2008 Survey of Developments in Australian Private International Law

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I. Introduction

This review of the Australian developments in private international law in 2008 surveys a surprisingly large number of decisions in the midst of a Global Financial Crisis. It adopts the structure and methodology of previous annual reviews, namely making of qualitative rather than quantitative review of important decisions.[1]

Among the notable decisions this year included the following. At the highest level, the newly constituted High Court reaffirmed the strict Australian test to *forum non* conveniens in *Puttick v Tenon (formerly Fletcher Challenge Forests)*.[2] In a second important development regarding classification as procedural versus substantive law, the New South Wales Court of Appeal in *Garsec v His Majesty the Sultan of Brunei*[3] reminded us that characterization occurs in the forum and that Australian courts adopt a narrow view of what is procedural law. The year also saw the Federal Court rule on concurrent proceedings in the United States and Australia with an application for an anti-suit injunction in the copyright dispute concerning the film and book 'The Secret'. This was a dispute that did much to highlight the nature of modern disputes about jurisdiction and venue, and the ascendency of the anti-suit injunction in transnational litigation.[4]

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1 See eg, K Anderson with J Davis, 'Annual Survey of Recent Developments in Australian Private International law 2000–2003' (2005) 24 *Aust YBIL* 443; K Anderson with J Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2004' (2006) 25 *Aust YBIL* 697; K Anderson and J Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2005' (2007) 26 *Aust YBIL* 425; K Anderson and K Pham with J Davis, 'Annual Survey of Recent Developments in Australian Private International Law, 2006' (2008) 27 *Aust YBIL* 467; K Anderson and K Pham with J Davis, 'Annual Survey of Recent Developments in Australian Private International Law, 2007' (2009) 28 *Aust YBIL 409*.

2 (2008) 238 CLR 265.

3 (2008) 250 ALR 682.

4 *TS Production LLC v Drew Pictures Pty Ltd* (2008) 250 ALR 97; *TS Production LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433, (2008) 252 ALR 1. For commentary on *TS Production v Drew Pictures,* see eg, T Golder and A Mayer, 'Whose IP Is It Anyway?' (2009) 4(3) *Journal of Intellectual Property Law & Practice* 165.

This article proceeds in traditional conflicts fashion, first covering developments in jurisdiction where most of the action was this year. It then reviews more briefly the recent case law in choice of laws and enforcement of judgments. It concludes by noting that rather than a year of new directions, 2008 developments reinforced and clarified past major decisions.

II. Jurisdiction

(a) Establishing jurisdiction

(i) In personam jursidication and service outside the jurisdiction

Where a party cannot be found within a jurisdiction to establish *in personam* jurisdiction, a court may exercise its 'long arm jurisdiction' by authorising service outside the jurisdiction pursuant to statute. It is axiomatic that orders for substituted service may be required in those cases where a party cannot be personally served, or is intentionally evasive, or both.

The Federal Court considered whether service in India by private agent was sufficient to establish jurisdiction in *Beluga Shipping GMBH & Co "Beluga Fantastic" v Headway Shipping Ltd and Others (No 2)*.[5] This case involved a dispute over unpaid freight and breach of fiduciary duty by an Indian resident who fraudulently entered into the freight contracts on behalf of his employer.

The Federal Court Rules provide an application for leave to serve an originating process outside of the jurisdiction must include a statement specifying whether the proposed method of service is permitted by either a convention, the Hague Convention, or the law of the foreign country.[6] Although India and Australia are not parties to any treaty or convention in respect of service of documents in civil proceedings, India nevertheless permits private agents to serve Australian court process in that country. In *Beluga* the proposed method of service was by private agent and, thus, satisfied the requirements of the Federal Court Rules.[7]

Under Order 8 rule 3(2) of the Federal Court Rules a court may grant leave to serve an originating process outside of the jurisdiction if three requirements are satisfied. Firstly, the Court must have jurisdiction,[8] which the Court held it did because the claim arose out of an agreement relating to the carriage of goods on a ship and therefore it fell within the meaning of a "maritime claim" under the Admiralty Act 1988 (Cth).[9]

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5 (2008) 251 ALR 620.

6 *Federal Court Rules 1979* (Cth) O8 r 3(3)(c).

7 *Federal Court Rules 1979* (Cth) O 8 r 3(3).

8 *Federal Court Rules 1979* Cth) O8 r 3(2)(a).

9 Admiralty Act 1988 (Cth) s 4(3)(f).

Secondly, the proceedings must be of a type specified under the Federal Court Rules,[10] including the "setting aside of a contract."[11] This was satisfied as the alleged fraud was under a contract.

Finally, the plaintiff must show a prima facie case for the relief claimed.[12] Given that the pleadings alleged serious loss and damage as a result of the fraudulent activities and considerable evidence was provided, the Court was satisfied of a prima facie case and granted leave to serve in India.

A second service outside the jurisdiction case shows how the substantive choice of law issue of the place of a wrong can influence the jurisdictional question of whether service outside the jurisdiction should be allowed. The Western Australian case of *Proud Nominees Pty Ltd T/As Proud Machinery v Constructie Bruynooghe NV*[13] involved an appeal of the Deputy Registrar's decision setting aside fourth party notice that was served out of the jurisdiction.

The plaintiff brought an action regarding her personal injury, asserting that she fell down stairs in a plant operated by her employer, the defendant. The defendant had contracted with the third party to construct and supply the plant, who then subcontracted its design, manufacture and installation to the fourth party, a company based in Belgium.

The third party argued that the fourth party's negligence arose from its failure to design and manufacture the stairs in accordance with the relevant Australian Standards, and installing them at the premises when it knew or ought to have known that the design and manufacture of the stairs made them dangerous and posed a risk of injury.

Under the Rules of the Supreme Court 1971 (WA) ('the rules'), the decision to grant leave to serve out of the jurisdiction is a discretionary one and should not be granted, "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction".[14] The third party submitted that service out of the jurisdiction was permissible as the third party's contribution action was a tort committed within the jurisdiction and therefore fell within Order 10 rule 1(1)(k) of the rules. Furthermore, the third party argued that the Western Australia Court was the appropriate forum, given that the majority of the witnesses resided in that state or other parts of Australia, and that there was no other forum in which justice could be done at less inconvenience and expense.

The fourth party rejected the third party's submission. Rather they claimed that the third party's allegation was a claim related to the design or manufacture of the stairs in Belgium, rather than a claim that the tort had been committed in Western Australia. In relation to the suitability of Western Australia as a forum, the fourth

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10 *Federal Court Rules 1979* (Cth) O8 r 3(2)(b).

11 *Federal Court Rules 1979* (Cth) O 8 r 2, item 6.

12 *Federal Court Rules1979* (Cth) O8 r 3(2)(c).

13 [2008] WADC 91.

14 *Rules of the Supreme Court 1971* (WA) O 10 r 4(2).

party relied primarily on the submission that because the tort was not committed in the jurisdiction, the Western Australian District Court would not be the appropriate forum to hear the third party's claim.

The Court held that 'a determination as to whether a tort was committed in the jurisdiction is not simply answered by damage having been sustained in the jurisdiction'[15] but instead on 'where the act on the part of the defendant which gives the plaintiff his cause of complaint occurs because this is in substance where the cause of action arises'.[16] Although the fourth party designed and manufactured the stairs overseas, its installation constituted a sufficient basis for the Court to find that a duty of care was owed to the plaintiff and that it was breached in Western Australia. As such, the Court exercised discretion to allow service out of jurisdiction.

The characterisation of the nature of the process for the purpose of service out of jurisdiction was addressed in *Freehills, in the matter of New Tel Ltd (in liq) ACN 009 068 955*.[17] The plaintiff sought orders relating to service of summons for examination on a Monaco resident. In doing so, the Federal Court addressed two questions. The first was whether service out of the jurisdiction should be permitted. The second was whether (assuming such leave to serve was granted) substituted service should be permitted if service out of the jurisdiction would be impracticable.

Numerous searches were undertaken by the plaintiff to locate the examinee and (unsuccessful) attempts made to effect personal service. There is no convention, treaty or other agreement in force between Australia and Monaco on the service of documents in civil proceedings. Thus, if a party in Australia wishes to serve documents they need to send a formal request through diplomatic channels seeking the assistance of the competent authorities in Monaco to effect service. Based on this evidence, the Court was satisfied that there was a basis for an order for service out of the jurisdiction. The Court, however, cautioned that although the scope for granting such an order is expansive, 'the exercise of the discretion has always been tempered with caution.'[18]

The Court then turned its attention to whether a summons for examination constitutes an "originating process" within the Federal Court Rules so as to enable service out of the jurisdiction. Under the rules, the kind of proceeding in which originating process may be served on a person outside Australia includes a proceeding affecting the person to be served in relation to their membership of, or office in, a corporation incorporated in or carrying on business in Australia — which the examinee in this case was. The Court held that as a threshold point, a summons for examination constitutes an originating process.

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15 [2008] WADC 91 [36].

16 [2008] WADC 91 [37]; *Distillers Co (Bio-Chemicals) Ltd v Thompson* [1971] AC 458; *Buttigeig v Universal Terminal & Stevedoring Corporation [1972] VR 626.*

17 [2008] FCA 762.

18 [2008] FCA 762 at [24].

