

Brexit and Private International Law in the Commonwealth

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A. Introduction

The implications of Brexit for the United Kingdom (UK) and the European Union (EU) are inevitably uncertain, but they will also be just as inevitably profound and unsettling. However, to return to the beginning of the UK's period 'in Europe', the implications of the UK's entry to the European Economic Community (EEC) in 1973 were also profound and unsettling of its relations with the rest of the Commonwealth. To that point, the Commonwealth had certainly been much more than an international trading and economic organisation. Resting on the legacy of Empire, it was still a setting for the promotion (too often unsuccessful) of parliamentary democracy; mutual international assistance; educational and public health support; common cultural and sporting traditions; diplomatic and consular support; the official use of English; and (for sub-groups of Commonwealth countries) security, defence and intelligence-sharing. The British diaspora of the previous three centuries meant personal blood-relationships remained strong between UK and other Commonwealth nationals. All citizens of Commonwealth countries were still recognised as British subjects.¹ And the Commonwealth had, to a significant extent, a genuinely shared legal tradition.

Entry to the EEC was just as critical a moment in the development of the Commonwealth because, in substantial effect, it was a political decision to reverse the British Imperial project.²

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¹ The status was changed to that of 'Commonwealth citizen' from 1983: s 37, Sch 3 British Nationality Act 1983 (UK).

² J Bowle, *The Imperial Achievement: The Rise and Transformation of the British Empire* (Penguin, 1977) 526–7. Niall Ferguson concludes that entry to the EEC should be understood as a distinctly political decision to re-profile the UK economy, and was not a consequence of its existing trade with Europe. In 1965, Commonwealth trade was twice as important to the UK as EEC trade; amounting respectively to 35 per cent and 18 per cent of total UK trade. The quantity of Commonwealth trade could not be sustained once the UK assumed EEC trade barriers. '[I]t was the political decision that caused the economic change, not the other way around': N Ferguson, *Empire: How Britain Made the Modern World* (Penguin, 2003) 361.

The colonial expansion of England, Scotland and Great Britain from the 16th century was largely a commercial venture. While the Empire had other purposes — even moral purposes — those such as defence, emigration and permanent settlement remained inextricably bound to the promotion of British trade and commerce. The dominant industries of other Commonwealth countries, principally in agriculture and commodities, had largely been developed to serve the industrial and commercial development of the UK. Even in 1973 many Commonwealth countries' trade depended significantly on access to UK markets.

As a result, no other country in the Commonwealth supported the UK's entry to the EEC.³ Once entry took place in 1973, access to UK markets met the EEC's higher customs barriers and, above all, the strong protectionist measures of the Common Agricultural Policy.⁴ The subsequent evolution of the EEC into the European Community and the EU generally saw, with some late-period exceptions,⁵ little change to the UK's formal trading and commercial relationships with other Commonwealth countries. For the most part, the UK's place in Europe offered no benefits to the Commonwealth above those guaranteed by the General Agreement on Tariffs and Trade. So while, at least in public, other Commonwealth governments have been careful not to comment on the Brexit referendum or its politics since 2016, the number that have entered preliminary negotiations with the UK for free trade agreements⁶ suggests that leading economies in the Commonwealth have welcomed Brexit for the economic opportunities it presents.

³ See D Judd, *Empire: The British Imperial Experience from 1765 to the Present* (Fontana Press, 1977) 382–3. For accounts of Australian, Canadian and New Zealand reactions to EEC entry, see A May (ed), *Britain, The Commonwealth and Europe* (Palgrave Macmillan, 2001).

⁴ For the exception made for New Zealand, see text to below n 210.

⁵ The exceptions are that, from 2004, Cyprus and Malta also became member states of the EU. Canada and the EU have a comprehensive trade agreement that has been provisionally in force since 2017. Singapore has had a free trade agreement with the EU since 2019. The EU also has Interim Partnership Agreements or Partnership Agreements with Antigua and Barbuda, The Bahamas, Barbados, Belize, Botswana, Cameroon, Dominica, Fiji, Ghana, Granada, Guyana, Jamaica, Mauritius, Mozambique, Papua New Guinea, Samoa, Seychelles, South Africa, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Trinidad and Tobago. However, Partnership Agreements bring no change to tariffs and (relative to World Trade Organisation regulation) do not bring preferential access to EU markets.

⁶ The UK seeks to continue the EU's trade agreements with Cameroon, Canada and Singapore. Australia and New Zealand are in negotiations with the UK for free trade agreements. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP 11), to which the UK is negotiating entry, includes, amongst others, Australia, Brunei, Canada, Malaysia, New Zealand and Singapore. Bangladesh and India are in pre-negotiation discussions with the UK for trade agreements.

The question is whether Brexit also presents opportunities for the development of private international law in the Commonwealth — including the UK. There are two aspects to those opportunities. First, there is *the content* of the principles of private international law in the Commonwealth; in particular, whether the UK's release from the lawmaking of the EU Council and Parliament, and the Court of Justice of the European Union (CJEU), could enhance mutual engagement with other Commonwealth countries in the development of private international law. Secondly, there is *the role* of private international law in coordinating the commercial and personal relationships of individuals and businesses across borders. To what extent might the private international law of the Commonwealth have to adjust to the different place of the UK in the world after Brexit? It is in this connection that the economic significance of Brexit for other Commonwealth countries is most significant. For the UK, a broader and deeper trading relationship with the United States will certainly be of greater importance than any with the Commonwealth. However, for any other Commonwealth country, improved access to UK markets will be of great commercial and economic significance. It may yet influence the shared legal tradition.

In suggesting how the private international law of the Commonwealth is likely to develop after Brexit, an account must be given of the status, trajectories and interrelationship of the law in different Commonwealth countries while the UK was 'in Europe'. Accordingly, Part B addresses Europeanisation as the most significant difference to have emerged between the private international law of the UK and of other parts of the Commonwealth. In Part C, an account is given of both the continuing lead that English adjudication has given to private international law in the Commonwealth and, yet, the greater fragmentation of that law while the UK was in the EU between 1973 and 2019. Part D addresses a development that is a direct consequence of the UK's membership of the EU: the trans-Tasman market and the integration of Australian and New Zealand private international law. Part E's conclusion considers the improved trading and commercial opportunities of Brexit, and the role that private international law could have to

support them. This concentrates on more efficient means of securing the cross-border enforcement of judgments within the Commonwealth, and the example given in that respect by the Commonwealth's federations and the trans-Tasman market. Possible directions that the cross-border enforcement of judgments could take in the Commonwealth are explored.

A number of preliminary observations must be made. The Commonwealth is a large and diverse international organisation, second in size only to the United Nations. As a result, this account cannot cover the law in all 54 countries that are currently Commonwealth member states. Therefore, in addition to a consideration of the private international law in the UK, I limit this account to developments in Australia, Canada, New Zealand and Singapore. These four countries are those whose courts' judgments are most commonly cited in UK courts and, so, alongside the UK courts are the most prominent in the development of the Anglo-common law. It is no coincidence that these four countries are also the first four that engaged in serious free trade negotiations with the UK⁷ — and so the first Commonwealth countries for which private international law coordination of private trading and commercial relationships with the UK is most likely to be needed.

At the time when the UK entered the EEC, Professor Cheshire's claim that English private international law 'has been only lightly touched by the paralysing hand of the Parliamentary draftsman'⁸ still rang true.⁹ *Dicey and Morris* noticed that statutes were bringing radical changes in family law, but otherwise 'the courts have been busy in elaborating and refining the rules of the conflict of laws'.¹⁰ The European era of UK private international law ended that — although in addition to Brussels, the Hague Conference on Private International Law (HCCH) has also been partly responsible for this shift to legislation.¹¹ Europeanisation also brought profound cleavage with the law of almost all other Commonwealth countries. The hand of the EU drafters brought

⁷ *Ibid.*

⁸ GC Cheshire, *Private International Law* (Clarendon Press, 1935) preface.

⁹ PM North, *Cheshire's Private International Law*, 9th edn (Butterworths, 1974) preface to first edition.

¹⁰ JHC Morris (ed), *Dicey and Morris on the Conflict of Laws*, 9th edn (Stevens & Sons Ltd, 1973) ix.

¹¹ PM North, *Essays in Private International Law* (Clarendon Press, 1992) 20–1.

permanent change to UK private international law and, even after Brexit, significantly directs how UK courts address multistate litigation. While the adoption of HCCH conventions has also seen legislation emerge as a larger source of private international law in the rest of the Commonwealth,¹² common law adjudication has continued to predominate.

As will be seen, the UK's entry to the EEC most directly caused divergence between its law and that of other Commonwealth countries through Europeanisation and the reconsideration of some trading associations in the Commonwealth.¹³ There is also a unique occasion when the UK's place in Europe was used in the Commonwealth to justify changes to the law.¹⁴ However, it is more often that other processes of legal decolonisation, which were already in train before 1973, influenced changes in other Commonwealth countries. Even for Australia, Canada and New Zealand — the dominions that were the most closely integrated within the Imperial system — EEC entry accelerated a cultural reorientation from pride in Empire to independent nationalisms,¹⁵ and this influenced a willingness to engage in independent legal development. The UK's period in Europe also saw the end of two legal processes that formalised the legal independence of these countries from the UK and each other. First, appeals from the highest courts in these countries to the Judicial Committee of the Privy Council ceased. All appeals to the Privy Council from Canada had already ended in 1949,¹⁶ but for the other three countries this happened much later. In Australia, appeals from federal and territory courts ended in 1968,¹⁷ from the High Court of Australia in 1975¹⁸ and from state courts in 1986.¹⁹ Singapore ended all civil appeals in 1989,²⁰ and New Zealand in 2004.²¹ Secondly, there is the UK's abdication of lawmaking power for each of

¹² R Mortensen, R Garnett and M Keyes, *Private International Law in Australia*, 4th edn (LexisNexis Butterworths, Sydney, 2019) 19; M Hook and J Wass, *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) 8.

¹³ See text to below nn 27-56, 209-230.

¹⁴ See text to below nn 78-101.

¹⁵ S Ward, 'The Erosion of the Old Commonwealth Relationship' in May (n 3) 156, 156.

¹⁶ S 3 Act to Amend the Supreme Court Act, SC 1949 (2nd sess) (C).

¹⁷ S 4 Privy Council (Limitation of Appeals) Act 1968 (Cth).

¹⁸ S 3 Privy Council (Appeals from the High Court) Act 1975 (Cth).

¹⁹ S 11 Australia Act 1986 (Cth & UK).

²⁰ Judicial Committee (Amendment Act) 1989 (Sg).

²¹ S 42 Supreme Court Act 2004 (NZ).

these other countries. The patriation of all lawmaking power, in effect, took place for Singapore in 1966²² and New Zealand in 1986.²³ These were ‘legal revolutions’ in Kelsen’s sense, because the removal of UK lawmaking power was achieved through local legislation. For Canada in 1982²⁴ and Australia in 1986,²⁵ the UK Parliament itself more conventionally abdicated its lawmaking power for the two countries. However, the highest courts of all of these countries continued to show respect for the English courts’ adjudication in private international law, and this has been especially marked in New Zealand and Singapore. Ironically, the removal of the theoretical possibility of the UK legislating for Australia and Canada led in substance to more revolutionary changes to private international law in those countries.

