

## KUWAIT AIRWAYS CORPORATION v IRAQI AIRWAYS COMPANY

### I. INTRODUCTION

Even when a forum has completed the task of identifying, in any given case, the *lex causae*, there remains a possibility of further choice of law complexities as regards delimitation of the applicable law. The extent of leeway which a Scottish or English forum enjoys when purporting to apply the *lex causae*, in the question of whether that court should refer to,<sup>1</sup> and apply, the whole corpus of the *lex causae*,<sup>2</sup> is ultimately a matter for the forum's discretion, the exercise whereof admittedly few opportunities are afforded.

The extraordinary facts of *Kuwait Airways Corporation v Iraqi Airways Company*<sup>3</sup> illustrate some of the difficulties which may arise in such cases. By reason of date,<sup>4</sup> the court in this recent House of Lords decision was required to assess actionability according to the *lex loci delicti* for the purposes of the second limb of the common law tort choice of law rule of double actionability. The case also demonstrates the artificiality of an English court being seised of jurisdiction, resisting all attempts to be unseated in an action which concerns a foreign tort, and of its insistence on applying the parochial double rule to a wholly foreign *mise en scène*. Essentially, this is a story of confiscation of property situated in a territory into control of which the 'confiscating' state had recently come; yet litigation about the private law property consequences appears in the guise of an action in the English tort of conversion (an outcome which itself emphasises the importance of the jurisdiction in which the case happens to be pursued).

### II. THE FACTS

On 2 August 1990, Iraqi military forces occupied Kuwait. Shortly afterwards, the Revolutionary Command Council of Iraq ('RCC') passed resolutions proclaiming Iraqi sovereignty over Kuwait. Iraqi forces seized from Kuwait Airport, and removed to Iraq, ten commercial aircraft belonging to Kuwait Airways Corporation ('KAC'). On 9 September, the RCC passed resolution 369, dissolving KAC, purporting to transfer all of the company's property, wherever situated, to Iraqi Airways Company ('IAC'). On 11 January 1991, KAC raised proceedings against IAC and the Republic of Iraq, for return of the aircraft or payment of value,<sup>5</sup> and damages.<sup>6</sup>

<sup>1</sup> Subject, of course, to proof of foreign law by the parties.

<sup>2</sup> Not in the sense of *renvoi*, but rather in the sense of picking and choosing only certain provisions of the *lex causae*; or in choosing to apply the *lex causae* at a certain date. These are minority cases; but the point is central to the remarkable instance under discussion.

<sup>3</sup> [2002] 3 All ER 209.

<sup>4</sup> Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (the '1995 Act') applies only to allegedly tortious acts and omissions occurring after the commencement date of 1 May 1996 (SI 1996/995, Private International Law (Miscellaneous Provisions) Act 1995 Commencement Order). The alleged wrong in the case in question occurred prior to 1 May 1996.

<sup>5</sup> Four of the aircraft had been destroyed by coalition bombing in Northern Iraq, whilst the remaining six were detained, on IAC's behalf, in Iran. KAC sought return of the 'Iran Six' and payment of value in respect of the 'Mosul four'.

<sup>6</sup> In respect of the sums paid by KAC to IAC for the cost of keeping, sheltering and maintaining the aircraft.

At first instance, Mance, J held that IAC had wrongfully interfered with the ten aircraft,<sup>7</sup> but the action was subsequently dismissed by Aikens, J on other grounds.<sup>8</sup> Both parties appealed, KAC against Aikens, J's dismissal of the action, and IAC against Mance, J's ruling on liability. The Court of Appeal upheld KAC's claims in respect of the six aircraft evacuated to Iraq, but rejected those concerning the four planes destroyed by coalition bombing. IAC appealed to the House of Lords, arguing that the entire action should be dismissed. KAC cross-appealed, contending that the claims in respect of the four destroyed planes should also succeed.

### III. THE JURISDICTIONAL ISSUE

It is important to realise that the claim which was being determined by the English courts was one which had no real connection with England. As the speech of Lord Scott of Foscote makes clear, '. . . it is an action in tort which has nothing whatever to do with England save that England has made itself available as the forum for litigation.'<sup>9</sup> The allegedly tortious act took place entirely in Iraq (albeit as newly enlarged); the aircraft in question were registered in Kuwait; the defendant was an Iraqi state-owned corporation, having Iraqi directors; and the claimant was a Kuwaiti state-owned corporation, with Kuwaiti directors. Both parties to the action lacked a significant connection with England; their Lordships considered it to be of no real significance that each litigant had a place of business in London since international airlines typically operate branch offices in several countries.<sup>10</sup> Endorsing the view of Lord Scott, Lord Hope of Craighead concluded that, '[t]here is nothing in this case which connects the laws of this country [England] with the events constituting the alleged tort, other than the fact that this is the country where the proceedings were brought . . .'<sup>11</sup>

It is not surprising that IAC raised a plea of *forum non conveniens* early in the proceedings. This line of argument, however, was subsequently abandoned.<sup>12</sup> Thus, the

<sup>7</sup> [1999] CLC 31.

