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Navigating sovereignty and transnational commercial law: the use of comity by Australian courts

Thomas Schultz* and Jason Mitchenson**

Academically, the principle of comity is all but dead. Not only is there a distinct lack of literature regarding the principle, but in circumstances where it is addressed it is considered to be of negligible importance for the resolution of modern private international law disputes. However, a review of Australian case law demonstrates that there is a significant disjunct between the academic view of comity and its actual use in judicial practice. In the last 10 years, over 850 Australian court decisions have made reference to comity – many of which relate to the field of private international law. In this article, the authors review 77 Australian cases where comity played a definitive role in the resolution of private international law issues. These cases demonstrate that comity is a relevant, useful legal tool to guide the development and application of private international law rules – doing so in a manner that helpfully mediates between the political need to uphold the doctrine of sovereignty and the commercial and judicial need to permit law to act transnationally in order to accommodate international commerce. This is the purpose for which comity was created almost 400 years ago and the examined case law demonstrates that it continues to be effective in reflecting these interests in the law.

Keywords: comity; private international law; conflict of laws; Australian law; sovereignty; transnational law

A. Introduction

How best to reconcile the basic political doctrines of the modern state system and the growing need to make the geography of the law match the geography of today's commercial realities? The rub lies in the fact that the modern state

*Thomas Schultz is SNF Research Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland, and Reader in Commercial Law, The Dickson Poon School of Law, King's College London, UK. Email: thomas.schultz@gradutateinstitute.ch, thomas.schultz@kcl.ac.uk

**Jason Mitchenson is Doctoral Research Assistant, International Law Department, Graduate Institute of International and Development Studies, Geneva, Switzerland, and PhD Candidate, Law Faculty, University of Geneva, Switzerland. He is also admitted as a solicitor in the Supreme Court of Queensland, Federal Court and High Court of Australia. Emails: jason.mitchenson@gradutateinstitute.ch, jason.mitchenson@etu.unige.ch.

system is built on ideas of sovereignty and non-interference, whilst today's commercial realities have become increasingly transnational: they spill over the borders of any given State but are not distinctly international (in the sense of "between States"). Whilst political, legislative and normative recommendations have been offered in abundance to reconcile these positions, modern transnational commerce (and the resolution of transnational disputes) is, in many ways, still hindered by traditional sovereign boundaries.

From a black-letter law perspective, an interesting yet so far quite under-researched part of the solution may be found in the principle of comity – this elusive concept that (mostly) everyone has heard of, but nobody can really define.[1] Australian law offers some particularly interesting insights in this regard. Comity thrives in Australia, though it is in half-covert action: a textbook account of Australian private international law tells us there is little to be seen, but our review of recent case law suggests a different reality.[2] In many cases, comity plays a definitive role in the development and application of Australian private international law rules and provides guidance to courts as to the appropriate exercise of their judicial power.

The fact that conventional literature has cold-shouldered the principle has led to insufficient knowledge, inadequate understanding and quite some confusion about what comity may or may not mean.[3] This confusion is of course to the

[1]This article uses the term *comity, doctrine of comity* or *concept of comity* interchangeably. The concept is also known in some jurisdictions to varying degrees as *comitas gentium*, *courtoisie internationale* and *Völkercourtoisie*. Prior studies of comity do exist but this has not dispelled the general confusion surrounding the principle. For other studies, in other contexts, see A Briggs, "The Principle of Comity in Private International Law" (2011) 354 *Hague Lectures* 65; L Collins, "Comity in Modern Private International Law", in JJ Fawcett (ed), *Reform and Development of Private International Law* (Oxford, Oxford University Press, 2002), 89; FJ Zamora Cabot, "Sobre la International Comity en el sistema de derecho internacional privado de los EE.UU" (2010) *Revista Electrónica de Estudios Internacionales*, 19; HE Yntema, "The Comity Doctrine" (1966) 65 *Michigan Law Review* 9; JR Paul, "The Transformation of International Comity" (2008) 71 *Law and Contemporary Problems* 19; JR Paul, "Comity in International Law" (1991) 32 *Harvard International Law Journal* 1; A Watson, *Joseph Story and the Comity of Errors* (London, University of Georgia Press, 1992); and DE Childress, "Comity as Conflict: Resituating International Comity as Conflict of Laws" (2010) 44 *U.C. Davis Law Review* 11.

[2]References to "comity" are extremely rare in Australian academic literature. One exception is Professor Mary Keyes who notes in *Jurisdiction in International Litigation* (Sydney, The Federation Press, 2005), 191–2 the relevance of comity in the context of granting anti-suit injunctions.

[3]Paul, *supra* n 1 at 19–20 notes that scholars and courts outside of Australia have characterised comity as a choice of law principle, a synonym for private international law, a rule of public international law, a moral obligation, expediency, courtesy, reciprocity, utility and diplomacy. Due to the lack of consideration of comity in Australian private international law literature, case law demonstrates that Australian courts have largely relied on foreign decisions to gain an understanding of comity.

benefit of those who assert that comity cannot play a significant role in the resolution of private international law issues.[4] But this conclusion is not self-evidently correct. There is confusion as to what comity entails – that is true. However, the case law demonstrates that from a judicial perspective comity continues to be considered an important and relevant part of Australian private international law.

This paper seeks to shed light on the importance of comity in the development and application of Australian private international law rules through a review of relevant case law. In doing so, it will attempt to sketch a functional definition of comity – one that takes into consideration comity's historical purpose and the way in which it is used by the Australian judiciary. Clarifying the meaning and role of comity through a functional definition may help unbridle comity's legal potential: the better it is understood, the better it can be applied and the more useful it becomes.

Importantly, this paper does not seek to analyse every instance of comity in Australian jurisprudence and should not be understood as a comprehensive guide to comity in Australia. Rather, its aim is to shed light on the judicial importance given to comity by the Australian judiciary and sketch a definition of comity in practice by reference to Australian case law. The primary purpose of this paper is to reposition comity as a useful and relevant principle of private international law worthy of further academic research. Whilst this paper focuses solely on Australian case law, its findings should be of interest to scholars and practitioners in other legal orders – particularly those that share a common legal tradition.[5]

B. The idea of comity

In 1648, after four years of negotiations, the Treaties of Westphalia ended the Thirty Years War.[6] In doing so, they contributed to the consolidation of the doctrine of sovereignty, thus helping to establish the legal-political foundations for the modern state.[7] In popular lore, the Treaties actually established the modern state, but this is an exaggeration.[8] Rather, the idea of sovereignty was merely implied as part of the negotiations of the Treaties.[9] It was thought that a clear

[4]Paul, *supra* n 1 at 19–20 notes that there is a perception that comity is too vague, incoherent, illusory and ephemeral to be of any use.

[5]Initial indications demonstrate that comity may play a similar role in the UK and to some extent in the US. Likewise, it should not be forgotten that comity is a civil law invention and thus may continue to play a role in civil law jurisdictions – particular those in Europe. Paul, *supra* n 1; Watson, *supra* n 1; and Briggs, *supra* n 1.

[6]L Gross, "The Peace of Westphalia" (1949) 42 *American Journal of International Law* 20.

[7]N Schrijver, "The Changing Nature of State Sovereignty" (1999) 70 *British Year Book of International Law* 65.

[8]M Koskenniemi, "The Politics of International Law" (1990) 1 *European Journal of International Law* 4.

[9]S Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" (2000) 2 *Journal of the History of International Law* 148 at 152.

distribution of sovereign power would be a means to end the Thirty Years War and reduce the risk that something similar would happen again in the future.[10] Two of the great components of sovereignty – the principles of self-determination and non-interference – helped establish an *inter*national legal scene and clarify who had the right to do what on that scene.[11]

The Thirty Years War had been fuelled by an unclear overlap of political, secular and spiritual power.[12] It was not only a bloody religious battle but also a great legal-political mess.[13] It was thought at the time that an era of peace would require the creation of clear-cut States with separate regulatory scopes. No more regulatory overlaps. No more legal-political tangles. The compartmentalisation of law yielded hope. In this sense, the doctrine of sovereignty was based on the idea that "good fences make good neighbours".

This compartmentalisation of law, of course, never really matched the geography of social and economic life.[14] The boundaries laid down by the doctrine of sovereignty never completely framed where people moved or how they interacted, let alone determined where actions exerted effects. Hence, the question quickly became – What were States to do with disputes that fell within the regulatory scope of more than one State? As international trade increased and multi-jurisdictional disputes became more frequent, it was clear there was a need to create a legal doctrine that would soften the sharp edges of the doctrine of sovereignty.[15] Enter comity, and at a distance a host of principles and rules of private international law inspired by it.[16]

Comity was created as a legal tool to meet the political need to uphold the doctrine of sovereignty, and thereby protect the foundational pillar of the modern state system, whilst at the same time recognise the commercial and judicial need for law to apply transnationally in certain circumstances.[17] This is still the role it plays today. It serves to adapt, through the separate but interconnected ideas of "recognition" and "restraint", the "Westphalian Equilibrium",[18] based on the doctrine of sovereignty,

[10]MN Shaw, *International Law* (Cambridge, CUP, 5th edn, 2003), 21 at 25.
[11]G Abi-Saab, "Cours général de droit international public" (1987) 207 *Hague Lectures* 15 at 48.
[12]Beaulac, *supra* n 9, 155.
[13]A Osiander, "Sovereignty, International Relations, and the Westphalian Myth" (2001) 55 *International Organization* 251.
[14]J Crawford, *The Creation of States in International Law* (Oxford, OUP, 2nd edn, 2007), 10.
[15]Childress, *supra* n 1, 20–2; Gross, *supra* n 6, 39; and Yntema, *supra* n 1, 26.
[16]T Schultz and D Holloway, "Les origines de la comity au carrefour du droit international privé et du droit international public" (2011) 138 *Journal du Droit International* 863 and T Schultz and D Holloway, "La comity dans l'histoire du droit international privé" (2012) 139 *Journal du Droit International* 571.
[17]K Lipstein, *Principles of the Conflict of Laws, National and International* (The Hague, Martinus Nijhoff, 1981), 14.
[18]JM Gillroy, *An Evolutionary Paradigm for International Law: Philosophical Method, David Hume, and the Essence of Sovereignty* (New York, Palgrave Macmillan, 2013).

to commercial and judicial realities. It operates as a balancing principle that helps judicial and legislative actors to accommodate the doctrine of sovereignty with concerns of doing justice to private litigants. If sovereignty embodies the systemic value of order that underpins the idea that "good fences make good neighbours", comity embodies, through the ideas of recognition and restraint, "the systemic value of reciprocal tolerance and goodwill".[19] Comity does so by softening the hard edges of the jurisdictional spheres of States laid down by the doctrine of sovereignty.