The Privy Council’s understanding of federalism had been an old gripe of Australian and Canadian judges.²⁶ However, a stronger awareness in the 1980s and 1990s of how federalism should reshape private international law rested more immediately on the abdication of UK lawmaking power. The two federal dominions’ courts were long used to adjudication under rigid constitutions: the British North America Act 1867 (UK) — which became the Constitution Act 1982 (C) — and the Commonwealth of Australia Constitution Act 1900 (UK). The removal in the 1980s of even the theoretical possibility of the UK Parliament passing legislation for the two countries saw a subtle shift in the status of these two constitutions as the nation’s unqualified basic law. In ways that are not seen in New Zealand, Singapore and the UK, the Australian and Canadian courts began to expect that *all* law, including the common law and private law, had to conform to any requirements of the basic law of the federal constitution. Less predictably, federalism in

²² The legislative powers of the Yang di-Pertuan Agong (ie, the king) and the Malaysian Parliament ceased for Singapore, and were transferred to the Singapore Parliament, in 1965: s 5 Republic of Singapore Independence Act 1965 (Sg). In 1966, the UK Parliament passed its last statute relating to Singapore and giving it independence and recognising sovereignty: Singapore Act 1966 (UK): see T Li-Ann, ‘The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study’ [1993] *Singapore Journal of Legal Studies* 80.

²³ S 15(2) Constitution Act 1986 (NZ).

²⁴ S 2 Canada Act 1982 (UK).

²⁵ S 1 Australia Act 1986 (UK).

²⁶ Eg, *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1111-1112; and see A Roland, ‘Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective’ (2007) 32 *Commonwealth Law Bulletin* 569, 575-7.

Australia and Canada also motivated changes not only to the private law that deals with interstate or interprovincial questions, but also to the treatment of international questions.

B. Europeanisation

The web of European instruments that displaced the UK's autochthonous private intentional law was extensive, and in the 21st century grew in depth as well as in coverage of the field.²⁷ At the turn of the century, the only EU private international law instruments applicable in the UK were the Brussels Convention of 1968²⁸ relating to civil jurisdiction and the enforcement of judgments within the EU, and the Rome Convention of 1980²⁹ on the law applicable to contractual obligations. The 'parallel' Lugano Convention of 1988,³⁰ which extended the terms of the Brussels Convention to most countries of the European Free Trade Association (EFTA),³¹ was also in place. Both the Brussels Convention³² and the Rome Convention³³ were updated and adopted as EU Regulations. They have been supplemented with other Regulations on jurisdiction and the

²⁷ T Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *International and Comparative Law Quarterly* 813.

²⁸ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, 27 September 1968 [1998] OJ C27/1, given effect in the UK by the Civil Jurisdiction and Judgments Act 1982.

²⁹ Convention on the law applicable to contractual obligations, Rome, 19 June 1980 [1998] OJ C27/34, given effect in the UK by the Contracts (Applicable Law) Act 1990.

³⁰ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 16 September 1988 [1988] OJ L319/9, also given effect in the UK by the Civil Jurisdiction and Judgments Act 1982.

³¹ Iceland, Norway and Switzerland. Liechtenstein is a member of EFTA but is not party to the Lugano Convention.

³² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels Ia). Under the Brussels Convention, the UK secured special protection for judgments made in other EU countries against Canadian and Australian domiciliaries. Judgments made in EU member state courts against defendants domiciled outside the EU are enforceable throughout the EU regardless of the jurisdiction that the member state court exercised. Art 59 Brussels Convention allowed member states to enter treaties with third countries by which enforcement of member state judgments could be refused when made against defendants domiciled in the third country. The UK agreed with Canada in 1984 and Australia in 1990 not to enforce such judgments against defendants domiciled in those countries: Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987 (UK); Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 (UK). This arrangement was preserved under Art 72 Brussels Ia.

³³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

enforcement of judgments,³⁴ and in applicable law in the Rome II Regulation on applicable law for non-contractual obligations.³⁵

As part of the *acquis communautaire*, none of these Regulations now apply directly in the UK, although the applicable law Regulations — Rome I on contracts and Rome II on non-contractual obligations — have been continued by legislation as part of UK law.³⁶ The jurisdiction and judgments Regulations were important to the UK largely because of the capacity they gave to project the enforcement of UK judgments in the EU, but this depended entirely on the judgment having been made in a member state. That is no longer the case. The UK is therefore to rely on each EU member state's individual domestic laws for the recognition and enforcement of foreign judgments if UK judgments are to be enforced in the EU. It may also rely on the HCCH Choice of Court Agreements Convention 2005, to which the EU is party and to which the UK separately became party in 2020. The Choice of Court Agreements Convention enables judgments to be enforced throughout the EU, on terms similar to those for enforcement under the Brussels I Regulation, when the parties had 'bought in' to UK jurisdiction by an exclusive choice of court agreement. A broader capacity for the enforcement of judgments in Europe will only be possible if the UK is allowed to become party to the modified Lugano Convention³⁷ — in which case it

³⁴ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1; Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160 (Brussels II); Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1 (Brussels IIa); Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1 (Maintenance Regulation).

³⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40 (Rome II Regulation).

³⁶ See the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (UK), made in the exercise of powers under s 8(1), Sch 7 para 21(b) European Union (Withdrawal) Act 2018. See also European Commission, Notice to stakeholders — Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law, Brussels, 27 August 2020; HM Government, Department for Exiting the European Union, *Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper*, 22 August 2020.

³⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 30 October 2007 [2007] OJ L339/3.

will restore all of the capacity that the UK had under the Brussels I Regulation, as it stood in 2000, to have its judgments enforced in Europe.

This is not the place to explore the Europeanisation of the UK's private international law, which is reduced after the Brexit transition and, in effect, continues only in the admittedly significant areas of applicable law for contract, tort and some other non-contractual obligations. However, Europeanisation also only created differences between UK and other Commonwealth private international law because European legal models in the field have also had no success in being transplanted to the Commonwealth. If, as Professor Harris says, 'in more than one sense the English speak a different language to most of the rest of Europe' and 'are ill at ease with civilian concepts',³⁸ the English speakers of the Commonwealth are even more uncomfortable with them.³⁹

The Australian Law Reform Commission undertook a review of Australian applicable law rules in 1992,⁴⁰ and gave close attention to applicable law rules for contract.⁴¹ The Law Reform Commission's general assessment was that the common law applicable law rules were 'ill-defined, uncertain in scope and inadequate to deal with modern developments in international contracts'.⁴² So far as models for reform were contemplated, the Rome Convention received considerable positive attention. Aspects of the Convention's treatment of party autonomy,⁴³ mandatory rules⁴⁴ and consumer contracts⁴⁵ were considered useful for reform. An attractive aspect of the Rome Convention to the Law Reform Commission was its use of rebuttable presumptions to identify the proper law of the contract in the absence of a choice.⁴⁶ The uncertainties of the common law's

³⁸ J Harris, 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4 *Journal of Private International Law* 347, 347.

³⁹ Eg, see R Mortensen, 'A Common Law Cocoon: Australia and the Rome II Regulation' (2008) 9 *Yearbook of Private International Law* 203.

⁴⁰ Australian Law Reform Commission, *Choice of Law — Report No 58* (Commonwealth of Australia, Canberra, 1992).

⁴¹ *Ibid*, 81–107.

⁴² *Ibid*, 81.

⁴³ *Ibid*, 82, 92.

⁴⁴ *Ibid*, 89, 91.

⁴⁵ *Ibid*, 104–5.

⁴⁶ *Ibid*, 94–7, 99.

unqualified ‘closest and most real connection test’ needed correction.⁴⁷ As a result, the Law Reform Commission recommended introducing a structure for applicable law in contract that was based on the Rome Convention. The proposal was that, in the absence of party choice, the law of the place where the contract had its most real and substantial connection would be the applicable law, but this was presumed to be the law of the place of characteristic performance. Greater detail was given as to where the place of characteristic performance was for contracts of employment, for contracts concerning rights in immovable property and for consumer contracts.⁴⁸ All were modelled on the Rome Convention. Nothing has come of those recommendations, and after almost three decades nothing is likely to.

The Lugano Convention had also attracted some interest in Australia and New Zealand, with both countries’ national law reform agencies being asked whether the country should become a party to the Convention. In 1996, the Australian Law Reform Commission noted that there would be advantages and disadvantages for Australia to join the Lugano Convention, and believed that ‘this is likely to be politically difficult given the level of approval required by the existing members.’⁴⁹ It nevertheless thought that participation in a multilateral jurisdiction and judgments convention was more likely to be secured through the Lugano Convention than through the HCCH — and then referred the question of accession to the Lugano Convention to the Attorney-General’s Department.⁵⁰ It remains there. In a review of electronic commerce by the New Zealand Law Commission in 1998, the Commission was asked to consider whether the Lugano Convention should be adopted *in toto*.⁵¹ The question was too large for the review, and the Commission briefly noted that consideration would have to be given to the question: ‘[t]he benefit of subscribing to a document such as the Lugano Convention is that New Zealand’s law would be

⁴⁷ *Bonython v Commonwealth of Australia* [1951] AC 201; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; see the general criticisms in Mortensen, Garnett and Keyes (n 12) 450-1.

⁴⁸ Australian Law Reform Commission (n 40) 94–8, 177–9.

⁴⁹ Australian Law Reform Commission, *Legal Risk in International Transactions — Report No 80* (Commonwealth of Australia, Canberra, 1996) [9.44].

⁵⁰ *Ibid*, [4.36]-[4.37].

⁵¹ Law Commission, *Electronic Commerce — Part One: Report 50*, Parliamentary Paper E 31AK (Law Commission, Wellington, 1998) xix.

brought into line with the approach adopted by a number of our major trading partners.⁵² It has not received subsequent consideration.

Finally, in 2006 a uniform bilateral scheme of civil jurisdiction and judgments was being considered by Australia and New Zealand in the context of their single economic market. The model presented by the Brussels I Regulation received extensive consideration.⁵³ The resulting trans-Tasman scheme is discussed later⁵⁴ but, in the course of the review, the Brussels I Regulation was compared with the Australian federal scheme that is implemented in the Service and Execution of Process Act 1992 (Cth). Alignment of the Australia-New Zealand scheme with the Act of 1992 was always a consideration that would disfavour the Brussels model. While the Brussels I Regulation was thought to be overly complex,⁵⁵ the Trans-Tasman Working Party also based its recommendation not to adopt the Brussels model on the shared legal culture. The Regulation:⁵⁶

... was originally designed for Member States when all were civil law countries. Its civil law origins do not make it the best model for two countries with a shared common law heritage.

It is likely that European legal models were considered only because of the shared legal culture with the UK and the UK was in the EU. The Trans-Tasman Working Party's approach nevertheless reinforced that it was 'ill at ease with civilian concepts'.⁵⁷ After Brexit, it is even less likely that the proposals of the 1990s to consider adopting European models or joining the Lugano Convention would go any further. However, as we will see in Part E, civilian concepts may yet be indirectly important in the influence that they have had on the two HCCH Conventions that promise the most for future integration of private international law in the Commonwealth.

⁵² *Ibid*, 106.

