ARTICLES

Through the Looking Glass: Renvoi *in the New Zealand Context*†

RINA SEE*

The renvoi doctrine has again attracted significant attention following the High Court of Australia decision in Neilson v Overseas Projects Corporation of Victoria Ltd. *As renvoi has never been applied in New Zealand, there is little commentary on it in the New Zealand context. This article aims to explore renvoi in a wider framework before considering* Neilson. *It is submitted that renvoi is a solution of practical necessity and should be applied when the purpose of the choice of law rule would be promoted – such as to achieve uniformity. This article suggests that renvoi is appropriate in succession, title to immovables, formal validity of marriage and divorce, and, occasionally, contract and tort.* Neilson *is then assessed. The article argues that the majority's adoption of total renvoi was justified but it disagrees with the result. Finally, it observes that* Neilson *has limited direct relevance to New Zealand because of differences in our choice of law and jurisdiction-selecting rules.*

I INTRODUCTION

Within the area of conflict of laws lives a doctrine more baffling than the Jabberwocky — the renvoi doctrine. It arises whenever a court is directed, by its conflict rules, to consider the law of another country, and the conflict rules of that country refer the question back to the first court or somewhere else. The doctrine has amused, bewildered and frustrated jurists for over a century. Although interest in the doctrine had waned in the last few decades, the recent decision of the High Court of Australia in *Neilson v Overseas Projects Corporation of Victoria Ltd* has awakened the sleeping beast.[1]

Private international law witnessed a surge of discourse on renvoi following *Neilson*, adding to the already "immense amount of scholarly literature" on the topic.[2] An examination of the decision and the renvoi doctrine in the New Zealand context is timely given its significance. Such

† Winner of the 2012 Minter Ellison Rudd Watts Prize for Legal Writing.

* BA/LLB(Hons). The author would like to thank Dr Elsabe Schoeman of The University of Auckland Faculty of Law for her invaluable help and unending support.

1 *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, (2005) 223 CLR 331.

2 At 362.

discussion rarely occurs in New Zealand as renvoi has never arisen here. As *Neilson* has been amply analysed and discussed,[3] this article instead aims to explore the renvoi doctrine in a wider framework before considering *Neilson* in that light.

Part II of this article sets out an explanation of the renvoi problem and its "solutions", along with a summary of *Neilson* and the position in New Zealand. Part III observes that the general consensus is for renvoi to be applied where it promotes the purpose of the particular choice of law rule. The policy of uniformity is discussed.

Part IV looks at choice of law rules in several areas of law, and makes recommendations on renvoi's scope in respect of each area generally and as they apply in New Zealand. Finally, Part V returns to *Neilson*, tying the decision in with the wider renvoi landscape. Ultimately, this article concludes that *Neilson* should not be followed in New Zealand due to current differences in the two countries' rules, but leaves open such a possibility if changes occur in the future.

This enigmatic doctrine has been compared to getting lost in a hall of mirrors.[4] In keeping with this description, we follow Alice through the looking glass, to see what we find there.

II INTRODUCING "RENVOI"

The Great Puzzle

> Barbara, an Australian citizen, was living in China when she seriously injured herself falling down a flight of stairs (missing crucial balustrades) in an apartment owned by an Australian company. Five years after the accident, she sued the company for negligence in an Australian court. Under Australian private international law, foreign torts are governed by the law of the place where the tort occurred — in China. However, in China, where the parties have a common nationality or domicile, the law of their country may govern the question — that is, the law of Australia. Barbara's claim was within the six-year limitation period under Australian law, but had been statute-barred after one year under Chinese law.

These were the facts the High Court of Australia faced in *Neilson*. The issue the Court had to decide was whether Australian or Chinese substantive law was applicable. The claim could proceed if Australian law applied, but could

3 See, for example, Martin Davies "Renvoi and Presumptions about Foreign Law" (2006) 30 MULR 244; Andrew Dickinson "Renvoi: The Comeback Kid?" (2006) 122 LQR 183; Elsabe Schoeman "Renvoi: Throwing (and Catching) the Boomerang — *Neilson v Overseas Projects Corporation of Victoria Ltd*" (2006) 25 UQLJ 203; Reid Mortensen "'Troublesome and Obscure': The Renewal of *Renvoi* in Australia" (2006) 2 Jour PIL 1; and Mary Keyes "Foreign law in Australian courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*" (2007) 15 TLJ 9.

4 *Neilson*, above n 1, at 351.

not under Chinese law. Australian conflict rules directed the application of Chinese law, but Chinese conflict rules referred the question *back* to Australian law. How should this be resolved? This is a classic example of renvoi.

Renvoi occurs when a forum is directed by its conflict rule to apply the law of another country or state, but the conflict rules of the other country refer the question elsewhere. The matter may be referred back to the law of the forum (remission), or on to the law of a third country (transmission). The example above was of remission, as the Australian forum was directed to apply Chinese law, but the Chinese conflict rule referred it back to Australian law. Put simply, renvoi involves a "[c]onflict of [c]onflict [r]ules".[5] It occurs whenever the conflict rules of the relevant countries differ, or are interpreted differently, and point to a different outcome.

It is useful to conceive of a country's laws as being divided into two parts: its internal law and its conflict of laws rules. The internal law consists of the substantive rules (the local law applicable to purely domestic disputes), while private international law rules have a purely selective function — to select the appropriate legal system. The renvoi question can be framed as follows: what does it mean to apply "the law of" a foreign legal system? If a court in Utopia is directed by its conflict rule to apply "the law of" Wonderland, does it refer merely to Wonderland's internal law, or does it refer to its whole law including its choice of law rules?

The difficulties do not end there. Here we encounter the infamous *circulus inextricabilis*.[6] If the law applied includes a country's choice of law rules, there is the theoretical possibility that Utopia's conflict rules point to Wonderland, Wonderland's conflict rules point to Utopia, Utopia's conflict rules point back to Wonderland and this continues in an international game of lawn tennis ad infinitum.[7] This paradoxical situation has been referred to as a hall of mirrors,[8] a merry-go-round,[9] officers bowing at Fontenoy[10] and Alphonse and Gaston "apres vous"-ing in the doorway.[11] For all the perplexing imagery, this problem is more a puzzle for legal minds than an issue in practice, there being no reported case in which a *circulus inextricabilis* has occurred.[12]

To summarise, renvoi arises if the forum court refers to the conflict rules of the lex causae and those rules are different from the forum's. Renvoi

---

5 Martin Davies, Andrew Bell and Paul Brereton *Nygh's Conflict of Laws in Australia* (8th ed, LexisNexis, Chatswood (NSW), 2010) at 315.

6 Inextricable circle.

7 James Fawcett and Janeen M Carruthers *Cheshire, North & Fawcett: Private International Law* (14th ed, Oxford University Press, Oxford, 2008) at 62.

8 *Neilson*, above n 1, at 351.

9 Erwin N Griswold "Renvoi Revisited" (1938) 51 Harv L Rev 1165 at 1167.

10 *Re Askew* [1930] 2 Ch 259 (Ch) at 267.

11 Bruce Welling and Richard Hoffman "'The Law of' in Choice of Law Rules: 'Renvoi' Comme Nostalgie de la Boue" (1985) 23 UWOL Rev 79 at 80.

12 Lawrence Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2006) at [4-033].

cannot arise if the conflict rules of both countries are identical, as they would agree on the internal law to be applied. In an ideal world where the conflict rules of all countries are exactly alike, renvoi would not arise and similar disputes would be decided similarly regardless of where the case is heard. However, as private international law rules are developed at the national level, inconsistencies are inevitable.

Some Way of Escape

1 All Three to Settle the Question

Three possible solutions are usually outlined in addressing renvoi and the ambiguous meaning of "the law of":[13]

- The "no renvoi" solution: a reference to "the law of" Wonderland is interpreted as a reference to its internal law only. Wonderland's conflict rules are not considered at all.
- The "partial" or "single renvoi" solution: when referring to Wonderland's law, the conflict rules of Wonderland are taken into account. If they point to "the law of" Utopia (or a third country) this is understood as a reference to its internal law only, and that law will be applied. In cases of remission, it is often said that the forum court "accepts the renvoi" from the foreign law.
- The "total" or "double renvoi" theory, also known as the "foreign court theory": the Utopian court attempts to mimic exactly what the Wonderland court would do if it were faced with identical facts, by looking to its conflict rules *and* its theory of renvoi. For example, a Wonderland judge might ignore Utopian conflict rules and simply apply Utopian internal law, or it may accept the remission from Utopian law and apply Wonderland's internal law. The Utopian court will adopt whichever law the Wonderland court would select.

