I N T R O D U C T I O N

Towards An Australasian Commercial Causes Court

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Preliminary

1. The day after the C.E.R. agreement was signed a New Zealand Herald editorial[1] noted the relative smoothness of the treaty's inauguration but warned that the treaty possessed 'flaws on the fringe', citing:

   a) the lack of provison for harmonisation of exchange rates
   b) the lack of more ordered attempts to harmonise commercial law at large in Australia and New Zealand
   c) some initial friction of countervailing and anti-dumping mechanism

   Foreign investment is another example.

2. The Deputy Prime Minister and Minister of Trade in the Hawke Government, Mr Lionel Bowen, himself a lawyer, when interviewed by 'The Exporter'[2] had this to say:

> "The CER agreement had laid the ground rules for free trade between the two countries, but what are being called 'second generation' issues are still to be discussed.
>
> These include foreign investment, legal and trade practices and trading in steel, apparel and motor vehicles."

Although Bowen did not foresee a political union of the two countries in the immediate future, he did point out that the Australian Constitution allows for New Zealand to become a state of Australia.

On the question of a common legal system, however, Bowen recognising a few hitches, said:

> "New Zealand must realize that Australia itself does not have a common legal system among its own states and between the states and the federal government."

The C.E.R. Agreement

3. Its expressed objectives are:

a) to strengthen the broader relationship between Australia and New Zealand
b) to develop closer economic relations through expansion of free trade
c) to eliminate trade barriers gradually, progressively, by agreement, and with minimum disruption
d) to develop trade under conditions of fair competition

Can The Law Contribute To The Achievement Of These Objectives?

4. The answer is "yes" provided that lawyers, legislators and bureaucrats from both countries address themselves to the harmonisation of commercial law and procedure. Before adverting to particulars I wish to make brief mention of sovereignty, nationalism, the prides and prejudices of each nation: I do not pretend to know whether these will stymie legal harmonisation. I suspect not. At least our respective countries begin with the recognised advantage that we have:

> "... longstanding and close historic, political, economic and geographic relationship."

The agreement itself expressly recognises that fact.[3] One can point to examples which suggest New Zealand is attuned to Australia's Judges and Commissioners presiding in New Zealand. For example:

a) The chairmanship of the Thomas Royal Commission.
b) The Stewart Commission, an Australian Royal Commission of Inquiry Into Drug Trafficking, to act as a Commission of Inquiry in New Zealand.
c) The Oakley Hospital Inquiry manned by Australian medical personnel.
d) The Milan Brych Inquiry headed by an Australian Medical Practitioner.

An example of reciprocity has been the appointment of Sir Owen Woodhouse of our New Zealand Court of Appeal to an Australian Commission of Inquiry into Accident Compensation. Furthermore, the process of legal harmonisation takes place daily in our Courts. Australian decisions, particularly those of the High Court, the State Supreme Courts, and in

taxation are relied upon by our own Cours to highest level. Further, many of our own statutes are the product of Australian statutes as models.

Our Legal System

5. New Zealand has a unified legal system. Australia, a federal system, consisting of several units. Both systems have common origins.

The Case For Harmonisation

6. For a New Zealand litigant intending court action against an Australian defendant a fundamental question must be determined at the outset:

- Where should the action be commenced?

If the decision is made to commence proceedings in a New Zealand Court the first hurdle to overcome is:

- Will the New Zealand Court grant leave to the New Zealand litigant to serve the proceedings out of New Zealand upon an Australian defendant?

Rule 48 of our Code of Civil Procedure specifies exhaustively the type of cases where leave may be sought. Even though the New Zealand litigant's case is of the type which Rule 48 provides for it is still necessary to persuade our Court to exercise its discretion to grant this leave. Over the years the Courts have developed the matters it takes into account in the exercise of that discretion. They include:

a) Is New Zealand the convenient forum (which usually involves a comparison of the relative cost of conducting the case in the New Zealand Courts as opposed to the Australian Court, where the most

witnesses reside etc).

b) Is the action being brought in good faith?

c) What prospect of success has the action?

d) What degree of involvement had the foreign defendant?

e) What is the amount or value of the property in dispute?

f) Does the foreign court have jurisdiction?

7. Most recently in MATTHEWS GRANT DYNAMICS LTD v JOHNSON AND TRACTION CONTROLS PTY LTD[4] (unreported High Court, Christchurch) in determining whether to grant an application by N.S.W. defendants to set aside the leave already granted to a New Zealand plaintiff, who had commenced action in New Zealand, to serve the N.S.W. defendant in Sydney, Casey J. stated at page 5:

> "... It is important to recognise the speed a cheapness of air travel between Sydney and New Zealand making it comparable with travel between the major centres in this country. This, and our close legal and commercial relationship with Australia, makes some of the comments in earlier cases about the reluctance to involve "foreign" residents or jurisdictions of little relevance here."

