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**XIV. World Congress of the International Association of
Procedural Law on «Procedural Justice» (July 25th - 30th in
Heidelberg)**

**General Report: «Transnational Litigation and Elements of Fair
Trial – Common law Jurisdictions» (Prof. David Bamford)**

In an increasingly globalised world, interactions between individuals and businesses across national borders are rapidly growing. International trade, finance, tourism, migration, education are of such importance that almost no part of the globe is untouched by their effects. The development of the internet has accelerated international linkages at such an expanding rate that the physical location of the parties to the interaction has become less relevant if not almost unknowable. Many businesses operate with range of legal structures across national borders and likewise have assets and personnel potentially exposed in transnational litigation.

Transnational litigation adds an additional level of complexity to the conduct of litigation. It converts even ordinary or simple disputes into more complex and challenging ones. Judges and lawyers are faced with considering extra and often difficult issues of which country's laws should be applied, and if the laws of another country, what the content of those laws actually is; which country's courts should hear the case; along with a host of practical questions relating to the obtaining of evidence and conducting the trial where witnesses and parties may reside in other country. Then, if all these challenges are successfully overcome, questions may arise as to how any judgment may be forced in another country.

Law firms are responding by developing transnational litigation departments¹. Governments under pressure from courts and business are increasing engaged in attempts to develop international agreements to facilitate transnational litigation and resolution of transnational legal disputes. While these have enjoyed differing degrees of acceptance and success, the work of the Hague Conference on Private International Law and various regional agreements reflect the continuing demand for procedural reform.

Within the academy, debate continues over whether transnational litigation is a distinctive field of academic study or whether it is merely specialized subsets of range of other legal fields.² Which ever view is taken, it is clear that academic interest in transnational litigation continues to grow with a burgeoning literature.

To provide an better understanding of developments across the procedural world the International Association of Procedural Law decided to make this important area of litigation one of the themes of its XIVth World Congress. National reports were obtained from the jurisdictions across the world³ on some of the common but key

¹ See for example recent announcements by leading US litigation firms – in December 2010 Gibson, Dunn and Crump formed a transnational litigation and foreign judgments practice with in the firm “to help our clients respond to the increasing threat to corporations posed by lawsuits filed in jurisdictions around the world”.

(<http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignJudgmentsPracticeGroup.aspx> (17 Jan 2010)); in September 2010 Cadwalader, Wickersham, and Taft created an International Law and Litigation Centre - “As our markets have gone global, so too are the demands and complexities of cross border legal practice and international litigation. The pace of change is breathtaking, requiring constant attention to capture the many developments in this diverse field.”

http://www.cadwalader.com/assets/news_release/092010IntlLawandLitigationCenter.pdf (17 January 2010)

² See P Dubinsky, “Is transnational litigation a distinct field? The persistence of exceptionalism in American procedural law.” (2008) 57 *Stanford Journal of International Law* 301; S. Baumgartner . “Transnational Litigation in the United States: The Emergence of a New Field of Law” (2007) 55 *American Journal of Comparative Law* 793.

³ Australia, Canada, Israel, South Africa, United States, and United Kingdom. South Africa has elements of both civil and common law traditions.

procedural issues. Jurisdictions covered were Australia, Canada, England, Israel, South Africa and United States.

This General Report begins with an overview of the degree to which ‘due process’ requirements are required by national laws. It then examines certain procedural issues as they apply to transnational litigation. In the Part One it examines some of the important issues affecting choice of venue - the roles of *forum non conveniens* and anti-suit injunctions. The question of whether procedural rules have developed for transnational litigation that differ from the procedural rules governing domestic litigation is considered in Part Two. Part Three looks at the recognition and enforcement of judgments.

Due process and transnational litigation

While concepts of ‘due process’ underpin civil procedure, the content and resilience of the concept varies greatly across national boundaries. Whether these are constitutionally based or spring from other sources, concomitant principles of ‘natural justice’ and ‘fair trial’ are broadly shared. The extent to which these extend to foreign parties and transnational litigation, in part, reflects the degree to which transnational cases are treated differently from domestic cases.

Increasingly across the common law world, ‘due process’ obligations are founded in constitutional frameworks. In the United States, Canada and South Africa due process equivalents can be found in domestic constitutional documents – the 14th Amendment to the United States Constitution, section 7 of the Canadian Charter of Rights and Freedoms, section 34 of the South African Constitution. As Antonin Pribetic notes in his National Report from Canada, while “..a civil proceeding [does] not engage a Charter right, it nevertheless emphasized that the right to a fair trial is a fundamental

principle of justice.”⁴ The South African constitutional requirement appears to be broader and Professors van Loggerenberg SC, Boraine and van Heerden report that it applies to transnational proceedings brought within South Africa.⁵

Wendy Kennett outlines how, in the United Kingdom, section 3 of the *Human Rights Act 1998* imports the Article 6 of the *European Convention on Human Rights* requirements of “... a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” She points out this can have direct and indirect effect – the right to due process may be directly infringed by an English court’s refusal to allow a case to continue in it, or it may be raised indirectly where questions as to whether due process exists arise in relation to proceedings in another jurisdiction. As Kennett argues, this “...opens up the possibility that there may be a breach of Article 6 on the part of the domestic court in the context of transnational litigation when a refusal to exercise jurisdiction exposes a litigant, obliged to have recourse to a foreign court, to the risk of flagrant denial of justice in that court.”⁶

On the issue of indirect effect due process requirements, Antonin Pribetic in his Report from Canada noted that with respect to *Charter* protections that the Supreme Court of Canada held in *R v Hape*⁷ that the *Charter* did not extend to searches by Canadian authorities in other countries under the laws of that other country. Nevertheless the Charter could have an indirect effect when it came to use of evidence gained from such searches in Canadian proceedings. The admissibility of such evidence could be challenged at that stage on due process grounds.⁸

⁴ A Pribetic, *National Report for XIVth World Congress on Procedural Law*, p3.