Comity's place in the ordering of legal systems may further be situated in the following manner – albeit with many simplifications relating to general problems concerning the ordering of legal systems. The doctrine of sovereignty in international law empowers, and to a certain extent requires, States to act within their regulatory domains.[20] These domains, however, are not without boundaries. A sovereign, the traditional doctrine goes, recognises no higher authority. On the international plane, this postulate translates into the principle of sovereign equality, and in a horizontal arrangement of state regulatory spheres. In this scenario, the orderly coexistence of equal sovereign powers is ensured by recognition that the regulatory power of States is, at the same time, legitimate and subject to limits.

How we perceive these limits has changed over time, echoing changes in the understanding of the concept of sovereignty. After a phase in which state jurisdiction was considered plenary and restricted by positive prohibitions only,[21] it is now ordinarily recognised that the regulatory power of States – and on a more general level, their sovereignty – can only extend as far as international law allows.[22] It is important to note that not every connecting factor (such as territoriality, nationality or passive personality) enjoys the same support in international law and no jurisdictional rule is a magic bullet against every possible jurisdictional overlap – in fact, concurrent jurisdictional competence is tolerated by international law.[23]

[19] *Société Nat'l Industrielle Aérospatiale v United States Dist. Court* (1987) 482 US 522, 555 per Justice Blackmum.

[20] A Mills, "Rethinking Jurisdiction in International Law" (2014) 84 *British Yearbook of International Law* 187 with further references to R Teitel, *Humanity's Law* (Oxford, OUP, 2011); A Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20 *European Journal of International Law* 513; E Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107 *American Journal of International Law* 295.

[21] The judgement of the Permanent Court of International Justice in the *Lotus* case is generally considered the high-water mark of this conception: *S.S. Lotus (France v Turkey)* (Merits), 1927 PCIJ Reports Series A No. 10.

[22] J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Leiden, Brill – Nijhoff, 2014), 65.

[23] For a more in-depth discussion about the meaning and realties of regulatory spheres and overlaps, see A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge, CUP, 2009) and T Schultz, "Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface" (2008) 19 *European Journal of International Law* 799.

Leaving aside the cases in which regulatory overlaps are the deliberate choice of States by way of agreement, it is worth noting that rules of jurisdiction perform two related functions. First, they aim to minimise the risk and occurrence of conflict arising; and second, they supply the legal tools to work out a solution when conflict does occur. Rules of private international law serve as an example – they too operate as "limits of international law jurisdiction", expressions of concern relating to the international allocation of regulatory authority, of which they may be deemed a domestic implementation.[24]

Comity, too, is one such instrument. It allows us to mediate those conflicts that may occur when more than one State believes it has a legitimate basis to exercise regulatory power. When a court or legislature must determine whether to "recognise" the legitimate exercise of regulatory power by another State, in situations of unavoidable conflict in which no rule provides an answer (or *satisfactory* answer) or where the applicable rule or rules require interpretation, comity, in principle, will come into play. Likewise, when a court or legislature must determine whether it has a legitimate claim that other States should "recognise" its own legitimate exercise of regulatory power, comity, in principle, will again come into play.

Comity allows States to "go beyond" the rules of jurisdiction (or soften their hard limits) by acknowledging that in certain circumstances there is a commercial and judicial need for one State to "recognise" the application or exercise of another State's laws or judicial power within its regulatory sphere. Since territoriality is the most accepted basis for the exercise of sovereign power, these scenarios will most likely, but not exclusively, arise in cases of jurisdictional assertions going beyond a State's borders. A conflict of regulatory spheres under different heads of jurisdiction is also possible.[25] In such circumstances, comity will provide for "recognition" of those laws or judicial powers so long as they do not constitute an undue infringement of sovereignty by either shaping or guiding the application of private international law rules.

By the same token, this idea of "recognition" encompasses a legitimate claim that the application of laws or the exercise of judicial power by one State should be "recognised" in another State if there is a sufficient commercial and judicial need to do so and it would not constitute an unacceptable challenge to that other State's sovereignty. What constitutes an "unacceptable" infringement of the doctrine of sovereignty in either circumstance is to be determined by weighing the gravity of the infringement against the commercial or judicial importance of the extra-jurisdictional use of regulatory powers. This balancing act, which comity embodies, is highly context specific, but a review of Australian case law provides significant guidance as to how comity is used for this purpose.

On the other hand, comity recognises that even if there is a commercial and judicial need to recognise the application of another State's laws or judicial

[24]Mills, *supra* n 23, 226 and 303.
[25]Mills, *supra* n 20.

power, it may constitute an unacceptable infringement of the doctrine of sovereignty. In such circumstances, comity will "restrain" those acts to the extent that they constitute such an infringement. For States seeking to apply laws or exercise judicial power beyond the boundaries laid down by the doctrine of sovereignty and specific agreements, comity requires "self-restraint" where it would constitute an undue infringement of another State's sovereignty. Likewise, comity enables States to "restrain" the effect of foreign laws and judicial acts that have been applied or exercised by a foreign State that come within their sovereign regulatory scope on the basis that it poses an unacceptable infringement of their sovereignty.

The result is that comity will be relevant in two common scenarios. The first is in circumstances where a court is, *prima facie*, permitted to apply domestic law or exercise its judicial power in an ostensibly unlimited manner, but it must determine how far and to what effect it would be appropriate. In these types of cases the question is one of "self-restraint" and whether or not the court can legitimately expect "recognition" of its acts from a foreign State. The second is in circumstances where a court must determine how far and to what extent it would be appropriate to recognise the effect of foreign laws or judicial power in its territory. In these types of cases the question is to what extent the court should "restrain" or "recognise" those foreign acts within its sovereign territory. In both cases a comity analysis will be appropriate, if not required, because behind each judicial act of recognition or restraint lies an intricate matrix of sovereign, commercial and judicial interests that are required to be reflected in the law. It bears noting that judicial power is not exercised for "reasons of comity". Rather, comity is the means by which courts weigh and balance the commercial and judicial need to permit the transnational application of law and the political need to uphold traditional conceptions of sovereignty.

Such an understanding of comity should provide useful guidance to courts regarding the appropriate exercise of their judicial power in individual private international law cases. The guidance will of course be soft, because it is for courts to determine whether the exercise of judicial power, in the circumstances of individual cases, will constitute an unacceptable infringement of the doctrine of sovereignty. However, even soft guidance may be critically helpful in drawing the right lines with regard to the exercise of judicial power in these types of cases. This is particularly so if that guidance is informed by a nuanced understanding of comity – one that takes into consideration its historical and systemic purpose and the interests it is attempting to reflect in the law. Indeed, an examination of Australian case law reveals many examples where comity has played an invaluable role in guiding the development and application of private international law rules in a manner consistent with relevant sovereign, commercial and judicial interests.

The balance of this article seeks to offer this examination by analysing three areas of Australian law where considerations of comity are particularly prevalent. These include: statutory interpretation and the construction of international

instruments and contracts; the determination of jurisdiction and the selection of forum; and the recognition of foreign judgements.[26]

C. Comity in the interpretation of statutes, international instruments and contracts

1. *Statutory interpretation*

The case law demonstrates that comity plays a key role in the interpretation of domestic legislation that has the potential to have an effect outside of Australia's sovereign boundaries. A long line of cases have created an interpretive principle, based on comity,[27] according to which courts should interpret domestic legislation, so far as the language permits, in a manner that does not constitute an unacceptable infringement of the doctrine of sovereignty. The principle can be said, analytically, to operate in two stages. The first is the creation of a legal presumption against interpreting legislation "extra-territorially"; and the second is one of residual interpretation when the assumption is rebutted.

The case law demonstrates that comity has formed the basis for the legal presumption that the legislature does not intend to deal with matters over which, according to the doctrine of sovereignty, jurisdiction rightfully belongs to another sovereign State. In 1908 the High Court held in *Jumbunna Coalmine No Liability*[28] that:

> Every statute is to be interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations or established rules of international law.

[26]As stated above, this article does not seek to analyse all instances of comity in Australian jurisprudence. Rather, it seeks to analyse areas of law where comity is particularly prevalent.

[27]It bears noting that the High Court, which is the final court of appeal in Australia, has not laid down a definitive definition of comity in Australia. However, it has on a number of occasions adopted and approved of the well-known definition of comity formulated by the United States Supreme Court in *Hilton v Guyot*, which reads as follows:

> "Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws:

Hilton v Guyot (1895) 159 US 113, 163–4. On the impact of this case, see L Collins, "The United States Supreme Court and the Principles of Comity: Evidence in Transnational Litigation" (2006) 8 Yearbook of Private International Law 53. For Australian decisions approving of this definition of comity, see most notably CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345, 395–6 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ and Lipohar v R (1999) 200 CLR 485, 100 per Gaudron, Gummow and Hayne JJ.

[28]*Jumbunna Coalmine No Liability v Victoria Coal Mines Association* (1908) 6 CLR 309, 363 per O'Connor J.

In 1938 the High Court reconfirmed its position in *Barcelo*[29] holding:

> It is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state.

More recent decisions of the High Court,[30] State Courts[31] and Federal Courts[32] have reaffirmed this position. Recently, in *B v T*[33] her Honour Lyons J held that:

> In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits … [T]his principle was based on the idea of comity of nations and that the legislature of one state is presumed not to deal with persons or matters the jurisdiction over which properly belongs to some other sovereign state.

However, it should be noted that comity forms the basis of a legal presumption – not a rule. Thus, it can be displaced or rebutted by wording to the contrary.[34] Usually, it will only be rebutted by explicit statutory language expressing the legislature's intention to legislate extra-territorially. If it is the clear intention of parliament, courts cannot refuse to apply and enforce legislation, even if it might constitute an unacceptable challenge to the doctrine of sovereignty.[35] In *Habib v Commonwealth of Australia*[36] Perram J held that:

[29] *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424 per Dixon J.
[30] *Chu Kheng Lim and Ors v Minister for Immigration* (1992) 176 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; and *Re Maritime Union of Australia; Ex Parte CSL Pacific Shipping Inc* (2003) 214 CLR 397.
[31] *McGee v Gilchrist-Humphrey* [2005] SASC 254; *Singh v Singh* [2009] WASCA 53; *B v T* [2008] 1 Qd R 33; and *R v Ahmad Ahmad* [2011] NTSC 71.
[32] *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1989) 22 FCR 305; and *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345.
[33] *B v T* [2008] 1 Qd R 33, 13–4 per Lyons J quoting with acceptance the position stated by DC Pearce and RS Geddes in *Statutory Interpretation in Australia* (Chatswood, New South Wales, Butterworths, 5th edn, 2001), 133.
[34] *Habib v Commonwealth of Australia* (2010) 183 FCR 61; *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345; and *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1989) 22 FCR 305.
[35] *Habib v Commonwealth of Australia* (2010) 183 FCR 61; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; and *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
[36] *Habib v Commonwealth of Australia* (2010) 183 FCR 61, 37 per Perram J.

