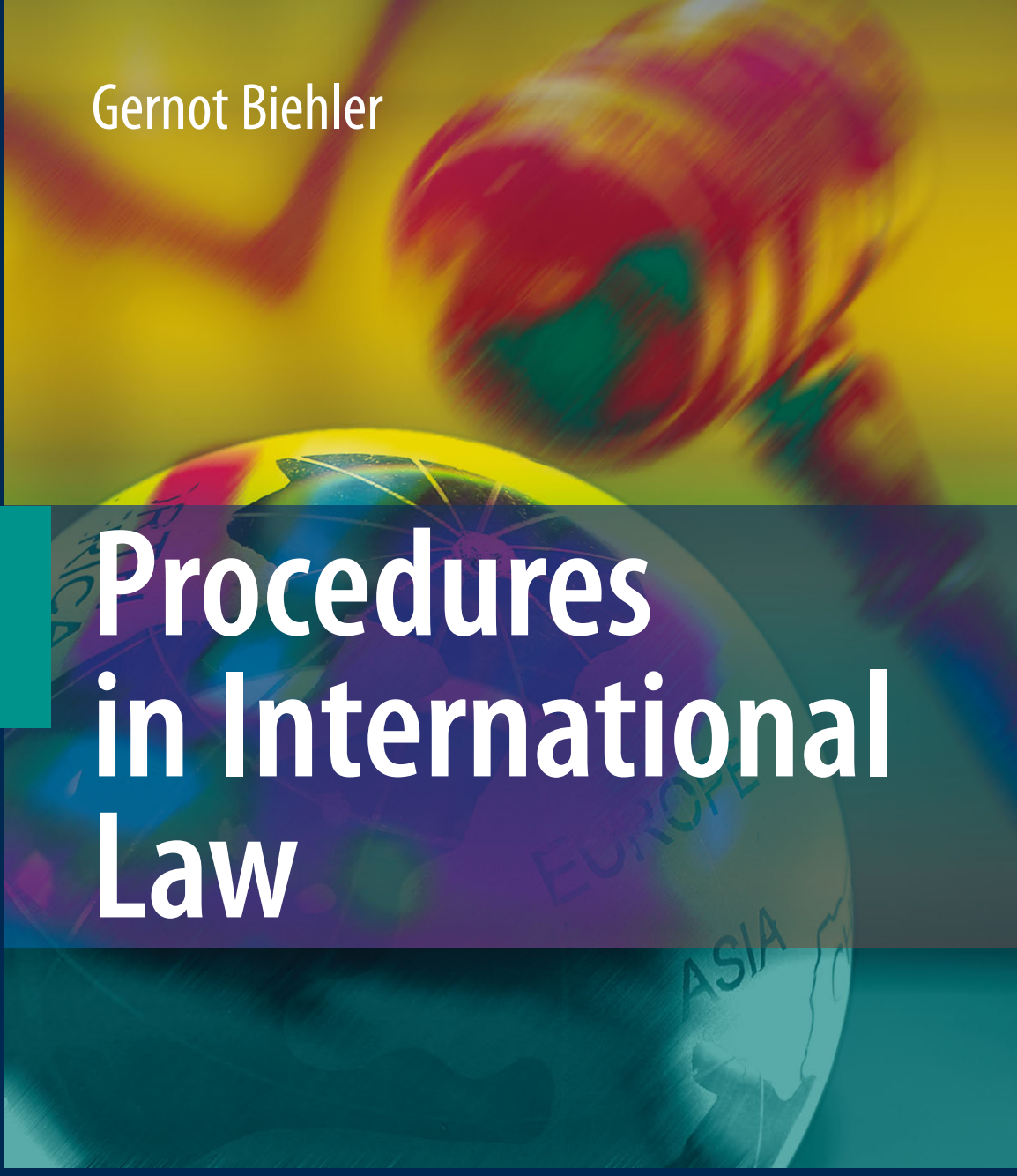
Gernot Biehler



Procedures in International Law

Springer

Procedures in International Law

Gernot Biehler

Procedures in International Law

Springer

Dr. Gernot Biehler
University of Dublin
School of Law
39 Trinity College
Dublin 2
Ireland
biehlerg@tcd.ie

ISBN 978-3-540-74497-9 e-ISBN 978-3-540-74499-3

DOI: 10.1007/978-3-540-74499-3

Library of Congress Control Number: 2008934037

Cover Design: WMX Design GmbH, Heidelberg, Germany

Printed on acid-free paper

5 4 3 2 1

springer.com

Preface

Legal procedures determine what the law is and what may be possibly enforced. Normally left to the practitioners their role particularly in the field of the grey zones of international law merits closer attention. This book introduces a procedural perspective to better deal with the often inchoate nature of international law both in practice and doctrine.

International private law or the conflict of laws have probably rendered the greatest service to an understanding of procedural as opposed to substantive law due to the precedence on the *lex loci proceduralis* over any foreign *lex causae.* To better deal with "Italian Torpedoes" and other inconsistencies of the international judicial system an overview of the different bases of national jurisdictions is provided in Chapter 4.5. which is possibly the first of its kind. It can give a first orientation to the practitioner in international litigation and inform doctrine.

Jurisdiction and other procedural issues may only be fully appreciated when international law both public and private may shed its light on the varied legal procedures generating international law both nationally and internationally.

I am nevertheless all too conscious of the incompleteness of this attempt to establish a genuine procedural perspective in international law. Challenging to the reader, I only hope that any deficiencies in this attempt will prove useful in illustrating the need for further detailed studies on the issue, if I may be so fortunate to take part in such endeavours or not be so privileged to do so again.

I feel particularly indebted to three great scholars; the late Professor F. A. Mann, Lord Justice Lawrence Collins and Professor Andreas Lowenfeld of New York University for giving credibility to a comprehensive understanding of all international law both public and private without which the ideas suggested here would not have seen the light of the day. This is an understanding which in the German context is only a distant memory associated with Wilhelm Wengler and Count Helmuth James Moltke.

More immediately I have to acknowledge the contribution of Professor Hilary Delany who drafted the final chapter and helped on all stages of the book. I am at a loss to explain her friendly intellectual support reaching far beyond her duties as Head of the Law School of Trinity College Dublin. However, I gladly reciprocate her last book's dedication. (The Right to Privacy, Thomson Round Hall 2008). Mr. Conor Wright MA (Dubl.) BL helped to draft the national bases of jurisdiction, Herr Jochen Rauber did the same for the case law in Chapter 6 and Miss Brenda Carron LL.B. (Dubl.) compiled the tables and index and did most of the proof reading. All contributed greatly and fulfilled their tasks with admirable skills.

Frau Dr. Brigitte Reschke, Legal Editor at Springer Heidelberg, made this book possible. From the first mentioning of the idea at a Staatsrechtslehrertagung right up to the printing stage her friendly and most efficient support made it a pleasure to work together.

July 2008 Gernot Biehler

Table of Contents

Cases

Bibliography

Adler-Karlsson, Gunnar, *Western Economic Warfare 1947–1967* (McGraw Hill, New York, 1968)

ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (CUP, 2006)

Allain, Jean, *A Century of International Adjudication: The Rule of Law and its Limits* (Kluwer Law, 2000)

Amerasinghe, Chittharanjan, *Evidence in International Litigation* (2005)

American Law Institute, *Restatement of the Law: Conflict of Laws,* 2d (1971)

Anagnostopoulos, Nikos, "Greece" in Van Lynden, Baron Carel J.H. (ed.), Forum Shopping (LLP, 1998)

Annan, Kofi, Nobel Peace Prize Lecture, 10 December 2001 visited at http://www.unhnhr.ch

Anonymous, "Limitations on the Federal Power to Compel Acts Violating Foreign Law" (1963) 63 Col L Rev 1441

Anonymous, "Ordering Production of Documents from Abroad in Violation of Foreign Law" (1963–64) 31 U Chi L Rev 791

Arnold, Thurman, "The Role of Substantive Law and Procedures in the Legal Process" (1931–1932) 45 Harv L Rev 617

Arnull, Anthony, *The European Union and the Court of Justice* (2nd ed., OUP, 2006)

Bar, Christian v. and Mankowski, Peter, *Internationales Privatrecht* (2nd ed., 2003, Verlag C.H. Beck, München)

Bates, Ed, "State Immunity for Torture" (2007) 7 Human Rights Law Review 651

Bebr, Gerhard, "Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg" (1983) 20 CML Rev 35

Bennion, Francis Alan Roscoe, *Statutory Interpretation* (4th ed., Butterworths, 2002)

Berkey, Judson Osterhoudt, "The European Court of Justice and Direct Effect for the GATT: a Question Worth Revisiting" (1998) 9 European Journal of International Law 626

Bertele, Joachim, *Souveränität und Verfahrensrecht, eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiction im Verfahrensrecht* (Tübingen Mohr & Siebeck, 1998)

Besselink, Leonard F.M., "The Constitutional Duty to Promote the Development of the International Legal Order: the Significance and Meaning of Article 90 of the Netherlands Constitution" (2003) 34 NYIL 133

Bianchi, Andrea, "Ferrini v Federal Republic of Germany" (2005) 99 AJIL 242

Biehler, Gernot, "Between the Irish, the Strasbourg and the Luxembourg Courts: Jurisdictional Issues in Human Rights Enforcement" (2006) 28 DULJ 317

Biehler, Gernot, *Auswärtige Gewalt* (Mohr & Siebeck, 2005)

Biehler, Gernot, "Individuelle Sanktionen der Vereinten Nationen und Grundrechte" (2003) 41 *Archiv des Völkerrechts* 169

Biehler, Gernot, *International Law in Practice* (Thomson Round Hall, 2005)

Biehler, Gernot, "Legal Limits to International Sanctions" (2003) 4 Hibernian Law Journal 15

Biehler, Gernot, "One Hundred Years On – The Hague Convention V on Neutrality and Irish Neutrality" (2007) 25 Irish Law Times 226

Biehler, Gernot, "Property Rights for Individuals under International Humanitarian Law" (2007) 45 *Archiv des Völkerrechts* 432

Binchy, William, *Irish Conflicts of Law* (Butterworths, Ireland, 1988)

Blankenburg, Erhard, "Civil Justice: Access, Cost and Expedition. The Netherlands" in Zuckerman, Adrian (ed.), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998)

Blix, Hans, *The Independent*, 8 March 2004 "Disarming Iraq, the Search for Weapons of Mass Destruction"

Bodin, Jean, *Six Livres de la Republique*, Book VI

Brand, Ronald A., "The Status of the General Agreement of Tariffs and Trade in United States Domestic Law" (1989–1990) 26 Stan J Int'l L 479

Breuer, Marten, "Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?" (2005) Neue Zeitschrift für Verwaltungsrecht 412

Briggs, Adrian, "Jurisdiction and Arbitration Agreements and Their Enforcement" (2006) 122 LQR 155

Briggs, Adrian, "Anti-Suit Injunctions and Utopian Ideals" (2004) 120 LQR 529

Brinkhof, Jan, "Between Speed and Thoroughness: The Dutch 'Kort Geding' Procedure in Patent Cases" (1996) 18(9) EIPR 499

British Institute of International and Comparative Law, *Evidence before International Tribunals* (2002)

Broman, Claes and Granström, Max, "Sweden" in Grubbs, Shelby R. (ed.), *International Civil Procedure* (Kluwer Law International, 2003)

Brown Scott, James (ed.), *The Proceedings of The Hague Peace Conferences: The Conference of 1907* (London, 1920–1)

Brown, Chester, *A Common Law of International Adjudication* (OUP, 2007)

Calabresi, Guido and Melamed, A. Douglas, "Property Rules, Liability Rules and Inalienability: One view of the Cathedral" (1972) 85 Harv L Rev 1089

Cassese, Antonio, *International Criminal Law* (OUP, 2003)

Cassese, Antonio, *International Law* (OUP, 2005)

Chamberlayne, Charles F., *Evidence* (1911)

Chapus, René, "L'Acte de gouvernement, Victime ou Monstre?" D. Chronique, p. 5

Chinkin, Christine, "Alternative Dispute Resolution Under International Law" in Evans, Malcolm (ed.), *Remedies in International Law* (Hart, Oxford, 1998) p.123

Churchill, Winston, *The Gathering Storm* (Cassell, 1948)

Collier, John, *Conflict of Laws* (3rd ed., CUP, 2001)

Collins, Lawrence, "Public International Law and Extraterritorial Orders" in *Essays in International Litigation and the Conflicts of Laws* p. 99

Conforti, Benedetto, in Conforti, Benedetto and Francioni, Francesco (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1997)

Craig, Paul and de Búrca, Gráinne, *EU Law* (4th ed., OUP, 2008)

Craig, William Laurence, "Application of the Trading with the Enemy Act to Foreign Corporations owned by Americans: Reflections on Fruehauf v Massardy (1969–1970) 83 Harv L Rev 579

Cremer, Hans-Joachim, "Zur Bindungswirkung von EGMR-Urteilen" (2004) Europäische Grundrechte-Zeitschrift 683

Danilenko, Gennady M., "The Economic Court of the Commonwealth of Independent States" (1998–1999) 31 NYU Journal for Int'l & Po 893