It is immediately clear that the choice of approach determines the result. It is less obvious which solution should be adopted, as each has its set of benefits and flaws. The "no renvoi" theory is the easiest to apply, but it ignores the fact that a different result would have been reached if the case had been heard in the other country. It also applies the lex causae incompletely, on the basis of the forum's characterisation of certain laws as conflict rules. "Partial renvoi" applies the foreign law more fully, yet parity of result is still not achieved. Nonetheless, the fact that each court applies its own law could be seen as an advantage.

"Total renvoi" then seems to provide the answer. Uniformity of result,

13 At [4-007]–[4-009].

if not exact, is the best that can be accomplished in practice as the lex causae is applied in its totality. However, total renvoi has been subject to a whole raft of objections: the outcome is unpredictable, being dependent on proof of foreign law and the ascertainment of foreign attitudes to renvoi. Most alarmingly, we are faced with the *circulus inextricabilis*: if both Utopia and Wonderland adopt the total renvoi approach, each would aim to imitate the other, creating an infinite loop. The total renvoi doctrine is thus only workable if it is rejected by one of the countries involved.

Each of these approaches has had some measure of acceptance. The "no renvoi" rule has been adopted in Brazil, Greece, Tunisia and Spain,[14] as well as several jurisdictions in the United States.[15] It is also the position in Europe for contractual and non-contractual obligations.[16] "Partial renvoi" is followed in most civil law systems,[17] including countries such as Japan, Thailand and South Korea.[18] Pertinently for New Zealand, "total renvoi" has been accepted in England, and — since *Neilson* — Australia.

2 *Which Way? Which Way?*

In *Neilson*, a six-to-one majority rejected the "no renvoi" alternative, with McHugh J dissenting. Of the six that favoured applying renvoi, Callinan J endorsed what effectively was the theory of single renvoi because he was concerned with the *circulus inextricabilis*. The remaining five judges did not choose between single and double renvoi, but acted in a manner consistent with the latter by aiming to establish what a Chinese court would have done. *Neilson* thus leaves us with the following tally: five votes for double renvoi, one for single renvoi and one for no renvoi.

"Well, in our country," said Alice

In New Zealand, the only mention of renvoi was obiter.[19] The issue in *Re Bailey* was whether the Court could make an order under the Family Protection Act 1955 regarding land situated in England, where the testator had died domiciled in New Zealand.[20] In deciding that it could not, Prichard

14 Jacob Dolinger "Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts" (2000) 283 Hague Academy Collected Courses 187 at 242, n 115.

15 American Law Institute *Restatement of the Law: Conflict of Laws* (2nd ed, American Law Institute Publishers, St Paul (MN), 1971) § 8.

16 Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L177/6, art 20; and Regulation 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2008] OJ L199/40, art 24.

17 Davies, Bell and Brereton, above n 5, at [15.4].

18 J Georges Sauveplanne "Renvoi" in Kurt Lipstein (ed) *International Encyclopedia of Comparative Law* (Mohr Siebeck, Tübingen (Germany), 1990) vol 3 at 33.

19 See David Goddard and Helen McQueen "Private International Law in New Zealand" (paper presented to New Zealand Law Society Seminar, Wellington, December 2001) at [9.6]. The authors consider it probable that in relevant areas, New Zealand courts would apply the whole of the foreign law.

20 *Re Bailey* [1985] 2 NZLR 656 (HC).

J stated:[21]

> This may involve a consideration of the theory of the renvoi — the Courts of the lex situs may have a rule that succession to immovables is governed by some other law, for example, the law of the testator's domicil or the law of his nationality. As between New Zealand and England the renvoi principle is of no effect in the present context because in both jurisdictions it is well established that the lex situs governs succession to immovables. The lex situs (the law in force in England) includes the Inheritance (Provision for Family and Dependants) Act 1975. That Act empowers the Court to afford relief only in relation to the estates of testators domiciled in England. It follows, in my view, that *if this Court is to determine the matter as would a Court sitting in England* — and applying the law in force in England — then this Court must inevitably hold that there is no provision enabling the making of an order affecting the devise of real property to Mrs Bremer by a testator not domiciled in England.

The passage suggests that renvoi would have been applied had the English choice of law rules been different from those of New Zealand. The language used may also indicate a preference for the total renvoi doctrine.[22] However, it is difficult to give such throwaway remarks any real significance.

III WHY RENVOI?

"I should like to have it explained," said the Mock Turtle

The renvoi doctrine had its beginnings over a century ago.[23] Prior to that, a reference to foreign law would usually have meant foreign internal law.[24] Since the doctrine's inception, there has been constant academic debate as to whether it serves any useful purpose.

At present, an overview of the literature discloses that the majority of writers reject renvoi in principle but acknowledge exceptions to the rule.[25] There are also a few who accept renvoi as a rule but refuse to apply the doctrine in certain situations.[26] It is clear, however, that the general hostility towards the doctrine has diminished.[27] Much of the historical discussion had been predicated on the assumption that absolute acceptance or rejection of

21 At 660 (emphasis added).

22 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [10].

23 The founding case is considered to be *Collier v Rivaz* (1841) 2 Curt 855, 163 ER 608.

24 *Re Askew*, above n 10, at 265.

25 See, for example, Collins, above n 12, at [4-023].

26 See Adrian Briggs "In Praise and Defence of Renvoi" (1998) 47 ICLQ 877 at 881–882.

27 See PE Nygh and Martin Davies *Conflict of Laws in Australia* (7th ed, LexisNexis Butterworths, Chatswood (NSW), 2002) at [15.12], expressing the view that "*renvoi* is a device at best to be tolerated, but certainly not to be encouraged or extended". After *Neilson*, the authors leaned towards a single renvoi approach: Davies, Bell and Brereton, above n 5, at [15.26].

the doctrine is necessary.[28] Instead, there is now a prevailing view that renvoi should be applied in a "purposive" manner — in some situations, where the doctrine is convenient and promotes justice, it may be applied.[29]

In deciding when the renvoi doctrine should be applied it has been suggested that one should look to the underlying policy or purpose of the conflict rule:[30]

> The doctrine should not ... be invoked unless the object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflict rules of that law.

Significantly, this approach was adopted in Gummow and Hayne JJ's judgment in *Neilson*.[31] Their Honours concluded that Australia's choice of law rule in tort was such a case. On this view, whether the doctrine should be applied turns on a purposive interpretation of the choice of law rule in question.

"No wise fish would go anywhere without a porpoise"

Given that renvoi should be applied in a purposive manner, more questions arise. What purposes do choice of law rules serve? Will the operation of renvoi meet these purposes? If so, how?

To answer these questions, we look briefly to the reasons for the doctrine's development. Several of these can be identified from the early jurisprudence:

- Renvoi's use as an "escape device" to mitigate the effects of harsh conflict rules;[32]
- A desire to apply the lex fori as the law with which the forum courts are more familiar;[33]
- The promotion of international comity and reciprocity;[34] and
- The use of renvoi as a means to secure international uniformity of result.[35]

Some of these justifications have fallen into disfavour. For example, it has been considered inappropriate for renvoi to be used to apply the law of the

---

28 Collins, above n 12, at [4-023].

29 At [4-022]. See also a resolution passed on when renvoi should be applied: Institut de Droit International *Taking Foreign Private International Law to Account* (Session of Berlin, 23 August 1999).

30 Collins, above n 12, at [4-023].

31 *Neilson*, above n 1, at 369.

32 See *Collier v Rivaz*, above n 23; and *Re Lacroix* (1877) 2 PD 94 (Prob).

33 See *L'Affaire Forgo* (1883) 10 Clunet 64; and *L'Affaire Soulié* [1910] Clunet 888.

34 See *Re Trufort* (1887) 36 Ch D 600 (Ch).

35 See *Re Annesley* [1926] 1 Ch 692 (Ch); *Re Ross* [1930] 1 Ch 377 (Ch); and *Re Askew*, above n 10.

forum,[36] or to escape results dictated by a strict conflict rule as it adds to indeterminacy.[37] The idea that renvoi is necessary to ensure respect for other state sovereigns has also been rejected as outmoded.[38] Still, others have taken the view that renvoi can legitimately be used for these purposes because they contribute towards expediency and practicality.[39]

One objective has been generally accepted as appropriate: that of achieving international uniformity of outcome. Even the staunchest critics have recognised exceptions to their stance on the basis that renvoi would achieve harmony of result in limited situations.[40] In recent years, uniformity has taken on additional significance in the movement against forum shopping and has now emerged as the chief justification for renvoi.

Uniformity in Utopia

1 Forum Shopping

Historically, uniformity across jurisdictions was sought in the area of succession to ensure that the property of a decedent would be distributed as a unit as far as possible.[41] However, it was not significant, having received little attention in earlier cases on renvoi. Recently, as courts have become increasingly concerned with forum shopping, uniformity has entered the limelight. This may explain the increased acceptance of renvoi in recent times and, ultimately, the result in *Neilson*.