⁵³ See Australia (Attorney-General's Department) and New Zealand (Ministry of Justice), *Trans-Tasman Court Proceedings and Regulatory Enforcement — A Public Discussion Paper by the Trans-Tasman Working Group* (Commonwealth of Australia, Canberra, 2006) (Trans-Tasman Discussion Paper); Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *Trans-Tasman Court Proceedings and Regulatory Enforcement — Report by the Trans-Tasman Working Group* (Canberra, Commonwealth of Australia, Canberra, 2006) (Trans-Tasman Report).

⁵⁴ See text to below nn 209–230.

⁵⁵ Trans-Tasman Discussion Paper (n 53) 12.

⁵⁶ *Ibid*, 11–12.

⁵⁷ Harris (n 38) 347.

C. Private international law in the Commonwealth, 1973-2019

Through the UK's period in what is now the EU, the English courts continued to be the most important external influence on the development of private international law in the other Commonwealth countries. British legislative developments also influenced legislation and proposed legislation in the Commonwealth. However, this was also a period in which the centrifugal forces of decolonisation also began to have significant effect. It saw the collapse of the pre-1973 consensus in the Commonwealth on the content of the private international law of its member states.

1. *Gravitational pull: Forum non conveniens*

The settling of the scope and role of the doctrine of *forum non conveniens* could be regarded as the most important development in the private international law of the Commonwealth during the UK's membership of the EU. The doctrine already had a long history in Scotland,⁵⁸ and had been recognised in the United States from the early 20th century.⁵⁹ It was different in the Anglo-common law. According to the English Court of Appeal in *St Pierre v South American Stores (Gath & Chaves) Ltd*,⁶⁰ a stay of proceedings that had begun in a *forum competentis* (a court with a power to judge them) was permissible only if, at the least, 'continuance of the action would work an injustice because it would be oppressive or vexatious' to the defendant or 'would be an abuse of the process of the Court in some other way.'⁶¹ The greater suitability of a court elsewhere was irrelevant because '[t]he right of access to the King's Court must not lightly be refused'.⁶² However, in

⁵⁸ For early cases, see *Vernor v Elvies* (1610) 6 Dict of Dec 4788; *Anderson v Hodgson* (1747) 6 Dict of Dec 4816. The first reference to the term *forum non conveniens* seems to have been Lord Cowan's in *Macadam v Macadam* (1873) 11 SC (3D) 860, 862. See *Sim v Robinow* (1892) 19 R 665, 668; *Société du Gaz de Paris v Société Anonyme de Navigation 'Les Armateurs Français'* 1926 SC (HL) 13, 22.

⁵⁹ *Bagdon v Philadelphia and Reading Coal and Iron Co*, 178 App Div 662, 663 (1917). However, something akin to *forum non conveniens*, although not called that, had already been used as early as *Willendson v Forsoket*, 29 F Cas 1283, 1284 (1801). See also *Gulf Oil Corporation v Gilbert*, 330 US 501 (1947); *Koster v (American) Lumbermens Mutual Casualty Co*, 330 US 518 (1947).

⁶⁰ [1936] 1 KB 382.

⁶¹ *Ibid*, 398. See also *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194.

⁶² *St Pierre* (n 60) 398.

English appeals from the time of its decision in *The Atlantic Star*⁶³ in 1973, the House of Lords chipped away at this approach and progressively merged its ideas of oppression and vexation with concepts of the appropriateness of hearing the proceedings.⁶⁴ The House of Lords completely abandoned any pretence of the *St Pierre* approach to stays of proceedings when the Scottish doctrine of *forum non conveniens* was adopted in its 1986 decision in *Spiliada Maritime Corp v Cansulex Ltd*.⁶⁵ In *Spiliada*, a case where the forum competing with the English court was in British Columbia, Lord Goff said:⁶⁶

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

In many respects, the doctrine aims to put the proceedings in (what is clearly) the more appropriate forum: as Lord Goff put it, the ‘natural forum ... that with which the action had the most real and substantial connection’.⁶⁷ If a clearly more appropriate forum is identified and the justice exception does not apply then, the plea gives the defendant a stay of proceedings in cases where jurisdiction is founded ‘as of right’⁶⁸ or, if discretionary long-arm jurisdiction is being invoked, a dismissal of the proceedings.⁶⁹

The *Spiliada* doctrine assists in putting litigation into the court where, having regard to all of its contacts with the parties and the proceedings, it has its closest and most real connection — although it does not guarantee it. As will be seen,⁷⁰ this makes it well-adapted to the coordination of provincial or state civil jurisdictions within a federation. *Spiliada* was taken up quickly in other Commonwealth countries. In the Privy Council, Lord Goff had made it clear as early as 1986 in

⁶³ *Atlantic Star v Bona Spes (The Atlantic Star)* [1974] AC 436.

⁶⁴ *MacShannon v Rockware Glass Ltd* [1978] AC 795; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *The Abidin Daver* [1984] AC 398.

⁶⁵ [1987] AC 460.

⁶⁶ *Ibid*, 476.

⁶⁷ *Ibid*, 477–8.

⁶⁸ *Ibid*, 477.

⁶⁹ *Ibid*, 473–4, 482.

⁷⁰ See text to below nn 102–121.

an appeal from Brunei that *Spiliada* would be applied.⁷¹ New Zealand was still subject to Privy Council supervision at this time and when, in *McConnell Dowell v Lloyd's Syndicate 396*,⁷² the New Zealand Court of Appeal came to consider the question, Cooke P was already aware of the Privy Council's position and adopted *Spiliada* without giving any special justification.⁷³ The Privy Council itself followed this in an appeal from New Zealand in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*,⁷⁴ and it remains the settled position.⁷⁵ Although not subject to Privy Council direction, the Singapore Court of Appeal adopted *Spiliada* without qualification in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia*⁷⁶ and it has repeatedly reinforced the application of *Spiliada* in questions of *forum non conveniens*.⁷⁷ Equally, the Supreme Court of Canada did not quibble to adopt *Spiliada* for Canada's common law provinces when the question had to be considered in the context of an anti-suit injunction in *Amchem Products Inc v British Columbia (Workers Compensation Board)*.⁷⁸

In *Amchem*, Sopinka J also endorsed Lord Goff's claim that 'the law in common law jurisdictions is ... remarkably uniform',⁷⁹ but this was already an exaggeration. Sopinka J was aware that Australia was the Commonwealth's outlier on the question of *forum non conveniens* (at least in international litigation), although he downplayed the practical consequences of this

⁷¹ *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 891–2, 896, 897–8.

⁷² [1988] 2 NZLR 257.

⁷³ *Ibid*, 273, 275–6 (Cooke P), 280–3 (Somers J). See also the earlier decision in *Oilseed Products (NZ) Ltd v HE Burton Ltd* (1987) 1 PRNZ 313, 316–17.

⁷⁴ [1991] 1 AC 187, 212, 213.

⁷⁵ *Kidd v van Heeren* [2006] 3 NZLR 520; *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2011] 1 NZLR 754.

⁷⁶ [1992] 2 SLR 776, 784 (Chao Hick Tin J).

⁷⁷ *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited* [2001] 2 SLR 49; *Rickshaw Investments Ltd v Baron von Uexkull* [2007] 1 SLR 377. This is subject to one clarification in the context of commercial litigation. The Singapore International Commercial Court is promoted as a specialist court for international disputes, and is modelled closely on the London Commercial Court. In *Rappo v Accent Delight International Ltd* [2017] SGCA 27, it was argued that the availability of the International Commercial Court was a factor that weighed in favour of identifying Singapore as the natural forum in a *forum non conveniens* enquiry. The Court of Appeal agreed. Sundaresh Menon CJ pointed out (at [122]) that procedural advantages available in the International Commercial Court — such as establishing foreign law by submissions rather than evidence — were relevant factors to consider under the principles of *Spiliada*. He cautioned (at [124]) that this was not 'a free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore', but (at [121]–[122]) it was plainly a factor that weighed in favour of the Singapore court as the *forum conveniens* in commercial proceedings.

⁷⁸ [1993] 1 SCR 897.

⁷⁹ *Ibid*, 921–2.

position.⁸⁰ In 1991, a majority in the High Court of Australia held, in *Voth v Manildra Flour Mills Pty Ltd*,⁸¹ that proceedings in an Australian court could only be stayed or dismissed if they were, according to the *St Pierre* formula, vexatious or oppressive or an abuse of the court's process. The proceedings would nevertheless be treated as vexatious or oppressive if the court regarded itself as a 'clearly inappropriate forum' to determine them.⁸² This approach allows an Australian court to hold on to jurisdiction even when there is a more appropriate forum elsewhere that has jurisdiction to deal with the case: that is, where the Australian court is not the natural forum.⁸³ *Spiliada* was rejected, partly on the ground that it did not represent the position in the United States, and partly because the Supreme Court of Canada was yet to consider it.⁸⁴ The position settled in *Voth* was also openly a compromise because, on the first occasion when the Australian High Court had come to consider *Spiliada* and the doctrine of *forum non conveniens*, it failed to secure any majority agreement on the point.⁸⁵ In *Oceanic Sun Line Special Shipping Company Inc v Fay*,⁸⁶ a majority of the High Court refused a stay of a New South Wales case that concerned an injury suffered in Greece. In dissent, Wilson and Toohey JJ thought that *Spiliada* 'should henceforth chart the course for the common law in Australia'⁸⁷ and considered the Greek court to be the natural forum for the proceedings.⁸⁸ In the majority, Brennan J continued to apply the *St Pierre* standards of oppression and vexation,⁸⁹ and Deane J and Gaudron J opted for a position midway between *Spiliada* and *St Pierre*⁹⁰ – the position that eventually became the majority view in *Voth* and which rejected *Spiliada*.⁹¹ As Deane J admitted, this was actually the position that the House of

⁸⁰ *Ibid*, 917–18.

⁸¹ (1990) 171 CLR 538.

⁸² *Ibid*, 557–60 (Mason CJ and Deane, Dawson and Gaudron JJ).

⁸³ *Ibid*, 558.

⁸⁴ *Ibid*, 560–1.

⁸⁵ MC Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 *Australian Law Journal* 774.

⁸⁶ (1988) 165 CLR 197.

⁸⁷ *Ibid*, 213.

⁸⁸ *Ibid*, 218.

⁸⁹ *Ibid*, 232–3.

⁹⁰ *Ibid*, 247–8 (Deane J), 266 (Gaudron J).

⁹¹ *Ibid*, 251–3 (Deane J), 265 (Gaudron JJ). See also *ibid*, 240 (Brennan J).

Lords had reached in *The Atlantic Star*.⁹² However, in rejecting for Australia the adoption of the English position on *forum non conveniens*, Gaudron J relied to some extent on perceived differences in judicial culture that had developed because of the UK's place in the EU, and gave a small nod towards Australian nationalism:⁹³

Our legal heritage is the gift of the common law of England, and our legal system necessarily has much in common with that of England. Where, however, developments in the common law of England reflect underlying changes which may not be matched in Australian law or society, care must be exercised in determining the extent to which changes in the English common law should be reflected in the common law of this country. For example, expressions of preference in England for 'judicial comity' rather than 'judicial chauvinism' ... are readily understandable when it is borne in mind that England is a member of the European Community, which is not merely an alliance of similarly minded sovereign nation states, but a community with its own parliament, its own laws and its own court. Indeed, the European court has said that member states 'have limited their sovereign rights, albeit within limited fields' ...

