Interfering with Choice of Law: The Employment Relations Act 2000 as an Overriding Mandatory Rule

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Introduction

As globalisation progresses, the employment relationship has become more complicated. People may be employed by a New Zealand employer, but carry out their work either partially or entirely overseas. This can be in one specific country, in multiple different countries, or potentially no country at all if they are a peripatetic employee, such as an airline pilot, or a crew member on a ship. Conversely, a person may be working in New Zealand, but be employed by an overseas employer. The issue that arises in these circumstances is determining what law should apply to the employment relationship, if problems arise between the employee and employer. Thus, these new employment relationships give rise to a key legal issue for New Zealand: when should the Employment Relations Act 2000 apply to an employee? This question was partially answered in a recent Employment Court decision, *Brown v New Zealand Basing Ltd of Hong Kong*,[1] where the Court held that the Employment Relations Act 2000 was an overriding mandatory rule. In light of that, this dissertation will consider overriding mandatory rules in an employment context, so as to determine whether the Employment Relations Act 2000 should be an overriding mandatory rule.

The first chapter will explain what an overriding mandatory rule is, and the criteria that the courts used to rely on in the past to determine whether a statute was an overriding mandatory rule. It will then consider the approach that the courts currently use to determine whether a statute can be an overriding mandatory; and the method they apply to decide whether an overriding mandatory rule can apply to a particular plaintiff or not. Finally, it will examine the consequences of applying this approach, and conclude that a different approach is necessary.

The second chapter will lay out a new approach that could be used to determine whether a statute is an overriding mandatory rule. It will apply this approach to the Employment Relations Act 2000 to establish whether the entire Act, or parts of it, can be treated as an overriding mandatory rule.

The third chapter will consider how the new approach will affect interested groups, namely employees and employers, countries, and courts, and if it can balance their interests sufficiently.

[1] *Brown v New Zealand Basing Ltd of Hong Kong* [2014] NZEmpC 229.

I will conclude that the new approach appropriately balances the needs of all the interested parties, whilst still providing more clarity and certainty than the current approach, which should thus be abandoned.

Chapter I: The Status Quo

A. Overriding Mandatory Rules – What are They?

In *Brown v New Zealand Basing Ltd of Hong Kong* two pilots faced dismissal upon turning 55.[2] This was because their contracts expressly stated that they were governed by Hong Kong law,[3] which "provided for retirement at age 55".[4] The pilots' argument was that New Zealand law should apply, specifically the Employment Relations Act 2000, and that the proposed dismissals were consequently unlawful, as the Employment Relations Act 2000 prohibits age discrimination.[5] Corkill J, in the Employment Court, held that the Employment Relations Act 2000 was an overriding mandatory rule, and accordingly applied it to the employment relationship problem before him, which resulted in the proposed dismissals being unlawful.[6] This decision caused him to overrule the parties' express choice of law, namely that the contract should be governed by Hong Kong law. In order to understand the effects of this decision it is necessary to first consider what an overriding mandatory rule is and when it applies.

At its most basic level an overriding mandatory rule can be described as a statute or provision "which must be applied regardless of the normal rules of the conflict of laws, because the statute says so".[7] This definition is outlined in *Dicey, Morris and Collins on The Conflicts of Law* (*Dicey*),[8] and was relied on by Palmer J in *Clifford v Rentokil Ltd (NZ).*[9] It was also referenced by Corkill J in *Brown v New Zealand Basing Ltd of Hong Kong.* However, the problem with this definition is that one needs to determine when a statute "says" that it is an overriding mandatory rule. Some statutes will "expressly state" that they "are to have an overriding mandatory effect";[10] and such cases are easily dealt with, as the court can simply apply the statute and need not consider the

[2] At [58].
[3] At [23].
[4] At [8].
[5] At [59].
[6] At [100]-[101].
[7] At [92].
[8] Lord Collins of Mapesbury (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at 1.053.
[9] *Clifford v Rentokil Ltd (NZ)* CEC 18/95, 5 May 1995.
[10] Louise Merrett *Employment Contracts in Private International Law* (Oxford University Press, New York, 2011) at 7.14.

matter any further. An example of this is s 137(1)(b) of the Credit Consumer Finance Act 2003, which states:

> This Act applies to a credit contract, guarantee, lease, or buy-back transaction if the contract, guarantee, lease, or transaction would be governed by the law of New Zealand but for a choice of law provision in the contract, guarantee, lease, or transaction.

Another example is s 204 of the Employment Rights Act 1996 (UK), which states:

> For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.

However, it is much more common for a statute to be silent as to its status, and in such cases the court has to determine the status of the statute. The question then arises, how are courts to do this?

The concept of an overriding mandatory rule was defined by Friedrich Karl von Savigny, the "father" of the "classical multilateral system of conflict of laws".[11] According to him, an overriding mandatory rule had to reflect a "public", rather than a private, interest.[12] He saw this as including laws which protected "moral" values, or related to "politics, police or political economy".[13] Thus, when a statute did not expressly state that it was an overriding mandatory rule, the court was able to determine whether it was one by deciding whether it fit into one of these narrow categories. If it did, it was held to be an overriding mandatory rule. However, over time, "the notion of public interest has expanded" to the point that rules that protect the "interests" of "private citizens", such as employment and consumer laws, are often classified as overriding mandatory rules. [14] This expanded definition of public interest has caused a problem for the courts. This is because courts are now faced with the reality that most laws could be viewed as protecting a public interest, and

[11] Peter Nygh *Autonomy in International Contacts* (Oxford University Press, New York, 1999) at 199.
[12] Friedrich Karl von Savigny *Treatise on the Conflict of Laws* (2nd ed Guthrie Translation, T & T Clark, Edinburgh, 1880) at 78.
[13] At 78.
[14] Nygh, above n 11, at 199.

thus as overriding mandatory rules,[15] as naturally Parliament only legislates on matters that it thinks are important for society.[16]

B. Narrowing the Concept of Public Interest

The best way for the courts to solve this issue would be to, once again, narrow the meaning of public interest. Chapter II will consider how this could be achieved. This approach is appropriate as overriding mandatory rules should be seen as the "exception".[17] The reason for this is that they override, and therefore encroach on, the ordinary rules of the conflict of laws system, which serve many important purposes. The conflict of laws system relies on choice of law rules to determine the applicable law. Courts will characterise the claim before them, and will subsequently choose the choice of law rule, or "connecting factor", which is associated with that issue.[18] The choice of law rule will indicate which country's law is applicable.[19] The claim will then be governed by the law of that country, including all its statutes. For example, when a case involving an employment relationship arises, the issue will ordinarily be characterised as contractual, as employment relationships are founded in contracts. The common law choice of law rule that is connected with contract issues is the "Proper Law" rule.[20] The Proper Law is the law that the parties have intended to apply.[21] It can either be based on an express choice, or if there is no express choice, the intention will be ascertained "from the terms of the contract and the relevant surrounding circumstances".[22] If the intention cannot be ascertained from the contract and the surrounding circumstances, the law of the country that has the "closest and most real connection" to the contract will apply.[23] This "choice of law" approach has many benefits. It ensures decisional uniformity,[24] certainty and predictability[25], that the reasonable expectations of parties will be met,[26] and party autonomy.[27]

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[15] At 204.
[16] At 203.
[17] Dicey, above n 8, at 1.053.
[18] *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 (CA) at 391.
[19] At 392.
[20] Dicey, above n 8, at 32.006.
[21] *Vita Food Products Inc v Unus Shipping Co Ltd (in Liquidation)* [1939] AC 277 (PC) at 290.
[22] At 290.
[23] *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab)* [1982] 1 WLR 961 (HL) at 967.
[24] Mary Keyes "Statutes, Choice of Law, and the Role of Forum Choice" (2008) 4 J Priv Int L1 at 13.
[25] At 14.
[26] At 14.
[27] At 14.

These benefits do not occur if the law of the forum is continually held to supersede the normal choice of law rules. Thus, although it is acceptable to deem some laws of the forum to be overriding mandatory rules when they are a matter of public interest; this type of rule should only be held to exist in very rare situations, which is why narrowing the scope of public interest is appropriate.

C. The Statutist Approach

Unfortunately, rather than simply narrowing the public interest definition, the courts have taken a more uncertain approach to determining whether a statute is an overriding mandatory rule. Namely, courts have started to look for additional indications that a statute should be held to be an overriding mandatory rule. Thus, it has been noted by some that "it will be a matter of construction as to whether a rule is intended by the country involved to have an overriding mandatory effect".[28] This approach fits into a concept within conflict of laws, known as 'statutism', which maintains that "statutory interpretation should determine whether a statute applies to foreign facts".[29] There are two issues with using the statutist approach to determine overriding mandatory rules. Firstly, the particular features that are relied upon as indications that a rule is an overriding mandatory rule are problematic. Secondly, and more importantly, statutism leads to forum bias.

1. Statutory Features as an Indication: Domestic Mandatory Rules

A feature that courts sometimes rely on to hold that an Act, or a section, is an overriding mandatory rule is "absolute laws",[30] also referred to as "domestic mandatory laws".[31] These are rules that are mandatory, in the sense that they cannot be contracted out of, but which apply "only if they form part of the governing law".[32] Thus, domestic mandatory laws can be avoided, or circumnavigated, by inserting a choice of law clause into a contract, which states that the contract is governed by the law of another country. In contrast, overriding mandatory rules have to be applied regardless of any choice of law clause.[33] However, courts have begun to posit that a statute containing a

[28] Merrett, above n 10, at 7.15.
[29] Maria Hook "The 'Statutist Trap' and Subject-Matter Jurisdiction" J Priv Int L (forthcoming).
[30] Nygh, above n 11, at 200.
[31] Keyes, above n 24, at 6.
[32] At 6.
[33] At 6.

domestic mandatory rule is a sufficient reason to hold that the statute is an overriding mandatory rule.

