
Taming the Unruly Horse:
The Public Policy Exception in Private International Law in the Context
of Human Rights

Stephanie Knowler

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Introduction

The field of private international law (or the conflict of laws) serves a unique function: it often requires the forum court to apply foreign law to a particular case.¹ In certain circumstances, however, the application of that foreign law may be contrary to the forum's fundamental public policy, leading to an intolerable result. The forum does not simply have to accept that result, though. Instead, the courts may have recourse to the public policy exception, or doctrine of *ordre public*, to refuse the application of that law. As the exception entails setting aside foreign law in favour of one's own, there are often concerns of parochialism and undermining the entire private international law system. As such, the exception has been described as "a very unruly horse [and] once you get astride it, you never know where it will carry you."² The courts are frequently reminded they must ensure "this animal [does not] wreak havoc in international pastures."³ Despite concerns about keeping the exception reined in, it is a necessary tool in private international law. The forum must be able to protect the fundamental tenets underpinning its society when choice-of-law rules do not do so. In our world of diverse legal systems, and increasing globalisation, the practical significance of the public policy exception has never been greater. Now, more than ever, it requires renewed attention.

This dissertation argues that, in determining whether to invoke the public policy exception, the courts should engage with the underlying principles of choice-of-law. These principles provide justification for applying foreign law, according to the applicable choice-of-law rule. As such, they are relevant to whether the foreign law should be disapplied pursuant to the public policy exception. The current conceptualisation of the public policy exception, however, does not engage with these principles. As the Court of Appeal outlined in the leading case on public policy and choice-of-law, *New Zealand Basing Ltd v Brown*, the current exception has a high threshold⁴ and requires a breach of an absolute or universally shared value before it will be invoked.⁵ This arbitrary focus on absolute values undermines the underlying principles and the purpose of the exception; to protect domestic policies fundamental to the forum.

To make this point good it will be necessary to first provide an overview of the foundations of private international law, and in particular, the choice-of-law process. This will enable a better

¹ M Davies, A Bell and P Brereton (eds) *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis Butterworths, Chatswood (NSW), 2014) [Nygh] at 3.

² *Richardson v Mellish* (1824) 2 Bing 229 at 252.

³ PB Carter "The Role of Public Policy in English Private International Law" (1993) 42 ICLQ 1 at 9-10.

⁴ *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [65].

⁵ At [68].

understanding of the framework within which the public policy exception lies and why an exception to choice-of-law rules is necessary (see Chapter I). Chapter II will then analyse choice-of-law rules in more depth. As will be seen, these rules can be conceptualised as a compromise between the competing values of proximity and giving effect to important domestic policies. Where the latter is more important, a unilateral choice-of-law rule will be implemented, ensuring the law of the forum applies to give effect to that policy. Where the policy is less important, the forum will be more willing to tolerate foreign law and will implement a multilateral choice-of-law rule, which seeks the law with the greatest proximity to the dispute. On the facts of a particular case, however, the choice-of-law rule may result in an intolerable outcome. If so, the public policy exception must step in as a corrective tool. This Chapter will then analyse the principles underlying choice-of-law rules, demonstrating that the main justifications for applying foreign law are uniformity of decisions, meeting party expectations, doing justice and comity. It will be seen that, in certain circumstances the underlying principles may actually point in favour of domestic, rather than foreign, law applying and therefore, may justify invoking the public policy exception. As such, these principles should be relevant considerations within public policy.

After illustrating the relevance of the underlying principles, this dissertation will then propose a nuanced approach to public policy which ensures the courts engage with these principles (see Chapter III). Under this approach, it is submitted the courts should undertake a balancing exercise, whereby they consider and weigh the relevant principles. Where the principles point more strongly in favour of applying domestic law rather than foreign law, the public policy exception should be invoked more easily. To demonstrate a practical application of this nuanced approach, the balancing exercise will then be applied to the facts of *Basing*, which was concerned with age discrimination in employment (see Chapter IV). This proposed approach would provide principled guidelines to the court and in doing so, would enable the “unruly horse” to be tamed.

Chapter I: Foundations of Private International Law and the Shortcomings of the Current Public Policy Exception

The requirement for courts to apply foreign law in private international cases, when the choice-of-law rule says so, raises a unique issue for the judiciary; namely, the need to tolerate this foreign law despite possible differences with domestic law. One may question why New Zealand courts should apply foreign law in the first place. In fact, there is an entire living body of principles underlying choice-of-law rules, providing clear justification for doing so. For example, the court may apply foreign law to meet the parties' expectations, do justice, or for comity reasons.⁶ However, the courts are not required to blindly adhere to foreign law in every instance, at the expense of fundamental public policy. Despite the choice-of-law rule dictating foreign law applies, the court may refuse to do so if such application would be contrary to New Zealand's fundamental public policy.

This dissertation argues that, in determining whether to invoke the public policy exception, the court must engage with these underlying principles of choice-of-law rules. The public policy exception has been described as a type of "exceptional choice-of-law rule"⁷ in that it is essentially an "implicit and overriding choice of [forum] law."⁸ Recognising the exception is akin to a choice-of-law rule suggests it should therefore, be governed by the same principles underpinning choice-of-law rules themselves.⁹ These principles provide the reasons for applying foreign or domestic law in the first place, according to choice-of-law rules. Therefore, they are also relevant in determining whether domestic law should be applied through the public policy exception; where the principles point in favour of applying domestic instead of foreign law, the exception should be invoked to do so.

As currently conceptualised, however, the public policy exception in New Zealand regrettably does not engage with these underlying principles. As will be seen, the exception currently requires a fundamental breach of an absolute value before it will be invoked.¹⁰ This focus on absolute values sets a high threshold, meaning the test is very difficult to meet. As a result, it may not be invoked

⁶ See ch II, s II.

⁷ Alex Mills "The Dimensions of Public Policy in Private International Law" (2008) 4(2) J Priv Int L 201 at 207. But see Joost Blom "Public Policy in Private International Law and its Evolution in Time" (2003) NILR 373 61 at 375.

⁸ Mills, above n 7, at 208.

⁹ At 209.

¹⁰ *New Zealand Basing Ltd v Brown*, above n 4, at [68].

in circumstances where many would contend it would be fair and just to invoke it,¹¹ or, more importantly, in circumstances where the underlying principles actually weigh in favour of invoking it. In applying the exception as a static, blanket rule, only in cases where absolute values are infringed, New Zealand's important values and our own citizens and residents are not always adequately protected. So, how should New Zealand's public policy exception be conceptualised?

Before turning to this question, it will be useful to provide an overview of the foundations of private international law and public policy. This overview, which will form the basis for subsequent analysis in Chapters II and III, explores the relationship between choice-of-law rules and public policy. In particular, it will be seen that the public policy exception is a necessary exception to objective choice-of-law rules which may be blind to the interests at stake. Understanding this relationship is crucial to understanding why and how the courts should engage with the principles underlying choice-of-law in the context of public policy (see Chapters II and III).

I What Are Private International Law Systems?

Private international law is that part of a country's law dealing with cases that have a foreign element¹² and is concerned with the "just disposal" of such proceedings.¹³ A case will have such a foreign element when it has "contact" with some system of law other than New Zealand.¹⁴ For example, a contract between a New Zealand company (X) and an English company (Y) to be performed in England has a foreign element and will be governed by private international law. Despite the title of private *international* law, the system of rules governing this area are part of the domestic laws of each country.¹⁵

¹¹ See M Tilbury, G Davis and B Opeskin *Conflict of Laws in Australia* (Oxford University Press, Melbourne, 2002) 53 at 394: "[P]erhaps English law has been too willing in the past to sacrifice its own policy imperatives for the sake of international comity".

¹² Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) [*Dicey*] at [1-001].

¹³ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] AC 883 at [15].

¹⁴ *Dicey*, above n 12, at [1-001].

¹⁵ Marcus Pawson *Laws of New Zealand Conflict of Laws: Choice of Law* (online ed) at [1]; J Morris, J McClean and K Beevers *The Conflict of Laws* (7th ed, Sweet & Maxwell, London, 2009) at [1-006]; and David Goddard and Campbell McLachlan "Private International Law - Litigating in the Trans-Tasman Context and Beyond" (Paper presented at the New Zealand Law Society seminar, August 2012) at 1.

The private international law system generally has three functions:¹⁶ first, it discerns whether the forum court has jurisdiction to determine a matter with a foreign element. Second, if the court does have jurisdiction, it uses domestic choice-of-law rules to identify the law applicable to the matter (the *lex causae*). Third, the system determines whether the forum court will recognise or enforce foreign judgments.

If a New Zealand court has jurisdiction, it will apply New Zealand choice-of-law rules to determine the applicable law. If the relevant choice-of-law rule indicates an issue should be governed by foreign law, the court will generally apply that foreign law. So, if the court had jurisdiction over a dispute between X and Y above, the court would apply New Zealand's choice-of-law rules to determine which law would govern the contract. New Zealand's contract choice-of-law rule states contractual issues are governed by the "proper law" of the contract,¹⁷ which will be either the law expressly,¹⁸ or impliedly,¹⁹ chosen by the parties, or absent that, the law with which the transaction has the closest and most real connection.²⁰ Similarly, a New Zealand court will use New Zealand private international law rules to determine whether they will enforce a foreign judgment.

However, the courts retain the power to refuse to apply a foreign law, or recognise or enforce a foreign judgment, in certain circumstances.²¹ The court may refuse to apply a foreign law if there is an overriding mandatory rule which must apply regardless of the applicable law.²² Additionally, the court may refuse to apply a foreign law, or enforce a foreign judgment, if to do so would be contrary to public policy.²³ As recognition and enforcement of foreign judgments raises different considerations in relation to public policy, this dissertation will be confined to a discussion of the public policy exception in choice-of-law. In that context, the exception overrides the otherwise applicable choice-of-law rule. Therefore, to fully understand the exception and why it is required, it will be helpful to first analyse choice-of-law rules themselves. As will be seen, the choice-of-law rules often specify the application of foreign law which may have implications inconsistent with the forum's substantive policies, necessitating the public policy exception.

¹⁶ *Dicey*, above n 12, at [1-003].

¹⁷ *Pawson*, above n 15, at [115].

¹⁸ At [117].

¹⁹ At [118].

²⁰ At [118].

²¹ *Goddard and McLachlan*, above n 15, at 124.

²² *Dicey*, above n 12, at [1-053]; and *Pawson*, above n 15, at [8].

²³ *Dicey*, above n 12, Rules 2 and 51; *Pawson*, above n 15, at [14]; and *Carter*, above n 3, at 1.

II Choice-of-Law Rules

Choice-of-law rules can fall into one of two categories – multilateral rules or unilateral (*lex fori*) rules.²⁴ The multilateral approach to choice-of-law was propagated by 19th century German scholar Friedrich Carl von Savigny,²⁵ who proposed to resolve choice-of-law problems by allocating each legal relationship to its “seat” or the territory to which it “belongs”.²⁶ To find this “seat”, multilateral choice-of-law rules are employed. Such rules are neutral and objective,²⁷ in that they specify a connecting factor that can lead to either the *lex fori* or foreign law being applicable.²⁸ For example, the validity of marriage is governed by the *lex loci celebrationis* (the law of the place where the marriage was celebrated),²⁹ which could be any number of legal systems.

Multilateral rules, in attempting to find the “seat”, attempt to find the legal system with the “closest connection”³⁰ or the greatest proximity to the dispute, as that is considered the “most appropriate” system to govern the dispute.³¹ This notion of proximity can be seen in several of New Zealand’s multilateral choice-of-law rules. For example, as noted above, in the absence of choice, the contractual choice-of-law rule requires the court to identify the law most closely connected to the contract.³² More recently, New Zealand Parliament incorporated proximity into the tort choice-of-law rule through the Private International Law (Choice of Law in Tort) Act 2017. The Act provides that the law applicable to torts is the law of the place where the events giving rise to the claim occurred (the *lex loci delicti*),³³ subject to a flexible exception enabling the court to apply the law of another country instead if it has a substantially closer connection to the parties and the dispute.³⁴

²⁴ *Dicey*, above n 12, at [1-042]. Unilateral choice-of-law rules may also be known as ‘particular’ rules, while multilateral choice-of-law rules may also be known as ‘general’ rules.

²⁵ Friedrich K Juenger "Need for a Comparative Approach to Choice-of-Law Problems" (1999) 73 Tul L Rev 1309 at 1315-1316; and Giesela Rühl "Unilateralism" in K Hopt, J Basedow and R Zimmermann (eds) *Max Planck Encyclopedia of European Private Law* (Oxford University Press, New York, 2012) 1735 at 1736.

²⁶ Friedrich Carl von Savigny *Treatise on the Conflict of Laws* (2nd ed Guthrie Translation, T & T Clark, Edinburgh, 1880) at 133; and Friedrich K Juenger *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers, Dordrecht, 1993) at 36.

²⁷ Juenger, above n 26, at 47.

²⁸ Christopher Forsyth "The Eclipse of Private International Law Principle - The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era" (2005) 1 J Priv Int L 93 at 102.

²⁹ Pawson, above n 15, at [18].

³⁰ Juenger, above n 26, at 40; Mills, above n 7, at 211.

³¹ Symeon C Symeonides *Private International Law at the End of the 20th Century: Progress or Regress?* (Kluwer Law International, London, 2000) at 29.

³² Pawson, above n 15, at [115]-[118].

³³ Private International Law (Choice of Law in Tort) Act 2017, s 8.

³⁴ Private International Law (Choice of Law in Tort) Act, s 9.