As to whether substituted service should be permitted, the Court distinguished the present case as the plaintiff tendered no specific evidence on how to effect personal service in accordance with the law in Monaco. The application was adjourned until more complete evidence was provided on affidavit, for instance by a qualified expert as to the relevant law in Monaco. The Court did not, in this case, apply the presumption of similarity to fill the gap in evidence as to Monegasque law.

This provides an interesting point for reflection on the presumption of similarity. The presumption of similarity does not operate in many other jurisdictions.[19] As a matter of evidence, the party seeking to rely upon the foreign law has the onus of pleading and proving the foreign law as a fact. In the absence of adequate proof of the content of the foreign law, the presumption of similarity may apply. The extent to which the presumption may apply, in cases where there is some evidence that the foreign law is not the same as the forum law, has not been closely examined. Broadly construed, the presumption gives litigants in Australia a clear forensic advantage, if it is in their interests to abstain from pleading or bringing any or much evidence of foreign law.

It is often the case that it is to the mutual advantage of plaintiff and defendant that neither pleads the foreign law, so that the presumption of similarity can be left to do its work and the forum can apply the law it knows best, which will always be the *lex fori*. This will frequently occur in practice. Conversely, were a defendant wishing to rely on an aspect of foreign law for some forensic advantage, as is most often the case, it will bear the evidential burden[20] of qualifying foreign law experts[21] to prove the foreign law to a sufficient extent to displace the presumption of similarity.[22] However, when foreign law evidence is deficient and the presumption of similarity is left to do its work, the forum is left to apply an amalgam of foreign and forum law that promotes neither harmony between jurisdictions, nor an outcome that meets the legitimate expectations of the parties.

Returning to service outside the jurisdiction to establish a court's authority over a party, the New South Wales case of *Building Insurers' Guarantee Corporation v Merv Eddie*[23] considered the permissibility of substituted service on a defendant

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19 See A Mills, 'Arbitral Jurisdiction and the Mischievous Presumption of Identity of Foreign Law' (2008) 67 *Cambridge Law Journal* 25.

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

21 This is discussed in considerable detail in by Anthony Gray, see A Gray 'Choice of Law: The Presumption in the Proof of Foreign Law' (2008) 31(1) *University of New South Wales Law Journal* 136. For a helpful survey of the pleading and proof of foreign law in Australia since 2000, see especially J McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400.

22 What will constitute 'sufficient' proof of foreign law is an area in need of clarification by Australian courts, especially since *Neilson v Overseas Projects Corporation of Victoria* (2005) 223 CLR 331.

23 [2008] NSWSC 195 (7 March 2008).

residing outside the jurisdiction. The plaintiff commenced proceedings in the NSW courts to recover money paid to building owners by the defendants who were involved in constructing the building.

The defendant travelled to Syria and Europe after he became aware of the plaintiff's claims against him, but before the plaintiff filed proceedings. Thus, he was not within the jurisdiction when proceedings commenced against him. The plaintiff obtained an order allowing substituted service under Part 10 rule 14 of the Uniform Civil Procedure Rules ('UCPR') on the professional premises of the defendant's daughter. The defendant applied to have this order set aside pursuant to Part 12 rule 11(1) of the UCPR, arguing that the common law does not permit substituted service on a defendant who was not resident in the jurisdiction at the time of the initiation of the process.

The NSW Supreme Court began by affirming *ASIC v Sweeny* which held that, 'substituted service can be ordered where the defendant is outside the jurisdiction…[but] should not be permitted…as a means of sidestepping the obstacles to personal service abroad.'[24] It then held that as the defendant had not provided any overseas address for service, actual personal service was impracticable.

The Court explained that the interests of justice demand that a person who lived and worked in NSW and is facing a claim as a consequence of that work, and has been provided with a copy of the initiating process or has taken steps to avoid service, ought not to be able to preclude a plaintiff from proceeding with his case because he has not been personally served. The Court did not consider there to be any policy reason in this case that would encourage a restrictive view of the ambit of Part 10 rule 14.

It is worthy of note that in the later 2008 decision of the Family Court in *Kumar v Gupta*, Cohen J made similar observations outside of the context of the UCPR.[25] In that case the Court held that a wife may be excused from serving her husband personally in matrimonial proceedings. The Court allowed substituted service on her husband's family members in Australia and the United States where it was a clear case of the husband spiriting a child away, concealing his whereabouts, and thereby avoiding service.

By way of commentary, the courts' pragmatic approach—particularly in the increasingly highly mobile and globalised world — is to be supported. Hopefully lawyers will take note and not only discourage their clients from frivolous hide-n-seek, but also not unnecessarily challenge straightforward, albeit substituted, service.

Finally, in *Apollo Marble and Granite Imports v Industry + Commerce (Civil Claims)*[26] the Victorian Civil and Administrative Tribunal (VCAT) confirmed that

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24 *ASIC v Sweeny* [2001] NSWSC 114 at [40], [41].

25 [2008] Fam CA 885 (26 September 2008).

26 [2008] VCAT 2298 (14 November 2008).

the Victorian Civil and Administrative Tribunal Act 1998 (Vic) and its Rules do not authorize service outside Australia, and it therefore has no jurisdiction over persons outside of Australia who cannot be validly served.[27] The VCAT is a creature of statute and has no inherent jurisdiction or implied power and the applicant could not rely on the extraterritorial operation of the Fair Trading Act 1999 (Cth) in combination with s 140 of the VCAT Act to authorize service outside Australia.

(ii) In rem jurisdiction and the nature of a freezing order

Interestingly, due to the in rem nature, the validity of a freezing order by a State court exercising federal jurisdiction is not affected by difficulties serving that order on a party located outside Australia. A 2008 Western Australian decision confirmed freezing orders operate in respect of property and not persons, and so long as an Australian court makes an order freezing property in Australia, the order is valid.

Centurion Trust Company Ltd v Director of Public Prosecutions[28] concerned the grant of a freezing order over a chose in action. The West Australian Court of Appeal considered whether shares in mining companies registered to or held on trust for Centurion — a company registered and domiciled in Jersey — were confiscable pursuant to the Criminal Property Confiscation Act 2000 (WA) ('CPCA'). It also considered whether the granting of a freezing order was valid in circumstances where the West Australian Director of Public Prosecutions (DPP) failed to seek leave to serve the order overseas. A further issue arose as to whether the DPP had standing to seek a freezing order in this matter in which the West Australian Supreme Court was exercising federal jurisdiction.

The matters date back to an investigation by the Australian Securities Commission (now ASIC) commencing in January 1998. In June 1998 ASIC made orders pursuant to the Australian Securities Commission Act 1989 (Cth) restraining Centurion from dealing with certain shares. In 2001 Centurion unsuccessfully applied to ASIC for revocation of the orders and release of the property held on trust by ASIC. On 8 February 2002 Centurion then applied to the Administrative Appeals Tribunal (AAT) for a review of ASIC's decision, seeking the funds released. The AAT gave notice it would deliver a decision at 2 pm on 14 November 2003.

Anticipating that the AAT would set aside ASIC's decision and release the funds, the DPP filed an ex parte motion on 13 November 2003 to freeze the fund. The DPP argued that it had applied for an examination order in relation to the property and was likely to apply for a crime-used property substitution declaration, and a criminal benefits declaration, 21 days after the grant of the freezing order (which it then filed within time).

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27 *Apollo Marble v Industry + Commerce* [2008] VCAT 2298 [21].

28 (2008) 35 WAR 463; [2008] WASCA 6.

The DPP obtained its freezing order before Scott J at 10.30 am on 14 November 2003. At 2 pm on 14 November 2003, ASIC upheld Centurion's application, but by that stage the trust funds were subject to the freezing order granted by the Scott J. On 15 December 2003 Centurion applied to set aside the freezing order.

On 9 January 2004 Heenan J granted the DPP leave to serve the freezing order 'on any person in the United Kingdom who is, or might be, an interested party within the meaning of the CPCA, including Centurion'[29] together with a notice under s 46(6) of the CPCA. Heenan J also ordered that the time for any objection to the freezing order be extended from 28 to 60 days. On 23 January 2004, the Viscount's Department in Jersey served Centurion with the freezing order and the notice.

Jersey is not within the United Kingdom. The solicitors for Centurion wrote to the DPP to advise that service in Jersey was outside the scope of Heenan J's order. The DPP applied to vary that order and Roberts-Smith J varied the order on 19 February 2004.

Centurion was served on 16 March 2004. Unfortunately the notice under s 46(6) noted that objections to service were to be filed within 28 days, and not the extended 60 day period as ordered by Heenan J on 9 January 2004.

Centurion contended that the shares were not confiscable property for the purposes of the CPCA. It also argued that the freezing order was invalid on grounds that granting the order was beyond the jurisdiction of the Court, because leave was not obtained under Order 10 rule 7 of the Rules of the Supreme Court 1971 (WA) to serve the order on the appellant in Jersey.

In relation to the claim that '[t]he grant of the freezing order was beyond the jurisdiction of the Court because no leave was obtained to serve the appellant in Jersey when the order was made',[30] Martin CJ (with McLure and Buss JJA) held that this ground of appeal was 'misconceived'[31] for several reasons. The first reason was that, as an appeal from the ex parte decision of Scott J in November 2003, there was nothing to serve until the making of that order. Plainly, the question of service only arose in January 2004 when Heenan J made orders as to service on interested persons in the 'United Kingdom'. Further, freezing orders operate in respect of property and not persons. The property being the shares was at all times situated in Western Australia, so 'the validity and effectiveness of the order is not dependent upon its service outside the jurisdiction'.[32]

The Court also stated that:

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29 *Centurion v DPP* (2008) 35 WAR 463 at [29].

