

**Complete Citation:** Gray, Anthony (2007). The rise of Renvoi in Australia: creating the theoretical framework. *University of New South Wales Law Journal*, 30 (1). ISSN 0313-0096.

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## The Rise of Renvoi in Australia: Creating the Theoretical Framework

### *Introduction*

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

### *Background*

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

Should the court:

- (a) Refer to the internal rules (ie excluding choice of law rules) of Canadian law to resolve the issues? This is known as *rejecting the renvoi* and is the approach that garners most support among courts and the academy;<sup>2</sup>

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

<sup>2</sup> This approach was suggested in *Re Annesley* [1926] Ch 692, 709 (although the judge then applied the foreign court theory) and *In re Tallmadge* (1909) 181 NYS 336. Lorenzen supports this approach: see Ernest Lorenzen 'The Renvoi Doctrine in the Conflict of Laws – Meaning of the Law of a Country' (1917) 27 *Yale Law Journal* 509 where he claimed that accepting the renvoi and allowing another state to dictate the applicable law would be an abdication of sovereignty and a failure on the part of a State to discharge the duties it owes to its residents (523); 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 *Columbia Law Review* 190; Joseph Cormack 'Renvoi, Characterisation, Localisation and Preliminary Question in the Conflict of Laws' (1941) 54 *Southern California Law Review* 221; Morris 'The Law of the Domicile' (1937) 18 *British Yearbook of International Law* 32, 39; Cheshire *Private International Law* (1938) p50 (2<sup>nd</sup> ed) dismisses the vagaries of the remarkable doctrine as illogical. Some connect the refusal to consider the foreign choice of law rules with the now discredited vested rights theory ie that the forum applies its own law to vindicate rights that have vested in the law of another jurisdiction: Kermit Roosevelt 'Resolving Renvoi: The Bewitchment of Our Intelligence By Means of Language' (2004) 80 *Notre Dame Law Review* 1821,1836; Joseph Beale *A Treatise on the Conflict of Laws* (1935) p53, Dean Falconbridge 'Renvoi and Succession to Movables' (1930) 46 *Law Quarterly Review* 485, Schreiber 'The Doctrine of the Renvoi in Anglo-American Law' (1918) 31 *Harvard Law Review* 523, 570-571, Frederick Pollock 'The Renvoi in New York' (1920) 36 *Law Quarterly Review* 91; Mendelssohn-Bartholdy *Renvoi in Modern English Law* (1937); Ernst Schreiber Jr 'The Doctrine of the Renvoi in Anglo-American Law' (1917-1918) 31 *Harvard Law Review* 523. Others have suggested a true vested rights theory would consult foreign choice of law rules in order to determine whether foreign rights in fact had vested: Walter Wheeler Cook *The Logical and Legal Bases of the Conflict of Laws* 19 (1942). Both the First and Second Restatements of the Conflict of Laws apply a general rule of rejecting the renvoi: *Restatement, Conflict of Laws* (1934) s7, except in relation

- (b) Refer to both the internal and choice of law rules of Canada, following the reference back to Australian law (*single renvoi theory*)(the reference back could only be to Australian internal law, to avoid the problem of infinite regression where one system is constantly referring to another in attempting to determine which law applies to the scenario)<sup>3</sup>
- (c) Do what the Canadian court would do in resolving the dispute? (*foreign court or double renvoi theory*)(again if the Canadian court would refer to the law of another country to do this, this reference should only be to that country's internal laws, to avoid the infinite regression problem highlighted above)(this approach would consider Canada's approach to renvoi problems).<sup>4</sup> This approach requires the court of the forum to approximate its decision as closely as possible to that which would have been reached by the court of the foreign system, given its choice of law and renvoi rules.<sup>5</sup>

This article will focus on the resolution of the renvoi question in tort (which is considered contentious) rather than on the exceptional areas where it is generally accepted that renvoi will apply.<sup>6</sup>

### *Neilson*

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

It is clear that the High Court's decision in this case does not present a ringing endorsement of the renvoi doctrine – the Court does not accept that the principle is one of universal application in the realm of the choice of law field – at least at this time. Several judges do not specifically refer to the renvoi doctrine or concede that they are applying the doctrine. However, the case is seen as an important one in the

to title to land and divorce, *Restatement (Second) Conflict of Laws* s8(1), as does the *Private International Law (Miscellaneous Provisions) Act 1995 (UK)* s9(5)

<sup>3</sup> This approach appears in for example *Collier v Rivaz* (1841) 2 Curt 855; 163 ER 608 (though there the English court said it would have to decide the case as if it were the Belgian court); it is the approach taken by most civil law countries, and is advocated by Thomas Cowan 'Renvoi Does Not Involve a Logical Fallacy' (1938) 87 *University of Pennsylvania Law Review* 34. The author accepts that the cutting of the references back here is not the only approach possible, and accepts one of the criticisms of renvoi is that unless this somewhat arbitrary decision is made, there could be an endless stream of references from the legal principles of one system to that of another. The author does not maintain that it is 'logical' to stop after the first reference, but adopts the view of Griswold that a stop must be found somewhere and this is a reasonable point at which to do so: see Erwin Griswold 'Renvoi Revisited' (1938) 51 *Harvard Law Review* 1165, 1192-1193

<sup>4</sup> This approach appears in *In Re Johnson (Roberts v Attorney-General)* [1903] 1 Ch 821; *Armitage v Attorney-General* [1906] P 135, *Simmons v Simmons* (1917) 17 SR (NSW) 419, where the court enquired as to the conflicts of laws principles of New Caledonia; *Re Ross* [1930] Ch 377; Maugham J in *Re Askew* [1930] 2 Ch 259; Wynn-Parry J in *Re Duke of Wellington* [1947] Ch 506; Scarman J in *The Estate of Fuld, Deceased (No 3)* [1968] P 675, *Dupuy v Wurtz* (1873) 53 N Y 556, 573; *Harral v Harral* (1884) 39 NJ Eq 279, and *Ross v Ross* (1894) 25 Can SC 307. It has the support of Erwin Griswold 'Renvoi Revisited' (1938) 51 *Harvard Law Review* 1165, 1182. Dicey always maintained that the law of a country as applied by the English cases included its conflict of laws rules: Albert Dicey *Conflict of Laws* (1896) 77 (1<sup>st</sup> ed) In *Frere v Frere* (1847) 5 Notes of Cases 593, the decedent died domiciled in Malta, leaving a will made in England. The will was valid according to English law, but not Maltese. Maltese courts would have upheld the will because it was made according to the law of the place of execution. The English court followed this rule, upholding the will. To like effect, in some cases the forum court has stayed the matter until the same matter has been pronounced upon by the foreign court: see for example *De Bonneval v De Bonneval* 1 Curteis 856 (Ecc Ct 1838). This may be taken as implicit support for renvoi.

<sup>5</sup> As Kirby J put it in *Neilson*, 'how the foreign court itself would have resolved the substantive rights of the parties in an hypothetical trial conducted before it', rather than stepping into the shoes of the foreign judge and exercising the discretion.

<sup>6</sup> These exceptional areas are traditionally, at least in the United States, seen to be immovable land and divorce, due to the practical difficulty of not recognising the choice of law rules of a foreign state in these areas - see *Restatement, Conflict of Laws* (1934) s8, although some quibble with the description of these areas as exceptions: see Joseph Cormack 'Renvoi, Characterisation, Localisation and Preliminary Question in the Conflict of Laws' (1941) 54 *Southern California Law Review* 221, 264-266.

<sup>7</sup> (1917) SR (NSW) 419

<sup>8</sup> (1964) 64 SR (NSW) 195; refer also to *Barcelo v Electrolytic Zinc* (1932) 48 CLR 391

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

The opportunity for the High Court to consider renvoi arose in the case of *Neilson v Overseas Projects Corporation of Victoria Ltd*<sup>9</sup>, which involved a claim made by the appellant against Overseas Projects Corporation (OPC) for damages for personal injuries sustained as a result of OPC’s negligence. The appellant’s husband worked for OPC and had travelled with his family to China to work on a project for his employer. OPC provided accommodation for the family. One night, the appellant was injured when she fell down stairs connecting the upper and lower levels of the accommodation. It was suggested the stairs were dangerous as they did not have a handrail. The appellant and respondent were both Australian residents.

