Conflict of Laws and Relationship Property:

Allowing a New Zealand Court to Apply Foreign Law in the Absence of a Choice of Law Agreement

Oliver Allum

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago

October 2017

Acknowledgements

To Dr Maria Hook, for your meticulous feedback, technical prowess and infinite enthusiasm for the conflict of laws. Without your replies to my emails at hours too late to mention, this dissertation would not have been possible.

To my parents, for your unquestioning support over twenty-two years. In particular, to Dad, for poring over what must have seemed a foreign language, and to Mum, for being the cheerleader always by my side.

To Tanisha, for enduring five years of a sleep-deprived, caffeinated and overcommitted law student, yet still choosing to keep me around.

To my friends, for indulging my constant need for procrastination, coffee and laughs.

Table of Contents

Introduction

> The Conflict of Laws indeed has the potential to preserve the diversity of domestic family law systems around the world and at the same time to provide practical procedural methods for the individual who is in some way caught between those systems.[1]

This dissertation will evaluate the choice of law provision in s 7 of the Property (Relationships) Act 1976. In particular, whether the current conflict of laws rules preserve the diversity of domestic family law systems around the world, and best serve the interests of those individuals that are caught between those systems. Take, for example, an English couple who have lived in England their whole lives, who have married in England, and have received legal advice as to the property consequences of their marriage from an English lawyer advising on English law. The couple, content with this knowledge, lives in England for the next thirty years, before moving to New Zealand for retirement. By moving to New Zealand with a view to live here indefinitely, the couple will have likely acquired New Zealand domicile. Shortly after moving to New Zealand, the couple separates, and the husband initiates relationship property proceedings in a New Zealand court. Which law should apply to the couple's relationship property? Under the current approach in s 7, the court will apply New Zealand law to the couple's movable property, located anywhere in the world, and any immovable property located in New Zealand. This is termed the "unilateral" approach to choice of law, as when the Act is engaged, New Zealand law applies. This is the case, even though it is not the law that the couple would reasonably expect to apply to their relationship property; English law. This dissertation will argue that instead, s 7 should provide for the application of foreign law when the foreign law is more closely connected to the parties' relationship than New Zealand law. This is termed the "multilateral" approach to choice of law, as the choice of law rule could lead to either the application of domestic or foreign law.

To reach this conclusion, this dissertation is divided into three chapters. In Chapter I, the theoretical foundations of the conflict of laws are examined. The chapter will demonstrate that the unilateral approach can be used to preserve domestic notions of public policy in the face of competing foreign laws, repel intrusions into New Zealand's sovereign independence, and assist the swift and efficient function of the courts. In support of a multilateral approach, it will be argued that multilateralism reflects the parties' reasonable expectations as to which law will govern their affairs, supports internationalisation, prevents applicants' ability to forum shop for a favourable law, and enhances predictability. Additionally, it will be shown that the established exceptions to the multilateral approach allow it to accommodate domestic public

[1] Campbell McLachlan "Reforming New Zealand's conflicts process: the case for internationalisation" (1984) 14 Victoria University of Wellington Law Review 443 at 447.

policy considerations by excluding the application of foreign law where it conflicts with an overriding mandatory rule of the forum, or is contrary to New Zealand public policy.

Chapter II identifies three major issues with the unilateral rule in practice. The first issue is the influential effect of the unilateral approach on the court's decision that it is the appropriate forum to hear the relationship property claim, when in reality, there is another forum that more closely connected to the claim. The second issue is the application of New Zealand law in circumstances where the parties would reasonably expect another law to have applied to their division of relationship property. The third issue is the limitation on the court's ability to take into account foreign immovable property when determining the split of relationship property. In light of those issues, it will be argued that the protection of New Zealand's family law policy is not a compelling reason to retain the unilateral approach. This is because the multilateral exceptions of overriding mandatory rules and the exclusion of foreign law that is contrary to public policy provide sufficient protection from the application of discriminatory foreign laws.

Chapter III recommends a new choice of law rule that uses the first common habitual residence at the conclusion of the marriage, civil union, or de facto relationship as a connecting factor to determine the applicable law. Further, it will recommend including foreign immovable property into the relationship property that the court can take into account. It will also recommend that the provision includes an express reference to the mandatory rules of New Zealand policy that are to have effect regardless of the applicable law, and the court's ability to decline foreign law contrary to New Zealand public policy.

Chapter I: Theoretical Foundations

> The realm of the conflict of laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.[2]

This chapter clarifies the theoretical foundations of the conflict of laws, in order to provide a coherent framework to analyse s 7 of the Property (Relationships) Act. The chapter first explains why legal systems maintain a system of conflict of laws, before exploring the justifications for the multilateral and unilateral approaches to the conflict of laws. Finally, the chapter will examine the choice of law rules in s 7, to define the scope of the section, and illustrate the effect of its application to relationship property claims by international couples.

I Why Maintain a System of Conflict of Laws?

The conflict of laws is the area of law dealing with cases that have a foreign element. This will occur when the case has a 'contact' with some system of law other than New Zealand.[3] For example, a contract between a New Zealander and an Australian may have been made or performed in England. A German may have committed a tort against a New Zealander on holiday in Italy. A New Zealander and a New Yorker may have married in California, purchased a house in New York, and moved to Auckland before separating.

Such cases raise a number of questions. Which law is to be applied? Which court should hear the dispute? Will the judgment be enforced, and by whom? The conflict of laws exists to provide a legal framework to resolve these questions. The functions of the conflict of laws can be summarised into three broad categories: jurisdiction, applicable law and enforcement.[4] Jurisdiction describes the conditions under which a domestic court will have power to hear a claim. The applicable law determines, for each class of case (such as tort, contract or property), the substantive law to be used to determine the parties' rights and obligations. Enforcement is the last stage, describing the circumstances in which a foreign judgment will be recognised and enforceable by action in a New Zealand court. This dissertation deals primarily with the second objective: determining, in cases where New Zealand courts have jurisdiction to hear a relationship property claim, which law applies to the division of relationship property in a case with foreign elements.

---

[2] Prosser "Interstate Publication" (1953) 15 Michigan Law Review 959 at 971.

[3] Lawrence Collins and others (eds) *Dicey, Morris & Collins on the Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2006) [Dicey] at 3.

[4] J Fawcett and J Carruthers *Cheshire, North & Fawcett on Private International Law* (14th ed, Oxford University Press, Oxford, 2008) at 3 and 4.

The reader may question why, in the first place, a New Zealand court does not simply apply the *lex fori* (the law of the forum) in all cases brought before it, even those involving an international element. The *raison d'être* of the conflict of laws is that the world consists of a number of separate systems of law that differ greatly in the way they regulate the legal relationships of everyday life.[5] Therefore, there needs to be a system that implements the reasonable and legitimate expectations of the parties to a transaction or occurrence involving foreign elements.[6]

For example, if two New Zealanders married in France in accordance with the formalities prescribed by French law, but not in accordance with the formalities prescribed by New Zealand law, the New Zealand court, if it applied New Zealand law to the validity of the marriage, would have to treat the parties as unmarried persons.[7] One of the possible effects is that a will made prior to the marriage by one of the parties was not, after all, revoked by the marriage. Another possible effect is that a supposed "widow" would not, in law, be the "widow" for the purposes of a life insurance policy effected by the deceased husband, or his "widow" for the purposes of a family trust in favour of the husband's "widow."[8]

As demonstrated, the blind application of the *lex fori* in all cases therefore has the potential to result in "grave injustice and inconvenience."[9] Instead, New Zealand courts use choice of law rules to determine the applicable law governing legal matters. For the validity of marriage, New Zealand courts apply the *lex loci celebrationis* (the law of the place where the marriage was celebrated) as the connecting factor to determine the applicable law,[10] avoiding the potential for the "grave injustice[s]" outlined above, as the marriage will be held to be valid under French law. In summary, the conflict of laws has been described as resembling the inquiry office at a railway station, where a passenger may learn the platform at which the train starts.[11]

II Multilateralism

Multilateralism does not exhibit a preference for any particular legal system. The *lex loci celebrationis*, mentioned above, is an example of a multilateral choice of law rule. They are objective, in the sense that any legal system in the world could be applied, provided that the

[5] At 3 and 4.

[6] Dicey, above n 3, at 5.

[7] This example has been modified from an example in Dicey, above n 3, at 5.

[8] *Family Law Service* (online looseleaf ed, LexisNexis) at [11.52].

[9] Dicey, above n 3, at 5.

[10] *Family Law Service*, above n 8, at [11.52].

[11] Fawcett and Carruthers, above n 4, at 8.

connecting factor in the rule points towards that legal system.[12] Multilateral choice of law rules are simply jurisdiction-selecting, and are therefore indifferent to the content of the substantive law that is applied. Importantly, they do not discriminate in favour of application of the forum law.[13] The multilateral approach can be justified by both a private and a public rationale. On a private rationale, the conflict of laws is seen as neither a part of state order, nor an expression of state power, rather it is an expression of people and of individual will.[14] Alternatively, on a public rationale, the conflict of laws should ensure that the same law is applied to a matter regardless of where the court is located, which requires a tolerance for the rules and institutions of other legal systems.[15]

Therefore, in the ordinary course, a New Zealand judge will apply New Zealand domestic law, whether in the form of the common law, equity, or statute. However, a judge will apply foreign law when the choice of law rules which make up New Zealand conflict of laws provide that foreign law is in principle applicable to the issue in question. To illustrate the practical effects of multilateralism, the rules of choice of law may lead a New Zealand court to conclude that the law which governs a contract is French, that the law applicable to an alleged tort is German, that the formal validity of a marriage is determined by English law, and so on.[16]

A Multilateralism as the Default Approach

The popularity of multilateralism has been accredited to the 19th century German theoretician Friedrich Carl von Savigny, who proposed to solve choice of law problems by allocating each relationship to its 'seat', or in other words, to where it belongs. Savigny justified this approach as necessary to protect private relationships on the international plane. This required equal treatment of the legal relationships between citizens and foreigners, regardless of the forum. If this was achieved, then there would be uniformity of result no matter which court an action was brought, and therefore no incentive to "forum shop" for a jurisdiction that would apply a more favourable law.[17] Savigny proposed that legislators are to act as surrogates for a non-existent international legislature, and should therefore:[18]

---

[12] Christopher Forsyth "The Eclipse of Private International Law Principle – The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era" (2005) 1 Journal of Private International Law 94 at 102.

[13] Mary Keyes "Statutes, Choice of Law, and the Role of Forum Choice" (2008) 4(1) Journal of Private International Law 1 at 3.

[14] Giesela Rühl "Unilateralism" in Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds) *Max Planck Encyclopedia of European Private Law* (Oxford University Press, New York, 2012) 1735 at 1736.

[15] Forsyth, above n 12, at 102.

[16] See A Briggs *The Conflict of Laws* (3rd ed, Oxford University Press, Oxford, 2013) at 7.

[17] Friedrich Juenger *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers, Dordrecht, 1993) at 34-36.

[18] Symeon C Symeonides *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press, New York, 2014) at 291.

