THE INSOLUBILITY OF *RENVOI* AND ITS CONSEQUENCES

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A. Introduction

The problem of *renvoi* has puzzled jurists for over a century.[1] In that time, the problem has been described as "vexed",[2] "troublesome"[3] and "inherently illogical".[4] Yet the doctrine of *renvoi* lives on in many legal systems today.

The debate surrounding *renvoi* is unusual because the criticisms made of it are not principally directed to the unfairness of its operation, or to its inconsistency with some principle of social policy. Rather, the criticisms are of a logical character – opponents assert that the doctrine is logically incoherent, while proponents argue the doctrine is both logical and necessary. What is unusual is that a debate about logical coherence could have gone on for so long. How can it be that logical criticisms have been pressed, and resisted, for so long without a conclusive resolution? Either *renvoi* is logically coherent or it is not.

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1 The literature on the subject is immense. For extensive references, see TA Cowan, "Renvoi Does Not Involve a Logical Fallacy" (1938) 87 *University of Pennsylvania Law Review* 34, 37, nn 16–20; AV Dicey, JHC Morris and L Collins, *Dicey, Morris and Collins on the Conflict of Laws* (London, Sweet & Maxwell, 14th edn, 2006), 73, n 1; JD Falconbridge, *Essays on the Conflict of Laws* (Toronto, Canada Law Book Company, 2nd edn, 1954), 136, 150, 157–58; O Kahn-Freund, *General Problems of Private International Law* (Alphen aan den Rijn, Sijthoff, 1976), 312, n 62; EG Lorenzen, *Selected Articles on the Conflict of Laws* (New Haven, Yale University Press, 1947), ch 2, n 24; E Rabel, *The Conflict of Laws: A Comparative Study* (Ann Arbor, University of Michigan Law School, 2nd edn, 1958), 70, n 6.

2 JHC Morris, "The Law of the Domicil" (1937) 18 *British Yearbook of International Law* 32, 32.

3 Cowan, *supra* n 1, 35.

4 A Lu and L Carroll, "Ignored No More: Renvoi and International Torts Litigated in Australia" (2005) 1 *Journal of Private International Law* 35, 67. See also JP Bate, *Notes on the Doctrine of Renvoi in Private International Law* (London, Stevens & Sons, 1904), 49.

Yet it seems that there is something "sphinx like" about *renvoi*[5] – whenever one attempts to put one's finger on the problem, it somehow slips away.

This paper applies the tools of mathematical logic to analyse the question of *renvoi*, and to illuminate the logical difficulties that are at the heart of so much debate. It will be demonstrated that both the proponents and opponents of *renvoi* are in some sense correct, and in some sense wrong. For *renvoi*, it will be shown, is not a problem that is capable of reduction to a simple answer of true or false; instead, it falls into the more difficult category of logically insoluble problems that was shown to exist by Gödel's Incompleteness Theorem. It is submitted that this conclusion provides insight into the difficulties at the heart of the *renvoi* question, and shows the way forward beyond the arguments that have fuelled the hitherto inconclusive debate.

The paper commences, in section B, by defining the nature of the problem of *renvoi*, and considering the various solutions to *renvoi* that have been proposed, including the approach of the High Court of Australia in *Neilson v Overseas Projects Corp*.[6] Section C then considers the connection between *renvoi* and the policy goals underlying choice-of-law rules, and concludes that *renvoi* is necessary in those areas of law where especial importance is given to the policy of uniformity. It will also be shown that there are certain circumstances in which there is general agreement, even amongst opponents of *renvoi*, that *renvoi* ought to be applied.

Having shown the purposes that *renvoi* serves, and that *renvoi* is sometimes a nescessity, the paper then considers in section D whether, as a matter of logical possibility, any *renvoi* solution is capable of achieving those purposes. The logical consequences of *renvoi* are then considered, and it is shown that any solution to *renvoi* will either fail to achieve uniformity, or will select an applicable law on meaningless grounds. In either case, *renvoi* fails to give any effect to the policies that it was created to serve. It follows that *renvoi* is insoluble in the sense that, as a logical construct, no solution to *renvoi* can achieve the goals for which it was created.

The paper will then argue that this conclusion is not cause for despair. It will be shown that developments in the field of formal logic made in the twentieth century have shown that any complex system must yield constructs that are insoluble. A recognition of this truth allows the debate about *renvoi* to move, finally, to the next step.

In section E, the paper concludes by considering the consequences of insolubility, and sketches out a path – hinted at in *Neilson* – towards the type of rules that may give greater effect to the policies underlying *renvoi*, and choice of law more broadly. The paper concludes with a tentative yet concrete example of

[5] M Davies, "Renvoi and Presumptions about Foreign Law" (2006) 30 *Melbourne University Law Review* 244, 245.

[6] *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331 (hereafter "*Neilson*").

the type of rule that would serve the purposes that *renvoi* seeks to further, but would avoid the logical dangers that have plagued *renvoi* for so long.

B. The *Renvoi* Problem

1. The Problem Stated

Sometimes courts apply foreign law. In the general case, a court in country[7] A applies the conflicts rules[8] of country A to the facts of the case and determines that the law of country B should apply to determine the questions in issue. The issue of *renvoi* arises where country B's conflicts rules, when applied to the same facts, would determine that the case should be decided according to the law of either country A (an outcome referred to as "remission"), or some third country (referred to as "transmission"). The term "*renvoi*" – French for "sending back" – is usually used to refer to the case of remission, but is also sometimes used to refer to both remission and transmission.

One observes immediately that, if the conflicts rules of both country A and country B were identical, *renvoi* could not arise. *Renvoi*, in short, involves a conflict of conflicts rules,[9] and arises because different countries have different such rules. Moreover, the difference in the rules need not be found in the choice-of-law rule of either country: a *renvoi* situation may also arise where different countries characterise a question differently, or where they determine a relevant place element differently, or interpret the same connecting factor differently. [10]

It is also clear why the *renvoi* question is so alluring. When country A's conflicts rules point to country B, and country B's conflicts rules point the question back to country A, there is a theoretical danger that each country will continue to remit the problem – back and forth – *ad infinitem*, causing what was described over one hundred years ago as a "*circulus inextricabilis*".[11] Today, the problem of how to escape this circle remains "live".[12]

2. "Solutions" to the Problem

A variety of "solutions"[13] have been put forward to solve this problem. In general, most commentators have asserted that the problem may be solved in

[7] The principles considered herein also apply to intranational cases.
[8] By which I mean the whole set of rules that lead to the selection of the applicable law.
[9] Falconbridge, *supra* n 1, 159.
[10] *Ibid* 159–67.
[11] Bate, *supra* n 4, 49.
[12] K Roosevelt, "Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language" (2005) 80 *Notre Dame Law Review* 1821, 1824.
[13] I place the word within quotes once to indicate that I consider it inapt. All subsequent uses should be understood to be expressed with equal scepticism, until otherwise indicated.

one of three ways,[14] and have argued in favour of one of them, often also acknowledging the various shortcomings that attend the solution argued for. It is relevant to traverse quickly the main solutions that have been put forward.

First, where the conflicts rules of country A determine that a legal problem ought to be determined according to the law of country B, and country B would remit the problem to country A, one course that country A could take is to ignore the remission and simply apply the internal law of country B. This solution is known as "rejecting the *renvoi*",[15] and is the rule in Europe for contractual and non-contractual obligations,[16] and is said to be the general rule in Holland, Peru, Quebec, Tunisia, Uzbekistan,[17] Greece and Brazil.[18] Another way of understanding this solution is to say that where the choice-of-law rules of country A point to the law of country B, they point only to the "internal" or "domestic" law of country B, and not to its choice-of-law rules. Viewed in this way, this solution might be criticised because it regards as irrelevant the fact that the courts of country B would apply the law of country A, and it raises the question whether it is legitimate only partially to apply the law of country B based upon a distinction that is imposed by the forum.[19]

Secondly, country A might "accept the *renvoi*" from country B, and apply the law of country A. This solution is also known as "single" or "partial *renvoi*",[20] and is said to be the rule in most civil law countries.[21] Under this theory, when the conflicts rules of country A point to the law of country B, the reference is to the whole law of country B, including its conflicts rules; but, when country B points back to the law of country A, country A understands this as a reference only to its internal law. Again, this solution might be criticised on the

[14] See, eg, Dicey, Morris and Collins, *supra* n 1, [4-007]; PM North, JJ Fawcett and GC Cheshire, *Cheshire and North's Private International Law* (London, Butterworths, 13th edn, 1999), 53; PE Nygh and M Davies, *Conflict of Laws in Australia* (Sydney, Butterworths, 7th edn, 2002), [15.3].

[15] This view is supported by EH Abbot, "Is the Renvoi a Part of the Common Law?" (1908) 24 *Law Quarterly Review* 133; Bate, *supra* n 4; Dicey, Morris and Collins, *supra* n 1; Falconbridge, *supra* n 1; Lorenzen, *supra* n 1; Morris, *supra* n 2; North, Fawcett and Cheshire, *ibid*; Nygh and Davies, *ibid*.

[16] Reg (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) OJ 2008 L177/6, Art 20; Reg (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) OJ 2007 L119/40, Art 24.

