

## THE RISE OF RENVOI IN AUSTRALIA: CREATING THE THEORETICAL FRAMEWORK

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### I INTRODUCTION

One of the few remaining areas of uncertainty in the conflict of laws is the problem of conflicting choice of law rules in different jurisdictions. One of the more controversial doctrines to deal with this issue is renvoi. The doctrine enjoys some support from the judiciary and academia, but has also been the subject of great criticism and resistance. The High Court recently had occasion to consider the doctrine and, in a controversial decision, accepted it, at least for the purposes of resolving the case. This article considers the doctrine in the light of this recent decision. I believe, as others such as Mortensen and Keyes<sup>1</sup> have noted, that there are better ways to resolve this problem than by accepting the renvoi doctrine, but given that the High Court has elsewhere in choice of law jurisprudence rejected these other ways, it is, at present, better to apply the renvoi principle. This article explains the different approaches and the High Court decision, considers philosophical criticisms of the renvoi doctrine and whether they can be met, and explores the relationship between renvoi and a conflicts doctrine with which I have some sympathy: interest analysis. This is designed to provide a theoretical framework for the possible eventual acceptance of the renvoi doctrine in Australia. Unlike courts in other jurisdictions, Australian courts have not yet explicitly applied interest analysis in choice of law jurisprudence. The issue of the proof of foreign law also features in the discussion.

### II BACKGROUND

Assume that Gordon, a New South Wales citizen, dies in a car accident in Quebec, Canada, involving another Australian tourist. Australian law determines liability and quantum of damages (if any) by reference to the law of the place of the wrong. Canadian law determines these issues based on the residence of those involved in the case. Action is commenced in an Australian court.

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1 Reid Mortensen, 'Troublesome and Obscure: The Renewal of Renvoi in Australia' (2006) 2 *Journal of Private International Law* 1; Mary Keyes, 'The Doctrine of Renvoi in International Torts: Mercantile Mutual Insurance v Neilson' (2005) 13 *Torts Law Journal* 1.

Should the court:

- (a) Refer to the internal rules (ie, excluding choice of law rules) of Canadian law to resolve the issues? This is known as *rejecting the renvoi* and is the approach that garners most support among courts and the academy;<sup>2</sup>
- (b) Refer to both the internal and choice of law rules of Canada, following the reference back to Australian law. This is known as the single renvoi theory, though the reference back could only be to Australian internal law, to avoid the problem of infinite regression where one system is constantly referring to another in attempting to determine which law applies to the scenario);<sup>3</sup>
- (c) Do what the Canadian court would do in resolving the dispute? This is known as the foreign court or double renvoi theory. Again, if the Canadian court would refer to the law of another country to do this, this reference should only be to that country's internal laws, to avoid

2 See *Re Annesley* [1926] Ch 692, 709 (although the judge then applied the foreign court theory) and *in Re Ta Tallmadge* (1909) 181 NYS 336 where this approach was suggested. For supporters of this approach, see Ernest Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of the Law of a Country' (1917) 27 *Yale Law Journal* 509, 523 where he claimed that accepting the renvoi and allowing another state to dictate the applicable law would be an abdication of sovereignty and a failure on the part of a State to discharge the duties it owes to its residents; Ernest Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 *Columbia Law Review* 190; Joseph Cormack, 'Renvoi, Characterisation, Localisation and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws' (1941) 14 *Southern California Law Review* 221; J H C Morris, 'The Law of the Domicile' (1937) 18 *British Yearbook of International Law* 32, 39; Geoffrey Cheshire, *Private International Law* (2<sup>nd</sup> ed, 1938) dismisses the vagaries of the remarkable doctrine as illogical at 50. Some connect the refusal to consider the foreign choice of law rules with the now discredited vested rights theory, ie, that the forum applies its own law to vindicate rights that have vested in the law of another jurisdiction: Kermit Roosevelt III, 'Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language' (2004) 80 *Notre Dame Law Review* 1821, 1836; Joseph Beale, *A Treatise on the Conflict of Laws* (1935) 53; Dean Falconbridge, 'Renvoi and Succession to Movables' (1930) 46 *Law Quarterly Review* 485; Ernst Schreiber Jr, 'The Doctrine of the Renvoi in Anglo-American Law' (1917-18) 31 *Harvard Law Review* 523, 570-71; Frederick Pollock, 'The Renvoi in New York' (1920) 36 *Law Quarterly Review* 91; Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937). Others have suggested that a true vested rights theory would consult foreign choice of law rules in order to determine whether foreign rights in fact had vested: Walter Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 19. Both the First and Second Restatements of the Conflict of Laws apply a general rule of rejecting the renvoi: *Restatement (First) Conflict of Laws* (1934) s 7, except in relation to title to land and divorce, *Restatement (Second) Conflict of Laws* (1971) s 8(1). So too, does the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, s 9(5).

3 See, eg, *Collier v Rivaz* (1841) 2 Curt 855; 163 ER 608 (though there the English court said it would have to decide the case as if it were the Belgian court). This is the approach taken by most civil law countries, and is advocated by Thomas Cowan, 'Renvoi Does Not Involve a Logical Fallacy' (1938) 87 *University of Pennsylvania Law Review* 34.

the infinite regression problem highlighted above).<sup>4</sup> This approach requires the court of the forum to approximate its decision as closely as possible to that which would have been reached by the court of the foreign system, given its choice of law and renvoi rules.

This article will focus on the resolution of the renvoi question in tort (which is considered contentious) rather than on the exceptional areas where it is generally accepted that renvoi will apply.<sup>5</sup>

### III *NEILSON V OVERSEAS PROJECTS CORPORATION OF VICTORIA LTD*<sup>6</sup>

Before considering the jurisprudential issues with renvoi, it is necessary to provide a synopsis of *Neilson*, the recent High Court decision in this area. The decision is important because until the case had been brought, there was extremely scant reference to the renvoi doctrine in Australian cases. The doctrine had apparently not been considered in any detail by the High Court; it had been recognised by the New South Wales Supreme Court in *Simmons v Simmons*,<sup>7</sup> though it remains doubtful whether the Court was applying the single or the double renvoi theory. Justice Walsh in *Kay's Leasing Corporation Pty Ltd v Fletcher*<sup>8</sup> thought renvoi might apply to contract cases.

It is clear that the judgments in *Neilson* do not present a clear endorsement of the renvoi doctrine – the Court does not accept that the principle is one of universal application in the realm of the choice of law field – at least at this time. Chief Justice Gleeson, Callinan and Heydon JJ do not state that they are applying the renvoi doctrine to resolve the case, though their approach is consistent with a renvoi approach. However, the case is seen as an important one in the development of the jurisprudence regarding renvoi because it directly considers

4 This approach appears in *Re Johnson, Roberts v Attorney-General* [1903] 1 Ch 821; *Armitage v Attorney-General* [1906] P 135; *Simmons v Simmons* (1917) 17 SR (NSW) 419 (where the court enquired as to the conflicts of laws principles of New Caledonia); *Re Ross* [1930] 1 Ch 377; *Re Askew* [1930] 2 Ch 259 (Maugham J); *Re Duke of Wellington* [1947] Ch 506 (Wynn-Parry J); *The Estate of Fuld, Deceased (No 3)* [1968] P 675; *Dupuy v Wurtz* (1873) 53 NY 556, 573 (Scarman J); *Harral v Harral* (1884) 39 NJ Eq 279; and, *Ross v Ross* (1894) 25 SCR 307. It has the support of Erwin Griswold in Griswold, above n 3, 1182. Dicey always maintained that the law of a country as applied by the English cases included its conflict of laws rules: Albert Dicey, *Conflict of Laws* (1<sup>st</sup> ed, 1896) 77. In *Frere v Frere* (1847) 5 Notes of Cases 593, the decedent died domiciled in Malta, leaving a will made in England. The will was valid according to English law, but not Maltese. Maltese courts would have upheld the will because it was made according to the law of the place of execution. The English court followed this rule, upholding the will. To like effect, in some cases the forum court has stayed the matter until the same matter has been pronounced upon by the foreign court: see, eg, *De Bonneval v De Bonneval* 1 Curteis 856 (Ecc Ct 1838). This may be taken as implicit support for renvoi.

5 These exceptional areas are traditionally, at least in the United States, seen to involve immovable land and divorce, due to the practical difficulty of not recognising the choice of law rules of a foreign state in these areas: see *Restatement (First) Conflict of Laws* (1934) s 8, although some quibble with the description that these areas are exceptions: see Cormack, above n 2, 264-66.

6 (2005) 223 CLR 331 (*Neilson*).

7 (1917) SR (NSW) 419.