In contrast, unilateral choice-of-law rules are rules mandating the application of the law of the forum (the *lex fori*).³⁵ Such rules are implemented as a “clear signal that important public interests are at stake” which the legislators do not wish to jeopardise by allowing the application of foreign law.³⁶ These rules may be statutory rules directing the court to apply New Zealand law when the facts fulfil a specified forum contact contained within the statute.³⁷ For example, s 3 of the Fair Trading Act 1986 provides that the Act applies to the “engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services ... within New Zealand.”³⁸ Alternatively, the common law may dictate that the *lex fori* must apply in certain circumstances, such as in matters concerning procedure.³⁹

The multilateral approach has become the “conventional wisdom”⁴⁰ for generations of conflicts scholars and continues to occupy a “commanding position”⁴¹ in both civil and common law jurisdictions.⁴² Unilateral choice-of-law rules have been both strongly criticised by some writers, particularly given the favouritism for forum law,⁴³ and equally strongly defended by others.⁴⁴ But, despite criticism, virtually every country has enacted at least one unilateral rule.⁴⁵ While in the past, the two approaches have been seen as mutually exclusive, there has been increasing recognition that the two systems, and therefore, the two types of rules, can “co-exist and complement each other”.⁴⁶

³⁵ Symeonides, above n 31, at 15; and *Dicey*, above n 12, at [1-042].

³⁶ Symeon C Symeonides *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press, New York, 2014) at 313-314.

³⁷ At 312.

³⁸ Fair Trading Act 1986, s 3(1). This could also be interpreted as an overriding mandatory rule: see David Goddard “Conflict of Laws - The International Element in Commerce and Litigation” (Paper presented at the New Zealand Law Society seminar, November 1991) 15 at 60-61; and Maria Hook “The ‘Statutist Trap’ and Subject-Matter Jurisdiction” (2017) 13 J Priv Int L 435 at 439.

³⁹ *Dicey*, above n 12, at [7-002].

⁴⁰ Juenger, above n 26, at 39.

⁴¹ At 40. Note, however, that unilateralism is the prevailing view in the United States; see generally Juenger, above n 25; and Rühl, above n 25.

⁴² Symeonides, above n 31, at 76.

⁴³ Mary Keyes “Statutes, Choice of Law, and the Role of Forum Choice” (2008) 4(1) J Priv Int L 1 at 4.

⁴⁴ *Dicey*, above n 12, at [1-046].

⁴⁵ Symeonides, above n 31, at 16; and Symeonides, above n 36, at 332.

⁴⁶ Symeonides, above n 31, at 75.

Any exceptions to choice-of-law rules will necessarily only be invoked when a multilateral rule specifies that foreign law applies. If New Zealand law is designated as applicable, there will be no need for such exceptions.⁴⁷ What exceptions then are available to exclude foreign law?

III Exceptions to Choice-of-Law Rules

As multilateral choice-of-law rules are objective, and do not examine the substantive content of the chosen law, they are often described as being “blind to the interests at stake”.⁴⁸ As such, several exceptions are necessary to enable courts to take these interests into account. The primary exceptions examined below – overriding mandatory rules and the public policy exception - allow the court to refuse to apply the foreign law specified by the choice-of-law rule, and instead apply the *lex fori*, when a non-derogable matter of public policy is at issue.

A Overriding Mandatory Rules

Overriding mandatory rules are rules of the forum which are so important they must be applied irrespective of the otherwise applicable foreign law.⁴⁹ Ordinarily, New Zealand rules will only apply if our choice-of-law rules conclude New Zealand law is the applicable law.⁵⁰ However, if a domestic rule is considered “so important that as a matter of construction or policy [it] must apply”⁵¹ the court will apply that rule, irrespective of the otherwise applicable law.⁵² Overriding mandatory rules are described as operating positively as they “affirmatively direct the application of the forum law.”⁵³

⁴⁷ Mills, above n 7, at 207. See also T de Boer "Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community" in A Malatesta, S Bariatti, F Pocar (eds) *The External Dimension of EC Private International Law in Family and Succession Matters* (CEDAM, Padova, 2008) 295, T de Boer "Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community" (2008) University of Amsterdam Digital Academic Repository <<http://hdl.handle.net/11245/1.285248>> at 3.

⁴⁸ de Boer above n 47, at 4.

⁴⁹ Nelson Enonchong "Public Policy in the Conflict of Laws: A Chinese Wall around Little England" (1996) 45 ICLQ 633 at 635.

⁵⁰ Dicey, above n 12, at [1-053].

⁵¹ J Fawcett and J Carruthers *Cheshire, North & Fawcett on Private International Law* (14th ed, Oxford University Press, Oxford, 2008) citing Law Com Working Paper No 87 (1984) at 150.

⁵² Dicey, above n 12, at [1-053]; and Pawson, above n 15, at [8].

⁵³ Tilbury, Davis and Opeskin, above n 11, at 396.

Article 9(1) of the European Rome I Regulation (on the law applicable to contractual obligations) defines overriding mandatory rules as:⁵⁴

... 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 ...

A statute may contain an express provision stating it has overriding mandatory effect.⁵⁵ For example, s 137 of the Credit Contracts and Consumer Finance Act 2003 states the Act applies to a credit contract, guarantee, lease, or buy-back transaction if it would be governed by the law of New Zealand but for the parties' choice of foreign law.⁵⁶ Where a statute is instead expressed in general terms,⁵⁷ the court must determine whether the particular rule is so important as to have overriding mandatory force.⁵⁸ Overriding mandatory rules have been described by leading conflicts author *Dicey* as “crystallised rules of public policy” because they set out “mandatory rules which the parties cannot contract out of”.⁵⁹

B The Public Policy Exception

Importantly for our purposes, courts retain the power to refuse to apply an otherwise applicable foreign law if such application would be contrary to New Zealand's fundamental public policy.⁶⁰ In contrast to overriding mandatory rules, the public policy exception has a ‘negative’ effect⁶¹ in that it operates to exclude or disapply foreign law.⁶² The public policy exception serves as a “check on the operation of [choice-of-law] rules”⁶³ and is used to avoid unacceptable results (in the view of the forum) that would arise from recognising foreign law.⁶⁴ The courts emphasise that the

⁵⁴ Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art 9(1).

⁵⁵ Pawson, above n 15, at [8].

⁵⁶ Credit Contracts and Consumer Finance Act 2003, s 137(b).

⁵⁷ *Dicey*, above n 12, at [1-037].

⁵⁸ Pawson, above n 15, at [8]. For the two possible approaches to determining whether such a statute applies to the case at hand, see *Dicey*, above n 12, at [1-040].

⁵⁹ *Dicey*, above n 12, at [1-061].

⁶⁰ At Rule 2.

⁶¹ Blom, above n 7, at 375.

⁶² *Dicey*, above n 12, at [5-007]; and Adeline Chong "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2(1) J Priv Int L 27 at 32.

⁶³ Blom, above n 7, at 374.

⁶⁴ Mills, above n 7, at 212-213; Blom, above n 7, at 379; and de Boer, above n 47, at 3.

exception is of an “exceptional nature”⁶⁵ and must be invoked “with the greatest circumspection”⁶⁶ and “judicial restraint”.⁶⁷ This is because public policy is the only ground on which a court may examine the substance of the foreign law, which is, in general, “viewed as contrary to ... principles of private international law”,⁶⁸ and a finding that the application of foreign law is contrary to public policy is often seen as condemning that foreign law.⁶⁹

To invoke the exception, it is not enough that the foreign law is different to New Zealand law,⁷⁰ or would lead to a different outcome;⁷¹ after all, we cannot say that “every solution of a problem is wrong because we deal with it otherwise at home.”⁷² Instead, the focus must usually be on the *effect* of the application of foreign law. While there are some extreme cases of laws which, in the abstract, are so repugnant (such as serious infringements of human rights) that they should not be recognised at all, in all other instances, the court may only refuse to apply a foreign law if the *effect* of applying that law is contrary to public policy in the particular case.⁷³ In invoking the exception, the courts do not disapply the entire foreign law, but only the offending rule.⁷⁴ If the rest of the foreign law can be applied, the courts will do so.⁷⁵ However, if that is not possible, the courts will apply forum law to fill the gap.⁷⁶

It is also not enough that the application of foreign law is simply contrary to ‘domestic public policy’ (the public policy applicable only in a wholly domestic case⁷⁷). So, the exception will not be invoked merely because it “could, or would, be invoked in the forum if the same facts had been

⁶⁵ *New Zealand Basing Ltd v Brown*, above n 4, at [65]. See *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [18]; and Goddard and McLachlan, above n 15, at 126.

⁶⁶ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [18].

⁶⁷ At [140], per Lord Hope.

⁶⁸ Mills, above n 7, at 209.

⁶⁹ *New Zealand Basing Ltd v Brown*, above n 4, at [65]; and *Beals v Saldanha* [2003] 3 SCR 416 89, at [75], as cited in *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 88, at [50]-[51].

⁷⁰ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [15]; and Jan Oster "Public Policy and Human Rights" (2015) 11(3) J Priv Int L 542 at 550.

⁷¹ Goddard and McLachlan, above n 15, at 126.

⁷² *Loucks v Standard Oil Company of New York* 224 NY 99 (1918) at 111.

⁷³ *Dicey*, above n 12, at [5-005]; Pawson, above n 15, at [14]; *New Zealand Basing Ltd v Brown*, above n 4, at [66]; and O Kahn-Freund "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 Transactions of the Grotius Society 39 at 40.

⁷⁴ *Dicey*, above n 12, at [5-007].

⁷⁵ Mills, above n 7, at 208 and 212.

⁷⁶ Blom, above n 7, at 375; and Mills, above n 7, at 208 and 212. But see Mills at 212 where the author considers that a better approach may be to consider “which state has the next greatest interest in governing the dispute” rather than always resorting to forum law.

⁷⁷ Adeline Chong "Transnational Public Policy in Civil and Commercial Matters" (2012) 128 LQR 88 at 89.

presented in a purely domestic context.”⁷⁸ Instead, the exception will only be invoked where the application of foreign law is contrary to ‘international public policy’⁷⁹ – domestic public policy norms which are so important as to be applicable in private international law.⁸⁰ So, for example, the mere fact that a foreign contract contains a provision which would, in a New Zealand contract, be contrary to public policy will not necessarily make its enforcement in New Zealand contrary to public policy.⁸¹ The conception of public policy is, and should be, narrower in private international law than in internal law⁸² and therefore, courts will be slower to invoke the exception in cases involving a foreign element than in purely domestic cases.⁸³

Formal definition of the public policy exception is elusive⁸⁴ and attempts to define it often result in vague conceptualisations referring to abstract notions. As noted earlier, New Zealand’s current exception focuses on fundamental breaches of absolute values. The following section will illustrate how courts have attempted to define the exception.

1 How is the exception currently conceptualised?

At English common law, the courts held that applying foreign law was contrary to public policy if doing so would “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”⁸⁵ or would “lead to a result wholly alien to fundamental requirements of justice.”⁸⁶ Many areas of choice-of-law and public policy are now embodied in European Regulations and statute in the United Kingdom.⁸⁷ New Zealand’s

⁷⁸ Carter, above n 3, at 2.

⁷⁹ Kenny Chng "A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws" (2018) 14(1) J Priv Int L 130 at 133; and Enonchong, above n 49, at 659. For more information on the distinction between ‘domestic’ and ‘international’ public policy see Chong, above n 77, at 2-3; and Mills, above n 7, at 213.

⁸⁰ Chng, above n 79, at 133.

⁸¹ *Dicey*, above n 12, at [32-185] as cited in *New Zealand Basing Ltd v Brown*, above n 4, at [66]. For example, a New Zealand court will generally enforce a contract that is valid by its governing law even if it is made without consideration: *Re Bonacina* [1912] 2 Ch 394 (CA).

⁸² *Fawcett and Carruthers*, above n 51, at 140.

⁸³ *Dicey*, above n 12, at [5-003].

⁸⁴ Kent Murphy "The Traditional View of Public Policy and Ordre Public in Private International Law" (1981) 11(3) Ga J Int'l & Comp L 591 at 591.

⁸⁵ *Loucks v Standard Oil Company of New York*, above n 72, at 202. See also *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [17].

⁸⁶ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [16].

⁸⁷ *Dicey*, above n 12, at [5-015]; Goddard and McLachlan, above n 15, at 3; and Adrian Briggs *The Conflict of Laws* (2nd ed, Oxford University Press, Oxford, 2008) at 3. See also Regulation (EC) 593/2008 (Rome I), above n 54, at art. 21: “The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”

exception, however, continues to be governed by common law. The New Zealand Court of Appeal outlined the current test in *Reeves v OneWorld Challenge LLC* in the context of enforcement of a foreign judgment.⁸⁸ The test is whether enforcement would:⁸⁹

... ‘shock the conscience’ of a reasonable New Zealander, or be contrary to New Zealand’s view of basic morality or a violation of essential principles of justice or moral interests in New Zealand.

This test was subsequently adopted by the Court of Appeal in the context of choice-of-law in *New Zealand Basing Ltd v Brown* where the Court stated:⁹⁰

[67] The question is whether recognition of a foreign law ... would shock the conscience of a reasonable New Zealander, be contrary to a New Zealander’s view of basic morality or violate an essential principle of justice or moral interests. The touchstone is whether the result of applying the foreign law would be wholly alien to the fundamental requirements of justice as administered by a New Zealand court ...

In particular, the Court emphasised that the threshold for the test is high⁹¹ and there must be an infringement of an absolute or universally held value, rather than an infringement of “relative values which are recognised in one legal system but not the other.”⁹² It is not clear, under this broad-brushed conceptualisation, exactly when the exception will be invoked. As such, some examples of instances where the courts have used the exception will be beneficial.

2 Examples of the public policy exception

The public policy exception has predominantly been invoked in cases involving breaches of clearly established rules of international law or serious infringements of fundamental human rights.⁹³

⁸⁸ *Reeves v OneWorld Challenge LLC*, above n 69.

⁸⁹ At [67]. This test was adopted from the Supreme Court of Canada in the case of *Beals v Saldanha*, above n 69, where the test applied was whether enforcement would “shock the conscience of the reasonable Canadian” (at [77]) or would be “contrary to our view of basic morality” (at [71]).