[17] A von Overbeck "De Quelques Règles Générales de Conflits de Lois dans les Codifications Récentes", in J Basedow *et al* (eds), *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification* (The Hague, TMC Asser, 2000), 545, 547. See also JG Sauveplanne, "Renvoi", in K Lipstein (ed), *International Encyclopedia of Comparative Law*, Vol 3 (Tübingen, JCB Mohr, 1990), 12–35.

[18] J Dolinger, "Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts" (2000) 283 *Collected Courses* 185, 242.

[19] *Neilson* (n 6), [94] (Gummow and Hayne JJ), [171] (Kirby J); A Briggs, *The Conflict of Laws* (Oxford University Press, 2nd edn, 2008), 15–16. *Cf* R Mortensen, "'Troublesome and Obscure': The Renewal of Renvoi in Australia" (2006) 2 *Journal of Private International Law* 1, 13.

[20] This view is supported by Cowan, *supra* n 1, and by Callinan J in *Neilson*, *supra* n 6, [259].

[21] Nygh and Davies, *supra* n 14, [15.3]. See also Sauveplanne, *supra* n 18, 12–35; von Overbeck, *supra* n 17, 547–48.

basis that it regards as irrelevant the possibility that the courts of country B could also adopt a single *renvoi* solution, in which case its courts would accept a further remission from country A.

Thirdly, country A might adopt the "foreign court theory", sometimes also described as "total *renvoi*" or (in my view, misleadingly[22]) "double *renvoi*", which is the rule in England for the intrinsic validity of wills, intestate succession and legitimation by subsequent marriage.[23] The foreign court theory is the rule for torts in Australia,[24] and is the rule in Switzerland for names and succession.[25] Pursuant to this solution, country A, having determined to apply the law of country B to a legal question, attempts to determine the question as closely as possible to the way in which a court in country B would do so.[26] One observes that, should both country A and country B implement this solution, the *circulus inextricabilis* will emerge. On the other hand, if country B implements one of the other two solutions to *renvoi* set out above, no infinite loop is created, but the question of which law to apply is left to the law of the country B, and will effectively be decided by the conflicts rules and *renvoi* solution of country B.

3. The Approach in *Neilson*

A recent example of *renvoi* arises from the facts of *Neilson*[27] – the first occasion in many years where a court of final appeal has given consideration to *renvoi*.[28] In that case, an Australian citizen was injured in China when she fell in an apartment provided by her husband's Australian employer. She sued the employer for negligence in an Australian court. The relevant Australian choice-of-law rule required that the action be decided by the *lex loci delicti*, which was China. The relevant Chinese law, however, provided that, where both parties are nationals of the same state, the law of their own state "may" be applied.[29]

[22] As is explained in the text accompanying n 84, *infra*.

[23] Dicey, Morris and Collins, *supra* n 1, [4-021].

[24] *Neilson*, *supra* n 6.

[25] Von Overbeck, *supra* n 17, 548.

[26] This theory is supported by A Briggs, "In Praise and Defence of Renvoi" (1998) 47 *International & Comparative Law Quarterly* 877; EN Griswold, "Renvoi Revisited" (1938) 51 *Harvard Law Review* 1165; BD Inglis, "The Judicial Process in the Conflict of Laws" (1958) 74 *Law Quarterly Review* 493; and is the approach taken by courts in *Collier v Rivaz* (1841) 2 Curt 855; 163 ER 608; *Re Annesley* [1926] Ch 692 (Ch); *Re Askew* [1930] 2 Ch 259 (Ch); *Re Ross* [1930] 1 Ch 377 (Ch); *Neilson*, *supra* n 6.

[27] *Neilson*, *supra* n 6

[28] The case has already attracted significant comment: see, eg, Davies, *supra* n 5; A Dickinson, "Renvoi: The Comeback Kid?" (2006) 122 *Law Quarterly Review* 183; A Gray, "The Rise of Renvoi in Australia: Creating the Theoretical Framework" (2007) 30 *University of New South Wales Law Journal* 103; M Keyes, "The Doctrine of Renvoi in International Torts" (2005) 13 *Torts Law Journal* 1; Lu and Carroll, *supra* n 4; Mortensen, *supra* n 19; E Schoeman, "Renvoi: Throwing (and Catching) the Boomerang" (2006) 25 *University of Queensland Law Journal* 203; R Yezerski, "Renvoi Rejected? The Meaning of 'the lex loci delicti' after Zhang" (2004) 26 *Sydnew Law Review* 273.

[29] *Neilson*, *supra* n 6, [8]

It was also found that, in applying Australian law, a Chinese court would not accept a further remission from Australia (ie China would "reject the *renvoi*").[30] A majority of the High Court held that the question of which law to apply should be determined by reference to the manner in which a Chinese court would determine the question,[31] thereby appearing to endorse the foreign court theory, at least where Australian law employs the *lex loci delicti* choice-of-law rule.[32]

It is relevant, in particular, to examine the joint judgment of Gummow and Hayne JJ, which appears to propose a new approach to *renvoi*. Their Honours noted that, by adopting the foreign court theory, it was possible that a *circulus inextricabilis* could arise on different facts.[33] Their Honours dismissed this obstacle on the basis that such an approach:

> "is apt to introduce those notions of dialogue between legal systems which have been disfavoured earlier in these reasons. The task is to consider the content of the Australian choice of law rule which has fixed upon the lex loci delicti."[34]

Their Honours' reference to their earlier rejection of a "dialogue" between legal systems relates to a passage in their judgement where, in the course of discussing the theories of *renvoi*, their Honours said:

> "[S]cholarly analyses of renvoi by the metaphors of 'reference', 'reference back' and 'acceptance' do not provide a sure footing upon which to construct applicable rules. The metaphors of reference, reference back and acceptance suggest, wrongly, the existence of some dialogue between legal systems. They therefore mask the nature of the task being undertaken. That task is to determine, here as an element of the common law of Australia, the source and content of rules governing the rights and obligations of parties to a particular controversy."[35]

There are two matters that might be taken from their Honours' judgment. First, their Honours' emphasis that no "dialogue"[36] occurs between legal systems appears to involve a rejection of all previous solutions to *renvoi*. Instead, in each individual case a court must fashion the content of the choice-of-law rule by reference to the particular circumstances of the case including the choice-of-law rules of the *lex loci delicti*, and its approach to *renvoi*.[37] Rather than engaging in a "dialogue" between the *lex loci delicti* and the *lex fori*, the judge

[30] *Ibid*, [130] (Gummow and Hayne JJ), [277] (Heydon J). Gleeson CJ upheld the trial judge's finding of fact that this was the case (at [17]).
[31] *Ibid* [15] (Gleeson CJ), [113] (Gummow and Hayne JJ), [165], [176] (Kirby J).
[32] *Ibid* [99]–[101] (Gummow and Hayne JJ), [175] (Kirby J), [277] (Heydon J). Callinan J, who concurred in the result, applied a single *renvoi* analysis: [261].
[33] *Ibid* [132].
[34] *Ibid.*
[35] *Ibid* [96].
[36] McHugh J, in dissent, similarly refers to a 'discourse' between systems: *ibid* [54].
[37] Dicey, Morris and Collins, *supra* n 1, [4-020].

must take all relevant matters into account and, in a single step, choose the law to be applied. This process is very similar to the approach to characterisation favoured by Professor Falconbridge, who said that:

> "It is sometimes a good thing to look before you leap, and especially in the conflict of laws it is sometimes desirable that the forum know something in advance about the definitive solution which will result from its selection of a particular law as the proper law."[38]

In effect, what their Honours appear to be saying is that choice of law involves not a dialogue, but a single leap – a leap that is preceded by a long, hard look at the whole of the *lex loci delicti*. The court considers the facts of the case, and the content of the foreign law, and then decides what law to apply. Following Professor Falconbridge's formulation, I will refer to solutions of this character as "look before you leap" solutions.

Secondly, their Honours hinted at how the *circulus inextricabilis* might be avoided. When considering what might occur had Chinese law also applied the foreign court theory,[39] their Honours referred to an article by Professor Jonathan Harris,[40] and to the judgment of Scrutton LJ in *Casdagli v Casdagli*.[41] These references provide insight into how their Honours might proceed should the case arise. In *Casdagli*, Scrutton LJ suggested that one possible solution to the *circulus inextricabilis* might be simply to apply the domestic law of the forum.[42] Similarly, the page of Professor Harris's article to which their Honours referred argues that, to break the infinite loop, the forum must "exert its authority . . . as a way of bringing the process to the end".[43] The point that emerges from these two references is that the *circulus inextricabilis* is capable of solution by the application of a secondary rule determined by the forum. Recognising this, their Honours concluded that such a possibility raised a different problem, and therefore did "not warrant departing from the conclusion, earlier expressed, that reference to the *lex loci delicti* is to be understood as reference to the whole of that law".[44]

Their Honours' solution appears to be, then, to apply the foreign court theory and, should a *circulus inextricabilis* arise, apply a secondary rule – possibly the domestic law of the forum. This solution to *renvoi* is different to the

[38] Falconbridge, *supra* n 1, 162. Dicey, Morris and Collins (*supra* n 1) also note the similarity to the approach taken to characterisation by Mance LJ in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825.

[39] *Neilson*, *supra* n 6, [312] n 123, [313].

[40] J Harris, "Does Choice of Law Make any Sense?" (2004) 57 *Current Legal Problems* 305.

[41] *Casdagli v Casdagli* [1918] P 89 (CA).