(1) aim for international harmony and uniformity of result;

(2) act unselfishly, impartially, and even-handedly when drafting choice of law rules;

(3) treat foreign and forum law equally, as well as foreign and domestic litigants; and

(4) adopt choice of law rules that are sufficiently appealing to be adopted by other nations.

Savigny was the first to develop a clear and logical rationale for neutral, even-handed conflicts rules that accord foreign law the same importance as the *lex fori*. This laid the foundation for multilateralism, and his ideas have informed the conventional wisdom for generations of conflicts scholars, and to this day still occupy a commanding position in both the common law and civil law conflict of laws.[19] Consequently, the conflict of laws became a neutral law of the application of laws. The process was confined to seeking and determining the applicable law for private persons involved in a private legal relationship, and therefore consciously recognised that when the conflict of laws process was finished, it would end with a "leap in the dark" for litigants, as the process was largely unconcerned with the substantive result of the applicable law.[20] With the modern trend toward globalisation and deregulation, there has been an enhanced awareness of the importance of self-determination and a strengthening of individual legal positions,[21] further reinforcing the popularity of Savigny's multilateralist theory.

B Exceptions within the Multilateralist Theory

Under the multilateralist theory, the conflict of laws does not have to be totally immune from, or ignorant of, state interests. Rather, the conflict of laws starts from the position of objectivity, and as will be discussed, provides exceptions for the application of the *lex fori*. Examples of established exceptions under the multilateral approach include overriding mandatory rules and the public policy exception. It is therefore untrue that multilateralism will always lead to the "blind determination of the applicable law" that "ignore[s] any notion of a state's interest in social or economic policy."[22]

1 Mandatory rules

[19] Juenger, above n 17, at 39 and 40.

[20] Michael Martinek "Codification of Private International Law – A Comparative Analysis of the German and Swiss Experience" (2002) Journal of South African Law 234 at 239.

[21] At 243.

[22] At 240.

Savigny acknowledged the outer limits of his theory, allowing the unilateral application of the *lex fori* for "strictly positive, mandatory laws."[23] These are laws that are enacted "not merely for the sake of the persons who are the possessors of rights" but "rest on moral grounds" or "reasons of public interest [relating to] politics, police, or political economy."[24] This ordinarily occurs when Parliament has expressed that the statute is intended to apply, irrespective of the governing law under ordinary choice of law rules.[25] For example, s 137 of the Credit Contracts and Consumer Finance Act 2003 states that the Act applies to a credit contract, guarantee, lease, or buy-back transaction if it would be governed by the law of New Zealand but for a choice of law provision to the contrary.[26] In rare cases, where the legislation is silent on whether it has mandatory force, some types of legislation have nevertheless been held to be mandatory in character and to therefore apply irrespective of a governing law other than that of the forum.[27] This was the case in the New Zealand Supreme Court decision of *Elwin v O'Regan* where the (then) Chattels Transfer Act 1924 was held to apply to chattels subject to overseas agreements that were located in New Zealand or brought within New Zealand, irrespective of whether the contract in question was governed by foreign law. The Court "[saw] this matter simply, away from any question of the conflict of laws."[28]

2 The public policy exception

When a choice of law rule leads to the application of a foreign law, a New Zealand court will generally apply that law even though the result may be contrary to a policy of New Zealand law that would apply in a purely domestic case.[29] For example, a marriage below the age of consent,[30] and a polygamous relationship,[31] have been upheld by English courts, despite the courts likely regarding the foreign laws that permit these acts as unwise or immoral.[32] However, New Zealand courts will not apply a foreign law if the law, or the result of its application, is contrary to a fundamental policy of New Zealand law.[33] The public policy exception was recently discussed in the New Zealand Court of Appeal decision of *New Zealand Basing Ltd v*

---

[23] Friedrich Karl von Savigny *Treatise on the Conflict of Laws* (2nd ed Guthrie Translation, T & T Clark, Edinburgh, 1880) at 34.

[24] Martinek, above n 20, at 240.

[25] M Davies, A Bell and P Brereton *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis, Australia, 2014) at [19.40].

[26] Credit Contracts and Consumer Finance Act 2003, s 137(b).

[27] Davies, Bell and Brereton, above n 25, at [19.45].

[28] *Elwin v O'Regan* [1971] NZLR 1124 (SC) at 1129 per Beattie J.

[29] *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [13].

[30] *Baindail v Baindail* [1946] P 122 (CA).

[31] *Mohamed v Knott* [1969] 1 QB 1 (CA). The English Court upheld a marriage of a girl aged 13 that was valid under Nigerian law.

[32] Dicey, above n 3, at [5-006].

[33] *Laws of New Zealand*, above n 29, at [13]; Dicey, above n 3, at [5-003].

Brown where the threshold test was whether the foreign law would "shock the conscience of a reasonable New Zealander, be contrary to a New Zealander's view of basic morality or violate an essential principle of justice or moral interests."[34] Further, "differences [between forum and foreign law] do not in themselves furnish reason why the forum court should decline to apply the foreign law."[35] The Court did not consider age discrimination to violate fundamental requirements of justice, or be likely to shock the conscience of a reasonable New Zealander.[36] However, the public policy exception has been used to exclude a law that would gravely infringe the human rights of a person, such as a 1941 German decree that excluded Jewish immigrants of their German nationality and allowed confiscation of their property.[37] The example demonstrates that the policy infringement must be of a "fundamental or universal value, not… relative values which are recognised in one legal system but not the other."[38] In these cases, the multilateral approach provides for the application of the *lex fori* to the exclusion of foreign law.

C Justifying a Multilateral Approach

The multilateral approach to the conflict of laws aims to achieve justice in a number of ways, as distinct from New Zealand conceptions of justice contained in domestic legislation. There are different ways to rationalise how the multilateral method achieves conflicts justice, which are outlined below. However, these are never absolute values, and as has been discussed in the context of overriding mandatory rules or the public policy exception, the dilemma between the conflicts justice of multilateralism and domestic notions of justice will sometimes be resolved in favour of domestic policy considerations.[39]

1 Meeting the parties' reasonable expectations

The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a case with foreign elements.[40] The Court of Appeal in *New Zealand Basing Ltd v Brown* considered this justification to be one of the "fundamentals of private international law."[41] A Legal system gives effect to this idea of liberty or 'justice' by

---

[34] *New Zealand Basing Ltd v Brown* [2016] NZCA 525 at [67]. This analysis was not disturbed on appeal to the Supreme Court as the case was decided on different grounds: *Brown v New Zealand Basing Ltd* [2017] NZSC 12. See also *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA) at [67].

[35] *New Zealand Basing Ltd v Brown*, above n 34, at [67]; citing *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883 at [15] per Lord Nichols.

[36] At [83]

[37] *Oppenheimer v Cattermole* [1976] AC 249 (HL) at 277 and 278.

[38] *New Zealand Basing Ltd v Brown*, above n 34, at [68].

[39] See Forsyth, above n 12, at 101.

[40] Dicey, above n 3, at [1-005].

[41] *New Zealand Basing Ltd v Brown,* above n 34, at [79].

being prepared, when the occasion demands, to look beyond its boundaries to the system of law by which rational persons might reasonably expect to be governed.[42] This is a related concept to the rule of law, whereby "rules are just [when] they establish a basis for legitimate expectations" and "constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled."[43] The principle of giving effect to reasonable expectations of the parties has been recently used in New Zealand to uphold a contractual choice of law clause,[44] to define the territorial scope of the New Zealand ACC scheme,[45] and to justify the continued recognition of the *Moçambique* rule.[46] Further, particularly in the field of personal and family law, there has been an increasing concern world-wide to connect the individual with the system of law which is most likely to reflect his or her intentions, rather than the rules which a particular society might regard as appropriate for its own internal regulation.[47] While the principle has been criticised for "masking normative judgments reflecting what a court believes the parties ought to expect",[48] this is in fact the point of the principle, which involves an objective analysis, not what the parties subjectively might have expected.[49]

2 Promoting internationalism

In addition to the fulfilment of the parties' reasonable expectations, the conflict of laws has been justified by an internationalist approach, which is "essential to ensure the efficacy and thus the maintenance of and respect for domestic legal systems."[50] The internationalist approach compliments the goal of serving the interests of justice and the legitimate expectations of the parties.[51] For example, everywhere in the world, couples should either be married or unmarried, or contracts should either be valid and enforceable or invalid and

---

[42] McLachlan "Reforming New Zealand's conflicts process", above n 1, at 444.

[43] At 444; quoting John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, 1971) at 235.

[44] *New Zealand Basing Ltd v Brown,* above n 34, at [79]. The principle was one of the factors in determining that a "bona fide and legal choice of law" should not be excluded by the public policy exception.

[45] *McGougan v DePuy International Ltd* [2016] NZHC 2551 at [123]. The ACC scheme provides universal cover for all who suffer personal injury in New Zealand, regardless of fault. This is the scheme that the defendant expected to encounter when it exported its products to New Zealand, and that expectation could not be put aside to allow the plaintiff to claim for compensatory damages. See also David Cavers *The Choice of law Process* (The University of Michigan Press, Ann Arbor, 1965) at 139-141.

[46] *Burt v Yiannakis* [2015] NZHC 1174 at [52] and [54]. The *Moçambique* rule is that New Zealand courts have no jurisdiction in proceedings primarily concerned with title or the right to possession of immovable property situated outside the jurisdiction of New Zealand.

[47] McLachlan "Reforming New Zealand's conflicts process", above n 1, at 444 and 445.

[48] Larry Kramer "Rethinking Choice of Law" (1990) 90 Columbia Law Review 277 at 336.

[49] Davies, Bell and Brereton, above n 25, at 306 fn 80.

[50] McLachlan "Reforming New Zealand's conflicts process", above n 1, at 444 and 445.

[51] Lord Mance "The Future of Private International Law" (2005) 1(2) Journal of Private International Law 185 at 186.

unenforceable.[52] By adopting a multilateral approach to choice of law, whereby the courts apply an objective connecting factor to determine the applicable law that the parties would reasonably expect to apply, countries preserve the ability to determine the content and policy considerations of their domestic laws. At the same time, if similar multilateral rules are adopted in other countries, an agreement will be reached on when those domestic laws are to apply to the legal affairs of private parties.[53] This principle of equality of legal systems is embodied in the multilateral choice of law rule.[54]

3 Preventing forum shopping

The second objective of multilateral choice of law rules is the avoidance of forum shopping for a favourable substantive law. This flows from the first goal of achieving the reasonable expectations of the parties, as this will be defeated if one of the parties can gain an advantage through the choice of forum.[55] The multilateralist approach discourages forum shopping by eliminating any incentive to choose a particular forum to bring a legal claim. There are three main reasons to justify the prevention of forum shopping.[56]

The first argument is that forum shopping favours the claimant. When choosing to litigate, the claimant can choose the forum that hears the dispute, and this can be based exclusively on their own preferences, as long as the court will assume jurisdiction. If the forum has a rule that it will only apply the law of the forum to the case, and the claimant can satisfy any limitations on the law's application, the claimant can choose the forum that has a substantive law that best supports their interest.[57] It should be noted that where a forum only applies its own law to a dispute with foreign elements, there will usually be a requirement that the claimant has to first satisfy, such as being a domiciliary of the jurisdiction. Secondly, forum shopping can lead to increased litigation costs and a "race to the courthouse" as each party will try to be the first to file a lawsuit as soon as a legal dispute becomes likely,[58] in order to 'win the battle' over the substantive law that governs the dispute. Finally, forum shopping increases the likelihood that parties will argue about the appropriateness of the forum in addition to the merits of their case, increasing their respective legal expenses.[59] The cost of disputing the appropriate forum can be a significant portion of the legal fees, as shown in the English Court of Appeal decision of

---

[52] Forsyth, above n 12, at 100.
[53] At 100 and 101.
[54] At 102.
[55] Davies, Bell and Brereton, above n 25, at [12.21].
[56] Giesela Rühl "Methods and Approaches in Choice of Law: An Economic Perspective" (2006) 24 Berkeley Journal of International Law 801 at 808.
[57] At 809.
[58] At 811.
[59] At 811.

