

Judicial Remedies in English Private International Law

Thesis submitted for the degree of Doctor of Philosophy
in the University of London
1995

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Abstract:

The dissertation considers the existing English forum classification of remedies in actions *in personam* as typically procedural in the context of private international law. It addresses the current law because of the central role of remedies in the processes of litigation and adjudication. Several other typically procedural matters have recently been reconsidered or been the subject of significant suggestions for re-examination.

The current law on remedies and the several cognate procedural matters is encapsulated in Dicey and Morris' Rule 17 which states:

All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).

This is referred to in the dissertation as the single reference thesis; because it prescribes exclusive reference to forum domestic law.

The single reference thesis is compared and contrasted with the objectivity thesis offered in the dissertation, both based on forum convenience-derived justiciability. The latter demonstrates that neither the justification for the application by the former of principles governing the availability of any given remedy nor the position thus justified by which the only applicable principles are those of the domestic *lex fori* is conceptually sound for all types of conflict case, and that forum remedies have an objective conflictual context.

Observable themes and the matter of forum efficacy are central to the advancement of the objectivity thesis, and are sufficiently self-contained for individual depiction. They are (i) extraterritorial jurisdictional competence, (ii) the concept of substantive relief, (iii) finality, recognisability and enforceability of judgments, and (iv) expediency and policy (including judicial discretion).

Arguments derived from their consideration are applied to the existing law in producing a clearer delocalised consideration of remedies in the conflict of laws than as it stood on 31st December 1994.

Acknowledgments

The idea for the analysis of conflict forum remedies began with a briefer unsupervised dissertation, "A Critique of the Orthodoxy of Excluding Foreign Law in the Evaluation of Compensatory Damages in the English Conflict of Laws: Considerations of Propriety of Quantum", prepared at the Bodleian law library to complete with distinction the requirements for the degree of master of law in the University of Hull in 1986. Much has subsequently happened, in slow but measured ways (notably by reason of accession to European Union law), in the private international laws of obligations and remedies generally.

The preparation of the present dissertation at University College London was supervised by Professor M.D.A. Freeman, Professor of English Law, to whom the candidate is indebted for having been given his time; no doctorant could have been more fortunate. But for his patience, counsel and kindness, the work could not have been completed. Professor R.W. Rideout, Director of Research, was helpful in enabling its conclusion as was Ms L. Teulon of the College Postgraduate Office; Professor W.L. Twining, Quain Professor of Jurisprudence, commented on what became the first chapter.

Professor S.A. Roberts of the London School of Economics recommended the transfer of registration to U.C.L.; Professor T.C. Hartley, also of the L.S.E., commented on what became of the procedural arguments in the third chapter and obtaining evidence abroad in the fifth. Dr. iur. utr. Markus Fisseler, *rechtsanwalt*, expressed constructive opinions on aspects of German law contained in the second chapter. Lord Denning expressed the most valuable personal terms of encouragement, as did Lord Wilberforce.

The candidate should like to deeply thank all of the above for their respective generousities, plus the staff of the U.C.L. and University of London I.A.L.S. libraries (especially Stan of the former, for a friendly voice), and others too numerous to mention. Sole responsibility for the work and for any faults or infelicities which may remain is, of course, his.

Wilkins Building, U.C.L.

June 1995

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List of Abbreviations of Journals Cited.

AJCL:	American Journal of Comparative Law
BIICL:	British Institute of International and Comparative Law
BrklynLR:	Brooklyn Law Review
BullLegDev:	Bulletin of Legal Developments
BYBIL:	British Year Book of International Law
CanBR:	Canadian Bar Review
CanJLJ:	Canadian Journal of Law and Jurisprudence
CivJQ:	Civil Justice Quarterly
CLJ:	Cambridge Law Journal
CLP:	Current Legal Problems
ColumLR:	Columbia Law Review
CornLR:	Cornell Law Review
DickJIL:	Dickinson Journal of International Law
HagRec:	Hague Academy Recueil Des Cours (Collected Courses)
HarvJIL:	Harvard Journal of International Law
HarvLR:	Harvard Law Review
HYBIL:	Harvard Year Book of International Law
IBA:	International Bar Association
ICLQ:	International and Comparative Law Quarterly
ILO:	International Law Quarterly
KCLJ:	King's College Law Journal
IntL:	International Lawyer
JuridR:	Juridical Review
LawContProb:	Law and Contemporary Problems
LegStud:	Legal Studies
LMCLO:	Lloyd's Maritime and Commercial Law Quarterly
LQR:	Law Quarterly Review
MLR:	Modern Law Review
MichLR:	Michigan Law Review
OJLS:	Oxford Journal of Legal Studies

StanfJIL:	Stanford Journal of International Law
SuprCR:	Supreme Court Review
TennLR:	Tennessee Law Review
TexLR:	Texas Law Review
TexILJ:	Texas International Law Journal
VandJTrL:	Vanderbilt Journal of Transnational Law
YbEurL:	Yearbook of European Law
YLJ:	Yale Law Journal

List of cases.

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- Johnson v Chief Constable Royal Ulster Constabulary [1986] E.C.R. 1651²¹⁴

- Kalfelis v Schroeder [1988] E.C.R. 5565^{82,240}
- LTU v Eurocontrol [1976] E.C.R. 1541⁹⁸
- Netherlands v Ruffer [1980] 3 E.C.R. 3807⁸¹
- Rewe Handelgesellschaft Nord mbH v Hauptzollamt Kiel [1981] E.C.R. 1805²¹⁴
- H. Shenavai v K. Kreischer [1987] 3 C.M.L.R. 782⁸²
- Tessili v Dunlop [1976] E.C.R. 1473⁸²
- Union Nationale des Entraîneurs et Cadres Techniques Professionnels au Football (UNECTF) v Heylens [1987] E.C.R. 4097²⁰²
- Wood Pulp; AA Osakeyhtio & Others v Commission of the EC [1988] E.C.R. 5193⁷⁹

C. United States cases:

- Asahi Metal Industries Co. v Superior Court (1987) 480 U.S. 102⁷⁸
- Burnham v Superior Court (1990) 110 S.Ct. 2105⁷⁸
- Cargill Inc. v Hartford Accident and Indemnity Co. (1982) 531 F.Supp. 710⁷⁸
- in re Commissioner of Patents for the Republic of South Africa (1980) 88 F.R.D. 75²⁸⁴
- Chase Securities Corporation v Donaldson (1945) 325 U.S. 304²³³
- Cooney v Osgood Machinery Inc. (1993) 612 N.E. 2d. 277, N.Y.⁷⁸
- J. Deere Ltd. and Deere & Co. v Sperry Corporation (1985) 754 F.2d. 137²³⁴
- Gardner v Thomas (1817) 14 John (N.Y.) 134¹⁷⁵
- International Shoe Co. v Washington (1945) 326 U.S. 310⁷⁸
- Laker Airways v Sabena 731 F.2d. 1300³⁴
- Loucks v Standard Oil Co. of New York (1918) 224 N.Y. 99^{170,175,196,200}
- Matusevich v Telnikoff (unreported, US Law Week, 14/2/95; BILCL BullLegDev No. 4 1995, p. 42)^{79,95,97}
- Pennoyer v Neff (1877) 24 L. Ed. 565⁷⁸
- Seattle Totems Hockey Club Inc. v National Hockey League (1981) 652 F. 2d. 852⁷⁸
- Slater v Mexican National Railway Co. (1904) 194 U.S. 120¹⁶²
- U.S. v Aluminum Company of America (1945) 148 F.2d. 416⁷⁹
- Watts v Thomas (1811) 2 Bibb. (Ky.)¹⁷⁵

D. Other cases:

- Adras Ltd. v Harlow and Sons GmbH Israeli Supreme Court (noted 104 LQR 383).²⁴⁰
- 243930 Alberta Ltd. v Wickham (1987) 61 O.R. (2d.) 731¹⁸⁷
- Ballabil Holdings Pty. Ltd. v Hospital Products Ltd. [1985] 1 N.S.W.L.R. 155¹⁸⁵
- Bank Melat v Nikpour (1985) F.S.R. 87¹⁸³
- Canadian Acceptance Corporation Ltd. v Matte (1957) 9 D.L.R. (2d.) 304¹⁸⁷
- Clark v Naqvi (1990) 63 D.L.R. (4th) 361²³³
- Consarc v Iraq IBA News August 1994, pp. 10-12⁸⁹
- Goring v Reid Brothers Motor Sales Ltd. (1982) 136 D.L.R. (3d.) 254¹⁷⁸
- Khalij Commercial Bank v Woods (1985) 17 D.L.R. (4th) 358^{163,187,198}
- Northern Trusts Co. v McLean [1926] 3 D.L.R. (Ont. C.A.) 93¹⁸⁷
- Pettkus v Becker (1980) 117 D.L.R. (3d) 257^{237,238}
- Protector Alarms v Maxim Alarms [1978] F.S.R. 442¹⁸³
- Sigurdson v Farrow and Others (1981) 121 D.L.R. (3d.) 181¹⁸⁷
- Vile v von Wendt (1979) 103 D.L.R. (3d) 356⁷⁵

List of statutory provisions and instruments.

(dissertation page numbers are indicated in superscript)

A. English:

- Statute of Frauds 1677⁷⁶
- Common Law Procedure Act 1852¹⁶⁷
- Fine Arts Copyright Act 1862¹⁹⁷
- Bills of Exchange Act 1882²⁴
- International Copyright Act 1886¹⁹⁷
- Order-in-Council of 28/11/1887 (incorporating the Berne Copyright Convention 1887)¹⁹⁷
- Maritime Conventions Act 1911²³⁵
- Administration of Justice Act 1920^{61,62,99,100}
- Maintenance Orders (Facilities for Enforcement) Act 1920²⁴²
- Supreme Court Judicature (Consolidation) Act 1925²¹
- Foreign Judgments (Reciprocal Enforcement) Act 1933^{61,97,99}
- Matrimonial Causes Act 1950²¹¹
- Wills Act 1963²⁴
- Misrepresentation Act 1967²⁴³
- Maintenance Orders (Reciprocal Enforcement) Act 1972²⁴²
- Matrimonial Causes Act 1973²⁴²
- Evidence (Proceedings In Other Jurisdictions) Act 1975²³⁵
- Domestic Proceedings and Magistrates Courts Act 1978²⁴²
- Civil Liability (Contribution) Act 1978³⁷
- Supreme Court Act 1981^{33,43,55,86,141,142,148,191,195,241}
- Administration of Justice Act 1982⁸⁶
- Civil Jurisdiction and Judgments Act 1982^{44,62,75,93,84,123,145,186,197}
- Foreign Limitation Periods Act 1984^{33,128,218,233,234}
- Merchant Shipping Act 1988^{201,220}
- Contracts (Applicable Law) Act 1990^{33,46,48,56,86,109,110,114,117,123,131,151,162,168,195,201,212}
- Civil Jurisdiction and Judgments Act 1991^{cf. references to 1982 Act}
- Maintenance Orders (Reciprocal Enforcement) Act 1992²⁴²

- Rules of the Supreme Court 1965, Orders X²⁴¹, XI^{24,44,58,75,83,99,142,181,227}, XXIV²³⁴, XXVI²³⁴, XXXVIII²³⁴, LIII²¹³, LXX²³⁵, LXXV²⁴¹
- County Court Rules 1981, Order XX²³⁴

B. European conventions:

- Convention For The Protection of Literary and Artistic Works (Berne, 1887)¹⁹⁷
- Convention on the Law Applicable to Contractual Obligations (Rome, 1980)^{33,47,86,110,127,132,220}
- Convention on Civil Jurisdiction and Judgments in Civil and Commercial Matters (Brussels, 1968)^{44,46,59,60,61,75,81,82,177,197,212,225,227,229,233,236}
- Convention on Civil Jurisdiction and Judgments in Civil and Commercial Matters (Lugano, 1988)⁸¹, otherwise cf. Brussels Conv. 1968

C. Other:

- Austria: *Allgemeines Burgeliches Gesetzbuch* (General Civil Code)³⁷
- Belgium: *Code Judiciaire* (Legal Code)⁴⁶
- France: *Code Civil* (Civil Code)^{46,189}
- France: Code Penal 1810 (Penal Code)²¹¹
- Germany: *Burgerliches Gezetsbuch, BGB* (Civil Code)^{37,49 et seq,88,189}
- Germany: *Zivilprozebordnung, ZPO* (Code of Civil Procedure)⁸⁴
- India: Code of Civil Procedure 1908¹⁸⁷
- Luxembourg: *Code Civil* (Civil Code)⁴⁶
- New Zealand: Recognition and Enforcement of Judgments Act 1934¹⁸⁷
- Ontario (Canada): Workmen's Compensation Act 1897¹⁶¹
- Switzerland: *Obligationenrecht* (Code of Obligations)³⁷
- United States: Federal Civil Procedure Rules^{181,234}

"[O]ne is sometimes convinced of the *correctness* of a view by its *simplicity* or *symmetry*; that is, these are what induce one to go over to this point of view. One then simply says something like: "That's how it must be"."

- L. Wittgenstein On Certainty (G.E.M. Anscombe and G.H. von Wright (eds.), 1969, paragraph 92)

CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTORY NOTE:

The dissertation considers the English forum classification of remedies as procedural in actions *in personam*¹ in conflict of laws adjudication². It is a study of the way in which forum remedial adjudication reflects and could more pervasively reflect the transjurisdictional characteristics of the cause of action. Other typically procedural matters have recently been extensively reconsidered in the courts and in the literature³, or had significant suggestions for re-analysis made about them⁴. The law on interim remedies⁵ has, in the past fifteen to twenty years, been the subject of much judicial and academic commentary. With regard to the main final remedies of compensatory damages, specific performance, injunctions and restitution, the assessment of the first of the remedies stated alone has witnessed an identifiable change of forum approach away from the exclusive application of the domestic *lex fori*⁶. To be sure, textbook writers usually consider compensatory damages away from the general headings of 'nature of remedy' and 'method of enforcement'⁷.

The thesis is to give the law on remedies a distinct conflictual context. It is to demonstrate that there is a characterisation issue and consequently a choice-of-law issue inherent in the law on remedies, the significance of which so far has not been amply addressed in the courts or in the literature to date, and which is thus responsible for the exclusive application, in both case law and academic commentary, of the inward-looking *lex fori*, comprising only forum domestic law, as satisfactory.

The central argument for delocalising the law on remedies is that the justification under the present law for the application of the principles which govern the availability of the given remedy is not properly conceived of for all types of conflict action (i.e., that "remedies law" is not, strictly speaking, "procedural law"); nor is the deductively justified position by which the only

applicable principles are those of forum domestic law (i.e., that "procedural law" is not strictly "domestic law").

The meta-theme of the thesis is objectivity, or "reference to observable forum competence in transjurisdictional contexts", of the forum. Thematic considerations broadly conceived of and a discussion of forum effectiveness are important to the presentation of the thesis. For the purpose of describing the viewpoint of the dissertation, it is sufficient to identify the themes and to mention that they overlap but are adequately self-contained for individual depiction. They are:

- (i) extraterritorial jurisdictional competence (i.e., that the English forum is competent to prescribe effective remedies to be enforced extraterritorially),
- (ii) the concept of substantive relief (i.e., that, though procedural in a formal definition, availability of all the main remedies of compensatory damages, specific performance, injunctions and restitution is significantly determined by substantivist argument),
- (iii) finality, recognisability and enforceability of judgments (i.e., that the final remedial order of the forum need only be satisfactory in its own eyes, and is good for export to other jurisdictions), and
- (iv) expediency and policy, including judicial discretion (i.e., that the interests of rational justice can override the dictates of strict application of rules in order to produce fair results).

Arguments deriving from the consideration of these themes are brought to bear upon the present law in making proposals and formulations for a clearer analysis of the conflict of laws of remedies. Together, the themes introduce and form the core of the expression "conflictual analysis", the explanation and manifestations of which are explained below. It is necessary here to clarify the viewpoint and the scope of the dissertation and, in particular, what is meant by "a distinct conflictual character" for the law on remedies, plus some definitional points.

1.2 CONFLICTUAL ANALYSIS OF REMEDIES:

The means to answering a question arising in a conflict case is begun by its characterisation by the forum as either a choice-of-jurisdiction question or a choice-of-law question. The object of the characterisation is to select the applicable law⁸. Various opinions have been expressed as to the correct rationalisation of the selection of the applicable law: that the selection is of an entire legal system with which the given question is most closely connected⁹, that the selection is of a particularly apropos rule (or rules) of a significantly relevant legal system¹⁰, that the selection is predetermined by consequentialist argument¹¹.

In typically wholly procedural matters (e.g. whether there is forum jurisdiction in a particular cause; what the mode of trial is to be), forum domestic law as *lex fori* is the predominant applicable law. However, there is an increasing number of applicable rules in this area which have no role in a domestic action and thus are not, strictly speaking, rules of domestic law, although they are a subset of the *lex fori*. Examples are most commonplace in the law governing the main interim conflictual remedies: *Mareva* injunctions¹², antisuit injunctions¹³ and *Anton Piller* orders¹⁴. These are discussed in Chapter Three (at 3.4.2A(iii)) and in Chapter Five (at 5.5.1). These interim orders have a characteristically extraterritorial aspect¹⁵, yet, in principle, they can be derived only from forum jurisprudence writ large into an intelligible and objectively definable form, strictly and necessarily for conflictual purposes only. The form confirms the existence of conflict rules of the forum. These rules are necessarily conceived of as part of the *lex fori*, but are not, strictly speaking, rules of domestic law.

Other examples of this type of rule are contained in section 72 of the Bills of Exchange Act 1882 which expressly applies only "where laws conflict", and in section 7 of the Wills Act 1963 which lays down forum rules for the formal validity of wills in conflict cases. Several examples of definitively procedural conflict rules of the forum are to be found in the Rules of the Supreme Court Order 11 Rule 1(1)(a) to (t) which, considered

together, extends forum jurisdictional competence to adjudicate. These are discussed in Chapter Two. The reason for referring to these rules is that they illustrate further that the *lex fori* contains rules that are not rules of domestic law.

It is not intended to discuss the range of remedies and their definitive rules as they exist in a conflict action. The aim is to critically analyse the conception of remedies as procedural for conflictual purposes, hence the description of the exercise as "conflictual analysis of remedies". It could have been "conflictual analysis of 'remedy'". For the purpose of the dissertation, "remedial law" means the sum of rules and principles which define the actual remedies, their availability and their enforcement.

From the point of view of theory, the main attribute of a general conflictual analysis of remedies (interim and final) is that the analysis makes the definition and exercise of jurisdiction more coherent and more comprehensive. This is necessary not least because the protection of forum process the definition of forum competence are significant factors that can necessitate the determination of the rules that must apply to a given typically procedural question such as the matter of remedies. In practice, granted the unavoidably fictional nature of the conflict of laws itself, the interests of coherence make a strong case for rules which should be departed from only where the results of their application will be manifestly unacceptable.

Conflictual analysis entails the identification of rules and principles of decision (whether or not to grant a given remedy in a conflict case) as a subset of the rules of the forum or legal system¹⁶. The distinguishing feature of the subset is that its application is transjurisdictional. The normative scopes of the identified rules or principles of decision are important because their applicability may be contended by the parties. The critical analysis does not involve *either* the notion that the set of rules and principles to which a conflict rule of decision does belong is other than the forum legal system, *or* the notion that evasion¹⁷ (as distinct from the avoidance) of possible conflict of rules of decision obtaining in the relevant

legal systems is granted or to be contemned by the reader: the former would be 'overconflictual' or too outward-looking, and the latter 'underconflictual' or a straightforward application of domestic law.

It will be argued that the now overdue re-analysis of remedies for conflict purposes should be predicated, first, upon sufficient account being taken of the non-procedural rules and principles that determine the availability of remedies and, secondly, upon the part that must be played by substantivist thought in characterising them. This is because the conception of judicial relief is based on the dichotomy between substance and procedure. Consequently, the choice of applicable law should reflect the dichotomy as fully as may be necessary. In this connection, the analysis of remedies will dispel any misgivings that the applicable rules and principles of decision must correspond to choice-of-law methodology which is usually applied to substantive matters, for example, the establishment of obligations.

However, the analysis will rely on the methodology of choice of law, as this is a central part of the existing institutional framework, and will further dispel misgivings that the relevant provisions of the *lex fori* need to be approximate to some other relevant law in order for the forum to establish parties' liability to meet obligations which are currently classified properly as substantive, or to establish procedural entitlement to a judicial remedy for the breach of obligations¹⁸, or that remedial adjudication must be conflict-evasive.

Furthermore, analysing remedies conflictually will draw attention to the exceptions to the applicability of the forum domestic rules and principles that govern the given remedy. The process of analysis will determine whether and, if so, how the forum should be disposed to the furtherance of a policy contained in a particular rule or principle of relevant foreign law, which is arguably not duplicated in forum domestic law. Where the latter law would become inapplicable as a result of conflictual analysis, the appropriate alternative provided by the analysis is not necessarily offered locally or

domestically but nonetheless originates from forum jurisprudence and jurisdiction¹⁹.

To have conceived of the arguments arising from the thesis' themes identified earlier in terms of a proper law of the remedy was not followed because it would have become necessary to entrench the arguments within the wider context of 'procedure' an exhaustive discussion of which is superfluous for the purposes of the dissertation²⁰. There will be adequate discussion in Chapter Five, "Cognate Topics". The critique of the present law will substantially refer to the test of double remediability which establishes that both the *lex fori* and the law of the place of the established wrong must provide a remedy for the cause of action, and to the test's redolence of tort double actionability²¹. The arguments from the themes will not separate 'nature of remedy' and 'method of enforcement' from the interpretation of 'procedure'. Therefore, to have proceeded in terms of a proper law of the remedy would have been apt to create the unnecessary and unhelpful presumption that the sum of the implications of proper law theory are to be prayed in aid²². It would also have been apt to create the equally unwarranted impression that the arguments are in some way dedicated to analysing the law on remedies as substantive law. Neither of these presumptions could be further from the truth about the arguments. The delocalising facts are the main comparison between (subjective) proper law theory and the critical analysis. It should be recalled that the themes are forum-oriented, but are primarily indicative of forum remedial (not procedural) competence.

The arguments are not much removed from describing the present law as being less sophisticated than it can be; in other words, that the present law can be underconflictual or can produce an underconflictual remedy. It will be argued that, in the appropriate case, it is sound to defer to rules or principles of the *lex causae* and/or of the law of the jurisdiction of enforcement²³; in other words, that double remediability, as described in the immediately preceding paragraph, is materially flawed as a premise to Dicey and Morris' Rule 17 which is discussed below. The arguments make

a case for the consideration, where appropriate, of rules or principles of another related legal system²⁴.

1.3 THE THESES:

The present law is encapsulated in Dicey and Morris' Rule 17:

All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).

Some pronounced features of conflict of laws adjudication are illustrated by the operation of this Rule: as is the case in the domestic action, compensatory relief is markedly better favoured than other types of relief such as, in particular, coercive relief²⁵; forum approach which follows the forms of action prescribed in domestic cases, is pragmatic rather than logically aspirated²⁶; domestic policy considerations are just as pervasive in the conflict action. These illustrations provide the basis for further examination of the law; this is the burden of Chapters Three and Four. For example, the pragmatic basis of English law accounts for several instances of incoherence in the forum's jurisdictional competence. To illustrate want of coherence for the purposes of the present chapter, it is sufficient to recall the reference to interim remedies and the absence of similar developments regarding final remedies, as may be observed in a comparison of the extended rules for the acquisition of adjudicatory jurisdiction and the limited regulation of the grant of final remedies where the applied *lex causae* is foreign.

The existing remedial law can be said to coherently reflect the principle of obligation which underpins the recognition and enforcement of foreign judgments²⁷ in the sense that post-judgment enforcement is conceived of as separate from but conditional upon the sum of the preceding stages of the process of litigation, in the way that the prescription of remedial judgments is separate from but required for enforcement. However, the requirements of double remediability do not include reference to the jurisdictional competence of the foreign court when remediability under the

relevant foreign law is being examined by the forum. The foreign law requirement of the test might, on the view of the existing law, be more convincingly procedural if the competence of the foreign court was considered relevant (it is not). This point is dealt with in the contexts of the jurisdiction and judgments themes, of the discussion of efficacy of forum orders, and more directly, of remedial jurisdiction, at 3.4.2.

The part played by foreign law under the present law is subsidiary, and clearly follows the tort double actionability test. Because effective liability is presumed for much of the dissertation (except in the depiction of the themes of substantive relief and expediency and policy), the analogy with the tort test must be strictly illustrative, but will nevertheless help demonstrate that one of the shortfalls of the present law is that it does not adequately address the apposition of liability and relief in the conflict of laws. This point is dealt with in the substantive relief and expediency and policy themes.

The application of Rule 17 is deduced from the fulfilment of the requirements of double remediality. As described thus far, the present law will be referred to as "the single reference thesis". In the course of the analogy between the tort liability test and the remediality test, much of the expressed judicial and academic dissatisfaction with tort double actionability²⁸ will surface in arguing for the realisation of a discrete non-procedural content in remedial orders as the most significant basis for reconsidering the law. For example, *lex causae* liability often includes liability to provide relief in a particular way²⁹; or the parties to a contract may validly stipulate their respective entitlements to relief in the event of breach³⁰.

In the former instance, adjudication by the single reference thesis will sever liability to provide relief in the manner prescribed by the *lex causae* because the principles establishing liability are deemed to be inapplicable, notwithstanding the plaintiff's entitlement to enforce the particular obligation according to the *lex causae*³¹. Unless identical remedial liability exists under forum law, no judicial order will be made. It will be argued that, in the latter

instance, the stipulations governing entitlement to relief should be enforceable if they are typically substantive and for the applicable *lex causae*³²; instances of the foregoing point to a compelling case for greater correlation between liability and relief in the interests of fulfilling the objectives of the conflict of laws.

It will be argued that the single reference thesis provides no cogent reason why, in appropriate circumstances, non-domestic rules and principles governing a particular remedy should not bear more directly upon the decision whether or not to grant it. It will be shown to offer inadequate analytical discrimination between the (non-procedural) purposes of final remedies and the (procedural) purposes of interim remedies, which is accounted for by the strict subsumption of the relevant considerations under the headings of 'substance' and 'procedure', predominantly the latter. The clear synthesis between substantive law and remedies in the domestic action must be adverted to in this regard as a fact of remedial adjudication.

It will further be argued that in a legal system renowned for its originality and having a pragmatically aspirated system of remedial adjudication³³, the order in the conflict case should reflect the rules and principles that will have governed the acquisition and the exercise of jurisdiction. This would clarify the character of 'procedure' for conflict purposes and, more specifically, would affirm the disposition of the legal system's adjudicatory scheme to give typically procedural matters a conflictual sense. It will be demonstrated that adjudication under the single reference thesis is not unlike using a torchlight in total darkness to improve one's hearing.

Greater store should be set by interpreting '*lex fori*' in the interests of coherent forum jurisdictional competence. This attribute of the forum requires that the finality and formal recognisability of its orders will be more readily sustained by the jurisdictions or legal systems concerned particularly because 'jurisdiction' and 'final judgment' are essentially more closely related than practical applications of the single reference thesis represent them to be. The aims and policies of the foreign jurisdiction will have been borne out

in rationalising the remedial order; secondly, litigants will only then be exercising a free choice in subjecting their legal interests to the procedural rules of the forum³⁴.

Where these results are absent, the substantive obligation under the *lex causae* is made less relevant and, consequently, the law to govern the remedy is underconflictual. The separateness of the law on remedies from substantive law should be seen less pervasively to infer that the former can only be domestic law; the latter is frequently premised on preserving substantive obligation free from remedial rules. It will be respectfully argued that this premise oversimplifies the judicial task.

No case is to be made in the dissertation for novel remedial forms. Rather, it is for novel rationalisations of the grant of the existing forms. The type of remedy available in a conflict action remains for the *lex fori* but not as wholly domestic law. The method of enforcement of a remedial order of a forum order will comply with the *lex fori* as wholly domestic law (particularly rules governing ancillary remedies) where enforcement is to take place within the jurisdiction. To these extents, no issue is taken with the single reference thesis. In fact, the groundwork of the arguments will derive substantially from the existing law.

The foregoing is the gist of what will be referred to as "the objectivity thesis". The intersection between the theses is more than partial. It is important that the current judicial disinclination to consider final remedies conflictually should not prejudice the case for objectivity. To be sure, the margin of error produced by the single reference thesis widens considerably in the case of coercive remedies³⁵. The objectivity thesis is descriptive and prescriptive, and offers a 'better'³⁶ deductive justification that amply considers the intrinsic nature of the remedy and the autonomy of forum law. It will be demonstrated that it is within the policy factors that are currently considered by the forum in deciding to apply jurisdiction at all³⁷ to adopt the objectivity thesis as outlined. In several respects, the objectivity thesis represents the coming of the law on remedies into its own outside the conflict of laws³⁸.

1.4 A NOTE ABOUT COMPOSITION:

The theses are compared and contrasted in Chapter Four, "Objectivity v Single Reference" where the reasons are demonstrated as to why the objectivity thesis is to be preferred as the means to setting conflict of laws doctrine in the area of remedies along its course. The themes will have been adequately presented in Chapter Two, "The Themes". To this will be added a short excursus on the effectiveness of final remedial orders. Chapter Three, "The Arguments", will have developed the arguments arising from the themes, and will constitute the objectivity thesis. The same chapter will include a fuller discussion of interim and judgment-executing remedies, than in previous chapters. Recent developments in the area of other typically procedural and related matters (e.g. the way in which remedies *in rem*, restitutionary remedies and so-called self-help remedies enhance the objectivity thesis) will be the subject of Chapter Five, "Cognate Topics". There then follows a conclusion.

NOTES TO CHAPTER ONE:

1. The remedies, or remedial orders, in question are those of compensatory damages, specific performance and final injunctions, plus discussion of restitutionary relief. The remedies are not necessarily analysed individually, the primary object of enquiry being the way in which they are conceived of, and, consequently, the implications for theory of the conception. For an operable definition of actions, see s. 151(1) Supreme Court Act 1981: "'action" means any civil proceedings commenced by writ or in any other manner prescribed by rules of court"; for one of damages, see Halsbury's Statutes of England and Wales, (4th ed., Vol. 13, 1991), at p. 576; of specific performance, see G. Jones and W. Goodhart Specific Performance (1986), p. 1; of final injunctions, Halsbury's Statutes, ante, Vol. 21, at p. 1203; of restitution, Lord Goff of Chieveley and G. Jones The Law of Restitution (4th ed., 1994), e.g. at p. 3.

2. The formal version of the focus of the dissertation is set out at the beginning of 1.3, post (p. 28).

3. e.g., in respect of foreign limitation periods, see the Foreign Limitation Periods Act 1984 (cf. Law Commission Working Paper No. 114 (1982)); in respect of obtaining evidence from abroad, see South Carolina Insurance Co. Ltd. v Assurantie Maatschappij "De Zeven Provinciën" N.V. [1986] 3 All E.R. 487.

4. e.g., in respect of priorities of claims, see P.B. Carter (1983) 54 B.Y.B.I.L. 207 ("Priorities Of Claims In Private International Law").

5. see nn. 12-14, post.

6. see D'Almeida Araujo Lda v Sir Frederick Becker and Co. Ltd. [1953] 2 All E.R. 288; Boys v Chaplin [1971] A.C. 356. See also, article 10(1)(c) EEC Convention on the Law Applicable to Contractual Obligations which provides that the *lex causae* should govern the assessment of damages "in so far as it is governed by rules of law". This is now incorporated into English law by s. 7(1)(c) Contracts (Applicable Law) Act 1990. The Act, as well as the common and civil law traditions are discussed at 2.3 (pp. 43-53).

7. see Dicey and Morris on the Conflict of Laws (L. Collins (ed.), 12th ed., (1993), pp. 171-172 and 183-184; Cheshire and North's Private International Law (P.M. North and J.J. Fawcett (eds.), 12th ed., pp. 91-92 and 92-96. Other authors discuss damages to the virtual exclusion of other remedial questions: see J.G. Collier, Conflict of Laws, (1987), pp. 324-326 (since amended in the second edition, 1994, at pp. 68-71).

8. See generally, Cheshire and North, op. cit., at pp. 43 et seq. See also R.H. Graveson Comparative Conflict of Laws: Selected Essays (1977, 2 Vols.), Vol. 1, at pp. 99-106, and 112-118.

9. Cheshire and North, op. cit., pp. 45 et. seq., J.D. Falconbridge (1937) 53 L.Q.R. 235 ("Characterization In The Conflict of Laws"), at p. 236, A.H. Robertson, Characterization in the Conflict of Laws (1940), p. 92.

10. Cheshire and North, pp. 32-38.

11. See e.g. P.B. Carter, (1991) 107 L.Q.R. 405 ("Choice Of Law In Tort And Delict"), at pp. 408-409, and also J.J. Fawcett, (1985) 5 O.J.L.S. 378 ("Result Selection In Domicile Cases").

12. Mareva Compania Naviera SA v International Bulk Carriers SA [1975] 2 Ll. Rep. 509. The order was first granted in Nippon Yusen Kaisha v Karageorgis [1975] 2 All E.R. 282. The basic rules were set out by Lord Denning M.R. in Third Chandris Shipping Corporation v Unimarine SA [1979] 2 All E.R. 972, C.A.

13. British Airways Board v Laker Airways Ltd. [1985] A.C. 58 and Laker Airways v Sabena 731 F. 2d. 1300 and Midland Bank Plc v Laker Airways [1986] 1 All E.R. 526; Societe Nationale Industrielle Aerospatiale v Lee Kui Jak and Anor., [1987] 3 All E.R. 510. See T.C. Hartley, (1987) 35 A.J.C.L. 487 ("Comity And The Use Of Antisuit Injunctions In International Litigation").

14. Anton Piller KG v Manufacturing Processes Ltd. [1976] 1 All E.R. 779.

15. see L. Collins (1989) 105 L.Q.R. 262 ("The Territorial Reach Of Mareva Injunctions"); C. McLachlan (1987) 36 I.C.L.Q. 669 ("Transnational Application Of *Mareva* Injunctions and *Anton Piller* Orders"); Derby v Weldon (No. 6) [1990] 3 All E.R. 263.

16. This is much the same as the 'domestic jurisprudence writ large into an intelligible and objectively defined form, strictly and necessarily for conflictual purposes only', supra p. 24.

17. 'Evasion' is used here with reference to the forum's choice-of-law methodology and not to the litigants as is frequently the case; see, e.g., J.J. Fawcett (1990) 49 C.L.J. 44 ("Evasion of Law and Mandatory Rules in Private International Law").

18. The reasoning behind a rule of decision whether or not to grant a remedy should go beyond the present law which merely denies that such rules are justified on Cook's local law theory. See W.W. Cook, The Logical and Legal Bases of the Conflict of Laws (2nd ed., 1942) and, H. Kelsen, General Theory of Law and State (2nd. ed., 1961), pp. 244-245: "The true meaning of the rules of so-called private international law is: that the law of a state directs its organs to apply in certain cases norms which are norms of the state's own law, but which have the same contents as corresponding to another state's law".

For criticisms of the local law theory, see A.E. Anton and P.R. Beaumont, Private International Law: A Treatise from the Standpoint of Scots Law (2nd ed., 1990), pp. 29-31 and Cheshire and North, op. cit., 30-31.

The essence of propositions in the dissertation regarding the reasoning behind rules of decision about granting remedies is that the best way pragmatically to enforce the defendant's established remedial liability may require the consideration and the inclusion of appropriate positions under relevant foreign remedial law, and that even where legal provisions between the *lex fori* and the *lex causae* coincide, the applied law should be identified and the decision reached justified.

19. The intended arguments differ from views such as those propounded by I. Szaszy, International Civil Procedure (1986). Szaszy's 'international civil procedure' is based on municipal civil procedural rules of the forum and so his views are more in line with the position found under most legal systems (but see J. Salmond, Jurisprudence or The Theory of Law (1902), at pp. 610 et seq.); cf. 3.4.1.a, at n. 59, post.

Szaszy argues, however, that 'international civil procedure' is a precondition for the fulfilment of a conflict system, though the rules are rules of municipal law (pp. 26-27). The rules which are proposed in this regard in this dissertation are the rules of a conflictual character and are rules that assert that such conflictual rules, not being rules *ad hoc*, are singularly tied to the forum (e.g., by envisaging and emphasising the continued submission of the defendant to the forum). This confirms that the rules have their origins in domestic jurisprudence.

Further, the rules proposed in this dissertation have no public law connotations whatsoever as does Szaszy's theory, even if one ignores certain inaccuracies in his conception of the differences between public law and private law.

His discussion of the sources of 'international procedural law' (pp. 53 et seq.) as excluding jurisprudence, the will of contracting parties and the practice of the courts, plus his distinctive socio-political bias (pp. 79 et seq.) are further reasons for distinguishing his perspective from that of the arguments in this dissertation.

20. See J.A. Jolowicz in I.R. Scott (ed.) International Perspectives on Civil Justice (1990), at pp. 27-45, and K.D. Kerameus in the same book, at pp. 47-66, for accounts of the nature and purposes of civil procedural law and of the need for and limitations to procedural unification. See also N. Andrews Principles of Civil Procedure (1994), Chapter 2 generally, and pp. 455-462.

21. i.e., "redolent" in the sense that it makes the *lex fori* the dominant governing law in the same way that the tort test does, and in the sense that liability must be established under both the domestic law and the relevant foreign law.

22. For an account of English proper law theory, see F.A. Mann (1987) 36 L.Q.R. 437 ("The Proper Law In the Conflict of Laws"). See also C. McLachlan (1990) 61 B.Y.B.I.L. 311 ("Splitting The Proper Law In The Conflict Of Laws") for opposition to the idea of a split proper law.

23. See e.g. N. MacCormick, Legal Reasoning & Legal Theory, 1994, at p. 261: "That *P* is not a principle of mine does not mean that it cannot be a principle at all, not even if I have good arguments which suggest that it is a very bad principle to adhere to"; and J. Bell in The Legal Mind: Essays for Tony Honore (1986), p. 45, at pp. 45-46: "by 'sound' I do not necessarily mean 'correct', but rather the weaker sense of 'legally arguable'".

24. See nn. 9 and 10, ante, and the text they accompany (p. 24). It is not fatal that a distinction is not made between jurisdiction selection and rule selection. For instance, it is possible that the parties to a contract may select the rules to govern their contract without selecting the jurisdiction to which the rules belong, and vice versa. Further, the splitting of the contractual proper law according to the question arising is also possible. Cf. McLachlan, loc. cit., in B.Y.B.I.L.

Forum recourse to a foreign system's conflict rules (*renvoi*) is excluded from the considerations of foreign law in the dissertation. Cf. Dicey and Morris' Rule 1, op. cit., p. 70. See also art. 15 Rome Contracts Convention, 1980. The reasons for excluding *renvoi* are the unpredictability of result (cf. Dicey and Morris, pp. 82-83) and *circulus inextricabilis* (Dicey and Morris, pp. 84-85).

25. Only where appropriate, (i.e., where the justiciability of the given case requires that foreign remedial rules/principles, which do not make damages the primary remedy, should apply instead of domestic ones) will the arguments include arguments against compensatory damages being the primary remedy in private international law (cf. 3.2.2, pp. 109-111). Such arguments are in no way pervasive in the dissertation. For a good discussion of such arguments in the wholly domestic case, see P.S. Atiyah, An Introduction to the Law of Contract, (4th. ed., 1989), pp. 444-448; see also P.B.H. Birks, Civil Wrongs: A New World (1992). At p. 57: "The hegemony of compensation for loss is an illusion..."

26. See Sir Jack I.H. Jacob, The Fabric of English Civil Justice (1987), pp. 169-172 and 177-178. See also R. Dworkin, Law's Empire (1986), pp. 94-96, and 151-175.

27. This is discussed in Chapter 2 (2.4). The most recent affirmation of this principle is Adams v Cape Industries [1990] 2 W.L.R. 657, C.A. But see, A. Briggs (1987) 36 I.C.L.Q. 240 ("Which Foreign Judgments Should We Recognise Today?"), at p. 242 et seq., though Briggs does not relate 'recognition' to 'remedy'.

28. See the recent House of Lords' Private International Law (Miscellaneous Provisions) Bill 1994 derived from the Law Commission Working Papers Nos. 87 (1984) and 193 (1990). See also P.B. Carter, *loc. cit.* (1991) L.Q.R., and Red Sea Insurance Co. Ltd. v Bouygues SA and Others [1994] 3 All E.R. 749 per Lord Slynn of Hadley, on the application of the "jurisdiction-with-the-most-significant-connection-to-the-given-issue" exception to the tort rule of double actionability. At p. 762: "To limit the [tort choice of law] rule so as to enable an English court only to apply English law will conflict with...flexibility..., though the fact that the forum is being required to apply foreign law in a situation where its own law would give no remedy will be a factor to be taken into account where the court decides whether to apply the exception". The effect of the exception is to make the *lex loci delicti* the sole applicable law, sometimes to the entire claim (including the remedy sought). This effectively brings the law of tort damages up to that of contract damages, cf. n. 6, *supra*, since the *lex causae* can now govern damages in both cases.

29. e.g., para.276 German Civil Code: "The debtor is responsible for deliberate acts of negligence..." See also, paras. 920 and 1295(1) Austrian Civil Code, and art. 99 Swiss Code of Obligations. For a brief comparative study of these positions vis-a-vis the common law, see G.H. Treitel, Remedies for Breach of Contract: A Comparative Account (1988), especially at pp. 7 et seq.

30. Godard v Gray (1870) L.R.6 Q.B. 139, at pp. 147-148.

31. Warner Brothers Pictures Inc. v Nelson [1937] 1 K.B. 209; see also Dicey and Morris, *op. cit.*, pp. 171-174.

32. See n. 27, *ante*.

33. See n. 23, *ante*. See also Sir Leonard Hoffman, (1993) 56 M.L.R. 297 ("Changing Perspectives in Civil Litigation"). See also Arab Monetary Fund v Hashim and Others; Arab Monetary Fund v Bahiralulloom and Others (judgment of Chadwick J. of 29/7/94: CH 1988 A No. 9317), for the (restitutionary) right to recover contribution under s. 1 Civil Liability (Contribution) Act 1978 enacted pursuant to the Law Commission Report on Contribution (Working Paper No. 79 (1977)). Restitutionary remedies are discussed generically at 5.5.2 (pp. 226-229).

34. See J.A. Jolowicz in I.R. Scott International Perspectives on Civil Justice: Essays in Honour of Sir Jack I.H. Jacob (1990), at p. 32. See also R. Dworkin, A Matter of Principle (1986), pp. 92-93: "They have a right to procedures justified by the correct assignment of moral harm the procedures risk, and a related right to a consistent evaluation of the harm in the procedures afforded them as compared with the procedures afforded others in different civil cases".

35. i.e., injunctions and specific performance. In a material sense, these remedies can be constitutive (i.e., give the awardee assertable rights in the same way as declaratory judgments). For a discussion of the common doctrinal origins of orders *in personam* and orders *in rem*, see W.H. Hohfeld, Fundamental Legal Conceptions As Applied In Judicial Reasoning (ed. W.W. Cook, 1964), pp. 13 et seq. The theme of the finality, recognisability and enforceability of judgments will draw upon these origins. See also P.S. Atiyah, An Introduction to the Law of Contract (1989), p. 448, for a discussion of the similarity between a decree for specific performance and a property right. For a discussion, e.g., of similarities between the remedies of specific performance and recovery of a liquidated sum, see G. Jones and W. Goodhart Specific Performance (1986), at p. 262, dealing with The Puerto Buitrago [1976] 1 Ll.Rep. 250.

36. 'Better', not in the sense in which R.A. Leflar has used the expression in terms of the selected applicable law: see R.A. Leflar (with L.L. McDougal III and R.L. Felix) American Conflicts Law (4th ed., 1986), at pp. 297-300.

37. See J.J. Fawcett (1989) 9 O.J.L.S. 205 ("Trial In England Or Abroad: The Underlying Policy Considerations").

38. See S.M. Waddams (1983) 3 O.J.L.S. 113 ("Remedies as a Legal Subject").

CHAPTER TWO: THE THEMES

2.1 INTRODUCTORY NOTE:

Chapter One outlined the scope of the dissertation by identifying the themes, the expression 'conflictual analysis' and aspects of the present law which the dissertation deals with. The present chapter depicts the themes which constitute the parameters for the presentation of the conflictual analysis of remedial orders. The chapter is divided mainly into sections 2.2 to 2.5, each dealing with one of the themes in the order in which they are referred to in Chapter One. To these is added a brief excursus, 2.6, on the effectiveness of conflictual final orders. 2.7 contains closing remarks.

2.2 EXTRATERRITORIAL JURISDICTIONAL COMPETENCE¹

"A suitable symbol for the difficulty in gaining a clear understanding of the matter is the puzzling etymology of the word 'territory' itself. It is, obviously enough, the English translation of the word *territorium*, which was employed to describe the area of land surrounding a town (*municipium*) which was under the latter's jurisdiction..."²

This section introduces and examines the above theme from two viewpoints, namely, public international law and E.U. law. The discussion demonstrates that there is a single all-purpose jurisdictional approach, which enables the definition of the limits of forum jurisdictional competence.

Jurisdictional competence is the forum's ability or capacity to adjudicate over the parties and the subject-matter, and the facility with which that power can be exercised in a given cause³. The term refers to the general legal competence of the forum and is an aspect of judicial sovereignty within the state⁴. Jurisdiction can be legislative (or prescriptive) or prerogative (or enforcement)⁵. As will be demonstrated, the distinction is particularly relevant in private international law, and more so than in the wholly domestic case⁶. The focus on territorial aspects of jurisdiction in the present section is necessary because of the role played by these aspects in the current theory which underlies the forum's jurisdiction to prescribe

remedies⁷. The dissertation is concerned primarily with *in personam* jurisdiction. The only discussion of *in rem* jurisdiction is contained in Chapter Five.

In general terms, the determinants of *in personam* jurisdictional competence are the forum's control over its own process, the forum's control over the parties, especially the defendant⁸, and the connectedness of the substantive dispute to the forum. It goes without saying that, of the themes, extraterritorial jurisdictional competence is predominant from the point of view of theory because it supplies the context and operates as a subtextual means of cohesion for the other themes that follow.

By the traditional rules⁹, the historical basis for the forum's exercise of jurisdiction was the defendant's presence within the territory of the forum court¹⁰. The traditional rules and the modern rules of extended jurisdiction¹¹, hereafter referred to in the dissertation as "the forum rules", are applicable alongside the rules adopted by reason of the United Kingdom's membership of the European Economic Community¹². The latter set of jurisdictional rules will hereafter be referred to as "the European rules".

The intention is not to examine the entire range of either set of rules; rather, it is to demonstrate, first, that there is distinguishable a single basic judicial approach to jurisdictional matters generally, which approach follows forum jurisprudence irrespective of the set of rules to which any particular facts may direct the forum for application. The approach will be rendered as a formula comprising the broad principal components of jurisdictional theory, namely, 'domicile', 'residence', 'presence' or 'submission' and 'substantial connection'¹³.

The historical basis of presence within the territory would found forum jurisdictional competence upon the time and place of service of the writ on the defendant (submission to the forum's jurisdiction would also be sufficient) without more¹⁴, and thus effectively rule out the connection between the dispute and the legal system as a relevant factor. When proceedings are to be instituted and at which stage jurisdiction is either assumed or declined, the focus is on whether the action can be prosecuted,

rather than on its final justiciability. The latter would become the subject of focus after the forum's subsequent characterisation of the merits for choice-of-law purposes¹⁵.

This would suggest that the decision to take jurisdiction in the conflict action is not related directly to the adjudicatory function because there is an available remedy, as is the case in domestic actions¹⁶. Consequently, this provides an instructive indicator of the implications of applying the methods of adjudication in domestic actions in conflict actions and, in particular, it exemplifies the significance of the forum's interest¹⁷ in and appropriateness¹⁸ to the given case, as factors in the decision to assume or decline jurisdiction¹⁹.

Domestic law classifications are those with which the conflict forum is most familiar in its undertaking to protect its own process²⁰; otherwise, a conflict forum could assume jurisdiction despite its inability to recognise, for example, a particular type of foreign civil wrong as sufficient to establish a cause of action in tort. In such a case, the forum does not interpret its own interest as an overriding factor. The absence of a domestic law remedy to satisfy a similar but not expressly identical claim established under a foreign *lex causae* should, on the historical view, found the declining of jurisdiction.

Expressed differently, if the forum's interest as it is interpreted in a domestic case is mechanistically transferred to a conflict case, the result could be the application of the *lex fori* (comprising domestic rules only) once the decision has been reached to exercise jurisdiction to adjudicate. The question of liability for a civil wrong could possibly be addressed before that of jurisdiction and, questionable as this must be, could thereby influence prematurely and, therefore, negatively, the outcome of the latter question, and would be a different construction of the purpose of the forum's interest in the exercise of the power to adjudicate. Forum interest would be represented as though it coincided, or was coterminous, with the process of adjudication itself. It would thus be a distinctly premature, excessive and underconflictual assertion of domestic jurisprudence.

It is for these reasons that both the traditional and the European rules for the taking of jurisdiction are no longer justified exclusively on the territorial view²¹. The territorially justified model subsists for the exercise of remedial jurisdiction²². Theoretical coherence may require that the exercise of the remedial aspects of prescriptive jurisdiction be accordingly interpreted away from the constraints of territoriality.

2.2.1 The 'Public International Law' Viewpoint²³:

I. Brownlie writes that despite the pervasiveness of territoriality as a basis for jurisdictional competence of an international law tribunal, the principle is no longer a contemporary limiter of that forum's jurisdictional competence²⁴. He introduces the role and the importance of the forum's interest²⁵. The contemporary limits of jurisdictional competence and the significance of the forum's interest have been responsible for the direction in which assertion and exercise of jurisdiction have developed for the purposes of public international law. Brownlie's opinion is expressed in the following way:

"[m]unicipal courts are often reluctant to assume jurisdiction in cases concerning a foreign element and adhere to the territorial principle conditioned by the *situs* of the facts in issue, and supplemented by criteria relating to the concepts of allegiance or domicile and doctrines of prior express submission to the jurisdiction and of tacit submission, for example on the basis of the ownership of property in the state of the forum"²⁶.

The fact that the exercise of jurisdiction is, in a large number of cases, ultimately sustained by enforcement procedures strengthens the proposition in the passage²⁷. The role of enforcement procedures is discussed in its own right later in the present chapter under the theme of finality, recognisability and enforceability of judgments.

It is pertinent that foreign courts will often acquiesce in measures taken by the forum²⁸. The position of foreign courts can be said to go beyond territoriality and appears to be the result of a process of balancing the respective legal systems' interests at stake²⁹, with a view to refining

the role of territory in matters of jurisdiction³⁰. Citing Judge Jennings, Brownlie concludes with:

"the principle 'that extraterritorial jurisdiction may not be exercised in such a way as to contradict the local law at the place where the alleged offence was committed'. In the case of corporations with complex structures and foreign-based subsidiaries, a principle of substantial or effective connection could be applied as a basis for jurisdiction. This approach would accord with the highly relevant notions of the conflict of laws and, in particular, the notion of the proper law of the transaction"³¹.

For private international law, there is much to gain from the public international law position thus described. Some of this is in evidence in the exercise of prescriptive *in personam* jurisdiction. The readiest example is found in forum interim remedies. They are the subject of discussion in their own right in Chapter Five. It should be observed that the legal basis for these extraterritorially enforced remedies is much the same as the basis for extraterritorial measures taken in public international law³². The practical parallels for remedies are rife and not to be downplayed as the present law could possibly do.

An important implication of the theme of extraterritorial prescriptive jurisdiction is that the acceptable limits, contained in the various forum jurisdictional rules, to the assumption and exercise of jurisdiction in a conflict case³³ must in theory be limits predetermined by a rational³⁴ forum, one that is attuned to its conflictual jurisdictional rules as having originated from its own jurisprudence. The limits of extraterritorial jurisdiction will always be imposed by the *lex fori* comprising not only domestic rules but rules that reflect the appropriate consideration of relevant foreign jurisdiction. The English forum encapsulates the rational forum.

The limits by the present law are to be found in the rules on *forum non conveniens*, the staying of actions, and *lis alibi pendens*³⁵, the applications of which construe foreign jurisdictional rules as relevant. The inherent jurisdiction of the forum to prevent injustice via foreign litigation is strengthened statutorily in section 49(3) of the Supreme Court Act 1981 and

in section 49 of the Civil Jurisdiction and Judgments Act 1982. They may be relied on even in wholly domestic cases, and in cases where the cause of action arises extraterritorially. All that is necessary is that the relevant fora have jurisdiction should they be required to exercise this power.

2.2.2 The 'European Rules'³⁶ Viewpoint:

It should be stated from the outset that the only strictly procedural European rules are to do with the enforcement of judgments and with preliminary rulings³⁷, which implies that the forum can exercise extraterritorial jurisdiction once all other grounds for acquiring jurisdiction are satisfied. To interpret procedure as having this implication is to understand that it dictates the bounds of coherence in subsequent exercise of jurisdictional competence. For private international law, there is a latent basis under the European rules for possible incorporation by the forum of adjudicatory methods in non-European cases, and which is facilitated by existing significant jurisdictional parallels between the respective types of case currently regulated by different jurisdictional rules.

Articles 2 to 4 of the Brussels Convention contain the basic rules which give jurisdiction in the particular cause to the forum court of the defendant's domicile (Articles 2 and 3)³⁸. Where the defendant is not domiciled in any of the Member States, Article 4 provides that the jurisdiction of the courts of each Member State is referred to the ordinary law of the forum state. Article 24 provides that even where a court lacks subject-matter (substantive) jurisdiction, the court is able to grant provisional relief, including such relief as *Mareva* injunctions³⁹.

The territorial scope of the European rules is put in sharper focus by the following hypothetical case:

An English mail order company wishes to institute proceedings for damages for breach of contract against a German national domiciled and resident in Brazil. The contract was executed and to have been performed in England with English law as the applicable law.

Clearly, the appropriate set of jurisdictional rules for the forum to adopt in order to empower it to assume jurisdiction (including, presumably, to allow

service out of the jurisdiction) are the ordinary forum rules⁴⁰. This is because the European rules do not directly address the question of extraterritorial jurisdiction and, significantly, because the rules leave the determination of the question of the defendant's domicile to the law of the particular Member State⁴¹. It is significant that neither applicable law is entirely territorially justified.

In this light, the formula underpinning the European rules is to be welcomed as good for jurisdictional purposes generally. If the forum can assume jurisdiction, then it is able to grant orders- interim or final- as it may deem fit, subject only to a case for the given order being satisfactorily made, to the exercise of contrary jurisdiction by some other interested forum⁴² and to the operative limits imposed by public policy and reciprocity (both these are more appropriately discussed later in the present chapter), and the circumstances under which the consideration of foreign law must be excluded all together⁴³. A workable all-purpose jurisdictional formula can accordingly be rendered thus:

J ; (D)~ (R/P)(S)or(SC) :that is, there is jurisdictional competence where the basic rule founded on domicile, however defined, whether of individuals or of corporations, is satisfied- where the basic rule is inapplicable, residence and/or presence or submission, or substantial connection between the forum and the cause of action will be sufficient.⁴⁴

The formula is not offered to represent formal judicial method. It provides a synchronisation of the bases of forum jurisdictional jurisprudence.

It will transpire that it is not unreasonable to consider the forum's application of rules of either the *lex causae* or the law of the place of enforcement of the remedy⁴⁵. Territorial interests are evidently not decisive where the order is ordinarily to be given effect outside forum territory thus bringing the considerations of *in personam* jurisdiction being ineffectual, a *brutum fulmen*⁴⁶. It is constant that the validity of every judgment of the forum depends upon, is tied to, the forum's competence and not on whether the need arises to deploy effective ancillary enforcement measures. The constraints on jurisdiction to prescribe final remedies which will take effect

extraterritorially are no less liberal than those which obtain under domestic law.

The depiction of the theme of judicial jurisdiction can be closed with the view that extraterritorial remedies are not necessarily exorbitant in the way that current remedial jurisdiction suggests that they are. A version based on the present theme is no more exorbitant than Article 14 of the French or the Luxembourg *Code Civil*, or Article 638 of the Belgian *Code Judiciaire*, all of which provide for jurisdiction based on parties' nationality or domicile, and which rules are now applicable only in non-European conflict cases. The appearance of exorbitance is markedly less convincing where the case is a non-European conflict case, and where the forum does not apply as mandatory the rules derived from the Brussels and Lugano Conventions. It is also less convincing when compared with the rule in *Baroda v Wildenstein* for non-European conflict cases.