Forum shopping is where a party is able to "shop around" for a forum that will apply the law most favourable to its case, gaining an advantage that would not have been available to it in its primary forum. The prevention of forum shopping has become a key policy in private international law.[42] This policy has led to development in other areas as well, such as the trend towards substantive characterisation of rules to limit application of the lex fori. It is particularly evident in plaintiff-friendly jurisdictions like the United States and England, which have become popular destinations for international litigation, and is likely to be grounded in the interests of preserving their judicial resources.

Aside from pragmatic concerns, it is inherently desirable that like cases be treated alike, regardless of where they are decided. It has been said that the "purpose of a conflict-of-laws doctrine is to assure that a case will be treated

36 Ernest G Lorenzen "The *Renvoi* Doctrine in the Conflict of Laws — Meaning of 'The Law of a Country'" (1918) 27 Yale LJ 509 at 520.

37 James Audley McLaughlin "Conflict of Laws: The Choice of Law *Lex Loci* Doctrine, The Beguiling Appeal of a Dead Tradition, Part One" (1991) 93 W Va L Rev 957 at 997–998.

38 Peter North and James Fawcett *Cheshire and North's Private International Law* (13th ed, Butterworths, London, 1999) at 5. Noted in *Neilson*, above n 1, at 363.

39 See Griswold "Renvoi Revisited", above n 9, at 1193.

40 See Lorenzen, above n 36, at 528–529.

41 Norman Bentwich *The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (Sweet & Maxwell, London, 1911) at 181.

42 See *Chaplin v Boys* [1971] AC 356 (HL) at 378 and 389; and *The Atlantic Star* [1974] AC 436 (HL) at 454.

[in] the same way ... regardless of the fortuitous circumstances which often determine the forum".[43] It would be unfair to defendants if plaintiffs could improve their position simply by unilaterally choosing a law more favourable to them.[44] Gummow and Hayne JJ recognised this in *Neilson*, remarking that conflict rules:[45]

> ... should, as far as possible, avoid parties being able to obtain advantages by litigating in an Australian forum which could not be obtained if the issue were to be litigated in the courts of the jurisdiction whose law is chosen as the governing law.

Forum shopping is only a problem when choice of law rules vary across jurisdictions and the resulting applicable law differs. It can be curtailed by aligning those rules: if the same outcome is reached regardless of where a case is brought, there is no material advantage in choosing one forum over another. Renvoi theoretically ensures that a dispute is decided the same way no matter where it is heard by adopting the law that the other jurisdiction would have applied. It thus promotes uniformity, which curbs forum shopping.

2 *Jurisdiction Rules and Uniformity*

In his defence of renvoi, Briggs views the renvoi doctrine as the only real means by which forum shopping can be controlled in England after English law abandoned the forum non conveniens doctrine.[46] He maintains that renvoi serves an important jurisdiction-selecting function through its operation within the field of choice of law.[47] Accordingly, he claims that renvoi should be given wider application.[48]

Briggs observes that the overarching aim in private international law is to identify the most appropriate legal system to govern a particular dispute. Jurisdiction-selecting rules such as the forum non conveniens doctrine serve a "gatekeeper" function, narrowing down the number of potentially applicable jurisdictions. Courts have the power to decline jurisdiction where there is another appropriate forum with closer connection to the proceedings.[49] If several courts still concurrently have jurisdiction, the search for the applicable law is continued through the operation of their choice of law rules.

Where the choice of law rules of each jurisdiction correspond, each selects the same applicable law and a consistent result is obtained. However, different jurisdictions often have different choice of law rules pointing toward

---

43 *Lauritzen v Larsen* 345 US 571 (1953) at 591.

44 See *Chaplin v Boys*, above n 42, at 378 and 389.

45 *Neilson*, above n 1, at 363.

46 Briggs, above n 26, at 880. The doctrine no longer applies in English law due to the United Kingdom's adoption of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (signed 27 September 1968, entered into force 1 February 1973).

47 At 881.

48 At 882.

49 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

different applicable laws. As a result, like cases receive dissimilar outcomes, and the object of identifying the "best" legal system to govern the dispute is not met. By deciding as other jurisdictions would, renvoi is a last ditch attempt to ensure the operation of only one set of choice of law rules — a single applicable law and a particular result — so that uniformity prevails.

Without the sentry doctrine of forum non conveniens in England, the number of potential jurisdictions where the case may be heard is greater. According to Briggs, renvoi becomes all the more important for achieving uniformity there.[50] Conversely, on this reasoning, there is less need for uniformity to be realised through back-door renvoi if forum non conveniens operates at the start. It is worth pointing out that unlike in England, forum non conveniens continues to apply in both Australia and New Zealand.[51] Consequently, the need for renvoi may be less dire.

3 Worldwide Uniformity

The use of renvoi to achieve uniformity is commonly criticised for being a poor substitute for internationally standardised choice of law rules. Schreiber asserts that renvoi does not in fact achieve uniformity, and that identity of result can be secured "only by the international adoption of a uniform body of conflict-of-laws rules".[52] Similarly, in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, Millett J remarked:[53]

> [Renvoi] owes its origin to a laudable endeavour to ensure that like cases should be decided alike wherever they are decided, but it should now be recognised that this cannot be achieved by judicial mental gymnastics but only by international conventions.

The use of international conventions to achieve uniformity of result is certainly more straightforward than renvoi. Multilateral agreement would ensure, regardless of the forum, that all jurisdictions' choice of law rules would direct that the same substantive law apply, such that uniformity across cases is achieved. This aim has been pursued by international organisations, such as the Hague Conference on Private International Law, which has developed international covenants to standardise choice of law rules across countries. Legislation has also been passed for this purpose amongst European Union member states.[54] The renvoi problem does not arise where the relevant countries are all signatory states sharing the same conflict rules.

Still, the success of this endeavour is limited. International agreement

50 Contrast Mortensen, above n 3, at 25, who considers that uniformity should be left to jurisdiction and excluded from choice of law.

51 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; and *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA).

52 Ernst Otto Schreiber Jr "The Doctrine of the Renvoi in Anglo-American Law" (1918) 31 Harv L Rev 523 at 534–536.

53 *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 (Ch) at 1008.

54 See Rome I, above n 16; and Rome II, above n 16.

can only achieve uniformity in every situation if the same choice of law rules are adopted by every country, on every matter — a goal far out of reach. This is illustrated by the failure of what became known as the "Renvoi Convention". Recognising the futility of attempting to standardise choice of law rules worldwide, an attempt was made instead to formulate uniform rules to govern conflicts between conflict rules.[55] However, even after limiting the scope of the convention to conflicts between rules of nationality and domicile, this proved to be too ambitious. Only two out of the required five countries ratified the Convention, and it never came into force.

In the absence of international conventions standardising all conflicts rules, renvoi is again a backup means of maintaining uniformity. As Bentwich noted:[56]

> [U]ntil an international convention is substituted for national law, the *renvoi* principle offers an excellent means for extending conventional law to the greatest possible number of States, and eliminating the grave difficulties which actually result from the divergence of national laws.

The aim of attaining worldwide harmony in all conflict rules is still a worthwhile goal, but it is almost certainly unachievable. Although renvoi will arise less frequently as more international conventions are adopted, there will always be situations where it remains an issue.

4 "Contrariwise," continued Tweedledee, "... that's logic"

The above discussion has proceeded on the assumption that renvoi does in fact achieve uniformity. Proponents of the doctrine usually presume that the same outcome would be reached if the forum court applied the choice of law rules of the foreign law. Critics often try to undermine this assumption by pointing out logical fallacies and practical shortcomings.[57] It is necessary to examine further whether uniformity can actually be attained through renvoi.

David Hughes set out to solve this conundrum.[58] He applies mathematical tools to the doctrine to evaluate whether it is logically possible for uniformity to be achieved. First, he ascribes each renvoi solution with a renvoi number n, where n is the maximum number of references between the countries. The no-renvoi solution is thus "0-renvoi", the single renvoi solution "1-renvoi" and the foreign court theory "∞-renvoi". He then outlines all the possible combinations when two countries have differing conflict rules.[59] Applying the "collision" and "difference" theorems, he concludes that

55 Convention Relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile (signed 15 June 1955).

56 Bentwich, above n 41, at 187–188.

57 See Thomas A Cowan "Renvoi Does Not Involve a Logical Fallacy" (1938) 87 U Pa L Rev 34.

58 David Hughes "The Insolubility of *Renvoi* and its Consequences" (2010) 6 Jour PIL 195.

59 At 209–214. The outcomes depend on whether the two countries' renvoi numbers n are the same or different, and even or odd.

renvoi is actually "logically insoluble", because either uniformity will not be achieved,[60] or uniformity is achieved, but it is arbitrary which country's law is applied, such that predictability and meaning is sacrificed.[61]

Having reached this conclusion, Hughes observes that it is (paradoxically) in the *circulus inextricabilis* situation that an escape can be found, because the judge can step back and adopt a decision that is both meaningful and uniform.[62] The lex causae should be selected through standardised secondary rules, looking to the policies of all the countries affected by the "loop".[63] Accordingly, Hughes advocates universal adoption of the foreign court theory. It seems, however, that this approach does away with renvoi altogether and simply ascertains which internal law is most appropriate for the dispute on a proper law enquiry.

