Annual Survey of Recent Developments in Australian Private International Law 2004

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I. Introduction

As explained in the previous volume of this journal,[1] this annual survey of developments in private international law (or conflict of laws) is a return to a review of developments over the previous year. Thus, in contrast to the four-year survey covering 2000-2003 last year, this year we offer a briefer review of only those developments in 2004.

Our purpose with this review is to provide a quick source of information on developments over the previous year for those involved with conflicts issues either as a practitioner or teacher. We have in mind both the annual review of cases that we do before teaching our own class and the quick check that a lawyer would make after developing an argument based on secondary sources. We cover in detail those developments that develop the rules of private international law, but we also try to refer to cases that apply established rules in new factual situations.

Our purpose, of course, affects our methodology. This review is primarily qualitative rather than quantitative; that is, we are selective, rather than comprehensive, in our choices of what material to include. First, we identified cases and developments by searching computer databases such as Westlaw, LexisNexis and AGIS, as well as other traditional research methods. We covered cases handed down and other developments that occurred between 1 January 2004 and 31 December 2004. Occasionally we note where appeals or other developments continued beyond our self-imposed cut-off date. Second, from all the identified materials we applied our own judgment as to which developments altered existing Australian conflicts rules. Our rough rule of thumb was whether a development would need to be mentioned in our courses or syllabus on private international law. This standard is admittedly idiosyncratic and subjective. We hope that, by identifying cases collectively and based on our experience of teaching this material, our choices will be prescient rather than peripheral.

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1 K Anderson J Davis, 'Annual Survey of Recent Developments in Australian Private International Law, 2000-2003' (2005) *Aust YBIL* 443.

Given the relatively limited volume of annual decisions and developments in Australia, we have also attempted to collect and note in the text or the notes all relevant academic writing on Australian conflicts during this period. In light of this approach, we encourage colleagues to contact us regarding any relevant developments or research that they think we should mention in future volumes.

This article is organised in traditional conflicts order. While this structure is consistent with last year, we have not maintained identical numbering from previous editions. Section II covers developments in Australian jurisdictional law, including both international jurisdiction and domestic cross-vesting issues. Section III reviews choice of law questions including *renvoi*, substance versus procedure characterisation, choice of privilege, contract and garnishment law, and exclusion of foreign laws. Section IV considers enforcement of foreign judgments, in particular the exceptions for fraud, punitive damages, and statute of limitations. In a brief conclusion, we note what may be a developing trend in the shadow of the High Court of Australia's decisions in *Pfeiffer* and *Zhang* for courts to prefer clear, easily applicable rules over approaches which, while more nuanced, may be more challenging to apply.

II. Jurisdiction[2]

(a) Generally

(ii) Jurisdiction over property

Jurisdiction over property rarely becomes an issue: either a court has the property within its jurisdiction or it does not. *Tisand Pty Ltd v Owners of the Ship MV Cape Moreton (ex Freya)*[3] presents one of those unusual occasions, because there was a dispute as to who owned the property: a ship. The plaintiffs were suing the defendants for damages from the consignment of a cargo carried on a voyage from South Africa to Shanghai. Neither party had any presence in Australia, so the plaintiffs established jurisdiction in the Australian Federal Court by having the ship arrested here. The defendants countered that the ship could not be the basis of *in rem* jurisdiction, because the plaintiffs were not 'owners' of the ship as required to establish jurisdiction by section 17 of the Admiralty Act 1988 (Cth). It seems the defendants had purchased the vessel from the plaintiffs at the relevant date – when the proceeding commenced – but the sale had not yet been registered in the ship's port of registry in Liberia. Thus, the plaintiffs were still noted on the Liberian Registry as owners. The issue was: in establishing *in rem* jurisdiction under the Admiralty Act, is the requisite ownership of the vessel satisfied by registry ownership even when beneficial ownership has passed?[4]

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2 Two unrelated but extremely interesting recent articles discussing Antipodean jurisdiction are R Garnett, 'The Internationalisation of Australian Jurisdiction and Judgment Law' (2004) 25 *Australian Bar Review* 205 and C McLachlan, 'International Litigation and the Reworking of the Conflict of Laws' (2004) 120 *Law Quarterly Review* 580.

3 (2004) 141 FCR 29; 210 ALR 601.

