China. Trading alliances and allegiances have shifted both in geographic terms and on account of products on offer. They continue to shift and, as you well know, assumptions we all made about free trade and global stability as recently as three years ago are now very much open to question. The current position in Hong Kong, so long a commercial powerhouse in the South East Asian economy, underwritten by a stable common law system, is a case in point.

4 There is also the point that as Australia continues to strengthen its ties with the Asia-Pacific – the United Kingdom having long ceased to be Australia's primary trading partner – the cross-border disputes that will inevitably arise will increasingly involve legal systems very different to our own.

5 The phenomenon of globalisation, in numerous different areas, finds reflection in a range of Australian cases in recent years concerning:

- people working abroad;[3]
- people travelling abroad;[4]

[2] Andrew Bell, 'The Future of Private International Law in Australia' (2012) 19 *Australian International Law Journal* 11, 11.
[3] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; *McGregor v Potts* (2005) 68 NSWLR 109; *Puttick v Tenon Ltd* (2008) 250 ALR 482; *Michael Wilson and Partners Ltd v Emmott* [2019] NSWSC 218 ('*Michael Wilson*').
[4] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Povey v Qantas Airways Ltd* (2005) 223 CLR 189.

- international capital raisings;[5]
- the operation of multi-national corporations with foreign subsidiaries and the operation of double taxation treaties;[6]
- the existence of international insurance and reinsurance markets;[7]
- the rise of the internet;[8]
- international trade;[9]
- the import and export of goods[10] and services;[11]
- international distributorship[12] and franchising arrangements;[13]
- international investment arrangements;[14]
- the international sale of businesses;[15] and
- mixed nationality marriages.[16]

[5] *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 1)* (1996) 64 FCR 1; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 2)* (1996) 64 FCR 44.
[6] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ('*Voth*').
[7] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance (in liq)* (2003) 254 ALR 29.
[8] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 351 ALR 584.
[9] *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 ('*Comandate*').
[10] *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1; *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724; *Mackellar Mining Equipment Pty Ltd v Thornton* [2019] QCA 77 ('*Mackellar Mining*').
[11] *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2008) 249 ALR 458; *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 ('*Home Ice Cream*'); *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61 ('*Hive*').
[12] *Armacel Pty Ltd v Smurfit Stone Container Corporation* (2008) 248 ALR 573; *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111; *Vautin v BY Winddown Inc* [2016] FCA 632; *Avwest Aircraft Pty Ltd v Bombardier Inc* [2018] WASC 139.
[13] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1.
[14] *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383.
[15] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1 ('*Kraft Foods*').

6 New South Wales and Australian courts have dealt with many disputes falling into these categories in recent years.

7 Against this background, I propose to address a number of areas of private international law that frequently arise across the divisions of the Court, focussing on some recent developments in the following areas:

(1) service outside Australia;

(2) the incorporation and interpretation of jurisdiction and arbitration agreements;

(3) the restraint of local and foreign proceedings;

(4) applications for interlocutory relief in transnational cases, in particular, freezing orders and foreign subpoenas;

(5) the choice of non-state law;

(6) proof of foreign law; and

(7) the enforcement of foreign judgments.

Service outside Australia

8 It is logical to begin with the issue of jurisdiction, the ambit of which is, in effect, defined by the rules governing the service of originating process. In the case of the New South Wales Supreme Court (**NSWSC**), these rules are found in Part 11 of the *Uniform Civil Procedure Rules 2005* (NSW) (***UCPR***). Schedule 6 sets out a number of types of claims or "jurisdictional pigeonholes"[17] in respect of which leave is not required for service outside Australia.[18] Generally speaking, these categories require some form of

[16] *Henry v Henry* (1996) 185 CLR 571; *Du Bray v McIlwraith* (2009) 259 ALR 561.
[17] *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108, 118 [55] (Edelman J).
[18] *UCPR* r 11.4(1).

connection between Australia[19] and the parties to the dispute, the cause of action or the subject matter of the dispute. However, a wholly international claim, that is, one with no connection whatsoever to Australia, may be commenced in the NSWSC without leave if the parties have submitted to the jurisdiction of the Court.[20] This is the same simple mechanism which has resulted in the Commercial Court in London having so much work of a truly international flavour, and it is the same device by which the Singapore International Commercial Court gets its jurisdiction.[21]

9 In December 2016, as a result of the work of the Harmonisation of Rules Committee of the Council of Chief Justices of Australia and New Zealand, a number of amendments were made to the *UCPR*.[22]

10 Prior to the amendments, the nexus requirement in each of the subcategories in Schedule 6 was to New South Wales rather than to Australia, as it now is. The principal significance of the change which no longer requires the relevant nexus be with New South Wales is that the Supreme Court can assume personal jurisdiction over a foreign defendant in a case whose only connection is with a jurisdiction in Australia other than New South Wales. The assumption of jurisdiction in such a case may but will not necessarily invite a transfer application by the foreign defendant under the cross vesting regime to the Australian jurisdiction with the relevant geographical nexus. The foreign defendant may, however, be indifferent to the location within Australia or may, in fact, prefer that the casei is litigated in New South Wales and this be content to leave it in New South Wales notwithstanding, for example, that its geographical connection is with another State.

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[19] Prior to December 2016, the connection required was defined by reference to New South Wales. Schedule 6 was then amended to require a connection with Australia as a whole. This gives the NSWSC jurisdiction over matters which may have no connection with New South Wales.

[20] *UCPR* sch 6(k).

[21] See AS Bell "An Australian International Commercial Court: not a bad idea or what a bad idea?", speech delivered at Australian Bar Association Conference, Singapore, July 2019 available at http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_judicialspeeches/sco2_speeches_current_judicialofficers.aspx#bellp

[22] For a useful summary of the changes that were introduced, see Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the *Uniform Civil Procedure Rules*' (2017) 44 *Australian Bar Review* 160.

11 Perhaps the most significant change introduced in 2016 was the introduction of a new residual category that permits service outside Australia in respect of claims that do not fall within sch 6 with leave of the NSWSC.

12 The new r 11.5(1) provides that "[i]n any proceeding when service is not allowed under Schedule 6, an originating process may be served outside of Australia with the leave of the court". The circumstances in which leave may be granted are set out in sub-s (5), which provides that:

> "(5) The court may grant an application for leave if satisfied that:
>
> (a) the claim has a *real and substantial connection with Australia*, and
>
> (b) Australia is an appropriate forum for the trial, and
>
> (c) in all the circumstances the court should assume jurisdiction."

13 Again it will be seen that the connection need not be with New South Wales. In other words, it would be sufficient for the assumption of jurisdiction over a foreign defendant if the case had a real and substantial connection with Western Australia as opposed to New South Wales.

14 This addition to the NSWSC's extended jurisdiction appears to have been modelled on New Zealand's *High Court Rules 2016*, r 6.28 of which provides that the Court may grant an application for leave to serve if the applicant establishes that:

> "(a) the claim has a real and substantial connection with New Zealand; and
>
> (b) there is a serious issue to be tried on the merits; and
>
> (c) New Zealand is the appropriate forum for the trial; and
>
> (d) any other relevant circumstances support an assumption of jurisdiction."