According to the relevant rules in the *General Principles of Civil Law of the PRC (General Principles)*, the laws of China were to apply to civil activities carried out within that country, unless otherwise stipulated. Article 146 stated that in a claim for compensation for damages resulting from an infringement of rights, the law of the place where the infringement occurred should be applied. The article goes on to provide that where both parties are nationals of the same country, the law of their own country *may* be applied. Article 136 of the *General Principles* specified a limitation period of one year for demands for compensation for bodily harm, extendable in special circumstances. Regarding the Australian rules, the High Court had recently in *Regie Nationale des Usines Renault SA v Zhang*<sup>10</sup> (*Zhang*) established the Australian choice of law rule that the law of the place of the wrong should determine liability in such cases, without exception. The relevant limitation period in Australia would typically be six years for a personal injuries claim.

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

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

Gleeson CJ in effect applied the third approach, consistent with the object of choice of laws principles, by deciding the present case in the same way as it would be decided in China.<sup>11</sup> Admittedly, there was little evidence presented to the court to show why in a case such as this the Chinese court would exercise its discretion and apply the foreign law. Gleeson CJ concluded the evidence, such as it was, was ‘barely sufficient, but just enough’ to support that view. He said it was plausible that Article 146 called for a consideration of what was just and reasonable in the circumstances. Further (reminiscent of interest analysis), Gleeson CJ opined that the Chinese authorities were ‘totally unaffected by the outcome of the litigation, no Chinese interests are involved, and there appears to be no reason of policy for a Chinese court to resist the proposition that the rights and obligations of the parties should be determined according to the law of Western Australia’.<sup>12</sup> Gleeson CJ did not find it useful to rely on a suggested assumption that in the absence of evidence to the contrary, it was assumed foreign law is the same as Australian law. He found such a rule could not apply here because there clearly were differences between the relevant principles in China and Australia.<sup>13</sup>

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<sup>9</sup> (2006) 221 ALR 213

<sup>10</sup> (2002) 210 CLR 491

<sup>11</sup> 217-218

<sup>12</sup> 219

<sup>13</sup> 218; McHugh J agreed 223

Gummow and Hayne JJ, agreed with the double renvoi approach for reasons of certainty and simplicity.<sup>14</sup> This approach was, they said, most consistent with the High Court's recognition of the law of the place of the wrong as the dominant factor in multistate tort cases.<sup>15</sup> These judges avoided the infinite regression problem identified by McHugh J by concluding that if the foreign law referred back to the law of the forum (here Australia), this was a reference to the internal law of Australia.<sup>16</sup> These judges rallied against one single approach to renvoi problems – each area had to be considered on its merits. They expressed concern that the approach chosen avoid incentives for forum shopping, so that as far as possible, the rights and obligations of the parties should be the same regardless whether the dispute was litigated.<sup>17</sup>

Accepting that the parties did not lead evidence as to how Article 146 had been applied by the Chinese courts, these judges nevertheless concluded that 'the trial judge was bound to conclude that Chinese law, when applied to the facts of this case, would look to the law of the nationality or domicile of the parties'.<sup>18</sup> In justifying this position, the judges called into play the presumption that foreign law is the same as the local law, and that Article 146 should be interpreted as would an Australian statute, by focusing on the scope and objects for which the discretion was conferred.<sup>19</sup> The judges referred to the fact that all parties to the dispute were Australian; the only connecting factor between China and the events was that they occurred in that country.<sup>20</sup>

Kirby and Heydon JJ agreed with the double renvoi approach.<sup>21</sup> Kirby J accepted the evidence of the Chinese legal expert in this case that time limitation periods in China were substantive rather than procedural.<sup>22</sup> The expert said he was not aware of any cases where the exception to the standard limitation period had been applied. As a result, the court should have applied the Chinese limitation period of one year, with the result that the action here was statute-barred.

Given the absence of evidence as to how Article 146 would be applied by a Chinese court, Kirby J was not prepared to assume that Chinese law would adopt similar principles as an Australian court in interpreting the Article, or that the law of China was the same as the law of Australia.<sup>23</sup> Such a presumption might be possible in relation to two common law countries, but not given China's very different legal history and development. The plaintiff here had the burden of proving foreign law, and had failed to do so. Kirby J was not satisfied with the concession by the expert that it was possible that a Chinese court might, in interpreting Article 146, apply Australian law. Kirby J also disputed the view of other judges that no Chinese interests were at stake in this scenario.<sup>24</sup>

### **Single Renvoi**

Callinan J applied this approach, accepting the reference by the Chinese choice of law rules to Australian law, and applying Australian domestic law, based on his view of what the Chinese court would likely have done in all the circumstances.<sup>25</sup> Callinan J noted that according to the evidence, it

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<sup>14</sup> 236

<sup>15</sup> 239

<sup>16</sup> 238-239

<sup>17</sup> 235

<sup>18</sup> 242

<sup>19</sup> 242-243

<sup>20</sup> 243

<sup>21</sup> 257,283

<sup>22</sup> 258

<sup>23</sup> 261-262

<sup>24</sup> 265-266. He cited relevant interests to include (1) the self-respect of a newly emergent polity in building its own legal systems (2) lack of expertise of the Chinese court on foreign law (3) the need in China (as in Australia) to prove a foreign law where it is to be applied, and the practical availability and cost of such an exercise (4) the differing legal and cultural attitudes to strict time limits and the extinguishment of time-barred proceedings (5) the avoidance of manifest dis-uniformity of outcomes in proceedings decided by the same court (6) the criticism, inherent in the appellant's claim, of the Chinese builders and providers of the allegedly defective dwelling (7) the risk of joinder of those State agencies in the proceedings, if the proceedings were to be brought in China.

<sup>25</sup> 278

was unlikely that a Chinese court would have exercised its discretion to remove the statute-bar preventing this action, as being out of time. However, in the end for Callinan J this was a moot point. Having presumed that the Chinese principles of statutory interpretation were the same as those in Australia,<sup>26</sup> he applied the kinds of factors that an Australian court would take account of in deciding whether or not to exercise the discretion to apply the law of a particular country.<sup>27</sup>

### No Renvoi

Troubled as he was by the infinite regression that may occur with the application of the double renvoi doctrine, McHugh J (dissenting) considered the options to be either the acceptance of single renvoi or rejection of the entire doctrine of renvoi. His starting premise was that the court must resolve the appeal by applying as much of the law of the place of the wrong as possible.<sup>28</sup> He saw this as inconsistent with the foreign court theory ie that the court should take into account what the foreign jurisdiction would do if the matter were to be litigated there.<sup>29</sup> In order to have as much of the law of the place of the wrong applying as possible, he rejected the renvoi. In other words, when Australian law refers to the law of China to resolve the dispute, it refers to the law of China minus its choice of law rules; in other words Chinese substantive law (including its limitation period) should apply to resolve the dispute.<sup>30</sup> McHugh J was not convinced either that if a Chinese court had heard the matter, it would necessarily have applied Australian law to resolve the dispute.

Having considered the High Court view,<sup>31</sup> we turn to a critique of aspects of the High Court's acceptance of renvoi in this case, and of the renvoi doctrine more generally. We attempt to place the judgement into the broader context of conflict of laws scholarship. It is suggested that the Court might be informed in its future development of the doctrine by the broader scholarly debate in choice of law, including issues such as forum-bias, interest analysis, proof of foreign law, and previous judicial and scholarly pronouncements on the issues that confronted the court in *Neilson*. It is noteworthy that the Court in its decision by and large bypassed this debate. It is thought that by engaging in this debate, the roots of renvoi in Australia might be grounded in firmer soil.