4 Ibid 605 [22].

In addressing this question, the Court began by noting that a string of cases made clear that the jurisdiction clause was satisfied by '*beneficial* ownership'.[5] It also noted in *dicta* that the party challenging the presumption of the registry ownership bore the burden of showing why it should be ignored.[6] The Court, however, found it unnecessary in this case to resolve whether registry ownership alone would satisfy the jurisdictional ownership requirements. It did note that to answer that question might require an investigation of not only the Admiralty Act and its legislative history, but also the law of the place of the registry(ies).[7] Thus, rather than clarifying the seemingly simple issue, *The Cape Morton* appears to leave the issue murkier than before by implicating the evidentiary question of proving the foreign registry law in each case.

(ii) Jurisdiction over parties outside Australia:[8] *torts*

The way new technologies have 'flattened' the world[9] presents challenges for long-arm jurisdiction over virtual operators outside Australia. The High Court's review of jurisdiction for internet defamation in *Dow Jones & Co Inc v Gutnick*[10] starts the clarification process and now *K & S Corp Ltd v No 1 Betting Shop Ltd*[11] suggests some guidance on jurisdiction over virtual casinos. The plaintiff's employee misappropriated approximately $8.5 million largely to cover his betting debts to the defendants (virtual casinos located in Vanuatu and the United Kingdom). The plaintiff sued the off-shore casinos, seeking to get the money that had been deposited with them, based on some form of constructive trust theory. Jurisdiction was derived from the South Australian Supreme Court Rules 1987, rule 18.02[12] which allowed service out of jurisdiction where:

> the subject matter of the claim is or relates to … (f) a tort committed wholly or partly within the jurisdiction; or (fa) where the proceedings, wholly or partly are founded on, or are for the recovery of damages in respect of damage suffered in the State caused by a tortious act or omission wherever occurring.

The plaintiff's argument was that because its claim in equity against the casinos was 'related' to the employee's allegedly tortious act of conversion, service out of jurisdiction on the defendants should be allowed. Justice Duggan was unwilling to accept this bootstrapping approach, but he signalled that the plaintiff might present an application for leave to serve out of the jurisdiction based on another ground.[13] Given the various presences the defendants did have

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5 Ibid [23] (emphasis in original).
6 Ibid 609 [44].
7 Ibid 605-06 [27].
8 Discussing this issue generally in New Zealand see, P Myburgh and E Schoeman, 'Jurisdiction in Trans-national Cases' [2004] *New Zealand Law Journal* 403.
9 See eg T L Friedman, *The World is Flat: A Brief History of the Twenty-first Century* (2005).
10 (2002) 210 CLR 575.
11 [2004] SASC 155 (unreported, Duggan J, 1 June 2004).
12 Under South Australia's new Supreme Court Rules the language has been revised slightly. Supreme Court Rules 2006 r 40(1)(f)(i)-(ii).
13 *K & S Corp* [2004] SASC 155, [62]-[67].

in Australia, including bank accounts and *Gutnick*-type access by locals, the Court's desire not to force unnecessarily the long-arm rules for tort to cover this claim, and yet to guide the plaintiff towards an approach for reaching such virtual actors, seems admirably well-balanced and pragmatic.

(b) *Forum non conveniens* and Anti-suit Injunction

(i) Forum non conveniens

Sometimes even the application of the *forum non conveniens* rule is easy. In *El-Kharouf v El-Kharouf*,[14] the defendants sought a stay against a series of related proceedings in the Supreme Court of New South Wales concerning their previous joint venture with their cousin, the plaintiff, in Jordan. The parties jointly operated a Jordanian company that did business in Jordan, Saudi Arabia, and Iraq. A dispute arose among them regarding contributions to the enterprise around the time that the defendants, all Jordanians, emigrated to Australia. The conflict resulted in the plaintiff, also a Jordanian though occasionally residing in Switzerland, bringing a lawsuit in Jordan. Before pursing the Australian suit, the defendants had been actively defending the Jordanian case, which was still pending. In commenting on the factual dispute that was underlying both lawsuits, the New South Wales Court noted that to unravel the matter would involve evidence from a number of Jordanian witnesses, some of whom would need translation and might not be able to travel, and an understanding of Jordanian law. Thus, in applying the Australian *forum non conveniens* standard derived from *Voth*[15] and its progeny, Burchett AJ found without difficulty that his Supreme Court of New South Wales was 'a clearly inappropriate forum'; thus, the suit should be permanently stayed.[16]

(ii) Anti-suit injunctions

The only 2004 case found referring at all to anti-suit injunctions was a short statement in *Old UGC Inc v Industrial Relations Commission of New South Wales*.[17] It bears mentioning for an obvious point – Spigelman CJ noted requests for anti-suit injunctions should first come before the trial court not the appeals court – and its impressive sense of comity. The Chief Justice in commenting on the request observed that a similar application had already been made and refused in the competing jurisdiction, Colorado, leaving him disinclined to allow such an antagonistic manoeuvre in the matter before him.[18] While this *dicta* will not likely hold much precedential or persuasive value, considering both its pragmatic and respectful appeal, it is a good 'rule of thumb' for future courts.