This approach was used in *Brown v New Zealand Basing Ltd of Hong Kong.* Corkill J noted that s 238 of the Employment Relations Act 2000 states that: "The provisions of this Act have effect despite any provision to the contrary in any contract or agreement." He concluded: "In my view the contracting out provision is pivotal to the threshold issue of whether the domestic law has overriding effect."[34] He justified this approach by referring to *Mazengarb's Employment Law (Mazengarb),*[35] which states that s 238 exists to ensure that employees do not "surrender any of their employment protection rights under the legislation".[36] He also noted that if s 238 was not an overriding mandatory rule then "Parliament's intention…would be frustrated".[37]

A similar approach was taken in a recent South African case, *Lloyds & others v Classic Sailing*.[38] Lewis JA, eventually applied the Act in issue on the basis that the Admiralty Jurisdiction Regulation Act 105 1983 (South Africa) required all maritime claims to be governed by South African law, and thus was essentially an express overriding mandatory rule.[39] However, she also made the obiter comment, that when a court is determining whether an Act that is silent as to its overriding status can be held to be an overriding mandatory rule, the court should consider whether the party "can waive the application of the provisions".[40] She concluded that if a party is unable to do so, "it should not be open to the parties to contract out of the application of the provisions of that statute by choosing another system of law to govern their contract".[41] In other words, the statute should be held to be an overriding mandatory rule.

One can understand why courts take this approach. They see a section which is supposed to prevent people from contracting out of the statute, and they want to give effect to Parliament's intention. It is interesting to note that in both *Brown v New Zealand Basing Ltd of Hong Kong* and *Lloyds &*

[34] *Brown v New Zealand Basing Ltd of Hong Kong,* above n 1, at [96].
[35] *Mazengarb's Employment Law (NZ)* (online looseleaf ed, LexisNexis).
[36] *Brown v New Zealand Basing Ltd of Hong Kong,* above n 1, at [98].
[37] At [100].
[38] *Lloyds & others v Classic Sailing* (250/09) [2010] ZASCA 89 (31 May 2010).
[39] At [27].
[40] At [23].
[41] At [24].

others v Classic Sailing the statute had the effect of overriding the law that the parties had themselves chosen to govern the contract. Thus, the court was not overriding a typical 'set' choice of law rule, which is usually concerned with identifying and applying the law with the closest connection. Consequently, it could be argued that the court's eagerness to override the choice of law reflected their unease with parties being able to override domestic mandatory rules, simply by choosing the law of another country to govern their contract. However, if there is an issue with party autonomy (parties being able to choose the law that governs their contract), the response should not be to simply use overriding mandatory rules as a limiting tool. Rather, it may then be necessary to consider whether the party autonomy aspect of the Proper Law is an appropriate choice of law rule for contracts, or if it should be replaced by a more defined choice of law rule.

This discussion is outside the scope of this dissertation. However, for current purposes, it is sufficient to note that when Savigny formulated the concept of overriding mandatory rules, he acknowledged that not all "absolute laws [domestic mandatory rules]" would be "classed among the exceptional cases [overriding mandatory rules]".[42] This is due to the key distinction that was referred to above, namely that domestic mandatory rules could be "replaced with the rules of another legal system through submission by the parties to that system", whereas overriding mandatory rules could not.[43] Thus, domestic mandatory rules were never intended to be automatically deemed to be overriding mandatory rules. This makes sense, as it reflects the fact that overriding mandatory rules should be the exception, not the norm, because they interfere with the benefits of the choice of law system. Consequently, deeming all domestic mandatory rules to be overriding mandatory rules would be unreasonable and "parochial",[44] as it would exponentially increase the number of overriding mandatory rules of each country. Also, if courts just continually apply the law of the forum, the conflict of laws system could become redundant.

However, although a rule being mandatory in a domestic sense is "not a sufficient condition" for it to be an overriding mandatory rule, it "is a necessary condition for a statute being mandatory at

[42] Savigny, above n 12, at 77-78.
[43] Nygh, above n 11, at 199.
[44] Jason Mitchell "To Override, and When? A Comparative Evaluation of the Doctrine of Mandatory Rules in South African Private International Law" (2013) 130 SALJ 757 at 768.

the international level".[45] Thus, it could be argued, that a rule being mandatory in a domestic sense is an indication that it could potentially be an overriding mandatory rule; as it is a sign that the rule is seen as particularly important, which is why it is given the extra 'protection'. However, this will just unnecessarily complicate the law. Firstly, there is a lack of logical connection. Just because Parliament sees a certain rule as incredibly important in a New Zealand context, does not mean that the court can assume that Parliament will also see that certain rule as important to the extent that it should be imposed in an international context. Secondly, the practical issue is that often domestic mandatory rules will contain exceptions. For example, s 5C(2) of the Fair Trading Act 1986 states: "A provision of an agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable." Consequently, s 5C(2) is a domestic mandatory rule. However, s 5(D) subsequently limits this, by stating that parties that are "in trade" can contract out of the Act,[46] as long as they fulfil the requirements laid out in s 3.[47] Similarly, s 43 of the Consumer Guarantees Act 1993 states that: "The provisions of this Act shall have effect notwithstanding any provision to the contrary in any agreement." However, this is qualified by the preceding sentence: "Subject to this section and to sections 40, 41, and 43A", each of which contain circumstances in which a party is entitled to contract out of the Act. In such circumstances, how should the court view the domestic mandatory rule? Are the exceptions an indication that Parliament sees the rule as less important, and therefore a sign that the statute is not an overriding mandatory rule? Or, should it still be a factor that indicates that the statute could potentially be an overriding mandatory rule, but a less weighty one? The issue with this approach is that it leads to uncertainty. The court is in the position of playing a guessing game, trying to ascertain whether Parliament intended the rule to be an overriding mandatory rule, by considering a factor that actually has very little to do with the matter.

2. Statutory Features as an Indication: Territorial Scope

Another feature courts commonly rely on to hold that a statute is an overriding mandatory rule is a "provision which governs [the] territorial scope" of a statute.[48] The reasoning behind this is that

[45] At 768.
[46] Section 5D(3).
[47] Section 5D(1).
[48] Merrett, above n 10, at 7.15.

if a statute "expressly" states that it applies to people and events in geographical location 'X', "a court may infer that 'the legislator had in its contemplation the international effect of the statute so that it applies whenever the specified connection with [geographical location 'X'] is present'".[49] However, provisions that state that an Act applies only to particular situations or people are typically referred to as "self-limiting provisions".[50] Thus, they are actually used to "limit the application of the statute" to situations and people that have a sufficient connection "with the country whose legislature enacted the statute",[51] rather than as an indication that the statute should apply to foreign situations and people just because the specified connection happens to be present. For example, imagine that the Employment Relations Act 2000 stated that the Act applied to those who 'ordinarily work within New Zealand'. The primary meaning of that statement is that the Employment Relations Act 2000 does not apply to New Zealanders who ordinarily work overseas, even if New Zealand law is the law applicable to the employment contract. Thus, the intent of that phrase would seem to be to exclude, rather than to include. Nevertheless, it is possible to argue that such a statement also contains the inference that if someone ordinarily worked in New Zealand, and their contract was governed by foreign applicable law, that the Employment Relations Act 2000 would apply regardless; thus, giving it the status of an overriding mandatory rule. However, the issue with a provision governing territorial scope determining whether a statute is an overriding mandatory rule, is that an important decision is being made on the basis of an inference that may, or may not, have been meant to be drawn. Since overriding mandatory rules are supposed to be an exception, deeming a rule to be an overriding mandatory rule on the basis of a mere inference is too risky and steeped in uncertainty. Thus, when a statute specifically states that it applies to particular people or situations, the courts should see this as an indication that Parliament is confining the Act to those particular circumstances; not as an indication that the Act should have the effect of overriding foreign applicable law.

3. Statutism and Forum Bias

[49] At 7.15.
[50] Dicey, above n 8, at 1.049.
[51] At 1.049.

However, even if domestic mandatory rules and territorial scope provisions could reliably determine whether a statute is an overriding mandatory rule, there is still a problem with courts focusing only on the statute itself, and Parliament's intention, to determine whether it should be an overriding mandatory rule. Such an approach places too much emphasis on matters of the forum, and leads to forum bias. The fact that a statute-centred approach leads to forum bias is evident when courts rely on statutism to determine whether a statute applies to a plaintiff.

4. Statutism and Territorial Scope

Part 2 discussed how courts use express territorial scope provisions as an indication that a statute is an overriding mandatory rule. However, this section considers how courts use statutism to determine whether a statute applies to the plaintiff when there is a *lack* of an express territorial scope. The purpose of this consideration is twofold. Firstly, to demonstrate how courts using statutism to determine whether a statute applies to a plaintiff has led to forum bias, as courts are most likely to apply their own country's law. Secondly, to suggest that the same result will occur if courts use statutism to determine whether a statute should be an overriding mandatory rule.