#### (1) *The High Court's desire to apply Forum Law in this case*

It seems quite clear that members of the High Court were determined in this case to apply Australian law to the dispute.<sup>32</sup> Indeed, some critics of the renvoi doctrine see it as an escape device to allow the forum court to apply its own law.<sup>33</sup> As Mortensen notes

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<sup>26</sup> 275

<sup>27</sup> These were stated to include (a) the absence of any question of liability of a Chinese national or authority (b) the fact that liability, if found, would be the liability of an authority or company of a polity of Australia (c) that there is no allegation of a breach of any written building laws or laws of occupiers' liability in China (d) that the relationship between the parties came into existence in Australia (e) that the court might need to construe a contract made in Australia (f) that the expenses and standards of treatment of the appellant would be Australian (g) that Chinese nationals would not be required to give evidence (except perhaps as to the effect of Chinese law); and (h) that the outcome of the case on the application of Australian law would be of no or little relevance or interest to the Chinese law makers or reformers (276). However as Briggs notes, this approach is odd because there are no rules of Australian statutory construction applicable to the Chinese law in this case. He cites *Damberg v Damberg*, where the New South Wales Court of Appeal refused to apply an Australian rule, that an illegal transaction may be enforced where the illegality lies in an infringement of revenue law which has been disclosed and remedied, to a contract to which German law applied but where relevant German law on point was not proved: (2001) 52 NSWLR 492: "The Meaning and Proof of Foreign Law" (2006) *Lloyd's Maritime and Commercial Law Quarterly* 1, 5

<sup>28</sup> 224

<sup>29</sup> 227

<sup>30</sup> 229

<sup>31</sup> The Supreme Court of Massachusetts reached the same conclusion when considering the same Chinese article in *Lou ex rel Chen v Ottis Elevator Co* [2004] WL 504697, involving a United States citizen injured in China by an escalator manufactured in the United States. The court held that Massachusetts had a more significant relationship with the parties than China did, and doubted, given the terms of Article 146, whether a Chinese court would apply Chinese law to resolve the case.

<sup>32</sup> As Reid Mortensen puts it 'It is difficult to leave a close reading of *Neilson* without getting the impression that the High Court made all efforts to have the *lex fori* apply to the case. Every unprecedented step taken by the High Court carefully laid a pathway to the forum': 'Troublesome and Obscure: The Renewal of Renvoi in Australia' (2006) 2 *Journal of Private International Law* 1,21

<sup>33</sup> Ernest Lorenzen 'The Renvoi Doctrine in the Conflict of Laws – Meaning of the Law of a Country' (1917) 27 *Yale Law Journal* 509,521: 'The renvoi doctrine appears to be a mere expedient to which the courts resort in order to justify the

The eccentricity of *Neilson* ... might itself show what desperate measures judges are prepared to take to get to the *lex fori*<sup>34</sup>

This is seen, for example, in the judgment of Gleeson CJ who was satisfied with the extremely brief evidence of the Chinese legal expert in relation to the exercise of the Article 146 discretion to apply Chinese law. The expert had never seen the exception being applied by the Chinese courts, but eventually agreed that it was possible that the discretion could be applied in this case. This is taken by Gleeson CJ to be ‘barely sufficient but just enough’<sup>35</sup> to support the view that the discretion would in fact be exercised. Gleeson CJ fortified this view by considering that the Chinese court would apply the provisions of the Article in accordance with Gleeson CJ’s view of what was ‘just and reasonable’. Gleeson CJ then listed off a number of connecting factors showing that China had no real interest in the litigation.<sup>36</sup> This was an interesting argument from a judge who had expressly disavowed the relevance of connecting factors in establishing the law to be applied to a torts choice of law issue in Australia. This is surely a difficult thing to do in the absence of any evidence that the Chinese courts did in fact apply a ‘proper law of the tort’ process, which is what Gleeson CJ applied. Some members of the Court seemed very willing to assume that China would adopt a proper law process, when they had previously completely rejected such an approach as the relevant Australian position.

Further evidence that the judges wished to apply the law of the forum appears in the judgment of Gummow and Hayne JJ, who were convinced that, *quite apart from the scope and objects of the discretion mentioned in Article 146*, ‘fairness and the justice of the case’ required that Australian law be applied to the dispute.<sup>37</sup> They went on to justify this view by listing the connecting factors between the dispute and Australia. These judges, together with Callinan and Heydon JJ, then made a very large assumption that in the absence of evidence to the contrary, that foreign law is the same as the law of the forum. With respect, it is highly ironic to make such an assumption, particularly in the area of the choice of law, whose *raison d’être* is the reality that there are real differences in the laws of different nations/states.

With respect, there is a much easier way to get to apply the law of the forum in this case, if it was felt necessary to administer ‘fairness and justice’. That would have been by applying a ‘flexible exception’<sup>38</sup> to the general rule that in cases of international torts, the law of the place of the wrong should be applied.<sup>39</sup> Of the judges, only Callinan J explicitly mentioned this link, commenting reluctantly that

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application of their own law’; ‘*renvoi* implies a reversion pro tanto to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law (528-529). Even Larry Kramer, a supporter of the *renvoi* doctrine, observed that judges quickly recognised that accepting the *renvoi* could serve as a useful device to avoid forum choice of law rules and allow them to apply forum substantive law: ‘Return of the *Renvoi*’ (1991) 66 *New York University Law Review* 979, 997

<sup>34</sup> ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839, 873.

<sup>35</sup> 219

<sup>36</sup> Callinan J (in terms in which Heydon J agreed) expressed a similar list of factors.

<sup>37</sup> To quote the judges in direct terms (243), ‘whether regard is had to the scope and objects of the power or discretion, or regard is had, on the hypothesis identified, to fairness and the justice of the case, the conclusion available on the limited evidence led at trial is the same. All parties to the dispute were Australian. The only connection between the dispute and China was the place of occurrence of the tort.’

<sup>38</sup> The so-called flexible exception was developed by the House of Lords in *Boys v Chaplin* [1971] AC 356. It allows displacement of the general choice of law rule in appropriate cases, such as where that rule does not refer the court to the law of the jurisdiction with the stronger connection with the parties and events. For example, it may be that the general choice of law rule in tort is that we apply the law of the place of the wrong to resolve the dispute. However, it may be that both parties to the dispute live in another country and otherwise have little connection to the place where the wrong allegedly occurred. In such cases, it might make little sense to apply the general rule of the law of the place of the wrong. It is also known as the approach of the ‘proper law of the tort’.

<sup>39</sup> As Mortensen notes, ‘*Neilson* ... show(s) how the rigidity of the *Pfeiffer-Renault* regime could backfire’: ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches (2006) 55 *International and Comparative Law Quarterly* 839, 874; refer also to M Keyes ‘The Doctrine of *Renvoi* in International Torts: Mercantile Mutual Insurance v *Neilson* (2005) 13 *Torts Law Journal* 1,10 and A Lu ‘Ignored No More: *Renvoi* and International Torts in Australia’ (2005) 1 *Journal of Private International Law* 35

No matter which solution is adopted by Australian courts, the result will not be entirely satisfactory intellectually and in logic. This does not stem wholly however from the unwillingness of the Court to recognise in *Zhang* what in hindsight might have resolved this case, a flexible exception in special circumstances of the kind which the second sentence of Article 146 ... contemplates, but from the fact that absolute rules however apparently certain and generally desirable they may be, almost always in time come to encounter a hard and unforeseen case<sup>40</sup>

The author applauds Callinan J for at least acknowledging the obvious in this case, that the flexible exception would have been a useful tool here to deal with the issues raised. That this is the case is hardly noteworthy<sup>41</sup> – the reality that flexibility is required has been recognised in case law<sup>42</sup> and legislation<sup>43</sup> in Great Britain, and in case law in the United States<sup>44</sup> and Canada,<sup>45</sup> not to mention legislation in China. Is a case where the place of the wrong is fortuitous or relatively unimportant really such a hard and unforeseen case, as Callinan J claims? Surely the facts in *Chaplin v Boys* or *Babcock v Jackson* show that this situation is quite a common occurrence, surely making it untenable to apply a rule with no flexibility. It is not surprising that the High Court has had to resort to another way to obtain the required flexibility, but with respect it is surprising that this was apparently not foreseen by the members at an earlier stage.