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14 [2004] NSWSC 187 (unreported, Burchett AJ, 23 June 2004).
15 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
16 Ibid [25].
17 (2004) 60 NSWLR 620 (Spigelman CJ, Mason P and Handley JA), reversed on other grounds (2006) 227 ALR 190; [2006] HCA 24, [34] (unreported, Kirby J, 18 May 2006).
18 Ibid 633 (Spigelman CJ).

(c) Cross-vesting Jurisdiction within Australia

(i) Transfers under cross-vesting scheme

The domestic equivalent of *forum non conveniens* is section 5(2) of the uniform Jurisdiction of Courts (Cross-vesting) legislation.[19] As reviewed in the previous volume, however, an effective split in interpretation of section 5(2) had developed within Australia.[20] For domestic venue questions, Western Australia applies a stricter *Voth*[21]-type 'clearly inappropriate forum' standard[22] while all other jurisdictions apply a more liberal *Spiliada*[23]-type 'more appropriate forum' standard.[24] The High Court has indirectly resolved this debate in *BHP Billiton Ltd v Schultz*[25] by explaining in detail why the more appropriate forum test is the correct interpretation of the cross-vesting legislation. The key element of the decision, on which all the Justices agreed, was the Court's explanation of how the stricter *Voth* test emerged from a concern about denying a party its right of access to a specific court, while the cross-vesting scheme did not deny access but rather only directed 'cases [to be] heard in the forum dictated by the interests of justice'.[26] Thus, in application, a Court hearing a request for transfer to another domestic court should make 'a 'nuts and bolts' management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute'.[27]

The 'nuts and bolts' management decision made in *BHP* is interesting as it appears to be one of the few court-confirmed examples that would satisfy the *Spiliada* approach but not the *Voth* test. In *BHP*, the plaintiff was a South Australian suffering from asbestosis that he alleged he had contracted while working in the defendant's South Australian plant. Thus, the applicable law was South Australian, which was also where most of the witnesses were. Nevertheless, the plaintiff commenced proceedings in the New South Wales Dust Diseases Tribunal, which specialises in such cases and offers numerous advantages for plaintiffs including the proceedings not being subject to a limitation period, relaxation of the rules of evidence, speedy resolution of disputes and interim damage awards. Because *James Hardie & Co Pty Ltd v Barry*[28] had already confirmed that the Tribunal could not transfer cases to other states, the defendant sought to remove the case to the New South Wales Supreme Court and then sought to transfer the matter to South Australia

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19 See eg Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) s 5(2).
20 Anderson and Davis, above n 1, 450-51.
21 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
22 *Anderton v Enterprising Global Group* [2003] WASC 67 (unreported, Hasluck J, 4 April 2003) [33]-[36].
23 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460.
24 See eg *James Hardie & Co Pty Ltd v Barry* (2000) 50 NSWLR 357, 361 (Spigelman CJ), 377 (Mason P); *World Firefighters Games Brisbane v World Firefighters Games Western Australia Inc* (2001) 161 FLR 355.
25 (2004) 221 CLR 400; 211 ALR 523.
26 Ibid 527 [14] (Gleeson CJ, McHugh J, Heydon J).
27 Ibid [13] (quoting Street CJ in *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711, 714).
28 (2000) 50 NSWLR 357.

pursuant to section 5(2) of the cross-vesting scheme.[29] The judge on this matter denied the application,[30] and the defendant appealed directly to the High Court by special leave.[31]

As noted above, all the Justices of the High Court agreed on the appropriate standard to apply to the section 5(2) transfer application. They split in its application, however, with three Justices wanting to remit the case to the New South Wales Supreme Court for determination[32] and a majority agreeing with Gummow J that the matter should be transferred forthwith to South Australia.[33] In coming to this conclusion, Gummow J simply noted that it was not a difficult case in light of the only applicable law being that of South Australia, the fact that the majority of witnesses were in South Australia, and the view that the trial court had attached too much significance to procedural elements favouring one side in the New South Wales Court.[34]

A second case applying the section 5(2) standard, albeit in Western Australia and before the High Court decision, was *Anderson Formrite Pty Ltd v Baulderstone Hornibrook Pty Ltd*.[35] The case involved a dispute about the construction of an office building in Perth. The subcontractor from Western Australia ended up suing the prime contractor from New South Wales in the Supreme Court of Western Australia, despite a clause in the contract which provided:

> The law governing the Subcontract, its interpretation and construction, and any agreement to arbitrate, is the law of Western Australia but the forum is New South Wales for the conduct of any dispute.