> … comity between nations is a fine and proper thing, but it provides no basis whatsoever for this court to decline to exercise the jurisdiction conferred on it by parliament.

However, even when the presumption is rebutted, comity still plays a role of residual interpretation. Comity will still favour restriction of the judicial power to interpret legislation extra-territorially, but it is limited by the court's obligation to interpret legislation according to the intent of the legislature. What remains is the idea that legislation should be read, so far as possible, not to have an extra-territorial effect. For some, the application of a presumption as to the legislature's intent is artificial and unhelpful in the quest to determine the true application and scope of laws and legal principles.[37] However, as Dixon J held in *Barcelo*, the presumption exists to ensure that courts do not offend the sovereignty of foreign States, and thus undermine the doctrine of sovereignty.[38]

In this sense comity has guided the development and application of the presumption against extra-territoriality – strongly restricting the ability of courts to interpret legislation as having an effect outside Australian sovereign boundaries. However, comity only exists in the form of a presumption – not a rule. Arguably, if it were to exist in the form of a rule this would be too restrictive on domestic sovereignty and would restrict the courts from furthering legitimate commercial and judicial aims by extending the scope of legislation in certain cases. The presumption merely favours an interpretation against extra-territoriality on the basis that in most cases such an interpretation will unacceptably challenge the doctrine of sovereignty. By forming the basis for the presumption and guiding its application, comity is able to reflect relevant sovereign, commercial and judicial concerns in the law.

2. *International instruments and contracts*

Comity also plays a key role in the interpretation of international instruments and contracts. In this context comity places restrictions on the court's interpretive process in an effort to achieve the commercial and judicial aim of transnationally consistent interpretation. Comity is generally able to reconcile the political need to uphold the doctrine of sovereignty with this commercial and judicial aim because the act of interpreting international instruments and contracts is an essentially inward facing endeavour and there is little risk of courts offending the sovereignty of foreign States.

[37]Briggs, *supra* n 1, 96. Briggs notes that as with many attempts to explain legal principles by reference to the intention of the legislature it is simply not true. More often than not the legislature will not have given any thought to the appropriate scope of legislation.

[38]*Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424 per Dixon J.

In *Great China Metal*[39] the High Court held that it was "self-evidently" desirable for public international instruments, such as conventions and treaties, to be construed in a uniform manner and that Australian courts should strive to achieve this aim. Similar comments have been repeatedly made by the High Court on a number of other occasions before and after *Great China Metal*.[40] Likewise the High Court has noted on a number of occasions that this aim of transnationally consistent interpretation is consistent with the requirements of comity and should be viewed as the settled attitude of the High Court.[41] In particular, Kirby J noted in *Siemens Ltd*[42] that in the construction of public international treaties and conventions, comity requires that consideration be given to international case law to achieve the aim of uniform construction.[43]

Similar comments have also been made in relation to the interpretation of private instruments that have wide international application. However, the obligation comity places on courts to strive for a transnationally consistent interpretation does not appear to be as strong in the context of private international instruments as it is in the context of public international instruments. One particularly interesting case is the Full Federal Court's decision in *Leonie's Travel Pty Ltd*[44] where Landers and Rares JJ thought it necessary to extend the principle of transnational uniformity laid down by the High Court in relation to public international instruments to the construction of private international instruments. Their Honours held that:

> … there is much to commend the approach that domestic courts should strive to adopt a uniform construction of documents that have wide international application, even if their genesis is not an international treaty.[45]

In their Honours' opinion, private standard form contracts used in international business should be given a uniform construction and Australian courts should strive to achieve this aim.[46] Interestingly, Landers and Rares JJ held that in the

[39] *Great China Metal Industries Co Ltd v Malaysian International Shipping Berhad* (1998) 196 CLR 161, 38 per Gaudron, Gummow and Hayne JJ.
[40] *Shipping Corporation of India Ltd Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142; *De Lv Director-General, NSW Department of Community Services* (1996) 187 CLR 640; and *Povey v Qantas Airways Limited & Anor* (2005) 223 CLR 189.
[41] *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2004) 216 CLR 418, 154 per Kirby J making reference to *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142; *DeL v Director-General, NSW Department of Community Services* (1996) 187 CLR 640; and *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161.
[42] *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2004) 216 CLR 418, 154 per Kirby J.
[43] *Ibid*, 153–4 per Kirby J.
[44] *Leonie's Travel Pty Ltd v Qantas Airways Limited* [2010] FCAFC 37.
[45] *Ibid*, 48 per Landers and Rares JJ reaffirming the remarks made by Moore J in *Leonie's Travel Pty Limited v International Air Transport Association* [2009] FCA 280, 46.
[46] *Leonie's Travel Pty Ltd v Qantas Airways Limited* [2010] FCAFC 37, 58 per Landers and Rares JJ.

circumstances of the case a prior decision of the English Court of Appeal regarding the same issue should have been followed by the primary Judge, unless he considered that the decision was irrelevant or plainly wrong.[47] In light of the commercial and judicial need to strive for a transnationally consistent interpretation of private international instruments, their Honours held that comity demanded that the decisions of the English Court of Appeal be "recognised" and be given considerable "respect" in Australia. There was, in their opinion, an obvious commercial and judicial imperative for the courts of other nations to follow a decision of a court of the standing of the English Court of Appeal in cases concerning the international construction of commercial documents.[48] Whilst Landers and Rares JJ did not address the question, it can only be assumed that comity would require that this same "recognition and respect" be extended to the superior courts of other States.

The decision in *Leonie's Travel* demonstrates the Court's recognition that a strict application of the doctrine of sovereignty – one that gives no recognition to the decisions of foreign courts – is simply unable to accommodate the commercial and judicial need to construe international contracts in a uniform manner. In this case, the Court was able to use comity as a legal basis to permit foreign judicial acts to have effect in Australia where it would be commercially and judicially desirable to do so. Importantly, their Honours did not hold that comity required that Australian courts follow the prior decisions of English courts – it was not binding in the sense a superior decision of an Australian court would be. To do so would be offensive to Australian sovereignty and therefore constitute an unacceptable challenge to the doctrine of sovereignty. Rather, their Honours merely held that comity required that considerable respect be given to the prior English judgement and that courts should bear in mind whether it is commercially and judicially desirable that a different interpretation be used. In doing so, they were able to use comity to further the commercial and judicial aim of transnationally consistent interpretation without offending foreign or domestic sovereignty.

3. *Service outside the jurisdiction*

The case law demonstrates that considerations of comity have also played, and continue to play, a significant role in the development and application of the law surrounding service outside the jurisdiction. In particular, the case law helps to highlight how comity is used by the courts to reflect changing sovereign, commercial and judicial interests in the law. Below we review the role of comity in relevant case law concerning the service of originating applications and subpoenas outside the jurisdiction.

Service outside the jurisdiction is governed by the civil procedure rules of the Supreme Court in each State and Territory and the civil procedure rules of the

[47] *Ibid*.
[48] *Ibid*.

Federal Court and High Court.[49] Whilst similar in many regards, each set of rules is different. Regardless of these differences, in the context of discussing comity, one would expect the courts to interpret the law relating to service outside the jurisdiction in accordance with the general legal presumption against extra-territoriality. As demonstrated in Part C.1, comity plays a key role in restricting the interpretive function of the court in circumstances where domestic legislation or rules permit them to exercise judicial power outside of Australia's sovereign boundaries. However, a review of the case law demonstrates that comity works in a very different way in the context of service outside the jurisdiction.

The case law demonstrates that comity plays differing roles depending on the effect of the service on the doctrine of sovereignty. The more likely the service is to be perceived as a challenge to the doctrine of sovereignty the more likely it is that comity will place restrictions on the court's ability to effect service. For example, in circumstances where a party seeks leave of the court to issue a subpoena outside the jurisdiction, comity will place significant restrictions on the court's ability to grant such leave on the basis that to do so is a direct exercise of domestic judicial power in a foreign State. In most cases, such an exercise of power will be considered an unacceptable challenge to the doctrine of sovereignty. Conversely, in circumstances where a defendant applies to the court to set aside an originating application, comity will often not require that the court do so. This is because originating applications are generally not considered to be as grave an infringement to the doctrine of sovereignty as subpoenas – they merely serve to notify the defendant of the proceedings in Australia and give them the opportunity to choose whether or not to appear and defend those proceedings. Thus, whilst there may be commercial and judicial reasons to serve both subpoenas and originating applications, comity will place significant restrictions on the ability to serve the former, rather than the latter, because of its effect on foreign sovereignty.

The case law allows us to make further observations as to comity's role and ability to shape the law. In particular, the case law demonstrates that comity has been used effectively to reflect changing perceptions of sovereignty, commerciality and justice in the law. Changing perceptions of sovereignty and the need to develop transnational law, combined with developments in communications and transportation technology, have meant that comity need not act with the same restrictions as it did in the past. For example, in the context of originating applications, comity plays a far less restrictive role than it once did, permitting service of originating applications outside the jurisdiction in furtherance of commercial and judicial goals. Likewise, recent case law demonstrates that the longstanding restrictive nature of comity in the context of subpoenas may also be changing.

[49]The court has no inherent jurisdiction where such a statutory power does not exist: *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250; *Ward v Interag Pty Ltd* [1985] 2 Qd R 552; *Re Austral Oil Estates (in liq)* (1986) 7 NSWLR 440; and *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250.

In particular, a heated debate has arisen between members of the New South Wales Judiciary as to whether comity should reflect these same changing perceptions of sovereignty, commerciality and justice in the law concerning subpoenas.

