**International Law Series Part 3:**
**Where to Divorce? Resolving Forum Disputes**

*Matthew O'Grady (2010 call) is a barrister in England and Australia. He is enrolled as a barrister in New Zealand. He is ranked by the Legal 500 as a "leading junior" in both children and financial disputes and sits part-time as a Judge. This is the third article in a series undertaking a detailed study and analysis of common issues that arise advising clients in financial cases with an international dimension. Connect with him on LinkedIn and Twitter at @matthewjogrady.*

* * *

Previous Parts of this International Law Series introduced the ways clients can establish jurisdiction in divorce and property proceedings in England and Wales ('England'), Australia and New Zealand. This article will analyse how those jurisdictions resolve increasingly common forum disputes. It will identify scope for law reform and make recommendations for effectively assisting clients with forum disputes.

**Forum Disputes under English & Welsh National Law**

The principles that are applicable to resolving forum disputes under English national law depend upon:

- Whether the divorce petition was issued during or after the conclusion of the UK Brexit Transition Period.
- Which other forum is in conflict with England.

Disputes with European Union Member States

For divorce petitions issued before the end of the UK-EU Transition Period on 31 December 2021, under Article 67(1)(c) of the UK-EU Withdrawal Agreement disputes between the UK and EU member states (except Denmark) are resolved by applying Brussels II Revised.

The rule in these cases is that the jurisdiction of the Brussels II Revised member state first seised should prevail over that of any subsequently seised member state (*lis pendens*).[1] A member state court is seised at the time an application was lodged (provided the applicant went on to subsequently serve the application in accordance with the court's rules).[2] The application is 'lodged' even if under national law lodging the document does not of itself immediately initiate proceedings.[3]

The occurrence of these cases will now be vanishingly small because the UK-EU Transition Period has expired. Conflicts between England and EU member states where the petition has been issued from 1 January 2021 onwards will now be determined in accordance with the law which is applicable to non-EU countries.

Disputes with Other Jurisdictions

If the English court concludes that it has jurisdiction to hear a petition for divorce, and consequentially the jurisdiction to determine the parties' property disputes (see Parts 1 and 2 for more information), but there is another non-UK jurisdiction that is or may also be seised under its own national law, then the English court asks where the balance of fairness and convenience lies as between the two jurisdictions (*forum (non) conveniens*).

[1] Brussels II Revised, Art. 19(3).
[2] Ibid, Art.16.
[3] *MH v MH* (Case C-173/16) at [29]; approved in *Thum v Thum* [2018] EWCA Civ 624 at [55].

The court must identify '...where the case may be tried suitably for the interests of all the parties and for the ends of justice'.[4] The 'cardinal' principles are:[5]

- The court must first identify the 'natural forum' for the dispute (the place with which the case has the most real and substantial connection).
- Connecting factors will include not only matters of convenience and expense but also factors such as the relevant law governing the proceedings and the places where the parties reside.
- The party wishing to stay the English proceedings must show not only that England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate.
- The court retains a discretion to refuse to grant a stay where, in the circumstances, justice requires it should be refused – these circumstances should be all the circumstances of the case and not just 'connecting factors'.

The list of considerations that weigh in favour of a forum being more suitable is not exhaustive. Factors to consider include:[6]

- Where assets are located.
- The convenience of the parties and any witnesses.
- Where the relationship subsisted.
- The rights of the parties in each jurisdiction (including procedural rules of disclosure).
- The delay and expense that would arise from the proceedings being stayed.

For English-EU forum disputes the certain and (relatively) cost effective nature of the Brussels II Revised *lis pendens* scheme has been replaced by a discretionary evaluation of the circumstances, which does little to discourage the litigation of forum disputes. However, it may give *some* benefit in disincentivising a precipitous 'race to issue' because being first to issue is unlikely to give significant tactical advantage. That in turn may afford space and time for the parties to step back from precipitous litigation and increase collaboration.