The Court first held that the clause was indeed an exclusive jurisdiction clause.[36] It then continued to consider whether pursuant to section 5(2)(b)(iii)[37] there might be matters – beyond a mere balance of convenience – that justified overriding the parties' exclusive choice. In application, the Court found that the facts did not justify overcoming the bias in favour of the exclusive jurisdiction clause as there was only a slight imbalance of witnesses favouring Western

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29 Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) s 5(2)(b)(iii) provides where: 'it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory, the first court shall transfer the relevant proceedings to that other Supreme Court'.

30 *BHP Billiton Ltd v Schultz* [2002] NSWSC 981 (unreported, Sully J, 22 October 2002).

31 *BHP* (2004) 211 ALR 523, 533 [34] (Gummow J).

32 Ibid 532 [31]-[32] (Gleeson CJ, McHugh and Heydon JJ).

33 Ibid 547 [101] (Gummow J), 565 [175] (Kirby J), 566 [177] (Hayne J), 586-87 [262]-[263] (Callinan J).

34 Ibid. Also discussing this case see, M Schilling, 'A Questionable Onus of Proof in Cross-Vesting Applications (2006) 80 *Law Institute Journal* 34; S Herd, 'Dust Diseases: Recent Developments for Asbestos Claims' (2006) 26 *Queensland Law Society Proctor* 11.

35 (2004) 206 ALR 614.

36 Ibid 618.

37 The language of the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) s 5(2)(b)(iii) is in all relevant respects the same as the New South Wales legislation quoted above n 29.

Australia, the applicable law factor was neutral since there was no significant difference in the laws, and in any event the defendant had a significant connection with New South Wales.[38] We can only hope that this decision, combined with *BHP*, will compel the West Australian Supreme Court to abandon its previous parochial approach to cross-vesting transfer applications under section 5(2).

III. Choice of Law

(a) *Renvoi*

As foreshadowed in our previous review, in *Neilson v Overseas Projects Corporation of Victoria*,[39] the Supreme Court of Western Australia brought out the classic spanner of *renvoi* to throw into the seemingly straightforward works of the choice of tort law rule following *Pfeiffer*[40] and *Zhang*.[41] The case involved an Australian plaintiff who was the partner of a lecturer contracted by an Australian company to teach in China. While in China, the plaintiff fell down the stairs of the apartment provided as part of the employment contract. Upon her return to Australia, she sued the employer and its insurer in tort. The trial Court, applying the strict *lex loci delicti* rule of *Pfeiffer* and *Zhang*, found that Chinese law applied. However, it went on to find that Chinese law allowed for application of foreign law where both parties were 'nationals of the same country',[42] and thus, it applied Australian tort law to find in favour of the plaintiff.[43] Effectively without mentioning or discussing it, the Court had applied *renvoi* to the choice of law question.

On appeal to the Full Court of Western Australia under the name of *Mercantile Mutual Insurance (Australia) Ltd v Neilson*,[44] the Justices tackled the tricky *renvoi* problem in tort for the first time in Australia.[45] In a very useful section, the Court first outlined the so-called 'no *renvoi*', 'single *renvoi*' and 'double *renvoi*' options.[46] It rejected summarily the single *renvoi* approach effectively taken by the trial Court in applying Australian law as 'not supported by authority'.[47] The Court then established that no case law supports application of *renvoi* to a tort case and that academic authority is uniformly critical of such a move. Moreover, the Court showed, building from *Pfeiffer* and

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38 *Anderson* (2004) 206 ALR 614, 623-24.
39 [2002] WASC 231 (unreported, McKechnie J, 2 October 2002).
40 *John Pfeiffer Pty Ltd v Rogerson* (2000) 2003 CLR 503.
41 *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.
42 Art 146 of the General Principles of Civil Law of the People's Republic of China was said to provide: 'With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.' *Mercantile* (2004) 28 WAR 206, [22].
43 *Neilson* [2002] WASC 231, [122].
44 (2004) 28 WAR 206 (McLure J, Johnson J, Wallwork AJ).
45 Ibid [35].
46 Ibid [29].
47 Ibid [34].

Zhang, how allowing for double *renvoi* went directly against the main rationale for those High Court decisions; viz certainty and predictability. Thus, the appeal Court concluded that the trial Court erred in applying Australian law, and as the claim was statute barred under Chinese law, the plaintiff had no claim.

