

# *Foreign Legal Professional Privilege: A New Problem For Australian Private International Law*

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## *Abstract*

Claims of legal professional privilege relating to foreign legal advice arise in a surprising number of instances. Despite this, the question of how best to deal with foreign legal professional privilege remains largely undiscussed in Anglo-Australian private international law. While the orthodox approach has largely been to treat such matters as ones of procedure, to be governed by the domestic law of the forum, this article suggests that foreign law can and often should apply. After discussing the law of legal professional privilege in a number of important jurisdictions, this article explores the existing *lex fori* approach, before proposing ways in which foreign law might better apply. Finally, it examines the role of public policy in shaping the forum's approach to questions of foreign privilege.

## *1. Introduction: The Scope of the Problem*

Can one claim privilege in Australia over the advice of foreign lawyers? What law should govern claims to privilege over foreign legal advice? The fact that these questions do not have self-evident answers invites reflection. In an increasingly globalised world, in which individuals, governments and corporations all have legal dealings that cross national boundaries — and in which the market for legal services is truly global in scope — it seems odd that the law of legal professional privilege should remain so remarkably parochial. Despite the prevailing Anglo-Australian view that questions of legal professional privilege should be governed by the law of the forum, this article argues that foreign law can and often should govern such matters.

Questions relating to foreign privilege can arise in a surprising number of contexts. Consider the following:

- Nelly in Melbourne and Joan in Sydney invest in French champagne vineyards together. The relationship between the parties sours, and Nelly obtains written legal advice from a Paris lawyer about the French investments. Joan sues Nelly in the Federal Court of Australia and attempts to discover the French legal advice.
- The Commissioner of Taxation is suspicious that Nelly's investments were a form of tax avoidance, and wants to exercise a statutory power of investigation to obtain the French legal advice.
- The Paris lawyer goes to the Barossa Valley on holiday, and is promptly subpoenaed by the Commissioner of Taxation to testify in proceedings brought against Nelly.

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- The Paris lawyer goes home. On Joan's application, the Federal Court issues a letter of request under the *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Convention)*<sup>1</sup> to obtain documents in the Paris lawyer's possession relating to Nelly's affairs.
- The Paris lawyer returns to Australia, and agrees to give expert testimony on French law. To explore the lawyer's credentials, Joan's QC wants to cross-examine him on his and his clients' investment expertise. Revealing confidential details of his other clients' business affairs will expose the lawyer to civil penalty and criminal sanction in France.

Only in some of these situations does Australian law give clear guidance about whether the evidence or testimony can be given. For example, it is clear that the privilege against exposure to civil penalties applies with respect to penalties under foreign law,<sup>2</sup> but it is not clear whether the privilege against self-incrimination similarly applies to foreign offences.<sup>3</sup> Regarding the request under the *Hague Convention*, the prospective witness can refuse to produce documents if they would be privileged under *either* French or Australian law. As to the other situations mentioned above, the orthodox approach is that the law of the forum applies, and that the law of the forum does extend to protecting privileges that arise under foreign law, at least in some circumstances. However, as we shall see, the authorities that support this approach are surprisingly ambivalent, and are conceptually unsound. This article thus advocates that a preferable approach is simply to apply the relevant foreign law, rather than to entangle the law of the forum in questions of foreign privilege.<sup>4</sup> More specifically, the best rule will often be to apply the law of the lawyer's place of admission.

A number of factors make the question of foreign privilege a particularly interesting issue for private international law. First, the topic is often treated quite differently across jurisdictions, giving rise to the potential for true conflicts of law. As a comparative view of civil procedure demonstrates, issues of 'privilege' are far more important for common law jurisdictions, which allow wide-ranging pre-trial documentary discovery, than for most civil law jurisdictions, which do not. Conversely, civil law jurisdictions generally provide a wider and more stringent protection of professional secrecy than is known in most common law

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1 *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 231, art 11 (entered into force 7 October 1972).

2 *United States of America v McRae* (1867) LR 3 Ch App 79.

3 *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd (No 4)* [1985] 1 Qd R 127; *F F Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd* (1990) 96 ALR 468. The position is clearer in those jurisdictions covered by the uniform evidence legislation, under which foreign offences *are* included within the scope of the privilege: see, eg, *Evidence Act 1995* (Cth) s128(1)(a). See generally Constantine Theophilopoulos, 'The Anglo-American Privilege against Self-Incrimination and the Fear of Foreign Prosecution' (2003) 25 *Syd LR* 305.

4 This article primarily focuses on legal professional privilege and its international equivalents, although other forms of privilege will be discussed by way of illustration or comparison. The term 'privilege' will be used to refer either to legal professional privilege specifically or to privilege generically, as the context makes clear.

jurisdictions. Also, terminology differs across jurisdictions, so issues that might be labelled as 'privilege' in Australia might well be labelled as a species of 'confidentiality' in Germany.

Second, there are a number of recent examples of statutory regulation in the wake of corporate scandals that might appear to have an extra-territorial effect on questions of legal professional privilege. In Australia, legislation came into force in December 2004 purporting to abrogate all legal professional privilege over material relating to the James Hardie corporate restructure.<sup>5</sup> Since the purpose of the restructure was to set up an offshore parent company, it seems certain that the James Hardie group received legal advice from overseas lawyers. This advice would now appear to be free from any privilege — at least so far as Australian regulatory investigations and proceedings are concerned — when it might otherwise have remained privileged under the relevant foreign law.<sup>6</sup>

A little earlier, there was great overseas legal interest in the United States Securities and Exchange Commission's (SEC) planned ruling under s307 of the *Sarbanes-Oxley Act*,<sup>7</sup> requiring all lawyers who dealt with the SEC — whether American or not — to make a 'noisy withdrawal' if their corporate clients acted improperly under US law. This requirement was dropped from the final rule, largely through the objection of foreign lawyers who believed that the 'noisy withdrawal' — in effect, ostentatiously resigning in order to draw attention to corporate wrongdoing — would violate their home jurisdictions' laws of privilege or professional confidentiality.<sup>8</sup>

Third and finally, there is a public law aspect to the problem, in that the most intrusive powers to obtain material covered by foreign privilege lie not in the hands of private litigants and the discovery process, but rather in the hands of government instrumentalities. Thus, the statutory powers of the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) to conduct investigations and examinations,<sup>9</sup> the power to issue search warrants under the various *Crimes Acts*,<sup>10</sup> and the power of the Commissioner of Taxation to conduct

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5 *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s4(1).

6 Even if foreign law ought otherwise to govern questions of privilege, this enactment would apply as a mandatory rule of the forum, thus abrogating privilege in any event: see below Part 6(B).

7 15 USC 7245 (2002).

8 See, for example, the submissions of the Japan Federation of Bar Associations, 14 December 2002: <<http://www.sec.gov/rules/proposed/s74502/tmotobayashi121402.pdf>>; the Council of Bars and Law Societies of the European Union: <<http://www.sec.gov/rules/proposed/s74502/ccberesponse.htm>>; and the combined submission of Allen & Overy, Freshfields Bruckhaus Deringer, Herbert Smith, Linklaters, Lovells, and Norton Rose, 17 December 2002: <<http://www.sec.gov/rules/proposed/s74502/allenfresh1.htm>>. The final rule is Securities and Exchange Commission, *Implementation of Standards of Professional Conduct for Attorneys* — 17 CFR pt 205: <<http://www.sec.gov/rules/final/33-8185.htm>>.

9 *Trade Practices Act 1974* (Cth) s155; *Australian Securities and Investments Commission Act 2001* (Cth) ss19, 58.

10 See, for example, *Crimes Act 1914* (Cth) s3E; *Crimes Act 1958* (Vic) s465; *Search Warrants Act 1985* (NSW) s6.

investigations,<sup>11</sup> each carry with them the possibility of gathering information and material that might otherwise be privileged under foreign law, and which might not have been susceptible to investigation by the government of the relevant foreign jurisdiction. The existence of these governmental powers might warrant, in some circumstances, a different treatment of foreign legal professional privilege than would be the case if the party requesting the material or information is merely a private litigant.

This article begins by describing the law of legal professional privilege as it applies in a number of important jurisdictions. Then, in Part 3, it discusses whether legal professional privilege should be classified as procedural or substantive for the purposes of private international law. Next, in Part 4 it examines how the law of the forum has traditionally dealt with matters of foreign privilege, before showing in Part 5 how it may be preferable to apply foreign law. Finally, in Part 6, it discusses the relevance of local public policy to the issue of legal professional privilege.

## 2. *A Primer On The Law Of Legal Professional Privilege*

### A. *Australia*

In Australia, legal professional privilege is a protection against the compulsory disclosure of confidential communications between clients and their lawyers for the dominant purpose either of giving and receiving legal advice, or for use in existing or anticipated litigation.<sup>12</sup> In a sense, the privilege is misnamed: it is the client's privilege and not the lawyer's, and as such it can be waived by the client.<sup>13</sup> The privilege applies not merely to judicial or quasi-judicial proceedings, but to any form of compulsory disclosure.<sup>14</sup>

The rationale for the privilege has been variously described. While its origins lay in the general law of confidentiality, it is now accepted that the privilege is justified by the need for frank communication between clients and lawyers in the interests of the administration of justice. As Stephen, Mason and Murphy JJ explained in *Grant v Downs*, the privilege advances the public interest in the administration of justice by encouraging the representation of clients by legal advisers, by keeping their communications secret, 'thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor'.<sup>15</sup> As such, legal professional privilege is a recognition that the public interest in protecting

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11 See, for example, *Income Tax Assessment Act 1936* (Cth) s263(1).

12 On the 'dominant purpose' test, see *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 563 (McHugh J) (hereafter *Daniels Corporation*).

13 *Baker v Campbell* (1983) 153 CLR 52 at 85 (Murphy J).

14 See, for example, *Baker v Campbell*, id (search warrants); *Daniels Corporation*, n12 (investigations under s155 of the *Trade Practices Act 1974* (Cth)).

15 *Grant v Downs* (1976) 135 CLR 674 at 685.

certain confidences outweighs the general public interest in compelling all relevant information to be placed before the court.<sup>16</sup>

Indeed, it is this quasi-public role of the lawyer in securing the administration of justice that explains why the lawyer-client relationship is privileged when other confidential relationships are not.<sup>17</sup> In the context of investigation by regulatory authorities, Deane J stated that the principle:

represents some protection of the citizen — particularly the weak, the unintelligent and the ill-informed citizen — against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure ...<sup>18</sup>

Other explanations have focused on the need to foster personal autonomy in a complex legal and regulatory world.<sup>19</sup>

A corollary of these rationales is that the privilege cannot be used to facilitate a crime, fraud or civil offence, or to otherwise further an illegal purpose. However, the privilege is obviously available when the client is seeking advice about past wrongdoing.<sup>20</sup> Since the privilege exists to promote the administration of justice, it cannot be used 'in order to frustrate the processes of law'.<sup>21</sup>

The privileged communication need not emanate from the client personally. Communications by the client's agent to the client's solicitors will be privileged,<sup>22</sup> as will documents prepared by the client's professional advisers for the dominant purpose of obtaining legal advice.<sup>23</sup> Communications between a client's various legal advisers are also privileged.<sup>24</sup>

The privilege is limited to legal advisers acting as such, and is generally restricted to lawyers who are admitted to practice.<sup>25</sup> There does not seem to be any requirement, though, that the lawyer actually hold a current practising certificate.<sup>26</sup>

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16 *Baker v Campbell*, above n13 at 128 (Dawson J).

17 *Id* at 94 (Wilson J).

18 *Id* at 120.

19 *Id* at 89 (Murphy J), 95 (Wilson J).

20 *Id* at 86 (Murphy J), 123 (Dawson J).

21 *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 156 (Stephen J). See also *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 515 (Gibbs CJ).

22 *Wheeler v Le Marchant* (1881) 17 Ch D 675.

23 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

24 *Hughes v Biddulph* (1827) 4 Russ 190; 38 ER 777.

25 *Attorney-General (NT) v Kearney*, above n21 at 510 (Gibbs CJ). For example, legal advice given by a legally-trained accountant was not privileged, because the accountant was not admitted as a legal practitioner: *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 (hereafter *Glengallan Investments*). Privilege does apply, though, to non-lawyers working under the supervision of legal practitioners admitted to practice: see for example, *Waterford v Commonwealth* (1987) 163 CLR 54 at 81 (Deane J); *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 at 247 (Williams JA).

Under Anglo-Australian law, the privilege also extends to in-house counsel: that is, lawyers who are admitted to practice but who are employed by a business rather than practising privately. As we shall see, this is a significant point of distinction between Australian law and several foreign jurisdictions. In the leading case, Lord Denning MR remarked that many legal practitioners are employed as legal advisers by a single employer, but they are:

regarded by the law as in every respect in the same position as those who practise on their own account .... They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges.<sup>27</sup>

This passage has been approved by members of the High Court of Australia.<sup>28</sup> Since that case, the privilege of in-house counsel has been upheld by a number of courts,<sup>29</sup> as has the privilege of lawyers employed by government.<sup>30</sup>

Most striking for present purposes, however, is the way in which the High Court has characterised the nature of legal professional privilege: far from being a mere procedural or evidentiary rule, privilege has been classified as a substantive right. As we shall see, this categorisation has profound importance for the conflict of laws. Thus, in *Daniels Corporation*, Gleeson CJ, Gaudron, Gummow and Hayne JJ declared that '[i]t is now settled that legal professional privilege is a rule of substantive law', and that '[b]eing a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings'.<sup>31</sup> To the contrary, their Honours emphasised that '[l]egal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity', and that it applied to the investigatory powers under consideration in that case.<sup>32</sup>

26 *Commonwealth v Vance* [2005] ACTCA 35. The case concerned lawyers employed by the Defence Legal Office who were admitted to practice, but did not hold practising certificates. The ACT Court of Appeal reversed Crispin J's judgment at first instance (*Vance v Air Marshall McCormack* (2004) 154 ACTR 12), that the absence of practising certificates and the authoritarian command structure of the military disentitled the lawyers from claiming legal professional privilege.

27 *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 at 129.

28 *Attorney-General (NT) v Kearney*, above n21 at 510 (Gibbs CJ), 531 (Dawson J); *Waterford v Commonwealth*, above n25 at 60–62 (Mason and Wilson JJ), 81 (Deane J), 97 (Dawson J). Contrast Brennan J at 71–2.

29 See, for example, *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 4)* (1987) 14 NSWLR 100 at 102 (hereafter *Ritz Hotel*) (McLelland J); *Re Citibank Ltd* [1989] 1 Qd R 516 at 519 (Williams J); *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 at [18] (Spigelman CJ).

30 *Waterford v Commonwealth*, above n25 at 62 (Mason & Wilson JJ); *Commonwealth v Vance*, above n26.

31 *Daniels Corporation*, above n12 at 552 (citations omitted).

32 *Id* at 553.

Likewise, McHugh J described legal professional privilege as a ‘fundamental right or immunity’ that ‘embodies a substantive legal right’ whose operation ‘is not limited to judicial or quasi-judicial proceedings’.<sup>33</sup> According to Kirby J, the High Court has consistently emphasised the importance of the privilege as ‘a basic doctrine of the law and a “practical guarantee of fundamental rights”, not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings’.<sup>34</sup>

In this regard, legal professional privilege is like the privilege against self-incrimination, which is also characterised as a substantive legal right,<sup>35</sup> and apparently unlike the privilege against exposure to penalty, which has not yet been so characterised.<sup>36</sup>

### B. France

French law draws a distinction between in-house lawyers (*juristes d’entreprise*) and private practitioners (*avocats*).<sup>37</sup> Only the latter enjoy the protection of privilege, since employed lawyers are thought to lack the requisite independence needed for legal practice, and for this reason are in fact forbidden from being admitted to the bar.<sup>38</sup> Private practitioners are under an obligation not to disclose professional secrets in any circumstances.<sup>39</sup>

The strength of the privilege, known in France under the rubric of ‘*secret professionnel*’, has been increased in recent years both by statute and judicial decisions, reversing an earlier tendency to weaken it.<sup>40</sup> Since 2004, the statutory form of the privilege has been as follows:

In all matters, whether in the domain of counselling or defence, the consultations addressed by a lawyer at his client or destined thereto, the correspondence exchanged between the client and his lawyer, between the advocate and his colleagues (with the exception of correspondence marked ‘official’), notes of interviews and, more generally, all the items of the file, are covered by professional secrecy.<sup>41</sup>

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33 Id at 563.