Courts rely on the absence of an express territorial scope to determine whether a statute can apply to a plaintiff for both 'normal' generally worded statutes,[52] and overriding mandatory rule statutes. This is because, even if a statute is held to be an overriding mandatory rule, "the plaintiff will still have to satisfy any limits provided for in the statute", including a "territorial limit".[53] *Dicey* has noted that: "If a statute is expressed in general terms without any self-limiting provisions, courts are sometimes willing to read such provisions into it under the guise of interpreting that statute."[54] In other words, they will use statutism to determine whether the statute applies to the plaintiff.
This approach was taken in the English case *Lawson v Serco*,[55] which was followed in *Brown v New Zealand Basing Ltd of Hong Kong.* In *Lawson v Serco,* Lord Hoffman noted that the Act "contain[ed]" no geographic limits".[56] Consequently, he held that it was appropriate to imply

[52] Keyes, above n 24, at 17.
[53] Merrett, above n 10, at 7.50.
[54] Dicey, above n 8, at 1.052.
[55] *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 at [1].
[56] At [1].

"some territorial limits", as it was "inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain".[57] He then established three categories in which there would be a sufficient connection between a plaintiff and England, such that the Employee Rights Act 1996 (UK) would apply to them. These categories were, firstly, "an employee who was working in Great Britain".[58] Secondly, when a peripatetic employee was "based" in Great Britain.[59] Thirdly, expatriate employees that were either "posted abroad by a British employer for the purposes of a business carried on in Great Britain",[60] or "who [are] operating within…an extra-territorial British enclave in a foreign country".[61] In *Brown v New Zealand Basing Ltd of Hong Kong,* Corkill J similarly noted that the Employment Relations Act 2000 "has no express territorial limits",[62] and that thus, like in *Lawson v Serco,* the Court was left to "imply whatever geographical limitations [seem] appropriate to the substantive right".[63] Corkill J then concluded that the "base test" was also the appropriate test for territorial scope in relation to peripatetic employees.[64]

As seen in the above cases, the justification that is often given for this approach is the "presumption against extraterritoriality".[65] Namely, that a generally worded statute should not be seen as applying to the whole world, as this would be contrary to comity between countries.[66] After providing this justification for implying a territorial scope, the courts then try to determine what the parliamentary purpose is, and use this to imply the territorial limits they believe Parliament intended to exist.

However, the problem with this approach is that "[P]arliament almost certainly gave no consideration to the scope of application of the statute".[67] Arguably, if Parliament had given some thought to the scope of the statute, and had viewed it as important, they would have included a

[57] At [1].
[58] At [25].
[59] At [31].
[60] At [38].
[61] At [39].
[62] *Brown v New Zealand Basing Ltd of Hong Kong*, above n 1, at [77].
[63] At [77].
[64] At [82].
[65] Keyes, above n 24, at 18.
[66] At 18.
[67] At 18.

provision as to the territorial scope of the statute. Thus, when the courts are 'interpreting' the statute, in order to determine the territorial scope, the reality is that they are engaging in a "post hoc exercise in which they are likely to be subconsciously inclined to apply forum legislation".[68] This forum bias is, arguably, even more overt when the court is confronted with an overriding mandatory rule. Since overriding mandatory rules deal with issues that the public have an interest in, courts are likely to be even more protective about the lex fori. This can be seen in *Lawson v Serco* and *Brown v New Zealand Basing Ltd of Hong Kong,* as both courts were quick to create territorial scopes that ensured that the lex fori, English law and New Zealand law respectively, applied. These sorts of results have led to *Dicey* calling statutism "artificial" and "dangerous".[69] Such consequences suggest that statutism is an inappropriate method, as the result is essentially predetermined, since the implied territorial scope is usually such that the law of the forum applies.

5. *Avoiding Statutism in relation to Overriding Mandatory Rules*

Since courts using statutism to determine the territorial scope results in forum bias, it is likely that the same result will occur if courts use statutism to determine whether a statute is an overriding mandatory rule. This is because, just as Parliament generally does not consider the territorial scope of a statute, it usually does not consider whether a statute is an overriding mandatory rule or not. Therefore, no features within the statute can be seen as intentionally indicating that it should be an overriding mandatory rule. Thus, courts are again engaging in an artificial process, where they are looking for reasons to hold that a statute is an overriding mandatory rule, particularly as these rules are ones that the New Zealand public has an interest in. Peter Nygh refers to this tendency, noting that overriding mandatory rules "provid[e] a ready excuse for national courts to protect 'their own'".[70] This means that a statute is more likely to be held to be an overriding mandatory rule than not, thus leading to forum bias.

Hence, there is a very high chance that the statutist approach will result in overriding mandatory rules being applied to a case, as there are two stages where forum bias can creep in. Firstly, when

[68] At 18.
[69] Dicey, above n 8, at 1.040.
[70] Nygh, above n 11, at 211.

the court is deciding whether a rule is an overriding mandatory rule. Secondly, when they are deciding what the territorial scope of the overriding mandatory rule will be.

The forum bias can be removed at the first step, if a statute reflecting a public interest is accepted as a sufficient basis to deem it an overriding mandatory rule; since then statutism does not need to be used. This will only be possible if the definition of "public interest" is narrowed, which will be discussed in Chapter II. However, removing it at the second step is more complicated. Conflict of laws scholars are in complete agreement that when a statute does not state when it applies, it is the purpose of conflict of laws to limit its application,[71] which occurs through the choice of law rules. Thus, it is unnecessary for courts to imply territorial limits into statutes which are not overriding mandatory rules, as such statutes are already limited by the conflict of laws system. However, overriding mandatory rules are not limited in this way, because they are the one exception to choice of law rules, as they override them.[72] Thus, there are no limitations on overriding mandatory rules. This means that an overriding mandatory rule can virtually be seen as applying to every single situation, regardless of which countries the parties are from, and which country the claim arose in. Thus, it is necessary to consider how we can limit the application of overriding mandatory rules, without doing so in a way that prioritises the forum. Therefore, in my next chapter I will consider two things. Firstly, how the narrower public interest approach would work, and how it would apply to the Employment Relations Act 2000. Secondly, what kind of connection between the plaintiff and New Zealand should be required for the Employment Relations Act 2000 to apply; and how it could be determined in a way that would avoid, or at least reduce, forum bias.

[71] Keyes, above n 24, at 11-12.
[72] Dicey, above n 8, at 1.053.

Chapter II: A New Approach

A. The Purpose of Overriding Mandatory Rules

Chapter I has established that using a wide public interest approach to determine whether a statute is an overriding mandatory rule is problematic, as it results in courts relying on statutism. Thus, it is now necessary to determine the extent to which the public interest approach should be narrowed. In order to do this, it is essential to consider the purpose of overriding mandatory rules. Although overriding mandatory rules are an exception, they are an important one, as they serve two purposes that cannot be achieved by the ordinary conflict of laws system.

1. Defending State Interests

Firstly, overriding mandatory rules, "defend…the interest of the state itself".[73] Focusing on the interests of the "state", rather than the "public", is helpful. It highlights the fact that the rule does not just have to be beneficial to the public to be an overriding mandatory rule, rather it must be vital to the governance of the country. Examples of "state interests" include: [74]

> The regulation and control of the market and the national economy (antitrust laws, import and export restrictions), the protection of national interest in landed property (prohibition of acquiring landed property by foreigners, protection of farmland), the protection of monetary resources (safeguard of the balance of payment), the control of the securities market (regulations for takeovers, duty of disclosing of controlling participations), the protection of the environment or of labour (limitation of working hours).

This approach limits the number of statutes that will be held to be overriding mandatory rules, but also ensures that foreign laws are not allowed to impact on the New Zealand economy or political system. This is important, as a government needs to be able to run its country in accordance with the policies it was voted in on, and this could be affected if foreign laws were allowed to interfere with systems that are based on government policies. For example, it is important that states with a

[73] Nygh, above n 11, at 203.
[74] At 203.

"more interventionist regulatory philosophy" are able to "protect local markets from the activities of foreign entities that target those markets."[75] Interestingly, this interpretation of public interest is also more in line with Savigny's original public interest approach, namely that rules related to "politics, police or political economy" were overriding mandatory rules.[76]

2. *Protecting Economically Weaker Parties*

The second, more modern, purpose that has been attributed to overriding mandatory rules is that they seek to "protect economically weaker parties".[77] This perception of overriding mandatory rules contradicts the original purpose, as Savigny emphasized that overriding mandatory rules did not exist to protect private interests.[78] Consequently, some countries have refused to adopt this purpose. However, other countries have attempted to explain away the contradiction, so that overriding mandatory rules can be seen as existing to protect parties who have less bargaining power, due to their financial status. An example of this is the way different countries have interpreted Art 9(1) of the European Rome I Regulation.[79] Article 9(1) contains a definition for an overriding mandatory rule, and states:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

The phrase "safeguarding *its* public interests" [my emphasis], has led German courts and academics to see a statute or provision as being an overriding mandatory rule only if it "at least partly pursue[s] a state interest".[80] Additionally, "the protection of this state interest should not simply be ancillary to the purpose of protection of an individual interest".[81] Thus, in Germany,

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[75] Catherine Walsh "The Uses and Abuses of Party Autonomy in International Contracts" (2010) 60 UNBLJ 12 at 16.
[76] Savigny, above n 12, at 78.
[77] Nygh, above n 11, at 204.
[78] Savigny, above n 12, at 78. See also Nygh, supra n 11, at 199.
[79] Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L177/6.
[80] Laura Maria van Bochove "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law" (2014) 7 Erasmus L Rev 147 at 149.
[81] At 149-150.