**Forum Disputes under Australian National Law**

Disputes with New Zealand

Just as unique arrangements existed for forum disputes between the UK jurisdictions and EU member states', special arrangements exist between neighbours Australia and New Zealand. Their reciprocal arrangements permit respondents in one jurisdiction to argue that the other jurisdiction is the more appropriate forum for the dispute.[7] They do not employ a *lis pendens* system.

Australian statute specifies an exhaustive list of factors to be considered in deciding whether to stay the proceedings on the basis the New Zealand court has jurisdiction and would be the more appropriate forum:[8]

- The residence of the parties.
- The residences of witnesses likely to be called.
- The place where the subject matter of the proceedings is situated.
- Any agreement between the parties about the court where the issues should be determined.
- The law that would be most appropriate to apply to the proceedings.

---

[4] *Spiliada Maritime Corp v Cansulex Ltd The Spiliada [1987] AC 460, per* Lord Goff.
[5] *W v L (Forum Conveniens)* [2019] EWHC 1995 (Fam), *per* MacDonald J at [30], applying *Spiliada*.
[6] *Butler v Butler (No 2)* [1997] 2 FLR 321, *per* Sir Stephen Brown P.
[7] *Trans-Tasman Proceedings Act 2010* (Cth), s 17(1).
[8] Ibid, s 19(2).

- Whether related or similar proceedings have been commenced in New Zealand.
- Financial circumstances of the parties.
- Any matter prescribed by regulations.
- Any other matter the Australian court considers relevant.

The Australian court is expressly prohibited from taking into account the fact that proceedings were commenced in its jurisdiction.

Disputes with Other Jurisdictions

Whilst under English law a forum dispute between England and another jurisdiction is determined by the English court asking whether the other forum is 'more appropriate', the test applied in Australian law is subtly different. It requires the Australian court decline its jurisdiction only if the party resisting its jurisdiction persuades it that Australia is a 'clearly inappropriate forum'.[9]

The High Court of Australia adopted the 'clearly inappropriate forum' test in the matrimonial context in *Henry v Henry*.[10] In deciding whether it is a clearly inappropriate forum, the Australian court's (non-exhaustive) considerations include:[11]

- Factors of convenience and expense (such as witness location).
- Whether, having regard to their resources and understanding of language, the parties are able to participate in the proceedings on an equal footing.
- The connection of the parties and their marriage with each of the potential jurisdictions and the issues on which relief may depend in those jurisdictions.
- Whether the other potential forum will recognise Australian orders and vice-a-versa and the ease of enforcement in each country.
- Which forum may provide more effectively for a complete resolution of the matters involved in the parties' controversy.
- The order in which each of the proceedings were instituted, the stage which they have reached and the costs incurred in each jurisdiction.
- The governing law of the dispute.
- The place of residence of the parties.
- The availability of an alternative forum.
- Any legitimate juridical advantage to litigating in either jurisdiction.

This article's conclusions will identify a case for review of the 'clearly inappropriate forum' test in light of: 1) the unnecessary lack of alignment in the tests applied to disputes with New Zealand and other countries; and 2) the scope for an irreconcilable clash of forums because of the different tests applied in in sister common law countries.

**Forum Disputes under New Zealand National Law**

Disputes with Australia

The statutory considerations to be weighed in deciding whether Australia is the more appropriate forum for a Trans-Tasman dispute are almost identical in New Zealand to those set out, above, in Australia.[12]

[9] *Voth v Vanildra Flower Mills Pty Ltd* (1990) 171 CLR 538.
[10] (1996) 185 CLR 571.
[11] *Deslandes & Deslandes* [2015] FamCA 913, *per* Kent J at [22].
[12] *Trans-Tasman Proceedings Act 2010* (NZ), ss 22 and 24(2).