Hughes' analysis confirms, at least, that uniformity is logically achievable in certain instances of renvoi, even if the outcome is arbitrary. Achieving perfect uniformity in practice is a different story. There are inevitably restrictions on the extent to which a forum court can imitate exactly a foreign court's decision processes.[64] For instance, a forum court can refuse to apply foreign law on public policy grounds. The forum court will also apply its own procedural rules, such as its rules of evidence, rather than those of the foreign law. Finally, evidence of foreign law is always limited.[65] Apart from conflicting expert evidence, differences in legal traditions and attitudes that can influence the outcome will never be adequately conveyed.

Renvoi is not perfect. In some situations it is logically incapable of achieving uniformity and, in others, discrepancies will inevitably arise from glitches in its implementation. Nonetheless, renvoi goes some way toward ameliorating these differences, reducing the scope for forum shopping.

IV USING RENVOI

All Sorts of Choice of Law Rules

Having established that renvoi *can* achieve uniformity, it is necessary to determine the types of situations in which uniformity of outcome is particularly desirable. Although deterring forum shopping is generally a noble objective, the advantages of achieving uniformity with renvoi must be balanced against the disadvantages, such as difficulty in application, unpredictability of result and dependence on proof of foreign law. These

60 Where *n* is finite and the same (when both countries adopt no or single renvoi).

61 Where *n* is different (combinations of single–no renvoi, total–single renvoi and total–no renvoi). The uniform law that is applied will simply be that of the country with the lower *n* number; this is "no better than the flip of a coin": at 214.

62 At 215–217.

63 At 217–224.

64 Ed Rimmel "The Place of Renvoi in Transnational Litigation — A Pragmatic Approach to an Impractical Doctrine" (1998) 19 Hold LR 55 at 60–61.

65 At 62–64.

create uncertainty for the parties and should also be minimised. Accordingly, the renvoi doctrine should only be invoked when uniformity is a key purpose of the choice of law rule in question.

This approach can be found in the American Restatement (Second) of Conflict of Laws.[66] While maintaining the basic rule that "the law" of another state refers to its local law,[67] § 8(2) reads:

> When the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the forum will apply the choice-of-law rules of the other state, subject to considerations of practicability and feasibility.

There are two main situations in which this section will apply: when the other state clearly has a dominant interest in the issue to be decided and where there is an urgent need for all states to apply a single law in resolving the question.[68] The former situation will include matters involving title to land, the lex situs clearly having a dominant interest. The latter is directed at issues such as succession to movables, where no one legal system has an inherently dominant interest but uniformity of distribution is important.[69] Further, the requirements of practicability and feasibility mean that the exception cannot be applied in areas where choice of law rules are imprecise, such as in tort and contract.[70] In the event of a *circulus inextricabilis*, the forum is directed to abandon the renvoi and apply a local law of its own choosing instead.[71]

In discussing when renvoi should be applied, Hughes distinguishes between two common forms of choice of law rules:[72]

- "Territory-based rules" seek to match the facts of a cause of action with a particular locality. Examples are the lex situs rule for property, the lex loci delicti rule in tort and the lex loci celebrationis rule of marriage.
- "Proper law rules" seek to identify the law that is most appropriate to the circumstances. Such rules are used in contract and tort where a court attempts to select the law most closely connected to the cause of action.

Hughes asserts that territory-based rules are focused primarily on uniformity, and secondarily on certainty.[73] Once the place of the action is determined,

---

66 *American Restatement*, above n 15.

67 At § 8(1).

68 At § 8 comment h.

69 At § 8 comment h.

70 At § 8 comment j.

71 At § 8 comment j.

72 Hughes, above n 58, at 204–206. He also describes "interest analysis" rules, but these are mostly prevalent in the United States.

73 At 204–205.

resolution of the question is deferred entirely to the courts of that place. Reference to the "law" in these "place" rules should thus be interpreted as the whole law. Conversely, proper law rules are "law" rules, directing selection of a particular law instead of a place. The policy underlying these rules is to apply the substantive law that is the most closely connected. Renvoi would defeat this policy as it applies another internal law, one that is less connected in the eyes of the forum.

Forum shopping may be less of a concern with proper law rules if it is a matter of judicial discretion which substantive law ultimately applies. However, the assumption that proper law inquiries are directed at identifying the most appropriate "law" rather than the "place" is questionable. Many of the connecting factors used in proper law inquiries attempt to locate where salient facts pertaining to the cause of action occurred. There is thus room to argue that it is the whole of the law that should be applied when "place-based" connecting factors are determinative of the choice.

Through a Telescope, Then Through a Microscope ...

Whether renvoi is suited to a particular situation requires an in-depth examination of the purpose of the particular choice of law rule in question. In *Neilson*, Gummow and Hayne JJ said:[74]

> Choosing a single overarching theory of renvoi as informing every question about choice of law would wrongly assume that identical considerations apply in every kind of case in which a choice of law must be made. But questions of personal status like marriage or divorce, questions of succession to immovable property, questions of delictual responsibility and questions of contractual obligation differ in important respects. Party autonomy may be given much more emphasis in questions of contract than in questions of title to land. Choice of governing law may be important in creating private obligations by contract but less important when the question is one of legal status. Choosing one theory of renvoi as applicable to all cases where a choice of law must be made would submerge these differences.

Nonetheless, despite efforts to categorise and rationalise choice of law rules, identifying the precise policy that underlies the relevant conflict rule is easier said than done. Conflict rules may not even have an articulated policy basis, instead persisting only through precedent.[75] While discovering a rule's purpose may sometimes require historical research into the rule's origins, it may be more relevant to ask what present-day courts should assume to be the purpose of the rule.[76] With this in mind, we consider whether and how the

74 *Neilson*, above n 1, at 366.

75 Mortensen, above n 3, at 16.

76 Walter Wheeler Cook *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press, Cambridge (MA), 1942) at 243–244.

doctrine should apply in particular classes of cases.

1 Succession

(a) Formal Validity

The renvoi doctrine originated in the formal validity of wills. Generally, at common law, succession to a deceased's movables is governed by the law of the deceased's domicile at the date of death, while succession to immovables is regulated by the law of the place where the property is situated.[77]

Partial renvoi was originally used to soften the rigidity of the common law choice of law rule and to avoid undesirable results.[78] It was used as an alternative rule of reference to give effect to wills made in legitimate form. Choice of law rules were seen as permissive rather than mandatory.[79] This was rendered unnecessary when the Wills Act 1963 (UK) was passed, which excluded renvoi but expanded the range of applicable laws to reduce the risk of testamentary dispositions being held void for want of form.[80] That Act stemmed from the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, which aimed to standardise the rules on formal validity of wills across contracting jurisdictions.[81]

These legislative developments indicate that the predominant purposes of these rules are to ensure uniformity across jurisdictions and to uphold testators' intentions.[82] Although renvoi has been specifically excluded in English legislation, its operation as an alternative is consistent with these purposes. Permitting the widest range of legal systems to govern the question ensures that testators' intentions are always given effect. Some may find this excessive, but others have "no objection to this extreme latitude".[83] Given the desirability of uniformity in this area, especially where it concerns immovable property, Rimmel considers the exclusion of renvoi "dubious".[84] Still, due to the ample choice provided, courts very rarely need to resort to renvoi to uphold the formal validity of a will.

In New Zealand, the formal validity of wills is still governed by the general common law rule but is supplemented by statute. Section 22 of the Wills Act 2007 allows for a wide range of choice of law rules in relation to the disposition of movable property.[85] Notably, renvoi is not excluded — it

---

77 See *Bremer v Freeman* (1857) 10 Moo PC 306, 14 ER 508 (PC). In the New Zealand context, see *Re Ah Chong* (1913) 33 NZLR 384 (SC).

78 See *Collier v Rivaz*, above n 23.

79 *Collier v Rivaz*, above n 23. But see *Bremer v Freeman*, above n 77.