Delany, Hilary and McGrath, Declan, *Civil Procedure in the Superior Courts* (Thomson Round Hall, 2005)

Delany, Hilary, *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007)

Desmedt, Axel, "ECJ Restricts Effect of WTO Agreements in the EC Legal Order" (2000) 3 J Int'l Econ Law 191

Dicey and Morris, *The Conflict of Laws* (14th ed., Sweet & Maxwell, 2006)

Dicey and Morris, *The Conflict of Laws* (8th ed., Stevens and Sons Ltd, 1967)

Domke, Martin, "Indonesian Nationalisation Measures before Foreign Courts" (1960) 54 AJIL 305

Dutta, Anatol, *Die Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Mohr & Siebeck, Tübingen, Germany 2006)

Editorial note in (1956) 50 AJIL 415

Eyermann, Erich and Fröhler, Ludwig, *Kommentar zur Verwaltungsgerichtsordnung* (9th ed. 1988)

Fatima, Shaheed, *Using International Law in Domestic Courts* (Hart Publishing, Oxford and Portland, Oregon, 2005)

Fentiman, Richard, "Jurisdiction Agreements and Forum Shopping in Europe" (2006) Butterworth's Journal of International Banking and Financial Law 304

Fitzmaurice, Gerald, "Some Problems Regarding the Formal Sources of International Law" in *Symbolae Verzijl* (The Hague, La Haye 1958) p. 153

Fleuren, J.W.A., "Directe en indirecte toepassing van internationaal recht door de Nederlandse rechter", 131 Mededelingen van de Nederlandse Vereniging voor Internationaal Recht (2005) pp. 126 – 131

Fleuren, J.W.A., "De maximis non curat praetor? Over de plaats van de Nederlandse rechter in de nationale en de internationale rechtsorde" in Bovend'Eert, P.P.T., van den Eijnden, P.M. and Kortmann C.A.J.M. (eds.), *Grenzen aan de rechtspraak? Political question, acte de gouvernement en rechterlijk interventionisme* (Deventer: Kluwer, 2004) pp. 127 – 159

Foss, Edward, *A Biographical Dictionary of the Judges of England from the Conquest to the Present Time 1066–1870* (London, John Murray, Albemarle Street, 1870)

Fox, Hazel, *The Law of State Immunity* (OUP, 2002)

Fox, Hazel, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States" in Evans, Malcolm D. (ed.), *International Law* (2nd ed., OUP, 2006) p. 361

Fox, Hazel, "Where does the Bucket Stop? State Immunity From Civil Jurisdiction And Torture" (2005) 121 LQR 353

France, Thomas William, "The Domestic Legal Status of the GATT: The Need for Clarification" (1994) 51 Washington & Lee L Rev 1481

Francioni, Francesco, "International Law as a Common Language for National Courts" (2001) 36 Tex Int'l LJ 587

Franck, Thomas, "The Secretary General's Role in Conflict Resolution: Past Present and Pure Conjecture" 6 EJIL 360

Franck, Thomas, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995)

Franzosi, Mario, "Worldwide Patent Litigation and the Italian Torpedo" (1997) 7 EIPR 382

Frowein, Jochen Abraham, "Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte", in Dicke, Klaus *et al* (eds.), *Weltinnenrecht – Liber amicorum Jost Delbrück* (Berlin, Duncker & Humblot, 2005) pp. 279 – 287

Geimer, Reinhold, *Internationales Zivilprozeßrecht* (5th ed., 2005, Verlag Dr.Otto Schmidt Köln)

Giménez, Diez-Picazo, "Civil Justice in Spain: Present and Future. Access, Cost and Duration" in Zuckerman, Adrian (ed.), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998)

Gray, Christine, "Is there an International Law of remedies?" (1985) 56 BYIL 25

Gray, Christine, "Types of Remedies in ICJ Cases: Lessons for the WTO?" in Weiss, Freidl (ed.), *Improving WTO Dispute Settlement Procedures* (Cameron May, 2000) p. 401

Gray, Christine, *Judicial Remedies in International Law* (OUP, 1987)

Grubbs, Shelby R. (ed.), *International Civil Procedure* (Kluwer Law International, 2003)

Grubbs, Shelby R. and DeCambra, Esther, "United States" in Grubbs, Shelby R. (ed.), *International Civil Procedure* (Kluwer Law International, 2003)

Guillaume, Gilbert, "The Future of International Judicial Institutions" (1995) 44 ICLQ 862

Halliday, Dennis and Sponeck, Harris, *The Guardian,* 29 November 2001 "Former UN relief chiefs Hans von Sponeck and Dennis Halliday speak out against an attack on Iraq"

Hart, H.L.A., *The Concept of Law* (OUP, 1994)

Hartley, Trevor C., "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) 54 ICLQ 813

Hartley, Trevor C., "The Modern Approach to Private International Law – International Litigation and Transactions from a Common-Law Perspective" in (2006) 319 *Recueil des Cours* p. 41

Hartley, Trevor C. and Dogauchi, Masato, *Explanatory Report to the Hague Convention of 30 June 2005 on the Choice of Court Agreements*, http://www.hcch.net/upload/expl37e.pdf

Henken, Louis, *How Nations Behave* (2nd ed., 1979)

Herzog, Peter E., "Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?" (1995) 43 AJCL 379

Higgins, Rosalyn, "Remedies and the International Court of Justice: An Introduction" in Evans, Malcolm D. (ed.) *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford 1998) p. 6

Highet, Keith, "Evidence and Proof of Facts" in L.F. Damrosch (ed.), *The International Court of Justice at a Crossroad* (Transnational Publishers, Dobbs Ferry, New York, 1987) p. 355

Highet, Keith, "Evidence, the Court and the Nicaragua Case" (1987) 81 AJIL 1

Hudson, Manley, *The Permanent Court of International Justice: A Treatise* (1934)

Jennings, Sir Robert and Watts, Sir Arthur (eds.), *Oppenheim's International Law* (9th ed., Longman, Harlow, 1992)

Kelsen, Hans, *General Theory of Law and State* (Harvard University Press, 1949)

Kerr on Injunctions (6th ed., Paterson, 1927)

Klein, Eckhart, "Anmerkung zu BVerfG, Beschluss vom 14.10. 2004 (Görgülü)" (2004) Juristen Zeitung 1176

Koh, Harold H., "Transnational Legal Process" (1994) 75 Neb L Rev 181

Kunig, Philip, "Völkerrecht und staatliches Recht" in Vitzthum, Wolfgang Graf (ed.), *Völkerrecht* (3rd ed., 2004)

Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law* (Longmans, London, 1927)

Lauterpacht, Hersch, *The Development of International Law by the International Court* (Stevens, London 1958)

Layton, Alexander and Mercer, Hugh, *European Civil Practice* (2nd ed., 2005)

Lefebvre, Paul, "Belgium" in Grubbs, Shelby R. (ed.), *International Civil Procedure* (Kluwer Law International, 2003)

Lowe, Vaughan, *International Law* (OUP, 2007)

Lowenfeld, Andreas, "Act of State and Department of State" (1972) 66 AJIL 795

Lowenfeld, Andreas, "Public Law in the International Arena; Conflict of Laws, International Law, and Some Suggestions for their Interaction" in (1979) 163 *Recueil des Cours* pp. 315 – 428

Lowenfeld, Andreas, "Sanctions and International Law: Connect or Disconnect?" (2003) 4 Hibernian Law Journal 1

Lowenfeld, Andreas, *International Economic Law* (2nd ed., OUP, 2008)

Lowenfeld, Andreas, International Litigation and Arbitration (3rd ed. Thomson West 2005)

Lowenfeld, Andreas, *Trade Controls for Political Ends* (2nd ed., 1983)

Malanczuk, Peter, *Akehurst's Modern Introduction to International Law* (7th ed., Routledge, London and New York, 1997)

Mani, Rama, "Peaceful Settlement of Disputes and Conflict Prevention" in Weiss, Thomas and Daws, Sam (eds.), *The Oxford Handbook on the United Nations* (OUP, 2007) p. 300

Mann, Frederick Alexander, "The Doctrine of Jurisdiction in International Law" in (1964) *Recueil des Cours* p. 73

Mann, Frederick Alexander, "The Present Legal Status of Germany Revisited" (1967) 16 ICLQ 760

Merrills, John G., "Reflections on the Incidental Jurisdiction of the International Court of Justice" in Malcolm D. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford, 1998) p.51

Merrills, John G., *International Dispute Settlement* (2nd ed., Grotius, Cambridge, 1991)

Miller, Nathan, "An International Jurisprudence? The Operation of 'Precedents' across International Tribunals" (2002) 15 LJIL 483

Montana i Mora, Miguel, "European Community Law – Legal Status of International Agreements within the Community Legal Order – General Agreement on Tariffs and Trade – Lome Conventions" (1997) 91 AJIL 152

Moodrick-Even Khen, Hilly, "Case Note: Can We Now Tell What 'Direct Participation in Hostilities' Is? HCJ 769/02 the Public Committee Against Torture in Israel v The Government of Israel" (2007) 40 Israel Law Review 213

Mosler, Hermann, "Eine allgemeine, umfassende, obligatorische, internationale Schiedsgerichtsbarkeit: Das Programm des Grundgesetzes und die internationale Realitat" in Hailbronner, Kay, Ress, Georg and Stein, Torsten (eds.) *Festschrift für Karl Doehring* (Springer, Berlin, Heidelberg, New York, 1989) p. 607

Neufang, Paul, *Erfüllungszwang als remedy bei Nichterfüllung: eine Untersuchung zu Voraussetzungen und Grenzen der zwangsweisen Durchsetzung vertragsgemäßen Verhaltens im US amerikanischen Recht im Vergleich mit der Rechtslage in Deutschland* (1998)

Nicholls, Clive, Montgomery, Claire and Knowles, Julian B., *The Law of Extradition and Mutual Assistance* (2nd ed., OUP, 2007)

Niederländer, Hubert, "Materielles Recht und Verfahrensrecht" RabelsZ 20 (1955) 1

Noonan, Joe, *DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* (the Pitstop Ploughshares Case) (2006) 1 Irish Yearbook of International Law 337

Nowlan, "Ireland" in Van Lynden, Baron Carel J.H. (ed.), *Forum Shopping* (LLP, 1998)

Palley, Claire, *An International Relations Debacle – The UN Secretary-General's Mission of Good Offices in Cyprus 1999–2004* (Hart Oxford, 2005)

Petersmann, Ernst, "Act of State, Political Question Doctrine und gerichtliche Kontrolle der auswärtigen Gewalt" in Jahrbuch des öffentlichen Rechts Neue Fassung 25 (1976) p. 587

Petersmann, Ernst-Ulrich, "Application of GATT by the Court of Justice of the European Communities" (1983) 20 CML Rev 397

Petersmann, Ernst-Ulrich, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement* (London, The Hague: Kluwer Law International, 1997)

Reinisch, August, "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions" (2001) 95 AJIL 851

Reinisch, August, *International Organisations before National Courts* (CUP, 2000)

Rogerson, Pippa, "Kuwait Airways Corp v Iraqi Airways Corp: the territoriality principle in international private law – vice or virtue?" [2003] Current Legal Problems 265

Romano, Cesare, Comment on the Project on International Courts and Tribunals PICT, at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf

Rosenberg Overby, Lars and Nielsen, Bent, "Denmark" in Van Lynden, Baron Carel J.H. (ed.), *Forum Shopping* (LLP, 1998).