(a) Serving originating applications outside the jurisdiction

The law regarding the service of originating applications differs depending on the applicable civil procedure rules. Most civil procedure rules permit service outside the jurisdiction without prior leave of the court.[50] In order for a plaintiff to serve an originating application outside the jurisdiction without leave of the court, the plaintiff should satisfy the necessary criteria contained in the rules.[51] Such criteria exist to establish a connection with the matter so that the court is not likely to be perceived as inappropriately assuming jurisdiction.[52] If the plaintiff cannot fulfil the criteria for service without leave they may apply to the court seeking leave to serve outside the jurisdiction.[53]

In general, an originating application will be served outside the jurisdiction without prior leave of the court. Thus, comity will not be relevant at the service stage. However, considerations of comity do become relevant in circumstances where the plaintiff seeks leave to proceed[54] against the defendant (where the defendant does not enter an appearance) or the defendant applies to the court to set aside the originating application.[55] In the past, considerations of comity placed significant restrictions on the court's power to grant leave to proceed or refuse to set aside the originating application.[56] However, changing perceptions of sovereignty and the

[50]For example, see *New South Wales Uniform Civil Procedure Rules 2005 Rule 11.2*; also see the observations of Debelle J, 89 in *K and S Corporation Ltd and Anor v Number 1 Betting Shop Ltd and Ors* [2005] SASC 228:

> Most, if not all, of the Supreme Courts of the States and Territories have adopted a rule which, though similar to O 11 in England as to the circumstances in which the court will exercise jurisdiction over a foreign national out of the jurisdiction, differs in that leave to serve is not required.

[51]For example, see *New South Wales Uniform Civil Procedure Rules 2005 Rule 11.2 and Schedule 6*. It should be noted that because service is not subject to leave of the court, unauthorised service is possible.
[52]For example, see *New South Wales Uniform Civil Procedure Rules 2005 Schedule 6*.
[53]For example, see *New South Wales Uniform Civil Procedure Rules 2005 Rule 11.5; Court Procedure Rules 2006 (ACT), Reg 6505*: "(1) The court may give leave for service outside Australia of (a) an originating process if service outside Australia is not allowed under *Reg 6501* (Service outside Australia – service of originating process without leave)".
[54]For example, see *New South Wales Uniform Civil Procedure Rules 2005 Rule 11.4.*
[55]For example, see *New South Wales Uniform Civil Procedure Rules 2005 Rule 11.7.*
[56]*Agar v Hyde* (2000) 201 CLR 552, 570–1 per Gaudron, McHugh, Gummow and Hayne JJ: "Considerations of comity, and consequent restraint, have informed many of the reported decisions about service out of the jurisdiction".

commercial and judicial need to develop transnational law, combined with developments in communications and transportation technology, have meant that comity need not act with the same restrictions as it once did.[57]

The High Court's decision in *Agar*[58] is particularly illustrative of comity's ability to reflect these changing perceptions in the law. *Agar* concerned an appeal from the New South Wales Court of Appeal which had refused to set aside service of an originating application outside the jurisdiction. Whilst the High Court noted that comity had traditionally played a restrictive role in the context of originating applications, changing perceptions of sovereignty and the commercial and judicial need to develop transnational law, combined with developments in communications and transportation technology required that comity reflect these changes in the law. The High Court held:

> Considerations of comity, and consequent restraint, have informed many of the reported decisions about service out of the jurisdiction. It is, however important to notice that rules of court, or local statutes, providing for service outside the jurisdiction are now commonplace – at least in jurisdictions whose legal systems have been formed or influenced by common law traditions. Further, as the Court of Appeal rightly noted in its reasons in these matters, contemporary developments in communications and transport make the degree of "inconvenience and annoyance" to which a foreign defendant would be put, if brought into the courts of this jurisdiction, "of a qualitatively different order to that which existed in 1885".
>
> The considerations of comity and restraint, to which reference has so often been made in cases concerning service out of the jurisdiction, will often be of greatest relevance in considering questions of forum non conveniens. The starting point for the present enquiry, however, must be the terms of the Rules, not any general considerations of the kind just mentioned.[59]

In the High Court's opinion, in circumstances where the civil procedure rules provided plaintiffs with the power to serve originating applications outside the jurisdiction without leave of the court, comity was no longer required to play such a restrictive role. Rather, modern conceptions of sovereignty, commerciality and justice, combined with contemporary developments in communications and transport technology, meant that States were less likely to perceive originating applications as a challenge to their sovereignty and recognise the commercial and judicial need for originating applications to be served within their jurisdiction.

However, comity does play a more restrictive role in circumstances where leave is required by the relevant civil procedure rules. Take for example the

[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.

cases of *K and S Corporation*[60] and *Lightsource Technologies.*[61] In the former case, which concerned leave to issue an inter partes summons (which is similar to an originating application) outside the jurisdiction, Debelle J held that the fact the court is given discretion under the appropriate rules to grant or refuse leave implies that applications to serve outside the jurisdiction should not be granted as a matter of course. Whether the discretion should be exercised is a question for comity. In Debelle J's opinion comity still favoured restriction of the power as a means of ensuring that courts would not "overreach" and cause offence to other sovereign States. However, his Honour held that the High Court's decision in *Agar* meant that such (comity-induced) restrictions ought not to apply with the same force as they once did.[62]

Similar comments were made in *Lightsource Technologies*,[63] which concerned an application to grant leave to serve an originating application outside the jurisdiction.[64] Refshauge J held that whilst comity had traditionally limited the judicial power to grant leave, *Agar* had called for an adjustment of its effect to more modern times, marked by changes in the international legal landscape and developments in communications technology. In his Honour's opinion, comity was to be used to reflect modern conceptions of sovereignty, commerciality and justice in the law which ultimately differed to those of the past.[65] In making these observations his Honour ultimately granted leave.

In the context of originating applications, it is important to note that the role of comity has not changed. Comity is still used by the courts to reflect relevant sovereign, commercial and judicial interests in the law. However, its effect has changed as a result of changes in these interests. More specifically, the case law demonstrates that comity no longer acts with the same level of restraint it once did.[66] Instead, it seeks to reflect in the law modern conceptions of these same interests.

[60] *K and S Corporation Ltd and Anor v Number 1 Betting Shop Ltd and Ors* [2005] SASC 228. Note that whilst this case concerned the application of the old South Australian civil procedure rules (*Supreme Court Rules 1987*) leave is still required for cases that do not satisfy the criteria for service without leave under the new rules (*Supreme Court Civil Rules 2006*). See rule 18.02 and 18.07 under the *Supreme Court Rules 1987* and rule 40 and 41 under the *Supreme Court Civil Rules 2006.*

[61] *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies Ab* [2011] ACTSC 59.

[62] *K and S Corporation Ltd and Anor v Number 1 Betting Shop Ltd and Ors* [2005] SASC 228, 90–1 per Debelle J.

[63] *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies Ab* [2011] ACTSC 59.

[64] The plaintiff had sought leave to serve the originating application outside Australia under *Court Procedure Rules 2006 (ACT), Reg 6505(1)(a)* which provides that the court may grant leave for service outside Australia for an originating application if service is not allowed under *Reg 6501* (service outside of Australia where leave is not required).

[65] *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies Ab* [2011] ACTSC 59, 80–1 per Refshauge J.

[66] *Agar v Hyde* (2000) 201 CLR 552, 571 per Gaudron, McHugh, Gummow and Hayne JJ.

Changes in perceptions of these interests, combined with developments in communications and transport technology, means that States are less likely to consider the service of originating applications in their territory as an infringement of their sovereignty and more likely to recognise the commercial and judicial need for such service. In these circumstances, comity need not act with the same restraint it once did and may help facilitate the development of transnational law in furtherance of relevant commercial and judicial aims.

The criteria that parties must satisfy to be permitted to serve without leave ensures that there will be little to no interference with the sovereignty of foreign State and that the service of originating applications will not pose an unacceptable challenge to the doctrine of sovereignty. In circumstances where parties do not satisfy the criteria they will be required to seek leave of the court to serve outside the jurisdiction. However, the decision in *Agar* means that considerations of comity need not act with the same restrictive force they once did. Such a position enables courts to establish a balance between facilitating commercial and judicial interests whilst protecting the doctrine of sovereignty.

(b) Serving subpoenas outside the jurisdiction

Subpoenas require leave of the court as they are, in effect, a compulsory order of the court requiring a party to appear or do some act. A person who is issued with a subpoena, but fails to comply with it, will be liable for punishment for failing to comply with an order of the court. Thus, the granting of leave to issue a subpoena constitutes a stronger and more direct exercise of judicial power because of its compulsive nature. In 1990, Rogers CJ Comm D in *Arhill*[67] summarised the position with regard to the service of subpoenas outside the jurisdiction:

> It is at the heart of the exercise of jurisdiction, by courts taking their system from England that, jurisdiction rests on presence or submission. Relevantly that is recognised in the concept that the courts of a State will exercise jurisdiction over persons upon whom service may be effected within the boundaries of the State, or those who submit. Admittedly, that concept has received some extension or enlargement … Today, almost every sophisticated court system permits the service of process outside the territorial jurisdiction of the State, in certain specified circumstances. However, these circumstances are, in every case, most carefully defined in a manner which maintains a relationship between the action, in relation to which the process is sought to be served, and the State. Even so, the exercise of such jurisdiction has been described as "exorbitant" jurisdiction …
>
> Another way of stating the point is, "that a foreigner, resident abroad, will not lightly be subjected to a local jurisdiction". The basis of that approach lies essentially in the respect which a State has for the sovereignty of another State. In other words, without

[67] *Arhill Pty Limited v General Terminal Company Pty Limited & Ors* (1990) 23 NSWLR 545.

> the consent of the other State, the sovereign does not seek to exercise its rights and powers, in relation to legal proceedings, within the territory of another …
>
> [There is] clear [statutory] authority for the Court to give leave to serve a subpoena outside Australia. The fact that an order made pursuant to it could, in some instances, involve an infringement of the sovereignty of another country does not mean that it is a reason for holding the rule to be invalid. Nonetheless, the rule should be construed consistently with "the established criteria of international law with regard to comity".[68]

For Rogers CJ Comm D, this meant that it would be contrary to comity to grant leave to issue a subpoena outside the jurisdiction in the case at hand. This was so even though the relevant civil procedure rule contained the necessary power to grant it. In essence, the decision in *Arhill* meant that the power to grant leave should only be exercised in exceptional circumstances.[69] The rationale for such a position is simple – where one State seeks to exercise its domestic judicial power in the territory of another, this is likely to be considered by the latter as a breach of its sovereignty.

When *Arhill* was decided in 1990, comity was used by the courts to reinforce the political need to uphold the doctrine of sovereignty. Whilst comity did not constitute a complete bar to the exercise of the judicial power, it did culminate in the creation of precedent that strongly favoured restriction of the judicial power even where there were significant commercial and judicial reasons for its exercise.[70] Later decisions after 2000 demonstrate a similar position.[71] For example, in the cases of *Stemcor*[72]and *Federal Treasury Enterprise (FKP) Sojuzplodoimport*[73] both Courts considered that the exercise of the judicial power to grant leave to issue a subpoena outside the jurisdiction would, in nearly all cases, constitute

[68]*Ibid*, 550–3 per Rogers CJ Comm D.