Moore v Moore where an "extraordinary feature" of the case was the "grotesque waste of family resources", whereby the parties "spent about £1.5 million in legal fees, most of it in proceedings concerning the question whether the financial consequences of the divorce should be determined in Spain (as the husband contends) or in England (as the wife contends)."[60]

4 Predictability

A multilateral choice of law rule offers a higher level of predictability than a unilateral choice of law rule. This may seem counter-intuitive, as unilateralism is predictable in the sense that litigants will know that a forum court will always apply forum law, however this only arises after the suit has been brought. Prior to litigation, the unilateral approach is considerably uncertain, as the parties will not know where litigation will take place, unless there is a pre-existing forum selection agreement. On the other hand, multilateralism enables the parties to ascertain the applicable law in advance, as the result should be the same regardless of the forum the dispute is heard.[61] This is because a court, in applying a multilateral choice of law rule, will look to objective connecting factors to determine the applicable law, which should uniformly lead to the law that the parties would reasonably expect to apply.

III Unilateralism

Unlike the objective nature of the multilateralist approach, whereby a choice of law rule could lead to the application of New Zealand or foreign law, a unilateral choice of law rule directs a New Zealand court to apply New Zealand law to the exclusion of any foreign law. This occurs when the facts fulfil a specified forum contact contained in a statute,[62] such as the requirement that one of the parties has New Zealand domicile.[63] Additionally, aside from statutory unilateral choice of law rules, the common law provides for the unilateral application of the *lex fori* in certain circumstances, such as matters concerning procedure, or the penal, revenue, or public laws of a foreign country.

A The Lex Fori Rule in the Common Law

As mentioned, the common law occasionally provides for the application of the *lex fori*, rather than determining the applicable law through multilateral choice of law rules. For example, the principle that procedure is governed by the *lex fori* has been universally accepted. Therefore, New Zealand courts will apply New Zealand law to any matters of procedure without any

---

[60] *Moore v Moore* [2007] EWCA Civ 361 at [6] per Lord Justice Thorpe.

[61] Giesela Rühl "Methods and Approaches in Choice of Law", above n 56, at 807 and 808.

[62] Symeonides, above n 18, at 312.

[63] Property (Relationships) Act 1976, s 7(2).

reference to any foreign law. Moreover, New Zealand courts will refuse to apply any foreign procedural law to a case.[64] While there can be difficulty in discriminating between rules of procedure and rules of substance,[65] examples include the nature of the remedy a party is entitled to,[66] the method of enforcement of a judgment,[67] the eligibility of a person or body to be a party to a case,[68] or how the facts in issue must be proved.[69] The justification for the unilateral application of the *lex fori* is in these cases not to push notions of public policy to cases with foreign elements, rather it is to avoid the inconvenience of conducting the trial of a case containing foreign elements in a manner with which the court is unfamiliar.[70] Similarly, it is also accepted that the courts of one country will not enforce the penal, revenue or public laws of another country.[71] The justification for applying domestic law in these circumstances is that the enforcement of foreign penal, revenue or public laws is an extension of sovereign power by one country into the territory of another, which runs contrary to the concept of sovereign independence.[72]

B Controversy of Statutory Unilateral Rules

The desirability of unilateral choice of law clauses as a legislative technique is controversial, having been both "strongly criticised" and "strongly defended" by a range of academic writers.[73] In support of unilateral rules, Mann argues that the unilateral technique, which combines a rule of internal law with a point of contact specifying when the *lex fori* is to apply, is "unobjectionable in theory and may on occasions be useful in practice" even if the mixture of substantive law and conflicts rules "obscures the fundamental distinction" between them.[74] Currie took a similar view, stating that the advantage of a unilateral choice of law rule lies in its ability to "avoid, or minimize the difficulties of, some of the major ambiguities inherent in the traditional form of rules for choice of law" if drafted "with wisdom and restraint, and with

[64] Dicey, above n 3, at [7-002].
[65] At [7-004].
[66] At [7-011].
[67] At [7-013].
[68] At [7-017].
[69] At [7-022].
[70] At [7-004].
[71] At [5R-019].
[72] At [5-020]. Although this justification is the matter of some controversy, it is suggested by Dicey to be the best explanation.
[73] At [1-046].
[74] F Mann "Statutes and the Conflict of Laws" (1972-1973) 46 British Year Book of International Law 117 at 136, citing John Morris "The Choice of Law Clause in Statutes" (1946) 62 LQR 170 at 172.

careful regard to the moderate interests of the state."[75] Currie made the incorrect prediction that "this is the form in which the conflict of laws rules of the future will be cast."[76]

On the other hand, Morris wrote that if we must have statutes with a choice of law clause, the multilateral type is "vastly preferable" to the unilateral type. This is because "confusion is bound to result unless a clear distinction is maintained between domestic rules and conflict rules; and a statute with a [unilateral] choice of law clause is a bastard hybrid."[77] Further, Unger argues that unilateral choice of law rules are "parasitic" in that, when they are designed to reflect the common law, they prevent the courts from being able to develop the choice of law rule in future cases.[78] Further, Unger argues that if a statute is to depart from the common law choice of law rules, usually springing from the wish to "pursue national policies through legislation", "the extent to which this policy will [apply] at the expense of foreign law should be left to the determination of the courts."[79] This takes into account the distinction between a unilateral rule and a mandatory rule. A unilateral choice of law rule explicitly states the circumstances when New Zealand law must apply, and leaves open the application of foreign law when it is not specified to apply.[80] In contrast, a mandatory rule contained in a statute must be applied regardless of the normal rules of the conflict of laws, because the statute says so.[81] In this way the two concepts are related in that they both point towards the application of the *lex fori* in certain circumstances, however start from different points. A unilateral choice of law rule starts by defining the circumstances the *lex fori* applies, while mandatory rules start from the premise that the applicable law could be domestic or foreign, but will exceptionally apply the *lex fori* where the foreign law clashes with a mandatory rule of the forum.

C Justifying a Unilateral Approach

There are different reasons for a legislator to enact, or a court to rely on, a unilateral choice of law rule that requires the application of the *lex fori*. Typically, a unilateral choice of law rule is enacted to give force to state interests and fulfil social functions, and so to that end, the conflict of laws is not considered to be a neutral and objective process.[82] An example is s 3 of the Fair Trading Act 1986, which provides that the Act "extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests

---

[75] Brainerd Currie *Selected Essays on the Conflict of Laws* (Duke University Press, Durham, 1963) at 116.
[76] At 117.
[77] Morris, above n 74, at 172.
[78] J Unger "Use and Abuse of Statutes in the Conflict of Laws" (1967) 83 LQR 427 at 444.
[79] At 448.
[80] Dicey, above n 3, at [1-042].
[81] At [1-053].
[82] Giesela Rühl "Unilateralism", above n 14, at 1735-1737.

in land, within New Zealand."[83] It is likely that Parliament enacted this unilateral choice of law rule in consideration of the public policy of protecting New Zealand's free market structure so that the "interests of consumers are protected"[84] and "businesses compete efficiently",[85] which could be hindered by the application of a foreign law that fails to protect consumers from misinformation and malpractice. Unilateral choice of law rules are employed in a diverse range of fields, not only in traditional public law fields such as antitrust law, but also in traditional private law fields such as contract, marriage, divorce, maintenance, property and succession. In these circumstances, the interests that the legislator is seeking to protect include both economic interests and societal values and beliefs, such as gender equality in marriage.[86] They are likely enacted where the legislator places more weight on achieving the desired practical consequence, rather than leaving the matter to the methodological purity of the multilateral approach, which could result in the application of a foreign law that clashes with domestic notions of public policy.

However, as discussed in the context of procedural rules, the application of the *lex fori* does not necessarily have to be aimed at the advancement of New Zealand notions of public policy to cases with foreign elements. Instead, they may simply be enacted to achieve the efficient function of the court. Additionally, the unilateral choice of law rule in a statute may simply mirror the position of the common law, such as the application of the Property (Relationships) Act to immovable property located in New Zealand, which mirrors the outcome of the multilateral *lex situs* rule, whereby the law applicable to immovable property is the country in which it is located. Therefore, the justification for a unilateral choice of law rule may lie in the breadth of its scope. A wide unilateral rule, that purports to apply to cases more closely connected to a foreign law, may be of the category designed to give force to state interests and fulfil social functions. On the other hand, if a unilateral choice of law rule is limited in scope, the justification for its existence may be for other reasons, such as to clarify the parties' rights under an ambiguous area of common law, to promote the efficiency of domestic courts, or to protect against overreaching assertions of sovereign power by a foreign state.

[83] Fair Trading Act 1986, s 3(1). This could also be interpreted as an overriding mandatory rule: see David Goddard "Conflict of Laws: The International Element in Commerce and Litigation" (New Zealand Law Society Seminar, November 1991) at 60 and 61.

[84] Fair Trading Act, s 1A(1)(a).

[85] Section 1A(1)(b).

[86] Symeonides, above n 18, at 332-333.

IV Section 7 of the Property (Relationships) Act 1976

A The Common Law Approach

The common law conflict of laws rules made a four-fold division for the treatment of relationship property, based on the nature of the property, and the presence or absence of an agreement. Property was divided, according to normal conflict of laws rules, into movable and immovable property.[87] Regarding movable property, the governing law in the absence of a marriage contract was that of the matrimonial domicile. In contrast, where there was immovable property, and no marriage contract, the common law rule was to apply the *lex situs*.[88] The uncertainty and confusion surrounding the common law approach to movable property was likely a driving factor behind the New Zealand legislator enacting specific choice of law rules to govern relationship property.[89] Taking the approach of Currie, this could be seen as an appropriate use of a unilateral choice of law rule, as it helps minimise or avoid the "major difficulties" of the common law choice of law rules. However, this dissertation will assess whether the unilateral choice of law rule continues to be the best approach to determining when the Property (Relationships) Act is to apply to relationship property.

B Unilateral Codification

Section 7 of the Property (Relationships) Act expresses when the Act is to apply, and therefore is unilateral in nature.[90] The Act states:[91]

> **7 Application to movable or immovable property**
> (1) This Act applies to immovable property that is situated in New Zealand
> (2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand-
>
> (a) at the date of an application made under this Act; or
> (b) at the date of any agreement between the spouses or partners relating to the division of their property; or
> (c) at the date of his or her death
>
> (3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.