⁵ Van Loggerenberg et al, *National Report for XIVth World Congress on Procedural Law*, pp1-2.

⁶ W Kennett, *National Report for XIVth World Congress on Procedural Law*, pp3-4.

⁷ [2007] 2 SCR 292.

⁸ A Pribetic, *National Report for XIVth World Congress on Procedural Law*, p5. Pribetic also notes the application of the principle in *R v Hape* by the Court of Appeal, Ontario in *R v Drabinsky* (2008) 295 DLR (4th) 727.

Australian continues to have no express constitutional provision requiring due process but the High Court of Australia has upheld a common law right to a fair trial and suggested that the constitutional protection of federal judicial power carries with it constitutional protection for fundamental procedural principles.⁹

Israel has no formal written constitution but the development of Basic Laws in the 1990s has been accompanied by recent attempts by the Supreme Court to confer a cloak of constitutional legitimacy on certain procedural requirements which would fall within common law concepts of due process.¹⁰

Part One Venue

One of the significant points of distinction with the civil law systems is the common law's approach to jurisdiction. In general terms, common law jurisdiction rests on the presence in the jurisdiction and valid service of initiating process. Jurisdiction also exists if the defendant submits to the jurisdiction or legislation or procedural rules provide for valid service outside the jurisdiction in specified situations.¹¹

The generous approach to jurisdiction taken by common law courts continues to generate controversy. The breadth of the jurisdiction gained through transient and unrelated presence in the jurisdiction makes even more important the development of procedural rules enabling a court to refuse to exercise the jurisdiction in appropriate cases.

⁹ J Viven, *National Report for XIVth World Congress on Procedural Law*, p1; W Bateman, "Procedural Due Process under the Australian Constitution" (2009) 31 *Sydney Law Review* 411.

¹⁰ B Blum, "Doctrines without borders: the "new" Israeli exclusionary rule and the dangers of legal transplantation." (2008) 60 *Stanford Law Review* 2131.

¹¹ Australia: see J Viven, *National Report*, p1; Canada: A Pribetic, *National Report* pp6 -7; Israel: M Karayanni and E Brosh, *National Report*, pp1-4; South Africa: van Loggerenberg et al, *National Report* pp1-2.

From a practical perspective the choice of jurisdiction and venue is often critical to the outcome of the case.¹² It effectively determines which substantive laws will be applied to determine the case and which procedural rules will govern the litigation process. A party in dispute which has transnational elements who is served with proceedings may be able to resist an opponent's choice of a local venue by seeking a stay. A party to litigation in one jurisdiction may wish to prevent other parties pursuing litigation in other jurisdictions. The former maybe achieved by resort to the principle of *forum non conveniens*, the latter by way of seeking an anti-suit injunction.

Forum non conveniens

The common law jurisdictions examined in this General Report all have accepted the concept that a court validly seised of a matter may decline to exercise that jurisdiction on the basis that the case should be determined by another jurisdiction. While similar factors are considered when determining to stay an action on the grounds of *forum non conveniens*, the basis of the concept and the manner of its exercise does vary significantly across jurisdictions.

The common law's preference for ensuring proceedings rightfully commenced in a jurisdiction remained in the jurisdiction meant that the grounds for staying proceedings on the basis another country should hear the case remained fairly limited in most jurisdictions until the 1980's. Much deference was given to the English approach of only staying the proceedings in the forum if continuing the case in the forum would be vexatious or oppressive¹³.

¹² "The battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case" D Roberson and P Speck, "Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Anti-Suit Injunctions". (1990) 68 *Texas Law Review* 937.

¹³ *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382.

Exceptions to this included Scotland which had long recognised the concept of *forum non conveniens* which had adopted the concept of the “natural or proper forum”¹⁴ and the United States which, in part due its federal nature, was faced with ‘internal’ conflict of laws challenges.

In Scotland cases from the nineteenth century show that the concept of staying proceedings properly commenced with Scotland could be stayed on the grounds that the proceedings were more appropriately heard in another jurisdiction. While initially describe as the principle of *forum non competens*, which suggested a jurisdictional challenge, by the 1870s the Latin phrase had become *forum non conveniens*.¹⁵

United States

In the United States as Thomas Main reports, the underlying imperative still remains the “virtually unflagging obligation” to exercise properly invoked jurisdiction.¹⁶ Much of the development of *forum non conveniens* has been influenced by the federal nature of its juridical system. Insofar as foreign parties are concerned, the content of the principle of *forum non conveniens* has been influenced by the jurisprudence developed to deal with inter-state litigation. In determining whether to hold another jurisdiction’s court is a more appropriate court under the *forum non conveniens* doctrine, a two- old test is applied – is there an alternative forum? If there is, the courts looks to both public and private interest factors. Public interests include in ‘administrative inconvenience’ ranging from court congestion to increasing complexity of cases with conflict of laws issues. Private interest factors cover the range of practical circumstances ranging from costs, facilitating collection of evidence and the presence of witnesses.¹⁷ To this is added the gloss established by *Piper*

¹⁴ D McClean and K Beevers, *Morris: The Conflict of Laws*, 7th ed, 2009, 133.