[69]*Ibid*, 553 per Rogers CJ Comm D. There is a multitude of cases to the same effect as *Arhill*, each holding that the relevant rule did not confer the judicial power to issue a subpoena when interpreted in accordance with comity, or that it would not have been appropriate to grant leave to issue a subpoena because to do so would infringe the sovereignty of the foreign State: see, for example, *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250; *Gao v Zhu* [2002] VSC 64; *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391; *Ives v Lim* [2010] WASC 136; *Levy Schneider v Caesarstone Australia Pty Ltd* [2012] VSC 126; and *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558.

[70]See the decision of Rogers CJ Comm D in *Arhill Pty Limited v General Terminal Company Pty Limited & Ors* (1990) 23 NSWLR 545 where his Honour conducted a comprehensive review of the case law up to that point.

[71]*Gao v Zhu* [2002] VSC 64; *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391; *Ives v Lim* [2010] WASC 136; *Levy Schneider v Caesarstone Australia Pty Ltd* [2012] VSC 126; and *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558.

[72]*Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391.

[73]*Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558.

an unacceptable challenge to the doctrine of sovereignty. The Courts acknowledged the commercial and judicial benefit of exercising their judicial power transnationally in both cases, but ultimately held that considerations of sovereignty would be offended if the power were to be exercised.[74]

However, recent case law demonstrates that perhaps the effect of comity in shaping the law surrounding subpoenas is changing. In 2012 Hallen AsJ in the New South Wales Supreme Court case of *Caswell v Sony/Atv Music Publishing (Australia) Pty Ltd*,[75] held that despite the fact *Agar* concerned the setting aside of an originating application, the decision of the High Court represented a general change in the effect of comity in all matters regarding service outside the jurisdiction. This was so not only in the context of originating applications but also with regard to subpoenas.

> In this day and age, in a highly integrated world economy, I am of the view that the principle of comity [insofar as it favours the restriction of judicial power] may have less weight than it did in the past. Developments in communication and transport are practical considerations that should also be considered. Issues of extraterritoriality must now be viewed in the light of the substantial changes that have taken place, in recent times, in the way businesses communicate with each other. As is obvious from the connection between the Defendant and the Applicant, the business of each operates in a global economy.
>
> This view is supported by what was noted by Gaudron, McHugh, Gummow and Hayne JJ in Agar v Hyde … albeit dealing with service of originating process outside the jurisdiction …
>
> I accept, however, that whilst the principle of comity should be adjusted in the light of a changing world order, this is not to say that those principles should be ignored or diminished. They are clearly relevant at the discretionary phase. I have borne these principles in mind.[76]

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[74] *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391, 11–2 per Allsop J:

> I am not prepared to grant leave to issue the subpoena even assuming that the court has power … I would adopt the approach of Rogers CJ Comm D in *Arhill* and view the service of an order upon a German company demanding that it do something in Australia on pain of punishment in proceedings to which it has not submitted as such an invasion of German sovereignty as not to be contemplated except in the most exceptional circumstances.

In *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558, 15–7 per Black CJ, Allsop and Middleton JJ, the Federal Court set aside a grant of leave to issue a subpoena on the basis that the primary Judge failed to act with the requisite caution comity demanded when there is an intrusion upon the sovereignty of a foreign State. Their Honours held that the order clearly intruded upon the sovereignty of the foreign State, even though it was indirect and possibly only as a matter of perception. They also held that the approach of Rogers CJ Comm D in *Arhill* and Allsop J in *Steamcor* should have been adopted by the primary Judge.

[75] *Caswell v Sony/Atv Music Publishing (Australia) Pty Ltd* [2012] NSWSC 986.

[76] *Ibid*, 117–9 per Hallen AsJ.

Ultimately, his Honour refused to set aside a grant of leave to issue a subpoena outside the jurisdiction. His Honour held that the applicable legal provision established the Court's power to grant leave to issue subpoenas outside the jurisdiction and comity did not preclude the exercise of that power. In his Honour's view, if the effect of comity is adjusted in light of the "changing world order", as it should be, then the circumstances of the case meant that comity should not act to compel the Court to set aside the subpoena.[77] His Honour's held that comity is still an important and relevant principle but it was required to reflect changed conceptions of sovereignty, commerciality and justice, and developments in communications and transport technology, in the law.

However, the decision of Hallen AsJ in *Caswell* has not been met with unanimous enthusiasm. Only one year after the decision in *Caswell*, White J of the New South Wales Supreme Court came to the opposite conclusion in *Gloucester.*[78] For White J, whilst the applicable civil procedure rules established the Court's power to grant leave to issue subpoenas outside the jurisdiction, considerations of comity required the Court restrain itself from exercising that power in most cases.[79] It would indeed in most cases, he held, amount to an inappropriate exercise of the judicial power of an Australian court in a foreign State.[80]

White J noted that the documents sought by the subpoena in the case at hand were likely relevant to the determination of the issues raised and there was a judicial interest in granting leave to serve the subpoena.[81] However, his Honour was particularly critical of the position taken by Hallen AsJ in *Caswell* that changes in the legal landscape and developments in communications technology meant that foreign States would be more relaxed than they would formerly have been to the exercise of foreign judicial power in their territory.[82] In his view, despite the judicial interest in granting the subpoena, the service of a subpoena in a foreign State would constitute an unacceptable challenge to the doctrine of sovereignty.[83] Consistent with this approach, White J held that there is only one category of case where leave to issue subpoenas outside the jurisdiction may be granted as a matter of course – that is, cases where there is evidence that the foreign State will not object to the subpoenas being issued in its territory.[84]

[77] *Ibid*, 119 and 126 per Hallen AsJ.
[78] *Gloucester (Sub-Holdings 1) Pty Ltd v Chief Cmr of State Revenue* [2013] NSWSC 1419.
[79] *Ibid*, 9–14 per White J.
[80] *Ibid*, 14 per White J.
[81] *Ibid*, 9 per White J.
[82] *Ibid*, 39 per White J.
[83] *Ibid*, 9–11 per White J.
[84] *Ibid*, 30 per White J. For example, in *Sweeney v Howard* [2007] NSWSC 262 and *B v T* [2008] 1 Qd R 33 the New South Wales Supreme Court and Queensland Supreme Court respectively accepted evidence made public by the government of the UK that it did not consider service in the UK of subpoenas issued by foreign courts to be an interference with its sovereignty.

It is important to note that the disagreement between Hallen AsJ and White J is not in regard to the content, purpose or role of comity. Rather, the disagreement is to comity's ultimate effect – the former considered the issuance of the subpoena not to infringe the doctrine of sovereignty whilst the latter did. In White J's opinion, the principle in *Agar* could not be extended to the context of issuing subpoenas, because subpoenas pose a greater challenge to the sovereignty of foreign States than originating applications. The difference is that service of an originating application merely notifies the defendant of the proceedings in Australia and gives them the opportunity to choose whether or not to appear and defend those proceedings. Conversely, granting leave to issue a subpoena constitutes a stronger, more direct exercise of judicial power because of its compulsive nature. A person who is issued with a subpoena, but fails to comply with it, will be liable for punishment for failing to comply with an order of the court. An originating application has no coercive power, but a subpoena compels the recipient to do something with the penalty for non-compliance being contempt of court.[85]

Thus, the debate between the two Justices is not about whether or not comity is relevant or important – the case law clearly demonstrates this to be the case. Rather, the debate is about where the line should be drawn – that is, when should comity permit the exercise of judicial power and when should it restrain it. To Hallen AsJ, a modern informed version of comity should favour a more transnational approach. Comity should not restrict courts from exercising their judicial power to grant leave to serve both originating applications and subpoenas where it is commercially and judicially desirable to do so because changes in world relations, technology and the legal landscape mean that foreign States are less likely to perceive such actions as an infringement of their sovereignty. Conversely, to White J, who favoured a more conservative view of international relations, comity should continue to favour restriction of such judicial power because it is likely to still be considered by foreign States to be an unacceptable challenge to their sovereignty. To White J, whilst the service of an originating application in a foreign State fell within what was acceptable, the issuance of subpoenas in foreign States will generally fall outside of what is considered acceptable.

The debate between the two Justices demonstrates that comity is particularly relevant in this area of law. In each case, leave was heavily dependent on the Court's comity-based analysis. Furthermore, whilst some may consider Hallen AsJ's decision "too liberal" or White J's decision "too conservative", both cases demonstrate the effectiveness of comity as a legal tool to shape law in a manner consistent with sovereign, commercial and judicial interests. Evidently, a

[85] *Gloucester (Sub-Holdings 1) Pty Ltd v Chief Cmr of State Revenue* [2013] NSWSC 1419, 31–2 per White J. A similar distinction was made by the United States Court of Appeal for the District of Columbia in *Federal Trade Commission v Compagnie de Saint-Gobain-Pont-à-Mousson* 636 F 2d 1300 (DC Cir 1980), 1311.

nuanced understanding of comity – including its historical purpose and the interests it seeks to reflect in the law – will provide courts with the guidance they need to exercise their judicial power appropriately in individual cases.

4. *Service outside the jurisdiction in accordance with international conventions*

When service is conducted in accordance with a valid international convention there will be no risk of infringing the sovereignty of foreign States. Consequently, when a foreign State does not perceive service within its jurisdiction as a breach of its sovereignty, comity will have no role to play. Two recent examples of cases concerning service in accordance with international conventions can be seen in the Federal Court decisions of *Clifton (Liquidator), Re Solar Shop Australia Pty Ltd (In L)*[86] and *Donnelly, Re Advance Finance Proprietary Ltd (in liq)*.[87]

In *Clifton*, White J (who also delivered the judgement in *Gloucester*) held that leave to serve an originating application in China would not raise any issues of comity if it were served in accordance with the Hague Convention to which Australia and China were both party to. Likewise, in *Donnelly*, which dealt with an examination summons, Farrell J held that service carried out in accordance with accepted procedures for international proceedings demonstrated that a foreign State would not perceive service within its territory as a breach of its sovereignty. Accordingly, service in this manner would not challenge the doctrine of sovereignty.