⁹⁰ *New Zealand Basing Ltd v Brown*, above n 4, at [67] (footnotes omitted). At footnote 86 the Court suggested but did not decide that the test for the application of the public policy exception should be the same in the context of recognition or enforcement of contracts as in the context of enforcement of foreign judgments.

⁹¹ At [65]; and *Chng*, above n 79, at 132.

⁹² *New Zealand Basing Ltd v Brown*, above n 4, at [68].

⁹³ *Empresa Nacional de Telecomunicaciones S A v Deutsche Bank AG* [2009] EWHC 2579 (QB), 2010 1 All ER (Comm) 649 at [22].

Therefore, the exception is clearly capable of taking account of human rights concerns.⁹⁴ However, there has been minimal judicial consideration, particularly in New Zealand, of the exception in the context of substantive human rights.⁹⁵ The Court of Appeal decision in *Basing*,⁹⁶ discussed below, is our highest authority on point.

(a) Clearly established rules of international law

The exception may be invoked where there has been a serious breach of a clearly established rule of international law. In *Kuwait Airways Corp v Iraqi Airways Co* Iraq invaded Kuwait⁹⁷ seizing aircraft belonging to Kuwait Airways Corporation (KAC).⁹⁸ The aircraft were then taken to Iraq and used by Iraqi Airways Corporation (IAC).⁹⁹ The Iraqi Government passed a resolution transferring all of KAC's property to IAC,¹⁰⁰ which was a breach of United Nations Security Council resolutions and thus, international law.¹⁰¹ The House of Lords held this was a "gross violation of established rules of international law" and enforcement of this law would be "manifestly contrary to the public policy of English law".¹⁰²

(b) Serious infringements of fundamental human rights

The concept of human rights, when relied upon to justify invoking the public policy exception, is uncertain, and no detail is given as to its content or source.¹⁰³ In particular, it is unclear whether courts should be relying on international or domestic human rights law.¹⁰⁴ The classic example of the exception being invoked in this context is where the foreign law itself represents a serious infringement of fundamental international human rights. In *Oppenheimer v Cattermole* the House of Lords held that a 1941 Nazi Government decree depriving Jewish émigrés of their nationality and confiscating their property was contrary to English public policy because a law of that nature

⁹⁴ Maria Hook "Private International Law and Human Rights" in M Bedggood, K Gledhill and I McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) at 952.

⁹⁵ At 952.

⁹⁶ *New Zealand Basing Ltd v Brown*, above n 4.

⁹⁷ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [1].

⁹⁸ At [2].

⁹⁹ At [2].

¹⁰⁰ At [2].

¹⁰¹ At [20] and [29].

¹⁰² At [29].

¹⁰³ J Fawcett, MN Shuilleabháin and S Shah *Human rights and Private International Law* (Oxford University Press, Oxford, 2016) at [2.102].

¹⁰⁴ At [2.102].

“constitutes so grave an infringement of human rights that the courts of [a civilised country] ought to refuse to recognise it as a law at all.”¹⁰⁵

Under the current conceptualisation in New Zealand, as demonstrated in *Basing*, it appears only the grossest infringements of absolute human rights will invoke the exception,¹⁰⁶ and relative values will not suffice.

(c) *New Zealand Basing Ltd v Brown*

(i) Facts

New Zealand-based pilots Brown and Sycamore (the pilots), were employed by Cathay Pacific Airways Limited (Cathay Pacific), a Hong Kong based international airline, to fly between Auckland and Hong Kong.¹⁰⁷ They had entered into employment agreements with Cathay Pacific through the defendant, a wholly owned Hong Kong subsidiary: New Zealand Basing Ltd (NZBL).¹⁰⁸ The agreements materially provided that Hong Kong law applied to the pilots’ contracts (the express choice-of-law clause) and that the pilots were required to retire when they reached the age of 55.¹⁰⁹

Facing dismissal, the pilots sought relief in New Zealand under s 104(1)(c) of the Employment Relations Act 2000 (ERA) which prohibits termination of employment by reason of discrimination on the basis of age.¹¹⁰ The issue at hand was whether the ERA applied¹¹¹ given the foreign element of the case and the express choice-of-law clause.

NZBL argued Hong Kong law applied since the employment agreements expressly stated so.¹¹² Hong Kong law does not provide protections against discrimination on the grounds of age.¹¹³ The pilots contended that s 238 of the ERA, which provides that “[t]he provisions of [the Act] have effect despite any provision to the contrary in any contract or agreement”, was an overriding

¹⁰⁵ *Oppenheimer v Cattermole* [1976] AC 249 (HL) at 277-278.

¹⁰⁶ Fawcett, Shúilleabháin and Shah, above n 103, at [2.102].

¹⁰⁷ *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229, [2014] ERNZ 770 at [1].

¹⁰⁸ *New Zealand Basing Ltd v Brown*, above n 4, at [1].

¹⁰⁹ At [2].

¹¹⁰ *Brown v New Zealand Basing Ltd*, above n 107, at [59].

¹¹¹ *New Zealand Basing Ltd v Brown*, above n 4, at [5].

¹¹² *Brown v New Zealand Basing Ltd*, above n 107, at [2].

¹¹³ At [2].

mandatory rule which overrode the parties' agreement that Hong Kong law would apply.¹¹⁴ Alternatively, they contended the application of Hong Kong law would be contrary to New Zealand public policy, as it did not provide protection against age discrimination,¹¹⁵ and therefore, Hong Kong law should be disapplied.

(ii) Employment Court

Judge Corkill held that the ERA applied because the pilots were based in New Zealand and therefore, fell within the implicit territorial scope of the Act,¹¹⁶ and because s 238 had overriding effect.¹¹⁷ Thus, the age discrimination provisions applied to the pilots' employment, despite their choice-of-law clause,¹¹⁸ and it would be discriminatory under the Human Rights Act 1993 (HRA)¹¹⁹ to require the pilots to retire on the ground of age.¹²⁰

In the alternative, Judge Corkill was also prepared to hold that the public policy exception should apply.¹²¹ Protection from discrimination on the grounds of age was "one of a number of deeply held values that bear on the very essence of human identity"¹²² and the application of Hong Kong law, which did not provide such protection, would be "an affront to basic principles of justice and fairness."¹²³ NZBL appealed to the Court of Appeal.

(iii) Court of Appeal

The Court of Appeal overturned the Employment Court decision, concluding the ERA did not apply as Hong Kong law was the applicable law and there was no mandatory rule or public policy ground for overriding it.

On the first argument, the Court held that s 238 was not an overriding mandatory rule and therefore, did not override the parties' agreement that Hong Kong law applied.¹²⁴ On the alternative

¹¹⁴ *New Zealand Basing Ltd v Brown*, above n 4, at [4(a)].

¹¹⁵ At [4(b)].

¹¹⁶ *Brown v New Zealand Basing Ltd*, above n 107, at [80].

¹¹⁷ At [100].

¹¹⁸ At [132].

¹¹⁹ Human Rights Act 1993, s 21.

¹²⁰ *Brown v New Zealand Basing Ltd*, above n 107, at [132].

¹²¹ At [127].

¹²² At [111].

¹²³ At [113].

¹²⁴ *New Zealand Basing Ltd v Brown*, above n 4, at [59].

argument, the Court also concluded that application of Hong Kong law was not contrary to New Zealand public policy and thus, the public policy exception did not apply.¹²⁵ Recall that the Court held the right infringed must be “a fundamental or universal value”, rather than a relative value “recognised in one legal system but not the other.”¹²⁶ On the facts, the Court held that the right to be free from age discrimination is not “an absolute value that must trump transnational contracting”¹²⁷ but rather is a flexible concept linked to and reflecting a “range of fiscal, social and cultural factors.”¹²⁸ This is reinforced by international human rights law which is largely silent on age discrimination, compared to grounds such as gender and ethnicity.¹²⁹ Therefore, the Court concluded that the absence of protection under Hong Kong law against age discrimination would not “shock the conscience of a reasonable New Zealander or violate an essential principle of our justice or moral interests.”¹³⁰

In concluding the exception did not apply, the Court also considered the employment agreements as a whole. Because the agreements provided significant financial benefits to the pilots through the election of Hong Kong law, such as a favourable income tax rate,¹³¹ there was no justification for allowing the pilots to use the exception to “circumvent a bona fide and legal choice of law”¹³² or defeat the “private bargaining intentions of the parties”.¹³³

As a result, the pilots were not afforded protection from age discrimination and were held to their choice of Hong Kong law. The pilots appealed to the Supreme Court.

(iv) Supreme Court

The Supreme Court overturned the Court of Appeal’s decision, concluding that the right not to be discriminated against on grounds of age did apply to the pilots’ employment relationships.¹³⁴

¹²⁵ At [83].

¹²⁶ At [68].

¹²⁷ At [74].

¹²⁸ At [74].

¹²⁹ At [74].

¹³⁰ At [83(c)].

¹³¹ At [77]. But see Maria Hook and Jack Wass "The Employment Relations Act and its Effect on Contracts Governed by Foreign Law" [2017] NZLJ 80 at 83, where the authors note that the favourable tax rate applied because NZBL was resident in Hong Kong, not because the parties had chosen Hong Kong law.

¹³² *New Zealand Basing Ltd v Brown*, above n 4, at [79].

¹³³ At [83(d)].

¹³⁴ *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 at [72] per William Young J and at [90] per Ellen France J.

However, the Supreme Court did not treat this case as a private international law case and applied statutory interpretation principles instead. The Court held that “statutory employment rights have a sui generis character”,¹³⁵ rather than a contractual character, and their application does not depend on the proper law of the employment agreement.¹³⁶ The rights not to be discriminated against are “free-standing rights” and apply to conduct which occurs in New Zealand,¹³⁷ regardless of whether the employment relationship is governed by New Zealand law.¹³⁸ The Court thought Parliament had considered the extent of the territorial application of the ERA, given the inclusion of certain exceptions to the right to be free from unlawful discrimination¹³⁹ relating to crews of ships and aircraft¹⁴⁰ and work performed outside of New Zealand,¹⁴¹ and intended the ERA to apply to employees based in New Zealand.¹⁴² As the pilots were based in New Zealand and did not come within the exceptions, their employment fell within the territorial scope of the ERA.¹⁴³ The Court left open the possibility that a different approach could be taken to the right not to be unjustifiably dismissed.¹⁴⁴

Because the Court applied statutory interpretation principles as opposed to private international law rules, they did not consider the public policy exception further. Therefore, the Court of Appeal decision is the highest New Zealand authority on the exception in the context of human rights and choice-of-law.

IV Why Engage with the Underlying Principles of Choice-of-law?

As has been seen, the current conceptualisation of the public policy exception does not engage with the underlying principles of choice-of-law. Instead, it focuses on arbitrary notions of absolute values and ‘shocked consciences’, imposing a high threshold in every case. As this dissertation will establish, it would be much better if the exception did take these principles into account, to determine whether they justify applying foreign law or invoking the exception. In particular, because the exception is akin to another choice-of-law rule, it should be governed by the same

¹³⁵ At [66].

¹³⁶ At [66] per William Young J and at [77] per Ellen France J.

¹³⁷ At [69].

¹³⁸ At [71].

¹³⁹ Employment Relations Act, s 106(1).

¹⁴⁰ Human Rights Act, s 24.

¹⁴¹ Section 26.

¹⁴² *Brown v New Zealand Basing Ltd*, above n 134, at [88].

¹⁴³ At [71].

¹⁴⁴ At [57] and [86].

principles as choice-of-law rules.¹⁴⁵ As Chapter II will demonstrate, on the facts of the particular case, these principles may point in favour of applying the *lex fori*, instead of foreign law.¹⁴⁶ In those cases, the exception should be invoked to give effect to the *lex fori*. Engaging with the underlying principles would also provide several benefits, as will be outlined in Chapter III.

The current conceptualisation of the public policy exception is vague¹⁴⁷ and uncertain, due to its open-textured nature,¹⁴⁸ and “[n]o attempt to define the limits of [the exception] has ever succeeded.”¹⁴⁹ Engaging with the underlying principles of choice-of-law, however, would provide clarity and certainty to the exception and such a principled approach could provide these thus-far elusive limits.

¹⁴⁵ See ch II, s I.

¹⁴⁶ See ch II, s III.

¹⁴⁷ Oster, above n 70, at 544.

¹⁴⁸ Chng, above n 79, at 131.

¹⁴⁹ *Dicey*, above n 12, at [5-008].

Chapter II: Justifying Choice-of-Law Rules and Public Policy

Chapter I highlighted that the public policy exception is a necessary escape from intolerable outcomes which may result from applying objective choice-of-law rules. This Chapter will analyse choice-of-law rules further, exploring the underlying justifications for them. It will be seen that choice-of-law rules themselves attempt to strike a balance between the principles of the wish to give effect to domestic policies and the value of proximity or close connection, through selecting either a unilateral or multilateral choice-of-law rule. When the choice-of-law rule strikes the wrong balance on the facts of the particular case, though, the public policy exception may need to step in as a corrective tool. To demonstrate why we give effect to foreign law in certain circumstances but not others, the main principles underlying choice-of-law rules will be analysed. As will be seen, these principles may actually provide justification for invoking the public policy exception instead of applying foreign law, in certain circumstances.

I Conceptualising Choice-of-Law Rules

As noted in Chapter I, the court uses choice-of-law rules to identify the applicable law. To fully understand choice-of-law rules, and thus, the public policy exception to these rules, it is helpful to analyse the rules on a conceptual level. One way to conceptualise choice-of-law rules is as a compromise between competing principles; in particular, a compromise between the wish to give effect to domestic public policies, on the one hand, and the value of proximity or close connection, on the other. The choice-of-law rules chosen by lawmakers are designed to strike a balance between these competing principles, by selecting either unilateral or multilateral choice-of-law rules. Where the domestic policies are considered fundamentally important, those policies will ordinarily be given effect to through the selection of a unilateral rule. For example, Parliament likely enacted the unilateral rule in s 3 of the Fair Trading Act to give effect to the fundamental policy of ensuring that “the interests of consumers are protected”¹⁵⁰ and “businesses compete efficiently”¹⁵¹ within New Zealand’s free market, which may not be given effect to through application of a foreign law that fails to protect consumers. However, where the domestic policies are considered less important, the lawmakers may be more open to tolerating foreign law and instead, will select a multilateral choice-of-law rule which seeks the legal system most closely connected to the dispute.