[42] *Ibid*, 111. This reference seems to have led Dicey, Morris and Collins, *supra* n 1, to the conclusion that, had Chinese law also applied the foreign court theory, 'a fair reading of the judgement suggests that the approach of Scrutton LJ would have been adopted': [4-033].

[43] Harris, *supra* n 40, 346.

[44] *Neilson*, *supra* n 6, [134].

single-*renvoi* solution in one significant respect:[45] the secondary rule is only applied where a *circulus inextricabilis* arises. Had the court received evidence that a Chinese court would accept a remission back from Australia, but then apply its own domestic law, it appears that the reasoning of Gummow and Hayne JJ (and certainly of Gleeson CJ, Kirby and Heydon JJ), would have supported the application of Chinese law.

C. The Purpose and Form of Choice-of-Law Rules

This section considers the circumstances in which *renvoi* may be desirable. This involves an investigation of the purpose and form of choice-of-law rules. Choice-of-law rules form a particularly important subset of conflicts rules, being the most direct means by which effect can be given to the policy imperatives that require the application of foreign law.[46] Choice-of-law rules may take a variety of forms, and these forms reflect the weight given to the various policies that the rules pursue. Moreover, the particular characteristics of the area of law governed by a choice-of-law rule may require more weight to be given to one or more of the relevant policies that underlie choice-of-law rules. Each of these factors is relevant to the question of whether *renvoi* should be applied.

In this section it will be shown that *renvoi* is apposite in circumstances where the policy imperative of *uniformity* drives a choice-of-law rule. Moreover, choice-of-law rules that select a place with which an action is most closely connected are more amenable to the application of *renvoi* than those rules that directly select a law. Finally, it will be noted that, in some areas of law, matters of policy or practicality require that particular emphasis be given to uniformity, and accordingly *renvoi* may be appropriate in such areas.

1. Uniformity – An Important Purpose of Choice-of-Law Rules

A *renvoi* situation can only occur where two countries have different conflicts rules.[47] Consideration of how to resolve a conflict between two sets of conflicts rules requires an examination of the purposes of such rules.

At the most basic level, the question why a court of one country would ever apply the law of a foreign country can be given no clearer answer than that justice sometimes requires it.[48] For example, justice will not be done if one party is able to choose a forum that will apply a law more favourable to its

[45] *Cf* McHugh J, dissenting: *ibid* [50].
[46] See Harris, *supra* n 40.
[47] See *supra* text to n 10.
[48] Dicey, Morris and Collins, *supra* n 1, [1-006]; North, Fawcett and Cheshire, *supra* n 14, 4–5.

position. This particular species of unjust conduct is known as "forum shopping".

The prevention of forum shopping is a central policy goal of private international law, and motivates both rules of jurisdiction and choice of law. In *Neilson*, Gummow and Hayne JJ held that the "first and most important" principle that governed their consideration of *renvoi* was what they described as the "no advantage" principle, which requires that choice-of-law rules

> "should, as far as possible, avoid parties being able to obtain advantages by litigating in an Australian forum which could not be obtained if the issue were to be litigated in the courts of the jurisdiction whose law is chosen as the governing law."[49]

To similar effect, Jackson J said in *Lauritzen v Larsen* that "the purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way . . . regardless of the fortuitous circumstances which often determine the forum".[50] A similar sentiment underlies the important decisions of *Boys v Chaplin*,[51] *John Pfeiffer Pty Ltd v Rogerson*,[52] *Regie Nationale des Usines Renault SA v Zhang*[53] and *Tolofson v Jensen*.[54]

Forum shopping may be arrested by reducing the lack of uniformity that is "critical" to its existence.[55] For this reason, Professor Sir Otto Kahn-Freund concluded that "[t]he ideal of . . . uniformity is not an aesthetic caprice of academics: it is in this sphere a requirement of justice".[56] Uniformity, then, is the principal means by which choice-of-law rules may prevent forum shopping and thereby do justice between the parties.

Uniformity cannot stand alone – it is an abstract concept which requires a comparison between two things. A court that is guided by considerations of uniformity must also choose the foreign law with which to be uniform, and this choice must be made by reference to considerations other than uniformity. This fact, however, does not relegate the goal of uniformity to the position of a "second order policy".[57] That is to put the cart before the horse. Rather, a foreign law is identified *because* of the "essential interest" of uniformity.[58] For this reason, Professors Rabel and Wolff have gone so far as to say that uniformity is the "chief purpose" or "aim" of choice-of-law rules.[59] Whether or not one

[49] *Neilson*, *supra* n 6, [89].
[50] *Lauritzen v Larsen*, 345 US 571, 591 (1953).
[51] *Boys v Chaplin* [1971] AC 356 (HL) 378, 389.
[52] *John Pfeiffer Pty Ltd v Rogerson* (2003) 203 CLR 503 [83], [129], [184].
[53] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 [65], [194].
[54] *Tolofson v Jensen* (1994) 120 DLR (4th) 289, 307.
[55] AS Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003), ch 2, esp [2.08].
[56] Kahn-Freund, *supra* n 1, 323.
[57] *Cf* Mortensen, *supra* n 19, 15.
[58] G Kegel, "The Crisis of Conflict of Laws" (1964-II) 112 *Collected Courses* 91, 188.
[59] Rabel, *supra* n 1, 94; M Wolff, *Private International Law* (Oxford, Clarendon Press, 2nd edn, 1950), 202.

would put it as high as that, it is submitted that uniformity is a central policy goal of choice-of-law rules. In the rest of this paper, I will refer to this as the "Uniformity Goal".

If *renvoi* is to have any place in the conflict of laws, its "first and main" purpose is to further the Uniformity Goal.[60] One might argue that *renvoi* is also justified for the purpose of giving more perfect effect to the "law" of the other country, but the reason that one would seek such perfection is to achieve uniformity. At its core, then, *renvoi* represents an attempt, in conjunction with rules of jurisdiction and choice of law, to ensure that cases are decided as they would be "if the action were brought in the courts which are probably the closest to the facts of the dispute" .[61]

It should be noted, if only for completeness, that critics of *renvoi* have suggested that the doctrine is often employed by courts in the name of uniformity but for the veiled purpose of giving effect to the *lex fori*,[62] or as an escape mechanism from the harsh application of a conflicts rule to which there is no exception.[63] Whether these criticisms are valid of the use of *renvoi* in the past is neither here nor there for the purposes of this paper. All legal doctrines, after all, are capable of misuse. The argument that follows will proceed on the basis that the principal purpose of *renvoi* is to contribute towards uniformity. It follows, therefore, that the standard against which *renvoi* should be measured is whether it in fact makes any such contribution.

2. The Form of Choice-of-Law Rules

It is relevant to note three common forms of choice-of-law rules: territory-based rules, proper law rules and interest analysis rules. It will be seen that the different forms place different emphases on the various policies that choice-of-law rules pursue.

Territory-based rules, such as the *lex loci delicti* rule in tort, and the *lex situs* rule for immovable property, seek to locate the salient facts of a cause of action within a particular place. Rules of this character are bound up with the territorialist view of the conflict of laws that juridical questions ought to be governed by the law of the place in which the question arises.[64] Rules of this type are also favoured as they promote certainty, which is another goal of choice-of-law rules.[65] Sometimes territorialism will be a matter of necessity, as is the case with

[60] Wolff, *ibid.*

[61] Briggs, *supra* n 19, 17.

[62] Eg Gray, *supra* n 28, 110; Lorenzen, *supra* n 1, 67; Mortensen, *supra* n 19, 21.

[63] JA McLaughlin, "Conflict of Laws: The Choice of Law *Lex Loci* Doctrine: The Beguiling Appeal of a Dead Tradition, Part 1" (1991) 93 *West Virginia Law Review* 957. De Boer provides, it must be conceded, a convincing example of a Dutch court doing this: TM de Boer, *Beyond Lex Loci Delicti* (London, Kluwer Law and Taxation, 1987), 118–19.

[64] *Tolofson*, *supra* n 54, 305.

[65] *Ibid*; *Zhang*, *supra* n 53, 517.

the *lex situs* rule for immovable property, since only the courts of the place in which the property is located can actually give effect to a decision concerning an interest in immovable property. On other occasions, however, the territorial nature of a rule is a matter of policy, such as the law of the place of a debt, or other intangible property. As a matter of history, it appears that the choice-of-law rules for most areas of law started life as territory-based rules, and then developed over time into proper law rules, or interest analysis rules.[66] The common thread that runs through the remaining territory-based choice-of-law rules is that they seek to promote uniformity of outcome by determining legal questions according to the law of the place in which they arise. By emphasising the role of place – a "forum neutral connecting factor"[67] – the rule operates to limit the activity of the forum to the question of locating the salient facts. Once the place of the action has been determined by the forum, the substantive *lex fori* plays no further role, deferring the resolution of the question to the "law" of the place.[68] In such circumstances, there is a strong argument for interpreting "law" to mean "the whole law" of the place.