30 Ibid [53].

31 Ibid [54].

32 Ibid [55].

> Put another way, by the express provisions of the CPCA, and general principle, the court plainly has jurisdiction to make freezing orders in respect of property situated in Western Australia. The fact that such orders may, when served upon persons outside the jurisdiction, have statutory consequences under the specific regime created by the Parliament in respect of property associated with criminal conduct does not, and cannot, enliven the need to comply with Rules of Court made pursuant to the *Supreme Court Act 1935 (WA)*. Any coercive consequences for persons flow from the CPCA, not from the freezing order.[33]

The straightforward nature of in rem jurisdiction makes freezing orders an easy case. This approach also makes sense given the freezing order is not a determinative judgment but merely a procedural device to slow process down pending clarification of substantive issues.

(b) Discretionary exercise of jurisdiction

(i) Transfers under Cross-Vesting Scheme within Australia

The decision in *AIG UK Ltd and Ors v QBE Insurance (Europe) Ltd* [34] highlights the need to submit to the law of a particular Australian State, and to submit to the jurisdiction of a particular state court, when drafting a forum clause and a choice of law clause in a contract. This case is of particular relevance to international insurers writing business in Australia. A generic reference to the 'law of Australia' in a forum clause is unhelpful and leaves room for disagreement and debate if a dispute as to jurisdiction arises. The differences between the laws of each Australian state and territory may have implications for insurers and reinsurers, and in a federation such as Australia, the laws of a state or territory should be specifically identified in a jurisdiction clause.

QBE was the primary insurer for an accident in New South Wales, and the primary policy identified 'Australian law' as the law governing any contractual dispute. The insurer and insured agreed to submit to any court of competent jurisdiction in Australia. Three reinsurers were involved. AIG reinsured part of QBE's liability. The reinsurance contract defined the jurisdiction as 'the Commonwealth of Australia and New Zealand only, as original.'

The first proceedings against the insured were commenced in Victoria and eventually settled pursuant to Victorian law. Subsequently, AIG and the other reinsurers sought a declaration in the Supreme Court of Queensland that they were not obliged to indemnify QBE as it had not complied with a condition to advise its reinsurers as soon as practicable of any loss which might give rise to a claim. QBE sought a stay of the Queensland proceedings arguing the matter was better heard in Victoria. The Court denied this on grounds that the parties had submitted to the jurisdiction of the Queensland court as a 'Court of competent jurisdiction within Australia.'

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33 Ibid [61].

34 [2008] QSC 308.

QBE also sought a transfer of the proceedings from the Supreme Court of Queensland to the Supreme Court of Victoria under the cross-vesting scheme. The Instruments Act 1958 (Vic) contained provisions that might have assisted QBE's position on non-disclosure and hence QBE and its legal team no doubt hoped to use that legislation to its best advantage. There was no Queensland legislative equivalent of the Victorian act.

The Supreme Court of Queensland declined to transfer the proceedings. It based this firstly on the fact that the connection with Victoria was merely incidental, and secondly because the forum clause in the contract of reinsurance did not specify that proceedings should be brought in any specific court but merely that suit be commenced in an Australian court. As an aside, the Court did not need to answer what the applicable contract law was based on the choice of law clause, had it done so the Instruments Act 1958 (Vic) may have applied even if the matter continued in the Queensland court.

It is difficult to argue for a stay or transfer under the cross-vesting scheme where the parties have submitted to the jurisdiction of any competent Australian court. A court seised of a matter is more likely to retain it, rather than to rule itself incompetent.

For insurers and reinsurers, APRA Prudential Standard GPS 230 Reinsurance Management requires reinsurance contracts to be governed by Australian law, and further requires any disputes to be determined by an Australian court. This obliges insurers to pay close attention to choose the law and the court of a particular State or Territory, rather than to refer broadly to 'Australian law'.

(ii) Forum Non Conveniens

Among the more notable conflicts cases in 2008, the High Court had a chance to reasses the stricter Australian standard for *forum non conveniens* in its decision of *Puttick v Tenon Ltd (formerly called Fletcher Challenge Forests Ltd)*.[35] Nevertheless, the Court retained the 'clearly inappropriate forum' threshold test for a stay on *forum non conveniens* grounds.

Puttick concerned negligence proceedings brought by Mrs Puttick against her husband's employer in the Supreme Court of Victoria. The claim alleged that Mr Puttick, employed by a New Zealand company, the Tasman Pulp and Paper Company (a subsidiary of Tenon), contracted mesothelioma as a result of visits to factories in Belgium and Malaysia in the course of his work. At first instance, Harper J stayed the proceedings in Victoria on *forum non conveniens* grounds in favour of the matter being determined by the New Zealand court. The Victorian Court of Appeal upheld Harper J's decision. A finding that the tort had occurred in New Zealand was the main factor in both courts concluding that the action in the Supreme Court of Victoria should be stayed on *forum non conveniens* grounds.

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35 (2008) 238 CLR 265.

Mrs Puttick appealed again to the High Court. The only ground of appeal was that the Court of Appeal had erred in finding that the place of the tort was New Zealand. In two separate judgments, the High Court unanimously upheld the appeal. After finding that it was not possible based on the material available to it to determine the place of the tort, the High Court went on to discuss the application of the 'clearly inappropriate forum' test.

The High Court rejected an invitation from Tenon to reconstrue the test for *forum non conveniens*. Tenon argued that the Court should replace the present Australian 'clearly inappropriate forum' test with the English test that a stay should be granted when the local forum is an 'inappropriate forum' or where there is a more appropriate forum.[36] Tenon was clearly in favour of the less strict *Spiliada*[37] test rather than the current and more strict *Voth* [38] test. The defendants submitted that this would eliminate 'the scope for tension and confusion' created by the explanation in *Voth* of the different meanings of the terms 'vexatious' and 'oppressive'.[39]

The plurality of French CJ, Gummow, Hayne and Kiefel JJ strongly rejected any problems with the current test:

> It may … be observed, as it was in *Voth*, that 'oppressive' and 'vexatious' are terms that have been understood in different senses. … What was said in *Voth* about those differences casts no doubt on the content of the test ultimately stated in *Voth*. In particular, contrary to Tenon's submissions, it provides no 'scope for tension and confusion' about the content or application of the clearly inappropriate forum test.[40]

Heydon and Crennan JJ also refused to overrule *Voth*, but for reasons based on the circumstances of the present case. First, on the approach already taken by the Court, the question did not arise for consideration. Second, the submissions did not explain how the considerations relevant to overruling prior authorities had been satisfied. Third, although the respondent contended that *Voth* should be overruled because it had been undercut by the later decisions of the Court in *Pfeiffer*, *Zhang*, and *Neilson*, no detailed argument had been heard as to the correctness of *Voth* and its relationship with these cases. Finally, it had not been demonstrated that overruling the *Voth* test would make a difference in the result of the appeal, and hence any changes to the law would strictly be *dicta*.[41]

Having found that the Court of Appeal erred, it fell upon the High Court to re-exercise the discretion and determine whether the stay should be granted. The plurality emphasised that the application of a foreign *lex causae* was not a

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36 A trend seen in cross-vesting transfers since *BHP Billiton v Schultz* (2004) 221 CLR 400: see eg, K Anderson and J Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2005' (2007) 26 *Aust YBIL* 425 at 427–28.

37 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460.

38 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

39 *Puttick v Tenon* (2008) 238 CLR 265, 277 at [28].

40 Ibid at [29].

41 Ibid 280–81.

determinative factor in granting a stay of *forum non conveniens*. If the tort was not a foreign tort, the claim for a stay would have been 'greatly weakened'. However:

> it by no means follows that showing that the tort which is alleged is, or may be, governed by a law other than the law of the forum demonstrates that the chosen forum is clearly inappropriate to try the action. The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction. Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the lex causae as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute.[42]

Even if the *lex causae* was later shown to be New Zealand law, and although most of the evidence was also in New Zealand, this did not demonstrate that Victoria was a clearly inappropriate forum.

Heydon and Crennan JJ again took a narrower approach than the plurality. The primary judge made it clear that he would not have granted a stay if it could not be concluded that New Zealand law was the *lex causae*, and the respondent did not point to any error of law or fact made by the primary judge. The fact that the lex *causae* 'might' be New Zealand law, when that question could not be determined, was irrelevant and should not be taken into account. Thus, while New Zealand was an appropriate forum, Victoria was not clearly inappropriate. The proceedings were not oppressive, vexatious or an abuse of process.[43]

This confirms that the 'clearly inappropriate forum' test will remain the test for *forum non conveniens* stays in Australia, with the High Court rejecting a move to the lower *Spiliada* standard. Further, the decision of the plurality arguably signals a strengthening of the strict application of the *forum non conveniens* test by confirming that the applicable law is to be given limited weight in determining whether a forum is clearly inappropriate. As we have previously noted, there was an emerging trend in which the application of foreign law was seen as an extremely strong factor in *forum non conveniens* being granted.[44] However, in this case, although foreign law applied, and much evidence was located in a foreign forum, the Court still found that the local forum was not clearly inappropriate.