¹⁵⁰ Fair Trading Act, s 1A(1)(a).

¹⁵¹ Section 1A(1)(b).

There is a clear tension within this compromise between foreign law and domestic law and when each should apply. In striking the right balance, the choice-of-law rules are essentially trying to find the limit to the forum's tolerance of differences in foreign laws. In certain instances, the forum will tolerate foreign law even if it is different to domestic law (and therefore, allow multilateral rules to govern). In other instances, however, the forum will not tolerate foreign law and unilateral rules and thus, the *lex fori*, will apply instead. This tension between foreign and domestic law is also clearly seen in overriding mandatory rules.¹⁵² Where a particular domestic rule is so fundamental, it will be given effect as an overriding mandatory rule regardless of the ordinarily applicable choice-of-law rule. Like with unilateral rules, the balance is also struck in favour of giving effect to domestic policies.

Importantly, because choice-of-law rules are exactly that – rules – they will necessarily be a rigid expression of the principle chosen in the compromise, as they need to apply to many varied situations. Once the balance is struck, there is little room for the courts to renegotiate this balance within the choice-of-law rules themselves (they cannot simply change the choice-of-law rule in the particular case if they do not think the rule struck the right balance). As Aristotle recognised many centuries ago, any pre-formulated rule, no matter how carefully or wisely drafted, may, “because of its generality”, or its specificity, produce results contrary to the purpose for which it was designed.¹⁵³ Choice-of-law rules are no exception.

As such, this dissertation argues that the public policy exception is required to operate as a corrective tool, to allow an “escape” from the “shortcomings of choice of law rules”,¹⁵⁴ particularly the fact that objective multilateral rules may be “blind to the interests at stake.”¹⁵⁵ Where the rigid rules do not strike the right balance between proximity and giving effect to domestic policies in the particular case, and an intolerable result ensues, the exception is needed to correct that result.¹⁵⁶ In acting as a corrective choice-of-law device, the exception is simply providing the boundaries of tolerance of difference in foreign laws¹⁵⁷ where the choice-of-law rule itself inadequately delineated this boundary. A state is entitled to prevent adverse consequences to policies about

¹⁵² Overriding mandatory rules and unilateral choice-of-law rules have been described as essentially the same, in a practical sense. See Hook, above n 38, at 438: “There does not seem to be much of a practical difference between unilateral choice of law rules and overriding mandatory rules: both types of rules call for the unilateral application of the *lex fori* to specified issues.” The author notes that the principal difference is one of scope.

¹⁵³ Symeonides, above n 31, at 31.

¹⁵⁴ Carter, above n 3, at 1.

¹⁵⁵ de Boer, above n 47, at 4.

¹⁵⁶ At 3.

¹⁵⁷ Alex Mills *The Confluence of Public and Private International Law* (Cambridge University Press, Cambridge, 2009) at 6.

which it feels strongly.¹⁵⁸ The public policy exception allows a state to do so when the choice-of-law rule did not provide that protection or where the balance shifted because, for example, the choice-of-law rule did not actually lead to the law most closely connected. Given the exception is akin to a choice-of-law rule,¹⁵⁹ it should be conceptualised and justified in the same way.

There are several principles underlying choice-of-law rules which provide theoretical justification for applying either the *lex fori* or the rules of another system of law.¹⁶⁰ These principles help explain why the balance is struck in the way it is; either in favour of giving effect to domestic policies or in favour of proximity. These theoretical justifications have been the subject of much debate¹⁶¹ and there is no one “sacred principle” to explain why we have the choice-of-law rules we do.¹⁶² However, there are several principles or objectives that courts and scholars refer to on a consistent basis which will be analysed below.

II Underlying Principles of Choice-of-law Rules

The multilateral approach to choice-of-law may reflect private as well as public interests. Several scholars, such as Savigny, view choice-of-law rules as not concerned with “the protection or application of governmental interests” but instead “with the reconciliation of private interests and expectations.”¹⁶³ On this view, conflicts are not between sovereign states, but rather, between “areas of individual will or spheres of freedom.”¹⁶⁴ As such, several of the principles providing justification for multilateral rules stem from reasons concerning the individual, such as uniformity of decisions, giving effect to parties’ expectations and doing justice between the parties. However, conflicts cases do implicate public or state interests too,¹⁶⁵ demonstrated by the fact that courts often rely on the doctrine of comity to justify the application of multilateral rules. State interests also feature significantly in unilateral rules, given the predominant justification for such rules is the protection of important “interests and values of the forum state”.¹⁶⁶ It is important to note that these principles are not absolute and will necessarily be limited in certain circumstances, depending on the importance placed on either giving effect to domestic policies or proximity.

¹⁵⁸ Symeonides, above n 36, at 337.

¹⁵⁹ See ch I.

¹⁶⁰ Dicey, above n 12, at [1-005].

¹⁶¹ David Goddard *Laws of New Zealand Conflict of Laws: Jurisdiction and Foreign Judgments* (online ed) at [2]; and Goddard and McLachlan, above n 15, at 11.

¹⁶² Fawcett and Carruthers, above n 51, at 37.

¹⁶³ Nygh, above n 1, at [12.19].

¹⁶⁴ Rühl, above n 25, at 1736.

¹⁶⁵ Symeonides, above n 36, at 335.

¹⁶⁶ At 294.

A Uniformity of Decisions

At the heart of Savigny's multilateral approach is the notion that the supreme goal of private international law is to achieve uniformity of decisions;¹⁶⁷ that each case should be decided in the same way regardless of where the litigation occurs.¹⁶⁸ This principle is premised on the idea of equality of legal systems; that choice-of-law rules should treat equally foreign and forum law, and foreign and domestic litigants.¹⁶⁹ Multilateral rules, by using objective connecting factors to find the system with the greatest proximity to the dispute, achieve these goals. Such rules also ensure certainty and predictability, by clearly indicating the governing law.¹⁷⁰ Individuals should be able to predetermine the legal consequences of their actions and plan accordingly.¹⁷¹ If courts always applied forum law, the consequences of their actions would depend on the forum in which the case was brought. This goal also discourages forum shopping,¹⁷² whereby a plaintiff seeks out the forum which will apply the most favourable law.¹⁷³ Forum shopping would naturally be discouraged if all states applied the same law.¹⁷⁴

This principle is subject to criticism that it is not easily attainable,¹⁷⁵ due to divergences in legal systems.¹⁷⁶ Even if the choice-of-law rules were identical in every country, each country could still interpret and apply the rules differently.¹⁷⁷ The courts may characterise an issue differently, resulting in a different choice-of-law rule and possibly, a different law, applying.¹⁷⁸ As a result, a different outcome may arise.¹⁷⁹ For example, while some legal systems characterise limitation periods as substantive, and thus, governed by choice-of-law rules, others consider them to be

¹⁶⁷ Symeonides, above n 36, at 292.

¹⁶⁸ E Sykes and M Pryles *Australian Private International Law* (3rd ed, The Law Book Company Ltd, Sydney, 1991) at 12; *Nygh*, above n 1, at [12.21]; and *Keyes*, above n 43, at 13.

¹⁶⁹ Symeonides, above n 31, at 62.

¹⁷⁰ *Keyes*, above n 43, at 14.

¹⁷¹ At 14.

¹⁷² Sykes and Pryles, above n 168, at 12; and *Nygh*, above n 1, at [12.21].

¹⁷³ Sykes and Pryles, above n 168, at 12.

¹⁷⁴ At 12. However, the authors note that forum shopping can be discouraged in other ways, such as jurisdictional rules empowering a court to decline hearing a case if there is no good reason why the action should be litigated there.

¹⁷⁵ *Nygh*, above n 1, at [12.21]; Christa Roodt "Reflection on Theory, Doctrine and Method in Choice of Law" (2007) 40 *Comp & Int'l LJ S Afr* 76 at 94; *Keyes*, above n 43, at 13; Forsyth, above n 28, at 101; and Symeonides, above n 36, at 293.

¹⁷⁶ *Keyes*, above n 43, at 13.

¹⁷⁷ Forsyth, above n 28, at 101 and 104.

¹⁷⁸ Juenger, above n 26, at 71.

¹⁷⁹ Juenger, above n 26, at 71.

procedural, governed exclusively by the *lex fori*.¹⁸⁰ Moreover, this objective is not unfettered and issues of fundamental domestic public policy may trump uniformity.¹⁸¹ Where the balance in the compromise tips in favour of giving effect to domestic policies, uniformity will be set aside and a unilateral rule implemented instead. Such criticisms and limits to this principle, however, do not mean the goal of decisional uniformity is not still a laudable goal. It simply means that this principle alone is not enough to explain why we have the choice-of-law rules we do and it may be outweighed in certain circumstances where protecting fundamental domestic policies is more important.

B Meeting the Parties' Reasonable Expectations

A related underlying principle is that the conflict of laws “implements the reasonable and legitimate expectations of the parties to a transaction.”¹⁸² *Dicey* thought this was the main justification for the conflict of laws and the Court of Appeal in *Basing* agreed this objective was one of the “fundamentals of private international law.”¹⁸³ Pursuant to this principle, the courts seek to apply the law the parties would reasonably have expected to apply.¹⁸⁴ Multilateral rules enable such expectations to be fulfilled,¹⁸⁵ as the parties will ordinarily expect the law most closely connected to their dispute to govern. For example, parties will generally expect their contractual rights to be governed by the law they chose, or absent that, by the law most closely connected to the contract.¹⁸⁶ If the court always applied the law of the forum to disputes, the parties’ expectations could be frustrated, particularly because, as noted above, the outcome of the claim would then depend on the chosen forum.¹⁸⁷ This principle has been criticised for “masking normative judgments reflecting what a court believes the parties ought to expect”.¹⁸⁸ However, the purpose of the principle is exactly that; to undertake an objective analysis, not to determine what the parties subjectively might have expected.¹⁸⁹

¹⁸⁰ At 71.

¹⁸¹ Forsyth, above n 28, at 99.

¹⁸² *Dicey*, above n 12, at [1-005] as cited in *New Zealand Basing Ltd v Brown*, above n 4, at [79]. See also *Nygh*, above n 1, at [12.20]; and *Fawcett and Carruthers*, above n 51, at 37.

¹⁸³ *New Zealand Basing Ltd v Brown*, above n 4, at [79]. See also *Savigny*, above n 26, at 198: “We have therefore to inquire to what place the expectation of the parties was directed – what place they had in their minds as the seat of the obligation.”

¹⁸⁴ *Goddard and McLachlan*, above n 15, at 11.

¹⁸⁵ See *Goddard and McLachlan*, above n 15, at 11.

¹⁸⁶ *Nygh*, above n 1, at [12.20].

¹⁸⁷ At [12.21].

¹⁸⁸ Larry Kramer “Rethinking Choice of Law” (1990) 90 Colum L Rev 277 at 336.

¹⁸⁹ *CMV Clarkson and J Hill The Conflict of Laws* (4th ed, Oxford University Press, Oxford, 2011) at 10-11.

Party expectations, though, are not limitless. Where important forum interests are at stake, such as in consumer law, where there is a significant forum interest in protecting consumers from inequality of bargaining power,¹⁹⁰ the parties may be precluded from choosing the law themselves¹⁹¹ or their expectations may be given little weight.¹⁹² In such instances, the state's interest in giving effect to important domestic policies will be accorded greater weight and a unilateral rule may be implemented, such as s 3 of the Fair Trading Act.

C Doing Justice Between the Parties

A further justification for applying foreign law is to do "justice between the parties",¹⁹³ although, it is not always obvious what "appeals to 'justice' mean in the context of private international law."¹⁹⁴ Ordinarily, doing justice in this context is referred to as 'conflicts justice'.¹⁹⁵ This does not entail applying domestic conceptions of substantive justice; what is conceived as the 'just' outcome of a dispute will necessarily differ between legal systems.¹⁹⁶ Instead 'conflicts justice' requires the court to ensure the application of the law with the closest connection,¹⁹⁷ regardless of the content of that law. This will also ensure the parties' expectations are met, given they usually expect the closest connected law to apply.¹⁹⁸ As Mills describes it, doing justice between the parties requires a commitment to 'justice pluralism',¹⁹⁹ the idea that:²⁰⁰

... questions of private law do not have a single 'correct' answer, that different societies are capable of making (and entitled to make) different decisions about such questions, and that ... those differentiated determinations of the just outcome of a dispute ought to be given at least a degree of accommodation.

¹⁹⁰ Matthias Lehmann "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws" (2008) 41 *Vanderbilt Journal of Transnational Law* 381 at 416.

¹⁹¹ At 416. For example, Regulation (EC) 593/2008 (Rome I), above n 54, at art. 6, which provides that consumer contracts shall be governed by the law of the country where the consumer has his habitual residence.

¹⁹² Lehmann, above n 190, at 416.

¹⁹³ *Dacey*, above n 12, at [1-008]. See also Clarkson and Hill, above n 189, at 9; Lehmann, above n 190, at 407; and *New Zealand Basing Ltd v Brown*, above n 4, at [79].

¹⁹⁴ Mills, above n 157, at 3.

¹⁹⁵ Clarkson and Hill, above n 189, at 9.

¹⁹⁶ Mills, above n 157, at 6.

¹⁹⁷ Symeonides, above n 36, at 246-247.

¹⁹⁸ Mills, above n 157, at 4.

¹⁹⁹ At 5.