34 Id at 575 (citations omitted).

35 *Reid v Howard* (1995) 184 CLR 1.

36 *Rich v Australian Securities and Investments Commission* (2004) 209 ALR 271 at 279 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

37 On the admissions requirements for *avocats*, see *Loi n° 90-1259 du 31 Décembre 1990 Portant réforme de certaines professions judiciaires et juridiques*, JO n° 4 du 5 Janvier 1991 p 219 (Law Reforming Certain Judicial and Legal Professions) art 9.

38 *Décret n° 91-1197 du 27 Novembre 1991 Organisant la profession d’avocat*, JO n° 277 du 28 Novembre 1991 p 15502 (Decree Organising the Profession of Lawyers) art 111.

39 *Code Penal* (Criminal Code) art 226-13.

40 Examples of such earlier ‘weakening’ decisions include: Cass crim, 30 sept 1991, D 1992, 323 note Gavalda (purporting to exclude lawyers’ drafting and negotiation work from the scope of the privilege); Cass crim, 7 mars 1994, D 1995, somm 167, obs Brunois (narrowly construing ‘*droits de la défense*’). Examples of more recent ‘strengthening’ decisions include: Cass crim, 6 févr 1997, Gaz Pal 1997, 183 note Damien (reinstating a broad construction of ‘*droits de la défense*’); Cass 1e civ, 4 févr 2003, D 2003, inf rap 601 (re-emphasising the absence of exceptions to the privilege).

The concept of ‘*secret professionnel*’ is thus sufficiently broad to protect documents relating to legal advice in the client’s possession. The privilege is not limited by time, and thus former clients’ affairs continue to be covered by the obligation of secrecy.<sup>42</sup>

Privilege cannot be waived, even by the client,<sup>43</sup> and there is no ‘crime or fraud’ exception as it is understood in Australian law. Rather, the seizure of such documents can only be justified if they constitute evidence of the *lawyer’s* (not the client’s) participation in a crime or fraud.<sup>44</sup>

Strikingly, it is a violation of professional secrecy for the lawyer to disclose the confidential information even to someone who is also bound by the client’s privilege.<sup>45</sup> Nor does the client’s information lose its character of confidentiality merely because it comes to be known by third parties.<sup>46</sup>

### C. *Germany*

German law recognises privilege for in-house lawyers who are admitted to the bar, although in-house lawyers are not permitted to represent their clients in court.<sup>47</sup> All lawyers, whether in-house or not, are obliged to avoid any associations that may jeopardise their professional independence,<sup>48</sup> and all lawyers admitted to the bar have a duty to maintain professional secrecy,<sup>49</sup> breach of which is a criminal offence.<sup>50</sup> The duty of secrecy does not, however, cover facts which are public or which are not so significant as to require secrecy.<sup>51</sup>

Lawyers are entitled to refuse to testify in both civil and criminal cases regarding any information provided to them in their professional capacity.<sup>52</sup> Documentary discovery is generally very limited under German law, and lawyers

41 ‘*En toutes matières, que ce soit dans le domaine du conseil ou dans celui de la défense, les consultations adressées par un avocat à son client ou destinées à celui-ci, les correspondances échangées entre le client et son avocat, entre l’avocat et ses confrères à l’exception pour ces dernières de celles portant la mention “officielle”, les notes d’entretien et, plus généralement, toutes les pièces du dossier sont couvertes par le secret professionnel*’: *Loi n° 71-1130 du 31 décembre 1971 Portant réforme de certaines professions judiciaires et juridiques*, JO du 5 Janvier 1972 p 131 (Law Reforming Certain Judicial and Legal Professions) art 66-5 (amended by *Loi n°2004-130 du 11 février 2004*, JO n° 36 du 12 février 2004 p 2847 art 34).

42 Cass crim, 18 déc 2001, D 2002, inf rap 862.

43 ‘*[L’obligation du secret professionnel] est absolue et ... il n’appartient à personne de les en affranchir*’ – Crim. 11 mai 1844. S.441.527 (the obligation of professional secrecy is absolute and is not for anyone to release).

44 Cass com, 5 mai 1998, D 2000, somm 154.

45 Cass crim, 16 mai 2000, D 2002, somm 858.

46 Ibid.

47 *Bundesrechtsanwaltsordnung* v 1.8.1959 (BGBl I 1959 S 565) (Federal Lawyers Regulation) § 46(1).

48 *Bundesrechtsanwaltsordnung* v 1.8.1959 (BGBl I 1959 S 565) (Federal Lawyers Regulation) § 43a(1).

49 *Bundesrechtsanwaltsordnung* v 1.8.1959 (BGBl I 1959 S 565) (Federal Lawyers Regulation) § 43a(2); *Berufsordnung für Rechtsanwälte* (Regulations concerning the Legal Profession) § 2.

50 *Strafgesetzbuch* (Criminal Code) §§ 203 at 300.

51 *Bundesrechtsanwaltsordnung* v 1.8.1959 (BGBl I 1959 S 565) (Federal Lawyers Regulation) § 43a(2).

are entitled to refuse to disclose any documents relating to their professional practice.<sup>53</sup>

Clients are able to waive the privilege, and their waiver binds their lawyers.<sup>54</sup> Lawyers are entitled to breach privilege in only very limited circumstances, such as to prevent the commission of a serious crime.<sup>55</sup>

Aside from protections stemming directly from the lawyer–client relationship, the German constitutional protection of the privacy of correspondence<sup>56</sup> and the inviolability of the home<sup>57</sup> has been held to extend to the protection of business premises and business correspondence, including those of lawyers.<sup>58</sup> Similarly, in a case concerning the seizure of documents from a German lawyer’s office, the European Court of Human Rights has held that the protection of the home, private life and correspondence contained in art 8 of the *European Convention on Human Rights*<sup>59</sup> extends to the protection of a lawyer’s office, and legal correspondence in the possession of either the lawyer or the client.<sup>60</sup>

#### D. Italy

Lawyers admitted to practice are bound by professional secrecy,<sup>61</sup> violation of which is a criminal offence.<sup>62</sup> The strength and importance of such professional secrecy has recently been reaffirmed by the Corte di Cassazione.<sup>63</sup> However, paid employment is thought to be incompatible with the autonomous and independent role of the lawyer: thus in-house lawyers are not admitted to practice, and consequently are not protected by privilege.<sup>64</sup> Indeed, lawyers are ethically obliged to remain independent.<sup>65</sup>

As in Germany, lawyers are entitled to refuse to testify in both civil and criminal cases regarding any information provided to them in their professional

52 *Zivilprozeßordnung* (Code of Civil Procedure) § 383(1)(6); *Strafprozeßordnung* (Code of Criminal Procedure) § 53(1)(3).

53 *Zivilprozeßordnung* (Code of Civil Procedure) § 142(2); *Strafprozeßordnung* (Code of Criminal Procedure) § 97.

54 *Strafgesetzbuch* (Criminal Code) § 385(2); *Zivilprozeßordnung* (Code of Civil Procedure) § 53(2).

55 *Berufsordnung für Rechtsanwälte* (Regulations concerning the Legal Profession) § 2(3).

56 *Grundgesetz* (Basic Law) art 10.

57 *Grundgesetz* (Basic Law) art 13.

58 *Betriebsbetretungsrecht* BVerfGE 32, 54 (1971).

59 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

60 *Niemietz v Germany* (1992) 351–B Eur Court HR (ser A).

61 *Codice Deontologico Forense* (Code of Forensic Rules) art 9.

62 *Codice Penale* (Criminal Code) art 622.

63 Cass pen, sez VI, 21 gen 2004, n 85. This decision emphasised the stringency of the concept of ‘segreto professionale’, and extended its reach to encompass a journalist’s ability to refuse to disclose his or her sources.

64 Regio Decreto-Legge 27 Novembre 1933, n 1578, *Sull’Ordinamento della Professione di Avvocato e di Procuratore* (Gazz Uff 5 dicembre 1933, n 281) (Royal Decree-Law on the Ordering of the Profession of Advocate and Procurator) art 3.

65 *Codice Deontologico Forense* (Code of Forensic Rules) art 10.

capacity.<sup>66</sup> There is an exception to privilege in cases where the lawyer makes a disclosure to prevent the client committing a particularly grave crime, but this exception is very limited.<sup>67</sup>

### *E. Japan*

Japanese law does not recognise the concept of ‘privilege’ as such, but contains an extraordinarily strong protection against the compulsory disclosure of confidential information more generally, which is not limited to legal or professional advice. Thus, the holder of confidential documents may refuse to produce them to a civil court, provided that the duty of confidentiality has not been exempted or waived.<sup>68</sup> Similarly, documents created for the author’s exclusive use are immune from production.<sup>69</sup> Each of these rules apply with equal force to in-house and independent lawyers.

Lawyers and all other professionals cannot be compelled to reveal other persons’ secrets confided in them in the performance of their profession.<sup>70</sup> Witnesses may also refuse to testify when questioned regarding matters relating to technical, trade, or professional secrets.<sup>71</sup>

### *F. Switzerland<sup>72</sup>*

Swiss law provides a very strong protection of attorney–client privilege, in part because of the very high value placed on the constitutional right to privacy.<sup>73</sup> Privilege is justified by the belief that the lawyer’s profession ‘can only be exercised properly if the public has the indispensable confidence given by an absolute guarantee of the professional’s discretion’.<sup>74</sup> In language that would be familiar to Australian lawyers, Switzerland’s highest court has emphasised that legal professional secrecy assists the administration of justice by allowing clients to confide frankly in their lawyers:

If the client does not unreservedly trust him, and if he is not aware of all the material circumstances, then it is difficult, even impossible, for the lawyer to properly represent the client in either advisory work or in a lawsuit.<sup>75</sup>

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66 *Codice di Procedura Civile* (Code of Civil Procedure) art 249; *Codice di Procedura Penale* (Code of Criminal Procedure) art 200.

67 *Codice Deontologico Forense* (Code of Forensic Rules) art 9.

68 *Minpo*, Law No 109 of 1996 (Code of Civil Procedure) art 220(4)(c).

69 *Minpo*, Law No 109 of 1996 (Code of Civil Procedure) art 220(4)(d).

70 *Bengoshi-Ho* (Law on Lawyers) Law No 205 of 1949, art 23; *Minpo*, above n68 art 197(1)(2).

71 *Minpo*, Law No 109 of 1996 (Code of Civil Procedure) art 197(1)(3).

72 As the reader will see, the decisions in *Kennedy v Wallace* (at trial (2004) 208 ALR 424, and on appeal (2004) 213 ALR 108) make it important to discuss Swiss law in some detail. See below Part 4(B).

73 *Constitution Fédérale de la Confédération Suisse* art 13.

74 ‘[D]iese Berufe nur dann richtig und einwandfrei ausgeübt werden können, wenn das Publikum auf Grund einer unbedingten Garantie der Verschwiegenheit das unentbehrliche Vertrauen zum Inhaber des Berufes hat’: BGE 112 Ib 606, 606.

However, in-house counsel are not protected by privilege on the basis of their perceived lack of independence.<sup>76</sup> Lawyers can only be employed by other lawyers, or by registered non-profit organisations, but not by businesses.<sup>77</sup> As the Swiss Federal Tribunal has emphasised:

The independence of the lawyer ensures the greatest possible freedom and objectivity in safeguarding the interests of both the client and the judge. It forms the necessary condition for confidence in the lawyer and in justice.

Moreover, the lawyer's independence guarantees that the lawyer's professional duties — in particular, legal professional secrecy — are kept. .... In the legal system, legal professional secrecy is a privilege given to registered lawyers in light of their special role in the administration of justice. In relation to those professional duties, they can only be followed to their fullest extent if the lawyer is independent both from their client and from third parties.<sup>78</sup>

The violation of professional secrecy is a criminal offence.<sup>79</sup> Lawyers cannot be compelled to testify on confidential matters arising out of their profession,<sup>80</sup> nor can documents covered by privilege be seized.<sup>81</sup> The obligation of confidentiality

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75 'Wenn der Klient sich ihm nicht rückhaltslos anvertraut und ihm nicht Einblick in alle erheblichen Verhältnisse gewährt, so ist es für den Anwalt schwer, ja unmöglich, den Klienten richtig zu beraten und ihn im Prozess wirksam zu vertreten': BGE 112 Ib 606, 606–7. Compare the judgment of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685: '(Legal professional privilege) promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers .... This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.'

76 *Loi fédérale sur la libre circulation des avocats du 23 juin 2000* RS 935.61 (Federal Law on the Free Circulation of Lawyers) art 12(b): '[l'avocat] exerce son activité professionnelle en toute indépendance, en son nom personnel et sous sa propre responsabilité' [the lawyer engages in his professional activity in complete independence, in his own name, and under his own responsibility].

77 *Loi fédérale sur la libre circulation des avocats du 23 juin 2000* RS 935.61 [Federal Law on the Free Circulation of Lawyers] arts 8(1)(d), 8(2).

78 'Die Unabhängigkeit des Anwalts soll grösstmögliche Freiheit und Sachlichkeit bei der Interessenwahrung gegenüber dem Klienten wie gegenüber dem Richter gewährleisten. Sie bildet die Voraussetzung für das Vertrauen in den Anwalt und die Justiz.... Darüber hinaus dient die Unabhängigkeit des Anwaltes der Sicherstellung, dass die anwaltlichen Berufspflichten, insbesondere das Anwaltsgeheimnis, eingehalten werden. ... Zudem stellt das Anwaltsgeheimnis im Rechtssystem eine Besonderheit dar, das dem registrierten Anwalt im Hinblick auf seine ausserordentliche Stellung in der Rechtspflege eingeräumt wird. Dem stehen Standespflichten gegenüber, denen der Anwalt nur vollumfänglich nachkommen kann, wenn er vom Mandanten und von Dritten unabhängig ist'. Bundesgericht 2P.187/2000 8 Januar 2001, Pra 90/2001 Nr 141 S 835.

79 *Code pénal suisse du 21 décembre 1937* RS 311.0 (Swiss Criminal Code) art 321.

80 *Loi fédérale de procédure civile fédérale du 4 décembre 1947* RS 273 (Federal Law on Federal Civil Procedure) art 42; *Loi fédérale sur la procédure pénale du 15 juin 1934* RS 312.0 (Federal Law on Criminal Procedure) art 77.

81 *Loi fédérale sur la procédure pénale du 15 juin 1934* RS 312.0 (Federal Law on Criminal Procedure) art 69.

continues after the termination of the retainer,<sup>82</sup> and even after the death of the client.<sup>83</sup>

Unlike in Germany, if a communication is privileged, the attorney has no obligation to disclose it, even if his or her client purports to waive the privilege.<sup>84</sup> However, upon the lawyer's application, special cantonal commissions are able to release the lawyer from the obligation of privilege if it is in the public interest to do so.<sup>85</sup>

Despite its strength, legal professional secrecy is not unlimited. First, the secrecy does not cover *all* material disclosed by the client, but rather only such material as is confided for the purpose of the retainer and the exercise of the lawyer's profession.<sup>86</sup> As the Swiss courts have said, professional secrecy:

extends only to facts which the client entrusts to his lawyer in order to carry out the retainer, or which the lawyer notices in the practice of his profession. ... On the other hand, the lawyer is not bound to secrecy concerning such facts which he noticed as a private person, or which are generally known, since the client can have no interest in keeping them secret.<sup>87</sup>

Second, the lawyer's professional function is not open-ended, but rather is confined to traditionally legal activities. The Federal Tribunal has warned that risk of overstepping the mark is particularly high in investment or corporate advisory work:

If the commercial element predominates to such a degree that the activity of the lawyer can no longer be regarded as being truly legal, then professional secrecy will not extend to this activity; at least not in any comprehensive sense.<sup>88</sup>

Thus, banking, funds and asset management, and investment activities are all typically excluded from the protection of legal privilege.<sup>89</sup>

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82 BGE 112 Ib 606 at 607.