15 Rule 11.5 broadens the NSWSC's jurisdiction by conferring upon the Court jurisdiction to hear claims that do not fall within sch 6, including where the

proceedings are made up of one or more claims that fall within sch 6 and one or more claims that do not. Without r 11.5, service would only be permitted, pursuant to sch 6(s), where the claim falls partly within one or more of the "pigeonholes" and, as to the residue, within one or more of the others of the "pigeonholes".[23] In this regard, it has been suggested that:

> "… one important role for the rule could be to allow the entire dispute between parties to be heard in one set of proceedings. Potentially, it could be used in New South Wales both to allow the incorporation of matters not included in sch 6 in an existing case, and to ensure that related proceedings between different sets of parties are amalgamated."[24]

16 Neither of the "real and substantial connection" and "appropriate forum" tests are novel in the private international law context. Indeed, they are often found together in the context of the *forum non conveniens* test. In *Spiliada Maritime Corporation v Cansulex Ltd*,[25] Lord Goff articulated the "more appropriate forum" formulation of the *forum non conveniens* test as follows:

> "The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."[26]

17 His Lordship adopted the expression used by Lord Keith in *The Abidin Daver*[27] to describe the "natural forum", that being the forum "with which the action had the most real and substantial connection".[28]

18 The "more appropriate forum" test was rejected by the High Court of Australia (**HCA**) in *Voth* in favour of the "clearly inappropriate forum" test. As to the difference between these tests, Mason CJ and Deane, Dawson and Gaudron JJ explained that:

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[23] See generally M Davies, A S Bell and P L G Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2014) 73 [3.107].
[24] Douglas and Bath, above n 21, 167.
[25] [1987] AC 460.
[26] Ibid 476.
[27] [1984] AC 398.
[28] Ibid 415.

> "The 'clearly inappropriate forum' test is similar to and, for that reason, is likely to yield the same result as the 'more appropriate forum' test in the majority of cases. The difference between the two tests will be of critical significance only in those cases – probably rare – in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one. But the question which the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums. That is not to deny that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum. The important point is that, in those cases in which the ascertainment of the natural forum is a complex and finely balanced question, the court may more readily conclude that it is not a clearly inappropriate forum."[29]

19 Whether the concepts of a "real and substantial connection" and an "appropriate forum" will be interpreted and applied in the same way in the context of r 11.5 remains to be seen. Some have sounded caution against doing so. In respect of the "real and substantial connection" test, Michael Douglas and Professor Vivienne Bath observed that:

> "The language of *UCPR* r 11.5(5)(a) is distinguishable from that in *Spiliada* and in *The Abidin Daver*. The natural forum has the *most* real and substantial connection to the action, whereas the new rule simply requires the claim to have *a* real and substantial connection. Further, the rule does not require a connection to the forum, but *with Australia*."[30]

20 They suggested that guidance may instead be sought from New Zealand, which, as mentioned earlier, has a similar provision to r 11.5, and Canada, which recognises a common law "real and substantial connection" test.[31]

21 As for the "appropriate forum" test, Douglas and Bath proffered the following two alternative interpretations of the test:

> "The test in r 11.5(5) does not require that the forum is not 'inappropriate' or 'clearly inappropriate'. One view, however, is that this should be read in the context of 'inappropriate forum' in r 11.6, with all of the associated case history, to mean 'an appropriate forum', in the *Voth* sense of it 'not being clearly inappropriate', for the determination of that matter.

[29] *Voth* (1990) 171 CLR 538, 558.
[30] Douglas and Bath, above n 21, 168.
[31] Ibid 168-9.

> Alternatively, the language may indicate that the Council of Chief Justices did not intend to import the common-law *Voth* approach into *UCPR* r 11.5(5)(b). Instead, the test might require the court to determine the *forum conveniens* by applying the more appropriate forum test."[32]

22 They contend that, having regard to the *UCPR* as a whole, the first of these interpretations was more persuasive, noting that it would challenge the principle of coherence to apply a "clearly inappropriate forum" test in the context of an application for a stay, but a "more appropriate forum" test in the context of leave to serve.[33]

23 More fundamentally, they challenged whether the "appropriate forum" test has any work to do – that is, "how can Australia be an inappropriate forum if there is a real and substantial connection between the action and Australia?"[34] Lord Keith's conception of the "natural forum" certainly suggests that the concepts of a "real and substantial connection" and an "appropriate forum" are interrelated.

24 Thus far, only one case, *Michael Wilson*, has considered the operation of r 11.5. The background to the case was as follows. In 2001, the defendant, Mr Emmott, became a director of the plaintiff, Michael Wilson and Partners Ltd (**MWP**), a company incorporated in the British Virgin Islands. In 2004, MWP engaged Mr Nicholls and Mr Slater as associates. Messrs Emmott, Nicholls and Slater subsequently left MWP and established a number of companies incorporated in the British Virgin Islands which provided legal and corporate advisory services in Kazakhstan in competition with MWP (t**he Competitor Companies**). MWP, pursuant to an arbitration agreement in its contract with Mr Emmott, commenced arbitration proceedings in London. Mr Emmott was found liable in contract and for breaching his fiduciary duties. MWP was also successful in proceedings commenced in New South Wales against Messrs Nicholls and Slater, which had the effect of bankrupting them and placing the Competitor Companies into liquidation. MWP took an

[32] Ibid 170.
[33] Ibid.
[34] Ibid.

assignment of the rights of the trustees in bankruptcy of Messrs Nicholls and Slater and the liquidators of the Competitor Companies.

25 Relying on that assignment, MWP commenced proceedings in the NSWSC against Mr Emmott seeking, inter alia: contribution from Mr Emmott in respect of the liability of Messrs Nicholls and Slater and the Competitor Companies; damages and equitable compensation for various alleged breaches of Mr Emmott's duties as an alleged shadow director of the Competitor Companies; and a declaration that Messrs Emmott, Nicholls and Slater had established a partnership in equal shares on leaving MWP. Mr Emmott challenged whether service on him outside Australia was permitted.

26 Ball J found that the contribution claim fell within sch 6(h)(ii) of the *UCPR*, which provides that a defendant to a claim for contribution in respect of a liability enforceable by a proceeding in the NSWSC may be served with originating process without leave, but that the Court should refuse to assume jurisdiction under r 11.6.[35]

27 As for the claim for breach of directors' duties, MWP argued that leave to serve should be granted under r 11.5. Ball J found that the "real and substantial connection" test was not satisfied having regard to the fact that:

> "… both companies were incorporated in the British Virgin Islands. It is conceded that Mr Emmott is a resident of the United Kingdom or Kazakhstan. None of the conduct which is said to involve a breach of duty occurred in Australia. The likelihood is that the laws of the British Virgin Islands apply to the determination of the question whether Mr Emmott owed fiduciary duties to [the Competitor Companies] as a shadow director of those companies …"[36]

28 His Honour rejected MWP's argument that the claim had a "real and substantial connection" with Australia because it raised similar issues to those raised in the New South Wales proceedings, finding that that was an insufficient connection. His Honour explained that "[t]he connection must arise from the facts of the case itself, not the fact that those facts are

[35] *Michael Wilson* [2019] NSWSC 218 [30]-[31].
[36] Ibid [54].

interwoven with facts that were in issue in some other case brought in Australia".[37]

29 His Honour found that, for similar reasons, the "appropriate forum" test was not satisfied. His Honour observed that:

> "Australian law will not apply to the resolution of the issues in the case. There are no witnesses in Australia. It is not suggested that there are any original documents in Australia that are relevant to the dispute. The fact that this Court has determined proceedings arising out of related facts, will not facilitate the resolution of the current dispute."[38]

30 In respect of the partnership claim, MWP again sought leave under r 11.5, relying on the following factors:

> "(a) Messrs Slater and Nicholls were defendants to proceedings in Australia and were the subject of orders here;
>
> (b) Mr Nicholls was bankrupted in Australia and Mr Slater's bankruptcy (which occurred in the UK) is recognised here;
>
> (c) This Court has exercised jurisdiction over and applied Australian law to the underlying dispute;
>
> (d) Unsigned consultancy agreements between Mr Emmott and [one of the Competitor Companies] were expressed to be governed by Australian law;
>
> (e) Mr Nicholls before his death was and Messrs Slater and Emmott are Australian citizens;
>
> (f) It is said that there is evidence that Messrs Emmott, Slater and the [alleged partnership] were or are being funded by an Australian Corporation;
>
> (g) Mr Emmott has given evidence in Australia."[39]

31 Ball J doubted the relevance of most of these matters, finding that:

> "The fact that Messrs Nicholls and Slater were defendants in other proceedings does not mean that the current claim has any connection with Australia. The same is true of the facts relating to Messrs Nicholls and Slater's bankruptcies. There is no evidence that the unsigned consultancy

[37] Ibid [55].
[38] Ibid [56].
[39] Ibid [62].