---

[87] Campbell McLachlan "Matrimonial Property and the Conflict of Laws" (1986) 12 New Zealand Universities Law Review 66 at 69.

[88] At 69.

[89] At 69. The old common law concept of "matrimonial domicile" has been described by McLachlan as "bedevilled by uncertainty."

[90] Dicey, above n 3, at [1-042].

[91] Property (Relationships) Act, s 7.

The unilateral rule is two-fold. First, the Act requires a court to apply New Zealand law to immovable property that is located within New Zealand.[92] Second, a court must apply New Zealand law to movable property, located in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand.[93] The Act does make provision for a court to decline to make an order in regard to movable property located outside New Zealand where it is made against a party who is neither domiciled nor resident in New Zealand.[94] However, the court's ability to decline to make an order takes place after the unilateral application of New Zealand law. Therefore, it is still necessary to assess the desirability of the unilateral rule as a means to determine when New Zealand is to apply, or indeed, if the Act should provide for the application of foreign law in some circumstances.

1 The scope of the rule

The scope of the unilateral rule, and therefore the scope of the Act's application to relationship property, has been limited by particular points of contact. For instance, the Act only applies to immovable property located in New Zealand, and by necessary implication, does not apply to immovable property situated outside New Zealand.[95] However, the Act does provide that it can apply to overseas immovable property, where the parties have agreed that it is to apply.[96] Therefore, in the absence of a choice of law agreement, overseas immovable property owned before the date of separation cannot be taken into account when dividing the couple's relationship property under the Act.[97] Couples with immovable property located in foreign countries will have to resort to foreign courts (and therefore likely foreign laws) to determine their relationship property rights. In regard to movable property, the scope of the unilateral application of the Act is confined to the circumstance where one of the parties is domiciled in New Zealand at the time of application. Therefore, the circumstances could arise where neither party is domiciled in New Zealand, however their movable property is located in New Zealand. In this situation, the Act will not apply. This can be explained in terms of jurisdiction: a New Zealand court might have 'personal jurisdiction' over the parties to the dispute, but not 'subject matter jurisdiction' under the Act over the property. Where the Property (Relationships) Act does not apply, there may be a residual role for New Zealand common law to determine the applicable law to govern the parties' relationship property.[98] However, this dissertation will

---

[92] Section 7(1).

[93] Section 7(2).

[94] Section 7(3).

[95] *Enright v Fox* (1989) 5 NZFLR 455 (HC) at 447.

[96] Property (Relationships) Act, s 7A(1).

[97] *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14 (CA) at 20; followed in *Standil v Standil* [2011] NZFLR 554 (HC) at [19] and [24].

[98] For further discussion, see McLachlan "Matrimonial Property and the Conflict of Laws", above n 87, at 75-77.

assume that the Property (Relationships) Act is a codified scheme to the exclusion of the common law rules,[99] and will not discuss the issue further.

Due to the narrowed scope of the rule, it is unlikely that s 7 was enacted out of a desire to push forward New Zealand notions of family policy and norms to cases that are unconnected to New Zealand. This is because, as mentioned, the immovable property must be located in New Zealand, or, for movable property, one of the parties must be domiciled in New Zealand at the date an application is made. However, the unilateral rule likely does represent an aversion to applying foreign law where there *is* some connection to New Zealand. Chapter II will discuss whether a multilateral choice of law rule can take account of the fear of applying foreign laws to the division of relationship property where one of the parties is domiciled in New Zealand, or the immovable property is located in New Zealand.

2 The effect of the rule

In order to trigger the unilateral application of the Property (Relationships) Act in regard to movable property, one of the spouses or partners must be domiciled in New Zealand at the time an application is made under the Act, at the time an agreement relating to the division of relationship property is reached, or at the time of the death of one of the parties. For simplicity, this dissertation will discuss domicile at the time an application is made under the Act. The Domicile Act 1976 governs the acquisition of domicile in New Zealand.[100] A person can acquire a new domicile if they are present in another country and intend to live there indefinitely.[101] The courts have defined the requisite intention as "the intention to reside permanently or for an unlimited time in a country."[102] The first domicile that a person acquires is that of the person's parents, with priority given to the father's domicile.[103] For the purposes of the Property (Relationships) Act, this means that a person from New Zealand could be living abroad while retaining their New Zealand domicile if they do not intend to live indefinitely in that foreign country. Conversely, a foreigner could acquire New Zealand domicile, and therefore trigger the unilateral application of the Property (Relationships) Act, if the foreigner is present in New Zealand and intends to make New Zealand their permanent home. The consequence is that if a New Zealand court has personal jurisdiction, and the applicant claiming

---

[99] Property (Relationships) Act, s 4. The section states that the Act is a code, and "applies instead of the rules and presumptions of the common law and of equity"; *Burt v Yiannakis* [2015] NZHC 1174 at [26]. Asher J held that the language of the Act is plain and unambiguous, and that the Act codifies the law that applies to transactions between spouses and partners in respect of property.

[100] Domicile Act 1976.

[101] Section 9.

[102] *Doucet v Geoghegan* (1978) 9 Ch D 441 (CA) at 130 (England); as cited in *Humphries v Humphries* [1992] NZFLR 18 (FC) at 26.

[103] Domicile Act, s 6.

under Property (Relationships) Act is domiciled in New Zealand (or indeed if the respondent is domiciled in New Zealand) at the date an application is made, the court will be required to apply New Zealand law to the parties' movable relationship property.

It is helpful to illustrate the various circumstances that can trigger the Property (Relationships) Act's unilateral application to the parties' relationship property. In each of the following scenarios, one or both parties to a relationship property claim in the New Zealand court is likely domiciled in New Zealand at the date an application is made under the Act. The scenarios reflect the effect of the indiscriminate nature of the unilateral rule contained in the Act, once the point of contact of domicile is satisfied:

(1) A New Zealand domiciliary marries an English domiciliary in Auckland, and they decide to continue to live in Auckland for the next 30 years until separation. Both parties are therefore likely to be New Zealand domiciliaries at the time of separation. The New Zealander makes an application under the Property (Relationships) Act, triggering the unilateral application of New Zealand law under s 7(2)(a).

(2) A New Zealand domiciliary marries an English domiciliary in London. The couple continues to live in London for the next 30 years, before retiring permanently in New Zealand. The couple separates a few years later, at which time both parties are likely to be New Zealand domiciliaries. The New Zealander makes an application under the Property (Relationships) Act, triggering the unilateral application of New Zealand law under s 7(2)(a).

(3) A New Zealand domiciliary travels to London for a three-year work contract. He meets an English domiciliary in London, and they decide to marry in England. A year later, the New Zealand domiciliary is transferred to Germany for work, and the couple remains in Germany for five years, before the couple separates. The New Zealand domiciliary has likely retained New Zealand domicile, as there was no intention to live permanently in England or Germany. The New Zealander makes an application under the Property (Relationships) Act, triggering the unilateral application of New Zealand law under s 7(2)(a).

(4) An English domiciliary meets a French domiciliary while studying at the University of Paris. In their final year, they decide to marry. Over the next ten years, they work in Paris, living in a small rental apartment. The couple then decides to move to London, where they purchase a home and raise a family, while keeping the apartment in Paris for holidays. Over the course of twenty years, the couple acquires a substantial number of shares in various English companies, purchase a few pieces of expensive artwork, and acquire two new cars. The English domiciliary is then transferred to New Zealand

for work, and the couple decides to live in New Zealand permanently, renting a townhouse in Wellington. The couple separates a few years later, at which time both parties are likely to be New Zealand domiciliaries. One of the parties makes an application under the Property (Relationships) Act, triggering the unilateral application of New Zealand law under s 7(2)(a).

While the first scenario is unobjectionable, as the scenarios progress, it becomes less and less obvious why New Zealand has adopted this unilateral approach as the default conflict of laws rule, whereby the court is required to apply New Zealand law regardless of the connection between the relationship and a foreign legal system. In the last scenario, there are three substantive laws that theoretically could govern the dispute: French law, as the place of the parties first common habitual residence after the conclusion of the marriage, English law as the place of the first matrimonial home, or New Zealand law, as the place of one of both of the parties' domicile. Why should New Zealand law take priority as the law governing the couple's relationship property? Should the choice of law rule ignore the relevance of any foreign elements once triggered? Would the couple have reasonably expected New Zealand law to govern their division of relationship property? These questions are discussed further in Chapter II, which will explore the practical consequences of s 7 under the current unilateral approach, and assess whether a multilateral approach is able to take into account unilateralist concerns. In particular, the fear of the application of discriminatory foreign laws to the relationship property of parties connected to New Zealand.

Chapter 2: Establishing an Opportunity for Change

This chapter first assesses the issues of the current approach in s 7. Three issues are identified: the corruption of the principle of *forum non conveniens*, the application of New Zealand law where the parties would reasonably expect foreign law to apply, and the limited scope of the rule in its exclusion of foreign immovable property. The chapter then evaluates whether the unilateral approach should nevertheless be retained, primarily due to the concern that discriminatory foreign laws could apply to parties connected to New Zealand. Finally, the chapter demonstrates how a multilateral approach can take into account the public policy considerations within family law, through overriding mandatory rules, and the public policy exception.

I Issues under the Current Approach

As discussed in Chapter I, a unilateral choice of law rule simply states when the *lex fori* is to apply by reference to a point of contact. If the point of contact is satisfied, the *lex fori* applies, regardless of a closer connection between the parties and a foreign legal system. For the Property (Relationships) Act, the point of contact is when immovable property is located in New Zealand, or for movable property, where one of the parties is domiciled in New Zealand at the date an application is made. In these circumstances, the *lex fori* applies. Because of this, if an applicant satisfies the point of contact requirements, it is possible that the New Zealand relationship property scheme could apply to relationships that are more closely connected to a foreign legal system, such as the example given of the English and French couple who, after living abroad for a significant portion of their relationship, separate in New Zealand. As long as one of those parties is a New Zealand domiciliary at the date an application is made under the Act, New Zealand law will apply to the division of the parties' relationship property.

A Where the Parties are More Closely Connected to Another Forum

The proponents of the unilateral approach are likely to argue that New Zealand has sufficient protective mechanisms to prevent the Property (Relationships) Act applying to cases that are more closely connected to another forum, referring to the court's ability to decline jurisdiction under the doctrine of *forum non conveniens*.