2.3 THE CONCEPT OF SUBSTANTIVE RELIEF⁴⁷:

The present theme deals with the institutional dichotomy between substance and procedure. The preservation and use of the dichotomy in choice of law is to be examined in the light of the facts that judicial remedies are the ultimate objective of the process of litigation and are the centrepiece of the lawsuit⁴⁸. When granted, they constitute the judgment of the forum⁴⁹.

From the viewpoints of the Contracts (Applicable Law) Act 1990, of the civil law tradition and of normativity and the legal system, the following discussion of the concept of substantive relief aims to demonstrate that final remedies are unequivocally substantivistic⁵⁰, even if only at a secondary level, or at some level other than that at which the expression "substantive" is frequently used. It is not being suggested that liability for wrongs must always be interpreted as remedial liability. Rather, the discussion infers that *lex causae* liability for wrongs may include remedial liability. The aim of the discussion is advanced by separating the principles that govern the availability of relief from the rules that stipulate the steps (the procedure) to follow in the ultimate realisation of relief. From another perspective, the aim

is to distinguish between the form of the remedial order and the substance of remedial liability; only the former is conceived of here as procedural relief.

2.3.1 The 'Contracts (Applicable Law) Act 1990'⁵¹ Viewpoint:

The relevant provision of the statute is contained in Schedule 1 of the Act (The Rome Convention), Article 10(1)(c):

The law applicable to the contract will further determine, within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law.

This statute incorporates the Rome Convention on the Law Applicable to Contractual Obligations 1980, and is a turning point in private international law⁵². It adjusts the dichotomy between substance and procedure in a traditionally procedural question (much in line with contemporary adjustments of the dichotomy in other areas the subject of discussion in Chapter Five) and transfers the ground of applicable law from the traditional *lex fori* to the contractual *lex causae* for the purpose of remedying breaches of contract, and includes the quantification of damages⁵³.

The necessary and significant implication for a discussion of the concept of substantive relief is that the law governing questions of compensatory damages is now considered as being more substantive than it was once thought to be. This represents a development of the *rationes decidendi* in D' Almeida Araujo Lda v Sir Frederick Becker⁵⁴ and Boys v Chaplin⁵⁵ respectively.

The present law is that once it is established that the forum has subject matter jurisdiction, it automatically has jurisdiction to make an order for the remedy of compensatory damages, the quantum of which may be subject to principles of an applied foreign law; subject to establishment of liability and to proof of the establishing law. The question of competence to adjudicate and to make a remedial order remains, to all intents and purposes, a properly procedural one that can be answered solely by reference to the appropriate set of jurisdictional rules⁵⁶: in this case, the European rules, as the law upon which the Act is based.

The proceedings for a given remedy as it appears on the writ and the forum court's order where one is awarded, are, together, the definitively procedural steps⁵⁷. There is the added advantage of reference being made to rules or principles of only one legal system in the forum court's application of the *lex causae* to the questions of contractual liability and of the quantum of damages (if these questions are to be dealt with at all times as separate questions as they would be in the wholly domestic case⁵⁸). Accordingly, the forum's task is simplified and neither by design nor by overexpediency.

The foregoing outlines the concept of substantive relief; for better definition the concept may be contrasted with ancillary and/or procedural relief (i.e. pre and postjudgment relief, such as interim remedies and judgment-executing measures), which is not apposite to substantive liability as is the liability for substantive relief: interim relief is to the forum's internal rules of practice (designed primarily to protect the forum's process), as substantive relief is to the forum's rules of substantial (in the context of this theme, conflictual) justice⁵⁹. Substantive relief properly conceived of can be as much a part of the substantive liability established by the *lex causae* if that law provides rules for the availability of the particular relief⁶⁰. It should be sufficient that the applicable principles of the given remedy will continue to be described as being "authorised" by the procedural law of the forum, as the Contracts (Applicable Law) Act 1990 does.⁶¹

Rule 17 considers remedies strictly in terms of procedure. The dichotomy with substance could promote the coming into its own of the law of remedies away from the dichotomy⁶² as it evidently has done in the case of compensatory damages in the manner described thus far. In several respects, the substantivistic aspects of a remedy are reflected by its degree effectiveness⁶³. For private international law, this translates as the use of a non-domestic (or non-localised) context so that the norms of the law be further and better upheld⁶⁴. Although the *lex causae* rules that define substantive liability (or the substantive obligation) are conceptually and purposively different from the rules that indicate the remedial measures

available to enforce that liability, the *lex causae* may have produced the right which the forum considers for enforcement as a forum right and, consequently, adjudicatory methods different from those the forum deploys in domestic cases⁶⁵ may be necessary.

2.3.2 The 'Civil Law Tradition' Viewpoint (The German Law example⁶⁶):

The basic differences in remedial law between the common and the civil law traditions are the classification of relief as legal (compensatory damages) or equitable/discretionary (injunctions, specific performance and restitution) to be found only in the former tradition⁶⁷, and the doctrine which emphasises performance rather than substitutionary relief in the law of obligations generally, to be found in the latter tradition⁶⁸. In this connection, a central rule of contemporary German law will be considered as a hypothesis which, it is hoped, more than serves the present purpose of illustrating instances of synthesised substantive and remedial liability.

The definitive paragraph 241 of the *Bürgerliches Gesetzbuch (BGB)* provides:

Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen. (In English, "an obligation consists of the aggrieved party's entitlement to demand actual performance from the defaulting party, the content of which may be coercion of the latter party")

This stipulates, literally, an obligational relationship (or *Schuldverhältnis*) which entitles the aggrieved party (or *Gläubiger* who is anyone with 'the right to demand', or *Forderungsrecht*, 'an obligated performance,' or *Leistungspflicht*, from another) to demand a 'performance' (or *Leistung*) from the defaulting party (or *Schuldner* who is anyone obligated to comply with a demand for performance). The primary obligation to perform is based directly on the obligational relationship, breach of which gives rise to an alternative obligation to compensate. The parties, the court or the *BGB* can imply a further secondary duty to perform, (e.g. to perform a given obligation by a certain date and/or in a certain way) which depends on the



primary duty. The latter duty in time completes the former and does not separately exist⁶⁹.

The forum applying the above law as *lex causae* could interpret this to mean that only the primary alternative obligation to compensate is recognised as the applicable substantive law because forum remedial (and, therefore, procedural) law recognises compensation as the primary remedy. This will be the case where the parties have relied on the *lex causae* which has been validated by a choice-of-law clause, and also where the parties' expressed preference is for the forum to resolve the main (primary and the secondary) duty⁷⁰. The substantive conflict of laws right is a reconception of the right under the *lex causae*⁷¹ and, furthermore, is the only practical, and therefore the only available (justified), interpretation open to the forum.

The original *lex causae* right is, in principle at least, fulfillable by the forum (domestic) law, the applicable *lex fori* by which the action would be for the equitable discretionary remedy of specific performance which, more likely than not, would not be available instead of compensatory damages⁷². The extent to which the substantive right is reconceived of is considerable when compared with the original right. Much the same would be the case with a materially valid contractual stipulation for the provision of relief, by means which forum domestic law does not associate with the actual breach, in the event of breach. It is difficult to justify the forum's intervention in overriding such a stipulation in the event of breach⁷³.

It is to be noted that a judgment rendered in one E.E.C. Convention State, including one which is remedial and is classified as discretionary under forum law, is now freely enforceable in another E.E.C. Convention State⁷⁴. The illustration above is from the German law of obligations. It could have been of the law of obligations found in another civilian legal system. The relevance of compelling theory is clear.

2.3.2.1 Normativity and the Legal System: What has thus been related in the present section is to do with the use of domestic law and its classifications in a conflictual setting, not unlike the position, now evolved, with the territorial basis for jurisdiction discussed at section 2.2. Should the

lex causae forum not avail the parties (for whatever reasons, jurisdictional and/or otherwise), their choice of forum and, therefore, their expectations will be based to some extent on the forum principle that a legal right "generally takes the form merely of a series of immunities from actions which would otherwise be illegal as being...breaches of contracts, torts..."⁷⁵. The right to be enforced can, in principle, be conceived of (or "adopted"⁷⁶) by the forum in substantially the same way as it exists under the *lex causae*.

Typical forum consideration of litigants' expectations is in the precepts of "obligation" and "remedy" rather than of "rights" and "principles"⁷⁷. In the context of the foregoing, the fiction that is the conflict of laws could throw out the proverbial baby with the bath water. Forum rights are remedies-derived⁷⁸ and, consequently, they signify the predilection of the legal system for pragmatic justice as being indicative of effectiveness. In the hypothesis, it was debated that rights established under foreign law can be conceived of in their original context⁷⁹, such that the domestic principles governing the availability of specific performance (especially the principle which necessitates supervision by the court⁸⁰) can be considered for similarity with the principles of foreign law which are inferred by the context. In this light, it can be said that the substance-procedure divider does not operate to desubstantiate remedies in the domestic case as the divider can do in the conflict case.

Forum practice would appear to rate more its control of process than its furtherance of the typically rational interest in doing substantive justice⁸¹: the forum provides pretrial remedies which may subsequently sustain rights *in personam*, than reconceives of substantive rights to reflect the significance of remedies, including possible reconception of these remedies as being tangibly substantive. Consideration of the implications of the foregoing may tentatively be summed up in the following propositions the applicability of which would depend on the circumstances of the case:

- (i) where the right established under the foreign *lex causae* is of the civil law combined liability type, factors for consideration may include those of remedial liability as may be prescribed by the *lex causae*⁸²;
- (ii) where a foreign jurisdiction (presumably the same jurisdiction which yields the applicable *lex causae*) is topical in giving effect to the substantive right, the law could be developed by discretionary and innovative expansion of the existing remedial jurisdiction, whether it be by parliamentary intervention, by treaty or on the basis by which forum judgments are recognised and enforced elsewhere⁸³.

Sir Jack Jacob describes the nature of remedies in the following way:

"[a]t the stage at which remedies are awarded by the court there arises the closest connection between civil procedural law and substantive law, since remedies reflect the substantive rights and interests of the parties and, conversely, they constitute an essential foundation upon which the rules of substantive law have been and are being fashioned, constructed and enforced...From the procedural point of view, the importance of civil remedies lies in the inseparable connection between the legal right, claim or interest and the judicial remedy, relief or redress provided by the court."⁸⁴

Conflictual theory and practice can, in principle, reconsider the role of the forum with reference to the notion that effectuation of remedies always falls upon the prescribing forum, and does so on the basis of the principles of its convenience and effectiveness of the remedy itself. This is discussed more comprehensively under the theme of finality, recognisability and enforceability of remedial judgments to which our attention turns.

It should be emphasised that the present law is good for the vast majority of cases that culminate in the award of a remedy. With respect, as a measure of the civil justice system, the present remedial law, illustrates some forum indifference to theoretic coherence and the practical consequences that stem from it. The substance-procedure divider necessarily should be adjusted to accommodate a concept of substantive relief within the existing institutional framework. The argument in the next chapter will

show that functional interpretation of Dicey and Morris' Rule 17, away from its expression in mechanistic terms, is the means to this end⁸⁵.

2.4 FINALITY, RECOGNISABILITY AND ENFORCEABILITY OF JUDGMENTS⁸⁶:

The discussion of the present theme is focused on the forum's final remedial order *per se*. The types of judgment for discussion are forum judgments (in domestic and conflict cases) and foreign judgments (from E.U. and non-E.U. cases). The aim is to demonstrate that a judgment *in personam* properly reached in a conflict case is good for other relevant jurisdictions, subject to the rules of those jurisdictions, and to the satisfaction of the forum of adjudication itself. The discussion is facilitated by the conclusions reached in the discussion of extraterritorial competence, particularly those in favour of making orders for foreign enforcement.

The themes of extra-territorial jurisdictional competence and of finality, recognisability and enforceability of judgments are closest to one another. But the affinity ends when the notion that the forum of prescription need not be the one of enforcement and vice versa⁸⁷ is considered, and which is derived from the conflictual principle of obligation⁸⁸, and founds much of the discussion of forum jurisprudence that now follows.

2.4.1. The 'Final Judgments' Viewpoint (The Doctrine of *Res Judicata*)⁸⁹:

In the case of judgments reached by means of forum process, recognition of such a judgment by the seised forum clearly does not arise. Finality (or conclusiveness) of the judgment is all that matters, as recognition is plain data. In the discussion of the concept of substantive relief, final remedies were defined, first, as the centrepiece of the process of litigation and, secondly, as the outcome of the forum's application of the rule of decision whether to grant a particular remedy sought⁹⁰. The second of these definitions draws attention to how the remedial judgment constitutes the operative and serviceable final judgment⁹¹.

Judgments represent the sum of formalism in most legal systems, with finality of judgments as an integral part of finality in the law in general.

This is the kernel of the formal common law doctrine of *res judicata* which operates to seal disputes hermetically, and which is preserved in the maxim *interest reipublicae ut sit finis litis*⁹². The doctrine imposes three important duties⁹³ upon the forum: (a) not to permit its judgment to be weakened, (b) not to weaken the formal status of the final judgment and (c) not to over-indulge in impractical substantivist reasoning. Default in any of these erodes the doctrine and could affect what has been described as "the mandatory formality of legal rules of liability"⁹⁴. In this connection, forum jurisprudence has developed what has been described as a "high enforcement formality"⁹⁵: prompt entry of final decisions as judgments, plus prompt enforcement. The decision reached must be authoritative as the definitive legal form⁹⁶.

Enforcement, strictly speaking, of final judgments founds the judicial process, the coercive feature of which expresses the sovereign will of the state⁹⁷. The general principle of enforcement is that "the judgment of the order of the court must, so far as possible, be obeyed or complied with, for otherwise the authority of the court would be diminished and the legal order would suffer a breakdown"⁹⁸. In the same way as proceedings will have been instituted, and which will have produced the remedial order to be enforced, a separate action must be instigated to procure enforcement. The court *suo motu* cannot enforce its own judgment. This seemingly unsystematic approach has led Sir Jack Jacob to comment:

"[i]n relation to both money and non-money judgments...[the English system] functions in the absence of a general body of principles, but rather on an *ad hoc* basis applicable to particular modes of enforcement"⁹⁹.

Later in the same breath, he comments further:

"[p]erhaps the most outstanding feature of the English system of enforcement, and the most coercive and effective weapon that it wields is that the failure to comply with a judgment or order in civil proceedings to do a specified act within a specified time or not to do a specified act is treated as a contempt of court"¹⁰⁰.

It must be noted that non-money judgments are essentially effective once they are made and do not require any separate process of enforcement. For money judgments, the chief method of enforcement lies in execution as against goods¹⁰¹.

Some irrebuttable presumptions are inherent in the enforceability of remedial judgments in the conflict case, for example, that the forum has properly taken jurisdiction and has reached a judgment which contains the grant of a remedial order and, that it is within the competence of the pertinent foreign forum to give effect to the order. Enforcement jurisdiction is exercised at all times *ad personam* and only at the instigation of the successful plaintiff, though execution may subsequently require jurisdiction against assets¹⁰². The reader may wish to recall the submissions earlier made under the theme of extraterritorial jurisdictional competence, in particular, that the competence is limited by the principle against interference with another forum's process and by the principle against ineffectual judgments¹⁰³.

Where the forum is *conveniens*, and there is a preponderant foreign law content for giving effect to the remedial order, there is ample justification for the competence of the forum to prescribe final orders intended to take extraterritorial effect (or final orders intended to be enforced by another forum) where the limiting principles are fulfilled. This extension of prescriptive remedial jurisdictional competence marks off the true theoretical limits of forum competence generally. Otherwise, the forum may be competent to determine the parties' liabilities, but not to give directions as to the realisation of the liabilities. If it is accepted that the forum does not have to be the forum of enforcement, the appropriate limits of forum adjudication can be dictated by the conclusive facts and circumstances of the particular case and the legitimate bases upon which the forum assumed jurisdiction in the first place.

The orders are to be taken seriously as final, self-executing (in a conflictual sense) and, above all, recognisable for the purpose of enforcement by the appropriate foreign forum. The possibility of non-

recognition by the relevant foreign forum has not been a reason at law for the adjudicatory forum's refusal to make extraterritorial judgments¹⁰⁴. Such judgments can be asserted by the successful party (e.g. by creating a right of action) in the appropriate jurisdiction.

2.4.2 The 'Foreign Judgments' Viewpoint (The Principle of Obligation¹⁰⁵):

The depiction here must necessarily be aimed at analogy. To proceed otherwise would be to assert the judicially and academically long-abandoned principle of reciprocity as definitive¹⁰⁶. The principle of reciprocity has only a descriptive role (i.e. descriptive of the trend in the underlying principle) in the scheme of the present theme¹⁰⁷. It will be argued and demonstrated in the present section that reciprocity as a basis for the recognition of foreign judgments¹⁰⁸ is a distinct example of underconflictual analysis¹⁰⁹.

The judgments for consideration are those from the European Union Member States' fora (under the Brussels and Lugano Conventions), and those from other fora (governed by the statutorily supplemented common law rules on recognition and enforcement). The basis for recognition of either type of judgment is that the forum is bound to recognise and to enforce a judgment binding both the parties if the jurisdictional rules of the forum of judgment have been met, subject to exclusionary rules and defences, under both forum law and the European Conventions as the case may be. These rules and defences negative recognisability and enforceability. Recognition involves a presumption of finality and obligating character of the particular foreign judgment. These are discussed in due course.

The aim is to apply the Convention-derived rules on recognition and enforcement as a format for justifying a view that forum judgments need only be satisfactory in the eyes of the forum of adjudication in the ways described in the preceding paragraph, and that, within the confines of the present theme, this "satisfactoriness" makes the remedial judgment good for export. The aim is not to examine the range of the relevant rules under either set of applicable laws. Reference was made, in the preceding paragraph, to the identical basis (the principle of obligation, or at least an innominate

variation of it in the case of E.E.C. fora judgments) upon which recognition and enforcement by the forum proceeds.

The subject of discussion is the foreign judgment and the way it is assessed by the forum. The views rendered in the course of discussion are for analogy only and do not provide conclusive criteria about how the forum should expect its own judgments to be regarded elsewhere, save in E.U. fora where the Conventions bind the other Member States and allow for cross-enforceable judgments among the states. The views to be expressed do however provide cogent criteria about how the forum may regard its own judgments, subject to the rules on recognition of the pertinent foreign jurisdiction and the proof of these rules by the party seeking to rely on them. This means that the discussion of the present theme will serve to supply a compelling case for liberalism in forum interpretation of its own process in order that its judgments, in general, be recognisable and enforceable in the relevant foreign jurisdiction(s).

The forum need only satisfy itself that its own judgments generally are final, substantively sound (that is, that the *lex causae* is applied to the merits), procedurally sound and within the limits of public policy¹¹⁰. The same requirements are made of foreign judgments: this fact explains the inclusion of this theme among the parameters of conflictual analysis. It is in this very restricted sense that the principle of reciprocity, described earlier as good for analogy but not for conclusiveness about the validity of a legal rule of decision, contributes to the delocalising purpose.

The discussion could be further expressed in terms of the advancement of the interests of jurisdictional coherence and can be repeated thus: that a forum's rules on its competence to reach judgments should reflect its rules on its competence to acquire jurisdiction in the same type of case since both are the definitive aspects of the forum's exercise of jurisdiction. It is unnecessary to discuss the enforcement procedures under either type of judgment, save to mention registration of judgment certificates in either type of case for the sake of completeness of discussion.

Before going further, it is helpful to look especially at the views

expressed by A. Briggs in a recent article as a model for discussion. Having begun discussion with the point, *inter alia*, that there is an inexorable theoretical link between jurisdiction to adjudicate and jurisdiction to recognise and enforce¹¹¹, he argues that Blackburn J. in Schibsby v Westenholz, a *locus classicus* for upholding the irrelevance of the doctrine of reciprocity in these matters, had in fact subtly applied the doctrine in that case, "so subtle, indeed that it has long been hidden"¹¹². Discussing and relying on the judgment of Lord Denning M.R. in Re Dulles (No 2)¹¹³ and on the decision in Henry v Geoprosco¹¹⁴, Briggs submits:

"[w]hen it comes to recognising foreign judgments, in cases where the defendant has not submitted to the jurisdiction of the foreign court, the judgment will be recognised on grounds which are approximately reciprocal with the domestic jurisdictional rules at common law. That is to say, that the defendant was there present or resident. But a foreign judgment will not be recognised on the basis of reciprocity with R.S.C. Order XI, rule 1. If this be so, the common law rules on recognition do in fact base themselves, if inexactly, on the idea of reciprocity with common law jurisdiction. And the question which then has to be asked is this: What is the effect on the rules for the recognition of foreign judgments of the changing rules for the taking of jurisdiction at common law?"¹¹⁵

He argues further:

"we should recognise the judgment of a forum to whose jurisdiction the defendant submitted, or which was in any event the natural forum for the action to be prosecuted in...It is clear that this would not force us to recognise judgments based solely on consideration of reciprocity with Order XI rule 1...[I]f the foreign court were in our eyes the natural forum, we should-and we now *do*-see it as jurisdictionally competent in the international sense; and we should act accordingly"¹¹⁶.(Briggs' italics)

Having determined that the naturalness or otherwise of the foreign forum will turn on forum rules¹¹⁷, Briggs' argument remains reciprocity-based because it will always be the forum court independently questioning the naturalness and, consequently, the jurisdictional competence, of the foreign court whose judgment is to be considered for recognition. Granted that legislation long after Schibsby uses the language of reciprocity¹¹⁸, in no way is it justifiable to conclude, as Briggs does, that the decision in that

case endorsed the doctrine. In point of fact, the decision expressly dictated the principle of obligation.

The forum's practice of questioning the recognisability of a foreign judgment when one of the defences to recognition is raised, can be compared with the provisions under the Brussels Convention (as to finality and conclusiveness of judgments for recognition which, as Briggs identifies¹¹⁹, which are materially identical to the common law rules on the same subject), to reinforce the pervasiveness of the principle of obligation as the doctrinal basis upon which recognition has proceeded in the courts of this country.

A pertinent question to which Briggs did not advert is the question whether the forum accepts the normative character of the foreign judgment obligation as it stands (in the eyes of the relevant foreign law itself), or whether, instead, this obligation is converted into a forum right as a precondition to its recognition. It is unhelpful not to consider this question because on no other basis is recognition of the judgment sought or granted. The substantive suit will not have been, and will not be, heard by the recognising forum. To ignore the question is to disregard the content of the principle of obligation, from the outset, as the theoretical basis as Briggs would appear to have done. With respect, the answer to the question is to be found in the way in which the grant or the refusal of a foreign judgment is presented: in terms of exclusionary or negating rules which are in the nature of exceptions to a positive rule to recognise.

The "case for reuniting the two areas [of jurisdiction and judgments]....[is] a strong one"¹²⁰. But, with respect, it does not imply a further case for uniformity by evasion-oriented analysis. It may rather imply harmonisation by avoidance-oriented analysis of the relevant rules as they exist under different legal systems¹²¹. It is more appropriate to proceed, as the forum has done, on the comity-reciprocity-obligation progression. This approach has much greater potential to set conflictual theory along its proper course¹²².

Briggs' discussion of the trends in contemporary conflictual theory especially regarding the shift in its emphasis from "choice-of-law" to "natural forum" broaches the notion of "jurisdictional propriety", or of "the proper law of jurisdiction" which must assist the case for cohesive and comprehensive exercise of forum jurisdiction. We can proceed on the basis that the consensus regarding the principle of obligation remains the underlying doctrine for the purpose of recognising and enforcing foreign judgments; that the foreign rules that will have given jurisdiction can be reciprocated by the similar common law rules will be of practical significance.

2.4.2.1 Judgments From E.U. Fora:

The Brussels and Lugano Conventions' provisions on recognition and enforcement of judgments are described as extremely liberal¹²³. There are noteworthy differences from the forum domestic rules, namely that the Conventions' rules govern both money judgments and non-money judgments¹²⁴ and that the forum of enforcement generally cannot query the jurisdiction of the adjudging court. To these, it may be added that article 25 of the Convention includes interlocutory judgments (presumably excluding interlocutory orders not meant to govern the parties' legal relationship) in its definition of what constitutes a judgment. The enforcement procedures apply to E.U. domiciliaries and to non-domiciliaries alike.

There is extensive protection for defendants under the Conventions: they can only be sued in the first place in the courts of their domicile (articles 2 and 3) and must have had opportunity to be heard (Articles 18 and 25). By Article 20 (1) and (2), failure to enter an appearance warrants the recognising court's protection by way of that court's declining jurisdiction forthwith, unless jurisdiction is assumed under the Convention. Article 27 sets out the grounds for refusal to recognise (and, therefore, to enforce: Article 34(2)), namely: contrariness to public policy, breach of rules of natural justice¹²⁵, variance with recognising forum's own judgment between the same parties¹²⁶, variance with an earlier recognisable

judgment of a non-E.U. forum on the same facts and between the same parties. Articles 29 and 34(3) establish finality and the equivalent of the common law doctrine of estoppel *per rem judicatem* save in respect of the Conventions' provisions on insurance (Articles 7-12A), consumer contracts (Articles 13-15) and cases of exclusive jurisdiction (Article 16), though there is authority that the court for enforcement can enquire as to the applicability of the Conventions¹²⁷.

In the forum domestic action, the protection afforded is no less, despite the absence of a fixed corpus of rules such as the Conventions' rules just described. Further, it can be seen from the protective rules above that misgivings about extraterritorial jurisdiction of the forum are ill-founded on the notion that the exercise of such jurisdiction *ad personam* is improper or exorbitant; in other words, forum private international law rules should not, as a matter of principle confined to the present theme, be interpreted (as they are) as though they were still the subject of the historical territorial theory. For convenience, the principle in discussion may be called the "protected obligated defendant" principle: the defendant is obligated, but not made unduly vulnerable, by the forum's judgment, which is good for all the world (subject to forum satisfaction as previously indicated) in much the same way as the forum's judgment is *ex facie* recognisable and enforceable under the Conventions.

The basis for recognition supplied by the Conventions has so far not been described as the principle of obligation. The foregoing suggests that to do so would clarify the similarity and interpenetration between the Conventions and forum jurisprudence.

2.4.2.2. Judgments From Non-E.U. Fora:

These are governed by the common law rules as supplemented by the Administration of Justice Act 1920 and by the Foreign Judgments (Reciprocal Enforcement) Act 1933. The former governs judgments from the Commonwealth and gives the forum a discretion to recognise and/or enforce (section 14); the latter governs a wider range of judgments, is more detailed in its provisions and makes recognition available as of right.

A foreign judgment by a jurisdictionally competent forum is conclusive and must be recognised under the common law rules on recognition, following the decision in Godard v Gray¹²⁸ and in Schibsby v Westenholz¹²⁹. The basis for recognition is the principle of obligation recently confirmed in the Court of Appeal decision in Adams v Cape Industries plc¹³⁰. By the act of recognition, the forum adopts the rights contained in the foreign judgment as an enforceable forum right. (Section 34 of the Civil Jurisdiction and Judgments Act 1982 provides for finality through the extinction of the original cause of action by the act of recognition¹³¹).

It is useful to consider situations when the forum court will determine according to its own rules (*lex fori* rules which have no domestic application), whether a foreign court has jurisdiction, and when the contrary. An initial reference point is the familiar jurisdictional principle of presence or residence as espoused by the Court of Appeal in Adams v Cape Industries in the following way:

"[T]he voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law"¹³².

Besides residence or presence, submission to the jurisdiction of the foreign court also suffices¹³³.

By the 1933 Act, jurisdiction does not exist unless exercised by the foreign court as set out in section 4(2)(a) of the Act¹³⁴. These are presumably inexhaustive and are only supplementary to the common law rules, but nevertheless exclude the possible heads of possession of property in the foreign country, presence in the foreign country at the time of institution of the proceedings, nationality¹³⁵, domicile¹³⁶, or reciprocity¹³⁷. Furthermore, there are defences to the foreign court's jurisdiction, such as fraud¹³⁸, contrariness to public policy¹³⁹ and contrariness to natural justice¹⁴⁰.

The cases of Carl Zeiss Stiftung v Rayner & Keeler (No. 2)¹⁴¹ and The Sennar (No. 2)¹⁴² are authority for the finality of foreign judgments as a form of estoppel *per rem judicatem*. But, practically speaking, neither the lack of internal competence by the foreign court¹⁴³ nor the discovery of fresh evidence¹⁴⁴ can be good defences to a foreign judgment not avoided in the foreign legal system.

The forum has a wider jurisdiction than it concedes to foreign courts. So much for reciprocity. Otherwise, the principle of obligation would be lost to either of the principles of comity and/or reciprocity. The forum's recognition of foreign judgments is not necessarily discretionary¹⁴⁵ as is, for example, its power to order service out of the jurisdiction.

A case with substantial connection to another jurisdiction may require the forum to consider the apropos foreign rules of recognition of forum judgments. The object is for the forum to make the proper and effective order. It is not the case that every foreign judgment is recognisable; nor is it the case that every foreign judgment tendered for recognition has been rendered with forum jurisdiction in mind. It is for the forum of judgment to limit its own powers by coherent exercise of its jurisdiction, by practical considerations primarily of the effectiveness of the orders made pursuant to coherence, and by its own determination based on conflictual analysis of what will constitute substantial justice. It goes without saying that reciprocity (or comity, for that matter) plays no real role in the present scheme¹⁴⁶. In the appropriate/'hard conflictual' case (where the forum is *conveniens* but the facts are closely related to another jurisdiction), the substantivistic aspects of the remedial order will have taken account of the relevant *lex causae* provisions which may also be the law of the jurisdiction of enforcement. Judgments of this kind can be named after the case in which they are first awarded.¹⁴⁷

2.5 EXPEDIENCY AND POLICY (including Discretion)¹⁴⁸:

An alternative description of the theme of expediency and policy is purposive forum autonomy¹⁴⁹. If allowance is made for the possible overlaps with the theme of jurisdictional competence, such as the rules for taking or declining jurisdiction in the conflict case and the forum-protecting and foreign jurisdiction policies which explain them, none of the other themes is as definitive of the actual basis for the forum's independence¹⁵⁰. This description of private international law adjudication, as 'policy', fundamentally, serves to indicate the range of the present depiction of 'policy'. The emphasis in the following discussion is on the overriding extralegal considerations (i.e. considerations not based on legal rules/principles, strictly speaking) which significantly influence the decisions reached in the conflict case¹⁵¹. This does not preclude the judicial policy of deciding according to precedent (or according to analogy¹⁵²), nor should it suggest that the present discussion is not concerned with so-called covert decision-making¹⁵³. It is to be demonstrated that deciding the conflictual hard case will, in the existing remedial scheme, often turn upon recourse being had to principles deriving from arguments of expediency and policy, judicial discretion or judicial reasoning away from rules.

'Policy' in the present context includes public policy¹⁵⁴ and the principles that govern the exercise of judicial discretion as may be relevant. Expediency can be described as forum interest and convenience¹⁵⁵, as dictated by its own fundamental values. This should not imply that the forum be seen as indifferent to the interests of the parties or of relevant fora as this implication may raise important problems of forum effectiveness. This description of expediency is refined by referring the circumstances which have necessitated the recourse to expediency to the policy considerations which may accompany the legal rules and/or principles that will have produced unconvincing (or otherwise unattractive) results.

Policy considerations operate to limit the possible misapplication of arguments based on expediency, in such a way that both can and should be

seen as one. In this interpretation, the theme is presentable in terms of non-procedural legitimation of judicial decision-making.

The normativity of the final order based on principles deriving from the present theme¹⁵⁶ is presumed in the remainder of this section, as is the fact that the merits will already have been resolved in favour of granting the remedy in question¹⁵⁷. The present theme is one of resort in the conflictual hard case (e.g. where the remedy sought is, in the eyes of the forum, an equitable/discretionary remedy, but is available as of right under the applied *lex causae*¹⁵⁸), and is predicated upon practical fairness and the doing of substantive justice. A useful model for discussion is J. Bell's work, Policy Arguments in Judicial Decisions¹⁵⁹.

2.5.1 Bell's Views:

Bell's emphasis is on the judge as the neutral and impartial representative of the state¹⁶⁰. He compares and contrasts the judicial role with that of the legislature¹⁶¹, using models of the role, namely, the "consensus", the "rights" and the "interstitial legislator" models¹⁶². It is of minimal use to refer in any significant way to either the first or the third models given their distinctly domestic context. He presents settings in which expediency and policy are resorted to in the performance of the judicial role:

- (a) in novel situations (i.e. where there is no binding precedent);
- (b) when it is necessary to reconsider the basis of existing rules (i.e. where the law in related areas has been changed);
- (c) when it is necessary to overturn settled rules (i.e. where the fact-situations envisioned by settled rules have been superceded by the passing of time);
- (d) when the use of discretion is necessary and justified¹⁶³.

Of these settings, the first is probably least relevant to an antipathic view of the mechanistically applied Dicey and Morris' Rule 17; the only situation that can be categorised as novel would arise under the European Rules which automatically bind the forum to recognise and to enforce Convention States' non-money judgments *in personam*¹⁶⁴. As this does not refer to substantive adjudication, it requires little special attention.

The most relevant setting in a direct way is the second¹⁶⁵, clearly followed closely by the third. The fourth, the use of discretion, should be relevant with the qualification that it conforms to acceptable intervention by the forum and to the applicable law¹⁶⁶. It must be said that, unless an attempt is made to rework his presentation of the models of the judicial role by substituting the references to "social order", "the interests of the community at large" and such other expressions with domestic adjudication in mind, with "the purposes of the conflict of laws", the localising precepts of the present law will be the only relevant context. His illustration of his views show that they clearly were not presented with the conflict case in mind. They nevertheless supply a context within which to observe the forum in reasoned inarbitrary creative mode¹⁶⁷. In this respect, he does not disagree¹⁶⁸ with the views expressed on the same subject by R.A. Posner in the following terms¹⁶⁹:

"I can conceive of no better approach than for judges to conceive of their task, in every case, as that of striving to reach the most reasonable result in the circumstances, which include though are not limited to the facts of the case, legal doctrines, precedents, and such rule-of-law virtues as stare decisis".

It is more useful to go straight to the types of policy and the types of situation which require the application of considerations of expediency and of policy, than to evaluate different writers' views. It is sufficient to say that the forum is not opposed to the application of these considerations and where they are applied, there may be involved the "formulation of new legal norms"¹⁷⁰.

2.5.2 Policy Considerations Relevant to Remedies:

J.J. Fawcett presents a more flexible and serviceable list of policy considerations, already referred to in the dissertation¹⁷¹, which affect the forum's decision to permit or to refuse trial in the jurisdiction. These are:

- (a) the satisfaction of the parties' interests by an economic trial,
- (b) the protection of the parties,
- (c) the public interest in the protection of affected third parties,
- (d) comity,

- (e) the guarantee of a minimum standard of justice in the alternative forum,
- (f) advancement of the forum's interest in its own trial,
- (g) sustaining the parties' choice of forum,
- (h) upholding jurisdiction agreements/clauses, and
- (i) the maintenance of an efficient administration of justice.

These are clearly considerations directed at the assumption of jurisdiction to adjudicate, rather than at the jurisdiction to prescribe. In the discussion that now follows, the unity of 'jurisdiction' and 'judgment' will be presumed and, relying on this presumption and making the distinction between prescription and enforcement, a re-presentation will be attempted of the foregoing, plus some policies not included in the list, namely:

- (i) non-interference with another forum's process,
- (ii) the protection of the forum's jurisprudence and
- (iii) the advancement of the purposes of the forum's conflict of laws. These are directed at judgments, with the necessary caution on how far the interests of the forum at the interim stage can coincide or be coterminous with its interests at the final stage¹⁷². At the former stage where Fawcett's list is relevant, the forum is concerned with the protection of its process, and at the final stage, the forum is concerned with what can be called "dispositive justice", which entails the making of a final order having normative character, and it matters not that such an order is not, in the final analysis, grounded in strict or formal legal rules/principles (i.e., as opposed to policy considerations)¹⁷³. It is not intended to present an immutable set of policies. Rather, it is to indicate the types of consideration that complete the present theme. The main characteristic that explains any similarity between the interim and the final stages, and which consolidates the application of any considerations for the former to the latter, is the significance of the principle of "fairness"¹⁷⁴, which should permit the re-presentation of some of Fawcett's considerations.

Clearly, (a) on the list is malapropos since trial will already have taken place; (b), (f), (g) and (i) can be combined and subsumed under "the protection and furtherance of adjudication by the forum", or "the interests

of maximum realisation of forum assumption and exercise of jurisdiction". (c), like (a), is best omitted because, in the present context, it would refer to the forum's unexplicated export of its public interest to another jurisdiction; however, where the facts point to extraterritorial relief best effectuated in that jurisdiction, and which would affect third parties also found there, (c) fits with (b), (f), (g) and (i). There could be an added reason for an order in such terms as would be recognisable and enforceable in the jurisdiction in question. (d) speaks for itself and coincides substantially with the policy against interference with another jurisdiction. (e) will need to have been established factually to the satisfaction of the forum by the party seeking relief¹⁷⁵. (g) will probably require a conflictual re-definition to take into account the crucial private international law distinction between prescriptive jurisdiction and enforcement jurisdiction.

The discussion thus far can be restated in the following policy propositions:

- (a) protection, furtherance, and full realisation of forum jurisdiction and adjudication;
- (b) non-interference with other jurisdictions;
- (c) efficient conflictual administration of justice, including the guarantee of the minimum enforcement formality of the forum's order in the foreign jurisdiction;
- (d) advancement of the purposes of the forum's conflict of laws, i.e., the ratification of normative facts originating under a foreign *lex causae*.

This list more fully defines the present theme. If the main idea of the theme is taken up, the list may be developed further and refined. As is the case with other types of situation in which resort is had to express or impliedly policy, and, therefore, to discretion¹⁷⁶, the case for judicial restraint and for certainty in the law¹⁷⁷ (by indication of forum reliance on policy rather than on rules/principles where this is the case) is strong.

The theme of expediency and policy will be closed by looking at cases in which the House of Lords has relied on it in order to provide a remedy which would otherwise have been unavailable. The cases are National Bank

of Greece and Athens SA v Metliss¹⁷⁸ and Adams v National Bank of Greece SA¹⁷⁹. In Metliss, the cause of action was the recovery of a contract sum due, from a third party, and whether statutory protection under the foreign *lex domicilii* (which would undoubtedly have been available in an action in its courts) was available where the proper law of the contract was forum law. The Court of Appeal (Denning, Romer and Parker L.JJ.) had dismissed an appeal from Sellers J.. Dismissing the subsequent appeal, the leading judgment of the House of Lords, delivered by Viscount Simonds, held, on "the principle of rational justice"¹⁸⁰, that such a debt was indeed recoverable since the party sued was, by its incorporation, the "universal successor"¹⁸¹ of the party to the contract. It was further held that the proper (forum) law could not be varied by the foreign law despite the protection that would be forthcoming under the latter law had the action been instituted there. Viscount Simonds' judgment was considered and followed in the Adams case the facts of which were identical.

We may refer conveniently to the foregoing as "the Metliss and Adams approach". It is open to the criticism that "the forum's use of 'policy' and 'justice'..is not only open to the charge that these labels are synonymous with forum interest.." ¹⁸², or that the use of policy to reach practical results such as in these two cases is "dubious"¹⁸³. The criticisms are inadequate because the strict application of relevant rules without considering the reasons for the rules would have produced the much less tenable result that the plaintiff would have been without relief according to either forum or foreign law separately interpreted. The decisions encapsulate the theme of expediency and policy and "in fact represent at the highest judicial level contemporary thinking in questions of private international law and reflect, perhaps by coincidence, theories of the conflict of laws that have been expressed in England for more than a decade."¹⁸⁴

2.6 EXCURSUS TO THE THEMES: THE EFFECTIVENESS (OR EFFICACY) OF FORUM ORDERS-

In this excursus, it is intended to demonstrate that, because of the necessary distinction between *in personam* jurisdiction to prescribe remedies and to enforce remedies¹⁸⁵, the question of effectiveness should be judicially settled to indicate the precise extent to which forum jurisdiction should be a reflection of its jurisdiction in the domestic case in which both aspects of jurisdiction coincide and subsist in the same forum. The question of effectiveness is usually considered in connection with the exercise of jurisdiction¹⁸⁶, even in the conflict case, which is where the importance of effectiveness will, in point of fact, diminish because there is a preponderance of factors connecting the proceedings to the forum. This implies that there is a presumption of effectiveness in such cases. The presumption is a central part of the notion of the rational forum (at 2.2.1).

It is in the context of enforceability of the forum's final order that the question of effectiveness becomes prominent. The more significant factor is not whether the forum court will be capable of supervising and enforcing its own extraterritorial order; with respect, it should not even be a factor at all because the forum would otherwise be defining its interest in the proceedings by overemphasising its enforcement jurisdiction. Rather, it is the preparedness of the relevant foreign forum to recognise such a final order and then to enforce it. The matter of the foreign forum's preparedness will, in the scheme of the themes, have been dealt with by the forum at the instance of the party seeking the order. It will have been for the party opposing to establish inefficacy, the probability of ineffectiveness, failing which, the forum will adapt the order to the relevant foreign *lex fori* rules as will have been pleaded and proved.

In the same way as effectiveness is a prerequisite to the acquisition of jurisdiction in the first place (i.e., that the connecting factors are strong enough to persuade the forum to exercise its powers), it should be seen as a prerequisite to the definition of competence to make orders to be enforced in another jurisdiction¹⁸⁷ where it is in the nature of the cause of action,

and if the justiciability of the cause so requires. In addition to such factors as the foregoing, the overriding consideration is that the forum is exercising jurisdiction *in personam*. It is definitional that the enforcement of the final remedial order is indubitably procedural in the scheme of the themes, given especially the substantivist discussion¹⁸⁸ led under the themes of the concept of substantive relief and expediency and policy. It does not matter whether we say that other weightier factors (e.g. rational justice) operate to make effectiveness less decisive than it is in the domestic case, or effectiveness is settled conflictually to mean that an effective order is one which meets all the requirements of a valid judgment: either statement is definitional¹⁸⁹.

2.7 CONCLUDING NOTE:

This chapter has presented depictions of the themes that provide the parameters for analysing forum remedies in private international litigation. Clarity of each theme permitted expression of some respective views. The next step in the thesis for objectivity in conceiving of the nature and the role of remedies is to set out and to develop the arguments deriving from the themes' presentation. These arguments subsequently form the basis for propositions which constitute the objectivity thesis.

NOTES TO CHAPTER TWO

1. See Dicey and Morris, The Conflict of Laws, (L. Collins et al (eds.), 12th ed., (1993), Chap. 11 (also Chaps. 10 and 12); Cheshire and North's Private International Law, (P.M. North and J.J. Fawcett (eds.), 12th ed., (1992), Chapter 11, also Chaps. 10, 12 and 14). The 'extraterritorial' description is chosen because it emphasises the aspect of the English forum's general jurisdictional competence which will be addressed and emphasised almost to the complete exclusion of other aspects of the forum's jurisdictional competence, e.g. to decline jurisdiction or to stay its own proceedings. The authorities cited in this footnote are general authorities on jurisdiction *in personam*; they do not isolate for discussion the extraterritorial exercise of jurisdiction by the forum as will be done here.

2. T. Baldwin, in H. Gross and R. Harrison (eds.), Jurisprudence: Cambridge Essays (1992), at pp. 209-210.

3. See Dicey and Morris, op. cit., at p.270 for Rule 22: "(1) The High Court has jurisdiction to entertain an action in personam if, and, only if, the defendant is served with the writ in England or abroad in the circumstances authorised by, and in the manner prescribed by, statute or statutory order. (2) Where an action relates to a civil or commercial matter within the meaning of the Brussels and the Lugano Conventions on jurisdiction and the enforcement of judgments in civil and commercial matters (...together "the Conventions") the High Court has jurisdiction to entertain an action in personam solely in accordance with the provisions of the Conventions." See also Cheshire and North, op. cit., p. 179 and pp. 182-213.

4. This connotes a relation to constitutional theory. The relation is the basic reason for discussing the public international law viewpoint of forum jurisdictional competence. The use of the term 'jurisdictional competence' is trite in public international law texts, some of which are cited (see e.g., n. 23 post) and discussed below (2.2.1 below, pp. 42-44). Concern here is with the way in which the competence, in terms of jurisdiction, of the English forum seised of an 'international' case is understood by judges and academics alike.

F.A. Mann, op. cit., n. 5, post, at p. 15: "Since the test which determines the existence of legislative jurisdiction and the content of a rule of the conflict of laws is the same and since it has from a historical point of view, the same root, it cannot be surprising that the doctrine of international jurisdiction has a considerable bearing upon the formation of private international law" and at p. 16: " Public international law, therefore, has a limiting function in its relation to private international law. This function is underlined by those principles which originate from treaties..."

The limits to the parallels implied here between the private and the public international law case (i.e. that the parties in the latter type of case will be sovereign states litigating in their sovereign capacities about subject matter not regulated by domestic law, strictly speaking) are not relevant to

the usefulness, or the lack of it, of the parallels, which are best discussed in their own right. For a preview, see I. Brownlie, Principles of Public International Law, (4th ed., 1990), especially at pp. 298-299), and C. McLachlan 1993 HYBIL 125-144, at p. 127: "In truth, the relationship between public and private international law cannot be explained merely as a relationship of source and application of rules. There is a much more complex interpenetration of the two systems.." and at p. 128: "This degree of interpenetration reflects the changed realities, both in the conduct of international commerce and in the development of the law in response to it".

In "Beyond The Sovereign State", (1993) 56 M.L.R. 1, N. MacCormick deals with the problem of sovereignty in the face of the United Kingdom's accession to the European Communities and makes the following respective points: at p. 5: "One thing which is necessary for jurisprudence or the philosophy of law to do in the present state of affairs is to guard against taking a narrow one-state or Community-only perspective, a monocular view of these things. The difficulty about sovereignty theory is that it seems to point inevitably in that direction. So the thing to do is to [look] at other models which may enable us to account for legal complexity in a different way"; at p. 14: "It seems that [sovereignty] should denote the concept of a territorial political order coupled with a legally defined position of near-absolute legislative power...Looking at it...from the outside, the condition of sovereignty of the state requires an absence of legal restrictions on the exercise of legal or political power by or on behalf of the organs of the political order. Externally, a state is sovereign if the exercise of power internally to the state is not subject to external superior power or to other constraints or restrictions legal in nature"; and at p. 18, having asserted that there are no Euro-sovereigns (p. 16): "[That legal and political communities recognise themselves as communities of principle] is the task that lies beyond the sovereign state- but beyond the sovereign state is where we are now". If his views are correct, then greater weight attaches to the mandatory character of universal applicability P.M. North ascribes to the 1990 Contracts Act (cf. n. 50, post) and to the 1982 Jurisdiction and Judgments Act (see P.M. North (1992) 3 K.C.L.J. 29 ("Choice In Choice Of Law", at p. 40).

5. See Brownlie, *op. cit.*, pp. 298-299. Most private international law texts do not address this distinction perhaps because the distinction is mostly overlooked in domestic cases dealing with similarly characterised subjects matter as in the conflict case. It is thematic, especially at 2.4, that it is legitimate to use the distinction as adverted to by public international lawyers and that the failure of conflict lawyers to advert to the distinction accounts for the problems related to the inadequacy of conflictual remedial law. See also R. Higgins, Problems and Process: International Law and How We Use It (1994), pp. 56-94, especially at p. 78: "There are really two major categories of jurisdiction. Some writers describe them as jurisdiction to legislate and jurisdiction to enforce. I think the better division is between jurisdiction to *prescribe* and jurisdiction to *apply*." (her emphases). F.A. Mann, discussing civil jurisdiction in Further Studies in International Law

(1990) at p. 51, states that "[t]he international jurisdiction to adjudicate...is not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate: a state's right of regulation is exercised by legislative jurisdiction which includes adjudication. It follows that both aspects of jurisdiction are co-extensive".

Leaving aside the different views as to the proper terminology, it is the case that enforcement is often considered in the domestic case alongside supervision (execution), which means, alongside the remedy of specific performance (see e.g. F.H. Lawson, Remedies of English Law (2nd ed., 1980), pp. 174-177, which is the only place at which he really discusses enforcement at all), since the other final remedies are essentially self-executing.

See McLachlan, loc. cit., at p. 140: "The ability to execute is...not a sufficient basis for original jurisdiction. The mere presence of assets may be wholly fortuitous and preservation of those assets may be achieved by provisional measures without prejudicing litigation on the substance in a proper forum", and, previously on the same page, "[i]t is...a distortion of reality to equate state power with the ultimate execution of a judgment, so as to contend...that the only limit on a state's jurisdiction to adjudicate is execution on its own territory or (at the free election of foreign states) on foreign territory".

6. It is significant that the jurisdiction of prescription need not be the jurisdiction of enforcement, which is why foreign judgments can be enforced by the forum consequent to recognition. See 2.4, post (pp. 53 et seq).

7. For an account of some of the aspects of the present law with which issue is being taken, see Dicey and Morris, op. cit., p. 171 (*sub* Rule 17): "The nature of the plaintiff's remedy is a matter of procedure to be determined by the *lex fori*." The reference to the procedural law of the forum suggests territoriality, as does the fact that there are no final remedial orders for extraterritorial enforcement other than damages. These are matters discussed more fully under the theme of finality, recognisability and enforceability of judgments at 2.4.

8. See J.A. Jolowicz in I.R. Scott International Perspectives in Civil Justice (1990), pp. 36-43. See n. 27, post; cf. 2.2.2, 2.4.2.1, pp. 44-46, 60-61.

9. See Tyne Improvement Commissioners v Armement Anversoise SA [1949] A.C. 326, at p. 338 (Lord Porter): "Primarily, the jurisdiction of the courts in this country is territorial in the sense that the contract or tort sued upon must have some connexion with this country.."; see also Distillers Co. v Thompson [1971] 2 W.L.R. 441, at p. 447 (Lord Pearson): "..when the question is which country's courts should have jurisdiction to try the action...the search is for the most appropriate court...and the degree of connection between the cause of action and the country concerned should be the determining factor." The inadequacy of the territorial basis of jurisdiction which arose from the absence of the defendant from the territory

of the forum was responsible for the refinement of the traditional rules. See also Cheshire and North, op. cit., pp. 179, 182-213.

10. Cf. D.& M. Rule 22, n. 1, ante. See Colt Industries v Sarlie [1966] 1 W.L.R. 440, at p. 444 (Lyell J.): ".jurisdiction was well founded by serving a writ upon a foreigner who was there merely casually"; Baroda v Wildenstein [1972] 2 Q.B. 283; Rome and Anor. v Punjab National Bank (No. 2) [1989] 1 W.L.R. 1211, at p. 1214: "In the field of private international law it was clear that the in personam jurisdiction of English courts over foreigners is based upon the fact of residence or presence: see Sirdar v Rajah of Faridkote [1894] A.C. 670, 682-683...That jurisdiction should continue after cesser of residence or presence, as occurs when an overseas company ceases to have an established place of business in this country, is in clear conflict with such principle...There is no reason why different rules should apply depending on whether or not the company is English"; see also Saccharin Corporation v Chemische Fabrik Von Hayden [1911] 2 K.B. 516 (C.A.) and Okura v Forsbacka Jernverks [1914] 1 K.B. 715 (C.A.). More recently, Lord Diplock in The Siskina [1979] A.C. 210, at p. 254: "...the general rule that the jurisdiction of the English court over persons is territorial".

11. These are to be found in R.S.C. Order XI, rule 1. Note that rule 1(1)(f) on service out in tort cases was modified in line with the Brussels Convention (see n. 12, post) and the European Court of Justice's decision in Handelswerkerij GJ Bier BV v Mines de Potasse d'Alsace SA, Case 21/76 [1978] Q.B. 708: it is enough if some significant damage was sustained in England; see also the Canadian decision in Vile v von Wendt (1979) 103 D.L.R. (3d) 356.

12. These are found in the Civil Jurisdiction and Judgments Acts 1982 and 1991, which incorporate the E.E.C. Brussels Convention 1968 and the E.E.C. Lugano Convention. For an indication of the basic similarity among the different jurisdictional regimes, see Sir J. Jacob (Gen. ed.), Private International Litigation (1988)(hereafter Litigation), at pp. 3-4 (at 1.04(a) and (b) and 1.05), pp. 129-140 (at 6.01, 6.07-6.15) and pp. 211-222 (especially at 9.01-9.10).

13. See the text (the formula) that carries n. 44, post and the text accompanying n. 42, post (p. 45).

14. See nn. 9 and 10, ante.

15. See Chapter One, 1.2, the first paragraph (p. 24). The point above should be borne in mind in relation to the case for overall jurisdictional coherence and comprehensiveness.

16. This means that at present, there can be jurisdiction to adjudicate without jurisdiction to close litigation by ordering a remedy in the given case; this is different from the merits showing no cause of action. Cf. n. 11, ante.

See McLachlan, loc. cit., at p. 129: "[T]he courts do have a serious concern with the efficacy of the civil process, which is not likely to be dislodged by jurisdictional constraints. Courts will often find a way to take jurisdiction over a dispute where they believe that the plaintiff will otherwise not have a remedy". Cf. the penultimate paragraph of 2.5 (expediency and policy), post (pp. 66-69), regarding 'the Metliss and Adams approach'.

17. 'The forum's interest' as it is referred to here is definitional; this expression can be said to have the same connotations as 'the forum's broad sense of justice' and is an objective concept comprising the parties' interests, the connectedness of the cause of action, the territory and policy, public interest, and the purpose of the conflict of laws. See n. 25, post.

18. This is the crux of the rules on *forum non conveniens*/the natural forum which are discussed shortly. See n. 35, post, and the accompanying text.

19. see generally, J.J. Fawcett, loc. cit., n. 37, Chapter One, ante.

20. The illustration of the dangers involved in the forum's use of familiar methods is the decision in Leroux v Brown (1852) 12 C.B. 801, concerning the erroneous application of the limitation provision in the Statute of Frauds 1677 for written contracts to the oral contract, the subject matter of that case, governed (and (validated) by French law. See e.g., Cheshire and North, op. cit., pp. 45 and 48.

21. Cf. n. 9, ante.

22. See nn. 5-7, ante.

23. The citations that follow explicate further (cf. nn. 4-6, ante) the correctness of drawing parallels between public and private international law viewpoints as is done here. See Brownlie, op. cit., pp. 298-300, and 307-311; R. Higgins, op. cit. pp. 56-94; F.A. Mann, Studies in International Law (1973) pp. 1-139; C. McLachlan, loc. cit. at n. 4, ante; D. Rosenthal and W. Knighton National Laws and International Commerce: The Problem of Extraterritoriality (1982); A.V. Lowe Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials (1983); A.D. Neale and M.L. Stephens International Business and National Jurisdiction (1988) especially at pp. 15-16 (the objective territorial principle), pp. 128-133 (personal jurisdiction), pp. 151-161 and pp. 176-181; Karl M. Meeson in C.J. Olmstead (ed.), Extra-territorial Applications of Laws and Responses Thereto, (1984), p. 38, at p. 41: "The basis of jurisdiction under international law may in the abstract be described as *the common denominator of domestic rules of conflict of laws in the community of states. Only to the extent that such a common denominator may be found is there some chance for the existence of rules of customary international law related to the basis of jurisdiction.*" (italics added); L. Kramer (1992) Supr. Ct. Rev. 179 ('Vestiges of Beale: Extraterritorial Application of American Law'), at p. 223: "[R]ecognize that courts have many[R] resources to draw upon. Practices and

conventions followed in foreign nations provide a valuable source of information, as do existing treaties and agreements..With these sources, courts should be able to establish a system of rules through conventional common law adjudication in the same way they have developed substantive principles of customary international law, and in the same way courts...have developed choice of law rules", and at p. 224: "Judges are supposed to administer the law sensibly, and a presumption against extraterritoriality simply is not sensible"; McLachlan, loc. cit., at p. 127: "Public international law may itself become a substantive legal system to which reference is made by operation of „choice of law rules".

24. op. cit., pp. 298 et seq. and especially 309-310; i.e. that territoriality is subject to other principles which need only be identified here such as nationality, protection (or security), passive personality and universality.

25. op. cit., p. 298 (cf. n. 17, ante); see D.W. Bowett (1982) 53 B.Y.B.I.L. 1 ("Jurisdiction: Changing Patterns Of Authority Over Activities And Resources"), at p. 18; see also Roth, n. 29, post, regarding the role of interests. 'Forum interest' in this context bears little or no relation to Currie's 'governmental interest analysis', (Selected Essays on the Conflict of Laws (1963), Chapters 4 and 12, and 28 LawContProb 754 (1963)and followed substantially more recently by H.H. Kay ("A Defense of Currie's Governmental Interest Analysis") III HagRec 9 (1989)) which attempts to explain choice-of-law on the basis of judicial scrutiny of the policies contained in the conflicting rules of competing legal systems the ultimate object being the application of the forum's *lex causae*, i.e., irrespective of the interest of the other state and the interests of the parties. Currie's ideas could possibly work for interstate rather than international conflict cases. This is the reason for not referring to comparative approaches in other federal common law jurisdictions; where writings from such jurisdictions are prayed in aid, the authors will have indicated convincingly the usefulness of their comments in a nonfederal, international context (e.g., von Mehren and Trautman, at n. 33). For criticisms of his approach, see A. Shapira The Interest Approach to Choice of Law (1970), pp. 34-44, P.M. North I HagRec 9 ("Development of Rules of Private International Law..."), at pp. 33-38 (1980), and F.K. Juenger (1984) 33 A.J.C.L. 1 ("Conflict of Laws: A Critique of Interest Analysis").