83 DTF 87 IV 105 at 107.

84 *Loi fédérale sur la libre circulation des avocats du 23 juin 2000* RS 935.61 (Federal Law on the Free Circulation of Lawyers) art 13: '*Le fait d'être délié du secret professionnel n'oblige pas l'avocat à divulguer des faits qui lui ont été confiés*'. [Being released from professional secrecy does not oblige the lawyer to reveal the facts that were confided in him].

85 See, for example, Canton of Zürich, *Anwaltsgesetz vom 17 November 2003* (OS Zürich Bd 59 S 144) arts 33–5; Canton of Geneva, *Loi sur la profession d'avocat du 26 avril 2002* (RSG E 6 10) art 12.

86 BGE 112 Ib 606. The same is true of other professions, such as doctors: BGE 101 Ia 10 at 11–12.

87 '*[Das Berufsgeheimnis] nur auf Tatsachen, die der Klient seinem Anwalt anvertraut, um ihm die Ausübung des Mandates zu ermöglichen, oder die der Anwalt in Ausübung seines Berufes wahrnimmt. ... Auf der andern Seite ist der Anwalt nicht zur Verschwiegenheit bezüglich solcher Tatsachen gehalten, die er als Privatperson wahrgenommen hat oder die allgemein bekannt sind, so dass der Klient zum vornherein kein Interesse haben kann, sie gegenüber irgendwem geheimzuhalten*': BGE 112 Ib 606 at 607.

88 '*Überwiegt ... das kaufmännische Element derart, dass die Tätigkeit des Anwalts nicht mehr als eine anwaltliche betrachtet werden kann, kann sich das Berufsgeheimnis auf diese Tätigkeit jedenfalls nicht in einem umfassenden Sinn erstrecken*': BGE 112 Ib 606 at 608.

### **G The European Union**

For matters relating to European law, legal professional privilege only applies to communications that ‘emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment’.<sup>90</sup> Thus, in-house lawyers are not covered by privilege. Under European law, privilege:

is based on a conception of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs.<sup>91</sup>

The significance of this ruling is that it arose in an EU competition law case, when the documents in question were produced by an English in-house lawyer whose communications would otherwise have been privileged under English law. Thus, the degree of privilege afforded to English (and Irish) in-house lawyers will differ depending on whether EU investigatory powers are involved. There was some hope that this position would be revisited in *Akzo Nobel Chemicals v Commission*, but this hope now seems to have been dashed.<sup>92</sup>

### **H The United States of America**

America has no unified common law and no unified national regulation of lawyers. Thus, the law of privilege differs subtly across the fifty states and various federal jurisdictions. As a general rule, privilege is recognised on much the same terms as in Australia,<sup>93</sup> and generally applies to in-house counsel whether by virtue of common law<sup>94</sup> or statute.<sup>95</sup>

Perhaps the most significant difference across the states is their approach to whether a corporate client can claim privilege over employees’ communications with lawyers, whether in-house or not. For example, in Illinois,<sup>96</sup> Michigan<sup>97</sup> and New Jersey,<sup>98</sup> only members of the ‘control group’ who actually direct the

89 BGE 112 Ib 606 at 609. Exceptions obviously include such matters as administration of deceased estates, distribution of marital property upon divorce, liquidations and the like.

90 *A M & S Europe Ltd v Commission of the European Communities* (C-155/79) [1982] ECR 1575 at 1611.

91 *Id* at 1611–12.

92 In *Akzo Nobel Chemicals Ltd v Commission of the European Communities* (Joined Cases T-1225/03 R and T-253/03 R) (Court of First Instance, 30 October 2003) the President of the Court of First Instance granted interim relief against the seizure of documents prepared by, or for the use of, in-house counsel. On appeal, however, the European Court of Justice overturned the grant of interim relief on procedural grounds, and did not address the merits of the privilege issue: *Akzo Nobel Chemicals Ltd v Commission* (C-7/04 P(R)1) (European Court of Justice, 27 September 2004).

93 *Hickman v Taylor*, 329 US 495 (1947).

94 At the federal level, see *Upjohn Co v United States* 449 US 383 (1981). At the state level, see, for example, *Exxon Corporation v Department of Conservation and Natural Resources* 859 So 2d 1096 (Ala 2002); *State Farm Fire & Casualty Co v Superior Court*, 54 Cal App 4th 625 (Ct App 1997), 639; *Rossi v Blue Cross & Blue Shield of Greater New York* 542 NYS 2d 508 (1989).

95 See, for example, Arizona: ARIZ REV STAT § 12-2234(B); Colorado: COLO REV STAT § 13-90-107(b); Florida: FLA STAT § 90.502.

96 *Consolidated Coal v Bucyrus-Erie Co*, 89 Ill 2d 103; 432 NE 2d 250 (1982).

97 *Hubka v Pennfield Township* 197 Mich App 117; 494 NW 2d 800 (Ct App 1992).

litigation can claim privilege. By contrast, in the federal courts,<sup>99</sup> Arizona,<sup>100</sup> Colorado<sup>101</sup> and New York,<sup>102</sup> privilege is generally available whenever the communication is for the purpose of seeking legal advice, whatever the role or seniority of the person making the communication. Some courts, though, subject claims of privilege in the corporate context to a ‘heightened level of scrutiny’.<sup>103</sup>

### 3. *Substance or Procedure?*

For Australian courts, the law of privilege is ‘substantive’ for the purposes of domestic law,<sup>104</sup> and it is similarly characterised under Canadian law.<sup>105</sup> A question therefore immediately arises: does this characterisation hold true of Australian (and Canadian) private international law as well? For it is not immediately clear that a matter labelled as ‘substantive’ under domestic law will be considered ‘substantive’ for conflicts of law purposes. In *John Pfeiffer Pty Ltd v Rogerson*,<sup>106</sup> the High Court rejected an earlier line of authority that sought to distinguish between ‘right’ and ‘remedy’; the former being substantive, the latter being procedural.<sup>107</sup> Although the High Court acknowledged that, in a certain sense, a litigant must take the forum court and its procedures as it finds them, the Court concluded that:

matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.<sup>108</sup>

In this regard, the High Court endorsed the earlier statement of Mason CJ in *McKain v R W Miller & Co (SA) Pty Ltd* to the effect that the concept of ‘procedure’ should be limited to ‘rules which are directed to governing or regulating the mode or conduct of court proceedings’, and that all other provisions or rules are to be classified as substantive.<sup>109</sup>

This holding has been described by Peter Nygh and Martin Davies as an ‘outcome determination test’ to distinguish between procedure and substance.<sup>110</sup> Yet, as Nygh and Davies themselves note ‘[t]here are indeed very few instances

98 *New Jersey Rules of Professional Conduct* r 1.13.

99 *Upjohn Co v United States*, above n94.

100 *Samaritan Foundation v Goodfarb*, 176 Ariz 497; 862 P 2d 870 (1993).

101 *Shriver v Baskin-Robbins Ice Cream Co Inc* 145 FRD 112, 114 (D Colo 1992).

102 *Rossi v Blue Cross & Blue Shield of Greater New York*, 542 NYS 2d 508 (1989).

103 *Southern Bell Telephone & Telegraph Co v Deason*, 632 So 2d 1377, 1383 (McDonald J) (Fla 1994).

104 *Daniels Corp*, above n12.

105 *Descoteaux v Mierzewski* [1982] 1 SCR 860.

106 (2000) 203 CLR 503.

107 See the discussion of the supposed distinction by Mason CJ in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 18–27. This was a distinction of which his Honour (then in dissent) disapproved.

108 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

109 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 26–7 (Mason CJ).

where the classification of a rule as being either procedural or substantive does not have a weighty effect on the outcome of a case'.<sup>111</sup> Thus, while it might not be a meaningful distinction to categorise rights as 'substantive' merely because they may affect the 'substance' of the case, it is certainly meaningful to distinguish as 'procedural' those technical rules which exist only to oil the machinery of litigation. As a Canadian judge has put it, the purpose of the distinction between substance and procedure 'is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of [the] parties'.<sup>112</sup>

When seen in this light, it becomes clear that the rules of legal professional privilege should be considered as substantive rather than procedural. As the High Court made clear in *Baker v Campbell*, privilege is not simply a procedural mechanism limited to the court or trial process: rather, it is a substantive right that exists independently of any actual adjudicative procedure.<sup>113</sup> Quite clearly, legal professional privilege does not exist merely to 'make the machinery of the forum court run smoothly': rather, it has a substantive and outcome-affecting life of its own. This is a conclusion that has also been reached in the United States.<sup>114</sup>

Indeed, even if privilege were otherwise categorised as procedural, this does not mean that it should be so categorised for private international law purposes. By way of comparison, while evidence is generally categorised as procedural in the private international law,<sup>115</sup> not everything within the domestic law of evidence should 'be classified internationally as adjective [i.e. procedural] law'.<sup>116</sup> Rather, 'only provisions of a technical or procedural character' are so characterised internationally.<sup>117</sup>

Thus, one can agree with Jack Weinstein that since the rules of privilege act to deny the court access to what would otherwise be probative and relevant evidence, they differ from other procedural or evidentiary rules 'because their net effect is to subordinate substantive rights and thus subtly to affect the entire substantive law'.<sup>118</sup> Indeed, Weinstein concludes that to 'ignore [a foreign jurisdiction's] policies on privileges while enforcing another aspect of its substantive law is not, in its long-run effect, much different from ignoring one part of its law of contracts'.<sup>119</sup>

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110 Peter Nygh & Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) at 311 (hereafter *Nygh & Davies*).

111 *Id* at 303.

112 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1072 (La Forest J).

113 *Baker v Campbell*, above n13.

114 *Republic Gear v Borg-Warner Corporation*, 381 F 2d 551 (2nd Cir 1967).

115 Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13<sup>th</sup> ed, 2000) at 162 (hereafter *Dicey and Morris*). Indeed, the 6<sup>th</sup> edition of this work (the first edited by Morris) ascribed 'the whole law of evidence' to the category of procedure: J H C Morris (ed), *Dicey's Conflict of Laws* (6<sup>th</sup> ed, 1949) at 860. The chapter on procedure was written by Zelman Cowen.

116 *Mahadervan v Mahadervan* [1964] P 233 at 243 (Simon P).

117 *Ibid*.

118 Jack Weinstein, 'Recognition in the United States of the Privileges of Another Jurisdiction' (1956) 56 *Colum L Rev* 535 at 541.

One final observation should be made: even if it is relatively clear that legal professional privilege is a substantive right both in Australian domestic law and in Australian private international law, there is no reason to assume that any foreign legal system would make the same ‘substantive’ classification. As Richard Fentiman observes of the substantive–procedural dichotomy in English law, ‘if the question whether an issue is substantive or procedural as a matter of English law is controversial, it may be equally controversial under foreign law’.<sup>120</sup> That is to say, any foreign law, which the Australian ‘substantive’ categorisation might suggest is applicable to the question of privilege, might not itself view privilege in substantive terms, although this possibility seems more theoretical than real.<sup>121</sup>

As we shall see, however, the true controversy is not so much whether the law of privilege is procedural or substantive. If privilege were merely procedural, then the *lex fori* would clearly apply. Rather, the real issue — assuming that the law of privilege is indeed substantive — is to determine what law should apply. That is to say, the controversy is to determine whether there is a choice of law rule that is demonstrably preferable to applying the *lex fori*.

#### 4. *Applying the Law of the Forum*

To the extent that it is discussed at all,<sup>122</sup> the traditional — and largely unquestioned — view is that privilege is a matter for the law of the forum.<sup>123</sup> Privilege is commonly categorised as part of the law of evidence, and thus, like evidence, to be governed by the law of the forum as a procedural matter.<sup>124</sup> As one classic American text puts it:

The rule that admissibility of evidence is to be governed by the law of the forum is so obviously necessary to an efficient disposition of the business of the court that cases in which counsel have seriously contended that any other rule should be adopted are exceedingly rare.<sup>125</sup>

On this orthodox view, it is up to the forum’s *domestic* law to decide whether to protect the communications of foreign lawyers and their clients.

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119 Ibid.

120 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (1998) at 41.

121 There does not seem to be any well-known foreign legal system in which this possibility arises. For example, Canada and the United States classify privilege as substantive, and most European civil law countries treat questions of evidence and admissibility as a matter of substance and not procedure: see V Bellini, ‘Evidence in Comparative Private International Law’ (1951-1953) 2 *UWALR* 330 at 330-1.

122 Even leading texts like P M North & J J Fawcett, *Cheshire and North’s Private International Law* (12<sup>th</sup> ed, 1992) (hereafter *Cheshire and North*) and *Nygh & Davies*, above n110, make no mention of the issue at all.

123 See *Dicey and Morris*, above n115 at 166; J-G Castel, *Canadian Conflict of Laws* (2<sup>nd</sup> ed, 1986) at 121.

124 *Bain v Whitehaven & Furness Railway Co* (1850) 3 HL Cas 1 at 19 (Brougham LJ).

125 Joseph H Beale, *A Treatise on the Conflict of Laws* (1935) vol 3 at 1614.

Despite this orthodox approach, the characterisation of privilege as ‘substantive’ indicates that a choice of law of some sort needs to be made, such that *foreign* law might apply to questions of foreign legal advice. Authority on this *choice of law* issue is sparse, especially so concerning legal professional privilege as opposed to other privileges.<sup>126</sup> Some American cases considering the matter have emphasised the traditional procedural–substantive divide as a reason for applying the forum’s law of privilege.<sup>127</sup> For example, in *Metropolitan Life Insurance Co v McSwain*, the *lex fori* applied, because the law of privilege must ‘be considered as a rule of evidence, or adjective law, and ... not ... a rule of substantive law’.<sup>128</sup> Other courts, though, have emphasised the need to uphold the public policy behind the forum’s law of privilege, quite independently of whether that privilege should be characterised as procedural or substantive.<sup>129</sup> Indeed, some American courts have even applied the law of the forum without bothering to consider what the *lex causae* actually was.<sup>130</sup>

In English law, the matter has arisen even less frequently, and perhaps the only case in which the issue is squarely raised is *Bourns Inc v Raychem Corp*, in which the Court of Appeal stated that:

[t]he fact that under foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced.<sup>131</sup>

However, the case is not firm authority for the principle for which it is said to stand, namely that ‘whether or not a document is privileged is to be determined by English law’.<sup>132</sup> The case concerned an attempt by an unsuccessful litigant in English patent proceedings to use a document produced for taxation of costs for collateral purposes in litigation in the United States. It was thus not a case about a party basing its claim to privilege (or its absence) on the direct application of foreign law. Indeed, *Raychem* (the party seeking the documents) expressly denied that privilege could be lost in England *simply* because it was denied under some foreign law.<sup>133</sup>

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126 It is only Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws: Second Supplement to the Thirteenth Edition* (2002) at 9 (hereafter *Dicey and Morris Supplement*) that mentions any case law at all, namely *Bourns Inc v Raychem Corp* [1999] 3 All ER 154.

127 See, for example, *Doll v Equitable Life Assurance Society* 138 F 705 (3rd Cir 1905) (a New Jersey court refusing to apply New York law of doctor–patient privilege); *Jones v Jones* 144 NYS 2d 820 (Sup Ct 1955) (a New York court refusing to apply French law which supposedly lacked doctor–patient privilege).

128 149 Miss 455 at 458; 115 So 555 at 557 (Hall J) (1928).