In New Zealand, the grounds for asserting personal jurisdiction over the parties to a dispute are broad. Service as of right can be initiated even if the respondent is only temporarily present in New Zealand.[104] If the respondent is overseas, service without leave can be effected in specific circumstances, such as when the subject matter of the proceeding is land or other property

[104] Dicey, above n 3, at [11-102].

situated in New Zealand.[105] The doctrine of *forum non conveniens* provides the courts with a "principled and even-handed" means to decide whether to exercise its wide jurisdictional powers.[106] Under the High Court rules, if a respondent objects to the court's jurisdiction where the respondent has been served overseas, or if the respondent has been validly served in New Zealand but argues that New Zealand is not the appropriate forum, the court must then determine whether New Zealand is the appropriate forum for the dispute. If New Zealand is not the appropriate forum, then the court must stay or dismiss the proceeding.[107]

The New Zealand approach to *forum non conveniens* was outlined by Randerson J in the Court of Appeal judgment of *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*.[108] The Court adopted the reasoning of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd,* where the test to determine whether another forum is more appropriate involves looking for the forum with which the proceeding has the most real and substantial connection. The factors to be taken into account include issues of convenience or expense, availability of witnesses, the place where the parties reside, and the law governing the matter.[109] The Court of Appeal in *Wing Hung* noted that additional considerations included a cautious approach to subjecting foreigners to the jurisdiction of a New Zealand court, whether related proceedings were pending elsewhere, whether a New Zealand or foreign court would provide the most effective relief, and whether an overseas defendant will suffer an unfair disadvantage in a New Zealand court.[110]

The relevance of the law governing the matter in determining the forum that has the most real and substantial connection requires further discussion. If the legal issues are complex, or if the legal systems are very different, the general principle is that a court applies its own law more reliably than a foreign court attempting to do so. Therefore, the governing law helps to point towards the more appropriate forum, whether New Zealand or foreign.[111] For example, the Court in *Wing Hung* held that to the extent that the Fair Trading Act 1986 was relied on by the parties, the law of New Zealand must apply, as the reach of the legislation extended to overseas parties who have engaged in misleading conduct in New Zealand.[112] New Zealand law, as the governing law, was one the factors favouring the conclusion that New Zealand was the "obvious forum" for resolving the dispute.[113]

---

[105] High Court Rules, r 6.27(2)(e).
[106] Dicey, above n 3, at [12-003].
[107] High Court Rules, rr 5.49, 6.28 and 6.29.
[108] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502.
[109] *Spiliada Maritime Corporation v Cansulex Ltd* [1986] All ER 843 (HL) at 844 and 855 per Lord Goff.
[110] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 109, at [27].
[111] Dicey, above n 3, at [12-034].
[112] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 109, [135].
[113] At [141].

In the context of relationship property, *Gilmore v Gilmore* reinforces the observation that a court is reluctant to stay proceedings where the dispute is governed by New Zealand law. Although the Court, perhaps mistakenly, did not look at the issue through the lens of the unilateral choice of law rule in s 7, the Court nevertheless held that the law governing the ownership and disposition of immovable and movable property located in New Zealand was New Zealand law. This was held to be a factor that pointed strongly towards New Zealand being the appropriate forum.[114]

The two decisions demonstrate the significant influence of the governing law on a New Zealand court's assessment of the appropriate forum under the *forum non conveniens* test. Crucially, if a New Zealand court is faced with a domestic unilateral choice of law rule, which requires the court to apply the *lex fori*, it is likely to be a highly persuasive factor in the court's decision to decline to stay or dismiss proceedings on the grounds of *forum non conveniens.* The result is that the unilateral choice of law rule in s 7 of the Property (Relationships) Act is likely to significantly weaken the doctrine of *forum non conveniens*' ability to temper the effect of wide jurisdictional grounds. In these cases, s 7 drives the court to determine that New Zealand is the appropriate forum as, if s 7 is triggered, New Zealand law is the applicable law. This may be so, even where the parties have little connection to New Zealand other than one of the parties' domicile.

B Where New Zealand is the Appropriate Forum

The unilateral approach is also likely to reach undesirable outcomes even where New Zealand is the appropriate forum to hear the dispute. This may be because under the *forum non conveniens* test (not taking into account the issue of governing law, which is influenced by the unilateral choice of law rule under s 7), both parties may be present in New Zealand at the time of application, leading to the New Zealand court being the place of greatest convenience and lowest expense for the parties. In this case, the New Zealand court is unlikely to stay proceedings on the grounds of *forum non conveniens,* as it is unlikely that there would be a more appropriate foreign forum. Nevertheless, it may still be undesirable for the New Zealand court to apply New Zealand law to the dispute. This is because, despite New Zealand being the forum of greatest convenience to the parties, the parties may still reasonably expect the court to apply a foreign law to their division of relationship property. In other words, the unilateral application of New Zealand law, even in cases where New Zealand is the appropriate forum, could defeat the parties' reasonable expectations.

---

[114] *Gilmore v Gilmore* [1993] NZFLR 561 (HC) at 566.

The following example illustrates the situation where both parties are present in New Zealand, making New Zealand the appropriate forum, however would reasonably expect a foreign law to apply to their division of relationship property. A New Zealand domiciliary from Auckland is transferred to England for work, and intends to return to New Zealand once the work contract expires. After a few years in London, the New Zealander meets an Englishwoman, and they decide to marry soon afterwards. Before getting married, the couple sees an English family lawyer, who advises that their property will remain separate until divorce, in which case the court has an ancillary power to award relief on a discretionary basis. The couple are happy with this legal arrangement of their property, should a divorce occur. Ten years later, the New Zealander's work contract expires, and the couple decides to move to New Zealand to explore work opportunities. Soon after the couple moves to Auckland, the relationship breaks down, and one of the parties goes to a New Zealand court to apply for a division of relationship property. The New Zealander has likely retained New Zealand domicile, as he never intended to make England his permanent home. This would trigger the point of contact in s 7 of the Property (Relationships) Act requiring the unilateral application of New Zealand law.[115] In this example, it is likely that the parties reasonably expected the law of England to apply to the property consequences of separation. They would have been content with that knowledge for the last fifteen years. For a New Zealand court to ignore this history would be to frustrate their reasonable expectations.[116]

C Limited Subject Matter Jurisdiction

In addition to the circumstances where New Zealand law applies to cases with a stronger connection to a foreign law, a third concern is that s 7 may unnecessarily limit New Zealand's subject matter jurisdiction to take into account overseas immovable property in determining the division of the parties' relationship property.[117] There are two alternative arguments to justify this criticism. First, it is necessary to examine the position at common law in relation to the court's subject matter jurisdiction over foreign immovable property. In the common law, a domestic court does not have subject matter jurisdiction over proceedings primarily concerned with title to or the right of possession of immovable property situated outside the jurisdiction unless the action is based on a contract or equity between the parties (the *in personam* exception) or the proceeding concerns the administration of an estate or trust and extends to

[115] This example has been modified from the example given in CMV Clarkson "Matrimonial Property on Divorce: All Change in Europe" (2008) 4 Journal of Private International Law 421 at 424.
[116] At 424.
[117] *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14 (CA) at [18] and [19]. The Act does not authorise the courts to take into account foreign immovable property when determining the division of relationship property.

other property within the jurisdiction. This is termed the '*Moçambique* rule,[118] and it has been recently confirmed to be the approach in New Zealand.[119]

The first criticism of the court's limited subject matter jurisdiction under the Act lies in the view that the Act reflects the New Zealand common law on the application of the *Moçambique* rule to foreign immovable property. This is because the justification for the *Moçambique* rule has been questioned, as "there seems to be no reason why a New Zealand court could not simply apply foreign law to determine title to foreign property the same way a court will apply foreign law… in a tort of a contract dispute."[120] Moreover, the normal rules of jurisdiction and *forum non conveniens* are "perfectly adequate" to deal with proceedings related to foreign land, as it is open for the court to stay or dismiss proceedings on the basis that it is not the appropriate forum to determine the case, which will usually occur when the case involves foreign immovable property.[121] The second justification for criticising the court's limited subject matter jurisdiction under s 7 relates to the *in personam* exception. Hypothetically, if relationship property was divided according to the rules of common law, it is arguable that the *in personam* exception would apply, allowing the courts to take into account foreign immovable property in the division of relationship property. A court will exercise jurisdiction *in personam* in cases where the court has personal jurisdiction over the parties, and a personal obligation or equity exists between the parties that has been incurred with regard to land.[122] Therefore, as long as the court is not making an order directly against the title or possession of the foreign immovable property, it may be able to, for example, take into account the value of the foreign immovable property when dividing the share of the other assets within the couple's relationship property.[123] On either justification, it is apparent that s 7(1) unnecessarily limits the court's subject matter jurisdiction to take into account foreign immovable property, whether it is because the Act is based on a criticised principle, or, alternatively, the Act fails to take into account the *in personam* exception that would otherwise be available in the common law. The desirability of extending of the Property (Relationships) Act to include foreign immovable property will be further discussed in Chapter III.

---

[118] *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL).

[119] *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412 at fn 9.

[120] *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387 at [13].

[121] At [13]; *Laws of New Zealand*, above n 29, at [173]; David Goddard and Campbell McLachlan "Private International Law – Litigating in the Trans Tasman Context and Beyond" (seminar presented to the New Zealand Law Society, August 2012) at 157.

[122] *Burt v Yiannakis*, above n 46, at [56]; citing *Laws of New Zealand*, above n 29, at [173]. See also Lawrence Collins, above n 3, at [23-042].

[123] The approach of taking into account the value of the foreign immovable property was rejected by the Court of Appeal in *Walker v Walker* [1983] NZLR 560 (CA) at 566. However, this was on the basis that it would "[wrench] what the Act understandably says", which would not be the position in the common law, due to the existence of the *in personam* exception.

II Is Unilateralism Nevertheless Justified?

Given the issues that can arise under s 7, namely the application of New Zealand law to cases that are more closely connected to the law of another forum, or the limited subject matter jurisdiction under the Act to take into account immovable property, it is necessary to consider whether there are any compelling reasons to nevertheless retain a unilateral choice of law rule for the division of relationship property in New Zealand.

A Public Policy within Family Law

A likely argument against the inclusion of a multilateral choice of law rule for relationship property is that it could lead to the application of foreign law to cases that would otherwise be governed by the Property (Relationships) Act. For example, recall the scenario outlined in Chapter I, where a New Zealander marries an English person in England, and they live in England for the next thirty years, before moving indefinitely to New Zealand, and therefore both likely gaining New Zealand domicile. As long as a claim is made under the Property (Relationships) Act when at least one of the parties is a New Zealand domiciliary, New Zealand law will apply. On the other hand, a multilateral approach designed to point towards the application of the law most closely connected to the parties' relationship would be likely to lead to the application of English law to govern the parties' relationship property. The concern, then, is that applying foreign law, in circumstances where New Zealand law would otherwise have applied under the Act, could lead to the application of undesirable foreign notions of public policy. This concern is heightened due to family law being an area that is heavily influenced by considerations of public policy. The domestic substantive rules of any one relationship property scheme are likely to reflect a different balance of principles derived from five areas of law: marriage, divorce, property, contract and succession.[124] The balance reached represents a fundamental world-view, based on different attitudes towards gender equality, labour market participation, social welfare provision, taxation, and religious values.[125] For this reason, family law sits on the periphery of private law, as opposed to the core, which is represented by the legal structures of the market, such as tort, contract and property.[126]

This is one of the primary reasons informing the English view that a unilateral approach is justified in the context of relationship property. In England, all proceedings for divorce or judicial separation are governed by English domestic law.[127] This is because, where the courts

---

[124] McLachlan "Matrimonial Property and the Conflict of Laws", above n 87, at 68.

[125] Máire Ní Shúilleabháin "Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective" (2010) 59 ICLQ 1021 at 1049 and 1050.