¹⁵ R Braucher, “The Inconvenient Federal Forum” (1947) 60 *Harvard Law Review*, 908, 909.

¹⁶ T Main, *National Report for XIVth World Congress on Procedural Law*, 1.

¹⁷ *Gulf Oil Corp v Gilbert* (1947) 330 US 501. See M Karayanni, “The Myth and the Reality of a Controversy: ‘Public Factors’ and the Forum Non Conveniens Doctrine” (2003) 21 *Wisconsin*

*Aircraft Co v Reyno*¹⁸ advantaging United States citizens when they have chosen to commence proceedings in a United States court.

In the context of parallel transnational litigation, Main reports that the granting of a stay in the local proceedings in favour of the foreign action has also been based on concepts developed for parallel litigation in the domestic context¹⁹. While a broad range of factors are to be considered by the court considering an application to stay a local action, a stay is very likely if the case involves property located in the foreign jurisdiction or the case involves a forum selection clause. Beyond this, the situation is much less clear. “As a practical matter, if the local court has confidence in the quality of the dispute resolution system of the foreign forum and has reason to believe that the dispute will be resolved in a timely fashion, the local court may stay the local suit”.²⁰

England

In the English courts, the adoption of the *forum non conveniens* doctrine by the House of Lords in 1989 followed a series of cases in the 1980s that saw a serious challenge to the narrowness of the prevailing approach. This approach placed great weight on jurisdictional issue – if a matter was properly within the court’s jurisdiction, it would only be stayed if continuing the matter would be vexatious or oppressive.²¹

International Law Journal 327; E Derr, “Striking a Better Public-Private Balance in Forum Non Conveniens” (2008) 93 *Cornell Law Review* 819.

¹⁸ (1981) 454 US 235.

¹⁹ *Landis v North American Co*, 299US 248 (1936); *Colorado River Water Conservation District v US*, 424 US 800 (1976).

²⁰ T Main, *National Report for XIVth World Congress on Procedural Law*, 2.

²¹ *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382.

In the 1970s English courts became increasingly concerned about forum shopping and in a series of decisions began broadening the circumstances in which stays might be granted. This culminated in 1986 with the decision in *Spiliada Maritime Corporation v Cansulex*²² in which the House of Lords adopted the *forum non conveniens* doctrine. English courts could stay proceedings in the interests of all the parties and the ends of justice if another jurisdiction was the more appropriate forum.

The utility of the doctrine in England has been greatly reduced by the effects of the *Brussels Convention* and the *Judgments Regulation* with their prescriptive approach²³. Not only do these control the question of which forum between Contracting States, but also, in many cases, the question of which forum between Contracting and non-Contracting States. Kennett argues that the “highly structured non-discretionary approach to jurisdiction ... is highly frustrating to English lawyers dealing with international commercial litigation...It is perceived as making it more difficult to do justice in the individual case, and so, in reality, contrary to the aim of ensuring there is a fair trial”.²⁴

In considering the role of due process and Article 6 ECHR in *forum non conveniens* cases, this arises in three ways – a denial of access to the court chosen by the plaintiff; because of a delay in trial; and in some case because of the lack of fair trial in the foreign forum.²⁵ Whether the foreign forum would meet the requirements for a fair trial has led English courts to consider whether there would be unreasonable delay in

²² [1987] AC 460.

²³ *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (1968); *Europe Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.

²⁴ W Kennett, *National Report for XIVth World Congress on Procedural Law*, 7.

²⁵ W Kennett, *National Report for XIVth World Congress on Procedural Law*, 10 citing J Fawcett, “The Impact of Art 6(1) ECHR on Private International Law” [2007] ICLQ 1

the foreign forum; whether the foreign forum is impartial and independent; and whether there is the necessary legal assistance for the parties.²⁶

Canada

In Canada the power to stay a proceeding on *forum non conveniens* grounds flows from a court's inherent powers to prevent an abuse of process, reflected in its controlling legislation. The courts will stay a proceeding if there is clearly a more appropriate court which in the interests of justice should hear the case.²⁷ According to Antonin Pribetic the courts have made it clear that questions going to whether a "real and substantial connection" exist to found jurisdiction are "...different and distinct from those being considered for *forum non conveniens*."²⁸ The factors taken into account in determining whether to stay proceedings include:

- (1) The location of the majority of the parties;
- (2) Where each party carries on business;
- (3) Where the cause of action arose;
- (4) Where the loss or damage occurred;
- (5) Any juridical advantage for the plaintiff in this jurisdiction;
- (6) Any juridical disadvantage for the defendant in this jurisdiction;
- (7) Convenience or inconvenience to potential witnesses;
- (8) The cost of conducting the litigation in this jurisdiction;
- (9) Applicable substantive law; and
- (10) Difficulty in proving foreign law, if necessary.²⁹

²⁶ See Ward "Protection of the Right to a fair trial and Civil Jurisdiction: the Institutional Legitimacy in Permitting Delay (2007) *Juridical Review* 15; *Cherney v Deripaska* [2009] EWCA Civ 849; *Lubbe v Cape PLC* [2000] 1 WLR 1545 discussed in *the National Report on England*.