> agreements ever came into effect. Consequently, their provisions are irrelevant. Citizenship may not be wholly irrelevant to the question whether the Court should assume jurisdiction, since it is one of the matters required to be disclosed in an affidavit filed in support of an application for leave: see UCPR r 11.5(4). But … citizenship of the parties is not normally regarded as a connecting factor at common law and no reason was advanced that would justify an exception in this case. There is no evidence that the defence of the current claim is being funded by an Australian corporation; and even if it is, it is difficult to see why that would be relevant. The funding of the plaintiff may be important because it may be relevant to the question of costs. The same is not true of the funding of the defendants. Finally, the fact that Mr Emmott has given evidence in Australia previously does not of itself mean that there is a connection between the current claim and Australia."[40]

32 His Honour found that any connection with Australia ceased following delivery of the final judgment in the New South Wales proceedings, stating that:

> "The fact that judgment was obtained against two alleged partners in an Australian court in respect of what is said to be a partnership debt or liability is not itself sufficient to mean that there is a real and substantial connection between Australia and a claim brought to recover contribution in respect of that judgment and related costs orders from someone said to be liable to contribute to that debt or liability as a partner. It is true that the debt arises as a consequence of the judgment of an Australian court. But the relevant claim is a claim for contribution arising from a partnership, and that claim depends on the existence and terms of the partnership and whether the judgment can properly be characterised as a liability of the partnership. In the present case, it is difficult to see how the resolution of any of those issues has a connection with Australia."[41]

33 His Honour again found that, for similar reasons, Australia was not an "appropriate forum" to hear the dispute.[42] Accordingly, his Honour ordered a permanent stay of the proceedings.

34 So long as commercial parties with claims that do not fall within the traditional "pigeonholes" continue to seek to invoke the jurisdiction of the NSWSC, the scope of the rule will no doubt be tested and clarified.

35 The *Michael Wilson* decision is the subject of an appeal to the Court of Appeal (**NSWCA**) which is yet to be heard.

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[40] Ibid [63].
[41] Ibid [65].
[42] Ibid [66].

The incorporation and interpretation of jurisdiction and arbitration agreements

36 Assuming that jurisdiction to entertain a matter exists, two issues that frequently arise in the NSWSC are whether a jurisdiction or arbitration agreement has been incorporated into a larger contract[43] and the interpretation of such agreements,[44] including the impact of statute on the scope of a jurisdiction or arbitration agreement.

37 The first of these issues was considered most recently by the NSWCA in *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*.[45] At issue in that case was whether an arbitration agreement in favour of California was incorporated into a contract for the supply of services for the production and direction of a film. The contract provided that "[t]he balance of terms will be … WB standard for 'A' list directors and producers, subject to good faith negotiations".

38 Bathurst CJ (Beazley P and Emmett AJA agreeing) found that the terms which met this description, of which the arbitration agreement was one,[46] were immediately incorporated into the contract, although subject to good faith negotiations, having regard to the text of the clause read in the context of the contract as a whole.[47] In particular, his Honour found that without the immediate incorporation of those terms, critical provisions of the contract would be rendered meaningless.[48] Accordingly, the proceedings were permanently stayed.

39 As to the construction of jurisdiction and arbitration agreements, the general approach to be taken was articulated by Allsop J (as his Honour then was) (Finn and Finkelstein JJ agreeing) in *Comandate*. His Honour stated that:

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[43] See, eg, *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133.
[44] See, eg, *AAP Industries Pty Ltd v Rehau Pte Ltd* [2015] NSWSC 468; *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* [2016] NSWSC 1170; *Parnell Manufacturing Pty Ltd v Lonza Ltd* [2017] NSWSC 562.
[45] (2018) 130 IPR 527.
[46] Ibid 541-3 [75]-[86].
[47] Ibid 538 [56]-[61].
[48] Ibid 538 [57].

> "The authorities … are clear that a liberal approach should be taken. That is not to say that all clauses are the same or that the language used is not determinative. The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration."[49]

40 His Honour explained that this approach was underpinned by the "sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places".[50] Notwithstanding consensus as to the general interpretative approach to be taken, however, there remains scope for differences of opinion as to the proper construction of particular terms used in jurisdiction and arbitration agreements.[51]

41 The approach articulated in *Comandate* was approved by the House of Lords in *Fiona Trust & Holding Corporation v Privalov*.[52] The House of Lords, however, went further. Lord Hoffman (Lords Hope, Scott, Walker and Brown agreeing) held that the construction of an arbitration agreement should start from the assumption that "the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal".[53]

42 This approach was rejected by the NSWCA in *Rinehart v Welker*.[54] In the HCA's recent decision of *Rinehart v Hancock Prospecting Pty Ltd*,[55] which concerned the same arbitration agreement considered by the NSWCA, the Court found it unnecessary to refer to *Fiona Trust*.

43 The HCA did, however, consider the meaning of the expression "through or under" as it is used in the *Commercial Arbitration Act 2010* (NSW). Section 2(1) of that Act defines a "party" as including "any person claiming

[49] *Comandate* (2006) 157 FCR 45, 87 [164].
[50] Ibid 87 [165].
[51] Compare *Rinehart v Welker* (2012) 95 NSWLR 221 and *Rinehart v Rinehart (No 3)* (2016) 257 FCR 310 as to the ambit of the word "under".
[52] [2007] 4 All ER 951 ('*Fiona Trust*').
[53] Ibid 958 [13].
[54] (2012) 95 NSWLR 221, 247 [121] (Bathurst CJ).
[55] [2019] HCA 13 ('*Hancock*').

through or under a party to the arbitration agreement".[56] The expression has traditionally been confined to derivative claims or defences; in other words, "an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence",[57] such as a liquidator claiming through or under a company where the claim or defence is vested in or exercisable by the company.[58]

44 A much more expansive approach was taken in *Hancock*, in which Kiefel CJ, Gageler, Nettle and Gordon JJ found that a number of third party companies, against which claims for knowing receipt of trust property had been brought, were "part[ies]" within the meaning of s 2(1) and could rely on an arbitration agreement contained in a deed of release to which they were not parties in order to stay the proceedings. The third party companies alleged that an "essential element" of their defence was that the relevant property had not been transferred to them in breach of trust as the trustees, who were party to the deed of release, were beneficially entitled to the property. Their Honours found that:

> "… since the assignor and the claimant are bound by an arbitration agreement applicable to the claim of breach of trust, there is no good reason why this claim should not be determined as between the claimant and the assignee in the same way as it will be determined between the claimant and the assignor. To exclude from the scope of the arbitration agreement binding on the assignor matters between the other party to that agreement and the assignee would give the arbitration agreement an uncertain operation. It would jeopardise orderly arrangements, potentially lead to duplication of proceedings and potentially increase uncertainty as to which matters of controversy are to be determined by litigation and which by arbitration. And ultimately it would frustrate the evident purpose of the statutory definition."[59]

45 Edelman J, in a forceful dissent, found that Parliament did not intend to depart from the principle of privity by the use of "the century-old formula concerning

[56] This definition also appears in the *International Arbitration Act 1974* (Cth), s 7(4) of which provides that "[f]or the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party".
[57] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 342 (Brennan and Dawson JJ).
[58] Ibid.
[59] *Hancock* [2019] HCA 13 [73].