Given the rarity of an explicitly *renvoi* decision in Australia or anywhere, a number of articles[48] and an appeal to the High Court predictably followed. Interestingly, the Court reinserted the complexity of *renvoi* into Australian private international law. However, because that case was handed down in 2005, we will save its discussion for next year.

(b) Characterisation of substance and procedure

Much more common than *renvoi*, but equally perplexing, is the problem of characterising substantive and procedural law for private international law purposes. *Harding v Wealands*[49] is an English case that adds to the mix. English cases, of course, are referred to much less in Australia than in the past. Nevertheless, given the matter's significant factual connection with Australia and its comments building on Australian authority for the distinction between substantive and procedural law, it is worth considering here. For the English lawyer, the case primarily is about application of the exception to the *lex loci delicti* rule where significant connections with another jurisdiction justify displacing the place of the tort as the applicable law.[50] For the Australian lawyer, that exception (with the caveat for *renvoi* noted in *Neilson* above) has been hermetically sealed by the High Court's decisions in *Pfeiffer* and *Zhang*.[51] Instead, the case warrants attention for its comments on the characterisation of substance versus procedure.

In *Harding*, the plaintiff, a British national, and the defendant, an Australian national, lived together for eight months in England before heading to New South Wales for a holiday. While driving there the defendant negligently caused a car accident that left the plaintiff tetraplegic. The couple returned to England where suit was brought and liability conceded leaving only the issue of damages. The New South Wales Motor Accidents Compensation Act 1999 limited damages, while English law allowed for the common law alone to

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48 A Lu and L Carroll, 'Ignored No More: *Renvoi* and International Torts Litigated in Australia' (2005), 1 *Journal of Private International Law* 35 (arguing against *renvoi*); R Mortensen 'Troublesome and Obscure: The Renewal of *Renvoi* in Australia' (2006) 2 *Journal of Private International Law* 1; M Keyes, 'The Doctrine of *Renvoi* in International Torts' (2005) 13 *Torts Law Journal* 1; R Yezerski, '*Renvoi* Rejected? The Meaning of 'the lex loci delecti' after *Zhang*' (2004) 26 *Sydney Law Review* 273 (arguing in favour of *renvoi*).

49 [2005] 1 All ER 415. See also P Rogerson, 'Conflict of Laws – Tort – Quantification of Damages – Substance or Procedure?' [2005] *Cambridge Law Journal* 305.

50 Private International Law (Miscellaneous Provisions) Act 1995 (UK) ss 11 (*lex loci delecti*), 12 (flexible exception).

51 Some commentators seem to suggest that despite *Pfeiffer* and *Zhang*'s statements there might still be room for some flexibility to choice of tort law issues. A Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases: the Way Forward in Australia' (2004) 23 *University of Queensland Law Journal* 435.

apply, resulting in more damages than were available in Australia. The English trial judge ruled that given the connections to England, English law should apply to all aspects of the case, including the quantum of damages. In the alternative, he held that the New South Wales damages cap should be viewed as procedural law in which case the *lex fori* applied.[52] The Court of Appeal disagreed on the substantial connections issue, stating that the connections with Australia were so significant that it would be 'unlikely' that it might be displaced by another law.[53]

The Court split on the characterisation of the quantum of damages, however. Waller LJ accepted the established English view that while heads of damages is a substantive matter, quantum is procedural.[54] On the other hand, Arden LJ and Sir William Aldous were persuaded by Mason CJ's reasoning in *Stevens v Head*,[55] which was subsequently adopted by the High Court in *Pfeiffer*,[56] that all questions relating to damages are substantive.[57] Not only does this approach seem to give procedure its 'natural meaning', but Sir William Aldous also pointed out that to do otherwise would be to invite inappropriate forum shopping even in cases such as this where *forum non conveniens* would not obviously address the situation.[58] While a similar result would have been arrived at by Australian judges based on the existing decisions alone, the addition of a recent English decision reinforcing this approach and providing a specific example of its application is welcome. Nevertheless, we note that the decision was appealed to the House of Lords, and just as we were going to press, the House upheld the appeal;[59] we will leave discussion of their Lordships' opinions for a future volume.

(c) Choice of Substantive Law

(i) Legal Professional Privilege

At first glance, the question of the admissibility of privileged legal documents would seem to be an issue of procedure or evidence, which in either event would be governed by the *lex fori*.[60] However, two recent cases both questioned, without answering, that approach. In *Kennedy v Wallace*,[61] the

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52 *Harding v Wealands* [2004] EWHC 1957 (QB) (unpublished, Elias J, 27 May 2004).

53 *Harding* [2005] 1 All ER 415, [20]-[21] (Waller LJ), [45] (Arden LJ), [76] (Sir William Aldous).