80 Wills Act 1963 (UK), ss 1–2 and 6(1).

81 Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions (opened for signature 5 October 1961, entered into force 5 January 1964). New Zealand is not one of the 39 signatory states.

82 Rimmel, above n 64, at 67.

83 John Delatre Falconbridge *Essays on the Conflict of Laws* (2nd ed, Canada Law Book Company, Toronto, 1954) at 154.

84 Rimmel, above n 64, at 68.

85 These rules are still generally based on the testator's domicile, and are not as extensive as their English counterparts that also use the concepts of habitual residence and nationality.

is not specified that reference is only to be made to the internal law of the place. This means that it is open to a New Zealand court to decide that the law referred to also includes the country's conflict rules.[86] Wills disposing of immovable property are still governed by the lex situs at common law, and renvoi may also apply.[87] A New Zealand court should thus give serious consideration to the possibility of applying renvoi in this area, should the question arise.

(b) Essential Validity

Renvoi was initially applied to the essential validity of wills in the early cases of *Re Annesley* and *Re Ross*.[88] In this area the common law conflict rules still apply. Uniformity is an underlying purpose of the choice of law rules in this area. As Bentwich notes, the object of these rules is:[89]

> ... to secure a unity in the distribution of the succession, so that the whole of the movable estate of the deceased ... may be distributed on one system and subject to one law.

Levontin asserts that the whole of the personal law of the testator should apply because the domicile is the closest to the testator and is the "most knowledgeable" about him.[90]

Conversely, Cook suggests that the original purpose of the "lex domicilii at death" rule was not uniformity, but that an individual domiciled in a foreign country was so much a member of that community that his or her movables ought to be distributed in the same way as those of a citizen.[91] The aim of the rule may also be to apply the law with which the deceased is the most familiar.[92] On this view the reference should be to the domestic law, rejecting renvoi. Still, these arguments must overcome the weight of precedential authority, which points towards its use.[93]

(c) Brussels IV

The European Union has recently passed regulation on succession and wills in the form of the Brussels IV Regulation, which has not been opted into by

86 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [218].

87 At [219]. See *Re Bailey*, above n 20, at 660.

88 *Re Annesley*, above n 35; and *Re Ross*, above n 35.

89 Bentwich, above n 41, at 181.

90 AV Levontin *Choice of Law and Conflict of Laws* (AW Sijthoff, Leyden, 1976) at 67. This is especially so for matters of capacity.

91 Cook, above n 76, at 243–244.

92 JHC Morris "The Law of the Domicil" (1937) 18 BYBIL 32 at 36.

93 The only New Zealand case with obiter comments endorsing renvoi was in the context of material validity of wills: *Re Bailey*, above n 20.

the United Kingdom.[94] The Regulation aims to harmonise choice of law rules on most aspects of succession and generally looks to the person's last habitual residence to determine which law applies.[95]

Article 26(1) includes renvoi where a third (non-member) state is concerned, directing the application of "its rules of private international law" insofar as those rules direct application to the law of a member state or another third state which would apply its own law. Renvoi is otherwise excluded under art 26(2). The Regulation is thus used to maintain uniformity within member states, while renvoi achieves uniformity with non-member states.

2 *Property*

The choice of law rule used when determining title to property — whether movable or immovable — is the law of where the property is situated. This is generally due to convenience and practical necessity.[96]

(a) Title to Land

The one area in which there is general agreement that renvoi applies is title to foreign land.[97] There is a powerful interest in uniformity because the country where the land is situated has exclusive control over that land. The forum court's aim is thus to decide exactly as the foreign court would. It would be futile for a court to reach a different decision from the court of the situs: it would not be enforced and would undermine security of title. Numerous cases provide support for this position,[98] including obiter comments in New Zealand.[99]

In practice, the question of renvoi in title to land situations rarely arises. The lex situs choice of law rule has been widely adopted, so that the domestic rules of the lex situs are almost always applied when the issue of title to land arises. Further, jurisdiction rules usually prevent courts from assuming jurisdiction where foreign land is involved.[100] Still, this is a clear illustration of when renvoi is useful and necessary.

(b) Title to Movables

The position relating to title to foreign movable property is less certain and

94 Regulation 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession [2012] OJ L201/107.

95 Article 21.

96 Falconbridge, above n 83, at 218.

97 See, for example, Collins, above n 12, at [4-024]; and Falconbridge, above n 83, at 141 and 217–220.

98 *Re Ross*, above n 35; and *Re Duke of Wellington* [1947] 1 Ch 506 (Ch).

99 *Re Bailey*, above n 20, at 660.

100 *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL). The question whether the *Moçambique* rule applies in New Zealand is not yet settled.

is complicated by the distinction between tangible and intangible property.[101] Several commentators see no difference between movable or immovable property as the state where the property is situated exercises practical control.[102] Even so, they acknowledge that the argument for renvoi is much weaker as movables may be removed, reducing the need for acquiescing with the lex situs.

The purpose of uniformity may further be overshadowed by the competing consideration of certainty of ownership.[103] It may be commercially desirable to be certain whether a vendor has good title to pass to a purchaser, as otherwise the free alienability of goods will be undermined. A straight application of the internal lex situs provides this certainty, whereas superimposing renvoi complicates matters.

The current English authorities reject renvoi in this context. In *The Islamic Republic of Iran v Berend*, Ms Berend had purchased a fragment of an Achaemenid limestone relief originating from ancient Persepolis.[104] She had it delivered to her in Paris and attempted to auction it 30 years later in London. The Iranian government brought an action to recover the fragment as a national treasure under Iranian domestic law. The question for Eady J was whether the lex situs included French conflict rules, which allowed for an exception to apply the law of the state of origin.

Eady J looked to previous authority on the matter.[105] On the one hand, there was dicta that favoured applying renvoi in this context.[106] On the other, Millett J in *Macmillan Inc* had vehemently rejected renvoi in determining a question of priority between competing claims to shares.[107] In that case, his Honour described renvoi as "largely discredited", especially in commercial situations.[108] He stated that such questions are determined at the domestic level by striking a balance between the policies of security of title and security of a purchase. He then (confusingly) asserted that the same exercise should be carried out at a higher level. Accordingly, he concluded that there was "no scope" for renvoi in questions of priority between competing claims to shares.[109]

Eady J was swayed by the comments in *Macmillan*. He pointed out that the reason underlying the lex situs rule for movable property was "to achieve consistency and certainty".[110] Further, he could not detect any

101 The choice of law rule applicable for intangible property is uncertain. For current purposes, discussion will be confined to the lex situs rule.

102 See, for example, Collins, above n 12, at [4-025].

103 Rimmel, above n 64, at 70–71.

104 *The Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132. See Derek Fincham "Rejecting *Renvoi* for Movable Cultural Property: *The Islamic Republic of Iran v Denyse Berend*" (2007) 14 IJCP 111 at 117; and CJS Knight "Au Revoir to Renvoi?" (2007) 71 Conv 564.

105 *Berend*, above n 104, at [20]–[22].

106 See, for example, *Winkworth v Christie Manson & Woods Ltd* [1980] Ch 496 (Ch) at 514.

107 *Macmillan Inc*, above n 53, at 1008. The renvoi argument was abandoned on appeal.

108 At 1008.

109 At 1008.

110 At [23].

"practical control" exercised by France over the limestone fragment.[111] Although he acknowledged that it might be desirable to apply the law of states of origin when dealing with national treasures or monuments, he considered that a matter for international covenants.[112] As a result, his Honour declined to extend the notion of renvoi to questions of title to movables and French domestic law was applied.[113]

Eady J's decision to reject renvoi in *Berend* may have been influenced by the profound impact it would otherwise have had on the antiquities trade:[114] source nations could start seeking to enforce their national patrimony laws, and dealers and collectors in England could suddenly have their ownership questioned. There appeared to be good public policy reasons against applying renvoi in that case.

However, in *Blue Sky One Ltd v Mahan Air*, the rejection of renvoi led to an outcome that was less justifiable.[115] An aircraft registered in the United Kingdom was mortgaged to PK Airfinance US Inc. On the date the mortgage was granted, the aircraft was in the Netherlands. Default in repayment subsequently occurred and PK Airfinance sought to enforce the mortgage. The question was whether the rights to the aircraft had been validly transferred to PK Airfinance, which was governed by the lex situs. The mortgage was invalid under domestic Dutch law, but there was evidence that Dutch courts would have applied the law of the aircraft's register. This was English law, under which the mortgage was valid.

Beatson J also looked to the comments in *Macmillan*. His Honour was persuaded against applying renvoi due to the weight of authority against doing so in the field of movable property. The mortgage was held to be invalid, although it would have been upheld in the place it was executed.