'claiming through or under a party', which had a longstanding meaning consistent with privity".[60] His Honour considered that the majority's approach was antithetical to the contractual nature of arbitration, stating that:

> "However laudable may be the pragmatic considerations of reducing expense and increasing convenience, there is no basis for an extended meaning of 'party' in s 2(1) that would compel a third party to submit its independent claim or defence to arbitration, without the third party having consented to the procedure, without an arbitrator to whose appointment the third party had consented in the exercise of its own 'voice in the choosing of the arbitrators', and possibly by a reference to a legal system that would not have been chosen by and would not otherwise have applied to the third party."[61]

46 The majority's decision is, in my opinion, likely to encourage interlocutory litigation. It also has the potential to generate some far-reaching consequences. It would, for example, appear to permit a party to a contract containing an arbitration agreement who wished to sue a tortfeasor for inducing breach of contract to enforce the arbitration agreement against that party. The NSWSC can expect to feel the consequences of this decision in due course.

The restraint of local proceedings

47 When I use the expression "restraint of local proceedings", I am speaking of the staying of proceedings in New South Wales either on *forum non conveniens* or *Voth* grounds, or by reason of the fact that the parties have agreed in a jurisdiction clause to another forum, or in an arbitration clause to another mode of dispute resolution.

48 It will be apparent from the preceding discussion that sophisticated commercial parties will often stipulate in advance a forum or mode of dispute resolution. Out of respect for party autonomy and holding parties to their bargain, Australian courts have manifested a strong disposition towards the enforcement of such agreements. This prima facie position is, however, subject to qualification.

[60] Ibid [84].
[61] Ibid [86].

49 Earlier this year, the NSWCA considered the issue of the enforcement of jurisdiction agreements in a complex context. *Hive* concerned a retail promotion governed by two contracts with two different jurisdiction clauses: a non-exclusive jurisdiction clause in favour of the courts of New South Wales and an exclusive jurisdiction clause in favour of the courts of England. To complicate matters further, not every relevant party to the arrangement was party to both contracts – each contract was entered into by a different permutation of three of the four relevant parties.

50 A dispute arose which gave rise to proceedings against two defendants in the NSWSC. One of the defendants, which was only party to the contract containing the exclusive English jurisdiction clause, sought to enforce the jurisdiction clause by applying for a stay of the proceedings against it. The primary judge made orders to this effect, with the result that the proceedings against that defendant were stayed, leaving on foot in New South Wales the balance of the proceedings against the other defendant. There was thus the prospect of related sets of proceedings in both England and New South Wales.

51 In cases where there are multiple parties not all of whom are party to or otherwise bound by a contract with an exclusive jurisdiction clause, and proceedings have not been commenced in the chosen forum, there will often be a tension between the desire to uphold the contractual bargain, on the one hand, and the decision to resolve all aspects of a dispute in one forum. In multi-party cases, it will often be the case that some defendants are not amenable to suit in the contractually chosen forum.

52 The NSWCA upheld the primary judge's decision, stating that:

> "In cases such as the present, when not all parties to the proceedings are party to an exclusive jurisdiction clause, the court should not … start with a prima facie disposition in favour of a stay of proceedings, which is the default starting point where the litigation only involves parties who are bound by the exclusive jurisdiction clause … The importance of holding parties to their bargain is a very powerful consideration but is not one that should be

> elevated or given some special status in the hierarchy of factors where not all parties to the dispute are parties to the exclusive jurisdiction clause."[62]

53 The Court emphasised that each case will turn on its own facts:

> "The discretion is ultimately to be exercised by reference to the facts of the particular case and a careful consideration, in light of those facts, of the nature and complexity of the matters in issue, the degree of risk of inconsistent decisions and the weight to be attributed to that possibility as against the weight to be attributed to the consequences of one party losing the real benefit of an exclusive jurisdiction clause for which it bargained and secured as part of the overall commercial arrangement between the parties."[63]

54 The generally pro-enforcement attitude of Australian courts may be contrasted to the approach of the Canadian courts in respect of standard form consumer contracts. In *Douez v Facebook Inc*,[64] a 2017 decision of the Supreme Court of Canada, the majority refused to enforce an exclusive jurisdiction clause in favour of the courts of California contained in Facebook's terms of use. In reaching this conclusion, Karakatsanis, Wagner and Gascon JJ had regard to the fact that the claim involved a consumer contract of adhesion between an individual consumer and a large corporation, as well as a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians, which, considered together, their Honours found was decisive.[65] Their Honours acknowledged the importance of "party autonomy and commercial certainty in the context of contracts involving sophisticated parties",[66] but found that:

> "A court has discretion … to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect 'the social, economic, or political policies of the enacting state in the collective interest' … In this case, both of these categories are implicated. It raises both the reality of unequal bargaining power in consumer contracts of adhesion and the local court's interest in adjudicating claims involving constitutional or quasi-constitutional rights."

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[62] *Hive* [2019] NSWCA 61 [90] (Bell P).
[63] Ibid [92].
[64] [2017] 1 SCR 751 ('*Douez*').
[65] Ibid 779-83 [50], [53]-[62].
[66] Ibid 779 [51].

55 In addition to these public policy considerations, their Honours found that the interests of justice and the comparative convenience and expense of litigating in California supported the adjudication of the appellant's claim in British Columbia.[67]

56 McLachlin CJ and Moldaver and Côté JJ dissented. Their Honours emphasised that the default position is that jurisdiction clauses should be enforced, which serves to "uphol[d] certainty, order, and predictability in private international law, especially in light of the proliferation of online services provided across borders".[68] Having regard to the factors set out in *The Eleftheria*,[69] their Honours found that: the facts of the case and the evidence to be adduced did not shift the balance of convenience from California to British Columbia – in particular, there was no evidence regarding the relative convenience and expense of litigating in California;[70] the applicable law did not justify overriding the jurisdiction clause as "the British Columbia tort created by the *Privacy Act* does not require special expertise";[71] no evidence was adduced as to Californian law, including its private international law principles, such as to suggest that a Californian court would not entertain the matter or that the appellant would be without remedy;[72] that the appellant's place of residence was British Columbia was not sufficient to override the jurisdiction clause;[73] it was not shown that Facebook was merely

[67] Ibid 783-6 [64]-[75].
[68] Ibid 815 [159].
[69] [1970] P 94, 100 (Brandon J). The following factors are relevant to determining whether or not to grant a stay: "(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."
[70] *Douez* [2017] 1 SCR 751, 816-17 [163]-[164].
[71] Ibid 817 [165].
[72] Ibid 818 [166].
[73] Ibid 818-19 [167].

seeking to gain a procedural advantage over the appellant;[74] and there was nothing to suggest that the appellant would be deprived of a fair trial.[75]

57 I would expect the issue raised by *Douez* to present itself in our courts in the near future.

The restraint of foreign proceedings

58 In addition to the restraint of local proceedings, the NSWSC is sometimes required to deal with the restraint of foreign proceedings by way of an anti-suit injunction.[76] Less commonly, it may be required to deal with applications for anti-anti-suit injunctions to prevent the seeking of anti-suit injunctive relief[77] or anti-arbitration injunctions to restrain foreign arbitration proceedings.[78]

59 The more commonplace anti-suit injunction was considered by the Court of Appeal of Queensland in *Mackellar Mining*, which concerned a plane crash in North Queensland. The plane had been bought by a partnership of two Australian companies from a United States company and leased to "Transair". Relatives of some of the passengers and the pilots killed in the crash commenced proceedings in the Circuit Court of Green County, Missouri against the United States company, the Australian partnership and the widow of the chief pilot of Transair, seeking damages under the *Trade Practices Act 1974* (Cth) and in negligence. The plaintiffs alleged that the crash was caused by the defendants' failure to detect a number of alleged defects with the plane or warn Transair of the existence of those defects.