²⁷ J Walker, *Halsbury's Laws of Canada – Conflict of laws*, 2006, HCF24.

²⁸ *Van Breda v Village Resorts Ltd* [2010] ONCA 84 (on appeal to the Supreme Court of Canada) cited by A Pribetic, *National Report for XIVth World Congress on Procedural Law*, p7.

²⁹ *Muscutt v Courcelles* (2002) 213 DLR (4th) 577 cited by A Pribetic, *National Report for XIVth World Congress on Procedural Law*, p7.

Israel

The doctrine of *forum non conveniens* has long been recognised in Israel. The defendant needs to demonstrate that the foreign forum is the ‘natural forum’ which involves persuading the Israeli court that “...after considering all relevant contacts (private and public alike) the foreign alternative forum clearly possesses most significant contacts with the case at hand and it is thus natural and appropriate to adjudicate the case before it.”³⁰

Over the last decade the utility of the *forum non conveniens* doctrine has been increasingly restricted. The Israeli Supreme Court held that modern developments in transport and communication make it less likely that an application to have an Israeli court decide it is not the appropriate forum will succeed. One recent example of this more restrictive approach is the *Arbel* case which saw an Israeli court refuse an application for a stay of the Israeli claim in a case where an Israeli resident suffered personal injury while on vacation in Turkey. The governing law was Turkish, most of the witnesses Turkish, two of the major defendants Turkish and there questions about how an Israeli judgment would be enforced in Turkey.

Yet cases continue to see successful applications in Israel staying local proceedings. One recent example described in the National Report is of a divorce and custody dispute between parties domiciled in Russia.. Here the overriding factor was the best interests of the children which in this case were best served by having a Russian court decide the case.

Michael Karayanni and Ehud Brosh suggest that a number of circumstances will tend to support the granting of a stay or dismissal – the existence of parallel foreign

³⁰ M Karayanni and E Brosh, *National Report for XIVth World Congress on Procedural Law*, Part III.

litigation or the existence of forum selection clauses in favour of a foreign forum. The “... general trend is to give effect to jurisdiction agreements unless special circumstances exist...”³¹.

Australia

Australia has taken a different approach to *forum non conveniens*. The High Court of Australia has founded *forum non conveniens* on the longstanding power to dismiss or stay proceedings on the grounds that the proceedings are oppressive, vexatious or an abuse of process. In situations where parallel litigation has arisen or is possible, it is possible that the circumstances are such that the continuation of the proceedings in Australia would ‘seriously and unfairly burdensome’ or “productive of serious and unjustifiable trouble and harassment”.³²

As Jessica Viven reports, the High Court of Australia has departed from other common law jurisdictions in that the key question for the court is whether it is clearly inappropriate for the Australian court to hear the case. The fact that a court in another jurisdiction is more appropriate does not support the grant of a stay. This principle, first enunciated in 1987³³ has been confirmed by subsequent High Court decisions³⁴ and the High Court recently declined an invitation to reverse its approach and to bring it more in line with other jurisdictions³⁵. For litigation across state borders within the Australian federal system, statutory provisions incorporate the principle that the jurisdiction most appropriate to hear case should in fact hear the case and cases are transferred on that basis.

³¹ M Karayanni and E Brosh, *National Report for XIVth World Congress on Procedural Law*, Part III

³² J Viven citing Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1987) 165 CLR 197.

³³ *Oceanic Sun Line Special Shipping Co Inc v Fay* (1987) 165 CLR 197.

³⁴ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

³⁵ *Puttick v Tennon Ltd* (2008) 238 CLR 265.

A recent development reported by Viven that is altering the Australian approach to international litigation is increasing use of international bi-lateral agreements. In 2010 Australia and New Zealand each enacted legislation (the *Trans-Tasman Proceedings Act 2010*) to facilitate transnational litigation involving those two jurisdictions and adopts the “more appropriate court” test when questions of venue are to be determined. If the litigation raises questions of a possible third forum, the “clearly inappropriate” test is to be applied to it.³⁶

South Africa

In their National Report, D van Loggenberg SC, A Boraine and C van Heerden note that section 9 of the Supreme Court 1959 enables the removal of a proceedings from one High Court to another if “...such proceedings may be more conveniently or fitly heard or determined by the other court.”³⁷ A further ground added by statute in 2003 was if the proceedings should have been commenced in another High Court.