²⁰⁰ Alex Mills "The Identities of Private International Law: Lessons from the US and EU Revolutions" (2013) 23 *Duke J Comp & Int'l L* 445 7 at 472. Note that the author recognises that this is not the only value which might underpin a theory of private international law and that it is not enough on its own.

This idea is premised on an underlying acceptance that “the outcome determined by a foreign law [may] be more ‘just’ than local law.”²⁰¹ For example, if two English people married in France in accordance with French law, but not in accordance with English law, the English court, if it applied English law to the validity of the marriage, would have to treat the parties as unmarried persons and any children as illegitimate.²⁰² In applying English law, to the exclusion of French law, a “grave injustice” is inflicted on the parties.²⁰³ Therefore, to achieve ‘conflicts justice’, the courts must be able to tolerate and apply foreign law when appropriate, which multilateral rules allow.

However, sometimes ‘conflicts justice’ will necessarily be limited by concerns for ‘substantive justice’ in the particular case. ‘Conflicts justice’ requires the forum to tolerate the application of the most closely connected law, regardless of whether that results in a just outcome in the forum’s eyes. But, where important domestic policies should prevail and they are not given effect to by adhering strictly to ‘conflicts justice’, ‘substantive justice’ may necessarily step in as a “general corrective”.²⁰⁴ In such cases, instead of seeking the law with the closest connection (regardless of the outcome), a unilateral rule may be implemented to give effect to what the forum believes is the substantively just outcome; their domestic policy. Or, it may be necessary for the courts to scrutinise the foreign law, through the public policy exception, to determine whether it actually produces a “proper” (i.e. just) result.²⁰⁵

D Comity

The doctrine of “comity”, which is concerned with state or sovereign interests,²⁰⁶ has long been described as a foundational principle of private international law.²⁰⁷ While a “term of very elastic content”²⁰⁸ and no precise definition,²⁰⁹ comity is often referred to as connoting “courtesy” or respect for a foreign country’s laws, or the “need for reciprocity”.²¹⁰ So, courts apply foreign laws

²⁰¹ Mills, above n 157, at 5.

²⁰² *Dicey*, above n 12, at [1-006].

²⁰³ At [1-006].

²⁰⁴ Symeonides, above n 31, at 46.

²⁰⁵ At 45.

²⁰⁶ Donald Childress "Comity as Conflict: Resituating International Comity as Conflict of Laws" (2010) 44 U C Davis L Rev 11 at 27.

²⁰⁷ *Dicey*, above n 12, at [1-008].

²⁰⁸ *Dicey*, above n 12, at [1-008].

²⁰⁹ Joel Paul "Comity in International Law" (1991) 32 Harv Int'l LJ 1 at 3.

²¹⁰ *Dicey*, above n 12, at [1-008]; and John Turner "Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant?" [2013] NZ L Rev 653 at 654.

out of respect for the foreign state's laws and the hope that foreign courts will do the same when appropriate.

Despite disagreement between the courts and scholars, comity remains of continuing relevance as a basis for choice-of-law rules. *Dicey* rejected comity as the basis for private international law, criticising it as “a singular specimen of confusion of thought produced by laxity of language”.²¹¹ Instead, he argued courts apply foreign law in order to “do justice between the parties”, not from any desire to show courtesy or seek reciprocity.²¹² However, the courts continue to use comity in their judicial decision-making.²¹³ For example, it is often still invoked to justify restraint in the application of public policy.²¹⁴ O'Regan J in *Reeves* said the public policy exception “must be necessarily confined in line with the comity of nations principle.”²¹⁵ And, Lord Hope in *Kuwait Airways* noted judges should be slow to depart from “accepted principles of international law” including “comity of nations”.²¹⁶ He remarked that comity ordinarily requires the courts to give effect to the legislation of a foreign state, given that state has jurisdiction over its own territory. Invoking the exception could infringe comity as the court may have “an inadequate understanding of the circumstances in which the legislation was passed”.²¹⁷

The principle of comity is also not absolute where there are “overriding constitutional or policy grounds which militate against [its] application.”²¹⁸ Comity will justifiably be displaced when there is a “countervailing need to safeguard fundamental human rights and community norms”.²¹⁹ In such cases, the need to protect the forum's important interests is greater than the need to respect foreign law and this protection will be provided through either a unilateral rule or the public policy exception. Importantly, on this view, the public policy exception is designed “not to throw stones at the laws of other countries but to protect the laws and values of the forum *in the forum*.”²²⁰

²¹¹ *Dicey*, above n 12, at [1-008].

²¹² At [1-008]; and Fawcett and Carruthers, above n 51, at 5.

²¹³ Turner, above n 210, at 654 and 664.

²¹⁴ *Dicey*, above n 12, at [1-014].

²¹⁵ *Reeves v OneWorld Challenge LLC*, above n 69, at [56].

²¹⁶ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [138], per Lord Hope.

²¹⁷ At [138].

²¹⁸ Turner, above n 210, at 666.

²¹⁹ Chng, above n 79, at 151.

²²⁰ Enonchong, above n 49, at 653 (original emphasis).

III How These Principles May Justify Invoking the Public Policy Exception

The underlying principles above provide clear justification for the choice-of-law rules we have and for tolerating foreign law in certain circumstances but not in others. Given the public policy exception is essentially another choice-of-law rule, and is also designed to find the limits of tolerance of foreign law, it is not inconsistent with these principles, as is often conceived. Instead, these principles may actually provide justification for invoking the exception in certain circumstances.²²¹ If the principles provide that the courts apply foreign law according to multilateral choice-of-law rules for the reasons outlined above, then arguably, where those reasons are absent, or where reasons in favour of giving effect to domestic public policy are stronger, we should not apply foreign law (and instead, should apply forum law). For example, where the choice-of-law rule did not actually find the most closely connected law, and forum law has a greater connection, proximity may justify invoking the exception and applying the *lex fori*. If the parties' expectations would, in fact, be best met by applying the *lex fori*, rather than foreign law, that would also weigh in favour of invoking the exception. And, where comity interests are absent or giving effect to domestic public policy outweighs such interests, this principle may also support invoking the exception.

Giving effect to fundamental domestic policies is a legitimate practice in private international law, as seen through unilateral choice-of-law rules and overriding mandatory rules. The public policy exception is simply another tool in the toolbox for doing so. Consequently, when the underlying principles of choice-of-law actually point in favour of invoking the exception, the courts should not be afraid to use it.

²²¹ Mills, above n 7, at 209-210; Chng, above n 79, at 151; and Turner, above n 210, at 654.

Chapter III: A New Approach

The principles identified in Chapter II provide justification for implementing either multilateral rules, whereby the forum tolerates foreign law in allowing the law with the closest connection to govern, or unilateral rules, where giving effect to fundamental domestic policies is more important than tolerating foreign law. However, on the facts of a particular case, those principles may not actually provide the justification presumed by the multilateral rule for tolerating and applying foreign law. Instead, the principles may point in favour of the *lex fori*, and thus, the public policy exception, applying. As such, this Chapter argues it is vital for the courts to engage with these underlying principles in the context of public policy, to determine whether they point in favour of applying foreign law, or whether they justify invoking the exception. To do so, a nuanced approach to the public policy exception will be proposed. Instead of focusing on absolute values, New Zealand courts should undertake a balancing exercise, whereby they weigh the underlying principles to determine whether they justify invoking the exception. Although there may be concerns that such a balancing approach provides too much discretion, it will be seen that judges are capable of exercising their discretion in a principled manner within other legal balancing exercises, such as the approach to the contractual doctrine of illegality. Moreover, the proposed approach has several potential benefits which will be outlined at the conclusion of the Chapter.

I A Nuanced Public Policy Exception: A Balancing Exercise

Chapter II highlighted that the principles underlying choice-of-law rules provide justification for why we apply foreign law in certain circumstances and domestic law in others.²²² However, despite the choice-of-law rule dictating foreign law applies, it is possible these principles may actually point in favour of domestic law applying and therefore, may justify invoking the public policy exception as a corrective choice-of-law tool.²²³ As the exception is essentially another choice-of-law rule,²²⁴ the courts should not look at the exception in isolation, but rather, within the context of the principles that shaped the relevant choice-of-law rules.

Therefore, it is submitted that a nuanced approach to the public policy exception requires the courts to engage with the underlying principles of choice-of-law to determine whether such principles provide justification for invoking or refusing to invoke the exception in the particular case. To do so, the courts should carry out a balancing exercise whereby they consider and weigh the relevant

²²² See ch II, s I.

²²³ See ch II, s III.

²²⁴ Mills, above n 7, at 207.

underlying principles to identify whether these principles point in favour of applying foreign or domestic law in the particular case, and therefore, whether, on balance, the public policy exception should be invoked.

Currently, the New Zealand courts require a breach of a universal or absolute norm before the exception will be invoked, thus setting a high threshold.²²⁵ However, this focus on absolute norms and a high threshold obscures the relevant considerations for the court; namely whether the principles justify applying foreign or domestic law. In fact, the threshold for the exception will vary depending on the strength of the underlying principles in favour of invoking the exception. Where the principles strongly point in favour of applying domestic law in the particular case, the threshold will justifiably be lower and the exception will be invoked more easily. In such cases, relative norms (i.e. important norms or interests unique to the forum²²⁶) will suffice to invoke the exception. In short, the exception should be performed along a “sliding scale”,²²⁷ depending on the strength of the underlying principles in favour of invoking the exception. As the exception depends on the underlying principles, the concept of absolute norms is neither helpful nor necessary; these principles may point in favour of invoking the exception even if a relative, rather than absolute, norm is in issue.

Moreover, unilateral choice-of-law rules are used to give effect to and protect important domestic policies, even though (and often, precisely because) such policies are not universally shared. Similarly, the public policy exception, as an exceptional choice-of-law rule, reserves to states “the authority to protect their own community interests and institutions.”²²⁸ It is legitimate, both in choice-of-law and the public policy exception, to protect important domestic policies. To do so, relative norms, not just absolute norms, can be used to invoke the exception, depending on the strength of the underlying principles considered together.

These relative policies express “principles of morality or certain interests unique to the particular community.”²²⁹ Not simply any local policy will suffice; the policy must still be fundamental to the forum and needs to convey “the community’s sense of morality” that runs through “the fabric of society.”²³⁰ The content of such norms may be determined by reference to local statutes and

²²⁵ *New Zealand Basing Ltd v Brown*, above n 4, at [68], [74] and [83(c)].

²²⁶ *Chng*, above n 79, at 152-153.

²²⁷ *de Boer*, above n 47, at 3.

²²⁸ *Chng*, above n 79, at 155.

²²⁹ At 136.

²³⁰ *Boardwalk Regency Corp v Maalouf* (1992) 88 DLR (4th) 612 at [9] as cited in *Chng*, above n 79, at 137-138.

common law jurisprudence²³¹ or alternatively, a judge's general assessments of "public sentiments and the moral standards of the community".²³² The importance of the policy to the forum will be an important consideration in the balancing exercise and statutory public policy will provide stronger prima facie proof of the importance of the norm to be protected.²³³ Therefore, the exception should be invoked more readily when the public policy is reflected in statute than in other sources.²³⁴

As has been demonstrated, under this nuanced approach, the focus should not solely be on whether the norm is absolute, as the current conceptualisation requires; rather the focus must be on the underlying principles and whether these principles justify invoking the exception. This balancing approach would give courts the flexibility to reach satisfactory results²³⁵ while ensuring greater transparency in judges' reasoning.²³⁶ By explicitly engaging with the principles, including proximity, giving effect to important domestic policies, comity, parties' expectations, decisional uniformity and justice, the court can identify whether these principles point in favour of the *lex fori* or foreign law applying. Where the principles weigh more strongly in favour of the *lex fori* applying, the balancing exercise will indicate that the exception should be invoked. The following section will elaborate on what the courts' considerations should look like when analysing and weighing these principles.

A How Should Courts Engage with the Underlying Principles?

In determining whether to implement a multilateral or unilateral choice-of-law rule, the lawmakers consider the principles of proximity and giving effect to important domestic policies, to determine how the balance should be struck between them and which should prevail.²³⁷ When those choice-of-law rules do not strike the right balance in the particular case, though, the public policy exception must step in as a corrective tool.²³⁸ As these principles are important considerations in selecting choice-of-law rules, they should also be important considerations in determining whether the exception should be invoked.

²³¹ Chng, above n 79, at 136.

²³² At 140.

²³³ At 155. See also *Poh Soon Kiat v Desert Palace Inc* [2009] SGCA 60 at [112].

²³⁴ Chng, above n 79, at 133; and *Poh Soon Kiat v Desert Palace Inc*, above n 233, at [112]-[113].

²³⁵ See Andrew Burrows "Illegality after *Patel v Mirza*" (2017) 70(1) CLP 55 at 57.

²³⁶ At 61.

²³⁷ See ch II, s I.

²³⁸ See ch II, s I.

Multilateral choice-of-law rules ordinarily seek to find the forum with the greatest proximity to the dispute. However, on the facts of the case, the choice-of-law rule may not actually find the forum with the closest connection and a much closer connection may exist to the domestic forum. In such cases, the principle of proximity may weigh in favour of the *lex fori*, and thus, the public policy exception, applying. The courts must, therefore, engage with this principle to determine whether the choice-of-law rule did find the most proximate forum or whether proximity points in favour of invoking the exception.

As Mills argues, the applicability of the public policy exception depends upon the degree of proximity between the dispute and the forum.²³⁹ Where there is little connection to the forum and the application of the law will not have a “tangible effect on the forum’s interests”,²⁴⁰ the principle of proximity does not weigh in favour of invoking the exception. In such cases, depending on the other principles, an absolute standard may be appropriate and the court may require a fundamental breach of a universal norm.²⁴¹ However, where the case is closely connected to the forum and application of foreign law would affect the forum’s fundamental interests, the threshold for the exception is lowered.²⁴² The exception should be invoked more easily in cases with greater proximity to the forum, given the principle of proximity weighs in favour of its invocation. In such cases, relative domestic norms, rather than absolute norms, will suffice.²⁴³ Given the exception can legitimately be invoked in cases involving relative norms if there is significant proximity to the forum, the requirement of an absolute norm under the current conceptualisation is not justified.