Nevertheless, it is unclear the extent to which the plurality's reasoning will affect the trend. In this case, the foreign jurisdiction was New Zealand. In deciding that the application of New Zealand law was an insufficient basis for Victoria to be a clearly inappropriate forum, the Court explicitly noted the geographical proximity to New Zealand and similarities between both legal systems and legislative provisions. Thus, it is arguable that where the *lex causae* is of a country and legal

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42 Ibid 277–78 at [31].

43 Ibid 283–85.

44 See K Anderson and K Pham with J Davis, 'Annual Survey of Recent Developments in Australian Private International Law' (2009) 28 *Aust YBIL* 409 at 413.

system with which Australian courts are less familiar (e.g., Indonesia [45] or Brunei [46]), the application of foreign law will continue to be an almost determinative factor in *forum non conveniens* being granted. Similarly, where the foreign law being applied is foreign constitutional law, that continues to be an almost determinative factor in whether a stay is granted, as in the case of *Garsec v Brunei*.

In *Garsec v His Majesty the Sultan of Brunei*,[47] the claimant alleged a breach of contract to purchase a rare manuscript of the Koran. The Sultan of Brunei's Private and Confidential Secretary was involved in negotiating the transaction on behalf of the Sultan. Garsec sought specific performance of the contract. In the alternative, Garsec pleaded a breach of warranty and the tort of negligent misstatement by the Private Secretary, and sought damages. Article 84B of the Bruneian Constitution granted the Sultan immunity from suit. The Sultan and his Secretary applied for a *forum non conveniens* stay of the proceedings in New South Wales. The *lex causae* was Bruneian law, being the proper law of the contract.

A stay was granted at first instance, and upheld by the New South Wales Court of Appeal, which found that the characterisation of a foreign law (in this case, the constitutional immunity) as either substantive or procedural is done by *lex fori*, not by the *lex causae*. Thus, it was not relevant how the Bruneian law might have characterised the immunity conferred on the Sultan by the Bruneian Constitution.

The Court then characterised the statutory immunity under Australian law as substantive because it was a matter that went to 'the existence, extent or enforceability of rights'.[48] As such, the forum court should apply it as a part of the *lex causae*. Therefore, in relation to the immunity, Garsec gained no juridical advantage by claiming in New South Wales or Brunei. The forum is not required to balance advantages and disadvantages in determining if the forum is clearly inappropriate.

Garsec also standards for the proposition that an Australian court might well be a clearly inappropriate forum even if no other court could resolve the matter.[49] Campbell JA observed that:

> If the subject matter of dispute had a tenuous connection with Australia such that an Australian court would have jurisdiction concerning it, but all of the witnesses and documents were in another country and the transaction was governed by the law of that other country it would be easy to reach a conclusion that the Australian court was a clearly inappropriate forum, regardless of whether there was another place that could hear the dispute.[50]

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45 *Murakami v Wiryadi* [2006] NSWDC 1354.

46 *Garsec v His Majesty the Sultan of Brunei* (2008) 250 ALR 682.

47 (2008) 250 ALR 682.

48 In accordance with *Pfeiffer*.

49 See *Voth v Manildra Flour Mills* (1990) 171 CLR 538, 558,

50 *Garsec v Sultan of Brunei* [2008] NSWCA 211 at [141].

The case affirms that forum law will be used to characterise the foreign law.[51] This follows *Neilson*[52] to the extent that Gummow and Hayne JJ submitted that the entirety of the foreign law should be considered, and that :

> to take no account of what a foreign court would do when faced with the facts of [a] case does not assist the pursuit of certainty and simplicity. It does not assist the pursuit of certainty and simplicity because it requires the law of the forum to divide the rules of the foreign legal system between those rules that are to be applied by the forum and those that are not.[53]

In another classic example of duelling courts within the *forum non conveniens* context, the Federal Court of Australia found that jurisdiction clauses will not save parties from venue disputes if there is case to argue that the clause is non-exclusive and a foreign court finds first that its own jurisdiction is satisfied under a non-exclusive jurisdiction clause giving rise to estoppel in the other forum. The intellectual property licensing case of *Armacel Pty Ltd v Smurfit Stone Container Corp*[54] involved an Australian corporation (Armacel) and a US corporation (Smurfit). It is in most respects a straightforward case in which the parties fought about venue.[55] The parties had included a jurisdiction clause in their agreement, selecting New South Wales as the forum for disputes and specifying that the agreement:

> must be read and construed according to the laws of the State of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia.

Despite this clause, Smurfit commenced proceedings against Armacel in the US District Court of Pennsylvania. Armacel filed a motion for dismissal of the US proceedings arguing the US court lacked jurisdiction. After the US suit had been filed, Armacel commenced proceedings in the Federal Court of Australia and sought an anti-suit injunction restraining the US proceedings. Smurfit countered Armacel's anti-suit claim in the Federal Court proceedings with its own claim for a stay based on *forum non conveniens* grounds. The US court acted first applying *lex fori* including the US rules of contractual interpretation and private international law to determine that the jurisdiction clause was a non-exclusive jurisdiction clause,[56] and dismissed Armacel's motion.

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51 Garsec sought special leave to appeal to the High Court on the characterisation point; it was heard on 17 February 2009. It was referred to an enlarged bench of the court for further written submissions, but the appeal was discontinued before hearing.

52 *Neilson v Overseas Projects Corporation of Victoria* (2005) 223 CLR 331.

53 Ibid 364 at [94] per Gummow and Hayne JJ; quoted in *Garsec Pty Ltd v His Majesty the Sultan of Brunei Darussalam & Anor* [2009] HCA Trans 021 (13 February 2009).

54 (2008) 248 ALR 573.

55 For further discussion see eg, M Davies, 'Reflections on the past decade of transnational litigation' (2009) 10(1) *Melbourne Journal of International Law* 46.

56 *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573, 575 at [5].

Absent the US court's finding, Jacobson J of the Federal Court was prepared to hold that the jurisdiction clause was an exclusive jurisdiction clause by which the parties submitted to the jurisdiction and laws of New South Wales, including the Federal Court of Australia exercising federal jurisdiction in the State of New South Wales. However, Jacobson J held that because the US court had already found that the jurisdiction clause was non-exclusive, Armacel was estopped from re-agitating, before the Federal Court the question whether the jurisdiction clause was exclusive or non-exclusive.[57] That was notwithstanding the fact that the US court had ruled the clause a non-exclusive jurisdiction clause by applying US rules of private international law.[58]

Eventually the Federal Court stayed the Australian proceedings conditional on: Smurfit agreeing to mediate in New South Wales; filing an appearance in those proceedings; and submitting to the jurisdiction of the Federal Court. It also granted Armacel liberty to apply to lift the stay depending upon how the US proceedings developed.[59] In particular, Jacobson J noted that Armacel made some claims against Smurfit under the Trade Practices Act 1974 (Cth). Smurfit adduced expert evidence to the effect that these claims could be heard by the US court.[60]

In one of the stranger decisions seen in Australian private international law in 2008 if not longer, a South Australian court granted a *forum non conveniens* stay on a first filed proceeding where the defendant was resident in the jurisdiction. Moreover, the court did not make the stay expressly dependent upon the defendant's submission to the jurisdiction of the foreign court. As such the South Australian court effectively assisted the defendant in escaping scrutiny and liability anywhere, pending the possible future trial overseas. The tale also has an interesting aside on the always difficult Moçambique Rule.

Strohschneider v Ehlert[61] was an action concerning the sale and purchase of land in the Republic of Germany. A written agreement was entered in Germany in January 1998 when both parties were German residents. After taking possession of the property the defendants failed to complete the purchase, and abandoned the property. In late 1998 the defendants relocated to South Australia. In 2001 the parties entered into a further written agreement by which the parties acknowledged rescission of the 1998 contract and the plaintiff's entitlement to compensation for consequential losses.

When the plaintiff issued proceedings in 2004 seeking specific performance of the 2001 contract, he was a resident of Germany, and the defendants were residents of South Australia. The defendants successfully obtained orders staying proceedings in the District Court of South Australia on grounds that the court was

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57 Ibid 583 at [82].

58 Ibid 584 at [90].

59 Ibid 588 at [127].

60 Ibid 585 at [100].

61 *Strohschneider v Ehlert* [2008] SADC 54.

clearly an inappropriate forum to determine the proceedings.[62] The defendant also argued that, pursuant to the Moçambique Rule[63] which was good law in South Australia, the District Court of South Australia lacked jurisdiction to determine this case as the claim was so closely related to the question of title to immovable property in Germany. Under the Moçambique rule, a court has no jurisdiction to hear an action for the determination of title to immoveable property located outside the jurisdiction.[64]

The plaintiffs brought an appeal by way of rehearing. The Court considered whether the defendants had discharged their onus to prove that South Australia was clearly an inappropriate forum to the standard required by the *Voth* test. The plaintiff pleaded that both contracts were 'effected in Germany and that German law will apply in these proceedings'[65] and sought specific performance based on the defendants' acknowledgement of the debt under German law.

The defendants resisted the proceedings on the dual basis that the District Court of South Australia lacked jurisdiction to hear proceedings to determine title to or possession of immovable property in Germany, and that the Court was 'clearly an inappropriate forum and Germany is clearly a more appropriate forum'.[66] They alleged that pursuant to section 35 of the Limitation Act 1936 (SA) the debt was statute-barred. The defendants agreed that German law applied.