<sup>8</sup> [2002] 2 All ER (Comm) 360. According to Aikens, J, the test of causation was not satisfied, and the actions of IAC could not be said to be the real and direct cause of the loss: 'KAC would have suffered the losses claimed even if IAC had not wrongfully interfered with the aircraft.' ([2002] 3 All ER 209, para 6).

<sup>9</sup> Para 174.

<sup>10</sup> Appropriate or not, it was certainly fortunate that jurisdiction technically could be founded in England—even though, for the very reason of the awkwardness of the double rule in tort, England (a desirable forum in most commercial matters) was rightly viewed with caution in tortious actions before 1995.

<sup>11</sup> Para 166.

<sup>12</sup> As to history of litigation, see per Lord Nicholls at paras 5 to 11. The basis of IAC's *forum non conveniens* plea was that the United Nations Security Council had established an independent compensation commission for the purpose of dealing with claims against Iraq pursuant to Iraq's invasion of Kuwait, and that this commission provided the only appropriate forum for the resolution of the dispute. Evans J rejected IAC's plea, and his decision was not appealed. The Court of Appeal, in addressing IAC's three other challenges to the jurisdiction of the English Court (viz (1) service of the process on IAC at its London office was not effective; (2) IAC was entitled to immunity from suit in England; and (3) the proceedings related to acts which were not justiciable in the English courts), did not find it necessary to consider the *forum non conveniens* plea. In the House of Lords, reported at [1995] 1 WLR 1147, it was held that the writ had been properly served on IAC, but not on the State of Iraq; and (diss. Lord Mustill and Lord Slynn of Hadley) that IAC in its retention and use of the aircraft (as opposed to the removal thereof to Iraq as directed by the

English court, exercising jurisdiction in an action concerning an alleged Iraqi tort, and having rejected the contention that another court of competent jurisdiction could try the case more suitably for the parties and for the ends of justice,<sup>13</sup> proceeded to apply to the 'foreign' scenario the English rule of choice of law in tort. Of course, English rules of choice of law in tort exist to service 'foreign' scenarios; that is their *raison d'être*. But the question then is the effectiveness of the discretionary safeguard against the inappropriate taking of jurisdiction in any given case.

#### IV. THE CHOICE OF LAW ISSUE

The alleged wrong having occurred before 1 May 1996,<sup>14</sup> the rule of double actionability applied.<sup>15</sup> The common law rule of choice of law in tort and delict can be stated succinctly: there must be actionability under the law of the forum *and* the law of the place where the events constituting the alleged tort or delict took place.<sup>16</sup> To accommodate the particularities of individual cases, the flexible exception introduced in *Boys*, namely that a particular issue (in tort) between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties, was reaffirmed and strengthened in *Red Sea*.<sup>17</sup> Though the configuration of the double rule and its exception may be concisely described, certain difficulties remain in defining the boundaries, geographical (ie, in defining the *locus delicti*) and substantive (ie, in distinguishing between matters of substance and procedure) of the rule and exception, and in operating a general exception to a particular rule.<sup>18</sup> The status of the exception under Scots law is not entirely clear.<sup>19</sup>

government of Iraq) was not acting under cover of sovereign immunity because its acts (in repainting two of the aircraft and using one for an internal flight) were not governmental acts, *jure imperii*.

<sup>13</sup> See *Spiliada Maritime Corporation v Cansulex* [1986] 3 All ER 843, per Lord Goff at p 853, citing with approval Lord Kinnear in *Sim v Robinow* (1892) 19 R 665 at p 668.

<sup>14</sup> See n 4 above.

<sup>15</sup> The common law rule of double actionability is well documented: Dicey & Morris, *The Conflict of Laws*, 13th edition (2000), Chapter 35; and EB Crawford, *International Private Law in Scotland* (1998), para 13.13 et seq. Trace the line in England through *The Halley* (1868) LR 2 PC 193; *Phillips v Eyre* (1870) LR 6 QB 1; *Machado v Fontes* [1897] 2 QB 231; *Boys v Chaplin* [1971] AC 356; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; and *Red Sea Insurance Company Limited v Bouygues SA* [1995] 1 AC 190; and in Scotland through *McElroy v McAllister* 1949 SC 110; *Mitchell v McCulloch* 1976 SLT 2; and *James Burrough Distillers plc v Speymalt Whisky Distributors Ltd* 1989 SLT 561.