5. *Domestic law that requires the contravention of foreign law*

Implicitly ordering the contravention of foreign law can also amount to a challenge of a foreign State's sovereignty – a challenge of the type that comity takes into consideration, and weighs against often competing domestic sovereign interests and commercial and judicial necessity. In *Suzlon Energy Ltd*[88] three Swiss banks applied to set aside notices to produce documents or an order that each bank be excused from producing documents on the basis that compliance with the notices would result in each bank being required to contravene the Swiss Federal Banking Act and/or the Swiss Criminal Code. Rares J held that the defendants were put in the impossible position where compliance with one set of laws would result in contravention of the other.[89] He held that the defendants should not be required to answer the notices to produce as comity requires that the courts of Australia do no compel persons to contravene the laws of foreign States.[90]

[86] *Clifton (Liquidator), Re Solar Shop Australia Pty Ltd (In L)* [2014] FCA 891.
[87] *Donnelly, Re Advance Finance Proprietary Ltd (in liq)* [2013] FCA 514.
[88] *Suzlon Energy Ltd v Bangad* (2011) 198 FCR 1.
[89] *Ibid*, 41 per Rares J.
[90] *Ibid*, 55 per Rares J.

In this sense comity provides courts with a legal basis by which they retain power to refuse specific relief if, by granting such relief, a person is compelled to contravene the laws of a foreign jurisdiction.[91] This power exists, to a large extent, to ensure courts do not offend the sovereignty of foreign States.[92] However, comity does not act as an absolute bar to the making of orders that may compel litigants to contravene foreign law.[93] What it requires is that the court assess whether there are domestic sovereign, commercial and judicial concerns at stake that are so great that the court should compel the litigant in the circumstances of the particular case. Whether the interests of enforcing a particular law are so commercially and judicially necessary (and important to the domestic sovereignty of Australia) as to warrant its enforcement depends on a number of factors including the significance of the proceedings, public interest, criminal penalties and the availability of alternate means by which a party may comply with the order without the risk of contravening foreign law.[94]

The general position is that comity has formed the basis for precedent which strongly favours restriction of the judicial power to grant orders or enforce laws that have the potential to infringe the laws of foreign States. This is the case even in circumstances where the commercial and judicial reasons for granting an order or enforcing a particular law are quite significant.[95]

D. The determination of jurisdiction and the selection of forum

1. *Stay of proceedings on grounds of* forum non conveniens *and the granting of anti-suit injunctions*

Comity plays one of its most definitive and well-known roles in cases concerning stays on grounds of *forum non conveniens* and the granting of anti-suit injunctions. In particular, the role of comity has gained most attention in the context of granting anti-suit injunctions. This is because many States, particularly those from civil law traditions, consider the use of anti-suit injunctions to be a breach of their

[91] *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531, 545B–C per Lehane J (Lockhart and Foster JJ agreeing); *Suzlon Energy Ltd v Bangad* (2011) 198 FCR 1, 43 per Rares J; *Bank of Valletta PLC v National Crime Authority* (1999) 90 FCR 565, 567 per Wilcox, Whitlam and Lehane JJ.

[92] *Suzlon Energy Ltd v Bangad* (2011) 198 FCR 1 per Rares J applying the definition of comity adopted by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395–6 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

[93] *Michael Wilson and Partners Ltd v Nicholls* (2008) 74 NSWLR 218 and *Nexans SA RCS Paris 393 525 852 v Australian Competition and Consumer Commission* [2014] FCA 255.

[94] *Bank of Valletta PLC v National Crime Authority* (1999) 90 FCR 565; *Nexans SA RCS Paris 393 525 852 v Australian Competition and Consumer Commission* [2014] FCA 255; and *Hua Wang Bank Berhad v Commissioner of Taxation* (2013) 296 ALR 479.

[95] *Hua Wang Bank Berhad v Commissioner of Taxation* (2013) 296 ALR 479; *Suzlon Energy Ltd v Bangad* (2011) 198 FCR 1; and *Nexans SA RCS Paris 393 525 852 v Australian Competition and Consumer Commission* [2014] FCA 255.

sovereignty regardless of the commercial and judicial reasons for which they were granted.[96]

From a commercial and judicial point of view, disputes should generally be litigated in the court with which the matter has the strongest connection. The idea is that justice is more likely to be served, and in a more economical fashion, if the court which entertains the matter is the court which is the closest to the matter. Anti-suit injunctions and stays on grounds of *forum non conveniens* are aimed at furthering these commercial and judicial aims. However, their application is necessarily tempered by concerns for sovereignty – both foreign and domestic. Thus, courts have used comity to shape and develop the law surrounding anti-suit injunctions and *forum non conveniens* in order to reflect these nuanced sovereign, commercial and judicial interests in the law.

(a) The role of comity in granting stay orders on grounds of forum non conveniens

In this area of law the principle of comity has shaped the development and application of the doctrine of *forum non conveniens*. In particular, the adoption of the "clearly inappropriate forum" test now used by Australian courts was based on the perception that it is more in conformance with the dictates of comity than the "more appropriate forum" test found in English jurisprudence. The development and application of the doctrine permits Australian courts to reflect in the law relevant sovereign, commercial and judicial needs from an Australian perspective.

In England, the House of Lords in *Spiliada*[97] laid down the "more appropriate forum" test for granting stays on grounds of *forum non conveniens*. Lord Goff (with whom the other Law Lords agreed) held that the burden resting on the party applying for the stay "… is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum".[98] Thus, in circumstances where there is another forum which is the natural or more appropriate forum, English courts will ordinarily grant a stay unless there are extenuating circumstances that make it unjust to do so.

In Australia, the High Court rejected the "more appropriate forum" test as it exists in England, instead favouring the inward facing "clearly inappropriate

[96] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 389–90 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. See also the decision of the European Court of Justice in *Turner v Grovit* [2004] ECR 1–3565.

[97] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. This paper does not contemplate the legal status of *forum non conveniens* in England as a result of the UK's participation in the European Union. Rather, the discussion is purely used to demonstrate how considerations of comity shaped the adoption of a different test in Australia.

[98] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 477–8 per Lord Goff.

forum" test.[99] In Australia, the touchstone is inappropriateness, not comparative appropriateness. Thus, the focus of the test is on the inappropriateness of the Australian court to resolve the dispute, not the comparative appropriateness of other forums. An Australian court does not become an inappropriate forum simply because another forum is deemed more appropriate.[100] The test thereby becomes significantly more onerous for the party seeking the stay.

The High Court's decision to adopt the "clearly inappropriate forum" test over the English "more appropriate forum" test was largely based on the High Court's opinion that the "clearly inappropriate forum" test was more in conformance with the requirements of comity.[101] When determining whether a stay should be granted, the "more appropriate forum" test used in England requires that courts consider whether or not the plaintiff will obtain justice in the foreign jurisdiction.[102] The High Court held that a test that requires a court to pass judgement on the quality or willingness of a foreign court to deliver justice is particularly offensive to the sovereignty of foreign States and therefore posed an unacceptable challenge to the doctrine of sovereignty.[103]

Conversely, the High Court was of the opinion that the "clearly inappropriate forum" test was more respectful of foreign sovereignty as it merely required that the Australian court determine its own appropriateness to be the forum to entertain a particular matter. The High Court held that the fact the test was inward facing –

[99]In *CSR Ltd*, the High Court held that the test which governs stay applications is that which was stated earlier by the High Court in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390–1 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. In *Voth*, the High Court unanimously declined to adopt the "more appropriate forum" test adopted by the English House of Lords in *Spiliada* and instead adopted the test laid down by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, namely that a stay on grounds of *forum non conveniens* may only be granted if the Australian court is a "clearly inappropriate forum". It bears noting that in *Voth*, Mason CJ, Deane, Dawson and Gaudron JJ provided a joint judgement favouring the "clearly inappropriate forum" test over the adoption of the "more appropriate forum" test established by the House of Lords in *Spiliada*. Brennan J, despite preferring a different formulation of the test, expressed his support for the position of the majority holding that it was more important that the test be authoritatively settled than adhering to his own personal preference: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 572 per Brennan J.

[100]*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 400–1 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; and *Regie Nationale des Usines Renault SA v ZHANG* (2002) 210 CLR 503.

[101]*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 per Mason CJ, Deane, Dawson and Gaudron JJ.

[102]*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 478 per Lord Goff and *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 per Mason CJ, Deane, Dawson and Gaudron JJ.

[103]*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 per Mason CJ, Deane, Dawson and Gaudron JJ citing the High Court's earlier decision in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

in that it evaluated the Australian court's appropriateness rather than the foreign court's ability or willingness to deliver justice – was more in conformance with the commands of comity.[104]

Interestingly however, the High Court seemed to overlook the fact that in certain cases the "clearly inappropriate forum" test may also contradict the dictates of comity. Whilst the High Court adopted the "clearly inappropriate forum" test to avoid having to pass judgement on the competency or willingness of foreign courts, the result of the test is that in some cases Australian courts will not grant a stay despite a foreign court being the natural or more appropriate forum. In circumstances where it is clear that a foreign court is clearly more suitable than the Australian court, but it cannot be said that the Australian court itself is "clearly inappropriate", Australian courts will refuse to grant a stay. Such a result is contrary to considerations of comity for it offends the sovereign interests of foreign States who have a legitimate, and potentially stronger, sovereign interest in entertaining the dispute and fails to further the commercial and judicial aim of allowing the most appropriate forum to entertain the matter.[105]

In many cases however, comity is able to reflect relevant sovereign, commercial and judicial concerns in the law. One particularly instructive example of its ability to do so is the 2013 case of *Telesto*[106] where Ward J granted a stay on grounds of *forum non conveniens* because parallel proceedings were already on foot in Singapore and because the High Court of Singapore had granted an anti-suit injunction against the plaintiff from continuing proceedings in the New South Wales Supreme Court. In that case Ward J held that comity required that the New South Wales Supreme Court give "due recognition" to the judicial acts of Singapore when determining whether New South Wales was a "clearly inappropriate forum" for the resolution of the dispute. Comity did not require the Court to give effect to the foreign anti-suit injunction in Australia. Rather, what it required was that the parallel proceedings and anti-suit injunction be taken into account as a factor in determining whether New South Wales was a "clearly inappropriate forum".[107] In *Telesto*, her Honour held that whilst the anti-suit injunction was not, of itself, capable of making the New South Wales Supreme Court a "clearly inappropriate forum", when combined with the fact

[104] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559–60 per Mason CJ, Deane, Dawson and Gaudron JJ; and *Henry v Henry* (1996) 185 CLR 571.

[105] The High Court did note that the difference between the "clearly inappropriate forum" test and "more appropriate forum" test may result in cases where it is held that the available foreign forum is the natural or more appropriate forum but it cannot be said that the Australian forum is clearly inappropriate. However, the High Court did not consider the implications of this result in light of the requirements of comity: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 558 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

[106] *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44.