In response to this claim, Wilson and Toohey JJ said:⁹⁴

In our view the evolution of English law since *The Atlantic Star* cannot be ascribed to local considerations such as the incorporation of the United Kingdom into the European Economic Community. Rather, this century has witnessed such a transformation in communications and travel, coupled with a greater importance attaching to considerations of international comity as the nations of the world become more closely related to each other ...

Gaudron J's claim that the UK's period in the EU had made English judges less 'chauvinistic' is unpersuasive, and rests on a number of misconceptions. Admittedly, it was too early to see how negatively the CJEU would eventually respond to the discretions given by the doctrine of *forum non conveniens* and its companion principles for anti-suit injunctions⁹⁵ — although this response reinforces how little those developments in the common law had to do with any Europeanising of civil jurisdiction. But, first of all, although Gaudron J was aware of the long history of the doctrine of *forum non conveniens* in Scotland,⁹⁶ she ignored the implication of that history that the doctrine took its present shape earlier than the UK's membership of the EU. And further, the House of Lords' dissatisfaction with *St Pierre* was expressed as early as *The Atlantic Star*⁹⁷ in 1973. Lord Reid

⁹² *Ibid*, 247.

⁹³ *Ibid*, 263.

⁹⁴ *Ibid*, 212.

⁹⁵ Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] ECR I-663.

⁹⁶ *Oceanic Sun* (n 86) 262.

⁹⁷ *Atlantic Star* (n 63).

had referred to *St Pierre* as a ‘rather insular doctrine’⁹⁸ long before there could have been any EU legal acculturation of English judicial attitudes or policy.⁹⁹ Having said that, as Gaudron J’s approach to *forum non conveniens* became the accepted position of the Australian High Court in *Voth*,¹⁰⁰ it is evident that the development of this distinctive Australian approach to the doctrine rests partly on a perception — a mistaken perception on this issue — that the UK’s place in the EU was of juridical significance.¹⁰¹

The position that Australian law reached in *Voth* is somewhat ironic, given how important the idea of the natural forum has become, in both Canada and Australia, to internal questions of the allocation of civil jurisdiction between provinces and states. In Canada, this has not been done through the discretionary considerations that help to identify the *forum conveniens*. It has arisen in questions of *forum competens* — that is, when the Canadian court has the power to assume jurisdiction. *Morguard Investments Ltd v De Savoye*¹⁰² was a case concerning the recognition of an interprovincial judgment. In delivering the judgment of a unanimous Supreme Court, La Forest J held that a Canadian court should recognise a judgment made in another province if the proceedings had a real and substantial connection with the province in which the judgment was rendered.¹⁰³ It represented a departure from the 19th and early 20th century English position that required the defendant to have been present in the country where judgment was rendered at the time of being served with a writ, or where the defendant had submitted to the jurisdiction of the rendering court.¹⁰⁴ La Forest J thought that modern conditions required a more generous basis for the recognition of a judgment. Even though the older English rules had been partly developed within the context of English courts recognising, or rather not recognising, judgments made

⁹⁸ *Ibid*, 453.

⁹⁹ *Ibid*, 464, 468-9 (Lord Wilberforce), 473, 475, 477 (Lord Kilbrandon). Cf *ibid*, 458, 462 (Lord Morris), 473 (Lord Simon).

¹⁰⁰ See text to above nn 81–92; see also *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Puttick v Tenon* (2008) 238 CLR 265.

¹⁰¹ For early academic opinion in Australia that entry to the EEC would drive legal difference between the UK and Australia: FKH Maher, ‘The Common Law — Tears in the Fabric’ (1969) 7 *Melbourne University Law Review* 97, 109.

¹⁰² [1990] 3 SCR 1077.

¹⁰³ *Ibid*, 1108–10.

¹⁰⁴ *Ibid*, 1095.

elsewhere in the Empire,¹⁰⁵ they were especially inappropriate within a federation with a common citizenship and an integrated economy.¹⁰⁶ The example of the EEC was mentioned — not as a justification for departing from English law — but to note that the Brussels Convention was designed to secure a similar broad base for the recognition of judgments.¹⁰⁷ However, so far as adjudicative jurisdiction was concerned, La Forest J thought that this should correlate with the recognition of a jurisdiction that gives rise to a judgment that was enforceable across provincial borders. He therefore held that a Canadian court could only assume jurisdiction in proceedings where they had a real and substantial connection with the province.¹⁰⁸ This position is now well settled in Canada.¹⁰⁹ In *Morguard*, La Forest J also noted the parallel that the new Canadian rule for *forum competens* had with the doctrine of *forum non conveniens*.¹¹⁰ Still, the Supreme Court has continued to recognise that the rules for assuming jurisdiction and those of *forum non conveniens* are distinct, even if, as ‘centre of gravity’ enquiries, they are related. It is possible both for a plaintiff to establish that a court is competent because the proceedings have a real and substantial connection with the province, and yet for the defendant to argue successfully that the court is a *forum non conveniens* and has a discretion to stay the proceedings.¹¹¹

In Australia, the principles of *forum non conveniens* are the central means of sorting civil jurisdiction within the federation. The Service and Execution of Process Act 1992 (Cth) enables a writ from a state court to be served anywhere in Australia — that is, in other states — and gives that court an unquestioned competence to judge.¹¹² Furthermore, a judgment made by any state court is enforceable anywhere in Australia, and there are no defences that allow judgment debtors

¹⁰⁵ See, eg *Emanuel v Symon* [1908] 1 KB 302.

¹⁰⁶ *Morguard* (n 102) 1098–9.

¹⁰⁷ *Ibid*, 1100.

¹⁰⁸ *Ibid*, 1108–9.

¹⁰⁹ *Hunt v T&N plc* [1993] 4 SCR 289, 324–6; *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572, 589–90, 594; *Chevron Corp v Yaiguaje* [2015] 3 SCR 69, 99–100; and see GD Watson and A Frank, ‘Constitutional Limits on Service Ex Juris: Unanswered Questions from *Morguard*’ (2000) 23 *Advocates’ Quarterly* 167; V Black, ‘Simplifying Court Jurisdiction in Canada’ (2012) 8 *Journal of Private International Law* 411; J Blom, ‘Constitutionalizing Canadian Private International Law – 25 Years Since *Morguard*’ (2017) 13 *Journal of Private International Law* 259.

¹¹⁰ *Morguard* (n 102) 1110.

¹¹¹ *Club Resorts* (n 109) 622–8.

¹¹² Ss 12, 15 Service and Execution of Process Act 1992 (Cth).

to resist enforcement.¹¹³ The means, therefore, by which concurrent proceedings and incompatible judgments are to be avoided, is to ensure that ‘the appropriate court’ deals with the litigation if there is any dispute over the exercise of jurisdiction. The mechanism for putting the proceedings into the *forum conveniens* is either a stay of proceedings¹¹⁴ or, for superior courts, a transfer of the proceedings to the more appropriate Australian court.¹¹⁵ For transfers of proceedings, there was early uncertainty as to whether the proceedings should be transferred when under *Spiliada* criteria there was a clearly more appropriate court in another state to deal with them,¹¹⁶ or when under (what became) the principles of *Voth* the transferring court considered itself a clearly inappropriate forum to hear them.¹¹⁷ This was resolved by the Australian High Court when, in *BHP Billiton Ltd v Schultz*,¹¹⁸ it held that the *Spiliada* search for ‘the more appropriate forum’ should indicate when, in transfer proceedings, a court should either retain the principal action or transfer it to another court.¹¹⁹ Lord Goff’s term ‘natural forum’ was freely used to describe the court that should retain or receive a transfer of the proceedings.¹²⁰ As any state court is a *forum competens* whenever service of process occurs in Australia, *Spiliada* has become the principal means of defining the limits on the adjudicative jurisdiction of state courts — a prominence in schemes of civil jurisdiction that is almost unique in the Commonwealth.¹²¹

2. Centrifugal forces: Applicable law in tort and the assessment of damages

In 1973 the Commonwealth had a single reference for applicable law in tort and related questions of the assessment of damages, although that reference was broad, unclear and subject to different readings. The 19th century rule in *Phillips v Eyre*¹²² requiring application of both the *lex fori* and the

¹¹³ S 105 Service and Execution of Process Act 1992 (Cth).

¹¹⁴ S 20(3) Service and Execution of Process Act 1992 (Cth).

¹¹⁵ See, eg s 5 Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) and identical legislation in all other states.

¹¹⁶ *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711.

¹¹⁷ *Platz v Lambert* (1994) 12 WAR 319; *Whyalla Refineries Pty Ltd v Grant Thornton (a firm)* (2001) 182 ALR 274.

¹¹⁸ (2004) 221 CLR 400.

¹¹⁹ *Ibid*, 419-21 (Gleeson CJ, McHugh and Heydon JJ), 463-4 (Kirby J).

¹²⁰ *Ibid*, 423 (Gleeson CJ, McHugh and Heydon JJ), 448, 464 (Kirby J), 493 (Callinan J).

¹²¹ See text to below nn 209-230.

¹²² (1870) LR 6 QB 1, 28-9.

lex loci delicti marked it as an oddity amongst common law applicable law rules. The House of Lords' decision in *Boys v Chaplin*¹²³ in 1969 perpetuated the oddity and, momentarily, added to the confusion around applicable law in tort. While holding in *Boys* that an English plaintiff could recover English damages from an English defendant for an accident in Malta, the House of Lords produced no *ratio decidendi* for that conclusion.¹²⁴ Lord Hodson held that English law applied as, given the issue in question, England had a more significant relationship with the occurrence and the parties.¹²⁵ Lord Wilberforce held that a cross-border tort claim required (what became known as) 'double actionability' — the claim had to be actionable in the forum and the place of the tort.¹²⁶ However, there was an exception to this double-barrelled applicable law rule when, in relation to a given issue, a single applicable law could govern the issue. To determine this, it was necessary 'to identify the policy of the rule, inquire to what situations, with what contacts, it was intended to apply; [and] whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet'.¹²⁷ Lord Pearson held that double actionability was not required — the *lex fori* was the applicable law that governed liability as long as there was no legal justification for the defendant's actions in the place of the tort.¹²⁸ Lords Guest¹²⁹ and Donovan¹³⁰ dissented.

At least for England, Professor Morse accurately predicted that Lord Hodson's and Lord Wilberforce's speeches would influence subsequent understandings of *Boys*.¹³¹ The decision also magnetised the attention of other Commonwealth courts. However, the unsatisfactory condition of the law meant that, once the centrifugal forces of legal decolonisation entered the questions raised by *Boys*, any general consensus around applicable law in tort across the Commonwealth

¹²³ [1971] AC 356.

¹²⁴ CGJ Morse, *Torts in Private International Law* (North-Holland Publishing Co, 1978) 282. For a contrary view, see A Briggs, 'What Did *Boys v Chaplin* Decide?' (1983) 12 *Anglo-American Law Review* 237, 238.

¹²⁵ *Boys* (n 123) 380–1.

¹²⁶ *Ibid*, 389.

¹²⁷ *Ibid*, 391.

¹²⁸ *Ibid*, 398.

¹²⁹ *Ibid*, 381–3.

¹³⁰ *Ibid*, 383.

¹³¹ Morse (n 124) 282; see below n 132.

collapsed. The developments show that these Commonwealth countries (including the UK) continued to trade in precedents with each other but, without the controlling direction of the House of Lords-*cum*-Privy Council, the applicable law rules that they individually developed drifted apart.