<sup>16</sup> While English law emphasises, in the first place, the role of the *lex fori*, Scots law refers in the first instance to the *lex loci delicti*. The result is the same. Law Commission Working Paper No 87 and Scottish Law Commission Consultative Memorandum No 62, '*Private International Law, Choice of Law in Tort and Delict*', para 2.42, and Crawford, *op cit*, paras 13.13 and 13.14.

<sup>17</sup> *Red Sea Insurance Company Limited v Bouygues SA* [1995] 1 AC 190. *Red Sea* is the apogee of English common law development: it was a decision of the Privy Council, authorising thereafter the displacement for disposal by another law not only of an issue or issues, but of the whole claim; and not only the displacement of the *locus delicti* by the forum, but also elision of the *lex fori* in a suitable case.

<sup>18</sup> See, for example, *Ennstone Building Products Ltd v Stanger Ltd*. [2002] EWCA Civ 916.

<sup>19</sup> Law Commission Working Paper No 87 and Scottish Law Commission Consultative Memorandum No 62, '*Private International Law, Choice of Law in Tort and Delict*', para 2.46: 'This leaves the present law of Scotland in some uncertainty because *Boys v Chaplin*, being an

The main issue in *Kuwait Airways* concerned the operation of the second limb of the double rule, in terms of which the claimant was required to show that the defendant's conduct was civilly actionable under Iraqi law. It was indisputable that the alleged wrongs were committed in Iraq (albeit as newly enlarged), and that there was no particular connection with any other country.<sup>20</sup> Lord Nicholls of Birkenhead explained that, 'In order to satisfy the double actionability test KAC must show it was the owner of the aircraft when IAC did the acts of which KAC is complaining. But, on the face of things, that was not so . . . Under Iraqi law, RCC resolution 369 was effective to divest KAC of its ownership of the aircraft and vest title in IAC.'<sup>21</sup> It can be appreciated immediately, then, that in this tort litigation, anterior property issues are inextricably<sup>22</sup> intermingled. *On the face of things*, application of the English rule of choice of law in property<sup>23</sup> trumped any possibility of satisfying the English rule of choice of law in tort—*except* that, in the circumstances here presented, the House of Lords set its face against recognition of the (intra-territorial) purported seizure.<sup>24</sup> Since

English case, is not binding in Scotland. Its authority, however, might well be prayed in aid to modify the Scottish rule in appropriate cases.' In pre-1995 days at least the Scottish courts seemed deaf to the hint and blind to the possibilities. The Scots approach in future (in applying section 13 of the 1995 Act) is a matter of speculation.

<sup>20</sup> Per Lord Nicholls at para 12. As English (and Scots) law currently stands in relation to acts and omissions occurring after 1 May 1996, the general rule enshrined in section 11(1) of the 1995 Act would lead to the application of Iraqi law (unedited: section 11 in terms does not authorise the application of part of the applicable law—though section 12 permits segregation of issues, and the public policy discretion permitted by section 14 does not appear to envisage a selective approach—see n 63 below).

<sup>21</sup> Para 13.

<sup>22</sup> Pace Lord Scott of Foscote, dissenting, who drew a distinction between actions *in rem* and actions *in personam*. See below at 771.

<sup>23</sup> To the effect that the transfer of title to tangible moveable property is, as a general rule, governed by the *lex situs* [subject to a limited policy exception: see *Winkworth v Christie, Manson & Woods Ltd* [1980] 1 Ch 496 at 501 and 510; and Halsbury's Laws of England, 4th edition, Volume 8 (1974), at 315, para 418): *Cammell v Sewell* (1860) 5 H&N 728; *Todd v Armour* (1882) 9R 901; *Winkworth v Christie, Manson & Woods Ltd*, above. Lord Nicholls explained that, ' . . . governmental acts affecting proprietary rights will be recognised by an English court as valid if they would be recognised as valid by the law of the country where the property was situated when the law takes effect. Here, that was Iraq.' (para 13) Notable confiscation cases include *Princess Paley Olga v Weisz* [1929] 1 KB 718, *Luther v Sagor* [1921] 3 KB 532 and *The Jupiter* [1927] P 122, at 250 (ineffective as judged extra-territorial), demonstrating the strength of the intra-territorial effectiveness principle.