In the context of transnational litigation the status of doctrine of *forum non conveniens* has been uncertain. With its Roman-Dutch heritage it is not surprising that such a common law doctrine did not have find easy acceptance. However it was not unknown – in the admiralty jurisdiction, legislation provided for a form of *forum non conveniens* applications. In the leading case of *Bid Industries* the South African Supreme Court re-examined questions of jurisdiction and appear to have adopted, for limited purposes, the common law principle of jurisdiction founded upon presence in the jurisdiction. As result of this, to deal with the exorbitant nature of such a jurisdictional approach, the Supreme Court recognised that a defendant could use *forum non conveniens* principles to argue whether the case was more appropriately heard elsewhere. According to Oppong “Thus, notwithstanding the acceptance of the doctrine by the SCA, the South African approach is still far removed from being, as in

³⁶ J Viven, *National Report for XIVth World Congress on Procedural Law*, pp4-7.

³⁷ D van Loggerenberg Sc, A Boraine and C van Heerden, *National Report for XIVth World Congress on Procedural Law*, 6.

the common law, a general doctrine applicable no matter the basis for assuming jurisdiction. But it is an important first step, although it must be admitted that not everyone will applaud this.”³⁸

Anti-Suit Injunctions

An adjunct to *forum non conveniens*, when it comes to choice of forum disputes in transnational litigation, is the use of anti-suit orders (or injunctions) to restrain a party from either commencing or continuing litigation in a foreign forum. This power has been long recognised and is said to have descended from the power of courts in equity to restrain parties from proceeding with litigation in common law courts. This is justified on the basis that order does not attempt to direct another court what to do but acts in personam. The order was directed to the parties who were answerable to the jurisdiction of the court making the order.³⁹

United States

Thomas Main in the National Report for the United States emphasises how the approach to anti-suit injunctions is influenced by the presumption in favour of concurrent jurisdiction. He outlines five situations where a court might restrain a party from proceeding with foreign litigation:

- (i) the local action is a proceeding in rem and the foreign court could order the property transferred outside the federal court’s jurisdiction;
- (ii) the foreign action was filed in violation of a valid forum selection or arbitration clause;
- (iii) the substantive law that will be applied in the foreign action is repugnant to public policy in the forum state;

³⁸ R Oppong’ “Roman-Dutch law meets the common law on jurisdiction in international matters” (2008) 4 *Journal of Private international Law* 326.

³⁹ A Bell, *Forum Shopping and Venue in Transnational Litigation*, 2003, 172-172.

or (iv) allowing the delay, expense and inconvenience associated with duplicative actions would be distinctly unfair.⁴⁰

He reports that the grant of anti-suit injunctions is more common in the Fifth, Seventh and Ninth Circuits of the US Courts of Appeals.

England

In England the scope of the traditional common law approach has been significantly affected by the Brussels Regulation and as Kennett demonstrates Article 6 of the European Convention on Human Rights. The grant of an anti-suit injunction at common law required more than the natural forum question underlying the doctrine of *forum non conveniens*. The English courts grafted on to that consideration, the requirement that the foreign proceeding amount to a vexatious oppressive proceeding.

Kennett notes that potential impact of Article 6 of the European Convention was considered in *The Kribi*⁴¹. Aikens J held rejected the defendant's argument that the grant of anti-suit injunction "...would deny them access to the Belgian courts and so would be incompatible with art.6..."⁴². Article 6, he held, only required that there be a forum somewhere and that the proceedings in that forum meet the fair trial required by Article 6.

Article 6 issues can arise in contrasting ways. "[I]n a single forum case, where the injunction relates to proceedings in the only State in which the claimant could bring a successful action, the requirement that there must a trial *somewhere* suggests that the grant of an injunction in such circumstances would be incompatible with art.6 ECHR".⁴³ The reverse may also breach Article 6. Where the foreign forum does not meet the fair trial standard, it can be argued failure to grant an anti-suit injunction

⁴⁰ T Main, *National Report for XIVth World Congress on Procedural Law*, 2.

⁴¹ *OT Africa Line Ltd v Hijazy (The Kribi)* (2001) 1 Lloyd's Reports 76.

⁴² W Kennett, *National Report for XIVth World Congress on Procedural Law*, 15.

⁴³ W Kennett, *National Report for XIVth World Congress on Procedural Law* 15

may breach Article 6. This was considered in *Al-Basam v Al Bassam*⁴⁴ where the judge at first instance had granted the anti-suit injunction against a sharia court in Saudi Arabia. On appeal the Court of Appeal held that such issues were appropriately raised if and when the recognition of the foreign judgment was being considered by an English court.

Canada

The Canadian approach continues to be as set out in *Amchem Products Inc v British Columbia*⁴⁵ places great weight on the principle of comity and requires an applicant for an anti-suit injunction to have unsuccessfully sought a stay in the foreign forum. The application will only be successful if the application of the *forum non conveniens* doctrine by the foreign forum has been unreasonable and creating a serious injustice.

Israel

Karayanni and Brosh highlight the role of *lis alibi pendens* in cases where parallel litigation exists. Israeli courts have long recognised this doctrine and stayed cases in the Israeli courts pending the outcome of the foreign proceeding. There does not need to be complete uniformity between the proceedings with liberal approach being adopted.⁴⁶ Israeli procedural law also allows for the grant of anti-suit injunctions and has adopted the traditional approach – the respondent must amenable to the jurisdiction and that foreign proceedings “vexatious, oppressive or a serious injustice”.⁴⁷

Australia

⁴⁴ [2004] EWVA Civ 857.