8 (1964) 64 SR (NSW) 195. See also, *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391.

the question of the extent to which Australian choice of law rules require application of the law of another country. The judgments in *Neilson* can be seen as pragmatic ones achieving what many would believe to be the 'correct' result, and to the extent that the majority accepted the reference back to Australian law, enlivening the possibility of further development of the renvoi doctrine, rather than a strong assertion of the intellectual merits of the renvoi doctrine.

*Neilson* involved a claim made by the appellant against Overseas Projects Corporation (OPC) for damages for personal injuries sustained as a result of OPC's negligence. The appellant's husband worked for OPC which had provided accommodation for the family for business purposes. Here, the appellant was injured when she fell down stairs. It was submitted by the appellant that the stairs were dangerous as they did not have a handrail. The appellant and respondent were both Australian residents.

According to the relevant rules in the 1986 General Principles of Civil Law of the People's Republic of China, *Min fa tong ze* (PRC) ('*General Principles*'), the laws of China were to apply to civil activities carried out within that country, unless otherwise stipulated. Article 146 stated that in a claim for compensation for damages resulting from an infringement of rights, the law of the place where the infringement occurred should be applied. The article goes on to provide that where both parties are nationals of the same country, the law of their own country *may* be applied. Article 136 of the *General Principles* specified a limitation period of one year for demands for compensation for bodily harm, extendable in special circumstances. The High Court had recently in *Regie Nationale des Usines Renault SA v Zhang*<sup>9</sup> established the Australian choice of law rule that the law of the place of the wrong should determine liability in such cases, without exception. The relevant limitation period in Australia would typically be six years for a personal injuries claim.

It was not clear whether China accepted the renvoi doctrine. It was not clear on the face of article 146 whether the reference to the legal rules of another country included only that country's substantive law (single renvoi) or also that country's choice of law rules (double renvoi). The case therefore also raised the important issue of the need for proof of foreign law, and what should happen when evidence of foreign law was not as strong as one would like.

### A Double Renvoi Approach Favoured in *Neilson*

Chief Justice Gleeson in effect applied the double renvoi approach, consistent with the object of choice of laws principles, by deciding the present case in the same way as it would be decided in China.<sup>10</sup> Admittedly, there was little evidence presented to the Court to show why the Chinese court would exercise its discretion and apply the foreign law. Chief Justice Gleeson concluded the evidence, such as it was, was 'barely sufficient, but just enough' to support that view. He said it was plausible that article 146 called for a consideration of what was just and reasonable in the circumstances. Further (reminiscent of interest

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9 (2002) 210 CLR 491 ('*Zhang*').

10 *Neilson* (2005) 223 CLR 331, 341-42.

analysis), Gleeson CJ opined that the Chinese authorities were ‘totally unaffected by the outcome of the litigation, no Chinese interests are involved, and there appears to be no reason of policy for a Chinese court to resist the proposition that the rights and obligations of the parties should be determined according to the law of Western Australia’.<sup>11</sup> Chief Justice Gleeson did not find it useful to rely on a suggested assumption that in the absence of evidence to the contrary, it was assumed foreign law is the same as Australian law. He found such a rule could not apply here because there clearly were differences between the relevant principles in China and Australia.<sup>12</sup>

Justices Gummow and Hayne agreed with the double renvoi approach for reasons of certainty and simplicity.<sup>13</sup> This approach was, they said, the most consistent with the High Court’s recognition of the law of the place of the wrong as the dominant factor in multistate tort cases.<sup>14</sup> Their Honours avoided the infinite regression problem identified by McHugh J by concluding that if the foreign law referred back to the law of the forum (here Australia), this was a reference to the internal law of Australia.<sup>15</sup> Their Honours rallied against one single approach to renvoi problems, arguing that each area must be considered on its merits. They expressed concern that the approach chosen would not prevent forum shopping, so that as far as possible, the rights and obligations of the parties should be the same regardless whether the dispute was litigated.<sup>16</sup>

Accepting that the parties did not lead evidence as to how article 146 had been applied by the Chinese courts, Gummow and Hayne JJ nevertheless concluded that ‘the trial judge was bound to conclude that Chinese law, when applied to the facts of this case, would look to the law of the nationality or domicile of the parties’.<sup>17</sup> In justifying this position, their Honours called into play the presumption that foreign law is the same as the local law, and that article 146 should be interpreted as would an Australian statute, by focusing on the scope and objects for which the discretion was conferred.<sup>18</sup> Their Honours referred to the fact that all parties to the dispute were Australian; the only connecting factor between China and the events was that they occurred in that country.<sup>19</sup>

Justices Kirby and Heydon agreed with the double renvoi approach.<sup>20</sup> Justice Kirby accepted the evidence of the Chinese legal expert that time limitation periods in China were substantive rather than procedural.<sup>21</sup> The expert said he was not aware of any cases where the exception to the standard limitation period had been applied. As a result, the Court should have applied the Chinese

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11 Ibid 343-344.

12 Ibid 342-43.

13 Ibid 364.

14 Ibid 367.

15 Ibid 366-67.

16 Ibid 363.

17 Ibid 371.

18 Ibid 371-73.

19 Ibid 372-73.

20 Ibid 389, 420.

21 Ibid 414.

limitation period of one year, with the result that the action here was statute-barred.

Given the absence of evidence as to how article 146 would be applied by a Chinese court, Kirby J was not prepared to assume that Chinese law would adopt similar principles to an Australian court in interpreting the article, or that the law of China was similar to the law of Australia.<sup>22</sup> Such a presumption might be possible in relation to two common law countries, but not given China's very different legal history and development. The plaintiff here had the burden of proving how the relevant Chinese law would apply here, and had failed to do so. Justice Kirby was not satisfied with the concession by the expert that it was possible that a Chinese court might, in interpreting article 146, apply Australian law. Justice Kirby also disputed the view of other judges that no Chinese interests were at stake in this scenario.<sup>23</sup>

### B Single Renvoi

Justice Callinan applied this approach, accepting the reference by the Chinese choice of law rules to Australian law, and applying Australian domestic law, based on his Honour's view of what the Chinese court would likely have done in all the circumstances.<sup>24</sup> Justice Callinan noted that according to the evidence it was unlikely that a Chinese court would have exercised its discretion to remove the statute-bar preventing this action. However, in the end for Callinan J this was an unimportant point. Having presumed that the Chinese principles of statutory interpretation were the same as those in Australia,<sup>25</sup> his Honour applied the kinds

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22 Ibid 393-95.

23 Ibid 398-400. Justice Kirby cited relevant interests to include: (1) the self-respect of a newly emergent polity in building its own legal systems; (2) lack of expertise of the Chinese court on foreign law; (3) the need in China (as in Australia) to prove a foreign law where it is to be applied, and the practical availability and cost of such an exercise; (4) the differing legal and cultural attitudes to strict time limits and the extinguishment of time-barred proceedings; (5) the avoidance of manifest dis-uniformity of outcomes in proceedings decided by the same court; (6) the criticism, inherent in the appellant's claim, of the Chinese builders and providers of the allegedly defective dwelling; (7) the risk of joinder of those State agencies in the proceedings, if the proceedings were to be brought in China.

24 Ibid 414.

25 Ibid 410-11.

of factors that an Australian court would take account of in deciding whether or not to exercise the discretion to apply the law of a particular country.<sup>26</sup>

### C No Renvoi

Troubled as he was by the infinite regression that may occur with the application of the double renvoi doctrine, McHugh J (dissenting) considered the options to be either the acceptance of single renvoi or rejection of the entire doctrine of renvoi. His Honour's starting premise was that the court must resolve the appeal by applying as much of the law of the place of the wrong as possible.<sup>27</sup> He saw this as inconsistent with the foreign court theory, ie that the court should take into account what the foreign jurisdiction would do if the matter were to be litigated there.<sup>28</sup> In order to have as much of the law of the place of the wrong applying as possible, he rejected the renvoi. In other words, when Australian law refers to the law of China to resolve the dispute, it refers to the law of China minus its choice of law rules; in other words Chinese substantive law (including its limitation period) should apply to resolve the dispute.<sup>29</sup> Further, McHugh J was not convinced that if a Chinese court had heard the matter, it would necessarily have applied Australian law to resolve the dispute.