54 Ibid [41] (Waller LJ).

55 (1992) 203 CLR 433.

56 *Pfeiffer* (2000) 203 CLR 503.

57 *Harding* [2005] 1 All ER 415, [49] (Arden LJ), [107] (Sir William Aldous)

58 Ibid [86] (Sir William Aldous).

59 *Harding v Wealands* [2006] 3 WLR 83; [2006] UKHL 32 (unpublished, Lords Bingham, Wolff, Hoffmann, Rodger, Carswell, 5 July 2006).

60 P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [16.1], [16.11]; L Collins (ed), *Dicey and Morris: The Conflict of Laws* (13th ed, 2000; 4th Supp, 2004) Rule 17(3). See also *Bourns Inc v Raychan Corp* [1999] 3 All ER 154 (CA) (applying English privilege rules where issue of privilege in United States).

61 (2004) 208 ALR 424.

issue was the admissibility in the Federal Court of legal documents from a meeting in London by the defendant with his Swiss lawyer about preventing Australian authorities (Australian Securities and Investments Commission (ASIC) in this case) from examining certain assets and transactions. In *Arrow v Merck*,[62] the issue was again about admission in the Federal Court of potential patent information circulated within a United States company to its in-house legal department. In both cases, the Justices raised the possibility of applying a substantial connection rule for the legal profession privilege, but with apparent disappointment they noted that counsel had not argued the issue.[63] Thus, in *Kennedy* the Court applied the *lex fori* directly,[64] while interestingly in *Arrow* it applied United States law on the basis that there was no relevant difference between it and Australian law.[65] Application of domestic law resulted in the documents not being protected in *Kennedy* but protected in *Arrow*. In light of these divergent results possible under existing domestic law, the priority on clarity seen in the High Court's recent conflicts decisions, and the otherwise seemingly clear and settled *lex fori* approach, the Courts' musings do not provide particularly useful signposting for the future.[66]

(ii) Contracts[67]

Sometimes even the seemingly dry subject of choice of contract law can be tragic. In *Commonwealth v Mills*,[68] an Australian father and Cambodian mother living in Phnom Penh lost their young Australian son unexpectedly after the Australian Embassy Clinic allegedly refused to see the boy. The parents sued the Commonwealth in the Supreme Court of New South Wales for nervous shock arising as a result of the breach of an alleged contract by the Clinic to provide medical services to the boy. In February 1996 the Australian Embassy in Cambodia had placed a notice in the local English paper that the Clinic was no longer going to provide services to the general public unless under 'a specific agreement'. The plaintiff sent a reply letter to the Embassy requesting service for his two Canadian and one Australian construction workers and his family. The Embassy did not reply. Thus, the substantive issue was whether a

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62 (2004) 210 ALR 593.

63 *Kennedy* (2004) 208 ALR 424, 438; *Arrow* (2004) 210 ALR 593, 597.

64 *Kennedy* (2004) 208 ALR 424, 439.

65 *Arrow* (2004) 210 ALR 593, 597.

66 See also P Chalk and C Burgess, 'Recent Developments in Professional Privilege – Foreign Patent Attorneys and Inhouse Counsel' (2005) 17(9) *Australian Intellectual Property Law Bulletin* 158; M Edelstein, 'Legal Professional Privilege – Some Recent Developments' (2004) 78(11) *Law Institute Journal* 54; A Hughes, D Travis and D Stock, 'A Privilege Not a Right (2004) 14(4) *Australian Corporate Lawyer* 22; C Kee and J Feiglin, 'Legal Professional Privilege and the Foreign Lawyer in Australia' (2006) 80(2) *Australian Law Journal* 131; E Kyrou, 'It's a Privilege' (2005) 15(3) *Australian Corporate Lawyer* 14.

67 A minor decision in this area was *Nicom Interiors Pty Ltd v Circuit Finance Pty Ltd* [2004] NSWSC 728, [11] (unreported, , Young CJ, 6 August 2004), where the Court held that the proper law of a guarantee annexed to a lease was the same as the law expressed under the lease.

68 [2004] NSWSC 1042 (unreported, MW Campbell AJ, 10 November 2004).

contract was formed. Initially, the Court had to determine whether Australian or Cambodian contract law governed the issue of formation.