<sup>24</sup> Eg per Lord Nicholls at paras 21 (recognition by no state of Iraq's annexation of, or its authority in, Kuwait ie in old terminology, no recognition of the confiscating state as *de iure* in control: not seemingly disputed, however, that, for the purposes of the 'act of state doctrine', Iraq at the time in question, was *de facto* in control). Per Lord Steyn at para 114: 'The present case is, however, a paradigm of the public policy exception' (exception, that is, to the 'act of state doctrine', that sovereigns may act as they please within their own territorial limits). Per Lord Hope, at paras 135–137 and 140, culminating at para 149, ' . . . such a flagrant international wrong should be deemed to be so grave a matter that it would be contrary to the public policy of this country to give effect to it.' At para 148 ' . . . I would hold that a legislative act by a foreign state which is in flagrant breach of clearly established rules of international law ought not to be recognised by the court of this country as forming part of the *lex situs* of that state.' Not only, therefore, would Lord Hope disregard the confiscation on policy grounds; he would not even see it as part of the *lex situs*. See also para 168. Their Lordships endorsed the principle articulated in the Court of Appeal, that the 'act of state doctrine' suffers exception, as follows: ' . . . the acts of a foreign state within its territory may be refused recognition because they are

all the speeches, including that of Lord Scott of Foscote (the sole dissenting voice), reveal a firm disinclination, on policy grounds, to recognise the intra-territorial confiscation, the tort claim could be approached on the basis that, for the purposes of English domestic and conflict law, KAC had *not* been divested of their ownership of the aircraft. This conclusion is relevant and needful in light of the definition of the tort of conversion per Lord Nicholls,<sup>25</sup> ‘Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant’s conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate (not accidental). Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods.’

V. WHERE PUBLIC INTERNATIONAL LAW MEETS INTERNATIONAL PRIVATE LAW

The case reveals an interesting interface between public international law and international private law. Iraq’s annexation of Kuwait did not receive international recognition,<sup>26</sup> for under (public) international law, ‘. . . this seizure and assimilation were flagrant violations of rules . . . of fundamental importance.’<sup>27</sup> From the international private law (tort) perspective, the question was framed by Lord Steyn thus, ‘For the purpose of determining whether the acts of IAC were actionable under Iraqi law, must regard be had to the totality of Iraqi law, including Resolution 369, or can that resolution be treated as excised from the corpus of Iraqi law for this purpose if it is contrary to English public policy?’<sup>28</sup> Further, as Lord Hope queried, even if resolution 369 were held to offend English public policy (ie in terms of *public* international law), ‘. . . does it nevertheless have to be recognised as vesting title to the aircraft in IAC for the purposes of the principle of double actionability?’<sup>29</sup> (ie for the purposes of international *private* law).

IAC argued that ‘[i]n considering whether the impugned acts would have been civilly actionable in Iraq, one must examine how an Iraqi court would have been required to rule on KAC’s claim in autumn 1990. An Iraqi court would have had regard to the entirety of Iraqi law, including RCC resolution 369. KAC’s claim for misappropriation

contrary to public international law . . . the Court of Appeal was right to extend the public policy exception beyond human rights violations to flagrant breaches of public international law.’ (Lord Steyn, para 114).

<sup>25</sup> Para 39; see also per Lord Steyn at para 119: ‘[d]espite elaborate citation of authority, I am satisfied that the essential feature of the tort of conversion, and of usurpation under Iraqi law, is the denial by the defendant of the possessory interest or title of the plaintiff in the goods: see Todd, *The Law of Torts in New Zealand*, 3rd ed (2001), para 11.3 for an illuminating discussion. When a defendant manifests an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff, he converts the goods to his own use.’

<sup>26</sup> Paras 21 and 107.

<sup>27</sup> Para 20 per Lord Nicholls. The United Nations Security Council promptly condemned the invasion of Kuwait as a breach of international peace and security, and demanded immediate Iraqi withdrawal.

<sup>28</sup> Para 111. Cf Lord Nicholls at para 27, ‘I return to the question whether as a matter of public policy an English court ought to decline to recognise RCC resolution 369 as effectual to divest KAC of its title to the aircraft.’

<sup>29</sup> Para 134.

(‘usurpation’) of the ten aircraft would have failed.<sup>30</sup> IAC’s contention was that, ‘[w]hen applying the second limb of the rule the foreign law must be taken as it is. An English court should not treat as civilly actionable under Iraqi law a state of affairs which, in fact, would not have been so actionable.’<sup>31</sup>