See also McLachlan, loc. cit., at p. 141: "Despite the huge academic and judicial effort put into "Governmental interest analysis", it is difficult to resist the conclusion that "the little vanities and susceptibilities of states" [citing Bodemeyer] do not provide a sound basis for choice of law- and the importation of the doctrine into civil jurisdiction should be resisted." See also H.G. Maier (1983) 32 A.J.C.L. 579 ("Interest Balancing and Extraterritorial Jurisdiction"), especially at p. 581 where he sums up his thesis that this activity is the preserve of diplomats rather than judges. Further, see A.D. Twersky (1994) 59 Brklyn L.Rev. 1351 ("A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in Cooney v Osgood Machinery Inc. (1993) 612 N.E. 2d. 277, N.Y.).

26. *op. cit.*, p. 298; but see the House of Lords' decision in Derby & Co. Ltd. v Larsson [1976] 1 W.L.R. 202. See also L. Brilmeyer and C. Norchi, (1992) 105 Harv. L. Rev. 1217 ("Federal Extraterritoriality And Fifth Amendment Due Process"), at 1240-1244 (regarding contacts, interests and fairness) and G.C. Hazard (1965) Supr. Ct. Rev. 241 ("A General Theory of State-Court Jurisdiction"), at pp. 273 et seq (regarding the 'minimum contacts' theory of state-court jurisdiction (cf. L. Brilmeyer (1980) Supr. Ct. Rev. 77 ("How Contacts Count..."), at p. 82 (regarding the notion of 'substantive relevance' of cause of action to the forum). The one-time *locus classicus* of U.S. law on the assumption of jurisdiction by service within the forum, Pennoyer v Neff 24 L. Ed. 565 (1877), was vigorously queried and declared inadequate by A. Ehrenzweig in 65 Yale L.J. 289 (1956) ("The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens") where he offers a compelling critique of the transient rule of personal jurisdiction; especially pp. 293-303 on Beale and power. See also McLachlan, *loc. cit.*, at pp. 135-137, and S.E. Cox, (1990-1991) 58 Tenn. L. Rev. 497 ("Would That Burnham Had Not..") on the unconstitutionality of transient presence jurisdiction and, with it, the progression from Pennoyer rationales to long arm statutes/'minimum contacts' rationales (similar to Order 11 Rule 1(1) jurisdiction) in International Shoe Co. v Washington (1945) 326 U.S. 310, still relied on today in cases like Asahi Metal Industries Co. v Superior Court (1987) 480 U.S. 102, and Burnham v Superior Court (1990) 110 S.Ct. 2105.

27. It is nevertheless reverse logic to argue that resort to enforcement (execution) proceedings is *the* justification of jurisdictional competence; after all it is the forum's need to monitor the activities of the defendant, which activities led to the litigation in the first place, that constitutes the forum's assertion of *in personam* jurisdiction.

See F.A. Mann, Further Studies In International Law (1990) ("The Doctrine of International Jurisdiction Revisited After Twenty Years"), at pp. 18 and 19 where he examines the nexus between extraterritorial enforcement jurisdiction and legislative jurisdiction within the context of sovereignty, and also examines indirect enforcement jurisdiction (pp. 32-37) e.g., by way of "injunctions with extra-territorial effect", citing Donaldson M.R. in British Airways v Laker Airways [1983] 3 W.L.R. 544, at p. 576 (that these are granted with "extreme caution"), and Seattle Totems Hockey Club Inc. v National Hockey League 652 F. 2d. 852 (1981), at p. 855 and Cargill Inc. v Harford Accident and Indemnity Co. 531 F. Supp. 710 (1982) to illustrate the "complete harmony" between U.S. and English positions. He had asserted that the defendant against whom the jurisdiction *ad personam* in these respects is exercised had to be a British subject or a subject of the forum's jurisdiction (citing Laker and Castanho respectively), which would attest to the approach given here in the form of the jurisdictional formula in the text to n. 44, post (p. 45), regarding substantial connection and domicile. See L. Collins (1989) 105 L.Q.R. 262, at pp. 266 et seq. and C. McLachlan (1987) 36 I.C.L.Q. 669, at p. 675 (cf. n. 15, Chap. 1.2 (p.34)).

28. Brownlie, *op. cit.*, p.307; see also Higgins, Problems and Process, p. 74, discussing extraterritorial jurisdiction *via* U.S. antitrust law (as in U.S. v Aluminium Company of America (1945) 148 F. 2d. 416) and from the viewpoint of the jurisprudence of the European Court of Justice (manifest in the Dyestuffs case [1972] E.C.R. 619 (see F.A. Mann (1973) 22 I.C.L.Q. 35 ("The Dyestuffs Case..."), the Beguelin case [1971] E.C.R. 949 and in the Wood Pulp Cases [1988] E.C.R. 5193), she submits that the controversial 'effects' doctrine (i.e., that a forum could exercise extraterritorial jurisdiction over facts in issue arising abroad which repercuss on the territory of the forum in their consequences) is now accepted in all but name.

The significance of the analogy with jurisdiction in private international law is that, in cases of extraterritorial jurisdiction, we should rationalise the 'apparent' exercise of forum jurisdiction not as an exercise 'for its own sake' but as an exercise of forum jurisdiction for "the protection of common values" (Higgins, p. 77). Another perspective is afforded by McLachlan, *loc. cit.*, at p. 143: "If there is indeed an emergent principle of co-operation it is to promote the international efficacy of the judicial process - all too easily frustrated by unscrupulous defendants - while ensuring that, on an international plane, the process is fair and not arbitrary or subject to manipulation", and "[The Brussels Convention] has also fostered, as experience particularly in the interim measures field has shown, much closer co-operation between courts. Of course, it has also drawn the line between permissible and impermissible jurisdictions."

29. See P.M. Roth, (1992) 41 I.C.L.Q. 245, ("Reasonable Extraterritoriality: Correcting the "Balance of Interests""). At p. 273: "[T]he weaker the domestic effect, the less is the national interest in the assertion of control."; p. 274: "Once a direct, substantial and foreseeable effect has been established, it is necessary to consider whether the assumption of jurisdiction over acts carried out in a foreign state is reasonable in the particular case. First to what extent does that foreign state encourage or support the conduct in question? Second, how close are the connections of the defendant to the forum state? On that basis, the critical question can be considered: is the strength of those connections such that, notwithstanding the degree of conflict with the interest of the foreign state, extraterritorial jurisdiction is justified?"; p. 279: "It is the threshold of effects and the closeness of the connecting links that in themselves establish the interest of the forum state...[I]t is an exercise in judicial judgment to determine whether the extraterritorial jurisdiction is reasonable despite the relevant interests of affected foreign States."

See also the recent decision of the Maryland District Court at first instance in Matusevich v Telnikoff (reported in US Law Week, 14/2/95, and in the BIICL Bull. of Leg. Dev. No. 4 1995, p. 42) where an English libel judgment was refused recognition because its underlying cause of action (libel) was not 'constitutional' in the US sense (presumably despite the 'civil liberty' context in United Kingdom law) and was, therefore, contrary to Maryland public policy. This case represents an extreme interpretation of 'public policy' and should probably be reversed on appeal.

30. See R. Higgins, in Olmstead (ed.) op. cit., n. 23.

31. op. cit., p. 309.

32. Cf. Higgins' "protection of common values", n. 28, ante.

33. See A.T. von Mehren and D.T. Trautman, (1966) 79 Harv. L. Rev. 1121 ("Jurisdiction To Adjudicate: A Suggested Analysis"), at 1127: "[J]urisdictional rules ordinarily presuppose, and are designed to ensure, not only that other concerned jurisdictions will not take serious offence at the assertion of jurisdiction in the original proceeding, but that they will not act affirmatively to frustrate the results reached in the original proceeding". See also J.D. McLean, International Judicial Assistance (1992) Chaps. 2 and 6, especially pp. 8-55, on service of process, and P. Gottwald [1990] Civ.J.Q. 61 ("Limits To Territorial Effects of Judicial Acts"), at p. 73.

Elsewhere, in Dominice Patry and Reymond (eds.), Etudes de Droit International en Honneur de Pierre Lalive (1993) p. 557, von Mehren identifies a trend in the exercise of jurisdiction away from "a personal or political relationship between a party and a legal order or on the legal order's sheer effective power over defendants. Instead, assertions of adjudicatory jurisdiction are explained and justified primarily by considerations of convenience, fairness and justice"- p. 558. Cf. 2.5, post (pp. 64 et seq).

34. A rational forum means a forum that will not take or exercise jurisdiction where it is not in its interests to do so for whatever reasons, be they lack of significant connection between the subject-matter and the forum, or non-interference with relevant foreign jurisdictions; cf. Rio Tinto Zinc Corporation v Westinghouse [1978] 2 W.L.R. 81, at p. 93 (Lord Wilberforce), and at p. 108 (Viscount Dilhorne). See also A. Briggs (1987) ICLQ 240 (cf. n. 27, Chap. 1.3, (p. 36)) at p. 251: "English law is surely not incapable of having views on where a trial should rationally take place." The English forum is the rational forum.

J.R. Lucas, On Justice (1980) at p.36 writes that because "arguments about justice are not scientific arguments, it follows that they are not scientific arguments in [the positivistic] sense", though "it is incontestable that justice has an intimate connection with reason and rational argument". This view is harmless enough to the present purpose which is to demonstrate the 'reasonableness' factor in jurisdictional rules and matters generally. The underpinning definition of 'rational' in the context in which it is used here is to do with an objectively identifiable (cf. Roth, n. 29 above) and practically realisable and, most importantly, a cohesive comprehension, of jurisdiction without more.

35. See generally, Cheshire and North, op. cit., Part Three. See also Dicey and Morris, op. cit., at p. 395 et seq: Rule 31: "(1) English courts have jurisdiction, whenever it is necessary to prevent injustice, to stay or strike out an action or other proceeding in England [Amin Rasheed Shipping Corporation v Kuwait Insurance Co [1984] A.C. 50; Spiliada Maritime

Corporation v Cansulex Ltd. [1987] A.C. 460; Charm Maritime Inc. v Kyriakou [1987] 1 Ll. Rep. 433 C.A.), or to restrain the institution or continuance of proceedings in foreign courts [Bank of Tokyo v Karoon [1987] A.C. 45; The Atlantic Emperor (No.2) [1992] 1 Ll. Rep. 624, C.A."]; see A.G. v Arthur Andersen & Co and Ors., The Times 13/10/87, affirmed in The Independent 31/3/88 (unreported), DuPont v Agnew [1987] 2 Ll. Rep. 585 (C.A.) and Jeyaretnam v Mahmood and Ors. The Times 21/5/92 (unreported) which refers to "principles of judicial restraint" in the exercise of discretion to enquire into the quality of justice in the domicile of the party seeking to litigate in England; see also L. Collins (1991) 107 L.Q.R. 10 ("Temporary Presence, Exorbitant Jurisdiction and the U.S. Supreme Court"). Dicey and Morris' Rule 31(2)-(4) cover the English and the 'European' stay of English proceedings rules- see pp. 395-397.

Cf. the penultimate paragraph of 2.4.1., post (pp. 60-61).

For a litigator's views on *forum non conveniens*, see A.G. Slater, (1988) 104 L.Q.R. 554 ("Forum Non Conveniens: A View From The Shop Floor"). He concludes at p. 575 that those given to Latin tags might express their feelings in terms that the principle be subsumed under the maxim *interest reipublicae ut sit finis litis*. Cf. 2.4.1 post. See also, D.W. Robertson, (1987) 103 L.Q.R. 398 ("*Forum Non Conveniens* In America And England: "A Rather Fantastic Fiction") for comparisons with U.S. positions, and L.D. Silberman (1993) 28 Texas I.L.J. 501 ("Developments in Jurisdiction and Forum Non Conveniens in International Litigation..").

36. i.e., the rules under the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention 1968 and its Modified Convention), and the rules under the E.C./E.F.T.A. Convention 1988 (the Lugano Convention). These are incorporated into forum law by the Civil Jurisdiction and Judgments Acts 1982 and 1991. All matters covered by these rules are "civil and commercial" (art. 1, 1968 Convention) as defined in L.T.U. v Eurocontrol [1976] E.C.R. 1541, to exclude public law matters (in that case, the *ultra vires* acts of a public body). See also Gourdain v Nadler (Case No. 133/78) [1979] 1 E.C.R. 733 (bankruptcy) and Netherlands v Ruffer (Case No. 814/79) [1980] 3 E.C.R. 3807 (public duties). The art. 1 definition also excludes matters of legal status, insolvency, social security and arbitration. See the Jenard Report (O.J. 1979 No C59/1), p. 9; see Jacob, Litigation, at pp. 98-99 (4.08).

See generally F.A. Mann, Notes and Commentaries on Cases in International Law and Arbitration (1992), at pp. 227-230 (also appearing at 106 L.Q.R. 354 (1990) and Further Studies, n. 5, ante, at p. 53: "From the point of view of public international law, the outstanding event of the last twenty years has been the conclusion of the [Brussels Convention]. This Convention...[T]he Convention has to be recognised as an important step in the evolution of an international law of civil jurisdiction...[I]ts pervading influence must be acknowledged"; see generally also T.C. Hartley, Civil Jurisdiction and Judgments (1984), L. Collins, The Civil Jurisdiction and Judgments Act 1982 (1983), D. Lasok and P.A. Stone Conflict of Laws in

the European Communities (1987), and D.L.C. Miller and P.R. Beaumont (eds.), The Option of Litigating in Europe (1993), McLachlan, loc. cit., at pp. 138-139. See generally also J.E. Levitsky (1994) 42 A.J.C.L. 347 ("The Europeanization of the British Legal Style").

37. See Lasok and Stone, op. cit, p. 73. There is, for example, no such thing as a special writ for the purposes of litigation brought pursuant to the European rules; the proceedings must meet the procedural requirements of the forum state. It is therefore proposed that, in adopting the European rules as part of its working jurisprudence, the forum implicitly acknowledges a number of jurisdiction-defining positions. One is the unity in theory between 'jurisdiction' and 'judgments', which will be returned to this later in the present Chapter under the theme of finality, recognisability and enforceability of judgments. Another is the narrow definition of 'procedure' manifest in the rules identified in the main text above to exclude all rules not governing the process of enforcement of judgments.

Cheshire and North, op. cit., at pp. 279-280 describe the purpose of the 1968 Convention as "to provide the free circulation of judgments throughout the Community, thereby inspiring business confidence and generally encouraging the right conditions for trade. To achieve this aim there had to be harmonisation of the law on jurisdiction throughout the Community." It would be overreaching to claim a similar concerted position between the United Kingdom and non-E.U. jurisdictions (recall, however, Higgins' submission about the 'effects' doctrine discussed under 'the public international law' viewpoint, n. 28, ante). See also Jacob, Litigation, at p. 96 (4.03).

The application of the European rules brings about the practical manifestations of the theory of jurisdictional competence upon which conflictual analysis could proceed. See Capelloni and Aquilini v Pelkmans [1986] 1 C.M.L.R. 388, at pp. 398-399; Calzaturificio Brennero v Wendel GmbH Schuhproduktion International [1986] 2 C.M.L.R. 59 and K. Lipstein (1987) 36 I.C.L.Q. 873 ("Enforcement Of Judgments Under The Jurisdiction And Judgments Convention: Safeguards").

38. See Hassan Shenavai v Klaus Kreischer (Case 266/85) [1987] 3 C.M.L.R. 782 which says that, in addition to the provision in art. 2 for the defendant's domicile as the general criterion in determining which court is to have jurisdiction, the plaintiff can institute proceedings under art. 5 in a different court where the obligation is the contractual obligation forming the basis of the legal proceedings, or the obligation which characterises the relationship. The art. 5 ground is subject to special criteria which need not be discussed here (cf. Tessili v Dunlop (Case 12/76) [1976] E.C.R. 1473. See also Kalfelis v Schroder [1988] E.C.R. 5565, and Shevill and Ors. v Presse Alliance SA, (C.A.) [1992] 1 All E.R. 409: "Once it is shown that there was an arguable case on which the plaintiff could rely to establish a [cause of action], then jurisdiction under art. 5(3) of the...(Brussels Convention) might be assumed by the English court").

39. section 25 of the 1982 Act makes this possible. The provisions of art. 24 would otherwise be inoperable because of the requirement there that provisional remedies must be available in the forum state: see Republic of Haiti v Duvalier [1990] 1 Q.B. 202, at p. 212 (C.A.).

The European Rules' provisions in the paragraph in the main text are comparable to the forum rules referred to in the earlier paragraphs carrying nn. 9-12 (the territorially justified traditional rules) and 21-22 (the departure from the old basis). Cf. n. 44, plus accompanying text (p. 45).

40. Order 11, r. 1(1)(d). The contract is governed by English law and the German domiciliary is a necessary and proper party: see Coast Lines Ltd. v Hudig and Veder Chartering N.V. [1972] 2 Q.B. 34 (C.A.), Armadora Occidental S.A. v Horace Mann Insurance Co. [1977] 1 W.L.R. 1098 (C.A.). The forum court would also be appropriate in the circumstances, unlike the situation in Amin Rasheed (n. 35, ante) about an insurance policy governed by English law but where Kuwaiti courts were the appropriate forum.

41. See arts. 52 and 53 (Title V). Corporations are domiciled where the law of the seised forum court says that the sole seat of the corporation is to be found: The Deichland [1990] 1 Q.B. 361. See Jacob, Litigation, at p. 98 (at 4.07), p. 130 (at 6.02) and p. 234 (at 9.25). Cf. the Jenard Report (O.J. 1979 No. C59/1), at p. 8.

42. Cf. n. 33, ante.

43. i.e., where the foreign law in question is of penal or revenue law: Dicey and Morris' Rules 2 and 3. However, see P.B. Carter (1984) 55 B.Y.B.I.L. 111 ("Rejection of Foreign Law: Some Private International Law Inhibitions"), for a convincing account of the theoretical reasons why the exclusion of foreign law in such cases is not necessarily sound.

J.E. Levitsky ((1994) 42 A.J.C.L. 347, "The Europeanization of the British Legal Style"), at p. 348: "...the possibility of a deep, long-term change in the British judicial role as a result of their experience, from a highly formal rule-focused decision-making rubric toward more discretionary principle-based reasoning." Cf. nn. 77-78, Chap. 3 (pp. 173-174).

44. The case for reconceiving of domicile, especially for jurisdictional purposes, to take into account the notion of substantial connection is presented by P.B. Carter (1987) 105 L.Q.R. 713 ("Domicil: The Case For Radical Reform in the United Kingdom") for the case for uniformity in the definition of domicile for jurisdictional purposes, again with the emphasis on substantial connection (pp. 722-723), in the light of different definitions under the Brussels Convention and under Order XI, while accepting that domicile needs to be conceived of differently for different purposes such as taxation, capacity and status respectively. See also R. Fentiman in "Domicile Revisited" (1991) 50 C.L.J. 445, especially at pp. 447-449 and 457-463. See also M. Weser (1961) 10 A.J.C.L. 323, at pp. 328-9 ("Bases of Judicial Jurisdiction in Common Market Countries").

It is emphasised that this formula represents the theoretical approach only of the English forum and does not in any shape or form represent a formal judicial rule in this respect. It nevertheless provides a context within which to observe the forum, more so in view of North's opinion that the Civil Jurisdiction and Judgments Acts 1982 and 1991 is mandatory and of general application (cf. n. 4, ante).

See J.E. Levitsky, *loc. cit.*, at p. 348: "There is significant evidence that British courts are applying techniques and judicial approaches that they were introduced to primarily as a result of Community membership in purely domestic legal cases".

The formula is implicit in the jurisdiction and judgments arguments in 3.4.2A, post (pp. 135 et seq).

45. See G. Dannemann Introduction to German Civil and Commercial Law (1993), at pp. 93-94 for a discussion of the jurisdiction based on the presence of assets in a member state's jurisdiction, in this case Germany, in connection with Muduroglu v TC Ziraat Bankast [1986] 3 All E.R. 682, C.A. and the bearing of s. 23 *Zivilprozeßordnung* (ZPO), the German Code of Civil Procedure. See L. Kramer, *loc. cit.*, n. 23, ante. H. Smit (1972) 21 I.C.L.Q. 335: "The danger of leaving one's umbrella in Sweden is known the world over..." ("Common and Civil Law Rules Of In Personam Adjudicatory Authority: An Analysis of Underlying Policies"); L.I. de Winter (1968) 17 I.C.L.Q. 706 ("Excessive Jurisdiction In Private International Law").

This is developed in 3.4.2A, post (pp. 135 et seq).

46. This goes to the principle of effectiveness of the forum's judgment orders and is therefore fittingly discussed under this principle. At any rate, the point is that the likelihood of the defendant's physical absence does not defeat the validity of the judgment- Romer J. in Re Liddell's Settlement Trusts [1936] Ch. 365, at p. 374: "It is not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed." Cf. n. 87, post (p. 93). See also Henderson v Henderson (1843) 3 Hare 100: that courts of equity require proof that a foreign court will cooperate before an order requiring its execution will be made.

47. See Sir Jack I.H. Jacob Fabric of English Civil Justice (1987), at p. 63: "[T]he true relation between substantive and procedural law should be redefined in terms of the primacy of substantive law and the supremacy of procedural law". (Cf. Chap. One, 1.3: "No case is to be made... for novel remedial forms. The case is for novel rationalisations of the grant of the existing forms..." (p. 31)).

See also P.B.H. Birks, Civil Wrongs: A New World (1992), at p. 98: "[I]f the definitional link between wrongs and loss is broken and the confusion between law and equity is at the same time taken seriously, it immediately becomes obvious that the frontiers of the category of tort and civil wrongs cannot be set by reference to the jurisdiction of the old courts of the common law. An incidental bonus of unification, not to be

contemned, is that the law is freed from the need to develop a theory capable of explaining the existence of two categories of wrongs, each with different remedial restrictions", and at p. 110: "[T]he distinctions which make thinking and teaching manageable must not be based on the accidents of jurisdictional history. And we must not build in limiting concepts at the outset".

This is to say that what is discussed about contracts in the main text should apply with equal force to other types of obligation, especially in the case of the 'most substantial relation' exception to tort double actionability discussed later (text at n. 55 (torts), and at 5.5.2 (unjust enrichment (post, pp. 226 et seq)). This is despite the fact that tort situations are unforeseen/unplanned; that is, having an identified plaintiff as well as identified applicable laws, coupled with the prevalence of insurance law (which means that the tort claimant could frame the claim in contract: Coupland v Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, Matthews v Kuwait Bechtel Corpn [1959] 2 Q.B. 57), cf. O. Kahn-Freund [1968] II Hague Recueil 5 ("Delictual Liability And The Conflict Of Laws"), at p. 44: "[W]hen in Rome see that your insurance policy covers the risks against which Romans insure". See P.M. North (1992) 3 K.C.L.J. 29, at pp. 41-44 (cf. n. 4, ante).

See also B. Kercher and M. Noone Remedies (1983), p. 1: "A discussion of remedial law assumes that a right has been or is about to be infringed, and *that the requirements of procedural law are satisfied*". (Cf. Dobbs Handbook on the Law of Remedies (1986), para. 1.1).

For some clarification about the meaning of the concept, see Z. Stalev, 'The Effects of Judgments as Remedies' in I.R. Scott (ed.), International Perspectives on Civil Justice: Essays in Honour of Sir Jack Jacob (1990), pp. 169-178, especially the various references to *substantive private law remedies* in contradistinction to procedural private law remedies (the former, but not the latter are described as having arisen *ex lege* (by reason of violation of primary or secondary substantive rights) and the reference to *substantive res judicata* (pp. 172-175)). These references are basic to all systems.

See also D. Laycock, Modern American Remedies (1985), especially on the "argument that remedies are the essence of substance [which] casts light on the nature of remedies and of substance and the relationship between them" and on the "sense in which the remedy ultimately defines the substantive obligation" (pp. 7-8).

48. Sir Jack Jacob, Fabric, at pp. 23-24 and at p. 169.

49. nn. 46 and 47, ante.

50. 'Substantivistic' means 'characterised by substantive aspects', and 'secondary level' means 'after recognising the formal (procedural) aspects of the award/refusal of the particular remedy'. See P.S. Atiyah and R.S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (1987), pp.

28 et seq; see also Z. Stalev, *op. cit.* (n. 46), with regard to the primary and secondary types of substantive rights- clearly remedial rights cannot constitute primary rights; see below at 2.3.2.

51. See the remarks of disappointment of F.A. Mann, (1991) 107 L.Q.R. 353 (cf. n. 22, Chap. 1.2): "The Act replaces one of the great achievements of the English judiciary during the last one hundred and forty years or so, an achievement which produced an effective private international law of contracts, was recognised and followed in practically the whole world and has not at anytime or anywhere led to dissatisfaction or to a demand for reform"; similar reactions were voiced by Lords Wilberforce and Goff of Chievely in Hansard Vol. 515, cols. 1476-1478. Surely, the Act, in these respects, amounts to what at worst can be described as an expansion of the doctrine of the proper contractual law, which no doubt has been subject to modifications over the decades since its inception in Robinson v Bland (1760) 1 Wm. Bl. 234. *Pace* the imposing remarkers, even in the eyes of English law, the new law must be progressive to the extent that the reference to foreign procedural law is to rules of law.

52. Cf. Chap. 1.1, opening paragraph.

53. s. 2 1990 Act and Schedule 1, art. 10(1)(c) of the Rome Convention.

54. [1953] 2 Q.B. 329.

55. [1971] A.C. 356, at 379. s. 32A Supreme Court Act 1981 (read alongside s. 6 Administration of Justice Act 1982) provides that the *lex fori* governs the assessment of damages and is illustrated by the forum's single assessment rule: see H. McGregor McGregor on Damages (15th ed., 1988), at paras. 1 and 1795. See also Dicey and Morris, *op. cit.* at p. 184. This is probably no longer tenable in the light of s. 2 of the 1990 Act, nor is Boys v Chaplin in these respects (at p. 394) still good law for cases brought under the 1990 Act. For torts, see Red Sea Insurance Co. Ltd. v Bouygues SA and Others, *loc. cit.*, n. 28, at 1.3, ante (p. 37). Restitution is discussed at 5.5.2, post (pp. 226-229).

56. Cf. 2.2, ante. See R. Dworkin, A Matter of Principle, (1987) at p. 96: "The basic procedural right in civil litigation is the right that the risk of the moral harm of an unjust result be assessed consistently so that no less importance is attached to that risk by a court's procedural decisions than is attached to the law as a whole. Both parties have that procedural right, though in most cases only one will rely on that right to demand some procedural benefit. But neither party has any right against procedures more accurate than the accuracy required by that right". Previously, at p. 77: "...since the sharp distinction between substantive [sic] and procedure is arbitrary from a normative standpoint,..., any descriptive theory that relies so heavily on that distinction, even if factually accurate, cannot be a deep theory about the nature of adjudication but must be only a claim that

happens to be true, perhaps for reasons of historical accident, about one part of adjudication and false about another".

57. See Jolowicz, *loc. cit.*, at pp. 29-32 (Cf. Chap. One, 1.3 at text leading up to n. 25 (p. 28)).

58. See the example from German law of obligations discussed below at 2.3.2 (pp. 49 et seq).

59. R.S.C. Order 11 rule 1(1)(b) (giving (extraterritorial) jurisdiction where the *bona fide* substantial claim is for an injunction to be executed within the jurisdiction, whether or not there is an additional claim for damages) suggests that, although the jurisdiction is limited to a forum injunction, having applied a foreign *lex causae*, the forum is not entirely indisposed to the proposition in the main text: see James North & Sons Ltd. v North Cape Textiles Ltd. [1984] 1 W.L.R. 1428 (C.A.) where an injunction was granted to restrain a threatened and anticipated breach of contract; Order 11 rule 1(1)(b) should, in the appropriate case, go further to give jurisdiction in respect of final injunctions to be executed abroad.

The rule does not operate to give jurisdiction over a claim for interim relief: The Siskina [1979] A.C. 210. See n. 50, ante. See also J.A. Jolowicz (ed.), Lectures on Jurisprudence, (1963), at p. 361, citing Salmond: "There are "many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law"".

60. It is trite that developed legal systems the world over have three basic types of final judicial relief in private law, namely, the substitutional (or compensatory ((including the restitutionary, where appropriate), as distinguished from the specific, e.g., in English law, legal damages for, rather than specific performance of, contracts), the coercive ((also including the restitutionary, where appropriate) or injunctive/obligated performance) and the declaratory (or constitutive), albeit conceived of in different ways and, therefore, subject to differing governing principles. For a thorough-going account, see G.H. Treitel, Remedies for Breach of Contract: A Comparative Account (1976), pp. 1-2, and pp. 7 et seq. See also, F.H. Lawson, Remedies of English Law, (1980) pp. 12-15.

61. See the setting out above of s. 10(1)(c) of the Act.

62. See Atiyah and Summers, *op.cit.*, pp. 53-69; especially at p. 53: "If laws are to be identified solely by formal criteria, that is, if they are to be treated as valid law just because they have been laid down by persons or bodies authorised to make law, without examination into their substantive purposes, underlying policies, or rationales, then it seems to follow that conflicts between the authorised sources of law should be reduced to a minimum, and that very clear formal criteria should exist for the resolution of such conflicts as remain. We submit that this is the situation in England." See also F.H. Lawson, *op. cit.*, p. v (the Preface), setting out the necessity

to present remedial law in its own right while acknowledging the inextricable links with substantive and procedural law; Laycock, *op. cit.*, n. 46, *ante*.

63. See the excursus following the presentation of the four themes below for a discussion of the effectiveness of remedies, at 2.6 (pp. 70-71).

64. See below, at 2.3.2.1 (pp. 50-51), for a discussion of normativity in private international law.

65. Recall the parallel discussion of Leroux v Brown in n. 20, *ante*, in connection with the theme of extraterritorial jurisdictional competence.

66. See G.H. Treitel, *op. cit.*; see also N. Horn, H. Kotz and H. Leser German Private and Commercial Law: An Introduction (1982; translated by Tony Weir), at pp. 109 et seq. See generally, G. Dannemann, "An Introduction to German Civil and Commercial Law" (BIICL, 1993), at pp. 99 et seq.

67. See F.H. Lawson, *op. cit.*; see also G.H. Treitel, *op. cit.* The absence of similar categories in the civil law tradition is recognised in both places.

68. See the main text following paragraph 241 *BGB*. See also F.H. Lawson Remedies of English Law (1980), pp. 173-177 where scepticism is expressed about the forum presumption against specific relief. For the French law, see generally D. Harris and D. Tallon Contract Law Today (1989), especially at pp. 265 (4) et seq.

69. See G. Dannemann An Introduction to German Civil and Commercial Law (1993), at pp. 99 et seq. Cf. Stalev, n. 46, *ante*.

70. In other words, if the secondary obligation to perform is to be sustained judicially, then the *lex causae* forum is the forum to sue in. Where that forum is inaccessible, e.g., because the parties have expressed a contrary choice, the plaintiff, in the event that the chosen forum will not assume jurisdiction, will be without an enforceable right (as it exists and is enforceable under the *lex causae*); the forum system taken as found, the plaintiff will, in principle, effectively have made substantial trade-offs. Cf. n. 71, and 3.4.2A(ii), *post*: the 'Forum Shopping' argument (pp. 138-139).

71. This is an example of what was referred to in Chapter One as approximation of the *lex causae* to the forum's domestic law for the purposes of the application of the former law by the forum. Besides the simplification (*pace*, oversimplification) of the judicial task, it would appear that a possible reason for this is the discouragement of forum-shopping (or, better still, avoiding an apparent (only) appropriate forum). Where the forum does assume jurisdiction, this could lead to the curious position where the forum appears to make way for a jurisdictional basis of necessity which, if this is a correct view, would be rather a peculiar basis from the point of view of proper exercise of jurisdiction, given especially that the forum could have declined jurisdiction. (See L. Brilmeyer (1980) *Supr. Ct. Rev.*, at pp. 108-

110, and also B. Pearce (1994) 30 *Stanf. J.Int'l.L.* 525, at p. 544 (*sub "The Doctrine of Necessity"*): "Civil law countries may also premise *in personam* jurisdiction on the independent ground that no other court would be willing to exercise it. This jurisdictional basis is generally unknown to American law and other common law jurisdictions..."). Further, it is legitimate and better to decline jurisdiction and discourage forum-shopping in this way, rather than underconflictually simplify the judicial task and produce a compromise solution which does not wash for want of coherent principle. See Jacob, Litigation, at p. 140 (6.16 et seq).

See Lonhro Ltd. v Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173, at p. 185 (per Lord Diplock): "one starts with the presumption...that where an Act creates an obligation, and enforces the performance in a specified manner...that performance cannot be enforced in any other manner." See also McArthur v Strathclyde Regional Council, *The Times* 20/5/94 (Scots Court of Session).

72. Tito v Waddell [1977] Ch. 106, at p. 322.

73. The consequences will most likely be dealt with according to the principle of efficient breach. For an account of this notion as one firmly rooted in the common law tradition, see Harris and Tallon, *op. cit.*, at pp. 259-260. (Cf. Holmes' Collected Legal Papers (1920) at p. 175: "[T]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it- and nothing else.").

74. Art. 24, the 1968 Convention. It is also now the case that an order for specific performance against a French domiciliary in New York can be enforced in any Convention State. For a US judgment refused recognition and enforcement, see Consarc Corporation and Consarc Engineering Ltd. UK v Iraqi Ministry of Industry and Military Industrialisation and Others (IBA International Litigation News, August 1994, at pp. 10-12. The Brussels Court of Appeal denied enforcement of a default judgment of the District of Columbia District Court. The reasons were those of lack of due process arising mainly from defendants' non-representation and fair hearing considerations).

75. Atiyah, *op. cit.*, p.19; see also F.H. Lawson, *op. cit.*, p. 3-4: that 'wrong' includes any legally protected interest, the legal protection being the remedy.

Cf. B.S. Markesinis (1993) 109 *L.Q.R.* 622 ("Judge, Jurist and the Study and Use of Foreign Law"), p. 623: "Capturing (or...recapturing) the imagination of the common lawyer will be a great coup for German legal culture: but the reverse will also occur and...German jurists also stand to be enriched by exposure to the English judicial mind. To be sure, this is not cast in a theoretical mould...[T]he English judicial mind is at its best when handling, defining, and redefining complex case law rather than when it is forced into theorising, system building, and deductive reasoning".

76. See J. Bentham: Of Laws in General (H.L.A. Hart (ed.), 1970), at pp. 64 et seq; M.D.A. Freeman Lloyd's Introduction to Jurisprudence (6th ed., 1994), at p. 210: "From a conceptual standpoint, there is no necessity for a sovereign to be individual and unlimited. Indeed, in the complex societies that have developed since Bentham's days, ..., quite the reverse is true." cf. MacCormick, at n. 4, ante.

See also J. Raz, Practical Reason and Norms (2nd ed., 1990), at p. 153: (The emphases are added) "*Legal systems achieve [the maintenance and support of other forms of social grouping] by upholding and enforcing contracts, agreements, rules and customs of individuals and associations, and by enforcing through their conflict of laws the laws of other countries, and so on.*

Norms which are recognised for such reasons are not normally regarded as part of the legal system which gives them its sanction. They are, however, recognized and made binding in such systems by norms which require the courts to act on and enforce these norms. Therefore, the criterion of membership in an institutionalized system must be modified to exclude these norms...

Norms are 'adopted' by a system because it is an open system if, and only if, they fulfil one of two tests. The first test requires that they belong to another normative system which is practised by its norm subjects and be recognized as long as they remain in force in such a system as applying to the same norm subjects...The alternative test requires that they be norms which were made by or with the consent of their norm subjects by the use of powers conferred by the system in order to enable individuals to arrange their own affairs as they desire. The first half of the test applies to norms recognized by the rules of conflict of laws...

Norms which meet these requirements are recognized by a system but are not part of it. If a system recognizes such norms it is an open system and, as I said, all legal systems are open systems (footnote: Saying that all legal systems are open systems is not to recommend them. They may 'adopt' the wrong norms and refuse to adopt those that should be 'adopted'). It is part of their function to sustain and encourage other norms".

Previously, at p. 147: "The unity of the [legal] system depends on the fact that it contains only rules which certain primary organs are bound to apply...But there is no reason to believe that valid norms belonging to one system cannot conflict. We should, therefore, conclude that though every legal system must contain at least one rule of recognition, it may contain more than one."; at p. 145: "Legal norms may conflict and in deciding what, according to law, ought to be done one may have to balance different conflicting legal considerations, but law is an exclusionary reason and it excludes the application of extra-legal reasons." The proposition that more than one rule of recognition is possible within the same legal system, exorbitant as it is, is discussed at 3.4.2B, post (pp. 150 et seq).

See also H. Kelsen, An Introduction to the Problems of Legal Theory (1992, translated by B.L. and S.L. Paulson), Chap. III, pp. 21-36 on "The

Concept of Law and the Doctrine of the Reconstructed Legal Norm", and pp. 12-13 on "Validity and Sphere of Validity of the Norm".

None of the foregoing questions the position that foreign law as fact which must be proved by the party seeking to rely on it (cf. R. Fentiman (1992) 108 L.Q.R. 142: "Foreign Law Before English Courts"). The foregoing postulates that when foreign law is pleaded and proved satisfactorily, foreign law as facts need not be reconceived of so extensively. They remain normative facts in issue that can be (and should be) the basis for a non-domestic judicial context/approach. It must be crucial that entitlements under foreign law which are not jurisdictionally relative moral entitlements deserve to be taken seriously. See generally N. MacCormick and P. Birks, The Legal Mind: Essays For Tony Honore (1986), p. 107 (*sub "Normativity of Law"*).

Raz's discussion would seem only to be one which, at least for private international theorists, is not satisfactorily responded to by R. Dworkin. Cf. M. Cohen Ronald Dworkin and Contemporary Jurisprudence (1983/1984), p. 74 (Raz's challenge) and pp. 260-263 (Dworkin's reply which does not ostensibly respond to the question of why courts enforce foreign standards). The 'Law As Integrity' arguments implicitly respond to this challenge (Law's Empire (1986), pp. 95-96, 225-227, 254-258 and 410-412; at p. 410: "[L]aw as integrity...unites jurisprudence and adjudication. It makes the content of law depend not on special conventions or independent crusades but on more refined and concrete interpretations of the same legal practice it has begun to interpret".).

77. Lord Wilberforce in Davy v Spelthorne [1983] 3 All E.R. 278, at p. 285: "typically, English law fastens not on principles but on remedies". This should, for the justification provided in n. 75, ante, not be confused with the theory of vested or acquired rights (first introduced by Huber and accepted by Dicey and Beale; see also Dalrymple v Dalrymple (1811) 2 Hag. Con. 54) which is justified by its proponents on the view that the forum applies only its territorial law and, therefore, that it is that law which indirectly recognises rights already acquired under foreign law. Besides being too fictional, the vested rights theory cannot be the basis for the views here since this theory (i) rests on doubt about the identity of the legal system from which the right originates, (ii) implicitly requires the forum to apply the relevant foreign conflict rules (Beale's version does not). Cf. n. 24, Chap. 1, for the exclusion of renvoi from the scope of objectivity (p. 36).

Considering the enforceability of a foreign law right to (say) contribution (cf. n. 33, Chap. 1 (p. 37)), it may seem that the recognition of 'the right to the remedy' is sufficient for all practical purposes. This should be no surprise nor, however, should it be taken as adequate clarification of the forum's pragmatically defined inclination to provide relief. For one thing, forum domestic law would have to be the *lex causae* in order for the recognition to be effective: Arab Monetary Fund case cf., n. 28 (p. 37), Chap. 1) ; see also the remedy of account discussed at n. 82, post.

78. See T.F.T. Plucknett A Concise History of the Common Law (5th ed., 1956), at pp. 353-378 (on Forms of Action). See also J.H. Baker An Introduction to English Legal History (2nd ed., 1979), at p. 59.

79. Consider that in Re Bonacina [1912] 2 Ch. 394 (C.A.), a foreign (Italian) agreement made without consideration was held to be enforceable in England, although the forum would not recognise the agreement as a contract (cf. art. 3(3) Rome Convention); but, in Phrantzes v Argenti [1960] 2 Q.B. 19, a status case, the forum refused to enforce a cause of action for the provision of a marriage dowry (recognised by forum law) on the ground that the forum had no remedial order for the discretionary (according to the foreign *lex domicilii*) award of the dowry. Remember also that "substantive law is, procedural law is not, "self-executing"": Jolowicz, loc. cit., at pp. 33-34.

80. Rigby v Connol (1880) 14 Ch. D. 482; Ryan v Mutual Tontine Westminster Chambers Association [1893] 1 Ch. D. 116. Cf. Chap. 1.2, at the paragraph containing n. 19.

81. See n. 46, ante.

82. For example, the development of the domestic law of breach of confidence by the use of the remedy of 'account' in the law of restitution, e.g., where a recipient of information in confidence about a non-patented manufacturing process: see Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd. [1964] 1 W.L.R. 96; My Kinda Town v Soll [1983] R.P.C. 15. See P.B.H. Birks, Civil Law: A New World (1992), at pp. 101-104 : "The fact that a wrong was developed in chancery is no more relevant than its having been first recognised on a Tuesday or first committed by a defendant with red hair" and also G. Jones (1970) 86 L.Q.R. 463 ("Restitution Of Benefits Obtained In Breach Of Another's Confidence"), at pp. 486-488. Cf. the role of contribution at n. 33, Chap. 1 (p. 37).

83. A short statute would be sufficient but probably unnecessary parliamentary intervention. Much the same trends are observable domestically, e.g. the expansion of the remedy of specific performance to modify the substantive law of privity of contract in Beswick v Beswick [1968] A.C. 58, and in the judicial power to make foreign currency awards in final judgments as in Miliangos v George Frank (Textiles) Ltd. [1976] A.C. 443. For foreign currency claims, see Jacob Litigation, pp. 267 et seq., especially to p. 273.

See R.H. Graveson Comparative Conflict of Laws: Selected Essays (2 Vols., 1977), at pp. 27-32, especially at p. 32: that statutes have "[enriched] the conflict of laws by new and useful concepts, often inspired by the civil law"; see also F.A. Mann 31 M.L.R. 342 (1968) on "Specific Performance of Money Judgments?".

The case for judicial discretion is assisted by J. Levitsky, loc. cit., at

pp. 348 and 350 on its "comparatively limited ambit". Cf. 2.5, post, generally (pp. 64 et seq).

84. Fabric, p. 169-170. See also N. Andrews Principles of Civil Procedure (1994), at pp. 455-462.

85. See F.H. Easterbrook, (1982) *Supr. Ct. Rev.* 85 ("Substance And Due Process"), at p. 109, where he discusses modern justifications of the substance-process dichotomy, and identifies what he calls "instrumental" and "non-instrumental" justifications and comes up with the useful notion of substantive due process, albeit in the context of public law.

86. See generally Jacob, Litigation, at Chaps. 3-10 (especially at 3.02, 3.03-.05, 3.08-.09, 3.23, 3.28, 4.02, 4.20, 6.29-.31, 7.01, 7.02, 7.07, 7.08, 8.01, 10.02-.06); see N. Andrews Principles of Civil Procedure (1994), at Chaps. 17 (on finality), 18 (pp. 501 et seq. and 530-538, on recognition and enforcement), see P. St. J. Langan and L.D.J. Henderson Civil Procedure (1977), pp. 226 et seq; Slatev, op. cit., especially at pp. 169-176; R.L. Marcus, M.H. Redish and E.F. Sherman Civil Procedure: A Modern Approach (1989) pp. 947 et seq.; F. James and G.C. Hazard Civil Procedure (1977) pp. 527 et seq. H. Smit, (1986) 34 *A.J.C.L.* 225 ("Enforcement of Judgments in the U.S.A.").

87. Cf. nn. 5-7, ante. This represents the fundamental difference, jurisdictionally speaking, between the wholly domestic case and the conflict case, especially the conflict case with a preponderance of foreign contacts centred on the same foreign jurisdiction, but in respect of which the English forum is jurisdictionally competent: the archetypal conflictual hard case. This fundamental difference is most readily evidenced by the existence of separate rules for enforcement under all the jurisdiction/judgments regimes: a good example of an enforcement rule is s. 18 C.J.J.A.1982, dealing with enforcement within the U.K. and within the Convention States (see Jacob Litigation, pp. 242 et seq). In the domestic case, prescription and enforcement coincide in the same forum jurisdiction; in the conflictual hard case, they do not. Consider, e.g., that "the existing legal system is not always the one to which a greater degree of obedience is rendered..": J. Raz, The Concept of a Legal System (1980), at pp. 204-205. This is discussed more fully in the excursus to the present chapter, at 2.6 (p. 70).

See McLachlan, loc. cit., at p. 140: "The exercise of enforcement jurisdiction sheds little light on appropriate bases for original jurisdiction. The defendant may be present in the country concerned but have no, or no significant, assets there. That potential deficiency in execution could not disqualify the court at the outset. Even if the defendant is not present and has no assets in the jurisdiction, the connections of the dispute may be such as to justify the assumption of jurisdiction. A judgment rendered on this basis may still be enforced abroad."

88. Cf. 1.3 (second paragraph). See Emanuel v Symon [1908] 1 K.B. 302, at p. 309 (per Buckley J.): "In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained". He was following a line of cases beginning with Russell v Smyth (1842) 9 M. & W. 810, Williams v Jones (1845) 13 M. & W. 628, through Godard v Gray, Schibsby v Westenholz (1870) L.R. 6 Q.B. 139 and 155 respectively.

89. See N. Andrews Principles (op. cit.) at p. 501; see Atiyah and Summers, op. cit., at pp. 208-216; J. Levin How Judges Reason: The Logic of Adjudication (1952), at pp. 133-174 on the concept of the judicial decision; Slatev, op. cit., pp. 172-175, substantive *res judicata* as the relief available for a specific wrong in the disputes about rights; see also the works cited in n. 84, ante.

90. See e.g., nn. 82 and 83, ante.

91. Amphill Peerage Case [1977] A.C. 547, at p. 569, Lord Wilberforce: "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or reopen disputes."; Marcus, Redish and Sherman, op. cit., at p. 250: "A judgment is not deprived of finality simply because there is still time to file a motion in the trial court for a new trial or because the time for appeal has not yet expired", and at p. 949: "The policy underlying finality...for the purposes of preclusion resembles the policy justification for insisting on a final judgment as a prerequisite for the right to appeal".; finally, see the American Restatement (Second) of Judgments, para. 17.

92. See Jacob, op. cit., p. 25; see also Hunter v Chief Constable of West Midlands [1982] A.C. 529. Cf. n. 47, ante, regarding Slater's reference to this maxim and its possible use in relation to the jurisdictional doctrine of *forum non conveniens*. This point goes to the case for jurisdictional coherence and comprehensiveness, and illustrates the strength of the relation between 'jurisdiction' and 'judgments' by indicating the cross-applicability of principle between them.

93. See also Jacob, op. cit., at p. 178 where he sets out the effects of finality, viz: (a) to end controversy between the parties, (b) to operate as *res judicata*, and (c) to provide a basis for appropriate enforcement measures.

94. See Atiyah and Summers, op. cit., p. 215. This is also the basis for subject matter estoppel. See Marcus, Redish and Sherman, op. cit., pp. 997-1019.

95. Atiyah and Summers, *op. cit.*, at p. 208.

96. See n. 89, *ante*, and the text it accompanies (p. 53).

97. Cf. n. 8, *ante*.

98. See Jacob, *op. cit.*, at p. 187.

99. *op. cit.*, p. 188. The reference is, of course to contempt proceedings, which are unknown to civil law; see J.H. Merryman, The Civil Law Tradition (1969), pp. 57,130: non-compliance with court orders in continental legal systems takes effect on between the parties, rather than between the court (or the state) and the non-complying party (cf. the *astreint* - a fine - under French law, the *goldstrafen* under German and Austrian law). See Treitel Remedies, at pp. 59 et seq.; see also N. Andrews Principles, at p. 594 ("An unholy jumble of rules").

100. n. 87, *ante*.

101. This must be a factor in the exercise of extra-territorial jurisdiction to prescribe a remedy to be effected in another jurisdiction, subject only to accommodating rules of the particular foreign jurisdiction.

102. cf. n. 45 (Dannemann) *ante*. See also P. Hay, (1992) 40 A.J.C.L. 729 ("The Recognition and Enforcement of American Money Judgments in Germany- The 1992 Decision of the German Supreme Court").

103. But see 2.6. Cf. N. Nichols (1989) 30 Harv. I.L.J. 256 ("International Enforcement of Judgments: Evasion of a Garnishee Order- Deutsche Schactfhau- und Tiefbehrgesellschaft mbH v Shell International Petroleum Co. Ltd. 27 I.L.M. 1032 (1988)"). Note that her reference is to 'evasion' by the judgment debtor and not to 'avoidance'. The latter would not be contrary to the judgment and might involve compliance by other acceptable means, while the former would attract judicial sanction in one form or the other.

104. See Morris on the Conflict of Laws (4th. ed., 1993), J.D. McLean (ed.), at p. 103: "It is plain that while a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises".

Cf. Matusevich v Telnikoff, n. 29, *ante*, contra Henderson v Henderson, n. 46.

105. See Jacob Litigation, at p. 66 (3.02) for the English common law position: "*Subject to certain grounds of objection, an overseas judgment given in civil proceedings will be recognised at common law if it is final and conclusive* [i.e. the judgment must be regarded as *res judicata* by the overseas court which pronounced it and is not liable to be set aside or varied by that court: Nouvion v Freeman (1889) 15 App. Cas. 1; Colt Industries v Sarlie, n. 10, *ante*] *and given on the merits* [i.e. it must finally determine the

substance of the dispute: Tracom SA v Sudan Oil Seeds [1983] 1 All E.R. 404 (judgment on capacity to sue) *by a court of competent jurisdiction* [not necessarily by the said court's own law: Vanquelin v Bouard (1863) 15 C.B. (N.S.) 341]...*by action in the English courts*".

The authorities refer to a legal obligation that binds the original judgment debtor (e.g. in Godard v Gray [1870] L.R.6 Q.B. 138: the obligation theory settled that a legal obligation arose to pay the sum called for in a judgment handed down by a court of competent jurisdiction). It is unlikely that the obligation is upon the forum to recognise a foreign judgment though there are dicta (e.g., n. 106, post: "...which the courts in this country are bound to enforce") that would appear to suggest this. See e.g., Blackburn J., below at n. 106.

See also Andrews Principles, at pp. 530-538.

106. Schibsby v Westenholz [1870] L.R.6 Q.B. 155, per Blackburn J, at p. 159: "The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce." This was an approval of Russell v Smyth (1842) 9 M & W 810, and was applied in Godard v Gray [1870] L.R.6 Q.B. 139, and more recently in Adams v Cape Industries [1990] Ch. 433, at pp. 552-553, and in Owens Bank Ltd. v Bracco [1991] 4 All E.R. 833, at p. 844.

107. i.e., by acknowledging the role once played by the principle of reciprocity and the conceptual reasons for departure from it. See Sir Frederick Pollock, (1896) 12 L.Q.R. 302: "No English judgment or English writer of authority sanctions the doctrine of reciprocity [in recognition]".

See also, J.H.C. Morris, Dicey's Conflict of Laws (6th ed., 1949), at p. 403.

108. See generally A. Briggs (1987) 36 I.C.L.Q. 240 (cf. n. 27, Chap. 1, (p. 36)). This article is presently discussed critically (pp. 58-60).

109. i.e., reciprocity, like comity, is more a matter of 'politeness' (see Briggs, loc. cit. p. 242) that is replete with the biblical and Confucian golden rules, but is decidedly not in the nature of a rule of law formed by either analogical or formalist argument. At best it uses the *lex fori* far too literally in respect of a different forum.

On comity, see T.C. Hartley (1985) 35 A.J.C.L. 487 ("Comity and the Use..."); J.R. Paul (1991) 32 Harv. Int'l.L.Rev. 1 ("Comity In International Law"), at p. 32 where we are told that the European Conventions are not based on comity, even though allowance is made therein for *ordre public* exceptions.

110. See J. Wroblewski, The Judicial Application of Law, (1992), p. 205: "The final decision is...a normative statement and, if valid according to the rules of procedure, is binding on its addressee.... Leaving out the procedural problems of attacking the decision and of *res judicata*, the criteria of validity

are: (a) the decision must be made by a competent court according to the valid rules of competence; (b) the decision must be made according to valid rules of procedure; (c) the decision must be a correct application of valid substantive rules." Cf. Matusevich v Telnikoff, n. 29, ante.

See also W. Anderson, 42 I.C.L.Q. 697 (1993), ("Enforcement of Foreign Judgments Founded Upon A Cause of Action Unknown in the Forum"), where Anderson proposes that in deciding whether the forum's public policy allows for enforcement of a foreign judgment, attention should be paid to the silence of the forum law on the cause of action, the prohibition of the cause of action by the forum law, and the entitlement of the defendant to the forum's protection. These can be borne in mind with regard to public policy and recognition generally.

111. Briggs, loc. cit., p. 240. See W.J. Ju (1983) 32 A.J.C.L. 520 ("The "Enforcement" Clause: A New Development in the Recognition and Enforcement of Foreign Judgments").

112. loc. cit., p. 244. See n. 106, ante, for the case citation.

113. [1951] Ch. 842.

114. [1976] Q.B. 726.

115. at p. 247.

116. at pp. 248-249.

117. as set out by Lord Goff in the Spiliada case [1986] 3 W.L.R. 973 (HL), at p. 983.

118. The Foreign Judgments (Reciprocal Enforcement) Act 1933.

119. at p. 257.

120. at p. 240.

121. See e.g., K. Lipstein (ed.), Harmonization of Private International Law By The E.E.C., (1978), L. Collins, at pp. 99-102, T.C. Hartley, at pp. 103-118.

122. See B.A. Caffrey, International Jurisdiction and Enforcement of Foreign Judgments in the LAWASIA Region: A Comparative Study of the Eleven Asian Countries Inter-Se and with the E.E.C. Countries (1985), at p. 60: "It thus seems clear that the courts have not and probably will not disturb the obligation theory as the basis for recognition and enforcement in respect of judgments in personam." It is difficult to envision a subsequent stage in the progression at this time since the notion of a universal multi-lateral convention is only just beginning to develop: see the International Bar Association's "International Litigation News", August 1994, pp. 1, 8-9,

discussing the question, reporting on the Special Commission of the The Hague Conference on Private International Law thereon.

This is not to say that reciprocity lacks a descriptive contribution. In point of fact, see R.H. Graveson, The Conflict of Laws (3rd ed., 1955), at p. 465: "In recent years, the ideas of comity and reciprocity have been developed by the courts, not as a negative and restricted rule on the actual enforcement of foreign judgments, but rather as a broad positive and enabling rule relating to the recognition of the jurisdiction of foreign courts".

See also G.D. Kennedy (1957) 35 Can.B.Rev. 123 ("Recognition of Judgments In Personam: The Meaning Of Reciprocity"), and B. Pearce, loc. cit., n. 71, ante. See also n. 74, ante.

123. McLean (ed.) Morris on the Conflict of Laws (4th. ed.), at p. 127. For a presentation and discussion of these rules, see Jacob, Litigation, at pp. 95 et seq (4.01-.08), pp. 181-2 (7.01-.02: "A judgment given in a contracting state must be recognised in other contracting states without any special procedure being required. Recognition thus is automatic; there is a presumption in favour of recognition which can be rebutted only if one of the grounds for refusal listed in art 27 of the 1968 Convention is present") and pp. 193 et seq (8.01); the Jenard Report, loc. cit., especially at pp. 3-8. See also F.K. Jeunger (1988) 36 A.J.C.L. 1 ("The Recognition of Money Judgments in Civil and Commercial Matters"), especially at pp. 9-13 and 13 et seq.

124. art. 25 Brussels Convention.

125. See EMI Records Ltd. v Modern Music Karl-Ulrich-Walterbach GmbH. [1991] 3 W.L.R. 663.

126. Hoffmann v Krieg [1988] E.C.R. 645 (Case 145/86).

127. L.T.U. v Eurocontrol [1976] E.C.R. 1541 (Case 29/76). At p. 1651: "[T]he courts of the State in which enforcement is sought are bound by the classification adopted by the courts of the State in which the judgment was given at least in those cases in which the latter courts have expressly designated the legal dispute in question as a civil or commercial matter".