The matter was first heard by a Master who determined that because there was no express or implied choice of law, the closest and most real connection determined the proper law. Applying this, despite the formation and place of performance being in Cambodia, the Master determined that Australian contract law applied as the alleged contract would have been between the Australian government and an Australian citizen for the provision of western-style medical services to his Australian child. He added, 'Indisputably, Australia has the most settled and stable legal system.'[69] Associate Judge M W Campbell in reviewing the Master's determination held that consideration of both the child's nationality at time of treatment (ie months after the contract would have been formed) and the comparative development of the Cambodian legal system were irrelevant to determining the proper law of the contact, and as such, he was free to reach his own conclusion.[70] In making this determination, M W Campbell AJ relied on *Bonython v Commonwealth of Australia*[71] and focused particularly on the place of performance, as well as the place of formation and residence of all parties in Cambodia. The result was that Cambodian law was the proper law of the contract.[72] This decision is welcomed in two regards: first, it expressly avoids the Master's chauvinistic comparison of legal systems and, second, much like *Pfeiffer* and *Zhang* for torts, it creates a simple, clear-cut rule for determining the proper law of a contract in tricky factual situations.[73]

(iii) Garnishment of debts[74]

The factually complex litigation surrounding the money laundering case of *Evans v European Bank Ltd*,[75] discussed below, also provides recent Australian confirmation of the time-honoured English rule for determining the applicable law while garnishing a debt.[76] Thus, in *European Bank Ltd v Citibank Ltd,*[77] Handley JA writing for the Court applied a *lex fori* approach and refused to recognise an American garnishment ('seizure warrant') which sought to capture assets in an Australian bank account.

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69 Ibid [24].
70 Ibid [38].
71 [1959] AC 201, 219.
72 *Mills* [2004] NSWSC 1042, [44].
73 For a recent interesting critique of the choice of law in formation of international contracts, see K F K Low, 'Choice of Law in Formation of Contracts' (2004) 20 *Journal of Contract Law* 167.
74 Another small issue that might also be treated to a separate conflict rule is whether 'liabilities in Australia' under the Insurance Act 1973 (Cth) should be determined in accordance with conflict rules. However, the Court of Appeal of New South Wales declared in October 2004 that the issue was *not* to be determined with reference to private international law. *Assetinsure Pty Ltd v New Cap Reinsurance Corporation Ltd (in Liquidation)* (2004) 61 NSWLR 451, 459, 461-62 (Hodgson JA), 497 (Ipp JA).
75 (2004) 61 NSWLR 75.
76 See eg *Martin v Nadel (Dresdner Bank, Garnishees)* [1906] 2 KB 26.
77 (2004} 60 NSWLR 153, 165 (Hadley JA).

(d) Exclusion of Foreign Law

Leading on from the *European Bank Case* and foreshadowed in our previous review was the exclusion of foreign law decision is *Evans v European Bank Ltd*.[78] *Evans* was a money laundering case that in application involved assertion of United States extraterritoriality, with which the New South Wales Court of Appeal refused to assist. The case was brought by a United States receiver appointed under its Federal Trade Commission Act (US) who sought to collect a credit card scammer's assets that were momentarily located in Australia. The scammer defrauded Americans and transferred the money, via the Cayman Islands, to European Bank, which, despite its name, was in Vanuatu. European Bank in turn held the money with Citibank Ltd, an Australian company, which in fact deposited the money at Citibank NA, a New York company. This serendipity allowed the receiver to attach the assets but required the assistance of an Australian court to release them.

The issue in the case goes to the scope of the time-honoured exclusion of foreign revenue, penal or public laws from enforcement in Australia. If the empowerment of the receiver pursuant to the United States Federal Trade Commission Act is conceived as a public law, then it would follow that Australian courts should not assist the receiver in exercising his foreign powers. The problem is, in the words of the High Court in *Spycatcher*: 'The expression 'public laws' has no accepted meaning in our law.'[79] In a detailed opinion, Spigelman CJ began with *Spycatcher's* test of public laws, namely whether they involved 'governmental interests [which were] powers peculiar to government'.[80] In applying this, he found the substance, rather than form, of the Federal Trade Commission Act (US) was not a public law in this case.

> The recoupment of funds with a view to their return to persons deprived of those funds is a normal consequence of the application of the civil law. … There is nothing in this case of the character of a governmental interest in the sense in which that concept is applied in the Australian authorities, that is, as the exercise of a power peculiar to government.[81]

Thus, the Court overturned the trial judge on the exclusionary rule issue, though it went on to deny the appeal on other grounds.[82] Special leave to appeal to the High Court was sought, but refused in 2005.[83] By way of commentary, any decision that provides a bit more guidance through the unruly wilderness of the public law exclusion is to be welcomed, especially in light of a globalised environment where e-scammers can cross borders as easily as was done in this case.[84]

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78 (2004) 61 NSWLR 75.

79 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30, 42.6.

80 *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 86.