#### VI. POLICY AS A SWORD, NOT A SHIELD

The approach taken by the majority of their Lordships<sup>32</sup> was to excise the offending resolution from the Iraqi *lex loci delicti*, on the basis that (to English eyes<sup>33</sup>) the provision constituted a fundamental breach of international law.<sup>34</sup> It is submitted that this decision is unexceptionable and probably inevitable in terms of policy and of internal consistency; that which is disquieting is the majority view that such an excision was justified not only by international public policy, but also by the flexibility inherent in the double rule, as enunciated in *Boys v Chaplin*,<sup>35</sup> and elaborated in *Red Sea*.<sup>36</sup> It is submitted that the former alone would have sufficed: the latter is a troublesome one for a conflict lawyer, who, it is suggested, would prefer the argument on definition of Iraqi law to be made and the decision taken on overarching principles of comity (a concept familiar<sup>37</sup>) than that the pre-1995 conflict rules in tort suffer undue interference. Per Lord Hope: ‘. . . as the public policy objection is truly international in character,<sup>38</sup> there is a sound basis in principle for severing this part of the *lex loci delicti* and disregarding entirely any legal effects which would be given under Iraqi law to the resolution . . .’<sup>39</sup> Lord Steyn explained that the United Nations Security Council had passed resolutions which ‘. . . called on member states to give no recognition directly or indirectly to any aspect of the annexation<sup>40</sup> . . . An English court may not recognise any Iraqi decree or act which would directly or indirectly enable Iraq or Iraqi enterprises to retain the spoils or fruits of the illegal invasion.’<sup>41</sup>

Conflict lawyers and public international lawyers may be found to take different approaches in situations which fall within the remit of both or more branches of the law.<sup>42</sup> But the case under discussion is an example in which public international law

<sup>30</sup> Para 30. The relevant tort in English law is that of conversion; IAC’s acts *would* have been tortious if done in England (para 44). The claim under Iraqi law was for usurpation or misappropriation of the aircraft. By implication, it appears that, in principle, usurpation under Iraqi private law *would* satisfy the second limb of the double rule. Cf n 25 above.

<sup>31</sup> Para 30.

<sup>32</sup> Lord Nicholls, Lord Steyn, Lord Hoffman, and Lord Hope of Craighead. Lord Scott of Foscote dissented (qv).

<sup>33</sup> Para 31.

<sup>34</sup> Cf Lord Nicholls’ remark at para 36: ‘[e]ffectively, the government of Iraq had stolen the aircraft from Kuwait.’

<sup>35</sup> [1971] AC 356, per Lord Hodson at 378, and Lord Wilberforce at 391–2.

<sup>36</sup> The main issue in *Red Sea* was, ‘. . . whether a defendant could rely solely on the *lex loci delicti* to establish liability in tort when the *lex fori* did not recognise such liability’ (para 152, per Lord Hope). Contrast the case in hand, where the converse question arose.

<sup>37</sup> See L Collins ‘Comity in Private International Law’, Chapter 4, *Reform and Development in Private International Law—Essays in Honour of Sir Peter North*, J Fawcett, ed (2002).

<sup>38</sup> As opposed to being a parochial policy of domestic English law.

<sup>39</sup> Para 168.

<sup>40</sup> Para 107 (Emphasis added). Cf para 117.

<sup>41</sup> Para 117. Cf Lord Hope, at para 168.

<sup>42</sup> See eg Crawford, *op cit*, at 2, n 6.

considerations and terminology have a notably high profile. It is interesting that a recent discussion<sup>43</sup> suggests that the concept of comity in modern private international law is 'worthy of further research and analysis. The vast amount of material cries out for synthesis . . . [and] cannot, and should not, be dismissed as if it did not exist and had nothing to tell us about the function of private international law, the relations between legal systems, between courts and *between public and private international law*.'<sup>44</sup> Our case is redolent of public international law concerns, as is to be expected from its nature.

Much reliance is placed throughout the judgments on the well-known dictum of Lord Cross of Chelsea in *Oppenheimer v Cattermole*<sup>45</sup> that, 'Whether, for example, legislation of a particular type is contrary to international law because it is 'confiscatory' is a question upon which there may well be wide differences of opinion between communist and capitalist countries. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.' Indeed, Lord Steyn, having quoted the foregoing, asserts that in *Oppenheimer*, '[t]he Court of Appeal broke new ground. It was the first decision to hold that the acts of a foreign state within its territory may be refused recognition because they are contrary to public international law.'<sup>46</sup> In fact, as is rarely pointed out, *Oppenheimer* was a tax case in which the question was whether the taxpayer had retained his German nationality. It was held by the House of Lords that, on the facts, the taxpayer was *not* a German national during the years of assessment and therefore was not entitled to tax relief under the relevant double taxation convention; he had not applied for re-naturalisation, nor taken up residence in Germany during those years. Furthermore, Lord Cross' oft-quoted remark is, in fact, *obiter*, appearing only in his explanation of the conclusion which he would have reached had the relevant German law been differently applied.<sup>47</sup>

One might add to the discussion the controversy which surrounded the decision in *Williams and Humbert v W & H Trademarks (Jersey) Ltd*.<sup>48</sup> Confiscations are never popular, by whatever name dignified,<sup>49</sup> but the House of Lords in that case suggested that compulsory acquisitions were commonplace occurrences with which other states had no concern.<sup>50</sup> This attitude, in turn, was

<sup>43</sup> J Fawcett, *op cit*, Chapter 4, 'Comity in Modern Private International Law'.