129 *Wexler v Metropolitan Life Insurance Co*, 38 NYS 2d 889 (Sup Ct 1942).

130 *Abety v Abety*, 77 A 2d 291 (NJ Ct Ch, 1950) (applying New Jersey law, which did not recognise New York doctor–patient privilege).

131 *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 at 167–8 (Aldous LJ).

132 *Dicey and Morris Supplement*, above n126 at 9.

133 See *Bourns Inc v Raychem Corp*, above n131 at 167 (Aldous LJ).

Most fundamentally, however, the documents would ordinarily have been privileged under United States law: the (apparently spurious) claim that privilege had been lost depended on the operation of United States procedural law which would not otherwise have had any relevance to the English proceedings. As the Court of Appeal stated:

US law and practice is for the US courts. However it cannot be right that under English law privileged documents and the information in them should be used in breach of privilege just because the party claiming the privilege has allegedly not complied with an obligation of US practice in the US proceedings.<sup>134</sup>

The choice of law issue has not squarely arisen in Australia.<sup>135</sup>

Even if it be accepted that the law of the forum applies to govern questions of privilege, a question immediately arises: what, then, *is* the law of the forum with regard to foreign legal professional privilege? At first blush, it seems somewhat odd that there should be *any* local law on foreign legal professional privilege, but there is a surprisingly detailed — if unsatisfactory — commentary on the subject in Anglo-Australian law.

#### A. *English Authorities*

The earliest case to consider the issue was *Bunbury v Bunbury*,<sup>136</sup> a case concerning the then-colony of Demerara, in which Dutch law governed certain topics. The suit was heard in England, but the defendants sought the advice of Dutch lawyers. The report indicates that documents containing ‘the opinion of counsel in Holland’ were held by the Master of the Rolls to be privileged, and their production was refused.<sup>137</sup> From the rather sparse report, one can infer that the Dutch lawyers were treated *as if* they were English lawyers, and were thus able to benefit from ordinary litigation privilege. Likewise, in *Macfarlan v Rolt*, a similar rationale governed the application of privilege in English litigation to the advice of a Brussels *avoué* (solicitor) concerning a shipping line from Antwerp to New York.<sup>138</sup>

More complex, though, was the situation in *Lawrence v Campbell*.<sup>139</sup> That case concerned a Scots solicitor practising in London on behalf of Scots clients who was not admitted to practice in England. The Vice-Chancellor held that documents produced by the Scots solicitor were privileged, and that the law to be applied was English:

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<sup>134</sup> Id at 168 (Aldous LJ).

<sup>135</sup> But see *Kennedy v Wallace* (2004) 208 ALR 424 (hereafter *Kennedy v Wallace*) and *Arrow Pharmaceuticals Ltd v Merck & Co Inc* (2004) 210 ALR 593 (hereafter *Arrow Pharmaceuticals*), both discussed below, which address the issue tangentially and incompletely.

<sup>136</sup> (1839) 2 Beav 173; 48 ER 1146.

<sup>137</sup> Id at 1147.

<sup>138</sup> (1872) LR 14 Eq 580 (Wickens V-C).

<sup>139</sup> (1859) 4 Drew 485; 62 ER 186.

sitting in an English Court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in London, and therefore the letters in question are privileged from production.<sup>140</sup>

However, the Vice-Chancellor's insistence on English law seems to be rather belied by his earlier commentary which appears to suggest that Scots solicitors should be governed by Scots law:

Suppose a Scotch solicitor ... comes across the border, and being found in England is required to produce communications made to him professionally in Scotland. No one would contend that he could be obliged to do so. If a Scotchman consults a Scotch solicitor in Scotland the privilege is allowed. What difference does it make in principle that the Scotch solicitor, instead of being resident in Scotland, resides in this country for the purpose of conducting the business of Scotch clients?<sup>141</sup>

I will return to these tantalising suggestions later. However, the great mass of English authority supports the view that privilege applies as much to communications to foreign lawyers as to local lawyers, and that both are subjected to English (ie the forum's) law of privilege.<sup>142</sup>

For the most part, English judges have been content to ignore the conflict of laws issue, and thus have had no need to discuss the concept of choice of law — or indeed of the *lex fori* — at all. One exception was Ormrod J in *Re Duncan (dec'd); Garfield v Fay*, who, while applying the English law of privilege, remarked that:

Any other conclusion would lead to an impossible position for if this Court were required to investigate the position of such communications in foreign law it must first determine the foreign law, but what law governs the relationship of English client and foreign lawyer, at any rate, where no proceedings are in contemplation? There is no forum and therefore no *lex fori*. The nationality of the foreign lawyer is as irrelevant as his address for this purpose.<sup>143</sup>

That is to say, even though his Lordship applied English law, he realised that there was in fact a choice of law issue to address:<sup>144</sup> what his Lordship applied was in effect the *lex fori*, and not merely 'English law' simpliciter.

140 Id at 188 (Kindersley V-C). Note also *Wheeler v Le Marchant* (1881) 17 Ch D 675 at 679, in which Brett LJ remarked with regard to privilege that 'Scotch legal advisers stand on the same footing as English legal advisers'.

141 Id at 188 (Kindersley V-C).

142 *Re Duncan (dec'd); Garfield v Fay* [1968] P 306 (Ormrod J) (hereafter *Re Duncan*); *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485 at 490 (Templeman LJ) (the case actually concerned the waiver of privilege over advice prepared by American lawyers); *International Business Machines Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413 at 429 (Aldous J).

143 *Re Duncan*, id at 311.

144 Counsel had invited his Lordship to apply the 'municipal law of the forum of the foreign lawyer' to any question of privilege: *Re Duncan (dec'd)*, above n142 at 311. This submission was rejected.

### **B. Australian Authorities**

The Australian authorities are somewhat ambivalent on the question of how foreign legal professional privilege ought to be handled. The first case to consider the issue, *Ritz Hotel Ltd v Charles of the Ritz Ltd [No 4]*, concerned advice given by a New York in-house lawyer. In upholding the claim for privilege — presumably as a matter of Australian law — McLelland J held that:

legal professional privilege is not confined to legal advice concerning or based on the law of the particular jurisdiction in which the giver of the advice has his formal qualification. . . . I see no reason why legal advice from a lawyer qualified in New York, concerning trade marks and trade mark litigation in other countries, would not, in appropriate circumstances, attract legal professional privilege.<sup>145</sup>

Likewise, in *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd*, the Full Federal Court approved *Ritz Hotel*, and remarked by way of obiter that:

[i]t would be an anomalous and capricious result that legal advice, given by [local] solicitors duly qualified and authorised to practise within a jurisdiction, especially in respect of a matter which involved a foreign element . . . was protected by the privilege, but legal advice given by properly retained foreign lawyers in respect of the same subject matter was not privileged.<sup>146</sup>

The most surprising decision on the subject — and ironically the only Australian case to deal with the choice of law implications — is Gyles J's decision in *Kennedy v Wallace*.<sup>147</sup> This case concerned Trevor Kennedy's failed attempt to claim privilege over jottings on Ritz Hotel notepaper, purportedly made as an aide-memoire for a meeting to receive advice from his Swiss attorney, one Benno Hafner. No evidence was led as to the Swiss law of privilege, to his Honour's obvious irritation.<sup>148</sup> ASIC alleged that Kennedy had been using Swiss legal entities to conceal his shareholding in Offset Alpine, an Australian listed company, and that he had sought legal advice on how to thwart the Australian financial and regulatory authorities. It also appeared that Hafner was not merely a legal adviser, but also had managerial involvement in Kennedy's Swiss affairs.<sup>149</sup>

After considering the authorities mentioned above, Gyles J remarked that '[t]he position taken in England without any real discussion seems to be that the matter is governed entirely by the law of the forum without any consideration of choice of law'.<sup>150</sup> His Honour then came to the remarkable conclusion that:

the authorities consulted do not establish the proposition that all communications of a professional nature between an Australian client and a foreign lawyer concerning advice as to foreign law are privileged from seizure in Australia . . .

<sup>145</sup> *Ritz Hotel*, above n29 at 102.

<sup>146</sup> (1993) 45 FCR 445 at 455 (Northrop, Ryan & Beazley JJ) (hereafter *Grofam*).

<sup>147</sup> *Kennedy v Wallace trial*, above n135.

<sup>148</sup> *Id* at 427.

<sup>149</sup> *Id* at 431. See above Part 2(F) of this article on the Swiss law relating to lawyers' involvement in management and investment activities. This law was not referred to in *Kennedy v Wallace*.

<sup>150</sup> *Id* at 438.

Furthermore, such a proposition is inconsistent with the rationale for legal professional privilege.<sup>151</sup>

That rationale, claimed his Honour, was to serve the public interest in the administration of justice *in Australia*, by encouraging frank disclosure between clients and their lawyers. In this context, it was ‘far from axiomatic’ that the administration of justice in Australia necessitated the granting of privilege to foreign legal advice.<sup>152</sup> So far as the domestic law of privilege was concerned, his Honour remarked that ‘it is questionable whether there is any need to extend the principle to overseas legal advice. It is not obvious that such advice promotes the better administration of Australian justice’.<sup>153</sup> However, since it would be ‘controversial’ to deny privilege to *all* foreign legal advice, his Honour reluctantly held that privilege ‘may’ apply to ‘some’ foreign communications.<sup>154</sup> In order for a foreign lawyer to benefit from privilege, it seemed that his Honour would have to have been satisfied that the foreign lawyer was subject to ethical and disciplinary supervision similar to that in Australia, and that evidence would need to be tendered to that effect.<sup>155</sup>

Most extraordinarily, his Honour held that to benefit from privilege, foreign legal advice must have some ‘connection’ to the ‘administration of justice or the proper functioning of the legal system in Australia’.<sup>156</sup> Taking advantage of the laws of tax havens was reason enough to deny the application of privilege:

Assisting an Australian to take advantage of foreign secrecy laws to evade scrutiny of assets and transactions by Australian authorities including taxation authorities has no conceivable connection with the administration of justice or the proper functioning of the legal system in Australia which is the sole rationale for legal professional privilege .... Those seeking or taking legal advice for such purposes are not entitled to resist an otherwise lawful demand for disclosure of such communications on the grounds of legal professional privilege.<sup>157</sup>

Kennedy’s claim to privilege was thus denied.<sup>158</sup>

On appeal, while the Full Federal Court dismissed the appeal and rejected Mr Kennedy’s claim for privilege on factual grounds,<sup>159</sup> it completely repudiated Gyles J’s reasoning on the application of privilege to communications with foreign lawyers. Not least among their Honours’ concerns was Gyles J’s wholesale rejection of authority — most notably a case decided by the Full Federal Court.<sup>160</sup>

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151 Id at 439.

152 Id at 440.

153 Id at 441.

154 Ibid.

155 Id at 427, 432–3, 441.

156 Id at 445.

157 Id at 446.

158 Id at 447.

159 Kennedy lost both at trial and on appeal, because he did not establish on the facts that his notes were made for the dominant purpose of receiving legal advice.

160 *Kennedy v Wallace* (2004) 213 ALR 108 at 142-3 (Allsop J) (hereafter *Kennedy v Wallace appeal*). The Full Federal Court authority was *Grofam*, above n146.

Allsop J, with whom Black CJ and Emmett J agreed on this point, remarked that the trial judge's limitation of the concept of privilege by reference to the administration of justice in Australia was spurious. First, with reference to *Daniels Corporation*,<sup>161</sup> Allsop J commented that the 'fundamental substantive nature of the right' (ie privilege) told against Gyles J's 'almost procedural concept' of the administration of justice.<sup>162</sup> His Honour added with reference to the domestic cases on privilege that 'the notion of the administration of justice seems to me to be wider than the carrying on of the court system in Australia and the vindication and protection of rights in Australia'.<sup>163</sup>

The Full Federal Court also rejected the Gyles J's view that the recognition of foreign privilege was antithetical to the rationale for privilege itself. In a global society in which people may well need the advice of foreign lawyers, 'treatment of the privilege as a jurisdictionally specific right [is] both impractical and contrary to the underlying purpose of the intended protection in a modern society'.<sup>164</sup> That purpose, said Allsop J is:

to enable persons in a civilised complex modern society to be able to conduct their affairs with the assistance of legal advice. Expressed thus, it is a fundamental right conforming to and underpinning the rule of law ...<sup>165</sup>

The fact that foreign lawyers are not subject to the supervision and discipline of domestic courts was no reason to deny their communications privilege under the law of the forum: so long as the lawyer was in fact admitted to practice in the foreign jurisdiction, that was enough. As Allsop J asked:

Is it to be necessary to prove the legal training and ethical control of a Queen's Counsel from Essex Court in connection with advice as to a marine insurance policy? If not, is that because of cultural conclusions one might be tempted to draw about the English legal system? If a person is a lawyer in country X and legal advice is sought from that person, one can conclude that the client needs or desires such advice in the facilitation of the orderly and lawful arrangement of his or her affairs ...<sup>166</sup>

In a complex legal world, 'which may be, for any particular person, multi-jurisdictional', the fundamental basis for privilege and the fundamental right which it protects gave no support for a distinction between foreign and domestic lawyers so far as the law of privilege was concerned.<sup>167</sup> Thus, Gyles J erred in law, both by requiring evidence on foreign disciplinary and ethical practices, and in requiring some 'connection' between the foreign advice and the Australian administration of justice.<sup>168</sup> The appeal was, however, dismissed on factual grounds.

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<sup>161</sup> *Daniels Corporation*, above n12.

<sup>162</sup> *Kennedy v Wallace appeal*, above n160.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Id* at 142.

<sup>167</sup> *Id* at 142–3.

<sup>168</sup> *Id* at 144.

### C. *Conceptual Uncertainties*

While it now seems clear that the orthodox position is that questions of legal professional privilege are to be dealt with by the law of the forum, and that the law of the forum in both England and Australia will allow privilege over foreign legal advice, a number of conceptual uncertainties remain.

First of all, it is not clear *why* or *how* domestic law extends its privilege to foreign legal practitioners. Two methods might explain why the domestic law of privilege applies to foreign communications. First, the courts of the forum might choose to treat foreign lawyers *as if* they were domestic lawyers. On this view, foreign lawyers should be treated as if they were a mirror image of domestic lawyers. Second, domestic law might make a principled decision about what range of activities should be given its protection. On this view, granting privilege to foreign communications might be a principled extension of domestic law.

Some cases more easily fall within the ‘mirror image’ rationale. For example, *Bunbury v Bunbury*<sup>169</sup> and *Macfarlan v Rolt*<sup>170</sup> are both cases in which the judges essentially reasoned: ‘Had you been a local lawyer, privilege would have applied. Therefore it will apply to your advice too’. By contrast, *Lawrence v Campbell*,<sup>171</sup> *Re Duncan*,<sup>172</sup> *Ritz Hotel* and *Kennedy v Wallace* are all cases in which the judges essentially reasoned: ‘You are not a local lawyer. Ought I nonetheless to grant privilege to your advice?’ At trial in *Kennedy v Wallace*, the answer — notoriously — was ‘No’, whereas in each of the other cases (including on appeal in *Kennedy v Wallace*) it was ‘Yes’.

In a sense, one might argue that the ‘principled extension’ basis forces the judge to expose the rationale that lies behind privilege, in order to see whether it encompasses the claim of foreign lawyers. On the other hand, the ‘mirror image’ approach allows the rationale behind privilege to remain opaque and unquestioned. Given the experience of the *Kennedy v Wallace* cases, it might not be such a bad thing to leave the rationale unquestioned, lest judges provide — as Gyles J did — their own eccentric version of it.

The difference between these two approaches with regard to legal professional privilege cases is perhaps neither determinative nor very apparent. However, when one considers the case of patent attorneys — an important quasi-legal profession not granted privilege at common law — the difference in the two rationales becomes more evident. In Australia, communications to and from Australian-registered patent attorneys are privileged.<sup>173</sup> What then of foreign patent attorneys? Most countries have similar statutory protection of patent attorney privilege, but this is a privilege that goes unrecognised under Australian law. In *Eli Lilly & Co v Pfizer Ireland Pharmaceuticals (No 2)* Heerey J concluded that communications to United Kingdom patent attorneys were not privileged: the

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169 Above n136.