Lord Wilberforce's approach in *Boys* was to require the proceedings to be actionable under both the *lex fori* and the *lex loci delicti*, but with a flexible exception in favour of applying a single applicable law. This approach eventually predominated in England,¹³² with a more rational statement of the rule eventually being given by Lord Slynn in the Privy Council's decision in *Red Sea Insurance Company Ltd v Bouygues SA*¹³³ — an appeal from Hong Kong. Lord Slynn effectively adopted *Dicey and Morris'* recast of Lord Wilberforce's approach in *Boys*:¹³⁴

- (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
 - a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
 - b) actionable according to the law of the foreign country where it was done.
- (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

It was explicitly recognised that the flexible exception allowed the *lex loci delicti* alone to be selected as the applicable law and, in *Red Sea Insurance*, this saw the Privy Council apply the law of Saudi Arabia for a claim in negligence brought in Hong Kong.¹³⁵ Professor Briggs dubbed this position 'double actionability with double flexibility'.¹³⁶

However, at the time of *Red Sea Insurance* the Law Commission and the Scottish Law Commission had already recommended abandoning the double actionability rule for a simple *lex*

¹³² *Coupland v Arabian Gulf Oil Co* [1983] 3 All ER 226; *Armagas Ltd v Mundogas SA* [1986] AC 717, 740-1, 752-3; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; *Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

¹³³ [1995] 1 AC 190.

¹³⁴ *Ibid*, 198, 201; see L Collins (ed), *Dicey and Morris on the Conflict of Laws*, 12th ed (Stevens & Sons Ltd, 1993) 1487-8.

¹³⁵ *Red Sea Insurance* (n 133) 206.

¹³⁶ A Briggs, *The Conflict of Laws* (Oxford University Press, 2002) 182; A Briggs, 'The *Halley*: Holed but Still Afloat' (1995) 111 *Law Quarterly Review* 18, 21.

loci delicti rule with an exception available for application of ‘the proper law of the tort’ — the place with the closest and most real connection to the circumstances and the parties.¹³⁷ Amongst the motivations for the proposal was the need to align the law with that in other European countries.¹³⁸ Although aspects of the Commissions’ report were not implemented, the recommendations formed the central structure of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 — which changed applicable law in tort in all UK countries.¹³⁹ This Act gave a general rule that the applicable law in claims in tort was the *lex loci delicti* — ‘the law of the country in which the events constituting the tort or delict in question occur.’¹⁴⁰ The place where the injury was sustained prevailed as *locus delicti* in personal injuries claims,¹⁴¹ and the *situs* of the property at the time of the damage in claims for damage to property.¹⁴² In all other claims, the applicable law was ‘the law of the country in which the most significant element ... occurred.’¹⁴³ A statutory flexible exception was created in that, after having compared the significance of any factors connecting the tort or delict with the *locus delicti* and with some other country, it appeared that it was ‘substantially more appropriate’ that the law of the other country should apply.¹⁴⁴ However, the double actionability rule was preserved for claims in defamation, meaning that these still had to be actionable under the relevant UK law.¹⁴⁵

The Commissions’ goal of aligning UK law with the law of its European partners was overtaken when, for the most part, applicable law in tort was Europeanised. The Rome II Regulation deals with non-contractual obligations, although it excludes proceedings for breach of privacy and defamation,¹⁴⁶ and therefore, in the UK, left a complicated structure across the field

¹³⁷ Law Commission and Scottish Law Commission, *Private International Law — Choice of Law in Tort and Delict*, Law Com No 193, Scot Law Com No 129 (HMSO, 1990) 11-14. This was largely the work of two giants of private international law, Sandy Anton and Peter North.

¹³⁸ *Ibid*, 10.

¹³⁹ See s 9(7) Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴⁰ S 11 Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴¹ S 11(2)(a) Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴² S 11(2)(b) Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴³ S 11(2)(c) Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴⁴ S 12 Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴⁵ S 13 Private International Law (Miscellaneous Provisions) Act 1995 (UK).

¹⁴⁶ Art 1(2)(g) Rome II Regulation.

of applicable law in tort. Rome II has been incorporated into post-Brexit UK law.¹⁴⁷ As it overrides and did not repeal the previous law, most questions of tort are captured by the patriated Rome II, but questions of privacy are dealt with under the Act of 1995 and, because the Act of 1995 itself did not apply to claims in defamation,¹⁴⁸ they are still subject to the double actionability rule of *Red Sea Insurance*. Rome II also departs from the modern shift in applicable law to the *lex loci delicti* by placing ‘the law of the country in which the damage occurs’ — the *lex loci damni* — at the centre of applicable law in tort.¹⁴⁹ It then gives some specificity to where the *locus damni* is for a range of non-contractual civil claims, and sometimes allows a number of places. For example, the applicable law for product liability claims could (depending on the circumstances) be the law of the place where the person who suffered the damage was habitually resident when the damage occurred, the place where the product was acquired, or even the place where the defendant was habitually resident.¹⁵⁰ The *lex loci damni* can be displaced in situations that parallel the common law’s flexible exception — the law of the place where the parties are habitually resident if they were habitually resident in the same place at the time the damage occurred, or the law of a place with which the tort is manifestly more closely connected — ‘[w]here it is clear from all the circumstances of the case’.¹⁵¹ Rome II also allows an agreement on the applicable law for the tort after or before the event giving rise to the damage — but if before only where all the parties to the agreement are pursuing a commercial activity and ‘freely negotiated’ the agreement.¹⁵²

As, under its accident compensation scheme, New Zealand has banned litigation relating to personal injuries,¹⁵³ its courts rarely entertain foreign tort cases. However, *Baxter v RMC Group Plc*¹⁵⁴ involved actions for fraudulent misrepresentation and conspiracy for events that largely took place in England. O’Regan J recognised, without question, that the double actionability rule as

¹⁴⁷ See above n 36.

¹⁴⁸ See n 145.

¹⁴⁹ Art 4(1) Rome II Regulation.

¹⁵⁰ Art 5 Rome II Regulation.

¹⁵¹ Art 4(2)–(3) Rome II Regulation.

¹⁵² Art 14 Rome II Regulation.

¹⁵³ S 317(1) Accident Compensation Act 2001 (NZ).

¹⁵⁴ [2003] 1 NZLR 304.

stated in *Red Sea Insurance* was law in New Zealand.¹⁵⁵ In this case, he also considered that the flexible exception was easily established to have all questions in dispute governed by English law as the *lex loci delicti*.¹⁵⁶ However, in 2017 the Parliament passed the Private International Law (Choice of Law in Tort) Act 2017 — legislation modelled directly on the UK Act of 1995 even though in the UK itself that legislation was largely overridden by the Rome II Regulation.¹⁵⁷ The New Zealand Act abolishes the double actionability rule,¹⁵⁸ and has all questions of tort governed by ‘the law of the country in which the events constituting the tort occur’.¹⁵⁹ There is no exception in New Zealand for claims in defamation; they are also governed by the Act.¹⁶⁰ The Act sets out a flexible exception in favour of the law of another place if ‘in all the circumstances it is substantially more appropriate for the law of another country ... to be the applicable law.’¹⁶¹

The double actionability rule remains completely in force only in Singapore. *Boys* is regarded in Singapore as ‘the “modern” starting point’ for choice of law in tort.¹⁶² However, in some respects, the requirement to show double actionability is reduced to a single *lex fori* rule. The Singapore courts have consistently held that the plaintiff is entitled not to plead the *lex loci delicti* and, if the claim is not met by the defendant’s pleading the *lex loci*, this leads the court to conclude that the *lex loci delicti* is identical to the law of Singapore and so determines the question purely by reference to the *lex fori*.¹⁶³ In *Parno v SC Marine Pte Ltd*,¹⁶⁴ the Singapore Court of Appeal dealt with a workplace injury in Myanmar purely by reference to the Singapore *Factories Act* — legislation which provided for the plaintiff’s recovery. Following the double actionability rule as stated in *Red Sea Insurance*, the Court of Appeal held that the failure to prove the law of Myanmar on workplace

¹⁵⁵ *Ibid*, 317–18.

¹⁵⁶ *Ibid*, 318; see also *Ocean Towing & Salvage (Vanuatu) Ltd v Custom Fleet (NZ) Ltd* [2006] NZHC 1481 [43]–[65].

¹⁵⁷ See text to above nn 146–148. See also Maria Hook, “New Zealand’s choice of law rules relating to tort” (2018) 19 *Yearbook of Private International Law* 313.

¹⁵⁸ S 10 Private International Law (Choice of Law in Tort) Act 2017 (NZ).

¹⁵⁹ S 8(1) Private International Law (Choice of Law in Tort) Act 2017 (NZ).

¹⁶⁰ Hook and Wass (n 12) 449.

¹⁶¹ S 9 Private International Law (Choice of Law in Tort) Act 2017 (NZ).

¹⁶² *Rickshaw* (n 77) [56]; Law Reform Committee of the Singapore Academy of Law, *Reform of the Choice of Law Rule Relating to Torts* (Singapore Academy of Law, Singapore, 2003) 2.

¹⁶³ *Gob Chok Tong v Tang Liang Hong* [1997] 2 SLR 641, [77]–[84].

¹⁶⁴ [1999] 4 SLR 579.

accidents required it to presume its identity with the law of Singapore and, therefore, to recognise that the claim was actionable in both the forum and the *locus delicti*.¹⁶⁵ As early as 2003, the Law Reform Committee of the Singapore Academy of Law recommended legislative reform to choice of law rules for tort along the lines of the UK's Act of 1995 — even to the point of recommending the preservation of the double actionability rule just for defamation claims.¹⁶⁶ Parliament is still to act. In *Rickshaw Investments Ltd v Baron von Uexkull*,¹⁶⁷ the Singapore Court of Appeal, still recognising the double flexibility of the exceptions to *Boys'* double actionability rule, nevertheless considered that it needed to be 'strictly applied' so that it did not 'overwhelm' the general rule.¹⁶⁸ In giving the Court's judgment, Andrew Leong J also reiterated that it was for the Singapore Parliament to abolish or reform the double actionability rule.¹⁶⁹ So, while the Singapore courts have shown some sympathy for the simpler *lex loci delicti* rule adopted in Australia and Canada,¹⁷⁰ they consider themselves bound by *Rickshaw* to continue to apply the double actionability rule as it stood in *Red Sea Insurance*.¹⁷¹

Radical changes to applicable law in tort were driven by federal considerations in Australia and Canada, although more decisively in Canada. These developments also demonstrate an intriguing interplay of the use of precedent in Australian, Canadian and UK adjudication which, contrary to the old House of Lords-*cum*-Privy Council directed uniformity, has added to the fragmentation of applicable law rules. The process began with the High Court of Australia's decision in *Breavington v Godleman*¹⁷² in 1988,¹⁷³ when a 4:3 majority held that questions involving

¹⁶⁵ *Ibid*, 595.

¹⁶⁶ See text to above n 145; see Law Reform Committee (n 162) 4–6, 8–9; WTS Hern, 'Warnings for a New Beginning: Torts (Choice of Law) Bill' [2005] *Singapore Journal of Legal Studies* 288; WTS Hern, 'Singapore Private International Law on Torts: Inappropriate For Modern Times?' [2007] *Singapore Journal of Legal Studies* 405, 412.