[126] Maria Marella "Critical Family law" (2011) 19 American University Journal of Gender, Social Policy & the Law 721 at 725.

[127] Dicey, above n 3, at [18-033].

have jurisdiction over proceedings relating to divorce or judicial separation, the issues are determined by the law that would be applicable if both parties were domiciled in England at the time of the proceedings,[128] or in other words, the *lex fori*. Further, unlike in New Zealand where the issue of relationship property is treated separately from the dissolution of a marriage or partnership under the Family Proceedings Act 1980, orders for financial relief on the dissolution of marriage are treated as ancillary to divorce.[129] Therefore, all matters relating to the division of relationship property in England are also governed by the same unilateral *lex fori* rule applicable to divorce. The reason for this approach was outlined by the English Law Commission in a 1968 review of matrimonial causes, whereby the Commission was of the view that it would be considered undesirable by many people to require an English court to determine the split of relationship property by reference to alien concepts of family law.[130] This was one of the reasons that informed the English Law Commission's "strongly held" view that "notwithstanding the theoretical arguments to the contrary [in support of the multilateral approach]", the *lex fori* must continue to be applied.[131]

Again, concern over the public policy aspect of family law was one of the considerations behind the United Kingdom's recent decision to retain its unilateral approach to the division of relationship property, despite the option to opt-in to the multilateral European relationship property scheme.[132] The United Kingdom Ministry of Justice released a response to public consultation that revealed a strong concern over the application of foreign family law concepts in English courts. Eleven of the sixteen formal responses recommended that the United Kingdom should retain its unilateral rule.[133] For example, one of the respondents, Resolution, an organisation of five thousand practicing family lawyers, expressed the concern that the application of foreign law could lead to English courts applying "blatantly discriminatory" relationship property schemes to parties in England.[134] Resolution's view likely reflects the "fear that domestic law will be usurped" and that parties will be able to "avoid the public commitments of marriage", such as the continuing duty to support after divorce,[135] or gender equality in relationships.

---

[128] At [18-034].

[129] Matrimonial Causes Act 1973 (UK), ss 23 and 24.

[130] Law Commission (England and Wales) *Family Law: Jurisdiction in Matrimonial Causes (other than Nullity)* (Working Paper No 28, April 1970) at 46.

[131] At 46.

[132] Ministry of Justice (UK) *European Commission proposed Regulations on matrimonial property regimes and the property consequences of registered partnerships: Response to public consultation* (28 November 2011) at [11], [22] and [23].

[133] At 6.

[134] See Resolution "Comments on the Proposal for a Council Regulation on Applicable Law in Matrimonial Matters" (30 November 2016) European Commission <www.ec.europa.eu> at 9.

[135] Maebh Harding "The Harmonisation of Private International Law in Europe: Taking the Character out of Family Law?" (2011) 7(1) Journal of Private International Law 203 at 228.

It is this author's view that the public policy dimension of family law is a legitimate reason to favour the application of domestic law in some circumstances. However, as will be discussed later in this Chapter, the concern does not naturally lead to the conclusion that a unilateral choice of law rule is the only way to deal with the issue. Instead, the multilateral approach can accommodate the public policy concerns through the application of overriding mandatory rules, and the public policy exception. This will be discussed in Part III below.

B Difficulty and Expense of Applying a Foreign Relationship Property Regime

A further reason for retaining the unilateral approach to the applicable law for the division of relationship property lies in the view that, to apply foreign law, it would be "highly inconvenient, undesirable, and expensive" from a practical standpoint. This is due to the variation of different legal systems, the different ways foreign law may apply, and the cost of bringing in evidence of foreign law. As a result, applying foreign law would "impede the swift and inexpensive administration of justice."[136] Individuals will be required to use experts to prove foreign law, which drives up legal costs and can lead to complicating the resolution of relationship property disputes.[137]

Further difficulties can arise due to the difference in the substantive law of different relationship property systems. This can occur even where there is an extensive collection of foreign law, as the texts and commentary are likely to be outdated compared with those available in the home country.[138] In addition to the availability of foreign law, practitioners and judges may struggle with foreign legal concepts. For example, New Zealand lawyers may lack an understanding of the English discretionary method of dividing relationship property, in particular which factors are taken into account, derived from English case law. This could lead to New Zealand lawyers struggling to correctly and easily apply English law without full training in the English legal system.[139] The result of this difficulty could lead to unnecessarily complex cases that are difficult, expensive, and time-consuming.[140]

---

[136] Law Commission (England and Wales), above n 130, at 45 and 46.

[137] Ministry of Justice (UK) *Impact Assessment on proposed European Community Regulations on Matrimonial Property Regimes and the property consequences of registered partnerships* (15 April 2011) at [3.38].

[138] Resolution "Comments on the Proposal for a Council Regulation on Applicable Law in Matrimonial Matters" (30 November 2016) European Commission <www.ec.europa.eu> at 22.

[139] See Resolution, above n 134, at 22-24; Bar Council of England and Wales "Matrimonial Property Regimes and the Use of Applicable Law in Family Matters: An English Perspective" (paper presented to the Forum on Judicial Cooperation in Civil Matters, Brussels, December 2008) at [16], [17], [25] and [26].

[140] Clarkson, above n 115, at 430.

In response to this concern, it should be noted that while it is difficult to apply foreign law, it is commonplace in many other areas of the conflict of laws, such as the validity of marriage, succession, property and commercial law. It has never been suggested that a multilateral choice of law process in the conflict of laws should be abandoned because of the difficulty of applying foreign law. In fact, the need to prove foreign law is the ultimate reason of maintaining a system of conflict rules within any legal system's private law.[141] Additionally, applying foreign law in the field of relationship property distribution on separation is no more difficult than other areas of the conflict of laws. Most countries have a clear relationship property regime, whereby evidence can be obtained from experts in the normal way. Where foreign law is pleaded, it is not the role of an expert to just recite the textbook law on the matter, but to also give evidence as to how that law would actually be applied in foreign courts.[142] Further, foreign law would only be applied in cases where a party chose to plead it and was prepared to pay the extra costs.[143] If the parties do not plead a foreign law, then a case containing foreign elements will be treated as a purely domestic one.[144] For this reason, this dissertation does not consider the expense or difficulty of applying foreign law as a compelling reason to retain a unilateral choice of law rule for relationship property.

III Can Multilateralism Take into Account Public Policy Considerations?

As discussed in Part II, the public policy dimension of family law is a relevant consideration in deciding whether to adopt a unilateral or multilateral approach. Particularly, there is the risk that New Zealand courts could end up applying discriminatory relationship property regimes to parties connected to New Zealand. It is therefore necessary to assess whether, in changing to a multilateral approach, these concerns can be taken into account.

A Mandatory Rules of the Forum

As discussed in Chapter I, the multilateral approach provides an exception for the application of the *lex fori* where a statute expressly overrides the normal conflict of laws rules.[145] Mandatory rules have been described as "crystallised rules of public policy", because litigants cannot avoid the consequences of the mandatory provision if a case is brought in a domestic court.[146] It is therefore open to the New Zealand Parliament to include a section or paragraph in the Property (Relationships) Act declaring certain aspects of the Act, or other related Acts, to have overriding mandatory effect. For example, the principle contained in s 1N of the

[141] At 430.
[142] At 430.
[143] Ministry of Justice (UK) *Response to public consultation*, above n 132, at [25].
[144] Dicey, above n 3, at [9-003].
[145] At [1-053].
[146] At [1-061].

Property (Relationships) Act, that "men and women have equal status, and their equality should be maintained and enhanced" could be given mandatory effect by Parliament by including an additional paragraph in s 7 that reads:

> The principle of gender equality contained in section 1N(1)(a) of the Act is to have effect, notwithstanding the application of any foreign law to the spouses' or partners' relationship property under this section.

Alternatively, the subsection could preserve the wider rights contained in s 21 of the Human Rights Act 1993, such as freedom from discrimination based on sex, marital status, religious belief, disability, race, colour, age, or sexual orientation:[147]

> The rights contained in s 21 of the Human Rights Act 1993 are to have effect, notwithstanding the application of any foreign law to the spouses' or partners' relationship property under this section.

This has the effect of preserving the public policy dimension of the New Zealand relationship property scheme, such as the "fundamental world-view" expressed in the Property (Relationships) Act regarding gender equality. This is a more nuanced approach to public policy concerns, as it ensures that New Zealand public policy is only applied when a foreign law *will not* give effect to it, rather than the indiscriminate approach (when one of the parties is domiciled in New Zealand) to the application of New Zealand law under s 7. Instead, a multilateral choice of law rule can be coupled with an overriding mandatory rule to provide for a conflicts process that better reflects the parties' reasonable expectations as to the applicable law in most circumstances. At the same time, a mandatory rule ensures the New Zealand courts do not have to apply clearly discriminatory foreign laws to the parties' division of relationship property. Additionally, the mandatory rule could be extended beyond the examples provided above, to take into account other public policy considerations, such as the mandatory recognition of same-sex couples or de facto relationships. The pairing of a multilateral choice of law rule with an overriding mandatory rule exception is the approach taken by the European Union Regulation on relationship property, where the multilateral choice of law rule that governs relationship property is subject to the exception that "nothing in [the] Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."[148]

B Excluding Foreign Law

[147] Human Rights Act 1993, s 21.

[148] Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1, Art 30.

In addition, as discussed in Chapter I, New Zealand courts retain the ability to exclude the application of foreign relationship property regimes where the foreign law is incompatible with fundamental aspects of New Zealand public policy. In this way, the exception operates as a safety net to the multilateral choice of law rule, defining the outer limits of the tolerance for different laws that may be applicable under those rules.[149] New Zealand courts may therefore refuse to apply a relationship property regime that would "shock the conscience of a reasonable New Zealander, be contrary to a New Zealander's view of basic morality or a violate an essential principle of justice or moral interests."[150] The public policy exception is a common law rule, and therefore does not need to be embodied in statutory form to have effect, however the addition of the exception into the Property (Relationships) Act would have the benefit of additional clarity and certainty for litigating parties when pleading foreign law. The inclusion of a public policy exception would not be a new addition to the Act, which already provides for the court to refuse to recognise an express choice of law agreement made by the spouses or partners, if the application of the law of the other country would be "contrary to justice or public policy."[151]

Analysis of the case law that has considered the public policy exception in s 7A(3) reveals the content of foreign law that would likely be excluded if a similar public policy exception was included in s 7. For example, in *Bishop v Bishop,* a couple entered into an ante-nuptial contract pursuant to South African law. The South African law noted the initial value of the assets each party brought into the marriage: R5,000 by the applicant, and R100,000 by the respondent. On separation, the South African law would take into account the initial contributions by each party.[152] The New Zealand Family Court stated in obiter that the application of South African law, by virtue of the ante-nuptial contract, would be contrary to justice or public policy, as it would be contrary to the well-known principles of the (then) Matrimonial Property Act 1976, in particular, the emphasis on equal division of the matrimonial home.[153] South African law was again excluded by the New Zealand Family Court in *Pretorius v Pretorius,* as the effect of the law was to significantly disadvantage the applicant, and unjustly enrich the respondent, in comparison to the division available under New Zealand law. The South African agreement was "bad for public policy [and] contrary to justice" as it significantly advantaged one party over the other.[154] On the other hand, in *H v H*, the New Zealand Family Court held that it would not be contrary to public policy to uphold an agreement pursuant to South African Law, as it was a relationship of short duration and all the income obtained during the relationship was