"rules aiming at the protection of individual interests" are not treated as overriding mandatory rules.[82] In contrast, France and the United Kingdom have taken the approach that statutes and provisions that protect the interests of individuals, "such as consumers or employees", are overriding mandatory rules.[83] This is because, even though these sorts of statutes and provisions "do not serve a specific public interest", it is argued that "the abuse of weaker parties can be viewed as a threat for civil society".[84] Consequently, it is a "state interest" to ensure that these rules are applied, even when there has been an attempt to contract out of them by choosing another country's law to govern the contract.[85]

B. Which Approach Should New Zealand Take?

This section will establish that the best way to determine whether a statute is an overriding mandatory rule is by considering whether the statute is irreplaceable, rather than by focusing on whether it protects a state interest or a private interest. However, before examining this criterion further, it is helpful to consider why Savigny originally excluded private interests. At first glance, there is nothing inherently wrong with statutes that protect private interests being overriding mandatory rules. Arguably, Savigny's stance, that only statutes that protected state interests could be overriding mandatory rules, reflected the fact that, at the time, lawmakers were not as interested in regulating private matters. Thus, statutes dealing with private matters were viewed as too unimportant to be overriding mandatory rules. However, nowadays, many social interactions, which previously would have been seen as private matters by legislators, are governed by legislation, such as the Care of Children Act 2004, the Wills Act 2007, and the Employment Relations Act 2000; which is why *Dicey* refers to the "modern tendency" of "social legislation".[86] Thus, it is arguable that statutes that protect private interests should be overriding mandatory rules, as modern legislators view them as being important.

[82] At 149.
[83] At 150.
[84] At 150.
[85] At 150.
[86] Dicey, above n 8, at 33.250.

However, if state interests and private interests are accepted as equally important, the number of statutes that would be held to be overriding mandatory rules would dramatically increase. This is demonstrated by the fact that the expansion of the concept of public interest has caused so many statutes to be seen as potential overriding mandatory rules, that courts have had to rely on statutism to identify the 'real' overriding mandatory rules. Thus, it is necessary to consider whether there is a distinguishing characteristic, other than importance, which can justify why statutes that protect state interests are more likely to be overriding mandatory rules. As foreshadowed at the start of this section, a characteristic that distinguishes these two types of statutes is the fact that statutes that protect private interests are replaceable. Peter Nygh refers to this concept of 'replaceability' as being the "essential distinction" that Savigny relied on to categorise statutes as overriding mandatory rules.[87] Laws which Parliament creates simply to "provide a framework for private transactions", and to ensure "order", are not overriding mandatory rules, as "other solutions [namely laws of other countries] are equally acceptable as long as they provide certainty".[88] Statutes that protect private interests will almost always fall into this category, as most deal with mainly transactional matters or administrative requirements. Consequently, it would be unnecessary for Parliament, or the courts, to insist that the New Zealand statute applies, if a choice of law requires that the equivalent statute of another country be applied. For example, there is no reason why the Unfair Contract Terms Act 1977 (UK) should be seen as any less satisfactory than the Contractual Remedies Act 1979.

Conversely, statutes that protect state interests are irreplaceable, as they are based on government policies, and naturally each country has their own policies that are endemic to their own political system and history. For example, it would be absurd to suggest that the Commerce Act 1986 could be successfully replaced by another country's equivalent statute. However, it is important to recognise, that there are some statutes that deal with private interests, which do not just contain transactional and administrative matters, but do also contain provisions that are based on government policies. Thus, these statutes cannot just be replaced by another country's equivalent statute. These sorts of statutes will be discussed in Part C below.

[87] Nygh, above n 11, at 203.
[88] At 203.

This analysis shows us that statutes that protect state interests will always be overriding mandatory rules, as they are inherently irreplaceable. In contrast, the fact that a statute protects a private interest cannot be sufficient for it to be an overriding mandatory rule, as generally they can be replaced by another country's equivalent statute. Also, allowing the protection of private interests to be sufficient to deem a statute an overriding mandatory rule would result in too many statutes being overriding mandatory rules. However, this analysis also shows that there is no inherent reason why statutes that protect private interests cannot be overriding mandatory rules, and that some statutes that protect private interests will be irreplaceable; it will just be the minority. Thus, it is appropriate to see overriding mandatory rules as serving a dual purpose, in that they seek to protect both state interests and private interests that Parliament see as vital to New Zealand. However, it is important to recognise that a statute protecting a state interest will be sufficient for it to be an overriding mandatory rule, whereas a statute protecting a private interest will additionally need to be shown to be irreplaceable to be an overriding mandatory rule.

C. Statutes that protect Private Interests as Overriding Mandatory Rules

If we look to the opposing approaches taken to private interests by Germany, on the one hand, and the United Kingdom and France on the other, we can see that each approach is actually based on this exact premise. Namely, that a statute that merely protects a private interest is insufficient to be an overriding mandatory rule. However, the problem with each of these approaches is that they are extreme. Germany's response is simply to say that statutes that protect private interests can never be important enough to be overriding mandatory rules. Conversely, the problem with the French and British approach is that ensuring the order of society is the very purpose of statutes that protect private interests. Thus, failure to follow them can always be argued to be a "threat to civil society", which is why this approach will include a multitude of statutes that protect private interests. Neither of these approaches should be adopted by New Zealand. The first approach ensures certainty, but sacrifices the ability of courts to deem a statute that is vital to New Zealand to be an overriding mandatory rule, just because it merely protects private interests. The second approach is too wide and continues the problem New Zealand is facing currently in relation to overriding mandatory rules, namely that 'public interest' can essentially include any legislation that has a benefit to the public.

This is why the best approach is to only make a statute an overriding mandatory rule when it protects private interests *and* those interests are irreplaceable. This approach ensures that deserving statutes that protect private interests will be overriding mandatory rules, without casting the net so wide as to include all such statutes. Thus, the key question to be answered is: when will a statute that protects private interests be irreplaceable?

It is submitted that there are two situations where statutes that protect private interests would be irreplaceable. Firstly, a statute that protects private interests that are unique to New Zealand, such as Maori interests, would be irreplaceable. Equivalent overseas statutes cannot be substituted as they are unable to understand the unique background that has given rise to those interests, and thus will be unable to protect them sufficiently. These sorts of statutes and provisions are, by their very nature, endemic to New Zealand.

Secondly, a statute which protects private interests that are based on, or reflect, fundamental human rights, such as the right to freedom from discrimination, would be irreplaceable (This sort of statute will be the main focus of this dissertation). Such interests are not irreplaceable in the sense that they are unique to New Zealand, as indeed many other countries have the same views on fundamental rights as New Zealanders. However, they are irreplaceable in the sense that these tenets underpin New Zealand society, and New Zealanders rely on, and take pride, in them. Thus, it is important that statutes or provisions that protect such rights are seen as non-derogable, as it reinforces the fundamentality and importance of these rights to New Zealand society. Consequently, it would be inappropriate to rely on an equivalent overseas statute, even if it was identical or very similar. Also, there are some situations where equivalent statutes will either have a different view as to how weighty particular rights are, or how certain conflicting rights should be balanced; or, in extreme circumstances, will not protect these sorts of rights at all. In these cases, it is particularly important that Parliament and the judiciary are seen as protecting the fundamental values that our society is based on.

Given that there are diverging views on how widely the concept of a "right" should be construed, the best way to determine what constitutes a fundamental right is to look to already existing sources that demonstrate what rights are seen as fundamental by New Zealanders. Examples of such

sources would include the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, the International Covenant on Civil and Political Rights (ICCPR), [89] and customary international law. Thus, when a Court is considering whether a section can be seen as irreplaceable, they should consider whether it protects a right that is contained in one of these sources. This is appropriate, as such sources are the best indicators as to which liberties are unanimously accepted as key rights by New Zealanders, and which are consequently seen as integral to New Zealand society.

Admittedly, this approach is very narrow, as only civil and political rights are included as fundamental human rights. Consequently, only statutes that protect private interests that are based on civil and political rights can be held to be overriding mandatory rules; whereas provisions that are based on economic and social rights are excluded from being overriding mandatory rules. For example, a statute or section which is based on a right such as the right to privacy, or the right to work, could not be held to be overriding mandatory rule. It could be argued that it is arbitrary to exclude statutes or provisions that protect private interests which reflect these sorts of social and economic rights, as they are also important rights. Thus, statutes that protect them should also be overriding mandatory rules. However, this approach is justified both in principle and in practice. Firstly, the principled argument is that since there is no unanimous agreement within New Zealand surrounding social and economic rights they cannot be argued to be irreplaceable. Social and economic rights cannot be seen as foundational tenets of New Zealand society that cannot be derogated from for two reasons. Firstly, there is actually disagreement as to what their status is and how important they are to New Zealand society. Secondly, this disagreement has led to their position within New Zealand law being uncertain.

This becomes evident when we compare the development of civil and political rights with the development of social and economic rights. The reality is that economic and social rights "have not fared as well as civil and political rights".[90] Whilst there is a general consensus that civil and political rights are fundamental rights, which is evidenced by the "steady progress" that is

[89] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
[90] Natalie Baird "Economic, social and cultural rights: a proposal for a constitutional peg in the ground" (2013) 8 NZLJ 289 at 289.

occurring in New Zealand regarding their protection,[91] the status of social and economic rights has been heatedly disputed. Some dispute the fact that social and economic rights are rights at all, and see them rather as "social policies". [92] Others see them as just as important as civil and political rights, and insist that they ought to be included amongst our "constitutional arrangements".[93] This seems unlikely to happen in the near future. An indication of New Zealand's current approach to social and economic rights is demonstrated by the fact that: [94]

> New Zealand has no current intention of ratifying the Optional Protocol to the ICESCR [International Covenant on Economic, Social and Cultural Rights][95] which would enable individual communications to the ESCR Committee [Committee on Economic, Social and Cultural Rights] in the same way that individuals can take communications to the Human Rights Committee under the ICCPR.