The other forms of choice-of-law rule to which I have referred – interest analysis and proper law – have a different form. They seek not to locate a place in which the relevant facts arose, but rather to identify a law that it is most appropriate to apply to the facts. This distinction is subtle, but important to a consideration of the merits of *renvoi*. Where the lawmaker empowers the forum court to choose the *law*, rather than identify the *place*, that is most appropriate to a set of facts, there is greater scope to argue that the forum court is entitled to stick with its choice. Where, however, the lawmaker requires the court only to identify the place of the law that governs the action, a more persuasive case can be made in favour of the proposition that the law which should be applied is the law that would be applied by courts of the place identified. This distinction, between *place* and *law*, appears to have been at the heart of the different approaches taken by the High Court of Australia, and the Full Bench of the Supreme Court of Western Australia which it overruled, in *Neilson*.[69]

The distinction between place and law is a principled distinction that recognises the different policies that may underlie different choice-of-law rules. Where a court selects the "proper law" of a contract or tort, it does so in furtherance of a policy to determine a claim according to the law that is, in the eyes of the forum, the most clearly connected. Similarly, a court applying an interest analysis approach furthers the policy of applying the law of the country that has, in the eyes of the forum, the greatest interest. In each case,

[66] See, eg, Briggs, *supra* n 19, 183–86, 211.

[67] C Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims" (1997) 76 *Canadian Bar Review* 91, 110 referred to in *Zhang*, *supra* n 48, [65].

[68] Subject only to considerations of public policy and mandatory laws.

[69] Mortensen, *supra* n 19, 14.

renvoi would defeat this policy by applying the domestic law of a less closely connected, or less interested, country.[70] By contrast, where parties to a contract choose a court in which disputes ought to be litigated, but are silent as to a law, there is a strong argument that the law to be applied should be the law as it would be applied by a judge of the chosen court.[71] To do otherwise would be to thwart the parties' reasonable expectations. Similarly, where lawmakers choose a law that turns on place, the policy of that law requires uniformity. Whereas *renvoi* would undermine the policy goals of the proper law and interest analysis approaches, *renvoi* is, by contrast, a "natural, and indeed inevitable, outgrowth of the *lex loci* doctrine".[72]

3. Characteristics of Particular Areas of Law

Sometimes the characteristics of a particular area of law are such that the choice-of-law rules governing them weigh heavily in favour of uniformity. Considerations of this character often arise in areas of law where one country has a clearly dominant interest in the question to be decided.[73] The canonical example of this case is the transfer and validity of interests in land, where the country in whose territory the land is situated has permanent and exclusive physical control of the land, and it is in the interest of all countries to determine the outcome in accordance with the *lex situs*.[74]

There are other areas of law where, despite no country having a particular interest in the outcome of a question, it is generally considered that uniformity of outcome is highly desirable. This will often be the case where the judgment has effect *in rem*.[75] For example, there are strong policy reasons why the validity of marriage should be decided uniformly.[76]

4. Policy, Form, and *Renvoi* – Some Conclusions

It follows, then, that choice-of-law rules fall on a continuum that is governed both by their form and by the strength of the policy imperatives that lie behind them. At one end of the continuum are the rules that assign a law to a legal activity without regard for how the courts in another country would determine the question. At the other end lie those rules where, due to the policies

[70] Yezerski, *supra* n 28, 284.
[71] Briggs, *supra* n 26, 880–01.
[72] McLaughlin, *supra* n 63, 982.
[73] American Law Institute, *Restatement (Second) of Conflict of Laws* (St Paul, American Law Institute Publishers, 1971), §8 comment (h).
[74] *Ibid*; Briggs, *supra* n 19, 16; Lorenzen, *supra* n 1, 78; E Rimmel, "The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to an Impractical Doctrine" (1998) 19 *Holdsworth Law Review* 55, 68.
[75] Briggs, *supra* n 19, 18.
[76] Dicey, Morris and Collins, *supra* n 1, [1-006]; Rimmel, *supra* n 74, 75.

that underlie them, or due to the particular character of the field of law they govern, it is desirable to apply the law of another country as the courts of that country would apply it to a particular set of facts. In these circumstances, *renvoi* forms "a natural complement to the policies inherent in the forum's choice of law rules".[77]

It is not the purpose of this paper to indentify which areas of law are most suited to *renvoi*, and which are not.[78] It is, however, relevant to note that, consistent with the principles discussed in this section, there is a general acceptance that *renvoi* is necessary in some areas of law. This acceptance extends even so far as to include some of *renvoi*'s most ardent critics.[79]

The cases in which *renvoi* is generally considered to be both necessary and expedient include title to land and movable property, questions of personal status, the validity of wills and succession to movables.[80] All of these areas, it is submitted, share the same common characteristic – that uniformity of outcome is overwhelmingly the most significant policy goal of the choice-of-law rule.

Having considered the justification of *renvoi*, the circumstances in which this justification finds particular force, and shown that *renvoi* is sometimes required, this paper now considers whether, as a matter of logical possibility, any *renvoi* solution is capable of achieving its purpose.

D. The Insolubility of *Renvoi*

In this section, the logical consequences of *renvoi* are considered in a relatively abstract fashion. This project could be justified solely by the existence of those choice-of-law rules for which *renvoi* is generally agreed to be required. The project finds further justification when one observes that, on some occasions, the words of a convention or statute expressly require the application of for-

[77] Harris, *supra* n 40, 306.

[78] Rimmel, *supra* n 74, attempts such a project.

[79] See, eg, Dicey, Morris and Collins, *supra* n 1, [4-024]; Falconbridge, *supra* n 1, 176. The contrast is most stark in Lorenzen, *supra* n 1. The penultimate section of ch 3 (at 75–76) concludes with a two-page peroration condemning *renvoi* in the strongest terms. It is charged that "[a] greater state of uncertainty in the law than that which arises from the theory of renvoi . . . is difficult to conceive", "[n]o proper system of conflict of law can be built among the civilized nations as long as this doctrine remains", and that "[i]ts days ought to be few after its deceptive character is fully understood". In the very next section, no more than five lines hence, consideration is given – apparently straight-faced – to "certain exceptional cases in which a recognition that the *lex fori* should incorporate the foreign law inclusive of its rules of the conflict of laws may be either necessary or expedient" (76). On the next page, it is then said that in certain limited circumstances *renvoi* "not only leads to results which are obviously just, but also tends to promote international uniformity in the decisions". Indeed.

[80] *Ibid.*

eign conflicts rules,[81] or are interpreted to require their application.[82] Finally, many commentators have noted the astonishingly vast quantity of literature that has been devoted to the topic of *renvoi*. To the extent that this logical analysis can bring further clarity to this body of work, the project finds some additional utility.

This section considers the solutions to the situation (which I refer to as a "*renvoi* situation") where the conflicts rules of country A point to country B, whose conflicts rules point back to country A. Accordingly, the principal focus will be placed upon the case of remission, in respect of which the most difficult logical questions arise. The question of transmission is brought into the analysis in section E.

The problem that arises is how to break the infinite loop generated between the two systems of law. In each case, this problem boils down to a simple question: after how many "bounces" (ie remissions) back-and-forth does one stop. This question might be answered differently by each of countries A and B. To put it a slightly different way, the manner in which the loop is broken depends on two numbers: the number of bounces tolerated by country A, and the number of bounces tolerated by country B.

1. The *Renvoi* Number

I define the term "*n-renvoi*", where *n* is a whole number, to refer to the approach to *renvoi* whereby a country permits no more than *n* bounces. I will refer to *n* as the "*renvoi* number". This mode of expressing solutions to *renvoi*, it will be shown, accounts for all such solutions.

First, we may describe as "0-*renvoi*" all those solutions that amount to rejecting the *renvoi*, as these solutions permit no bounces. That is, all solutions where a reference to the law of the another country refers only to the internal law of that country have a *renvoi* number of zero.

Similarly, we can describe as "1-renvoi" those solutions that amount to accepting the *renvoi*. The law of country A points to the law of country B, accepts country B's remission back to the law of country A, and stops there. There has been one "bounce". The case where country A would permit a further bounce back to country B, but no further,[83] can be described as "2-*renvoi*". And so on.

The foreign court theory is best described as "∞-renvoi". In this case, country A is willing to accept as many bounces as country B is willing to accept,

[81] The Second Restatement, *supra* n 73, gives an example of the former s 9-103(3) of the Uniform Commercial Code which expressly required the application of the *lex situs* and its choice-of-law rules: §8 comment (e). As to conventions that require *renvoi*, see Sauveplanne, *supra* n 17, 12–14.

[82] Eg *Richards v United States*, 369 US 1 (1962).

[83] Such as occurred in *Re Annesley*, *supra* n 26.

whether that number is zero, one, or one million. It is for this reason that one may have misgivings about referring to this solution as "double *renvoi*".[84]

The approaches to *renvoi* that apply a "look before you leap" analysis, or that choose a different number of bounces depending on the facts of the case, can also be made to fit within this analysis. Each such approach must still provide a definite number of bounces that are acceptable *for any given set of facts*. While, in *Neilson*, Gummow and Hayne JJ disapproved any notion of a dialogue between legal systems,[85] it is nevertheless possible to analyse their Honours' reasoning at the "looking" stage, and discern the number of times, so to speak, that their eyes moved back and forth. Australian law was applied because that is what Chinese law would have done,[86] thereby allowing at least one bounce.

The *renvoi* number, then, provides a complete description of the approach of any country to a particular *renvoi* situation. It does not, of course, provide any information on the question whether the approach is desirable or reasonable. Nevertheless, as will be shown, the *renvoi* number allows a number of significant conclusions to be drawn about the soundness of *renvoi* as a tool forged for the principal purpose of contributing to uniformity.