[149] Alex Mills "The Dimensions of Public Policy in Private International Law" (2008) 4 Journal of Private International Law 201 at 202.
[150] *New Zealand Basing Ltd v Brown*, above n 34, at [67].
[151] Property (Relationships) Act, s 7A(3).
[152] *Bishop v Bishop* [2001] NZFLR 57 (FC) at 57.
[153] At 60.
[154] *Pretorius v Pretorius* [2000] NZFLR 72 at 77.

derived from the separate property of one of the parties.[155] Additionally, it has been suggested that a New Zealand court would decline to apply and enforce a foreign relationship property regime that resembled the former common law rule which vested the wife's property in her husband upon their marriage.[156]

In addition to the unequal distribution of relationship property, another category of foreign law that has been excluded under the general public policy exception relates to incapacities imposed on persons by foreign law. For example, if a foreign law does not allow one of the parties in a relationship a share of relationship property on separation due to religion or religious vocation, alien nationality, race, prior divorce, or prodigality,[157] the foreign law will be disregarded by New Zealand courts. Further, foreign laws that prevent parties from claiming a division of relationship property on the grounds of sex or sexual orientation are also likely to run contrary to fundamental New Zealand policy.[158] In this way, the multilateral approach provides for the application of the *lex fori* in exceptional circumstances, thereby protecting against the risk that discriminatory foreign relationship property regimes, or laws affecting such regimes, could be applied by New Zealand courts to parties connected to New Zealand.

The inclusion of an express public policy exception is the approach taken by the European Union, whereby the multilateral choice of law rule may be refused if its application is "manifestly incompatible with the public policy… of the forum."[159] However, this dissertation suggests that an approach similar to the wording in 7A(3) is adopted. Section 7A(3) does not include the terms "manifestly incompatible" or "fundamental", which suggests a lower threshold than the common law public policy exception, or the exception contained in the European Union regime. This may be more appropriate, given the wide range of public policy concerns surrounding the division of relationship property, some of which might not "shock the conscience of the reasonable New Zealander", but nevertheless would clash with the public policy principles contained in the Property (Relationships) Act, particularly the policy of equal sharing.[160] A suggested public policy exception could read:

---

[155] *H v H* [2004] NZFLR 1096 (FC) at 1104.

[156] *Family Law Service*, above n 8, at [11.68].

[157] See Dicey, above n 3, at [5-010].

[158] For example, the interpretation of marriage under s 2(1) of the Marriage Act 1955 means the union of two people, regardless of their sex, sexual orientation, or gender identity. Additionally, s 21 of the Human Rights Act prohibits discrimination on the grounds of sex or sexual orientation. While discrimination on the basis of age has been held to not be an affront to a fundamental human right, this was distinguished from grounds such as gender and ethnicity, as the New Zealand legislator has provided exceptions to the prohibition on age discrimination, such as for work involving national security: *New Zealand Basing Ltd v Brown*, above n 34, at [71], [73] and [74]; Human Rights Act, s 25(2).

[159] Regulation 2016/1103, above n 148, Art 31.

[160] Property (Relationships) Act, ss 1M(b) and 1N(b).

> The application of a provision of any foreign law specified by this Act may be refused only if such application is incompatible with New Zealand public policy.

IV A Recommendation for Reform

Chapter II has revealed that the current approach in s 7 can lead to New Zealand courts hearing a relationship property claim that is more closely connected to another forum, the application of New Zealand law where the parties would reasonably expect a foreign law to apply, and the inability of the court to take into account foreign immovable property. Further, the exceptions to the multilateral approach remedy any concerns that changing from a unilateral approach could lead to the application of discriminatory foreign laws to the relationship property of parties connected to New Zealand. In light of this analysis, this dissertation recommends that the unilateral rule in s 7 should be replaced with a multilateral choice of law rule. Chapter III will discuss the form that the multilateral choice of law rule should take.

Chapter 3: An Alternative Approach

This chapter looks into the appropriate connecting factor that should be used to determine the applicable law to govern a relationship property claim. The connecting factors that are evaluated are the parties' first common habitual residence, domicile, and nationality. After concluding that habitual residence is the most appropriate connecting factor, the chapter assesses the advantages of including foreign immovable property into the relationship property that a New Zealand court can take into account. Finally, the chapter suggests a prototype model of a new multilateral provision.

I Common Habitual Residence as a Connecting Factor

In transitioning from a unilateral choice of law rule that specifies *when* New Zealand law applies, to a multilateral choice of law rule that specifies *what* law applies, it is necessary to select an appropriate connecting factor to determine the applicable law. This dissertation suggests that New Zealand draws influence from the hierarchy of multilateral choice of law rules used in the European Union Regulation governing relationship property.[161] The connecting factors, in order of precedence, are the couple's first common habitual residence after the conclusion of the marriage, or failing that, the couple's common nationality at the time of the conclusion of the marriage, or failing that, the law that has the closest connection to the couple, taking into account all the circumstances at the time the marriage was entered into. The rules reflect a balance between predictability and legal certainty, and the life actually lived by the couple.[162]

The connecting factor of "habitual residence" has been praised for its emphasis on the factual examination of the parties' situation. Habitual residence does this by not seeking to define a person's legal headquarters, but instead finds the territory with which the party (or parties) are realistically and closely associated. This avoids both the complex legal requirements of domicile and nationality, and the disagreement amongst their proponents. Nationality, on the one hand, has been criticised for defeating the parties' reasonable expectations in a world of increasing mobility, as it is can only be changed with the formal consent of the state of new nationality. On the other hand, domicile has been described as rigid, artificial, unstable, and difficult to ascertain.[163] It is therefore suggested that neither domicile nor nationality are included as connecting factors in a multilateral choice of law rule for relationship property.

---

[161] Regulation 2016/1103, above n 148, Art 26.

[162] At L183/7.

[163] McLachlan "Reforming New Zealand's conflicts process", above n 1, at 452; Dicey, above n 3, at [6-167]-[6-170].

II Inclusion of Foreign Immovable property

As discussed in Chapter II, the exclusion of foreign immovable property under s 7(1) reflects the common law approach under the *Moçambique* rule, without also including the *in personam* exception. However, in light of the recent criticism of the *Moçambique* rule, it continues to exist in the common law on the basis that: "if any change in the law is to be made it should only be made after detailed and full investigation [and therefore] it must be left to Parliament to change the law."[164] Further, the continued existence of s 7(1) has been interpreted by the courts to be an implicit recognition by the legislature of the ongoing application and relevance of the *Moçambique* rule.[165] The courts have therefore left the job to Parliament to change the subject matter jurisdiction rules regarding foreign immovable property, and the transition from a unilateral choice of law rule to a multilateral choice of law rule provides a sensible opportunity to make this change. One commentator has noted that there is no reason in principle why a multilateral choice of law rule should not apply to both movable and immovable property, as immovable property will often be a couple's largest asset, and it is common for a couple to own a second home in a foreign country.[166] Again, if the Act did include foreign immovable property, it would remain open for a New Zealand court to apply the doctrine of *forum non conveniens* to cases where the relationship is more closely connected to another forum. This is the approach in the European Union, where the Regulation states that "the law applicable… shall apply to all assets falling under that regime, regardless of where the assets are located."[167] This has the advantage of both ensuring legal certainty and avoiding fragmentation of the applicable law to the parties' relationship property.[168]

III A Prototype of the Multilateral Section

While the particulars of the section will require Parliament to consider, for example, the type of mandatory rules that are to be preserved notwithstanding the application of foreign law, a suggested approach is as follows:

> **7 Applicable law in the absence of choice by the parties**
> (1) In the absence of a choice of law agreement pursuant to section 7A, the law applicable to the spouses' or partners' relationship property shall be the law of the country:

---

[164] *Burt v Yiannakis*, above n 46, at [53]; citing *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 (HL) at 541 per Viscount Dilhorne.
[165] At [54].
[166] Clarkson, above n 115, at 439 and 440.
[167] Regulation 2016/1103, above n 148, at L183/6.
[168] Art 21.

(a) of the spouses' or partners' first common habitual residence after the conclusion of the marriage, civil union, or de facto relationship; or, failing that

(b) which the spouses or partners jointly have the closest connection at the time of the conclusion of the marriage, civil union, or de facto relationship, taking into account all the circumstances.

(3) The principle of gender equality contained in section 1N(1)(a) of the Act is to have effect, notwithstanding the application of any foreign law to the spouses' or partners' relationship property under this section.

(4) The application of a provision of any foreign law specified by this Act may be refused only if such application is incompatible with New Zealand public policy.

The proposed rule reflects the advantages of the multilateral approach outlined in Chapter I, and takes into account the unilateralist concerns identified in Chapter II, particularly the apprehension of applying foreign laws to cases connected to New Zealand. First, it leads to the application of the law that the parties would reasonably expect to apply to the division of their relationship property. It also promotes internationalism, as the choice of law rule reflects the equality of legal systems, in that it can lead to the application of both domestic or foreign law under the same objective test. In this way, there is no particular incentive for parties to 'forum shop' for New Zealand law to apply to their relationship property, as the applicable law should be the same across any other legal system with a similar multilateral choice of law rule, such as the European Union. This promotes certainty for the parties, so that they can arrange their legal affairs knowing in advance what law will be applicable should the couple separate, and should reduce the costs of litigation. Additionally, the concern that replacing the current unilateral rule with a multilateral rule could lead to New Zealand courts applying undesirable foreign laws to the division of relationship property is dealt with under the exceptions to the multilateral approach. For example, where the applicable law is a foreign law, the New Zealand court must still apply the *lex fori* where there is an overriding mandatory rule, or, in exceptional circumstances, the New Zealand court will apply the *lex fori* where there is a foreign law that would run contrary to New Zealand public policy.

Conclusion

This dissertation recommends that New Zealand adopts a multilateral approach to the default choice of law rules governing relationship property. In a pluralistic world where there are a diverse range of relationship property regimes, it is vital to provide a conflict of laws system that allows international couples to arrange their legal affairs according to their reasonable expectations. A corollary of this is that, no matter where a relationship property claim is brought, the substantive law that is applied should be the same. This ensures legal certainty for the parties, and enhances international cooperation, as domestic substantive laws are accorded the same level of respect through the neutral application of the "habitual residence" connecting factor.

The conclusion that a multilateral approach is the best way to promote the interest of international couples was reached through three layers of argument. First, this dissertation analysed the theoretical foundations of the conflict of laws. The multilateral approach, which is the default approach in the common law, upholds the parties' reasonable expectations, ensures uniformity of outcome, removes an incentive to forum shop for a favourable law, and promotes predictability of the law in advance of litigation. In contrast, the unilateral approach can be used to protect domestic notions of public policy in cases that are also connected to foreign legal systems, give effect to the principle of sovereign independence, and facilitate the efficient and swift administration of the courts. However, crucially, the multilateral approach is not totally blind in its neutral allocation of the law. The multilateral approach provides for the application of the *lex fori* in cases that would otherwise be governed by foreign law where there are overriding mandatory rules of the forum, or the applicable foreign law would be contrary to public policy.