⁴⁵ (1993) 104 DLR (4th) 96

⁴⁶ M Karayanni and E Brosh, *National Report for XIVth World Congress on Procedural Law*. 5.

⁴⁷ T Einhorn, *Private International Law in Israel*, Kluwer, 2009, 304.

In Australia, like other common law jurisdictions, courts consider applications for anti-suit injunctions with great caution. In the leading case of *CSR Ltd v Cigna Insurance Australia Ltd*⁴⁸ CSR Ltd, an Australian company, had issued proceedings against Cigna in New Jersey over liabilities arising from asbestos related claims against it. Cigna had then issued proceedings in the New South Wales Supreme Court seeking relief from liability and sought an injunction restraining CSR Ltd from continuing with its New Jersey proceedings. Ultimately the majority in the High Court held the New South Wales (i.e. the domestic proceedings) should be stayed, rather than the New Jersey proceedings.

As Viven notes⁴⁹, the High Court first looked at question of the doctrine of *forum non conveniens*- was the New South Wales the clearly inappropriate forum to hear the case? In this case, as the New South Wales proceedings were instituted primarily to prevent the New Jersey action proceeding, it was oppressive and thus the New South Wales was clearly an inappropriate forum.

The High Court went on to consider the anti-suit injunction could be warranted if the Australian jurisdiction was not clearly an inappropriate forum. The Court would then determine whether to require the applicant to seek a stay in the foreign court or whether to grant the anti-suit injunction. The majority thought there could be no general requirement to seek a stay in the foreign court – although that might be required in particular cases.

South Africa

⁴⁸ (1997) 198 CLR 433.

⁴⁹ J Viven, *National Report for XIVth World Congress on Procedural Law*, p 8.

The national reporters from South Africa report that no South African law contains no such remedy.⁵⁰

Part Two - Procedural regimes for transnational litigation

The underlying approach towards transnational litigation remains the same across the reporting jurisdictions— the procedural regimes for transnational litigation are the same as those for domestic litigation in the forum. No specific procedural rules were identified in the national reports having been developed for transnational litigation.

As an example of this is one jurisdiction, Thomas Main reports “[g]enerally speaking, formal procedural rules in the United States do not distinguish between transnational and domestic litigation.”⁵¹

Most jurisdictions have specific procedural rules for gathering evidence from abroad e.g the *Foreign Courts Evidence Act 1962* (South Africa)⁵². Viven in the Australian report notes that unlike domestic law, foreign law must be proved as part of the case and expert evidence is often required. However statutory changes have been made in so far as transnational litigation occurs between New Zealand and Australia – the judges are to inform themselves as to the content of the relevant laws.⁵³ Viven goes on to point to an interesting development whereby some Australian jurisdictions are entering into agreements with foreign jurisdictions to enable international judicial co-

⁵⁰ D van Loggerenberg Sc, A Boraine and C van Heerden, *National Report for XIVth World Congress on Procedural Law*, 7.

⁵¹ T Main, *National Report for XIVth World Congress on Procedural Law*, 3.

⁵² D van Loggerenberg Sc, A Boraine and C van Heerden, *National Report for XIVth World Congress on Procedural Law*, 10.

⁵³ J Viven, *National Report for XIVth World Congress on Procedural Law*, 11.

operation in cases of transnational litigation. The New South Wales Supreme Court has, in 2010, signed such agreements with Singapore and New York superior courts.⁵⁴

Kennett discusses in the National Report for England the impact of the Brussels Regulation on questions of proper service of originating process.⁵⁵ She suggests that the Brussels Regulation requirements have meant a narrower and more technical focus to questions over the service of documents. However she also notes the recent case of *Re Anderson Owen Ltd (In Liquidation); Merrygold v Bates and Another*⁵⁶ where the English court overlooked the lack of compliance with the Brussels Regulation because no injustice arose.

As Thomas Main notes, the development of separate procedural rules for transnational litigation has been subject of academic attention. This is particularly true for federal jurisdictions where the approaches have often been developed in the course of intra-national litigation. The argument has been made that the needs of truly ‘foreign’ litigation may require a different approach. Nevertheless the prevailing emphasis on ‘trans-substantive’ rules mean that this continues to be dealt with on a case by case basis by judges crafting solutions using the broad discretions within existing rules.⁵⁷

Part Three - Recognition of Judgments

The recognition of judgments remains a vital aspect of transnational litigation. The underlying principles of comity and the practical requirements demanded by international trade and commerce for finality and efficiency are leading to increased pressures to facilitate recognition and enforcement of foreign judgments. The sources of law now to found in complex patchwork of multi-lateral and bi-lateral international agreements as well as domestic legislation and the common law.

⁵⁴ Ibid.

⁵⁵ W Kennett, *National Report for XIVth World Congress on Procedural Law*, 17.

⁵⁶ [2009] EWHC 2837

⁵⁷ T Main, *National Report for XIVth World Congress on Procedural Law*, 3..