The High Court had painted itself into a corner by its steadfast refusal to admit a flexible exception<sup>46</sup> to the general rule. In *John Pfeiffer Pty Limited v Rogerson*,<sup>47</sup> the court gave its reasoning that

Adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms such as ‘real and substantial’ or ‘most significant’ connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule<sup>48</sup>

The High Court also adopted this approach in an international torts case,<sup>49</sup> after conceding that in those cases ‘questions which might be caught up in the application of a flexible exception to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.’<sup>50</sup> Kirby J reserved his opinion on the question whether a flexible exception existed in relation to international torts, but held the exception did exist. Unfortunately, he did not refer to it, let alone apply it, in *Neilson*.

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

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<sup>40</sup> 277

<sup>41</sup> The author advocated the adoption of a flexible exception in Anthony Gray ‘Flexibility in Conflict of Laws Multistate Tort Cases’ (2004) 23(2) *University of Queensland Law Journal* 435, 463

<sup>42</sup> *Chaplin v Boys* [1971] AC 356

<sup>43</sup> *Private International Law (Miscellaneous Provisions) Act 1995* (UK)

<sup>44</sup> *Babcock v Jackson* (1963) 191 NE 2d 279

<sup>45</sup> *Tolofson v Jensen* [1994] 3 SCR 1022

<sup>46</sup> This concept is explained at footnote 38.

<sup>47</sup> (2000) 203 CLR 503

<sup>48</sup> 538 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ)

<sup>49</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491

<sup>50</sup> 519. This was an interesting concession given the Australian High Court’s very narrow formulation of the test for when a stay order will be granted, that the forum selected must be clearly inappropriate: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, *BHP Billiton Ltd v Schulz* (2004) 211 ALR 523; the test is dismissed as ‘notoriously parochial’ by Reid Mortensen in ‘Troublesome and Obscure: The Renewal of Renvoi in Australia’ (2006) 2 *Journal of Private International Law* 1,26. Martin Davies has observed the lack of reference to China’s jurisdiction rules in the *Neilson* judgment. These rules may have allowed the court to reach the same conclusions it did via a different path: ‘Renvoi and Presumptions About Foreign Law’ (2006) 30 *Melbourne University Law Review* 244, 254-256

Indeed, it is interesting to ponder what would have happened in this case if one thing were different. What would have happened if Article 146 of the Chinese General Principles had not mentioned that the law of another country could be applied to resolve the case? Would the Australian judges then have been required to apply Chinese law, even though two of them suggested that fairness and justice required the application of Chinese law, and three of them could identify close connecting factors between Australia and the events? It seems unlikely, given their narrow formulation of the *forum non conveniens* test, that the court would have declined to hear the case. In other words, the escape device of *renvoi* will not always be available to allow the High Court to apply the law of Australia to such a scenario. It is submitted with respect that the High Court should accept this case as a warning that its inflexible choice of law rules in this area are surely not tenable in the long run.

## (2) *Interest Analysis and Renvoi*

This author has previously expressed a view that interest analysis should be used by the Australian High Court in deciding on the choice of law issue, at least in tort cases.<sup>51</sup> Briefly, interest analysis involves considering whether the objectives for which a particular law was passed would be furthered by the application of the law in the current case. It may be part of a ‘proper law of the tort’ approach, whereby a court assesses the connecting factors between the event/s in issue, and jurisdictions to which the parties have links. A state would be ‘interested’ in having its law applied if application of its law to this dispute would promote the reasons for which the law was passed.<sup>52</sup> On the other hand, events might have occurred in a jurisdiction, about which the jurisdiction might have little interest, because for example the protagonists both live elsewhere, the jurisdiction’s insurance system is not affected by the outcome etc. There might be good reason thus for suggesting that the laws of that jurisdiction might not apply to resolve such as case, given that jurisdiction’s low interest in the outcome, or lack of connection to the outcome.<sup>53</sup> It is logical then to consider what interest analysts might think of the *renvoi* doctrine, and what they might say about the *Neilson* litigation.

In *Neilson*, some members of the Court seemed to flirt with interest analysis reasoning. Gleeson CJ explained that the Chinese authorities were unaffected by the outcome of the litigation and no Chinese interests were involved, Gummow, Hayne and Callinan JJ considered ‘connecting factors’ between China and the litigation, and Kirby J considered the issue but concluded Chinese interests were at stake in the litigation.<sup>54</sup>

The discussion of interest analysis and *renvoi* below will necessarily focus largely on some American case law and scholarly writing, given the lack of consideration of the *renvoi* question in Australian and United Kingdom courts, the acceptance of interest analysis by some United States judges and scholars, and the legislative response to the question of proper law of the tort (and broadly interest analysis) in the United Kingdom.<sup>55</sup> Having said that, in a recent English case *Barros Mattos Junior v Macdaniels* Collins J left open the possibility of the application of *renvoi* principles to assess an international restitution claim. His Honour claimed that *renvoi* could be applied in such a case if

The object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflict rules of that law.<sup>56</sup>

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<sup>51</sup> Anthony Gray ‘Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia’ (2004) 23 (2) *University of Queensland Law Journal* 435

<sup>52</sup> Refer for example to Brainerd Currie *Selected Essays on the Conflict of Laws* (1963), Harold Korn ‘The Choice of Law Revolution: A Critique’ (1983) 83 *Columbia Law Review* 772, Russell Weintraub ‘An Approach to Choice of Law That Focuses on Consequences’ (1993) 56 *Alberta Law Review* 701, and Larry Kramer ‘Rethinking Choice of Law’ (1990) 90 *Columbia Law Review* 277

<sup>53</sup> A more detailed summary of interest analysis appears in Anthon Gray ‘Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia’ (2004) 23(2) *University of Queensland Law Journal* 435, 448-454

<sup>54</sup> 219 (Gleeson CJ), 243 (Gummow and Hayne JJ), 265-266 (Kirby J) and 278 (Callinan J)

<sup>55</sup> *Private International Law (Miscellaneous Provisions) Act 1995* (UK). *Renvoi* is specifically excluded from the realm of contract claims by the *Contracts (Applicable Law) Act 1990* Sch 1 Art 15.

<sup>56</sup> [2005] EWHC 1323. Collins J, drawing on the work of Dicey and Morris in making this comment, added that it would be an exceptional case in which a court would ascertain how a foreign court would decide the question (ie double *renvoi*), and the advantages of doing so would have to clearly outweigh the disadvantages (para 108)



Though not identified as such, these comments can be read as being consistent with interest analysis.

Perhaps surprisingly, at least some of the interest analysts completely eschewed the renvoi doctrine. As Currie said about the scenario where a foreign jurisdiction was 'interested' in the dispute where the forum was not,

The problem of renvoi would have no place at all in the analysis that has been suggested. Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state ... it seems clear that the problem of the renvoi would have no place at all in the analysis that has been suggested<sup>57</sup>

Currie reiterated this point in a later article. He cited the case of *Shaw v Lee*,<sup>58</sup> where a married couple from North Carolina had an accident in Virginia; the wife sued her husband in North Carolina. That state had abolished interspousal immunity; Virginia had not. North Carolina applied the place of injury rule (as Australia currently does), applying Virginian law and dismissing the action. Suppose that a similar situation arises again, with the victim suing in a Virginian court. The Virginian court is persuaded that Virginia has no interest in applying its immunity rule, but is referred to the decision in *Shaw v Lee*. Currie's solution to this case was that the Virginian court should ignore North Carolina's choice of law rule and follow its own determination of North Carolina's interest, applying North Carolina tort law.<sup>59</sup>

In a similar vein, Westen and others<sup>60</sup> claimed that it was up to the forum to decide whether or not another state was properly interested in the facts at issue. Kay, in discussing the Californian Supreme Court decision to apply Ohio law in *Reich v Purcell*, claimed not to be impressed by the fact Ohio might not have applied its own law if the suit had been brought there. She reasoned that the mere fact Ohio might mistakenly have failed to recognise her interests on her behalf should not preclude California courts from doing so.<sup>61</sup> For this reason, choice of law rules of another jurisdiction should not be taken into account.