Building on the theoretical foundations to the conflict of laws, this dissertation then assessed the practical consequences of the unilateral approach to the division of relationship property in New Zealand. In particular, it was found that the doctrine of *forum non conveniens,* which would normally prevent the New Zealand court exercising jurisdiction in cases where there is a more appropriate forum to hear the dispute, is corrupted by the unilateral application of New Zealand law. Additionally, in cases where New Zealand is the appropriate forum, the unilateral approach can lead the New Zealand court to apply New Zealand law to the division of relationship property where the parties would have reasonably expected a foreign law to apply. Finally, the limited scope of the unilateral rule in s 7(1) whereby the court cannot take into account foreign immovable property when making an order is both conceptually unjustified and practically inefficient. While the retention of a unilateral approach may be justified by the legitimate concern that the application of foreign law could lead to discriminatory relationship property regimes being applied to parties with a connection to New Zealand, the multilateral approach is equally able to take this concern into account. First, it is open to Parliament to

specify mandatory rules that are to have effect regardless of the applicable law, such as the principle of gender equality. Second, if the application of a foreign law was considered by a New Zealand court to be contrary to New Zealand public policy, then the *lex fori* will be applied instead.

In concluding that the multilateral approach can take into account the concerns of abandoning the current unilateral provision, this dissertation recommended the connection factor of the couple's first common habitual residence at the conclusion of marriage, civil union, or de facto relationship. Habitual residence as a connecting factor is easy to ascertain, and best reflects the life actually lived by the couple. Additionally, it was recommended that the scope of the rule is expanded to include foreign immovable property, as the current exclusion of immovable property is based on the criticised *Moçambique* rule, and does not include the *in personam* exception to the common law rule.

In answer to the initial question of whether New Zealand law respects the diversity of family law systems around the world, and meets the reasonable expectations of individuals caught between those legal systems, this dissertation has shown that it does not. A sensible response is to enact a multilateral choice of law rule to better reflect the goals and purposes of the conflict of laws.

Bibliography

A Cases

1 New Zealand

Bishop v Bishop [2001] NZFLR 57 (FC).

Brown v New Zealand Basing Ltd [2017] NZSC 12.

Burt v Yiannakis [2015] NZHC 1174.

Elwin v O'Regan [1971] NZLR 1124 (SC).

Enright v Fox (1989) 5 NZFLR 455 (HC).

Gilmore v Gilmore [1993] NZFLR 561 (HC).

H v H [2004] NZFLR 1096 (FC).

Humphries v Humphries [1992] NZFLR 18 (FC).

McGougan v DePuy International Ltd [2016] NZHC 2551.

New Zealand Basing Ltd v Brown [2016] NZCA 525.

Pretorius v Pretorius [2000] NZFLR 72 (FC).

Reeves v One World Challenge LLC [2006] 2 NZLR 184 (CA).

Samarawickrema v Samarawickrema [1995] 1 NZLR 14 (CA).

Schumacher v Summergrove Estates Ltd [2013] NZHC 1387.

Schumacher v Summergrove Estates Ltd [2014] NZCA 412.

Standil v Standil [2011] NZFLR 554 (HC).

Walker v Walker [1983] NZLR 560 (CA).

Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd [2010] NZCA 502.

2 England and Wales

British South Africa Co v Companhia de Mocambique [1893] AC 602 (HL).

Doucet v Geoghegan (1978) 9 Ch D 441 (CA).

Hesperides Hotels Ltd v Muftizade [1979] AC 508 (HL).

Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5) [2002] UKHL 19.

Mohamed v Knott [1969] 1 QB 1 (CA).

Moore v Moore [2007] EWCA Civ 361.

Oppenheimer v Cattermole [1976] AC 249 (HL).

Re Egerton's Will Trusts [1956] Ch 593.

Spiliada Maritime Corporation v Cansulex Ltd [1986] All ER 843 (HL).

3 United States

Loucks v Standard Oil Co of New York 224 NY 99 (1918).

B Legislation

1 New Zealand

Credit Contracts and Consumer Finance Act 2003.

Domicile Act 1976.

Fair Trading Act 1986.

Family Proceedings Act 1980.

High Court Rules.

Human Rights Act 1993.

Marriage Act 1955.

Matrimonial Property Act 1976.

Property (Relationships) Act 1976.

2 England and Wales

Matrimonial Causes Act 1973.

3 European Union

Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

C Books and Chapters in Books

A Briggs *The Conflict of Laws* (3rd ed, Oxford University Press, Oxford, 2013).

David Cavers *The Choice-of-Law Process* (The University of Michigan Press, Ann Arbor, 1965).

Lawrence Collins and others (eds) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012).

Brainerd Currie *Selected Essays on the Conflict of Laws* (Duke University Press, Durham, 1963).

M Davies, A Bell and P Brereton *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis, Australia, 2014).

J Fawcett and J Carruthers *Cheshire, North & Fawcett on Private International Law* (14th ed, Oxford University Press, Oxford, 2008).

Christopher Forsyth *Private International Law* (4th ed, Juta, Lansdowne, 2003).

Trevor C Hartley "Matrimonial (Marital) Property Rights in Conflict of Laws: A Reconsideration" in James Fawcett (ed) *Reform and Development of Private International Law: Essays in Honour of Sir Peter Smith* (Oxford University Press, New York, 2002) 215.

Friedrich Juenger *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers, Dordrecht, 1993).

Friedrich Karl von Savigny *Treatise on the Conflict of Laws* (2nd ed Guthrie Translation, T & T Clark, Edinburgh, 1880).

Symeon C Symeonides "Accommodative Unilateralism as a Starting Premise in Choice of Law" in Hans-Eric Rasmussen-Bonne (ed) *Balancing of Interests: Liber Amicorum Peter Hay* (Verlag Recht ung Wirtschaft GmbH, Frankfurt am Main, 2005) 417.

Symeon C Symeonides *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press, New York, 2014).

Symeon C Symeonides *Private International Law at the End of the 20th Century: Progress or Regress?* (Kluwer Law International, London, 2000).

John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, 1971).

Giesela Rühl "Unilateralism" in Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds) *Max Planck Encyclopedia of European Private Law* (Oxford University Press, New York, 2012) 1735.

D Journal Articles

Theodorus De Boer "Living Apart Together: The Relationship between Public and Private International Law" (2010) NILR 183.

CMV Clarkson "Matrimonial Property on Divorce: All Change in Europe" (2008) 4 Journal of Private International Law 421.

CMV Clarkson “Matrimonial property: the proposed EU regulation” (2011) 17 Trust & Trustees 846.

Christopher Forsyth “The Eclipse of Private International Law Principle – The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era” (2005) 1 Journal of Private International Law 94.

Maebh Harding “The Harmonisation of Private International Law in Europe: Taking the Character out of Family Law?” (2011) 7(1) Journal of Private International Law 203.

Gerhard Kegel “The Crisis of the Conflict of Laws” (1964) 112 Recueil Des Cours 95.

Mary Keyes “Statutes, Choice of Law, and the Role of Forum Choice” (2008) 4(1) Journal of Private International Law 1.

Larry Kramer “Rethinking Choice of Law” (1990) 90 Columbia Law Review 277.

Lord Mance “The Future of Private International Law” (2005) 1(2) Journal of Private International Law 185.

F Mann “Statutes and the Conflict of Laws” (1972-1973) 46 British Year Book of International Law 117.

Campbell McLachlan "Matrimonial Property and the Conflict of Laws" (1986) 12 New Zealand Universities Law Review 66.

Campbell McLachlan “Reforming New Zealand’s conflicts process: the case for internationalisation” (1984) 14 Victoria University of Wellington Law Review 443.

Maria Marella “Critical Family law” (2011) 19 American University Journal of Gender, Social Policy & the Law 721.

Michael Martinek “Codification of Private International Law – A Comparative Analysis of the German and Swiss Experience” (2002) Journal of South African Law 234.

Alex Mills “The Dimensions of Public Policy in Private International Law” (2008) 4 Journal of Private International Law 201.

John Morris “The Choice of Law Clause in Statutes” (1946) 62 LQR 170.

Prosser “Interstate Publication” (1953) 15 Michigan Law Review 959.

Giesela Rühl “Methods and Approaches in Choice of Law: An Economic Perspective” (2006) 24 Berkeley Journal of International Law 801.

Máire Ní Shúilleabháin “Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective” (2010) 59 ICLQ 1021.

Aaron Twerski “Enlightened Territorialism and Professor Cavers: The Pennsylvania Method” (1970) 9 Duquesne Law Review 373.

J Unger “Use and Abuse of Statutes in the Conflict of Laws” (1967) 83 LQR 427.

E Parliamentary and Government Materials

1 United Kingdom

Law Commission *Family Law: Report on Jurisdiction in Matrimonial Causes* (LC48 1972).

Ministry of Justice *European Commission proposed Regulations on matrimonial property regimes and the property consequences of registered partnerships: Response to public consultation* (28 November 2011.

Ministry of Justice *Impact Assessment on proposed European Community Regulations on Matrimonial Property Regimes and the property consequences of registered partnerships* (15 April 2011).

Ministry of Justice *Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals in these areas?* (15 April 2011).

2 European Union

European Commission *Green Paper on Conflict of Laws in Matters concerning Matrimonial Property Regimes, including the Question of Jurisdiction and Mutual Recognition* COM (2006) 400 final SEC (2006) 952.

European Commission *Summary of Replies to the Green Paper on the Conflict of Laws in Matters concerning Matrimonial Property Regimes, including the Questions of Jurisdiction and Mutual Recognition* (5 February 2008).

European Commission *Proposal for a Council Regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes* COM (2011) 126 final.

F Reports

Law Commission (England) *Family Law: Jurisdiction in Matrimonial Causes (other than Nullity)* (Working Paper No 28, April 1970).

G Looseleaf Texts

Family Law Service (online looseleaf ed, LexisNexis).

Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis).

H Other Resources

Bar Council of England and Wales "Matrimonial Property Regimes and the Use of Applicable Law in Family Matters: An English Perspective" (paper presented to the Forum on Judicial Cooperation in Civil Matters, Brussels, December 2008).

David Goddard and Campbell McLachlan "Private International Law: litigating in the trans-Tasman context and beyond" (seminar presented to New Zealand Law Society, August 2012).

David Goddard "Conflict of Laws: The International Element in Commerce and Litigation" (seminar presented to the New Zealand Law Society, November 1991).

Koskenniemi "Nationalism, Universalism, Empire – International Law in 1871 and 1919 (paper presented to Whose International Community? Universalism and the Legacies of Empire, New York, April 2005).

Resolution "Comments on the Proposal for a Council Regulation on Applicable Law in Matrimonial Matters" (30 November 2016) European Commission <www.ec.europa.eu>.

J Treaties

United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (signed 11 April 1980, entered into force 1 January 1988).

K Encyclopaedias

Laws of New Zealand Conflict of Laws: Choice of Law (online ed).