128. ante, n. 105.

129. n. 106, ante.

130. n. 106, ante.

131. cf. Lord Wilberforce in Carl Zeiss Stiftung v Rayner & Keeler (No. 2) [1967] 1 A.C. 853, at p. 966: "..otherwise it would be illogical and precarious". See Jacob in n. 85, ante.

132. at p. 519. For foreign corporations, s. 4(2)(a)(iv) of the 1933 Act requires that there be a principal place of business in the foreign country. S.

4(2)(a)(v) provides that an action can properly be brought on a transaction made through a representative office in the foreign country. In Adams, an overseas company was held by the Court of Appeal to be resident/present if it actively and by itself (or of itself) runs a place of business for some time, or did so through a representative office. Cf. n. 44, ante, and the formula in the main text it accompanies (p. 45).

133. s. 4(2)(a)(ii) and (iii) of the 1933 Act; Schibsby v Westenholz, ante, at p. 161; Emanuel v Symon [1908] 1 K.B. 302; Vogel v R.A. Kohnstamm Ltd. [1973] 1 Q.B. 133.

134. Societe Cooperative Sidmetal v Titan International Ltd. [1966] 1 Q.B. 828.

135. Emanuel v Symon, ante. This is also authority for the head of the presence of the defendant in the foreign country at the time of institution of proceedings in the foreign country.

136. i.e., without residence/presence. See Cheshire and North, op. cit., at p. 360.

137. i.e., despite Order 11 rule 1(1) of the R.S.C.. See the Societe Cooperative Sidmetal case cited above in n. 134.

138. s.9(2)(d) 1920 Act; s. 4(1)(a)(iv) 1933 Act; Owens Bank Ltd. v Bracco, n. 106 ante; but see Societe d' Informatique Service Realisation v Ampersand Software BV (1993) 137 Sol. J.(L.B.) 189, Court of Appeal: where a foreign judgment was alleged to have been obtained by fraud and means of redress were available in the country of judgment, there was no breach of public policy in recognising and registering the judgment in England.

139. s. 9(2)(f) 1920 Act; s. 4(1)(a)(v) 1933 Act; SA Consortium General Textiles v Sun and Sand Agencies Ltd [1978] Q.B. 279, at p. 300 to do with a foreign judgment for exemplary damages.

Cf. n. 110, ante, especially the Anderson article cited there.

140. Adams, n. 106, ante where there had been no judicial quantification of damages.

141. see n. 130, ante.

142. [1985] 1 W.L.R. 490.

143. Sun and Sand case, ante n. 139, at p. 307.

144. De Cosse v Rathbone (1861) 6 H.& N. 301.

145. It is discretionary under s. 14, 1920 Act.

146. See G.D. Kennedy (1954) 32 Can. Bar Rev. 359 ("Recognition" In The Recognition Of Foreign Judgments") at 373-383.

147. See, e.g., Sir Leonard Hoffmann, (1993) 56 M.L.R. 297 ("Changing Perspectives in Civil Litiation"): "The Norwich Pharmacal jurisdiction" to protect the privacy of intellectual property, after Norwich Pharmacal v Commissioners For Customs and Excise [1974] A.C. 133, and "The Bankers Trust jurisdiction" to interrogate third parties about stolen money, after Bankers Trust Co. v Shapira [1980] 1 W.L.R. 1274, and of course the familiar Mareva and Anton Piller jurisdictions.

148. See Graveson, *op. cit.*, at n. 81, *ante*, especially at pp. 32-46. See also P.B. Carter (1993) 42 I.C.L.Q. 1 ("The Role of Public Policy In English Private International Law"), and J.J. Fawcett (1984) 47 M.L.R. 650 ("Policy Considerations in Choice of Law"), A.J.E. Jaffey (1982) 2 O.J.L.S. 368 ("Foundations of Rules For The Choice of Law"), especially at pp. 372 et seq. See also F.A. Mann (1983) 2 Civ.J.Q. 320 ("Reflections On English Civil Justice And The Rule Of Law"), at p. 335-336: "One cannot help feeling that there exists at present a certain tendency towards expediency, expedition, efficiency, economy, streamlining. Any measure which is liable to prejudice the quality or the dignity of the judicial process for the sake of reaching any of these aims, praiseworthy in themselves, is bound to give rise to misgivings".

149. Cf. the closing paragraph of 1.3, Chap. One (p. 31). See H. Kelsen General Theory of Norms (1991, translated by M. Hartney), at pp. 83-85, on "The Principle of Autonomy".

150. See R.H. Graveson Comparative Conflict of Laws: Selected Essays (1977, 2 Vols.), Vol. 1, especially at pp. 14-50 ('Philosophical Aspects of the English Conflict of Laws', discussing *inter alia*, rules of convenience, "the dominant principle of rational justice"(p. 33), "internationalism"(pp. 43-46), "public policy (p. 46)) and pp. 51-65 ('Judicial Justice as a Contemporary Basis of the English Conflict of Laws'); see P.B. Carter (1993) 42 I.C.L.Q. 1 (cf. n. 148), at p. 1: "Every rule of law, and this is no less true of private international law, should, of course, be based upon, and reflect, policy considerations"; see also C. Jackson, The "Conflicts" Process, (1975), p.279: "The entire conflicts process is, in a broad sense, forum policy...[I]t represents the forum's approach to a situation containing a foreign element."

151. See J.J. Fawcett, n. 37 Chap. 1 (p. 31). In this persuasive article, he discusses the policy considerations underlying the decision to permit or to refuse trial. Cf. Levitsky, *loc. cit.*, first at n. 36, *ante*.

152. See R.A. Posner, The Problems of Jurisprudence (1990), at p. 86 where he discusses 'analogy' as the lawyer's tool, as witness the use of precedent. At p. 90: "[U]nless a precedent is authoritative in announcing a major premise that cannot be questioned, it can be a source only of data

that are anecdotal in character or of reasons, considerations, values, policies..".

153. See J. Bell, Policy Arguments in Judicial Decisions (1983), p. 53: "[T]he courts are...involved in evaluating other consequences of a proposed rule and, within the limitations imposed by considerations of consistency, striking a balance between the competing...interests concerned, even where this might be controversial. Within this framework, judicial rule-creation operates in a kind of creative continuity within the existing law, rather than being radically innovating".

See also M. Weaver (1985) 48 M.L.R. 613 ("Is A General Theory Of Adjudication Possible?.."), at p. 643: "Judicial unwillingness to develop such criteria must give rise to suspicion that judges wish to retain a vague and confused doctrine of justiciability as a cloak for strong sense discretion". Cf. the text accompanying n. 177, post.

See also T. Murphy and R. Rawlings (1981) 45 M.L.R. 34 ("After The Ancien Regime: The Writing of Judgments in the House of Lords 1979/80").

154. See Carter, loc. cit., at p. 1: "So far as private international law is concerned, public policy in this discreet sense [denoting a justification or excuse for not applying, or recognising the application of, an otherwise applicable rule of law] has relatively little role to perform in the area of forum jurisdiction. Its significant operation is in the area of choice of law, and in the area of recognition and enforcement of foreign judgments". Carter, loc. cit: "it is probably true that overt reliance on public policy in English private international law has been comparatively rare...It is perhaps significant, too, that it is mainly in private international law relating to commercial contracts...that public policy has been most frequently successfully invoked with regard to choice of law".

155. See J.R. Lucas, On Justice (1980), pp. 47 et seq. See also R. Dworkin Law's Empire (1986) at p. 406: "We bow to justice, among the political virtues, by creating for it a special form of integrity...The concrete consequences of political due process are much more contingent than those of justice, and they are often matters of regret." For a discussion, see generally, T.R.S. Allan (1993) 52 C.L.J. 64 ("Justice And Fairness In Law's Empire").

156.. Lord Wilberforce in Boys v Chaplin [1971] A.C. 356, at p. 391: "...[flexibility] to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present". See J.J. Fawcett (1984) 47 M.L.R. 650 ("Policy Considerations In Choice Of Law"), and A.J.E. Jaffey (1982) 2 O.J.L.S. 368 ("Foundations of Rules For The Choice of Law"). Cf. the main text text following n. 184, post; see also Szalatnay-Stacho v Fink [1947] K.B. 1, where the parties were governments in exile in England thus justifying different connecting factors.

157. R. Dworkin, Taking Rights Seriously, at p. 365.

158. See 2.3.2.1, ante (pp. 50 et seq).

159. op. cit., n. 151, ante.

160. op. cit., p. 7. (Cf. n. 4, and 2.3.2.1 (pp. 50 et seq)).

161. e.g., at p. 82: "[W]ithin [judges'] more restricted domain, they engage in discussions of fairness..., making judgments similar to those of a legislator, based on an independent view of what is best in all the circumstances. Bearing in mind the dangers of partial law reform, it could be expected that judges will not always be willing to act where a legislator would"; at p. 233: "Courts do not usually have the information or experience to consider the economic or diplomatic implications for the country in their judgments, which may be relevant factors of expediency in legislative or administrative decisions...Nevertheless, although these important factors of expediency may be missing, this does not mean that judicial decisions are different in quality, especially as some expediency may be involved".

162. pp. 9-19.

163. pp. 43-66.

164. Cf. the opening paragraph of 2.4.2.1., ante (pp. 60-61).

165. The reader might like to refer to the first paragraph of Chapter One of the dissertation (p. 22).

See p. 53 (Bell): "The need for a fundamental consideration of the basis of liability occurs not only where there is no clear rule already established, but also when the law has changed in related areas so as to undermine, to some extent at least, the basis on which a well-established rule was founded."

166. 'Discretion' is used here to denote any reliance on value-judgments (instead of reliance on previously defined values) on rules prior to the application of the rule in question in circumstances where there is guidance for the judge in neither statute nor case law. This is similar to Dworkin's 'weak discretion': Taking Rights Seriously, pp. 31-33, but is not as subjectivist as Dworkin's reference to the judge's personal choice. 'Discretion' here must be distinguished from, but considered alongside, the court's inherent jurisdiction (cf. the closing part of 2.2.1., ante (pp. 43-44)). See Sir Jack I.H. Jacob Reform of Civil Procedural Law (1982), at p. 224 (cf. n. 175, post).

167. See Posner, op. cit., p. 133.

168. At pp. 75-76, he does disagree with the economic analysis-based thrust of Posner's views (as too subjective and, therefore, unacceptable justification) expressed on the same subject of judicial policy in The Problems of Jurisprudence (1990). The main thrust of Posner's views are

that the inefficient use of social resources explains the indignation and fault attribution in the judicial policy decision regarding the duty of care in negligence cases.

169. *op. cit.*, p. 130. At pp. 130-148, Posner presents four steps in the judicial use of policy thus: (1) extract an overall concept of the relevant legal topic, (2) seek out precedents, (3) apply the policy judgment (in the present context, this could read redefine the conflictual substantive jurisdiction), and (4) review the precedents as being authoritative and not as data, so as to ensure that the judgment will be upheld.

170. Bell, *op. cit.*, p. 8. Cf 2.3.2.1, *ante* (pp. 50-53).

171. see e.g., n. 37 Chap. 1 (p. 38). Graveson has a list conceived of more broadly, *op. cit.*, at pp. 32-46: justice, freedom, positivism (i.e. upholding transactions, institutions unknown to forum law, presumably, e.g., the foreign combined liability type of right: 2.3.2 (p. 52)), equality, internationalism and public policy.

172. This caution is probably similar to what, Posner decries at p. 133, *infra*, as the judicial misuse of expediency/policy: contradiction, foolish consistency, lack of judicial self-restraint, indeterminacy, covert decision-making, lack of pedigree (i.e., judicial illegitimacy).

173. See Fawcett, *loc. cit.*, at p. 227: "The insistence on stating the law in the form of rules is not only dishonest but also makes the rationalization of the law in [the area of jurisdiction] particularly difficult...The best way of rationalizing the law in this area is therefore to concentrate on these underlying policy considerations". The main thrust of his argument is that policy considerations be deployed as jurisdiction-selecting considerations in place of the jurisdictional rules. (cf. Chapter 1.2). See also J.E. Levitsky, *loc. cit.*, at p. 350: "Formalism is a dominant characteristic of the British legal system, but there are substantive overtones. Even the most formal system cannot eliminate all judicial discretion..."

174. See Bell, *op. cit.*, p. 81.

175. This can probably be grouped together with (b), (f), (g), and (i). It nevertheless deserves to stand on its own lest the forum's order is ineffectual.

176. See Diplock L.J. in Garthwaite v Garthwaite (1964) P. 356, at pp. 387-388: "In its narrow and very strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed in its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise

its power to hear and to determine issues which fall within its "jurisdiction" (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances."

177. See Carter, *loc. cit.*, p. 10: "The ultimate objective must largely lie in judicial restraint. But this, although to be welcomed, can be no more palliative of uneven consistency. The ultimate objective (or cure) will lie in improvement in the detail of, the sophistication of, and not least the realism of, choice of law rules and rules governing the recognition and enforcement of foreign judgments...[I]t is the rigid rule of broad scope that gives rise to a need to escape in particular cases- gives rise to the temptation to mount the unruly horse and head for the nearest palm tree".

178. [1958] A.C. 509.

179. [1961] A.C. 255. See Graveson, *op. cit.* n. 144 ante, at pp. 53-65.

180. at p. 525.

181. at p.524.

182. See Jackson, p. 299.

183. *id.*

184. Graveson, *op. cit.*, at p. 65, commenting on these House of Lords' decisions. Cf. n. 147 (Expediency and Policy)- F.A. Mann, *loc. cit.*

185. It should be recalled that the domestic court will not *suo motu* enforce its own orders. Its (enforcement) jurisdiction must be sought by the party seeking enforcement. We should not say that, because the forum will not be the forum whose enforcement jurisdiction will be sought in respect of an extraterritorial order, prescriptive jurisdiction should not be sought by an aggrieved party. On this point, see generally P. Gottwald [1990] Civ.J.Q. 61 ("Limits To Territorial Effects of Judicial Acts").

See H. Kelsen, General Theory of Norms (1991, translated by M. Hartney), at pp. 138-139: "The effectiveness of a norm does not mean that it is always observed and applied without exception; it means only that it is observed and applied *by and large*. Indeed, there must always remain the possibility that it will not be observed or applied, since if this possibility did not exist, then a norm decreeing this behaviour to be obligatory would be superfluous....[T]he validity of a norm must be distinguished from its effectiveness as an Ought from an Is"; at p. 140: "The effectiveness of a norm - which is an Is - is a condition for the validity of a norm - which is an Ought - in the sense that a norm loses its validity when it loses its effectiveness or the possibility of effectiveness, but not in the sense that a norm has to be effective in order to be valid, since a norm becomes valid

before it is effective and it can become effective only once it has become valid".

186. i.e., rather than in connection with the assumption of jurisdiction.

187. i.e., because the preponderance of factors connecting relief to that jurisdiction are strong, e.g. because the foreign jurisdiction will have produced the applied *lex causae*, is where the defendant's assets are located and is also the plaintiff's domicile. In Hospital for Sick Children v Walt Disney Productions Ltd. [1967] 1 All E.R. 1005, at p. 1016 it was held that a foreign defendant had to prove that he had no assets in the forum's territory.

See Lord Scarman in Castanho v Brown & Root [1981] A.C. 557, at p. 572: "The English court...does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court".

188. Remember that this is not to argue that the law on remedies is substantive, only that there are substantivistic rules and principles and considerations so far considered by the present law to be inapplicable.

189. J. Raz, The Concept of a Legal System, (1980), at p. 204: "The principle of efficacy is concerned only with obedience and disobedience to [duty-imposing] laws."

CHAPTER THREE: THE ANALYSIS(I): THE ARGUMENTS

"[A]n immense portion of the literature on the conflict of laws has been based on a thoroughly unscientific theory; indeed, upon a theory which was a simple confusion of thought...Private International Law requires cases to be broken up and analysed..."- F. Harrison, On Jurisprudence and the Conflict of Laws (1919), at page 114.

3.1 INTRODUCTORY NOTE:

The current law on forum private international law remedies, hereafter the "single reference thesis"¹, is delineated and illustrated at 3.2, the first substantive part of this chapter. The chapter then restates and explains the central argument of the dissertation, at 3.3, directed at the single reference thesis as encapsulated in Dicey and Morris' Rule 17. After a set of general arguments at 3.4.1 which rests upon the fundamental aims of, and policy justifications of, private international law, the restatement is amplified by critical discussion of the basis of the forum's remedial jurisdiction in the part substantive-part procedural doctrine of double remediability and, then, by separate courses of specific argument viz. arguments from jurisdiction and judgments (or formal arguments), at 3.4.2A, and arguments from substance (or substantive arguments), at 3.4.2B.

It is in the nature of the subject of remedies, particularly as it is currently conceived of, that the vast plurality of the arguments are brought under the heading of "Procedure". Further, the independent arguments concerning double remediability will have dealt with the substantivistic aspects. The reader is reminded that in no way does the analysis of the conflictual law of remedies suggest that this law is substantive law, or is an area subject to usual choice-of-law methodology. All that is proposed and recommended in this regard is that the general substantivistic aspects of remedies (as discussed at 2.3), and the transjurisdictional aspects of a cause

of action be considered more fully than they have been, in rationalising the availability of the remedies in private international litigation and adjudication.

The courses of argument are essentially the elaboration and substantiation, and the reorganisation, of the tentative views expressed in the course of the draft of the themes of conflictual analysis in Chapter Two, plus further independent argument. The rendition of the arguments addresses more expansively than in the previous chapter, the substance-procedure dichotomy as it affects remedies and as it plays the decisive role in the application of Dicey and Morris' Rule 17.

The individual subjects of the respective arguments are aspects (or premises, even) of the single reference thesis which have not been amply addressed in the forum's interpretation of Rule 17, and which explain the localising inadequacies of the present law. The thesis is shown to produce limited remedial jurisdiction for reasons of want of adequate premises. The sum of the arguments produces the collection of basic postulates at 3.5 and the consequent main postulate at 3.6 for a conflict rule for final remedies. The proposed rule thus inferred is a modification of Dicey and Morris' Rule 17, mindful of the aphorism that hard cases make bad law. The arguments and the preceding postulates enhance the determinacy of the more fully dispositive rule in favour of a wider "international remedial jurisdiction" for the forum.

The arguments from jurisdiction and judgments include discussion of interim remedies though these are properly included in Chapter Five. The reader might even at this stage wish to look at the appropriate part of that chapter because the discussion there responds better to the context of procedure generally. The discussion in the present chapter is limited to illustrating forum application of *lex fori* rules and principles that are distinctly non-domestic. Rule 17 stipulates that the applicable law is the forum's domestic law. As illustrations of the extraterritorial scope of forum remedial jurisdiction, these remedies have a significant role in fulfilling the burden in the present chapter of establishing delocalising factors. 3.7 is the concluding note.

3.2 THE PRESENT LAW: THE SINGLE REFERENCE THESIS

The current law is encapsulated in Dicey and Morris' Rule 17:

All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).

3.2.1 The Rule In Theoretical/Jurisprudential Context:

Rule 17 is a judicial, rather than a statutory, rule and precedent of forum law and practice and is considered in the dissertation as a valid rule² in all senses. This is so in as much as validity does not refer to descriptive soundness. Thus, Rule 17 can be analysed mainly as:

- (a) a formal rule the context of which permits the consideration of foreign law, as in virtually all the cases decided under the Rule;
- (b) a conflict rule of the forum (that is, it belongs to a system of rules constituting a legal system, and is, therefore, examinable in its own right only if its membership of the legal system is acknowledged);
- (c) the existing conflictual final remedies rule of the forum;
- (d) a rule with definitional antecedent justifications and postulates which are manifest in the case law, and may be analysed;
- (e) a rule with conflictual and substantivist interpretive contexts (including contexts of 'principle' and 'policy') and, therefore, a rule that must be viewed functionally and purposively, for remedial and other procedural matters.

Above all, Rule 17 must be viewed, as all rules are, as a means to the end of justice, rather than as the end itself. It is presently demonstrated that Rule 17 in its practical application is frequently more a rule of judicial convenience and, if conflictual analysis as presented in the themes is acceptable, that justification for its application can be more in the nature of evasion based on definitional reasons that are not always convincing, and on the "procedural" characterisation of conflict final remedies.

The sum of the arguments is in the context forum application of the Rule to all remedial questions arising in every conflict case; in other words,

the arguments are in the context of remedial adjudication applying the single reference thesis. By addressing the fundamental question of what the forum can do (the forum's competence), the themes of jurisdiction and judgments are the primary terms of reference. The answer is in terms of delocalisation, and clarifies the focus of the arguments on procedure, given the procedural context of the current law, as addressed generally in the arguments at 3.4.1.

The themes show that the forum can, within the existing institutional framework of its private international law, and should, for reasons of principle and policy, look at final remedies conflictually (therefore, differently). It must be noted that the Rule as it applies to compensatory damages now differs because of section 7(1)(c) Contracts (Applicable Law) Act 1990 has already been referred to and relied on in the dissertation³.

3.2.2 Practical Applications/Illustrations of the Single Reference Thesis:

The Editorial Comment on Rule 17 as it applies to final remedies outlines some applications and illustrations of the existing thesis. The relevant portion of the comment sets out the practical gist of the single reference thesis thus⁴ (italics added):

"Nature of remedy and method of enforcement. The nature of the plaintiff's remedy is a matter of procedure to be determined by the lex fori⁵. Thus if the plaintiff is by the lex causae only entitled to damages but is by English law entitled to specific relief, the latter type of remedy is available in England⁶. Conversely, an English court will not grant specific relief where to do so is contrary to the principles of English law: thus no injunction can be obtained in England for breach of negative stipulations in a foreign contract of service if such an injunction would in effect amount to specific enforcement of the contract⁷. Again, a remedy which is discretionary under English law cannot be demanded as of right in an English court merely because this is possible according to the lex causae.

Generally speaking, the principle that the forum only applies if two conditions are satisfied. First, the lex causae must give the plaintiff some remedy against the defendant in respect of a wrong similar in character to that alleged in the English proceedings⁸. Secondly, the English remedy sought must "harmonise with the right according to its nature and extent as fixed by the foreign law"⁹. Thus English remedies will be refused if they are so different from those provided by the lex causae as "to make the right sought to be enforced a different right"¹⁰. Although an

action in England will not fail merely because the claim is unknown to English law, it will fail if English law has no appropriate remedy for giving effect to the plaintiff's alleged foreign right.

Similarly, the method of enforcing a judgment in England is a matter of procedure¹¹...

In the case of a contract, the principle is a matter for the *lex fori* is affected by the provisions of the Rome Convention on the Law Applicable to Contractual Obligations, given effect in English law by the Contracts (Applicable Law) Act 1990. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of the Convention governs, within the limits of the powers conferred on the court by its procedural law¹², the consequences of breach, including the assessment of damages so far as it is governed by rules of law".

The foregoing should be regarded, as does the dissertation, as a black letter statement of the current law of remedial adjudication applying the single reference thesis. Other statements in the Editorial Comment assist the critique of the thesis:

"The object of [Rule 17] is to obviate the inconvenience of conducting the trial of a case in a manner with which the court is unfamiliar. If, therefore, it is possible to apply a foreign rule, or to refrain from applying an English rule, without causing any such inconvenience, those rules should not necessarily, for the purpose of this Rule, be classified as procedural¹³¹⁴;

"[A] court may, even today, be tempted to extend the meaning of "procedure" in order to evade an unsatisfactory choice of law rule"¹⁵, and

"[M]echanistic application [of Rule 17]...has been discredited".¹⁶

Single reference as thus presented is to be examined in succeeding sections of the present chapter; on the ground that several aspects of its application are unsatisfactory. The italicised parts of these extracts indicate the major problem areas. In particular, the paragraph beginning "Generally speaking..." expresses cogently the test of double remediality with which much issue is taken in this dissertation and which is discussed critically below at 3.4.2(i) and (ii).

Other independent sets of comments, by C.G.J. Morse¹⁷ and by the current editors of Cheshire and North on Private International Law¹⁸, put the problem with Rule 17 in focus and as perceived in the dissertation.

3.2.3 Morse's Comments:

Morse's comments are as follows:

"The nature of the available remedy may vary from system to system and the incidents of common remedies may differ in various systems of domestic law...[E]ven if two systems of law have a common remedy, the circumstances which entitle a party to claim the particular remedy may be different under the domestic rules of each system. When all these possible divergencies are transported into a situation involving the conflict of laws, the problems that emerge are indeed difficult, and no less so in the field of delictual liability than elsewhere¹⁹.

The particular question which arises in the context of the conflict of laws is how far the applicable law...should control the plaintiff's remedy. In principle, it might be argued that if it is accepted that the right afforded to the plaintiff under the applicable law is inseparably linked with the remedy provided by that law, the forum should apply the foreign remedy. To do otherwise would be to enforce a right different from that given to the plaintiff by the applicable law²⁰. The validity of this proposition depends, of course, on the extent to which the forum remedy for enforcing an analogous right, if such exists, differs from the remedy available under the foreign law...[I]f the remedy available under the foreign law is wholly unknown at the forum, it may be justifiable for the forum to withhold relief. But even this consideration may, in principle, have to give way, if the application of the forum remedy is not wholly incompatible with the procedural possibilities available in the forum, even if the *lex fori* provides its own remedy in analogous cases.

The problem admits of no simple solution. On the one hand, to apply foreign [substantive] law without invoking the remedy available under that law may distort the foreign [liability] rule. On the other hand, the forum must necessarily have regard to its own powers and procedures. In seeking a way through these conflicting policies, the better view may be that the forum should apply the foreign remedy except in so far as the latter is incompatible with its own procedural possibilities. The efficacy of such a solution will of course depend on the extent to which domestic legal systems differ in the provision of...remedies and the extent to which those differences raise questions of substance rather than questions of procedural incompatibility...

Such difficulties have led Anglo-Commonwealth courts to seek refuge on this issue in the lex fori, though, it may be added,

the policy considerations which point the other way have never been fully considered...

...Given that the nature of the remedy is to be determined by the lex fori, what allowance is to be made in awarding remedy for the fact that the case involves a conflict of laws?" (italics added).

Some crucial points are raised in Morse's comments:

- (a) Remedies and remedial law can vary from jurisdiction to jurisdiction;
- (b) Substantive law can regulate the remedy;
- (c) Remedies under foreign law deserve to be considered and may coincide with the domestic counterpart, thereby enhancing the convenience with which the forum can apply foreign (remedial) law; and
- (d) There is an argument for reconsidering remedial law in terms other than those of sole reference to forum domestic law.

The points are tacit in the themes and enhance the dissertation as postulates in the arguments against single reference. The dissertation examines the "policy considerations which point the other way" (i.e., considering the application of foreign remedial law as Morse's penultimate paragraph mentions) as well as the allowance that should be made for the fact that the remedial adjudication is in a conflict case (i.e., the case for analysing remedies conflictually).

3.2.4 Cheshire and North's Comments²¹:

The relevant comments are made propitiously in the context of the nature of private international law as follows:

"...[I]f the court is to carry out in a rational manner the policy to which it is now committed- that of entertaining actions in respect of foreign claims -it must be in the nature of things to take account of relevant foreign law...A plaintiff, for instance, claims damages for breach of contract that was made or to be performed in France. Under the existing practice of the court...obviously neither the nature nor the extent of the relief to which he is rightly entitled, nor, indeed, whether he is entitled to any relief, can be determined if the [foreign law] is disregarded. To consider only English law might well be to reverse the legal obligations of the parties as fixed by which their transaction, both in fact and by intention, was originally subjected"²² (italics added).

As with Morse's comments above, these comments affirm the case for rethinking Rule 17 in terms of the themes as the succeeding arguments do. Attention will now turn to the arguments, and does so with the initial postulates indicated at 3.2.2 above in mind. It is unnecessary here to separately detail arguments for upholding the single reference thesis with a view to affirming its having full dispositive character in respect of remedial questions. Rule 17 and its case law outlined above in 3.2.1 indicate the thesis' groundwork. References are made to such arguments in the course of the chapter. They provide the reasons for reappraising the thesis as dispositive. Its primary basis in forum convenience is examined, but not undervalued.

It cannot be overemphasised that the single reference thesis is satisfactory for the vast majority of remedial questions which the forum has to answer, as the decided cases confirm. This is primarily because these questions arise in the course of adjudication in which the forum is also competent in terms of enforcement (as in the Warner Brothers case), or in which the action is formulated with the forum's enforcement of its own remedial order in mind (further to the settled position that the forum will only make an order which the forum will/can enforce), as in the domestic case. Nor is the status of the single reference thesis and Rule 17, as representing the current private international law, questioned.

The central and the subsequent arguments question the dispositive assertions of appropriateness and correctness of the thesis and the Rule from several bases of argument, including some of the bases suggested in the course of presenting the themes in preceding chapter.

3.3 THE CENTRAL ARGUMENT

3.3.1 Restating the Central Argument:

The central argument is levelled at Dicey and Morris' Rule 17 as it applies to final remedies, and was first stated at 1.1 in terms that the characterisation of remedies should and can exhibit conflictual attributes, even if most instances of remedial adjudication will involve the application of the forum's

own remedial law as envisaged by Rule 17. The first statement of the central argument can be recounted here:

-that the justification (i.e., procedural convenience) under the present law for the application of the principles which govern the availability of the given remedy is not properly conceived of for all types of conflict action;
 -nor is the deductively justified position (i.e., localisation) whereby the only applicable principles are those of the *lex fori* (as wholly domestic law); and
 -that there is observable forum exercise of jurisdiction which responds to transjurisdictional contexts.

The initial separate but logically related negative premises above are substantiated in the remainder of the argument in the present chapter, more definitively at 3.4. The premises can respectively and respectfully be restated in the main postulates indicated below:

(1) the law which the forum applies to remedial questions does not have to be procedural law; that is, *if the question is remedial, then the applicable law should not have to be described as procedural law (POSTULATE A1)*;

(2) leaving aside the classification of issues as either substantive or procedural and looking at remedy in its own right, when the applicability of remedial law arises, the forum does not have to look at its own domestic remedial law exclusively; that is, *if remedial law is applicable, then that law should not have to be domestic law (POSTULATE A2)*.

Current case law²³ constitutes some of the points of reference in the arguments and is considered more monolithically in the application, in the next chapter, of the arguments to the existing law, as the format for comparing and contrasting the theses. It is sufficient here to say that, by and large, the case law contains the legal system's justifications of the present law having fully dispositive character, even if account is taken of the significant changes in the law pertaining to the assessment of compensatory damages in the light of the Contracts (Applicable Law) Act 1990, discussed in particular at 2.3.1.

The central argument, as rendered thus far, considers the case law justifications the authority of which makes it necessary here to state no

more than that, as far as Rule 17 applies to remedial adjudication, it conforms to N. MacCormick's model of the "deductive justification" of legal rules²⁴, and to other contemporary models of rule analysis.

3.3.2 MacCormick's Model:

MacCormick draws our attention to the contexts of 'interpretation' and 'relevancy' thus:

"[R]ules can be ambiguous in given contexts, and can be applied one way or the other only after the ambiguity is resolved. But resolving the ambiguity involves choosing rival versions of the rule; once that choice is made, a simple deductive justification of a particular decision follows. But a complete justification of that decision must hinge then on how the choice between the competing versions of the rule is justified...[The problem is] the 'problem of interpretation'"²⁵, and

"...sometimes problems arise and decisions on them are given and justified in a manner which cannot plausibly be represented as involving the simple application of, or even the making of interpretive choices as between different versions of, already established valid and binding rules of law...The problem is, rather, 'Does the law in any way justify a decision in favour of this party against that party in this context?'. The solution of such problems manifestly transcends the possibility of deductive argumentation from established rules of law...In such a case, the question is whether the [plaintiff's] averments are 'relevant' in law to the conclusion for which [he/she] moves the court. Is there any reason why...[the plaintiff] ought to be granted the remedy for which [he/she] concludes?...[This] type of problem [is] 'the problem of relevancy'"²⁶.

Further to these contexts for rule analysis, MacCormick states with reference to the doctrine of precedent:

"[T]he notion of formal justice requires that the justification of decisions be always on the basis of universal propositions to which the judge is prepared to adhere as a basis for determining other like cases and deciding them in the like manner to the present one".²⁷

The concessions to context and the further clarification make for the critique of rules in general and, for the purpose of the dissertation, of Rule 17 as it applies to the remedies of private international adjudication. For

instance, the tort rule of double actionability, which is discussed at 3.4.2, is clarified by critique which is explicable in the foregoing terms. Rule 17, as it applies in particular to remedies is likewise so clarifiable.

In the context of the dissertation, the problems of interpretation and relevancy are both addressed by reference to the themes of conflictual analysis, dealing with jurisdiction, substantivity and recognition and enforcement of judgments (all three plus discretion comprising 'law-based adjudication')²⁸ and policy (including discretion, 'non-law-based adjudication')²⁹; this is to say, the Rule be interpreted, in every case to which it applies in respect of any remedial question arising, in the context of these themes.

The necessary implication is that there will be situations where the strict application of the Rule will bring about underconflictual results. In other words, it is a necessary implication (and, possibly, one that can easily be overstated, given the the general transjurisdictionally and substantivistically articulated characterisation imported by the themes to remedial issues) that exceptions to the application of the Rule can and will arise, not unlike the recognised exception to the rule of tort double actionability³⁰.

3.3.3 Twining's Model³¹:

W. Twining discusses legal rules as belonging to either the 'formal' MacCormick-type (if x , then y) or to the 'grand style' (to produce effects z , or for reasons z , or to remedy mischief z otherwise not forthcoming from the formal version of the given rule). The import of the 'grand style' is, by and large, similar to MacCormick's contexts identified in 3.3.2. This is to say that in order to avoid a mechanistic (and, therefore, virtually purposeless) application of Rule 17, it can be necessary to resort to the latter style with a view to applying the Rule in its full context otherwise not apparent *ex facie*.

According to this model where the scope of the rule is clear but its application is not, it behoves the court to exercise its function according to wisdom, justice and "situation sense" within the margins indicated by the doctrine of precedent. The exercise of the judicial function as suggested by

the 'grand style' is, simply, the application of Rule 17 according to the requirements of justice in the particular case; in other words, interpreting the Rule as a means to an end.

3.3.4 Baldwin's Model³²:

R. Baldwin offers another workable model of rule analysis. In describing "the dimensions of rules", he adopts W. Twining and D. Miers' definition of a rule³³ as "a general norm guiding conduct or action in a given type of situation"³⁴. Baldwin's attributes of rules comprise a degree (adequate or otherwise) of specificity or precision³⁵, extent or inclusiveness, accessibility and intelligibility³⁶, status and force, prescription or sanction.

The attributes are in varying degrees present and manifest in Dicey and Morris Rule 17 in both its general application and in its particular application to final remedies. In no way does the sum of the central argument as rendered and the succeeding arguments at 3.4 and 3.5 make any allowance for ordinary indeterminacy of the Rule as it stands.

In Baldwin's model, the sum of the central and the subsequent arguments address Rule 17's semantic theoretical imprecision (for example, in that its wording has remained unchanged despite the application, in respect of other typically procedural matters³⁷, of forum rules that have no domestic application), the inclusiveness (for example, of domestic forum remedial law only), status (for example, as a rule that admits no exceptions in its application to remedial questions save in respect of damages by virtue of the Contracts (Applicable Law) Act 1990) and sanction (for example, in that it sanctions the application/applicability of foreign law, and of extraterritorially realisable remedial orders)³⁸.

The "design of rules that work", to use Baldwin's phrase, is the design of objectivity through reference to the practical contexts of the themes of conflictual analysis. The central and the subsequent arguments aim to demonstrate that it is appropriate to conflictually analyse the remedies of private international adjudication, first, in their own right and for their own sake, and, secondly, in the way that other typically procedural

matters have been analysed. These other procedural matters are discussed in Chapter Five.

3.3.5 Kennedy's Model:³⁹

Discussing "the jurisprudence of rules" as the jurisprudence of forms, D. Kennedy states that the subject "is premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analysed in isolation from the substantive issues that the rules or standards respond to"⁴⁰. He defines the formal dimensions of a rule in terms of (a) its formal realisability (in contradistinction to standard, principle and/or policy, neither of which has this attribute), (b) its generality (the other side of which coin is particularity) of application, and (c) its formality (in contradistinction to its design)⁴¹.

This model of rules (particularly through the overall definition completed by the data in the parentheses) draws attention to the types of consideration which can reveal the general reductionist⁴² consequence of Rule 17, which is to reduce, actively (and possibly in a negative way), all final remedial questions to forum domestic law as a direct consequence of the characterisation of such questions, pursuant to the Rule, as being procedural only.

The themes are adaptable to fulfil the requirements for rule analysis using this model. For instance, referring to Kennedy's rule attributes stated above and in the order there, it can be said, respectively to each of them, that the application of Rule 17 to remedies raises the following points:

- (a) identification of and attention to the applicability of implicit principles, policies and standards,
- (b) identification of particular situations where its strict general application is inappropriate, and
- (c) attention to its design to further the rational aim of providing a conflict plaintiff with an adequate remedy, subject to proof of liability.

These are all addressed by or implicit in the themes as presented in the preceding chapter. For example, concerning (a) above, the 'protected and obligated defendant' principle under the theme of finality, recognisability

and enforceability of judgments⁴³ permits the making of satisfactory final remedial orders to be enforced in a different jurisdiction which is nowhere illustrated in the current practical applications of Rule 17. Concerning (b) the concept of substantive relief⁴⁴ shows that there are substantive justice requirements resulting from the non-procedural aspect to remedies and, consequently, that a strict characterisation of remedies as procedural in Rule 17 is inherently flawed. Concerning (c), the policy-based 'Metliss and Adams approach'⁴⁵ enables the forum, having been satisfied as to substantive liability, to provide relief where neither of the applicable laws interpreted separately would provide that result.⁴⁶

Of further relevance to the present discussion is Kennedy's discussion of private law adjudication⁴⁷ in terms of 'polar' senses⁴⁸ of (a) 'community' (having a plurality of rules for recognising its applicable law) and 'autonomy' (having a theoretically coherent subset of its applicable law), (b) 'regulation' (essentially, applying rules in situations requiring strict, or near-strict, terms) and 'facilitation' (adjudicating pragmatically to uphold substantive entitlements), and (c) 'paternalism' (deterministically applying the rule irrespective of the outcome) and 'self-determination' (adjudicating (liberally) to uphold legal relations, as intended by the parties).

The central argument (or any subsequent argument) does not question the formal and substantive validity and/or legitimacy of Rule 17 as an applicable conflict rule of the legal system⁴⁹. The central argument questions the justification and, consequently, the correctness of the Rule. The reader may wish to consult the postulates contained in the restatement of the central argument at the beginning of 3.3.

To recapitulate on the preceding chapters, inferences have been made and illustrations given which affirm the points raised in 3.3 above and need not be detailed here, since they will resurface and are detailed at 3.4.1, 3.4.2A and 3.4.2B subsequently. Attention turns to the arguments and postulates that amplify the central argument. The first of these arise from

the nature of English private international law itself, strictly speaking, and referred to as cogently as possible.

3.4. THE ARGUMENTS

The subsequent arguments here are developed from the central argument in 3.3. The first set of arguments, at 3.4.1, consider the foundations of forum private international adjudication in a general sense, with emphasis on remedial jurisdiction. These general arguments overlap in the sense that they all supply points from which aspects of the single reference thesis can be interpreted. The arguments at 3.4.1 do not primarily address the substance-procedure distinction which exclusively explains much of the formulation of Rule 17. 3.4.2A and 3.4.2B address the distinction more directly, with a view to demonstrating the best way to apply the distinction in the area of final remedies.

By drawing upon the collective import of the themes at 2.2 to 2.6 (especially the theme of expediency and policy, including discretion, at 2.5), the general arguments at 3.4.1 will have broached the distinction sufficiently, prior to the appropriate and necessary bifurcation of the more particularised arguments at 3.4.2. By transcending the distinction, the general arguments address better the problems of interpretation and of relevancy in MacCormick's model of legal rules at 3.3.2; that is, that Rule 17 could be interpreted as freely as may be necessary from domestic contexts, that foreign contexts (including foreign remedial rules) can be relevant and applicable to forum remedial jurisdiction, given the framework provided by the themes to these problems.

3.4.1 accordingly introduces, by necessary implication, the law of the place of enforcement of the remedial order which is more fully discussed at the end of 3.4.2A. For a Latin maxim, this law may conveniently be called the *lex loci confirmationis* (from the declension of *confirmatio*, which transliterates as, confirmation, corroboration) of the forum remedy or remedial order. To regard this law as latently relevant alongside the *lex causae* and the *lex fori* is to acknowledge, inter alia, the transjurisdictional

nature of the cause of action, plus the degree of co-operation and "liberal internationalism"⁵⁰ in private international judicial activity. With respect, the single reference thesis does not fully acknowledge either. This is because its premises are not as sophisticated as they could be and are unidirectional, and, therefore, limited and indispositive as founding a Rule of exclusive application in all types of conflict case.

3.4.1 THE NATURE AND PURPOSE OF PRIVATE INTERNATIONAL LAW ("EXPEDIENCY AND POLICY (INCLUDING DISCRETION"):

The current edition of Dicey and Morris informs us that "the main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction"⁵¹ and that forum private international law is strongly characterised by the predominance of jurisdiction over choice-of-law⁵²; that is, once jurisdiction is established in a cause of action, forum law is usually the applicable law.

This characteristic affirms the subsumption of conflict of laws under forum law generally, but also marks the disinclination to look at foreign law as relevant and thus potentially applicable, because of the pre-eminence of procedure in a law fundamentally based on causes of action (at 1.1). The characteristic may also be explained in terms of the facility or convenience with which the forum can adjudicate in cases containing a foreign element, and also implies that the forum has cogent interests⁵³ which explain its policy of "entertaining actions in respect of foreign claims"⁵⁴.

Similarly, the current edition of Cheshire and North describe private international law as "that part of the law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system"⁵⁵, and that the purpose is to avoid conflict⁵⁶. This characteristic founds the argument for analysing remedies conflictually, as no other reason than justiciability derived from convenience is offered in the single reference thesis' disinclination to analyse remedies other than by reference to forum domestic law.

It is relatively inconsequential to debate whether to select a foreign remedial rule rather than a foreign remedial jurisdiction or legal system because the primary focus is on the foreign rule as identified, pleaded and proved by the party seeking to rely on it. A foreign jurisdiction may become relevant in order for the forum to avoid making ineffective orders if practical enforcement by recourse to ancillary or judgment-executing measures obtaining in that particular jurisdiction is to take place there. On any view, the reference will be only to particular foreign remedial rules, with the distinct likelihood that they will be procedural rules of the given system.

It is necessary to recall points raised under the theme of expediency and policy at 2.5, in particular, that, fundamentally, private international adjudication is judicial and legislative discretion and policy⁵⁷. The opening arguments are derived from this postulate and are based on the following principles:

- (1) purposive autonomy of the forum (recognising the absence of separate private international law courts of the legal system and of the forum's inherent international appellate jurisdiction);
- (2) transjurisdictional (non-domestic) character of the cause of action (in respective arguments against domestic contexts and for conflictual analysis of the main final remedies); and
- (3) applicability of foreign remedial law (recognising that final remedies must, in the interests of accuracy in their conception be characterised articulately to express both their procedural and their substantive aspects, and, accordingly, that the given case may require the displacement of ordinarily applicable domestic remedial rules and principles by relevant foreign ones).

3.4.1.a Forum Purposive Autonomy: Generally speaking, the private international legal rules, principles and/or policy considerations the forum applies are, in the final analysis, identified by reference to the forum's jurisprudence⁵⁸. They form an identifiable subset of the rules of the legal system⁵⁹. The substantive content of the subset is not fixed and may be added to or subtracted from as circumstances, and/or changes in the law (be these changes introduced from within the system or from outside, e.g. from

E.E.C.-derived legislation), may necessitate and, as may be the case, as there may be forum preparedness to make the changes.

Examples include the Civil Jurisdiction and Judgments Acts 1982 and 1991, the Contracts (Applicable Law) Act 1990, the "most significant relationship" test as variously applied in (open or qualified) proper law theory to jurisdictional (procedural) or choice-of-law (substantive) questions⁶⁰.

The general point here is that in furtherance of its rational policy of private international adjudication, the forum can modify its current law on conflictual final remedies as that law is presented in Dicey and Morris' Rule 17, subject to convincing reasons for modification.

3.4.1.b Domestic Legal Contexts: This general argument can be alternatively described as the 'argument for transjurisdictionalism' in conceiving of and regulating conflictual final remedies. The description of the themes in the preceding chapter involved references to avoiding unaffected domestic legal contexts in private international adjudication⁶¹, mindful that this type of adjudication is nevertheless but a component of forum competence.

This does not imply that there is no domestic legal context to private international adjudication; nor does it imply that the domestic context is merely perfunctory. It means that, as a matter of principle, the contextual limits are indicated precisely by the location of the litigation in the forum, and that they vary with the strength of connection with the particular facts. Application of forum jurisdictional rules will have taken account of the connection in establishing and asserting competence. The appropriate domestic context, thus described, automatically takes effect and requires always that any subsequent application of forum law be satisfactorily justified⁶², and that there are particular rules from which neither the forum nor the parties can derogate⁶³. Rule 17 is not, strictly speaking, such a rule for the simple reason that the forum can, if it so determines, prescribe its modification, or admit of exception to its scope.

The extent to which the domestic context bears upon the facts must be determined by analysing its rules to establish a policy content⁶⁴ in order

to determine the particular rule's applicability. If this is the case, it follows that where a foreign remedial rule is pleaded, proved and relied on by one of the parties (it should not be decisive that such a rule is classified as procedural), the rule should also be analysed for its policy content with a view to its judicial application⁶⁵. In this sense, the general argument reconsiders the substance-procedure distinction as it relates to final remedies. It goes without saying that the policy (or policies) contained or expressed in a remedial rule is intrinsic to the substantive aspect of the remedy to which the rule applies.

The basis (in 'convenience' and/or 'practicality'⁶⁶) for express or implied resort to domestic contexts bears a closer relation to a justified simplification of the judicial remedial task, which cannot always be sustained. This can be observed from the independent⁶⁷ counterpart contexts of foreign law as applicable⁶⁸ (but excludable) law, and of a judicial function to justify the exclusion of foreign remedial law.

Attention now turns to arguments that incorporate these contexts better than does the present argument. The following arguments depend on successful pleading and proof of foreign law by the party seeking to rely on it, and also depend, to a lesser degree, on the simple distinction between 'inconvenience' and/or 'insurmountable difficulty' on the one hand, and 'factual and/or supervening impossibility' on the other.

3.4.1.c Applicability of Foreign Remedial Law: Much has already been said at 3.4.1.a and b., about the applicability of foreign remedial law⁶⁹ and should not be repeated. The worth of the argument in this subsection is that the interests of rational justice (conceived of as common law justice⁷⁰) may be served in the given case by reference to foreign law, such as where *lex causae* liability includes provisions for remedy with which the forum is familiar and for which the forum is equipped, or where effective practical enforcement of a final order falls to a foreign jurisdiction (e.g., because the parties habitually reside there⁷¹), which can also have produced the applied *lex causae*. In such circumstances, domestic law should be considered fortuitous and displaceable.

The necessary conceptual apparatus for applying foreign law already exists⁷². There are the further advantages that the relevant foreign law will have been evaluated, although this could substantially increase the complexity of factors to be taken into account in conflict cases⁷³. The criteria of justice continue to belong to the common law. The recognition is inevitable that Rule 17 does not always plainly dictate decision but may be interpreted to avoid results with which the forum may not be satisfied.

Foreign remedial law may conceivably become applicable because the parties refer to it⁷⁴ or because the forum refers to it. Foreign remedial law can displace domestic remedial law if the former law is contained in the *lex causae* (i.e., that liability and relief become so closely bound), or if the former law has to be referred to, for example, before an order is made to be enforced therein⁷⁵; otherwise, where the forum has no substantial interest in applying its own remedial law. The remedial law which has the greater interest in the resolution of the given cause of action should be applicable. There is no jurisprudential, practical, or deep policy consideration that makes foreign (remedial) law definitionally inapplicable in a matter-of-fact sense. It so happens that the acquisition of jurisdiction will have guaranteed the basic requirements for the exercise of jurisdiction to apply foreign law at all, so that cases will probably be few and far between in which foreign remedial law can be relied upon, let alone applied (prescribed) by the forum. In this light, foreign law as subsidiary law, as fact, is elevated to 'applicable law', with actual application being the exception, through the operation of jurisdictional rules. Arguments from jurisdiction are made at 3.4.2A.

The present argument does not elevate remedial law to the level, for example, of personal law or substantive law generally in the way that reference is made to applicable non-forum law. It implies simply that foreign remedial law, if pleaded and proved according to forum court rules of trial, deserves to be considered as potentially applicable. The argument is rejected by the single reference thesis for reasons which are not convincing. The reasons of procedural convenience are extended to all conflict cases. This reduces the jurisprudential accuracy of the single reference thesis, and

should accordingly be re-addressed in the context of permitting applications of foreign remedial law (through rationalisation and reconception) as postulated here as may be necessary from facts of a case.

3.4.1.d Oversimplification of the Judicial Task: The preceding arguments in this section (3.4.1) overlap to a substantial extent with the present argument. This is where the simple distinction between 'inconvenience'/'insurmountable difficulty' and 'factual and/or supervening impossibility' is prayed in aid. It has been demonstrated that foreign remedial law is, in principle, applicable.

Blanket exclusion of foreign law, either because it is labelled as procedural law or because it is unfamiliar law, is not easily sustained because it can be conflict evasion (rather than avoidance, which is the purpose of the conflict of laws). It is further respectfully inferred that to conceive of foreign remedial law as fundamentally inapplicable is to oversimplify the judicial task. In the context of the themes, this can be interpreted to mean reliance on plain expediency to apply what, in cases with only adequate forum contact, would be a simplistic expression of expediency, given the autonomy of the forum.

Excluding foreign remedial law on the grounds of convenience gives some reason to think that foreign remedial law is equivalent to foreign penal or public law, which are inherently inapplicable in the conflict forum, to the same effect as foreign remedial law is not. This equivalence is questionable given that, even if remedy is in some respects similar to punishment or if remedial law has public interest connotations, there is much to indicate that remedial law and penal or public law do not necessarily belong together. For one thing, the displacement of domestic remedial law is less likely to indicate non-justiciability than the application of foreign penal or public laws. Excluding foreign remedial law, as the single reference thesis does, can be arbitrary in practice. For it is one thing to say that the law should be simple, accessible and predictable and quite another to choose a law solely on the basis of familiarity with that law. This point is discussed at 3.4.2(i) and 4.2. Efficient adjudication should not have to fit the domestic case mould of

justice at the expense of the transjurisdictional context of the cause of action. The contrasts just given belong to the single reference thesis and should be re-addressed with a view to permitting the necessary excepting circumstances. As L. Kramer puts it:

"One might...object that this imposes a substantial burden on forum courts to learn and apply foreign rules of procedure, an objection reminiscent of the justification for the traditional approach. But the court need learn only foreign procedural rules that serve substantive purposes...Moreover, the adversarial system naturally limits this burden, since the court will consider only foreign rules that are properly raised by the parties. Finally, finding and applying foreign procedural rules is no more difficult than finding and applying foreign substantive law. Indeed, the premise of this canon is that some foreign procedural rules should be applied because they are in reality part of another state's substantive law"⁷⁶.

Whether the correct trend in adjudication in the last century is from "principles to pragmatism", as P.S. Atiyah describes it⁷⁷, or from "principles to principles", in J. Stone's response to Atiyah⁷⁸, practical considerations in the area of remedies indicate that a review of the present law in terms of both is justifiedly due.

These general arguments should include arguments from recent developments in conflictual adjudication which confirm the propriety of considering final remedies in the way suggested by the preceding arguments. The recent developments are in respect of matters previously referred to Rule 17. They include:

- (1) the application of foreign procedural rules governing the quantification of damages pursuant to Article 10(1)(c) of the Rome Convention;
- (2) the cross-enforceability of remedial orders under the European rules;
- (3) the extraterritorial jurisdiction in respect of interlocutory and judgment-executing remedies;
- (4) the exception to the tort rule of double actionability;

(5) the application, where appropriate, of foreign rules governing the limitation of actions (previously considered to be procedural, and thus for domestic rules), following the Foreign Limitation Periods Act 1984⁷⁹.

Clarity of exposition of these developments, in keeping with the compositional scheme of the dissertation, means that they are better discussed separately under more appropriate headings, mainly in Chapter Five, "Cognate Topics", though they will be relied on at 3.4.2.

The main postulate expressed in the general arguments can be summarised in the following way:

The forum can (and should) modify its remedial law as encapsulated in Rule 17 to permit the application of foreign remedial law. (POSTULATE B)

This simultaneously addresses and dispels misgivings about applicable law being impractical, inconvenient and/or unfamiliar, and makes for a more flexible rule of decision which is well justified in principle, and furthers the central argument. The postulate implies that *Q* in MacCormick's model of deductive justification of rules (Twining's *y*) becomes 'relevant, pleaded and proved remedial law', domestic or foreign, procedural or substantive, determined by the type and the degree of preponderance of contacts with the pertinent remedial jurisdictions. It counters the existing postulate for forum domestic remedial law based on remedial questions as procedural questions, as *Q* implies under the single reference thesis⁸⁰. Should postulate B be rejected for whatever reasons, it should have supplemented the central argument at 3.3 by assisting the definition of the absolute dimensions of this study of forum conflictual remedial adjudication.

Attention now turns to arguments which effectively separate the propositions antecedent to the single reference thesis, and which directly address the institutional substance-procedure distinction. 3.4.2A consists of argument from procedure, drawing on the jurisdiction and the judgments themes (2.2 and 2.4, respectively). 3.4.2B consists of substantivist

argument. 'Procedure' is re-examined to take fuller and better account of significant considerations which derive from the transjurisdictional contexts that may be dictated by a given case.

3.4.2 REMEDIAL ADJUDICATION (INCLUDING "DOUBLE REMEDIABILITY", "PROCEDURE" AND "SUBSTANCE"):

The bases for current remedial jurisdiction in private international law are the classification of remedial questions as procedural and then fulfilment of the requirements of double actionability, described previously at 3.2.2 to 3.2.4. The essence of the single reference thesis is that remedial questions are procedural and therefore referable to the forum's domestic law alone. To recapitulate, in order to invoke the remedial jurisdiction of the English forum, certain imperatives are to be fulfilled:

"[f]irst, the *lex causae* must give the plaintiff some remedy against the defendant in respect of a wrong similar in character to that alleged in the English proceedings. Secondly, the English remedy sought must "harmonise with the right according to its nature and extent as fixed by the foreign law".⁸¹

This test is applied to settle the question whether the forum has remedial jurisdiction in a given case. Rule 17 is the dominant rule, though both are conflict rules of decision (which neither have domestic scopes nor conflict with one another), and are, on a wide interpretation, therefore procedural or jurisdictional rules; that is, they deal with the way in which the forum proceeds to answer the questions addressed by these rules⁸². As is clear from the discussion of double remediality at 3.2.2 to 3.2.4, certain aspects of the test indicate substantive elements, e.g., the foreign conception of the breach of obligation for which a forum remedy is sought, or the forum's consideration of the foreign right as determined according to its *lex causae*.

Fulfilment of both requirements contained in the test is crucial to the decision to exercise remedial jurisdiction and have been strictly observed by the courts. These reasons, the need to focus on remedies generally in their own right, and the substantivist content referred to above, promote the critical arguments based on authoritative dissatisfaction with the test, independently of arguments conceived of in terms of, and directed

specifically at, procedure and substance, at 3.4.2A and 3.4.2B respectively. To debate double remediability otherwise would be much less tidy.

3.4.2.(i) Origins, Scope and Reform of (Dissatisfaction with) the Test: The following is the forum test for tortious and delictual liability developed from Willes J.'s judgment in The Halley⁸³ and expressed in Phillips v Eyre:

"As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be such a character that it would have been actionable if committed in England...Secondly, the act must not have been justifiable by the law of the place where it was done..."⁸⁴.

The same rule is the current Dicey and Morris Rule 203:

"(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both

(a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and

(b) actionable according to the law of the country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."⁸⁵ (italics added)

If the more recent 'most significant relationship' exception in (2)⁸⁶ is placed aside for the time being (there is no such exception to the remedies test), the distinct similarity and relation of double remediability to double actionability becomes clear. It is not a relation that has been addressed in any direct way either judicially or academically⁸⁷. It is traceable to the remedy of compensatory damages which is by far the most common domestic remedy in tort cases, but is not explicable in these terms only⁸⁸.