With respect, it seems somewhat artificial to determine whether or not a foreign state is interested in litigation by referring only to its internal legal rules.<sup>62</sup> In relation to the *Neilson* facts, could a court determine whether China was interested in the litigation by referring only to the internal rules? The internal rules provided for compensation for damages in the event of injury caused by an infringement of rights. There does not appear to be a specific statement in the Chinese law as to the reasons why the

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<sup>57</sup> Ibid p184. See to like effect Bruce Posnak 'Choice of Law – Interest Analysis: They Still Don't Get It' (1994) 40 *Wayne Law Review* 1121, 1140: 'The interest analyst is saying that the only policies that count in determining whether a state has an interest are the policies behind its competing law, not the policies behind its choice of law approach or some other policy', and Herma Hill Kay 'The Entrails of a Goat: Reflections on Reading Lea Brilmayer's Hague Lectures' (1997) 48 *Mercer Law Review* 891, 908-911. Another adherent of this view, Peter Westen, agrees:

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

<sup>58</sup> (1963) 129 S E 2d 288

<sup>59</sup> Brainerd Currie 'The Disinterested Third State' (1963) 28 *Law and Contemporary Problems* 754, 781-785

<sup>60</sup> Eg Posnak 'Choice of Law: Interest Analysis and its New Critics' (1988) 36 *American Journal of Comparative Law* 681,682 'even if a foreign state has made clear that it would consider itself to have a specific interest, this should not be binding on the forum' (687), and Allo 'Methods and Objectives in the Conflict of Laws: A Response' (1984) 35 *Mercer Law Review* 565, 579, who argued that generalised choice of law rules could not help in determining law's policy and scope, while substantive laws could.

<sup>61</sup> Kay 'Comment on Reich v Purcell' (1968) 15 *University of California Law Review* 551, 589

<sup>62</sup> Adrian Briggs comments on the artificiality involved in shearing parts of foreign rules off from others, a process that rejection of the renvoi would require: *The Conflict of Laws* (2002) p16

*General Principles of Civil Law of the PRC* was passed. It is submitted it would be difficult for a court, in the absence of a reference to China's choice of law rules, to determine that country's 'interest' in this litigation.<sup>63</sup> It is much more sensible to refer to all of the Chinese law, including its choice of law rules, to gain a sense of the interest that China has in the outcome. Here, the reference in Chinese law to the fact that where two foreigners from the same country are involved, the law of that country may apply, surely is a relevant factor to be taken into account, one which should influence the court in its assessment of the interests of various jurisdictions in the matter. What stronger evidence could there be of a country's interest in particular litigation than a statement in that country's legislation that the law of another country might instead be relevant?

Other writers have pointed to this apparent illogical position from some interest analysis scholars. As Larry Kramer puts it

Because choice of law is a process of interpreting laws to determine their applicability on the facts of a particular case, the forum can never ignore other states' choice of law systems ... On the contrary, the applicability of another state's law must be determined in light of its choice of law system. Hence, a proper understanding of choice of law means the return of the renvoi.<sup>64</sup>

As Kermit Roosevelt puts it, an approach that seeks to determine whether foreign law is intended to apply can hardly justify contradicting those provisions of foreign law that address applicability.<sup>65</sup> As Chait puts it, 'a State's choice of law rules can be a highly effective indicator of that State's interest in having its law apply to a dispute'.<sup>66</sup>

Secondly, Currie's 'solution' to the factual scenario above also seems objectionable on the grounds that it encourages forum shopping. Currie seems to be openly supporting a system where the result of the litigation would differ according to whether the action was commenced in North Carolina or Virginia. It is submitted that one of the goals of a coherent system of choice of law rules is to minimise wherever possible encouragement of forum shopping. The author cannot agree with Currie's approach to renvoi.

The United States Supreme Court found in *Klaxon v Stentor Electric Manufacturing Co*<sup>67</sup> that a federal court applying state law was required to heed the limits set by that state's choice of law rules. In other words, to apply state law was to apply the entirety of state law, not merely the internal rules. Further, the *Second Restatement (Conflict of Laws)*, though it generally rejects the renvoi and advocates applying the law of the state with the most significant relationship to the events, recognises that an exception exists in cases where the objective of the particular choice of law rule is that the forum reach the same conclusion on the facts involved as would the courts of another state. In other words, it implies that in considering whether foreign law should apply, its choice of law rules are relevant.

Thirdly, it does seem somewhat inconsistent with the idea of judicial comity, not to say arrogant, for one court to expressly refuse to apply choice of law decisions made by another state or country on the

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<sup>63</sup> Certainly, at least Kirby J thought China was interested in the litigation: refer to para 211 of the judgment.

<sup>64</sup> 'Return of the Renvoi' (1991) 66 *New York University Law Review* 979, 1005. Kramer draws support for his position from comments of Judge Easterbrook that in applying the law of a state its rules of statutory interpretation must also be applied: 'Statutes' Domains' (1983) 50 *University of Chicago Law Review* 533, 544. By analogy, since Kramer believes that conflict of laws rules are rules of interpretation, he believes foreign choice of law rules must also be applied.

<sup>65</sup> 'Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language' (2004) 80 *Notre Dame Law Review* 1821, 1856; see also John David Egnal 'The Essential Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law' (1981) 54 *Templeton Law Quarterly* 237,265, Arthur Von Mehren 'The Renvoi and its Relation to Various Approaches to the Choice of Law Problem' in *XXth Century Comparative and Conflicts Law* (1961) 380, 390, and Paul Freund 'Chief Justice Stone and the Conflict of Laws' (1946) 59 *Harvard Law Review* 1210, 1217 ('a second means of harmonizing by looking more closely at the competing laws may be found by examining not merely the policy but the conflict of laws delimitation of each law'). Even Brilmayer, an avowed critic of the interest analysis approach, agreed that a state's choice of law rules should be respected to the same extent as its internal law: Lea Brilmayer 'Methods and Objectives in the Conflict of Laws: A Challenge' (1984) 35 *Mercer Law Review* 555,563.

<sup>66</sup> Matthew Chait 'Renvoi in Multinational Cases in New York Courts: Does Its Past Preclude its Future?' (2003-2004) 11 *Cardozo Journal of International and Comparative Law* 143, 168

<sup>67</sup> (1941) 313 US 487

ground that the decision is incorrect (in the eyes of the forum court). With respect, the whole point of choice of law rules is to rationally resolve situations where events have contact with more than one jurisdiction; it is not to pass judgment on the laws of another state. Conflict of laws resolution is not assisted by a 'my way is best' or 'your rules are no good' approach.

Of course, Currie does not speak for all interest analysis scholars. Many adherents of this school of thought agreed, that at least in some cases, foreign choice of law rules should be taken into account. Examples of this appear in the work of Egnal and Seidelson.<sup>68</sup> Others who view the foreign choice of law rule that refers the issue back to the forum take the reasonable view that the case presents a false conflict, that the foreign state has renounced its interest in the case.<sup>69</sup> As Chait puts it

If the end goal of interest analysis is to determine the interests of the competing State, then modern renvoi should play an indispensable role in determining those interests. For a court to ignore a competing State's choice of law rules is essentially to disregard perhaps the most important source of information as to whether or not the competing State has an interest in having its law applied to a suit. Affording adequate consideration to the competing State's interests results in consistent application of foreign law and subsequently in reciprocity, advancement of policies other than those behind domestic laws, and discouragement of forum shopping. As a result, it would seem that renvoi is more than just useful in contemporary international choice of law – it is fundamental.<sup>70</sup>

Further, it is erroneous to assume that a State's interests are confined to the application of its own laws. As Kramer has pointed out, a State's interests should extend to comity towards other States, facilitating multi-state activity, and providing a legal regime whose enforcement is uniform and predictable.<sup>71</sup>

The facts of *Gray v Gray*<sup>72</sup> provide a good forum to demonstrate the interplay between interest analysis and the principles of renvoi. There a husband and wife were living in New Hampshire. While driving a car in Maine, the wife was injured in an accident that was claimed to have been caused by the husband's negligence. Action was commenced in New Hampshire, with the defendant claiming that a Maine law prevented a wife from suing her husband. The court simply applied this rule to reject the case, representing a simple example of application of the (internal) law of the place of the wrong.