His Honour determined the issue on comparative cost and set aside the leave granted originally (ex parte).

8. There is nothing particularly special about the MATTHEWS GRANT case but it points up at least one procedural problem which legal harmonisation between our respective legal systems would overcome or minimise. The claim ($NZ30,000.00) concerned the supply of manufactured goods by the New Zealand plaintiff to N.S.W. defendants. The N.S.W. defendants alleged defects and indicated a counterclaim of $A40,000.00. It emerged that the New Zealand plaintiff would call five witnesses and the N.S.W. defendant seven witnesses (each included experts). There is no reason to doubt that the New Zealand plaintiff's legal advisers decision to commence the action in the New Zealand Court was founded not only on good tactical sense but also upon an assessment, which in hindsight could not be criticised, that the necessary

leave would be granted. The consequence to the New Zealand plaintiff of the Court's setting aside the leave was to stop that action in New Zealand forever. At that point the New Zealand plaintiff would have already expended considerable amounts in legal fees in retaining solicitors, briefing evidence, settling the pleadings filed in New Zealand for the New Zealand Court. The New Zealand plaintiff, if his resolve and financial worth is such is now obliged to duplicate much of that expense in briefing Australian solicitors and counsel who in turn would need to duplicate most of the steps referred to. With harmonisation this waste of money and duplication of effort could be avoided or at least greatly reduced by having the existing proceedings transferred to the appropriate Australian Court as one transfers proceedings commenced, say, in Auckland to Dunedin on a change of venue application, and to accord appearance rights to New Zealand solicitor and/or counsel in the N.S.W. Court.

9. Take the MATTHEWS GRANT case further. Assume that the New Zealand Court had refused to set aside the leave granted to the Plaintiff so that the Plaintiff is free to proceed with its action and have it heard. That Plaintiff is looking ultimately to obtaining judgment against the N.S.W. defendant for $NZ30,000.00. The N.S.W. defendant has a decision to take:

> Should any steps be taken in the New Zealand proceedings to defend the action?

Some further assumptions need to be made. The N.S.W. litigant in assessing the position decided the Plaintiff had a strong prospect of succeeding and so obtain judgment against the N.S.W. litigant in New Zealand for the $NZ30,000.00; that the N.S.W. litigant's own counterclaim was unlikely to succeed; and that there were no reasons personal to the N.S.W. litigant which encoured its participation in the New Zealand proceedings. For example, the N.S.W. litigant has no assets in New Zealand against which the judgment can be enforced. The N.S.W. litigant would concern itself therefore with the question of whether the New Zealand judgment

could be enforced against the N.S.W. litigant in N.S.W. That brings into play the N.S.W. reciprocal enforcement statute. Each Australian state and New Zealand have an Act variously known as the Foreign or Reciprocal Enforcement of Judgments Act.[5]

Reciprocal Enforcement

10. In our context, this is the procedure which enables a foreign judgment creditor who has a judgment obtained in a foreign superior court at any time within six years after the date of that judgment or appeal to register the same in the local High or Supreme Court for the purposes of enforcement. Upon registration the foreign judgment shall be recognised by the local Court as though it were its own judgment subject to the right of the judgment debtor to make application to have thr egistration set aside.

Setting Aside

11. Section 6 of the Reciprocal Enforcement of Judgments Act 1934 (N.Z.) is the appropriate section. The N.S.W. equivalent is Section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1973. For our purposes both sections may be viewed as similar. The claim of the New Zealand judgment creditor in the MATTHEWS GRANT case is founded in debt and as such is an action in personam. The New Zealand and the N.S.W. statutes are at one on the point that in the given circumstances the judgment if registered in N.S.W. is capable of being set aside upon application by the judgment debtor because of lack of jurisdiction. The New Zealand authority is SHARPS COMMERCIALS LTD v GAS TURBINES LTD[6]. An authority of the West Australian Supreme Court to similar effect is CRICK v HENNESSY.[7] In both SHARP and CRICK's cases the courts emphasised that jurisdiction is based on residence or presence of the defendant within the jurisdiction at the time the proceedings were commenced. The plaintiff can probably overcome this problem by including in the contract itself a foreign jurisdiction provision , to effect, that all disputes are to be settled in a New Zealand Court

according to New Zealand law. If a New Zealand plaintiff commenced action in New Zealand contrary to an express foreign jurisdiction clause which provided for N.S.W. to be the place to resolve disputes and the law applicable for resolving such disputes a New Zealand Court is not absolutely bound to stay that action, c.f. SEALINK LTD v TRANZ PACIFIC CONTAINER SERVICES LTD and ATLANTIS LINE LTD[8] where Chilwell J. declined to stay proceedings commenced by a New Zealand plaintiff where the foreign jurisdiction clause under the contract provided for expressed the State of California as the place for resolving the dispute and whose law was applicable.