<sup>44</sup> *Ibid*, p 110. Emphasis added.

<sup>45</sup> [1976] AC 249, at 278.

<sup>46</sup> Para 114.

<sup>47</sup> However, in *Williams and Humbert*, (Court of Appeal) (n 50 below) at 399, Fox, LJ, in relation to *Oppenheimer*, remarks, 'I think it is now clear that English law would not recognise such legislation at all.'

<sup>48</sup> [1986] AC 368.

<sup>49</sup> The distinction earlier drawn between confiscation, nationalisation and requisitioning seems nowadays to be of little significance.

<sup>50</sup> 'This pleading could be justified if English law abhorred the compulsory acquisition legislation of every other country, or if international law abhorred the compulsory acquisition legislation of all countries. But in fact compulsory acquisition is universally recognised and practised . . . ' (*Williams and Humbert v W & H Trademarks (Jersey) Ltd*, per Lord Templeman at p 427). Cf F A Mann, 'The Effect in England of the Compulsory Acquisition by a Foreign State of the Shares in a Foreign Company' 1986 *LQR* 191 at 192: 'Compulsory acquisition of property is an



criticised by Mann.<sup>51</sup> The case was also notable for the ambitious attempt by Nourse, J at first instance to classify foreign confiscatory rules in hierarchical form, starting with the most objectionable. A distinction was drawn between 'those foreign laws which English law abhors' ('Class I' laws, which are not recognised as laws at all by reason of their being discriminatory on grounds of race or religion and the like), and those foreign laws 'which it merely declines, on grounds of public policy, to enforce' ('Class II' laws).<sup>52</sup> The Iraqi seizure under consideration, though attracting universal international condemnation and being described as stealing,<sup>53</sup> nevertheless could be said to contain no discriminatory element, and it is made clear throughout the speeches that however unfair the circumstances, the case is not a human rights one.

But still, it is not surprising to find in Lord Hope's judgment the following: 'It is now clear, if it was not before, that the judiciary cannot close their eyes to the need for a concerted, international response to these threats to the rule of law in a democratic society.'<sup>54</sup> It is submitted that on examination the whole edifice of the decision, of which the consideration of the second limb of the double rule in tort is the apex, rests upon policy considerations deemed to be of overwhelming importance: these are considerations of public international law. Hence, the sub-division of public policy which is central to this decision is that which pertains to the maintenance and fostering of good international relations and peaceful international order, which, in turn, may be said to coincide with one important aspect of 'comity'.<sup>55</sup>

It is trite law that public policy has a narrower ambit in the conflict of laws than it has domestically.<sup>56</sup> The paradox is that, in this case, it would be unacceptable *not* to give effect to the policy expressed by the international community in the form of United Nations resolutions. Failure to acknowledge and to give effect to it would be parochial.<sup>57</sup>

institution common to all civilised nations.' However, Mann distinguishes between compulsory acquisition and confiscation of property, the latter of which he describes at 196 as 'an entirely different institution generally rejected by civilised nations.'

<sup>51</sup> FA Mann, *The Effect in England* . . . above at 195; and 'Rumasa in America' 1988 *LQR* 346. See also Mann, 'Outlines of a History of Expropriation' 1959 *LQR* 188.

<sup>52</sup> At 378–9. The categorisation was accepted by inference by the Court of Appeal in *Williams and Humbert* per Fox, LJ at 392; and was approved by Sir John Donaldson, MR, in *Settebello Ltd v Banco Totta & Acores* [1985] 1 WLR 1050.

<sup>53</sup> Lord Nicholls, para 36.

<sup>54</sup> Para 145.

<sup>55</sup> See generally J Fawcett, *op cit*. Comity traditionally has also included a sizeable portion of reciprocity. It is, of course, the policy of any legal system to protect its nationals/domiciliaries. From the comity angle too, high-mindedness is mixed with an awareness of the protection of national image, as pointed out by PB Carter 'The Rôle of Public Policy in English Private International Law' 1993 (42) *ICLQ* 1, at 4.

<sup>56</sup> Paras 166 and 167.

<sup>57</sup> Cf the notion of 'community public policy' which is integral to the public policy of individual European member states (Giuliano and Lagarde Report on the Law Applicable to Contractual Obligations [1980 OJ C282, at 38]). Nevertheless, concepts of the concept of comity vary over the years: thus in *Luther v Sagor* [1921] 3 KB 352, per Scrutton, LJ at 558, '[b]ut it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality'. His Lordship's point was that such judicial pronouncements might become a *casus belli* and were the province of the Sovereign and his ministers not of the judges. A more modern reason inhibiting non-recognition is adverted to per Lord Templeman in *Williams and Humbert* at 431, where he refuses to admit any attack on the moral quality of a compulsory acquisition by the government of Spain, essentially on the basis that we do not query the actions of a foreign friendly state, in this case one about to become a member with us of the EEC.