The following sections set out two "theorems" concerning the properties of *renvoi* numbers. I do not laboriously spell out the proof of each theorem, but attempt to explain the gist of why they are true. A proof may be easily deduced with a little thought.

2. Collision Theorem

If, for a given set of facts, both countries apply the same finite renvoi number, the Uniformity Goal will always be violated. That is, the courts of country A will apply a different law to the question than would have been applied by the courts of country B. Moreover:

(a) If the common renvoi number is even (ie 0, 2, 4, …), the courts of each country will apply the law of the other country; and

(b) If the common renvoi number is odd (ie 1, 3, 5, …), the courts of each country will apply their own law.

An overview of why this theorem works is as follows. Suppose you are seated at a table in front of a mirror, and are holding a chess-piece in your hand. If you place the chess-piece on the table in front of you, the mirror-you will place the mirror-chess-piece on the mirror-table. Now, suppose this looking glass is magical and permits you to reach through it and place your chess-piece on the mirror-table. As you do so, the mirror-you will reach out into this world and

[84] *Ibid.* A further reason for eschewing this formulation is to avoid confusion with the French expression "renvoi au second degree", which refers to transmission: see, eg, T Vignal, *Droit International Privé* (Paris, Armand Colin, 2005), [99].

[85] *Supra*, text to nn 34–35.

[86] *Neilson*, *supra* n 6, [113].

place its chess-piece on the table in front of you. When you choose mirror-you, mirror-you chooses you; when you choose yourself, mirror-you chooses itself. A common choice is impossible. This symmetry is at the heart of the collision theorem.

One observes two special cases of the collision theorem. First, where both countries adopt an ∞-renvoi solution, each country accepts an infinite number of bounces, and the infinite loop will not be broken.

Secondly, the collision theorem applies to "look before you leap" solutions. Consider the case where both country A and country B apply such an approach: country A, prior to deciding which law to select, looks to the law of country B, including its conflicts rules. But the approach of country B requires that it look to the law of country A before it comes to a conclusion in any case. Neither law can find within the other the content that it requires to make a decision for itself. Rather than an infinite loop, one encounters an infinite void. Professor Kramer provides a devastating example of the complications that arise in such circumstances. It is sufficient to quote the conclusion:

> "[I]n order to decide what to do, the French Court must predict what the German court will predict the French Court will do (when France has both accepted and rejected the renvoi in conflicts with other states)."[87]

Uncertainty abounds. In each case, the collision theorem demonstrates that *renvoi* of any sort fails to provide uniformity where the other state solves the problem in the same way.

3. Consequences of the Collision Theorem

At first blush, the theorem appears to demonstrate that, as a uniform approach to *renvoi* cannot achieve the only goal that *renvoi* exists to serve, *renvoi* should be discarded. Indeed, those who oppose *renvoi* have used exactly this argument. In this regard, Professor Lorenzen has noted that 1-renvoi has "exactly the same disadvantages as the other theories" in terms of uniformity.[88] To similar effect, Professor Kahn-Freund said of 1-renvoi that

> "the doctrine of renvoi serves harmony only as long as it is treated, as it were, as a Kantian categorical imperative in reverse: as a prescription to adopt a principle of action workable as long as others do not act on it."[89]

[87] L Kramer, "Return of the Renvoi" (1991) 66 *New York University Law Review* 979, 996.
[88] Lorenzen, *supra* n 1, 72–73.
[89] Kahn-Freund, *supra* n 1, 287. To similar effect, see de Boer, *supra* n 63, 117–18; Kramer, *supra* n 87, 995; EO Schreiber, "The Doctrine of Renvoi in Anglo-American Law" (1918) 31 *Harvard Law Review* 523, 535.

Opponents of the foreign court theory have also pointed out that, where such a system is applied by both countries, an infinite loop arises.[90]

However, the fact that the collision theorem applies to all cases – even cases that would not normally be considered as *renvoi* – suggests that something deeper is at play. One observes that those who favour *renvoi* discredit the 0-renvoi approach by pointing to the violation of the Uniformity Goal that results where both countries reject the renvoi. In *Neilson*, Gleeson CJ noted that rejecting the renvoi in that case "would appear to ensure difference of outcome",[91] a result that Heydon J described as "absurd".[92] Professor Griswold similarly argued that, where both countries reject the renvoi, "[t]he actual disposition of the rights of the parties will depend upon the wholly irrelevant fact of the forum in which the case is brought".[93] These arguments also turn upon the application of the collision theorem to the case of 0-renvoi.

Set out in this manner, one observes the danger of employing the consequences of the collision theorem in favour or against *renvoi*. True it is that ∞-*renvoi* can lead to an infinite loop if the other country takes the same approach, but problems of uniformity arise with any of the other solutions to *renvoi*. Accordingly, while it is true that 0-*renvoi*, if applied in both countries, can lead to a lack of uniformity that may strike one as "absurd", every other *renvoi* solution will give rise to the same absurdity. A number of writers have observed that uniformity cannot be achieved if both countries apply 0-*renvoi*, 1-*renvoi*, or ∞-*renvoi*.[94] Hitherto, however, this outcome has been presented as something of puzzle or coincidence. The collision theorem shows that this outcome is more than coincidental – it is structural. It is built into the logical fabric of *renvoi*.

The collision theorem, as proven, adds to earlier observations by identifying the logical basis that underlies them. The theorem tells us that *whenever* two countries take the same solution to *renvoi*, the Uniformity Goal will be violated. This has nothing to do with the adequacy of the *renvoi* solution chosen – it is an outcome that is common to all solutions because it is a product of the logical structure of *renvoi*. The theorem applies as equally to the case where countries never apply foreign law as it does to the case where they apply the foreign court theory.

This conclusion appears bleak. But could we, perhaps, avoid the problem of collisions altogether if each country were to choose a different *renvoi* number? This could be done by choice or, perhaps, by random assignment by some

[90] WW Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge, MA, Harvard University Press, 1942), 247; Lorenzen, *supra* n 1, 67, 127; Mortensen, *supra* n 19, 18; Nygh and Davies, *supra* n 14, [15-10].

[91] *Neilson*, *supra* n 6, [13].

[92] *Ibid* [271].

[93] Griswold, *supra* n 26, 1180.

[94] The clearest statement: Falconbridge, *supra* n 1, 189. See also Griswold, *supra* n 26, 1180–01; Kahn-Freund, *supra* n 1, 287–88.

international organisation. Intuitively, this solution seems very wrong. Why it is wrong is explained in the next section, which considers the consequences of *renvoi* where two countries have different *renvoi* numbers.

4. The Difference Theorem

If, for a given set of facts, two countries apply a different renvoi number to a renvoi situation, the Uniformity Goal will always be met – ie the same law will be applied regardless of where the proceeding is brought. However, the law that is to be applied will depend solely on the lower of the two renvoi numbers and:

(a) If the lower number is even (ie 0, 2, 4, …), the law of the country with the higher renvoi number will be applied; and

(b) If the lower number is odd (ie 1, 3, 5, …), the law of the country with the lower number will be applied.

The gist of the proof is that the country with the higher number effectively applies the foreign court theory, as the number of bounces is curtailed by the country with the lower number before the *renvoi* solution of the country with the higher number has the chance to bite.

5. Consequences of the Difference Theorem

Like the collision theorem, the difference theorem illustrates an important structural property of *renvoi*. Where two countries apply different *renvoi* numbers, the question of which law is to be applied depends on the fortuitous circumstance of which country has the lower number. I say "fortuitous" because the *renvoi* number of each country is not selected after careful consideration of the manner in which it will interact with the *renvoi* solutions chosen by all other countries. Accordingly, where a *renvoi* situation arises, the resulting choice of law that derives from the combination of the two countries' respective *renvoi* solutions is a matter of happenstance rather than design.

The difference theorem underpins the criticism of *renvoi*, and in particular the foreign court theory, that it involves an "abdication of sovereignty and a failure on the part of the State to discharge the duties owed to its inhabitants".[95] In a similar vein, the foreign court theory has been described as a "surrender" to foreign law,[96] or as a "virtual capitulation"[97] and "casting aside"[98] of forum law. At the core of each of these arguments is the realisation that wherever

[95] Lorenzen, *supra* n 1, 34.
[96] Morris, *supra* n 2, 35.
[97] North, Fawcett and Cheshire, *supra* n 14, 57.
[98] GC Cheshire, *Private International Law* (Oxford, Clarendon Press, 2nd edn, 1938), 58. See also Falconbridge, *supra* n 1, 191–92; Nygh and Davies, *supra* n 14, [15-10].

one country has a higher *renvoi* number than the other (this circumstance being most evident where one country applies the foreign court theory), the question of which law is to be applied is entirely determined by the law of the other country. This outcome is intuitively unappealing because it means that the conflicts rules of the country with the higher number play no decisive role in the choice of law. What the difference theorem shows us is that this criticism is not limited to the case where one country applies the foreign court theory. Rather, it operates in all cases where two countries apply different solutions to *renvoi*.