[107] *Ibid*, 100–11 per Ward J.

that substantially identical proceedings between the same parties were already on foot in Singapore, her Honour granted the stay.[108]

Taking a step back, there were four intrinsically linked (but perhaps contradictory) interests at stake: (1) the commercial and judicial interest in litigating the matter in the most appropriate forum; (2) the commercial and judicial interest in avoiding the duplication of proceedings; (3) the political need to uphold the sovereignty of the State of Singapore by providing due recognition for its judicial acts; and (4) the political need to uphold the sovereignty of Australia by reinforcing the Court's right to adjudicate on matters falling within its regulatory scope and not simply submitting to a foreign court order (the Singaporean anti-suit injunction). Evidently, comity provided the Court with a legal means of appropriately balancing and reconciling these interests in the law. By recognising the foreign judicial acts as a non-decisive factor to be taken into account for the purpose of determining whether the Australian court was a clearly inappropriate forum, the Court respected the sovereignty of the foreign State by showing due recognition for its judicial acts in Australia (the anti-suit injunction and the ongoing proceedings) whilst also sparing the sovereignty of Australia (or at least its image).

Further interesting observations can also be made as to comity's ability to develop transnational law in the High Court's ultimate rejection of the "more appropriate forum" test originating in *Spiliada*. In *Voth*[109] it had been argued before the High Court that the "more appropriate forum" test had been accepted not only in England but also in other jurisdictions.[110] In response, the High Court held that if the test in *Spiliada* enunciated "a principle which commanded general acceptance among other countries, it would obviously be desirable in the interests of international comity" that it also be adopted in Australia.[111] Transnational consistency is both a commercially and judicially desirable thing and comity requires that Australian courts strive for such an aim where possible.

Evidently, the dictates of comity were pulling in two different direction: (1) in favour of adopting a test that was generally accepted and (2) in favour of adopting a different test because the former was deemed less consistent with the principle of comity. Ultimately, the High Court was not persuaded that there was a real international consensus as to the test that should govern stays on grounds of *forum non conveniens*[112] and thus it was free to develop its own test – the "clearly inappropriate forum" test. However, it did appear to suggest that comity would require that it

[108] *Ibid*, 115 per Ward J. Similar comments were made and a similar decision was given in *Commonwealth Bank of Australia v White (No 3)* [2000] VSC 259.
[109] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
[110] *Ibid*, 560 per Mason CJ, Deane, Dawson and Gaudron JJ.
[111] *Ibid*, 560–1 per Mason CJ, Deane, Dawson and Gaudron JJ.
[112] In particular, the High Court outlined the significant differences between the test pronounced by the English House of Lords in *Spiliada* and that of the Supreme Court of the US in the cases of *Piper Aircraft Co v Reyno* (1981) 454 US 235, *Gulf Oil Corp v Gilbert* (1947) 330 US 501; *Koster v Lumbermens Mutual Co* (1947) 330 US 518; *Voth*

put aside its preference for the "clearly inappropriate forum" test if an alternate test were to achieve general international acceptance. Indeed the High Court seemed to recognise the commercial and judicial need to create uniform translation law or at least harmonise transnational solutions to transnational problems. Such a position reflects a move away from the national to the transnational, from the strict compartmentalisation of States and their laws to States as players in a transnational legal game. Most interestingly, the High Court recognised that comity was the language of this change.

(b) The role of comity in granting anti-suit injunctions

Comity has also played, and continues to play, a key role in the development and application of the law surrounding the granting of anti-suit injunctions. Despite operating *in personam* – in that they work to restrain parties rather than foreign courts – anti-suit injunctions nevertheless interfere, albeit indirectly, with the processes of foreign courts. This has led some States to consider the use of anti-suit injunctions to be an unacceptable challenge to the doctrine of sovereignty – regardless of the circumstances of the case.[113] However, Australian courts recognise that, despite their interference with the sovereignty of foreign States, in certain circumstances anti-suit injunctions will not pose an "unacceptable" challenge to the doctrine of sovereignty. For this reason, comity will always be a relevant consideration in the determination of whether or not an anti-suit injunction should be granted.

Due to the interference caused by anti-suit injunctions with the processes of foreign courts, comity favours restriction of the power to grant anti-suit injunctions. However, it does not pose a complete bar to the exercise of the power, recognising that in certain circumstances there may be a commercial and judicial interest in exercising the power and that it will not always constitute an unacceptable challenge to the doctrine of sovereignty. In *CSR Ltd*[114] the High Court held that comity demands courts proceed very carefully when considering the use of their judicial power to grant anti-suit injunctions, whether it be founded in the court's inherent or equitable jurisdiction.[115] The result is that courts are required to balance the

v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, 560–1 per Mason CJ, Deane, Dawson and Gaudron JJ.

[113]Most notably, anti-suit injunctions are prohibited under the Brussels Regime: *Turner v Grovit* [2004] ECR 1–3565 at para 19–31; also see *Turner v Grovit* [2005] 1 AC 101.

[114]*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

[115]*Ibid*, 396 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. Similar comments have been made in a number of other cases. See most notably: *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 22 FCR 209, 232 per Gummow J; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237, 519 per Warren CJ, Osborn JA and Macaulay AJA; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2010] FCA 312, 20–1 per Logan J; and *QBE Insurance (Australia) Ltd v Gregory Robert Hotchin and Ors* [2011] NSWSC 681.

likelihood that the exercise of power will be considered an unacceptable challenge to the doctrine of sovereignty verses the commercial and judicial interests in favour of granting the anti-suit injunction.

Two recent cases – *QBE Insurance (Australia) Ltd*[116] and *Sunland Waterfront (BVI) Ltd*[117] – help illustrate how courts make this judgement in practice. In each case, an anti-suit injunction was granted with each Court holding that the existence of significant commercial and judicial reasons favoured the granting of an anti-suit injunction, whilst the lack of any real connection between the matter and the foreign jurisdiction meant that it was unlikely that the foreign State would perceive the anti-suit injunction as a breach of their sovereignty.[118] In each case the Court conducted a balancing exercise between these two factors – on the one hand, the commercial and judicial need to exercise the power, and on the other, the need to ensure courts do not unacceptably challenge the doctrine of sovereignty by unduly interfering in the processes of foreign court.[119]

The case law demonstrates that in determining whether an anti-suit injunction should be granted the court will outline the existence of significant commercial and judicial needs to exercise the power. The commercial and judicial needs are required to be significant because the infringement caused by the anti-suit injunction to the sovereignty of the foreign State is unlikely to be light either. If such commercial and judicial needs are established, comity demands that the court weigh these considerations against the foreign State's sovereign interests.

From a sovereign interest perspective, comity demands that the court undertake an analysis of the connecting factors between the matter and the foreign jurisdiction to determine the level of interference the anti-suit injunction will have in the foreign jurisdiction. The closer the connection between the matter and the foreign jurisdiction, the more difficult it will be to grant the anti-suit injunction. In situations where it is commercially and judicially important to grant an anti-suit injunction, courts often stress the lack of connection between the matter and the foreign jurisdiction in comparison to its connection with Australia. For example, in *Ace Insurance Ltd v Moose Enterprise Pty Ltd*,[120] Brereton J granted an anti-suit injunction holding that:

[116] *QBE Insurance (Australia) Ltd v Gregory Robert Hotchin and Ors* [2011] NSWSC 681.
[117] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 1)* [2012] VSC 1 (upheld in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237).
[118] *QBE Insurance (Australia) Ltd v Gregory Robert Hotchin and Ors* [2011] NSWSC 681, 23 per Bergin CJ; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 1)* [2012] VSC 1, 52–4 per Croft J (upheld in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237 per Warren CJ, Osborn JA and Macaulay AJA).
[119] *Ibid*.
[120] *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724.

> … given the choice of law, the jurisdiction clause (even if it be non-exclusive), the location of the parties, where they made their contract, and the very faint connection with California, the invocation of Californian jurisdiction … is unconscionable, vexatious and oppressive in the relevant sense. In other words, California is a clearly inappropriate forum for the resolution of this dispute.[121]

Where there are clear commercial and judicial reasons to exercise the power, courts will often go to great lengths to stress the lack of connection the matter has with the foreign State and the comparative existence of significant commercial and judicial reasons to exercise the judicial power. Likewise, courts will often go to great lengths to stress the utmost respect and recognition for the foreign jurisdiction. For example, in *Sunland Waterfront (BVI) Ltd*,[122] Croft J, in granting an anti-suit injunction, made a point to demonstrate that the injunction was not intended as any comment or reflection on the competency, adequacy or willingness of the courts of the foreign jurisdiction or the adequacy of its laws. He reinforced his point by recognising that to suggest as such would be entirely inappropriate and against considerations of comity.[123] Similarly, in *QBE Insurance (Australia) Ltd*[124] Bergin CJ, in granting an anti-suit injunction, provided the defendants with the liberty to apply to the Court should there be any developments in the foreign jurisdiction that would make it inappropriate to continue the anti-suit injunction.[125]

2. *Adjudicating on foreign law and acts*

Comity finds one of its strictest expressions in the context of adjudicating on foreign law and acts. If judicial determinations of foreign States were open to question or declared invalid, this would likely cause great offence to and resentment among foreign States. It would do so because the doctrine of sovereignty is so deeply seated in the political-legal psyche of States. For this reason comity has formed the basis of the "rule of non-adjudication" which restricts courts from adjudicating on such matters.[126]

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[121] *Ibid*, 74 per Brereton J.

[122] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 1)* [2012] VSC 1 (upheld in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237 per Warren CJ, Osborn JA and Macaulay AJA).

[123] *Ibid*, 54 per Croft J (upheld in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237 per Warren CJ, Osborn JA and Macaulay AJA).

[124] *QBE Insurance (Australia) Ltd v Gregory Robert Hotchin and Ors* [2011] NSWSC 681.

[125] *Ibid*, 26 per Bergin CJ.

[126] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–1 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 per Mason CJ, Deane, Dawson and Gaudron JJ; *Gamogab v Akiba* (2007) 159 FCR 578, 32 per Kiefel J; *Mokbel v A-G* (Cth) (2007) 162 FCR 278, 59–60 per Gordon J; *Zentai v Honourable Brendan O'Connor (No 3)* (2010) 187 FCR 495; and *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297.