The original decision of the Master was based on the principles in *Voth* and the clearly inappropriate forum test outlined by the majority of the High Court in that case.[67] The plaintiff argued that the jurisdiction of the District Court of South Australia had been properly enlivened as the defendants were South Australian residents. German law could be easily proved and there was no need for experts in German law to attend and give evidence. The plaintiff further argued that 'the power to stay should only be exercised in a clear case'.[68]

On the basis of *Renault v Zhang*,[69] Judge Beazley accepted that the jurisdiction of the District Court of South Australia had been properly invoked as the defendants were South Australian residents. However, Her Honour held that the

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62 Ibid at [5].

63 *British South Africa Company v Companhia de Moçambique* [1893] AC 602.

64 Within Australia, the Moçambique Rule has been abolished in New South Wales and the Australian Capital Territory by statute: see eg, the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) permitting New South Wales courts the discretion to deal with foreign land. See also Civil Law (Wrongs) Act 2002 (ACT) s 220.

65 *Strohschneider v Ehlert* [2008] SADC 54 at [10].

66 Ibid at [13].

67 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 556.

68 *Strohschneider v Ehlert* [2008] SADC 54 [33].

69 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 533–34 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); 559 (Kirby J). Callinan J dissented and preferred the rule in *Phillips v Eyre* (1870) LR 6 QB 1.

District Court ought to decline the exercise of jurisdiction on *forum non conveniens* grounds.

Her Honour rejected the argument that the Moçambique Rule applied, holding that this was not a proceeding essentially concerning title to foreign land. Rights to immovable property in Germany were not the essence of the plaintiff's claim. The land had been sold and this was 'an *in personam* claim for compensation or damages'.[70] The case was one falling within the exceptions to the Moçambique Rule, the effect of which the High Court reserved for further consideration in *Renault v Zhang*.[71]

The applicable law being the law of Germany was 'a very significant factor' both before the Master, and before Judge Beazley on appeal. The additional cost of proving German law in the District Court of South Australia was a significant factor, as was the reality that 'while Australian Courts have regularly been required to apply foreign law, there can be no doubt that [the Republic of Germany's] Civil law is more appropriately applied by the Courts of Germany'.[72] The availability of relief in the German courts was also a relevant consideration, although Her Honour acknowledged that there might be cases where Australian courts were clearly inappropriate even in circumstances where there might be no foreign court to hear the proceedings, for example as discussed at first instance by McDougall J in *Garsec v Sultan of Brunei*.[73]

With all of the connecting factors relating in this case to the Republic of Germany, and notwithstanding the unusual situation in this case where a foreign plaintiff elects to commence suit in the defendant's home jurisdiction, Judge Beazley held that continuing the proceedings in South Australia would be vexatious and oppressive to the defendants. Judge Beazley ordered a permanent stay of the South Australian proceedings on grounds that the District Court of South Australia was a clearly inappropriate forum.

Given the Australian case law emphasising the responsibility of Australian courts to provide a venue for Australians unless 'clearly inappropriate' and the importance of being the first place to file, it is difficult to understand this decision. Moreover, considering the case from an enforcement perspective and from an inconvenience to the defendant's convenience, the rationale is perplexing at best. On top of this, it seems the Court could have avoided its highly questionable *forum non conveniens* determination had it relied on the Mocambique rule. It can only be hoped that other courts see this decision as an aberration rather than giving any clarity to resolving *forum non conveniens* or Macambique matters.

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70 *Strohschneider v Ehlert* [2008] SADC 54 [48]; see also *Murakami v Wiryadi* [2006] NSWDC 1354.

71 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 [76].

72 *Strohschneider v Ehlert* 2008] SADC 54 [58].

73 *Garsec v Sultan of Brunei* [2007] NSWSC 882 at [126].

By contrast, in *Talacko v Talacko*, proceedings in Victoria and the Czech Republic concerning breach of fiduciary duty were allowed to continue in parallel. The defendant sought a dismissal of the Victorian claim or a stay pursuant to rule 23.01(c) of the *Rules of the Supreme Court (Vic)* on grounds that the Victorian proceeding was an abuse of process. The plaintiff had earlier instituted separate proceedings in Prague 'claiming the same relief sought in the Victorian proceeding'.[74] The relief claimed in the Victorian and Czech proceedings was not, in fact, precisely the same. The Czech proceedings concerned land in the Czech Republic whereas the Victorian proceedings included this land as well as other land in Dresden, Germany and in Sucha in the Slovak Republic. There was also a broad question about Czech law and whether the remedy of equitable compensation was available in the Czech Republic. The Victorian Court held the defendant had the burden of proving that the Czech proceedings were an abuse of process and failed to do so. Thus, the joint proceedings were not prima facie vexatious, as 'the mere co-existence of proceedings in different countries does not constitute vexation or oppression'[75] particularly if parallel foreign litigation will give other or additional remedies to those sought in the forum.[76]

(iii) Anti-suit injunctions

The Australian position on the discretion to grant anti-suit injunctions was outlined by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd*.[77] The High Court in *Cigna* observed that:

> [a]s Gummow J pointed out in *National Mutual Holdings Pty Ltd v Sentry Corporation,* [78] a court may grant an injunction to restrain a person from commencing or continuing foreign proceedings if they, the foreign proceedings, interfere with or have a tendency to interfere with proceedings pending in that court.
>
> The inherent power to grant anti-suit injunctions is not confined to the examples just given. As with other aspects of that power, it is not to be restricted to defined and closed categories. Rather, it is to be exercised when the administration of justice so demands or … when necessary for the protection of the court's own proceedings or processes.[79]

Thus, when considering the question of jurisdiction, Jobson J in *Armacel*[80] firstly considered whether the Federal Court was a clearly inappropriate forum in light of Smurfit's application, before proceeding to consider whether to issue an anti-suit injunction.

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74 *Talacko v Talacko* [2008] VSC 246 (unreported, Osborn J) [7].

75 *McHenry v Lewis* (1882) 22 Ch D 397; *Peruvian Guano Company v Bockwoldt* (1883) 23 Ch D 225.

76 *Talacko v Talacko* [2008] VSC 246 (unreported, Osborn J) at [48]–[49].

77 (1997) 189 CLR 345.

78 (1989) 22 FCR 209, 232.

79 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

80 (2008) 248 ALR 573.

2008 saw two decisions in the long running contest between production house TS Production LLC and Drew Pictures Pty Ltd, with the Federal Court of Australia considering the durability of the anti-suit injunction in this venue dispute.[81] The questions for consideration included:

1. whether the Federal Court was a clearly inappropriate forum to hear a copyright dispute between Australian parties on Australian copyright; and
2. whether the Federal Court should issue an anti-suit injunction to restrain proceedings concerning US copyright on foot in the US District Court.

Concurrent proceedings were on foot in the US District Court of Illinois and in the Federal Court of Australia. The substantive issue in dispute was ownership of copyright in the commercially successful film 'The Secret' released in 2006, and a book of the same name based on the film. The film was substantially produced in Australia. The film was produced by Prime Time Productions Pty Ltd, an Australian company. Prime Time claimed ownership of the copyright of the firm, that it transferred that copyright to its principal shareholder Ms Rhonda Byrne, and that Ms Byrne assigned that copyright to TS Production. The film proved to be popular with the self-help movement and was a box office success in the US grossing significant revenue in excess of $69.9 million, with book sales adding a further $215.55 million by 2008.[82]

The film's director was Mr Drew Heriot. Prime Time claimed that it contracted Mr Heriot to direct the film on its behalf. Mr Heriot claimed that he made the film on behalf of his company Drew Pictures and as such was co-owner of the film and book. There was a significant factual dispute between the parties.

Both TS Productions and Drew Pictures were Australian companies. The second respondent Mr Heriot was an Australian citizen resident at the time of directing the film. When he instituted proceedings in the US District Court, he had moved to the US.

TS Production commenced proceedings in the Federal Magistrates Court; those proceedings were commenced for a declaration of its ownership of the Australian copyright pursuant to the Copyright Act 1968 (Cth). That act does not operate outside Australia. TS Production also sought an anti-suit injunction to restrain Drew Pictures and Heriot from claiming copyright pursuant to the Copyright Act.

Drew Pictures and Heriot then commenced proceedings in the US District court asserting Heriot was the primary author of the screenplay and that he and Ms Byrne then collaborated on the screenplay, film and book thus entitling him to claim joint ownership of the copyright under the United States Copyright Act and the common law of Illinois. They sought a declaration of joint-ownership, account of profits,

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81 *TS Production LLC v Drew Pictures* (2008) 250 ALR 97; and *TS Production LLC v Drew Pictures* (2008) 172 FCR 433, (2008) 252 ALR 1.

82 See *TS Production LLC v Drew Pictures* (2008) 252 ALR 1, [2] per Finkelstein J.

and damages for copyright infringement from Byrne, TS Production and Prime Time.

Drew Pictures and Heriot also sought a stay of the Australian proceedings. On 30 July 2008, Sundberg J of the Federal Court stayed the Australian proceedings on *forum non conveniens* grounds.[83] Sundberg J found that the Federal Court was a clearly inappropriate forum for TS Production to claim copyright. His Honour reasoned that:

> Given the first publication of the Film in the United States, the substantial exploitation of the Film in that country, that United States law clearly provides for joint ownership of copyright in motion pictures, that the declaration sought by the plaintiffs [Drew Pictures and Heriot]…are available under the United States law, and that that law governs ownership and infringement issues, the plaintiffs have in my view issued their proceedings in the most appropriate place. A United States court is the most obvious and natural forum in which to litigate their claims. I attach great important to the fact that United States law will apply to the ownership as well as the infringement and relief issues.