The tests represent what P.B. Carter refers to, in the case of the tort test, as "technique[s] of *forum* control...[the] significance and value [of which are] to be assessed in the context of established (if not always legitimate) *forum* control techniques of general applicability, such as resort to public policy or the manipulation of the characterization process"⁸⁹, "the underlying purpose...[being] to protect the *forum* from having to apply unfamiliar/unattractive foreign rules..."⁹⁰. These tests represent "[areas] of

the conflict of laws in which the courts have displayed a uniquely marked "homing" instinct"⁹¹. It is certainly the case that no order for specific performance or for a final injunction, to take effect extraterritorially⁹², has been made by the forum.

As mentioned earlier, the remedies test admits of no exception and, therefore, differs from the tort test to this extent. The difference implies that it is more forum-oriented than its tort counterpart. In line with P.M. North's view that the Contracts (Applicable Law) Act 1990 applies mandatorily to all contracts subject to forum adjudication⁹³, the remedies test applies only to tort cases (whether or not liability is established by applying the general rule rather than by applying the exception), and to substantially forum-related contract cases only where the remedy in question is either an order of final injunction or of specific performance⁹⁴.

The remedies test, crucially, does not involve the application, strictly speaking, of the foreign law considered in the course of fulfilling its foreign law requirement. It does not consider the jurisdictional competence of the forum of the given jurisdiction, despite the procedural/jurisdictional bias of the law on remedies⁹⁵. This is not to say that the forum is to do more than satisfy itself fully about that court's view of actionability, or justiciability, if the suit was brought before that court. The point is that a view of the foreign court's jurisdiction would make the procedural bias more convincing. The present writer respectfully adds that the present bias is not.

On this point, Lord Wilberforce's overruling of Machado v Fontes⁹⁶ in Chaplin (as far as foreign actionability must now be taken to mean civil liability) is instructive. In Machado, it was held that criminal liability in the foreign jurisdiction was sufficient to fulfil the first limb. As regards remedies, the analogous position is that foreign remediability should attract greater consideration than it does perfunctorily at present. This is because the purpose of any remedial rule is closely bound to its original system's valuation of the loss incurred by the infringement of the correlative substantive right. It may also be the case that the loss incurred is remedied otherwise. This strengthens the case for the applicability of foreign rules

where they clearly and legitimately define the loss better than the forum domestic rules⁹⁷.

The view of foreign rules invoked under the tort test is expressed in

Dicey and Morris:

"[F]oreign rules of conduct are "incorporated" in the English cause of action for common law negligence, just as the terms of a foreign statute may be incorporated in an English contract. These rules do not operate as "rules of decision" but as factual "data" to which the *lex fori* is applied"⁹⁸.

Precisely the same is true of foreign remedial law under the remedies test. This implies separate points: mentioned earlier and for the forum-protecting reasons given, the forum laws of torts and of remedies are exceptionally forum-oriented; a separate regime applies to remedies for breaches of contract quite apart from, but with identical results as, the Rome Convention-derived law applicable to compensatory damages; the latter is confirmed by the fact that substantive contractual questions can be resolved by applying foreign rules of decision, unlike torts, because of the operation of the contractual proper law doctrine⁹⁹ which, strictly speaking, has no tort/delict counterpart¹⁰⁰. As Morse puts it:

"The particular question which arises...is how far the applicable law in tort should control the plaintiff's remedy...[It] depends...on the extent to which the forum remedy for enforcing an analogous right...differs from the remedy available under the foreign law...[T]he foreign remedy should always be applied if it is compatible with the procedural possibilities available in the forum, even if the *lex fori* provides its own remedy in analogous cases...The efficiency of such a solution...depend[s] on the extent to which domestic legal systems differ in the provision of delictual remedies and the extent to which those differences raise questions of substance rather than questions of procedural incompatibility..."¹⁰¹

Thus, Morse makes it clear that (i) the intrinsic substantive content of final remedies (which double remediability seeks to avoid by looking to 'forum protection from foreign laws'), (ii) the applicability of foreign remedial law (which implies, in turn, that the *lex fori* is displaceable) and above all, (iii) the case for considering more seriously the transjurisdictional aspects

manifest in a given action (that is, the case for analysing remedies conflictually¹⁰²) are problem areas that will not be resolved for as long as the test refers to convenience-derived forum law alone.

The reader is reminded that the operation of the forum's jurisdiction-acquisition rules results in most cases being disposed of adequately by the existing remedies test, as the case law demonstrates. It means that the remedy available will not necessarily reflect the conflictual context of the action. This is similar to the tort rules and principles about which Carter comments as follows:

"The private international law of tort and delict is currently not ripe for embodiment in comprehensive or semi-comprehensive statutory form. It would appear that it has been only very seldom indeed that the existing law has led to injustice. Moreover, the present choice of law rules...are reasonably well settled and uncomplicated. It does not, of course, follow that some further development and clarification would not be desirable. But this should take the form of evolution and formulation of particular rules, and patterns of rules, each specifically tailored to meet the policy needs of individual problems and issues"¹⁰³.

Either test is expressed as a general rule. The remedies test admits of no exception. It is designed, as most rules are, invariably, to accommodate exception. As it currently stands, all that it excepts is remediability, when it has not been fulfilled. The exception to the tort test supplies a ready model for an exception to the remedies test. This model would also dispose of the conflict-evasive aspect of the remedies test; this is to say that the question whether a breach of obligation to be determined by reference to a foreign *lex causae* is remediable should not, in principle, be decided without interpreting relevant foreign law separately from forum domestic rules, where the former is more relevant and, importantly, contains rules in point. In this type of case, double remediability is underconflictual in that it does not address the conflict of laws arising with a view to avoiding that conflict. To be sure, double remediability evades the conflict by its fundamental insistence on approximating the potentially applicable laws: the *lex fori* and the *lex causae* or the law of the place of enforcement and, less justifiably, by its

fundamental insistence on exclusive application of domestic remedial rules of the *lex fori* in excepting circumstances.

Double remediability should have a 'double actionability-type' exception not to be condemned as misconceived of. It is true that the tort test addresses substantive rights while the remedies test addresses the procedural enforcement of those rights. But the difference does not interrupt the analogical basis for the case for a remedies exception. It is given that enforcement may require the forum to consider relevant foreign rules for application in the formulation of the forum's order. This is to say that it is not only the substantivity of remedies that compels argument for delocalising the rationales for their availability. The distinctly procedural (i.e., enforcement) aspects also do. Most importantly, this is an aspect of the substance-procedure divider which should be reconsidered. The direction of reconsideration inferred in this paragraph is quintessentially conflictual.

3.4.2(ii) The Argument Encapsulated: The foregoing constitutes a substantial part of the substantivist argument for objectivity, completed in 3.4.2B, and is summarised in the following postulate:

Without a 'most significantly related remedial jurisdiction' exception, double remediability is flawed as the main premise to the single reference thesis and should be accordingly reformed . (**POSTULATE C**)

Thus far in the chapter, we have seen that private international remedial jurisdiction, on its most basic premise, has an ampler context than has been considered judicially and academically, and that the questions arising are in no way formally intractable. The further specific arguments will demonstrate that coherence and comprehensiveness in the overall exercise of jurisdiction as well as substantivist adjudication support the theory of conflict remedies expressed in the dissertation.

3.4.2A PROCEDURE ("JURISDICTION" AND "JUDGMENTS").

In Chapter Two, especially at 2.4, reference was made to the unity or affinity of the jurisdiction and the judgment themes¹⁰⁴. This substantially explains combining arguments from both themes which are clearly procedural in character. The following points were raised and are substantiated in the present set of arguments developed from them:

- (1) coherence and comprehensiveness in jurisdiction generally in consideration of pragmatically sound results and the possible extension of interlocutory relief rationales to final relief¹⁰⁵;
- (2) a definition of '*lex fori*' that recognises forum rules and principles having no domestic application;
- (3) a definition of 'procedure' that relates acquisition of jurisdiction to availability of relief;
- (4) the relevance of remedial enforcement jurisdiction in its own right.

The arguments here can be described as pragmatic justification for the general arguments at 3.4.1 from the aims of private international law, to the extent that the topics of those general arguments can be contained in forum rules¹⁰⁶. For example, as will become clear, the limits prescribed by the jurisdictional rules synchronise invariably with the forum's definition of its private international adjudicative function. Both sets of arguments address the autonomy and competence of the forum. The procedural arguments in this section substantiate the notion of the rational forum¹⁰⁷, and demonstrate that jurisdictional coherence produces no less pragmatic rules and principles. The procedural arguments contribute a unitary postulate which is set out after 3.4.2A(iii).

3.4.2A(i) Coherence/Comprehensiveness in Jurisdiction Generally: The starting point is that an intelligible understanding of jurisdiction *in personam* is good in itself and is in the forum's interest because it vindicates rationally any exercise of forum authority. Coherence supports subsequent arguments deriving from points (2), (3) and (4) set out above at the beginning of 3.4.2A.

"Comprehensiveness" is used here to mean "exhaustiveness of content" (and, indeed, "comprehension") as far as this is possible, given that

the content of the law changes. As is indicated in points (2),(3) and (4), comprehensiveness is facilitated by coherence, and means no more than the identification and/or formulation of (all) rules (especially the remedial) typically applicable only in transjurisdictional contexts. It is impractical and unnecessary to deal with all matters conceivably jurisdictional. Sections 2.2 and 2.4, especially, have provided an adequate framework.

The composition of jurisdiction was referred to at 2.2, in terms of acquisition, prescription and enforcement, respectively, and of its particular relevance in private international adjudication and litigation. In the context of remedial jurisdiction¹⁰⁸, this composition can be interpreted more precisely as follows:

(i) primary remedial¹⁰⁹jurisdiction: the acquisition or declining of jurisdiction to adjudicate, on the basis of justiciability, in the action in which the given remedy is sought. This involves more than perfunctory reference to jurisdictional rules of a competing forum where there is such a forum¹¹⁰;

(ii) interim/interlocutory remedial jurisdiction: the rationales are based necessarily neither on domestic law strictly speaking nor on adjudication which is justified in territorial terms. It thus dispels the pervasiveness of single reference in remedial issues. It is mainly concerned with the availability of coercive or injunctive relief at the particular stage in proceedings¹¹¹;

(iii)final remedial jurisdiction: the main question of final remedial orders for damages, injunctions, specific performance and restitution. The latter types of order can be described as governed by the single reference thesis, and the first by the objectivity thesis; and

(iv) remedial enforcement jurisdiction: the use of ancillary coercive measures to give effect to final orders made pursuant to (iii) above, considered circumscriptively in the single reference thesis in terms only of forum exercise of this jurisdiction in respect of its own orders. It thus excludes the likely justifiable need for final orders to take extraterritorial effect subject to successful pleading and proof of the pertinent rules of the identified law of the place of enforcement¹¹².

So much for a composition of remedial jurisdiction. The analysis has revealed that the jurisdiction is multipartite but incoherent despite clear indicators of the relative facility with which the incoherence can be favourably resolved. The pragmatic explanation in terms of convenience of the differing ways in which the aspects of this jurisdiction have been exercised is inadequate. Current remedial jurisdiction accurately infers that practical results are the true measure of remedial justice. By discountenancing the factual possibilities inferred in the composition, single reference appears to imply also that this minimises the value of theory.

* Interpreting 'Lex Fori': The analysis facilitates a reconsideration of '*lex fori*' (and thus the case for jurisdictional comprehensiveness and, before that, for coherence¹¹³) for Rule 17 in its general application, and for remedial jurisdiction in particular, by identifying forum rules which are domestic only because they are forum rules and not because they have any domestic application whatsoever¹¹⁴. Such rules are identified in their own right as conflict rules. They comprise an uncodified subset of the legal system's rules and can more easily be identified, formulated¹¹⁵ and, if necessary, modified (as for example the double remediability rule should be). Herein lies the case from jurisdictional competence.

* Considering 'Procedure': The analysis also facilitates the consequential reconsideration of 'procedure' for remedial purposes in particular, by referring to the concrete significance of focus on the different aspects of remedial jurisdiction. It is clear enough that primary remedial jurisdiction is plainly procedural in that it concerns the institution of proceedings¹¹⁶. The same is true of interim/interlocutory remedial jurisdiction, given the overriding process-protecting policy therein¹¹⁷.

Of final remedial jurisdiction, the concept of substantive relief shows at 2.3 that final remedies are often explicated substantivistically and that, it may be necessary to adjust the existing unidirectional substance-procedure divider to rate proceduralist reckoning of the availability of the given remedy¹¹⁸. The possibility of foreign enforcement rules being non-procedural is unlikely and contrary to the common law view. This constitutes

another instance for a forum conflict rule, in this case, to characterise such foreign enforcement rules. Herein lies the case for jurisdictional cohesiveness and comprehensiveness.

Other material aspects of current remedial jurisdiction contribute further bases for argument to which attention now turns. First, the argument from forum shopping ('primary remedial jurisdiction'), which partly demonstrates the institutional adequacy of the single reference thesis' framework.

3.4.2A(ii) 'Forum Shopping': This argument is closely related to the discussion of primary remedial jurisdiction because of the stage of adjudication at which both topics arise. If we limit the aim of the exercise of primary remedial jurisdiction to the question whether the forum is the appropriate forum to provide a remedy in the given cause, they are one and the same question¹¹⁹. The formal rules on *forum non conveniens*, staying of actions and *lis alibi pendens* variously incorporate the policy against forum shopping discussed below. Essentially, this argument supplements the argument for coherence, but also makes the separate point that the forum's rules of procedure are adequate to accommodate the modifications inferred in the dissertation.

Forum shopping, then, is the pejorative description of the institution of proceedings in the venue whose laws promise some quantitative or qualitative advantage. In the context of this argument, that advantage is remedial; it could have been in the mode of trial (e.g. requirements of proof of substantive rights) or in some other juridical advantage available in the forum. Forum shopping is disfavoured for policy reasons, e.g. sustaining the authority of the *lex causae*, the equality of legal systems, and not burdening the forum courts at expense to the litigants. These policy reasons detail the roles in these respects of legal positivism (or legal formalism) and uniform justice, and chance and neutrality¹²⁰. At 2.5, the forum's "Metliss and Adams" approach was identified, by which policy justifications enable the granting of relief where neither the *lex fori* nor the *lex causae* separately considered provides one¹²¹.

Forum shopping is legitimate in a jurisprudential sense. Where it is justifiable (i.e., the acquisition of jurisdiction rules are met), the reason is judicial discretion founded firmly in substantivist policy. It is to be noted that no decided case has held, nor has it been commented, that the policy against forum shopping overrides the policy of providing remedies. The present argument does not advocate forum shopping. It merely points out that a remedy (not the right of access) is not currently withheld merely because the forum is not the natural.

In point of fact:

"A central purpose of the legal system is to facilitate the provision of remedies, and forum shopping is often an important tool in this process...It is efficient to provide a remedy, and a future deterrent, in situations in which the [law] merely failed to anticipate a type of wrong"¹²².

The forum is adequately equipped, in a procedural sense, to exercise its remedial jurisdiction (coherently), subject only to the nature of the given remedy under the applicable *lex causae*. (This is the main subject of 3.4.2B where it is argued that, in a substantive sense, the current preclusion of foreign remedial law from applicability ill-equips the forum). Procedural adequacy in this context implies that the forum's final remedial jurisdiction, in the framework of the existing law, reflects the forum's primary remedial jurisdiction. Therefore, there is no reason to introduce novel remedial forms in order to enable rationalisation of the availability of the existing remedial forms (3.4.2B), or of making remedial orders for foreign enforcement (3.4.2A(iii), *infra*).

3.4.2A(iii) Interim/Interlucutory Remedial Jurisdiction: In the discussion of primary and final jurisdiction, we have identified the basis and format for subsequent coherent exercise of jurisdiction. This satisfactorily explains forum competence, because of the procedural contexts inferred in the mechanisms of litigation and adjudication. These mechanisms themselves represent definite and decisive bases and criteria for assessing forum remedial jurisdiction. They are discussed as such in the next chapter, "Objectivity v Single Reference".

The arguments in this section characterise the exercise of this jurisdiction accurately as illustrative of coherence (rather than the lack of it)¹²³. They demonstrate that interim jurisdiction supplies the practical reason, the theoretical other reason being the general competence of the "international" forum as discussed at 3.4.1, for extending its rationales to final jurisdiction, even though the latter is, jurisdictionally speaking, grounded differently. The former jurisdiction in point of fact operates both interlocutorily and as a means of post-judgment relief or, in the scheme of the description of remedial jurisdiction disclosed above, as remedial enforcement competence. This is clear from Babanaft International Co. SA v Bassatne¹²⁴, where the jurisdiction was successfully invoked after the judgment at trial. To reiterate the obvious definitional point, regarding the furtherance of coherence in the exercise of remedial jurisdiction, for the present basis of argument:

In this light, the forum could either acknowledge the proper general extraterritorial limits of its remedial jurisdiction, and accordingly modify Rule 17, or rectify its final remedial jurisdiction to include consideration and application of foreign remedial jurisdictional rules where appropriate, and accordingly modify Rule 17. As demonstrated at 3.4.2A(ii), the forum would not thereby exhibit "[a] tendency towards exceeding its own competence"¹²⁵.

It is thus implicitly clear that the arguments here significantly contribute to the conception of the suggested law of the place of enforcement. This is discussed in due course. While acknowledging at all times that there will be consequences from the stage(s) in proceedings at which this jurisdiction is exercised, and, therefore, its strictly procedural character¹²⁶, the following clarifying points are made to be noted:

(i) the jurisdiction shares a common juridical basis with other types exercise of injunctive/coercive jurisdiction in section 37(1) and (3) Supreme Court Act 1981;

(ii) the jurisdiction represents the astuteness and the immediacy with which an existing remedial form can be re-rationalised *de novo*, and be adapted to meet practical requirements and requirements of effectiveness;

(iii) the jurisdiction is exercised necessarily with due consideration of the presence of the defendant's assets abroad and of third parties there who are or might be affected by the exercise (by implication, therefore, of foreign remedial enforcement law).

The main orders made pursuant to this jurisdiction are respectively the *Mareva*¹²⁷ and the *Anton Piller*¹²⁸. The former is the more pertinent, although "the practical consequence is that it is really the *Mareva* injunction which is ancillary to the disclosure order, rather than the traditional relationship...For the disclosure order will be the main remedy in England, and the *Mareva* injunction will give the plaintiff time to apply to the relevant foreign court for appropriate orders"¹²⁹. Section 37 of the Supreme Court Act 1981 provides as follows:

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to do so.

(2) Any such order may be made either unconditionally or on such terms or conditions as the Court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled resident or present within that jurisdiction.

The *Mareva* jurisdiction has been described as "one of the most imaginative, important, and, on the whole, most beneficent of modern times"¹³⁰ and as "the greatest piece of judicial reform in [his] time"¹³¹. The jurisdiction operates *in personam*¹³² and, as with other equitable relief, is available only in exceptional circumstances¹³³. The rationales of the jurisdiction are described as "interlocutory, but...not for the purpose of preparation for trial¹³⁴; "[t]he justification...is that they...combat international fraud and prevent plaintiffs from being robbed of the fruits of judgment"¹³⁵.

L. Collins describes the exercise of the *Mareva* jurisdiction in the following terms which indicate jurisdictional coherence in these respects:

"The starting point for any discussion of the jurisdictional limits of Mareva injunctions must be s. 37(1) of the Supreme Court Act 1981...On its face this power is unlimited...But there is very substantial authority which puts severe limits on the jurisdiction...In the first place, the defendant must be subject to the personal jurisdiction of the court. This does not mean that the defendant must be in England...

[I]f the defendant is outside the jurisdiction, the case must be one in which it is open to the English court to assume jurisdiction under Order 11...[Secondly] the remedy is not available...where the defendant has assets in England, but the defendant is abroad, has not submitted to the jurisdiction, and the case does not otherwise come within Order 11 rule 1(1)..."¹³⁶.

Having identified the problem addressed by the jurisdiction, in terms of defaulting judgment debtors seeking to be judgment-proof and of abusers of fiduciary positions seeking to enjoy the fruits of their dishonesty¹³⁷, Collins further describes the jurisdiction and places it in some comparative context thus:

"The creation of the *Mareva* jurisdiction was not so much a step forward as the rectification of an omission or error which had stemmed from a line of authority, of which perhaps the oldest was the decision in *Lister & Co. v Stubbs* [1890 45 Ch. D. 1] to the effect that, except in proprietary claims in the strict sense, it was not possible to restrain the disposal of funds in the hands of a defendant prior to judgment...The *Mareva* injunction brought the English common law...into line with the practice of civil law countries (the *saisie-conservatoire* and similar remedies) and of the United States (the writ of attachment), and provided a remedy where one should always have been available"¹³⁸.

Initially, the jurisdiction did not apply where the defendant had assets outside the jurisdiction¹³⁹. The reasons given for this limit on the jurisdiction were the interpretation of the last phrase of section 37(3) of the Supreme Court Act 1981. The grounds were that (i) the defendant would otherwise be oppressed, (ii) enforcement would otherwise be difficult, especially where the plaintiff was abroad, (iii) where the jurisdiction included disclosure orders, the defendant's privacy would thereby be invaded, and

(iv) the *Mareva* would be misused to serve as advance security for claims.

As Collins adroitly expresses it:

"It cannot be said that any of these reasons is compelling...[I]t is no objection to the provision of a remedy that *some* plaintiffs may abuse it; it is for the courts to be alert to abuses in individual cases, or to devise means to avoid them...It is [true] that it is difficult to enforce and police injunctions against foreigners relating to assets abroad. But...that is no reason for excluding the remedy altogether in cases where justice requires it"¹⁴⁰.

Further light is shed on current exercise of the jurisdiction, and on the relative ease¹⁴¹ with which the task of transposing the governing or attendant considerations to the final stage, if we focus on the extraterritorial judgment-executing aspects and, as C. McLachlan does, on the extents to which availability of the order depends on the following:

- (i) its connection with forum proceedings,
- (ii) its being limited to property situated within forum jurisdiction, and
- (iii) its being in support of enforcement of a foreign judgment or award¹⁴².

None of these factors is at present especially decisive of the scope of the jurisdiction. These considerations conveniently lead the discussion of the extraterritorial aspects of the jurisdiction as these affect assets and third parties in the relevant foreign jurisdiction(s)¹⁴³. It is necessary first to recapitulate to state the necessary parallels with final remedial jurisdiction thus far:

(1) The jurisdiction primarily serves to protect the forum's process, and to "implement the plaintiff's undisputed procedural right to have his day in court"¹⁴⁴. Thus, in terms of forum interest and in final remedial terms, this transposes directly as the desirability of similar powers at the final stage, to protect or to guarantee the forum's (substantive) adjudication. Because such powers are currently available at the final stage only where they are invoked independently of, and after, judgment (i.e., as ancillary powers not necessarily incorporated, though deemable), the forum perpetuates an imbalance or incoherence in its general jurisdiction. It can be said that the fact that the merits will, at the final stage, have been resolved both strengthens this argument and countermands the dictates to the contrary

which arise from the stage at which the powers are currently exercised. In other words, it is to be hoped that the forum will rate equally the prevention of litigant default (i.e., the protection of its process) with the protection of its adjudicatory jurisdiction in its entirety, and thus interpret its process more coherently.

(2) The territorially limited exercise of the jurisdiction at its inception has since been departed from because it transpires that this was unrealistic and, therefore, unsatisfactory. In the light of the critique of the single reference thesis, these reasons persist in the case of final remedial orders: no final (non-money) order, or order which is not self-executing, to take extraterritorial effect has ever been made.

(3) The likelihood of misuse of this jurisdiction by the plaintiff at the relevant stage is a matter to be addressed by the forum, and not one which is disposed of by having regard solely to forum convenience; or, at least, not as it is currently conceived of. Not only will the onus for looking beyond convenience, to look at foreign remedial enforcement law as may thereby become applicable, be on the plaintiff, the terms of the order will be specific (as all forum injunctive orders are) as to the duration of the order, as to the specific assets covered therein, and as to disclosure of assets and the scope of discovery orders, where these are needed to supplement the injunction. This constitutes a significant addition to the principle of the 'protected and obligated defendant' identified earlier at 2.4.2.1 and returned to in the next subsection in elaborating the law of the place of enforcement. Further, the plaintiff is required to undertake not to use information obtained without the forum's permission: the "Babanaft proviso"¹⁴⁵. In this way, third parties abroad are protected from contempt proceedings¹⁴⁶.

The 'extraordinary' character of the jurisdiction consists of the burden and standard of proof imposed on the plaintiff and is sufficient to keep its availability within satisfactory limits. In this regard, it is an additional overriding consideration that the rules governing the acquisition of jurisdiction will have excluded the consideration of unmeritorious actions.

The reader might wish to review the discussion of primary remedial jurisdiction at 3.4.2(i) and the 'Argument from Forum Shopping' at 3.4.2(ii).

* The Extraterritorial Procedural Aspects: The Law of the Place of Enforcement. For conceptual or conflictual definition, the substantive counterpart of considering foreign procedural (remedial enforcement) law inferred in this section is where a foreign *lex causae* stipulates remedial liability as so bound up with substantive liability that both are in reality parts of the same whole: the combined liability right at 2.3. This is the subject of 3.4.2B. This descriptive aid to definition explains the present topic as distinctly procedural but non-domestic. The self-executing remedy of compensatory damages is excluded from the scope of application of the law of the place of enforcement, as are its attendant considerations of matters like interest on the judgment sum and priority of claims. Also, because of section 25 of the Civil Jurisdiction and Judgments Act 1982, European jurisdictions will automatically enforce forum orders.

We have seen that the defendant is not oppressed by the making of an *ad personam* order which takes effect extraterritorially. The order is made to conclude the substantive dispute (that is, even where the extraterritorial order operates as substantive *res judicata*¹⁴⁷). The final order therefore obligates the performance of specified duties to the forum, the plaintiff, and the foreign forum where the plaintiff now invokes enforcement or supervisory jurisdiction: the foreign forum of enforcement. Breach of these duties attracts contempt proceedings in the forum of judgment in the ordinary way¹⁴⁸.

Strictly speaking, the question of enforcement posed here differs in its conception from, but depends upon, the question of recognition and subsequent enforcement of the forum order. It differs from recognition and enforcement as this is conceived of and observed in the ordinary sense to the extent that the jurisdiction of recognition and enforcement ordinarily need not be identified. The successful party seeking recognition and enforcement is not required to plead and prove the law of the forum to

which the forum judgment is subsequently taken. Indeed, the judgment need not be one entered against the defendant personally.

The relation of the question of foreign enforcement, as it is posed in the present context, to the law of recognition and enforcement is solely explained by the fact that the order to be enforced is contained in a forum judgment *ad personam* which is to be enforced in another jurisdiction. The reader might wish to recall 2.4.1 which discusses the principle of satisfactoriness of judgments from the point of view of the forum¹⁴⁹. It transpires that the discrete realisation and adoption of the notion of the law of the place of enforcement is not much removed from current forum modes of private international enforcement adjudication¹⁵⁰.

On this view of enforcement, an order's subsequent recognition is, by and large presumed, and is therefore subsidiary to its enforcement¹⁵¹. The forum will have required and taken evidence of the pertinent (enforcement) rules of the particular foreign jurisdiction in which its order is to be enforced. There are reasons for this. The reason why it will have considered and applied such rules is that the plaintiff will have proved that the forum of the chosen jurisdiction is the forum best suited to enforcement, that the forum of judgment was the appropriate jurisdiction for adjudication but that enforcement of its order is appropriate or only possible in the given foreign jurisdiction.

The deeper reason is that the transjurisdictional character of the instant case indicates that the enforcement aspect is distinctly extraterritorial. The circumstances where this is requisite and necessary are no different from those in which the *Mareva* jurisdiction is exercised as ancillary means to post-judgment execution, as in the *Babanaft* case. This clearly does not attribute jurisdiction on the basis of competence to enforce (i.e., because there is no such competence, or the unrebutted presumption is against such competence¹⁵²). The crucial aspects of the given foreign jurisdictional rules which must be pleaded and proved are the following¹⁵³:

(A) rules which determine the definition of the forum's judgment order as a "foreign judgment", and, therefore, determine the existence of reciprocal enforcement arrangements¹⁵⁴

(B) rules which determine the given foreign forum's competence to refuse to recognise and enforce the forum order

(C) rules which provide the foreign forum's indicia of finality of foreign judgment orders

(D) rules which indicate the foreign forum's domestic competence

(E) rules which refer to fulfilment of dispute settlement clauses¹⁵⁵

(F) rules which indicate whether or not the foreign forum will re-examine the forum judgment, and, if so, on what ground(s)¹⁵⁶

(G) rules which stipulate precisely the enforcement procedure

(H) rules which indicate whether or not such enforcement procedures as exist will be stayed if an appeal is lodged against the judgment order

(I) rules which may indicate the treatment to be accorded to a defendant State/State entity¹⁵⁷, and

(J) rules which regulate the application for committal in the case of injunctions where the wrongful conduct has been rectified by the injunction and repetition is not anticipated.

The forum will thus be in a position to determine whether or not an order made further to such jurisdictional rules can and, as much as possible, will be realised. To this limited extent, the remedy to be granted may well conform with the foreign remedy¹⁵⁸; for example, where the foreign jurisdiction has also produced the *lex causae*. This is discussed in 3.4.2B. Above all, the forum will have observed the principles against interference with the foreign jurisdiction and against ineffectual judgments, and avoided (more so, at trial and judgment stages, rather than at the foreign enforcement stage, the latter being more likely to render the judgment precarious) the possibility of a conflict of jurisdictions¹⁵⁹. Therein lies the distinctive advantage which is not available under the scheme of the single reference thesis. The party seeking to rely on the foreign jurisdictional rules

will have pleaded these rules from the outset, and proved them satisfactorily along with the substantive case.

It will not be decisive that the foreign rules of practice relating to, e.g, the actual method(s) of enforcement may be classified as substantive under the foreign law. It is presumed to be procedural for the purpose of private international law¹⁶⁰. It has been held that a foreign statute dealing with the recognition or enforcement of prior rights is procedural, according to the presumption against retrospective construction of such statutes¹⁶¹. This would also be in line with the view taken in this dissertation of procedure to mean *inter alia* the sequence of adjudication.

This means, for example, that the action in Warner Brothers Pictures Inc. v Nelson¹⁶² could have succeeded had it been for an injunction to restrain the defendant from further breach of the contract, not only in forum jurisdiction terms, but also in the particular United States jurisdiction, California (and, presumably, elsewhere). Both parties were substantially connected to that jurisdiction, the contract was made there and was governed by its law. Jurisdiction was acquired properly by the forum. To decline jurisdiction under the scheme proposed here, on the basis that the action was for an extraterritorial order, would be at variance with familiar extraterritorial jurisdictional rules, on the one hand, and with the juridical basis in section 37 of the Supreme Court Act 1981. The Californian jurisdiction's injunction and enforcement rules would have been pleaded and proved by the plaintiff. It should be remembered that, by virtue of the enforcement provisions under the European rules, an American jurisdiction's order for specific performance against, e.g., an E.C. domiciliary, may be enforced in any Contracting State's courts. Further possibilities, yet to be raised and/or addressed judicially, arise from, are latent in or are suggested by other existing single reference decisions. These are discussed alongside hypothetical cases in Chapter Four, "Objectivity v Single Reference", in giving reasons why the objectivity thesis, based on the propositions made in the present chapter, is to be preferred to the single reference thesis.

To reiterate, the delineation, of the law of the place of enforcement of the final remedial order, guarantees procedural objects, viz.,

- (a) the protection and furtherance of adjudication by the forum (i.e., it assists full recognition of the forum's assumption and exercise of jurisdiction);
- (b) non-interference with other relevant jurisdictions;
- (c) a minimum standard of enforcement formality in the jurisdiction of enforcement; and
- (d) efficient conflictual administration of justice.

Extraterritorial orders are part of the forum's overall jurisdictional competence coherently exercised, and one that is exercised more easily and more assuredly than its existing parallel (i.e., the present exercise of jurisdiction to make judgments to be recognised and enforced elsewhere). It constitutes a jurisdiction that could, perhaps, always have been recognised in its own right. It is to be hoped that the added impetus supplied by the European rules in this regard, for the realisation of this jurisdiction, will assist the inferences herein for its formal recognition and for its exercise. The foregoing represents the sum of the "Procedural Arguments" for objectivity in conceiving of and making conflict remedies available. They are summed up in the following postulate:

Pragmatically and theoretically, remedial jurisdiction should be coherently exercised to reflect general forum competence and the comprehensive expanse of the forum's jurisdictional rules in particular. In order to achieve this, it is necessary to reconsider the precepts of '*lex fori*' and '*procedure*'. Doing so clarifies the role and the significance of enforcement jurisdiction *per se*, as well as the need to realise the possibilities of foreign enforcement not previously or currently fully considered, and is in the interests of the rational advancement of the procedural aspects of the forum's remedial adjudicative jurisdiction. (POSTULATE D)

The discussion in Chapter Five, "Cognate Topics", of other procedural matters no longer the subject of single reference, or about which departure

from single reference has been cogently and persuasively recommended in judicial pronouncements and academic commentary, completes the depiction of conflictual procedure which has been limited, in the present chapter, to remedies. More is said there about interim relief, in the more general context of conflictual procedure. It is to be hoped that the conception and depiction of conflictual procedure will be considered in the terms of the present section.

Attention turns now to the remainder of the substantivist arguments for objectivity in final remedial adjudication. The reader should recall the arguments from double remediability, at 3.4.2(i) and (ii), in particular as those arguments address the nature of the remedy as examined by North, Carter and Morse. The nature of the remedy is the reason for any substantivistic characteristics a given remedy is said to have.

3.4.2B SUBSTANTIVISM ("SUBSTANTIVE RELIEF")

At the close of the presentation of the theme of substantive relief, at 2.3.2.1, some tentative propositions were made, the latter of which has been dealt with more substantially in the arguments concerning double remediability at 3.4.2A(ii), leading to postulate D above. The other proposition (i.e., where the right established under the foreign *lex causae* is of the combined liability type, a new type of forum right could be developed, taking account of the liability prescribed by the *lex causae*) remains to be dealt with here, for completeness and symmetry of argumentation, and to tie the arguments on double remediability more firmly to that proposition.

The 'exception to double remediability' argument¹⁶³ does, in point of fact, take on a better light by virtue of the arguments in the present section. They give the conflictually explicable substantive reasons (such reasons as are inadequate - i.e., because the currently espoused reasons are underconflictual - by double actionability, as it operates in single reference) which are needed to justify Rule 17, or indeed any modification(s) to it.

At 2.3.2.1, the proposition was made in the context, and on the basis, of normativity, having examined the contribution of the Contracts

(Applicable Law) Act 1990 to the notion that relief is inherently substantivistic (that the law governing the availability of the conflictual remedy of compensatory damages is now wholly substantive law, since the matter of *quantum* is, by that statute, governable by a foreign *lex causae*) and especially moreso where substantive liability under the *lex causae* includes well-defined remedial liability.

To recapitulate further, it was said that the adoption or reconception, in forum private international law, of rights first established by reference to a foreign substantive law, as facts (rather than as law) need not be as extensive as to make the original right as it exists under the foreign law completely different, in order to apply the forum's remedy. That the foreign right must be fact is undisputed. That it is nevertheless normative, and that no harm is caused to the parties' expectations (nor to the process of adjudication, for that matter)¹⁶⁴ are, together, the basis for the arguments that now follow.

Whether or not we agree with J. Raz that a legal system can have more than one Hartian rule of recognition¹⁶⁵, and, therefore, that, in the present context, it is possible to have a rule of recognition by which rules of a foreign legal system may be deemed as applicable rules (rather than plain facts) for consideration in the forum, it is necessary to construct foreign law as fact in the interests of "understanding legal affairs"¹⁶⁶. A given domestic rule or principle is fact, first and foremost, but fact in an institutional sense; that is, by the 'legal' sense given by the institution of law¹⁶⁷.

When a (substantive) foreign rule or principle which does not exist under forum law is applied, it is applied as proven fact, e.g., to establish the existence of an enforceable agreement, as in Re Bonacina¹⁶⁸. But when a (substantive) foreign law, especially one which incorporates precise and explicit remedial provisions, does not exist under forum law, it is not applicable even if the form of the actual foreign remedy coincides with the forum's form of the same remedy; that is, the rationalisation of the remedy as it exists under foreign law is, in the final analysis, little more than

superficial, given that such form is merely examined as to its existence without enquiry as to the principles governing its availability within its system law¹⁶⁹. Herein lies the underconflictual quality of the single reference thesis, quite apart from the inadequacy for want of an exception of double remediability. For it is one thing to say that foreign law as a whole is fact only, and quite another not to apply it to particular (remedial) issues.

The foregoing is a particularised version of the arguments as 3.4.1. The question is one of discretion and policy in these respects, rather than one of uncompromising legal rationales. The solution inferred in this section founds in both policy and principle. It is a policy-based solution after the fashion of the solution provided through extraterritorial interlocutory injunctions¹⁷⁰; the revision of the previously problematic judicial practice in the case of injunctive orders was effected not because the then underlying legal principles differed from the principles of current judicial practice, but because it transpired that the forum had been underexercising its jurisdictional competence, and had done so for unconvincing reasons.

Thus, the solution is policy-based, but goes, nonetheless, to the nature, availability and/or substantivity, rather than to the form, of the given remedy. The question begged is: "If liability established by reference to foreign law is fact-based liability, why substantiate (remedially speaking) that liability by reference to domestic remedial law when there is proof of the adjunct pertinent principles (factual) of that foreign remedial law, and when the forum is all that connects the given action to forum domestic law?"

The answer on offer by the existing law is that the reference has to be to this law. With respect, this is less pragmatic than the single reference thesis suggests. The applications of single reference confirm that the forum recognises, even acknowledges, the substantivity of remedies, but discountenances this attribute of remedies for no other apparent reason than that there are domestic notions and precepts of the substantivity of (domestic) remedies, and that those notions are the only relevant and applicable ones even though substantive liability was not established by any reference to forum law.

In line with the policy of providing remedies whenever it is possible to do so, this reasoning would be useful where forum and foreign remedies respectively were so disparate in their respective forms and in the circumstances in which they would be available. In those circumstances, the probability is strong that the remedy sought will be unavailable for want of rationale, as in *Phrantzes v Argenti*¹⁷¹; therefore, the policy just referred to would be furthered by considering domestic and foreign remedial laws.

The reasoning also demonstrates that not only does it serve to fill a gap produced by the doctrine of double remediability (i.e., that, rather than inconveniently, or impossibly, treat remedies as wholly substantive and, therefore, really the subject of choice-of-law method - which is good enough as a private international adjudicative rule), the reasoning also points to a localising tendency in the private international system, which again is not, strictly speaking, without justification. This gap arises because of the insistence, in every case, on characterising the substantivity of remedies by reference to domestic notions and precepts of those remedies. This insistence, well explained and well justified as it must be in most cases in which primary jurisdiction can be acquired, is unnecessary and unjustified particularly where the preponderance of substantive merits of the given case is related to another law and/or jurisdiction; that is, the substantive obligation is not free from remedial principles.

In such cases, the nature, substantivity, rationales or availability of the given remedy should be referred to that law, to the extent that the forum and foreign forms of the given remedy match. This does mean that it will be possible, in those cases, to litigate in the forum but not subject to the substantive domestic principles which govern its availability¹⁷², but, rather, subject to the substantive principles which obtain under the given foreign law. The case for applying that foreign law is strengthened where the substantive right is of the combined liability type (that is, liability and relief are so distinctly apposite). The substantive reasons for applying those foreign rationales in such cases, or for displacing the domestic rationales, are strong¹⁷³.

The single reference thesis' consideration of the substantivity of final remedies is to be found in the doctrine of double remediability as discussed at 3.4.2(i) and (ii), in the doctrine's references to the similarity in character between the remedies available by the *lex causae* and forum law, and the primacy of the *lex causae* definition of the infringed right in determining the appropriateness of the forum remedy sought¹⁷⁴. This approximation of the respective remedial laws is taken to deal comprehensively with the matter of substantivity of remedies. It implies that the (substantive) remedial goals' rationales of the domestic legal system are the only relevant rationales for consideration with a view to judicial application.

Abandonment of goal reasons entirely "would drastically diminish our justificatory resources both inside and outside the law"¹⁷⁵, where the foreign right (and the remedy provided under its original context) is recognised by the forum but is not remedied in the same way as it would be if the case were wholly domestic. There is a rebuttable presumption of the remedy to be granted being rationalised according to forum law (and more so where enforcement is argued to be realised in that foreign jurisdiction). Always to rationalise according to forum domestic law is to de-substantiate conflictual remedies. The apparent reason for the primacy of forum law rationales is that foreign remedy rationales are factual (rather than legal or intuitive), and consequently that the substantivity depicted in such rationales is also only factual, such that it must always be considered only to confirm that a remedy exists¹⁷⁶.

Exclusive application of forum rationales can be said to illustrate R. Summers' "authority reasons" where the approximation confirms the equivalence of forum and foreign remedial law in respect of the given cause, "altruistic/egoistic goal reasons" where the approximation merely facilitates essentially straight forward application of domestic law¹⁷⁷. Where the preponderance of contacts is with the given foreign law, the relevance and usefulness of forum rationales and, therefore, of the approximation, is necessarily less; those rationales and the approximation exercise should, in such cases, be displaced by the 'most significantly related legal system'

exception to the application of the domestic *lex fori* inferred at 3.4.2(ii). It should be remembered that "[t]hat *P* is not a principle of mine does not mean that it cannot be a principle at all, not even if I have good arguments which suggest that it is a very bad principle to adhere to"¹⁷⁸. The onus of proof will of course rest on the party seeking to rely on the foreign remedial law.

The foregoing relates the issue of substantive relief more firmly to the issue of double remediability, and makes more cohesive the substantivist arguments¹⁷⁹ about final remedies directed at the single reference thesis¹⁸⁰. The reader may wish to re-read "The Concept of Substantive Relief" at 2.3, especially as it discusses the conceptual and the rational analogy of the new law of conflictual damages which stipulates the application of the *lex causae* to the question of quantification, and as it illustrates rules of the civil law tradition and the right-remedy situations that tradition produces¹⁸¹. The new law of damages and the civil law tradition complete the presentation of the substantivity of final remedies. The single reference thesis' view of remedial law as though that law represents public policy, and not judicial or legal policy, is one which must be questioned and departed from. This is taken up in the next chapter in giving reasons for preferring the objectivity thesis.

The foregoing shows that the single reference thesis' antecedents exclude reasoning other than from rules (i.e., exclude reasoning from conflictual principles), and relies on forum experience in these matters. The single reference thesis could be said to do so "at the expense of wisdom, compassion and a sense of justice"¹⁸². As R. Pound put it:

"rules of law...which are applied mechanistically are more adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises"¹⁸³.

It cannot be gainsaid that remedies, as they operate as substantive *res judicata*, go to the conduct of human affairs. As encapsulated in Rule 17 when applied mechanistically to remedial matters, the single reference thesis

denies that there are relevant standards other than domestic ones, and should, it is to be hoped, be accordingly modified. The conflictual law of remedies has changed, but without manifest recognition of the substantivist implications in those changes; the reference here is to interim relief, to the law of compensatory damages, and to the free enforceability of European Convention judgments. These changes should be brought to bear on the otherwise unattended (and therefore seemingly satisfactory) conflictual law of final remedies generally.

The foregoing arguments can be re-presented thus:

The substantivistic aspects of a final remedy necessitate consideration and/or application of governing principles under the *lex causae*, especially where the merits of the case are perceptibly most closely related to the foreign law in the given case. (POSTULATE E)

The arguments are now complete. The next section, 3.5, serves to remind us of the main postulates which make up the objectivity thesis, followed by 3.6 which contains a statement in formal terms of the inferred modification to Rule 17 in the light of the sum of the foregoing arguments and postulates.

3.5 THE POSTULATES OF THE OBJECTIVITY THESIS

The following is a collection of the postulates so far in the present chapter. They are the bases from which the case proceeds for objectivity in conceiving of the main remedies of private international adjudication.

- I If the question to be addressed by the forum is remedial, then the applicable law should not have to be described as procedural law
- II If remedial law is applicable, then that law should not have to be domestic law
- III The forum can (and should) modify its remedial law, as encapsulated in Rule 17, to permit the application of foreign remedial law

IV Without a 'most significantly related remedial jurisdiction' exception, double remediality is flawed as the main premise to the single reference thesis and should be accordingly reformed

V The forum should acknowledge the proper general extraterritorial limits of its final remedial jurisdiction, and accordingly modify Rule 17, or rectify its final remedial jurisdiction to include consideration and application of foreign remedial jurisdictional rules where appropriate, and accordingly modify Rule 17

VI Pragmatically and theoretically speaking, forum remedial jurisdiction could be coherently exercised to reflect competence generally and to reflect the comprehensive expanse of the forum's jurisdictional rules in particular. In order to achieve this, it is necessary to interpret the precepts of '*lex fori*' and 'procedure'. Doing so clarifies the role and the significance of enforcement jurisdiction *per se*, as well as the need to realise more fully the possibilities of foreign enforcement, in the interests of the rational advancement of the procedural aspects of remedial adjudicative jurisdiction

VII The substantivistic aspects of a final remedy necessitate more substantial consideration of the governing principles under the *lex causae* with a view to the judicial application by the forum of such principles, especially where the merits of the case are perceptibly most closely related to the foreign law in the given case

3.6 THE MAIN POSTULATE OF THE OBJECTIVITY THESIS

The foregoing, at 3.5, facilitates the following formulation as an alternative to Dicey and Morris' Rule 17 as it applies to final remedies and, therefore, as the formal basis for the objectivity thesis argued thus far:

Matters of remedy are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*), subject to the domestic law of the country to which the facts in the given case are most closely related (*lex causae*), and subject to the law of the country of enforcement of any final remedial orders being other than the domestic law of the court wherein the original legal proceedings are taken.

3.7 CONCLUDING NOTE

The essence of the objectivity thesis and its delocalising modifications to the existing law, viz., reference of remedial law to the foreign *lex causae* and to the foreign law of enforcement, are familiar enough to the reader by now. In the course of this chapter, several comparisons and contrasts were made between the respective scopes and consequences of the single reference and the objectivity theses, as were suggestions for choosing the latter, such as the tacit readiness of the legal system for it in its detail.

We are therefore now ready to compare the theses as they represent different broader conceptions of conflictual final remedies within the legal system, particularly as they dictate different adjudication and litigation techniques and expectations.

NOTES TO CHAPTER THREE

1. See generally 1.3, ante (pp. 28 et seq).

2. For a discussion of validity of legal rules, see H.L.A. Hart The Concept of Law (1994), at pp. 100 et seq. Hart determines the validity of a legal rule by using contextual criteria specified by a "rule of recognition" (pp. 94-96) the operation of which is examinable both internally (why the *propositus* obeys/recognises the rule as a rule of law) and externally (factual recognition of the rule as a rule of law). In this context, the existence of the legal system and the justifying and illustrative case law together 'validate' Rule 17; that is, Hart's distinction between a "set" of rules and a "system" of rules (at p. 98), and, therefore, that law is a system of rules, supports this incontrovertible aspect to Rule 17 (cf. H. Kelsen A Pure Theory of Law (1945), at p. 111: "The rule that judicial decisions have the force of law is legally ultimate and undervived..."). An argument, based on J. Raz's view that there can be more than one Hartian rule of recognition in one legal system, first referred to at 2.3.2.1 ante (n. 76, pp. 90-91), is developed at 3.4.2B post (pp. 150-156), as substantivist argument.

Rule 17 can be observed as Karl Llewellyn would have: The Common Law Tradition (1960), pp. 178-181; i.e., in terms of reckonability of result of applying the rule and of the normative, rather than supervisory, function of the Rule (and thus: "[i]f the application of the seemingly apposite [R]ule is compatible with sense, then the use in the deciding of *both* sense and the [R]ule narrows the spread of possible decisions and significantly increases the reckonability not only of the upshot but also of the decisions which will be taken by the ground on which the decision will be rested. To know these both limits the field of doubt and sharpens the eyes of enquiry...If application of the seemingly apposite [R]ule is incompatible with sense, then reckonability of either upshot or direction of the "ground" of decision depends on factors apart from the rule, sense, or both. To know this is to escape futile upset and to recognise instead the presence of danger and the need for exploration "outside" the simpler areas of inquiry...[P]robability in prediction will vary with the technical excellence of the rule itself- i.e. of tailoring to purpose- and...ease in such forecast will also increase with any increase in the accessibility of the sense concerned, the simplest access being by way of sense which speaks of and from the rule itself"). This means that as a formally valid legal rule, it must necessarily be viewed "both in regard to what is expected of [it] and in regard to what should be".

Alf Ross viewed "valid law" as an abstract set of normative ideas which serve as a scheme of interpretation for the phenomena in action": Directives and Norms (1968), p. 18. This view throws the determination of the validity of the particular law fairly wide, so that, assuming for the sake of discussion that Ross's postulates are acceptable, Rule 17, for its own sake and in its own right, attracts critical comment dictated especially by its practical applications, before it can be taken as satisfactory.

Ronald Dworkin's distinction between 'rules', 'principles' and 'policy' (Taking Rights Seriously (1968) at pp.22 et seq) assists the present discussion particularly if the views, taken in the interests of descriptive soundness, that Rule 17 case law reveals a judicial rule of practice and that identified foreign remedial law contains no morality are accepted. Dworkin's emphasis that law is not only rules draws attention to the need to look

beyond the form given to conflictual remedial law by Rule 17, to look at the principles and policies (e.g. as indicated in the Editorial Comment to the rule; see 3.2.2 post, pp. 109-111) that accompany the Rule, before any overall view can be taken of it as *the law*.

Other commentators/theorists' views are considered and applied in 3.3, post, notably MacCormick, Twining, Baldwin and Duncan Kennedy.

3. See Chapter One, n. 6 (p. 33), and 2.3.2 ante (pp. 47-49). For the tort position, see n. 28, Chapter One (p. 37).

4. *Op. cit.*, at pp. 173-174.

5. Flack v Holmes (1820) 1 J.& W. 405; De la Vega v Vianna (1830) 1 B.& Ad. 284; Liverpool Marine Credit Co. v Hunter (1868) L.R.3 Ch. App. 479, at pp. 486-487, Lord Chelmsford L.C., approving Lord Tenterden in Vianna: "A person suing in this country must take the law as he finds it. He cannot, by virtue of any regulation in his own country, enjoy greater advantages than suitors here, and he ought not, therefore, to be deprived of any superior advantage which the law of this country may confer", and approving Lord Brougham in Don v Lippmann 5 Cl.& F. 1, at p. 13: "The law...is well settled in this country...that whatever relates to the remedy to be enforced must be determined by the *lex fori*...I do not, therefore, see how Equity could properly interfere to restrain...actions which, however oppressive..., arose out of remedies employed by the plaintiff for the recovery of his debt, of which the law entitled him to avail himself".

The dicta do not supply a reason why the reference is automatically made exclusively to the *lex fori* though they indicate the implications of the reference, nor do the dicta indicate why the law to which the action for a given final remedy is referred has to be the forum domestic law. The reasons are the forum's practical convenience, rather than any reasons explicable in terms of other principles.

6. Baschet v London Illustrated Standard Co. [1900] 1 Ch. 73 (a breach of copyright case), at pp. 77-78: by Kekewich J.: "[I]t is a very large step...to say that the right to sue, once admitted, the plaintiff is to have no other remedies in the country in which he sues than he would have in the country of origin...I cannot believe that the Court has to consider the remedies of another country. It would be impossible to work two systems of jurisprudence together in that way". But see the part of the Editorial Comment in the paragraph beginning "Generally speaking...", particularly where there is reference to harmonisation; Chaplin v Boys [1971] A.C. 356, at p. 394 (Lord Pearson).

7. Cf. Warner Brothers Pictures Inc. v Nelson [1937] 1 K.B. 209 (the relevant facts are given in the main text above), at p. 219 (Branson J.): "There is all the difference in the world between declining to make an illegal covenant good by neglecting that which makes it contrary to law and exercising a discretion as to how far the court will enforce a valid contract

by injunction". The question begged is 'Why refer liability established under a foreign law to the forum's domestic context or to domestically explicated principles governing the availability of a given remedy if the remedy is not to be enforced in the forum's territory?'. This question did not arise in this case.

8. McMillan v Canadian Northern Railway Co [1923] A.C. 120 (P.C., an appeal from the Court of Appeal of Saskatchewan). This decision involved the appellant, an Ontario resident injured, in the course of employment by the respondent company, because of a fellow employee's negligence. He sued in Saskatchewan where there was no common employment defence. Under Ontario's Workmen's Compensation Act, he was entitled to compensation determined by the Act, plus Ontario had a common employment defence. It was held in the leading judgment delivered by Viscount Cave that the action was not maintainable since the negligent act was justifiable in Ontario: this is an application of the first limb of the test of double remediability, which essentially follows the tort double actionability rule, discussed at 3.4.2 post (pp. 129-134). Because the injury was not actionable and/or remediable under the *lex delicti*, the action did not stand in the forum.

This application of the single reference thesis should withstand the arguments hereafter, but for reasons not addressed in the judgment, namely, that it was an appeal from the jurisdictionally proper forum, which was also the jurisdiction most closely connected to the action.

9. Phrantzes v Argenti [1960] 2 Q.B. 19, at p. 35. This is the second of the requirements of double remediability. Recall the discussion at 2.3.2 of foreign rights, especially as to their place within a normative system (pp. 50-53).

The single reference thesis fails to reconcile its reconstitution (by adoption) of such rights with the aim of upholding "the right according to its nature and extent as fixed by the foreign law", and, strictly speaking, therefore does little more than pay lip service to that nature and extent. The only redemption is in the fact that the forum will not give relief where to do so transforms the foreign right.

10. *ibid.*, at p. 36.

11. Minister of Public Works of Kuwait v Sir Frederick Snow & Partners [1983] 1 W.L.R. 818, (involving an arbitral award) at p. 829 (Kerr L.J.): "[T]he presumption against a retrospective construction does not apply to statutes which are procedural in their nature; in relation to procedural statutes the presumption is the other way. However, a statute dealing merely with the recognition and enforcement of prior rights would be classified as procedural under our rules of private international law".

No objection is taken to the single reference thesis in this regard. Practical enforcement of a final remedial order by way of further ancillary/judgment-executing orders can only be for the domestic rules of the

forum of enforcement. Such enforcement summons procedural rules properly so-called.

12. i.e., a forum court is not required to make an order unknown to its legal system. This is in line with the position taken by this critique of the single reference thesis in 1.3: "No case is to be made for novel remedial forms. The case is for novel rationalisations of the availability of the existing forms" (p. 31).

13. at p. 170.

14. The effect of this comment is that Rule 17 is not necessarily to be interpreted literally. Even so, the case law on the application of the Rule to remedies indicates that it is often interpreted in this way.

15. at p. 169.

16. at p. 172.

17. See Torts in Private International Law (1978), at p. 195-196.

18. Op. cit., at p. 4.

19. The case against double remediability (see 3.4.2(i) and (ii) post (pp. 129-134)) is strengthened by the current law which treats contract damages differently (on the basis of the 1990 Act, s. 10(1)(c)) from tort damages. With the tort double actionability rule still in force, albeit with the 'most significant relationship' exception, the double remediability rule will most likely also remain in force to the extent that it follows the tort liability rule. In fact, Morse's comments are made in the context of tort conflicts. Cf. the House of Lords Tort Bill discussed at n. 86, post.

20. Cf. Slater v Mexican National Railway Co. 194 U.S. 120 (1904); the reader may wish to recall n. 76, Chap. 2.

21. Op. cit., at p. 4.

22. This extract puts some balance into the discussion since it addresses contract remedies not tort remedies.

23. A selection of the case law includes Liverpool Marine Credit Co. v Hunter (1868) L.R.3 Ch. App. 479; Phillips v Eyre (1870) L.R.6 Q.B. 1; Baschet v London Illustrated Standard [1900] 1 Ch. 73; Hansen v Dixon (1906) 23 T.L.R. 56 (breach of marriage contract); McMillan v Canadian Northern Railway [1923] A.C. 120; Warner Brothers v Nelson [1937] 1 K.B. 209; Kohnke v Karger [1951] 2 K.B. 670; D' Almeida Araujo Lda v Sir Frederick Becker & Co. Ltd. [1953] 2 Q.B. 329; Phrantzes v Argenti [1960] 2 Q.B. 19; Chaplin v Boys [1971] A.C. 356; Church of Scientology of California v Commissioner of Police (1976) Sol. J. 690; Coupland v Arabian

Gulf Oil Co. [1983] 1 W.L.R. 1136, affirmed at 1151; Khalij v Woods (1985) 17 D.L.R. (4th) 358; Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc. [1990] Ch. 75; Red Sea Insurance Co. Ltd. v Bouygues SA & Others [1994] 3 All E.R. 749.