United States

Main notes there have been no dramatic developments in this area in the United States. While recognition and enforcement of judgments is a largely a matter of state law , most states have adopted versions of the *Uniform Foreign Money Judgments Act* and where that is not available, similar approaches are derived from common law and local legislation that is broadly consistent with the Restatement (Third) of the Foreign Relations Law of the United States. Although the Hague Convention on Choice of Court Agreements has been signed by the United States it has not been ratified.⁵⁸

While there is a presumption of recognition and enforcement, Main describes three criteria for declining to recognize a foreign judgment:

(1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirement of due process of law;(2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have subject matter jurisdiction of the dispute.⁵⁹

Main notes that United States courts are also able to decline enforcement of a foreign judgment on discretionary grounds including :

(1) a lack of notice; (2) the foreign proceeding failed to recognize a forum selection clause; (3) the judgment is repugnant to public policy in the forum state; (4) the foreign judgment conflicts with another final judgment; (5) fraud; (6) the foreign proceeding was a seriously inconvenient forum; or (7) other circumstances would make enforcement unjust.

England

Recognition of judgments in England involves a complex patchwork of provisions depending on the foreign court. If the foreign court is a member state of the European

⁵⁸ T Main, *National Report for XIVth World Congress on Procedural Law*, 4

⁵⁹ T Main, *National Report for XIVth World Congress on Procedural Law*, 5.

Union, the Brussels Regulation applies. If the foreign court is one of the members or former members of the British Commonwealth, domestic legislation⁶⁰ may provide a statutory framework for recognition of judgments. For all other foreign courts, resort must be had to the common law. Briggs outlines 6 possible common law defences to resist recognition of foreign judgments; (1) disregard for choice of court agreements; (2) absence of local jurisdiction; (3) fraud; (4) want of natural justice; (5) public policy; and (6) prior English judgment.⁶¹

Kennett's national report discussed the impact of Article 6 ECHR on the recognition of judgments and notes that it provides additional content to the public policy ground for refusing recognition and enforcement of judgments viz. the lack of a fair trial. She notes the explicit consideration of this in *Krombach v Bamberski*⁶² where the judgment had been reached after a trial where the court did not hear from the defendant's counsel because the defendant was in contempt of court. She argues that even for those judgments not covered by the Brussels Regulation, its jurisprudence is having an impact. This can be seen for example in the approach of the House of the Lords in *United States v Montgomery (No 2)*⁶³ where the role of Article 6 ECHR on the United States judgment was considered.

Canada

Canada is a jurisdiction where there have been significant developments in the last twenty years and the approach to transnational litigation issues is still evolving. The Supreme Court of Canada has added to 'real and substantial connection' test to questions of jurisdiction and recognition of judgments. As Pribetic points out, in

⁶⁰ *Administration of Justice Act 1920* (UK), *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK)

⁶¹ A Briggs, *The Conflict of Laws*, Oxford University Press (2nd ed), 2008, 144-148.

⁶² [2001] QB 709.

⁶³ [2004] 1 WLR 2241.

*Beals v Saldanha*⁶⁴ the Supreme Court of Canada extended the real and substantial connection test from inter-provincial judgments to international judgments. Pribetic also notes there is ongoing controversy over the test for establishing whether a foreign court has personal or subject matter over a Canadian defendant. The question of which factors should be used is currently on appeal before the Supreme Court of Canada.⁶⁵

Once the Canadian court is satisfied that the foreign court properly has jurisdiction over the case, only three defences exist to an action for enforcement of the judgment: (1) fraud;; (2) denial of natural justice; and (3) public policy.⁶⁶

Fraud can only be raised by new material facts arising since the foreign judgment or newly discovered facts that existed at the time the foreign court was determining the matter but were not reasonably ascertainable. Foreign judgments obtained in the absence of a fair trial will not be enforced and the Court indicated the closer the foreign courts procedure was to Canadian procedure, the more likely its procedures would be regarded as being fair or providing due process. The third defence, public policy, enables a court to refuse recognition and enforcement if the foreign judgment is based on a foreign law that would be contrary to the Canadian courts view of “basic morality”.

Israel

Karayanni and Brosh highlight the current complexity and unsatisfactory situation current existing in Israel when it comes to recognition and enforcement of judgments. While there is the longstanding *Foreign Judgments Enforcement Law 1958* (FJEL) it does not cover the field. In addition to a range of bi-lateral conventions on recognition of judgments, it is also possible to resort to common law rules in an action to enforce

⁶⁴ [2003] 3 SCR 416.

⁶⁵ *Van Breda v Village Resorts* (2010) ONCA 84, leave to appeal granted [2010] SCCA no 174.

⁶⁶ A Pribetic, *National Report for XIVth World Congress on Procedural Law*, p9.

the foreign judgment. While in the past the Israeli Supreme Court has given priority or precedence to the FJEL over the bi-lateral conventions where conflicts arose, Karayanni and Brosh report that recent Supreme Court authority suggests this is no longer the case.

One of the problems with the FJEL is that as result of international affairs it has limited scope. It only provides for direct recognition of judgments where Israel has signed an international agreement. Creative interpretations by the Supreme Court of Israel have enabled 'indirect' recognition of judgments along with "the novel remedy of a 'non-recognition declaration' - a negative mirror recognition designed to prevent future attempts to give effect to a foreign judgment."⁶⁷ Indirect or incidental recognition enables recognition of a foreign judgment by an Israeli court if in dealing with a matter before it, it believes "...such recognition is required by 'law and justice'."⁶⁸ This approach has been used liberally by courts, particularly in the area of succession. The indirect recognition is also an important adjunct to res judicata proceedings.