Additionally, the UN Human Rights Council's recommendation that New Zealand should ratify it was actually rejected.[96] However, the point of this dissertation is not to argue that either of these approaches is 'better' or more 'legitimate'. Rather, the purpose of canvassing these approaches is simply to demonstrate that within New Zealand there is currently disagreement as to the role that social and economic rights should play in our society; and that the current position shies away from seeing them as fundamental rights. Thus, it would be inappropriate to elevate such rights to the level of civil and political rights, for the purpose of determining whether a statute should be an overriding mandatory rule, when there is not even consensus within the government, or the community, as to what status these rights have in New Zealand society. Therefore, it is sufficient for us to rely on equivalent statutes of other countries, which will adequately protect social and economic rights, even if they are different in the minutiae.

However, even if this position is accepted on a principled level, it could be argued that there is an issue as to how it will apply in practice. The danger of relying on equivalent legislation of other

[91] At 289.
[92] At 291.
[93] At 292.
[94] At 290.
[95] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).
[96] Baird, above n 90, at 290.

countries is that some countries might not have equivalent legislation, and might completely disregard these quasi rights. This would be problematic, as even though they do not have the status of fundamental rights in New Zealand, the non-application of such rights can still have consequences which our society would find deplorable. For example, it is likely that most New Zealanders would find an Act that requires employees to be subjected to a daily strip search, in order to be allowed onto the employer's premises, horrifying. However, fortunately, the conflict of laws system provides a partial solution to this problem through the public policy exception. This is the principle that if the applicable law is "contrary to public policy",[97] a court has the right to "decline to recognise or apply what would otherwise be an appropriate foreign rule of law".[98]

Finally, another practical benefit of deciding that only statutes, or sections, protecting private interests based on civil and political rights can be overriding mandatory rules, is that it ensures that they remain the exception; and thus upholds the conflict of laws system and its benefits.

Thus, the approach New Zealand should take in regards to overriding mandatory rules, is that a statute should be seen as reflecting a public interest, and thus as an overriding mandatory rule in two situations. Firstly, if it protects a state interest, in that it relates to the politics or economy of New Zealand, and is consequently vital to the governance of New Zealand. Secondly, if it protects private interests that are based on a fundamental human right, or which are unique to New Zealand.

D. Applying the New Approach to the Employment Relations Act 2000

If we apply this approach to the Employment Relations Act 2000, it becomes evident that the entire statute cannot be an overriding mandatory rule. This is because the Act contains both procedural and substantive provisions. Procedural provisions, such as s 65(2)(ii) which requires there to be a "description of the work to be performed by the employee" contained within the contract, cannot be seen as protecting a state interest, or a private interest which reflects a fundamental human right. (Given that there are no specific provisions in the Employment Relations Act 2000 that pertain to Maori, or which deal with other interests that are endemic to New Zealand, the focus will be on

[97] Dicey, above n 8, at 5.002.
[98] At 5.002.

whether there are any private interests that reflect fundamental human rights; not on whether there are private interests that are unique to New Zealand. Thus, this latter criterion will be left to be considered on another day, in relation to more relevant legislation.) On the other hand, there are other provisions that clearly fulfil the narrow public interest test, such as ss 103 to 105, which deal with discrimination, and thus are based on a fundamental human right.

At the extreme end of the scale it is easy to determine whether a provision fulfils the narrow public interest approach. However, many provisions fit somewhere in between the two extremes, thus making it difficult to determine whether they protect a state interest, or a private interest that reflects a fundamental human right. An example we can look to for guidance is Directive 96/71 of the European Parliament and of the Council,[99] also known as the "Posted Workers Directive".[100] The Posted Workers Directive deals with workers who are temporarily employed in an EU state other than the one they usually work in.[101] Article 3(1) lists employment rights that "shall be guaranteed to the posted worker". However, for our purposes, what is important is that the European Court has held that the matters contained in Art 3(1) are an "exhaustive list of the matters of which a host Member State may give priority to its own rules".[102] Hence, Art 3(1) highlights some important employment-interests. This makes it a helpful starting point when deciding which sections in the Employment Relations Act 2000 protect state interests, or private interests that reflect fundamental rights that are important to New Zealand; and should consequently be held to be overriding mandatory provisions. Matters that are included in Art 3(1) are:

> (a) maximum work periods and minimum rest periods, (b) minimum paid annual holiday, (c) minimum rates of pay… (d) the conditions of hiring out of workers… (e) health, safety and hygiene at work, (f) protective measures…[for] pregnant women or women who have recently given birth, of children and of young people, and (g) Equality of treatment between men and women and other provisions on non-discrimination.

[99] Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1.
[100] Dicey, above n 8, at 33.273.
[101] At 33.273.
[102] At 33.273.

Dicey also goes on to note that "rules governing unfair dismissal" and "trade union membership"[103] are, perhaps controversially, not included.

Since it is not within the scope of this dissertation to canvass every section of the Employment Relations Act 2000, in order to determine whether it should, or should not, be an overriding mandatory rule, I will focus on sections in the Employment Relations Act 2000 that are concerned with the interests listed in Art 3(1) (except (d), which deals with the "hiring out of workers", as in New Zealand this is governed by the common law).[104] This is because Art 3(1) summarises the areas of employment law that can be seen as linked to a country's policies or values. Thus, sections that deal with these issues will have the potential to be seen as protecting state interests, or private interests that reflect fundamental human rights. I will also consider the interests mentioned by *Dicey*, as the fact that there is controversy as to whether or not they should be included, suggests that New Zealand may view them differently from the European Court.

However, some of the interests contained in Art 3(1) are not actually governed by the Employment Relations Act 2000, but by statutes such as the Minimum Wage Act 1983, the Holidays Act 2003, and the Health and Safety at Work Act 2015. Thus, I will begin by briefly considering whether the sections in these Acts, which deal with the relevant interests, should be considered overriding mandatory rules. This consideration will also provide some context when deciding which sections in the Employment Relations Act 2000 should be overriding mandatory rules.

1. Sections based on the Enjoyment of Just and Favourable Conditions of Work

The first interest referred to in Art 3(1) is maximum work periods and minimum rest periods. There is no express minimum rest period referred to in any of the three Acts mentioned above. However, s 11B(1) of the Minimum Wage Act 1983 states that: "Every employment agreement under the Employment Relations Act 2000 must fix at not more than 40 the maximum number of hours (exclusive of overtime) to be worked in any week by any worker." Yet, this is subject to s 11B(2), which states that the number of hours can be greater if the "parties to the agreement agree".

[103] At 33.273.
[104] *Mazengarb's Employment Law (NZ)*, above n 35, at [1043].

Limiting the maximum amount of hours that someone works is not a state interest, as it will not impact on the economy or political system. Similarly, it does not reflect a fundamental right contained in the New Zealand Bill of Rights Act 1990, or the Human Rights Act 1993. Thus, it cannot be held to be an overriding mandatory rule.

Some people will take issue with this, as they see the limitation of working hours as being based on a human right, namely "the enjoyment of just and favourable conditions of work".[105] However, others argue that particular working conditions cannot be a human right when "employment is a status voluntarily assumed".[106] This, again, demonstrates that social and economic rights are too heatedly disputed for us to designate statutes that protect private interests based on these rights, to be overriding mandatory rules; and justifies s11 of the Minimum Wage Act 1983 not being an overriding mandatory rule. This approach is supported by the fact that individuals can actually agree to work more than 40 hours a week.[107] Such an exception indicates that deviation from this standard is accepted, and thus the standard cannot be seen as absolutely essential. For those concerned with the practical results of this decision, it must be remembered that any attempted exploitation of employees through a sweatshop-type situation, for example by the application of a law which states that employees can be required to work 80 hour weeks, can be remedied by the public policy exception. Also, the likelihood of such situations occurring, due to this section not being an overriding mandatory rule, is small, as most country's equivalent statutes have very similar standards to New Zealand. For example, the maximum work period permitted by s 4 of the United Kingdom's The Working Time Regulations 1988, is a 48 hour week, which is not hugely different from the 40 hour week permitted under s11B(1) of the Minimum Wage Act 1983.

The second interest referred to is minimum paid annual holidays. This is provided for in s 16(1) of the Holidays Act 2003 which states: "After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays." The third interest that is noted is minimum rates of pay. Section 4 of the Minimum Wage Act 1983 states that: "The Governor-General may, by Order in Council, prescribe a minimum adult rate of wages."

[105] Joss Opie "Economic, social and cultural rights" (2014) 5 NZLJ 195 at 197.
[106] Bernard Robertson "Human Rights" (2013) 8 NZLJ 281, at 282.
[107] Section 11B(2).