As Mills emphasises, in cases with greater proximity to the forum, there will be a greater desire to give effect to and protect important domestic policies.²⁴⁴ The impact on the forum’s domestic policies in cases only tenuously connected to it will not be significant, while cases with a stronger

²³⁹ Mills, above n 7, at 212 and 219. Mills argues that this is already the way the courts use the exception, even if they do not explicitly say so. See also Kahn-Freund, above n 73, at 58: “the strength of a public policy argument must in each case be directly proportional to the intensity of the link which connects the facts of the case with this country.”

²⁴⁰ Hook and Wass, above n 131, at 83.

²⁴¹ See Mills, above n 7, at 217 and 218; and Hook and Wass, above n 131, at 83.

²⁴² Mills, above n 7, at 217; Hook and Wass, above n 131, at 83. See also Louwrens R Kiestra *The Impact of the European Convention on Human Rights on Private International Law* (TMC Asser Press, The Hague, 2014) at 22-23; Blom, above n 61, at 382; Briggs, above n 87, at 50-51; and Ionna Thoma “The ECHR and the Ordre Public Exception in Private International Law” (2011) 29 *Nederlands Internationaal Privaatrecht* 13 at 18: “The factual situation, though, must entail some sufficient contact with the forum, for otherwise the repercussions emanating from the application of the foreign law will not be felt in the legal order of the forum.”

²⁴³ Mills, above n 7, at 217; and Hook and Wass, above n 131, at 83. See also Kiestra, above n 242, at 22-23.

²⁴⁴ See Mills, above n 7, at 211, 220 and 227-228.

connection to the forum will have greater implications on the forum's interests and policies.²⁴⁵ As such, in cases where the forum is closely connected to the dispute and therefore, there is both a greater impact on domestic interests and a greater desire to protect those important interests, these principles weigh in favour of invoking the exception.

In addition, the courts must also weigh the other underlying principles behind proximity, such as party expectations, comity and justice, to determine whether they support invoking the exception. For example, are the parties' expectations best met by applying foreign or domestic law? Are there comity concerns justifying the application of foreign law, or does the absence of such concerns support invoking the exception? Where there is greater proximity to the forum, the parties' expectations may be better met by applying the *lex fori* and the strong interest of the domestic state in giving effect to its important policies may outweigh the foreign state's weaker interest in having their law applied.

Considerations of proximity and the idea that the application of public policy varies depending on the degree of connection to the forum are not new to private international law. The concept of proximity is already well enshrined in many civil law jurisdictions through the formalised doctrines of *Inlandsbeziehung* and *effet atténué*.²⁴⁶ And, even though not explicitly, several common law judges have also used proximity within their reasoning.

(a) Civil law doctrines

In German, Austrian and Swiss law, the doctrine of *Inlandsbeziehung* provides that the application of public policy should vary depending on the domestic effects which the dispute has in the forum state.²⁴⁷ And in French and Belgian law, under the doctrine of *effet atténué*, public policy is limited or "attenuated" (given an *effet atténué*) to reflect the degree of connection between the dispute and the forum.²⁴⁸ The stronger the connection and thus, the domestic effects of the case, the more likely that public policy is to be applied.²⁴⁹

²⁴⁵ Katayoun Alidadi "The Western Judicial Answer to Islamic *Talaq*: Peeking Through the Gate of Conflict of Laws" (2007) 5 UCLA J Islamic & Near EL 1 at 8-9. See also Mills, above n 7, at 211; and Hook and Wass, above n 131, at 83.

²⁴⁶ Mills, above n 7, at 227. For a more detailed discussion on these doctrines, see Paul Lagarde "Chapter 11: Public Policy" in *International Encyclopedia of Comparative Law, Vol. III, Private International Law* (JCB Mohr, Tübingen, 1994).

²⁴⁷ Mills, above n 7, at 227.

²⁴⁸ At 227.

²⁴⁹ At 227.

These doctrines can be seen in practice in cases involving Islamic *talaq* divorces, where the husband unilaterally divorces his wife.²⁵⁰ In Norway, the attachment parties have to Norway is the most important factor in determining whether a *talaq* divorce should be refused recognition on the basis of Norwegian *ordre public*.²⁵¹ A strong attachment indicates the *talaq* divorce should be refused recognition, whereas a weak attachment points towards its recognition.²⁵² And, the French Supreme Court refused to recognise a *talaq* divorce where the husband possessed French nationality and both spouses lived in France, given the significant connection to the forum.²⁵³ The concept of *Inlandsbeziehung* was also clearly demonstrated by the German court in a maintenance case.²⁵⁴ The denial of maintenance according to Iranian law would be contrary to German public policy because there was a “particularly close connection” with the forum.²⁵⁵ Not only did the parties reside together in Germany with their child, but the husband had lived, studied and worked in Germany for a long time.²⁵⁶ Such doctrines, allowing the court to consider proximity, could profitably be adopted in New Zealand²⁵⁷ to aid the balancing exercise proposed.

(b) Common law cases

The notion of proximity has also featured in common law judges’ reasoning, even if not explicitly.²⁵⁸ For example, in *Kuwait Airways*, Lord Hope noted that “a principle of English public policy which was purely domestic or parochial” would not have been sufficient to invoke the exception given there was no connection to the forum.²⁵⁹ In *Rousillon v Rousillon* an undertaking of non-competition entered into in France and governed by French law was nevertheless subject to the public policy exception because of the proximity to England; the undertaking extended to

²⁵⁰ Susan Rutten "Recognition of Divorce by Repudiation (*talaq*) in France, Germany and the Netherlands" (2004) 11 Maastricht J Eur & Comp L 263 at 263-264.

²⁵¹ Rundskriv Q-19/2004. Lov 2. juni 1978 nr. 38 om anerkjennelse av utenlandske skilsmisser og separasjoner, samt skiftefritak etter ekteskapsloven (Circular Q-19/2004. Law 2. June 1978 no. 38 on the Recognition of Foreign Divorces and Separations, and the exemption of the duty to verify the division of estate in the Marriage Act); and Tone Linn Wærstad "Harmonising Human Rights Law and Private International Law through the *Ordre Public* Reservation: The Example of the Norwegian Regulation of the Recognition of Foreign Divorces" (2016) 2(1) Oslo Law Review 51 at 66.

²⁵² Wærstad, above n 251, at 66.

²⁵³ Cour de cass. 2me Ch.civ. 14 March 2002, D. 2002, IR p. 1177, as cited in Rutten, above n 250, at 275.

²⁵⁴ OLG Oldenburg 16 Sept. 1980, IPRspr. 1980 no. 60, IPRax. 1981 as cited in Lagarde, above n 246, at 22-23.

²⁵⁵ OLG Oldenburg, above n 254, at 136.

²⁵⁶ At 136.

²⁵⁷ See Mills, above n 7, at 227.

²⁵⁸ At 219.

²⁵⁹ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 13, at [166], per Lord Hope.

English territory and was allegedly breached in England.²⁶⁰ In *Duarte v Black & Decker Corp*, also relating to a restraint of trade provision, there were several factors connecting the case to England; the plaintiff was working in England under a contract governed by English law and wished to take up a new job, also in England and also governed by English law.²⁶¹ Due to the close connection to England, the Court held that “[t]he public policy of [England] ... [was] therefore directly engaged” and the application of foreign law allowing the restraint to be enforced would be contrary to public policy.²⁶²

The English courts have also used notions of proximity in relation to the question of validity of a foreign divorce that is lawfully obtained under foreign law, but not English law.²⁶³ Where the divorce is granted in a foreign state between two parties domiciled in that state, the courts have not been prepared to apply English public policy to refuse recognition of the divorce.²⁶⁴ In contrast, where one of the parties has English domicile, the courts have refused recognition through application of public policy.²⁶⁵ The justification for invoking the exception in one context and not the other is evidently the differing proximity of the dispute to England.²⁶⁶ These cases clearly acknowledge the potential role of proximity in the public policy exception in New Zealand.²⁶⁷

B Where Do Human Rights Fit within This New Approach?

Some scholars have argued that any breach at all of either a domestic or international human right should justify the exception being invoked. For example, Jan Oster posits that “*any* violation of domestically applicable human rights should justify the application of [the exception]; and neither only a ‘manifest’ infringement nor only violations of particular human rights”.²⁶⁸ As states have an unqualified obligation to protect both domestic *and* international human rights law,²⁶⁹ Oster argues the exception should not be interpreted restrictively when human rights are concerned.²⁷⁰

²⁶⁰ *Rousillon v Rousillon* (1880) 14 Ch D 351 at 369.

²⁶¹ *Duarte v Black & Decker Corp* [2007] EWHC 2720 (QB) at [61].

²⁶² At [61].

²⁶³ Mills, above n 7, at 225-226.

²⁶⁴ *El Fadl v El Fadl* [2000] 1 FLR 175 where the court refused to apply public policy to invalidate a *talaq* divorce procedure which was contrary to English law but consistent with Lebanese law, as the two parties were domiciled in Lebanon. See also *K v R* [2007] EWHC 2945 (Fam); and *H v H* [2006] EWHC 2989 (Fam).

²⁶⁵ *Chaudhary v Chaudhary* [1984] 3 All ER 1017 where a *talaq* divorce was refused recognition because the husband had obtained an English domicile. See also *Gray v Formosa* [1963] P 259.

²⁶⁶ Mills, above n 7, at 226.

²⁶⁷ See Mills, above n 7, at 223.

²⁶⁸ Oster, above n 70, at 553 (original emphasis).

²⁶⁹ At 548 and 552.

²⁷⁰ At 543 and 552.

However, it is submitted that such a blanket approach to human rights is not appropriate in light of the proposed nuanced exception. Human rights can be justifiably limited in certain circumstances, as demonstrated in the New Zealand Bill of Rights Act.²⁷¹ For example, as the Court in *Basing* highlighted, there is flexibility in New Zealand’s statutory framework in relation to the right to freedom from discrimination in employment²⁷² and the right can be limited through several exceptions.²⁷³ The Court also distinguished between grounds such as gender and ethnicity, and that of age,²⁷⁴ highlighting that the treatment of rights may differ depending on their content and the importance placed on the right. However, simply because a relative domestic human right is involved does not mean it cannot justify invoking the exception, as the Court assumed. We must be able to look to domestic human rights to determine what is important to New Zealand. In such cases, however, it will depend upon the underlying principles and whether they point in favour of invoking the exception. The human right embodied in the domestic policy will be one consideration within the balancing exercise; how important is the right to the forum and do the other principles support giving effect to this domestic policy?

II Too Much Discretion?

A possible objection to this balancing approach to public policy is that it provides judges with too much discretion and the outcome could vary largely depending on the judge at hand and the weight placed on each principle. This could result in significant uncertainty.²⁷⁵ However, similar objections – that judges are given a “broad and unfettered discretion”²⁷⁶ – are often raised in relation to the current exception. The courts arguably have significant discretion to determine whether applying foreign law would “shock the conscience of a reasonable New Zealander”.²⁷⁷

Moreover, judges are already well equipped to carry out balancing exercises and evaluate a range of policy factors, doing so in other areas of private international law. For example, many of the

²⁷¹ New Zealand Bill of Rights Act 1990, s 5: “Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

²⁷² *New Zealand Basing Ltd v Brown*, above n 4, at [73].

²⁷³ At [73(a)]. For example, Human Rights Act, ss 22-35.

²⁷⁴ *New Zealand Basing Ltd v Brown*, above n 4, at [74].

²⁷⁵ See Rohan Havelock "Judicial Discretion in Private Law - a Commentary" (2016) 14(2) Otago LR 285 at 286.

²⁷⁶ Mills, above n 7, at 202.

²⁷⁷ *Reeves v OneWorld Challenge LLC*, above n 69, at [88]; and *New Zealand Basing Ltd v Brown*, above n 4, at [69].

choice-of-law rules themselves involve an element of discretion,²⁷⁸ such as identifying the state most closely connected to the dispute. Judges also have considerable discretion under the *forum non conveniens* doctrine in determining whether to refuse to exercise jurisdiction on the basis that the forum is inappropriate.²⁷⁹ Discretion enables flexibility,²⁸⁰ which is necessary in the public policy exception to ensure a just outcome on the facts. The exercise of discretion under the proposed exception would be more principled and constrained, as concrete guidance is given as to what the courts should consider. As a result, this nuanced exception would provide more, not less, certainty.

Judges are also adept at undertaking balancing exercises in other areas of law. For example, both the United Kingdom and New Zealand have a balancing approach to the contractual doctrine of illegality, involving the weighing of policy considerations. This could prove useful guidance for courts looking to apply such a balancing approach to public policy.²⁸¹

A Lessons from the Balancing Approach in the Contractual Doctrine of Illegality

The UK Supreme Court's approach to the contractual doctrine of illegality in *Patel v Mirza*²⁸² could provide a useful example of a mechanism for engaging with underlying principles.²⁸³ Lord Toulson SCJ, for the majority, suggested that in determining whether a claim under a contract tainted by illegality should be allowed, the court should undertake a balancing exercise, having regard to a) the underlying purpose of the public policy contravened by the contract, b) any conflicting relevant public policies which may be undermined by denying the claim, and c) the need for a proportionate response to the illegality.²⁸⁴

As the test in *Patel* involves balancing multiple policy considerations,²⁸⁵ it is well-suited to the proposed nuanced public policy exception where several principles and policies must also be weighed. It could, therefore, provide a good exemplar for a balancing approach in the context of

²⁷⁸ Symeonides, above n 31, at 29. There has been significant literature written on this tension between certainty or predictability and flexibility in choice of law; i.e. the more "predictable" the choice-of-law rule, the greater the need for a flexible exception. For a discussion on this, see Symeonides, above n 36, ch 4; Symeonides, above n 31, at 21-35; and H Neuhaus "Legal Certainty versus Equity in the Conflict of Laws" (1963) 28 LCP 795.