The outcome appears senseless because of the arbitrariness of the aircraft's location at the time and the ease with which it could have been in a different jurisdiction. Security interests in aircraft mortgages are also undermined by the decision, where uniformity of recognition and enforcement is particularly desirable.[116] The contrast between *Berend* and *Blue Sky* demonstrates that the exercise of determining whether there are policies supporting renvoi's application may even have to be undertaken on a case-by-case basis where movable property is concerned. Attention should perhaps be paid to the significance of the movable's location, in determining how the lex situs is to be construed.

---

111 At [23].

112 At [30], quoting *Macmillan Inc*, above n 53, at 1008 per Millett J.

113 Eady J nevertheless proceeded to outline why he thought it "highly unlikely" that a French court would apply Iranian law to the dispute: see *Berend*, above n 104, at [34]–[56].

114 Fincham, above n 104, at 117.

115 *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm).

116 Christopher Forsyth "Certainty versus Uniformity: *Renvoi* in the Context of Movable Property" (2010) 6 Jour PIL 637 at 641–642.

3 Family

(a) Marriage, Divorce and Legitimation

In *Re Askew*, a foundational case in renvoi, Maugham J looked to the whole of the law of the father's domicile to determine a question of legitimation by subsequent marriage, considering himself bound by previous authorities.[117] However, little attention was paid to the fact that those authorities had all concerned succession, not legitimation. Commentators have not questioned this, and legitimacy is categorically accepted as an area to which renvoi has been extended.

The position the doctrine occupies in other aspects of family law is more ambiguous. For instance, it was held in *Armitage v Attorney-General* that English courts will recognise a foreign divorce as binding if it is shown that the decree would have been validly recognised by the law of the parties' domicile.[118] Although it is a rule of alternate reference — the question ordinarily being determined by the internal lex domicilii — this is arguably an example of renvoi as the forum court looks to the choice of law rules of the lex domicilii. Similarly, for the formal validity of marriage (where the law of the place of celebration governs the question), *Taczanowska v Taczanowski* indicates that a marriage would be sustained if it was also formally valid by the law that the lex loci celebrationis would apply.[119]

Dicey, Morris and Collins consider the formal validity of marriage appropriate for the application of renvoi. They observe that many of the same reasons favouring the initial use of renvoi in formal validity of wills also exist here: a rigid conflict rule requiring compliance with the lex loci celebrationis and a strong judicial preference for upholding marriages as valid.[120] Other commentators refuse to see *Armitage* and *Taczanowska* as involving renvoi at all. Nygh notes that these cases originated independently of the *Collier v Rivaz* line of authority, and maintains that it would be "regrettable" to complicate what is a "relatively simple device to avoid limping marriages" by attributing it to renvoi.[121]

Whether these cases are classed as situations of renvoi appears to be a matter of semantics. As with *Collier v Rivaz*, reference is made to either the domestic or the conflict rules of the lex loci celebrationis, so as to maximise the opportunity to find a marriage valid where such was the parties' intention. The differences in opinion stem from whether the renvoi doctrine encompasses a situation of alternative reference, where the foreign law could include its conflict rules depending on which produces the most favourable outcome. Technically, if the rule of alternate reference in *Collier*

117 *Re Askew*, above n 10.

118 *Armitage v Attorney-General* [1906] P 135 (Prob).

119 *Taczanowska v Taczanowski* [1957] P 301 (Prob) at 305.

120 Collins, above n 12, at [4-026].

121 Davies, Bell and Brereton, above n 5, at [15.17]. See also Falconbridge, above n 83, at 165 and 745.

v Rivaz is accepted as an example of renvoi, then these cases must be as well.

It is more important to ascertain whether this type of renvoi is supported by the purpose of the lex loci celebrationis rule. The reason for the rule is to recognise that the place of celebration has a vested interest in compliance with its procedures for marriage.[122] There is a pressing need for uniformity of outcome in cases of formal validity of marriage. If a result different to that of the place of celebration were reached, the parties would have different statuses in different countries. As marital status has widespread implications both within family law and beyond, the "limp" of this marriage would cause problems in many other areas of law.[123] It seems sensible, then, to apply renvoi as an alternate rule of reference in the areas of formal validity of marriage and divorce to maintain uniformity.

There is similar authority on this point on the essential validity of marriage.[124] However, after analysing the dual domicile rule (whereby both parties must have capacity to marry by the law of their domicile), Rimmel argues that the application of renvoi twice for each domicile does not achieve any useful uniformity and will only serve to confuse matters.[125]

In New Zealand, the Marriage Act 1955 applies to the validity of marriage of those domiciled in New Zealand, even if they were solemnised overseas.[126] Section 44 of the Family Proceedings Act 1980 sets out the statutory bases for recognising foreign divorce decrees. As neither precludes the common law, renvoi may still apply.[127] There thus appear to be good grounds to accept renvoi in the areas of formal validity of marriage and divorce, but not for essential validity.

(b) Child Abduction

Renvoi has also arisen under the Hague Convention on the Civil Aspects of International Child Abduction.[128] The Convention aims to secure the prompt return of children who have been wrongfully removed or retained, and ensure that rights of custody and access are respected.[129] Article 3 provides that rights of custody are determined by "the law of the State in which the child was habitually resident immediately before the removal or retention". Unusually, the applicable law is not qualified with the word "internal", opening the door for renvoi.

---

122 Rimmel, above n 64, at 74.

123 At 75. These arguments presumably apply also to the validity of divorces.

124 *R v Brentwood Superintendent Registrar of Marriages, ex parte Arias* [1968] 2 QB 956 (QB), in relation to capacity to marry.

125 Rimmel, above n 64, at 75–79.

126 Marriage Act 1955, s 3.

127 Webb and Davis contemplate the application of renvoi in the questions of marriage in New Zealand: PRH Webb and JLR Davis *A Casebook on the Conflict of Laws of New Zealand* (Butterworths, Wellington, 1970) at 248.

128 Convention on the Civil Aspects of International Child Abduction 1343 UNTS 98 (opened for signature 25 October 1980, entered into force 1 December 1983). New Zealand acceded to the Convention on 31 May 1991 and it entered into force on 1 August 1991.

129 Article 1.

The Convention's explanatory report refers to the drafting history of the Convention and observes that the decision not to exclude renvoi was deliberate.[130] The intention was to maximise the Convention's applicability by referring to the law of the child's habitual residence in the widest sense possible. Again, renvoi exists as a rule of alternate reference — the explanatory report confirms that "the law concerned can equally as well be the internal law of that State as the law which is indicated as applicable by its conflict rules".[131] Further:[132]

> It is for the authorities of the State concerned to choose between the two alternatives, although the spirit of the Convention appears to point to the choice of the one which, in each particular case, would [recognise] that custody had actually been exercised.

Unfortunately, this purpose was defeated in the English case of *Re JB (Child Abduction: Rights of Custody: Spain)*.[133]

An unmarried British couple had lived together in Spain, where their son was born. When he was eight the mother moved back to England, taking him with her. The father commenced abduction proceedings, arguing that the removal breached his parental rights under Spanish law — this being the law of the child's habitual residence. He had complied with all filiation requirements in Spain.

Munby J held that the law of habitual residence included Spain's private international law, where a parent's rights of custody were determined by the child's personal law. The child was found to be of British nationality, and because under English law at the time an unmarried father did not automatically acquire parental responsibility, the father could not claim rights of custody to establish that the removal was wrongful.

Aside from being contrary to the Convention's purposes, there are several policy reasons indicating that *Re JB* was incorrectly decided.[134] The result was unfair to the father who had done all that was necessary to secure his parental rights under Spanish law and who could not have foreseen the need to do the same under English law. The abducting mother gained an advantage by removing the child to another jurisdiction — a result the Convention aimed to prevent. There were also issues with proving Spanish private international law, especially relating to the existence of a public policy objection under the Spanish Constitution.

Re JB is unlikely to be followed. In *Re K (Children) (Rights of Custody:*

130 Elisa Pérez-Vera "Explanatory Report" in *Acts and Documents of the Fourteenth Session: Child Abduction* (Hague Conference on Private International Law, 1980) 426 at [66].

131 At [70].

132 At [70].

133 *Re JB (Child Abduction: Rights of Custody: Spain)* [2003] EWHC 2130 (Fam), [2004] 1 FLR 796.

134 Kisch Beevers and Javier Peréz Milla "Child Abduction: Convention 'Rights of Custody' — Who Decides? An Anglo-Spanish Perspective" (2007) 3 Jour PIL 201 at 211–224.