This is all very well and good and understandable, but surely it marks an enlargement in judicial confidence in the use of public policy, possibly prompted by recent atrocities and encouraged by the weight of international opinion as expressed by a powerful international organisation. But the political conditions in 1919 and 1939 were also dangerous, and yet it is only very recently that a student of the conflict of laws would dare to question the moral quality of an intra-territorial confiscation.<sup>58</sup> Perhaps we have been sleeping for fifty years, and a proactive approach is the correct approach. It may well be time to recognise that the scales have fallen from our eyes,<sup>59</sup> and to agree wholeheartedly with Lord Hope that, '[t]here is no need for restraint on grounds of public policy where it is claimed beyond dispute that a clearly established norm of international law has been violated.'<sup>60</sup> Indeed, what his Lordship is saying is that public policy *demand*s non-recognition; conversion prompted by 'conversion'.

#### VII. DELINQUENT DEALING WITH THE DOUBLE RULE

The English forum proceeded to apply its own modified version of the Iraqi *lex loci delicti* (namely, Iraqi law minus resolution 369). According to the edited *lex loci delicti*, KAC had *not* been divested of its title to the aircraft, and the facts could be taken to constitute 'usurpation' by Iraqi law.<sup>61</sup> Following this interpretation, and on the basis that the divestiture was not recognised by the English forum so that the first limb of the double rule presented no problem, the double rule *was* satisfied: 'The conduct would have been tortious if done in this country and was civilly actionable as usurpation in Iraq.'<sup>62</sup> Resolution 369 having been (notionally) excised from Iraqi law by the English court, their Lordships found the second limb of the double rule satisfied.

It is submitted that the majority interpretation of the double rule and its exception is a surprising one. The flexible exception as formulated in *Red Sea* does not permit a

<sup>58</sup> *Princess Paley Olga v Weisz*, above; *Novello & Co v Hinrichson Edition Ltd* [1951] Ch 1026; *Frankfurter v Exner* [1947] Ch 629. Crawford, *op cit*, para 3.13. Dr Morris suggested (Morris, *The Conflict of Laws*, 3rd edition (1984), p 380, n 46) that if a confiscatory decree could be viewed as 'penal' (in the sense of discriminatory on eg racial grounds), 'it probably will not be recognised as divesting the owner of his property, even if it was situated within the territory controlled by the foreign government at the time of the decree, if it is in England at the time of the action.' Authority is scarce. The view is repeated in the 4th edition (1993), at 338, and the 5th edition (2000), at 414 (both J D McClean), reliance on each occasion being placed on *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140, where, however, the securities judged by an English court to be beyond the reach of a Spanish republican decree had never been situated in Spain (see per Lord Templeman in *Williams and Humbert* at 431). However, confiscations by nature are unfair and it is notoriously difficult to discriminate between *them*. See *Luther v Sagor* above, per Scrutton, LJ at 559, again making the point that these judgments are political decisions: 'I do not feel able to come to the conclusion that the legislation of a State recognised by my Sovereign as an independent sovereign State is so contrary to moral principle that the judges ought not to recognise it.'

<sup>59</sup> As can be seen, in recent years, from the treatment of Nazi confiscated works of art. The Spoliation Advisory Panel, established by the UK Government in 2000, to help resolve claims in respect of cultural objects looted during the Nazi era (1933–45), has been charged with the task of giving due weight to the *moral* strength of claims. 'Conclusions on questions of law are not determinative of the parties' legal rights.' (Report of the Spoliation Advisory Panel, 18 January 2001, paras 6.2 and 6.3). Any recommendation made by the Panel, however, shall not be legally binding upon claimants or defendants, leaving the question of ownership of relevant cultural objects rather uncertain.

<sup>60</sup> Para 140.

<sup>61</sup> Para 45.

<sup>62</sup> Para 47.

court to displace the second limb of the double rule, that is, to discount all or part of the *lex loci delicti*, simply on the basis that the substance of that law is repugnant to the forum, or is not highly regarded by the forum. The forum is not expected, or entitled, to perform a quality control function as regards the substance of the foreign rule. The *Red Sea* exception does *not* introduce a ‘better law’ approach, but rather it sanctions displacement of a particular law only when another law is deemed to have a more significant relationship with the occurrence and the parties. That is to say, the decision to displace the *lex loci delicti* rests on perceived appropriateness of application of a(nother) particular legal system; it does not rest on the perceived merit of the substance of a rule, whatever may be the preferred practice in the USA. Nor is there any precedent for applying *part* of the *lex loci delicti* under the double rule regime, though it is true that under section 12 of the 1995 Act, segregation of issues—quite a different thing—is authorised. A selective approach to the application of foreign law is rarely seen and rarely justified,<sup>63</sup> except perhaps on the family side of the conflict of laws house.<sup>64</sup> But perhaps it is easier to accept an excision, on policy grounds, from a foreign rule within the law of obligations, for the sake of consistency and overarching policy considerations in this exceptional case, than to admit the possibility that their Lordships have introduced policy evaluation methods into an almost defunct conflict rule in tort. Wholesale rejection of one of the *leges causae*, on policy/comity grounds alone, however, might have been more palatable, and is not unprecedented.<sup>65</sup>