The Governor-General has exercised this right and s 4 of the Minimum Wage Order 2016 sets out the minimum wages for various groups. The fourth interest referred to is "health, safety and hygiene at work". This interest is currently protected by the Health and Safety at Work Act 2015. The fifth interest is "protective measures… [for] pregnant women or women who have recently given birth, of children and of young people", which is provided for in the Parental Leave and Employment Protection Act 1987. All these interests are also based on the concept of employees having "the enjoyment of just and favourable conditions of work".[108] Thus, all the arguments made in the above paragraph apply here, and, consequently, these sections would also not be overriding mandatory rules. It is worth noting that minimum wage is particularly complicated. Although one could argue that it is based on a social and economic right, the right to the "enjoyment of just and favourable conditions of work", one could also argue against the minimum wage on the basis that it conflicts with another social and economic right; the "right to work" - as it potentially increases unemployment.[109] Thus, even people who would see social and economic rights as being equally important as civil and political rights might not be in agreement as to how this should apply to the concept of minimum wage.

2. Anti-Discrimination Sections

The final interest referred to in Art 3(1) is "equality of treatment between men and women and other provisions on non-discrimination." This is provided for in ss 103 to 105 of the Employment Relations Act 2000. Section 103(1)(c) states that:

> For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee has been discriminated against in the employee's employment.

Sections 104 and 105 then go on to define discrimination. Section 104 states:

[108] Opie, above n 105, at 197.
[109] *Mazengarb's Employment Law (NZ)*, above n 35, at [1809].

> (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107,—
>
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
>
> (c) Retires that employee, or requires or causes that employee to retire or resign.

And s 105 states:

> (1) The prohibited grounds of discrimination referred to in section 104 are the prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act 1993, namely (a) sex; (b) marital status; (c) religious belief; (d) ethical belief; (e) colour; (f) race; (g) ethnic or national origins; (h) disability; (i) age; (j) political opinion; (k) employment status; (l) family status; (m) sexual orientation.

The interest of non-discrimination is definitely a private interest based on a fundamental human right. This is because the right not to be discriminated against is contained in s 19 of the New Zealand Bill of Rights Act 1990 which states: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". It is also contained in s 21 of the Human Rights Act 1993, which contains the same prohibited grounds of discrimination as s 105 of the Employment Relations Act 2000, but in more detail. Finally, s 22 of the Human Rights Act is essentially the same as s 104 of the Employment Relations Act 2000. Therefore, ss 103 to 105 of the Employment Relations Act 2000 are overriding mandatory rules, as they protect private interests that are based on a fundamental human right.

This is appropriate, as our political history shows that the right against discrimination is very important to New Zealanders. Firstly, "New Zealand ratified the First Optional Protocol to the ICCPR", which allows individuals to bring "communications" to the Human Rights Committee if their rights have been violated.[110] Secondly, the Human Rights Act 1993 "increased protection from unlawful discrimination by extending the grounds of discrimination, and establishing a mechanism for complaints of unlawful discrimination".[111] Thus, this continuing development of the right against discrimination, demonstrates that it is viewed as a fundamental right by New Zealand citizens. Consequently, sections that protect this right should never be derogated from, which is why they are justified in being held to be overriding mandatory rules.

3. Unfair Dismissal Sections

As noted at the start of Part D, Art 3(1) does not necessarily consider all the employment interests that can be viewed as important to a country. Thus, it is now necessary to consider whether the sections in the Employment Relations Act 2000, which protect the interests mentioned by *Dicey*, can be overriding mandatory rules.

The first of these interests referred to by *Dicey* was the "rules governing unfair dismissal". These are contained in s 103(1)(a) of the Employment Relations Act 2000 which states:

> For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim (a) that the employee has been unjustifiably dismissed.

Section 103A then lays out a "test of justification", to determine whether the dismissal was justified. These sections cannot be seen as protecting state interests, as *Mazengarb* acknowledges that "conditions [of employment], such as…protection against unfair dismissal" are "orientated towards individual workers".[112] Thus, the rules governing unfair dismissal must be seen as

[110] Baird, above n 90, 289.
[111] At 289.
[112] *Mazengarb's Employment Law* (NZ), above n 35, at [Intro 2].

protecting a private interest. These sections are also not based on any rights contained in the New Zealand Bill of Rights Act 1990, or the Human Rights Act 1993, but are based on a social and economic right, namely the "right to work".[113] Thus, they cannot be an overriding mandatory rule.

As aforementioned, the controversy surrounding "the enjoyment of just and favourable conditions of work" justifies excluding sections protecting private interests based on it from being overriding mandatory rules. However, what about private interests based on the right to work? The same argument applies here, as the status and scope of the right to work is also disputed. Typically New Zealand courts have rejected the concept of a "general right to work".[114] However, in specific cases the courts have been prepared to imply the right to work into a contract. For example, if the work itself is of vital importance to the employee, either because it enables them to "establish a reputation", as in the case of an actor; or because it enables them to "practice to maintain or to develop skills", as in the case of a computer programmer, the right to work has been accepted as an implied term of the contract.[115] Nevertheless, the courts were at pains to confirm that these exceptions did not establish the right to work as a general right, noting that: "Each case will depend on the terms of the particular contract, including those terms properly to be implied into it."[116] This settled position was somewhat overturned by *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee,*[117] where it was held that *"*employees have the right to work". [118] However, this was a departure from the position that had been taken by New Zealand courts, and it is uncertain whether it will be affirmed or not. In the Court of Appeal the ruling was overturned on other grounds, which made it unnecessary to consider whether there was a right to work.[119] However, arguably, if the Court of Appeal had approved of such a step they would have at least acknowledged it. Also, as mentioned earlier, the fact that Parliament has introduced legislation providing for a minimum wage suggests that no unabridged right to work is, as of yet, recognised in New Zealand. Thus, the status and scope of the right to work within New Zealand is uncertain

[113] At [ERA102.5].
[114] At [1024].
[115] At [1024].
[116] *Ogilvy and Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398 at 406.
[117] *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672.
[118] At 695.
[119] *Mazengarb's Employment Law (NZ),* above n 35, [1025] n 24.

and disputed, which means that it is appropriate that s 103 and s 103A are not overriding mandatory rules.

4. Trade Union Sections

The next interest *Dicey* referred to was "trade union membership". This is dealt with in s 8 of the Employment Relations Act 2000, which states:

> A contract, agreement, or other arrangement between persons must not require a person— (a) to become or remain a member of a union or a particular union; or (b) to cease to be a member of a union or a particular union; or (c) not to become a member of a union or a particular union.

Again, this is not a state interest. However, it is a private interest that reflects a fundamental right, as it is based on the right to freedom of association, because it allows employees to freely associate "for the purposes of collectively protecting and promoting employment interests".[120] The right to freedom of association is contained in s 17 of the New Zealand Bill of Rights Act, which simply states: "Everyone has the right to freedom of association." Therefore, s 8 should be held to be an overriding mandatory rule. This is appropriate, as it reflects the fact that "voluntary union membership is no longer a live issue with general agreement across the [New Zealand] political spectrum that union membership should be voluntary".[121] In other words, the right to join with your fellow workers, or to not join with your fellow workers, in promoting your employment interests is accepted as non-controversial within New Zealand, and is seen as something that should be guaranteed. Thus, a section that protects this right should be an overriding mandatory rule. There are many more sections covering union related interests in the Employment Relations Act 2000; too many for them to be comprehensively considered in this dissertation. However, the best approach to determine whether a section dealing with unions is an overriding mandatory rule would be to consider to what extent it protects the ability of union members to freely associate, and to what extent it goes above and beyond this.

[120] At [ERA P3.1].
[121] At [ERA P3.6].

Thus, we can see that this new, narrower public interest approach works, as it ensures that sections that are based on rights that are unanimously accepted as fundamental are given absolute protection, by being held to be overriding mandatory rules. Conversely, sections that are based on rights that are not unanimously accepted as important in New Zealand, receive sufficient protection through other country's equivalent statutes; or in the case that the other country has an insupportable rule, the public policy exception will allow New Zealand courts to reject the rule.

E. Replacing Territorial Scope with Jurisdiction

The first part of this chapter has established an appropriate test to determine whether a statute, or provision, can be an overriding mandatory rule. The next step is to determine what an appropriate test for territorial scope would be for employment legislation, particularly the Employment Relations Act 2000. As stated in Chapter I, the purpose of a territorial scope is to limit the statute, so that it only applies when the case is connected in a specific way with New Zealand.[122] This is important as, due to their nature, overriding mandatory rules, are not constrained by the normal conflict of laws system. Thus, they would apply to every scenario, even when there is no connection to New Zealand. Given that the test to determine whether a statute can be an overriding mandatory rule has been narrowed so much, to the extent that it only includes sections that protect state interests, or private interests based on fundamental rights, it would arguably be appropriate to have a wider territorial scope. This reflects the approach that was taken in England, namely that "different rights were subject to different express territorial limits".[123] For example, the now repealed s 196 of the Employment Rights Act 1996 (UK) had an express territorial scope in relation to interests such as "minimum notice periods", which required the employee to "ordinarily work" in Great Britain.[124] In contrast, "anti-discrimination legislation" had a much wider express territorial scope, which stated that it applied to those who worked "at least *partly* in Great Britain".[125]

[122] Dicey, above n 8, at 1.049.
[123] Louise Merrett "New Approaches to Territoriality in Employment Law" (2015) 44 ILJ 53 at 70.
[124] Merrett, above n 10, at 7.51.
[125] At 7.67.