¹⁶⁷ *Rickshaw* (n 77).

¹⁶⁸ *Ibid*, [58].

¹⁶⁹ *Ibid*, [66].

¹⁷⁰ See text to below nn 172–201.

¹⁷¹ *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860, [58]; *M Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123, [81]–[85].

¹⁷² (1988) 169 CLR 41.

¹⁷³ For the following, see also R Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 842-8.

interstate torts were to be determined by the *lex loci delicti* alone. Constitutional considerations and a strong sense of the national unity that they create directed this decision for three judges in the majority.¹⁷⁴ The fourth judge, Mason CJ, preferred to adopt the *lex loci delicti* rule as a common law rule, subject to a flexible exception; yet the need to coordinate private law relations within the federation still drove his conclusion.¹⁷⁵ All four judges explicitly rejected application of the double actionability rule of *Boys* for interstate torts.¹⁷⁶ A minority opted for the double actionability rule of *Boys*,¹⁷⁷ although Brennan and Dawson JJ denied the possibility of its having any flexible exception.¹⁷⁸ This *lex loci delicti* rule did not last long. In two decisions on the classification of substance and procedure in private international law, a change in the composition of the High Court saw a new 4:3 majority reintroduce the double actionability rule. In 1991 in *McKain v RW Miller & Co (South Australia) Pty Ltd*,¹⁷⁹ a majority held that statutes of limitations were procedural laws and that their application was to be governed by the *lex fori*. In *Stevens v Head*¹⁸⁰ in 1993, the same majority held that, as questions of the assessment of damages were procedural, damages were to be assessed in accordance with the *lex fori*. In both cases, this new majority departed from *Breavington* on the adoption of a *lex loci delicti* rule for torts and endorsed the double actionability rule as stated in Brennan J's minority judgment in that case — that is, double actionability with no flexible exception.¹⁸¹

Although the actual decision in *Breavington* supporting a *lex loci delicti* rule was, without express overruling, quietly discarded in *McKain* and *Stevens*, the original decision received attention in other Commonwealth countries. In *Red Sea Insurance* in 1994, the Privy Council noted the different approaches in *Breavington* but dismissed them as a 'relaxation' of *Phillips v Eyre* 'in a federal

¹⁷⁴ *Breavington* (n 172) 98 (Wilson and Gaudron JJ), 136–8 (Deane J).

¹⁷⁵ *Ibid*, 77–9.

¹⁷⁶ *Ibid*, 74 (Mason CJ), 92–3 (Wilson and Gaudron JJ), 126–7 (Deane J).

¹⁷⁷ *Ibid*, 110–11 (Brennan J), 145–6 (Dawson J), 160–1 (Toohey J).

¹⁷⁸ *Ibid*, 113 (Brennan J), 147–8, 157–8 (Dawson J); cf 162–3 (Toohey J).

¹⁷⁹ (1991) 174 CLR 1.

¹⁸⁰ (1993) 176 CLR 433.

¹⁸¹ *McKain* (n 179) 39 (Brennan, Dawson, Toohey and McHugh JJ); *Stevens* (n 180) 453 (Brennan, Dawson, Toohey and McHugh JJ).

context'.¹⁸² There was no reference to *McKain* and *Stevens*. More significantly, when in the same year the Supreme Court of Canada came to consider the applicable law in an interprovincial personal injuries case in *Tolofson v Jensen*,¹⁸³ it was of the view that *Breavington* meant that 'Australia has bypassed British precedents by adopting the *lex loci delicti* as the rule governing the choice of law in litigation within Australia'.¹⁸⁴ *McKain* and *Stevens* were again unreferenced. In giving the Court's judgment La Forest J addressed, amongst other decisions, *Boys* and *Red Sea Insurance*, and concluded that 'in none of these cases was the rule approached on the basis of Canadian constitutional imperatives'.¹⁸⁵ The passing of the UK's metropolitan status and of Privy Council supervision were also mentioned as reasons for abandoning *Boys* and adopting a *lex loci delicti* rule for cross-border tort claims in Canada.¹⁸⁶ And, while refusing to recognise any exception to the *lex loci delicti* rule in interprovincial cases,¹⁸⁷ La Forest J was sufficiently impressed with the reasoning in *Boys* and *Red Sea Insurance* to allow a flexible exception in foreign tort cases.¹⁸⁸ In *Tolofson*, the Supreme Court also classified statutes of limitation as substantive law and, so, applicable if the relevant statute of limitation was part of the *lex loci delicti*.¹⁸⁹

The Australian High Court revisited the substantive question of the applicable law rule for interstate torts in *John Pfeiffer Pty Ltd v Rogerson*¹⁹⁰ in 2000. Internal relations between states in the federation loomed large in the consideration of the law.¹⁹¹ Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ emphasised the need for the common law to conform to constitutional imperatives,¹⁹² and considered the reference to the *lex fori* in the double actionability rule to be inconsistent with the recognition of a sister-state's rights to regulate activity inside its own

¹⁸² *Red Sea Insurance* (n 133) 202–4.

¹⁸³ [1994] 3 SCR 1022.

¹⁸⁴ *Ibid*, 1051–2.

¹⁸⁵ *Ibid*, 1042–3, 1044–5.

¹⁸⁶ *Ibid*, 1053.

¹⁸⁷ *Ibid*, 1064–5.

¹⁸⁸ *Ibid*, 1054, 1078.

¹⁸⁹ *Ibid*, 1069–74; see also *Castillo v Castillo* [2005] 3 SCR 870.

¹⁹⁰ (2000) 203 CLR 503.

¹⁹¹ *Ibid*, 517–19 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 555–8 (Kirby J).

¹⁹² *Ibid*, 534–40.

borders.¹⁹³ Kirby J also referred to *Tolofson's* consideration of the effects of decolonisation.¹⁹⁴ Expressly endorsing *Tolofson*, the majority adopted a *lex loci delicti* rule — with no exceptions — for interstate tort questions.¹⁹⁵ In *John Pfeiffer*, the High Court also implicitly overruled *McKain* and *Stevens* by holding that, at common law, statutes of limitation and questions of the assessment of damages should be considered matters of substance that are governed, in tort cases, by the *lex loci delicti*.¹⁹⁶ And although federal constitutional considerations drove the decision in *Pfeiffer*, when the High Court came to consider the applicable law for foreign torts in *Regie Nationale des Usines Renault SA v Zhang*,¹⁹⁷ it adopted precisely the same rule. In *Renault*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ again gave detailed consideration to *Boys*, *Red Sea Insurance* and Brennan J's formulation of the double actionability rule as adopted in *McKain* and *Stevens*,¹⁹⁸ and rejected it as a 'technique of forum control specifically applicable in tort cases'.¹⁹⁹ *Tolofson* was influential in suggesting that the approach to interstate and foreign tort cases should be aligned.²⁰⁰ In extending the *lex loci delicti* rule in *Pfeiffer* to foreign torts, the majority also again rejected any use of the flexible exception in Australian proceedings.²⁰¹

Although the Private International Law (Miscellaneous Provisions) Act removed the need for UK courts to consider the reasoning in the Australian and Canadian applicable law cases, common law principles still applied to the classification of rules as substantive or procedural.²⁰² In *Harding v Wealands*,²⁰³ the House of Lords (in an English appeal) dealt with a question of the assessment of damages for a motor vehicle accident in New South Wales. Consideration was given to the Australian High Court's decision in *Stevens v Head*,²⁰⁴ but this time with an awareness that it

¹⁹³ *Ibid*, 540–2.

¹⁹⁴ *Ibid*, 547; see text to above n 184.

¹⁹⁵ *Pfeiffer* (n 190) 538.

¹⁹⁶ *Ibid*, 542–4 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 554 (Kirby J).

¹⁹⁷ *Renault* (n 100).

¹⁹⁸ *Ibid*, 506–15.

¹⁹⁹ *Ibid*, 515.

²⁰⁰ *Ibid*, 516–17.

²⁰¹ *Ibid*, 520.

²⁰² S 14(3)(b) Private International Law (Miscellaneous Provisions) Act 1995.

²⁰³ [2007] 2 AC 1.

²⁰⁴ *Stevens* (n 180)

had been implicitly overruled in *Pfeiffer*.²⁰⁵ Lord Hoffmann thought that ‘we could have no better authority than that of the High Court of Australia in *Stevens v Head*’²⁰⁶ and considered that *Pfeiffer* only changed the definition of procedural laws for interstate questions in Australia.²⁰⁷ Lord Rodger similarly treated *Stevens* as still being authoritative, and thought that both *Tolofson’s* and *Pfeiffer’s* view that the assessment of damages was a question of substance applied only to internal proceedings in the Canadian and Australian federations.²⁰⁸ The House of Lords may have read the conclusion in *Pfeiffer* too narrowly, but it nevertheless still reached a different position to that in Australia on how to classify the assessment of damages.

D. A Commonwealth sub-group: the trans-Tasman market area

The UK’s entry to the EEC had particularly profound implications for New Zealand. In 1960, over 53 per cent of its total exports were to UK markets, compared with 22 per cent for Australia and 17 per cent for Canada.²⁰⁹ To allow adjustment, the UK secured special and exclusive arrangements for New Zealand from the EEC for a five year transition period that New Zealand managed to extend.²¹⁰ New Zealand nevertheless had to secure new markets under conditions of free trade, and Australia was the obvious partner.²¹¹ Contemplating eventual UK accession to the EEC, a trade agreement between the two countries was struck in 1965.²¹² The more comprehensive Closer Economic Relations Trade Agreement was concluded in 1983,²¹³ and now

²⁰⁵ *Pfeiffer* (n 190).

²⁰⁶ *Harding* (n 203) 17.

²⁰⁷ *Ibid*, 19–20.

²⁰⁸ *Ibid*, 26–7.

²⁰⁹ P Robertson and J Singleton, ‘The Old Commonwealth and Britain’s First Application to Join the EEC, 1961-3’ (2000) 40 *Australian Economic History Review* 153, 154. It was especially exposed in exports of dairy products, for which the UK was one of the few unprotected markets: *ibid*, 154.

²¹⁰ H McDougall, ‘Buttering Up: Britain, New Zealand and Negotiations for European Communities Enlargement, 1970-1’ (2020) *International History Review* 1, 10–11.

²¹¹ For the following, see R Mortensen, ‘Together Alone: Integrating the Tasman World’ in A Dickinson, M Keyes and T John (eds) *Australian Private International Law for the 21st Century* (Hart Publishing, 2014) 113, 116–21.

²¹² New Zealand-Australia Free Trade Agreement, concluded at Wellington, 31 August 1965 (Entry into force, 1 January 1966) [1966] ATS 1.

²¹³ Australia New Zealand Closer Economic Relations Trade Agreement, concluded at Canberra, 28 March 1983 (Entry into force, 1 January 1983) [1983] ATS 2.

creates a single economic market reinforced by a longer-term arrangement for free movement between the two countries.