However, another approach might have been taken. Analysis of the Maine statute above might divulge that the law was passed to apply only to Maine husbands and wives, to preserve domestic harmony in that state. The Maine legislators had no interest in applying the law to out of state residents. Here if the New Hampshire court had considered all of the law of Maine, it might have realised that Maine had no interest in the outcome of the case, and applied its own law to resolve the case.<sup>73</sup>

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<sup>68</sup> John Egnal 'The Essential Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law' (1981) 54 *Templeton Law Quarterly* 237, 267, though Egnal concluded that foreign choice of law rules of the First Restatement variety could be overlooked. David Seidelson 'The Americanisation of Renvoi' (1968-1969) 7 *Duq Law Review* 201, 210-211 agreed with Egnal's position unless the rules had been very recently re-asserted.

<sup>69</sup> D Cavers *The Choice of Law Process* (1965) p103, Russell Weintraub *Commentary on the Conflict of Laws* (4<sup>th</sup> ed 2001) p90-92, 406-407; Horowitz 'The Law of Choice of Law in California – A Restatement' (1974) 21 *University of California Law Review* 719, 737-739; Martin An Approach to Choice of Law Problem (1984) 35 *Mercer Law Review* 583, 592; Sedler, 'Babcock v Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws' (1967) 56 *Kentucky Law Journal* 27, 97-101; Seidelson, 'Interest Analysis: For Those Who Like It and Those Who Don't' (1973) 11 *Duq Law Review* 283, 290-291

<sup>70</sup> Matthew Chait 'Renvoi in Multinational Cases in New York Courts: Does Its Past Preclude Its Future?' (2003-2004) 11 *Cardozo Journal of International and Comparative Law* 143, 175

<sup>71</sup> Larry Kramer 'Return of the Renvoi' (1991) 66 *New York University Law Review* 979, 1016

<sup>72</sup> (1934) 87 N H 82. The case is discussed by Griswold in 'Renvoi Revisited' (1938) 51 *Harvard Law Review* 1165, 1205-1206.

<sup>73</sup> In contrast, where the place of the wrong does express an interest in the outcome of the case, this should be respected. This occurred in *Pringle v Gibson* 195 Atl 695 (Me 1937), where the plaintiff sued in Maine for injuries sustained in an accident in New Brunswick. That province's statute law provided the driver of a car was not liable to passengers in the car for injuries suffered. The law was held to prevent this action in a Maine court, based on evidence the statute was intended to apply to all injuries in the province, regardless of the residence of the driver.

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

The renvoi principle was applied with interest analysis in a recent United States tort case, *Phillips v General Motors Corp.*<sup>74</sup> There survivors of a Montana family killed in a car accident in Kansas while travelling from their home state to North Carolina sued the manufacturer. The manufacturer, a Michigan-based corporation, manufactured the car in Michigan and sold it in North Carolina, where one the victims bought the car while living there. Montana law was most favourable to the plaintiffs, allowing the action, barring certain defences available elsewhere, and not capping liability payouts. Kansas law barred the action, allowed the defendant certain defences, and capped liability.

The court held Montana had a more significant relationship, and that its law should determine liability and damages. The court reasoned, consistently with interest analysis, that the purpose of the Kansas law would not be furthered by its application here. The court applied a double renvoi approach - it concluded that North Carolina had no claim to apply its law here, because under its choice of law rules, it would have applied Kansas law. The court also found that Michigan law could not apply, based on an earlier statement of that state's court finding the state had little interest in applying its own law when the only link to the state was the location of the manufacturer.<sup>75</sup>

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

### (3) Criticisms of the Renvoi Can be Met

Criticisms of the renvoi doctrine have certainly been many. They tend to revolve around its supposed illogical nature. This might be suggested based on an individual's conception of the purpose of choice of law rules. A scholar who believed that the purpose of choice of law rules was to indicate the mode in which a choice of law question must be solved would find renvoi problematic.<sup>76</sup> However, as Griswold has indicated,

What is the conflict of laws, unless it is a science for telling a court when it should cast aside its own rule in favour of one that is preferred abroad?<sup>77</sup>

Territorialists such as Beale were strongly against the doctrine,<sup>78</sup> although one might question whether applying the choice of law rules of the place where the wrong occurred may in fact be more consistent with territorialism than its rejection.<sup>79</sup> The author does not find arguments about an abdication of sovereignty convincing for that doctrine's acceptance in the choice of law area would surely rail against

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<sup>74</sup> 995 P 2d 1002 (Mont 2000)

<sup>75</sup> Most American States have now adopted an interest analysis/proper law of the tort approach, with only 8 adhering to the application of the law of the place of the wrong in all tort cases: Symeon Symeonides 'The American Choice of Law Revolution in the Courts: Today and Tomorrow' (2003) *Recueil Des Cours: Collected Courses of the Hague Academy of International Law* 9, s 8-103; 'Choice of Law for Products Liability: The 1990s and Beyond' (2004) 78 *Tulane Law Review* 1247, 1252

<sup>76</sup> P M North and JJ Fawcett *Cheshire and North's Private International Law* 13<sup>th</sup> ed (1999) p56

<sup>77</sup> 'Renvoi Revisited' (1937) 51 *Harvard Law Review* 1165, 1178. The Australian Law Reform Commission defined choice of law rules as the rules which determine which law should be applied when a fact situation is linked to more than one legal system: *Choice of Law* (1992) p2

<sup>78</sup> Beale *Conflict of Laws* (1935) 1939

<sup>79</sup> Refer for example to Dean Falconbridge 'Renvoi, Characterisation and Acquired Rights' (1939) 17 *Canadian Bar Review* 369, 387; Joseph Cormack 'Renvoi, Characterisation, Localisation and Preliminary Question in the Conflict of Laws' (1941) 54 *Southern California Law Review* 221, 256

the application of foreign law at all.<sup>80</sup> It ignores that it is the law of the forum in the first instance that determines whether reference is made to the foreign law. The author cannot agree with Lorenzen that application of the renvoi

Implies a reversion pro tanto to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law<sup>81</sup>

Of course, this only occurs when the foreign law refers back to the law of the forum. The author agrees that forum bias must be avoided at all costs, but there is no need to avoid renvoi in order to achieve this end. The problem of forum bias may, depending on the approach of the court, also taint interest analysis, a proper law approach, and a better law approach to resolving choice of law issues, leaving only the law of the place of the wrong as the available conflicts rule to be applied. (Yet even it can be overruled based on public policy grounds). Fewer than 10 of the United States adhere to the law of the place of the wrong as the choice of law to be applied in multi-state tort cases, and it has been abandoned by most jurisdictions around the world. The problem of forum bias is an ever-present one in the conflict of laws, and it is not 'solved', as Lorenzen would have us believe, by rejecting the renvoi.