81 Ibid 96 (Spigelman CJ).

82 Ibid 109 (Spigelman CJ).

83 *Evans v European Bank Ltd* [2005] HCATrans 142.

84 See also J L R Davis, 'Exclusion of Foreign Laws' Australian and New Zealand Society of International Law Conference Thirteenth Annual Meeting, 16-18 June

IV. Enforcement of Foreign Judgments

(a) Exception: Fraud and Punitive Damages

Finding exceptions to the generally favourable rules for enforcement of foreign judgments continues to be difficult. In *Benefit Strategies Group Inc v Prider*,[85] the plaintiffs sought to enforce a California default judgment in South Australia. The defendant asserted that the judgment was not enforceable because it had been obtained based on fraudulent service, and that in any event, the portion of the judgment that was for punitive damages was not enforceable as a foreign penal law. As this judgment came from the United States, which is not a statutorily recognised country for enforcement,[86] the Court proceeded under the common law rules of enforcement. First, the Court rejected any fraud claim because it simply did not believe the defendant's testimony.[87] Second, the Court summarily refused to recognise the damages deemed punitive,[88] strangely citing *Adams v Cape Industries Plc*[89] and without reference to the established English precedent in *Huntington v Attrill*.[90] Perhaps the most significant impact of this case is that it led to a 2005 appeal to the Full Court of the Supreme Court of South Australia that provides more clarity on the fraud exception and significantly corrects the characterisation of the damages in this case as punitive.[91]

(b) Exception: Statute of Limitations

What is the applicable statute of limitations rule for the enforcement of a foreign judgment? This deceptively simple question was answered in *Society of Lloyd's v Marich*.[92] An Australian, Marich, was one of the 'names' of insurer Lloyd's who refused to pay contribution calls in the 1980s and 1990s as required under the by-laws of Lloyd's, which were governed by English law . As a result, Lloyd's were granted summary judgment against Marich in England. The English statute of limitations on the judgment was six years. A day before the English statutory period had run, Lloyd's registered the judgment

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2005; M Burston, Case Note – Evans v European Bank Ltd (2004) 26 *Sydney Law Review* 439; P W Young, 'International Fraud: Tracing – Case Note; Evans v European Bank Ltd' (2004) 78 *Australian Law Journal* 569; V Priskich, 'Funds Recovery from Fraudulent Deposit' (2004) 20 *Australian Banking and Finance Law Bulletin* 70; R Martin, 'Money Laundering: An Overview' (2004) 20 *Australian Banking and Finance Law Bulletin* 29.

85 [2004] SASC 365 (unreported, Gray J, 15 November 2004).

86 See Foreign Judgments Regulations 1992 (Cth), Schedule.

87 *Prider* [2004] SASC 265, [74].

88 Ibid [99].

89 [1990] Ch D 433.

90 [1893] AC 150, 156-158. See also *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279, 299-30, 305-06; Collins, above n 60, Rule 3, 5-025 ('An action for punitive damages by a private person will not be regarded as penal.').

91 *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 (Bleby J, Vanstone J, Anderson J).

92 (2004) 139 FCR 560.

in the Supreme Court of New South Wales under section 6 of the Foreign Judgments Act 1991 (Cth). In the interim, Marich died and subsequently a bankruptcy case was established over his estate. Lloyd's then tried to enforce the registered judgment against the estate and have it recognised as a claim in the bankruptcy. The estate argued that the judgment was no longer enforceable because the applicable statute of limitations was the English period. It pleaded that the English period should apply because the substantive law was English contract law and the Foreign Judgments Act 1991 provisions, including the limitations period, were procedural. The Court, however, held: 'The English judgment provides the foundation, once registered, for proceedings to be brought on the registered judgment as if the English judgment were originally a judgment in the relevant Australian court and entered on the date of registration.'[93] In other words, the Australian statute of limitations on the judgment begins to run as of the date of its local registration. While this provides a clear and legalistically proper answer, it is questionable whether it is the right policy. Its application would seem to encourage improper forum shopping for the purpose of extending the enforceability of a judgment beyond that which is provided under either country's substantive law.

V. Conclusion

2004 was not a major year for conflict of laws developments. The High Court's decision in *BHP* and the New South Wales appellate decision in *Evans* both provide important clarifications of ambiguous areas, but do not radically set out in a new direction. If any generalisation can be made about the 2004 developments, it is the impact of *Pfeiffer* and *Zhang* on the various courts' preference for clear, simple rules even when they are at the expense of more subtle though complicated applications. This can be seen in cases such as *Neilson* and *Mills*. Whether this is just a few isolated cases or indeed a developing pattern will be worth watching over the coming years.

93 Ibid [23].