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SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW

RICHARD GARNETT

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General Editor's Preface

The *Oxford Private International Law Series* contains a number of works which fall within the ambit of what are referred to in the textbooks as preliminary or procedural matters. There is Richard Fentiman's *Foreign Law in English Courts* and Sophie Geerom's companion monograph, *Foreign Law in Civil Litigation*. There is also Georgios Petrochilos' *Procedural Law in International Arbitration*. What was needed was a monograph to examine procedural law in civil litigation. We now have Richard Garnett's *Substance and Procedure in Private International Law* to fill this gap. This book is not only welcome as dealing with one of the most fundamental and essential distinctions in private international law but is also very timely.

In Australia and Canada, the theoretical basis for drawing the distinction between substance and procedure has gone through a re-assessment in recent years. The differences in approach from that recently adopted at common law in England by the House of Lords makes particularly interesting reading. For the United Kingdom, the Europeanization of the law applicable to contractual and non-contractual obligations under the Rome Convention and Rome I and Rome II Regulations has meant that old classifications have had to be re-examined.

The emphasis in the book is on substance and procedure in common law jurisdictions and contains an impressively wider examination of the position not only in Australia, Canada, England (at common law), New Zealand, and the United States but also in Hong Kong and Singapore. At the same time, the position under the Rome Convention and Rome I and Rome II Regulations is fully considered. The book provides a practical guide for dealing with concrete situations but also a choice of law framework for procedural questions.

The stated aim of the *Oxford Private International Law Series* is to publish works of high quality and originality in a number of important areas of private international law. *Substance and Procedure in Private International Law* palpably fulfils these criteria and is an excellent addition to the *Series*.

James Fawcett
Nottingham
September 2011

Preface

Procedure has long been a significant factor in cross-border disputes, as can be seen from the increasing volume of decisions, particularly in the common law world, on matters such as service of process, jurisdiction, taking of evidence, interim measures of protection, and the recognition and enforcement of foreign judgments. The question of the law to be applied to procedural matters has always been assumed to be the law of the forum of adjudication of the dispute, given that forum's greater familiarity with and expertise in applying its own procedural rules. While granting the forum exclusive control over procedural matters may be generally accepted where procedure is narrowly defined, it becomes much more contentious where—as has traditionally occurred in common law countries—procedure has been expansively interpreted. The controversy arises from the fact that a wide view of procedure in private international law necessarily means a more restricted role for foreign law and greater opportunities for forum shopping. This book aims to explore the applicable law dimensions of procedure through three lines of inquiry. The first is the distinction between matters of 'substance' and matters of 'procedure', which remains inconsistent and contested across common law jurisdictions; the second examines procedure in the light of other approaches in private international law for referring matters to forum law, such as public policy and overriding mandatory rules; and the third considers, in the context of matters which are wholly 'procedural', whether the exclusive application of forum law is accurate and justified. A substantial part of the book involves an examination of these three inquiries in a number of situations commonly arising in transnational litigation, such as the admissibility and exclusion of evidence, service and jurisdiction, judicial administration, limitation of actions, and remedies.

The book aims to provide scholars and practitioners with clear guidance not only as to the current state of the law but also as to how it may develop and be applied in future cases. While the major focus of the book is the decisions of courts in England, Australia, Canada, New Zealand, Singapore, Hong Kong, Malaysia, South Africa, and the United States, important aspects of EU law, such as the Rome I and II Regulations and the literature and decisions of European civil law countries, are also examined. While the book is predominantly directed at lawyers from common law countries, the suggested framework for applicable law and procedure is equally relevant to a global audience.

This book has been enhanced by the discussions I have had with scholars and practitioners in England and Australia, many of whom also read and

commented upon the manuscript. I wish to acknowledge in particular the assistance of Andrew Bell SC, Andrew Dickinson, Dion Fahey, Perry Herzfeld, Kathryn Howard, Mary Keyes, James McComish, and Danielle Sirmai. I wish to thank the Honourable Sir Anthony Mason for writing such a gracious and insightful foreword and also Professor James Fawcett, the General Editor of the Series, who read the entire manuscript before publication and made many valuable suggestions. I also wish to thank Jessica Huntley at Oxford University Press whose patience and encouragement were unstinting. Finally, I would like to acknowledge the great support and encouragement provided by my family during the writing of this book, in particular my wife Linda and children Thomas and Isabelle. The book is dedicated to the memory of William Young, my grandfather, whose destiny is hopefully fulfilled in these pages. The law in this book is stated, as best known to me, as at 30 June 2011.

Richard Garnett
Melbourne
30 June 2011

ADDENDUM

Since the completion of this manuscript for publication, the European Court of Justice (ECJ) has delivered its judgment in Case C-412/10 Homawoo v GMF Assurance (17 November 2011) on the temporal effect of the Rome II Regulation (Regulation (EC) No. 864/2007). The ECJ held that the Regulation only applies to events giving rise to damage occurring after 11 January 2009.

Foreword

The publication of this work will fill a gap in the library shelf devoted to private international law. The distinction between substance and procedure, so fundamental in this area of law, is the central concern of the book. The author argues convincingly in favour of a narrow 'process' concept of procedure—the regulation of court proceedings—in preference to the broader concept of remedy; an argument which, if accepted, will promote uniformity across jurisdictions and inhibit forum-shopping, thereby achieving desirable policy goals at the expense of more parochial considerations.

Professor Garnett seeks also to establish a more comprehensive choice of law framework for the consideration of a broad range of procedural questions than that offered by the inadequate traditional law of the forum/law of the cause of action dichotomy. In doing so, the author maintains a focus on cross-border litigation excluding international commercial arbitration. Although the author's focus is mainly on the rules applicable in Commonwealth countries, he refers as well to United States and European materials.

This work is not just an admirable statement of the law as it currently stands; it identifies and engages with deeper underlying issues and offers persuasive solutions to them. In addition, it presents a penetrating analysis of the existing rules and the decided cases.

The Hon. Sir Anthony Mason AC, KBE
Chief Justice of Australia 1987–95
Justice of the High Court of Australia 1972–87
15 December 2011

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