The author does not accept it is too difficult to determine the foreign rules, especially in the 21<sup>st</sup> century.<sup>82</sup> The old rule, applied by the High Court in this case, that foreign law is presumed to be the same as Australian law, and that Australian courts know no foreign law, can be seen for the anachronism it is. As Martin notes, it also has great potential to undermine the High Court's newly fashioned choice of law rules in tort

The presumption about foreign law undercuts the underlying intention of the Zhang rule by providing the plaintiff with a positive incentive simply to ignore foreign law, unless it is in some way more favourable than Australian law ... That is an invitation to forum shopping, if ever there were one ... No-one who wanted to rely on a proposition of English law in an argument to an Australian court would think of calling expert evidence about English law and if pressed, an Australian court would surely feel comfortable taking judicial notice of English law. Is Australia still so parochial that it cannot treat other foreign laws in the same way?<sup>83</sup>

As Professor Briggs said, 'to insist that the foreign law must be completely proved, failing which it will be wholly discarded, is to make the best the enemy of the good'.<sup>84</sup>

The possible problem of the *circulus inextrabilis* is accepted, and some way must be found to resolve this problem. The author cannot improve on the suggestion that we should stop after the reference back ie if in the case of Neilson, the law of China would have referred back to Australia, the Australian court should accept the reference back and apply its own law.<sup>85</sup> This approach is also suggested by Griswold:

If we get into a situation where there is an endless series of references, there is no logical reason for stopping after the second reference (or 'accepting the renvoi'); it would be just as logical to stop after the third reference or the seventeenth. But by the same token, it is no more logical to stop after the first reference (reject the renvoi). It may or may not be expedient to stop there for one reason or another, but a solution reached on this ground cannot be accorded the accolade of logic.<sup>86</sup>

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<sup>80</sup> Lorenzen 'The Renvoi Doctrine in the Conflict of Laws – Meaning of the Law of a Country' (1918) 27 *Yale Law Journal* 509, 528

<sup>81</sup> 'The Renvoi Doctrine in the Conflict of Laws – Meaning of 'The Law of a Country' (1918) 27 *Yale Law Journal* 509, 528-529

<sup>82</sup> This argument is raised by Joseph Cormack 'Renvoi, Characterisation, Localisation and Preliminary Question in the Conflict of Laws' (1941) 54 *Southern California Law Review* 221, 257

<sup>83</sup> Martin Davies 'Renvoi and Presumptions About Foreign Law' (2006) 30 *Melbourne University Law Review* 244, 263-265. Davies refers to the fact that in the past United States rules were similar to that of Australia; however in 1966, the Federal *Rules of Civil Procedure* (US) were amended, with rule 44.1 dispensing with the need to prove foreign law.

<sup>84</sup> 'The Meaning and Proof of Foreign Law' (2006) *Lloyd's Maritime and Commercial Law Quarterly* 1,6

<sup>85</sup> The author acknowledges that this is not a perfect solution, but takes the pragmatic point that some solution must be found to this problem. The knot must be cut at some stage.

<sup>86</sup> Erwin Griswold 'Renvoi Revisited' (1938) 51 *Harvard Law Review* 1165

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

Reference to the areas in which renvoi is accepted more readily may assist us in meeting concerns about renvoi. For example in the case of *In Re Baines*,<sup>87</sup> an English decedent left land in Egypt. The land was sold and the proceeds brought to England. The decedent's will was valid according to English law, but invalid by Egyptian law. Egyptian choice of law rules stated that succession to land was governed by the law of nationality, and an Egyptian court would hold succession to be governed by the internal law of England. The court upheld the validity of the will under English law. This seems to the author to be the correct outcome. There would have been no merit in this case in applying Egyptian law and holding the will to be invalid, as rejection of renvoi would have required. Egypt clearly had no interest in the outcome of the case, and upholding the will clearly would not have offended any Egyptian legal principles.

Property was also in issue in the case of *In Re Schneider*.<sup>88</sup> Schneider died in New York as an American citizen of Swiss origin. His will disposed of Swiss property in a way that was ineffective according to Swiss law. A New York court was asked to decide under which jurisdiction the estate should be administered. The court accepted the renvoi by referring to the entire law of Switzerland, including its choice of law rules. Pointedly, the court did not decide the case as one involving immovable property and so a recognised exceptional case requiring the application of renvoi. It preferred to cast its decision on a broader footing, specifically allowing future cases to accept or reject a general principle of renvoi.

In the case of *Armitage v Attorney-General*,<sup>89</sup> a woman was domiciled in New York with her husband. She travelled to South Dakota, obtaining a divorce in that state. She later married an Englishman, and the issue arose as to the validity of this marriage. In legal proceedings in an English court, the validity of the earlier divorce was relevant. The evidence was that the divorce would be recognised as valid in New York, although the divorce was not valid according to the (internal) law of New York. The court then determined the validity of the divorce as the New York court would have, upholding the later marriage. Again this seems the right outcome; there would have been nothing to be gained by rejecting the renvoi and applying New York law to invalidate the divorce, when a New York court in the same case would not have done so. No New York policy was offended by the recognition of this divorce.

It is submitted that the application of renvoi in these cases has achieved the 'correct' result.<sup>90</sup> Why then is the orthodox view that renvoi is acceptable in these areas, but not in others? In the recent Australian case of *O'Driscoll v J Ray McDermott, SA*<sup>91</sup> McLure J was prepared to assume that the *Neilson* renvoi approach extended to contracts, and suggested that it could extend to 'other sources of conflict', which might well mean all substantive areas in which choice of law questions arise. Gummow and Hayne JJ in *Neilson* also suggest that the renvoi principle might be of general application,<sup>92</sup> though they do not commit to a general model, preferring the law in this area to develop incrementally.

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

Even at the international level it is difficult to justify renvoi from a doctrinal point of view. For every justification there appears an equally compelling counter-argument. Its only justification is a pragmatic one.

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<sup>87</sup> Case is cited in Dicey, *Conflict of Laws*, 5<sup>th</sup> edition 1932, p877-878 (not in current edition); similar is *Re Ross* [1930] 1 Ch 377 and *Faris v Tennant* (1923) 141 N E 784

<sup>88</sup> 96 NYS 652 (Surr Ct 1950)

<sup>89</sup> [1906] P 135; refer similarly to *Ball v Cross* (1921) 231 N Y 329, 332 and *Dean v Dean* (1925) 241 N Y 240

<sup>90</sup> Support for the High Court's decision in *Neilson* also appears in the subsequent literature; refer for example to Adrian Briggs 'The Meaning and Proof of Foreign Law' (2006) *Lloyd's Maritime and Commercial Law Quarterly* 1; and Andrew Dickinson 'Renvoi: The Comeback Kid?' (2006) 122 *Law Quarterly Review* 183

<sup>91</sup> [2006] WASCA 25, para 12-13

<sup>92</sup> 239

It helps to resolve problems that arise from the fact that different legal systems apply different connecting factors<sup>93</sup>...To prevent the problems of renvoi arising within Australia, the Commission recommends that it should not apply and that in the legislation implementing (the Commission's recommendations) the word 'law' should be defined to mean the internal or domestic law<sup>94</sup>

The author would submit in response that there is further justification for a renvoi approach rather than mere pragmatism, including respect for legal principles of another jurisdiction, and application of interest analysis. It is hard to justify the forum court applying foreign law, when the foreign court itself would not have applied its own law. This is a clear invitation to forum shopping.

#### (4) *Supposed Special Case Regarding Immovable Property and Status*

As indicated, the American Law Institute in both of its *Restatements on the Conflict of Laws* take the general position that renvoi is rejected, except in relation to land and marital status. The influence of Lorenzen,<sup>95</sup> who regarded general acceptance of renvoi as tantamount to an abdication of sovereignty, on the development of the *First Restatement* has been noted.<sup>96</sup>

A more detailed justification of the exceptions appears in an article by Cormack in the following terms:

It has been recognised throughout the world as peculiarly fitting that matters of property should be governed by the law of the situs, and matters of status by the law of the domicile. As to them a forum which is not itself the situs or the domicile makes no attempt to apply its own principles of justice – its only desire is to recognise the title to the property as it is at the situs, or the status as it is at the domicile. Not only does this accord with the forum's senses of justice and fitness, but it would be singularly ineffective for the forum, in the relatively few cases in which matters relating to foreign property or status are presented to it, attempt to apply a different rule from that existing at the situs or the domicile. Any such attempt would evidence a remarkably narrow public policy upon the part of the forum. In keeping with this line of thought, the forum will follow the conflict of laws rule of the jurisdiction of situs or of domicile... Use of the renvoi doctrine with matters of property and of status makes for certainty, because ... of the universal agreement upon the basic propositions stated, which are of the utmost practical importance ... In the absence of such agreement ... there is no increase in certainty through adoption or rejection of the renvoi doctrine.<sup>97</sup>

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

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

The author concedes that given the universal recognition of the conflict rules regarding immovable property and status, the argument for the application of renvoi here is strongest. However, it is submitted that the rationale for applying renvoi in these cases can be extended to the application of renvoi in other fields, in particular the field of personal liability in tort. As indicated, recently McLure in the Australian case of *O'Driscoll v J Ray McDermott, SA*<sup>98</sup> McLure J assumed that the *Neilson* renvoi

<sup>93</sup> Para 9.14. The Commission agreed with renvoi in the succession context.