That is not to say that it cannot be valid for the law of a country to choose to operate in a manner uniform with the law of another country. After all, the Uniformity Goal underpins many choice-of-law rules.[99] For this reason, others have rejected the "abdication of sovereignty" argument, asserting that *renvoi* involves no greater "capitulation" than occurs in the ordinary process of choice of law,[100] and is a perfectly rational choice.[101] These arguments are also valid – the conflicts rules of the country with the higher number still do perform the function of choosing which country's law the outcome should mimic.[102]

The difference theorem illuminates this controversy and demonstrates why the "abdication of sovereignty" argument contains a kernel of truth. In any case where two countries apply different theories of *renvoi*, the question of which law to apply is determined by the entirely fortuitous circumstance of whether the lower *renvoi* number is odd or even. For a country that applies 1-renvoi or ∞-renvoi – presumably in order to promote uniformity – the question of which law will be applied will in practice turn on whether the other country has chosen 0-, 1- or ∞-*renvoi*. As countries exist which take each of these approaches, any outcome is possible, and each outcome is fortuitous. Any country that chooses an approach of 1-*renvoi* or ∞-*renvoi* abdicates, if not sovereignty, then at least meaningful control of choice of law. The outcome is, in this sense, meaningless. For example, English law was applied in *Re Ross*,[103] but not in *Re Annesley*,[104] for the reason that, respectively, Italy employed 0-*renvoi*, but France employed 1-*renvoi*. While it is true that these outcomes were achieved, in part, by the application of English law, the difference in outcome was completely disconnected from any policies that England may have hoped to achieve. In each case, the outcome was determined – and only determined – by the circumstance that a number, chosen by another country, was odd or even. That

[99] See *supra*, section C.
[100] Griswold, *supra* n 26, 1178.
[101] Briggs, *supra* n 26, 882; Gray, *supra* n 28, 120; Kramer, *supra* n 87, 990.
[102] Briggs, *supra* n 19, 15.
[103] *Re Ross*, *supra* n 26.
[104] *Re Annesley*, *supra* n 26.

outcome is no better than the flip of a coin.[105] Uniformity was achieved; but it came at the cost of meaning.[106]

6. Conclusion – The Insolubility of Renvoi

The two theorems set out above – the collision theorem and the difference theorem – together prove that the problem of *renvoi* cannot be solved. The theorems do more than provide an arithmetical solution to the question of which law will be applied when a *renvoi* situation arises between two countries – the theorems explain the limitations of *renvoi* as a choice-of-law tool. The *renvoi* number accounts for all solutions to renvoi.[107] Accordingly, no matter what approach is taken to *renvoi*, one of two things will happen: the Uniformity Goal will be violated, or the applicable law will be selected by a process no more principled than a coin-toss. This leads to the conclusion that it is not possible to fashion a conflicts rule that both gives effect to the Uniformity Goal and meaningfully applies policy goals to the selection of law. *Renvoi*, therefore, has structural limitations. Moreover, given that the principal purpose of *renvoi* is to contribute to the Uniformity Goal, one must query whether its limitations are such as to bring its utility into question.

The insolubility of *renvoi* explains and justifies the uneasiness that underlies so much of the writing on the topic. *Renvoi* has been described as a "Sphinx-like question", for which all the answers are wrong.[108] Others have described the question as "vexed"[109] and "troublesome".[110] One senses in these statements a feeling that, whenever one attempts to put one's finger on the *renvoi* problem, it somehow slips away. The collision and difference theorems show this feeling to be correct. *Renvoi* is insoluble.

[105] With emphasis on the words "no *better*". It is not suggested that the outcome is a matter of chance: the outcome can be deduced as soon as the *renvoi* numbers of both countries are known. The point is that the outcome is fortuitous.

[106] Professor von Mehren has emphasised the tension between "aptness" and "the desire for decisional uniformity": see AT von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1974) 88 *Harvard Law Review* 347, 351. In this case, the pursuit of uniformity has caused all consideration of aptness to fall aside, resulting in an outcome that is entirely based on fortuitous circumstances.

[107] See *supra* section D.1.

[108] Davies, *supra* n 28, 245.

[109] Morris, *supra* n 2, 32.

[110] Cowan, *supra* n 1, 35.

E. The Consequences of Insolubility

1. The *Circulus Inextricabilis* Revisited

Hitherto, this paper has had little to say on the topic of the *circulus inextricabilis*, other than to suggest that it is something to be avoided. Having now exhausted all solutions to *renvoi* that involve breaking the infinite loop, it is perhaps worth revisiting the case where the loop is allowed to continue. One reason that this might be sensible is the realisation that the *circulus inextricabilis* is the only exception to the collision theory – where two countries apply the foreign court theory, each will encounter the infinite loop. This clearly is not a workable solution in itself, but it is better than a clearly non-uniform solution if uniformity is what you are after.

The first thing to observe is that when what is called the *circulus inextricabilis* arises, the court deciding the problem does not actually allow its decision-making process to become stuck in an unending series of references between systems of law. This is because the decision is made by a human who is capable of recognising an endlessly recurring pattern. Once recognised, the judge can take a step back from the problem and choose a new course. Accordingly, a solution that leads to a *circulus inextricabilis* is not intractable, but does leave unanswered the question of what to do once the decision-maker has stepped back from the endlessly recurring consequences of the initial attempt to choose a law. This calls for a secondary set of rules, as was recognised by Gummow and Hayne JJ in *Neilson*.[111]

Those critical of the *circulus inextricabilis* are surely aware of this. Why, then, do they maintain the criticism that "upon strict principles of logic, [*renvoi*] can lead to no solution",[112] that "a mere statement of this alternative carries with it its own refutation",[113] or that *renvoi* is "inherently illogical"?[114] The heart of these criticisms seems to be this: *renvoi* gives rise to paradox, and paradox cannot be permitted in the "science" of private international law.[115] *Renvoi* is the faulty axiom that "sends ripples on the surface of the theory".[116]

It is submitted that this view should not be accepted. To see why this is so requires a brief excursus into the world of logic.

[111] *Supra*, text to nn 39–45.
[112] Lorenzen, *supra* n 1, 27.
[113] Schreiber, *supra* n 89, 528.
[114] Lu, *supra* n 4, 67. See also Bate, *supra* n 11, 49.
[115] Lorenzen, *supra* n 1, 32–33.
[116] Roosevelt, *supra* n 12, 1890, although the author there used the expression to refer to the entire conventional understanding of choice of law.

2. Logic, Paradox and Self-Reference

The problem at the heart of the *circulus inextricabilis* is self-reference.[117] The law of country A points to the law of country B, which points back again. The loop repeats because the law of country A refers to itself. This has the consequence that no solution can be reached following this method. As Professor Roosevelt puts it, "there is no way of putting content . . . into the circle".[118] Stated this way, one observes that the *circulus inextricabilis* is logically equivalent to the "Liar's Paradox" attributed to Epimenides of Crete, who famously said "All Cretans are liars."[119]

Paradoxes of this character were the subject of considerable analysis by logicians in the early twentieth century. Alfred Whitehead and Bertrand Russell explained how a system of logic can be defined in such a way that paradoxes equivalent to the Liar's Paradox do not occur. This result is achieved by requiring that any statement that refers to a class of things (eg the statement "All statements by Cretans") must not be a member of the class referred to. Statements that violate this rule (eg Epimenides' statement) are forbidden. [120] Applied to the sphere of choice of law, this theory forbids any conflicts rule capable of applying itself, which boils down to forbidding the foreign court theory. This does not, however, advance our understanding of *renvoi* – it merely shows us a way of avoiding paradox by postulating the trouble away. [121]

Another logical principle, however, provides more insight to the present problem. A few years after Russel and Whitehead's work, Kurt Gödel proved his Incompleteness Theorem. Essentially, the theorem states that, in any mathematical system sufficiently complex to include basic arithmetic, it is possible to construct a statement that is logically equivalent to the Liar's Paradox.[122] This result has profound significance for *renvoi*. It means that the emergence of a *circulus inextricabilis* within the system of private international law does not mean

[117] Cowan, *supra* n 1, 43.

[118] Roosevelt, *supra* n 12, 1826.

[119] A number of writers have noted this connection: Cowan, *supra* n 1, 43; JC Hicks, "The Liar Paradox in Legal Reasoning" (1971) 29 *Cambridge Law Journal* 275, 275; JM Rogers and RE Molzon, "Some Lessons about the Law from Self-Referential Problems in Mathematics" (1992) 90 *Michigan Law Review* 992, 1014; Roosevelt, *supra* n 8, 1826. See also: O Perez and G Teubner, *Paradoxes and Inconsistencies in the Law* (Oxford, Hart Publishing, 2006), 8–13.

[120] AN Whitehead and B Russell, *Principia Mathematica* (Cambridge University Press, 2nd edn, 1925), Vol 1, 37–38. For an outline of the theory within which this conclusion was reached see Hicks, *supra* n 119, 278–80.

[121] Cowan, *supra* n 1, 44. It may be observed that the argument in favour of 0-*renvoi* on the grounds that it solves a logical paradox similarly involves postulating the problem away (and replacing it with the new problem posed by the collision theorem).