Spain),[135] the English Court of Appeal distinguished *Re JB* and held that a Spanish court would refuse to apply the child's "British" personal law for public policy reasons.[136] The Court also noted that *Re JB* was inconsistent with the approach in *Hunter v Murrow*.[137] There, Dyson LJ held that the inquiry consisted of two questions: the "domestic question", which looks at the rights the applicant had under the law of the child's habitual residence; and the "Convention question", which considers if those rights are "rights of custody" under the Convention.[138] This approach was adopted by the New Zealand Court of Appeal in *Fairfax v Ireton*.[139] In both of those cases the "domestic question" was answered by referring only to the internal law of the child's habitual residence.

What these cases indicate is that art 3 should have been drafted more precisely, to allow explicitly for "renvoi in favorem" — applying renvoi only if it achieves the desired result.[140] To comply with the Convention's purposes, a court answering the "domestic question" should look first to the internal law of habitual residence. That law's conflict rules should only be brought into play if the applicant fails to invoke the Convention under those rules.

4 Contract

Contract law is arguably the field in which renvoi has been the most clearly rejected. Article 20 of the Rome I Regulation expressly states that the "law of any country" referred to in the Regulations means the "rules of law in force in that country other than its rules of private international law". This position was affirmed at common law in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, where Lord Diplock emphasised that the proper law of a contract meant the:[141]

> ... substantive law of the country which the parties have chosen ... but excluding any renvoi ... that the courts of that country might themselves apply if the matter were litigated before them.

The law that governs a contract is its proper law. This is usually determined by the parties' express or implied choice. In the absence of a choice, it is determined by looking to the country most closely connected with the transaction. When choosing an applicable law, it is highly unlikely that the parties would intend for a court to apply the choice of law rules of that law, which could lead to a different domestic law applying. As Cheshire, North and Fawcett said, "no sane businessman or his lawyers would choose the

135 *Re K (Children) (Rights of Custody: Spain)* [2009] EWCA Civ 986, [2010] 1 FLR 782.

136 At [7]–[8].

137 *Hunter v Murrow* [2005] EWCA Civ 976, [2005] 2 FLR 1119.

138 At [46]–[48].

139 *Fairfax v Ireton* [2009] NZCA 100, [2009] 3 NZLR 289.

140 See Beevers and Peréz Milla, above n 134, at 226.

141 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50 (HL) at 61–62.

application of renvoi".[142] Renvoi must be excluded in order to avoid upsetting the parties' expectations and to ensure contractual certainty. Various New Zealand commentators have expressed this view.[143]

Nevertheless, this explanation carries weight only when the parties have expressly stipulated an applicable law in their contract. It is less persuasive when they simply specify a choice of court, but sue in a different forum.[144] Briggs questions the presumption that such a choice indicates the parties' intention to have the domestic law of that court govern their contract.[145] He argues that the parties "must have wanted ... that law which would be applied by the judge sitting in that court. This must include his rules of the conflict of laws."[146] The parties' expectations would appear to be thwarted if renvoi is not applied.

When the proper law of the contract is selected on an objective basis by the courts, there is no sound reason to restrict the use of renvoi.[147] In fact, if the courts of that country would apply a law other than their own, the competing concerns of uniformity and deterrence of forum shopping would demand that renvoi be applied.[148] To this effect, the parties in *O'Driscoll v J Ray McDermott SA* accepted that renvoi could be applied in contract cases, at least where the governing law is based on the "closest connection" rule.[149] In that case, applying the conflict rules of the relevant lex causae made no practical difference because the evidence showed that their contract choice of law rule was the same.[150] The question of renvoi could thus be ignored.

That comment in *O'Driscoll* is inconsistent with the notion that the policy goals of "proper law" rules would be undermined if renvoi were to be applied. The intention of such rules is for the forum to identify the substantive law that it considers the most closely connected to the contract. *O'Driscoll* can be distinguished from *Neilson* on this basis, as the rule in *Neilson* was a "lex loci" rule. As has been contended, however, a proper law inquiry may focus on the place of a cause of action as well, such that uniformity with that place becomes important. Whether the focus is on the place or the law requires an analysis of the connecting factors in the specific case.

In most contract cases, the parties would have inserted a choice of law clause, and the approach to renvoi would be simple: only the internal rules of that chosen law should be applied. However, the answer is less straightforward where the proper law of a contract is to be otherwise ascertained. The Rome I Regulation excludes renvoi in these situations, but *O'Driscoll* suggests otherwise. It is submitted that the parties' intentions regarding renvoi should

142 Fawcett and Carruthers, above n 7, at 71.

143 See, for example, Goddard and McQueen, above n 19, at [9.6]; and Webb and Davis, above n 127, at 338.

144 See, for example, *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 (HL), where an arbitration clause was treated as a choice of court.

145 See generally 594 per Lord Wilberforce.

146 Briggs, above n 26, at 881.

147 Rimmel, above n 64, at 79–85.

148 At 82. See also Davies, Bell and Brereton, above n 5, at [15.14].

149 *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25 at [11]–[13] per McLure JA.

150 At [17]–[18] per McLure JA; and at [60] per Murray JA, finding that there was no conflict because Singaporean choice of law rules would also point to the application of its own internal law.

be assessed objectively on the facts of each case where implied choices of law are involved. Equally, if a proper law is selected under the "closest connection" rule, a court should aim to secure the most rational outcome having regard to the connecting factors and the importance of uniformity in the particular circumstances.

5 Tort

Prior to *Neilson*, tort — like contract — was an area in which renvoi was routinely dismissed as irrelevant. At common law, *M'Elroy v M'Allister* specified that the internal domestic law of the lex loci delicti was relevant, not its private international law.[151] In England, the applicable law for questions of tort and delict was governed by Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (UK), which excluded renvoi in s 9(5). Those provisions have now been superseded by the Rome II Regulation, which also excludes renvoi.[152]

To examine the role renvoi should play in tort, it is necessary to look in more detail at tort choice of law rules. Unfortunately, in addition to being notoriously complex, the rules prevailing in the various common law jurisdictions all differ. Prior to the Rome II Regulation, the English rule was for the lex loci delicti to govern the matter, with an exception for when it was "substantially more appropriate" to apply the law of another more significantly connected country — a flexible "proper law" exception.[153] Under the Rome II Regulation, the applicable law for tortious obligations is primarily the law where damage occurred, although exceptions for the proper law and the parties' habitual residence also exist.[154] In Australia, the proper law exception has been firmly rejected and the lex loci delicti is strictly applied to all issues of substance.[155]

New Zealand is the only country to retain the old common law "double actionability" rule and its "flexible exception".[156] The rule provides that for a tortious action to be brought in New Zealand, it must be actionable as both a tort under the lex fori and as a civil wrong in the lex loci delicti. If this rule is satisfied then substantive New Zealand law will govern the question. However, if another country has a more significant relationship with the occurrence and with the parties, the substantive law of that country should be applied. The Australian rule is distinctly different from both New Zealand's and England's rules in this regard. This becomes important when considering the implications *Neilson* has for New Zealand.

---

151 *M'Elroy v M'Allister* 1949 SLT 139 (IH (1 Div)) at 126.

152 Rome II, above n 16, art 24.

153 Private International Law (Miscellaneous Provisions) Act 1995 (UK), ss 11–12. There is also a public policy exception in s 14.

154 Rome II, above n 16, art 4.

155 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503; and *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, (2002) 210 CLR 491.

156 *Baxter v RMC Group plc* [2003] 1 NZLR 304 (HC) at [58] adopting *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC).

What these rules generally have in common is a focus on locating an objective governing law, having regard to the circumstances of the tort, while also aiming to give effect to the policies of certainty, predictability of outcome and avoidance of forum shopping. Some of these interests are inconsistent with renvoi. On the one hand, renvoi is generally considered inappropriate when certainty is a key objective, as it upsets parties' expectations of the law to be applied. On the other hand, forum shopping is particularly salient in tort law and the renvoi doctrine is effective at addressing this issue. This contradiction is also apparent if the forms of the rules are considered. The lex loci delicti aspect of the rule — being territory-based — compels the application of renvoi, while the "proper law" aspects do not.

Briggs argues for renvoi in English tort law on the basis that the avoidance of forum shopping was the original purpose of the double actionability rule.[157] Rimmel takes the unusual stance of advocating renvoi on the basis that, in fact, it would promote greater certainty.[158] He broadly takes issue with the lex loci delicti rule from the perspective of a commercial entity trading overseas, and highlights the importance of certainty for the protection of free trade. Without the ability to predict what law would ultimately be applicable, commercial entities could not guard against potential tortious liability and would be deterred from trading overseas. Rimmel expresses a preference for the double actionability rule because defendants would be secure in knowing that they could only be liable if English law permits it. However, absent this, he considers that renvoi would provide some certainty by ensuring that the applicable law is one which the foreign law had an interest in applying.[159]

Rimmel's view is not entirely convincing. It is unclear how renvoi would increase certainty if the tort conflict rules of each potentially applicable law also have to be scrutinised. Nonetheless, renvoi is seen here as a means of escaping an unsatisfactory rule. At this point, we come back to *Neilson* to discuss its impact on renvoi in tort and on renvoi in general.