<sup>94</sup> Australian Law Reform Commission *Choice of Law Final Report* (1992)(para 4.12)

<sup>95</sup> Lorenzen 'The Renvoi Doctrine in the Conflict of Laws – Meaning of 'The Law of a Country' (1918) 27 *Yale Law Journal* 509, 530 referred to the 'permanent and exclusive physical control which a nation has over immovable property within its territories'. He noted that 'in the conveyance of immovable property there is a reasonable basis for the expectation that the adoption of the renvoi doctrine would promote international uniformity of decision' (531).

<sup>96</sup> Griswold notes that the commentaries on the relevant sections simply refer to articles by Lorenzen and Schreiber as authorities for the views in the Restatement.

<sup>97</sup> Joseph Cormack 'Renvoi, Characterisation, Localisation and Preliminary Question in the Conflict of Laws' (1941) 14 *Southern California Law Review* 221, 262-264.

<sup>98</sup> [2006] WASCA 25, para 12-13

approach extended to contracts, and suggested that it could extend to ‘other sources of conflict’, which might mean all substantive areas. Gummow and Hayne JJ in *Neilson* also suggest that the renvoi principle might be of general application,<sup>99</sup> though they do not commit to a general model, preferring the law in this area to develop incrementally. There is certainly no indication in the *Neilson* judgments that the doctrine should or would be confined only to the torts context, and nor is there any obvious reason for doing so.

Note the words Cormack uses above. In talking about immovable property and situs, he says, (emphasis added) that *as to them* a forum makes no attempt to apply its own principles of justice. This statement is taken to imply that in other fields involving choice of law questions, including tort, a forum *is* seeking to apply its own principles of justice. In Australia, the courts did initially accept that the forum could apply its own principles of justice in assessing multi-jurisdictional tort claims. The court adopted the rule in *Phillips v Eyre*, requiring for the claim to succeed that it was actionable by the law of the forum. However, eventually the Australian High Court abandoned the rule, requiring the application of the law of the place of the wrong, without reference to the law of the forum. In other words, the Australian court does not ‘attempt to apply its own principles of justice’ to the case. It applies the law of the foreign jurisdiction, provided it does not offend the public policy of the forum.<sup>100</sup> The author concludes that one of the arguments in favour of only applying renvoi to immovable property and status cases does not apply in the Australian context.

The circularity involved in Beale’s rejection of renvoi is well documented. He is determined that in relation to land, the state of the situs must have the final authority. This is consistent with territoriality, but the same could be said in relation to the facts in *Neilson*. Surely as a territorialist, Beale should advocate that Chinese law ‘must have the final authority’. And it seems bizarre to say the least that we should ignore which law the Chinese themselves would apply to resolve the case. Why is this not part of the ‘authority’ of China? It seems most especially bizarre when as in *Neilson* the substantive liability rule and the choice of law rule appear in the same Act. The author could never agree with an outcome where part only of an Act is applied, without reference to the context in which it was written. It is submitted that the Chinese choice of law rule does provide the context in which the substantive rule appears.

Beale is concerned about the equality of treatment of marital status, and so is willing to ask how the ‘proper law’ would determine it, including referring to its choice of law rules. The author suggests that as a general principle there should be as much equality of treatment in choice of laws rules as possible, recognising that complete equality is impossible. As some members of the High Court explicitly recognised in *Neilson*, one way to seek to ensure the greatest equality possible is for the forum court to consider, if it is applying foreign law, how the foreign court would apply that law (and indeed, whether the foreign court itself would apply its own foreign law or the law of another country). Equality of treatment is not only a worthy goal in the area of status.

#### *(4) Examples Where Renvoi Was Applied in the Non-Exceptional Areas*

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

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<sup>99</sup> 239

<sup>100</sup> As the author has noted elsewhere, ‘public policy’ here should not be equated with disagreement about the justice of the result reached by application of the foreign law: Anthony Gray ‘Flexibility in Conflict of Laws Multistate Tort Cases’ (2004) 23(2) *University of Queensland Law Journal* 435, 436-445.



The contract case<sup>101</sup> of *University of Chicago v Dater*<sup>102</sup> is one example. There a note was signed in Michigan by a married woman. The note was then sent to Illinois for placement of a mortgage on the written register. The money was then advanced in Illinois by the lender. The mortgage was later foreclosed in Illinois, with an action brought in a Michigan court to recover the balance due on the note. The internal law of Michigan provided that a married woman could not be bound by a signed note, while by the law of Illinois a married woman could freely contract. The majority of the court found that the wife's capacity was governed by the law of the place of contracting, which was decided as Illinois.

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

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

As indicated, in the 2006 Australian contract case of *O'Driscoll v J Ray McDermott, SA*<sup>103</sup> McLure J accepted without deciding that renvoi could apply to a contract case. This was also the position of Walsh J, speaking for the New South Wales Full Court in *Kay's Leasing Corp v Fletcher*.<sup>104</sup> Of course, renvoi cannot arise in British contract cases, due to its express exclusion by legislation.<sup>105</sup> However, Collins J was prepared to consider the doctrine in the recent quasi-contract case of *Barros Mattos Junior v MacDaniels*,<sup>106</sup> at least where the object of the British conflict rule would better be served by referring to the choice of law rules of the other jurisdiction.

### *Conclusion*

The author agrees with the end result in *Neilson*, if not all of the steps taken to get there. In particular, the author reiterates that the radical acceptance of the renvoi doctrine was forced upon by the Court by its refusal to acknowledge a flexible exception to its recently re-crafted choice of law rules in tort. The author would much rather that the court accept a flexible exception as other jurisdictions have seen the need to do. However, given the current High Court's apparent antipathy towards such a suggestion, it is submitted to be correct that the High Court applied Australian law in this case, given the lack of interest China apparently had (subject to matters of evidence of Chinese law, which admittedly were not entirely satisfactory in this case). The author is in favour of explicit interest analysis and sees the doctrines of renvoi and interest analysis as compatible. Consideration of how the Chinese court would presumably have dealt

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<sup>101</sup> Renvoi is specifically excluded in relation to contracts by the *Contracts (Applicable Law) Act* 1990 (UK), so it is not surprising that there are few British contract cases in which renvoi has been considered. However, dicta in some contract cases appears to support the application of the renvoi doctrine. Refer for example to Lord Wright in *Vita Food Inc v Unus Shipping Co* [1939] AC 277, 291 and Walsh J, speaking for the New South Wales Full Court, in *Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195, 207 (reversed on other grounds by the High Court: (1964) 116 CLR 124).

<sup>102</sup> (1936) 277 Mich 658, 270 NW 175; a comment on the case appears at 'Developments in the Law – Conflicts' (1937) 50 *Harvard Law Review* 1119, 1159

<sup>103</sup> (2006) WASCA 25

<sup>104</sup> (1964) 64 SR (NSW) 195, 207; the decision was reversed on other grounds by the High Court: (1964) 116 CLR 124

<sup>105</sup> *Contracts (Applicable Law) Act* 1990 Sch 1 Art 15; as to which see *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1995] 1 WLR 978; and *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284

<sup>106</sup> [2005] EWHC 1323, para 108

with the matter is important to minimise the opportunities available for forum shoppers, and to provide as much consistency and predictability as possible. It is an important thing to do to promote judicial comity and respect for legal systems other than our own.

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