Having considered the High Court's view,<sup>30</sup> I will turn to criticism of aspects of the High Court's acceptance of renvoi in this case, and of the renvoi doctrine more generally. I will attempt to place the judgement into the broader context of conflict of laws scholarship. I suggest that the Court might be informed in its future development of the doctrine by the broader scholarly debate in choice of law, including issues such as forum-bias, interest analysis, proof of foreign law, and previous judicial and scholarly pronouncements on the issues that confronted the Court in *Neilson*. It is noteworthy that the Court in its decision by and large

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26 These were stated to include: (a) the absence of any question of liability of a Chinese national or authority; (b) the fact that liability, if found, would be the liability of an authority or company of a polity of Australia; (c) that there is no allegation of a breach of any written building laws or laws of occupiers' liability in China; (d) that the relationship between the parties came into existence in Australia; (e) that the court might need to construe a contract made in Australia; (f) that the expenses and standards of treatment of the appellant would be Australian; (g) that Chinese nationals would not be required to give evidence (except perhaps as to the effect of Chinese law); and (h) that the outcome of the case on the application of Australian law would be of no or little relevance or interest to the Chinese law makers or reformers: at 276. However as Briggs notes, this approach is odd because there are no rules of Australian statutory construction applicable to the Chinese law in this case. He cites *Damberg v Damberg* (2001) 52 NSWLR 492, where the New South Wales Court of Appeal refused to apply an Australian rule that an illegal transaction may be enforced where the illegality lies in an infringement of revenue law which has been disclosed and remedied to a contract to which German law applied but where relevant German law on point was not proven: Adrian Briggs, 'The Meaning and Proof of Foreign Law' (2006) 1 *Lloyd's Maritime and Commercial Law Quarterly* 1, 5.

27 *Neilson* (2005) 223 CLR 331, 349.

28 *Ibid* 353.

29 *Ibid* 355-56.

30 The Supreme Court of Massachusetts reached the same conclusion when considering the same Chinese Article in *Lou ex rel Chen v Otis Elevator Co* [2004] WL 504697. This case involved a United States citizen injured in China by an escalator manufactured in the United States. The court held that Massachusetts had a more significant relationship with the parties than China did, and doubted, given the terms of article 146, whether a Chinese court would apply Chinese law to resolve the case.

bypassed this debate. By engaging in this debate, hopefully the roots of renvoi in Australia might be grounded in firmer soil.

#### D The High Court's desire to apply Forum Law in *Neilson*

It seems quite clear that members of the High Court were determined in *Neilson* to apply Australian law to the dispute.<sup>31</sup> Indeed, some critics of the renvoi doctrine see it as an escape device to allow the forum court to apply its own law.<sup>32</sup> Mortensen notes '[t]he eccentricity of *Neilson* ... might itself show what desperate measures judges are prepared to take to get to the *lex fori*'.<sup>33</sup>

This is seen, for example, in the judgment of Gleeson CJ who was satisfied with the extremely brief evidence of the Chinese legal expert in relation to the exercise of the article 146 discretion to apply Chinese law. The expert had never seen the exception being applied by the Chinese courts, but eventually agreed that it was possible that the discretion could be applied in this case. This is taken by Gleeson CJ to be 'barely sufficient but just enough'<sup>34</sup> to support the view that the discretion would in fact be exercised. Chief Justice Gleeson fortified this view by considering that the Chinese court would apply the provisions of the article in accordance with his Honour's view of what was 'just and reasonable'. Chief Justice Gleeson then listed a number of connecting factors demonstrating that China had no real interest in the litigation. This was an interesting argument from a judge who had expressly disavowed the relevance of connecting factors in establishing the law to be applied to a torts choice of law issue in Australia.<sup>35</sup> This is surely a difficult thing to do in the absence of any evidence that the Chinese courts did in fact apply a 'proper law of the tort' process, which is what Gleeson CJ applied. Some members of the Court seemed very willing to assume that China would adopt a proper law process, when they had previously completely rejected such an approach as the relevant Australian position.

Further evidence that the Court wished to apply the law of the forum appears in the judgment of Gummow and Hayne JJ, who were convinced that, *quite apart from the scope and objects of the discretion mentioned in article 146*, 'fairness and the justice of the case' required that Australian law be applied to the

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31 As Reid Mortensen puts it, '[i]t is difficult to leave a close reading of *Neilson* without getting the impression that the High Court made all efforts to have the *lex fori* apply to the case. Every unprecedented step taken by the High Court carefully laid a pathway to the forum': above n 1, 21.

32 See Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws – Meaning of the Law of a Country', above n 2, 521: 'The renvoi doctrine appears to be a mere expedient to which the courts resort in order to justify the application of their own law'; 'renvoi implies a reversion pro tanto to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law': at 528-9. Even Larry Kramer, a supporter of the renvoi doctrine, observed that judges quickly recognised that accepting the renvoi could serve as a useful device to avoid forum choice of law rules and allow them to apply forum substantive law: 'Return of the Renvoi' (1991) 66 *New York University Law Review* 979, 997.

33 Reid Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 873.

34 *Neilson* (2005) 223 CLR 331, 343-44.

35 The High Court in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ('*Zhang*') had unanimously rejected the so-called flexible exception, which calls for a weighing of relevant connecting factors in resolving the case.



dispute.<sup>36</sup> They went on to justify this view by listing the connecting factors between the dispute and Australia. Their Honours, together with Callinan and Heydon JJ, then made a large assumption that in the absence of evidence to the contrary, foreign law is the same as the law of the forum. With respect, it is highly ironic to make such an assumption, particularly in the area of the choice of law, whose *raison d'être* is the reality that there are real differences in the laws of different states.

With respect, if it was felt necessary to administer 'fairness and justice', an easier way to apply the law of the forum in this case would have been by applying a 'flexible exception'<sup>37</sup> to the general rule in cases of international torts (that the law of the place of the wrong should be applied).<sup>38</sup> Of the Judges, only Callinan J explicitly mentioned this link, commenting reluctantly that:

No matter which solution is adopted by Australian courts, the result will not be entirely satisfactory intellectually and in logic. This does not stem wholly however from the unwillingness of the Court to recognise in *Zhang* what in hindsight might have resolved this case, a flexible exception in special circumstances of the kind which the second sentence of Article 146 ... contemplates, but from the fact that absolute rules however apparently certain and generally desirable they may be, almost always in time come to encounter a hard and unforeseen case.<sup>39</sup>

I commend Callinan J for at least acknowledging that the flexible exception would have been a useful tool here to deal with the issues raised. That this is the case is hardly noteworthy.<sup>40</sup> The reality that flexibility is required has been recognised in case law<sup>41</sup> and legislation<sup>42</sup> in Great Britain, and in case law in the United States<sup>43</sup> and Canada,<sup>44</sup> not to mention China, as the relevant article considered in *Neilson* testified. Is a case where the place of the wrong is fortuitous or relatively unimportant really such a hard and unforeseen case, as

36 To quote the judges in direct terms, 'whether regard is had to the scope and objects of the power or discretion, or regard is had, on the hypothesis identified, to fairness and the justice of the case, the conclusion available on the limited evidence led at trial is the same. All parties to the dispute were Australian. The only connection between the dispute and China was the place of occurrence of the tort': *Neilson* (2005) 223 CLR 331, 372-73.

37 The so-called flexible exception was developed by the House of Lords in *Boys v Chaplin* [1971] AC 356. It allows displacement of the general choice of law rule in appropriate cases, such as where that rule does not refer the court to the law of the jurisdiction with the stronger connection with the parties and events. For example, it may be that the general choice of law rule in tort is that we apply the law of the place of the wrong to resolve the dispute. However, it may be that both parties to the dispute live in another country and otherwise have little connection to the place where the wrong allegedly occurred. In such cases, it may make little sense to apply the general rule of the law of the place of the wrong. It is also known as the approach of the 'proper law of the tort'.

38 See Mortensen, above n 33, 874, where he notes, '*Neilson* ... show[s] how the rigidity of the *Pfeiffer-Renault* regime could backfire'. See also, Keyes, above n 1, 10; Andrew Lu and Lee Carroll, 'Ignored No More: Renvoi and International Torts Litigated in Australia' (2005) 1 *Journal of Private International Law* 35.

39 *Neilson* (2005) 223 CLR 331, 413.

40 I advocated the adoption of a flexible exception in Anthony Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases' (2004) 23(2) *University of Queensland Law Journal* 435, 463.

41 *Chaplin v Boys* [1971] AC 356.

42 *Private International Law (Miscellaneous Provisions) Act 1995* (UK).

43 *Babcock v Jackson* (1963) 191 NE 2d 279.

44 *Tolofson v Jensen* [1994] 3 SCR 1022.

Callinan J claims? Surely the facts in *Chaplin v Boys*<sup>45</sup> or *Babcock v Jackson*<sup>46</sup> show that this situation is quite a common occurrence, making it untenable to apply a rule with no flexibility. It is not surprising that the High Court has had to resort to another way to obtain the required flexibility, but with respect, it is surprising that this was apparently unforeseen by their Honours at an earlier stage.