Arguably, since we have such a narrow public interest test, it is unnecessary to add an additional implied territorial scope. This is because the concept of jurisdiction already requires the court to consider whether a case with foreign elements has a close enough relationship with New Zealand, before the court can hear the case. Thus, we can just rely on the requirements of jurisdiction, to ensure that only cases that have a sufficient connection with New Zealand will have the overriding mandatory provisions of the Employment Relations Act 2000 applied to them. According to *Dicey*, the "foundation of jurisdiction…is service of process".[126] Thus, if the person being served is present in New Zealand a court automatically has jurisdiction.[127] If the person is outside New Zealand, whether or not a court has jurisdiction is determined by either r 6.27 or r 6.28 of the High Court Rules. Rule 6.27 lists factors that allow a person to serve a civil proceeding without the leave of the court, whereas r 6.28 allows a person to apply for leave to serve a civil proceeding, if they do not fulfil any of the factors under r 6.27. Rule 6.27(2)(b) is relevant to employment cases, as it states that a proceeding that relates to a contract can be brought without leave if the contract was "made or entered into in New Zealand",[128] or "was made by or through an agent trading or residing within New Zealand",[129] or "was to be wholly or in part performed in New Zealand",[130] or "was by its terms or by implication to be governed by New Zealand law".[131] Rule 6.28(5) states that the court can "grant the application for leave" if "the claim has a real and substantial connection with New Zealand",[132] and "there is a serious issue to be tried on the merits",[133] and "New Zealand is the appropriate forum for the trial",[134] and "any other relevant circumstances support an assumption of jurisdiction."[135]

[126] Dicey, above n 8, at 11.102.
[127] Admittedly a situation could arise where a person's presence in New Zealand is too tenuous to be seen as a sufficient connection, for example, if an employer simply happened to be on holiday in New Zealand. However, in such a case, the Court would be able to grant a stay on the grounds of forum non conveniens under r 15.1 of the High Court Rules as highlighted by r 6.29(3) of the High Court Rules. The factors that are relevant to a forum non conveniens are contained in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL), which was adopted into New Zealand law by *Wing Hung Printing Co v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754.
[128] Rule 6.27(2)(b)(i).
[129] Rule 6.27(2)(b)(ii).
[130] Rule 6.27(2)(b)(iii).
[131] Rule 6.27(2)(b)(iv).
[132] Rule 6.28(5)(a).
[133] Rule 6.28(5)(b).
[134] Rule 6.28(5)(c).
[135] Rule 6.28(5)(d).

The advantage of relying on jurisdiction, as opposed to an implied territorial scope, to prevent the overriding mandatory provisions of the Employment Relations Act 2000 from being applied to cases with an insufficient connection to New Zealand, is that it avoids the issue that statutism creates. Namely, that judges are inclined to imply whatever territorial scope is necessary to ensure that they can hear the case, due to their forum bias. Rule 6.27 lays out clear, definite categories, and r 6.28, although allowing for more discretion, contains four clear factors that must *all* be fulfilled in order for a court to grant an application for leave. Thus, it is unlikely that judges would be able stretch the concept of jurisdiction to ensure that they could hear the case. Simultaneously, this approach is wide enough that it ensures that deserving parties can bring their case before New Zealand courts. It does this by avoiding the 'black hole' that could be created in the situation where New Zealand law was held to be the law applicable to the contract, but the party was unable to fulfil the implied territorial scope of the Employment Relations Act 2000. In such a situation the party would be in the position of having no remedy at all, as New Zealand law would need to be applied to the case, but the territorial scope would prohibit it from being applied, which would not be an acceptable outcome.

Chapter III: The Effect of the New Approach

Four main groups will be affected if parts of the Employment Relations Act 2000 are held to be overriding mandatory rules: employers, employees, countries, and courts. Thus, in this chapter, I will consider how the approach promoted in the second chapter will affect these four groups. Also, this chapter will consider how the new approach would affect the reasoning and outcome in *Brown v New Zealand Basing Ltd of Hong Kong.*

A. The Effect on Employers and Employees

Firstly, I will consider employers and employees. Employment relationships are governed by the law that the parties choose, due to the Proper Law. Consequently, overriding mandatory rules in the area of employment overrule a choice made by the parties. In other words, overriding mandatory rules are a limitation on party autonomy.[136] This has been seen as both a negative and a positive thing. Those against overruling the parties' choice of law with overriding mandatory rules argue that "the invocation ex post facto of a 'mandatory provision' by a court adds to uncertainty and unpredictability".[137] Additionally, it is argued that this approach leads to "opportunistic litigation", as although there may have been agreement when the contract was signed, a party may still "opportunistically defect from the agreement, since it may stand to gain more by doing so".[138] These arguments suggest that overriding mandatory rules should never overrule the parties' choice of law. Thus, courts should respect the autonomy of parties, and allow them to choose the law that best accommodates their needs. Also, courts should prevent parties from backing out of their agreement, through the use of overriding mandatory rules, simply because they find their prior decision inconvenient.

However, those who support overruling the parties' choice of law with overriding mandatory rules, would point out that though these arguments are appropriate in relation to business contracts, they have no place in relation to employment contracts. This argument is based on the premise that in

[136] Nygh, above n 11, at 233.
[137] At 211.
[138] Michael Whincop and Mary Keyes "Putting the 'Private' back into Private International Law: Default Rules and the Proper Law of the Contract" 21 MULR 515 at 528.

a business situation both parties have a similar level of knowledge and business prowess. Consequently, there are no concerns about the choice being freely made on both sides. In contrast, employment contracts are created in a situation where there is a "systemic disparity in bargaining power".[139] Thus, there is potential for knowledgeable employers to take advantage of vulnerable employees, who will have no idea what difference it will make to them whether a contract is governed by the law of the country their employer is situated in, or the law of the country in which they are domiciled. Thus, some argue that overriding mandatory rules are a necessary limit to party autonomy in an employment context, as "Giving free rein to party autonomy to select the governing law would enable the stronger party to circumvent the protection afforded to the…employee by the law of her home state".[140] This argument suggests that the entire Employment Relations Act 2000 should be held to be an overriding mandatory rule, as it would ensure that employees do not lose any of their rights.

However, refusing to hold the Employment Relations Act 2000 to be an overriding mandatory rule to ensure that party autonomy is protected, or holding the entire Employment Relations Act 2000 to be an overriding mandatory rule to ensure that workers can never be exploited, are both extreme positions. If we take the former approach, employers could remove the most fundamental rights of employees, and the employees could not do anything about it; even if they signed the contract not understanding what it meant. If we take the latter approach, we are presuming that all employers will choose to disadvantage employees, and on this basis are removing their ability to select the law that best suits their employment contract. The latter approach also presumes that all employees are inexperienced and vulnerable, or that they will all opt to forgo independent legal advice, which is untrue.

This is why the approach promoted in Chapter II is the most appropriate. It ensures sections in the Employment Relations Act 2000 that protect employees' fundamental rights cannot be circumvented by choosing the law of another country to govern the contract. However, it also upholds party autonomy in general, as it will not just entirely replace the law that was chosen by the parties. Also, as noted in Chapter I, if there is a fundamental problem with party autonomy

[139] Walsh, above n 75, at 15.
[140] At 18.

(parties being able to choose the law that governs their contract), the solution should not be to just rely on overriding mandatory rules as a 'fall-back' solution. Rather, the Proper Law choice of law rule may need to be adjusted, perhaps by limiting, or removing, the party autonomy aspect to it.

B. The Effect on Countries

The next group that will potentially be affected by the application of overriding mandatory rules are countries. Overriding mandatory rules essentially replace another country's law with your own law, and this could be seen as a breach of comity. The doctrine of "comity" has long been a foundational principle of conflict of laws.[141] However, there is no agreed definition of comity. Some define it as showing "courtesy" for another country's laws and referring to the "need for reciprocity"; namely applying another country's laws, so that they will also apply your country's laws when appropriate.[142] Conversely, others see comity as having nothing to do with these concepts.[143] Rather, they see comity as a "synonym for the rules of public international law",[144] in the sense that it requires courts to show "respect for the territorial jurisdiction of other States".[145] Consequently:[146]

> One State does not purport to exercise jurisdiction over the internal affairs of any other independent State or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law.

If we apply the former definition of comity to overriding mandatory rules, the reality is that overriding mandatory rules will always be seen as contrary to comity. This is because, by replacing another country's law with your law, you are at the very least saying that the law of your country is more important, which can be viewed as discourteous. Thus, the approach promoted in the second chapter would be seen as contrary to comity, as even though only a few of the rules are

[141] Joseph Storey *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (1st ed, Hilliard, Gray & Co, Boston, 1834) at 33-35.
[142] Dicey, above n 8, at 1.008.
[143] At 1.008.
[144] At 1.008.
[145] At 1.009.
[146] At 1.009.

overriding mandatory rules, we are still saying that those laws are more important than the laws of another country. However, this definition of comity has been strongly criticized,[147] perhaps because it is so broad, and thus, arguably, more is required before an overriding mandatory rule can be seen as contrary to comity.

If we take the second definition of comity, which is more nuanced, we can see that this 'something more' is "exercising jurisdiction" over the "internal affairs" of a state.[148] Normally, this occurs when a court decides to hear a case, despite the fact that it clearly only has a connection with one other country. For example, imagine that in Australia a backyard barbeque got out of control, and burned down the neighbour's house. Both parties are Australian, and the act and damage occurred in Australia. Clearly, this is a case for the Australian courts, and if the New Zealand courts attempted to adjudicate on this matter, they would obviously be breaching comity, by exercising jurisdiction over an Australian internal affair.