Karayanni and Brosh report that the enforcement of judgment under the FJEL is less complex. While only available for civil matters (which can include punitive damages) , the requirements include the foreign courts having jurisdiction to hear the matter; being a final judgment; and not being repugnant to Israeli law and public policy. The public policy defence has been given narrow scope and said to exist only in extreme circumstances. Similarly the Israeli courts have not give wide scope to the defences of fraud or natural justice.

The picture presented by Karyanni and Brosh is of a procedural approach that has show great willingness to recognize and enforce foreign judgments despite the difficulties caused by Israeli legislation and the lack of international agreements. Underpinning the Israeli judiciary's approach is a concern for quality of justice and

⁶⁷ Karayanni and E Brosh, *National Report for XIVth World Congress on Procedural Law*, 8.

⁶⁸ Karayanni and E Brosh, *National Report for XIVth World Congress on Procedural Law*, 8.

where this is established, Israeli courts have been keen overcome impediments to recognition and enforcement of judgments.

Australia

Recognition and enforcement of foreign judgments in Australia is achieved through the *Foreign Judgments Act 1991*(Cth) for those countries proclaimed under the Act or through common law rules for all other jurisdictions. Proclamation of countries requires on a level of reciprocity and for historical reasons, most of the currently proclaimed countries are members of the British Commonwealth. However some of the major European countries (France, Germany, Italy) are covered by the Act.

The Australian common law principles for recognition of judgments are similar to that of England, and United States. It requires the foreign court to have valid jurisdiction over the defendant (primarily by submission or presence in the jurisdiction). The Australian courts have not adopted the Canadian extension of ‘real and substantial connection’ with the foreign jurisdiction.

The grounds for resisting a foreign judgment in Australia are much the same whether it is governed by the *Foreign Judgments Act 1991* (Cth) or the common law. While Australian courts will refuse to recognise penal or revenue judgments, the main reasons for resisting recognition are fraud and public policy.⁶⁹ As neither of these are defined in the Act, the approach taken follows the common law.

Viven outlines how Australian courts have taken a very cautious approach to the public policy defence. While its scope does include situations where the Australian court would regard a substantial injustice has been created, a recent decision of the Victorian Supreme Court interpreted this as meaning the foreign judgment ‘...offends some principle of Australian public policy so sacrosanct to require its maintenance at

⁶⁹ J Viven, *National Report for XIVth World Congress on Procedural Law*, 13.

all costs.”⁷⁰ Again, Viven demonstrates how the special relationship with New Zealand has led to specific provisions covering New Zealand judgments with limitations on the grounds for challenging New Zealand judgments.⁷¹

South Africa

The reporters for South Africa, van Loerenberg, Boraine and van Heerden, outline the common law of South Africa’s approach to recognition of judgments. They report that High Court in South Africa will grant provisional sentence on a foreign judgment where:

- The foreign court had jurisdiction or international competence;
- The judgment and order is final and conclusive;
- The recognition and enforcement of the foreign judgment does not infringe public policy or the principles of natural justice;
- The foreign judgment does not contravene the Protection of Businesses Act 99 of 1978 (which provides that foreign judgments will not be enforced and letters of request will not be acted upon without prior permission of the Minister of Economic Affairs); and
- The foreign judgment has not become superannuated.⁷²

Conclusion

The National Reports provide a picture of national legal systems evolving to cope with the increasing demands placed on them by growth in transnational litigation. It is clear that the trans-substantive procedural paradigm continues to prevail and the

⁷⁰ *Jenton Overseas Investment Pty Ltd v Townsing* [2008] VSC 470 at [22] cited in J Viven, *National Report for XIVth World Congress on Procedural Law*, 13.

⁷¹ J Viven, *National Report for XIVth World Congress on Procedural Law*, 14

⁷² D van Loggerenberg Sc, A Boraine and C van Heerden, *National Report for XIVth World Congress on Procedural Law*, 14.

development of special procedural regimes for trans- national litigation has not occurred.

One of the barriers to such development is the overlap in levels of government that exist in many countries. In those countries with federal systems of government, there are the challenges of ensuring appropriate procedures for cross-border cases within the nation states as well for truly international cases. Other countries find themselves party to multi-lateral arrangements like the European Union with its own procedural requirements creating a patchwork of international, national and local procedural requirements.

Nevertheless considerable inventiveness is apparent. The Canadian experiment or exceptionalism sees continued examination of the scope and utility of its ‘real and substantial connection’ approach to questions of jurisdiction and recognition of judgments. The Israeli courts work creatively at overcoming the difficulties caused by both its legislation and world affairs, often achieving by indirect means what they can not do directly. Australia has by legislation created special procedural provisions to facilitate transnational litigation arising with one of its key trading partners – New Zealand. Some State courts are also negotiating special procedural arrangements with important courts in other jurisdictions.

Nevertheless the need for reform remains. The work of academics, judges and lawyers is critical to the identification of procedural solutions and advocacy of them to ensure their implementation. The International Association of Procedural Law plays an important role here and this World Congress will contribute to that process.