The High Court had painted itself into a corner by its steadfast refusal to admit a flexible exception<sup>47</sup> to the general rule. In *John Pfeiffer Pty Limited v Rogerson*,<sup>48</sup> the Court reasoned that:

[a]dopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms such as ‘real and substantial’ or ‘most significant’ connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule.<sup>49</sup>

The High Court also adopted this approach in an international torts case,<sup>50</sup> after conceding that in those cases ‘questions which might be caught up in the application of a flexible exception to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.<sup>51</sup> Justice Kirby reserved his opinion on the question whether a flexible exception existed in relation to international torts, but held the exception did exist. Unfortunately, he did not refer to it, let alone apply it, in *Neilson*.

Here, the High Court’s concession in the previous paragraph was of no assistance, because the proceedings were brought in an Australian court, and the place of the wrong was an overseas country. This is perhaps an indicator that the above test does not provide the kind of flexibility required in this area of the law. Yet, there was no suggestion in *Neilson* that any of the Judges would be prepared to revisit the inflexible rules laid down in *John Pfeiffer*.

Indeed, it is interesting to ponder what would have happened in this case if article 146 of the *General Principles* had not mentioned that the law of another country could be applied to resolve the case? Would the Court then have been required to apply Chinese law, even though two Justices suggested that fairness and justice required the application of Chinese law, and three could identify close

45 [1971] AC 356.

46 (1963) 191 NE 2d 279.

47 This concept is explained at footnote 38.

48 (2000) 203 CLR 503 (*John Pfeiffer*’).

49 *John Pfeiffer* (2000) 203 CLR 503, 538 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ).

50 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

51 *John Pfeiffer* (2000) 203 CLR 503, 519. This was an interesting concession given the Australian High Court’s very narrow formulation of the test for when a stay order will be granted, namely that the forum selected must be clearly inappropriate: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *BHP Billiton Ltd v Schulz* (2004) 221 CLR 400. The test is dismissed as ‘notoriously parochial’ by Reid Mortensen in ‘Troublesome and Obscure: The Renewal of Renvoi in Australia’ (2006) 2 *Journal of Private International Law* 1, 26. Martin Davies has observed the lack of reference to China’s jurisdiction rules in the *Neilson* judgment. These rules may have allowed the court to reach the same conclusions it did via a different path: Martin Davies, ‘Renvoi and Presumptions About Foreign Law’ (2006) 30 *Melbourne University Law Review* 244, 254-56

connecting factors between Australia and the events? It seems unlikely that, given their narrow formulation of the *forum non conveniens* test, the Court would have declined to hear the case. In other words, the renvoi doctrine will not always be available to allow the High Court to apply the law of Australia to such a scenario. I suggest, with respect, that the High Court should accept this case as a warning that its inflexible choice of law rules in this area are surely not tenable in the long run.

#### IV INTEREST ANALYSIS AND RENVOI

I have previously expressed the view that interest analysis should be used by the Australian High Court in deciding on the choice of law issue, at least in tort cases.<sup>52</sup> Briefly, interest analysis involves considering whether the objectives for which a particular law was passed would be furthered by the application of the law in the current case. It may be part of a ‘proper law of the tort’ approach, whereby a court assesses the connecting factors between the event(s) in issue, and jurisdictions to which the parties have links. A state would be ‘interested’ in having its law applied if application of its law to this dispute would promote the reasons for which the law was passed.<sup>53</sup> Alternatively, events might have occurred in a jurisdiction about which the jurisdiction might have little interest, because, for example, the protagonists both live elsewhere, meaning the jurisdiction’s insurance system is not affected by the outcome. There might be good reasons, therefore, for suggesting that the laws of that jurisdiction might not apply to resolve such cases, given that jurisdiction’s low interest in the outcome, or lack of connection to the outcome.<sup>54</sup> It is logical then to consider what interest analysts might think of the renvoi doctrine, and what it might say about the *Neilson* litigation.

In *Neilson*, some members of the Court seemed to flirt with interest analysis reasoning. Chief Justice Gleeson explained that the Chinese authorities were unaffected by the outcome of the litigation and no Chinese interests were involved; Gummow, Hayne and Callinan JJ considered ‘connecting factors’ between China and the litigation; and Kirby J considered the issue but concluded Chinese interests were at stake in the litigation.<sup>55</sup>

The discussion of interest analysis and renvoi below will necessarily focus largely on some American case law and scholarly writing, given the lack of consideration of the renvoi question in Australian and United Kingdom courts, the acceptance of interest analysis by some United States Judges and scholars, and the legislative response to the question of proper law of the tort (and broadly

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52 Gray, above n 41.

53 See, eg, Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963); Harold Korn, ‘The Choice of Law Revolution: A Critique’ (1983) 83 *Columbia Law Review* 772; Russell Weintraub, ‘An Approach to Choice of Law that Focuses on Consequences’ (1993) 56 *Albany Law Review* 701; Larry Kramer, ‘Rethinking Choice of Law’ (1990) 90 *Columbia Law Review* 277.

54 A more detailed summary of interest analysis appears in Gray, above n 41, 448-54.

55 *Neilson* (2005) 223 CLR 331, 343-44 (Gleeson CJ), 372 (Gummow and Hayne JJ), 398-99 (Kirby J), 414-15 (Callinan J).

interest analysis) in the United Kingdom.<sup>56</sup> Having said that, in a recent English case *Barros Mattos Junior v Macdaniels*,<sup>57</sup> Collins J left open the possibility of the application of renvoi principles to assess an international restitution claim. His Honour claimed that renvoi could be applied in such a case if '[t]he object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflict rules of that law'.<sup>58</sup> Though not identified as such, these comments can be read as being consistent with interest analysis.

Perhaps surprisingly, some interest analysis completely eschews the renvoi doctrine. For example, in relation to the scenario where a foreign jurisdiction is 'interested' in a dispute, but where the forum is not, Brainerd Currie writes:

[I]t seems clear that the problem of renvoi would have no place at all in the analysis that has been suggested. Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state.<sup>59</sup>

Currie reiterates this point in a later article by citing the case of *Shaw v Lee*,<sup>60</sup> where a married couple from North Carolina had an accident in Virginia and the wife sued her husband in North Carolina. North Carolina had abolished interspousal immunity; Virginia had not. However, North Carolina applied the place of injury rule (as Australia currently does), which meant that the Supreme Court of North Carolina applied Virginian law (that is, interspousal immunity) and dismissed the action. Suppose that a similar situation arises again, except the victim sues in a Virginian court. The Virginian court is persuaded that Virginia has no interest in applying its immunity rule, but is referred to the decision in

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56 *Private International Law (Miscellaneous Provisions) Act 1995* (UK). Renvoi is specifically excluded from the realm of contract claims by the *Contracts (Applicable Law) Act 1990* sch 1 art 15.

57 [2005] EWHC 1323 (Ch).

58 *Ibid* [108]. Justice Collins, drawing on the work of Dicey and Morris in making this comment, added that it would be an exceptional case in which a court would ascertain how a foreign court would decide the question (double renvoi), and the advantages of doing so would have to clearly outweigh the disadvantages: [108].

59 Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963)184. See also Bruce Posnak, 'Choice of Law – Interest Analysis: They Still Don't Get It' (1994) 40 *Wayne Law Review* 1121 ('the interest analyst is saying that the only policies that count in determining whether a state has an "interest" are the policies behind its competing law, not the policies behind its choice of law approach or some other policy': at 1141); Herma Hill Kay, "'The Entrails of a Goat": Reflections on Reading Lea Brilmayer's Hague Lectures' (1997) 48 *Mercer Law Review* 891, 908-11. Another adherent of this view, Peter Westen, agrees:

[I]f the forum decides that a foreign state is interested in a case by looking to that state's conflicts law, it subordinates its own choice of law to that of a foreign state, however archaic the latter may be. To do so frustrates the very goals of governmental-interest analysis. Instead, as Currie himself admitted, the forum should assume final responsibility for deciding whether another state is properly interested in the facts at issue. The forum ultimately makes such a finding not by asking whether the foreign state declares itself to be interested, but rather by asking whether – in light of forum policy – that declared interest seems reasonable. Ultimately, the forum imputes those policies to a foreign law which it could conceive a rational foreign court adopting, were that foreign court deciding the case at hand: Peter Kay Westen, 'False Conflicts' (1967) 55 *California Law Review* 74, 85 (citations omitted).

60 258 NC 609 (1963).