The improvement in access to markets itself does little to reduce the business risk of trading in the market area unless transactions and representations can be effectively enforced. An efficient scheme for the cross-border enforcement of judgments was therefore required. As has been seen,²¹⁴ when in 2006 Australia and New Zealand considered the structure of a scheme for the enforcement of judgments between the two countries, they compared the Brussels I Regulation and Australia's Service and Execution of Process Act 1992 (Cth) — and unsurprisingly opted for the latter.²¹⁵ As David Goddard commented, the two governments were conscious of 'the limits and complexities' of the Brussels I Regulation and strongly preferred 'a much simpler regime built on our common acceptance of broad service rules coupled with an appropriateness test applied at the request of the defendant'.²¹⁶

The Trans-Tasman Proceedings Acts passed in the two countries ensure that the Australia-New Zealand scheme is aligned with the Australian federal scheme. A writ issued out of any court in Australia or New Zealand may be served anywhere in either country and, on service, gives that court an unquestioned competence to judge the proceedings.²¹⁷ A judgment of any court in Australia or New Zealand can be enforced anywhere in the market area²¹⁸ — unless it is contrary to public policy in the place of enforcement.²¹⁹ As any court in either country has both adjudicative and enforcement jurisdiction across both countries, the Acts also introduce two mechanisms to guide proceedings into the one court in the trans-Tasman area. The first generally applicable mechanism is a uniform standard of *forum conveniens* to have the most appropriate court in Australia

²¹⁴ See text to above nn 53–56.

²¹⁵ Trans-Tasman Discussion Paper (n 53); Trans-Tasman Report (n 53).

²¹⁶ D Goddard, 'Trans-Tasman Court Proceedings and Regulatory Enforcement' in Dickinson, Keyes and John (n 211) 152.

²¹⁷ S 9 Trans-Tasman Proceedings Act 2010 (Cth); s 13 Trans-Tasman Proceedings Act 2011 (NZ).

²¹⁸ S 68 Trans-Tasman Proceedings Act 2010 (Cth); s 53 Trans-Tasman Proceedings Act 2011 (NZ).

²¹⁹ S 72(1)(a) Trans-Tasman Proceedings Act 2010 (Cth); s 61(2)(b) Trans-Tasman Proceedings Act 2011 (NZ). The public policy defence is interpreted narrowly: *LFDB v SM* [2017] FCAFC 178.

or New Zealand hear and determine civil proceedings.²²⁰ The standard used gives statutory effect to *Spiliada*, and was essential to prevent Australian courts holding on to the exercise of jurisdiction under the principles of *Voth* when a New Zealand court was the natural forum.²²¹ The second mechanism is that, where there is an exclusive choice of court agreement selecting an Australian or New Zealand court as the place for conducting litigation, the chosen court must deal with the proceedings.²²² This provision takes the language of the HCCH Choice of Court Agreements Convention, and largely implements the Convention between the two countries.²²³

While the Acts set clear terms for the circulation of writs and judgments inside the market area, Australia and New Zealand have also edged close to a uniform scheme for civil jurisdiction in litigation that engages the ‘outer world’. Again, there are English antecedents. The New Zealand High Court Rules’ provision for long-arm jurisdiction²²⁴ owe a significant debt to those in Practice Direction 6B for England and Wales.²²⁵ In Australia, they have been modelled as the Harmonised Rules and promoted for adoption by Australia’s superior courts. Almost all Australian state Supreme Courts have adopted them.²²⁶ They have not yet been adopted in the Northern Territory, Western Australia or the Federal Court. However, the persistent difference between the application of the New Zealand High Court Rules and Harmonised Rules in force in Australia will be that, in its decision whether to proceed with or dismiss proceedings brought against a defendant outside the trans-Tasman area, the New Zealand court will consider whether

²²⁰ S 19 Trans-Tasman Proceedings Act 2010 (Cth); s 24 Trans-Tasman Proceedings Act 2011 (NZ).

²²¹ As happened in *Puttick* (n 100); and *In the Marriage of Gilmore* (1993) 110 FLR 311.

²²² S 20 Trans-Tasman Proceedings Act 2010 (Cth); s 25 Trans-Tasman Proceedings Act 2011 (NZ).

²²³ See R Mortensen, ‘The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention’ (2009) 5 *Journal of Private International Law* 213.

²²⁴ Rr 6.27-6.28 High Court Rules 2016 (NZ).

²²⁵ R 3.1(9) Practice Direction 6B, Civil Procedure Rules (UK).

²²⁶ R 6502 Court Procedures Rules 2006 (ACT); Sch 6(a)(ii) Uniform Civil Procedure Rules 2005 (NSW); r 125(a) Uniform Civil Procedure Rules 1999 (Qld); r 40A(ii) Supreme Court Civil Rules 2006 (SA); r 147A(a)(ii) Supreme Court Rules 2000 (Tas); r 7.02(a)(ii) Supreme Court (General Civil Procedure) Rules 2015 (Vic).

it is a *forum conveniens* by reference to the criteria of *McConnell Dowell v Lloyd's Syndicate* 396²²⁷ and *Spiliada*.²²⁸ Australian courts will make the same assessment by reference to *Voth*.²²⁹

The Australia-New Zealand scheme of civil jurisdiction and judgments is a consequence of the UK's entry to the EEC. Although the economic integration of the two countries may have taken place anyway, the reason that it did take place was because of the 'shock' to both countries, but to New Zealand in particular, caused by the loss of UK markets. As Michael Kirby put it, the two countries are 'leftovers' of the Empire.²³⁰ And a scheme that allows any court in either country complete jurisdictional competence over individuals and businesses in the other, without an overarching court of appeal, is only possible because of the shared Imperial background and its legal tradition.

E. After Brexit

1. *Lawmaking in the UK and the rest of the Commonwealth*

The development of private international law in the Commonwealth during the UK's period in the EU shows that, in general, the UK's membership of the EU itself had little direct effect on the changes that took place after 1973. The Australia-New Zealand jurisdiction and judgments scheme is unusual in being designed for a single market area that arose as a consequence of the loss of UK markets,²³¹ and even there the scheme was cut to an Australian pattern that itself developed in response to other processes of legal decolonisation. Further, the Europeanisation of the UK's private international law, coupled with the Commonwealth's unwillingness to adopt European institutions,²³² have seen important legal developments in the UK being regarded as irrelevant for

²²⁷ *McConnell Dowell* (n 72).

²²⁸ *Spiliada* (n 65).

²²⁹ *Voth* (n 81).

²³⁰ M Kirby, "Trans-Tasman Federation – Achievable, Impossible, Unnecessary?" (2011) 16 *Canterbury Law Review* 1, 8.

²³¹ See text to above nn 209–230.

²³² See text to above nn 38–56.

the Commonwealth.²³³ After Brexit, the retention of the rules of the Rome I and II Regulations in the UK is likely to see the other Commonwealth countries engage more closely with each other than with the English courts on questions of applicable law in contract and tort. However, this is a distancing that is driven by legislation and not by any weakness in the shared common law tradition. The suggestion that Gaudron J made in *Oceanic Sun Line Special Shipping Inc v Fay* that the English judiciary had become acculturated with European attitudes to civil jurisdiction seems to be unique.²³⁴ The view does not seem to have been shared by other Commonwealth judges, and in the same case was explicitly rejected by Wilson and Toohey JJ as providing any excuse to disregard English precedent.²³⁵

Any decline in the influence of the UK courts on legal development in the private international law of Commonwealth countries owes much more to other processes of legal decolonisation. The comments made by La Forest J in *Tolofson v Jensen* and Kirby J in *John Pfeiffer Pty Ltd v Rogerson* about the removal of appeals to the Privy Council partially explains the behaviour of Commonwealth courts after 1973.²³⁶ However, the constitutionalisation of private law that generated the more radical changes in *Tolofson* and *Pfeiffer* was more a product of the UK's abdication of its lawmaking power for Canada and Australia in the 1980s.²³⁷ This is not to say, outside the applicable law questions in contract and tort, that the English courts risk losing the esteem that they have long enjoyed as the courts that matter most in the Commonwealth's common law adjudication. The uptake of *Spiliada* standards of *forum conveniens*, a process that only began while the UK was in the EU, shows how remarkably influential the English courts remain. Apart from the position for New Zealand, this was a Commonwealth-wide development that did

²³³ Another consequence of this is that the distinctive authority that *Dicey, Morris and Collins* has had in the private international law of the Commonwealth has been progressively eroded: see Mortensen, Garnett and Keyes (n 12) 13, 18; Hook and Wass (n 12) 7; cf M Keyes, 'Order, Illumination and Influence: *Dicey, Morris & Collins on the Conflict of Laws, Fourteenth Edition*' (2007) 3 *Journal of Private International Law* 355, 360.

²³⁴ See text to above nn 93–101.

²³⁵ *Oceanic Sun* (n 86) 212.

²³⁶ See text to above nn 186–194.

²³⁷ See text to above nn 22–25.

not depend on Privy Council supervision.²³⁸ However, this influence now depends for the most part on the quality and persuasiveness of the adjudication.²³⁹ The law stated in *Spiliada* was coherent, met a clear policy purpose in civil jurisdiction and suffered no dissent in the House of Lords itself. In contrast, a decision like *Boys v Chaplin* had no *ratio* and perpetuated a confusing and anomalous approach to applicable law. It was bound to put pressure on independent national courts to change the law, but without any overarching coordination. The interplay of precedent across the Commonwealth after *Boys* is a striking example of the capacity of courts to pick and choose authorities, instead of being bound to follow them. An Australian decision is discarded in Australia and treated as unpersuasive in the Privy Council.²⁴⁰ However, it is followed in Canada, and the Canadian decision is then followed in Australia.²⁴¹ The Canadian and Australian decisions are thought persuasive in Singapore, but they cannot be adopted.²⁴² An Australian decision on how to treat the assessment of damages is overruled in Australia, but followed in England.²⁴³ These tensions will persist, and Brexit will not change them. Commonwealth courts will engage with each other, but the different common law of each country will evolve differently.

2. The enforcement of judgments

It should be recalled that, so far as the other Commonwealth countries are concerned, the real difference that Brexit brings is the opportunity to secure greater access to UK markets. The reduction of tariffs and subsidies, and the removal or increase of import and export quotas, might improve access to markets and will be welcomed. However, they do not necessarily reduce the business and legal risk that is inherent in cross-border trading and commercial

²³⁸ See text to above nn 65–121.

²³⁹ For a similar evaluation of the influence of the CJEU on UK courts' approach to EU law that will be continued after Brexit, see P Gilliker, 'Interpreting Retained EU Private Law Post-Brexit: Can Commonwealth Comparisons Help Us Determine the Future Relevance of CJEU Case Law' (2019) 48 *Common Law World Review* 15.

²⁴⁰ See text to above nn 172–182.

²⁴¹ See text to above nn 183–201.

²⁴² See text to above nn 170–171.

²⁴³ See text to above nn 180–181, 202–208.

relationships. It is precisely why easing the ability to enforce judgments across borders often follows free trade.