Rosenne, Shabtai, *Law and Practice of the International Court, 1920–2005* (2006)

Rougevin-Baville, Michel, "Irresponsabilité des Puissances Publiques" in Gazier, Francois and Drago, Roland (eds.), *Dalloz, Encyclopedie de Droit Publique, repertoire de la Responsabilité de la Puissance Publique* (Paris, 1988)

Rumpf, Helmut, *Regierungsakte im Rechtsstaat* (1955)

Sanchesz de Bustamente, Antonio, *The World Court* (1925)

Sandifer, Durward, *Evidence Before International Tribunals* (2nd ed., 1975)

Sands, Phillipe, Mackenzie, Ruth and Shany, Yuval (eds.) *Manual on International Courts and Tribunals* (Butterworths, 1999)

Schack, Heimo, *Internationales Zivilverfahrensrecht* (C.H. Beck, 2002)

Schneider, Hans, "Gerichtsfreie Hoheitsakte" in Recht und Staat 1951

Schreuer, Christoph H., "Concurrent Jurisdiction of National and International Tribunals" (1975–76) 13 Hus L Rev 508

Schwebel, Stephen, "Three Cases of Fact-Finding by the International Court of Justice" in Schwebel, Stephen, *Justice in International Law* (CUP, Cambridge, 1994) p. 125

Secretary General, Report of the, Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992 and 17 June 1992, An Agenda for Peace: Supplement, Preventive Diplomacy, Peace making and Peace-keeping, UN Doc. A/47/277

Shany, Yuval, "How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts" (2006) 31 Brook J Int'l L 341

Shany, Yuval, *Decisions of International Institutions before Domestic Courts* (1981)

Shany, Yuval, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007)

Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003)

Shaw, Malcolm N., "A Practical Look at the International Court of Justice", in Evans, Malcolm D. (ed.), *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford, 1998) p.11

Shearer, Ivan A., *Extradition in International Law* (Manchester University Press, 1971)

Slaughter, Rosemary, "A Global Community of Courts" (2003) Harv Int'l LJ 191

Slaughter, Rosemary, "Judicial Globalisation" (1999–2000) 40 Va J Int'l L 1103

Spiermann, Ole, *International Legal Argument in the Permanent Court of International Justice* (Cambridge, 2005)

Stelkens, Paul in Stelkens, Paul, Bonk, Heinz Joachim and Leonhardt, Klaus, *Kommentar zum Verwaltungsverfahrensgesetz* (5th ed. 1998)

Stephen, James F., *The History of the Criminal Law of England* (1883)

Stokke, Berit and Surlien, Sigrid, "Norway" in Van Lynden, Baron Carel J.H. (ed.), *Forum Shopping* (LLP, 1998)

Talpis, Jeffrey and Krnjevis, Nick, "The Hague Convention on Choice of Court Agreements of 30 June 30 2005: The Elephant that Gave Birth to a Mouse" (2006) 13 (1) Southwestern Journal of Law and Trade in the Americas 1

Tesón, Fernando R., "The Kantian Theory of International Law" (1992) 92 Col L Rev 53

Thirlway, Hugh, "The Law and Procedure of the ICJ 1960–1989: Part Nine" (1998) BYIL 1

Tomuschat, Christian, Gil Gil, Alicia and Pinzauti, Giulia (2005) 3 Journal of International Criminal Justice 1074

Trachtman, Joel P., "Bananas, Direct Effect, and Compliance" (1999) 10 EJIL 655

Tricot, Bernard, in Lecomte, Claude, *Coulez le Rainbow Warrior!* (Messidor: Editions sociales, Paris, 1985) pp. 151–168

Triepel, Heinrich, *Die Zukunft des Volkerrechts* (Leipzig, 1916)

UN Legal Affairs Office, *Handbook on the Peaceful Settlement of Disputes between States* (New York, 1992)

van Husen, Paul, "Gibt es in der Verwaltungsgerichtsbarkeit justizfreie Regierungsakte?" Deutsches Verwaltungsblatt 1953, pp. 70 – 73

Van Lynden, Baron Carel J.H., *Forum Shopping* (LLP London, 1998)

Veron, Pierre, "ECJ Restores Torpedo Power" (2004) International Review of Industrial Property and Copyright Law 17

Virally, Michel, "L'introuvable acte de gouvernement" RDP 1952, 317

Warbrick, Colin, "States and Recognitions in International Law" in Evans, Malcolm (ed.), *International Law* (2nd ed., OUP, 2006)

Warbrick, Colin, "The Jurisdiction of the Security Council: Original Intention and New World Order(s)" in Capps, Patrick *et al* (eds.), *Asserting Jurisdiction* (Hart Publishing, 2003)

Wehberg, Hans, *The Problem of an International Court of Justice* (Oxford, 1918)

Wellens, Karel, *Remedies against International Organisations* (CUP, 2002)

Wheeler Cook, Walter, "'Substance' and 'Procedure' in the Conflict of Laws" (1932–1933) 42 Yale LJ 333

Yang, Xiaodang, "Case and Comment – Universal Tort Jurisdiction Over Torture?" (2005) 64 CLJ 1

Yasuaki, Onuma, "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law" in Ando, Nisuke *et al*., (eds.), *Liber Amicorum Judge Shigeru Oda* (New York, Kluwer Law International, 2002)

Yeo, T.M., *Choice of Law for Equitable Doctrines* (OUP, 2004)

Zonnekeyn, Geert, "The Direct Effect of GATT in Community Law: From International Fruit Company to the Banana Cases" (1996) 2 International Trade Law & Regulation 63

Chapter 1

A Procedural Perspective in Law

Procedural and substantive law are in a special relationship. Legal procedures help to decide on the merits of bringing an action. Procedures make law real. This is expressed in the equitable maxim that where there is a wrong there is a remedy,[1] a maxim which is equally supported by the civil law doctrine of *bona fide*. This means that where there is an injustice, there should be a procedure to remedy it. Put another way, where there is a legal right there should be a way to give effect to it. This can occur through various means such as court proceedings, arbitration, ombudsmen, tribunals, special commissions or committees. However, this basic relationship between law and procedural remedies seems well recognised: "A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; *i.e.*, no law at all."[2]

The focus of most lawyers is primarily on substantive law. Procedural law is understood mainly as an ancillary subject and is particularly relevant to those determining and enforcing the law in practice. Procedural law in any jurisdiction regulates the hierarchical structure of the courts and the court of final appeal and their proceedings, the decisions of which are generally binding. Procedures are usually also laid down for the enforcement of court decisions.

While most lawyers focus mainly on substantive law and understand procedural law as an ancillary subject rarely worthy of too much attention, the perspective shall be different in this inquiry. A change in perspective may shed a different light on known facts. There is nothing essentially new to be discovered here and this study rather highlights known but hitherto less appreciated legal structures. It is suggested that the analysis of the relationship between substantive laws and those procedures which determine them and provide a basis for their later enforcement is extremely fertile as it may help to disclose properties not least of international law which it may be useful to ascertain. Some simple relationships between the law on the merits and legal procedures shall be examined first, preced-

---

[1] Delany, Hilary, *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) formulates at p. 13 under the heading "Equity will not suffer a wrong to be without a remedy", "that equity will intervene to protect a recognised right which for some reason is not enforceable at common law".

[2] Chamberlayne, *Evidence* (1911) para. 171 quoted in Walter Wheeler Cook, "'Substance' and 'Procedure' in the Conflict of Laws" (1932-1933) 42 Yale LJ 333, 336, footnote 10.

ing the following more conventional legal considerations. These prolegomena shall be introduced by the following observation: that law[3] cannot exist without procedures; procedures cannot exist without law.

Any law which is not determined and applied procedurally remains in the realm of general statements, principles or maxims. In such a state its place in academia would be with philosophy, theology or social sciences which would not merit its own School or Faculty of Law. It is ultimately the decision in any given case or issue which determines what the law is; extracted from the differing assumptions of the parties and the more philosophical and abstract reasoning of right or wrong, justice, law and equity the definite, defined and defining structures of law emerge. It is this ability to decide which distinguishes the law from all other academic or professional disciplines, severing it partly from the claim to partake essentially in the search for eternal truth(s) (as other sciences and arts endeavour) but providing it with an essential importance for all spheres of life. This makes law unique in character between an art and a profession exemplified both by those pursuing a professional career and those endeavouring to inquire into the nature of law with equal benefit to the subject. It is this capacity to make decisions which is inherently procedural. This quality of legal procedures, of giving effect to a decision, provides substantive law with its special importance as the standard according to which the case is to be decided. It is only by procedurally applying it that law is determined, possibly enforced and made real. Law may be only perceived through its procedures, which means that it cannot exist without them. It surfaces only from the realm of the indeterminate when proceeding to decide. The distinction between procedure and substantive law is one of the most interesting consequences of our attitude towards an independent judiciary. Law is fundamental, everlasting through the rule of *stare decisis*[4] and almost sacred. It represents the experience of ages. On it is based the freedom of the individual. Procedure on the other hand is perceived as entirely practical. It is based on the experiences of ages too but age with procedures is considered often as senility rather than wisdom.[5] There is nothing like *stare decisis*; for procedural rules there is no *stare dictum* rule, it is rather practical utility, convenience for the court and discretion about the standards around which they revolve.

Obviously procedures cannot exist without law as otherwise nothing could be applied to the facts brought before a forum. It is the tool that makes law real and there is no other means to effect this.

---

[3] While considering the relationship between law and procedure, law is understood as law on the merits or substantive law as opposed to procedural law which does not provide rules to decide the ultimate conflict between the parties but rather provides the procedure as to how to come to this decision.

[4] See *Trendtex Corporation v Central Bank of Nigeria* [1977] 1 All ER 881 on the exceptions to the *stare decisis* rule in international law.

[5] Thurman Arnold "The Role of Substantive Law and Procedures in the Legal Process" (1931-1932) 45 Harv L Rev 617, 644.

Historically, this intimate relationship between law and procedure was institutionalised when procedures were introduced to determine and enforce the law. Judicial institutions were originally established by what we would now call the sovereign.[6] This source of courts and their procedure is particularly visible in some traditional monarchies where decisions are handed down in the name of the monarch who may be referred to as the sovereign too. In those judicial formulas the idea is preserved that it is the sovereign who decides and the activity of the courts is advisory to this.

For the legal tradition in the English speaking world unified by the traditions of the common law the cradle for this development lies in the *Curia Regis* established by William the Conqueror. In his reign the highest court of judicature was the *Curia Regis*, over which the King himself frequently presided. Its members were the prelates and barons of the realm, and certain officers of the palace. Of these the principal officer was the Chief Justiciary, who in the King's absence was the ruling judge. This office continued until the reign of Henry III, a period of two hundred years, when its judicial functions were transferred to the Chief Justice of the King's Bench. From there the development into the modern courts took its course,[7] however, its historical source which is the *Curia Regis* was notionally preserved, for example, in the Privy Council which may be taken as a literal translation from Latin into English. The latter decides right up to today with the formula "As it is, their Lordships will humbly advise Her Majesty that the appeal should be dismissed"[8] indicating the source of legal proceedings and that the power to decide is that of HM, the Sovereign.

More abstract notions of sovereignty usually preferred by states with a less traditional constitutional structure would nevertheless allow state authority to be identified as the source of court decisions while using formulas in their courts' decisions such as "In the Name of the People", when, for example, "the People" is understood to be the ultimate source of the State's power, in short the sovereign. The same may be said for the formulas found in Muslim countries often referring to Allah as the source of authority for court decisions ("In the name of Allah etc. etc."). By their constitutional understanding Allah is the ultimate source of power in the State. All this would fit in neatly with the original definition of sovereignty provided by Bodin: "The sovereign is high above all subjects. His majesty does not permit any division and incorporates the idea of unity in a State."[9]

---

6 Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 28 *et seq*. on the notion of sovereignty in law which will be relevant in the further course of the inquiry.

7 Taken from the instructive Preface of Edward Foss, *A Biographical Dictionary of the Judges of England from the Conquest to the Present Time 1066-1870* (London, John Murray, Albemarle Street, 1870) p. vi.

8 *R v A-G for England and Wales (New Zealand)* [2003] UKPC 22, 17 March 2003, para. 37.

9 Bodin, Jean, *Six Livres de la Republique*, Book VI, para. 1056; Biehler, *op.cit*. p. 28 *et seq*.

This link between legal procedures and state authority or sovereignty may be crucial in understanding some properties and specificities of legal procedures. Law may hardly be conceived without sovereignty[10] or the power of the State which is often condensed in notions, such as jurisdiction or competency. A closer examination shows that it is less the law itself but rather the legal procedure provided to determine and enforce the law (or not) which must be classified in this way. To use the broad meaning of sovereignty encompassing all the power and authority of the State, whether understood as historically personified or in the abstract, it is by the sovereign that law is administered (or not). It is his, her or its (whatever the national constitutional personification of sovereignty provides for) public authority which renders decisions of the courts binding. Legal procedures are an emanation of state authority and they are understood as such. They form part of a country's constitutional structure and partake in the nature of any exercise of state authority; as with the other branches of government they are administered by an hierarchically organised governmentally financed structure handing down binding decisions and operating non discretionary procedures for those subject to them. It is the procedure which determines the properties of any court of law. This not only distinguishes procedures from substantive law, which is usually applied equally among those who are legally equals, subject to a wide discretion of the parties, for example, in the choice of law, but links it to other core activities of a state in the exercise of public authority.

1.1 Law and Procedure

The fact that law is reflected in its procedures helps to both determine and enforce it. The objective of this section is to examine whether there are any unique characteristics of legal procedures as opposed to the body of substantive law, or anything unique about the content or character of procedural principles and rules that render them suitable to shed some specific light on parts of the law, notably in the international context. Substantive law can be seen through legal procedures. To reflect law through its procedures is an unusual perspective. There is a general understanding that law is the body of rules which determines our behaviour. Legal procedure comes in only in the rare event when this behaviour deviates from the rules which necessitate determining and possibly enforcing the law. The law may be understood as the relevant part in this equation while procedures just facilitate it. However, a slightly more detailed examination of both will tell us more.

Legal theory has it that law may be entirely determined through its procedures; Kelsen writes "Law is the primary norm which stipulates the sanction".[11] This

---

[10] The notion of sovereignty still focuses on many of the notions like "jurisdiction", "competency", "independence of the judiciary" or just "power" in an unmatched way, Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 28.