*Shaw v Lee*. Currie's solution to this case is that the Virginian court should ignore North Carolina's choice of law rule and follow its own determination of North Carolina's interest, applying North Carolina tort law.<sup>61</sup>

In other words, no question of renvoi would arise according to Currie, because the foreign choice of law rules are ignored.

Similarly, others claim that it is up to the forum to decide whether or not another state is properly interested in the facts at issue.<sup>62</sup> For example, in discussing the Californian Supreme Court decision to apply Ohioan law in *Reich v Purcell*,<sup>63</sup> Herma Kay is unimpressed by the fact Ohio might not have applied its own law if the suit had been brought there. She reasons that the mere fact Ohio might mistakenly have failed to recognise its interests should not preclude Californian courts from doing so.<sup>64</sup> For this reason, choice of law rules of another jurisdiction should not be taken into account.

There are three criticisms of this view.

First, it seems somewhat artificial to determine whether or not a foreign state is interested in litigation by referring only to its internal legal rules.<sup>65</sup> In relation to the *Neilson* facts, could the Court determine whether China was interested in the litigation by referring only to China's internal rules? The internal rules provided for compensation for damages in the event of injury caused by an infringement of rights. There does not appear to be a specific statement in Chinese law as to the reasons why the *General Principles* were passed. Indeed, it would be difficult for a court, in the absence of a reference in China's choice of law rules, to determine China's 'interest' in this litigation.<sup>66</sup> It is much more sensible to refer to all Chinese law, including its choice of law rules, to gain a sense of the interest that China has in the outcome. Here, article 136 in the *General Principles*, which states that where two foreigners from the same country are involved in a compensation claim, the law of that country may apply, is a relevant factor to be taken into account. It is a factor which should influence the court in its assessment of the interests of various jurisdictions in the matter; for what stronger evidence could there be of a country's interest in particular litigation than a statement in that country's legislation that the law of another country might instead be relevant?

61 Brainerd Currie, 'The Disinterested Third State' (1963) 28 *Law and Contemporary Problems* 754, 781-85.

62 See, eg, Bruce Posnak, 'Choice of Law: Interest Analysis and Its "New Critics"' (1988) 36 *American Journal of Comparative Law* 681, 682 ('[e]ven if a foreign state has made clear that it would consider itself to have a specific interest, this should not be binding on the forum': at 687); Clifford D Allo, 'Methods and Objectives in the Conflict of Laws: A Response' (1984) 35 *Mercer Law Review* 565, 579. Allo argues that generalised choice of law rules cannot help in determining law's policy and scope, while substantive laws can.

63 67 Cal 2d 551 (1967).

64 Herma Hill Kay, 'Comments on *Reich v Purcell*' (1968) 15 *University of California Law Review* 584, 589.

65 Adrian Briggs comments on the artificiality involved in shearing parts of foreign rules off from others, a process that rejection of the renvoi would require: Adrian Briggs, *The Conflict of Laws* (2002) 16.

66 Certainly, at least Kirby J thought China was interested in the litigation: see *Neilson* (2005) 223 CLR 331, 399.

Some writers have pointed to this apparent illogical position from some interest analysis scholars.<sup>67</sup> Larry Kramer states:

because choice of law is a process of interpreting laws to determine their applicability on the facts of a particular case, the forum can never ignore other states' choice-of-law systems ... On the contrary, the applicability of another state's law must be determined in light of its choice-of-law system. Hence, a proper understanding of choice of law means the return of the renvoi.<sup>68</sup>

Similarly, Kermit Roosevelt considered that an approach that seeks to determine whether foreign law is intended to apply can hardly justify contradicting those provisions of foreign law that address applicability.<sup>69</sup> As Matthew Chait stated, 'a State's choice of law rules can be a highly effective indicator of that State's interest in having its law apply to a dispute'.<sup>70</sup>

Secondly, Currie's 'solution' to the factual scenario in *Shaw v Lee* also seems objectionable on the grounds that it encourages forum shopping. Currie seems to openly support forum shopping.<sup>71</sup> He supports a system where the result of the litigation would differ according to whether the action commenced in North Carolina or Virginia because people would bring actions in the jurisdiction which was most beneficial for them. Yet, one of the goals of a coherent system of choice of law rules is to minimise wherever possible encouragement of forum shopping. I, therefore, cannot agree with Currie's approach to renvoi.

The United States Supreme Court found in *Klaxon Company v Stentor Electric Manufacturing Co Inc*<sup>72</sup> that a federal court applying state law was required to heed the limits set by that state's choice of law rules. In other words, to apply state law was to apply the entirety of state law, not merely the internal rules. Further, the Restatement of Law (Second) of Conflict of Laws, though it

67 It is considered illogical because if one were genuinely interested in considering whether a foreign jurisdiction was 'interested' in having its rules applied to this matter, or whether its relevant policies would be advanced in having its rules apply, one would think that the content of its choice of law rules would provide some evidence of its level of interest in governing the matter.

68 Larry Kramer, 'Return of the Renvoi' (1991) 66 *New York University Law Review* 979, 1005. Kramer draws support for his position from comments of Easterbrook J that in applying the law of a state its rules of statutory interpretation must also be applied: Frank H Easterbrook, 'Statutes' Domains' (1983) 50 *University of Chicago Law Review* 533, 544. By analogy, since Kramer believes that conflict of laws rules are rules of interpretation, he believes foreign choice of law rules must also be applied.

69 Kermit Roosevelt III, 'Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language' (2004) 80 *Notre Dame Law Review* 1821, 1856. See also John David Egnal, 'The "Essential" Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law' (1981) 54 *Temple Law Quarterly* 237, 265; Arthur Taylor von Mehren, 'The Renvoi and its Relation to Various Approaches to the Choice of Law Problem' in Kurt H Nadelmann, Arthur T von Mehren and John N Hazard (eds), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (1961) 380, 390; Paul A Freund, 'Chief Justice Stone and the Conflict of Laws' (1946) 59 *Harvard Law Review* 1210 ('[a] second means of harmonizing by looking more closely at the competing laws may be found by examining not merely the policy but the conflict-of-laws delimitation of each law': at 1217). Even Lea Brilmayer, an avowed critic of the interest analysis approach, agreed that a state's choice of law rules should be respected to the same extent as its internal law: Lea Brilmayer, 'Methods and Objectives in the Conflict of Laws: A Challenge' (1984) 35 *Mercer Law Review* 555, 563.

70 Matthew Chait, 'Renvoi in Multinational Cases in New York Courts: Does Its Past Preclude Its Future?' (2003) 11 *Cardozo Journal of International and Comparative Law* 143, 168.

71 Brainerd Currie, 'Married Women's Contracts: A Study in Conflict-of-Laws Method' in Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) 117-21.

72 313 US 487 (1941).

generally rejects the renvoi and advocates applying the law of the state with the most significant relationship to the events, recognises that an exception exists in cases where the objective of the particular choice of law rule is that the forum reaches the same conclusion on the facts involved as would the courts of another state.<sup>73</sup> In other words, the Restatement implies that when a court is considering whether foreign law should apply, the foreign country's choice of law rules are relevant.

Thirdly, it seems somewhat inconsistent with the idea of judicial comity, for one court to expressly refuse to apply choice of law decisions made by another state or country on the ground that the decision is incorrect (in the eyes of the forum court). It is erroneous to assume that state's interests are confined to the application of its own laws. The essence of the choice of law rules is to rationally resolve situations where events have contact with more than one jurisdiction; it is not to pass judgment on the laws of another state. As Kramer has pointed out, a state's interests should extend to comity towards other states, facilitating multi-state activity, and providing a legal regime whose enforcement is uniform and predictable.<sup>74</sup> Conflict of laws resolution is not assisted by a 'my way is best' or 'your rules are no good' approach.

Of course, Currie does not speak for all interest analysis scholars. Many adherents to this school of thought agree, at least in some cases, that foreign choice of law rules should be taken into account. Examples of this appear in the works of John Egnal and David Seidelson.<sup>75</sup>

Others, who favour foreign choice of law rules which refer the issue back to the forum, take the reasonable view that the case presents a false conflict, that the foreign state has renounced its interest in the case.<sup>76</sup> As Chait suggests:

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73 *Restatement (Second) of Conflict of Laws* (1971) s 8.

74 Kramer, above n 69, 1016.

75 Egnal, above n 70, 267 (though Egnal concludes that foreign choice of law rules of the First Restatement variety could be overlooked); David E Seidelson, 'The Americanization of Renvoi' (1968-1969) 7 *Duquesne Law Review* 201, 210-11. Seidelson agrees with Egnal's position unless the rules have been very recently reaffirmed.