There is little reason to be satisfied with the current conditions for the recognition and enforcement of judgments between Commonwealth countries. The common law's approach in the early 20th century, despite the Imperial trade preference, was for English courts to treat colonial judgments on precisely the same restrictive terms as they did foreign judgments.²⁴⁴ Scrutton J tried in *Phillips v Batbo*²⁴⁵ in 1912 to be more generous in the recognition of decrees 'of Courts within the British Empire' that then had a shared sovereignty,²⁴⁶ but English and colonial courts refused to accept his view.²⁴⁷ This is the reason why, with greater consciousness of the implications of the shared but divided sovereignty of federal Canada, La Forest J was so critical of the application of the English common law rules to the interprovincial enforcement of judgments.²⁴⁸ Judgments of a sister-province should be enforced if the proceedings had a real and substantial connection with the rendering court.²⁴⁹ Similarly, the Australian federal scheme gives interstate recognition of judgments without enquiring into the jurisdiction exercised by the other state's courts – the assumption being that if the judgment debtor had contested the rendering court's jurisdiction then that court must have eventually concluded that it was the *forum conveniens*.²⁵⁰ The creation of the single market with New Zealand has seen the same generous basis for the enforcement of judgments incorporated into the trans-Tasman scheme.²⁵¹

²⁴⁴ Cf *Emanuel* (n 105) (Western Australia) with *Schibbsby v Westenholz* (1870) LR 6 QB 155 (France); *Roussillon v Roussillon* (1880) 14 ChD 351, 371 (France); *Carrick v Hancock* (1895) 12 TLR 59 (Sweden). Colonial courts had followed the same rules for judgments rendered elsewhere in the Empire: *Herman v Meallin* (1891) 8 WN (NSW) 38 (enforcement of Victorian judgment in New South Wales); *Forbes v Simmons* (1914) 20 DLR 100 (enforcement of British Columbia judgment in Alberta).

²⁴⁵ [1913] 3 KB 25.

²⁴⁶ *Ibid*, 32–3.

²⁴⁷ *Jacobs v Jacobs and Ceen* [1950] P 146, 153 (Cape Province). See also the interpretation of *Redhead v Redhead* [1926] NZLR 131 (enforcement of English judgment in New Zealand) in L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws*, 15th edn (Stevens & Sons Ltd, 2012) 709.

²⁴⁸ *Morguard* (n 102) 1095. See text to above nn 102–111.

²⁴⁹ See text to above nn 102–109. The Canadian courts have applied the same recognition rules to foreign judgments: *Beals v Saldanha* [2003] 3 SCR 1077.

²⁵⁰ See text to above nn 112–121.

²⁵¹ See text to above nn 209–230.

The current judgments schemes across the broader Commonwealth are anchored in the 19th century English courts' approach to foreign judgments and have remained structurally unchanged since the 1930s. The Administration of Justice Act 1920 (UK) set up a scheme only for the Empire and Commonwealth, and still includes arrangements for the enforcement of judgments for New Zealand and Singapore. The Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) was intended for judgments from foreign, rather than Commonwealth, countries, but the scheme it introduces covers judgments from Australia and Canada and is the model more commonly adopted across the Commonwealth for the reciprocal enforcement of judgments. Australia,²⁵² some Canadian provinces,²⁵³ New Zealand²⁵⁴ and Singapore²⁵⁵ have reciprocating legislation although, oddly, all of these are modelled on the UK Act of 1933. This legislation improves on the common law by providing for enforcement by registration and not litigation,²⁵⁶ but it has a narrow base for the enforcement of qualifying judgments. First, the judgment must be for a sum of money.²⁵⁷ Secondly, the registration of the judgment can be set aside if the judgment debtor had not conducted business or had not been resident in the place of the rendering court, or had not voluntarily submitted to the jurisdiction of that court.²⁵⁸ The conditions on which the other Commonwealth court is taken to have had jurisdiction to give the judgment are

²⁵² Foreign Judgments Act 1991 (Cth).

²⁵³ Court Order Enforcement Act, RSBC 1996 (BC); Reciprocal Enforcement of Judgments Act, RSNL 1990 (N&L); Reciprocal Enforcement of Judgments (UK) Act, RSO 1990 (O); Enforcement of Foreign Judgments Act, SS 2005 (Sask). Other provinces have reciprocal enforcement of judgments legislation that covers Australian judgments but not those from the UK, New Zealand or Singapore: Reciprocal Enforcement of Judgments Act, RSA 2000 (AB); Reciprocal Enforcement of Judgments Act, CCSM (Man).

²⁵⁴ Reciprocal Enforcement of Judgments Act 1934 (NZ).

²⁵⁵ Reciprocal Enforcement of Commonwealth Judgments Act 1934 (Sg).

²⁵⁶ S 6 Foreign Judgments Act 1991 (Cth); s 29 Court Order Enforcement Act, RSBC 1996 (BC); s 3 Reciprocal Enforcement of Judgments Act, RSNL 1990 (N&L); s 12 Enforcement of Foreign Judgments Act, SS 2005 (Sask); s 4 Reciprocal Enforcement of Judgments Act 1934 (NZ); s 3(1) Reciprocal Enforcement of Commonwealth Judgments Act 1934 (Sg); s 9(1) Administration of Justice Act 1920 (UK); s 2(1) Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

²⁵⁷ S 5 Foreign Judgments Act 1991 (Cth); s 28 Court Order Enforcement Act, RSBC 1996 (BC); s 2(1)(a) Reciprocal Enforcement of Judgments Act, RSNL 1990 (N&L); s 2 Enforcement of Foreign Judgments Act, SS 2005 (Sask); s 2(1) Reciprocal Enforcement of Judgments Act 1934 (NZ); s 2(1) Reciprocal Enforcement of Commonwealth Judgments Act 1934 (Sg); s 12(1) Administration of Justice Act 1920 (UK); s 1(2)(b) Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

²⁵⁸ S 7 Foreign Judgments Act 1991 (Cth); s 29(2) Court Order Enforcement Act, RSBC 1996 (BC); s 3(6)(b) Reciprocal Enforcement of Judgments Act, RSNL 1990 (N&L); s 6(3) Reciprocal Enforcement of Judgments Act 1934 (NZ); s 3(2)(b) Reciprocal Enforcement of Commonwealth Judgments Act 1934 (Sg); s 9(2)(b) Administration of Justice Act 1920 (UK); s 4(2)(a) Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

roughly those of the 19th century common law. Although Saskatchewan has amended its legislation to ensure that a court is taken to have jurisdiction to render judgment if it meets the *Morguard* standard of being in a place that has a real and substantial connection with the proceedings,²⁵⁹ it is most unlikely that there will be wholesale revision of the Commonwealth schemes to incorporate doctrine that is peculiar to Canada.

The broader *Morguard* bases by which the original court is recognised as having jurisdiction to render a judgment that is locally enforceable have been criticised as over-exposing Canadian businesses to the judicial power of foreign courts.²⁶⁰ The criticism is in part justified, inasmuch as the *Morguard* standard has been extended not only to judgments beyond the Canadian federation but also to judgments from foreign countries that may not recognise any Canadian judgments whatsoever. However, the price of securing the enforcement of transactions and integrity in commercial negotiations is that local businesses are sufficiently exposed to cross-border judgments to ensure that they can be compelled to perform contracts, pay damages for breach, or be subject to remedies for deceit and negligent misrepresentation. Any reduction of legal risk in trading and commercial relationships after Brexit will therefore require broader bases for recognising judgments than the schemes under the Acts of 1920 and 1933 can support. A comprehensive judgments scheme should allow for the enforcement of orders *in specie*, and especially injunctions, and accept that courts that exercise common special jurisdictions – the court for the place of the performance of a contract, for the place that gives a contract its applicable law, for the place where a tortious act that caused harm occurred – are assuming legitimate international jurisdictions. Although the federal schemes in Canada and Australia, and the trans-Tasman scheme, do more than this, Brexit will not bring the integrated economic markets that support them. This leaves three options, all of which require Commonwealth countries to be more prepared to accept civilian-influenced measures than they have generally been prepared to.

²⁵⁹ S 9 Enforcement of Foreign Judgments Act, SS 2005 (Sask).

²⁶⁰ HS Fairley, 'Open Season: Recognition and Enforcement of Foreign Judgments in Canada after *Beals v Saldana*' (2004) 11 *ILSA Journal of International and Comparative Law* 304, 316–318.

First, the UK may be seeking re-entry to the modified Lugano Convention, and it is an instrument that is technically open to other countries.²⁶¹ However, the experience of proposals in the Commonwealth to adopt the Lugano Convention suggests that other countries have little appetite to join Lugano. Australian and New Zealand proposals to accede to the Lugano Convention disappeared after the Trans-Tasman Working Party recommended against adopting any scheme modelled on the Brussels I Regulation.²⁶² And as it may be that Brussels I and Lugano were only considered in Australia and New Zealand because the UK was a member of the EU, this seems an unlikely means after Brexit of reshaping private international law within the Commonwealth.

Secondly, a small gain in improving the enforcement of contracts could be made with the adoption of the HCCH Choice of Court Agreements Convention. The UK and Singapore are already parties and, when the UK had the advantage of EU accession to the Convention, it had already eased the enforcement of judgments between the two countries.²⁶³ The enforcement of judgments under the Commonwealth schemes modelled in the Acts of 1920 and 1933 allow registration where the judgment debtor had agreed to submit to the court's jurisdiction,²⁶⁴ and this includes submission by an exclusive choice of court agreement. The Convention, though, has a broader definition of choice of court agreements that are deemed to be exclusive than the common law does, and it has stronger means than the common law of requiring a choice of court to be honoured. Australia and New Zealand have already, in part, implemented the terms of the Convention between themselves,²⁶⁵ and it would seem a useful support for international commercial contracts to add the Convention to the terms of any trade agreements with the UK.

²⁶¹ See text to above n 37.

²⁶² See text to above nn 49–56.

²⁶³ *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8; see Choice of Court Agreements Act (Sg).

²⁶⁴ See above n 258.

²⁶⁵ See text to above nn 222–223.

And thirdly, the HCCH Convention on the Recognition and Enforcement of Foreign Judgments²⁶⁶ is presently the most promising broad-based means of recognising judgments that can improve the legal security of trade and commerce. The jurisdictions recognised under the Judgments Convention are much more expansive than those recognised at common law and under the Acts of 1920 and 1933; the significant difference being that special jurisdictions which depend on the proceedings having a connection with the place where the court making judgment was located are given legitimacy.²⁶⁷ In many respects, the Judgments Convention borrows from the Brussels I Regulation and the modified Lugano Convention and, so, also bears a strong civilian quality.²⁶⁸ No Commonwealth country has yet signed the Judgments Convention, although there is some support for it.²⁶⁹ It is not as generous as the recognition of judgments is in the Australian federal scheme and under the Canadian *Morguard* structures.²⁷⁰ However, the Judgments Convention may yet be the best means of bridging the old Imperial rules and the modern federal schemes in ways that, for the Commonwealth, can help to give legal effect to the economic opportunities of Brexit.

²⁶⁶ Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (concluded at The Hague 2 July 2019).

²⁶⁷ Art 5 Judgments Convention.

²⁶⁸ See, eg F Garcimartin and G Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (Hague Conference on Private International Law, 2020) 98-110.

²⁶⁹ M Douglas, M Keyes, S McKibbin and R Mortensen, 'The HCCH Judgments Convention in Australian Law' (2019) 47 *Federal Law Review* 420; T Yeo, 'The Hague Judgments Convention – A View from Singapore', *Singapore Academy of Law Journal*, e-First, 3 August 2020.

²⁷⁰ Eg, see J Blom, 'The *Court Jurisdiction and Proceedings Transfer Act* and the Hague Conference's Judgments and Jurisdiction Projects' (2018) 55 *Osgoode Hall Law Journal* 257.