170 Above n138.

171 Above n139.

172 Above n142.

173 *Patents Act* 1990 (Cth) s200(2).

language of s200(2) of the *Patents Act* was ‘clear’, and there was ‘no apparent policy reason’ why the statutory privilege should be extended.<sup>174</sup> Referring to the trial decision in *Kennedy v Wallace*, Heerey J concluded that if it were sometimes doubtful whether foreign *lawyers* could claim privilege, ‘[t]here is even less justification for extending privilege to foreign patent attorneys when the privilege for Australian patent attorneys rests solely on a circumscribed statutory footing’.<sup>175</sup> Furthermore, when the parties filed suit in Australia, ‘they did so on the basis that Australian law, including the law as to privilege, would apply’.<sup>176</sup> A similar approach has been adopted in the United Kingdom itself.<sup>177</sup>

Quite clearly, *Eli Lilly* and its United Kingdom counterpart are applications of the ‘principled extension’ approach, albeit that the claim for extension was rejected. Equally clearly, had the ‘mirror image’ question been asked, the claim for privilege would have been allowed: that is, had the United Kingdom patent attorneys been Australian patent attorneys, they would have been covered by the privilege.

It may be objected that a patent attorney needs to be *registered* in Australia to attract the privilege, but one must remember that to benefit from ‘domestic’ legal professional privilege one must be admitted to practice as an Australian lawyer.<sup>178</sup> Patently, foreign lawyers are not admitted to practice in Australia, and yet their communications are nonetheless privileged; the fact that they are admitted in their home jurisdiction suffices.<sup>179</sup> The fact that legal professional privilege is a common law privilege and patent attorney privilege is statutory seems an insufficient basis for distinction: foreign statutory law is often applied by courts on ordinary choice of law principles, so it seems odd that a statutory privilege should be rejected out of hand.<sup>180</sup>

A second conceptual issue also arises for Australian courts. In Australia at least, the forum’s regulation of foreign privilege cannot be on the basis that the law of privilege is ‘merely’ procedural: pause for a moment, and let your mind boggle at the fact that the Full Federal Court in *Kennedy v Wallace* used the Australian classification of privilege as a *substantive* right to justify the application of the *forum*’s privilege to foreign communications. Quite clearly, a major conceptual uncertainty is at work, namely the question of how courts ought deal with a ‘substantive’ procedural right.

If the ‘procedural’ characterisation of privilege remained true in Australia, one might be able to agree with one rather cussed English text, which states that:

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174 (2004) 137 FCR 573 at 575; 61 IPR 292 at 293 (hereafter *Eli Lilly*).

175 *Id* at 294.

176 *Ibid*.

177 *Wilden Pump & Engineering Co v Fufeld* (1984) 3 IPR 104; [1985] FSR 159.

178 *Attorney-General (NT) v Kearney*, above n21 at 510 (Gibbs CJ); *Glengallan Investments Pty Ltd v Arthur Andersen*, above n25.

179 *Kennedy v Wallace appeal*, above n160 (Allsop J).

180 This is especially so the case if privilege can be claimed where the patent attorney is also an admitted lawyer: *Arrow Pharmaceuticals Ltd*, above n135.

A party to litigation in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other parties here; neither must he be deprived of any advantages that English law may confer upon a litigant in the particular form of action.<sup>181</sup>

Yet, as even this text recognises, the categorisation of a matter as ‘procedure’ is not immutable: ‘The crux of the matter is — Why is the distinction between substance and procedure made in private international law? The answer presumably is — For the convenience of the court’.<sup>182</sup> Since the distinction between substance and procedure exists largely for the court’s convenience, as the authors of *Dicey and Morris* note: ‘[i]f, therefore, it is possible to apply a foreign rule, or to refrain from applying [a local] rule, without causing any such inconvenience, those rules should not necessarily ... be classified as procedural’.<sup>183</sup>

Indeed, as the authors of *Dicey and Morris* observe, an over-wide conception of procedure ‘tends to frustrate the purposes of choice of law rules’ by removing to the *lex causae* matters that ought fairly be governed by the *lex causae*.<sup>184</sup> However, it is far from clear *what* matters ‘ought fairly be governed by the law of the cause’: at base the issue is one of line-drawing, albeit that privilege is one area in which it is especially difficult to draw the line.

Perhaps the final word should go to Nygh and Davies, who remark that

the real distinction lies between those matters in which the *lex fori* gives way in order to fulfil the reasonable expectation of the parties and those matters where local policy for reasons of convenience of public policy cannot give way.<sup>185</sup>

The rest of this article will explore whether the law of the forum can or should give way on questions of foreign legal professional privilege.

## 5. *Moving Beyond the Law of the Forum*

The legal (as opposed to factual) conclusion at trial in *Kennedy v Wallace* can perhaps be explained by the fact that Kennedy failed to plead and prove Swiss law, and proceeded on the assumption that Swiss law on point was identical to Australian law.<sup>186</sup> While one can only speculate, one has the sense that had Swiss law been pleaded, Gyles J would have applied it, as opposed to going through the contortions of applying the law of the forum. This would certainly explain why the Full Federal Court on appeal invoked *Damberg v Damberg*,<sup>187</sup> with its attendant

181 *Cheshire and North*, above n122 at 75.

182 *Id* at 78.

183 *Dicey and Morris*, above n115 at 158.

184 *Id* at 157.

185 Nygh & Davies, above n110 at 311.

186 See *Kennedy v Wallace trial*, above n135 at 427 (Gyles J): ‘It has been admitted for the purposes of this proceeding that Hafner was a qualified Swiss lawyer. No evidence has been led from Hafner or anybody else as to the nature of his practice, as to the work that he actually does or as to how lawyers in Switzerland are organised, controlled or disciplined. No evidence has been led as to whether legal professional privilege is a concept known to Swiss law or, if so, as to how and in what circumstances it operates under the law of that jurisdiction.’

187 *Damberg v Damberg* (2001) 52 NSWLR 492.

implication that foreign law cannot be presumed to be identical to the forum's, and that foreign law ought to be pleaded, proved and — presumably — applied.<sup>188</sup>

In a certain sense, orthodox Anglo-Australian law already applies foreign law to the question of privilege: at the very least, it can be said that the law of the forum is not the only law relevant to the question of privilege. Thus, the privilege against exposure to penalty or forfeiture applies to exposure to *foreign* penalties or forfeitures,<sup>189</sup> and the privilege against self-incrimination might also apply to foreign criminal offences.<sup>190</sup> In *United States of America v McRae*, the Lord Chancellor held that a foreign litigant 'coming into our Courts must be subject to every rule of evidence which prevails in them, and, amongst others, to that which protects a witness from exposing himself to penalties by his answer'.<sup>191</sup> Given that the United States would have been able to enforce the forfeiture, Chelmsford LC thought it 'would be most unjust not to extend' the protection under municipal law to forfeiture under foreign law.<sup>192</sup>

Thus, even the purported law of the forum is solicitous of privileges arising by virtue of foreign law (ie those with respect to penalties, forfeitures, or crimes created by foreign law), even if it could not be said that the privilege is itself one granted by foreign law. This gives one pause to think: if local law is solicitous of the defendant's foreign interests, why oughtn't one to say that those interests are protected by foreign law itself, namely through the forum's recognition and enforcement of foreign laws regarding privilege.

There are already some suggestions to this effect in the Anglo-Australian case law. In *Lawrence v Campbell*, the case concerning the Scots solicitor doing business in London, the Vice-Chancellor remarked:

If a Scotchman consults a Scotch solicitor in Scotland the privilege is allowed. What difference does it make in principle that the Scotch solicitor, instead of being resident in Scotland, resides in this country for the purpose of conducting the business of Scotch clients?<sup>193</sup>

The implication of these obiter dicta — but not the actual decision itself — is that Scots law of privilege should have been applied by the English court.

More explicitly, in *Arrow Pharmaceuticals Ltd v Merck & Co Inc*,<sup>194</sup> Gyles J — of all people! — suggested that domestic law should give regard to the foreign law of privilege. That case concerned a claim of privilege over documents

188 *Kennedy v Wallace appeal*, above n160 at 143 (Allsop J).

189 *United States of America v McRae*, above n2.

190 *Evidence Act 1995* (Cth) s128; *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd (No 4)*, above n3. Contrast *F F Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd*, above n3. See generally Theophilopoulos, above n3 at 322, in which the author advocates that the privilege *ought* to apply to offences under foreign law, but only if the jeopardy under foreign law is near certain and not merely speculative or potential.

191 *United States of America v McRae*, above n2 (Chelmsford LC).

192 *Ibid.*

193 (1859) 4 Drew 485 at 490-1; 62 ER 186 at 188 (Kindersley V-C).

194 *Arrow Pharmaceuticals*, above n135.

produced in order to obtain legal advice on patents law from an American in-house lawyer and patent attorney. The document was privileged under both Australian and American law.<sup>195</sup> Gyles J commented that:

In circumstances such as the present, it seems to me that, when dealing with international patents, it is appropriate to pay special regard to the situation in the place where the events have occurred, at least in circumstances where the principle applied there is the same as the principle applied here.<sup>196</sup>

A number of factors make this case astonishing. The first is Gyles J's road-to-Damascus conversion since his decision in *Kennedy v Wallace*, in which he doubted that communications with foreign lawyers should *ever* be privileged in Australia. It certainly seems a remarkable transformation from *that* belief to the belief that questions of foreign privilege should be determined by reference to foreign law.<sup>197</sup> Second, it seems ridiculous to say that foreign law will be relevant only when it is the *same* as local law: in truth, this is a situation of false conflict, in which ordinarily no choice of law needs to be made at all.<sup>198</sup> While one can applaud this openness to the influence of foreign law, the instant decision is both conceptually unsound and methodologically flawed.

Quite aside from the little authority on the issue, a point of practicality tells against the wholesale adoption of the law of the forum. In reality, one impediment to the utility of this attitude is that where evidence or witnesses are located in a foreign jurisdiction and are subject to foreign privilege, it may be impossible to proceed without the assistance of the authorities in that foreign jurisdiction, who will presumably insist that the privilege be applied. As Weinstein notes, the effect is that foreign privilege must in some sense be respected, 'not because the foreign privilege is voluntarily recognized by the [forum] court but because our normal adjudicative process is frustrated by powers beyond the court's control'.<sup>199</sup>

Finally, one might also note that if Australian law does indeed regard legal professional privilege as a substantive right, ordinary choice of law principles suggest that foreign law might very well govern those substantive rights. This section thus considers what choice of law rule might apply if one does indeed consider that privilege might be governed by foreign law.

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195 *Re Spalding Sports Worldwide Inc*, 203 F 3d 800 (Fed Cir, 2000).

196 *Arrow Pharmaceuticals*, above n135 at 597.

197 *Arrow Pharmaceuticals* was decided on 1 September 2004, and the appeal in *Kennedy v Wallace* was decided on 23 December 2004, so it is not as if Gyles J were humbled by being reversed on appeal. One can only speculate that he might have caught wind of what was coming through gossip around the judicial watercooler.

198 See Nygh and Davies, above n110 at 27.

199 Weinstein, above n118 at 539.

### A. *Applying the American ‘Interests Analysis’ Approach*

Unlike Anglo-Australian law, mainstream American private international law is far more solicitous of foreign laws of privilege. By contrast to what might be termed Anglo-Australian formalism, American law proceeds by way of analysing the respective ‘interests’ the parties and relevant jurisdictions have in enforcing the potentially applicable law. Thus, questions of privilege — and choice of law more generally — might be governed by the forum, the parties’ domicile, or some foreign jurisdiction, depending on the jurisdictions’ relative connection to the facts of the case, and their relative interest in seeing their law enforced. There is thus no clear or formalistic rule that governs any particular claim to foreign privilege.

To the extent that there is a meaningful distinction in American law between substance and procedure with regard to the application of foreign law, it is often seen in ‘interest analysis’ terms. Joseph Beale, for example, applied ‘interests analysis’ to the distinction between substance and procedure, such that where the forum’s interest is predominant, the *lex fori* applies:

there must be a balancing of the interests of the parties, the court, and the respective states [whose laws are in conflict]. If the practical convenience to the court in adopting the local rule is great, and the effect of so doing upon the rights of the parties is negligible, the law of the forum will be held to be controlling. If the situation is reversed the rule of the foreign law will be adopted.<sup>200</sup>

The *Restatement (Second) on the Conflict of Laws* purports to summarise the position of American common law as generally preferring the admission of relevant evidence, such that if the privilege is recognised in the foreign state but not the forum, the evidence will nonetheless be admitted unless there is ‘some special reason why the forum policy favoring admission should not be given effect’; and that evidence privileged in the forum but not the foreign state will also be admitted ‘unless the admission of such evidence would be contrary to the strong public policy of the forum’.<sup>201</sup> This rule was inserted in the *Restatement (Second)* in place of the former position in which privilege was considered to be part of the law of evidence, and thus to be governed by the *lex fori*.<sup>202</sup>

It must be stressed, though, that there is no uniformity in decisions on the topic,<sup>203</sup> a fact to which American courts have themselves drawn attention.<sup>204</sup> On the other hand, scholars have often praised this lack of uniformity as reflecting the diverse rationales behind the law of privilege.<sup>205</sup> For this reason, much of the American literature on the subject analyses in excruciating detail the supposed policy interests behind the various forms of privilege.<sup>206</sup>

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200 Beale, above n125, vol 3, at 1600.

201 *Restatement (Second) Conflict of Laws* § 139.

202 *Restatement (First) Conflict of Laws* § 597.

203 Kurt Riechenberg, ‘The Recognition of Foreign Privileges in United States Discovery Proceedings’ (1988) 9 *NW J Int’l L & Bus* 80 at 118 declares that questions of foreign legal privilege are governed neither by ‘established legal doctrines’ nor by any ‘comprehensive approach’ under American law, but rather proceed on a case-by-case basis.

204 *Mitsui & Co (USA) Inc v Puerto Rico Water Resources Authority* 79 FRD 72, 77 (Toledo J) (D Puerto Rico 1978).

Many American courts have insisted on the forum's law of privilege (or lack thereof) on the basis of the forum's interest in its local public policy, rather than the supposedly procedural characterisation of privilege.<sup>207</sup> One court rather trenchantly declared that where the forum recognises no privilege, its public policy in securing full disclosure is overriding, and:

foreign law cannot be permitted to obstruct the investigation and discovery of facts in a case, under rules established as conducive to the proper and orderly administration of justice in the court of the United States.<sup>208</sup>

Conversely, courts have insisted on applying a privilege the forum recognises which the foreign state does not. Thus, in *Wexler v Metropolitan Life Insurance Co*, the New York court forbade the taking of evidence from New Hampshire physicians, whose evidence would not have been privileged in their home state, because '[t]he public policy of this state does not permit the use of such evidence'.<sup>209</sup> This public policy rationale has been applied, for example, in the context of New York attorney–client privilege<sup>210</sup> and Illinois accountant–client privilege.<sup>211</sup> Indeed, the forum's public policy can be so overriding that the court will refuse a transfer of proceedings to an interstate court that does not recognise the forum's privilege, as occurred in *Webster v Columbia National Life Insurance Co* with respect to a proposed transfer from New York (which recognised doctor–patient privilege) to Massachusetts (which did not).<sup>212</sup>

The proper law of a relevant contract has been another relevant factor in determining which law should govern privilege. For example, in *Levy v Mutual Life Insurance Co*, where Georgia law was the proper law of an insurance contract, that law governed the question of privilege, and not the law of the New York forum.<sup>213</sup> Similarly, the parties' 'expectations' have also been a reason for

205 See, for example, Stewart Sterk, 'Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems' (1977) 61 *Minn LR* 461 at 469: 'To the extent that different privileges protect fundamentally different interests, it is inappropriate to treat them uniformly for choice of law purposes'.