60 The plaintiffs settled their claims against the United States company in January 2016. In March 2017, the remaining defendants commenced proceedings in the Supreme Court of Queensland seeking, inter alia, permanent injunctions restraining the plaintiffs in the Missouri proceedings

[74] Ibid 819 [168].
[75] Ibid 819 [169].
[76] See, eg, *JWT Bespoke Holdings Pty Ltd Atf Duncan 77 Trust v Duncan* [2015] NSWSC 1641.
[77] See, eg, *Home Ice Cream* [2018] FCA 1033.
[78] See, eg, *Kraft Foods* (2018) 358 ALR 1.

from continuing with those proceedings on the basis that they were vexatious and oppressive. They emphasised the cost and inconvenience of having the matter heard in Missouri, pointing to the following seven matters:

> "1. All of the parties are Australian;
>
> 2. All issues will be governed by Australian law;
>
> 3. There will be factual questions that will need to be considered by reference to Australian civil aviation standards;
>
> 4. The claim is based upon a transaction that took place wholly in Australia, namely the lease of the aircraft to Transair and the delivery of the aircraft to Transair in Australia;
>
> 5. All of the damage alleged to have been suffered was suffered in Australia;
>
> 6. All the lay witnesses are in Australia and two of them are elderly and will be unable to travel to the United States;
>
> 7. The connection of the case to Missouri is, to put the matter at its highest, slight."[79]

61 They also submitted that the "'objective purpose and effect of the continuation of the Missouri action since January 2016' is to obtain '… damages in excess of what is properly obtainable in a court of federal jurisdiction in Australia …'".[80] In other words, their case was that the proceedings became vexatious and oppressive when the United States company ceased to be a party following the settlement January 2016. They conceded that the proceedings were proper up until this point.

62 The primary judge, Lyons SJA, dismissed the defendants' application. The Court of Appeal upheld her Honour's decision. Sofronoff P (Morrison JA and Boddice J agreeing) drew a clear distinction between the test to be applied in respect of anti-suit injunctions and *forum non conveniens* stays, stating that, in respect of the seven matters raised by the defendants:

[79] *Mackellar Mining* [2019] QCA 77 [17].
[80] Ibid [53].

> "… these are matters that weigh heavily when a court is asked to make orders on the ground of *forum non conveniens* … But on their own, they cannot, in general, give rise to a conclusion that the person who prefers to litigate in a foreign jurisdiction is acting in such a manner that equity will intervene by injunction to restrain the exercise of undoubted legal rights."[81]

63 There was, his Honour found, a "fundamental fallacy"[82] in the defendants' case, namely that:

> "… if the Missouri proceeding was neither vexatious nor oppressive between 5 May 2008, when it started, and January 2016, when [the United States company] was removed as a party, I do not see how the proceedings gained that character thereafter. All of the factors relied upon by the appellants to support the submission that the Missouri proceedings are vexatious and oppressive are factors that existed since those proceedings were commenced. The continuation of these proceedings is not rendered vexatious and oppressive against the remaining defendants just because the sole US party has been removed."[83]

64 His Honour found that, contrary to the defendants' suggestion, it would have been irrational for the plaintiffs to have discontinued the Missouri proceedings after the United States company ceased to be a party and commenced fresh proceedings in Queensland, in circumstances where their causes of action would have been statute-barred in Queensland.[84]

65 His Honour identified a further "insurmountable hurdle"[85] faced by the defendants, that being the fact that two Missouri courts had found that the Missouri proceedings should not be dismissed on *forum non conveniens* grounds.

66 It is arguable that, even if there was something to be gained in Missouri over and above what may have been gained in Queensland,[86] the case was so tenuously connected, if at all, with Missouri after the United States company was removed as a party that intervention on the part of the Supreme Court of

[81] Ibid [73].
[82] Ibid [74].
[83] Ibid [54].
[84] Ibid [74].
[85] Ibid [80].
[86] *Bank of Tokyo Ltd v Karoon* [1987] AC 45, 60 (Goff LJ); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 393 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

Queensland would have been warranted.[87] But, the outcome of this case illustrates the difficulty in obtaining anti-suit relief.

67 Before moving off the topic of anti-suit injunctions, it is worth noting that the NSWSC is precluded by s 21 of the *Service and Execution of Process Act 1992* (Cth) from issuing an injunction to restrain a plaintiff from pursuing its claim in another state court. As for the relationship between the NSWSC and the Federal Court, the NSWSC was faced with a relatively unique case where proceedings were on foot in both the NSWSC and the Federal Court in *Wigmans v AMP Ltd*.[88] Ward CJ in Eq found that, as a matter of policy:

> "… the [NSWSC] should not take steps that may interfere with or undermine the processes of the Federal Court; just as I would expect that judges of the Federal Court would be concerned, as a matter of comity, not to take steps which would interfere or cause interference in the integrity or processes of this Court".[89]

68 Her Honour found that "powerful reasons"[90] were required before an anti-suit injunction would be granted in such circumstances.

Anti-deposition injunctions

69 The foreign proceedings sought to be restrained need not be for substantive relief. In *Jones v Treasury Wine Estates Ltd*,[91] for example, what may be called an "anti-deposition injunction" was granted. In that case, the applicant and others commenced class actions proceedings in the Federal Court of Australia against the respondent. Without giving notice to the docket judge, the applicant and another member of the relevant class commenced *ex parte* proceedings in a United States court seeking orders under the United States Federal Rules of Civil Procedure to conduct oral depositions of current and former senior executives of the respondent. The respondent sought an anti-suit injunction in relation to the United States proceedings.

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[87] M Davies, A S Bell and P L G Brereton, above n 22, 230-1 [9.27].
[88] [2018] NSWSC 1118.
[89] Ibid [18].
[90] Ibid.
[91] (2016) 241 FCR 111.

70 Justices Gilmour, Foster and Beach acceded to the respondent's application on the basis that it was necessary "to protect [the Court's] own processes once set in motion".[92] Their Honours found that the "vice" in the applicant's case was that "the conduct of [the applicant and the other member] in invoking the US Proceedings without notice and without the imprimatur of this Court has undermined this Court's case management and supervision of the class action".[93] Their Honours continued as follows:

> "What is vital is that this Court's proceedings and its pre-trial processes are solely subject to supervision by this Court, particularly where one is dealing with a class action which invokes the Court's supervisory role. If orders for … depositions are to be permitted in a case, they should not be obtained by a party to proceedings in this Court without notice to the other party and without the prior knowledge and endorsement of this Court by appropriate directions. It is neither necessary nor helpful to hypothesise upon the circumstances which might warrant such endorsement. We would expect them to be exceptional.
>
> In summary, the recent reforms to discovery procedure in this Court, allied with the regime of judicial case management, will, in the circumstances of this case, be undermined by the US Proceedings unless injunctive relief is granted."[94]

71 Having disposed of the respondent's application on the basis of the Court's power to protect its own processes, it was not necessary for their Honours to rely on the Court's equitable jurisdiction to restrain the United States proceedings on the basis that they were vexatious or oppressive. However, their Honours found that, had it been necessary to do so, they would have so held, in light of the "considerable expense and inconvenience"[95] to the respondent caused by the United States proceedings.