12. If the action commenced in a New Zealand Court had concerned specific performance of a contract for the sale of land situated in Australia or a claim to ownership of personal property, such as a ship, which had left New Zealand before the New Zealand plaintiff could arrest the ship and before proceedings were commenced in New Zealand, a New Zealand plaintiff could not enforce the judgment in N.S.W. under reciprocal enforcement at present if the N.S.W. defendant took no steps in the New Zealand proceedings.

13. The limitations of reciprocal enforcement rights between our two countries contrasts with the apparent privilege that may extend to far flung foreigners as was illustrated recently in HUNT v B.P. PETROLEUM CO. (LIBYA) LTD[9]. B.P., a British company, obtained judgment (in an English Court) against a U.S. national from the state of Texas in respect of disputes which arose in Libya over oil involving sums in excess of $30,000.00. HUNT possessed assets in Queensland and New Zealand in the form of stud farms and valuable racehorses and bloodstock. B.P. sought to enforce its judgment in both New Zealand and Australia. Both in the High Court of Australia and in our High Court of New Zealand registration of B.P.'s judgment was upheld notwithstanding a strong challenge based on the same principles (inter alia) of residence and presence as in SHARP and CRICK's cases. Jurisdiction existed no doubt because the claim had been

contested originally by both parties in the English Court and so they had submitted themselves to the jurisdiction.

Solution

14. I suggest there are a number of areas where legal development could be made to improve the way for transtasman commercial disputes to be resolved. For example:

a) New Zealand and Australian states extend uniformly the scope of their respective reciprocal enforcement statutes by reducing the rights of a judgment debtor to set aside judgments attained.

b) Australia extends its "full faith and credits" statute and interstate service and execution statute to include New Zealand. New Zealand in turn enacts "full faith and credits" and "service and execution statutes" for Australia.

Alongside these two developments is the need to achieve greater unformity and harmonisation of our commercial laws to reduce conflicts and comparative law problems.

Full Faith and Credits

15. Following United States precedent, Australia, under its constitution, by S.118, provides:

> "Full Faith and Credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every state."

By S.18 of the State and Territorial Laws and Records Recognition Act 1901-1973 (Com.) Australia provides that:

> "All public acts records and judicial proceedings of any State or Territory, if provided or authenticated as required by this Act, shall have such faith and credit given to him in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken."

Nygh in CONFLICT OF LAWS IN AUSTRALIA, 3rd Edition[10], states:

> "There is no doubt that the full faith and credit provisions compel Australian courts to take judicial notice of interstate laws, records and judgments and to admit them in evidence in the forum to the same degree and in the same circumstances as apply under the law of the state whence they were taken. But this is a relatively minor variation of the common law rules which does not add much to the position as it existed even before federation under the Evidence Acts of the several colonies. The crucial question, which is as yet unresolved in Australia, is whether full faith and credit involves not merely the taking note of, but also the giving of substantive effect to, interstate laws and judgments."

Then from the practical viewpoint an important statute is the SERVICE AND EXECUTION OF PROCESS ACT 1901-1974 (Commonwealth). It provides for the enforcement by registration of judgments made in an Australian state or territory in any other state or territory to which the Act extends. That Act extends beyond the six Australian states to its external territories of Norfolk Island, Christmas Island, Cocos (Keeling) Island.

Its practical operation is summed up in a helpful text CREDITOR AND DEBTOR LAW IN AUSTRALIA AND NEW ZEALAND by James Farmer at page 100-101 section 711:

> "The position with registration of inter-State judgments within Australia is made comparatively simple by Part IV of the Service and Execution of Process Act 1901-1974 (Cmwlth). Section 21(1) of that Act provides for registration of particulars of a certificate of any judgment given in a Court of Record (which terms includes District Courts, Small Debts Courts and Courts of Petty Sessions: see sec.22) in a book entitled "The Australian Register of Judgments" kept in each State and the internal and external territories of Australia. Registration of the certificate confers the same force and effect in the court of the registering State as the judgment has in its original State. Further, "the like proceedings (including proceedings in bankruptcy or insolvency) may be taken upon the certificate as if the judgment had been a judgment of that court and interest shall be payable thereunder at the rate and from the date set out therein" (sec.