206 *Ibid*; Willis Reese & Barry Leiwant, 'Testimonial Privileges and Conflict of Laws' (1977) 41 *Law and Contemporary Problems* 85 at 87–90.

207 Nevertheless, using such a procedural characterisation to apply the *lex fori* occurred in *Doll v Equitable Life Assurance Society* 138 F 705 (3rd Cir, 1905); *Metropolitan Life Insurance Co v McSwain* 149 Miss 455, 115 So 555 (1928); *Jones v Jones* 144 NYS 2d 820 (Sup Ct, 1955).

208 *Société Internationale pour Participations Industrielles et Commerciales v Brownell* 225 F 2d 532 (DC Cir, 1955).

209 38 NYS 2d 889, 890 (Parella J) (Sup Ct, 1942).

210 *Re Franklin Washington Trust Co* 148 NYS 2d 731, 733 (Steuer J) (Sup Ct, 1956).

211 *Palmer v Fisher*, 228 F 2d 603, 608 (Swaim J) (7th Cr, 1955).

212 *Webster v Columbia National Life Insurance Co* 116 NYS 404, 408 (Houghton J) (App Div 1909); *aff'd* 196 NY 523 (1909). What made the case all the more extraordinary was that all the facts in the case related to the conduct of Massachusetts residents in Massachusetts, with only a coincidental connection to New York.

213 56 NYS 2d 32 (Sup Ct, 1945). The evidence was privileged in New York, but not in Georgia. Contrast *Levy v Mutual Life Insurance Co* 138 F 705 (3rd Cir, 1905) rejecting the proper law as a basis for applying a foreign law of privilege (however, this rejection relied on a characterisation of privilege as a matter of substance and not procedure).

applying foreign law that did not recognise the forum's privilege. Thus, in *Mitsui & Co (USA) Inc v Puerto Rico Water Resources Authority*, the Puerto Rico forum recognised accountants' privilege, but New York did not. The judge applied New York law on the basis that compelling disclosure:

comports with the expectations of the parties to the relationship and the New York interest against the confidentiality of this communication. Besides, Puerto Rico has no legitimate interest in maintaining the confidentiality of accountant-client communications held wholly in New York, between New York citizens.<sup>214</sup>

By converse reasoning, some courts have been prepared to recognise a foreign privilege that does not exist in the forum, on the basis that the foreign state has the greater interest in seeing its law enforced. For example, in *Cepeda v Cohane*,<sup>215</sup> the federal court for the Southern District of New York felt able to apply California's statutory privilege protecting journalists' sources, a privilege that did not apply in New York. Tenney J remarked that:

it is a state's affirmative action in carving out a privilege creating an exception to a general rule of testimonial compulsion which constitutes the enunciation of a strong public policy in favor of the protection of certain communications, whereas the refusal to recognize a privilege is merely the application of the general rule of compulsion to testify to all facts affecting a specific controversy.<sup>216</sup>

Thus, when viewed in 'interest' terms, California had the greater interest in seeing its law of privilege enforced, since New York had no strong public policy interest in the matter.<sup>217</sup> Significantly, the judge thought that to do anything other than apply California law would encourage forum-shopping, in that plaintiffs would then have the incentive to find a forum which did not have the privilege which would otherwise have applied to the California libel action.<sup>218</sup>

The reasoning in *Cepeda*, ie applying a foreign law of privilege, has been followed in other cases, including a Georgia court applying Pennsylvania marital privilege,<sup>219</sup> and an Ohio court applying Illinois doctor-patient privilege.<sup>220</sup> Understandably, the decision has been influential in New York,<sup>221</sup> and thus New

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214 *Mitsui*, above n204 at 79 (Toledo J).

215 233 F Supp 465 (SDNY, 1964) (hereafter *Cepeda*).

216 *Id* at 470.

217 *Id* at 471.

218 *Ibid* (Tenney J). 'To apply the law of New York merely because of the fortuitous circumstance that it happens to be the place of the taking of the deposition, would merely encourage 'forum-shopping' in the sense of attempting to take a deposition in a state which does not recognize the privilege'.

219 *R & J Dick Co v Bass*, 295 F Supp 758 (ND Ga, 1968).

220 *Woelfling v Great-West Life Assurance Co*, 285 NE 2d 61 (Ohio Ct App, 1972).

221 Obviously, *Cepeda* was a New York decision, but it also makes intuitive sense that as a busy and well-regarded jurisdiction, New York courts are more likely to encounter out-of-state parties than, say, the courts of Arkansas.

York courts have applied Pennsylvania journalists' privilege,<sup>222</sup> Illinois journalists' privilege,<sup>223</sup> and Maryland accountants' privilege.<sup>224</sup>

An 'interests analysis' of sorts has also been applied to more multi-jurisdictional suits under the rubric of a 'center of gravity' test to determine the proper law of the tort. Thus, in *Hyde Construction Co v Koehring Co*, the Mississippi forum looked to the 'center of gravity of the transaction object of the civil suit', and decided that Mississippi law was the *lex causae* and should apply to questions of privilege on that basis, and not merely because it was the *lex fori*.<sup>225</sup> Thus, the Wisconsin defendant's communications with its in-house counsel were held to be privileged under Mississippi law, when they might not have been under the law of Wisconsin. Significantly, this 'interests analysis' reasoning also applies to the recognition of foreign patent attorneys' privilege, largely on the basis of international comity.<sup>226</sup>

Relatively few American decisions about recognising 'foreign' privilege are actually about international privilege *per se*,<sup>227</sup> and the vast bulk of these decisions are about intra-federal conflicts. By contrast, cases about truly foreign privilege are generally classified under the rubric of exposure to foreign penalty and foreign self-incrimination.<sup>228</sup> This classification unhelpfully elides the difference between 'blocking' statutes that apply to the use of evidence abroad, and statutes conferring a privilege that is also applicable to 'domestic' litigation.<sup>229</sup> The classification also tends to obscure the fact that it is the privilege and not the penalty that is the true issue. Nonetheless, the doctrine is significant and useful because many foreign laws of privilege provide civil or criminal sanctions by way of enforcement, and thus the avoidance of exposure to foreign penalty acts by way of a back-door recognition of foreign privilege. Typically, the American doctrine is expressed in 'interests' terms, which also tends to obscure the true status and purpose of the rule.

In *Re Chase Manhattan Bank*, Dawson J declared that as a matter of policy, '[t]he law appears to be clear that a Court should not order any party to act in such a way that it would violate the laws of a friendly foreign power'.<sup>230</sup> Thus,

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222 *Mazzella v Philadelphia Newspapers Inc*, 479 F Supp 523 (EDNY, 1979).

223 *Baker v F & F Investment* 339 F Supp 942 (SDNY, 1972).

224 *First Interstate Credit Alliance Inc v Arthur Andersen & Co* 542 NYS 2d 901 (Sup Ct, 1988).

225 455 F 2d 337 (5th Cir, 1972). See also *Brandman v Cross & Brown Co* 479 NYS 2d 435 (Sup Ct, 1984).

226 *Duplan Corp v Deering Miliken Inc*, 397 F Supp 1146 (DSC, 1974); *Ampicillin Antitrust Litigation* 81 FRD 377, 391 (Richey J) (DDC, 1978), 391; *Golden Trade SrL v Lee Apparel Co* 143 FRD 514, 519 (Dolinger MJ) (SDNY, 1992), 519; *Stryker Corp v Intermedics Orthopedics Inc* 145 FRD 298, 306–7 (Orenstein J) (EDNY, 1992). See generally, Daiske Yoshida, 'The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals' (1997) 66 *Fordham LR* 209.

227 *Jones v Jones*, above n207 (concerning the supposed absence of French doctor-patient privilege); *Davidson v Great National Life Insurance Co*, 737 SW 2d 312 (Tex, 1987) (concerning a claim for supposed Israeli privilege not to reveal details of ongoing criminal investigations). The cases on foreign patent attorneys also fall into this category.

228 *Société Internationale v Rogers*, 357 US 197 (1958).

229 Riechenberg, above n203 at 85–7.

230 192 F Supp 817, 818–19 (SDNY, 1961).

subpoenas have been set aside because compliance would have violated the laws of Canada,<sup>231</sup> Panama,<sup>232</sup> and most astonishingly, Cuba.<sup>233</sup> Later cases, though, have hesitated to apply this principle as a 'rule', and have rather preferred to see it as yet another balancing of relevant 'interests'. As one Court of Appeals judge has stated:

Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case.<sup>234</sup>

Thus, in *Trade Development Bank v Continental Insurance Company*, this balancing weighed against compelling the defendant Swiss bank to disclose information.<sup>235</sup> By contrast, in *United States v First National City Bank*, the court did order disclosure of German bank records, on the basis that the German contractual privilege was not a sufficiently important public policy to prevent disclosure.<sup>236</sup> However, the judge in that case also struck the conciliatory note that even if illegality under foreign law is not *of itself* reason not to order disclosure, '[i]t is not asking too much ... to expect that each nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behavior'.<sup>237</sup> This is a sentiment that Gyles J might perhaps have done well to consider in *Kennedy v Wallace*.

The lessons that can be learned from American law are mixed at best. On the one hand, at least some American courts are prepared to recognise and enforce the foreign law of privilege in appropriate cases. On the other hand, most courts end up asserting the law of the forum in any event, and classify the forum's law as a fundamental public policy choice irrespective of whether that choice is to recognise or deny a given form of privilege. As Daiske Yoshida observes, the American focus on public policy:

is self-defeating because a judge is always free to offer some domestic policy that is offended by the foreign law ... The result is that a court can always apply the law of the forum state regardless of any foreign interest, however important.<sup>238</sup>

'Interests analysis' proceeds by way of asking which jurisdiction has the greater interest in seeing its law enforced. This methodology, however, proceeds by way of a fiction, since it is not the respective jurisdictions that have an interest in any given law of privilege being applied, but rather the parties to the litigation. 'Interests analysis' misleadingly suggests that deciding a choice of law rule is a matter of round-table diplomacy between sovereign states, whereas the reality is that choice of law centres on the need to do justice between actual or future parties to litigation.<sup>239</sup> This fictitious approach leads to decisions that are, according to

231 *Ings v Ferguson* 282 F 2d 149 (2nd Cir, 1960).

232 *Re Chase Manhattan Bank* 192 F Supp 817 (SDNY, 1961).

233 *Re Equitable Plan Co* 185 F Supp 57 (SDNY, 1960).

234 *United States v First National City Bank* 396 F 2d 897, 901 (Kaufman J) (2nd Cir, 1968).

235 *469 F 2d 35* (2nd Cir, 1972).

236 *396 F 2d 897, 904* (Kaufman J) (2nd Cir, 1968).

237 *Id* at 901 (Kaufman J).

238 Yoshida, above n226 at 230.

Steve Bradford, ‘unclear at best and confused or manipulative at worst’.<sup>240</sup> Moreover, so far as the search for the law with the ‘most significant connection’ is concerned, Yoshida is surely right to complain that the concept of ‘most significant relationship’ is ill-defined.<sup>241</sup> Once again, a flexible rule is a mask for unstated and often unclear policy assumptions.

Most fundamentally, though, the American ‘interests analysis’ approach is a recipe for confusion, conflicting judgments and fatuous reasoning,<sup>242</sup> and hence injustice. Kurt Riechenberg calls the approach ‘unreliable, biased, impracticable, and counterproductive’,<sup>243</sup> and Bradford goes so far as to say of the ‘interests analysis’ cases that ‘[a]ll are intellectually vacuous — the court slaps the interest analysis label on a conclusion and is done with it’.<sup>244</sup> Contradictory or ambivalent decisions include the fact that courts have accepted<sup>245</sup> and rejected<sup>246</sup> the proper law of the contract as a basis for privilege; courts have asserted<sup>247</sup> and denied<sup>248</sup> that the absence of a privilege in a forum is an overriding public policy choice; and that New York courts have applied<sup>249</sup> and refused to apply<sup>250</sup> their own law of doctor–patient privilege.

Unlike so many American writers and judges, Beale also recognises that if *every* court determined *every* conflict situation afresh without regard for the need for consistency, then certainty and justice would be lost:

If every court were to determine for itself, completely without reference to any general principle, the extent to which it chose to be guided by the foreign law such confusion might well result as to defeat the very purpose of the rules of the Conflict of Laws.<sup>251</sup>

Sadly, this is precisely what has occurred under the banner of the ‘interests analysis’ and ‘most significant connection’ approaches. As Bradford points out, ‘[p]redictability requires a conflicts rule the results of which the parties can know in advance. The balancing and policy analysis inherent in most of the modern [American] approaches are not easily predictable’.<sup>252</sup> In the end, smorgasbord justice is no justice at all, and this is reason enough not to adopt the American approach to questions of foreign privilege.

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239 Indeed, to the extent that there *are* public interests at work, these most often seem to relate to the need to do justice *inter partes*.

240 Steven Bradford, ‘Conflict of Laws and the Attorney–Client Privilege: A Territorial Solution’ (1991) 52 *U Pitt L Rev* 909 at 931.

241 Yoshida, above n226 at 235.

242 For a particularly egregious example of this sort of fatuous reasoning, see Reese and Leiwant, above n206.

243 Riechenberg, above n203 at 125.

244 Bradford, above n240 at 931.

245 *Levy v Mutual Life Insurance Co* 56 NYS 2d 32 (Sup Ct, 1945).

246 *Doll v Equitable Life Assurance Society*, above n207.

247 *Abety v Abety* 77 A 2d 291 (NJ Ct Ch, 1950); *Société Internationale v McGranery* 111 F Supp 435 (DDC, 1953).

248 *Cepeda v Cohane*, above n215.

249 *Wexler v Metropolitan Life Insurance Co*, above n209; *Jones v Jones*, above n207.

250 *Levy v Mutual Life Insurance Co*, above n245.

251 Beale, above n125 at 1601.

252 Bradford, above n240 at 936.

### ***B. Applying the Lex Causae of the Substantive Dispute***

If indeed legal professional privilege is a matter of substance, the ordinary *lex causae* rule would be to apply the law of the cause; in other words, the law which applies to the substantive dispute. Thus, in the classic case of *Huber v Steiner*, Tindal CJ stated that ‘so much of the law as affects the rights and merits of the [case], all that relates “*ad litis decisionem*”, is adopted from the foreign country’.<sup>253</sup> Suppose that an Australian resident is run down by a horse on the streets of Paris, and consults a Paris lawyer about her injuries.<sup>254</sup> In such a case, it might be reasonable that French law as the *lex causae* governs the substance of the action as well as any question of privilege, even if the suit is ultimately brought in Australia.

However, applying the *lex causae* as a general rule is unacceptably capricious, especially (as is frequently the case) if a litigant consults a local lawyer about a foreign dispute. Suppose an Australian company’s chocolate machine is damaged on the quay at Bordeaux. The place of the tort is France, but damage — ie expense to the machine’s owner — may well be suffered in Australia.<sup>255</sup> If the company consults its Melbourne in-house lawyer about this possible French tort, it seems outlandish that their conversations should be governed by the French law of privilege. Thus, applying the *lex causae* is far from satisfactory as a choice of law rule to govern claims to foreign privilege, most particularly when it is a local lawyer that is consulted.

Moreover, the application of the *lex causae* implies that there is in fact a substantive dispute. In many cases in which privilege is claimed, there is in fact no litigious dispute and thus no *lex causae*,<sup>256</sup> such as is the case with search warrants and other governmental powers to obtain information. Likewise, the substantive ‘dispute’ that gave rise to the privileged legal advice may not be the same dispute — or even be in the same jurisdiction — under which the privileged documents are sought to be discovered. Famously, this was the situation in the *McCabe* tobacco liability case, in which legal advice created in the United Kingdom and the United States was discovered in Australian litigation.<sup>257</sup>

### ***C. Applying the Law about which Advice Was Sought***

One solution to the problem of an ‘absent’ or inapposite *lex causae* may be to rephrase ‘the *lex causae*’ into ‘the law about which advice was sought’. Suppose a company seeks tax planning advice about Caymanian law from a solicitor in the

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253 (1835) 2 Bing NC 202 at 210; 132 ER 80 at 83.