[11] Kelsen, Hans *General Theory of Law and State* (Harvard University Press, 1949) p. 2.

view does not, for example, recognise a prohibition against murder but understands as law only the rule which directs the authorities to apply certain sanctions in certain circumstances to those who commit murder.[12] It is the order to apply sanctions which is seen as law and the legal sanctions or order may be seen as procedure in themselves. Indeed, every rule of law can be rephrased to suit Kelsen's perspective.[13] What is usually thought of as the content of law, designed to guide the conduct of people is here merely the antecedent or "if-clause" in a rule which orders someone to apply certain sanctions if certain conditions are satisfied. All genuine laws, according to this view, are conditional orders to apply sanctions. They are all in the form; "if anything of a certain kind happens then apply the appropriate sanction." The overwhelming experience so important for international law[14] that most people in most circumstances observe the rule without even the remotest consideration of sanctions to coerce them is not encompassed by this view. In addition, there may be many more shortcomings of this particular perspective on law summarised by Hart under the heading of "distortion as the price of uniformity".[15] However, these shortcomings are not of interest here. Kelsen's view merely shows that all laws may be seen and potentially explained from the perspective of the possible sanctions they incur. This view of the law is one possible perspective and may facilitate a better understanding of certain parts of the law notably international law. It is well supported by doctrine as this quotation shows:

> "A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; i.e., no law at all."[16]

Short of concluding that sanctions are procedure it may be said that sanctions involve procedures. There are no sanctions without a procedure. Legal sanctions are closely linked to legal procedures. Procedures may comprise more than just determining and enforcing the law. However, determining and enforcing the law is the core function of any legal procedure.

To sum up; law becomes effective when determined and enforced through a procedure potentially leading to a sanction. Possibly, only law which may be potentially determined and enforced through a procedure is law in the strict sense of Kelsen's approach. From this it follows that it is possible to see laws through procedures which determine their contents in terms of certain sanctions or consequences.

---

[12] Example taken from Hart, *The Concept of Law* (OUP, 1994) p. 35 *et seq*.

[13] Hart, *op.cit*. at pp. 36 and 38 gives some examples.

[14] Lowe, Vaughan, *International Law* (OUP, 2007) p. 18.

[15] Hart, *op.cit*. at p. 38 *et seq*.

[16] Chamberlayne, *Evidence* (1911) para. 171 quoted in Walter Wheeler Cook, "'Substance' and 'Procedure' in the Conflict of Laws" (1932-1933) 42 Yale LJ 333, 336, footnote 10.

1.2 Essential Properties of Legal Procedures

To use procedures in international law to reflect on the substantive aspects of the law presupposes knowing what procedures are. Understanding their essential properties helps to qualify procedures in a responsible manner. From the foregoing discussion it follows that every procedure which determines the law in the context of possible authoritative consequences or sanctions would qualify. Although this definition may be correct and useful, a further refining of the notion of legal procedures with regard to applying them to international law is required. It may be expedient to elaborate a structured understanding of legal proceedings which is sufficiently settled in current legal theory and practice to be tested against a plethora of international legal situations far exceeding the complexity of cases which lack an international context. This almost indefinite variety, not only of state practice legally relevant to international law according to Article 38.1.b of the ICJ Statute but all international law, requires a sophisticated but flexible understanding of procedures.

The nature of procedures has rarely challenged legal minds. Notably, the writings on procedure do not contain any consideration of the essential properties of procedure as opposed to substantive law useful to gain insights which may be applied to international proceedings not hitherto analysed.[17] Such authors describe procedure simply as they find it. This is because a more general understanding of procedure seems of no apparent use when elaborating on the specific procedures applied by a certain court or forum. It is only where the difference of substance and procedure is legally relevant to deciding certain cases before the courts that the distinction sought would be provided. It is only in this context that procedure would take on a specific meaning creating a legal notion suitable to be applied by courts and the law. There are few areas of law where the relationship between substantive and procedural law is legally significant and accordingly developed in cases and doctrine. It is when law is applied internationally in different *fora* with their differing procedures that substance and procedure must be distinguished and clearly defined. It is mainly in the field of private international law or the conflict of laws that such a distinction is relevant and some insights on the essential properties of legal procedures may be drawn from this context. This is the field of law where it is necessary to make legally significant distinctions which may lead to different results.

1.2.1 The Legal Distinction Between Substance and Procedure

At this point the benefits of making the distinction between substance and procedure from the standpoint of private international law and the conflict of laws

[17] Delany and McGrath, *Civil Procedure in the Superior Courts* (Thomson Round Hall, 2005) p. 1.

shall be examined. This seems to be the primary field of law where procedures applied by courts and other *fora* need to be distinguished from substantive law. In international private law the distinction between substance and procedure is an important one since matters of substance are generally determined by the *lex causae* while matters of procedure are governed by the *lex fori*.[18] This means that all matters of procedure are governed by the law of the country to which the court where any legal proceedings are taken belongs. All courts will apply their own rules of procedure and not apply foreign rules which in their view are procedural.[19] While their procedure is entirely governed by their own law, matters of substance may be decided according to foreign laws when the applicable conflict of law rules so require. This possible split between the applicable laws of substance and procedure makes it essential for any court to clearly define what it considers to be procedural as opposed to substantive law. This characterisation may be decisive to, for example, the question of whether an action in tort survives in the event of the death of the tortfeasor so that the estate of the deceased may be made liable for the tort. It is possible that this issue might be dealt with as a matter of tort law which is substantive law.[20] From this it follows that the *lex causae* would govern the issue which might allow for such succession in tort actions if it were, for example, German law. Therefore, in addition to reflecting the law on the merits, legal procedures may well be seen to reflect the competency or jurisdiction of any forum to decide in a manner not only mandated by the merits of the case but to decide it differently having regard to its procedure. Generally it may be said that procedures provide a framework for any application of law. What should be examined are the procedural rules of the forum, the *lex fori proceduralis*, when different from the applicable law on the merits, the *lex causae substantialis*. The unusual situation of applying two different sets of laws, both foreign and national, to the same facts of a case although they may not fit with each other, provides an unrivalled opportunity to unravel the nature of legal procedures isolated from their usual amalgamation with their own national substantive laws. So closely are procedure and substance connected that in many cases a refusal to accept that the foreign rules of procedure are to be applied will defeat the policy involved in following the foreign substantive law. However, the principle was outlined by Lord Pearson as follows:

---

[18] Binchy, William, *Irish Conflicts of Law* (Butterworths, Ireland, 1988) p. 625; Dicey and Morris, *The Conflict of Laws* (14th ed., Sweet & Maxwell, 2006) p. 177, rule 17, 7-002; Collier, *Conflict of Laws* (3rd ed., CUP, 2001) p. 60; Geimer, Reinhold, *Internationales Zivilprozeßrecht* (5th ed., 2005, Verlag Dr. Otto Schmidt Köln) p. 140; v.Bar, Mankowski, *Internationales Privatrecht* (2nd ed., 2003, Verlag C.H. Beck, München) p. 398 with extensive references to both German and English jurisprudence.

[19] *De Gortari v Smithwick* [2000] 1 ILRM 463 (Supreme Court of Ireland).

[20] *Kerr v Palfrey* [1970] VR 825 (Australia); *Orr v Ahern* 139 A 691 (1928); *Ormsby v Chase* 290 US 387 (1993).

> "The *lex fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the *lex fori* must regulate remedies, because the court can only give its own remedies, having no power to give alien remedies. For instance, the English court could not make provision in its order to enable the plaintiff, in the event of a possible future incapacity materialising, to come back and recover in respect of it. That is alien procedure or an alien remedy and outside the powers of an English court. On the other hand, an English court may sometimes be able to give in respect of a tort committed in a foreign country a remedy which the courts of that country would be unable to give. For instance, the foreign courts might have no power to grant an injunction or to make an order for specific performance or for an account of profits."[21]

This approach is also embodied in convention law**.** Article 10(1)(c) of the Rome Convention of 1980 provides that the law applicable to a contract by virtue of the Convention shall govern:

> "Within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law."

This confirms the priority of procedural rules which provide a limiting framework for the application of all substantive law.

For the purpose of the current thesis this perspective on procedures applied by courts and embodied in conventions has the immeasurable advantage that it necessarily includes an international element; it is the application of the laws of different jurisdictions both foreign and national in a single case which renders any application of the *lex fori proceduralis* when different from the foreign *lex causae substantialis* to be, *inter alia*, an act of judicial delineation between states' authorities to govern the issue before the court according to their laws. Any such procedure providing for such an act may be called international. Results found in this context may be a first subtle step towards discovering the properties of international legal procedures understood exclusively by the judicial function they provide regardless of the institutional background from which they are applied.

In this class of cases applying both national and foreign laws in the same case on the basis of the procedural/substantive law distinction a few more seminal applications of the legal rule which distinguishes procedure when at variance with a foreign *lex causae* shall be displayed and then analysed to ascertain how they may possibly refine and clarify the understanding of legal procedures.

---

[21] *Boys v Chaplin* [1971] AC 356, 394.

1.2.1.1 Imprisonment as Procedure

Imprisonment is the ultimate sanction in procedural law if we discount the death penalty. Therefore, this situation is possibly the most striking application of local procedures at variance with the *lex causae*. In *De la Vega v Vianna*[22] the plaintiff, a Spaniard, had the defendant, a Portuguese, arrested in England for non-payment of a debt contracted in Portugal. The defendant claimed that he should be released on the ground that in Portugal imprisonment for debt had been abolished by statute in 1774. The then Chief Justice of England and Wales Lord Tenterden held that the defendant should remain in prison on the basis of the following reasoning:[23]

> "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

Without employing the terminology of procedure and substantive law the rationale of the decision is that everyone subject to the jurisdiction of the forum is also subject to its sanctions, no matter how severe or illegal they may be under the applicable law of the case which here was Portuguese. The intentions of the applicable law embodied in the statute of 1774 were certainly frustrated.

1.2.1.2 Non-enforceable Obligations Enforced: Specific Performance

It is a common feature of the common law that usually only damages may be claimed when an obligation is breached by the defendant. Specific performance is an exceptional remedy[24] only available in very few instances, for example, when damages cannot serve any reasonable purpose with regard to foreign land. Specific performance may be granted by English speaking courts of the common law world[25] or it may be granted in the field of intellectual property.[26]

---

[22] (1830) 1 Barn & Ad 284.

[23] *Ibid*. at 288, recently applied for its basic distinction of law and procedure in *Harding v Wealands* [2006] UKHL 32 (5 July 2006) para. 22.

[24] Neufang, Paul, Erfüllungszwang als Remedy bei Nichterfüllung: eine Untersuchung zu Voraussetzungen und Grenzen der zwangsweisen Durchsetzung vertragsgemäßen verhaltens im US amerikanischen recht im Vergleich mit der Rechtslage in Deutschland, (1998), gives a comparative account of this principle comparing the US law with the German one. T.M. Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) p. 98.

[25] *Penn v Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132. *Richard West and Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 (CA).

[26] *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1955] Ch 37.

A right to performance is substantially different from a right to damages.[27] Although the exceptional nature of the doctrine of specific performance in the Common Law is based on a substantive right to the performance of the contractual obligation in question, the prevailing common law view is that the availability of specific performance is procedural.[28]

This may result in a decision granting specific performance by another forum, for example, a civil law one which applies its own law granting specific performance as a regular procedural remedy even though the applicable *lex causae* derived from the common law does not provide such a remedy. In one such case, the German *Reichsgericht* qualified the exclusion of specific performance according to the applicable English *lex causae* as procedural and did not apply English law but rather the German *lex fori proceduralis*. Thus, a remedy not available under the applicable *lex causae* became available through another forum, distorting the original conceptions of the applicable law. The *Reichsgericht*, the Supreme Court of Germany at the time, elaborated:

> "There is no reason for the German judge to apply the principles of English law based on an actio limiting the right to specific performance only because the case is governed by English law. A distinction must be drawn between substantive laws and their realisation by the court. Foreign rules in relation to the latter are not relevant for the German judge, he only has to apply his own procedural laws." (Translation by the author).[29]

This confirms the observation that referring to some parts of the applicable foreign *lex causae* as procedural by the forum leads to the application of the *lex fori proceduralis* and may substantially alter the decision regardless of the intentions, statutes or laws of the jurisdiction providing the applicable laws.

From this it follows that a lawyer advising a client should be aware of the different remedies of those *fora* which may possibly assume jurisdiction in a case.

---

[27] G Calabresi and A.D. Melamed, "Property Rules, Liability Rules and Inalienability: One view of the Cathedral" (1972) 85 Harv L Rev 1089.

[28] *Baschet v London Illustrated Standard Co.* [1900] 1 Ch 73; *Boys v Chaplin* [1971] AC 356; *The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, 341; Dicey and Morris, *The Conflict of Laws* (14th ed., Thomson Sweet and Maxwell, 2006) Chapter 7.

[29] *Reichsgericht* decision of 28 April 1900, Vol 46 RGZ p. 193, 199: "Für den deutschen Richter besteht kein Anlaß diese Grundsätze des englischen Aktionensystems in einem von ihm geführten Prozeß deswegen zur Anwendung zu bringen, weil die Verpflichtung an sich dem englischen Recht untersteht. Es ist zu unterscheiden zwischen dem Inhalt der Rechte und ihrer gerichtlichen Geltendmachung. Die Regeln, die in letzterer Beziehung im Ausland bestehen, sind für den deutschen Richter, der nur sein heimisches Prozeßrecht anzuwenden hat, nicht maßgebend."