See nn. 5 to 12, ante for sketches of and comments on some of these cases.

24. N. MacCormick, Legal Reasoning and Legal Theory (1994), at pp. 21-22: "A deductive argument is one which purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the 'premises' of the argument. A deductive argument is valid if, whatever may be the content of the premisses and the conclusion, its form is such that its premisses do in fact imply (or entail) the conclusion. By that is meant that it would be self-contradictory of anyone to assert the premisses and at the same time to deny the conclusion"; in the context of the discussion in the main text, this means that the authority of the case law on Rule 17 affirms that it is quite unnecessary to discuss critique of MacCormick's postulation that legal rules such as Rule 17 are justified deductively. Later, at p. 24: "[T]he whole argument could be expressed symbolically as:

(A) In any case, if p then q

(B) In the instant case p

(C) Therefore, in the instant case, q ".

P represents the 'if' proposition in both the postulates in the main text above, and Q the 'then' propositions therein. This also conforms to W. Twining's x and y in his "Restatement of Grand Style and Formal Style as Theoretical Models" in Karl Llewellyn and the Realist Tradition (1973), at p. 213, which is discussed and applied presently.

See also, J. Wroblewski, The Judicial Application of Law (1992), p. 204: "The final decision is justified by the fractional decisions and, thus, its justification is a conjunction of the justifications of the fractional decisions" (the "fractional decisions" are (A) and (B) as simply expressed in MacCormick's model), and previously at p. 189: "[I]t is only an analysis of the deep structure of the justification of the final decision that proves its non-identity with the decision of choice of consequences." Cf. the discussion in 3.2.1 (pp. 108-109) of "competing versions of the rule" in relation to MacCormick's concession regarding 'the problem of interpretation'. The sense there is much the same as Wroblewski's "choice of consequences" here.

And see C.L. Hamblin, Fallacies, (1986), at p. 229: "[A]n argument is more than just a collection of statements. ' P , therefore Q ' states P and states Q , but there are other ways of stating P and Q that do not amount to arguing from P as a premiss to Q as a conclusion...When you choose say ' P , therefore Q ', the important feature of your utterance is that, as well as stating P and stating Q , you *adduce* P in support of Q .

Now it is important to notice that when P is adduced in support of Q , it may actually *not* support Q ...Although the existence in some sense, of a valid implication may be necessary condition of an argument." And at p.

233: "[C]onsider 'Q, because P' to emphasise passage from premise to conclusion irrespective of truth or falsity of premise or conclusion. If P then Q is hypothetical not real until P and Q are realised substantially".

See also A. Soeteman, Logic in Law (1989), at pp. 1-22, especially at p. 20 (8.5): "a. All argument is open to formal analysis; based on that it can among other things be reconstructed as compelling and noncompelling; b. Moreover, all argument can be treated to a nonconformal approach regarding its convincingness, that is as to the applicability of its premises, and in noncompelling argument, of its implicit premisses; c. Formal and nonformal logic complement and have need of each other; they are not competitors". In addition, see A. Aarnio The Rational as Reasonable: A Treatise on Legal Justification (1987); J. Bell in N. MacCormick and P. Birks (eds.) The Legal Mind: Essays For Tony Honore (1986), pp. 45 et seq, especially at pp. 60-65 on rationality, predictability and accountability in legal reasoning; J. Stone Legal System and Lawyers' Reasonings (1964), especially at pp. 41-60; R. Alexy An Introduction to Legal Argumentation (1989), especially at pp. 269-271.

25. Op. cit., at pp. 67-68 and 69-70 respectively for the passages quoted. Cf. the references in n. 3, ante, for 'rival versions of the [R]ule'.

26. Cf. D.M. Walker (1951) 63 Jurid. Rev. 1 ("The Theory of Relevancy"), at pp. 3 and 14. Cf. also, Leflar at n. 52.

27. op. cit., at p. 99 (see also p. 86: "[I]t seems that appreciation of the necessary universality of justifying reasons for the decision of particular cases can enable us clearly to explain otherwise puzzling features of the doctrine of precedent...[Q]uite apart from any doctrine of precedent in any official or binding sense, the constraints of formal justice obligate a court to attend to the need for generic rulings, as essential to the justification of particular decisions." Cf. the works cited in n. 4, ante.

28. This means cases decided/decidable by the application of strict rules/principles of law, i.e., without the need to resort to extralegal/policy-based solution of the dispute in hand.

29. Cf. n. 7, ante. Also, J.E. Levitsky (1994) 42 A.J.C.L. 347 ("The Europeanisation of the British Legal Style"), at pp. 368 et seq- "The Movement Toward Substantive Principles"..pp. 379 et seq-"A Common Law Civil Law Convergence?".

30. This is discussed in 3.4.2(i) and (ii) post (pp. 129-134). See, e.g., Lord Wilberforce in Chaplin v Boys [1971] A.C. 358, especially at pp. 389F-G and 391E-G and Lord Slynn in Red Sea Insurance Co. Ltd. v Bougues SA & Others [1994] 4 All E.R. 464, cf. n. 28, Chap. 1 (p. 37).

31. The model referred to here is contained in Karl Llewellyn and the Realist Movement (1973), at p. 213 ("Restatement of Grand Style and Formal Style as Theoretical Models"). Twining discusses legal rules elsewhere, e.g., in

How To Do Things With Rules cited in n. 34, post, where he defines a rule in terms inter alia of its attribute of "fixed verbal form". The Twining model adopted in the main text gives a better context for analysis of Rule 17, as soon will be clear, than does other of his discussions of rules.

32. R. Baldwin (1990) 53 M.L.R. 321 ("Why Rules Don't Work").

33. Baldwin, loc. cit., at pp. 321-322.

34. W. Twining and D. Miers, How To Do Things With Rules (1985), p. 127. The new edition (1991) contains the definition of a rule amended (as italicised) as follows: "a general norm *mandating or* guiding conduct...", at p. 130.

35. Cf. C.S. Diver (1985) Yale L.J. 65.

36. Cf. Diver, again.

37. Cf. n. 79, post. Regarding semantic/semiotic indeterminacy, see generally, e.g., G. Graff, (1982) 60 Texas L.Rev. 405 ("Keep Off..." at p. 413: "The beliefs that meanings are inherent in utterances and texts and that interpretation is a business of scooping them out and claiming a degree of certainty about them that's immune to counterargument, revision and refutation- these beliefs die hard. But the remedy for bad theories of interpretation is better theories..."); F. Schauer (1990) 3 Can.J.L.&Juris. 187 ("Rules and the Rule-Following Argument") and (1989) 97 Yale L.J. 509 ("Formalism..."); D.O. Brink (1989) 2 Can.J.L.&Juris. 181 ("Semantics and Legal Interpretation"); and M. Douglas The Future of Semiotics (1982), e.g.: "In legal practice it is usually all right to treat laws as if they were solid things whose effects have definite spatial boundaries and material consequences. When a semiotician starts examining law as a patterned system of meanings their insubstantiality becomes evident, and the inquiry presses on both jurisprudence and epistemology".

38. The discussion of developments in other cognate (i.e., other procedural) matters to which the Rule also applies furthers the central and the subsequent arguments' aims.

39. D. Kennedy (1976) 89 Harv. L. Rev. 1685 ("Form and Substance in Private Law Adjudication").

40. loc. cit., at p. 1687.

41. Loc. cit., at pp. 1687-1694. At pp. 1701 et seq., Kennedy demonstrates the types of relationship between 'form' and 'substance' viz., (i) contextualization of the rule (i.e., including the legitimacy of judicial action through the form of the rule, p. 1707), and (ii) 'form' as 'substance', at pp. 1710-1713. This aspect of his model of rules usefully emphasises what is

referred to, especially at 2.3 (p. 46), as the substantivistic aspects of remedies. Cf. Baldwin, last paragraph of 3.3.4 (pp. 117-118).

42. For a discussion of reductionism and legal concepts (in the context of the main text above, the concept can be described as 'conflictual relief'), see M.D.A. Freeman Lloyd's Introduction to Jurisprudence (6th ed., 1994), at pp. 743-4, especially at p. 744: "[R]eduction ignores the normative factor. Hence, quite apart from the practical inconvenience of doing without this vital form of legal shorthand [i.e., concepts/formalism]..., no amount of factual analysis is capable of providing a total substitute..."

See also L.L. McDougal III (1990) 38 A.J.C.L. 143 ("Private International Law: *Ius Gentium* Versus Choice-of-Law Rules or Approaches").

43. See 2.4.2.1, ante (pp. 60-61).

44. See 2.3, ante (pp. 46 et seq).

45. See 2.5.2, ante (pp. 66 et seq).

46. This illustrates a case, limited to the area covered in this dissertation, for a remedy-based justification for forum-shopping. This will be returned to later at 3.4 (pp. 138-139). See Editorial Note (1990) 103 Harv. L. Rev. 1677 ("Forum Shopping Reconsidered").

47. i.e., as responding to one of the two respective and opposite dispositive conditions of systemic altruism and systemic individualism. It will be shown in Chapter 4 that remedial adjudication under the single reference thesis is far too altruistic, and unnecessarily so, given that forum jurisprudence indicates otherwise (pp. 207-208).

48. Loc. cit., at pp. 1731-1737. The parentheses that follow in the main text are conflictual applications (made by the central argument in the main text) of Kennedy's framework discussed by him at pp. 1731 et seq. For a critique of Kennedy's analysis, see A. Altman Critical Legal Studies: A Liberal Critique (1990), at pp. 106-117, and 120-123.

49. Cf. n. 2, ante; see also H. Hohmann (1990) 38 A.J.C.L. 143 ("The Nature of the Common Law and the Comparative Study of Legal Reasoning"), at pp. 146-148.

50. See generally A.-M. Burley (1992) 92 Colum.L.Rev. 1907 ("Law Among Liberal States: Liberal Internationalism And the Act of State Doctrine"); at p. 1909: "International law, whether public or private, does not distinguish among sovereign states", she argues that it should ; at p. 1911: "According to the liberal internationalist model, the interpretation of the act of state doctrine as a conflicts doctrine is most consistent with its application to liberal states...Within the liberal zone of law, the price of a general rule of recognition and enforcement of foreign law is the submission of the specific law in question to some form of minimal review for consistency with

fundamental public policy and congruence with the balance of competing national interests". At p. 192: "To test the predictive value of the...model,...differing sets of considerations...consistent with the interpretive framework...can also be used to predict or explain circumstances".

See also P. Gottwald (1990) 9 Civ.J.Q. 61 ("Limits to Extraterritorial Effects of Judicial Acts"), at e.g., p. 73: "Jurisdictional conflicts can only be avoided if solutions to the different cases can be found through mutual international understanding".

51. L. Collins (Gen. ed.) Dicey and Morris' The Conflict of Laws (12th ed., 1993), at p. 5. Cf. Anton Private International Law (2nd ed., 1990), at pp. 40-41. Cf. Cheshire and North at 3.2.4, ante (pp. 112-113).

52. *op. cit.*, at pp. 4-5. The subject-matter jurisdiction under the Common Law Procedure Act 1852, by which such jurisdiction was equated with choice of law, should be noted specially. See C.G.J. Morse, *op. cit.*, at p. 14: "The common law tendency to concentrate on problems of jurisdiction is not reflected in continental practice."; and J.J. Fawcett (1991) 44 *Current Legal Problems* 39 ("The Interrelationships of Jurisdiction and Choice of Law in Private International Law"), generally and at p. 58: "[T]here need to be separate rules for jurisdiction and choice of law"; see also A. Briggs (1987) 36 *I.C.L.Q.* 240 ("Which Foreign Judgments..."). This is consistent with the position about the 'natural' inclination to interpret 'procedure' widely, in the third of the further Editorial Comments to Rule 17, 3.2.2 ante (p. 110). See also C. Walsh (1994) 73 *Can.B.R.* 394, at pp. 406 (about the equation of service of process with *in personam* jurisdiction), 408 (identifying the 1852 Act as expansionist for its time), and 410.

See H.E. Yntema (1957) 35 *Can. B. Rev.* 721 ("The Objectives of Private International Law"), at p. 723: "[T] classical conception that conflicts rules delimit the respective competence of the existing system of territorial law without regard to their substantive content is opposed, whether on the ground that such rules "incorporate" the applicable domestic rules of foreign law, or because they delimit the application, and form part, of the local substantive law, or because they refer to foreign law as fact."

At pp. 734-735, he offers a list of desirable objectives of private international law as follows: the uniformity of legal consequences, the minimization of conflicts of laws, the predictability of legal consequences, the validation of transactions, the relative significance of contacts, the recognition of the "stronger" law (i.e., e.g., the *situs* rule for cases of title to foreign land), cooperation among states, respect for the interests of other states, justice of the end results, respect for the policies of domestic law, the internal harmony of the substantive rules to be applied (this dissertation draws upon this point in arguing that the development of remedial rules for contract damages via the 1990 Contracts Act supplies a basis/reason for considering tort damages in similar light), the location or nature of the transaction, private utility, homogeneity of national law, and ultimate recourse to the *lex fori*. Cf. E.E. Cheatham and W.L.M. Reese (1952) 52

Colum.L.Rev. 959 ("Choice of the Applicable Law") for a similar list much relied upon by American commentators.

At pp. 735 et seq., he offers the principles of "security" (i.e., equal applicability of rules) and "comparative justice" (to complement the previous principle by individuating cases).

R.A. Leflar (1981) 81 Colum.L.Rev. 1080 ("The Nature of Conflicts Law"), at p. 1090: "The nature of conflicts law, and particularly of the law of choice of law, inheres as much in what the courts are free to do, and therefore may do, as in what they have previously done or said", and at p. 1094: "Conflicts law has a broader scope of relevancy than do most of the law's standard subjects. It deals with nearly all the problems that all law deals with, in every legal area. It deals with them, or should, not just in terms of a choice of jurisdiction (the old technique), but in terms of a choice between laws where substantive content is relevant to the choice that is made."

Bearing in mind the jurisprudential and part-substantive context given to Rule 17 in the main text at 3.2.1 (pp. 104-109), Leflar's reference here to relevancy of substantive content of rules is welcome.

53. But see A.J.E. Jaffey (1982) 2 O.J.L.S. 368: ("The Foundations of Rules for the Choice of Law"), at p. 368: "...the idea that a country or legal system can have an interest or concern in their application is misconceived. Similarly, if the policy of a rule is to do justice to parties to a dispute, that policy can tell us nothing about the rule's application in cases involving foreign elements. Rather, the applicability of such a rule in conflict cases depends on principles of justice germane to the conflict of laws".

The concluding sentence is acceptable, but not the prior submissions. At worst, Jaffey has to all purposes equated 'policy interest' with 'public interest', and therefore excludes increased applicability of a rule (domestic or foreign) whose policy fulfils the common law sense of justice; if the rule does not meet the common law sense of justice, it simply becomes less relevant to and applicable in the conflict case in which it is referred to. It is not thereby extinguished.

This interpretation of his view is confirmed by him at p. 376: "A given...rule is not designed to protect one party against the other, but to do justice between them, and the justice of the rule is not conditional on either party belonging to the country whose rule it is, or the facts having any particular connection with that country". Thus, if 'interest protection' and 'doing justice' can be interchanged, the concluding sentence stands despite its antecedents- he goes further at p. 376: "[T]he interest of a country cannot be a factor...unless the rule is one which is designed to protect the public interest", and at pp. 77 et seq, with a useful list of "Principles of Justice at the Choice of Law Level", comprising the effectuation of parties' intention to create legal relations, justice according to a party's country's rule, liability limited to *lex causae* liability, certainty and predictability, uniformity, convenience, the *lex fori*, and public policy (i.e., justice and morality).

54. P.M. North and J.J. Fawcett Cheshire and North's Private International Law (12th ed., 1992), at p. 4 (also at p. 4): "The recognition of a foreign law in a case containing a foreign element is necessary for at least two reasons. In the first place, the invariable application of the law of the forum, ie the local law of the place where the court is situated, would often lead to gross injustice...Secondly, if the court is to carry out in a rational manner the policy to which it is now committed...it must in the nature of things take account of relevant foreign law or laws..." (Cf. the wording of Rule 17).

This is a short statement of what constitutes the arguments for conflictual analysis of the main final remedies at 3.4.2 post (pp. 129-156); i.e., the simple fact that the case is a conflict case should create a rebuttable/affirmable presumption for an international sense for remedies.

See also J.J. Fawcett (1984) 47 M.L.R. 650 ("Policy Considerations in Choice of Law"), discussing multinational policy considerations, party policy considerations and jurisprudential policy considerations, and presenting the decision in Chaplin v Boys as one based on judicial policy.

55. op. cit., at p. 5. See L. Kramer (1990) 90 Colum.L.Rev. 277, at p. 283: "A choice of law problem exists only if the different laws *relied* on by the parties can plausibly be construed to govern the case". A cross-reference to the American Law Institute's First Restatement of the Conflict of Laws (1934), Section 1585 (which is effectively the same as Rule 17 in its application to procedural matters) attracts Kramer's comment at the same page: "This rule is justified on grounds of necessity: to achieve "theoretically complete uniformity of right and duty", the forum should adopt the procedures of the state whose substantive law is to determine the outcome, but the difficulty of learning for procedural rules makes this impractical". But cf. Kramer, at n. 76, post.

Clearly, these are views taken seriously in this dissertation (especially in connection with the claim that final remedies attract conflictual analysis, subject, practically speaking, inter alia, to reliance on and proof of relevant foreign remedial law by the necessary party).

These views are taken seriously in the light of further explications by Kramer thus, at p. 325: "[t]he classification of a state's procedural rules depend on their purpose", at p. 326: "Conflicts between the forum's procedural policies and another state's substantive policies are especially likely with respect to rules that serve both substantive and procedural purposes" (Rule 17 is one such rule), at pp. 327-329: "A [forum's] preference for forum procedural interests contrasts sharply with the treatment of substance/procedure conflicts...This conclusion rests on the assumption that states generally prefer substantive to procedural policies. After all, the ultimate purpose of procedural law is to implement substantive law accurately and efficiently. Moreover, when conflicts arise in domestic cases between substantive and procedural laws, the usual solution is to favour the substantive rule".

Kramer is returned to in the argument for the applicability of foreign law, post. All that comes between the single reference thesis and the argument here is acceptance of the proposition that final remedies be

analysed conflictually, as other procedural matters now are and as substantive matters have been.

56. *op. cit.*, at p. 4 (Cf. n. 52, ante). The italics are added here to emphasise 'avoidance' rather than 'evasion' of conflict in the consideration and the conception of questions arising in the course of private international adjudication. This is avoidance of conflicts of law, not by the parties (for which see J.J. Fawcett (1990) 49 C.L.J. 44 "The Evasion of Law and Mandatory Rules in Private International Law"), but in the formulation of the rule/position of private international law on a given question.

57. Cf. nn. 52 and 54, ante.

58. i.e., not exclusively to its domestic law (though the positions under the domestic law can be referred to for the sake of comparison). Problems could arise when, in respect of so-called wholly procedural matters such as the principal final remedies, 'the forum's jurisprudence' is co-extensive with its jurisprudence in ordinary domestic cases.

See Cardozo J. in Loucks v Standard Oil Co. of New York (1918) 224 N.Y. 99, at pp. 110-111: "If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare...The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal", cited with approval by Lord Parker C.J. in Phrantzes v Argenti [1960] 2 Q.B. 19, at pp. 33-34.

Cf. n. 52, ante (Jaffey's list of principles of justice for choice of law).

See also H. Batiffol Aspects Philosophiques du Droit International Prive (1956), where he describes conflict jurisprudence in terms of the coordination of the incidence of legal systems in conflict cases by reference to general ideas of national law, social facts and doctrinal conceptions of the ends of justice as defined by individual, national and international values, and, further, in terms of the bond between philosophic analysis and the tradition of identifying law with a legal system.

59. See F. Harrison On Jurisprudence and the Conflict of Laws (1919), at pp. 129-130: "Private International Law marks the limitation of legal rules in respect of *place*...Private International Law determines the limits of place...The *lex fori* always must establish a jurisdiction in some way, and in Private International Law it determines cases by reference to some other rules than its own" (this also goes to the applicability of foreign law, and should be borne in mind). Harrison's re-definition of private international law as "intermunicipal law" (pp. 130 et seq), as "the law of compound jurisdiction" (p. 131), confirms, at least, the 'subset' description in the main text above, though this definition is open to criticism.

60. These are the bases respectively of the postulates at 3.5 and 3.6 post (pp. 156-157). For the basics of "jurisdictional propriety", the reader may wish to recall the closing paragraph of 2.4.2 (p. 60).

61. See e.g., text in 2.2 at n. 5 (p.39), nn. 16-22 (pp.41-42); in 2.3 at nn. 63-65 (p.48-49), 80 (p.51); in 2.4 at nn. 87 (p.53) and 145 (p.63); and in 2.5 at nn. 163(p.65), text in 2.6 at n. 186(p.70). These should be reviewed here for an overview of this general argument against domestic contexts.

62. See e.g., C.G.J. Morse, *op. cit.*, at p. 287: "The purpose of a rule...is intimately connected with the value a society places on [the issues the rule addresses]...The state which has the greatest interest in effecting the purposes of its law is the state where both parties reside".

This implies correctly that the forum domestic law is displaceable for being fortuitous. This should be interpreted accurately, not only in the context of substantive issues, but also of jurisdictional ones, e.g., domicile, strength of connection with forum, justiciability.

63. See J.J. Fawcett, (1990) 49 C.L.J. 44 (cf. n. 56), mandatory rules of the legal system, e.g., that the exercise of jurisdiction by the forum is unassailable before any other forum, subject to contrary positions deriving from E.E.C. law.

Other rules from which derogation is impossible would be those which regulate the conduct of the trial, strictly speaking: cf. Dicey and Morris (12th ed., 1993) at p. 170 on the primary object of Rule 17 "to obviate the inconvenience of conducting the trial of a case containing foreign elements in a manner with which the court is unfamiliar..."

64. See e.g., Yntema, *loc. cit.*, at p. 730: "the technique of policy analysis" , cf. E.G. Lorenzen (1924) 33 Yale L.J. 736 ("Territoriality, Public Policy and the Conflict of Laws"), at p. 745: "[T]he adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself"; F.V. Harper (1947) 56 Yale L.J. 115 ("Policy Bases Of The Conflict of Laws").

65. See F.A. Mann (1950) 3 I.L.Q. 60 ("The Proper Law Of The Contract"), at p. 68: "To allow the parties to choose the localising elements, yet to restrict them in their choice of law, is inconsistent".

Cf. P.M. North (1992) 3 K.C.L.J. 29 ("Choice..."), at p. 37, citing Mann, above: "[This argument] could be taken to support freedom of choice everywhere...More specifically, it would support some freedom of choice where the general choice of law rule is based on the idea of closeness of connection..."; see also L. Kramer, *loc. cit.* at n. 55, *ante*.

66. See, e.g., Lord Wilberforce in Chaplin v Boys [1971] A.C. 356, at p. 391E-G.

67. The contexts are independent of one another, and respectively also independent of non-domestic/transjurisdictional contexts for conflictual final remedial adjudication.

68. This much is tacit even in the expression of the single reference thesis (3.2.2, ante); see also Morse's comments (3.2.3) and Cheshire and North's comments (3.2.4) (pp. 109-113).

69. The important point is that foreign remedial law is frequently pleaded and proved by the litigants, and is considered judicially but never applied. The argument here is that adjudication should go further than merely referring to foreign law for the purpose of determining whether or not the particular foreign law makes remedies available (as under the 'foreign remedy' limb of the test of double remediability as expressed in 3.2.2 ante (p. 109), and addressed in 3.4.2 post (pp. 129-134)), and as far as actually applying foreign remedial rules, as the justice of the case may require, e.g., in the interests of an effective and realisable final remedial order to be enforced in the jurisdiction which has supplied the *lex causae* and which is the jurisdiction in which both litigants habitually reside.

In no way is it proposed here that foreign remedial orders/forms be adopted by the forum. What is proposed is that foreign remedial rules may be considered in rationalising the availability of the orders which must necessarily be English, either because the foreign rules are part of the substantive liability rules or because foreign remedial enforcement rules have to be considered in cases of foreign enforcement of the forum order.

In this connection, recall the "obligated/protected defendant" principle discussed at 2.4.2.2 (p. 61), and the "Metliss and Adams approach", in 2.5.2, ante (pp. 68-69).

See, e.g., nn. 55 and 63 and accompanying texts.

70. Cf. generally 2.5 (pp. 64 et seq).

71. See C.G.J Morse, Torts in Private International Law (1978), at p. 286: "The state which has the greatest interest is the state where both parties are resident".

72. Cf. n. 63.

73. See Yntema, loc. cit., at pp. 728-729.

74. See P.M. North (1992) 3 K.C.L.J. 29, at p. 30: "The simplest way in which choice is exercised to determine the law to be applied or whether a court is to have jurisdiction is by the parties actually choosing by agreement the governing law or selecting one or more countries before whose courts any litigation is to take place." Otherwise weak justifications for applying forum domestic law (e.g., convenience, expense and the need to prove foreign law) can only be strengthened (detrimentally) by unsatisfactory rules on remediability such as Rule 17.

At pp. 34-35: "[R]eliance on this pleading device can provide a valid example of freedom of choice, albeit one which is more often implicit than explicit".

75. This makes sense *and* reciprocates with the position, under the single reference thesis, by which only the domestic *lex fori* can possibly regulate the method of enforcement of remedial orders: see Minister of Public Works of the Government of Kuwait v Sir Frederick Snow & Partners and Others [1983] 1 W.L.R. 818, at p. 829. It also strengthens the case for the law of the place of enforcement of the English remedy/remedial order, and is returned to in 3.4.2A, *sub* 'extraterritoriality...'.

Cf. the policy against interference with another forum which is pervasive in 2.2, ante (pp. 39-46).

76. Loc. cit. at nn. 55, ante, at pp. 328-329. See the passages at n. 53. The traditional approach he refers to in the first paragraph of the passage has been rejected in the area of damages, but is succinctly stated by Lynskey J. in Kohnke v Karger [1951] 2 K.B. 670, at p. 677: "The principles upon which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts". See also Fawcett, at n. 63, ante.

Other remedies are still governed by this type of restrictive view; see e.g. Lord Brougham's dicta in Don v Lippman (1837) 5 Cl.& F. 1, at p. 13: "[W]hatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made...I do not, therefore, see how Equity could properly interfere to restrain actions which, however oppressive..., arose out of remedies employed by the plaintiff..., of which the law entitled him to avail himself". Other remedies should, in the interests of consistency and coherence in the exercise of remedial jurisdiction, be treated in the same way as compensatory damages have been.

77. See From Principles to Pragmatism: Changes in the Judicial Process and the Law (1978). At p. 13: "Few [examples of the move away from the hortatory to the dispute-settling function, away from principles towards pragmatism], perhaps, are as extreme as the modern rule of conflict of laws that, in the absence of express choice, the law governing a contract is that which the contract has the closest connection...Is that a rule, or, in truth a blanket discretion?"; and at p. 23: "The weakening belief in the importance of the hortatory effect of the judicial process has been accompanied by, and has surely been part cause of, a change in the sense of justice itself".

78. (1981) 97 L.Q.R. 224 ("From Principles To Principles"), at p. 251: "Professor Atiyah's thesis seems to deny the legitimacy of the historical process of judicial activity from which "principles" (or rules) emerge", and at p. 253: "We should not...exalt "principles" as the badge of legitimacy of the judicial role and of the very nature of law, and in the same breath decry the process of gestation through which principles appropriate to changeful

conditions must pass. To decry as "pragmatism" the visible signs of their gestation is to diminish "principles" themselves, unless it be to pretend that when all else is changing the law itself can stand still."

79. An extemporised comparison can be drawn for these purposes between the present version of Rule 17 and the version in previous editions of the book (e.g., the 6th edition, 1949, at pp. 859 et seq, Rule 193, as it was then):

"All matters of procedure are governed wholly by the local or domestic law of the country to which a court wherein an action is brought or other legal proceeding is taken belongs (lex fori).

In this Digest, the term 'procedure' is taken in its widest sense, and includes (inter alia)-

(1) remedies and process;

(2) evidence;

(3) limitation of an action or other proceeding;

(4) set-off or counterclaim."

Curiously, the Editorial Comment reads, inter alia, that "...if [a particular foreign law] extinguishes the plaintiff's right..., it affords a complete defence to an action in England". It would not have mattered, presumably, whether the foreign law was substantive or procedural. This type of reasoning now explains in part the application of foreign rules, e.g., in respect of limitation periods.

In Chapter Five, it is suggested that final remedies must be analysed in the same way that other matters, which no longer feature on the above list of single reference subjects, have been.

80. See also R. Alexy *A Theory of Legal Argumentation* (1989; translated by R. Adler and N. MacCormick), at p. 206: "It is a quite separate question to what extent the claim to correctness implicit in the issuance of legal judgments and legal justifications is in fact taken seriously and satisfied, and whether and to what extent it matters at all in the light of the acceptance of judicial decisions".

Alexy identifies two aspects of justification- the "internal" (at pp. 221 et seq: "that the reflections of the decision-maker must lead to a justification which corresponds to the forms [of internal justification] described [at p. 206 in terms of claims to implicit correctness]") and the "external" (at pp. 229-230: "In the course of internal justification it becomes clear which premisses need to be externally justified"; and at p. 230: "[J]ustification of those premisses which cannot be derived directly from positive law" and "The justification of premisses used in the process of internal justification").

As described in the parentheses, the internal, in the context of the discussion here, refers to the responsiveness of Rule 17 to (substance and) procedure which produces the requirements of double remediability through single reference thrown wide; the external refers to justifications for the use of the distinction between substance and procedure, and for the use of double remediability. Both aspects of justification for Rule 17 and single reference have been shown to be inadequate for all cases.

81. Dicey and Morris, at p. 171.

82. For a view on this point, see Yntema, loc. cit., at p. 727: "...the prevailing conception of conflicts rules as prescribing the jurisdictional competence of substantive legal rules without reference to their content forces the court to engage "in a blindfold test", in which the court in reaching a decision is supposed to ignore the result which the law indicated by its conflicts rule "may work in the case before it" (citing D.F. Cavers (1933) 47 Harv. L. Rev. 173 "A Critique of the Choice of Law Problem").

This means that, although conflict rules are valid rules of the legal system, they can be scrutinised for their cogency.

83. (1868) L.R.2 P.C. 193. In point of fact, Willes J.'s formulation merely affirmed a jurisdiction dating back to Skinner v East India Co. (1666) 6 St. Tr. 710 (H.L.), Mostyn v Fabrigas (1774) Cowp. 161. This test has been applied since then in, e.g., Phillips v Eyre (1870) L.R.6 Q.B. 1, M'Elroy v M'Allister 1949 S.C. 110, Matthews v Kuwait Bechtel Corporation [1959] 2 Q.B. 57, Chaplin v Boys [1971] A.C. 356, Coupland v Arabian Gulf Oil Co [1983] 1 W.L.R. 1136, Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 39, and in Dimskal Shipping Co. SA v International Transport Workers Federation [1992] 2 A.C. 152, to mention but a few.

See P.B. Carter (1991) 107 L.Q.R. 405, P.M. North (1992) 3 K.C.L.J. 29, C.G.J. Morse, op. cit.

U.S. courts first adopted the test in Watts v Thomas 2 Bibb. (Ky.) (1811) and in Gardner v Thomas 14 John (N.Y.) 134 (1817), but rejected it in Loucks, supra.

84. (1870) L.R.6 Q.B. 1, at pp. 28-29.

85. op. cit., at pp. 1487-1488. The exception in (2) is added at this time for completeness only, and is discussed in the main text under "Dissatisfaction With Double Remediability".

86. This exception was first expressed by Lord Wilberforce in Chaplin v Boys at p. 389F-G: "I would state the general rule of English law with regard to torts as requiring actionability as a tort in England, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the country where the act was done. Given the general rule the necessary flexibility can be obtained through segregation of the relevant issue and the consideration whether, in relation to that issue, the relevant rule ought as a matter of policy to be applied. For this purpose, it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet. This technique appears well adapted to meet cases where the lex delicti either limits or excludes damages for personal injury". It remains to be seen however whether Lord Slynn's dicta in Red Sea

Insurance to the effect that all matters in tort/delict cases are referable to the appropriate foreign law will be interpreted to include remedial matters. Cf. generally P.B. Carter [1995] CLJ 38 ("Choice Of Law In Tort: The Role Of The *Lex Fori*").

The exception has been applied in Church of Scientology of California v Commissioner of Police (1976) Sol. J. 690 (C.A.) and in Red Sea Insurance Co. Ltd. v Bouygues SA [1994] 4 All E.R. 464. cf. n. 28, Chap.1.

Extensive proposals for the reform of the tort rule, qualified by the litigants' contractual freedom to choose the applicable law (*lex fori* or not), were made in the Law Commissions' Working Paper No. 87 (1984). These proposals were totally ignored in the subsequent Law Commissions' Report on Choice of Law in Tort and Delict, No. 193 (1990). For comments on these, see Carter, loc. cit., North, loc. cit. and also at (1991) 42 N.I.L.Q. 183, at pp. 194-198, J.G. Castel, Canadian Conflict of Laws (2nd. ed., 1986), at p. 621, and P. Kaye, Private International Law of Tort and Product Liability (1991), at Chaps. 16-18.

The recent House of Lords' Private International Law (Miscellaneous Provisions) Bill 1994, which looks to the Law Commission's proposals in its tort and delict provisions, is especially welcomed. It is to be hoped that it sees the light of day as law.

87. But see the last sentence from Lord Wilberforce's passage in n. 86, ante; see also 3.2.3 (Morse) and 3.2.4 (Cheshire and North) (pp. 111-113).

88. Carter refers to "the possibility of the existence of other justifications for choice of law in tort and delict being *sui generis*", loc. cit., at p. 409. At the same page he discusses the castigation of the tort doctrine as anomalous (i.e., e.g., that "there is...no corresponding rule in the private international law of contracts").

He goes further: "The "anomaly" has been said to derive from an association of the law of tort with the criminal law where the *lex fori* has virtually exclusive control. However, neither the fact that the *Halley* rule creates a divergence between the different parts of the private international law of civil obligation, nor the fact that the purposes of the civil law and of the criminal law are palpably different, in themselves rule out the possibility of the existence of other justification..." For the overlaps between tort and crime, see G. Williams and B.A. Hepple Foundations of the Law of Tort (2nd ed., 1984), at pp. 2-6. Criminal law does not aim to provide remedies in the way that tort law does.

For the relatively emergent law of international crime, see generally J.D. McLean, International Judicial Assistance, (1992).

89. Loc. cit., at p. 408.

90. Loc. cit., at p. 409. Cf. 3.4.1.a-d, ante.

91. Ibid.; see also Morse, op. cit., at pp. 1-14, tracing the historical origins of the tort rule from the *lex fori* (p. 5: "It is certainly true that the *lex fori* has

exerted and continues to exert a greater influence in the field of tort liability than it does in other areas of private international law", certainly not greater than in the general area of remedies) to double actionability.

92. In Warner Brothers, supra, the effect of the injunction awarded there was limited to forum jurisdiction to all intents and purposes (p. 220), was limited to the negative covenants contained in the contract in question (because to enforce the positive covenants would be tantamount to an order for specific performance thereof, which the forum court will not make for extraordinary and intellectual services); previously, at p. 219: "There is all the difference in the world between declining to make an illegal covenant good by neglecting that which makes it contrary to law and exercising a discretion as to how far the court will enforce a valid contract by injunction".

The parties had agreed contractually to the remedy of injunction in the event of breach.

In Baschet v London Illustrated Standard [1900] 1 Ch. 73, a similar injunction was granted by Kekewich J. in respect of breach of copyright involving France and England. French law had no final injunctive jurisdiction the rules of which could avail conceivably a forum action for an extraterritorial order; this makes sense. But consider where a closely connected foreign jurisdiction does have such injunctive jurisdiction and where the court is asked for an order to be enforced in the French jurisdiction, pursuant to substantive liability established by a *lex causae* supplied by that jurisdiction.

The possibility of an extraterritorial dimension is discussed at 3.4.2A (pp. 148-149). It may be added here that according to the European jurisdictional rules, the forum can make coercive orders to be enforced in any of the other Member States to the Brussels and Lugano Conventions.

93. See 2.3.1, ante, at n. 51 (p. 86). See also (1992) K.C.L.J. 29 ("Choice..."), at pp. 38-39, citing G.W. Hogan (1992) 108 L.Q.R. 12 ("Contracting Out Of The Rome Convention"), Arts. 22(1), 7(1) and 10(1)(c) of the parent Rome Convention (in support of states' power not to apply certain provisions none of which provisions includes the point on damages as governed by the *lex causae*), Art. 15 (which excludes the possibility of renvoi to states' private international law rules), and the drafters Giuliano and Lagarde Report O.J.C. 282/8 of 31/10/80: "The chief aim of the Convention is to introduce into the national laws of the EEC Member States a set of uniform rules on the law applicable to contractual obligations and on certain general points of private international law to the extent that these are linked with those obligations". See also O.J.C. 282/13.

94. Cf., n. 92, ante. The A.M.F. case illustrates restitution (n. 28, Chap. 1; cf. n. 37, Chap. 5).

95. See 1.3, ante (second paragraph) (pp. 28-29).

96. [1897] 2 Q.B. 231.

97. Cf. Morse, *op. cit.*, at pp. 286-287.

98. *op. cit.*, at p. 1513, citing Goring v Reid Brothers Motor Sales Ltd. (1982) 136 D.L.R. (3d.) 254, at p. 263 (Ontario).

99. See F.A. Mann (1987) 105 L.Q.R. 437; C. McLachlan (1991) 56 B.Y.B.I.L. 311. (cf. n. 22, Chap.1) (p. 36).

100. On this point, and on the practicality of going the proper law (issue-splitting/individuating) way for torts (first espoused by J.H.C. Morris in (1951) 64 Harv. L. Rev. 881 ("Proper Law Of A Tort") because of the "unlikelihood of a single mechanical formula [to] produce satisfactory results when applied to all kinds of torts and to all kinds of issues"), see North, *loc. cit.*, at pp. 43 et seq; Carter, *loc. cit.*, especially at pp. 410 et seq, e.g. at p. 410: "Interpreting the [tort] rule as one of articulate characterisation, rather than choice of law...[This] involves reduction of some *forum* control but in a relaxed and, it is submitted, acceptable form." Cf. nn. 86, ante (last paragraph).

101. *op. cit.*, at p. 195 (the full passage appears at 3.2.3, ante).

102. Inevitably, Morse asks the all-important question at p. 196: "Given that the nature of the remedy is to be determined by the *lex fori*, what allowance is to be made in awarding that remedy for the fact that the case involves a conflict of laws?"

The discussion of the answer along lines of the current contract damages position may well supply perfectly sound practical results (i.e., that the action for tort damages can be framed in contract) but does so without satisfying the want of principle which makes the tort damages position unable to stand in its own right. Cf. n. 86, ante, and n. 47, Chap. 2.3 (pp. 84-85), especially Birks and North.

103. *loc. cit.*, at p. 417.

104. Compare the bases for recognition of foreign judgments as set out by Buckley J. in Emanuel v Symon [1908] 1 K.B. 302, at p. 309, with the bases for jurisdictional competence. Cf. the intuitive formula rendered at the conclusion of 2.2, ante. Both sets of bases coincide substantially on domicile, residence, submission and forum selection by the parties.

See also the American Law Institute's Restatement (Third) of Foreign Relations Law, Part IV, and A. Hill (1985) 85 Colum.L.Rev. 1585 ("The Judicial Function In Choice Of Law").

105. See generally and for analogy only, N. MacCormick, Legal Reasoning and Legal Theory (1994), at pp. 119-128 (*sub* "Second-Order Justification"), e.g., at p. 123: "...the need not to controvert established valid rule, and...the need to find some supporting analogy or principle or other legal warrant...There is here no unfettered discretion"; and, more particularly, at pp. 152-194 (*sub* "The Requirement of Coherence: Principles and

Analogies"), at p. 153: "...to understand the values which legislation and case law rules in the intendment of legislators and judges are supposed to serve, and...what to oneself appears an acceptable value basis for the rules. There is a mixture of adopting received values and of adding to, extrapolating from, or modifying, them in one's own right" and, further, "The requirement of coherence can...be further understood as delimiting the field within which judicial law-making is legitimate", and at p. 179: "[C]onsistency and coherence as between related legal rules in similar areas of law is itself an important legal value, being indeed one aspect of justice, of treating like cases alike and refraining from arbitrary differentiation of cases...[T]he decisive consideration is judges' and lawyers' evaluations and perceptions of desirable lines of legal development. What is more such evaluations and perceptions change through time".

106. See nn. 52-54, ante, and the text they accompany (p. 121).

107. See the penultimate paragraph of 2.2.1 ante (pp. 43-44).

108. See M. Twitchell (1987-88) 101 Harv.L.Rev. 610 ("The Myth of General Jurisdiction") in which she argues (i) that U.S. courts have lost sight of the original meaning of "general" and "special" jurisdiction as a way of analysing jurisdictional problems, especially where the nature of the dispute is only tenuously related to the defendant's contacts with the forum, and (ii) that courts should not restrict unnecessarily their adjudicative authority. At pp. 650-665, she considers the tenuously related claim, which is identical to the appropriate/'conflictual hard' case much referred to in the course of the four themes, and concludes, at pp. 662-665, that the solution lies in the expansion of special jurisdictions. Her views are accepted in this dissertation.

109. The implication that this exercise of jurisdictional competence is remedial is discussed below. See n. 110 post, and the text it accompanies (p. 136).

The decisive point in this regard is the proceeding being for a remedy available in the English forum. If a proceeding is not for a remedy, then no primary remedial jurisdiction is invoked within the meaning intended here.

110. A summary of what has been proposed and submitted on this point:

In the domestic case, a remedy is refused on the merits because the case for the given remedy has not been proved adequately; i.e., the case is, at the outset, considered justiciable but has not subsequently been justified by the claimant (see Marshall in A.G. Guest (ed.) Oxford Essays in Jurisprudence (1980), at p. 265; R.S. Summers (1963) 26 M.L.R. 530 ("Justiciability"); J. Stone (1959) 35 B.Y.B.I.L. 124 ("*Non Liquet* And The Function Of Law"), though there may be some extrajudicial form of relief. Transferred to the conflict case, it is implicit in the principle of justiciability that justification for the given remedy should not depend on this domestic sense of adequacy of the case for the given remedy; i.e., the substantial

connection, however aspired (through domicile, residence, presence, submission), suffices to ground the submission that the forum may provide the given remedy, subject to proof according to the relevant (foreign) law.

If this view is rejected, it means that the forum adopts (it does not) an 'irrational', underconflictual analysis of jurisdiction only in these respects, thereby giving a distorted, unbalanced overall view of its exercise of jurisdiction, given the rational forum's limits of jurisdiction described in the penultimate paragraph of 2.2.1 ante (p. 43). (Cf. e.g., the second passage from Brownlie at 2.2.1 (p. 43), McLachlan, at nn. 5 and 6 at 2.2.1 ante (pp. 73-74)). The self-executing character of 'procedure' is upheld in this respect, as is the parties' freely exercised choice (express or implied) in litigating here. The English forum operates according to this view.

Thus, the existing limits of jurisdiction are not challenged here as incoherent (or for producing incoherence), nor is the existing exercise of primary remedial jurisdiction, as described in the main text. Both the English rules and the European rules provide an adequate format for coherence in subsequent exercise of other aspects of coherence (it is with these other aspects that lack of coherence is manifest). Further, the *lex fori* jurisdictional rules (Order XI (R.S.C.), 'forum non conveniens', 'lis alibi pendens' and 'staying of action' rules- cf. the last paragraph of 2.2.1 ante (p. 44)) illustrate such rules as have no domestic application, which supports the case for a wider interpretation of '*lex fori*'. These rules also illustrate 'rules properly conceived of, arising from coherent conception of jurisdictional competence'. This might be explained by the greater focus on jurisdiction, rather than on choice-of-law (cf. 3.4.1- the opening comments (p.121)). That the forum conflictually analyses its decision to take or decline jurisdiction is clear from: (1) the forum's readiness, from the outset of any *forum non conveniens* enquiry, to determine whether or not there genuinely exists an alternative forum (see Pillar & Another v Sarkar, *The Times* 21.7.94: an action for alleged libel damages suffered in England from a widely read publication in India in English with negligible readership in England; held- India was natural forum); and (2) the flexibility of the doctrine (see A. Alexander (1986) 86 Colum.L.Rev. 1000 "Forum Non Conveniens In The Absence Of An Alternative Forum") to allow forum discretion to discuss availability of an alternative forum, and to allow the forum to uphold parties' right of access, while the forum works against overcrowding through improper invocation of its jurisdiction.

The final remedial order should reflect these rules (it does not always do) is separate and is addressed in the context of forum shopping.

111. The rationales contribute to a basis for independent argument at 3.4.2(iii), post. A summary of the inferences so far made on this point is on:

(1) the jurisdiction here not being necessarily governed by domestically explicated rules of the forum, as the instant case might dictate (thereby strengthening the case against the semantic accuracy of Rule 17, or the case for some formal acknowledgment of a subset consisting of this type of rule (cf. 1.2, ante, containing the text leading up to for nn. 12-14) (p. 124); and

(2) the jurisdiction here being exercised necessarily extraterritorially in the appropriate case.

Cf. 2.2.1, ante, at the third paragraph (p. 43).

See n. 117, post, and 3.4.2A(iii) post (pp. 139 et seq).

112. The law of the place of enforcement was introduced in the third (last) paragraph of the initial part of 3.4 ante (p.120). The case for the conflictual analysis of enforcement jurisdiction forms a head of argument at 3.4.2A (pp.135 et seq). For a review of the inferences so far made on this jurisdiction, see 2.2 ante (pp.39-46), for the principle of non-interference with another forum, 2.4.1 ante (p.56), for the doctrine of *res judicata* (pp.53 et seq) and for satisfactoriness of English judgment orders, 2.4.2 (the last paragraph), for the principle of the obligated/protected defendant (p.61) and the principle against ineffectual judgments (p.55), and 2.6 ante (p.70).

113. Comprehensiveness is predicated on coherence; see the second paragraph of 3.4.2A(i) (pp. 135 et seq); see also n. 114, post.

114. Remember the wording of Rule 17; cf. n. 110, ante.

115. In realising the proposed law of the place of enforcement, for example, there has to be a (tacit) conflict rule to formalise the forum's disposition to consider/apply apropos rules of such a foreign law, not unlike the existing conflict rule which formalises the forum's disposition to consider/apply a foreign forum's jurisdictional rules prior to taking/declining jurisdiction or prior to recognising the foreign forum's judgment. Herein lies the case for jurisdictional coherence.

116. For a view of a forum selection clause (an example of a primary remedial jurisdictional issue) as conceivably substantive, see R.A. de By (1989) 89 Colum.L.Rev. 1068 ("Forum Selection Clauses"), discussing the U.S. courts' enforcement of this type of clause, pursuant to Federal Civil Procedure Rule 12(b)(3), by dismissal for impropriety of venue. De By's view is misguided or at least rather subjective even if only the dismissing court acts under procedural rules. It is an ill-conceived view because it does not concentrate, as it should, on the court. Moreover, this view overstates (and *pace* confuses) the parties' freedom of choice of forum as (and with) a substantive) right. At best, it signifies the limited use of federalist public law ideas to the aims of this dissertation.

117. The other policy therein, of preserving merely presumed (yet to be adjudicated upon) substantive rights suggests some degree of substantivist adjudication. However, this jurisdiction is exercised on a motion *ex parte*. It would therefore be a misconceived and unfair view of adjudication in the adversarial mode of trial to describe the jurisdiction at this stage as other than procedural, even though there are unresolved substantive issues.

See A.A.S. Zuckerman (1993) 56 M.L.R. 325, ("Interlocutory Remedies...") at p. 327: "The role of the interlocutory injunction as a procedure for minimising the risk of harm to lawful rights has been

somewhat obscured by the idea that the purpose of the procedure is to preserve the status quo until the court has had an opportunity to adjudicate", and at p. 328: "Pre-judgment interference is sanctioned only in the face of clear necessity and only on the basis of considerations that give due weight to the parties conflicting interests"; that is, it is directed at the defendant's fraudulent manipulation of the procedural principle of non-interference before final judgment.

118. The incontrovertible illustration here is, of course the revised law on contract damages, following the Rome Convention. The exception to double remediability at 3.4.2(ii) ante (p. 134), makes applied references to foreign remedial law for non-contractual loss another illustration.

119. Please read nn. 108 and 109 again.

120. See the Editorial Note (1990) 103 Harv.L.Rev. 1677 ("Forum Shopping Reconsidered"), at pp. 1684 et seq. Previously at pp. 1683-1684: "[T]he policy against forum shopping is not a principled distinction between legitimate and illegitimate actions, but rather a discretionary tool by which a court may constrain actions or motives it finds distasteful"; and at p. 1689 (*sub* "A Remedy-Based Justification For Forum Shopping"): "The formalistic underpinnings of the policy against forum shopping call into question its jurisprudential legitimacy...[F]orum shopping predominantly furthers the goals of ethical representation of one's client, efficiency, and community control over law, and through them the broader goal of providing a remedy for every injury".

121. See the penultimate paragraph of 2.5 (pp. 68-69); Cf. the Editorial Note cited at n. 120, at p. 1696: "Transcending the selective and formalistic aversion to forum shopping can enhance the possibility of pluralistic methods of remedying wrongs".

122. Ed. Note, loc. cit., at pp. 1692-1693.

123. Cf. n. 105, ante.

124. [1989] 2 W.L.R. 232 (C.A.: Kerr, Neill, and Nicholls L.JJ.). See also, Republic of Haiti v Duvalier [1989] 2 W.L.R. 261 (C.A.: Fox, Stocker and Staughton L.JJ.) and Derby and Co. Ltd. v Weldon (No. 6) [1989] 2 W.L.R. 276 (C.A.: May, Parker and Nicholls L.JJ.).

125. N. MacCormick and O. Weinberger, An Institutional Theory of Law: New Approaches to Legal Positivism, (1986), at p. 47.

126. Cf. the position identified, at the beginning of 2.2.2 ante (p. 44), under the European rules, whereby the only strictly procedural rules under those rules are to do with the enforcement of judgments and preliminary rulings: section 25(1) and (3) Civil Jurisdiction and Judgments Act 1981 (Art. 24 Brussels Convention 1968); see De Cavel v De Cavel (No. 1), Case 143/78

[1979] E.C.R. 1055 and Denilauler v Couchet Freres, Case 125/79 [1980] E.C.R. 1553.

Both decisions are authority that "the English court exercise this jurisdiction in the plaintiff's favour "over persons subject to its personal jurisdiction not only where it is pending in another Contracting State or in another part of the United Kingdom": L. Collins (1989) 105 L.Q.R. 262, at p. 289 (cf. (1989) 1 Yb.Eur.L. 249, "Provisional Measures, the Conflict of Laws and the Brussels Convention"). This confirms the mandatory character (universal applicability) of the English forum's jurisdictional rules as dictated by the European rules.

See also, A.A.S. Zuckerman (1993) 56 M.L.R. 325 ("Interlocutory Remedies in Quest of Procedural Fairness"), and (1993) 109 L.Q.R. 432 ("Mareva Injunctions and Security For Judgment in a Framework of Interlocutory Remedies"); C. MacLachlan (1987) 36 I.C.L.Q. 669 ("Transnational Application of Mareva Injunctions and Anton Piller Orders"), D. Capper (1991) 54 M.L.R. 329 ("Worldwide Mareva Injunctions").

127. So-called after Mareva Compania Naviera SA v International Bulk Carriers SA [1975] 2 Ll. Rep. 509; Babanaft Int'l Co. SA v Bassatne [1990] Ch. 13; Ghoth v Ghoth [1992] 2 All E.R. 920; Polly Peck Int'l plc v Nadir (No. 2) [1992] 4 All E.R. 769 See n. 12, at 1.2 ante (p. 34), and the works cited at n. 126, above; see also S. Gee Mareva Injunctions and Anton Piller Relief (3rd ed., 1994); N.H. Andrews [1989] C.L.J. 199 ("Freezing Foreign Assets By Mareva Injunctions"); P. Kaye (1990) 9 Civ.J.Q. 12 ("Extraterritorial Mareva Orders And The Relevance Of Enforceability").

128. So-called after Anton Piller KG v Manufacturing Processes Ltd. [1976] Ch. 55; see also Cook Industries v Galliher [1979] 1 Ch. 439, Protector Alarms v Maxim Alarms [1978] F.S.R. 442 and Altext v Advanced Data [1985] 1 W.L.R. 457.

129. L. Collins, loc. cit., at p. 297.

130. Sir John Donaldson M.R., in Deutsche Schachtban v R'asal Khaimah National Oil Co. [1987] 3 W.L.R. 1023, at p. 1036 (see also Bank Melat v Nikpour [1985] F.S.R. 87, at pp. 91-92).

131. Lord Denning, The Due Process of Law, at p. 134.

132. See Kerr L.J. in Babanaft, at p. 240, where he described as excessive Lord Denning M.R.'s dicta in Z Ltd. v A-Z ([1982] Q.B. 538, at p. 573) that the jurisdiction operates *in rem*. It is enforceable against third parties on notice, who own assets covered by the order, by contempt proceedings as are all other orders *ad personam*. This aspect is returned to subsequently.

See also Dicey and Morris, at p. 193: "The basis for the development of the worldwide *Mareva* injunction was the recognition that [it] operates *in personam*, and that where the defendant is personally subject to the jurisdiction of the court, an injunction may be granted in appropriate circumstances to control his activities abroad...The jurisdiction will be

exercised more readily after final judgment has been obtained against the defendant, or if the claim is a proprietary claim [as in Duvalier, *per* Staughton L.J., at pp. 213-214 (C.A.)]. It may be appropriate to make an order even if it will not be recognized by the courts of the country where the assets are situated, since the English court may still make its order effective by striking at the defence if the defendant disobeys the order [Derby & Co. Ltd. v Weldon (Nos. 3&4) [1990] Ch. 65, at p. 81]. But the English court will not normally grant a worldwide injunction in connection with proceedings in England to enforce a foreign judgment or foreign arbitration award [Rosseel NV v Oriental Commercial Shipping (U.K.) Ltd. [1990] 1 W.L.R. 1387 (C.A.)]".

133. See Babanaft, at p. 242, and Duvalier, at p. 273.

134. Sir Leonard Hoffmann (1993) 56 M.L.R. 297 ("Changing Perspectives In Civil Litigation"), at p. 302.

135. *Ibid.*, at p. 304. Cf. Zuckerman, at n. 117, *ante*.

136. *Loc. cit.*, at pp. 275-277. Cf. Babanaft, at p. 232 (Kerr L.J.) and Kerr on Injunctions (Paterson, 6th ed., 1927), at p. 11, and Acrow (Automation) Ltd. v Rex Chainbelt [1971] 3 All E.R. 1175 (C.A.).

It should be observed that the application of s. 37 to residents, domiciliaries and those subject to jurisdiction and to all others is a domestic precursor to the European rules on this point (cf. the opening paragraph of 2.4.2.1, *ante* (p. 60)).

137. *Loc. cit.*, at p. 262; Zuckerman, *loc. cit.* (in L.Q.R.), identifies the same problem in the wider terms of evasion of the risks of litigation (at pp. 432-441), the risks being losing the merits, inability to enforce a favourable judgment/order for costs, and litigation as an economic activity (i.e., imbalances of financial resources). The *Mareva* is thus "a weapon against abuse" (pp. 433-435), and "an extraordinary measure for counteracting evasion" (pp. 436-441).

138. *Loc. cit.*, at p. 263.

139. See, e.g., Third Chandris Shipping Corporation v Unimarine SA [1979] Q.B. 645, at pp. 668-669 (C.A. Lord Denning M.R.); The Bhoja Trader [1981] 2 Ll.Rep. 256 (C.A.) and Ashtiani v Kashi [1987] Q.B. 888, at p. 899 (Dillon L.J.). See also the original cases of Nippon Yusen Kaisha v Karageorgis [1975] 1 W.L.R. 1093 and Mareva Compania Naviera SA v Internatinal Bulk Carriers SA [1975] 2 Ll.Rep. 509.

See F.A. Mann Further Studies In International Law (1990), at pp. 32-37 (*sub* "The Doctrine of International Jurisdiction Revisited After Twenty Years", discussing "Indirect Enforcement Jurisdiction" and citing the example thereof of injunctions with extraterritorial effect), he states that the defendant/addressee of the injunction must be a British subject or the subject of English jurisdiction. Surely, only the latter is accurate. That

addressees have been British subjects is coincidental. Cf. the last paragraph of n. 136, ante.

140. Loc. cit., at p. 269. See also C. McLachlan, loc. cit. (1987), at p. 675, and Ballabil Holdings Pty. Ltd. v Hospital Products Ltd. [1985] 1 N.S.W.L.R. 155.