²⁷⁹ See *Dicey*, above n 12, at Rule 12.

²⁸⁰ Mills, above n 7, at 216-217.

²⁸¹ Chng, above n 79, at 158.

²⁸² *Patel v Mirza* [2016] UKSC 42.

²⁸³ Chng, above n 79, at 158.

²⁸⁴ *Patel v Mirza*, above n 282, at [101].

²⁸⁵ *Singularis Holdings Limited v Daiwa Capital Markets Europe Limited* [2018] EWCA 84 (Civ) at [65].

public policy.²⁸⁶ For example, the court could have regard to a) the nature of the domestic policy that would be contravened by the application of foreign law (in particular, the importance of this norm to the forum), b) whether upholding the important policy is supported by the other underlying principles or outweighs any countervailing principles, and c) whether refusal to apply the foreign law would be a proportionate response, taking into account the degree to which foreign law would contravene the domestic policy.²⁸⁷

This balancing approach to illegality is not unique to the United Kingdom. New Zealand has engaged in a similarly discretionary approach since Parliament implemented the Illegal Contracts Act 1970²⁸⁸ (now the Contracts and Commercial Law Act 2017²⁸⁹). Judges are given broad discretionary powers to grant any party to an illegal contract “any relief that the court thinks just”,²⁹⁰ having regard to a non-exhaustive list of factors including the object of the enactment if there has been a statutory breach²⁹¹ and “any other matters that the court thinks proper”.²⁹² New Zealand has thus shown a clear intention to move towards a flexible, policy-based approach in relation to illegality. In addition, New Zealand courts have referred to the approach in *Patel* without disapproval in *Lynds v Fitzherbert Rowe*²⁹³ and, more significantly, by the Supreme Court in *Horsfall v Potter*.²⁹⁴

The illegality doctrine, as with the public policy exception, is an “instrument of public policy”,²⁹⁵ with the essential rationale being that it would be “contrary to the public interest” to enforce a claim under an illegal contract.²⁹⁶ As such, applying a similar balancing approach to the public policy exception would be in line with our current jurisprudence in relation to other policy-based exceptions. Any concerns about excessive discretion under the proposed exception are, therefore, allayed when considering the courts can and do exercise their discretion in a principled manner in other areas of law. In particular, the New Zealand judiciary appear “much more content about the legitimacy of the exercise of judicial discretion” than other jurisdictions, as demonstrated by our

²⁸⁶ See Chng, above n 79, at 158.

²⁸⁷ See Chng, above n 79, at 158.

²⁸⁸ Illegal Contracts Act 1970.

²⁸⁹ Contracts and Commercial Law Act 2017.

²⁹⁰ Section 76 (previously the Illegal Contracts Act 1970, s 7).

²⁹¹ Section 78(b).

²⁹² Section 78(c).

²⁹³ *Lynds v Fitzherbert Rowe* [2017] NZHC 1297 at [253].

²⁹⁴ *Horsfall v Potter* [2017] NZSC 196 at [45] and [54], per William Young J and [139], per Elias CJ.

²⁹⁵ Havelock, above n 275, at 286.

²⁹⁶ *Patel v Mirza*, above n 282, at [120].

long-standing approach to illegal contracts.²⁹⁷ And this discretionary approach to illegal contracts “has not generated the degree of uncertainty which some anticipated”²⁹⁸ indicating any similar approach in private international law would also not result in uncertainty.

III Benefits of the New Approach

Along with providing clear guidance to judges as to the relevant considerations and enabling greater transparency in their reasoning,²⁹⁹ this nuanced public policy exception could provide several potential benefits to New Zealand’s private international law generally.

While the courts are often concerned about expressing parochialism³⁰⁰ and “cultural imperialism”³⁰¹ if they invoke the exception too readily, having a flexible and nuanced exception could help to make other areas of New Zealand’s conflict of laws more internationalist. In general, the common law uses the public policy exception comparatively rarely to civil law jurisdictions, such as France and Germany,³⁰² due to relying more heavily on unilateral rules.³⁰³ Such rules, with their inbuilt forum-oriented bias,³⁰⁴ mean there is less scope for the application of foreign law in the first place, and thus, less scope for the application of the public policy exception.³⁰⁵

New Zealand is no exception; we currently still have several unilateral choice-of-law rules, and overriding mandatory rules, within our private international law, which dictate that the *lex fori* applies no matter what. By having a nuanced public policy exception allowing the application of the *lex fori* in certain circumstances, the lawmakers could replace unilateral and overriding mandatory rules with more multilateral rules. As a result, the courts could apply foreign law more generally in private international law, through a greater number of multilateral rules, resulting in greater internationalism, and have the ability to invoke the public policy exception in particular cases only where those multilateral rules result in an intolerable outcome. This can already be seen in many civil law jurisdictions who have fewer unilateral choice-of-law rules and a more flexible exception. For example, in France and Germany, where their exceptions take proximity into

²⁹⁷ Graham Virgo "Judicial Discretion in Private Law" (2016) 14(2) Otago LR 257 at 257.

²⁹⁸ R Buckley *Illegality and Public Policy* (4th ed, Sweet & Maxwell, London, 2017) at [20-09].

²⁹⁹ See section I.

³⁰⁰ Murphy, above n 84, at 612.

³⁰¹ Mills, above n 7, at 236; and Fawcett, Shuilleabháin and Shah, above n 103, at [2.106].

³⁰² Kahn-Freund, above n 73, at 42; *Dicey*, above n 12, at [5-004]; Enonchong, above n 49, at 636; Carter, above n 3, at 3; and Briggs, above n 87, at 37.

³⁰³ See *Dicey*, above n 12, at [5-004]; Enonchong, above n 49, at 637; and Carter, above n 3, at 3.

³⁰⁴ Enonchong, above n 49, at 637; and Carter, above n 3, at 3.

³⁰⁵ See Kahn-Freund, above n 73, at 43-44.

account, divorce and separation are submitted to the law of the country where the spouses are, or were last, habitually resident, or, failing that, the law of the country where the spouses are nationals.³⁰⁶ In contrast, divorce and separation in New Zealand are submitted to the *lex fori*,³⁰⁷ meaning New Zealand law will apply to every divorce and separation brought before a New Zealand court, regardless of the connection to New Zealand.³⁰⁸ If New Zealand applied a multilateral choice-of-law rule to divorce, the courts would apply foreign law more often, becoming more internationalist. The public policy exception could step in to protect important domestic interests not protected under those foreign divorce laws. For example, the exception may be invoked against a foreign law preventing parties from claiming a division of relationship property on the grounds of sex, as this could be contrary to New Zealand's important policy of gender equality.³⁰⁹

In addition, the nuanced exception would allow the courts to reach satisfactory results without having to resort to tools outside private international law, such as statutory interpretation.³¹⁰ It is often not clear why the courts use statutory interpretation³¹¹ as opposed to orthodox conflicts methodology, or when they should do so; the Supreme Court in *Brown v NZBL* merely cited the "sui generis nature of employment law".³¹² The considerations used in statutory interpretation would feature in the nuanced exception anyway,³¹³ such as the policy underlying the statutory rule at hand, but with greater transparency as to why it is being considered (to weigh it against the other underlying principles). As such, applying the orthodox methodology, including the nuanced exception, would provide greater certainty.

³⁰⁶ Regulation (EC) 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10, art. 8. Article 12 provides a flexible public policy exception. See also Clarkson and Hill, above n 189, at 428-431.

³⁰⁷ Pawson, above n 15, at [43].

³⁰⁸ Although there are still some subject-matter limitations. See Family Proceedings Act 1980, ss 4, 20 and 37.

³⁰⁹ See Symeonides, above n 36, at 333. Gender equality is embodied in many statutes. For example, s 2(1) of the Marriage Act 1955 defines marriage as the union of two people, regardless of their sex, sexual orientation, or gender identity. Additionally, s 21 of the Human Rights Act prohibits discrimination on the grounds of sex.

³¹⁰ Keyes, above n 43, at 20: "It is sometimes simply assumed or asserted that forum courts must apply [statutory interpretation], with no explicit justification for that assumption or assertion."

³¹¹ Maria Hook "The Supreme Court's Decision in *Brown v New Zealand Basing Ltd*: Comments on the Majority Judgment" (December 21, 2017) *The Conflict of Laws in New Zealand: News and Comment* <www.blogs.otago.ac.nz/conflicts>. For more on statutory interpretation in the context of private international law cases see Hook, above n 38.

³¹² *Brown v New Zealand Basing Ltd*, above n 134, at [66] and [77].

³¹³ See Hook, above n 38, at 441.

Given the significant benefits, it would be advantageous for New Zealand to adopt this proposed nuanced public policy exception into its conflicts laws. The public policy exception would no longer be confined to arbitrary notions of absolute values and 'shocked consciences'. Instead, in engaging with the underlying principles of choice-of-law, the exception could protect fundamental domestic policies when those principles justify doing so.

Chapter IV: Practical Application of the New Approach

In an increasingly global and interconnected world, where there are a growing number of cross-border transactions, courts place significant emphasis on being internationalist and tolerating the differences of foreign laws. This appears to be reflected in New Zealand's current conceptualisation of the public policy exception, with a high threshold and requirement of an absolute value. However, there are dangers in allowing internationalism to eclipse important relative domestic policies.³¹⁴ In focusing on an arbitrary requirement for an absolute value, the court loses sight of what should be the real focus; the underlying principles behind why we tolerate and apply foreign law in certain circumstances but not others.

As we have seen, these underlying principles provide justification for when the courts will or will not tolerate foreign law.³¹⁵ Choice-of-law rules, in striking a compromise between the value of proximity and the desire to give effect to domestic policy,³¹⁶ usually delineate this tolerance for foreign law adequately. Where the domestic policy is fundamental, the forum will not tolerate the differences in foreign law and instead will give effect to the important policy through a unilateral choice-of-law rule.³¹⁷ In other instances, where the policy is less important, the forum may be more willing to tolerate foreign law through a multilateral rule.³¹⁸

However, in certain instances, the applicable choice-of-law rule may not strike the balance correctly on the facts of the particular case, resulting in an intolerable outcome.³¹⁹ Despite a multilateral rule dictating foreign law should apply, the underlying principles may actually point in favour of the *lex fori* applying.³²⁰ In such cases, the public policy exception must step in as a corrective tool.³²¹ As this dissertation argues, the courts should not ignore these underlying principles in the context of public policy.³²² Instead, the courts should engage with the principles to ascertain whether, on the facts of the particular case, they justify applying foreign law or invoking the exception to protect an important domestic policy.³²³ The balancing exercise

³¹⁴ See ch I and ch II, ss I and III.

³¹⁵ See ch II, ss I and II.

³¹⁶ See ch II, s I.

³¹⁷ See ch II, s I.

³¹⁸ See ch II, s I.

³¹⁹ See ch II, s I.

³²⁰ See ch II, s III.

³²¹ See ch II, ss I and III.

³²² See ch III, s I.

³²³ See ch III, s I.

proposed in Chapter III enables the court to do so.³²⁴ Under this balancing exercise, the courts must consider the principles, such as proximity, importance of the domestic policy, parties' expectations, decisional uniformity, justice, and comity, and determine whether they weigh in favour of invoking the exception or not.³²⁵ The more strongly the principles weigh in favour of domestic law applying, the easier the exception should be invoked.³²⁶ This nuanced approach would allow increased internationalism generally within New Zealand's choice-of-law rules³²⁷ without jeopardising fundamental domestic policies. The following section will provide a practical example of how these principles could be considered under the nuanced exception, on the facts of *Basing*.

I Application to Basing v Brown

It is arguable that on the application of the proposed balancing exercise, the Court in *Basing* could have justifiably invoked the exception, resulting in a different conclusion. It may not be clear-cut exactly which side the Court would come down on after weighing the principles. However, there are certainly arguments to be made that several of the principles point in favour of New Zealand law applying and thus, the exception being invoked. If the principles point more strongly in favour of New Zealand law applying, the threshold for the exception should be lower and the exception invoked more easily.³²⁸

The primary choice-of-law rule in *Basing* is the party autonomy rule; that the parties can choose the applicable law to govern their transaction. In choosing the applicable law, the parties opt out of the choice-of-law rule that would otherwise apply;³²⁹ the objective "proper law" rule, which seeks the law with the closest connection. Some would argue, therefore, that applying Hong Kong law would best meet the parties' expectations, given that was the law they expressly chose.³³⁰ In addition, applying Hong Kong law would ensure uniformity of decision, as the Court would be applying the same law the Hong Kong court would apply, and thus, the outcome would not depend on the forum chosen.³³¹ Although these principles possibly weigh against invoking the exception,

³²⁴ See ch III, s I.

³²⁵ See ch III, s I.

³²⁶ See ch III, s I.

³²⁷ See ch III, s III.

³²⁸ See ch III, s I.

³²⁹ Maria Hook *The Choice of Law Contract* (Hart Publishing, Oxford, UK, 2016) 35 at 1.

³³⁰ See ch II, s II(B).

³³¹ See ch II, s II(A).

arguably, in considering the principles in their totality, there is greater support for invoking the exception.

The proximity of the case to New Zealand and thus, the significant impact on New Zealand's interests, may point in favour of invoking the exception.³³² It must be noted that the rationale underlying the applicable choice-of-law rule here is not proximity, as with many objective choice-of-law rules. Instead, the party autonomy rule is premised on notions of freedom of contract and that parties should be free to regulate their own affairs, within limits.³³³ Despite this, proximity remains a relevant consideration in the balancing exercise. This is particularly so because the predominant reasons for applying the *lex fori*, and hence invoking the exception, are likely the same, regardless of whether the applicable law is the chosen law or the proper law. For example, there is still a desire to protect fundamental domestic policies in both instances.