76 David F Cavers, *The Choice-of-Law Process* (1965) 103; Russell J Weintraub, *Commentary on the Conflict of Laws* (4<sup>th</sup> ed, 2001) 90-92, 406-7; Harold W Horowitz, 'The Law of Choice of Law in California – A Restatement' (1974) 21 *University of California Law Review* 719, 737-39; James A Martin, 'An Approach to the Choice of Law Problem' (1984) 35 *Mercer Law Review* 583, 592; Robert Allen Sedler, '*Babcock v Jackson* in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws' (1967) 56 *Kentucky Law Journal* 27, 97-101; David E Seidelson, 'Interest Analysis: For Those Who Like It and Those Who Don't' (1973) 11 *Duquesne Law Review* 283, 290-91.

If the end goal of interest analysis is to determine the interests of the competing State, then modern renvoi should play an indispensable role in determining those interests. For a court to ignore a competing State's choice of law rules is essentially to disregard perhaps the most important source of information as to whether or not the competing State has an interest in having its law applied to a suit. Affording adequate consideration to the competing State's interests results in consistent application of foreign law and subsequently in reciprocity, advancement of policies other than those behind domestic laws, and discouragement of forum shopping. As a result, it would seem that renvoi is more than just useful in contemporary international choice of law – it is fundamental.<sup>77</sup>

The facts of *Gray v Gray*<sup>78</sup> provide a good basis for demonstrating the interplay between interest analysis and the principles of renvoi. A husband and wife were living in New Hampshire. While driving a car in Maine, the wife was injured in an accident, which was claimed to have been caused by the husband's negligence. Action commenced in New Hampshire, with the defendant (the husband) claiming that Maine inter-spousal immunity law<sup>79</sup> prevented a wife from suing her husband. The Supreme Court of New Hampshire applied this rule to reject the case, thus representing a simple example of the application of the (internal) law of the place of the wrong.

However, another approach could have been taken. Analysis of the Maine inter-spousal immunity law might divulge that the law was intended to apply only to Maine husbands and wives to preserve domestic harmony in Maine. Maine may have had no interest in applying the law to out-of-state residents. Here, if the Court had considered all of Maine's law, it might have realised that Maine had no interest in the outcome of the case and applied its own law to resolve the case.<sup>80</sup>

The latter approach is the correct approach to the factual scenario in *Gray v Gray*. There seems little point in a blind determination to apply the law of the place of the wrong, when the place of the wrong itself would not have applied its own law. This is not forum bias or an escape device to allow the law of the forum to be applied; it is a genuine attempt to find out what the 'other' court would do, and to respect that state's interest or non-interest in the suit. It is an effort to ensure the greatest uniformity of outcome possible in choice of law rules.

The renvoi principle was applied with interest analysis in a recent United States tort case, *Phillips v General Motors Corporation*.<sup>81</sup> Survivors of a Montana family killed in a car accident in Kansas while travelling from their home state (Montana) to North Carolina sued the car manufacturer. The manufacturer, a Michigan-based corporation, manufactured the car in Michigan

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77 Chait, above n 71, 175.

78 87 NH 82 (1934). The case is discussed by Erin Griswold, 'Renvoi Revisited' (1938) 51 *Harvard Law Review* 1165, 1205-6.

79 Espoused in *Sacknoff v Sacknoff* (1932) 131 Me 280; 161 Atl 669

80 In contrast, where the place of the wrong does express an interest in the outcome of the case, this should be respected. This occurred in *Pringle v Gibson; Pringle v Gibson*, 135 Me 297 (1937) where the plaintiff sued in Maine for injuries sustained in an accident in New Brunswick. New Brunswick's statute law provided that the driver of a car was not liable to passengers in the car for injuries suffered. New Brunswick's law was held to prevent this action in a Maine court, based on evidence the statute was intended to apply to all injuries in New Brunswick, regardless of the residence of the driver.

81 298 Mont 438 (2000).



and sold it in North Carolina, where one of the victims bought the car while living there. Montana law was most favourable to the plaintiffs because it allowed the action, barred certain defences available elsewhere, and did not cap liability payouts. Kansas law barred the action, allowed the defendant certain defences, and capped liability.

The Supreme Court of Montana held Montana had a more significant relationship with the action, and that its law should determine liability and damages. The Court reasoned, consistently with interest analysis, that the purpose of Kansas law would not be furthered by its application to the case. The Court applied a double renvoi approach. The Court concluded that North Carolina had no claim to apply its law to the case because under its choice of law rules, it would have applied Kansas law. The Court also found that Michigan law could not apply. It based this part of its decision on an earlier decision of the Michigan Supreme Court,<sup>82</sup> which held that Michigan had little interest in applying its own law when the only link to Michigan was the location of the car manufacturer.<sup>83</sup>

Interest analysis can be used to support reference to the full set of rules of another country in resolving a choice of law question. All of a country's legal rules should be taken into account in assessing whether and to what extent that country has an interest in the application of its laws to a given factual situation.

## V CRITICISMS OF THE RENVOI DOCTRINE

There have been many criticisms of the renvoi doctrine. They tend to revolve around its supposed illogical nature, which is based on an individual's conception of the purpose of choice of law rules. A scholar who believes that the purpose of choice of law rules is to indicate the mode in which a choice of law question must be solved would find renvoi problematic.<sup>84</sup> However, as Erwin Griswold says, '[w]hat is the conflict of laws, unless it is a science for telling a court when it should cast aside its own rule in favour of one that is preferred abroad?'<sup>85</sup>

Territorialists such as Joseph Beale were strongly against the doctrine;<sup>86</sup> although, one might question whether applying the law of the place where the wrong occurred may, in fact, be more consistent with territorialism than its rejection.<sup>87</sup> Arguments about the abdication of sovereignty are unconvincing

82 See *Farrell v Ford Motor Company* 445 Mich 8 (1994).

83 Most American States have now adopted an interest analysis/proper law of the tort approach, with only eight adhering to the application of the law of the place of the wrong in all tort cases: Symeon C Symeonides, 'Choice of Law for Products Liability: The 1990s and Beyond' (2004) 78 *Tulane Law Review* 1247, 1252.

84 Peter M North and James J Fawcett, *Cheshire and North's Private International Law* (13<sup>th</sup> ed, 1999) 56.

85 Griswold, above n 79, 1178. The Australian Law Reform Commission defined choice of law rules as 'the rules which determine which law should be applied when a fact situation is linked to more than one legal system': Australian Law Reform Commission, *Choice of Law Rules*, Report No 58 (1992) [1.3].

86 Joseph H Beale, *Conflict of Laws* (1935) Vol 3 1939.

87 See, eg, John D Falconbridge, 'Renvoi, Characterization and Acquired Rights' (1939) 17 *Canadian Bar Review* 369, 387; Cormack, above n 2, 256.

because the renvoi doctrine's acceptance would surely rail against the application of any foreign law.<sup>88</sup> These arguments ignore that it is the law of the forum in the first instance that determines whether reference is made to the foreign law. The application of the renvoi doctrine, does not, as Ernest Lorenzen suggest, 'imply a reversion *pro tanto* to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law'.<sup>89</sup> This only occurs when the foreign law refers back to the law of the forum. And whilst forum bias must be avoided at all costs, but there is no need to avoid renvoi in order to achieve this end.

Further, the problem of forum bias may, depending on the approach of the court, taint any of the three main approaches that have been suggested, including interest analysis, a proper law approach, or the 'better law' approach, leaving only the law of the place of the wrong as the available conflicts rule to be applied. (Yet, even the law of the place of the wrong approach can be overruled based on public policy grounds.) Fewer than 10 States in the United States of America adhere to the law of the place of the wrong as the choice of law to be applied in multi-state tort cases, and it has been abandoned by most jurisdictions around the world. The problem of forum bias is ever-present in solutions to conflict of laws, and it is not 'solved', as Lorenzen would have us believe, by rejecting the renvoi.

It is not too difficult to determine which foreign rules apply to a case, especially in the 21<sup>st</sup> century.<sup>90</sup> The old rule, applied by the High Court, that foreign law is presumed to be the same as Australian law, and that Australian courts know no foreign law, can be seen for the anachronism it is. As Martin Davies notes, it also has great potential to undermine the High Court's newly fashioned choice of law rules in tort:

That is an invitation to forum shopping, if ever there were one ... [T]he presumption about foreign law undercuts the underlying intention of the *Zhang* rule by providing the plaintiff with a positive incentive simply to ignore foreign law, unless it is in some way more favourable than Australian law ... No-one who wanted to rely on a proposition of English law in an argument to an Australian court would think of calling expert evidence about English law, and if pressed, an Australian court would surely feel comfortable taking judicial notice of English law. Is Australia still so parochial that it cannot treat other foreign laws in the same way?<sup>91</sup>

According to Professor Adrian Briggs, 'to insist that the foreign law must be completely proved, failing which it will be wholly discarded, is to make the best the enemy of the good'.<sup>92</sup>

The possible problem of the *circulus inextrabilis*<sup>93</sup> is accepted and some way must be found to resolve this problem. I agree with the suggestion that we should

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88 Ernest Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws', above n 2, 528.