[122] For a more extensive explanation of the theorem, and an outline of its proof, see Rogers and Molzon, *supra* n 119, 993–97. See also E Nagel and JR Newman, *Gödel's Proof* (London, Lowe & Brydon, 1959). The wider consequences of the theorem are analysed in DR Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (Stanford Terrace, Harvester Press, 1979), esp at 15–19, chs 9, 15.

that there is an error in the system, that the science is broken or that an axiom is faulty. It simply means that the system is complex. As Professors Rogers and Molzon[123] explain:

> "That an undecidable proposition *can* be created does not undermine the whole idea of a conflict of law system, or even a conflict of law system which permits reference to the conflict rules of another jurisdiction. Indeed, Gödel's theorem at least suggests (and by analogy proves) that all systems of law permit the construction of undecidable propositions."[124]

Paradox, then, is an unavoidable consequence of complexity and self-reference. Seen in this light, it is not surprising that self-reference-generated paradoxes should emerge in the field of private international law, in which rules of law are applied to determine which rule of law to apply. It follows that the arguments that *renvoi* should be rejected on logical grounds are themselves defeated by modern developments in logic.

3. Secondary Rules

The *circulus inextricabilis*, then, is no aberration. As the only exception to the collision theorem, it provides an opening for a *renvoi* solution[125] that may be employed by all countries without a corresponding loss of uniformity. Of course, the *circulus inextricabilis* provides no answer in itself, but requires forum-determined secondary rules to be applied once it has been encountered. This section develops that idea – hinted at in *Neilson* – further.

Secondary rules run the risk of recreating all the problems created by primary rules: if each country applies different secondary rules, then circumstances will arise where the secondary rules of two countries point in opposite directions. There is a danger of returning to square one. The secondary rule suggested by Scrutton LJ in *Casdagli*,[126] and referred to in *Neilson*[127] – ie to apply the *lex fori* – demonstrates this risk. If two countries take this approach, and should a *renvoi* situation arise between them, the courts of each country will apply the *lex fori* and uniformity will be thwarted.

Professor Kramer has proposed a set of secondary rules that amount to the forum court considering the competing choice-of-law rules and choosing the one "that maximises both states' interests".[128] This solution is proposed as a modification of the interest analysis approach, but offers guidance beyond that field. According to Professor Kramer, the forum should look at its own choice-

[123] Professor Molzon is a professor of mathematics.
[124] Rogers and Molzon, *supra* n 119, 1014.
[125] Here I tentatively remove the implicit inverted commas: see *supra* n 13.
[126] *Casdagli*, *supra* n 41, 111.
[127] *Neilson*, *supra* n 6, [132].
[128] Kramer, *supra* n 87, 1032.

of-law rules, and those of the other country, and determine which of the two rules "provides a better multistate accommodation of interests".[129] This proposal has great merit. It recognises the fact that the law of each country has disclaimed its own application to the controversy in favour of the law of the other country, and, for this reason, it is sensible that the choice of law should be made by reference to the policies underlying both countries' conflicts rules. Whether such co-operation is possible in practice is another question, but Professor Kramer sets out an argument based upon game theory why it is in the interests of both countries to co-operate.[130] It is sufficient to note, for these purposes, that where the policy underlying the choice-of-law rule of both countries is uniformity (as must be the case where both countries apply an ∞-*renvoi* approach), co-operation should be seen as desirable by both countries.

Professor Kramer's proposed secondary rule suffers, however, from the problem first identified – it requires the forum to make an assessment of the collective interest. If courts in different countries make different assessments, uniformity is thwarted.[131] Nevertheless, the proposal identifies a key requirement that secondary rules must possess: they must take into account the interests of both countries.

For a secondary rule to be truly effective, it must be common to all countries. This calls to mind an international convention of some character. Such a solution was attempted by the Hague Convention of 1955 on Conflicts between the Law of the Nationality and the Law of the Domicile.[132] That Convention, which has never come into force, was intended to resolve *renvoi* situations where they have historically arisen most often: where the choice-of-law rules of one country apply the *lex domicilii*, and the choice-of-law rules of the other country apply the *lex patriae*.[133] Where two countries have such rules, a *renvoi* situation will arise where a national of one country is domiciled in the other. The Convention sought to resolve such conflicts by applying the law of the domicile.[134]

The scope of the Convention was limited to conflicts of domicile and nationality. This limitation could raise complications in a case such as *Re Ross*,[135] where a third choice-of-law rule also requires consideration.[136] The most that the Convention could hope to achieve, then, was to place a patch over one area of *renvoi* – albeit an important patch. It was not because of this limitation, however, that the Convention failed. The Convention required the UK to

[129] *Ibid*, 1029.
[130] *Ibid*, 1021–28.
[131] As is admitted: *ibid*, 1034.
[132] Opened for signature 15 June 1955. An English translation may be found at: First Report of the Private International Law Committee, Cmd 9086 (1954) Appendix A.
[133] See Falconbridge, *supra* n 1, 118–48 and cases considered therein.
[134] Art 1.
[135] *Re Ross*, *supra* n 26.
[136] B Wortley *et al*, "The 1951 Hague Conference on Private International Law" (1952) 38 *Transactions of the Grotius Society* 25, 37.

alter its rules on domicile and bring them in line with the continental concept of habitual residence.[137] Despite the support of the Private International Law Committee,[138] legislation giving effect to the necessary changes was blocked due to lobbying by foreign businessmen resident in England who feared the taxation consequences of such a change.[139] It is likely that the refusal of the UK to join the Convention was an important reason for its failure.

A solution to *renvoi* by international convention, while unsuccessful, did not fail for any reason of principle, and remains an option for a future solution for *renvoi*. However, the Hague Convention was deficient in a number of ways. First, by dealing only with conflicts between *lex domicilii* and *lex patriae*, the Convention offered at best a patch-up solution. Secondly, and due to its limited scope, the Convention did not create a solution that acknowledged the policy reasons behind the two choice-of-law rules: the solution in Article 1 of the Convention involved complete capitulation to the *lex domicilii*. It cannot be expected that a general *renvoi* solution can be reached in this fashion. Thirdly, the Convention required countries to change their choice-of-law rules beyond that which was required to eliminate *renvoi*. The Convention was rejected by the UK "for reasons entirely unconnected with private international law".[140] Had the required change been limited to circumstances where *renvoi* situations arise, the outcome may have been otherwise.

4. Secondary Rules – Some Conclusions

A consideration of the foregoing suggests that secondary rules must possess a number of characteristics.

Secondary rules must be capable of taking into account, and giving effect to, the policy interests of both countries. Where a *renvoi* situation arises, the choice-of-law rules of each country have determined that justice requires that the suit be determined in accordance with the law of the other country. A secondary rule that implements the policies of both countries will therefore approach the attainment of justice according to the law of each country.

Secondary rules should ideally be the same in all countries. This is an ambitious and perhaps impossible goal. It is a much less ambitious goal, however, than the other solution that would eliminate *renvoi* altogether, which is to harmonise all conflicts rules worldwide. The European experience with the Rome Conventions shows what an all-consuming task that would be. The harmonisation of secondary rules, while still a considerable task, is far more modest in its ambition, for the elimination of *renvoi* does not require the complete harmonisation of all conflicts rules. While it is true that *renvoi* arises due to

[137] Art 5.
[138] First Report of the Private International Law Committee, *supra* n 132, [24], [30].
[139] M Mann, "The Domicile Bills" (1959) 8 *International & Comparative Law Quarterly* 29.
[140] Kahn-Freund, *supra* n 1, 289–90.

differences in conflicts rules, it is not true that any difference between conflicts rules will lead to a *renvoi* situation. *Renvoi* can be eliminated by the harmonisation of conflicts rules in a very narrow set of circumstances: when the conflicts rules of two countries point to one another. That is, *renvoi* could be eliminated if every country were to adopt the same rules to be applied only where a *renvoi* situation arises. Such a project would require countries to modify their choice-of-law rules in limited circumstances, and where they are already willing to countenance the application of foreign law. As the experience of the Hague Convention of 1955 demonstrates, countries appear willing to tweak their conflicts rules for the narrow case where a *renvoi* situation exists. Indeed, the Private International Law Committee remarked at the time that there could not be "any doubt of the desirability of doing whatever may be possible by international agreement to resolve" the difficulties to which *renvoi* leads.[141]

If unity of rules is too ambitious a goal, a yet more modest requirement is to apply the foreign court theory together with secondary rules that are *simple*, *workable* and *persuasive*. *Simple* means that secondary rules must be easily applied, and must produce an outcome that is certain whichever country they are applied in. Professor Kramer's approach arguably fails the simplicity test because weighing the competing governmental interests involves a complicated analysis of considerations that are likely to be finely balanced in a *renvoi* situation. If secondary rules are not simple, then they may be applied differently in different countries, taking us back to square one. *Workable* means that secondary rules must form part of a solution that conduces to uniformity regardless of the *renvoi* solution adopted by the other country. A solution that applies ∞-*renvoi* with secondary rules to displace the infinite loop will lead to uniformity of outcome if the other country adopts any theory of *renvoi*. The only case in which uniformity will not be achieved is if the other country applies ∞-*renvoi* with different secondary rules. For this reason, secondary rules must be *persuasive*, in the sense that the adoption of secondary rules by one country should be likely to lead to their adoption by another country. The *n-renvoi* solution, for example, is not persuasive because if it is adopted by country A, then it will only work as long as it is not adopted by country B. As Professor Kramer has noted, the "argument in favour of widespread adoption of renvoi requires that its adoption not be widespread".[142] Similarly, the secondary rule in *Casdagli*[143] – to apply forum domestic law – will thwart uniformity the more it is adopted. Secondary rules must avoid this property, and be capable of multilateral convergence. The persuasiveness of secondary rules is also likely to depend upon their simplicity, workability and the extent to which they successfully integrate the interests of both countries.