TS Production appealed to the Full Federal Court, firstly contesting the stay and secondly seeking an anti-suit injunction preventing the respondents from pursuing the action in the US. The appeal was unanimously allowed and the stay overturned.[84]

In the first 2008 decision on the matter, after considering the authorities including the recent authority of *Puttick v Tenon Ltd (Formerly Fletcher Challenge Forests Ltd)*,[85] Finkelstein, Gordon and Stone JJ held that the Australian court was not a 'clearly inappropriate forum' because the parties to the dispute were all Australian and the question concerned copyright to works substantially produced in Australia.

Finkelstein J found Sundberg J's reasoning flawed because the US proceedings concerned only the question of US copyright, which the parties could not litigate in Australia. By drawing a clear distinction between the US copyright issue and the Australian copyright issue, the Full Court was able to dispose of the respondent's arguments favouring a stay of the Australian action, namely relying on the cost of litigating in two jurisdictions and the listing of the US action for trial in March 2009. Finkelstein J held that the estimate of costs of two actions was insignificant when 'what is at stake is intellectual property worth hundreds of millions of dollars'.[86] He further held that although the US proceedings might determine some of the significant factual disputes between the parties,[87] the US proceedings did not and could not deal with the ownership of Australian copyright, which was the

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83 *TS Production LLC v Drew Pictures* (2007) 250 ALR 97.

84 *TS Production LLC v Drew Pictures* (2008) 172 FCR 433, (2008) 252 ALR 1.

85 (2008) 250 ALR 582; [2008] HCA 54.

86 *TS Production LLC v Drew Pictures* (2008) 252 ALR 1, [24] per Finkelstein J.

87 For Finkelstein J's comments see *TS Production LLC v Drew Pictures* (2008) 252 ALR 1 [22]–[23].

focus of the Australian proceedings and which Sundberg J's reasoning failed to address and distinguish. The Full Federal Court accepted that Sundberg J erred and that Australia was not a clearly inappropriate forum to determine the dispute about ownership of the Australian copyright under the Copyright Act 1968 (Cth).

In the second 2008 decision on the matter, the Full Federal Court agreed that the only grounds upon which it could issue an anti-suit injunction was if the US proceedings were 'according to the principles of equity, vexatious or oppressive'[88] and where there was 'complete correspondence'[89] between the local and foreign proceedings. This was based on its acceptance that Drew Pictures and Heriot did not commence the US proceedings to curtail the Australian proceedings, and that the proceedings concerned distinct issues,

In 1996 the High Court in *Henry v Henry* had found vexatious and oppression to mean 'productive of serious and unjustified trouble and harassment' [90] or 'seriously and unfairly burdensome, prejudicial or damaging'.[91] The Full Federal Court denied TS Production its application for an anti-suit injunction to restrain Drew Pictures from suing in Illinois whilst Australian proceedings were on foot. Gordon and Stone JJ were not satisfied there was any vexatiousness or oppressiveness; the partial duplication of proceedings was not sufficient. Finkelstein J, on the other hand, was prepared to grant the anti-suit injunction restraining the US proceedings until the Australian action was concluded on the basis of 'a significant overlapping factual dispute (namely, Mr Heriot's role in the creation of the works)'[92] which His Honour considered ought to be determined by the Federal Court.

Another anti-suit decision of 2008 was the matrimonial litigation of *Kumar v Gupta*[93] in the Family Court of Australia. This decision further refined the standard for anti-suit injunctions first made clear in 1997's *Cigna*.[94] The foreign proceedings were commenced to exploit a perceived forensic advantage to litigating in India. The parties, however, were Australian citizens ordinarily resident in Australia, and the jurisdiction of the Indian court was invoked only because the husband surreptitiously removed the child and 'spirited her away' to India.

The husband was born in Singapore, and the wife was born in India. At the time they met, the husband had taken Australian citizenship and had established a successful professional practice in Sydney. The parties married in India, the wife obtained a residency visa, and eventually she also obtained Australian citizenship. During the marriage, the parties were ordinarily resident in Australia. Their child

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88 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 393.

89 Ibid.

90 *Henry v Henry* (1996) 185 CLR 571, 591.

91 Ibid.

92 *TS Production LLC v Drew Pictures Pty Ltd* (2008) 252 ALR 1 [37].

93 [2008] FamCA 885.

94 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

was born in Australia and was a citizen of both Australia and India. Joint assets substantially located in Australia and accumulated before and during the marriage were conservatively valued at $6 million, including cash and land. There were minimal assets in India. Whilst on a visit to Singapore, the husband disappeared with the child. Singapore is not a signatory to The Hague Convention on International Child Abduction. The wife did not know where the husband had taken the child, but investigations revealed that the child was in India.

The wife sought an order from the Family Court of Australia to recover the child and to restrain the husband from removing the child from Australia. She also sought orders to restrain dealings with property, and to access cash in Australian bank accounts to pay her solicitors and meet living expenses. The husband then commenced proceedings in India for dissolution of the marriage and resolution of the custody and property issues. The Family Court accepted it had jurisdiction to hear the matter as the parties were ordinarily or habitually resident in Australia and that for the purposes of the Hague Convention on International Child Abduction 'it is clear that a child who has been taken by one parent to live in another country against the will of the other parent from whom the child was taken retains his or her ordinary or habitual residence'.[95]

The wife sought an anti-suit injunction restraining the husband's proceedings in India. The husband did not file affidavit evidence to challenge the wife's version of the facts. Cohen J considered whether the wife had established that India was a clearly inappropriate forum. In relation to the authorities put forward by both parties, *Voth*[96] and *In the Marriage of Dobson and Van Loden*,[97] His Honour observed that *Voth* was 'authority for the application of the clearly inappropriate forum test to applications to stay local proceedings when proceedings between the same parties for the same remedies are being conducted overseas'[98] and did not apply to an application for an anti-suit injunction to restrain foreign proceedings.

His Honour relied on *Cigna*[99] as authority for the proposition that:

> [a]n anti-suit injunction should only be granted against a litigant in a foreign court if the foreign proceedings interfere with or have a tendency to interfere with the proceedings which are pending in the court in which the injunction is sought.[100]

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95 *Kumar v Gupta* [2008] Fam CA 885 at [18].

96 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

97 (2005) 33 Fam LR 525

98 *Kumar v Gupta* [2008] Fam CA 885 at [20].

99 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

100 *Kumar v Gupta* [2008] Fam CA 885 at [21].

Exercising his discretion with caution, Cohen J first considered that the husband had brought no application to stay the Australian proceedings, before granting the anti-suit injunction sought by the wife to restrain the Indian proceedings. His Honour noted that *Dobson v Van Loden*[101] and *Cigna*,[102] together with *Henry v Henry*[103] oblige the court to consider how the foreign proceedings might be vexatious and oppressive or tend to interfere with the Australian proceedings. Cohen J held that it was vexatious and oppressive to commence proceedings abroad when similar proceedings had already been commenced in Australia.

It is worth noting that the husband's proceedings in India were held to be vexatious and oppressive for three reasons:

1. The parties were ordinarily resident in Australia, as was the child, and the husband ought 'not be permitted to impose upon the wife the unduly burdensome and damaging litigation [in India] which is potentially prejudicial to her rights and which will undoubtedly cause her serious inconvenience and unjustified trouble and harassment… when the natural place to litigate their matrimonial causes is Australia';[104]

2. The bulk of the family property of over $6 million was in Australia;[105]

3. The wife commenced her proceedings in Australia first, and the subsequent Indian proceedings would undermine the integrity of the Australian proceedings.[106]

Having regard to the overall effect of litigation relating to matrimonial causes and the observation of the Full Family Court in *Dobson* that 'issues arising between husband and wife [form] but one single controversy arising out of the matrimonial relationship',[107] Cohen J granted an anti-suit injunction to restrain the Indian proceedings.

(iv) Anti-anti suit injunctions

The Federal Court considered the discretion to issue a stay, on the application of a non-party to an arbitration agreement, in *BHPB Freight Pty Ltd v Cosco Chartering Pty Ltd.*[108] The Court granted interim relief in the form of an anti-anti suit injunction, and an anti-arbitration injunction, on an *ex parte* basis that remained in place pending trial.

BHPB retained shipbrokers Baemar Seascope to find a sub-charterer for a ship, the *Global Hawk*. Braemar Seascope negotiated with another shipbroker, Cosco, to

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101 (2005) 33 Fam LR 525.

102 (1997) 189 CLR 345.

103 (1996) 185 CLR 571.

104 *Kumar v Gupta* [2008] Fam CA 885 [32].

105 Ibid [31].

106 Ibid [29]–[30].

107 *Dobson v Van Loden* (2005) 33 Fam LR 525, 536.

108 (2008) 168 FCR 169.

charter the *Global Hawk* to New Century International (NCI) and that was agreed with BHPB. Without BHPB's knowledge, Cosco delivered the *Global Hawk* to Nera Shipping Co, which was a different sub-charterer. The sub-charterer failed to pay some charter, and BHPB sued Cosco for misleading and deceptive conduct and breach of warranty under s 52 of the Trade Practices Act 1974 (Cth).