Applications for interlocutory relief

Freezing orders

72 As the course of litigation progresses, a party may apply for interlocutory relief, including the issue of freezing orders or subpoenas. The former was

[92] Ibid 114 [21].
[93] Ibid 118 [47]
[94] Ibid 118-19 [48]-[49].
[95] Ibid 119 [54].

the subject of the High Court's relatively recent decision in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*.[96] PT Bayan Resources TBK (**PT Bayan**), an Indonesian company, and BCBC Singapore Pte Ltd (**BCBC**), a Singaporean company, were engaged in a joint venture. BCBC commenced proceedings against PT Bayan in the High Court of Singapore. While the proceedings in Singapore were pending, BCBC made an ex parte application to the Supreme Court of Western Australia for freezing orders in respect of PT Bayan's shares in an Australian company through which the joint venture was conducted. The Court made the freezing orders sought, which were confirmed by the Western Australian Court of Appeal.

73 On appeal, the HCA was faced with a question that has attracted much attention in the United Kingdom, that being whether a court can make interlocutory orders, including freezing orders, in circumstances where final judgment on the underlying claim will be given by a foreign court. In *The Siskina*,[97] the House of Lords held that an English court has no power to do so. This was affirmed by the Privy Council in *Mercedes Benz AG v Leiduck*.[98]

74 Following the HCA's decision in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*,[99] and unless and until the HCA decides that *Lenah Game Meats* does not apply in respect of transnational cases, the position in Australia would appear to be the same in relation to interlocutory injunctions.[100] Freezing orders, however, are no longer regarded as injunctions. As the HCA found in *Cardile v LED Builders Pty Ltd*,[101] such orders serve to prevent the abuse or frustration of the court's process.

75 *PT Bayan* confirms that Australian superior courts have the power to make freezing orders in relation to assets in Australia and in respect of a prospective judgment of a foreign court which would be enforceable in

[96] (2015) 258 CLR 1 ('*PT Bayan*').
[97] [1979] AC 210.
[98] [1996] AC 284.
[99] (2001) 208 CLR 199 ('*Lenah Game Meats*').
[100] M Davies, A S Bell and P L G Brereton, above n 22, 86 [8.6].
[101] (1999) 198 CLR 380.

Australia pursuant to the *Foreign Judgments Act 1991* (Cth) (***Foreign Judgments Act***), but where no substantive proceedings are on foot in Australia. The HCA found that the Supreme Court of Western Australia had inherent power to make the freezing orders to prevent the abuse or frustration of its process, including in relation to the anticipated judgment of the High Court of Singapore, which, when made, would be registrable under the *Foreign Judgments Act*.[102] The making of such an order serves to "protect a process of registration and enforcement in the Supreme Court which is in prospect of being invoked".[103]

Foreign subpoenas

76 Rule 11.8AB of the *UCPR*[104] provides that "[a]ny document other than an originating process may be served outside Australia with the leave of the court, which may be given with any directions that the court thinks fit". In *Caswell v Sony/ATV Music Publishing (Australia) Pty Ltd*,[105] Hallen AsJ conducted a comprehensive survey of the authorities and found that the NSWSC:

> "… has power to authorise a subpoena to be served outside Australia, with the leave of the Court, and it has power to subsequently confirm service of that subpoena. The burden of convincing the Court to accept jurisdiction is on the Plaintiff. Doubt should be resolved in favour of the recipient located outside Australia and the Court should be careful in acceding to jurisdiction."[106]

77 Although his Honour was considering the operation of r 11.8AB's predecessor, r 11.8AB is in similar, albeit simplified, terms.

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[102] *PT Bayan* (2015) 258 CLR 1, 18-21 [43]-[50] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).
[103] Ibid 21 [50].
[104] This provision was introduced in December 2016 and is equivalent to the old r 11.5, which provided that "[s]ervice outside Australia of a document other than originating process is valid only if it is effected pursuant to the leave of the Supreme Court or is subsequently confirmed by the Supreme Court".
[105] [2012] NSWSC 986.
[106] Ibid [101].

78 The issue of foreign subpoenas was most recently considered by Wigney J in *Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc*,[107] in reasons described by Edelman J in a subsequent decision as "compelling".[108] In that case, the applicant brought representative proceedings against the respondents in respect of an unsuccessful financial product which the respondents had given a positive credit rating. The applicant sought to serve a subpoena on the trustee of the financial product, a United States company, to ascertain the identity of all persons with an interest in the product in order to notify them about the representative proceedings, as required under the *Federal Court of Australia Act 1976* (Cth). Wigney J granted the applicant leave to serve a subpoena limited to the production of records identifying the holders of the financial product.

79 His Honour recognised that the question whether a court has power to grant leave to serve a subpoena on a person outside Australia is controversial and remains unsettled.[109] His Honour found that the courts have the power to do so in an appropriate case, subject to mandatory considerations of international law and international comity and the need to exercise care and restraint.[110] As his Honour explained, the requirement of caution and restraint means that the facts and circumstances of each case will need to be closely considered.[111] His Honour identified the following relevant facts and circumstances:

> "… the nature of the subpoena; the nature of the particular proceedings and (in the case of a subpoena to produce documents) the importance of the documents to the issues in those proceedings; the attitude of the subpoenaed party (if known or ascertainable); the foreign country involved; and the law in, and attitude of, the foreign country regarding foreign subpoenas and whether they impinge upon the country's sovereignty."[112]

[107] (2016) 245 FCR 340 ('*Ceramic Fuel*').
[108] *Titan Enterprises (Qld) Pty Ltd v Cross* [2016] FCA 890 [11].
[109] *Ceramic Fuel* (2016) 245 FCR 340, 344 [11].
[110] Ibid 351-2 [49]-[50].
[111] Ibid 354 [59].
[112] Ibid.

80 Whether the applicant has exhausted all other avenues to obtain the documents sought is also a relevant consideration.[113]

81 To the extent that a court may lack the means to enforce the subpoena, his Honour considered that this was better viewed as a discretionary reason why a subpoena should not be served on a foreign addressee, rather than a reason why it should be found that the court does not have the power to grant leave to serve such a subpoena.[114]

82 *Ceramic Fuel* makes clear that, as a practical matter, leave to serve a foreign subpoena is unlikely to be granted in most cases.[115] Indeed, the cases indicate that it will only be granted in "exceptional circumstances".[116] Parties are therefore more likely to rely on other procedures for obtaining evidence or documents from foreign parties, such as letters of request.

83 In the "unique and somewhat exceptional circumstances"[117] of *Ceramic Fuel*, however, Wigney J found that leave to serve the subpoena (limited to the lists of holders of the financial product) was both appropriate and necessary to ensure that justice was done.[118] To the extent that issues of international law or comity arose from the fact that the subpoena required an entity in the United States to produce documents to an Australian court, his Honour found that those issues were not particularly compelling.[119] His Honour concluded that:

> "In the circumstances of this case, they are outweighed by the importance of the documents to the progress of the representative proceedings. In particular, they are outweighed by the need to ensure that group members, or potential group members, are appropriately notified of their rights as required by s 33X of the Federal Court Act.