1.2.1.3 Calculation of Damages as Procedure

The latter proposition is particularly evidenced by this class of case. It is generally known that large international tort claims are litigated to an unusual extent in the United States. This is partly due to the higher damages awarded there and the industrious endeavours of US lawyers like Mr El Fagan and others. However, it may very well work the other way around. Claims in tort before the English courts seeking damages for injuries caused by asbestos against the US Company TN display this split between procedure and substance.[30] If US law was exclusively applied to the claim, would the quantification of damages be treated as a matter of procedure and therefore governed by English law as the *lex fori*? If quantification is a matter of procedure, then English law will apply, even in a case where some or all of the substantive issues are governed exclusively by US law. This question was both legally and economically significant because treble damages may be awarded under US law, but such an award is unknown to other laws. In *Re T & N Ltd*, it was held that US law was the *lex causae*, but that treble damages could not be recovered because the procedural character of calculating them would be subject to the *lex fori proceduralis*. This was to the detriment of the applicants unable to avail themselves of the generosity of the *lex causae proceduralis*.

The rule may hold true in the opposite direction to the benefit of the applicant as is illustrated by *Hulse v Chambers*.[31] This case concerned a claim for damages for personal injuries sustained in a motor accident in Greece. It was agreed by the parties that the applicable law was Greek law and that it should not be displaced by any subsequent agreement or rule. The head of general damages was recoverable under both Greek and English law but the amount would be markedly less under Greek law. The defendant submitted that the assessment of the amount of general damages should be governed by Greek law as the substantive law. This was rejected by the court, holding that the assessment of the general damages should be made by reference to English law as the *lex fori*. Assessment was a matter for the court's own judgment, not for decision on the basis of evidence as to what a Greek court might order.

This was recently confirmed to what is submitted is an extreme extent in *Harding v Wealands*,[32] which involved a split between Australian *lex causae* and English *lex fori*. The Australian *lex causae* specifically provided statutory limits of liability in cases of traffic accidents. The relevant part of the statute reads: "A court cannot award damages to a person in respect of a motor accident contrary to this Chapter."[33] However, this was exactly what the House of Lords did, allowing an appeal by qualifying the statute with its very precise limitations on possible

---

[30] *Re T & N Ltd, In the matter of the Insolvency Act 1986* [2006] 3 All ER 755.

[31] [2001] 1 WLR 2386 (Holland J).

[32] [2006] UKHL 32 (5 July 2006). See also *Boys v Chaplin* [1971] AC 356.

[33] *Harding v Wealands* [2006] UKHL 32 (5 July 2006) para. 73.

damages as procedural and calculating a higher sum for the applicant according to the English *lex fori*. The Law Lords considered the statutory limits of damages concerned not to be within the scope of the defendant's liability for the victim's injuries as such, but to be the remedy which the courts of Australia could give to compensate for those injuries. For purposes of private international law they were seen to be procedural in nature. It is noteworthy that a statutory provision of the applicable *lex causae*: "A court can not award damages …" means in effect: "A court can award damages …" when qualified as procedural by the foreign forum. This may hint at the character of this very qualification as inherently decisive or discretionary rather than exactly summarised from refined insights into the nature of the legal notion of procedure.

This decisive or discretionary character of the procedural qualification may be seen in another application of the same principles which led to the opposite result to that in *Harding v Wealands*. In *Red Sea*[34] in a triple split between the Saudi Arabian *lex causae* and the English and Hong Kong's *leges fori processualis* the former was surprisingly applied. The relevant forum was Hong Kong and unlike the *lex causae* which was Saudi Arabian, under Hong Kong law and English law no claim or counterclaim of subrogated liability could be litigated.[35] The latter rule was as procedural as any rule can ever be. However, it was decided that the plaintiff could rely exclusively on the Saudi Arabian *lex loci delicti causaeque* even if under English and Hong Kong *lex fori* his claim would not be actionable, on the basis that the court should be required to apply a foreign law when its own law would not give a remedy. Such exception, it was held, should be applied to the whole claim, not merely to "specific isolated issues".[36]

Despite this surprising outcome the Privy Council reiterated the accepted principles of the primacy of the forum's procedural laws in clear terms:

> "The court can only provide compensation for wrongs recognised by the sovereign's laws. It cannot entertain claims based on foreign concepts of wrongdoing which it would not regard as tortious. It cannot dispense alien justice".[37]

---

[34] *Red Sea Insurance Co. v Bouygues SA* [1995] 1 AC 190.

[35] *Hartmann v Konig* (1933) 50 TLR 114 (HL); *Lucas v Coupal* [1931] 1 DLR 391 (Ont.); *Enns v Lagrange* 6 April 1998 (Alberta); *AGIP Petroleum Co v Gulf Island Fabrication Inc* 920 F Supp 1318 (SD Texas 1996); but see Dicey and Morris, *op. cit.* para. 7-012 with an open view on the procedural qualification of an insurer's right of subrogation and going even further Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) p. 130, recommending a substantial qualification. However, even accommodating the latter views would not remedy the fact that the claim in this case was not originally appropriately stated before the Hong Kong Courts according to all possible laws applicable.

[36] [1995] 1 AC 190, 201.

[37] *Ibid*. at 194.

To eventually reach the very opposite result to this principle would indicate that there was a need for flexibility in the general rule in the interest of substantive justice, a reason not usually encountered when discussing the split in laws necessitated by the application of the forum's own procedural laws. The Privy Council referred to an American Restatement of Law, the US being a jurisdiction known for its flexibility in applying general rules:

> "No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical."[38]

It is submitted that the approach in *Red Sea* is at variance with all precedent regarding the non-application of the *lex fori proceduralis*, however, this was certainly to the benefit of substantive justice and coherence which is regularly enhanced by not applying two different sets of laws to one case. Allowing for the application of the *lex causae proceduralis* in this case despite its admitted incompatibility with the *lex fori proceduralis* invites some attention. Although many would feel an instant unease with such open inconsistency in applying the Saudi Arabian *lex causae proceduralis*, this flexibility openly displayed by the Privy Council in relation to the general rule provides a most welcome characterisation of legal procedures in the context of possible international splits of laws discussed here. This approach is discretionary in character being bound less by *stare decisis* or other principles than by whatever layer of justification the forum chooses to apply. In *Red Sea* it was able to render substantive justice, a topic less referred to in the other cases applying different sets of laws to one case because of the forum's procedural qualifications. However, the reference to this or other justifications for the flexibility of procedures seems somewhat less accountable or predictable than in the field of substantive law. It may be understood from Red Sea that the primacy of the *lex fori proceduralis* over the *lex causae* tends to be rather a primacy

---

[38] American Law Institute, *Restatement of the Law: Conflict of Laws*, 2d (1971) pp. 391-392, after referring to the general rule set out in clause (1) of rule 158 in Dicey and Morris*, The Conflict of Laws* (8th ed., Stevens and Sons Ltd, 1967) "as one which will normally apply to foreign torts".

of the courts and policies of the forum which are normally but not necessarily always embodied in the *leges fori proceduralis*.

To sum up; the calculation of damages is most significant for those litigating. The reference to the applicable *lex fori* gives the forum a wide discretion to grant a very different measure to that provided for by the applicable *lex causae* which is what applicants are mostly looking for and respondents are most reluctant to give when before a court. *Red Sea* hints at the policy character of this discretion.

1.2.1.4 Limitation Periods

The common law regards limitation periods as only barring the remedy rather than extinguishing the substantive right and, therefore, as procedural in character. This is exemplified in *Huber*,[39] which concerned an action based on a French promissory note made in 1813 and payable in 1817. The defendant pleaded that under French law an action upon the note was prescribed at the time of the litigation, but Tindal CJ held that, upon its true construction, French law did not extinguish the debt but only barred the creditor from obtaining a remedy. It was therefore a matter of French procedure which an English court would disregard.

Conversely, in an action brought in Scotland in 1829 on two French bills of exchange accepted in 1810 the House of Lords[40] held the defendant was entitled to rely on the Scottish six year period of prescription because, as Lord Brougham said: "Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made."[41] An extreme result follows if a statute of limitation of the *lex causae* is considered to be part of procedural law as traditionally assumed in the English speaking world, while the qualification of the *lex fori* in relation to its own statutes of limitations is substantive, for example, in German law.[42] In such a case neither would be applicable as was indeed decided by the *Reichsgericht*.[43] This entirely logical and stringent application of the *lex fori proceduralis* rule would leave such a claim unlimited.[44]

---

[39] *Huber v Steiner* (1835) 2 Bing NC 203.

[40] *Don v Lippmann* (1837) 5 Cl & F 1.

[41] *Ibid*. at 13, see further abundant references in Dicey and Morris *The Conflict of Laws* (14th ed., Sweet & Maxwell, 2006) p. 197 (para . 7.047) at footnotes 77 and 78.

[42] Geimer, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 151.

[43] Vol. 7 (1982) RGZ 21.

[44] An unpractical result which Dicey and Morris, *op.cit.* para. 7- 047 comment on with unusual verve: "A notorious decision of the German Supreme Court once actually reached this absurd result." The reason that any claim should be ruled out as a result of a limitation periods and not be left to expire with those who are able to, claim is not addressed by Dicey and Morris.

English statutory law today requires the application of the limitation period of the law applicable to the substantive issue, the *lex causae*, which is the opposite approach.[45] This is in line with German law[46] and with Article 10.1.d of the Rome Convention of 1980 which stipulates that the applicable law (*lex causae*) should be applied to "the various ways of extinguishing obligations and prescriptions and limitations of actions".

The tendency to apply the limitation periods of the forum according to the primacy of the *lex fori proceduralis* most clearly represented by the Reichsgericht and older English cases gave way recently to a tendency to take them rather from the applicable law, the *lex causae*. This is not only expressed by the German and English statutes noted, and by the Rome Convention, but by many writers.[47] There is much to commend the view that limitation periods should be treated as substantive issues and subject to the choice of law, the applicable *lex causae*. However, this is not surprising because any split in the laws applied by a court to a single case on the basis of the distinction between the applicable law and the differing rules of the *lex fori proceduralis* will necessarily distort the coherent application of one law to the case. Having made the choice of law such a split between the applicable procedural and substantive laws from different legal systems will rarely meet the necessities of justice on the merits. It is to be admitted that the rule of primacy of the *lex fori proceduralis* is not meant to foster material justice as seen from the perspective of the parties but rather the coherence of the court's policies and practices as seen from the bench which may be applied with some discretion. Therefore, it is no surprise that in a field where few if any of the forum's policies may be invoked as in the context of foreign limitation periods, a tendency to let substantive legal coherence have its way may be more readily expected. This would be different in cases where judges would find it appealing to exercise more discretion based on the procedural substantive divide in the calculation of damages, compensation or when policy considerations are involved as will be shown subsequently.

1.2.1.5 Equitable Remedies as Procedural Law

There is one line of thought which may classify equitable remedies as procedural in the choice of law context thus reserving the forum's competency to apply them

---

[45] Foreign Limitations Periods Act 1984, with a notable exception to this rule in s. 4 (3), see Yeo, *op.cit*. p. 131.

[46] Article 32 I Nr. 4 EGBGB. See Geimer, Reinhold, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 151.

[47] Geimer, Reinhold, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 151, with the valuable hint that this general tendency on the continent and in England has not yet been seen in the US courts; Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) p. 131 with further references.

as *lex fori proceduralis* irrespective of the applicable law. This is based on a statement in *Re Courtney*:[48]

> "… the courts of this country, in the exercise of their jurisdiction … in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect … might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."

The question in this case was whether an equitable mortgage could be enforced even though no property interest was created under the *lex situs* which was also the *lex causae*. This *dictum* may be explained as an application of the *lex fori proceduralis* rule as it is a reference only to the jurisdiction of the forum and assumes that equitable principles of the *lex fori* would apply once jurisdiction is established.[49]

The rationale in *Re Courtney* was that equitable jurisdiction will be exercised *in personam* by the court over those subject to its jurisdiction. Equity, in line with its primary task of mitigating the severity of the law,[50] is not limited by the applicable law. It is not concerned with the effect that this may have in other countries. This attitude of equity towards the substantive rules of law as being distinct from and subject to equitable rules, is exemplified by the bitter dispute between the English Chief Justice and the Lord Chancellor settled in the *Earl of Oxford's* case[51] to the benefit of the latter and of equity in general. This provides an easy blueprint to see how foreign laws applied under the jurisdiction of the courts are subject to equity as well. The concept of exercising jurisdiction over persons served with a writ of summons, process or a claim form with a wide discretion to assume jurisdiction or not (*forum conveniens*) would neatly fit the discretionary[52] *in personam* exercise of equity by the courts. These parallel if not identical features of jurisdiction and equity made it easy to see them as intertwined whenever jurisdiction is exercised by a court whose laws, *lex fori*, contained equitable principles. Further, it is convenient for a court to have equitable remedies within its discretion, in particular in relation to a foreign *lex causae*, which is not fully understood or appreciated by a

---

48 (1840) Mont & Ch 239.

49 Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.35; 3rd alternative. The view preferred by Yeo is not supported by in *Re Schreiber* (1874), which applied in *Re Courtney*. The applicable German law (*lex causae*) in *Schreiber* did not provide for an equitable mortgage, which was, however, enforced as part of the *lex fori proceduralis*.