[141] First Report of the Private International Law Committee, *supra* n 132, [23].
[142] Kramer, *supra* n 87, 994.
[143] *Casdagli*, *supra* n 41, 111.

Finally, a system of secondary rules should integrate with all forms of *renvoi*, and be capable of application to all choice-of-law rules. This was a failing of the Hague Convention of 1955. A system of secondary rules must be capable of dealing not only with the classic *renvoi* situation that arises between two countries, but also with the case of transmission, and with other configurations (such as a loop involving three countries) that some have considered "too terrifying to pursue".[144] This task need not be so terrifying – we have already identified all the tools that are needed. It is only necessary to identify the countries whose policies should be given effect by the secondary rule, and the rule should give effect to them in a simple and predictable manner.

5. Which Countries' Policies?

The remaining question, then, is to identify a technique that will identify which countries' policies should be integrated into the secondary rule. The answer to that question is right in front of our eyes: the *circulus inextricabilis*. Far from being devoid of all content, the *circulus inextricabilis* contains the central item of information required – the countries traversed by the loop are precisely those whose policies should be furthered by the secondary rule. In the case of the usual two-country *renvoi* situation, the loop traverses only two countries. But more complicated situations can arise. In the most general case, the conflicts rules of country A will point to country B, whose rules point to country C, and so on. The process will terminate in one of two ways. The first possibility is that the chain of references will eventually arrive at a country, say country X, whose conflicts rules point to the application of domestic law. In this case, no loop arises, and what has occurred is an ordinary instance of transmission. There is a strong argument that in such a circumstance the principled thing for a court in country A to do (and also countries B through to W) is apply the law of country X.[145]

The second possibility is that the chain of references will at some point loop back on itself; somewhere along the chain, the conflicts rules of one country,

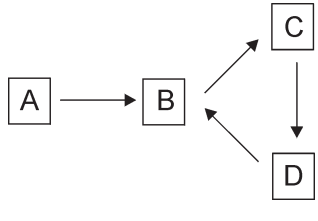

Figure 1

[144] Falconbridge, *supra* n 1, 168.
[145] Dicey, Morris and Collins, *supra* n 1, [4-027].

say country D, will point to the law of a country already traversed, say country B (see Figure 1).

In this case, a loop arises traversing countries B, C and D. Accordingly, a court in country A should apply a secondary rule that integrates the policies of these three countries. The advantage of this approach is that, wherever legal proceedings are brought, the same law will be applied. Each country will apply a secondary rule that integrates the policies of countries B, C and D. Uniformity is achieved despite the collision theorem. The *circulus inextricabilis* has pointed the way.[146]

6. An Example of a Secondary Rule

The main purpose of this section has been to sketch out the contours of effective secondary rules. It is beyond the scope of this paper to propose, justify and compare various options. In this section, I consider, briefly, a possible secondary rule that appears to meet the requirements, as an illustration of the foregoing analysis.

One possible secondary rule is to determine the case according to the domestic law of each country traversed by the loop, and attempt to average the outcomes. Thus, in the most common case where a *renvoi* situation exists between two countries, one decides the case according to both laws, determines the outcome according to both laws, and averages the result: if the defendant is liable in tort under the law of one country and must pay $1,000, but escapes liability under the law of the other country, then the secondary rule to be applied by both countries is that the defendant must pay $500.[147] Similarly, if a

[146] It is relevant to add, as an endnote to this section, that this proposed technique applies also in the trivial case where a country applies its own law to a purely local case. Consider a case that is entirely governed by the law of country A. When the case is brought before a court in country A, the court applies country A's choice-of-law rules to the facts, and determines that the whole law of country A is to apply, including the conflicts rules of country A. This leads to a *circulus inextricabilis* where the conflicts rules of country A point endlessly to themselves. The loop traverses one country only, so the secondary rule to be applied should integrate only the policies of country A, which is achieved by applying the domestic law of country A. Of course, in the real world such reasoning is needlessly elaborate, but it does demonstrate the robustness of the proposed method. This also addresses an argument against *renvoi* raised by Abbott in 1908, who pointed out that if a choice-of-law rule included a reference to foreign choice-of-law rules, then "there is the same deadlock even in the simplest case where both situs and domicil are English": see Abbot, *supra* n 15, 136.

[147] A rule of this character has been suggested, outside the field of *renvoi*, by Professors von Mehren and Dinwoodie: see AT von Mehren, *supra* n 106, 365-70; GB Dinwoodie, "A New Copyright Order: Why National Courts Should Create Global Norms" (2000) 149 *University of Pennsylvania Law Review* 469, 545–52. Such rules have been termed "special substantive rules". Hitherto, the suggestion has been that such rules are appropriate for certain general categories of multistate problems. The arguments employed in their favour in the general case apply *a fortiori* in the narrow case of a *renvoi* situation, where the choice-of-law rules of all countries involved disclaim the application of local domestic law. It is submitted that rules that have been suggested as special substantive rules would in many

will is valid under the law of country A, but invalid under the law of country B, then half the value of the estate should be distributed according to the will, and half according to the intestacy law that country B would apply. Of course, some outcomes are not divisible in this fashion – questions of status, for example, cannot be averaged. These indivisible cases, however, will be rare because while the outcome of many proceedings *turns* on the determination of status, the outcome *itself* will be divisible: money can be divided (*Neilson*[148]) as can a beneficial interest in trust property (*Re Askew*[149]); property can be co-owned (*Re Annesley*,[150] *Re Ross*[151]); and even child custody can be shared.[152] Of course, there will be the rare case where the outcome sought is truly indivisible.[153] In such cases one could apply the result reached according to the law of a majority of countries in the loop, and, in the event of a tie, apply a presumption in favour of the existence of the status – eg a presumption in favour of marriage being valid. But indivisible *outcomes* should form the minority of cases.

The merits of this proposal may be debated. A question arises, for example, whether to average the outcomes of a case according to the various laws is a proper way of integrating the various policies. That is a question for another day. For present purposes, it is sufficient to note that the solution integrates the laws of each country, and is simple, workable and persuasive in the senses described. In the case where $500 is awarded to the claimant in tort who would have won in one country and lost in the other, the outcome is surely one with which each country can live, given that each country's choice-of-law rules were willing to hand resolution of the entire dispute to the other law, according to which an opposite result would have been reached.

7. Should We Bother with Secondary Rules?

The contours of secondary rules having been defined, and an example having been given, it remains briefly to defend the notion of secondary rules against the argument that such rules "would only further complicate an already obscure choice of law method".[154] Arguments of this character may be fortified by pointing to the difficulty and uncertainty that attends proof of foreign law,[155] the combined force of which requires me to justify the practical value of the

cases satisfy the criteria of being simple, workable and persuasive, in the senses described, and may be an ideal starting point for the identification of appropriate secondary rules.

[148] *Neilson*, *supra* n 6.
[149] *Re Askew*, *supra* n 26.
[150] *Re Annesley*, *supra* n 26.
[151] *Re Ross*, *supra* n 26.
[152] *Cf* 1 Kings 3:16–27.
[153] Eg, *Collins v A-G* (1931) 145 LT 551 (PDA) (declaration of legitimacy).
[154] Mortensen, *supra* n 19, 20.
[155] But see Yezerski, *supra* n 28, 290–91, arguing that modern information technology has deprived this argument of much of its force.

analysis of *renvoi* that has been taken in this paper, and the solutions proposed. Why, one might ask, should one not find a simple tool that cuts through all the intricacies, however imperfectly?

The answer to criticisms of this character is to return to the conclusion reached at the end of section C above – that there is general agreement that in some circumstances uniformity is a sufficiently important policy goal that *renvoi* is required to do justice between the parties. Blunt instruments, therefore, are not always adequate to the task. If this view is correct, then it follows that serious consideration must be given to the insolubility of *renvoi* and its consequences. While it is true that foreign law is difficult and uncertain to prove, it should be remembered that a *renvoi* situation can only arise in circumstances where the forum court has already found that foreign law – for all its difficulty and uncertainty – should be applied. If *renvoi* is necessary – and sometimes it is – then it is worth examining its consequences in detail.

F. Conclusion

Professor Harris has observed that choice of law is a discipline that simultaneously requires both "considerations of impenetrable logical difficulty" and "pragmatic judgements".[156] The problem of *renvoi* demands a solution that combines these qualities.

The first part of this paper considered the most commonly advocated solutions to *renvoi*, and showed that they fail to implement the policy goals for which *renvoi* was brought into being. Moreover, it was shown that any such solution will fail in the same way. The second part of this paper, seeking to tackle this impenetrable logical difficulty, sketched out a solution using the foreign court theory augmented by pragmatically chosen secondary rules.

It is a truism that "the life of the law has not been logic: it has been experience".[157] Experience has shown, however, that *renvoi* is not so easily dispensed with. Despite its many detractors, the doctrine of *renvoi* will persist as a technique of private international law for as long as uniformity remains a policy goal of choice of law. That being so, there remains utility in the careful examination of the insolubility of *renvoi* and its consequences.

[156] Harris, *supra* n 40, 306.
[157] OW Holmes, *The Common Law* (Boston, Little, Brown & Co, 1881), 1.