[113] Ibid 359 [89].
[114] Ibid 354 [61].
[115] Ibid 352 [51].
[116] See, eg, *Australian Securities and Investments Commission v Flugge* (2015) 49 VR 606, 609 [11] (Robson J).
[117] *Ceramic Fuel* (2016) 245 FCR 340, 357 [78].
[118] Ibid 359 [89].
[119] Ibid 359 [88].

> Leave to issue and serve the subpoena (limited to the first category of documents) is in all the circumstances both appropriate and necessary to ensure that justice is done in the proceeding for the purposes of s 33ZF of the Federal Court Act. It is necessary for Ceramic, as representative party, to ascertain the identity of group members. Amongst other things, that is necessary to enable the notice requirement in s 33X of the Federal Court Act to be satisfactorily complied with. It is also appropriate and necessary in circumstances where that information is important for the conduct of meaningful early mediation to take place. Ceramic has effectively exhausted all other avenues available to it for acquiring information in relation to the identity of group members."[120]

84 It should be noted that under the *Trans-Tasman Proceedings Act 2010* (Cth), subpoenas may be issued to persons or corporations resident in New Zealand.[121]

The choice of non-state law

85 Just as it is open for parties to choose their desired forum and mode of dispute resolution, parties also have the right to choose the law by which their contract is to be governed. This otherwise trite observation gives rise to interesting issues where provisions of non-state law are purported to be incorporated into a contract. The NSWCA considered this issue in *Elkerton and Willcocks in their capacity as Administrators of South Head & District Synagogue (Sydney) (in liq) (controllers apptd) v Rabbi Milecki*,[122] which concerned the incorporation of Orthodox Jewish law, Halacha, into a contract of employment.

86 The respondent was appointed Chief Rabbi of the South Head & District Synagogue in 1985. In 1999, he entered into a contract with South Head & District Synagogue (Sydney) Ltd (**SHDS**), cl 1 of which explained that as material changes had been made to the contractual arrangements between the respondent and "the congregation", the parties had decided to set out those arrangements in writing. Clause 2 provided that "[t]he relationship between the Rabbi and the congregation shall be defined in accordance with Halacha".

[120] Ibid 359 [88]-[89].
[121] *Trans-Tasman Proceedings Act 2010* (Cth) pt 5 div 2.
[122] [2018] NSWCA 141.

87 The appellants, the administrators of SHDS, purported to terminate the respondent's employment. The respondent challenged the validity of the termination. According to the expert evidence, one aspect of Halacha is the principle of Hazakah, which provides that a Rabbi's appointment is for life and cannot be terminated except by agreement or pursuant to a decision of a Beth Din that the termination is justified. The respondent contended that Hazakah was a term of his contract. It is important to note that the respondent did not contend that cl 2 operated as a choice of law clause selecting Halacha as the governing law of the contract – it was accepted that the governing law was Australian law.

88 The primary judge, Brereton J (as his Honour then was), found that Hazakah was incorporated or, in the alternative, implied as a term of the contract and, accordingly, SHDS was not entitled to terminate the respondent's employment in the absence of a finding of a Beth Din that there were grounds for termination. The appellants were successful on appeal.

89 The issues on appeal were: first, whether the reference in cl 2 to "the congregation" should be construed as referring to SHDS (the primary judge's finding that cl 2 incorporated Hazakah as a term of the contract depended on this construction of cl 2); secondly, whether, if "the congregation" referred to SHDS, cl 2 was effective to incorporate Hazakah into the contract; and thirdly, whether a term in the nature of Hazakah should be implied, either as necessary or by custom.

90 Meagher JA (Bathurst CJ and Macfarlan JA agreeing) found that "the congregation" described the community of people who worshipped at the synagogue.[123] His Honour found that cl 2 was "in the nature of a recital, recording the position as between the Rabbi and his congregation, but not in a way intended to give rise to legal obligations".[124] Even if cl 2 was to be construed as referring to SHDS, his Honour found that it did not incorporate

[123] Ibid [35].
[124] Ibid [36].

Hazakah because the subject matter of the incorporation was not sufficiently described.[125]

91 As to whether Hazakah was an implied term of the contract, his Honour found that it should not be implied from custom or usage, there being no evidence that contracts made in Australia between a Rabbi and his congregation, or a legal entity controlled by that congregation, are taken to include such a term.[126] Nor did his Honour consider that such a term was to be implied to give the contract business efficacy.[127]

92 This case, in spite of its outcome, recognises that principles of non-state law may be incorporated as terms of a contract of which Australian law is the governing law, provided that there is certainty about what is being incorporated. The Full Court of the Supreme Court of South Australia so decided in *Engel v Adelaide Hebrew Congregation Inc*,[128] citing *Halpern v Halpern*[129] and *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*.[130]

93 It will not be long, in my opinion, before the Court will encounter a case of a contract governed by Sharia Law and, depending on the nature of the case and underlying dispute, very challenging questions may arise as to the effect of such a choice, especially where principles under Sharia Law are or may be at odds with Australian law or public policy.

Proof of foreign law

94 While on the topic of governing law clauses and before turning to consider the enforcement of foreign judgments, I wish to make brief mention of two recent decisions on the topic of proof of foreign law. The first concerns proof of foreign law by reference out. Pursuant to r 6.44(2) of the *UCPR*, the NSWSC may, on the application of one or more of the parties or of its own motion,

[125] Ibid [51].
[126] Ibid [45].
[127] Ibid [46].
[128] (2007) 98 SASR 402, 409 [36] (Doyle CJ, Bleby and Vanstone JJ).
[129] [2007] EWCA Civ 291.
[130] [2004] EWCA Civ 19.

order that a question of foreign law be answered by a court-appointed referee from the relevant foreign law jurisdiction.[131] This procedure was used to ascertain the content of Indian law in the Federal Court's decision of *Kadam v MiiResorts Group 1 Pty Ltd (No 4)*,[132] in which both sides had filed competing expert reports as to the content of Indian law. Depending on the precise terms of the reference, there is no reason why, in principle, a referee could not express a view as to how the relevant foreign law would be applied to the facts of a particular case. It would then be a matter for the court whether or not to adopt the referee's report.

95 I would note one further point in this regard. First, one of the procedural initiatives of the Singapore International Commercial Court has been to allow parties simply to make legal submissions in respect of foreign law questions rather than requiring it to be proved as a matter of fact. The value of this more flexible approach may depend upon what foreign law is invoked and how accessible it is.