50 Delany, *Equity and the Laws of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) p. 1.

51 (1615) 1 Rep Ch 1.

52 Finlay CJ in *Curust Financial Services v Loewe-Lack-Werk Otto Loewe GmbH* [1994] 1 IR 450, 467 refers to the discretion exercised in applying the "clean hands rule" of equity.

judge applying the harsh verdicts of public policy exceptions. The convenience for courts in having equitable remedies available in the exercise of their jurisdiction may be one of the reasons why there are few if any examples of the courts' jurisprudence contradicting this.

Therefore, traditionally the availability of equitable remedies such as, for example, injunctions and specific performance,[53] as well as the applicability of the doctrine of laches and some limitation periods, would have been regarded as exclusively forming part of the *lex fori proceduralis*. Consequently, in cases of alleged breach of contracts governed by foreign law equitable remedies have been granted or refused solely by reference to English[54] or Irish[55] law. More recently the question arose as to whether fiduciary obligations had arisen from an agency contract governed by foreign law. It was held by Mason P in *Kavalee v Burbridge*[56] that the foreign elements in the case did

> "not preclude the engrafting of binding equitable obligations. Anyone cognisant with the history of equity in our legal system would see no difficulty with such a concept in principle."

It cannot be denied that many see a difficulty with such a concept although cognisant with the history of equity. Probably the most thorough and recent study in the field[57] can be seen as a plea against this traditional approach and, indeed, against the application of equitable remedies pre-empting the applicable law. The capacity of the *lex fori proceduralis* to override the applicable substantive law has been limited in several fields by statute, convention[58] or conflicting jurisdiction.[59] This balances the suggestion that the nature and extent of an equitable remedy is procedural for choice of law purposes.[60] It must be admitted that any general rule apply-

---

[53] Discussed *supra* in this section at 1.2.1.2.

[54] *Boys v Chaplin* [1971] AC 356, 394; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 (specific performance not granted although provided for by the *lex causae* but not by the *lex fori*); *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73 (injunction to restrain copyright); Dicey & Morris, *op. cit*. para. 32-203.

[55] *Lett v Lett* [1906] 1 IR 618, 639 (CA); Binchy, *Conflict of Laws* (Butterworths, 1988) p. 638.

[56] *Kavalee v Burbridge* decision of the Court of Appeal of New South Wales (Australia) 22 April 1998; quoted in Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.52.

[57] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) especially Chapter 1.

[58] Article 10.1.d of the Rome Convention of 1980 stipulates that the applicable law (*lex causae*) applied to "the various ways of extinguishing obligations and prescriptions and limitations of actions" overrides their application as equitable remedies so far as it goes.

[59] *Phrantzes v Argenti* [1960] 2 QB 19 may be read this way but is ambiguous.

[60] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) especially Chapter 4: 4.04; 4.06 to 4.09.

ing equitable remedies such as the *lex fori proceduralis* would have to take account of these explicit exceptions. Article 10 of the Rome Convention of 1980 applicable in most European States which stipulates that the *lex causae contractus* is relevant for the assessment of damages, limitations and the consequences of nullity of the contract[61] "within the limits of the powers conferred on the court by its procedural law," has already been mentioned. However, the critique[62] goes further and will not allow equitable remedies to be seen as procedural. It is maintained that choice of law is relevant where equitable doctrines are sought to be applied in a case involving an international element because there is nothing in the nature of the equitable rules of the law of the forum that requires their mandatory application, and not all principles of equity form part of the fundamental public policy of the forum or are of such a formative nature that the law of the forum should always apply. Equitable remedies should be subject to the same choice of law application as any other substantive law of the forum. Some care[63] is applied not to characterise equitable remedies as procedural as this would render the choice of law irrelevant under the *lex fori proceduralis* rule. For good reason, however, few cases can be brought forward to support this view.

Whether or not the *lex fori* applies once equitable remedies are considered should only be treated here if the answer to this question may contribute to a better understanding of legal procedures in general. An answer would contribute accordingly: if the common law regards such a great variety of legal concepts such as trusts, injunctions, estoppel or presumptions *etc.* to be generally procedural in character, this would certainly inform any understanding of legal procedures in the international context. The fact that equity does not form part of civil law concepts and is rarely understood in non English speaking countries does not detract from this. It suffices that common law countries which constitute one of the two great legal traditions of the world possess this concept of equity which is relevant to defining the scope of legal proceedings, which may well help in understanding procedures from a global perspective. Therefore, the issue should be briefly addressed.

To sum up: equity[64] is a comprehensive system of justice acting *in personam* to remedy inequities caused by the application of the law.[65] In the framework of the

---

[61] Article 10 "Scope of the applicable law: 1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract."

[62] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 3.01 *et seq.*

[63] *Ibid.*

[64] See Delany, *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) for a general overview.

[65] *Crabb v Arun District Council* [1976] Ch 179, 187 "Equity comes in true to form, to mitigate the rigours of strict law" *per* Lord Denning MR.

common law it is opposed to the law and in case of conflict it will pre-empt it. Equity has to be applied in such a great diversity of circumstances that its rules can be stated only in general terms.[66] The general character of equitable principles is that they have to be applied having regard to all the exigencies of the case and this leaves great discretion to the judge. Administered by special courts historically their special character has developed in practice procedurally.

From the perspective of equity it would be unjust for any court having jurisdiction over the parties *in personam* to deny equity only because a foreign law was applicable on the merits of a case as equity is understood as an overriding set of judicial principles procedural in character which should be always applied by the court.

This stated attitude of courts when applying equitable remedies conflicts with another concept of justice promoted by the choice of law rules;[67] the most appropriate law should govern the case and possibly in its entirety as laws are a coherent system in themselves. In particular, distinctions between procedural and substantive laws are arbitrary and local and tend to disregard the intertwined character of laws, which advocates the full application of the *lex causae* as far as this is possible and convenient to the forum. All limitations on the application of the proper law through the use of different legal concepts including the primacy of the *lex fori proceduralis* over the *lex causae* should, therefore, be read as narrowly as possible in the interest of the coherent application of the proper law undiluted by the *lex fori* which is foreign to the proper law. Ideas of comity between nations and courts and the general tendency of Conventions in the field to abstractly determine the applicable law as predictably as possible, which however, do not necessarily allow all subtle ideas of equitable justice entertained by the forum to materialise, are put forward to justify the departure from the traditional primacy of equity in courts.

It is to be admitted that these conflicting views are expressions of different concepts of justice derived from various concepts of law. Certainly, it would be too easy to label them as representing only either the perspective of the *lex fori* or the *lex causae sed situs rei.* However, elements of a local attitude or of an internationalised flavour will be found in the arguments of the different sides respectively. The suggested primacy of choice of laws over equity is rooted in international law concepts of the equality of states[68] and their legal orders, indicating an indiscriminate full, equal and "blind" application of their laws as no jurisdiction should sit in judgment over the other and should never apply their own "better" law instead of

---

[66] *Boardman v Phipps* [1967] 2 AC 46, 123.

[67] This may summarise not only Yeo's critique but many others too, see Geimer, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 140 *et seq*. with many references; Niederländer, RabelsZ 20 (1955) 1, 45 suggests that the *lex causae proceduralis* should be applied as far as possible by the forum.

[68] See Article 2.1 of the UN Charter.

the choice of law rules.[69] Historically, international law concerns are of younger origin than equity, therefore, this view would regard itself as more modern. It sees a clear and unmitigated choice of law as the step preceding any application of the *legis forae* in legal procedures. It would take the principles embodied in conventions on the conflict of laws not as exceptions to the normal application of law but as expressions of general principles which must be broadly applied.[70] Indeed, all international conventions in the field would rest on the premise of equality of states, their jurisdictions, laws and courts which would require any judge to apply the law in an abstract way according to the choice of law rule required by the conventions.

Needless to say such a concept of justice is less concerned with the inequities suffered by an applicant and allows only for a very limited discretion of the judges, for example, in using the framework of public policy to rectify gross injustice. Equally it would have more regard to the consistency of foreign law and the equal treatment of the legal concepts of states demanded by international

---

[69] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.53 expresses this as follows: "It is against modern understanding of international comity that the forum may use its domestic equitable principles to 'improve' foreign law." *Ibid*. at footnote 130 "No modern court would endorse the statement in *Brent v Young* (1838) 9 Sim 180, 191, 59 ER 327, 331, that 'in the contemplation of the Court of Chancery every foreign court is an Inferior court.'" Although the motives are made admirably clear by Yeo, a note of caution should be added here; first, it is the very purpose of equitable remedies if not to improve the law but certainly to improve its application, and this is obviously meant. This would apply both to any substantive foreign national law, *lex causae*, before any court applying equity. In so far as equity has a non-discriminatory approach, it treats the law and a foreign *lex causae* equally, which as a point of departure is hard to criticise. Secondly, more polemic is the reference to *Brent v Young* which "no modern court would endorse". The remark in *Brent v Young* is not meant to disregard comity by denying the international legal equality of foreign and domestic states, jurisdictions and courts. It is "in the contemplation of the Court of Chancery", meaning from this court's perspective, that other courts (and the Lord Chancellor meant, I submit, 'jurisdictions') exercise only limited jurisdiction (in the case of *Brent* the Surinam courts). This becomes clear by the case's reference one sentence before the quote to *Derby v Athol* 1 Ves Sen 204, 982, 983 where "inferior courts" are defined as those with a limited jurisdiction. It would probably make more sense to understand inferior courts from the Court of Chancery's perspective in this case as courts which may not apply their *lex fori proceduralis* by reason of jurisdiction than to see this as an onslaught against foreign courts' dignity by the Court of Chancery (which would be entirely *obiter* anyway). The rationale would then equally apply to "every foreign court".

[70] See the different attitudes of the ECJ, C-159/02, 27 April 2004, and the House of Lords, [2001] All ER (D) 179, in their respective treatment of *Turner v Grovit*, as characteristic of the legal attitudes here described, especially the statements of the British (supporting the House of Lords in its "equitable" approach) and German (advocating clear cut rules not allowing for equitable anti-suit injunctions) governments before the ECJ, see protocol of 9 September 2003 C-159/02, para. 45.

law.[71] Modernity, coherence and comity between nations and their courts would be the concepts driving change while the other side would argue that the ultimate aim of any court procedure is to render equitable justice in an individual case and that failing to do so would be seen as tantamount to a miscarriage of justice whatever ulterior purposes are put forward.

Neither side has yet won the day; they both rely on different legal concepts which are legitimate and recognised and which have not been yet ultimately aligned. The same was true of law and equity before the decision in the *Earl of Oxford's* case under the rule of James I. Maybe they will never be entirely aligned by one legal *dictum* although this would probably be preferred by those who promote international equality through the vehicle of hard and fast conventional rules as opposed to equity. Equity which has enjoyed primacy over law, both foreign and national in its courts for centuries[72] is likely to be further fostered by the courts leaving such amenable and convenient remedies to their discretion.[73]

The different concepts need not be realigned here: relevant to aspects of procedure from the viewpoint of an English speaking court in the common law tradition is that equity meets the traditional[74] properties of jurisdiction and procedure in an unmatched way. Jurisdiction procedurally exercised as equity is exercised *in personam* on a discretionary and local basis, not abstractly but in a way closely linked with the competence of the court, while assuming a primacy over substantive law both foreign and local.[75] Therefore, the application of equitable remedies in court procedures may inform the scope and understanding of legal procedures in general.

1.2.1.6 Injunctions

Injunctions which are liable to have an effect abroad albeit only issued *ad personam* are most likely to be in conflict with the comity of courts based on the international legal equality of states, jurisdictions and the courts exercising such ju-

---

[71] In the Matter of Section 908 of the Taxes Consolidation Act, 1997, as substituted by section 207(1) of the Finance Act, 1999: *Paul Walsh v National Irish Bank* [2008] 2 ILRM 56, 80 McKechnie J outlines : "I would not deliberately offend the integrity of the Isle of Man or its judicial system by granting an order which I knew they would strongly object to. To do so would be downright disrespectful to a sovereign jurisdiction and would be the antithesis of showing due respect for the comity of courts." Not surprisingly the judgment has been appealed by the State. It is considered in more detail in Chapter 5.

[72] The effect of the *Earl of Oxford's* case (1615) 1 Rep Ch 1, giving equity overriding effect is now statutory, see England's Supreme Court Act 1981, s.25.

[73] Although the exceptions to its application in conflict with a foreign *lex causae* like those contained in Article 10.1.d of the Rome Convention of 1980 may increase in the interest of international judicial co-operation.

[74] Not the conventional exceptions of Regulation 44/2001 EC or the Rome Convention 1980 to name only the most important ones.

[75] Employing the *lex fori proceduralis* or the *Earl of Oxford's* case respectively.

risdiction. It is these which give rise to jurisdictional conflicts[76] more than other judicial means[77] which have some effect in foreign countries. Their role in delineating jurisdictions from an international perspective must be carefully considered. They are certainly an aspect of the relevant procedures to be considered in this study.[78] However, in understanding the procedures reviewed in this context, it is submitted that they may not add substantially to what has already been said generally about equitable remedies.