The plaintiff does not claim a proprietary interest, nor does he seek to trace the defendants assets: Polly Peck International Plc v Nadir [1992] 2 Ll.Rep. 235 (C.A.). The plaintiff does not achieve priority over third parties' security interests: Cretanor Maritime Co. Ltd. v Irish Maritime Management Ltd. [1978] 1 W.L.R. 966 (C.A.), The Angel Bell [1981] Q.B. 65. As in the Third Chandris case, supra, the plaintiff gives cross-undertaking in damages. The defendant is adequately protected.

141. See Hoffmann, loc. cit., at p. 303: on "the extent to which the new remedies can be integrated with existing civil procedure. The answer is that they often fit very uneasily together. There are...principal difficulties...[T]he judge...is more in the position of a *juge d'instruction*."

It is submitted that the judge's role is strictly limited by the adversarial method, and therefore, is not only limited to the evidence adduced (as to the facts and as to foreign law), the decision is facilitated by the official responsibility, for actualising the order, falling on a foreign forum/jurisdiction. The only circumstance of recourse to the forum is where the defendant fails to fulfil judgment obligation, thereby incurring liability for contempt. This likelihood in itself is no reason to withhold the remedy to which the plaintiff is entitled.

The problems arising from possible misuse of the jurisdiction (i.e., improperly as security for costs) are addressed by Zuckerman, loc. cit., at pp. 441 et seq. His suggestions for revising the jurisdiction from the point of view of its "elasticity" (facing the erosion of the strict requirement that the plaintiff must prove risk of dissipation of assets) are well taken in this dissertation. They are problems which would have to be faced even as the jurisdiction is currently exercised. They are problems which impact directly on the final remedial stage, but which, in line with Zuckerman's suggestion that the jurisdiction be limited to evasion of judgment by the defendant, do not weaken the argument for transposing the rationales to this final stage.

142. Loc. cit., at pp. 670 et seq. (iii) is evidence of the usefulness and flexibility of the remedy.

On the point about transposition, see Dicey and Morris, at p. 196, discussing "Relationship Between Jurisdiction to Determine the Merits and Jurisdiction to Order Interim Protection" in the context of s. 25(3) Civil Jurisdiction and Judgments Act 1982: "The power to grant interim relief where the English court has no jurisdiction over the substance may be extended by Order in Council to proceedings commenced or to be commenced otherwise than in a Contracting State, or to non-Convention States...But no Order in Council has yet been made". If this is possible in respect of a case in which the forum lacks substantive jurisdiction, it must

surely strengthen the argument to exercise the tantamount power in cases where that jurisdiction is had.

143. In effect, the principles (a) of non-interference with another forum, and (b) against ineffectual judgments, that are pervasive of the four themes. See, e.g., the penultimate paragraph of 2.2.1 ante (p. 43), 2.3.1 ante at n. 83 (p. 52), 2.4.1 ante at n. 103 (p. 55), n. 176 of 2.5.2 ante (p. 104), and, generally, 2.6, ante (pp. 70-71).

Cf. nn. 132 and 136, ante.

144. Zuckerman, loc. cit. (M.L.R.), at p. 337. Cf. Fawcett, at 2.5.2, ante.

145. see Babanaft, at p. 47, and Duvalier, at p. 217.

See nn. 132, 136, 137, and 140, ante.

146. See Collins, loc. cit. (1989), at pp. 281-286. Until the injunction is declared to be enforceable by the foreign court, the injunction cannot affect anyone besides the defendant and/or a recognised agent, and those capable of realising the terms of the order and are subject to the court's jurisdiction and who are on notice: Securities & Investments Board v Pantell SA [1990] Ch. 426, at p. 433.

147. Cf. 2.3, ante, at n. 47 (pp. 84-85).

148. See n. 132, ante.

149. Section 24 of the Civil Jurisdiction and Judgments Act 1982 makes it possible to enforce such orders automatically in Contracting States' jurisdictions, though no orders have yet been made in England under this provision.

150. In addition to works cited at 2.4 (n. 86, p. 93), see C. Platto and W.G. Horton (eds.) Enforcement of Foreign Judgments (2nd ed., 1993, International Bar Association)- a practitioners' text.

151. Recall n. 132, ante, especially in connection with the necessity factor (in making the final order) which overrides the possibility of non-recognition factor.

152. See nn. 6 and 27, at 2.2 ante (pp. 74 and 78-79).

153. See generally, Platto and Horton, op. cit., n. 150 ante.

154. These should indicate, inter alia, whether enforcement extends to non-money judgments, as does s. 44A Indian Code of Civil Procedure 1908.

155. This will probably include consideration of any forum-selection clauses (i.e., of the forum for original adjudication) one way or the other (i.e., if not observed, whether or not the failure to observe is a mitigating factor in the

eyes of the said foreign forum of enforcement, as in Khalij Commercial Bank Ltd. v Woods (1985) 17 D.L.R. (14th) 358).

156. See, e.g., Platto and Horton, op. cit., at p. 25.

157. See, e.g., s. 3B New Zealand Recognition and Enforcement of Judgments Act 1934, as amended in 1992.

158. As in Sigurdson v Farrow & Others (1981) 121 D.L.R. (3d) 181, at pp. 185-187, per Medhurst J.

159. Recall the highly useful "Babanaft proviso".

160. See, e.g., Dicey and Morris, at p. 172: "The *lex fori* determines what property of the defendant is available to satisfy the judgment, and in what order...[Northern Trusts Co. v McLean [1926] 3 D.L.R. 93 (Ont. C.A.); 243930 Alberta Ltd. v Wickham (1987) 61 O.R. (2d.) 731]...But if the *lex causae* provided that only...mortgaged property was available for the debt, this would amount to a rule of substance to the effect that by the *lex causae* the "debtor" was under no personal liability, Such a rule would, therefore, be applied by the *forum* [Melar v Fitzjames (1797) 1 Bos. & P. 138]. Conversely, a court would not apply a rule of its own domestic law protecting a debtor from personal liability where the *lex causae* imposed such liability on him [Canadian Acceptance Corporation Ltd. v Matte (1957) 9 D.L.R. (2d) 304 (Saskatchewan C.A.); Sigurdson v Farrow (1981) 121 D.L.R.(3d) 183 (Alta.)]".

These are the forum law, which may be affirmed or rebutted by the *lex loci confirmationis* of the remedial order.

161. See Minister of Public Works of Kuwait v Sir Frederick Becker & Partners & Others [1983] 1 W.L.R. 818, at p. 829 (Kerr L.J.).

162. [1937] 1 K.B. 209. The facts are discussed above at nn. 7 and 92, ante. Note especially that the parties there had stipulated expressly in the same original contract that breach was to be remedied by injunction.

163. Cf. 3.4.2(ii), ante (p. 134).

164. See especially, n. 76, at 2.3.2.1 ante (pp. 90-91).

165. *ibid.*

166. N. MacCormick and O. Weinberger, An Institutional Theory of Law: New Approaches To Legal Positivism (1986), at p. 100, *sub* "Legal Facts as Institutional Facts".

167. *ibid.*; Cf. J. Raz Practical Reason and Norms (1990), especially at 1.2 and at 2.3.

168. [1912] 2 Ch. 394 (C.A.). (see n. 79, at 2.3.4, ante).

169. See the italicised portions at 3.2.2 ante (pp. 109-110).

170. See, e.g., Dicey & Morris (12th ed.), at p. 193. Cf. Collins, at n. 140, ante.

171. [1960] 2 Q.B. 19.

172. e.g., principles which govern the availability of specific performance, such as the adequacy of damages (Tito v Waddell [1977] Ch. 106, at p. 322), the supervisability of the order by the forum court (Ryan v Mutual Tontine Westminster Chambers Association [1893] 1 Ch.D. 116) and whether or not the action is accompanied by a claim for damages.

While they define the forum's conception of remedial justice, such principles do not necessarily lend themselves, as intuitively applicable principles, to every conflict case. Moreover, circumstances can arise which justify the application of parallel principles found under foreign remedial law (cf. the combined-liability example, at 2.3.2 ante (p. 52)) but which are not necessarily approximate to forum law, possibly arising from there not being active law-equity distinctions under that foreign remedial system. The applicability of such principles necessarily means that conflictual remedial justice differs from domestic remedial justice, and that the two should fundamentally be conceived of differently enough to permit the application of such foreign principles.

This means that the primacy of damages as the remedial form should not necessarily be deemed to be exportable to conflict cases (cf. Birks, at the opening note at 2.3 ante (pp. 84-85)). Thus, it was a bonus in Baschet's Case, *supra*, at n. 6, that the injunction sought was regulated by international convention. Kekewich J.'s statement ("I cannot believe that the Court has to consider the remedies of another country") is, on this view, erroneous. Kekewich J.'s statement would be founded on a view that taking foreign law more seriously than he did, is to take the conflict of laws too literally. It is submitted that this is underconflictual. Branson J's refusal to depart from the domestic principle that making an illegal contractual covenant good is the same as neglecting its illegal character, in Warner Brothers, *supra*, at n. 7, would stand since it is based on the public policy to which the forum must defer.

173. See generally, R.S. Summers (1978) 63 Corn.L.R. 707 ("Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification"), at p. 723: "The values [institutional substantive reasons] incorporate...are intrinsically no less significant than most values that figure in other substantive reasons [e.g., rightness reasons, goal reasons]. Institutional reasons relate to such important matters as the rational division of legal labour, the efficient workings of judicial machinery, the practicability of remedies..., and even the limits of the law's overall efficiency", at p. 730 (on "The Primacy of Substantive Reasons"): "A specific theory of the nature and role of substantive reasons must form the core of a comprehensive theory of common-law justification. Substantive reasons, more than

authority reasons, determine which decisions and justifications are best", and "There may be no strong substantive reasons on either side of an issue, or the substantive reasons on each side may stalemate each other. If so, only authority reasons can tip the balance. Nevertheless, the case for the decisional and justificatory primacy of authority reasons pales when compared with the parallel reasons of substance"; at p. 731: "Substantive reasons delimit the range of authority reasons...Although [the rationales that underlie the doctrine of precedent] govern authority reasons, they are substantive in nature, too"; at p. 735: "It is one thing to grasp the primacy of substantive reasons in a healthy common-law system; it is another to comprehend their internal complexity and evaluate them systematically".

174. Cf. nn. 5 to 9, and 3.4.2 ante (pp. 129-134).

175. Summers, *loc. cit.*, at p. 752.

176. Therefore, domestic law, as fact, "simply exclude[s] as valid reasons in deliberation anything which would otherwise be a strong reason for doing something different"- N. MacCormick and O. Weinberger, *op. cit.*, at p. 100.

This is an explanation which is based on law as a unified and unifying institution. While it is true that private international law excludes foreign patterns of conduct, it cannot be true that private international law excludes foreign legalistic patterns of conduct, even if we call them facts.

Cf., *idem*, at p. 99: "[T]he legal rules by which [acts] count as the making of actions are themselves similarly explicable as [facts of the kind which results from the interpretation of human acts and other physical and psychological events in the light of a set of operative human rules]. Especially in the case of a country with a codified [law]...The Code Civil and the Burgeliches Gesetzbuch are among the grand facts of modern European history."

177. *Loc. cit.*, at n. 173.

178. N. MacCormick, Legal Reasoning and Legal Theory (1994), at p. 261.

179. For better definition of the distinction between these arguments and the procedural arguments, see, e.g., Dicey & Morris, (12th ed.) at p. 195: "...an interlocutory injunction was an *ancillary remedy* which presupposed the existence of a cause of action for *substantive relief* over which the court had jurisdiction" (emphases added).

180. It is to be remembered that in Phillips v Eyre, *supra*, not only did Willes J. set out double actionability as a general rule to which exception was possible, he also envisioned that "[c]ases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions..." (pp. 29-30). The case with a preponderance of foreign contacts is such a case. It is to be hoped that litigation in such a case will

arise, in the context of the European rules, to bring about the reform of the existing law along the lines identified by Willes J. above.

181. "Although the civil law is not of itself authority in an English court, it affords great assistance in investigating the principles on which the law is grounded"- Blackburn J., in Taylor v Caldwell (1863) 3 B.& S. 826.

182. MacCormick and Weinberger, op. cit., at p. 203; see generally pp. 203-205. See also, L. Fuller (1978-9) 92 Harv.L.Rev. 353 ("The Forms and Limits of Adjudication"), at p. 370: "...adjudication has to meet a test of rationality or of "principle"...", and at p. 404: "A right is a demand founded on a principle- a principle regarded as *appropriately* controlling the relations of two parties" (italics added). Given the fictional but necessary reconception of foreign law for the purposes of private international adjudication, the innominate forum law right, which replaces the original foreign right, supposedly brings about the application of principles (of forum domestic remedial law, such as the imposition of damages where this is the adequate remedy even though the claim may be for specific performance *simpliciter*) which are distinctively unidirectional and, therefore, underconflictual. This approach to the "adjudicatory accommodation of a problem to [the forms of adjudication]" (Fuller, at p. 404) is less acceptable than the approach by which the remedial problem is accommodated to the forms through consideration of the principles of the relevant foreign remedial law.

183. (1923) 36 Harv.L.Rev. 940 ("The Theory Of Judicial Decision"), at p. 951.

CHAPTER FOUR: THE ANALYSIS(II): OBJECTIVITY v SINGLE REFERENCE

4.1 INTRODUCTORY NOTE:

The main upshots of the objectivity thesis are the modifications it infers in the following areas:

- (1) expanding the scope and interpretation of section 37(1) Supreme Court Act 1981 regarding the extraterritorial principle and policy (that is, it encourages the institution and entertainment of actions for final orders of injunction, specific performance and possibly restitutionary relief- discussed at 5.5.2- not previously or currently granted, and envisions types of jurisdiction named after the cases in which such orders are granted, and envisions the application of the law of the place of enforcement of such orders where this is appropriate),
- (2) re-rationalising the availability of the forum remedial order, and of remedial litigation based on parties' expectations of the normativity of rights as they exist in the *lex causae* (i.e., contract damages; the combined liability right), and
- (3) the preparedness of the existing legal system to institutionalise the modifications.

We can say that the basic difference between the theses is that objectivity provides for international remedial jurisdiction, and that single reference, by being localised (and therefore, not objective), does not do so in a full way.

Objectivity advances principles for private international remedial adjudication. In the situations in which modifications to the existing law have been inferred in the preceding chapter, the thesis relies on deductive argumentation and on forum convenience-derived justiciability (as does the single reference thesis) as the conventional devices to persuade acceptance that its suggestions enhance, rather than replicate or violate, the legal order, and that its consequences are sound. The mutually supportive arguments in that chapter offered reasons of coherence, of propriety and of conformity to existing formal provisions and requirements, reasons why we should have the objectivity thesis at all.

As J. Finnis puts it:

"A judgment or belief is objective if it is correct. A proposition is objective if one is warranted in asserting it, whether because there is sufficient evidence for it, or compelling grounds, or because (to one who has the experience and intelligence to understand the terms in which it is expressed) it is obvious or self-evidently correct. And if a proposition *seems* to be correct *and* could never inherently be coherently denied, we are certainly justified in affirming it and in considering that what we are affirming is indeed objectively the case (in the sense of 'what is the case')."¹

The correctness of the objectivity thesis (including the sum of the principles² and the propositions³ therein) is founded on and justified by reasoning of this type. The thesis demonstrates, *inter alia*, that, although deductively justified, Rule 17, is flawed, and that deductive argumentation is not utilised fully in the existing private international remedial scheme. The antecedents and the propositions for the respective theses refer to and rely on semiotic⁴, contextual⁵, systemic⁶ and dynamic⁷ criteria for their respective correctness.

The objectivity thesis requires flexibility in remedial adjudication. Doing so, there is no existing legal rule to limit its scope. The limits to adjudication there are imposed by policy and discretion, in line with the view of conflictual adjudication as, fundamentally, policy-derived. This is not to say that conflictual adjudication is then arbitrary or wholly discretionary, rather than based on law and/or principle. The themes, and the principles to which they draw our attention⁸, confirm this. All this means is that, in the final analysis, conflictual adjudication is determined by the purposive autonomy of the forum as substantially defined by the forum's jurisprudence, by the autonomy of the parties, and by the autonomy of other interested or relevant fora; in other words, that the latent but definitive principles of forum private international remedial adjudication merit more consideration than is currently accorded to them.

The main feature of objectivity is that even if the practical (rather than the theoretical) consequences of remedial adjudication are the important measure of the legal system, it is difficult, if not impossible, articulately or

seriously to diminish the objectivity of law and compromise its future application on the ground of the possible effects (e.g., extraterritorial enforceability and effectiveness of the particular decision reached pursuant to the objectivity thesis) of judicial decisions produced by the legal system. It has been demonstrated that the most compelling substantive rationales found in remedies law generally are those which originate from rational but latent principles which the forum already regards as peremptorily binding, from the litigants and from relevant foreign jurisdictions, as the case may be.

This means that the final remedial order can be justified deductively even though the antecedents and propositions are best justified rationally and legalistically, rather than rigorously deductively as suggested by Rule 17 and localised single reference. This is derived from distinguishing between the respective roles of territorial (constitutional) considerations and rationales for remedial adjudication, and of the forum as a means to remedial justice⁹. This is elaborated at 4.2.

There is much scepticism in the objectivity thesis as to the use to which the parties could put the thesis, as to the possibility of overstatement of the thesis' relative liberalism. This is dealt with by its formal attributes and by the role played therein by expediency and forum situation sense. The sources of the thesis are the various viewpoints which constitute and explain the themes depicted in the second chapter. In principle, the viewpoints adequately, realistically and practically, make for a positive and objective conception of remedies, because the viewpoints provide the thesis' basis in observable forum exercise of jurisdiction. For a final order to appropriately reflect the transjurisdictional context of the action, it is necessary for the forum to focus on the particular facts so that the decision reached can be authoritative and persuasive, be useful in the formulation of applicable principles and in the isolation and consideration of competing norms from the relevant legal systems.

Why Objectivity? Objectivity in conceiving of the law, in applying it and in decision-making, provides for greater transparency, efficiency, consistency,

substantive soundness, fair procedure and legal justification. Objectivity addresses the salient questions:

- (a) Are the rights cases being instituted ?
- (b) Is the forum reaching the right results and decisions ?
- (c) Is good precedent created ?
- (d) Are the problems associated with proof of foreign law genuinely insurmountable ?
- (e) Is the exercise of jurisdiction coherently justified ?

What is Objectivity? Objectivity addresses the above questions through its main interpenetrative tenets:

- (a) rational transjurisdictionalism (comprising extraterritoriality and coherence);
- (b) universalism of European rules (jurisdictional and contract damages’);
- (c) substantivism of remedies;
- (d) *res judicata* (including "satisfactoriness");
- (e) non-interference with other forum/jurisdiction;
- (f) defendant obligation and protection;
- (g) effective, efficient administration of justice (including ‘the Metliss and Adams’ approach); and
- (h) procedural convenience.

All the tenets represent recognised and/or well-settled forum principles, and satisfactorily explain the import of the objectivity thesis. It is not clear that the views of P.M. North and others in respect of (b) represent settled law. It is to be hoped that this tenet will expressly be affirmed judicially.

The available case law, the subject of the single reference thesis, affords real and hypothetical backgrounds constructively to compare, contrast and assess the theses, and to answer "now" to the question "When Objectivity?"

The Cases: The reader should recall the discussions of single reference case law at 3.2.2¹⁰ (about the implications of the existing case law), at 2.3¹¹ (about conflictual procedure/jurisdiction), at 2.5¹² (about the policy-based ‘Metliss and Adams’ approach), at 3.4.1¹³ (about ‘convenience’ properly

conceived of), at 3.4.2(i)¹⁴ (about the merits of flexibility of approach), at the penultimate part of 3.4.2A (on 'Extraterritorial Procedural Aspects')¹⁵, and at 3.4.2B¹⁶ (on the substantivity of remedies). Real and hypothetical questions were raised in the discussions indicated, and will be examined in the present section. We should note that the new law on compensatory damages (section 7(1)(c) Contracts (Applicable Law) Act 1990)¹⁷, and the law on interim remedies¹⁸, represent, in effect, practical applications and illustrations of the objectivity thesis, given the delocalisation of remedial law therein. There is much to be gained from considering the case law to the questions posed above at "Why Objectivity?". The answers to these questions in respect of compensatory damages and of interim remedies confirm the case for objectivity, as do the answers to these questions in respect of the existing law governing otherwise procedural matters discussed in Chapter Five. Having repeatedly referred to the adequacy of the single reference thesis for the majority of actions for remedies of the forum, it will transpire now that such adequacy, being explicated mainly in terms of the exercise of primary remedial jurisdiction, is not without criticism, given the first question "Are the right cases being instituted in the forum?"

For example, we have noted that actions for specific performance are few and far between in the conflict forum, and that actions for such orders to be enforced extraterritorially are virtually nonexistent. In Warner, an action for an order of final injunction, which if granted would have been an order for specific enforcement of negative contractual covenants, was refused for this reason, even though it was the pre-breach remedy agreed upon, by the same contract. The injunction was to take effect within forum jurisdiction. Therefore, it made sense to have applied forum principles as Branson J. did in that case, even though the *lex causae* was not forum law. Assuming the facts in Warner, an action for an extraterritorial injunction should be permissible on the juridical basis of section 37(1) Supreme Court Act 1981 (and on the basis of interim remedies rationales) and should not attract the application of forum principles in deciding the availability of such an order. This does mean that the plaintiff can pursue an action for a split order, one

part pertaining to and enforceable in England, and the other in the relevant foreign jurisdiction, becomes possible; split, because the respective jurisdictions referred to therein may well be subject to different rationales.

Similarly, in Phrantzes, where the action was, inter alia, for an order for specific performance to be enforced within the jurisdiction, of a foreign *lex causae* obligation upon a non-party to the proceedings, to provide a marriage dowry, the reason why the action failed was that "the *lex fori*, English law, [recognises but] does not provide a cause of action and relief appropriate to the enforcement of the foreign right"¹⁹. That there was no appropriate cause of action was the real reason, rather than that the "machinery by way of remedies here is so different from that in Greece as to make the right sought to be enforced a different right, that would not therefore be enforced in this country"²⁰. This does not mean that the latter reason could not stand by itself if there was an appropriate cause of action. Nor does it suggest that an appropriate cause of action should exist for such cases. The objectivity thesis does not go so far as to require the expansion of primary remedial jurisdiction to accommodate actions like as Phrantzes. To do so would be spuriously overconflictual, since this would imply that the mere fact that the forum understands (more so, than recognises) the plaintiff's foreign right should be sufficient ground to successfully invoke the jurisdictional competence of the forum, though it can be said that this was what happened in Phrantzes²¹. Citing Cardozo J. in Loucks v Standard Oil Co.²² with approval, Lord Parker impliedly withheld relief in this case because "the cause of action in its nature offended our sense of justice"²³, rather than because "[the cause of action] menaces the public welfare"²⁴. This is elaborated presently at 4.2. The truth is that, in Phrantzes, the plaintiff's right as defined by the foreign law could not found an enforceable order, nor was the foreign jurisdiction pleaded in any significant way. This means that the single reference thesis can be said to encourage the institution of inappropriate proceedings (from the plaintiff's point of view) and, consequently, could produce precedents which are not capable of being adequately explained. That inappropriate proceedings may be instituted is

not the same as saying that the forum is jurisdictionally improper. These jurisdictional (and, therefore, procedural) questions of 'cause of action' and 'form of remedy available' can only be for the forum.

In Baschet, the cause of action, breach of international copyright, was established by section 6 Fine Arts Copyright Act 1862, section 2(3) International Copyright Act 1886 and Article 2 Berne Convention 1887 (incorporated by Order-in-Council of 28th November 1887). Having considered relevant foreign jurisdictional and remedial²⁵ rules as pleaded by the plaintiff, Kekewich J. granted an interlocutory injunction limited to forum jurisdiction (which at trial was converted into a final injunction) on the following principle:

"A man cannot sue here in respect of a work published in the country of origin...unless he proves that he is entitled to protection in that country of origin, and, vice versa, a man cannot sue in [the country of origin] in respect of a work published in England unless he proves to the satisfaction of the [foreign] court that he is entitled to sue in England as the country of origin.

But it is a very large step beyond that to say that, the right to sue, once admitted, the plaintiff is to have no other remedies in the country in which he sues than he would have in the country of origin..."²⁶.

That an injunction was not available by the *lex causae* did not bar a forum order to be enforced within the jurisdiction. But the availability of interlocutory injunctions under relevant foreign law is not necessarily topical when extraterritorial injunctions are awarded. Thus, although the decision reached in this case is acceptable, the ratio, with respect, is inadequate in that it prematurely omits to consider the possibility of its injunction being sustained in France, and is, in point of fact, contrary to the foreign remediability requirement. It is inadequate, however, only because the cause of action was territorially limited as encouraged by single reference adjudication which overemphasises the location. It is to be noted that section 25 Civil Jurisdiction and Judgments Act 1982 (as amended) now makes possible the cross-enforceability of any orders (interlocutory and/or final) inter fora within the territorial scope of the Brussels Convention. In one fell swoop, this stymies Kekewich J.'s ratio. The "impracticability"²⁷ he

ascribed to giving the plaintiff *lex causae* remedies is limited (and, it is submitted, only formally, rather than in substance or in rationalisation) to cases where the remedies are localised. It is further to be noted that where a choice has been made of the most advantageous remedy (unless there are contractual preclusions from doing so), to limit this choice is to imply that responsibility for the same activity cannot be ascribed to more than one party²⁸. It is one thing that the plaintiff must utilise recognised forum remedial forms, and quite another, that rationalising the availability of those forms need not regard the foreign element(s) of the case.

It is to be hoped that the institution of proceedings for remedial orders will take full advantage of both points raised in closing the preceding paragraph, and will thereby bring about fuller exercise of remedial jurisdiction. In turn, fuller exercise will bring about more accurate precedents which reflect and represent the true jurisdictional limits of the conflict forum. It is not the case that single reference involves no conflictual analysis. Single reference advocates localised remedial law and, therefore, is manifestly underconflictual.

The foregoing analysis of the cases shows the deficiencies inherent in single reference. Similar deficiencies in the law of conflictual damages have been rectified by the concession of previously otherwise locally explicated precepts²⁹ to foreign *lex causae* rules. Furthermore, we could say that the accurate ascription of post-judgment enforcement to the *lex fori*, as in the Khalij Commercial Bank case, should indicate the willingness of the forum to consider the role of a foreign *lex fori* and thus further the case for confirmatory reference to that law where the order is to be executed in that forum. We could say that Lords Wilberforce and Hodson in Chaplin v Boys, in several respects, accelerated the pace for delocalised, objective conflictual procedure, first, by establishing flexibility via the displacement of the *lex fori* in granting tort damages³⁰, and, secondly, that, strictly speaking, the precedent thus established survives Lord Pearson's view that forum law was *lex fori* and *lex causae* in that case³¹, and the

views of Lords Guest and Donovan, that any quantificatory elements were exclusively for the *lex fori*³².

Of particular importance are Lord Wilberforce's dicta about policy analysis of forum damages law with a view to determining whether forum law was applicable³³. He held that Maltese law, as *lex delicti/lex causae*, was prima facie applicable in respect of quantificatory elements, but that, as a desirable rule, those elements were (a) to be considered separately (in the circumstances, pain and suffering), (b) to be related to the parties and their particular circumstances, and (c) to be tested in relation to forum rules' policy and application. Since Malta had no interest in the application of its damages-limiting rule to foreign residents (in other words, Malta had no interest in denying the applicability of the rule which allowed damages for pain and suffering), the forum was justified in applying its own law. This means clearly and, it is respectfully submitted, correctly, that had the parties been Maltese, Maltese remedial law would have been applicable. Herein lies conflictual analysis. This leads conveniently to the role of policy, the first of the contexts for further assessment of the theses and their claims to correctness in respect of remedies and remedies law.

4.2 REMEDIAL POLICY: JUDICIAL (LEGALISTIC) OR PUBLIC?

Public policy operates to justify forum adjudication which otherwise would be arbitrary. Judicial policy operates in much the same way, though its function is more to explain, rather than to justify forum competence. In this light, the difference between public and judicial policy is clarified. Public policy is not judge-made, nor is it necessarily based upon strict rules or reasoning. It nevertheless binds the forum more generally, and, arguably, more firmly than does judicial policy. Public policy overrides judicial policy³⁴, but not vice versa.

In several respects, remedies law by single reference is suggested as being intrinsically related to the public policy of the forum. In point of fact, the draft of the theme of expediency and policy at 2.5 was depicted to include public policy. Likewise, at 4.1, it was suggested that single reference

has perhaps been so pervasive in remedial and other procedural matters because of otherwise unidentified constitutional antecedents to forum jurisdiction generally, thus providing a separate but parallel reason, alongside forum convenience, for the inapplicability of foreign remedial law. Cardozo J. in Loucks³⁵ rendered dicta suggestive of this view. It goes without saying that historical antecedents unify criminal law, tort law and remedies law³⁶, but do not adequately rationalise the unity; at least not for the contemporary purposes of these different areas of the law³⁷. Accordingly, even if remedies and public policy are related, the corpus of remedial rules denies that they are sufficiently close to justify any insistence on applying only forum domestic remedies rules. Lack of the closeness postulated by single reference explains the inappropriateness of blanket application of domestic principles and rationales. In any event, forum private international law explicitly excludes its own, and foreign, penal law. Yet, there is no denying the distinctive public policy character of penal law. Not unless we belabour the primacy, in forum law, of compensatory damages as the remedial form, or belabour the characterisation of remedies as wholly procedural, as public policy manifestations of the legal system (they are not; the theory of efficient breach founds the primacy of compensatory damages; the principle of convenience substantially founds the characterisation of remedies as wholly procedural), can we positively bring remedies law into the sphere of public policy. It is submitted that to do so is to exaggerate the judicial policy inherent in this position of forum law. We should recall Carter's views in these respects³⁸, especially that the localising or "homing" tendencies are ultimately explained solely in terms of techniques of forum control and protection and manipulation of the process of characterisation. Remedies law operates sufficiently independently (at least, from public policy) and should be observed and analysed in its own right. It goes without saying that remedial jurisdictional policy (which often legitimately includes aspects of public policy³⁹) is desirable where it is well articulated, as by Lord Wilberforce in Chaplin v Boys, and as conceived of in the 'Metliss and Adams' approach.

Even if remedies law is as bound up with public policy as can be construed from single reference adjudication (it is not), it is, under the objectivity thesis, subject to constructive criticism as such. We have noted with Carter, at 2.5⁴⁰, that while "it is probably true that overt reliance on public policy in English private international law has been comparatively rare", public policy "has relatively little role to perform in the area of forum jurisdiction" and that "[i]ts significant operation is in the choice of law [in commercial contracts], and in the area of recognition and enforcement of foreign judgments". If conflictual remedies law is covert public policy (it is not, strictly speaking), then it should be accordingly considered. If the unity of jurisdiction and judgments endorsed and depicted in the dissertation is sound (it is), then the role of public policy in judgments should be examined because it impacts on its possible extraterritorial aspects. If the new contract damages law refers to the chosen *lex causae*, and if that chosen law can be displaced on public policy grounds, then those grounds should be isolated and examined. It is nevertheless a fundamental error to throw remedies law (including its policy antecedents and precedents) in with public policy. That they may coincide, in which case the conflict is resolved in favour of public policy, is quite a separate matter.

The remedies we are concerned with are private law remedies⁴¹. This suggests, for example, that, where the forum is not only fortuitous but is also not the forum of enforcement, there may be a case for the forum to assess public policy considerations, e.g. not to affect innocent third parties, if its remedial judgment is otherwise satisfactorily justifiable. This is less readily sustainable than incorporating public policy considerations with criteria of satisfactoriness⁴².

Further light is shed on the public (constitutional) issues if we consider the celebrated Factortame litigation⁴³. The litigation involved the effective (interim) protection of European Union rights of individuals against Crown interference, the main question being whether forum courts had jurisdiction temporarily to disapply an Act of Parliament (the Merchant Shipping Act 1988) because the Act in question was incompatible with primary E.E.C.

legislation (by virtue of article 2 of the E.E.C. Treaty which provides for the primacy of European legislation where national legislation is conflicting or is otherwise incompatible). On reference to the European Court of Justice by article 177 of the E.E.C. Treaty, the Advocate-General Tesauro concluded inter alia that national courts were obliged to provide complete and effective remedial protection according to the principle of collaboration enshrined in article 5; in short, that European Community law rights ranked higher than comparable national law rights⁴⁴. The European Court had held, in a previous decision, Case 222/86, Union Nationale des Entraîneurs et Cadres Techniques Professionnels au Football (UNECTEF) v Heylens⁴⁵ that:

"the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of [a Community law right] is essential in order to secure for the individual effective protection for his right...[T]hat requirement reflects a general principle of Community law which underlies the constitutional traditions common to the Member States".

In particular, it was held that interim protection secured the effectiveness of final judicial protection by guaranteeing the possibility of exercising the E.E.C. right; refusal of the earlier remedy would signify the superiority of the national right.

The individual right in this context must be classified with public (constitutional) rights, because the questions arising pertaining to the sovereignty of the United Kingdom Parliament and of its legislation. This is so although the right is essentially *in personam*. The procedural remedy of interim injunction did not convert the right into a private right, despite the familiar private law basis of argument⁴⁶ led by the United Kingdom Government. In these circumstances and on the basis of the European Court ruling, Lords Goff and Jauncey held that, because of the public interest at stake, damages were insufficient relief in the circumstances, and that the public interest impacted more powerfully on the 'balance of convenience' guidelines which governed the ordinary availability of interim relief, and that the relief should be granted to restrain the Secretary of State from not registering the applicants' fishing vessels on the ground that the applicants

were resident and/or domiciled in an EEC Member State other than the United Kingdom⁴⁷.

It must further be clarified here that the grant of a procedural (pre-trial) remedy for a public law right (it was not a right of forum law being enforced, though it was recognised) does not thereby make the right enforced a private law right. The problem, identified by P. Cane⁴⁸, of determining whether a statutory right (the right here might qualify as such a right if we accept that it originates from a statutorily incorporated right, rather than that it is not a domestic right and therefore is but factual) is private law- or public law-based, does not arise (or if it does, is overridden by the fact that it cannot be enforced by domestic public law remedies) because of the public interest involved in its resolution. It is a public law right, albeit one conceived of with private law antecedents, but no less a personal right than different, e.g., the right to a sum withheld by a public body in Roy's case (at note 41). Those antecedents may be said to justify the adequacy of the interim relief awarded, but they do not make the right a private law right because of the overriding constitutional issue of the approach the forum must adopt. The respondent is the Crown, and is not, as such, liable in private law for breaches of its subjects' individual rights; the breaches must be conceived of as breaches of public law rights, even though we are, in these respects, beyond the sovereign state. The right in issue here simply could not, by its very nature, be a private domestic right since it particularly operated against Englishmen's fishing rights.

The judicial policy inherent in interim relief, is overridden by the public policy of collaboration in European Union affairs, as is apparent from the adaptation of the ordinary operation of the interim relief to suit the requirements made of the forum by Community law. The usefulness of this case study is that the possible scope of public policy in remedial matters is propitiously illustrated, with the upshot that remedial policy is independent of public policy, but can nevertheless be overridden it⁴⁹. Existing remedies can be adapted to suit novel rationalisations of their availability without disrupting the ordinary rationalisations of that availability.

Remedial policy as public policy is, at best, the exception, and irresolutely so, because the more accurate description is in terms of the displacement of the former by the latter. The basis for explicating remedial law as public policy, if this view of the basis for excluding foreign remedial law is correct, is untenable.

4.3 PREPARATION FOR TRIAL: THE LITIGANTS'⁵⁰ VIEWPOINT

The main upshots of objectivity produce radically different features for litigants' pre-trial preparations. Under the objectivity thesis, the defendant should expect any claims the plaintiff may have which involve full realisation of any liability (including remedial liability, where this is the case) originating under an alleged *lex causae*. We have noted that objectivity gives fuller meaning, as should be the case⁵¹, to the parties' freedom of choice of forum/jurisdiction. Once proceedings are begun the forum and the parties are bound by forum due process rules.

With regard to pleading, virtually the entirety of single reference case law shows that foreign remedial law is almost invariably sought to be relied on by the parties. This has been met by varying degrees of forum disinclination to consider (for application rather than establishment of remediability) foreign remedial law as pleaded. The theses coincide thus far. Objectivity requires the forum to go further and regard that law as applicable law, if the resolution of the disputed facts so requires. The threshold for applicability is the indication from the facts that litigation ideally should proceed in the foreign forum that produces the remedial law in question, so that, for example, the plaintiff in Phrantzes should have litigated in Greece. From the point of view of a foreign litigant (i.e., one who is neither domiciled nor resident within forum territory), single reference remedial jurisdiction can be more altruistic, than it is individualistic, according to D. Kennedy's model of private law adjudication⁵². This is presently discussed at 4.4. It is sufficient to remark that the charge is justified by single reference's exclusive relevancy and adequacy of forum domestic remedial law to all actions for its remedial orders⁵³. Single reference underconflictually makes

no concessions to function in transferring standards that are domestically adequate to conflict cases.

Thus the changes argued for in the objectivity thesis in these respects examine current judicial disinclination to apply foreign remedial law that will have been pleaded, although these changes enhance their legitimate expectations. Forum jurisprudence has this in its purview. They will more readily plead and prove, e.g. the law of the place of enforcement if this is considered necessary and provable. There is the distinct advantage that the objectivity model will produce greater precision about the juridical issues arising, but only if the litigants are prepared sufficiently, and with immediacy, concentration and dispatch. It goes without saying that, because the adversarial forum plays no part in the litigants' preparation, the advantage is defined by their mastery of the particular facts. It goes without saying also that the parties must observe the prime significance of pleadings⁵⁴ both inter partes and to inform the forum of the issues⁵⁵.

Nothing new is required by the objectivity thesis in any formal sense in these respects. As Sir Jack Jacob and Iain Goldrein put it:

"The system of pleadings has played a predominant role in the machinery of English civil justice from the earliest days of the common law to the present time. Its history affords an outstanding illustration of the capacity of the fabric of English civil justice to absorb fundamental changes while remaining substantially the same as before, which is the secret of its historical continuity from the old order to the new"⁵⁶.

The litigants are thus much assisted in taking account of the following main points among others⁵⁷:

- (a) that the forum has personal and merits jurisdiction;
- (b) that the forum's final remedial order (if any) is fully enforceable in the relevant foreign forum;
- (c) that the choices according to forum procedural rules ensure a fair result (especially from a foreign litigant's perspective);
- (d) that skilled and instructed counsel is available;
- (e) and that justice will not inordinately be long drawn out nor costly.

It is, in the present context, not the point that the English forum is inherently better than another possible forum in determining the issues or in satisfying the litigants (it may be). It is the inferred case however that its remedial jurisdiction considered in its entirety is potentially even more compelling than it is at present, given especially that the one litigant will strive to avoid the other's domestic courts. It is to the role of the forum that our attention turns in the remaining section of the present chapter.

4.4 ADJUDICATION: THE FORUM VIEWPOINT (JUSTIFICATION, INSTITUTIONAL FRAMEWORK, PRAGMATISM AND PRINCIPLE)

We need not discuss afresh the deductively justified basis for both theses. At 4.1⁵⁸, we noted that the objectivity thesis makes for a better deductive justification than does single reference, enhances, rather than violates, the existing legal order⁵⁹. We have seen also that the existing institutional framework more than adequately meets the modifications brought on by objectivity. These need not be repeated here.

In no way does objectivity infer that the pragmatistic bias of single reference (or, more accurately, of domestic remedial law) is unfounded in firm principle. The first major inference of objectivity is that those firm but wholly domestic principles should not represent a full dispositive set of such applicable principles in every set of transjurisdictional facts. The second major inference is that objectivity is no less pragmatistic than is single reference, and is in point of fact more pragmatistic in several respects, most notably in connection with the identification of the appropriate ground on, and the appropriate point in adjudication at, which the forum should regard procedural convenience, generally, and in particular, regard its necessarily and inevitably subjective role-sense⁶⁰. In this light, and in the light of the principles listed at 4.1 which comprise objectivity, the single reference thesis (which, it so happens, is also necessarily and inevitably subjective in its conception of the forum's role-sense) is inherently incapable of producing, manifesting or being founded in much needed rational transjurisdictionalism,

the true substantivism of remedies, and true forum procedural convenience. Single reference is thus incapacitated with regard to the making of satisfactory judgments, and with regard to providing effective and efficient administration of justice. It is submitted that, because of its local and localising precepts, single reference does not authentically or factually represent the significance of remedies to the legal system.

It is emphatically not the case that objectivity makes final orders more available than they are at present. We have noted at 4.1 that, in a practical sense, the objectivity thesis involves a good deal of scepticism of foreign remedies. Herein lies the worth of the principle of rational transjurisdictionalism. So that where foreign remedial rules become applicable in a given case on the basis of the preponderance of connection with the system which produces those rules, it will be relevant that those rules do in fact make the remedy sought available and, then, that it is, on balance, proved that the forum order based on such rules will be upheld, where this is applicable, in the foreign forum. For these reasons, the question of the possible criticism of single reference as being unnecessarily altruistic, and not adequately individualistic⁶¹, is now addressed.

To clarify, altruistic adjudication implies the legitimacy for all purposes of the forum's values on the basis that those values are not subjectively conceived of. This includes the central altruist tenet that "[G]ood judging ...means the creation and development of values, not just the more efficient attainment of whatever we may already want"⁶². Conversely, individualist adjudication is based on the view of the judge as a "simple rule applier, and rules are defined as directions whose predicates are always facts and never values. So long as the judge refers only to facts in deciding the question of liability, and the remedial consequences, he is in the realm of the objective. Since facts are objective rather than subjective, they can be determined, and one can assert that the judge is right or wrong in what he does"⁶³. The intersection and divergence between these as models of adjudication has been referred to elsewhere in the dissertation⁶⁴ and need not be repeated, except to say that the balance struck by objectivity between altruism and

individualism (i.e., calibrating reference to forum autonomy and jurisprudence, to party autonomy and to other forum autonomy, with application of foreign rules) is 'better' than the balance struck by single reference (i.e., even if we can identify a similar calibration, the reasons for applying only domestic law considerably weaken the balance). We have noted at the beginning of this chapter that objectivity brings "international remedial jurisdiction". The reader may wish to recall the analysis of this jurisdiction at 3.4.2A, which considers ethical and rational aspects of adjudication.

4.5 CONCLUDING NOTE

Objectivity encourages the consideration of remedies in their own right. It demonstrates that there is much to be gained (and nothing forfeit or misplaced) from doing so. There is not one consideration (be it jurisdiction, characterisation, choice-of-law or recognition and enforcement of judgments) that is applied to other currently individuated areas of law (including the traditionally substantive areas) that does not apply to remedies. It is hoped that sufficient ground has been indicated for the adoption of the analysis of conflict remedies offered here, and that there is, in truth, no reason to reject the analysis. In line with other traditionally procedural matters to be discussed in the next chapter, the best way to bring into practice the modifications herein may necessitate parliamentary intervention in the form of a short statute. It is to be hoped that judicial innovation will be sufficient in particular respects, notably, in the creation of the exception to double remediality as the main pre-requirement to single reference, and in the deployment and the incorporation of foreign remedies rationales in making final orders available, where appropriate, to enforce rights and/or to remedy infringed rights. Chapter Five closes the substantive dissertation by discussing instances of traditional procedure the recent modifications and interpretations of which contextualise more fully or attest to the case for objectivity.

NOTES TO CHAPTER FOUR

1. Natural Law and Natural Rights (1980), at p. 75. See N. MacCormick Legal Reasoning and Legal Theory (1994), at pp. 244-245, for the 'validity thesis' there as a point on which positivist and natural-law jurisprudence are agreed as to the validity of the legal system and its rules.

See also K. Greenawalt Law and Objectivity (1992), especially at p. 198: "Like moral reasoning and prudential reasoning about how to achieve given objectives, reasoning within the law is practical about what should be done. But reasoning within the law is largely about the meaning of authoritative materials and their implications for practical issues that arise..." Much as the title of Greenawalt's book may seem to coincide with the thesis advanced herein, its value is actually indirect, such that the abstraction required directly to relate his views to objectivity as conceived of (as "reference to observable forum competence in transjurisdictional contexts") here would be extensive, given the variety of meanings he either gives to or finds for objectivity. Our objectivity here is sufficiently depicted in the themes.

2. See, "What is Objectivity?", post, in the present section.

3. Cf. 3.5 and 3.6 ante (pp. 156-158).

4. i.e., the features of Rule 17 which indicate the normative aspects of remedial law. Cf. n. 37, Chap. 3 (p. 165).

5. i.e., criteria which emphasise the static or the spatial perspective/interpretation of remedial law, in the case of the single reference thesis, that remedial law is local law, or is law that is explicable only in terms of local precepts, and in the case of the objectivity thesis, the contrary.

6. i.e., like contextual criteria, criteria which give a static depiction of remedial law, and which assist the drawing of inferences from different interpenetrative norms (coherence).

7. i.e., in relation to the contexts in which remedial norms operate functionally, teleologically and consequentially speaking. These interrelated criteria supplied bases for argument in Chapter Three, give an operational depiction of remedial law through time.

8. Cf. What is Objectivity?, post (p. 194).

9. See, e.g., C.J. Reid (1994) 92 Mich. L.R. 1646 ("Am I, By Law, The Lord Of The World?..."), reviewing K. Pennington The Prince And The Law, 1200-1600: Sovereignty And Rights In The Western Legal Tradition, 1993, at pp. 1649 et seq.

10. Especially at nn. 5 to 12 there (pp. 160-162).
11. Especially at nn. 55, 59 and 79 (pp. 86, 87 and 92).
12. Especially at the text which carries nn. 178 et seq (pp. 68-69).
13. At n. 76 (p. 127).
14. At nn. 86 (pp. 175-176) and 92 (p. 177).
15. especially at the text containing nn. 160-162 (p. 148).
16. especially at the text containing nn. 171 and 172 (p. 153).
17. Thus overruling previous authorities like D'Almeida's Case [1953] 2 Q.B. 329, Kohnke v Karger [1951] 2 K.B. 670, and Chaplin v Boys [1971] A.C. 356 (on assessment of damages).
18. See generally 3.4.2A(iii), ante (pp. 139 et seq).
19. [1960] 2 Q.B. 19, at p. 34 per Lord Parker C.J.
20. *ibid.*, as n. 19.
21. The plaintiff had sought the forum's remedies of declaration and enquiry, an order in the nature of specific performance (allegedly similar to the forum's power to order settlement of a wife's property under ss. 23 and 24 Matrimonial Causes Act 1950), and the forum's inherent jurisdiction (s. 47 Supreme Court Judicature (Consolidation) Act 1925). None of these really availed the plaintiff's case which was not, as contended by her, like a widow's right of dower.

It is nevertheless relevant to the present analysis that the forum did not strike out the plaintiff's action or decline jurisdiction at the outset, as it could (or should) have done.
22. Cf. n. 58, at 3.4.1.a, ante (p. 170).
23. *ibid.*, Parker C.J., at pp. 33-34.
24. *ibid.*
25. Art. 427, French Penal Code 1810, governing liability for penalties but not for injunction.
26. [1900] 1 Ch. 73, at pp. 77-78.
27. at p. 78.
28. See Lord Goff in Arbuthnott and Others v Fagan and Feltrim

Underwriting Agencies Ltd; Henderson and Others v Merrett Syndicates Ltd. and Others [1994] 4 All E.R. 464.

29. e.g., Lynskey J. in Kohnke v Karger [1951] 2 K.B. 670, at p. 677: "The principles upon which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts". Not only are these dicta now overridden by section 7 of the Contracts Act 1990, they are extremely reminiscent of dicta still applicable in respect of other remedies, such as those of Kekewich J. in Baschet, in the passage cited previously in the main text, of Lord Chelmsford L.C. in Liverpool Marine Credit Co. v Hunter (1868) L.R.3 Ch. App. 479, at p. 486 (cited at n. 5, 3.2.2, ante). It is to be hoped that the same prospects await these non-money remedies, especially in view of art. 25 Brussels Convention (s. 25 Civil Jurisdiction and Judgments Act 1981 (as amended)).

30. [1971] A.C. 356, at pp. 389F-G and 391E-G, and 380A-C and 390G-391B respectively (per Wilberforce, "This technique appears well adapted to meet cases where the *lex delicti* either limits or excludes damages for personal injury").

31. *ibid.*, at pp. 394G-395B and 406D.

32. *ibid.*, at pp. 381E-382H, and 383H respectively.

33. *ibid.*, at p. 392B-C and E-F.

34. So that if, for example, Lord Parker in Phrantzes sought to apply the legalistic 'Metliss and Adams' approach to provide a remedy for the plaintiff in that case, the approach would probably be overridden by considerations of the propriety of manipulating the public policy rationales intrinsic to the forum law vaguely identical to the *lex causae*; the plaintiff had sought to rely on the former to secure forum remedies. But, in Re Bonacina, it may be said that any public policy considerations underlying the English doctrine of contractual consideration were not considered weighty enough to overturn an otherwise valid foreign contract. Cf. 3.4.1.d (pp. 126-127).

35. *supra*, at nn. 22 and 23.

36. See 3.4.2(i), ante, at text carrying nn. 89-92 (pp. 130-131), and the notes indicated (pp. 176-177). See also the Law Commission Consultation Paper No. 132 (1993), at p. 121 (para. 5.28). Cf. n.88, Chap.3 (third para.).

37. This should explain the express exclusion of foreign penal and revenue laws from the scope of private international law in general (e.g., see generally Cheshire and North, Chapter 8).

38. Cf. n. 36, ante.

39. e.g., in Warner, enforcement of the negative covenants was refused since this would have been enforcement of an illegal contract (or illegal aspects thereof). It is questionable whether the refusal to enforce such covenants would be legitimate in respect of an order enforceable extraterritorially in a jurisdiction which will have produced the *lex causae* and which does not deprecate such covenants. The forum's role-sense should supply an answer in terms of refusal.

40. See nn. 152 and 153, at 2.5, ante (p. 101).

41. See e.g., P. Cane [1992] Public Law 193 ("Private Rights and Public Procedure") in which the confusion of public and private remedies is discussed and deprecated, using the decisions in Roy v Kensington and Chelsea Family Practitioner Committee [1992] 2 W.L.R. 239 and O'Reilly v Mackman [1983] 2 A.C. 237, as abusive of process, in that public law remedies can apply "*only* when the interest which the applicant was seeking to protect by litigation was one which had no basis in private law" (p. 194). In Roy, the action was for payment of a withheld sum in circumstances clearly indicative of a dominant private law right, and therefore not to be enforced through the public law remedy of judicial review under Order 53 Rules of the Supreme Court even though the defendant was a public body. At p. 197, Cane addresses the question "What are "private law rights"?", and, having asserted that "Contractual and property rights are obviously private law rights [FOOTNOTE: [i]t does not follow that disputes about such rights may not raise issues of public concern to which rules and procedures may be relevant], as are rights to obtain monetary awards for private law wrongs or to obtain restitution on some other basis than wrongful conduct (such as mistake of fact)", finds that "[t]he really difficult cases are those in which the right in question arises out of a statutory provision".

In no way do these problems fudge the identity of the private law remedies with which we are primarily concerned in this dissertation: damages, restitution, injunctions, specific performance. Public law remedies (e.g., judicial review, prerogative orders etc.) have no place in the conflict of laws because of the types of public interest matters such remedies address. At best, a plaintiff could frame the action in private or in public law (as suggested in Roy, supra), and expect only the remedies available under the respective regimes. Foreign public law clearly has no scope of application in an English forum.

See also generally C. Lewis Judicial Remedies in Public Law, (1992), especially at pp. 1 et seq. (on the nature of public law remedies), 67 et seq. (on the rule in O'Reilly) and pp. 476 et seq. (for the E.C. position).

42. Recall the grounds for refusing to recognise even a jurisdictionally competent foreign forum's judgment where the judgment offends forum conceptions of public policy, at 2.4.2 (at text carrying n. 110: p. 57), at 2.4.2.1 (at text carrying nn. 125 and 126: p. 60), and at 2.4.2.2 (at text carrying nn. 137-139: p. 62).

43. R v Secretary of State For Transport, ex parte Factortame Ltd. and Others (No.2) [1990] 3 W.L.R. 818; (No.3) [1992] 1 Q.B. 680. See also L. Collins European Community Law in the United Kingdom (1990) at pp. 38, 39, 108, 120, 183, 193, 194 and 225.

44. at para. 22 of the ECJ report (cf. n. 43, ante). The U.K. Government had unsuccessfully argued subsequently, on the basis of American Cyanamid [1975] A.C. 396, that, there not being a defined remedy under EEC law, no English remedy availed the EEC fishing quota rights in question (since interim relief could not go against the Crown, under English law). The ECJ replied that the Treaty was "not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law": cf. Case 158/80, Rewe Handelgesellschaft Nord m.b.H. v Hauptzollamt Kiel [1981] E.C.R. 1805, at para. 44, and that the existing remedy was adequate but restricted and needed only modified application.

45. [1987] E.C.R. 4097, at para. 14; also Johnston v Chief Constable of the Royal Ulster Constabulary [1986] E.C.R. 1651, at para. 17.

46. cf. n. 44, ante, on American Cyanamid. See generally J.E. Levitsky (1994) 42 A.J.C.L. 347 ("The Europeanization of the British Legal Style").

47. On 9/7/90.

48. See n. 41, ante.

49. This is nothing new; cf. text above which carries n. 34 (p. 199).

50. "Litigants" here includes their lawyers. On preparation for trial generally, see A. von Mehren, (1984) 3 Dick. J. Int. L. 43, Symposium (1984) 17 Vand. J. Trans. L. 1, Symposium (1984) 18 Int. L. 522.

51. Remember that procedural law is invoked voluntarily by the parties.

52. Cf. at 3.3.5, ante (pp. 118-119).

53. See, e.g., D. Kennedy (1976) 89 Harv. L.Rev. 1685 ("Form and Substance..."), at p. 1738: "There is a strong analogy between the arguments that lawyers make when they are defending a "strict" interpretation of a rule and those they put forward when they are asking a judge to make a rule that is substantively individualist. Likewise, there is a rhetorical analogy between the arguments lawyers use for "relaxing the rigor" of a regime of rules and those they offer in support of substantively altruist lawmaking. The simplest of these analogies is at the level of a moral argument". Cf. R. Dworkin A Matter of Principle (1986), at pp. 92-93 (see 1.3, ante, at n. 34) (pp. 30 and 37).

54. See, e.g., Sir Jack Jacob and Iain Goldrein, Pleadings: Principles and Practice (1990), Chapter One, especially at pp. 10-12.

55. It may even bring about the vacation of the parties' intentions to litigate.

56. Op. cit., at p. 19.

57. For an identical checklist, see, e.g., D. Vagts, Transnational Business Problems (1986), at pp. 158-159.

58. See the first four paragraphs there (pp. 191-192).

59. On this point, see K.-H. Ladeur on "From the Deductive to the Argumentative Rationality of Law", in P. Nerhot (ed.) Law, Interpretation and Reality (1990), at pp. 169 et seq, especially at the closing page 192: "[A] new concept of self-changing processes must also be made productive for any second-order argumentation theory proceduralism. Such a theory must build on connexion-possibilities and connexion-restraints which have been created by previous moves. But under conditions of uncertainty and complexity and, therewith, of increasing significance of the projective-constructive element of juridical argumentation, it must seek, rather, to guarantee flexibility and a wealth of alternatives and thus maintain a productive relationship between order and disorder through which new relational patterns will always be generated in the interplay of difference".

Objectivity, as we have conceived of it, is, like single reference, but a proceduralistic means to the end of conflictual justice.

60. This explains the subjective proper law of remedies description referred to in Chap. 1, at the end of the penultimate paragraph of 1.2(p.27). Note that the forum is autonomous and not strictly jurisdictionally answerable either to the parties or to another forum, except in so far as the forum must not abuse its jurisdiction in such a way as to interfere with another forum.

61. Cf. Duncan Kennedy, cited at 3.3.5 (pp. 118-119), and at 4.4 ante (pp. 207-208). In no way is this assessment of single reference (and, by implication, objectivity) hard and fast. To be sure, altruism and individualism are merely observational media, so that it is possible to identify aspects of either medium in either thesis. Kennedy makes tacitly for this allowance at p. 1776: "There *is* a limited connection, in the rhetoric of private law, between individualism and a preference for rules, and altruism and a preference for standards. The substantive and formal dimensions are related because the same moral, economic and political arguments appear in each case...In practice, the choice between rules and standards is often instrumental to the pursuit of substantive objectives".