Cosco sought a stay of the proceedings pursuant to s 7 of the International Arbitration Act 1974 (Cth) or the Court's inherent jurisdiction. Whilst the Court had power to stay proceedings between parties to an arbitration agreement and to refer the matter to arbitration, Cosco was not a party. It argued that pursuant to s 1 of the Contracts (Right of Third Parties) Act 1999 (UK), it was entitled to enforce the term as to arbitration where that term purported to confer a benefit on him.

The Court held that as Cosco was not claiming through or under a party to the arbitration agreement as required by the International Arbitration Act, the UK statute was not available to it. Thus, it was not entitled to the stay.

Further, the Court had no inherent power to stay proceedings in favour of arbitration,[109] and even if it had such inherent power, the Court would stay the proceedings only if Cosco was a party to the arbitration agreement and if BHPB was acting unconscionably in bringing suit.[110] Finkelstein J noted 'there is no agreement between BHPB and Cosco which BHPB is attempting to circumvent. It is immaterial that there is an arbitration clause in the charterparty'.[111]

Finkelstein J distinguished *CSR v Cigna*, on which Cosco sought to rely in its contention that BHPB was acting unconscionably in its pursuit of the action instead of arbitration. In *Cigna*, a majority of the High Court said that 'in some cases, the equitable jurisdiction to restrain unconscionable conduct may be exercised in aid of legal rights. Thus…if there is a contract not to sue, an injunction may be granted to restrain proceedings brought in breach of that contract, whether brought here or abroad.'[112] The majority also said that 'proceedings which are brought for the dominant purpose of preventing another party from pursuing remedies available in the courts of another country and not available in this country are…oppressive in the *Voth* sense of the word'.[113]

Cosco took steps amounting to a waiver of any right to a stay because it failed 'to insist upon a right at an appropriate time either by choice or default'.[114] These steps included that Cosco entered an unconditional appearance to the action. Moreover, it failed to raise arbitration until more than eight months after

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109 *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169, 182–83 at [42]–[45] per Finkelstein J.

110 See ibid 183–84 at [45]–[50].

111 Ibid at [46].

112 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 392 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

113 Ibid 401.

114 *BHPB v Cosco* (2008) 168 FCR 169, 184 at [52], approving Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [69].

proceedings commenced even though it had considered referring the matter to arbitration earlier in the action. Cosco took various other steps submitting to the curial process, such as filing a defence, giving and taking discovery, and seeking a cross-claim.[115]

Finally, as Braemar Seascope did not seek a stay, Finkelstein J held that to grant Cosco its stay would expose BHPB to two sets of proceedings — an arbitration process and litigation before the Federal Court.[116]

III. Choice of Law[117]

(a) Characterisation of substance and procedure

As foreshadowed in *Garsec v Brunei*, another of the issues clarified by the New South Wales Court of Appeal in *Garsec* was whether the Sultan's constitutional immunity from suit was substantive or procedural law. The Court of Appeal in Garsec found that the characterisation of a foreign law as either substantive or procedural is done by the forum law of Australia, not by the *lex causae*. Thus, it was not relevant how the Bruneian law might have characterised the immunity conferred on the Sultan by the Bruneian Constitution.

The Court then characterised statutory immunity according to the Australian law as substantive because it was a matter that went to 'the existence, extent or enforceability of rights'.[118] As such, this constitutional immunity should be applied in the forum as a part of the *lex causae*.

(b) Discovery

In *Michael Wilson and Partners Ltd v Nicholls*,[119] the issue was whether the court should make an order for discovery, where compliance with that order would breach foreign law. The plaintiff (MWP) was a law firm providing legal services in, among other places, Kazakhstan. The first two defendants, Messrs Nicholls and Slater, were lawyers who had previously been employed by the plaintiffs, but were currently employed by or had interests in the other defendant companies, which also operated in Kazakhstan (collectively the 'Temujin companies'). MWP brought

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115 *BHPB v Cosco* (2008) 168 FCR 169, 185 [53].

116 See also *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, 508 per Allsop J.

117 For recent commentary on choice of law, see eg, A Gray, 'Choice of Law: The Presumption in the Proof of Foreign Law' (2008) 31(1) *University of New South Wales Law Journal* 136; for an overview of common law rules on choice of law and statutory indemnity see C Kourakis, 'Sweedman v Transport Accident Commission: A Simple Crash and Bang?' (2007) 28 *Adelaide Law Review* 23; on choice of law in the context of statutory civil liability reforms across Australia, see M Davies, 'Choice of Law after Civil Liability Legislation' (2008) 16 *Torts Law Journal* 10.

118 In accordance with *Pfeiffer*.

119 (2008) 74 NSWLR 218. Special leave to appeal to the High Court was subsequently sought but refused, and commentary on that application will be reserved for a future edition of this annual update.

an action in the New South Wales Supreme Court, alleging that Nicholls and Slater had breached their contractual and fiduciary duties to MWP by setting up the Temujin companies, directing clients and business of MWP to the Temujin companies, using MWP's confidential information and convincing MWP's staff to join the Temujin companies.

MWP sought orders for the production and inspection of documents in Kazakhstan. In particular, it sought discovery of the client files of the Temujin companies so that they could be used as evidence of the work that MWP would otherwise have undertaken. The defendants argued that production of the documents would breach Kazakh civil and criminal law.

Noting the 'dearth of authority on the question', Brereton J went back to an 1840 English decision for the proposition that a Court of Equity would not make an order for an injunction or specific performance that would require the defendant to do something illegal in the place that the order was to be carried out.[120] However, as discovery was a matter of practice and procedure, rather than substantive law, the law of the domestic forum prevailed:

> while the Court may in various ways have regard to the impact that compliance with an order for discovery may have on the exposure of a party to penal sanctions under foreign laws, it is not an absolute objection to the making of an order for discovery that compliance would involve contravention of a foreign law. … the Court may limit or even dispense with discovery or production as a matter of discretion, taking into account whether the party seeking a limitation or dispensation is the plaintiff or the defendant … but, in general, local notions will predominate because discovery is a part of the local procedure.[121]

It was, however, unnecessary for Brereton J to consider whether and how discovery should be limited to take Kazakh law into account in this case. The expert evidence on Kazakh law showed that disclosure of the documents would not be in breach of criminal law. It would potentially be in breach of civil law, but 'if accompanied with appropriate protections, it would not likely result in liability to pay damages, and this would be relevant to the weight this factor might otherwise attract as a discretionary consideration.'[122] In any case, there was insufficient evidence to uphold the respondent's claim that the documents were confidential. The judge ordered production of the client files.

The conclusion reached by Brereton J – that discovery is a matter of procedure and thus governed by the *lex fori* – is also reached by what is a clear application of the substance/procedure test set down by the High Court in *Pfeiffer*.[123] The more interesting question raised by the case is how the *lex fori* (in this case New South Wales law) should take into account the fact that a party may be put into the unenviable position of having to decide between complying with the discovery

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120 *Re Courtney; Ex parte Pollard* (1840) Mont & Ch 239.

121 (2008) 74 NSWLR 218, 222 [12].

122 (2008) 74 NSWLR 218, 225 [24].

123 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

order or breaching a foreign law — it is a shame that it was not necessary for the judge to consider it in this case.

(c) Torts

As discussed above, the second main issue in *Puttick v Tenon* was identifying the place of the alleged tort. French CJ, Gummow, Hayne and Kiefel JJ,[124] with whom Heydon and Crennan JJ relevantly agreed,[125] held that it was not possible to determine the place of the tort on the available material.

The amended statement of claim did not expressly allege that the claim was governed by foreign law. Further, the plaintiff's pleadings failed to identify the location of key events, such as where Mr Puttick was employed, where Tenon or Tasman operated at the relevant time, and how, when or where it was that Mr Puttick was required to travel to Belgium and Malaysia and work in or inspect asbestos plants. Thus:[126]

> [b]ecause the relevant relationships between the parties could not be identified and described in any relevant detail, and because it was not possible to say where (or for that matter how) the various requirements referred to in the plaintiff's pleading were made of Mr Puttick, not even a provisional finding could be made about what was the place of commission of the tort alleged. Rather, all that the material … demonstrated about questions of choice of law was that there would likely be a lively dispute about those questions, and that one possible outcome of the dispute is that New Zealand law [applied].

On a practical level, the case is a reminder of the permissive character of Australia's *lex loci delicti* choice of law for tort, since *Pfeiffer*, *Zhang* and *Neilson*. Australia's choice of law rule for international torts does not require the pleading let alone even the proof of foreign law by either party. *Puttick* also underscores the importance of clearly identifying in a statement of claim where particular events took place — or seeking further particulars — where cross-border issues are potentially involved. This is particularly the case given that, as discussed above, the *lex causae* continues to play an important role in determining *forum non conveniens* claims.

IV. Enforcement of Foreign Judgments

(a) Foreign Judgments Act

The most notable decision in 2008 considering the Foreign Judgments Act 1991 (Cth) was *Jenton Overseas Investment Pte Ltd v Townsing*.[127] Jenton obtained a judgment against Mr Townsing after a hearing in the High Court of Singapore, confirmed on appeal to the Court of Appeal of Singapore. Those judgments were

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124 *Puttick v Tenon* (2008) 238 CLR 265, 276 [24].