Disputes with Other Jurisdictions

New Zealand will stay its proceedings if a respondent establishes that New Zealand is *forum non conveniens*. New Zealand applies the same 'more appropriate' test applied in England. The applicable principles have been stated by the New Zealand court to be:[13]

- A stay will only be granted where there is a foreign forum which is the appropriate forum in the sense the case will be more suitably tried there in the interests of all the parties and the interests of justice.
- It is not sufficient to show New Zealand is not the natural or appropriate forum, it must also be demonstrated the foreign forum is clearly or distinctly more appropriate.
- The court takes an overall view of factors which show the most real and substantial connection with each forum.
- The fact proceedings are ongoing in the foreign forum is relevant, but not decisive.
- The fact the applicant gains a legitimate personal juridical advantage in New Zealand is relevant, but not decisive – the appropriate forum must be decided on an objective basis, serving the interests of both parties and the interests of justice.
- The enforceability of a final judgment abroad is relevant.
- Even if the foreign forum is clearly more appropriate, the New Zealand court may decline to stay its proceedings if justice requires it.

This approach was doubted by the New Zealand High Court, which suggested it would be sufficient to 1) identify the factors that connect the case with the foreign forum, and 2) ask whether those factors show the foreign forum is clearly more appropriate to determine the issues.[14]

**Conclusions**

This article has identified the principles which are applied by courts in England, Australia and New Zealand for resolving forum disputes with their neighbouring jurisdictions and third countries.

It is suggested there is a strong case for the High Court of Australia to review its holding in *Voth* and *Henry* that the 'clearly inappropriate forum' test should be preferred to the 'more appropriate forum' test.

There are three advantages to adopting the 'more appropriate forum' test. First, it better suits the ends of justice to have a test that endeavours to identify where proceedings are better suited, rather than one which will only give itself up to an objectively more suitable forum, if it believes itself to be 'clearly inappropriate'.

Secondly, it would harmonise Australian law by bringing the treatment of non-New Zealand forum disputes in line with the treatment of disputes in the *Trans-Tasman Proceedings Act 2010* (Cth). In doing so the law would be simplified, thereby making it more accessible.

Thirdly, it would align Australian law with that of its closest common law relations. The 'more appropriate forum' test is not only utilised by England and New Zealand in its non-Australian disputes, but also by Canada, Singapore and Hong Kong.

The existence of this difference creates the possibility of an irreconcilable conflict: a conflict in which the foreign court is recognised by even the Australian court to be the natural or appropriate forum, but in which it cannot be said the Australian court is clearly inappropriate. The likelihood of this

[13] *Gilmore v Gilmore* [1993] NZFLR 561
[14] *Wang v Yin* [2008] 3 NZLR 136.

irreconcilable conflict was described by the High Court in *Voth* in 1990 to be 'rare'.[15] However, it must be doubted whether that conclusion continues with the force it did three decades later in a society in which global connectivity and ease of international movement of families have evolved to unprecedented levels. Furthermore, even if the likelihood is remote, why entertain such a possibility when there is a preferable test which has been adopted by leading common law jurisdictions in the time since *Voth* was decided?

Good Practice Guidance

Acting in international disputes requires a firm grasp of the client's circumstances, alongside a comprehensive understanding of the foreign law issues. The following are likely to be highly advantageous in assembling a defence of the client's preferred forum:

- Instruct a foreign lawyer as early as possible – or, ideally, a dual qualified lawyer. Ask:
    - Are there procedural advantages/disadvantages of the two jurisdictions (for example, in the rules of disclosure)?
    - What are the probable costs of proceeding in the foreign jurisdiction?
    - Are there merits for the client under the substantive law of the foreign jurisdiction?
    - Can an interim restriction be entered against property in the foreign jurisdiction to prevent its sale?
    - How suitable is the relief available to the parties?
    - Will the foreign forum be able to determine all the issues between the parties? (For example, are there pension or superannuation issues that can only be determined in one jurisdiction, which will make litigation in the other jurisdiction just a partial solution).
    - Will a judgment of the foreign jurisdiction be enforceable?

- Gather the facts from the client that are necessary to deal with a forum dispute:
    - Will there be witnesses besides the spouses (for example, expert witnesses or third parties)? Where do they reside?
    - Where are the parties' assets located?
    - Where are relevant business interests based?
    - Did the parties execute an agreement on forum?
    - Where will the children reside (which jurisdiction is best suited to assess their long-term needs and make orders)?

**Coming up in the International Law Series Part 4: Remedies following an overseas divorce**

[15] *Voth* at [36].