In *Heinemann Publishers Australia Pty Ltd (No. 2)*[127] the High Court held that to permit the validity of the acts of one State to be re-examined and perhaps condemned by the courts of another State would, certainly, "imperil the amicable relations between governments and vex the peace of nations".[128] To reflect these sensitivities, comity has formed the basis for the "rule of non-adjudication" – restricting courts from adjudicating on the laws and acts of foreign States. The decision in *Heinemann Publishers* and subsequent High Court cases demonstrate that, given the severity of the infringement likely to be caused to the sovereignty of foreign States, adjudication of foreign laws and acts is not to occur even in circumstances where there may be a commercial or judicial need to do so.[129]

The only real exception, as Professor Adrian Briggs points out, is when foreign laws are so disgraceful that they cannot truly be considered law at all – for example, Nazi law treating Jews as non-people and depriving them of their property and status, or Iraqi law treating Kuwait as a non-State and depriving its citizens of their property.[130] Fair enough – when sovereignty is misused to such a degree, why spare it? States cannot blow hot and cold – they cannot misuse sovereignty to such an extent then claim the right of non-interference which the doctrine of sovereignty affords.

But it would be incorrect to assume that the restriction against adjudicating on foreign laws and acts means that comity is unable to accommodate commercial or judicial needs. Rather, it does so on a daily basis. Take for example, how the same comity-induced principle of non-adjudication works in the specific context of the recognition of foreign legal entities. In *Chaff and Hay Acquisition Committee*[131] Latham CJ held that it was a well-established principle that foreign corporations that are recognised as legal entities in one jurisdiction will, by virtue of comity, be recognised as legal entities in other jurisdictions.[132] As a matter of comity the existence of a legal entity under foreign law entitles it to recognition as such in Australia without the judgement of Australian courts.[133] Here sovereign, commercial and judicial aims all point in the same

[127] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.
[128] *Ibid*, 40–1 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ; also see *Mokbel v A-G* (Cth) (2007) 162 FCR 278, 59–60 per Gordon J.
[129] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–1 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 per Mason CJ, Deane, Dawson and Gaudron JJ; *Gamogab v Akiba* (2007) 159 FCR 578, 32 per Kiefel J; *Mokbel v A-G* (Cth) (2007) 162 FCR 278, 59–60 per Gordon J; *Zentai v Honourable Brendan O'Connor (No 3)* (2010) 187 FCR 495; and *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297.
[130] Briggs, *supra* n 1, 112.
[131] *Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* (1947) 74 CLR 375.
[132] *Ibid*, 385 per Latham CJ.
[133] *Mcintyre v Eastern Prosperity Investments Pte Ltd* (No 6) (2005) 221 FCR 267.

direction – recognising the creation of foreign legal entities in Australia is commercially and judicially desirable and at the same time respects both domestic and foreign sovereignty.

3. *The preclusionary doctrines of res judicata, issue estoppel and Anshun estoppel*

With only limited exceptions, Australian courts will not challenge the authority of foreign judgements even where the reasoning of such judgements would be open to criticism.[134] The position is reflected in the law through the preclusionary doctrines of res judicata, issue estoppel and Anshun estoppel.

In addition to applying to domestic judgements, these three preclusionary doctrines, in principle, also apply to foreign judgements. For res judicata, the law is settled – res judicata may arise from a foreign judgement.[135] For issue estoppel and Anshun estoppel, the situation is slightly less clear, insofar as the High Court has left the question open.[136] However, recent decisions from State and Federal Courts demonstrate that issue estoppel[137] and Anshun estoppel[138] may also arise from a foreign judgement.

The purpose of these preclusionary doctrines is to promote the finality of litigation.[139] The rationale is that commercial and judicial reality dictates that it is inefficient and inequitable to allow the same matter to be heard multiple times – multiple times within the same jurisdiction or multiple times in multiple jurisdictions. These commercial and judicial interests are of obvious concern. However, they must be weighed against the sovereign concerns of the foreign State and Australia.

For foreign States, respect for the doctrine of sovereignty requires that due recognition be given to foreign judgements – Australian courts should not challenge the authority of foreign judgements even if the reasoning of the foreign court is open to criticism. Indeed, none of the preclusionary doctrines permit such a

[134] *Armacel Pty Ltd v Smurfit Stone Container Corporation* (2008) 248 ALR 573.
[135] *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406, 418 per Gummow J; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69; and *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, 185 per Sackar J.
[136] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 346 per Brennan and Dawson JJ.
[137] *Armacel Pty Ltd v Smurfit Stone Container Corporation* (2008) 248 ALR 573 and *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, 210 per Sackar J.
[138] *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, 239–40 and 247 per Sackar J; *PCH Offshore Pty Ltd (ACN 086 216 444) v Dunn (No 2)* [2010] FCA 897, 100–13 per Siopis J adopting the reasoning of Dillon LJ in the English Court of Appeal case of *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433, 450.
[139] *Dow Jones v Gutnick* (2002) 210 CLR 575, 36 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

challenge.[140] Rather, each doctrine assumes the foreign judgement to be evidence of a decision on the legal position of the parties, or a decision on a question of law or fact between the parties.[141] This is so even if the reasoning of the foreign court is not entirely convincing. The only requirement is that the foreign judgement be final, conclusive and on the merits.[142] Where these conditions are met, each preclusionary doctrine requires that the court give due recognition to the foreign judgement. In this context, the commercial and judicial need for finality will generally align with the foreign sovereign need to respect the judgements of the foreign court.

However, domestic sovereign concerns must also be taken into consideration. Under the doctrine of sovereignty, States have the right to self-determination and are not bound by the decisions of foreign courts. Concerns for domestic sovereignty would thus appear to pull the other way – against recognition of the foreign judgement and permitting Australian courts to reopen already adjudicated matters. However, by forming the basis for the preclusionary doctrines, comity has enabled courts to reconcile these domestic sovereign concerns with foreign sovereign needs and the commercial and judicial need for finality of litigation.

Where a foreign decision is required to be recognised by application of one of the preclusionary doctrines this does not amount to an unacceptable challenge of domestic sovereignty. Under the doctrine of sovereignty each State has the ability to determine how it will deal with matters that fall within its sovereign regulatory scope, including the ability to develop and apply preclusionary doctrines that direct courts as to how to deal with foreign judgements. In this sense, Australian courts are not bound by the decisions of foreign courts. Rather, they are, by developing and applying these preclusionary doctrines, choosing to recognise the effect of foreign judgements in Australia as long as they meet the minimum requirements necessary to respect domestic sovereign concerns. In this sense, comity has shaped the preclusionary doctrines in a manner that is respectful of both domestic and foreign sovereignty and permits the courts to further the commercial and judicial aim of finality in litigation.

E. Recognition of foreign judgements

Foreign judgements can typically be refused recognition if they are not consistent with public policy. This is the case in Australia, as it is in most jurisdictions. Here, the main effect of comity is to shape the public policy exception and determine under what conditions foreign judgements may be refused recognition.

[140] *Armacel Pty Ltd v Smurfit Stone Container Corporation* (2008) 248 ALR 573.
[141] *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, 81 per Sackar J.
[142] *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508, 518 per Kirby P, Samuels and Clarke JJA; *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, 185–6 per Sackar J; and *Schnabel v Lui* [2002] NSWSC 15, 75–7 per Bergin J.

As is the case with the preclusionary doctrines, it is both commercially and judicially desirable that once matters have been adjudicated they should not be subject to re-litigation. Thus, there is a general commercial and judicial interest in recognising foreign decisions. Likewise, the due recognition of foreign decisions also respects the sovereignty of foreign States. However, at the same time there are also domestic sovereign concerns that need to be taken into consideration. In some cases, certain foreign decisions may be considered offensive to domestic sovereignty.

Comity reflects this position in the law by shaping the public policy exception in a manner that makes it difficult for applicants to succeed in cases where they seek an order from the court refusing recognition. In order for the requirements of the public policy exception to be met there needs to be significant reasons why the foreign decision should not be recognised. The authorities demonstrate that courts are generally slow to accept public policy as a ground for refusal and there are only a few instances in which foreign judgements have not been recognised on this basis. For the public policy exception to be successfully invoked, recognition must offend some principle of Australian public policy so sacrosanct that it is required to be maintained at all costs – including the cost of possibly offending a foreign State's sovereignty.[143]

The weight of the public policy concerns must be significant because the opposing foreign sovereign interests are not light either. As Kirby P, as he was then, held in *Bouton*,[144] "interests of comity are not served if the courts of the common law are too eager to criticise the standards of the courts and tribunals of another jurisdiction".[145] Likewise, in *Jenton Overseas Investment*,[146] Whelan J, making reference to the decision in *Bouton*, insisted on the view that "[t]he respect and recognition of other sovereign states" institutions is important because there are "interests of comity to maintain".[147]

F. Conclusion

This article has sought to shed light on the importance of comity in the development and application of Australian private international law rules through an analysis of its use by the Australian judiciary. It has shown that Australian courts use comity quite often and in quite significant ways for the critical task of navigating sovereign sensitivities and transnational economic realities. In this context, case law demonstrates that comity is a flexible and adaptive legal tool that permits courts to guide and shape

[143] *Jenton Overseas Investment Pty Ltd v Townsing* (2008) 21 VR 241, 246–7 per Whelan J and *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (No 2) [2012] NSWSC 438.
[144] *Bouton v Labiche* (1994) 33 NSWLR 225.
[145] *Ibid*, 234 per Kirby P.
[146] *Jenton Overseas Investment Pty Ltd v Townsing* (2008) 21 VR 241.
[147] *Ibid*, 246–7 per Whelan J.

the development and application of private international law rules in a manner consistent with relevant sovereign, commercial and judicial interests.

This article's findings present a very different reality for comity than that which is presented in conventional literature.[148] Our findings suggest that comity is a useful and relevant principle of private international law worthy of further academic attention. Whilst this article has focused solely on Australian jurisprudence, it should hopefully stir the interest of scholars and practitioners in other legal systems – particularly those that share a common legal tradition. Hopefully further research will determine whether the importance and relevance attributed to comity by the Australian judiciary is a particularly Australian phenomenon, or whether it plays an equally important role in other jurisdictions.[149]

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[148]Perhaps to put it like Mark Twain, comity may be entitled to claim that rumors of its death are largely exaggerated – at least in Australia. Mark Twain, noted to reporter Frank Marshall White, London 1897: Shelley Fisher Fishkin, *Lighting Out for the Territory: Reflections on Mark Twain and American Culture* (Oxford University Press, 1996), 134: "James Ross Clemens, a cousin of mine, was seriously ill two or three weeks ago in London, but is well now. The report of my illness grew out of his illness; the report of my death was an exaggeration".

[149]Initial indications demonstrate that comity may play a similar role in the UK and to some extent in the US. Likewise, it should not be forgotten that comity is a civil law invention and thus may continue to be relevant in civil law jurisdictions – particularly those in Europe. Paul, *supra* n 1, 22; Watson, *supra* n 1; Collins, *supra* n 1, 89; Briggs, *supra* n 1, 65.