1.2.1.7 Public Policy Exceptions and Political Considerations

Unlike equitable remedies which form part of the common law the public policy exception or the *ordre public* is to be found in all legal orders of this world.[79] As Sir Hersch Lauterpacht observed in *Netherlands v Sweden*:[80] "in the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or, rather, universally – recognized." It is described as the necessary precondition to applying foreign law with the potential, however, to be the "death of all choice of law" and as a constituent part of the forum's legal procedures.[81] The public policy exception is part of the *lex fori proceduralis*. However, it does not rely only on its qualification as procedural in a choice of law context but transgresses it. It is particularly interesting in the international context as it is directed specifically against foreign law and with it the choice of law. Public policy provides an escape route when reasons to protect fundamental interests of the forum outweigh reasons for applying foreign law.[82]

This definition of public policy would equally fit all other fields of procedural law overriding a foreign *lex causae* discussed here *supra* if perhaps the word "fundamental" is discounted. The public policy exception fulfils the same function

---

[76] *X AG v A Bank* [1983] 2 All E R 465; *Walsh v National Irish Bank* [2008] 2 ILRM 56, 80.

[77] *E.g.* service of a writ/ summons/ process/ claim form out of jurisdiction.

[78] *Infra.*

[79] Bar, Christian v. and Mankowski, Peter, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 714: "Mit dieser Vorschrift hat der Gesetzgeber eine Art Überdruckventil geschaffen, das als solches wohl in allen Kollisionsrechtsordnungen dieser Erde vorkommt." Dicey and Morris, *op. cit.* para. 32-230 outline that the public policy exception is applied by "the courts of all countries".

[80] [1958] ICJ Rep 54, 92.

[81] v. Bar and Mankowski, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 715: "Der ordre public Vorbehalt ist gleichsam die conditio sine qua non einer Emanzipation des Kollisionsrechts vom Sachrecht … Er ist eine Art Residualkontrolle des Rechtsanwendungsprozesses, verfassungsrechtlich mittelbar gegründet auf Souveränität und Hoheit des Staates über seine Rechtsanweender. Er ist zugleich aber auch, wenn er im Übermaß benutzt wird, der Tod allen Verweisungsrechts."

[82] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.69 gives this definition.

of preserving the values and laws of the forum in its procedures whether deriving its role in overriding foreign *leges causae* by expressly being qualified as *lex fori proceduralis* or claiming a wider application comprising but transgressing the *lex fori proceduralis*. It shares the properties of procedures already defined as it is discretionary, overriding the application of the foreign proper law and with it undoing choice of law considerations to the benefit of the forum's legal order and jurisdiction. The public policy exception is meant for the more extreme cases and may be described as the outer limit of the court's jurisdiction as defined in its *leges fori proceduralis*. A mere difference between the *lex fori* and the foreign law which would otherwise be applicable, or a difference between the policy of the foreign and national laws is not sufficient to justify the exclusion of foreign law on the ground of public policy. Courts will not refuse to enforce or recognise a foreign right unless it would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[83]

The public policy exception is, unlike the other applications of the *lex fori proceduralis* against the foreign *lex causae*, recognised by Article 16 of the Rome Convention of 1980 which provides: "The application of a rule of the law of any country specified by this convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum." With this international approval in the Rome Convention the public policy exception is probably the only uncontested way for a forum to avoid applying the foreign laws applicable according to its own choice of law rules, although if widely applied it may be the "death of all choice of law".[84] One group of cases revolves around political considerations against the enforcement of contracts which on general principles of the conflict of laws,[85] were governed in each case by a foreign legal system according to which they would have been valid. These are contracts related to citizens of countries with which political relations had broken down.[86]

Perhaps the leading example of this special application of the public policy exception is still *Rio Tinto*.[87] An English company which owned cupreous ore mines in Spain, on various dates prior to the outbreak of the war between Great Britain and Germany, contracted to sell large quantities of this ore to three German companies, to be shipped from Spain to Rotterdam or certain other Continental ports

---

[83] *Loucks v Standard Oil Co* 224 NY 99, 111 *per* Cardozo J.

[84] v. Bar and Mankowski, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 715. "Er ist zugleich aber auch, wenn er im Übermaß benutzt wird, der Tod allen Verweisungsrechts."

[85] v. Bar and Mankowski, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 713, p. 724 *et seq*. gives an overview over German practice and case law in the field.

[86] *Arab Bank Ltd v Barclays Bank* [1954] AC 495; *Schering Ltd. v Stockholms Enskilda Bank Aktiebolag* [1946] AC 219; *Duncan, Fox v Schrempft and Bonke* [1915] 1 KB 365; *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 292, especially pp. 293-294, 297-299, 302.

[87] *Dynamit AG v Rio Tinto Co. Ltd* [1918] AC 292.

and to be delivered to several buyers by instalments extending over a number of years. At the date of the outbreak of the war some of the contracts had been partially executed, the others were pending. The contracts with one of the German companies were in English form; those with the two other companies were made in Germany and were in the German language. The English company claimed declarations that all the contracts were abrogated on 4 August 1914, by the existence of a state of war between Great Britain and Germany. It was held that, assuming that these contracts were valid by the law of Germany, the contracts were abrogated on the outbreak of war inasmuch as they involved trading with enemy citizens; that the contracts concluded were void as against public policy as tending to be to the detriment of Great Britain and the advantage of its enemy and that the question of whether they were void as against public policy should be determined by the law of the forum which was English. The House of Lords refused enforcement of the contracts while assuming that German law, as the proper law of the contract, might have held the contract to be enforceable as consistent with German law applicable to the contracts. While one of the contracts was arguably subject to English substantive law, English public policy prevailed over both German and English law. The question of whether the court should refuse to enforce an obligation arising under foreign law was not answered by reference to any similarity between the relevant provisions of the foreign and domestic laws (otherwise the contract subject to English law would have been enforced) but only by reference to the exigencies of public policy of domestic law and the actual effect which application of the foreign law would have.

In *Joachimson*[88] the firm of N. Joachimson carried on business in Manchester prior to 1914. The firm had a banking account with the defendant bank in London. On 1 August 1914, the German partner S. Joachimson died and the partnership thereby became dissolved. On that date a sum was standing to the credit of the partnership in a current account. At the outbreak of war with Germany on 4 August 1914, the remaining German partner in the firm, who resided in Hamburg, became an alien enemy. No money was paid out of the bank account after 1 August 1914. After the war an action was brought in the firm's name to recover the said sum as money lent by the plaintiffs to the defendants as bankers. The claim was refused as no demand had been made, nor had any cause of action accrued to the plaintiffs on 1 August 1914 and therefore the action was not maintainable.

The House of Lords made a slightly less harsh decision in *Schering*.[89] In that case by a contract made in February 1936, a German company agreed to purchase German currency from a Swedish bank, payment to be postponed for eight years, and an English company, a subsidiary of the German company, guaranteed the payment as surety and agreed to pay the bank this sum by half-yearly instalments over a period of eight years, at the same time acquiring the right to an assignment

---

[88] *N. Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.

[89] *Schering Ltd v Stockholms Enskilda Bank Aktiebolag* [1946] AC 219 distinguishing *Dynamit (Nobel) v Rio Tinto* [1918] AC 260.

of the bank's right against the German company, whose liability to pay the guarantee was to be discharged in the event of the original sum being paid. It was held that, on the true construction of the documents, the respondent bank having fully performed its obligations to the German company before the outbreak of war, nothing remained to be done under the contract, which was one between an English company and a neutral, but to discharge an accrued debt by instalments. Accordingly, since war does not abrogate or discharge a debt incurred before its declaration, the obligation to pay and the right to recover were only suspended.

In *Arab Bank v Barclays*[90] the appellants, whose registered office was in Jerusalem, claimed the amount of the current account standing to the credit of the appellants at the respondents' branch in Jerusalem at the time of the expiration of the British mandate in Palestine at midnight on 14–15 May 1948. On the expiration of the mandate, war broke out between Israel and the Arabs in Palestine. The appellants' office remained in territory controlled by the Arabs, while the respondents' branch remained under the control of Israel. Pursuant to the provisions of the Absentee Property Law 1950 passed by the legislative body of Israel, the respondents paid to the Custodian of Absentees' Property the amount standing to the appellants' credit at the respondents' branch at the termination of the mandate. The law of Israel and the law of Palestine both incorporated the law of England in relation to the effect of war. It was held that the appellants' right to obtain payment was suspended by the outbreak of war.

These examples show that the application of the public policy rule applied in the context of enemy trading is fairly discretionary. It does not take into consideration the merits of the applicable laws of foreign countries, nor even of the applicable substantive law of the country itself (one of the contracts in Rio Tinto was subject to English law), but is rather based on what is seen to be the overriding interests of public policy by the forum. The wartime prohibition against trading with enemy citizens is probably the strongest application of this public policy rule. To exemplify the flexibility and discretion of courts in the field of public policy considerations it may be useful to analyse the public and political considerations in *Kuwait Airways Corp*.[91] While the procedural derogation from the *lex causae (lex loci delicti commissii*) to the benefit of the English *lex fori* was not explicitly justified as a public policy consideration, it would have been better if it had been.

When Iraq occupied Kuwait in 1990 it confiscated the planes of Kuwait Airlines in order to benefit its own airline IAC. In proceedings in tort before the English courts to recover the planes the question arose as to whether the then confiscatory applicable Iraqi *lex causae* could be overcome by characterising parts of the issue as subject to the English *lex fori*, a desirable effect from the English perspective as it would avoid any confirmation of the confiscations. The question was whether there was sufficient flexibility to enable the *lex loci delicti* to be excluded and the question of IAC's title to the aircraft to be decided exclusively by the *lex*

---

[90] *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] AC 495.

[91] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, 16 May 2002.

fori.[92] As the confiscations were based in statute it was hardly possible to accept the confiscation as a tort at the relevant time according to the Iraqi *lex causae*. Strong reasons of public policy such as the non-actionable[93] illegality of the confiscations under international law and the inconvenient prospect that HM courts would confirm such measures, led the court to look for some flexibility. Indeed, this desire for flexibility persuaded the court to take into consideration the strong policy arguments possibly to the detriment of a consistent application of *lex causae*.[94] Lord Scott in a minority opinion commented on this in the following terms:

> "The flexibility they had in mind, however, was a flexibility that would enable the court to apply English law, the lex fori, rather than the lex loci delicti to a discrete issue in a case where the only significant connection between the action and the foreign country was that the allegedly tortious act on which the action was based had taken place in the foreign country. It may be that they would, if the 'only significant connection' criterion were satisfied, have allowed the lex fori rather than the lex loci delicti to be applied to the case as a whole … There was nothing, however, which suggested that, in a case where the only connection with England was that the action had been brought in England, the advocated flexibility could enable the court to waive the requirement that the allegedly tortious act be such as to give rise to civil actionability under the law of the country where the act was done, still less where that country was in every significant respect the country of the tort."[95]

Although this case does not precisely delineate the *lex fori proceduralis* from the *lex fori* in general, it may hardly claim to have applied the *lex causae* mechanistically without being informed by policy considerations inviting judicial discretion which was exercised by referring the issue to the *lex fori*. Except for the general jurisdiction of the English courts there was no connecting factor maintained which might have indicated the application of the English *lex fori*.[96] This indicates that the reasons for applying the *lex fori* would be similar to those which explain why

---

[92] *Ibid.* at para. 159.

[93] *Luther v Sagor* [1921] 3 KB 532, enforcing the confiscations of a then unrecognised regime, see also *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964); Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 5 at footnote 10; Andreas Lowenfeld, "Act of State and Department of State" (1972) 66 AJIL 795.

[94] Rogerson, Pippa, "Kuwait Airways Corp v Iraqi Airways Corp: the territoriality principle in international private law – vice or virtue?" [2003] Current Legal Problems 265, which contains a persuasive critique of the majority.

[95] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, 16 May 2002, para. 187-188, *per* Lord Scott of Foscote dissenting.

[96] Unlike in *Boys v Chaplin* [1971] AC 357, where both parties were English and domiciled in England although the tort took place in Malta.

the *lex fori* is applied to all things procedural. It is submitted that it would have been better to categorise this case under the heading of public policy. However, for the current purpose of assessing the forum's procedural discretion not to apply the foreign *lex causae* applicable according to the choice of law rules this would make no difference.

Public policy's close links with the other procedural remedies described here is evidenced also by those who would not like to see *Re Courtney* as a basis for the general qualification of equitable remedies as procedural, but to see public policy as an arguable basis for the decision instead.[97] In *Re Courtney*[98] Cottenham LC noted that it would be an injustice to deny the creditor the benefit of "his" security, which, as Yeo[99] suggests is only keeping the debtor to his promise which could be characterised in the choice of law context as an enforcement of a contract. In the modern context however, there is little excuse not to take advice from foreign law. It would be better, he suggests, to apply the foreign *lex causae* except where the application of that law would itself be contrary to the public policy of the law of the forum.