125 Ibid 279 [36].

126 Ibid 275 [21].

127 (2008) 21 VR 241; (2008) 221 FLR 398. The decision also considered reg. 4 of the Foreign Judgments Regulations 1992 (Cth).

registered in the Supreme Court of Victoria, pursuant to the Foreign Judgment Act. Townsing applied to have a judgment set aside under s 7(2) of the Foreign Judgments Act on grounds that enforcing the judgment was contrary to public policy because there had been a denial of natural justice, substantial injustice or an unacceptably unjust result.[128]

Whelan J held that in the interests of maintaining comity, mindful of the 'inherent volatility of the notion of "public policy"'[129] and on the basis that the enforcement of the Singapore judgment would not cause Townsing substantial injustice, Townsing's application should be refused.

As noted by the Queensland Supreme Court in *Bank Polska v Opera*,[130] there is limited authority on the scope of the public policy ground under s 7(2) and 'few instances in which a foreign judgment has not been recognized or enforced on this ground'.[131] The application of s 7(2) thus fell to be determined in accordance with the common law principles of denials of natural justice or substantial injustice. In Townsing's case, it was not contended that he had been denied natural justice as he had in fact participated in a trial and an appeal before the courts of Singapore. The question was whether registration of the Singaporean judgment would cause him substantial injustice.

Only in cases where 'the offence to public policy is fundamental and of a high order'[132] such that 'enforcement must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs'[133] would the court set aside registration for the foreign judgments.

By way of commentary, it is good to see courts take seriously the presumption of enforcement of foreign judgments and the extremely limited role for exceptions based on public policy.

(b) Stay of enforcement

In limited circumstances a party may seek to stay enforcement proceedings. On the balance of convenience, courts have been prepared to grant such stays for a limited period to enable foreign proceedings, such as an appeal of a foreign judgment, to run its course. One such stay was granted by the NSW Supreme Court in *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267.

Xplore, a US company, applied to the NSW Supreme Court to enforce a default judgment obtained in a Texas District Court against Australian company Tough Corp. Tough Corp sought a stay of those enforcement proceedings. The parties

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128 As noted in *Bouton v Labiche* (1994) 33 NSWLR 225 per Kirby P, and *De Santis v Russo* (2001) 27 Fam LR 414 per Atkinson J.

129 *Jenton v Townsing* (2008) 21 VR 241, 246 at [20].

130 [2007] QSC 1 [6].

131 Ibid 246.

132 Ibid at [22].

133 Ibid.

were in dispute about the quality of equipment supplied by Xplore. An exchange of correspondence failed to resolve the dispute and Xplore issued a notice of demand to Tough Corp.

The plaintiffs filed suit and service notice on 20 March 2008 to the Texas Secretary of State, which pursuant to s 17.044 of the Texas Civil Practice and Remedies Code was authorised to accept Tough Corp as a foreign company doing business in Texas. Xplore did not attempt to effect personal service relying instead on the Texas Secretary of State forwarding its petition to Tough Corp by registered mail. Tough Corp received the mail on 17 April and responded within 20 days. However, Texas law deemed service occurred on 24 March with a response due by 14 April while Tough Corp assumed that 20 days ran from the date it was actually served and would expire on 12 May.

On 18 April, Xplore sought default judgment in Texas. It obtained default judgment without first notifying Tough Corp of its motion. Tough Corp first became aware of the default judgment on 30 April whereafter it appealed the judgment in the Texas Court of Appeals.

After noting the principles for enforcing foreign judgments, and that the parties did not dispute either the jurisdiction or the competence of the Texas Court, or that Tough Corp was carrying on business in Texas, Rothman J observed the two exceptions to enforcement of foreign judgments at common law:

1 denial of natural justice;

2 where the judgment has been obtained by fraud by the party relying on the foreign judgment, or by the court pronouncing judgment.[134]

His Honour held it was arguable that Tough Corp had been denied natural justice since it had insufficient opportunity to present its case, in view of a timetable by which it was obliged to respond to a claim it first received on 17 April 2008, and of which it had no notice, by 14 April 2008. In addition, His Honour found that the judge in Texas may have been misled by comments from the bar table about Xplore's attempts to contact Tough Corp.

On the balance of convenience, mindful that the default judgment was on appeal in Texas, Rothman J granted a stay of the enforcement proceedings for a limited period, to enable the Texas court to determine the appeal. His Honour also referred to the 'the necessity and desirability of a just, quick and cheap resolution of the real issues between the parties'[135] which would be served by awaiting a decision in the Texas appeal.

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134 The fraud must be an allegation of fraud based on evidence not available to the foreign court which delivered the judgment: see *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [19], citing *Keele v Findley* (1990) 21 NSWLR 444.

135 *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [29].

The case suggests pragmatic lessons for both plaintiffs to make best efforts to ensure effective service and for companies operating overseas to be familiar with these typical foreign office expectations. As noted above, the enforcement stage is necessarily a blunt and difficult point at which to resolve substantial issues and it is in all parties interests to have the matter heard before then.

(d) Cross-Border regulatory enforcement

The Cross Border Insolvency Act 2008 (Cth) commenced on 1 July 2008, adopting the UNCITRAL Model Law on Cross Border Insolvency. Very soon after the Act commenced, the use of letters of request (so called 'letters rogatory') for the examination of persons was considered in *McGrath & Anor as Liquidators of HIH Insurance Ltd*.[136] The liquidators considered the practical effect of applying for a letter of request was the same as applying directly to the foreign court under the Model Law, and use of the letter of request might be more cost-effective.

The liquidators were investigating and litigating in the context of the HIH takeover of FAI. The liquidators applied for an order for a letter of request to be sent to the UK, and tendered opinion from English solicitors outlining the English Court's jurisdiction to receive and act on the letter of request to enable the liquidator to conduct examinations in the UK.

Section 426(4) of the Insolvency Act 1986 (UK) provides that 'The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other party of the United Kingdom or any relevant country or territory'.[137]

Barrett J observed that in the absence of a compelling reason to the contrary, the English court would act upon the request and quoted from a judgment of Lord Hoffman in another HIH case, *Re HIH Casualty and General Insurance Ltd; McGrath v Riddell*:[138]

> The primary rule of private international law which seems to me applicable to this case is the principle of (unmodified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution

The Supreme Court of NSW ordered a letter of request be sent to the High Court of Justice of England and Wales (the English Court) pursuant to s 581 of the

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136 [2008] NSWSC 881 (26 August 2008).

137 *McGrath & Anor as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881 [6]. Australia is a relevant country: see s 426(11) of the Insolvency Act 1986 (UK) and the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (UK).

138 [2008] UKHL 21; [2008] 1 WLR 852 [30]; see *McGrath & Anor as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881 [12].

Corporations Act rather than applying to the English court under the Model Law.[139] Some discussion ensued about why the liquidators did not apply under the Cross Border Insolvency Act to allow the English court to 'have immediate and direct jurisdiction to make orders for the obtaining of information concerning HIH's "assets, affairs, rights, obligations or liabilities"'.[140] The liquidators were familiar with using letters of request and had previously obtained an order for examination of a Hong Kong resident.[141] They saw a letter of request as 'the more convenient route, particularly since the alternative involves the preliminary step of obtaining an order of the English court recognizing the foreign insolvency proceeding'.[142]

As the Model Law was always intended to supplement, not supplant, successful domestic insolvency cooperation mechanisms, the practitioners' reliance within the sister Commonwealth jurisdictions of the common law letters rogatory is commendable practice. That this tool could not likely be used when seeking assistance from Civil Law courts highlights the added benefit of the new cross-border model law.

V. Conclusion

The year 2008 provided a solid number of private international law developments, but rather than set out on new trajectories the decisions confirmed the earlier major directives. Thus, the greatest value of the developments is to provide greater refinement and subtlety to rules. Two areas in particular stand out for having been polished over the year.

For *forum non conveniens* the newly composed High Court in *Puttick v Tenon* did not take the opportunity to depart from the more restrictive 'clearly inappropriate forum' test from *Voth.* The case does add greater clarity in that the similarities between the legal systems of New Zealand and Victoria appeared to be relevant considerations in concluding that the Victorian forum was not clearly inappropriate. It remains to be seen whether the trend identified in previous editions of this survey — of a move towards the application of foreign law as an important factor in granting *forum non conveniens* grounds — continues. Certainly, *Garsec v Brunei* portends the application of foreign law as an almost determinative factor in favour of a stay.

The role of the anti-suit injunction, and of the anti anti-suit injunction, continues to grow as a feature in transnational disputes. As *TS Production* and *Wilson v Nicholl* both show, venue disputes can entail multiple interlocutory steps and protracted argument about matters that do not appear to concern the just, quick

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139 By the Cross-Border Insolvency Regulations 2006 (UK), the Model Law is in force as part of the law of the United Kingdom.

140 *McGrath & Anor as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881 [15].

141 See further *McGrath & Anor as Liquidators of HIH Insurance Ltd* [2008] NSWSC 780.

142 *McGrath & Anor as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881 [17]–[18].

and cheap resolution of the real issues between the parties. Whilst this makes for interesting academic commentary, and may be satisfying for the practitioners involved in the cut and thrust of litigation, the costs of such disputes run the risk of approaching or outstripping the quantum, unless the quantum of the claim is in the tens or hundreds of millions of dollars.

Finally, the increased number of decisions on private international law in 2008 suggests the courts are relying less on the presumption of similarity. This is a trend we hope continues in 2009.