While the case has some connection to Hong Kong, given the employer is a Hong Kong company and Hong Kong law was chosen to govern the contract,³³⁴ there is still significant proximity to New Zealand;³³⁵ the pilots are New Zealand residents based in New Zealand, with Auckland described as their "Home Base", and they start and finish work in New Zealand. Due to this close connection, New Zealand's and the parties' interests are implicated; applying Hong Kong law and enforcing the compulsory retirement age would be to accept that employees based in New Zealand may be held to bargains that are potentially discriminatory,³³⁶ and therefore, may not be afforded the protection ordinarily afforded to our residents and citizens. Given the greater proximity to New Zealand, and the significant impact on New Zealand interests, there is a greater desire to give effect to the fundamental policy of protection from age discrimination, particularly considering its importance to the forum. Even though protection from age discrimination may not be an absolute value,³³⁷ and is not completely unlimited in New Zealand,³³⁸ it is still an important domestic policy

³³² See ch III, s I.

³³³ See Hook, above n 329, at 21 and 43. See generally Hook, above n 329, for a discussion on the party autonomy rule as a choice of law contract.

³³⁴ See *Brown v New Zealand Basing Ltd*, above n 107, at [65]; and *New Zealand Basing Ltd v Brown*, above n 4, at [35].

³³⁵ See *Brown v New Zealand Basing Ltd*, above n 107, at [83], for a detailed description of why the pilots were based in New Zealand (which can be seen as other factors pointing to a close connection to New Zealand).

³³⁶ Hook and Wass, above n 131, at 83.

³³⁷ *New Zealand Basing Ltd v Brown*, above n 4, at [71].

³³⁸ See New Zealand Bill of Rights Act, s 5 which states that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

to New Zealand. Anti-discrimination protections are included in several domestic statutes³³⁹ and statutory public policy provides stronger prima facie proof of the importance of the policy to the forum.³⁴⁰ In addition, it is not obvious the contracts would have been governed by Hong Kong law had the parties not chosen that.³⁴¹ Given the significant proximity to New Zealand, it is possible New Zealand law may have been the proper law of the contract, further weighing in favour of invoking the exception.

In addition, arguably the parties' expectations would be better met through the application of the public policy exception and the *lex fori*. In turn, meeting the parties' expectations also ensures justice is done.³⁴² Arguably parties in their position would expect that the anti-discrimination provisions in the ERA would apply, as opposed to the silence on anti-discrimination in Hong Kong law. Anti-discrimination protection in employment is a fundamental tenet underpinning New Zealand society. Where the parties are closely connected to the forum, as the pilots are, they would expect (and should be able to expect) that the New Zealand court would afford them these important protections, particularly given they are afforded to all other employees within New Zealand's territory.

Moreover, the underlying principle does not speak only of 'expectations' but of 'legitimate' and 'reasonable' expectations,³⁴³ meaning the court must inquire into the expectations of a reasonable person in the parties' position, not their subjective intentions.³⁴⁴ In the context of human rights and private international law, Fawcett argues that parties would have a legitimate expectation that a court would always uphold their human rights and a failure to do so would run contrary to such legitimate expectations.³⁴⁵ Arguably a reasonable person in the pilots' or employer's position could not have a legitimate expectation that the court would apply Hong Kong law and in doing so, breach the pilots' fundamental human rights. Rather, he or she would legitimately expect the court to uphold their fundamental human rights and so, any conflicting expectation that Hong Kong law would be applied in breach of those rights could not be legitimate or reasonable. The parties' presumed expectation of Hong Kong law applying was also formed in the face of inequality of bargaining power; to fly for Cathay Pacific, the pilots were required to accept a standard form

³³⁹ See Human Rights Act, ss 21(1)(i) and 22; New Zealand Bill of Rights Act, s 19(1); and Employment Relations Act, ss 103, 104 and 105(1)(i).

³⁴⁰ See ch III, s I.

³⁴¹ See Hook and Wass, above n 131, at 84.

³⁴² See ch II, s II(C).

³⁴³ Mills, above n 157, at 9.

³⁴⁴ At 9.

³⁴⁵ Fawcett, Shúilleabháin and Shah, above n 103, at [2.108]. See Hook, above n 94, at 954-955.

contract governed by Hong Kong law.³⁴⁶ This lack of bargaining parity makes that expectation of Hong Kong law applying further unreasonable.

A possible objection to the above argument is that parties could easily circumvent their contractual obligations by claiming that the law they originally agreed to no longer applies because their expectation of its application was not legitimate. This would frustrate international commerce and remove the predictability and certainty required in international transacting.³⁴⁷ However, only in rare instances will the court hold an expectation is not legitimate, usually only where there is some conflicting legitimate expectation (such as an expectation the court will uphold fundamental rights) that must prevail.

Additionally, the principle of comity is arguably not relevant on the facts, further justifying invoking the exception. Comity involves analysing the strength of each state's interest in having their law applied.³⁴⁸ Hong Kong's interest in having their law applied could stem from an interest in "having one of its citizens prevail" in the private litigation³⁴⁹ or, more significantly, from an interest in regulating their employers.³⁵⁰ On the other hand, New Zealand has a competing interest in having their fundamental policy of protection from age discrimination applied, which would be significantly impacted by the application of foreign law given the close connection to New Zealand. Arguably New Zealand's interest in protecting this fundamental domestic policy outweighs Hong Kong's weaker interest in having their law applied.³⁵¹ On this basis, the exception is not being used to express disapproval of Hong Kong law, but instead to protect New Zealand's important domestic interests³⁵² when the choice-of-law rule did not do so. As such, there is no disrespect for Hong Kong law and thus, no comity concerns engaged.

Reasonable minds may differ on whether the principles point strongly enough in favour of invoking the exception; in particular, some may question whether New Zealand's connection to the case is sufficiently strong and whether the values affected are sufficiently important to trigger the exception.³⁵³ There is still some connection to Hong Kong and perhaps the "fiscal, social and cultural" interests associated with age discrimination would be of greater weight where the

³⁴⁶ *New Zealand Basing Ltd v Brown*, above n 4, at [80].

³⁴⁷ *Mitsubishi Motor Corp v Soler-Chrysler-Plymouth* 473 US 614 (1984) at 629 as cited in Paul, above n 209, at 63.

³⁴⁸ See ch II, s II(D).

³⁴⁹ Lehmann, above n 190, at 405.

³⁵⁰ Hook and Wass, above n 131, at 83.

³⁵¹ See Joseph William Singer "Multistate Justice: Better Law, Comity and Fairness in the Conflict of Laws" (2015) 5 U Ill L Rev 1923 at 1925 and 1938.

³⁵² de Boer, above n 47, at 4.

³⁵³ Hook and Wass, above n 131, at 83.

employer, and not employee, is located in New Zealand, given the forum has an interest in regulating its employers.³⁵⁴ However, it does not necessarily follow, as the Court assumed, that simply because age discrimination was a relative, rather than absolute, value, that the exception is not triggered.³⁵⁵ There is still a close connection to New Zealand, resulting in a significant impact on an important domestic policy. Arguably, the parties reasonably expect the anti-discrimination provisions would apply, and comity reasons for applying Hong Kong law do not arise on the facts. Therefore, on balance, several of these underlying principles point in favour of New Zealand law applying, and thus, the public policy exception could justifiably have been invoked to protect this important, albeit relative, domestic policy.

II The Supreme Court's Reasoning within the New Approach

As noted in Chapter I, the Supreme Court used statutory interpretation, to arrive at the same conclusion that invoking the public policy exception would have; that the anti-discrimination provisions applied to the pilots. Upon closer scrutiny, elements of the Court's reasoning could fall within the bounds of the proposed nuanced exception, indicating the Court did not have to resort to statutory interpretation to come to the desired conclusion.

The Court's reasoning involved considerations of the proximity of the case to New Zealand. In determining the territorial scope of the right not to be discriminated against on grounds of age, the Court adopted the "base test" applied by the United Kingdom courts;³⁵⁶ whether the employment relationship was *so connected* with the forum as to justify the application of the right.³⁵⁷ As the pilots were based in, and partially working in, New Zealand, the Court concluded that justified the application of the right.³⁵⁸ This reasoning falls squarely within the principle of proximity: the pilots being based in New Zealand meant the case was sufficiently connected to New Zealand, would implicate New Zealand's important interests and therefore, justified giving effect to the *lex fori* to protect those interests.

The Court also effectively considered the importance of the domestic policy in question; Ellen France J for the majority noted there is significant value attached to the anti-discrimination provisions, reflected by the fact they are not only incorporated in the ERA and HRA, but also in

³⁵⁴ At 83.

³⁵⁵ At 83.

³⁵⁶ *Brown v New Zealand Basing Ltd*, above n 134, at [71] and [78].

³⁵⁷ At [71], own emphasis.

³⁵⁸ At [72].

the New Zealand Bill of Rights Act.³⁵⁹ And William Young J highlighted that it could be “contrary to the policy” of the HRA to exclude its operation in relation to acts of discrimination that occur in New Zealand simply because the governing law was a foreign law, further highlighting this is an important right which should be afforded to all within New Zealand. In addition, the Court noted that its interpretive approach might be very similar to the approach used in determining whether a domestic rule is an overriding mandatory rule,³⁶⁰ which also involves considering the importance of the domestic policy at hand.

In essence, the essential considerations of the Court align with several of the underlying principles. In considering that protection from age discrimination is a value of significant importance which should be afforded to those with sufficient proximity to New Zealand, such as the pilots, the Court was analysing the principles of proximity to the forum and the importance of the policy. As demonstrated in section I, these principles arguably weigh in favour of invoking the exception to give effect to New Zealand’s fundamental domestic policy, indicating the Court could have used their current reasoning within the conflicts methodology to legitimately invoke the exception.

III Conclusion

The public policy exception is “a fundamentally important element of modern private international law”³⁶¹ and it is vital the forum has a robust exception to apply when needed. The purpose of the public policy exception is to correct an intolerable result, and in turn, protect fundamental domestic policies when the choice-of-law rules do not do so. To fulfil this purpose, this dissertation argued that, given the public policy exception is akin to a choice-of-law rule,³⁶² the courts must engage with the underlying principles of choice-of-law in determining whether to invoke the exception.³⁶³ To do so, the courts should undertake a balancing exercise, considering and weighing the principles to determine whether they point in favour of applying foreign or domestic law.³⁶⁴ Importantly, simply because the application of foreign law does not “shock the conscience of a reasonable New Zealander”³⁶⁵ (whatever that may entail) or infringe an absolute value, as the current conceptualisation requires, does not mean the domestic policy breached is not still fundamental to the forum and worthy of protection. Rather, where the underlying principles point

³⁵⁹ At [87].

³⁶⁰ At [58].

³⁶¹ Mills, above n 7, at 201-202.

³⁶² See ch I and ch II, s I.

³⁶³ See ch III.

³⁶⁴ See ch III.

³⁶⁵ *Reeves v OneWorld Challenge LLC*, above n 69, at [88]; and *New Zealand Basing Ltd v Brown*, above n 4, at [67].

in favour of giving effect to such important domestic policies, the exception may be invoked to do so.³⁶⁶ This proposed balancing exercise shifts the focus to where it belongs; away from abstract notions of absolute values and shocked consciences, to a meaningful consideration of the rationales and principles underlying choice-of-law and public policy. In providing guidelines to the court as to the considerations they should take into account, the nuanced exception provides definition to the previously “vague and slippery conception”³⁶⁷ of public policy.

In the future, this proposed balancing approach need not be confined only to conflicts cases involving human rights; it may be beneficial across a range of cases, including possibly in the context of recognition and enforcement of foreign judgments. It must be acknowledged that the scope of the exception may vary between these different contexts given different considerations arise,³⁶⁸ for example, where foreign judgments are involved, the importance of finality of litigation and not re-examining the merits of the judgment are significant considerations.³⁶⁹ However, these factors could simply be one consideration to weigh in the mix. The Supreme Court in *Basing* also explicitly left open the possibility that a different approach could be taken in relation to unjustified dismissal cases not involving unlawful discrimination,³⁷⁰ as such, the nuanced exception could guide the court’s reasoning rather than statutory interpretation. This nuanced exception may also be beneficial in the face of new technologies, which may make the connecting factors in choice-of-law rules artificial or inappropriate.³⁷¹ Until the choice-of-law rules themselves are modified to cope with such technologies, a flexible exception is needed.

New Zealand can no longer simply rely on developments and precedents originating from the United Kingdom, particularly given the increasing Europeanisation of their conflicts laws. Rather, New Zealand must take the lead in developing its own private international law and public policy exception. With a principled approach to public policy in choice-of-law, truly considering the rationales and principles for applying either foreign or domestic law, the exception will no longer

³⁶⁶ See ch III.

³⁶⁷ M Wolff *Private International Law* (2nd ed, Clarendon Press, Oxford, 1950) at 179.

³⁶⁸ Mills, above n 7, at 206.

³⁶⁹ Turner, above n 210, at 684-685.

³⁷⁰ *Brown v New Zealand Basing Ltd*, above n 134, at [73] and [86].

³⁷¹ See Briggs, above n 87, at 30-31. For example, “[i]n the private international law of intangible property, dealings with negotiable instruments are traditionally governed by the law of the place where the document is. But widely-used, international electronic dealing or settlement systems ... would risk being defeated by the rigid application of this venerable rule of law to such novel methods of dealing.”

be an “unruly horse”³⁷² wreaking “havoc in international pastures.”³⁷³ Rather, as Lord Denning confidently remarked:³⁷⁴

With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.

New Zealand judges should strive to be that “good man”, enabling the public policy exception to jump over the “fictions” that may be created by a focus on absolute values and instead, do justice, by focusing on the heart of choice-of-law and public policy; the underlying justifying principles.

³⁷² *Richardson v Mellish*, above n 2, at 252.

³⁷³ Carter, above n 3, at 9-10.

³⁷⁴ *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] 1 All ER 215 at 219, per Lord Denning.

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