254 Compare *Raulin v Fischer* [1911] 2 KB 93.

255 Compare *Darrell Lea Chocolate Shops Pty Ltd v Spanish Polish Shipping Co Inc (The Katowice II)* (1990) 25 NSWLR 568.

256 This was the central point of *Baker v Campbell*, above n13, namely that (Australian) legal professional privilege is not limited to curial proceedings.

257 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73; rev’d *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524. See also *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 concerning a letter of request from the USA to gather evidence relating to multi-jurisdictional legal advice.

Cayman Islands: if the company is careful, there will be no substantive dispute to be governed by Caymanian law. However, the issue of privilege might arise in other contexts, in which case it should appropriately be governed by Caymanian law, as the law about which advice was sought. This would obviate problems where there is no *lex causae*, but it would not improve the inherent capriciousness of the rule where advice on foreign law is sought from local lawyers. Thus, it seems surprising and unsatisfactory that a Perth lawyer giving advice about the Cayman Islands should have his advice governed by Caymanian law. Likewise, the rule also breaks down if advice is sought about multiple law areas, or indeed if truly ‘transnational’ advice is sought.<sup>258</sup>

Interestingly, the decision in *Arrow Pharmaceuticals* might be explained in light of this ‘law about which advice was sought’ approach.<sup>259</sup> That case concerned an American lawyer admitted to practice in the state of Ohio and the United States federal courts, who gave legal advice on United States patents law. Since the lawyer’s advice concerned United States patents law, the judge purported to apply the law of privilege declared by the American appellate court with exclusive jurisdiction over patent law — the Court of Appeals for the Federal Circuit — to the effect that documents produced by in-house counsel are privileged.<sup>260</sup> This decision to cite Federal Circuit authority is doubly perplexing: not only is the general law of privilege in the United States federal courts is governed by well-known United States Supreme Court opinions,<sup>261</sup> it is also not relevantly different from the Australian law of privilege. One rationalisation, then, for this seemingly odd choice of law might be that since the lawyer’s advice concerned *patent* law, the law relating to patent claims — ie that of the Federal Circuit — should govern.

#### **D. Applying the Law of the Place of Communication**

Since legal professional privilege attaches to *communications*, it may be appropriate to apply the law of privilege of the place of communication. Thus, to continue the example mentioned above, when the Australian plaintiff speaks to its Melbourne lawyers about its damaged chocolate machine, Australian law will govern, as the law of the place of communication.

What happens, though, if the lawyer and client are located in different jurisdictions? The general rule in private international law is that communications — such as negligent misstatements — are governed by the law of the place where the communications are received and acted upon.<sup>262</sup> Thus, if our hapless Australian

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258 Advice about choice of law issues might be thought to be ‘transnational’ in a certain sense. However, the issue of choice of law is referable to the particular system of private international law under which the choice is to be made, and thus ‘choice of law advice’ is itself referable to a given system of substantive law.

259 *Arrow Pharmaceuticals*, above n135.

260 *Re Spalding Sports Worldwide Inc* 203 F 3d 800 (Fed Cir, 2000).

261 See, for example, *Upjohn Co v United States*, above n94.

262 *The Albaforth* [1984] 2 Lloyd’s Rep 91; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

tourist in Paris returns to Australia and gives instructions over the telephone to her Parisian lawyer, those instructions will be governed by French law.

However, this 'place of communication' approach ignores the bilateral nature of legal professional privilege, in which communications by *both* the client and the lawyer are privileged. Consider what will happen if our tourist's Parisian lawyer then faxes his advice to the client in Melbourne. It seems ridiculous that Australian privilege should govern half the lawyer-client relationship, and French law the other half. More significantly, the place of communication might be entirely fortuitous, or at least inopportune. Suppose a workaholic lawyer on holiday reads and drafts documents from a beachside recliner: her clients might be very surprised to find that the law of Vanuatu applies. Thus, to apply the law of the place of communication, however defined, is scarcely an adequate rule.

### *E. Applying the Law upon which the Client Relied*

A more realistic alternative may be to apply the law upon which the client relied. This theory was favoured by Ehrenzweig, who was incidentally the only treatise-writer to address the issue of foreign legal professional privilege in any substantial way. Ehrenzweig concluded that '[i]nstead of arbitrary and mechanical characterizations of the privilege as a matter of substance or procedure, the only feasible test for its recognition in conflicts cases is that of reasonable reliance'.<sup>263</sup> In this regard, Ehrenzweig found it 'clearly inequitable' and mere 'mechanistic dogma' to apply the law of the forum 'without regard to reliance', most particularly when the foreign law upon which the parties relied not merely granted privilege but also forbade disclosure.<sup>264</sup>

This sentiment also finds expression in the *Restatement (Second) Conflict of Laws*.<sup>265</sup> In explaining the preferred choice of law rule,<sup>266</sup> the *Restatement* adds by way of rationale:

There can be little reason why the forum should exclude evidence that is not privileged under the local law of the state which has the most significant relationship with the communication, even though this evidence is privileged under the local law of the forum. Admitting such evidence cannot defeat the expectations of the parties since, if they relied on any law at all, they would have relied on the local law of the state of most significant relationship.<sup>267</sup>

Such an approach was adopted in *Mitsui & Co (USA) Inc v Puerto Rico Water Resources Authority*, when the court used Mitsui's reliance on the law of New York as a justification for not applying the accountant's privilege recognised only by the Puerto Rico forum. Given Mitsui's reliance on the law of New York, as the place of its incorporation and of its business activities, 'choosing the full disclosure of

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<sup>263</sup> Albert Ehrenzweig, *A Treatise on the Conflict of Laws* (1962) at 356.

<sup>264</sup> *Ibid.*

<sup>265</sup> Hereafter *Restatement (Second)*.

<sup>266</sup> Namely, that if the communication is not privileged under the law with the 'most significant relationship with the communication', it should be admitted into evidence notwithstanding that the forum recognises a privilege.

<sup>267</sup> *Restatement (Second) Conflict of Laws* § 139 cmt c.

their communication comports with the expectations of the parties to the relationship and the New York interest against the confidentiality of this communication'.<sup>268</sup>

However, this approach is not without its pitfalls. First, few if any parties subjectively rely on any given system of law, and thus to base a choice of law on 'reliance' is to impute a fictional state of mind to all but sophisticated or repeat litigants. Even where the parties do turn their mind to the matter, determining the actual law upon which the parties relied may also be legally complicated. Suppose the Melbourne-based Notional Bank owns an Irish subsidiary, the Shamrock Bank. Kylie in the Melbourne office is concerned by potentially anti-competitive practices by the Shamrock Bank, so she obtains legal advice from Fintan, Shamrock Bank's in-house counsel in Dublin. Under Irish — and indeed Australian — law, the parties can reasonably rely on the fact that in-house counsel are protected by privilege.<sup>269</sup> However, Ireland is also a European Union state, and the parties would also be aware that Irish in-house counsel are not protected by privilege against compulsory disclosure to the European Union competition authorities.<sup>270</sup> Upon which law did the parties rely? The general law relating to in-house counsel, or the specific law relating to competition matters?

More broadly, to state that a party 'relies' on the law of a jurisdiction is often to ignore the true reason why that choice of law is being made. For example, a party may imagine that the law of a given jurisdiction applies not because they 'rely' on it, but because it is their domicile; or their lawyer's home jurisdiction; or else the system of law about which they seek advice. If indeed 'reliance' really means 'reasonable reliance', then the concept of 'reliance' simpliciter does not explain *why* it is reasonable to rely on the law of one jurisdiction rather than another. With regard to the *Restatement (Second)*'s formulation, there is no guarantee that the parties would in fact rely on the law with the 'most significant relationship with the communication': significance of connection is quite a separate matter from reliance. Reasonable though it might be to rely on the most 'significant' law, if that law is to apply, it is because that is the law with the most significant connection, and not because the parties putatively relied upon it.

One might also make the final point that, with the exception of contractual governing law clauses,<sup>271</sup> choice of law is not otherwise generally governed by the subjective intention of the parties.

#### ***F. Applying the Law which Governed the Lawyer–Client Relationship***

The lawyer–client relationship is primarily but not exclusively governed by a contract of retainer,<sup>272</sup> and, like all contracts, that contract of retainer will have its own proper law. As such, it may be appropriate that questions of privilege arising

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268 *Mitsui*, above n204 at 79 (Toledo J).

269 *Geraghty v Minister for Local Government* [1975] IR 300.

270 *A M & S Europe Ltd v Commission of the European Communities*, above n90. One imagines that in reality, Kylie would have consulted external lawyers for advice, to avoid this very problem regarding European Union in-house counsel.

271 In addition, a party's choice about where to establish a trust or corporate structure will also bring about a subjective choice of law, albeit indirectly.

from the lawyer-client relationship be governed by the proper law of the contract of retainer. This rule has the advantage of avoiding the capriciousness that may result from a rule derived from the *lex causae* or the place of communication, and unlike rules based on reliance it provides a genuine basis for respecting the parties' expectations.

However, this potential rule is susceptible to two criticisms. First, determining the proper law of any contract can be a notoriously multivalent exercise, and the proper law governing a complex multi-jurisdictional relationship may not be easily discerned. Second, the proper law of the retainer may not bear any relationship to the jurisdiction in which the legal work is actually done.<sup>273</sup> Suppose a London-based client has an English contract of retainer with the London office of a large international firm of solicitors, whose Chinese partners give the actual advice. Although it might well suit the client, the Chinese partners might be quite surprised to be subject to the English law of privilege, as might any potential litigant attempting to discover documents produced by those Chinese lawyers for the London client. Given that claims to foreign legal professional privilege arise by definition from transnational legal work, this is a substantial disadvantage to the application of the proper law of the retainer.

**G    *The Preferable Solution: Applying the Law of the Place in which the Lawyer Was Admitted to Practice***

If 'interests analysis', the *lex causae*, the law of the place of communication and the law upon which the parties relied are all unsatisfactory in their own way, a more effective rule is to apply the law of the jurisdiction in which the lawyer was admitted to practice. Such a rule recognises that in many jurisdictions it is the lawyer's status as an officer of the courts *of that jurisdiction* that is, at least in part, the justification for the existence of legal professional privilege.<sup>274</sup>

While it might be objected that privilege 'belongs' to the client, a lawyer-focused choice of law rule reflects the reality that it is *lawyers*, and not clients, who are expected to know and advise on the relevant law. Such a rationale has been proposed in the American context by Bradford, who observes that

[t]he client may have a generalized expectation of confidentiality, but is unlikely to know or understand the details of his home state privilege law. The attorney, on the other hand, engages in repeated communications with clients and ought to know the outlines of the privilege law in her state of practice.<sup>275</sup>

272 See *Hawkins v Clayton* (1988) 164 CLR 539. The duty in tort does not extend beyond what is required by the terms of the retainer: see *Heydon v NRMA Ltd* (2001) 51 NSWLR 1.

273 Perhaps it would be more accurate to talk of a *surprising* lack of relationship; after all, English law is quite often *chosen* by parties to govern contracts not otherwise related to England. However, such 'surprise' should also be seen in light of the fact that documents will most often be sought to be discovered by parties who are *not* privy to the contract of retainer, and who had thus *not* chosen to be bound by the particular 'surprising' law.

274 Compare *Baker v Campbell*, above n13; *Hickman v Taylor* 329 US 495, 510 (Murphy J) (1947); *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 at 129 (Lord Denning MR).

In a certain sense, then, it is more efficient that the privilege is determined by the *lawyer's* jurisdiction. Moreover, one might say that the lawyer has an actual — rather than fictive — reliance on the law of their home jurisdiction; unlike the client who is not likely to have much knowledge of, let alone expectations about, the law of privilege of any given jurisdiction.

A rule based on the law of the lawyer's place of admission avoids the negative consequences or surprising outcomes of the earlier proposed rules. The rule is capable of applying satisfactorily to situations where local lawyers give advice on foreign law;<sup>276</sup> where there is no *lex causae*;<sup>277</sup> where communications are received in unexpected places;<sup>278</sup> where there are multiple jurisdictions involved;<sup>279</sup> where there was no actual reliance on any given law;<sup>280</sup> and where the law governing the contract of retainer is inapposite.<sup>281</sup>

One new problem does, however, arise: what if the lawyer is admitted in multiple places? In such cases, it seems fairest to apply the law of the jurisdiction about which the lawyer purports to advise. Quite apart from lawyers admitted in two or more separate countries, this qualification is especially relevant concerning American lawyers, since that country is a federal system without a unified common law, and with various subject matter jurisdictions each with their own law of privilege. For example, in *Arrow Pharmaceuticals*, where an American attorney was admitted both in the state of Ohio and in the federal courts, the court purported to apply the law of the Federal Circuit because the attorney was giving advice about patents law, a subject over which the Federal Circuit has exclusive appellate jurisdiction.<sup>282</sup>

What, then, if the lawyer is advising on a bilateral international transaction, and the lawyer is admitted in both jurisdictions? It would seem that the lawyer may be governed by two sets of laws. In such a case, it may be preferable to let the *lex causae* tip the balance in favour of one or other of them, at least since the *lex causae* is normally likely to be the law of one of the two relevant jurisdictions. Greater complications arise, however, if the lawyer admitted in multiple jurisdictions is not in fact giving advice about *substantive* law: in such cases, other factors of residence or 'most substantial connection' may need to be applied.

If a local client retains multiple lawyers in different foreign jurisdictions to work on related matters, the 'place of admission' rule creates a risk of confusion, in that documents in the client's possession may be subject to two or more different laws of privilege. However, this is not a risk that outweighs the utility of the 'place of admission' rule, especially its utility so far as foreign clients and lawyers are

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275 Bradford, above n240 at 948.

276 This was a problem with applying the *lex causae* when local lawyers give advice on foreign law.

277 Again, a problem with the *lex causae* rule.

278 A problem with the 'law of the place of communication' rule.

279 A problem with the 'law about which advice was sought' rule. This is still a problem if the lawyer is *admitted* in multiple jurisdictions, see below.

280 A problem with the 'law upon which the parties relied' rule.

281 A problem with the 'law governing the retainer' rule.

282 *Arrow Pharmaceuticals*, above n135.

concerned, and thus there is no compelling reason for departing from the normal rule in the case of ‘over-lawyered’ clients.<sup>283</sup> Moreover, even within domestic law there is nothing unusual about documents in the client’s (or lawyer’s) possession being subject to different standards of privilege. Two examples of this are, first, that only documents created for the *dominant* purpose of obtaining legal advice are privileged (and not documents created with more multifarious purposes)<sup>284</sup> and second, that copies of otherwise unprivileged documents can become privileged if the copy is made for the purpose of giving legal advice or preparing for litigation.<sup>285</sup>

In the bulk of cases, though, such complexities do not arise. Where a foreign lawyer is advising on foreign law, applying the law of the lawyer’s place of admission will result in that advice being governed by the relevant foreign law of privilege; a result that seems fair and intuitively correct. In most cases involving a substantive dispute, this rule results in the *lex causae* applying, which accords with the notion of treating privilege as a question of substance. However, a rule based on the place of the lawyer’s admission also avoids the surprising effect of local lawyers being governed by foreign law.