One well known procedural feature is the non enforcement of foreign public laws which leads to the non application of the foreign *lex causae* leaving the *lex fori* to be applied. The fact that this doctrine has an effect identical to that of all examples discussed and particularly the close possible connection to the public policy exception found here indicates that it is worth looking at it for some further elucidation on procedural characteristics. In relation to the public policy exception it may be seen as the other side of the coin. Both undo choice of law rules to the benefit of the laws of the forum either because the forum's own fundamental public policies require it or the public policies and laws of another forum require the forum not to apply them. Despite their reverse character they achieve procedurally the same result by either disregarding the foreign public laws or providing them with overriding force as against the normally applicable laws (the fundamental national public policies.)[100] From the procedural perspective they may be more connected than is usually admitted.

Heinemann[101] is probably one of the more recent cases which represents the doctrine quite clearly. The Attorney-General of the United Kingdom sued the pub-

---

[97] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.47.

[98] (1840) Mont & Ch 237, 252.

[99] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) *op.cit*.

[100] While retaining the usual terminology of "public policy", it must be noted that when applied in legal proceedings the public policy exception becomes law, therefore, it may be right to say here "public policy laws" to make the equation with the non application doctrine more visible.

[101] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 applying the relevant jurisdiction from English, US, Irish, Australian and New Zealand sources; *Huntington v Attrill* [1893] AC 150, 156*; Moore v Mitchell* 30 F 2d 600, 604 (1929); *Buchanan Ltd v McVey* [1954] IR 89; *A-G (NZ) v Ortiz* [1984] AC 1, 21-24; *Re Kingdom of Norway's Application* [1987] 1 QB 433, 478.

lisher and the author of a book in an Australian court, claiming an injunction to restrain the publication of the book which contained information that had been acquired while the author was an officer of the British Secret Service MI6. It was asserted that the disclosure of the information was in breach of a contractual obligation of confidence owed by the author to the United Kingdom Government as a private right. The High Court of Australia, the highest Australian court, held that the claim could not be entertained because it sought to vindicate the governmental interests of a foreign State, that it was a rule of international law that such a claim was not enforceable and that the court would not enforce an obligation of confidence in an action brought to protect the intelligence secrets and confidential political information of a foreign government.[102]

It is noteworthy that in the case Brennan J linked the doctrine expressly with public policy: [103]

> "To give effect to this public policy, a court must be able to discriminate between the cases where it would and cases where it would not be damaging to Australian security and foreign relations to protect the intelligence secrets and confidential political information of the foreign government. … In these circumstances and in the absence of legislative direction, the only course which a court might properly take to ensure that Australian security and foreign relations are not damaged is to refuse to enforce all claims made by a foreign government for the protection of its intelligence secrets and confidential political information."

Further it was stated by Kingsmill Moore J in the decision of the Irish Supreme Court in *Buchanan v McVey* as quoted in *Heinemann*:

> "In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, Courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum … If then, in disputes between private citizens, it has been considered necessary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary, to reserve a similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign State. But if the Courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of

---

[102] (1986) 165 CLR 30, 50 *per* Brennan J.

[103] *Ibid*.

> selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications."[104]

It is a small step from this reasoning to further equate the public policy exception with the rule or doctrine preventing the enforcement of foreign public laws as well as foreign penal and revenue laws. In this context this doctrine may be seen as an application of the same principles effective in the public policy exception described above. One of its features is the very discretionary application of these rules. This is easily seen in the application of this general rule of exclusion. In an almost identical case to *Heinemann* the English *lex causae* was not overruled by New Zealand's *lex fori* as expressed in the general rule of exclusion nor was it even discussed.[105] It would be harsh to suggest that the Judges of the House of Lords sitting in their capacity as the Judicial Committee of the Privy Council in London would be more amenable to the core public security interests of their country whose justice they normally administer than the perspective of the Antipodes would suggest.[106] *Arab Bank, Joachimson* and *Schering* are possibly in the same relationship to *Kuwait Airlines* as *Heinemann* is to *A-G for England and Wales v R*. There is obviously no need to state the reasoning of *A-G v R* here, as the London decision on behalf of New Zealand does not address the policy exception at all nor does it even mention *Heinemann* or related decisions. This may in itself be seen as an expression of the discretion of the forum in the context of public policy concerns.

It must be understood that in this field of discretion and national public interests the public policy exception and the non enforcement of foreign public law rule (sometimes called the revenue rule) are occasionally discounted entirely by some courts. In such cases, as in *A-G for England and Wales v R*, obviously no reason is given for this deficit in legal reasoning. As it is the task at this point of the inquiry to elaborate on the practice of legal procedures in the public policy context in order to sharpen the understanding of procedures in terms of how they really work and how they may be best applied and analysed, it may be expedient to look at those cases which discounted totally the rules considered here.

In *Islamic Republic of Iran v Pahlav*[107] the New York Court of Appeal did not admit the claim of Iran against the Shah in relation to his governmental activities for want of jurisdiction (*forum non conveniens*). The same result could have been achieved by applying the exclusionary rule as the targeted acts of the Shah had

---

[104] *Buchanan v McVey* [1954] IR 89, 106.

[105] *A-G for England and Wales v R.* (New Zealand) [2003] UKPC 22, 17 March 2003.

[106] It is possible that the Lords in the Privy Council applied the reverse perspective of the reasoning of Brennan J in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 48.

[107] 62 NY 2d 474 (1984).

been clearly carried out in his public capacity at the time. In the *Republic of the Philippines v Marcos*[108] on the other hand, jurisdiction was not only assumed, but without any reference to the public policy or revenue rule or the related doctrines of act of state or immunity, the claim of the Philippines was granted.

The same result ensued in *Republic of Haiti v Duvalier*[109] where a Mareva injunction freezing Duvalier's assets in France was enforced by the English Court of Appeal. This made clear that the English Court of Appeal did not consider the non enforcement or revenue rule to be applicable here because the Mareva injunction or freezing order would only be applied if the French decision on the merits was enforceable in England because otherwise there would be no good arguable case.[110] If the claims of the Republic of Haiti against its former ruler had been qualified as public under the rules of the forum, the revenue rule would have applied, and such an enforcement of the French decision could hardly be imagined when applying the revenue rule. Otherwise the English enforcement of the French court's freezing order would have been an indirect enforcement of foreign public rules, a result at variance with the rule here discussed. Damages with a clearly penal character were also awarded by the Privy Council in favour of Hong Kong in a claim against one of Hong Kong's civil servants in respect of the fraudulent exercise of his public duties.[111] In addition, in an old case even a claim of this kind by the King of Prussia against one of his former civil servants was entertained before American courts.[112]

All these cases which do not mention the non enforcement rule are set in an immensely political context in which the governments of the forum countries[113] have a clearly understood policy towards the respective defendants. The non application of the revenue rule could be explained by reference to these respective policies in all the cases and it would be to disregard the only explanation of these different courts' discounting of the revenue rule not to take note of these contexts.

1.2.1.8 Conclusions

The likely conclusions from this overview may seem surprising. Although initially procedures were seen as ancillary to substantive law indistinguishably linked to the latter in their task of giving them effect, a more independent profile of legal procedures has emerged when set at odds with some of the rules of substantive

---

[108] 806 F 2d 344 (2nd Cir 1986); 862 F 2d 1355 (9th Cir 1988), cert. den. 109 SCt 1933 (1989).

[109] [1990] 1 QB 202 (CA).

[110] See, for example, *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159, 164 (CA) *per* Rix LJ.

[111] *A-G for Hong Kong v Reid* [1993] 3 WLR 1143 (PC).

[112] *King of Prussia v Kuepper's Administrator* 22 Mo 550 (1856); *Sumitomo Bank Ltd v Thahir* [1993] 1 Sing LR 735 (HC).

[113] Here the Privy Council is treated as part of the government of the United Kingdom.

law both local and foreign. In particular, the distinction between the *lex fori proceduralis* and the *lex causae* proved extremely helpful in analysing the ulterior purposes and interests which will be entertained by legal procedures when these are not indistinguishably amalgamated and absorbed in giving effect to substantive laws. It is suggested that this perspective shows that known properties of procedures are generally able to disclose something about substantive laws notably in an international context.

Although most would see procedures mainly as providing a mechanism to determine, give effect to and sanction whatever substantive law is applicable in a case brought before a forum, the profile of legal procedures looks different when it is regarded as distinct from substantive law on its own merits. It emerged from the more general observations made at the outset that procedural rules do not share the properties of substantive laws as embodied in the *stare decisis* rule, which guarantees the stability of the law over time but not the procedures subject to it. For example, if substantive law changes a contract would be governed according to the laws in force at the material time, however, the procedures would not guarantee such stability. In the interest of ulterior purposes they may not enforce substantive law at all, for example, if one party to a contract becomes an "enemy citizen" to the forum or if equity must be done. This is linked historically to the sovereign as the source of all procedures framing the law embodied in the English legal tradition by the *Curia Regis*, as the cradle of modern courts presided over by William the Conqueror.

Procedure and law seen through Kelsen's functional approach as conditional offers to apply sanctions hints at the fact that it is authority not reason which gives effect to the law.[114] In the context of the conflict of laws the international delineation of competing legal concepts by the forum requires a neat distinction between substantive laws and procedures common to all laws in all countries. In discovering common properties, a first step towards establishing international legal procedures which may be understood functionally may be seen. The remarkable pre eminence of the *lex fori proceduralis* over the applicable substantive *lex causae* known to all jurisdictions has shown itself to be a legal tool capable of accommodating a variety of forum interests and standards. These are local or national forum standards often distinct from those provided by the applicable law. They comprise the calculation of damages, limitation periods and most of the other equitable remedies such as injunctions building on the jurisdiction of the forum over the parties to a claim *in personam*. Rather than the international the local perspective governs these procedures which are closely linked to the jurisdiction of the courts and exercised with discretion.

Discretion exercised by granting or refusing service out of the jurisdiction or immunities could have added to the insights gleaned from the application of the public policy exception or the revenue rule. Procedure works to the benefit of the

[114] To rephrase a well known *dictum* of Thomas Hobbes' "*auctoritas non veritas facit legem*".

forum's legal order and standards and, it is submitted, never against. Foreign applicable law and exceptionally even national applicable law[115] may be denied effect by procedures. The political character of applying procedural dominance over substantive laws in a discretionary manner may be discerned in various cases not only involving deposed rulers, revealing that procedural practice has a low value as legal precedent and is better not relied upon. Such practice is erroneously understood to live up to standards of legal precedent known in the application of substantive laws. Procedure may be akin to the discretionary display of sovereign political powers not only in the discontinuation of contractual obligations in times of war. Public order, the primacy of procedure over law, the *Primat des Prozeßrechts*[116] are concepts in this context close to legal notions of sovereignty, jurisdiction, discretion, political exception to law, competency of the forum, authority or power, which are however limited locally to the extent of the forum's reach. There may be seen to be a note of hierarchy in the primacy of procedural law too, giving effect to the authority's political and legal standards. This could be based on two *dicta*, one by Coke J:

> "As a matter of principle, in my view, if a United States court exercises jurisdiction over a person resident in the United States, it is exercising powers inherent in the sovereignty which adheres to the United States. As a matter of principle, too, in my view, English law should recognise the legitimacy of that exercise of jurisdiction. It follows that the answer to the question which I must answer does not lie in investigating the function discharged by the court but lies in investigating the source of the authority of the court. … The source of its authority is to be found in the sovereign power which established it. For those reasons I conclude that the exercise of jurisdiction by a federal district court over a person resident in the United States is, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction."[117]

The other by Holmes J, namely that: "The foundation of jurisdiction is physical power".[118]

---

[115] *Dynamit AG v Rio Tinto Co. Ltd* [1918] AC 292, which concerns a contract in English which would have been subject to English substantive law but was nevertheless not enforced because of overriding procedural concerns stemming from the war.

[116] See Schack, Heimo, *Internationales Zivilverfahrensrecht* (C.H. Beck, München, 2002) p. 19 with further references from the German background. The German statutory provision of Article 32.1. No. 3 of the EGBGB makes it clear that the State of the forum has the opportunity to potentially determine everything according to its own *lex fori* if it chooses to do so. This includes the competence to liberally qualify the contents of the *lex fori proceduralis*.

[117] *Adams v Cape Industries plc* [1990] 2 WLR 657.

[118] *McDonald v Mabee* 243 US 90, 91 (1917).

1.2.2 The Public Character of Procedures

The main rule already outlined above is that matters of procedure are governed by the *lex fori* which means in practice that a court's procedure is local and everything which is classified as procedural by the forum will be treated according to its own laws irrespective of the proper law applicable to the merits of the case before it. When discussing the character of legal procedures their public nature, which aligns them with other core activities of a state exercising public authority, was referred to. The public private divide which is legally relevant in relation to the non-enforcement of foreign public laws by the forum[119] and when granting immunity for public acts of foreign states as opposed to private ones[120] may help to inform the view on procedures. The procedural rules of the forum seem to mirror properties seen in public policy or mandatory forum rules within the formative jurisdiction of the forum. They give effect to those core values of the legal system which they are part of. In doing so procedures may be seen to be part of the public exercise of state authority. Legal procedure is a very condensed kind of public authority which is linked to the concept of jurisdiction and sovereignty. This may allow us to understand better the nature of legal procedures wherever they are encountered.

[119] *Bank of Ireland v Meeneghan* [1994] 3 IR 111, and see *supra*.

[120] *Trendtex Corporation v Central Bank of Nigeria* [1977] 1 All ER 881.