However, determining whether New Zealand courts would be exercising jurisdiction over the internal affairs of another state, if they applied the Employment Relations Act 2000 as an overriding mandatory rule, is more complicated. This is because the law that is being overruled, namely the law applicable to the contract, could have been determined in two different ways. Firstly, the parties could have expressly chosen the law. In such a situation it is possible for comity to be a non-issue, as parties have the ability to choose a law that has no connection whatsoever to either of the parties, or the transaction.[149] Thus, in such a case, it is hard to see how the court's refusal to apply the law would reflect in any way on the territorial jurisdiction of the country whose law is applicable. However, if the parties have not expressly chosen the law, the law with the "closest and most real connection" to the contract will apply.[150] In this case, it is possible to argue that replacing the applicable law with the Employment Relations Act 2000 is a breach of comity, as New Zealand courts would be exercising jurisdiction over the internal affairs of another state. The response to this argument, is that if countries have decided to allow parties to choose whatever law they want to govern their contract, by allowing the Proper Law to be the relevant choice of

[147] At 1.008
[148] At 1.009.
[149] *Vita Food Products Inc v Unus Shipping Co Ltd (in Liquidation),* above n 21, at 290.
[150] *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab),* above n 23, at 967.

law rule, they cannot be that concerned about their territorial jurisdiction being respected. Thus, they should have no concerns if another country chooses to apply their law, and should not view it as breaching comity.

Finally, even if it were accepted that overruling another country's law is a breach of comity, due to what it means in principle, the approach promoted in the second chapter ensures that New Zealand law will only overrule other countries' laws in a small number of cases. Namely, when sections in the Employment Relations Act 2000 that are based on fundamental human rights apply. Thus, if there is a breach of comity, it is only a very minor one

C. The Effect on Courts

The final group that will be affected by holding parts of the Employment Relations Act 2000 to be overriding mandatory rules are the courts. This is because of how employers and employees, though realistically mainly employers, could respond to parts of the Employment Relations Act 2000 being an overriding mandatory rule. There are two options. Firstly, they could simply accept it. Secondly, they could start including jurisdiction clauses in their contracts, in order to completely bypass the New Zealand court system, which could lead to more litigation. Employers might think it worthwhile to include a jurisdiction clause in a contract if the entire Employment Relations Act 2000 was an overriding mandatory rule. However, given that only the sections dealing with discrimination and unions are overriding mandatory rules, employers are unlikely to go through the hassle of obtaining legal advice in order to circumnavigate these overriding mandatory rules. Also, once it becomes evident which sections are going to be overriding mandatory rules, this certainty should result in fewer cases coming before the courts, as employers and employees will know exactly what to expect. This is much better than the current system, where employers and employees have no idea which way the court will rule, which makes settlements much harder, and increases the chance that cases will proceed to court.

D. Positive Effects

Thus the approach that is promoted in Chapter II benefits all the groups that will be affected by parts of the Employment Relations Act 2000 being overriding mandatory rules. Firstly, employers and employees will generally have their party autonomy respected, but employees will still have their fundamental rights protected in case an employer attempts to take advantage of them. Secondly, comity is not an issue, as the fact that countries allow parties to choose the law that is applicable to their contract suggests they are not too concerned with their territorial jurisdiction being respected. Thirdly, courts can be assured that employers and employees are unlikely to try avoid New Zealand law. Also, once it is clear which sections are overriding mandatory rules, there will be fewer cases coming before the courts, as employers and employees will know what the likely outcome is, and can thus either reach a settlement, or accept the position they are in.

E. The Effect of the New Approach on *Brown v New Zealand Basing Ltd*

In *Brown v New Zealand Basing Ltd of Hong Kong*, Corkill J applied the statutist approach that was criticized in Chapter I. Firstly, he held that the entire Employment Relations Act 2000 was an overriding mandatory rule,[151] due to the fact that s 238 of the Employment Relations Act 2000 was a domestic mandatory rule.[152] Secondly, he used statutory interpretation to imply a territorial scope into the Employment Relations Act 2000,[153] and held that an employee being based in New Zealand was sufficient for the discrimination sections of the Employment Relations Act 2000 to apply.[154] These two decisions led to him overruling the parties' choice of law, and holding that the Employment Relations Act 2000 applied to the pilots.[155] Consequently they could not be dismissed upon turning 55, as this would constitute discrimination under s103(1)(c) of the Employment Relations Act 2000.[156]

If the Chapter 2 approach had been applied, the result would have remained the same. However, the reasoning and flow-on effects would be markedly different. The entire Employment Relations Act 2000 would not have been held to be an overriding mandatory rule. Rather, only the relevant

[151] *Brown v New Zealand Basing Ltd of Hong Kong*, above n 1, at [100].
[152] At [96].
[153] At [77].
[154] At [82].
[155] At [87].
[156] At [87].

section, s 103(1)(c), would have been held to be an overriding mandatory rule, as it is based on a fundamental human right, namely the right against discrimination. The Employment Relations Act 2000 would have applied to the parties, not because of an implied territorial scope, but because the requirements of jurisdiction would have been fulfilled by New Zealand Basing Limited being present in New Zealand, due to being a company that should be registered under Part 18 of the Companies Act 1993.[157]

The fact that the result happens to be the same under each approach should not mislead one into thinking that they are both satisfactory approaches. Corkill J's approach has negative consequences for the future. Firstly, the entire Employment Relations Act 2000 has been held to be an overriding mandatory rule, and as this dissertation has established there are many sections in the Act that should not be overriding mandatory rules, as they are easily replaceable. Thus, Corkill J's approach has unnecessarily encroached upon the conflict of laws system, and needlessly abrogated the benefits that it provides. Also, the territorial scope he established is likely to lead to forum bias in future cases, as it allows a court to consider any factor that could possibly tie an employee to New Zealand. This is evident in *Brown v New Zealand Basing Ltd of Hong Kong*, where the court considered *ten* factors that pointed to the pilots being based in New Zealand. This included the extraneous factor that: "They were paid a salary designed to reflect a lower cost of living than that experienced in Hong Kong."[158] Thus, although the statutist approach adopted by Corkill J rendered a satisfactory result in this case, in future cases it will cause overriding mandatory rules to be applied in situations where they should not be.

[157] At [83].
[158] At [83].

Conclusion

This dissertation has sought to establish that the current approach, of using statutism to determine whether a statute is an overriding mandatory rule, and to define the territorial scope of an overriding mandatory rule, is unsatisfactory. Statutism results in statutes regularly being held to be overriding mandatory rules, and to a wide territorial scope being implied, due to forum bias. This consequence is problematic, as it undermines the conflict of laws system, and the benefits it provides.

Accordingly, this dissertation has provided an alternative approach, which upholds the conflict of laws system, whilst still ensuring that New Zealand courts can replace the law governing a contract with New Zealand law when it is necessary. This alternative approach narrows the public interest approach, so that a statute will only be an overriding mandatory rule if it fulfils strict criteria. The criteria laid out by this dissertation are that a statute will be an overriding mandatory rule if it either protects state interests; or if it protects private interests that are based on fundamental human rights, or interests which are unique to New Zealand. The reason these statutes have been singled out is that they are irreplaceable. Thus, it would be inappropriate to allow parties to replace such statutes with any law they choose, as they are usually entitled to do under the Proper Law rule. Statutes that protect state interests are irreplaceable, as they are based on policies instituted by the New Zealand government to run the country, and it would be inappropriate for foreign laws to interfere with the governance of New Zealand. Statutes that protect private interests that are based on fundamental human rights are irreplaceable, as even though other countries' equivalent statutes may be similar, the fact that these rights underpin New Zealand society means it is important to reinforce that they are non-derogable. Statutes that protect private interests which are unique to New Zealand, such as Maori interests, are irreplaceable, as the legislation of other countries cannot reflect the distinctive background that gave rise to that interest, and will be unable to protect it adequately.

Once this dissertation had established and justified these new criteria, it then applied them to particular sections contained within employment legislation, particularly the Employment Relations Act 2000, to determine which sections could be overriding mandatory rules. It was

concluded that only two sections could be overriding mandatory rules, namely those dealing with discrimination and trade unions. This was justified on the basis that the other sections were based on social and economic rights, the status of which is currently disputed within New Zealand. Given that this is the case, it would be inappropriate for courts to hold that they are on par with civil and political rights, and to make sections that are based on them overriding mandatory rules.

This dissertation also suggested that the narrowness of the new test for overriding mandatory rules, meant it was unnecessary to imply a narrow territorial scope. Rather, it would be appropriate to simply rely on jurisdiction to ensure that the Employment Relations Act 2000 is only applied to cases that are sufficiently connected to New Zealand. This has the benefits of avoiding forum bias, and the potential 'black hole' that could arise in the situation where the Employment Relations Act 2000 is the applicable law, but the plaintiff fails to fulfil the requirements of the territorial scope.

Finally, this dissertation considered how the new approach would affect interested parties, and concluded that it benefits all concerned. Firstly, the party autonomy of employers and employees is maintained as far as is possible, but the fundamental rights of employees are protected. Secondly, the approach avoids breaching comity. Thirdly, the reasonableness of the test ensures that employers and employees will not try to avoid New Zealand law, and, because it is more certain than the current approach, it will reduce the number of cases coming before the court.

Although determining the status of a statute can seem like a minor issue, the steadfast progression of globalisation makes it important to think about how these cross-country interactions will affect New Zealand law, and consequently our lives. It is important for the law to keep pace with the changes occurring in society. Otherwise, we may find ourselves on the back foot, in the position where the law is inconsistent and uncertain, consequently leading to haphazard results and unhappy litigants. This is particularly true in the area of employment law, which is an area of law that impacts the vast majority of New Zealanders.

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