Suppose this preferable rule had been applied by the judges in *Kennedy v Wallace*: what would the result have been? Perhaps surprisingly, the outcome would have turned on factual grounds very similar to those that proved fatal to Kennedy’s case under Australian law. Kennedy’s lawyer, Benno Hafner, was based in Zürich: Switzerland has a unified law of admission to practise,<sup>286</sup> and the content of the law of professional secrecy is established at a federal level.<sup>287</sup> Thus, the Australian court would apply Swiss law, under which — as we have seen<sup>288</sup> — documents covered by professional secrecy cannot be seized.<sup>289</sup> However, Swiss lawyers’ professional secrecy does not extend to business or financial dealings.<sup>290</sup> As it appears that Hafner had a substantial business involvement in Kennedy’s Swiss affairs,<sup>291</sup> it seems likely that a Swiss court would conclude that this commercial aspect was ‘predominant’,<sup>292</sup> and thus that privilege did not apply. Thus, while the Swiss legal test differs somewhat from its Australian equivalent,<sup>293</sup> it seems likely that the same factual conclusion would have emerged in Kennedy’s case.

283 Contrast Bradford, above n240 at 952, where the author proposes a rule that the *weakest* law of privilege apply to a client with lawyers simultaneously acting on the same matter in multiple jurisdictions. With the greatest respect, this proposed rule seems both implausible and unnecessary.

284 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

285 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

286 *Loi fédérale sur la libre circulation des avocats du 23 juin 2000*, RS 935.61 (Federal Law on the Free Circulation of Lawyers).

287 However, the law of professional secrecy is *administered* at a cantonal level by cantonal institutions. See, in Hafner’s case, *Anwaltsgesetz vom 17 November 2003* (OS Zürich Bd 59 S 144) arts 33–35. See also art 8, preserving the operation of Federal law.

288 Above Part 2(F).

289 *Loi fédérale sur la procédure pénale* RS 312.0 (Federal Law on Criminal Procedure) art 69.

290 BGE 112 Ib 606 at 608.

291 *Kennedy v Wallace trial*, above n135 at 431 (Gyles J).

292 BGE 112 Ib 606 at 608.

## 6. *The Role of Local Public Policy*

Even if local law should, in principle, recognise the foreign law of privilege, how in practice should it do so? It must be frankly confessed that any attempt to apply a foreign law of privilege to matters within the forum is somewhat anomalous: choice of law for privilege does not easily fit under the rubric of ordinary choice of law techniques, not least because privilege is a doctrine of substantive law without a 'cause' that could be subject to a *lex causae*. Moreover, since Australian courts would agree with Learned Hand J that 'no court can enforce any law but that of its own sovereign',<sup>294</sup> it seems odd that they should be asked to enforce a privilege that is so much an emanation of a foreign sovereign; at least in the sense that the existence of legal professional privilege is necessitated by the administration of justice, which is in its own way an exercise of sovereignty.

Quite aside from these conceptual issues, there is the pragmatic issue in that the very reason why privilege is a matter of substantive law in municipal law may be a reason why municipal law could *never* recognise a foreign law of privilege. That is to say, it is only because of Australian law's extremely strong public policy belief in the essentiality of privilege for the proper administration of justice that (domestic) privilege is classified as a substantive right; and yet this strong public policy might simultaneously prevent the recognition on policy grounds of any form of privilege that *differs* from the Australian variant. Ironically, privilege might be the one area of 'substantive' law that could never depart from the *lex fori*.

Aside from attempts to discuss choice of law for 'non-substantive' techniques such as tracing,<sup>295</sup> the nearest analogue for the recognition of foreign privilege is the enforcement of foreign judgments. Here too, strong policy values can prevent the recognition of foreign judgments, and here too there is a degree of methodological complexity. Likewise, the two variables that are relevant to the issue of recognising foreign judgments are also relevant to the recognition of foreign privilege. First, there is the issue of how accommodating the local court should be towards foreign law,<sup>296</sup> and second, there is the converse question of how assertive the local court should be in applying its own policy as a basis for refusing recognition.

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293 The contrast is between a test in which privilege applies only if the *legal* purpose is dominant (Australia) and in which privilege applies unless the *commercial* purpose is dominant (Switzerland).

294 *Guinness v Miller* 300 F 769, 770 (SDNY, 1923). In the private international law context, see *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 517 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); in the constitutional context, see *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 573 (Gummow and Hayne JJ).

295 See Jonathan Harris, 'Tracing and the Conflict of Laws' (2002) 73 *British Yearbook of International Law* 65. The difficulty in the parallel between tracing and privilege is that tracing is always 'appurtenant' to some cause of action or other, whereas privilege is a freestanding right which — as we have seen — can exist quite independently of any 'substantive' dispute.

296 Compare the radically all-encompassing Canadian approach to the recognition of foreign judgments (*Beals v Saldanha* [2003] 3 SCR 416) with the more restrictive approach that applies in England (at least insofar as European law is not applicable) and Australia (*Emanuel v Symon* [1908] 1 KB 302).

Even if one accepts that the foreign law of privilege may apply in principle, there might very well be reasons of local policy to refuse its recognition in certain cases. Following the analogy with enforcement of foreign judgments, this local policy must be of a high degree of importance. As Tamberlin J explained:

The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of the cases involve questions of moral and ethical policy; fairness of procedure, and illegality, of a fundamental nature.<sup>297</sup>

Although one might criticise the result in *Beals v Saldanha*, Major J's comments on the non-recognition of foreign law on policy grounds deserve consideration:

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.<sup>298</sup>

The essence of these cases is that mere *difference* from local law is not a basis to refuse recognition of a foreign law. Thus, the fact that the foreign law of privilege differs from local law is not by itself a reason to refuse recognition. If the contrary were true, 'foreign' law could only apply in cases of false conflict, which rather defeats the purpose of turning to foreign law in the first place. Nonetheless, even if one accepts that, *prima facie*, foreign law should govern questions of privilege, a number of difficult cases remain. These will be discussed below.

#### **A. Foreign Law Giving Less Protection than Local Law**

What happens if the law of privilege under the foreign law offers substantially less protection from disclosure than does Australian law? Should Australian law defer to the foreign law's definition of privilege, or should it insist on its own policy values? For example, suppose the privileged documents are legal advice produced by French in-house counsel at Chanel for their Australian subsidiary. Under French law, these documents would not be privileged at all. Under Australian law, the position is surprisingly unclear. On the one hand, if the French lawyers were *Australian* in-house lawyers, their advice would clearly be privileged. On the other hand, French in-house lawyers are not — and cannot — be admitted to practice, which suggests that their advice could *never* be privileged under Australian law.

This illustrates the difference between the 'mirror image' and 'principled extension' approaches to privilege discussed earlier: a strict mirror image approach would deny French in-house lawyers privilege, whereas a more flexible 'mirror image' approach and a 'principled extension' approach would both grant local privilege. This latter approach is supported by some American authority to

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<sup>297</sup> *Stern v National Australia Bank* [1999] FCA 1421 at [143].

<sup>298</sup> *Beals*, above n296 at 453 (Major J).

the effect that French in-house lawyers should be treated *as if* they were local lawyers admitted to practice:

Because there is no clear French equivalent to the American 'bar', in this context membership in a 'bar' cannot be the relevant criterion for whether the attorney-client privilege is available. Rather, the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by law to do so. French 'in-house counsel' certainly meet this test ...<sup>299</sup>

The prospect that French in-house lawyers may be unprotected by any form of privilege raises an important question: does this mean that Australian authorities are able to use their investigative powers to obtain legal advice given by French in-house lawyers which would, if given by Australian lawyers, be subject to privilege? Intuitively, it seems unfair that a search warrant, or ASIC, ACCC or Tax Office inquiry, could compel the production of more information from parties who rely on foreign lawyers than it could from parties who rely on local lawyers. This has a particular importance when one remembers that one of the rationales of the Australian law of legal professional privilege is to protect people against the intrusive powers of the state.<sup>300</sup>

In circumstances like this, it may be relevant to draw a distinction between discovery by a private party, in which the foreign law denying privilege ought to apply, and investigations by government authorities, in which foreign law might be overruled on policy grounds. In the language of *Stern v National Australia Bank*, it might indeed be said that protection against government intrusion is a public policy of a 'high order'.<sup>301</sup> By contrast, on the Canadian approach, this sort of interest falls into the category of 'perceived injustices that do not offend our sense of morality', which would *not* be sufficient reason for denying the application of foreign law.<sup>302</sup>

Ultimately, though, it seems that if the law of Australia is to recognise the foreign law of legal professional privilege at all, it should do so on the foreign law's own terms. To do anything else is to defeat the purpose of recognising foreign law in the first place. The last word on this issue should perhaps go to Cardozo J's famous statement that:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home ... 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.<sup>303</sup>

If this statement is true, it should also hold true for the law of privilege, even where that privilege offers weaker protection than that available under local law.

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299 *Renfield Corp v E Remy Martin & Co SA* 98 FRD 442, 444 (Stapleton J) (D Del, 1982).

300 See *Baker v Campbell*, above n13 at 89 (Murphy J), 95 (Wilson J), 120 (Deane J).

301 *Stern v National Australia Bank*, above n297 at [143].

302 *Beals*, above n296 at 453 (Major J).

303 *Loucks v Standard Oil Co of New York* 224 NY 99 (1918), 111.

### ***B. Foreign Law Giving Greater Protection than Local Law***

The converse situation is where the foreign law of privilege offers *greater* protection from disclosure than is afforded by local law. For example, if a Japanese company seeks business strategy advice from a Japanese lawyer, this will be privileged under the law of Japan even though it would not be privileged under Australian law. Likewise, a Swiss lawyer might insist on retaining privilege over documents even if the client has purported to waive it, whereas an Australian lawyer has no such right to insist on privilege.

In principle, there seems to be no reason to treat such situations differently from those arising when the foreign law provides *weaker* protection. Moreover, there is all the more reason to apply the foreign law since there is no suggestion that the foreign law leaves individuals exposed to governmental intrusion, as might be the case with weaker laws of privilege.

One final situation must be mentioned: the recent law abrogating legal professional privilege with respect to James Hardie matters.<sup>304</sup> So far as foreign lawyers are concerned, this means that foreign law *necessarily* gives greater protection than does local law. The foreign law that would otherwise apply is overridden not because the foreign law offers greater protection than does local law, but because the specific James Hardie enactment appears to be a mandatory rule of the forum, thus displacing foreign law.

### ***C. Foreign Law That May Undermine the Australian Legal System***

Perhaps the most problematic claims for foreign privilege relate to cases where the communications over which privilege is claimed relate to conduct that is inimical to the administration of justice in Australia. This was of great concern to Gyles J in *Kennedy v Wallace*, who referred to the potential problems when foreign privilege is either more or less extensive than that recognised in Australia. According to his Honour, it would be ‘an affront to ordinary notions of justice’ to claim the benefit of the Australian law of privilege when the tax haven did not recognise such a privilege.<sup>305</sup> Likewise, it was ‘not acceptable’ to use the tax haven’s secrecy laws to conceal what would not otherwise be privileged in Australia.<sup>306</sup>

Either way, thought his Honour, such conduct in a tax haven does not deserve *any* protection of privilege, because it ‘has no conceivable connection with the administration of justice or the proper functioning of the legal system in Australia which is the sole rationale for legal professional privilege’.<sup>307</sup> While this conclusion was reversed on appeal<sup>308</sup> it nonetheless gives one pause for thought: many legitimate actions have no ‘connection’ with the administration of justice in Australia, and indeed many legitimate activities are in some sense inimical to the Australian legal system.

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304 *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s4(1).

305 *Kennedy v Wallace trial*, above n135 at 438.

306 *Ibid.*

307 *Id* at 446.

308 *Kennedy v Wallace appeal*, above n160 at 144 (Allsop J).

Suppose an Australian company involved in litigation before the English courts seeks advice from a London QC about obtaining an anti-suit injunction against parallel proceedings against it in Australia. The anti-suit injunction is surely an interference that is inimical to the administration of justice in Australia, but ought the QC's advice really to be denied privilege on this basis? Or, consider the situation of an Australian company seeking advice on how to avoid the Australian courts having venue over a transnational dispute. This is a case of desperately seeking to *avoid* having a 'connection' with the administration of justice in Australia, but there is no good reason to deny privilege on that account.

Contrary to Gyles J' view, if indeed the foreign privilege is being used to conceal fraud, crime or the like, the orthodox approach under domestic law is to say that the privilege is *vitiating* by that fraud, rather than claiming that the privilege never existed in the first place. If similar 'crime and fraud' exceptions exist under foreign law, these should be applied in appropriate cases. With regard to French law, which recognises no crime or fraud exception, or German and Italian law, which recognise only a 'serious crime' exception, these seem to be appropriate cases for the public policy of the forum to override the foreign law, and to insist that privilege cannot be used as a cloak for crime or fraud. However, the mere fact that a claim for privilege lacks a 'connection' with Australia, or is concerned with conduct 'inimical' to the administration of justice in Australia but which falls short of crime or fraud, is not reason to deny the application of the foreign law of privilege.

## 7. *Conclusion*

Ultimately, the classification of legal professional privilege as 'substantive' perhaps raises more questions than it answers, so far as private international law is concerned. Even as a matter of domestic law, the classification is problematic: the result in *Baker v Campbell* could have been reached simply by declaring that privilege applied to investigative as well as adjudicative procedures; just as the result in *Daniels Corporation* could have been reached by describing the right as 'fundamental' rather than 'substantive'. Perhaps these are mere semantic disputes, but they illustrate the complexity of the fundamental question, namely, how local courts should deal with a claim for legal professional privilege arising outside the forum.

The traditional approach of purporting to apply the *lex fori* and then improvising an attitude towards foreign privilege is hardly satisfactory. Foreign lawyers cannot simply be treated as a mirror image of local lawyers. Nor should foreign lawyers and their clients be subject to the often opaque process of reasoning through which the local law of privilege is sometimes extended to them as a gesture of good will or comity. The trial decision in *Kennedy v Wallace* stands as a warning of the risk that such policy-based 'reasoning' can be both capricious and unfair.

On the other hand, it is not self-evident how best to apply any law other than that of the forum. Legal professional privilege is an anomalous substantive right, in that applying the *lex causae* will often be highly inapposite. Nor does the

American style of broadly-construed 'interests analysis' give any greater confidence. Tests based on reliance or the place of the communication are equally unavailing. The best alternative seems to be to apply the law of the lawyer's place of admission, taking into account the complexities that can arise when a lawyer is admitted in more than one place.

Nonetheless, even if one accepts in principle that foreign law ought to govern questions of foreign privilege, the forum should retain a few safeguards to protect the integrity of its processes. Thus, it will certainly be appropriate for the forum to insist on the 'crime and fraud' exceptions to privilege: this is one case in which the policy of the forum should legitimately override the application of foreign law. Beyond this, the mere fact that a foreign law of privilege offers a different degree of protection than does local law is not sufficient reason to displace the foreign law.

In reality, one must wonder whether many parties would bother to plead and prove foreign law. *Damberg v Damberg* notwithstanding, it will not be worth the effort for most parties to plead a foreign law of privilege, since in most standard cases there is rarely a tactical benefit in doing so. However, even in these typical cases, the advantage of applying foreign law lies not in the fact that foreign law conveys some tactical advantage, but rather that it conveys the protection of privilege *at all*, since as *Kennedy v Wallace* demonstrated, litigants cannot always rely on the law of the forum to protect their privileged communications with foreign advisers.

The parties with the most to gain from the application of foreign law seem to be local regulators investigating corporate wrongdoing, since many overseas jurisdictions do not grant privilege to the advice of in-house counsel. Given that one of the rationales for the local law of privilege is to prevent excessive government intrusion into private affairs, this might be thought to be objectionable on policy grounds. On the other hand, if we are to treat foreign law seriously, it seems odd to make an exception on these grounds, not least since it does not fall within the classic scope of the public policy exception. The consequences of this may have to be worked out on a case-by-case basis.

The question of how best to recognise foreign legal professional privilege is indeed complex, and this article does not propose a wholly satisfactory resolution of the issue. Nonetheless, if the question forces us to examine the nature of privilege under local law, and to investigate the relationship between domestic and private international law on the subject, then it is one worth asking.