The relative individualism of single reference is apparent in the description of individualism, at the text leading up to n. 63 (p. 207). That objectivity is, by comparison, more individualistic than single reference is, and that objectivity is altruistic rests on the connection provided by "facts" as the basis for objective individualism. Foreign law as potentially and

legitimately applicable fact completes the demonstration of objectivity as being predominantly individualistic. The altruism observable in objectivity stems from its Razian 'legal system openness' and receptivity (cf. n. 76, at 2.3.2 (p. 173)) of foreign remedial law as rules as may be alleged and adduced by one or both of the parties. This altruism is limited, of course, in that such foreign law is applicable neither automatically (as of right: it is fact, not law) nor in every case in which reliance upon it is sought.

62. Kennedy, *loc. cit.*, at pp. 1771-1772

63. *ibid.*, at p. 1770. Cf., n. 61, *ante*, especially at the second paragraph therein.

64. See 3.3.5, *ante* (pp. 118-119).

CHAPTER FIVE: COGNATE TOPICS (CONFLICTUAL PROCEDURE)

5.1 INTRODUCTORY NOTE

"[T]he statement that courts should enforce foreign substantive rights but not foreign procedural laws has no justifiable basis if the so-called procedural law would normally affect the outcome of the litigation"¹.

We have seen why the objectivity thesis should be preferred to the single reference thesis as the better means to setting conflict theory, in the area of final remedies, along its course. The purpose of this closing chapter is to complete the presentation of the thesis by referring to aspects of coherence and at delocalised aspects of current law regulating other matters characterised as typically procedural. We have frequently referred to interim remedies law. This will be reviewed in the present chapter after discussion of the topics of foreign limitation periods, obtaining evidence abroad and priorities of claims in forum private international law. Thereafter, there will be brief survey of other remedies so far not really considered in the dissertation: restitutionary remedies, remedies *in rem* and self-help remedies. It is intended that the chapter concisely and adequately sets the objectivity thesis in the context of conflictual procedure. For remedies, as well as the cognate topics discussed here, will fall into consideration in the application of Rule 17, and in the interpretation of procedure.

The emphasis of the chapter is on coherence and, to a lesser degree, on delocalisation in forum jurisprudence. It is to be hoped that substantivistic improvements identical to and encouraged by those in the cognate topic of limitation (and for that matter in the case of compensatory damages) will be made for remedies and, doing so, will set the groundwork for a coherent, functional, delocalised conception of the forum law of conflictual procedure. This is beyond the scope of a work limited to remedies. It is reasonable to anticipate more widespread improvement in response to the influences of

civilian and Community law, and of authoritative commentators' suggestions for improvement cited from forum jurisprudence.

5.2 FOREIGN LIMITATION PERIODS: THE FOREIGN LIMITATION PERIODS ACT 1984²

Before the Foreign Limitation Periods Act 1984, hereafter the 1984 Act, domestic limitation periods applied in conflict actions irrespective of there being a relevant foreign rule which limited or extinguished the right in question. This was because limitation periods were characterised as procedural³ and therefore for the *lex fori*, even though their function was practically substantive defence. This meant that a plaintiff could still sue in the forum if the time permitted under the *lex causae* for the institution of proceedings had expired; it also meant that a plaintiff could lose a live remedy under the *lex causae* if the relevant domestic rule so provided.

The 1984 Act now makes foreign limitation periods substantive rather than procedural⁴, the applicable law being both substantive and procedural: forum domestic *lex fori* continues to determine the procedural points of the date of commencement of proceedings and of the running of the relevant periods (section 1(3)). In private international litigation instituted after 1 October 1985, the commencement date of the Act, domestic law would have to be a relevant and, therefore, applicable *lex causae* in the proceeding if foreign limitations are to be displaced. In actions begun before then, the old rule applies, by which the only applicable periods are domestic. The forum's unfamiliarity with a foreign *lex causae* has contributed significantly to the changes brought on by the 1984 Act which are primarily that foreign procedural law is now applied by the forum⁵ in consideration of the transjurisdictional nature of the cause of action, the different functions of limitation laws and periods and the preservation of the forum's process (the inalienability of certain aspects of the judicial role). In this way, the changes can be said to represent a conflictual analysis of limitation.

It is significant to observe that the provisions of the 1984 Act include the empowerment of the forum to exercise discretions vested by a relevant

and applied foreign *lex causae*⁶ as far as it is practical to do so and as far as the exercise will be comparable to the exercise by the relevant foreign court in question, having regard to its jurisdictional case law and jurisprudence. Furthermore, the 'forum domestic public policy' exception to the application, otherwise, of foreign law⁷ brings about the application of the common law as *lex fori*⁸. This includes the grounds of undue hardship. This overriding provision secures the sum of the policy (including public policy) rationales in the law in this area to the forum and to its jurisprudence, rather than throw the field so wide that it cannot meaningfully be rationalised. As with tort double actionability (that is, in the case of choice of applicable limitation, where domestic law is relevant and is a relevant *lex causae*), expiry of either limitation period stipulated by either the forum or the relevant foreign law will bar the action in the forum⁹.

We would be justified in maintaining that the sum of the arguments for objectivity in Chapter Three is vindicated by the existing law of foreign limitation, in particular, the fundamental general arguments led at 3.4.1 and, with appropriate allowance being made for the different subject matter there, the procedural and the substantivist arguments at 3.4.2A and 3.4.2B respectively¹⁰.

5.3 OBTAINING EVIDENCE ABROAD: DICTA FROM SOUTH CAROLINA INSURANCE

In the Court of Appeal, in South Carolina Insurance Co. Ltd. v Assurantie Maatschappij "De Zeven Provinciën" N.V.¹¹, Griffiths L.J. held as follows:

"Once the parties have chosen or accepted the court wherein their dispute is to be tried they must abide by the procedure of that country and that court must be master of its own procedure...

[A]s a matter of principle the court must have an inherent jurisdiction to make any necessary order to ensure that the litigation is conducted in accordance with its own procedures".

On subsequent appeal, in response to contention on the question of pre-trial discovery (an interim remedy in its own right), Lord Brandon held as follows,

having found an essential difference between the civil procedures in the High Court rules and those of the U.S. district courts¹²:

"It appears to me that there may well be considerable force in this contention [that a relevant foreign rule of pre-trial discovery, which differs from the English rule on the same point, may be applicable in an English forum]. It is not possible, however, for your Lordships, on the material before you, to decide for yourselves in advance how the U.S. district court would see fit to exercise the discretion conferred on it by section 1782, in the particular circumstances of this case, and having regard to the characteristics of civil procedure in the High Court of England"¹³.

On the same point, the current edition of Dicey and Morris states that:

"It is a principle of English civil procedure that a party obtains by his own means the evidence he needs to support his case. The means may include the taking in foreign countries of any steps which may lawfully be taken there, such as the making of a direct application to a foreign court for a procedural remedy available under the law of that court, for example an extensive order for discovery which a U.S. court may make under its own procedural rules even if the evidence is intended for use in English proceedings. The English court will not restrain a party from taking such steps in a foreign country unless they amount to unconscionable conduct interfering with the due process of the English court or invade the legal and equitable rights of another party"¹⁴.

It goes without saying that, in the course of litigation, the *lex fori* determines the methods of proof¹⁵, questions of admissibility¹⁶, the law governing witnesses and the burden of proof¹⁷. Article 14(2) of the Rome Contracts Convention provides that the *lex fori* (or the law governing formal validity of the contract) may determine the methods of proving the legal effect of a contract or of acts done in furtherance of the contract¹⁸.

The *lex causae* generally determines the (substantive) facts in issue¹⁹, sometimes by way of substantive provisions. However, the *lex causae* cannot govern admissibility, especially where the *lex fori* provides differently²⁰. There is no justification for subjecting the establishment of the factual dispute before the forum to some other law, because the process of establishing the factual dispute must satisfy the forum of litigation. It is clear

enough from the passages above that, in obtaining evidence in another jurisdiction (hardly substantive by any description or in any context) strictly speaking, the applicable law in doing so is procedural though clearly not of the *lex fori*, but rather, of the pertinent foreign jurisdiction. Admissibility (including actual admission), by the forum, of evidence which has been properly procured from abroad for use in the forum, can be said to confirm that the *lex fori* includes rules that are not part of the domestic law of the forum²¹, and that, in the appropriate circumstances, the forum will not be averse to its process being influenced (positively, though minimally) by procedural rules possibly more advantageous to the one of the litigants seeking to rely on such rules which originate and are applied elsewhere.

In the absence of decided authority, this much can be garnered from the passages cited at the beginning of this section. While it is not the case that the forum will apply foreign evidential rules of procedure, the argument that such rules should not be available to the party seeking to rely on them may not hold. Therefore, it is with some caution that the current law in these respects can be said to radically support the view that conflictual procedure be extensively re-appraised. It would nevertheless be meaningless to suggest even that this should be otherwise, that the forum should apply foreign rules of procedure, not just because they may depart substantially from the comparable provisions of its own law, but because the admission of evidence obtained by this means may be contrary to the forum sense of justice *inter partes* as it was in the South Carolina Insurance case. It can be rightly said that foreign enforcement considerations are markedly identical to the foregoing.

The law on evidence from abroad requires no adjustment of the line between substance and procedure, at least to the extent that Rule 17 is not taken literally to mean that because evidence is materially procedural it must be governed exclusively by the domestic rules of the *lex fori*, and to the extent that the difference between the scientific process of proof and the strict rules that indicate what constitutes evidence is constantly borne in mind. Besides the implicit immutability of the forum, of the outcome of

observing foreign rules, the main contribution to the case for objectivity in conceiving of final remedies derives from the fact that the matter of establishing the facts in issue may be governed by the *lex causae*²², and from the fact that it furthers the principle of non-interference with foreign jurisdiction and, therefore, the case for coherence. It is to be hoped that this is sufficient at least to contribute to a delocalised conception of the law of remedies. The law on evidence adequately supports the contention here that reference of evidential questions to the *lex fori* should not mean that the relevant rules of the *lex fori* are exclusively relevant in the conflict case²³.

5.4 PRIORITIES OF CLAIMS: CARTER'S VIEWS

The decision of the Privy Council in Bankers Trust international Ltd. v Todds Shipyards Corporation, The Halcyon Isle²⁴ is authority that priorities, as between claimants to a limited fund being distributed by the court, are governed by the *lex fori*²⁵. As to the verification and, consequently, the quantum of creditors' claims, the same decision is authority that the *lex causae* governs²⁶.

The important point is that it is the domestic priorities rules that are prayed in aid and, if successfully prayed, applied by the forum. The reasons for the application of the forum's domestic rules are none other than the forum's practical convenience rather than analysis of the validity of the claim (or claims) or of the scope and tenor of relevant choice of law rules. The decision in The Halcyon Isle prompted critical response of P.B. Carter²⁷.

The gist of Carter's views is contained in the following passages:

"The validity of each claim must be determined by reference to the law which, in accordance with the rules of private international law obtaining at the *forum*, is deemed to be its governing law...

Of course, in a case in which more than one claim is being put forward, and in which, therefore, more than one choice of law rule may be involved, a question of characterisation could arise when considering the scope of any of these choice of law rules, in exactly the same way as such a question may arise when considering the scope of a choice of law rule where only one such rule is involved"²⁸.

Further on, he states:

"The practical convenience policy, however, does not reach out to an issue of priority such as that which arose in The Halcyon Isle. There no unacceptable inconvenience to the court would have been involved either way...Of course, convenience did require that the court should decide one way or another, but it did not require that this decision should be in conformity with any pattern of its own domestic law.

Faced with two (or more) valid and competing claims a *forum* has itself to intervene authoritatively. There is no a priori reason for it to apply the law determining the validity and effects of one claim rather than the law covering the validity and effects of another claim"²⁹.

It is to be hoped that the significant suggestions for change away from the dominance of the domestic *lex fori* will attract positive judicial response. There is no doubt that the judicial role required here deserves not to be oversimplified. From the foregoing passages, it is also clear that the questions arising can be far more complex than single reference adjudication could satisfactorily address. That the forum has its own priorities rules should not be held to justify the blanket application of those rules in all transjurisdictional situations in which it is necessary to prioritise multiple creditors' claims³⁰.

There is much to be gained from a realisation of discrete conflict forum rules which are neither applicable in nor derived directly from their domestic parallels. Such rules should qualify as rules of the *lex fori* in the same way as do, e.g. rules governing the availability of interim relief³¹; that is, such *lex fori* rules should refer (i.e., not infringe and/or disrupt) to the law governing the creditor's claim itself. Prioritisation, as distinct from verification, of the substantive aspects of the claims of competing creditors is arguably better described as procedural rather than as substantive. It nevertheless seems to depend on a leap in logic to apply domestic rules and precepts. They could fail a relevancy test (e.g. where the preponderance of respective claims is with a foreign jurisdiction). The connecting factor between the creditors' claims and the domestic law of priorities is the locus of the litigation. It is respectfully submitted that the law of the claim (or

claims), should be a great deal more decisive, and that the forum, having already established that it has jurisdiction to determine the claim (or claims), is jurisdictionally competent to use that law in a purposive, though yet untested, way. Forum prioritisation is one of several important steps. This is as procedural as the exercise gets, given especially that the significant question of verification of the claims is subject to a foreign governing law. It is further submitted in conclusion that, in the same way as the assessment of compensatory damages in contract is now regulated where possible according to the relevant *lex causae*³² (even though the exercise of assessment is a step the forum alone must take), prioritisation should, where appropriate, also be unfettered from the dominance of the domestic *lex fori*.

The usefulness of the conflictual law of priorities as described here is in the context of coherence. The particular points, on the clear conception (and re-definition) of '*lex fori*' to include non-domestic rules, and of 'procedure' as having a weaker 'forum steps' sense and, possibly, a stronger substantivistic aspect are tacit in the foregoing account of the law and need not be repeated³³. It should be added that because the priorities actions are for monetary interests *in rem*, the discussion at 5.5.3³⁴ on remedies *in rem*, serves to indicate remedial aspects of the present section.

The foregoing completes the discussion of other characteristically procedural topics in private international law. There are other topics, e.g. the propriety of parties, service of process, security for costs, the law of set-off and counterclaim. Besides the constraints of space, there is little to add to the effort to delocalise the conception of remedies in particular and procedure generally by discussing these topics. It should be said that they can be referred to the substance-procedure divider in much the same way as evidence from abroad has been. It is to the discussion of other conflictual remedies (in varying degrees of sophistication and pervasiveness), viz. interim remedies, restitutionary remedies, remedies *in rem*, and some non-judicial but legally imposed remedies (self-help remedies: contract rescission, defences) that our closing attention now turns.

5.5 OTHER REMEDIES

5.5.1 Interim Remedies Revisited:

The law which governs interim remedies has been vital to the presentation of the objectivity thesis. That law has been examined and prayed in aid in in the contexts of defining the major imprints of conflictual analysis (at 1.1 and 1.2), and of depicting the thematic considerations and procedural arguments developed from them in Chapters Two (especially at 2.2 and 2.4) and Three (especially at 3.4.2A) respectively, particularly in drawing the limits of judicial jurisdiction. The arguments derived from the law of interim remedies at 3.4.2A(iii) in no way suggest that the very material differences between these remedies and final remedies be contemned. Rather, as with legal argument generally, the arguments rely on analogy, and on the relation between 'jurisdiction' and 'judgment' to illustrate instances of want of coherence in the exercise of remedial jurisdiction. The reader may wish to look again at the places cited. To recapitulate, we have noted that the law of interim remedies helps identify some crucial precepts, viz:

- forum rules that have no domestic application (procedural rules of private international litigation³⁵);
- the true scope and flexibility of *in personam* jurisdiction, especially extraterritorially (including the transjurisdictional possibilities brought on by the Brussels and Lugano Conventions), and, in terms of how the acquisition of jurisdiction should be more significant in determining the subsequent (remedial) exercise of forum jurisdiction³⁶;
- the relevance of substantive law and the law of recognition and enforcement to final remedies (including, once again, the distinctly progressive cross-border possibilities brought on by the Brussels and Lugano Conventions).

We have seen how interim remedies and final remedies illustrate different but hitherto unaddressed senses of 'procedure' for conflict purposes: the 'forum procedure' and the 'substantivistic' senses respectively, which, if addressed more fully, will objectively delocalise the conception of the law of conflictual remedies in the way inferred herein. The

added advantage is that this will clarify the meaning of conflictual procedure generally, and make for coherence in the exercise of jurisdiction.

It is neither intended nor is it necessary to resume or revise the discussion of interim remedies now. It is to be hoped that the final remedies' formulations derived from the discussion will be approved of, and that the greater sophistication required in the formulation of the forum's private international remedial (and procedural) rules that can follow will become more familiar. It goes without saying that final remedies as conceived of in the dissertation have a great deal more in common with interim remedies (also as conceived of here) than with other types of remedy primarily because, and to the extent that, they both operate *in personam*. It goes also without saying that the argument for coherence and comprehensiveness in jurisdiction generally (at 3.4.2A(i)) and the derived case for considering '*lex fori*' and 'procedure' are crucial.

5.5.2 Restitutionary Remedies:

There is a virtual absence of substantive conflict case law³⁷ based expressly on actions for restitution³⁸. The remedies to be portrayed in this section have been referred to in presenting the reconception of final remedies in preceding chapters. The central restitutionary principle³⁹, like the compensatory principle in the law of damages⁴⁰, and the types of restitutionary remedy, both make the point clear that be the order judicial, coercive, constitutive (declaratory) or personal (i.e., self-help, e.g., contract rescission⁴¹, recaption of goods)⁴² it can be referred to Rule 17, as are any of the more traditional remedies of injunction, specific performance and damages. To be sure, the themes in the second chapter, plus the sum of the arguments in Chapter Three, apply with equal force to restitutionary remedial orders. Unlike the older remedies, restitutionary remedies can of course be either *in personam* or *in rem*, depending on the particular facts of the case.

The conflictual law is summed up in Dicey & Morris' Rule 201 and the accompanying Editorial Comment⁴³, Rule 201 being neither supported nor contradicted by judicial authority. We are informed there that restitution actions arise in connection with (as distinct from "arise out of"⁴⁴)

contracts⁴⁵ and/or land transactions⁴⁶, or independently of these⁴⁷, and that the proper law of the obligation determines the existence, scope and content of the obligation to restore the benefit of an unjust enrichment. Forum domestic law characterises the action as restitutionary (which then makes the merits referable to the proper law of the obligation), and whether it is 'personal'⁴⁸ or 'real'⁴⁹, for example, an attempt to trace property.

Where the action is not connected to a contract or land transaction, and where the law of the place of enrichment defines the restitutionary obligation by imposing a constructive trust on the unjustly enriched party, the question arises for the forum (that is, for the *lex fori*) whether the imposition is procedural or substantive⁵⁰. If the domestic conception under the foreign proper law (which conception is relevant to the forum) creates substantive rights, then, clearly, its conflictual purpose is not procedural even if it is classified there as "remedial"⁵¹. It must be one thing to have to characterise a foreign conception, for reasons of practical convenience, as procedural, e.g. because it is not known to forum law (and, therefore, that there can be no restitutionary order as prayed⁵²), and quite another to characterise it as procedural because it is remedial⁵³. Neither is particularly convincing.

The thematic considerations, familiar now, of rational judicial jurisdiction (to adjudicate and to make orders), of substantivism of (in this case) restitutionary relief, of recognisability and enforceability, in other jurisdictions as may be the case, of the forum's restitutionary orders, and of judicial policy, are directly relevant to the presumptions the forum makes in the present context. Article 5(1) and (3) of the Brussels Convention gives jurisdictional superiority to the courts of the defendant's domicile⁵⁴, and where there is a strong contract bias, Order 11 Rule 1(1)(d) applies to give jurisdiction to the forum⁵⁵. The parallels are rife and need not be overdone or otherwise duplicated here.

The matter of "recognising the independence of the claims being brought"⁵⁶ which stems from the familiarity (and, arguably, the sophistication) with such actions in civilian jurisdictions⁵⁷ may be

considered. We need look only as far as Scots law where the current law is described in the following way by D.M. Walker:

"Where a legal obligation arises to make restitution, for the avoidance of the unjust benefit which will otherwise arise, and restitution is not made, a claim of damages arises in those cases where restitution should have been effected *in specie*, as an alternative to restitution, and the remedy appropriate where restitution cannot be made. Where the restitution required is a payment or repayment of money, a claim for damages in the alternative is pointless as it in effect asks for the same thing as should have been, but has not been, paid, but interest can no doubt be asked for the wrongful withholding of the money"⁵⁸

It would appear that the basis on which forum law in these respects can be described as identical is that it would be bad counsel not to advert to the futility of a action for damages as an alternative to an action for, e.g. money had and received, as in Fibrosa⁵⁹. This is not to suggest that adjudication in the forum proceeds unsatisfactorily as far as clarity of principles goes. Rather, it is to say that it is only with increased adjudication in conflict of laws of restitution as, it is to be hoped, will take place, can the sophistication that is required come about. The clear preference from this early on for an objective, flexible proper law theory approach⁶⁰, in choice of law matters, which takes into consideration the place of the unjust enrichment or the place of loss⁶¹ is to be welcomed as indicative of the primary focus being on the separateness of restitution actions and, thus, as P. Birks puts it:

"[i]t is the demands of plaintiffs and defendants which put pressure on the frontiers of liability. It is then for the judges to decide when and how the existing lines must be redrawn"⁶².

The clear objectivity and absence of undue localisation in the present law and the development of that law in the wholly domestic context are to be welcomed. In the discussion of remedies *in rem* that now follows, it should be borne in mind that restitutionary remedies can also be typical here. We have seen from the second and third paragraphs of this section that it is reasonable to anticipate functional judicial use of the substance-procedure divider, and to expect that the *lex fori* will not be interpreted in a way which

would make for underconflictual forum exercise of its restitutorial jurisdiction. It remains to be seen what forthcoming decisions will add to the case for objectivity generally, which case is at least encouraged by the current law.

5.5.3 Remedies *in rem*⁶³:

These remedies are usually money remedies⁶⁴, where sufficiently traceable money *in specie* (or in the form of proceeds therefrom) is referred to as property, in practice, usually a ship (against third persons, as the case may be) rather than as legal tender, so that any order made will make the plaintiff an unsecured creditor and will not be for a debt. The typical substantive right *in rem* is a property right or a right to personal integrity and reputation, the infringement of which is, generally speaking, a tort⁶⁵. This usual conception of the right should not unduly affect the definition of the remedy: it is sufficient to limit our attention to the proprietary nature of the enforceable remedial order. It is the action *in rem* which requires consideration and which is distinguished from the action *in personam*.

The Editorial Comment to Dicey and Morris' Rule 33⁶⁶ which deals with jurisdiction in actions *in rem* states that "[t]he only action *in rem* which exists in English law is an Admiralty action brought in the Queen's Bench Division of the High Court"⁶⁷. Its distinguishing features are that the judgment order goes not against the person but the *res* alone⁶⁸ and binds only as far as the actual interest in the *res*, even if the interested person is not a party to the action. Further, article 2 of the Brussels Convention gives the forum jurisdiction if the defendant is domiciled⁶⁹ in the United Kingdom; otherwise, Article 4 allows for the application of the traditional forum rules⁷⁰. The judgment in The Deichland⁷¹ is authority that, for Convention purposes, the owner (or interested person) is probably the proper defendant.

A significant consideration is that, irrespective of the defendant's domicile, if the forum has prescriptive jurisdiction⁷², this will be exercised applying domestic law⁷³. Bearing in mind the territorial antecedents of acquisition of jurisdiction (i.e., typically, considerations of propriety of forum, and that there can be no service out), the subsequent application of

domestic law appears justified to the extent that the same law will presumably have been the *lex causae* which establishes the obligation in the *res* as in The Talabut⁷⁴. However, because the *lex causae* can be foreign⁷⁵, as can be a jurisdiction to which a forum order *in rem* is taken for recognition and enforcement⁷⁶, there is a basis for arguing that the present remedies be referred to considerations identical to those for *in personam* remedial jurisdiction. Otherwise, we find the odd scenario where the fact that there can be no service out should, in principle, also mean that a final judgment cannot be good for other jurisdictions.

There is support for this view from Hohfeld⁷⁷ and from Atiyah⁷⁸. Hohfeld demonstrates that both types of order have the same doctrinal origins. Atiyah confirms the doctrinal and practical similarity between a decree for specific performance and a property right. The theme of finality, recognisability and enforceability of orders in the conflict of laws adds a third concept to Atiyah's two: the successful plaintiff's territorially and extraterritorially enforceable rights accruing from a judicial order, whether *in personam* or *in rem*. This means that the connection, which justifies the forum's taking and exercise of jurisdiction over the proper defendant, is sufficient to justify the view expressed here that, even though the *res* may be located outside the territorial jurisdiction, there is no reason to consider a final order against it ineffectual.

The reasons for the view are not entirely different from those adduced earlier in the dissertation, especially at 2.7. A *res* is not subject to contempt proceedings in the way that a person is, but will nevertheless be on record as the subject of a final judicial order. The transjurisdictional context infers that this fact should feature prominently in the forum's rationalisation of its jurisdictional competence. One obvious situation for not referring to the context would be where the forum's assumption of jurisdiction is successfully challengeable⁷⁹. This would make the purported exercise 'irrational'⁸⁰ and potentially ineffectual. Another is if the *res* does remain permanently outside the territory of the forum and it is possible for the

owner (or holder of an interest) who will have submitted to the jurisdiction to operate the *res* from within the jurisdiction.

As with the remedies discussed in the present chapter, the themes are equally relevant in this section and need not be set out afresh. The question of service out could be reconsidered, given that its territorially justified premise derives from the implications of property law following the *situs* of the property, with no allowance being made for the fact that questions of title *strictu sensu* are in no way pervasive in present respects. If service out were possible, the matter of rational judicial jurisdiction would be more readily freed from currently possible constraints of lack of justification for extraterritorial exercise of that jurisdiction. Put differently, the case made at 2.2 for delocalising remedial jurisdiction, at 2.3 for giving effect to any substantivistic aspects where it is appropriate to do so, at 2.4 for identifying correctly and practicably the limits of the forum's prescriptive jurisdiction, and at 2.5 for realising and giving effect to cogent remedial policy are no less relevant to the remedies discussed in this section.

5.5.4 Self-Help Remedies:

Self-help remedies are those which are not judicially ordered as the result of the processes of litigation and adjudication, but which are nonetheless recognised and/or imposed by law, either by the operation of law or by the express consent of the parties. F.H. Lawson⁸¹ tells us that, where available and appropriate, these remedies can be superior to other (judicial) remedies. We are told further that self-help remedies are relatively safe and practical, being inexpensive and requiring little by way of time. They predate judicial remedies and, in forum law, "[give] way [to judicial remedies] only by degrees". In the law of obligations generally, the remedies in the present section operate as defences where the matter goes to litigation, which makes them a possible incidental question at that stage, and subsequently, where a remedy is ordered, of consequence in its rationalisation and composition. Self-help remedies may have a role in the establishment of substantive liability and/or relief.

In tort, examples of self-help are to be found in the law of self defence generally, in the ejection of trespassers, the abatement of nuisance and/or the recovery of possession of immovable property, in the recaption of moveable property, and in the law of distress. It is clear enough how these will be relevant where a remedy is subsequently awarded in respect of the matter about which self-help options such as the foregoing may have previously been exercised. It is also clear how these may be said to share common pre-litigation characteristics with the laws of set-off and of counterclaim⁸².

In contract, the main self-help remedy is rescission⁸³. Rescission (or repudiation) arises by the operation of law, as does the other contractual self-help remedies of set-off⁸⁴ and the appropriation of payments⁸⁵. These may be distinguished from penalties and liquidated damages, which arise by the parties' express consent⁸⁶.

It goes without saying that the law to govern the remedies outlined here will be determined according to proper law method, and, therefore, that the approach of forum law will be the familiar one by which, having settled the question of competence, closeness of connection, the parties' choice and convenience are important considerations. It cannot be said that there is much by way of procedural considerations in these respects, even if the exercise of a self-help remedy becomes material at litigation, e.g. in connection with the exercise of a remedial order. The simple distinction between the steps taken by the forum and the redressing of the established wrong, both procedural in the differing senses discussed in this dissertation, can be relied on.

NOTES TO CHAPTER FIVE

1. E.G. Lorenzen, Selected Articles in the Conflict of Laws (1947), p. 134; recall also the passage of Kramer's n. 76 of 3.4.1.d (p. 127).

2. This statute is based on the Law Commission's "Classification of Limitations in Private International Litigation", No. 114 (1982); see also P.B. Carter (1985) 101 L.Q.R. 68 ("The Foreign Limitation Periods Act 1984"), and P.A. Stone (1985) L.M.C.L.Q. 497 ("Time Limitation In The English Conflict of Laws").

3. This 'procedural' classification obtained and was applied exclusively even though it was based on the distinction between barring a right (a matter of substantive law) and extinguishing a remedy (a matter of procedural law): Williams v Jones (1811) 13 East 439; Huber v Steiner (1835) 2 Bing N.C. 202; Phillips v Eyre (1870) L.R.6 Q.B. 1, at p. 29; Black-Clawson International Ltd. v Papierwerke W.-A. AG [1975] A.C. 591, at p. 630; Chase Securities Corp. v Donaldson (1945) 325 U.S. 304, at p. 313; Clark v Naqvi (1990) 63 D.L.R. (4th) 361); see also Dicey & Morris on the Conflict of Laws (12th ed., 1993), p. 186.

It is as well to clarify here that a possible description of limitations as being remedial does not imply that they are subject to the same considerations, generically, as are final remedies: limitations are not judicial remedies (though they are imposed by law). This means that they share several features with ordinary substantive defences. Limitations may extinguish the right the breach of which is the basis for seeking a particular remedy (i.e., they may operate as defences to the assertion of such rights), or they may bar the given remedy. It is nevertheless clear that the substance-procedure divider applies, as it should in the case of final remedies, to reveal the considerations of function generally in these typically procedural matters.

4. We are told that civil law systems have commonly characterised limitation periods as substantive, and have approached them on the basis that the applicable limitation period is governed by the governing law of the obligation itself and not the *lex fori*: see O. Lando in International Encyclopaedia of Comparative Law (1971; Vol. 3, Chapter 24, at pp. 123-124); T. Prime and G. Scanlan The Modern Law of Limitation (1993), p. 270. S. 1(4) of the 1984 Act excludes renvoi.

5. This is the import of section 1(1) of the Act. Section 5 provides expressly that the limitation rules of the *lex causae* are applicable in forum actions and arbitrations. Section 2 makes forum domestic public policy exceptions to the application of foreign limitations, and section 1(1)(2) excepts the position where forum law is a relevant and applicable *lex causae*.

6. Section 1(4). Remember that in Phrantzes v Argenti the forum refused to exercise a discretion arising by virtue of a foreign *lex domicilii*, and that this was a reason for there having been no remedy from the forum for a provable wrong.

7. Section 2(1).

8. Section 2(1). See The Komninos S [1990] 1 Ll.Rep. 541; Jones v Trollope Colls, The Times 26.1.90.

9. Section 1(1)(2). The parallels cease of course at the point where the tort test applies to all actions and the limitation test only where domestic law is relevant to the proceedings. Otherwise, the foreign period alone is relevant.

10. This is to state that if, at a most basic level, we substitute "remedies" and "remedial law" with "limitation" and "limitation law" respectively, the same arguments sustain the ultimate position that foreign remedial law and foreign limitation law are eminently applicable in a conflict action. It is neither necessary nor is it the intention here to go through the arguments. Cf. generally Law Commission Paper No. 114 (1982).

We have noted above that remedies and limitations are different concepts which serve different ends (n. 8, ante) that there are limited parallels between the provisions of section 1(2) of the 1984 Act and the tort double actionability rule. The Law Commission's proposal for the abolition of tort double actionability (No. 193, 1990) was accompanied by a proposal that s. 1(2) of the 1984 Act be repealed since that section would thereby become superfluous. As discussed at 3.4.2, ante (pp. 129-134).

The main point is that both concepts respond to similar analyses and, therefore, what is found in respect of the one should provide significant indicia about the other. Above all, both are characteristically procedural matters: see n. 79, at the end of 3.4.1 (p. 174). See also the recent House of Lords' Private International Law (Miscellaneous Provisions) Bill of 1994.

11. [1985] 3 W.L.R. 739, at pp. 746-747.

12. i.e., in the High Court, the disclosure and inspection of documents, under Order 24 Rules of the Supreme Court, and on oath of interrogatories, under Order 26 of the same Rules, is available only as against the parties to the action, even in the face of Order 38(1) of the same Rules which provides that oral evidence by witnesses must be given as such and in open court (cf. Order 20(4) of the County Court Rules). In the U.S. district courts, pre-trial discovery procedure may be used against non-parties, usually at an early stage of the action: In re Commissioner of Patents for the Republic of South Africa (1980) 88 F.R.D. 75, at p. 77; John Deere Ltd. and Deere & Co. v Sperry Corporation (1985) 754 F.2d. 137.

13. [1986] W.L.R. 398, at p. 406.

14. (12th ed., 1993), at pp. 211-212. On obtaining evidence for use in another jurisdiction, see the Evidence (Proceedings In Other Jurisdictions) Act 1975 and Order 70 R.S.C. See also Dicey & Morris, pp. 212-218. See also K. Lipstein (1990) 39 I.C.L.Q. 120 ("The Evidence (Proceedings in Other Jurisdictions) Act 1975: An Interpretation"); see also Union Carbide Corporation v B.P. Chemicals Ltd., *The Times* 18/4/95, on the same point between the English and the Scots jurisdictions.

15. St. Pierre v South American Stores Ltd. [1937] 1 All E.R. 206, at p. 209.

16. Bain v Whitehaven & Furness Junction Ry. (1850) 3 H.L.C.1.

17. In re Fuld (No. 3) [1968] P. 675, at pp. 696-697.

18. See also Irvani v G. & H. Montage GmbH [1990] 1 W.L.R. 667 (C.A.).

19. The Gaetano and Maria (1882) 7 P.D. 137 (C.A.).

20. See Roe v Roe (1916) 115 L.T. 792 and Brown v Brown (1917) 116 L.T. 702.

21. The second and third paragraphs at 1.2 ante (p.24), especially on the identification of such non-domestically aspirated forum rules of procedure, and on the illustration of such rules in interim transjurisdictional relief.

22. See n. 19, ante. This may be illustrated by Re Bonacina [1912] 2 Ch. 394, where proof of the existence of an enforceable agreement (one without consideration in the forum sense) depended on the *lex causae*.

23. See, e.g., W. Twining Theories of Evidence: Bentham and Wigmore (1985), at pp. 153 et seq.: "The law of evidence is a conceptual minefield...[I]t is important to distinguish clearly between 'materiality', 'relevance', 'admissibility' and 'weight'...; but there is no agreed terminology and some issues of substance are hidden in some debates about words". For private international law, the substantivistic aspect would be what constitutes proof. The acceptance of evidence from abroad which has been proved there should fulfil this requirement. Otherwise, we would be arguing that the private international law be conceived of so radically as to render the forum a composite part of an international judiciary (i.e., one which actively applies international rules of procedure not belonging to any given jurisdiction), rather than that the conflict of laws is but part of the national legal system. The former is absurdly 'overconflictual', and the latter 'conflictual'.

24. [1981] A.C. 221 (P.C.). See also Dicey and Morris, at pp. 182-183.

25. There is a statutory exception to be found in section 7 Maritime Conventions Act 1911, on the apportionment of salvage.

26. See also The Colorado [1923] P. 102 (C.A.). Once the *lex causae* has been applied to establish existence and *quantum*, the *lex fori* determines the priority among the creditors' claims. See Pardo v Bingham (1868) L.R.6 Eq. 485; *ex parte Melbourn* (1870) L.R.6 Ch.App. 64, *contra* Cook v Gregson (1854) 2 Drew. 286, where the debtor's foreign assets were administered under the foreign law's priorities rules, thus inferring that priority as between assignments of debt is governed by the proper law of the debt, in the way that competing claims against foreign land are prioritised according to the *lex situs* as in Norton v Florence Land and Public Works Co. (1877) 7 Ch.D. 332. See also Le Feuvre v Sullivan (1855) 10 Moo.P.C. 1.

27. (1983) 54 B.Y.B.I.L. 207 ("Priorities Of Claims In Private International Law"). Cf., n. 4, Chap. 1.1.

28. Loc. cit., at pp. 208-209.

29. Loc. cit., at p. 211.

30. i.e., allowing even for the "apportionment of salvage" exception noted above at n. 25.

31. See 1.2 (p. 24) and 3.4.2A(iii) ante (pp. 139 et seq); including the rules which permit pretrial evidence from abroad, further, under foreign rules.

32. See 2.3.1, ante (pp. 47 et seq).

33. For a reminder of the re-consideration of '*lex fori*' and 'procedure' for remedial purposes, 3.4.2A(i) ante (pp. 137-138).

34. Especially as it concerns the exception to the *lex fori* rule referred to at n. 25, ante.

35. See the second and third paragraphs at 1.2 ante (p. 24).

36. See 2.3.1, at text carrying n. 59 (p. 48).

37. Dicey & Morris on the Conflict of Laws (12th ed., 1993), at p. 1472: "Courts have...seldom been confronted with conflicts of law concerning the restitution of an unjust enrichment in which the question of choice of law was directly addressed"; but recall the Arab Monetary Fund case for the restitutionary remedy of contribution, first cited at n. 33, Chap. 1.

As the combined cases of Barclays Bank plc v Glasgow City Council; Kleinwort Benson Ltd. v Glasgow City Council [1994] 4 All E.R. 865 show, this is due to the pre-eminence of jurisdiction, such that the question, whether the banks could in restitution recover payments made further to (void) Scots *ultra vires* agreements was to be determined in Scotland (and not in England), had to be answered in the negative; nor was the question restitutional within the meaning of arts. 5(3) and 6 of the Brussels Convention defining 'unjust enrichment.'

38. "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract and in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.": Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barton Ltd. [1943] A.C. 32, at p. 61; also, Lord Diplock in Orakpo v Manson Investments Ltd. [1978] A.C. 95, at p. 104: "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in the legal system that is based on the civil law". Cf. American Law Institute Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts, 1937, section 160.

The main restitutionary remedies are account (cf. n. 82 at 2.3.2.1: p. 92), contribution (cf. n. 33 at 1.3: p. 37), subrogation (at n. 39 below), possibly constructive trust (text carrying, and, nn. 50 and 56 below), tracing (text carrying, and, n. 50 below) damages (cf. Burrows, *op. cit.*, pp. 293-299); see nn. 40-42, and n. 50 (Millett), *post*.

39. "...that a defendant should make restitution of a benefit, gained at the plaintiff's expense, which it is unjust for him to retain": G. Jones, in A. Burrows (ed.) Essays in the Law of Restitution (1993), p. 197; see also Pettkus v Becker (1980) 117 D.L.R. (3d) 257, at pp. 273-274, per Dickson J., as he was then: "There are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment". See also Orakpo, n. 37, *ante*, at p. 112 (per Lord Edmund Davies), and C. Mitchell The Law of Subrogation (1994), p. 3-4 (on subrogation and its hitherto untapped potential, in principle, as a remedy of more general application, and, in Mitchell's view, it seem would seem, as the principal restitutionary remedy: see p. 9, *sub* "When Should Subrogation Be Awarded?", and pp. 37-48).

40. Cassell & Co. Ltd. v Broome and Another [1972] A.C. 1027, at p. 1070F: "In almost all actions for breach of contract, and in many actions for tort, the principle of *restitutio in integrum* is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated by relation to some material loss." A simplistic interpretation (which leads to an equally simplistic prediction about the future of conflictual restitution) of the said principle (cf. Trayner's Latin Maxims (1993), pp. 558-559: "Entire restitution; restoration to one's former condition) makes clear the point that both remedies coincide substantially in their aims, and that if thinkers like P. Birks are correct (they are: cf. n. 47 of Chap. 2, and see Restitution- The Future, 1992, p. 25), the difference in their justifications is all that comes between there being a unified remedy reconceived of for

conflict cases as may be necessary as indicated at n. 62. (cf. Millett J, at n. 50).

For restitutionary damages, see A. Burrows Remedies For Torts And Breach of Contract (2nd ed., 1994), pp. 293-299, and dicta in Surrey County Council v Bredero Homes Ltd. [1993] 3 All E.R. 705, at 710-711 and 714-715: "not to compensate the plaintiff for a loss, but to deprive the defendant of the benefit he gained by the breach of contract. The classic illustration is a claim for the return of goods sold and delivered where the buyer has repudiated his obligation to pay the price."

41. See A. Burrows, *op. cit.*, at p. 494. Cf. n. 41, post for rescission at law.

42. See A. Burrows The Law of Restitution (1993), at pp. 28 et seq.; see also F.H. Lawson Remedies of English Law (1980), pp. 139-146.

We noted such restitutionary remedies as contribution (n. 33, Chap. 1), account (n. 82, Chap. 2), subrogation (n. 38, ante). Others include money had and received (Moses v Macfarlan (1760) 2 Burr. 1005, at p. 1012: "it lies for money paid by mistake; or upon a consideration which happens to fail, or for money got through imposition...contrary to laws made for the protection of persons under those circumstances; Dies v British and International Mining & Finance Corporation Ltd. [1939] 1 K.B. 724), money paid (Exall v Partridge (1799) 101 E.R. 1405: "...for the recovery of moneys paid by the plaintiff under express or implied contract with the defendant to a third party with consequent benefit to the defendant") and rescission at law (Johnson v Agnew [1980] A.C. 367. The position of the constructive trust is discussed below in this section at text carrying nn. 49 and 55.

43. *Op. cit.*, at p. 1471. See also P. North Contract Conflicts, pp. 16-17; A. Burrows Essays in the Law of Restitution (1993), pp. 487 et seq.; D. Lasok & P. Stone Conflict of Laws in the European Communities (1992), at pp. 16-17; The Giuliano-Lagarde Report [1981] O.J.C282/1, at p. 33.

44. Fibrosa, at pp. 46, 63 and 70.

45. In such cases, the proper law (or, where appropriate, the putative proper law) of the connected contract is the governing law: Dimskal Shipping Co. SA v International Transport Workers Federation [1992] 2 A.C. 152. See also Fibrosa (*supra*, where no foreign law was pleaded), J.H.C. Morris (1946) 62 L.Q.R. 180, at p. 182; H. Mather "Restitution as a Remedy for Breach of Contract" (1982) 92 Yale L.J. 14; S.M. Waddams ("Restitution as Part of Contract Law") in A. Burrows (ed.), *op. cit.*, at pp. 197 et seq.

46. In such cases, the *lex situs* of the land/immovable is the governing law: Pettkus v Becker (1980) 117 D.L.R. (3d) 257.

47. In such cases, the applicable law is that of the country where the enrichment takes place: Chase Manhattan Bank NA v Israel-British Bank (London) Ltd. [1981] Ch. 105; Re Jogia [1990] 1 W.L.R. 484, at pp. 495-496. The separateness of the law of restitution from the laws of contracts

and of transactions cannot be over-emphasised, even though it is a vital part of the law of obligations. The distinguishing feature is in the fact that the restitutionary obligation can arise without there being a connected contract and is imposed by law, rather than by the parties' volition: the parties' volition is immaterial; see Dicey & Morris at p. 1473, A. Goff & G. Jones The Law of Restitution (4th ed. 1993), at p. 1251, P. Birks Introduction to the Law of Restitution (1985), at pp. 34-39.

48. See Dicey & Morris, at p. 1471. Where an order is given for a personal restitutionary remedy in a conflict case, the choice of law may also determine the appropriate currency in which payment is to be made: B.P. Exploration (Libya) Ltd. v Hunt (No. 2) [1979] 1 W.L.R. 783, at pp. 838-845, affirmed [1981] 1 W.L.R. 232 (C.A.).

49. See, e.g., Batthyany v Walford (1887) 36 Ch.D. 269 (C.A.), especially at pp. 278-278 and 281. Cf. Bennett, loc. cit. (39 I.C.L.Q.), at p. 138 ("Perhaps more important than any other topic of private international law, enrichment has been influenced by the way in which it is treated in domestic law. In particular its ambiguous position within the overall legal structure has had a strong influence on the formulation of choice of law rules"), and at p. 144 (in reference to Batthyany, n. 48, "A possible method of avoiding the complexities of the process of characterisation would be to treat all enrichment claims as matters of remedy rather than right, or procedure rather than substance").

50. See Dicey & Morris at p. 1478: "...it may be that the foreign law describes a constructive trust or a right to trace as a "remedial" device". See the Chase Manhattan Bank case, *ante*, at pp. 109, 112, 115 and 124. Cf. n. 55, post, and G. Elias, op. cit., at pp. 159 et seq. See also The Hon. Sir Peter Millett (1991) 107 L.Q.R. 71 ("Tracing The Proceeds Of Fraud"), at p. 85: "A unified and comprehensive restitutionary remedy should be developed, and attempts to rationalise and develop the common law action for money had and received should be abandoned."; R.M. Goode (1976) 92 L.Q.R. 360 ("The Right To Trace And Its Impact On Commercial Transactions").

51. Dicey & Morris, at p. 1478.

52. Compare with the decision in Phrantzes v Argenti as discussed variously at 2.3.3 (n. 79:p.92), 3.2.2 (n. 9:p.161), 3.4.1.a (n. 58:p.170), 4.1 (nn. 19-24:p.211) and 4.2 (n. 34:p.212). The same points should apply in the case of unfamiliar foreign restitutionary principles *if* they arise, *if* they are substantivistic and *if* the forum can identify policy factors to justify the provision of restitutionary relief where there otherwise would not be one as in the 'Metliss and Adams approach' first discussed at 2.5.2 (pp. 68-69).

53. Dicey & Morris, *ibid*. On this point, bearing in mind the unity of 'jurisdiction' and 'judgments', we could expect the forum to refuse to recognise and to enforce a foreign restitutionary order such as that of the

Israeli Supreme Court in Adras Ltd. v Harlow & Sons GmbH (noted by Friedmann in (1988) 104 L.Q.R. 383). There, that Court ordered the defendant to account for profits made from its breach of a contract even though there was no loss to the plaintiff. In such a case the refusal would be justified because it is the foreign final order, not foreign procedural rules, that stand to be considered with a view to being upheld.

54. This is very much the principle of the protected (though yet unobligated) defendant. See S. O'Malley & A. Layton European Civil Practice, paras 17.06 and 17.46; Kalfelis v Schroeder [1988] E.C.R. 5565; Barclays Bank plc v Glasgow City Council [1992] 3 W.L.R. 827, at p. 836 (Hirst J.).

55. See Bowling v Cox [1926] A.C. 751, Re Jorgia supra, The Olib [1991] 2 Ll. Rep. 108, at pp. 118-119.

56. Hirst J. at n. 54, *ante*. See also G. Elias Explaining Constructive Trusts (1990), Chapter Six, generally, and B. Dickson [1995] C.L.J. 100 ("Unjust Enrichment Claims: A Comparative Overview"), Sir Anthony Mason (1994) 110 L.Q.R. 238 ("The Place of Equity and Equitable Remedies in the Contemporary Common Law World"), at 249-253 (*sub* 'The remedial constructive trust').

57. This much is in evidence in the drafters' comments to the Brussels and Lugano Conventions: [1980] O.J.C282/1. But see B. Dickson, *loc. cit.*, especially at p. 126: "[A]ny direct comparison of the structure of unjust enrichment claims in common and civil law systems is bound to be misleading because the principle against unjust enrichment serves distinctly different purposes in the two systems. For common lawyers unjust enrichment is a *rationale* for allowing some claims in restitution; for civil lawyers it is a residual category in the law of obligations which comes into play when other categories have been exhausted. Moreover, *within* each set of systems unjust enrichment claims perform very different roles and the relevant legal rules have not developed at the same pace in all countries."

58. Civil Remedies (1974), p. 806.

59. *ante*, at n. 38.

60. Dicey & Morris, at pp. 1471 et seq.

61. There is still no clear authority one way or the other. See A. Burrows, *op. cit.*, at n. 42, *ante*.

62. (1994) 14 Legal Studies 156, at pp. 156-157. See also Restitution- The Future, at p. 25: "The remedial part of the law of restitution is not concerned at all with defining causes of action, for it takes as given the wrongs which are defined elsewhere. Nevertheless, remedial restitution raises large questions for the substantive law of wrongs, challenging both the hegemony of compensation for loss and the old habit of dividing common law and

equitable wrongs. Moreover, its own purely remedial questions are also far from easy to resolve."

63. See F.H. Lawson, Remedies of English Law (1980), pp. 147-160. Some legal systems have no *in personam*/*in rem* dichotomy, e.g. the Italian; see M. Cappelletti and J.M. Perillo Civil Procedure in Italy (1965), p. 83, para. 4.03b. The latter simply does not exist nor is presence or availability enough or even necessary for the exercise of jurisdiction. The jurisdictional rules are framed in terms of contacts between subject-matter and state, and between defendant and state. Jurisdiction and competence are said to merge in the judgment.

64. They could also be non-money, e.g., an order that the owner of (or person with an interest in) the property should do something to the property in recognition of another's legal entitlement. A restitutionary remedy *in rem* is a distinct possibility: see A. Burrows, *op. cit.*, at pp. 28 et seq. Cf. generally, The Hon. Sir Peter Millett (1991) 107 L.Q.R. 71 ("Tracing The Proceeds Of Fraud"), at p. 31.

65. Lawson, *op. cit.*, at p. 4.

66. at p. 439.

67. High Court Admiralty jurisdiction *in rem* (and *in personam*) is provided for in section 20 Supreme Court Act 1981 in terms that service of the writ must be on the particular property (detailed rules in Order 75 rule 11 and Order 10 rule 1 (4) and (5) R.S.C.) which must be within the territorial jurisdiction of the High Court (Aichorn & Co. KG v The Talabut (1974) 132 C.L.R. 449. The owner (or interested person) to submit to the jurisdiction: The Gemma [1981] P. 285 (C.A.).

68. The Deichland [1990] 1 Q.B. 361 (C.A.); The Sylt [1991] 1 Ll.Rep. 240, at pp. 244-245.

69. i.e., "domiciled" in the meaning of the Convention.

70. Dicey and Morris, at pp. 447-450.

71. n. 67, ante.

72. i.e., to make an order as with our final remedial jurisdiction, at 3.4.2A(i), ante.

73. Sealy v Canlan [1953] P. 135; Cammell v Cammell [1965] P. 467.

74. n. 67, ante.

75. Therefore, it is further possible that the foreign law will define liability and relief conjunctively (cf. the concept of substantive relief, at 2.3, ante).

76. E.g., under the Matrimonial Causes Act 1973 or the Domestic Proceedings and Magistrates Courts Act 1978.

It is particularly noteworthy that in respect of maintenance orders (provisional and/or final) made pursuant to matrimonial causes, the Maintenance Orders (Facilities for Enforcement) Act 1920 and the Maintenance Orders (Reciprocal Enforcement) Act 1972 provide for the displacement of English law in cases involving jurisdictions listed in these statutes, provided that the law of the given jurisdiction so binds the addressee of that jurisdiction's order, that neither party resides in the United Kingdom (ss. 9(4), 26(3) and (4) and Part II of the 1972 Act), and/or that the addressee of the foreign order proves a defence possible in the original proceeding (ss. 4(3) and 7(2) of the 1972 Act as amended respectively by Sched. 1, paras. 2(1)(4) and 8(1)(2) of the 1992 Act of the same name). See Dicey & Morris, pp. 767-770 and 788.

Whilst recognising that the foregoing in this footnote is not remedial law but law of (specialised) judicial orders, it is the case that there is involved a distinct obligation (to maintain) which is not unlike the 'obligation' sense in other types of order.

77. Fundamental Legal Conceptions As Applied In Judicial Reasoning (ed. W.W. Cook, 1964), at pp. 13 et seq.

78. An Introduction to the Law of Contract (1989), at p. 448.

79. or actually challenged.

80. Cf. 2.2.1, at n. 34, ante (p. 80).

81. op. cit., pp. 25-46. As with the phrase quoted subsequently in this paragraph.

82. See Dicey and Morris at pp. 1117 et seq.; see also P.R. Wood English and International Set-Off, (1989). We are told that set-off is in widespread use as security, but is potentially weak in a transjurisdictional context.

Wood, op. cit., at para. 23-7 (p. 1121): "The *lex fori* is not considered the appropriate system of law to determine the availability or effects of independent set-off [because]..., first, set-off is predominantly a matter of substance [whether the debtor is in default for non-payment]...in conflict cases, which is governed by proper law doctrines, not the *lex fori*...

Secondly, the application of the *lex fori* would make little sense where both reciprocal claims are governed by a foreign system of law, whether different or the same.

Thirdly, as a general principle of modern conflict of laws, the *lex fori* should not be applied, unless there is no convenient alternative, because it elevates the rules of the home forum above all others". Cf. Hanak v Green [1958] 2 All E.R. 141; The Leon [1985] 2 Ll.Rep. 470.

See also paras. 23-8 and -10 (p. 1121) on the non-procedurality (based on parties' expectations and on legitimate foreign interests) of set-off and of other remedies, and on the role of the *lex fori*, e.g., in deciding (i)

whether a set-off pleaded as a counterclaim can still operate as a set-off, and (ii) the time within which the set-off must be pleaded as a defence.

83. Cf. ss. 1,2 and 4 Misrepresentation Act 1967. See generally S.J. Stoljar Mistake and Misrepresentation, 1968, pp. 98 et seq. See also G.H. Treitel Remedies for Breach of Contract: A Comparative Account (1988), generally at Chap. IX.

84. n. 83, ante. See also D.B. Casson and I.H. Dennis, Odgers' Principles of Pleading and Practice (1975), p. 194.

85. See A.L. Diamond, W.R. Cornish, A.S. Gardiner, R.S. Rock, Sutton & Shannon on Contracts, (7th. ed., 1970), at p. 434.

86. See G.H. Treitel, The Law of Contract, Ch. 21, generally.

CONCLUSION

PROCEDURE or, to refer to its other usual description, due process, makes things possible in the forum by indicating how and to what extent the legal system can and will go about the rectification of wrongs. It does so by constituting the backbone of the processes of litigation and adjudication. Its rules, principles, standards, values and policies are distinguishable and are invoked to elicit one half of the means available in the forum to achieving the end of rational and factual vindication of recognised antecedent remedial rights leading up to and consequent upon judgment as the case may be. In this sense, the plaintiff's expectations and the defendant's anathema (at least until the dispute is settled) can be described contemporaneously as remedial and procedural, albeit in different senses for either party: the former seeks to assert the latter's liability in a given remedial order, while the defendant seeks to resist that assertion.

Then we have substance, the other half, also equipped with its own distinguishable attributes (rules, principles, standards, values and policies). We have seen that, without substance, the forms of the legal system's rational strength would be nebulous or plain non-existent. On this view, the pervasively remedial aspect of a proceeding cannot but be imprinted with substantive antecedents contained in notions of pre and post judgment liability in its widest terms.

The foregoing is offered in this dissertation as a transjurisdictionally sensitive analysis of the all-important institutional dichotomy between substance and procedure, as the groundwork for a critical conflictual re-analysis of remedies. We have seen that the analysis can be deployed to address legal procedure generally and typical individual matters which can also be, or are in fact, deemed procedural as remedies currently are. Although discussion of the possible redeployment and of some of the consequences has been inevitable, this is a separate project from the subject of remedies which the dissertation

addresses. It has nevertheless been established that it is possible, desirable and worthwhile to articulate or to settle coherently the question of jurisdiction.

Comprehensiveness, or exhaustiveness, of jurisdictional rules will come in step with the different fact permutations as these arise in the forum, and may well be more dynamic than, but would depend on, coherence. It has also been established that doing so necessarily involves a delocalised reconception of remedies, and that the new conception is dictated by the transjurisdictional context, with cardinal modifications inferred as a result, viz. the application of rules, principles, standards, values and policies of a foreign law (or laws as the case may be), on the one hand, and on the other, the making of final remedial orders to be enforced extraterritorially once the appropriate case has satisfactorily been made to the forum.

The rational forum has become more international than single reference implies or, indeed, can contemporarily cope with. Objectivity neither espouses conflictual remedial adjudication in terms alien to the legal system, nor does it imply a fundamental basis other than policy (including discretion). Objectivity defines the rational and pragmatic international forum with greater precision, than does single reference. This it does by its focus on that forum as one that fully and actively discriminates among, but cohesively correlates, acquisition of, prescription and enforcement, jurisdiction and competence; the forum does so, essentially, by identifying its own transjurisdictional jurisprudence, and by extrapolating from this. This way, the conflict of laws of remedies is mindfully addressed in its own right, with just the right emphasis on the conflictual context.

The absence of these features in the existing law makes for unsophisticated territorially restricted forum remedial adjudication which, moreover, should not have to be the case. The candidate should like to hope to have persuaded the reader to endorse the delocalised version herein of the English conflict forum's remedial jurisdiction.

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