89 Ibid.

90 See Cormack, above n 2, 257.

91 Martin Davies, 'Nelson v Overseas Projects Corporation of Victoria: Renvoi and Presumptions about Foreign Law' (2006) 30 *Melbourne University Law Review* 244, 263-65. Davies refers to the fact that in the past United States rules were similar to that of Australia; however, in 1966, the Federal Rules of Civil Procedure 2004 (US) were amended, with r 44.1 dispensing with the need to prove foreign law.

92 Briggs, above n 26, 6.

stop after the reference back. That is, if in the case of *Neilson*, Chinese law referred back to Australia, the High Court should have accepted the reference back and applied Australian law.<sup>94</sup> This approach is also suggested by Griswold:

If we get into a situation where there is an endless series of references, there is no logical reason for stopping after the second reference (or 'accepting the renvoi'); it would be just as 'logical' to stop after the third reference or the seventeenth. But by the same token, it is no more 'logical' to stop after the first reference [reject the renvoi]. It may or may not be expedient to stop there for one reason or another, but a solution reached on this ground cannot be accorded the accolade of logic.<sup>95</sup>

In other words, there is no easy answer to this difficulty, and logic does not assist us to determine the matter. However, other considerations, such as judicial comity and respect for the legal principles of another jurisdiction, together with interest analysis, favour this solution.

Reference to the areas in which renvoi is accepted, namely property law, may more readily assist us in meeting concerns about renvoi. For example, in the case of *Re Baines*,<sup>96</sup> an English decedent left land in Egypt. The land was sold and the proceeds brought to England. The decedent's will was valid according to English law, but invalid by Egyptian law. Egyptian choice of law rules stated that succession to land was governed by the law of nationality, and an Egyptian court would hold succession to be governed by the internal law of England. The Court upheld the validity of the will under English law. This seems to be the correct outcome. There would have been no merit in applying Egyptian law and holding the will to be invalid, as would have been required by rejection of the renvoi. Egypt clearly had no interest in the outcome of the case, and upholding the will clearly would not have offended any Egyptian legal principles.

Property was also in issue in the case of *Re Schneider*.<sup>97</sup> Schneider died in New York as an American citizen of Swiss origin. His will disposed of Swiss property in a way that was ineffective according to Swiss law. The Surrogate's Court of New York was asked to decide under which jurisdiction the estate should be administered. The Court accepted the renvoi by referring to the entire law of Switzerland, including its choice of law rules. Pointedly, the Court did not decide the case as one involving immovable property; instead, it recognised an exceptional case which required the application of the renvoi. It preferred to cast its decision on a broader footing, specifically allowing future cases to accept or reject a general principle of renvoi.

In *Armitage v Attorney-General*,<sup>98</sup> a woman was domiciled in New York with her husband. She travelled to South Dakota, obtaining a divorce in that state. She

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93 In other words, the problem that may arise in our acceptance of double renvoi where the law of the first country looks to the law of a second country to resolve the matter, only for the law of the second country to refer the matter back to the law of the first.

94 I acknowledge that this is not a perfect solution, but it takes the pragmatic position that some solution must be found to this problem. The knot must be cut at some stage.

95 Griswold, above n 79, 1177.

96 (Unreported, Farwell J, 19 March 1903) in Albert V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (5<sup>th</sup> ed, 1932) 877-78. See also, *Re Ross*; *Ross v Waterfield* [1930] 1 Ch 377; *Faris v Tennant*, 194 Ind 506 (1923).

97 96 NYS 2d 652 (1950).

98 [1906] P 135. See also *Ball v Cross*, 231 NY 329, 332 (1921); *Dean v Dean*, 241 NY 240 (1925).

later married an Englishman. The issue before the English High Court was whether the marriage was valid and whether the plaintiff's earlier divorce was valid. There was evidence that the divorce would be recognised as valid in New York, although the divorce was not valid according to the (internal) law of New York. The Court determined the validity of the divorce as it would have been determined by a New York court and upheld the later marriage. Again, this seems to be the right outcome. Nothing would have been gained by rejecting the renvoi and applying New York law to invalidate the divorce, when a New York court, in the same case, would not have done so. No New York policy was offended by the recognition of this divorce.

I suggest that the application of renvoi in these cases has achieved the 'correct' result.<sup>99</sup> Why then is the orthodox view that renvoi is acceptable in these areas, but not in others? In the recent Australian case, *O'Driscoll v J Ray McDermott, SA*,<sup>100</sup> McLure J was prepared to assume that the *Neilson* renvoi approach extended to contracts, and suggested that it could extend to 'other sources of conflict', which might extend to all substantive areas in which choice of law questions arise. Justices Gummow and Hayne, in *Neilson*, also suggest that the renvoi principle might be of general application,<sup>101</sup> though they do not commit to a general model, preferring the law in this area to develop incrementally.

The Australian Law Reform Commission, in its review of the Australian choice of law rules, largely dismissed the renvoi doctrine but, with respect, little justification is offered. The Commission stated:

Even at the international level it is difficult to justify renvoi from a doctrinal point of view. For every justification there appears an equally compelling counter-argument. Its only justification is a pragmatic one. It helps to resolve problems that arise from the fact that different legal systems apply different connecting factors.<sup>102</sup>

The Commission recommended:

To prevent the problems of renvoi arising within Australia, the Commission recommends that it should not apply and that in the legislation implementing [the Commission's recommendations] the word 'law' should be defined to mean the internal or domestic law.<sup>103</sup>

Yet, it is hard to justify the forum court applying foreign law, when the foreign court itself would not have applied its own law. This is a clear invitation to forum shopping.

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99 Support for the High Court's decision in *Neilson* also appears in the subsequent literature: see, eg, Adrian Briggs, above n 26; Andrew Dickinson, 'Renvoi: The Comeback Kid?' (2006) 122 *Law Quarterly Review* 183.

100 [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006) [12]-[13].

101 *Neilson* (2005) 223 CLR 331, 367-68.

102 Australian Law Reform Commission, *Choice of Law Rules*, Report No 58 (1992) [9.14]. The Commission agreed with renvoi in the succession context.

103 *Ibid* [4.12].

## VI IMMOVABLE PROPERTY AND MARITAL STATUS

As indicated, the American Law Institute, in both of its Restatements on the Conflict of Laws,<sup>104</sup> takes the general position that renvoi is rejected, except in relation to land and marital status. Lorenzen,<sup>105</sup> who regarded general acceptance of renvoi as tantamount to an abdication of sovereignty, influenced the development of the First Restatement.<sup>106</sup>

A more detailed justification of these exceptions appears in an article by Joseph Cormack:

[I]t has been recognized throughout the world as peculiarly fitting that matters of property should be governed by the law of the situs, and matters of status by the law of the domicile. As to them a forum which is not itself the situs or the domicile makes no attempt to apply its own principles of justice – its only desire is to recognize the title to the property as it is at the situs, or the status as it is at the domicile. Not only does this accord with the forum's senses of justice and of fitness, but it would be singularly ineffective for the forum, in the relatively few cases in which matters relating to foreign property or status are presented to it, to attempt to apply a different rule from that existing at the situs or the domicile. Any such attempt would evidence a remarkably narrow public policy upon the part of the forum. In keeping with this line of thought, the forum will follow the conflict of laws rule of the jurisdiction of situs or of domicile ... Use of the renvoi doctrine with matters of property and of status makes for certainty, because ... of the universal agreement upon the basic propositions stated, which are of the utmost practical importance ... In the absence of such agreement ... there is no increase in certainty through adoption or rejection of the renvoi doctrine.<sup>107</sup>

The influential conflicts scholar Beale, a territorialist and opponent of the general acceptance of the renvoi theory, put it in these terms:

Because of the paramount social importance of treating the existence of marriage, for instance, in the same way in all states, the law of the forum attempts to bring about a warranty of such treatment by providing in its law for a decision of the question in the way that the law, which in its opinion is the proper law would determine it; not because of any effect given to that law but simply as the rule adopted by the law of the forum for the determination of such problems. The same argument applies to a determination of the title of foreign land; it being essential to the protection of the interests of all parties that such a title should be determined everywhere as the state of situs would determine it since that state alone must have the final authority.<sup>108</sup>

I concede that, given the broad recognition of the conflict rules regarding immovable property and marital status, the argument for the application of renvoi here is strong.<sup>109</sup> However, as discussed above, the rationale for applying renvoi

104 See *Restatement (First) of Conflict of Laws (1934)*; *Restatement (Second) of Conflict of Laws (1971)*.

105 Lorenzen refers to the 'permanent and exclusive physical control which a nation has over immovable property within its territory': Lorenzen, 'The Renvoi Doctrine in the Conflict of Laws', above n 2, 530. He notes that 'in the conveyance of immovable property there is a reasonable basis for the expectation that the adoption of the *renvoi* doctrine would promote international uniformity of decision': at 531.