21(2)). Execution cannot be levied until the process of registration is completed.

There has been some debate as to whether registration can be challenged on the grounds that the original court lacked jurisdiction in a private international law sense or on the grounds of public policy or denial of natural justice. The opposing views and authorities are discussed in Nygh, Conflict of Laws in Australia, but it is submitted that the view which was ultimately accepted in Re E. and B. Chemicals and Wood Treatment Pty Ltd., namely that these grounds of challenge are not available, is the correct one."

Revenue Laws

16. As a matter of public policy in New Zealand and Australia dating back from eighteenth century England that common law courts will not enforce the revenue laws of foreign countries. Nygh on CONFLICT OF LAWS IN AUSTRALIA, 3rd Edition[10] states:

"... The origin of this rule is not altogether clear but it can be traced back to two notions which were prevalent in the eigtheenth century: first, that the public rights of a sovereign only extended as far as his domains, and secondly, that the interests of British trade demanded that English courts should refuse to enforce restrictions imposed upon trade by foreign countries.

These reasons have long since lost any force they might have had, but the rule still remains. Up to this day Australian courts will not give effect to any foreign sovereign for arrears to taxes owed to him by one of his subjects will most certainly be rebuffed. But English and Australian courts also decline to entertain any foreign claim which by indirect means seeks to enforce a foreign revenue debt. In Government of India v Taylor a company which was incorporated in England was being would up in that country. The company had carried on business in India and owed the Indian Government certain arrears in taxation. The Indian Government entered a proof in respect of these arrears with the liquidator was entitled to reject the proof since the term "liabilities" referred only to such liabilities as an English court would enforce."

If both countries wished to retain this 'rule' of public policy such limitation can be expressed in any amending legislation under the Reciprocal Enforcements Statutes.

A Transnational Cause

17. What type of situation could be said to give rise to matters transnational. Any list could not be exhaustive. It would surely include:

a) trade practices such as monopolies, price fixing, unfair competition, restraints of trade, involving New Zealand/Australian companies.
b) dumping, anti-dumping, and countervailing disputes under which C.E.R. provides for consultation only.
c) copyright, patent and trade mark infringements.
d) defamation, e.g. Australian and New Zealand newspapers.
e) taxation.
f) harmonisation of statutes and regulations.
g) liquidations of companies with transtasman assets and liabilities.

The Transnational Court

18. The tribunals need not only be an adversary one. Room exists for transnational investigative tribunals or commissions such as Commerce Commission (N.Z.), Industries Assistance Commission (Australia), and the like.

19. As a first step the two countries might consider setting up transtasman Registries to deal with matters interlocutory and procedural. Certain Judges from both countries could be given special warrants to handle transtasman causes (in the same way as Judges are warranted in this country to deal with say administrative causes for our Administrative Division). Commencing, interlocutory steps and orders such as for injunctions, document searches, preservation of assets, charging assets, etc could all be dealt with by reference to the local transtasman Judge. Forseeably the idea of closed-circuit televised hearings on a hook-up system between Judges and parties may be financially viable (if studio/courts could be set up in each country). Modern electronic aids such as computers, word processors and telexes could be used for argument-presentation, making orders and delivery of judgments. There would be obvious

problems to circumvent such as examination of exhibits produced, judicial assessment of writness credibilities. It may be that the final hearing however should be held in a particular country.

Bankruptcy/Liquidations

20. Each country has exclusive jurisdictions. A bankruptcy in one country does not prevent the issuing of a petition in the other country, c.f. Re ARTOLA HERMANOS.[11] Each country controls the assets in its respective country. Proof of debt may be lodged irrespective of residence. There is a provision under the N.Z. Insolvency Act (S.135) which requires it to act in aid of overseas bankruptcies. Australia acting under a U.K. Act has a similar duty. The Australian view is that the S.135 provision requires it to assist in tracing assets only. None of these help our respective revenue agencies. Harmonisation in this area should be considered.

FOOTNOTES

1. New Zealand Herald, 29 March 1983
2. The Exporter, July 1983
3. C.E.R. Trade Agreement Preamble Page 4
4. A.278/79 Christchurch Registry. Judgment delivered 15 February 1983
5. Foreign Judgments (Reciprocal Enforcement) Act 1973 (N.S.W.) Reciprocal Enforcement of Judgments Act 1934 (N.Z.)
6. /1956/ NZLR 819
7. 1973 W.A.R. 74
8. A.270/82 Auckland Registry. Judgment delivered on 5 October 1982.
9. (1980) 28 A.L.R. 145 /1980/ 1 NZLR 104
10. Page
11. (1890) 24 Q.B.D. 640