96 The second decision to which I wish to refer concerns the presumption that the relevant foreign law is the same as that of the forum. The presumption is, of course, subject to limitations. In a matter heard by the NSWCA last year, *Benson v Rational Entertainment Enterprises Ltd*,[133] although it was not necessary to decide the issue, Leeming JA (Beazley P and Emmett AJA agreeing) indicated that "not lightly would [he] have been prepared to proceed on [the] basis"[134] that the law of New York in relation to privity of contract was the same as that of the common law of Australia. His Honour noted that it is notorious that most jurisdictions of the United States had long ago relaxed the

[131] See generally Chief Justice James Spigelman, 'Proof of Foreign Law by Reference to the Foreign Court' (2011) 127 *Law Quarterly Review* 208; Justice Paul Brereton, 'Proof of Foreign Law: Problems and Initiatives' (2011) 85 *Australian Law Journal* 554.
[132] (2017) 252 FCR 298.
[133] (2018) 355 ALR 671.
[134] Ibid 689 [104].

restrictions imposed by the rules of privity, as least insofar as it applied to third party beneficiaries.[135]

The enforcement of foreign judgments

97 Turning finally to the enforcement of foreign judgments, it has long been recognised that enforceability is critical to the smooth operation of commerce. In *Comandate*, it was observed that "[a]n ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce".[136] A foreign judgment may be enforced pursuant to common law rules for enforcement, as well as pursuant to statute. It is the latter on which I wish to focus.[137] A useful vehicle for considering this issue is the Court of Appeal of Western Australia's recent decision, *Kok v Resorts World at Sentosa Pte Ltd*.[138]

98 That case concerned a judgment of the High Court of Singapore entered against the appellant in respect of his failure to repay money that had been lent to him by the respondent for the purpose of gambling at the respondent's casino. The judgment was registered in the Supreme Court of Western Australia pursuant to the *Foreign Judgments Act*. The High Court of Singapore is one of the courts to which the application of the Act extends.[139] Pursuant to s 6(1), the respondent applied to the Supreme Court of Western Australia to have the judgment registered. Section 6(3) provides that if an application is made under s 6, upon proof of the matters prescribed by the applicable rules of court, the relevant court "is to order the judgment to be

[135] Ibid.
[136] *Comandate* (2006) 157 FCR 45, 95 [192] (Allsop J).
[137] Enforcement under the *Foreign Judgments Act* is a matter that frequently arises in the NSWSC: see, eg, *Yee v O'Dea* [2015] NSWSC 1752; *Bank of South Pacific Tonga (formerly Westpac Bank of Tonga) v Emberson* [2016] NSWSC 383; *Oldham v Lloyd* [2017] NSWSC 87; *Surgibit IP Holdings Pty Ltd v Ellis (No 2)* [2017] NSWSC 1379; *First Property Holdings Pte Ltd v Nyunt* [2019] NSWSC 249.
[138] (2017) 323 FLR 95 ('*Kok*').
[139] *Foreign Judgments Regulations 1992* (Cth). Whether the operation of the Act extends to a particular jurisdiction depends on whether there is substantial reciprocity of treatment between Australia and the foreign jurisdiction. Pursuant to s 5(1) of the *Foreign Judgments Act*, this is a matter to be determined by the Governor-General. As Martin CJ (Murphy and Beech JJA agreeing) explained in *Kok*, "[r]eciprocity of treatment in the foreign jurisdiction in which the judgment was first entered of a notional case corresponding to the claim the subject of the judgment is not a matter properly considered by a court hearing an application to set aside registration of the judgment": *Kok* (2017) 323 FLR 95, 106 [41].

registered". In other words, the court has no discretion but to order registration.[140]

99 The appellant applied under s 7 of the *Foreign Judgments Act* for the registration of the judgment to be set aside on the basis that enforcement of the judgment would be contrary to the public policy against the provision of credit for the purpose of gambling. Section 7(2) sets out the circumstances in which the court must set aside the registration of a judgment, including, relevantly, where the enforcement of the judgment "would be contrary to public policy".[141]

100 The primary judge, Sanderson M, dismissed the appellant's application. His Honour proceeded on the basis, as accepted by the parties, that the provision of credit for gambling in Western Australia was prohibited by statute. However, his Honour found that:

> "… it does not seem to me the fact there is such a prohibition in this jurisdiction in any way undermines the judgment obtained in Singapore. The legislature in Western Australia has made a determination and enacted legislation which reflects its approach to gambling and the social problems to which it can give rise. That is a perfectly valid exercise of legislative power. But it hardly embodies a universal principle. A system which does allow the provision of credit for gambling is not so inherently evil as to render it contrary to public policy. Many ordinary citizens of Western Australia and Singapore may regard the provision of credit for gambling as morally and ethically wrong. But that is not the point. It cannot possibly be said Singapore is not entitled to make its own decision on that question. Having made that decision, and the defendant having availed himself of the facility, public policy in Australia does not dictate that registration of this judgment should be set aside."[142]

101 On appeal, Martin CJ (Murphy and Beech JJA agreeing) emphasised that only in a "narrow and limited range of circumstances"[143] will enforcement be refused on the basis of public policy. To the extent that the appellant relied on

[140] The court must, however, refuse to register a judgment if it appears that the court would be bound to set aside the registration. The court would, for example, be bound to set aside the registration of a judgment in respect of which the judgment debtor has the benefit of an immunity under the *Foreign States Immunities Act 1985* (Cth): see *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.
[141] *Foreign Judgments Act* s 7(2)(xi).
[142] *Resorts World at Sentosa Pte Ltd v Kok* [2016] WASC 96 [15].
[143] *Kok* (2017) 323 FLR 95, 101 [18].

the laws of Western Australia prohibiting the provision of credit for gambling, his Honour found that, in a federal system, the laws of the particular jurisdiction in which enforcement is sought do not carry special significance.[144] This, his Honour explained, was for two reasons. First, as the *Foreign Judgments Act* is a Commonwealth statute, "public policy" should be construed as "a reference to the public policy of Australia, as recognised by all of the courts of Australia, rather than as a reference to public policy parochial or peculiar to a particular state or territory".[145] Secondly, in light of the fact that the authorities make clear that the offence to public policy must be "fundamental and of a high order",[146] his Honour considered that it was "inconceivable that a principle of 'public policy so sacrosanct as to require its maintenance at all costs' could be peculiar or parochial to a particular state or territory of Australia".[147]

102 Contrary to the assumption made by the primary judge on the basis of the position adopted by the parties that the advancement of credit for the purpose of gambling in Western Australia is prohibited by statute, Martin CJ found, and the appellant accepted, that all or at least a significant number of Australian jurisdictions, including Western Australia, expressly permit the provision of such credit and authorise the enforcement of debts created by the provision of such credit.[148] In other words, the appellant conceded that the laws regulating gambling in Western Australia and in most, if not all, states and territories of Australia are substantially identical to the laws regulating gambling in Singapore. This, his Honour found, was fatal to the appeal.[149]

103 As his Honour explained, "it is inconceivable that the courts of Australia could recognise a public policy which was not recognised by the laws [either common law or statute] which those courts are required to enforce".[150] In order words, to suggest that the enforcement of a judgment arising from a

[144] Ibid 101 [19].
[145] Ibid 101 [20].
[146] *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 21 VR 241, 246 [22] (Whelan J).
[147] *Kok* (2017) 323 FLR 95, 101 [21].
[148] Ibid 102 [25].
[149] Ibid 104 [31]-[32].
[150] Ibid 102 [23].

contract which was lawful and enforceable in the foreign jurisdiction in which judgment was first entered and which would be lawful and enforceable in most, if not all, states and territories of Australia was contrary to the public policy of Australia would be an "extraordinary"[151] result.

Conclusion

104 An inevitable consequence of the growth of transnational litigation is that the area of private international law is one that is full of movement. This movement takes place at the domestic level – as I have sought to illustrate by examining some of the recent developments in Australia – but it also occurs at the international level – as exemplified by the conclusion of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters on 2 July 2019 which, together with the Hague Convention on Choice of Court Agreements will, if implemented municipally, significantly alter the framework in which some of the issues addressed in this paper are dealt with in practice.

105 Last month at the Australian Bar Association Conference in Singapore, I sat on a panel debating whether or not Australia needed an international commercial court. For a number of reasons, I expressed the view that we do not. One of the reasons was that a number of jurisdictions, including the NSWSC, already have commercial lists that have the necessary qualities to attract transnational litigation. Keeping abreast of developments in private international law and being attuned to changes in the global market are vital to sustaining the Court's ability to deal effectively and efficiently with cross-border matters.

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[151] Ibid 104 [33].