V *NEILSON*

Who Stole the Torts?

The majority's adoption of total renvoi in *Neilson* was clearly confined to tort, despite expressing the merits and demerits of renvoi generally. The High Court declined to offer a comprehensive theory of renvoi, highlighting that different considerations apply in each kind of case.[160] Gummow and Hayne JJ's joint judgment was the only one that scrutinised the policies underlying the Australian conflict rule in tort. Their Honours noted that:[161]

157 Briggs, above n 26, at 878–880.

158 Rimmel, above n 64, at 85–86.

159 At 87–89.

160 *Neilson*, above n 1, at 366, 388 and 420.

161 At [100] (footnotes omitted).

> ... adopting the lex loci delicti accommodates requirements of certainty with the modern phenomenon of the "movement of people, wealth and skills across state lines". As one North American scholar has put it, "... the significance attached to the concept of the personal law is in decline; activity-related connections are increasingly thought to offer a more stable and predictable criterion for choice of law".

In light of these considerations and the broader policies of uniformity and certainty, Gummow and Hayne JJ held that where that law adopts a different connecting factor, the lex loci delicti is the whole of that law.[162] On balance, the object of the exceptionless lex loci delicti rule was said to be better served by renvoi.[163]

The majority's reasoning accords with the view that, as a territorial rule without a proper law exception, the "law" of the locus delicti should refer to its "whole law" as uniformity is a primary objective. Uniformity and the avoidance of forum shopping were policies behind the exceptionless lex loci delicti rule, and these were the reasons given for the adoption of renvoi in the case.[164] Despite being a "sharp departure from ... [the] dominant view in Anglo-Australian conflict of laws",[165] the authorities rejecting renvoi in tort either involved "proper law" choice of law rules or were obiter statements based on insufficient reasoning.[166] Being limited to choice of law in tort, the majority's decision on renvoi appears justified. Rather, the author takes issue with the majority's use of the presumption of identity — that the foreign law is the same as the lex fori — to address the evidentiary deficiency on Chinese law.

Curiouser and Curiouser

It is apparent that *Neilson* reflects the same factors that motivated the development of renvoi. Kirby J referred to respect for the territorial sovereignty of other countries, although international comity was expressly rejected by others as a reason for the uniformity ideal.[167] Callinan J alluded to the two more unorthodox purposes of the renvoi doctrine: to evade the effect of the exceptionless lex loci delicti rule,[168] and to apply Australian law because of greater familiarity with the lex fori.[169]

As before, critics have focused on the "improper" motives underlying the outcome. Vehement disapproval has been directed towards the attempt

---

162 At [102] and [108].

163 At [110]–[111].

164 See *Pfeiffer*, above n 155, at [44], [128]–[130] and [184]; and *Zhang*, above n 155, at [118]–[126] and [194]–[196].

165 *Neilson*, above n 1, at 368.

166 Yezerski, above n 3, at 283–285. Contrast Andrew Lu "Ignored No More: Renvoi and International Torts Litigated in Australia" (2005) 1 Jour PIL 35 at 54–56.

167 *Neilson*, above n 1, at 388. Compare 363.

168 "[A]bsolute rules ... almost always in time come to encounter a hard and unforeseen case": at [256].

169 At [261], stating that single renvoi is an approach that "limits the need to search for and apply foreign law".

to introduce a flexible exception "by stealth".[170] Most have taken the view that introducing an exception would have been more transparent than using renvoi to get around the *Pfeiffer–Zhang* rule.[171]

A flexible proper law exception would certainly have achieved the same result more directly. But in the absence of such an exception, renvoi is an alternative. This is defensible on grounds of uniformity, and it at least indicates that the forum's conflict rule is unsatisfactory. The early use of renvoi in relation to formal validity of wills demonstrates this, as legislation was soon introduced to relax the rigid conflict rule. *Neilson* may thus spur further such developments.

In Australia, a forum non conveniens enquiry exists. Under the *Voth* test, a defendant must satisfy the court that the Australian forum is "clearly inappropriate" before jurisdiction is declined.[172] This test has been criticised as being too pro-plaintiff as it places few impediments before potential forum shoppers.[173] On this view, the majority was justified in adopting total renvoi in Australia. It signals to would-be forum shoppers that even if they overcome the first hurdle of jurisdiction, they will be halted by renvoi at the next stage.

Again, forum shopping would be better prevented by jurisdiction rules rather than through renvoi. However, without such means, renvoi is an alternative way of attempting to achieve uniformity. In the author's view, the majority in *Neilson* erred in the lengths they were willing to go to achieve their desired result by using the presumption of identity. Based on Australia's specific choice of law rule in tort, as well as its jurisdiction-selecting rules, the use of renvoi was otherwise appropriate.

"Please, Ma'am, is this New Zealand or Australia?"

The adoption of total renvoi in *Neilson* has no direct relevance to the New Zealand position as New Zealand differs from Australia in two material aspects. First, New Zealand still retains the double actionability rule in tort.[174] This means that New Zealand law will be applied in most situations and no question of renvoi will arise.[175] Even if the flexible exception is used, as a "proper law" rule, there is less justification for renvoi. Secondly, New Zealand's forum non conveniens test allows courts to refuse jurisdiction where there is a "more appropriate" forum under the traditional *Spiliada* test.[176] Forum shopping can thus be adequately and more appropriately addressed through rules of jurisdiction rather than through renvoi.[177]

---

170 Lu, above n 166, at 38, 64 and 66.

171 See Mortensen, above n 3, at 24; and Anthony Gray "The Rise of Renvoi in Australia: Creating the Theoretical Framework" (2007) 30 UNSWLJ 103 at 111–112.

172 *Voth*, above n 51.

173 Keyes, above n 3, at 25–27.

174 *Baxter*, above n 156.

175 See *Neilson*, above n 1, at 368, referring to the irrelevance of renvoi under the double actionability rule.

176 *Club Mediterranee NZ*, above n 51.

177 See Mortensen, above n 3, at 25–26, arguing that the jurisdictions still retaining the *Spiliada* test should not adopt double renvoi.

Because the findings in *Neilson* should be confined to tort, a New Zealand court rejecting renvoi in this area does not mean that renvoi should be rejected across the board in New Zealand law — it will necessarily turn on the specific choice of law rule. Yet the availability of the forum non conveniens doctrine in New Zealand is always relevant when considering whether renvoi should be adopted. Ideally, the doctrine functions to prevent a New Zealand court from having to address a situation where renvoi is at issue. This provides sound reason for New Zealand to continue applying the *Spiliada* doctrine.

VI CONCLUSION

Cheshire once reassured us that the question of whether renvoi should be adopted has "received its final quietus".[178] This was not to be, and the debate continues almost a hundred years on. This article has attempted to provide some guidance on why the doctrine exists and how it should be used.

In approaching renvoi, this article attempted to identify what exactly the doctrine tries to achieve. It proceeded on the basis that renvoi should be applied only when the purpose of the particular choice of law rule would be promoted by doing so. It is clear that the primary policy justifying renvoi's use is the desire to achieve decisional uniformity across jurisdictions in order to restrict forum shopping. Various choice of law rules were then analysed to determine when renvoi had been (and should have been) employed.

It is suggested that renvoi is appropriate in most cases of succession, in determining title to immovables, in the formal validity of marriage and divorce, and even in some situations of contract and tort. Uniformity is a prime purpose of the relevant conflict rules in those areas and it may be achieved by the operation of renvoi. *Neilson* was then assessed in light of the article's findings. It was argued that the majority were correct to adopt a total renvoi solution, although issue was taken with the outcome. Finally, it was observed that it would be inappropriate for *Neilson* to be applied in New Zealand tort cases.

Renvoi has been described as "a subject loved by academics, hated by students and ignored (when noticed) by practising lawyers (including judges)".[179] This article is unlikely to change that situation, but it has endeavoured to provide greater insight into a troublesome topic. It has also attempted to find a principled means of using what ultimately — in the absence of better methods — is a practical mechanism for achieving certain purposes. Standing back from the looking glass, it is hoped that a deeper understanding of renvoi has been imparted.

---

178 GC Cheshire "Private International Law" (1935) 51 LQR 76 at 77.

179 Martin Davies, Sam Ricketson and Geoffrey Lindell *Conflict of Laws: Commentary and Materials* (Butterworths, Sydney, 1997) at [7.3.1] as cited in *Neilson*, above n 1, at 386.