106 Griswold notes that the commentaries on the relevant sections simply refer to articles by Lorenzen and Schreiber as authorities for the views in the Restatement: Griswold, above n 79, 1174.

107 Cormack, above n 2, 262-64.

108 Beale, above n 87, 57.

109 I concede that this distinction was not referred to in *Neilson*; however, it was not directly relevant to decide the case at hand.

in these cases can be extended to the application of renvoi in other fields, in particular the field of personal liability in tort.

Cormack, in talking about immovable property and situs, says that *as to them* a forum makes no attempt to apply its own principles of justice. This statement implies that in other fields involving choice of law questions, including tort, a forum *is* seeking to apply its own principles of justice. In Australia, the courts initially accepted that the forum could apply its own principles of justice in assessing multi-jurisdictional tort claims. The courts adopted the rule in *Phillips v Eyre*,<sup>110</sup> which required the claim to be actionable by the law of the forum in order to succeed. However, eventually the High Court abandoned the rule, requiring the application of the law of the place of the wrong, without reference to the law of the forum. In other words, Australian courts do not ‘attempt to apply [their] own principles of justice’ to the case; instead, they apply the law of the foreign jurisdiction, provided it does not offend Australian public policy.<sup>111</sup> In other words, one of the arguments in favour of only applying renvoi to immovable property and status cases clearly is not applicable in Australia – it is based on an assumption that in most cases, the forum does attempt to apply its own principles of justice. As the new choice of law rules in tort attest, this is not the position in Australia.

The circularity involved in Beale’s rejection of renvoi is well documented. He thinks that, in relation to land, the state of the situs must have the final authority. This is consistent with territoriality, but the same could be said in relation to the facts in *Neilson*. Surely as a territorialist, Beale should advocate that Chinese law ‘must have the final authority’. And it seems bizarre to say that we should ignore the law which the Chinese themselves would apply to resolve the case. Why is this not part of the ‘authority’ of China? It seems particularly strange when, as in *Neilson*, the substantive liability rule and the choice of law rule appear in the same Act. How could one agree with an outcome where part only of an Act is applied, without reference to the context in which it was written? The Chinese choice of law rule does provide the context in which the substantive rule appears.

Beale is concerned about the equality of treatment of marital status, and so is willing to ask how the ‘proper law’ would ensure equality of treatment, by referring to the situs’ choice of law rules. However, as a general principle there should be as much equality of treatment in choice of laws rules as possible, recognising that complete equality is impossible. As some members of the High Court explicitly recognised in *Neilson*, one way to seek to ensure the greatest equality possible is for the forum court to consider, if it is applying foreign law, how the foreign court would apply that law (and whether the foreign court itself would apply its own foreign law or the law of another country).

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110 (1870) LR 6 QB 1.

111 As I have noted, ‘public policy’ here should not be equated with disagreement about the justice of the result reached by the application of foreign law: Anthony Gray, ‘Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia’ (2004) 23 *University of Queensland Law Journal* 435, 436-45.

## VII APPLICATION OF THE RENVOI DOCTRINE IN NON-EXCEPTIONAL AREAS

Given that renvoi-type situations do not occur regularly, and even when they do the consequences may not be realised, there are few cases where renvoi has been applied outside of the so-called exceptional cases. It is not surprising the High Court did not refer to any tort cases where a renvoi approach had been applied, in *Neilson*.

However, some support for the doctrine appears in some contract law cases.<sup>112</sup> *University of Chicago v Dater*<sup>113</sup> is one example. A note was signed in Michigan by a married woman. The note was sent to Illinois for placement of a mortgage on the written register. The money was advanced in Illinois by the lender. The mortgage was later foreclosed in Illinois, with an action brought in a Michigan court to recover the balance due on the note. The internal law of Michigan provided that a married woman could not be bound by a signed note, while the law of Illinois provided that a married woman could freely contract. The majority of the Court found that the wife's capacity was governed by the law of the place of contracting, Illinois.

The Court asked what an Illinois court would do in such a case. They found that an Illinois court would hold that the wife's capacity was governed by the internal law of the place of execution. According to this law, the wife was not liable, and so, on this basis, the Court found the wife not liable. Three members of the Court dissented in the case, rejecting the renvoi.

In this case, there was no *circulus inextrabilis*. The place of contracting, Illinois, had no interest in the application of its law. It would not have sought to apply its own law. This means that the forum court should not seek to apply what would otherwise be the 'proper law'. There is no difficulty about forum shopping. If the action had been commenced in Illinois, the court would also have been referred to the law of the place of contracting, that is, Illinois. It would have applied its choice of law rules, reflecting that Illinois had no interest in the outcome of the case. Similarly, Michigan law would have applied.

As indicated, in the 2006 Australian case *O'Driscoll v J Ray McDermott, SA*, McLure J accepted that renvoi could apply to a contract case. This was also the position of Walsh J, speaking for the New South Wales Full Court in *Kay's Leasing Corporation v Fletcher*.<sup>114</sup>

112 Renvoi is specifically excluded in relation to contracts by the *Contracts (Applicable Law) Act 1990* (UK) c 36, so it is not surprising that there are few British contract cases in which renvoi has been considered. However, dicta in some contract cases appears to support the application of the renvoi doctrine: see, eg, *Vita Foods Products Inc v Unus Shipping Company Ltd (in liq)* [1939] AC 277, 291 (Lord Wright); *Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195, 207 (Walsh J).

113 277 Mich 658, 270 NW 175 (1936).

114 (1964) 64 SR (NSW) 195, 207. The decision was reversed on other grounds by the High Court: *Kay's Leasing Corporation v Fletcher* (1964) 116 CLR 124.

Renvoi cannot arise in British contract cases, due to its express exclusion by legislation.<sup>115</sup> However, Collins J was prepared to consider the doctrine in the recent quasi-contract case of *Barros Mattos Junior v MacDaniels Limited*,<sup>116</sup> at least where the object of the British conflict rule would be better served by referring to the choice of law rules of the other jurisdiction.

### VIII CONCLUSION

This author agrees with the end result in *Neilson*, if not all of the steps taken to get there. In particular, I reiterate that the radical acceptance of the renvoi doctrine was forced upon the Court, by its refusal to acknowledge a flexible exception to its recently re-drawn choice of law rules in tort. I would prefer a flexible exception to the general choice of law rule in tort, as other jurisdictions have endorsed. However, this is unlikely to occur, given the High Court's clear antipathy towards such a suggestion. I suggest that in *Neilson* the High Court was correct in applying Australian law, given the lack of interest China had in the case (at least as shown by the evidence, which admittedly was not entirely satisfactory). This author favours an explicit interest analysis and considers that the doctrines of renvoi and interest analysis are compatible. Consideration of how a Chinese court would presumably have dealt with the matter in *Neilson* is important to minimise the opportunities available for forum shoppers, and to provide consistency and predictability. It is also important to promote judicial comity and respect for legal systems other than our own.

On the assumption that a Chinese court would have remitted the matter back to an Australian court to apply Australian law, I agree that Australian law should be applied (as it was) to resolve the case. However, proof of foreign law is important, and one cannot agree with presumptions that foreign law is the same as local law, or that statutory interpretation is the same in the two jurisdictions. Rather, appropriate evidence must be sought and pleaded on these matters before the case can be resolved. Australian law should move to accept the doctrine of renvoi as a general principle. It should not apply the doctrine only in isolated areas, as has been advocated by the American Law Institute, because the *raison d'être* of the doctrine is not confined to one or two substantive topics. It is believed that interest analysis might be used to construct the theoretical framework on which renvoi as a general principle could be placed.

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115 *Contracts (Applicable Law) Act 1990* (UK) c 36, sch 1, art 15. See also, *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978; *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284.

116 [2005] EWHC 1323 (Collins J, High Court of Justice, Chancery Division, 24 June 2005) [108].