No comparison was made of the significance of the connection between the circumstances of the case and Iraqi law on the one hand, and English law on the other<sup>66</sup>—though this is hardly surprising given the extremely tenuous nature of the connection with English law.<sup>67</sup> As Lord Scott remarked, ‘What is proposed here is not that the law of the country with the most significant relationship etc should be applied but that the law of that country should be disappplied.’<sup>68</sup> It is with Iraq that KAC’s case against IAC has the most significant relationship. It is an Iraqi tort that KAC is prosecuting, not an English tort.<sup>69</sup>

#### VIII. THE DISSSENT

Rejecting KAC’s claim against IAC, Lord Scott took the view that the rule of double actionability was *not* satisfied: ‘[i]t is an unquestionable fact that under the law of Iraq

<sup>63</sup> Indeed, famously vilified in *Machado v Fontes* [1897] 2 QB 231 (where the forum turned a blind eye to the absence of civil remedy, choosing to be satisfied by the presence in the Brazilian *lex loci delicti* ‘delicti’ of the crime of libel). And though segregation of issues and the possibility of *dépeçage* is permitted in section 12 of the 1995 Act, section 14 (disapplication on the grounds of public policy) appears to take a broad approach. One cannot ‘blue-pencil’ the *lex loci delicti*; see per Lord Steyn, para 112, and Lord Hope, para 136.

<sup>64</sup> Eg *Martin v Buret* 1938 SLT 479, and *Buckle v Buckle* [1956] P 181 (regarding penal incapacities). See Crawford, *op cit*, paras 9.18 and 10.14. Consider also the Matrimonial and Family Proceedings Act 1984, which permits the forum to ‘add’ to a foreign order.

<sup>65</sup> As is evinced by Rome I, Article 16, and the 1995 Act, section 14. One can cite mirror image cases such as *Regazzone v Sethia* [1958] AC 301 (refusal, not grant, of a remedy) and *Foster v Driscoll* [1929] 1 KB 470.

<sup>66</sup> The nearest thing to a comparison is found in Lord Hope’s remarks at para 159.

<sup>67</sup> III. above.

<sup>68</sup> Cf Lord Hope’s remark at para 159 to the effect that, ‘[i]t cannot be said that the *lex loci delicti* has no real connection with these proceedings, as one of the parties to the action has its principal place of business in Iraq where the alleged acts of conversion took place.’

<sup>69</sup> Para 190.

at the relevant time IAC's conduct in relation to the aircraft was lawful and did not give rise to any civil liability.<sup>70</sup> Referring to a dictum of Lord Halsbury in *Carr v Francis Times & Co*,<sup>71</sup> his Lordship expressed the view that it was not for the English court to declare what was, or was not, the law of Iraq at the *tempus inspiciendum*. Similarly, recalling Lord Cross' decision in *Oppenheimer v Cattermole*,<sup>72</sup> Lord Scott explained that, '... although the courts of this country may refuse to give effect to odious or barbarous foreign legislation the existence of the legislation may nevertheless have to be recognised as a fact. So here.'<sup>73</sup>

But is it not true to say that, in recognising, we give effect? And equally, having refused recognition at Stage 1 (confiscation), it is difficult to justify inclusion amounting to recognition, or at least acceptance, at Stage 2 (tort). This dilemma is not fully resolved, it is submitted, by reference to distinctions between active (giving effect) and passive (noting) behaviour, or *in rem/in personam* considerations, no matter how much the conflict lawyer, anxious to preserve from abuse his conflict tort rules, warms to the dissenting judgment. As Lord Cross remarked in *Oppenheimer*, '... it surely cannot be right for the question whether the decree should be recognised or not to depend on the circumstances of the particular case.'<sup>74</sup> Whilst this comment related to those persons affected by Nazi legislation depriving them of German citizenship, the sentiment might apply with equal force to the Iraqi resolution: to recognise the existence of resolution 369 for the purposes of an action *in personam*, but not to recognise it (*a fortiori*, not to enforce it), for the purposes of an action *in rem*, is a strained distinction. Even if the *in personam* distinction is valid, recognition is not passive conduct: it leads, at least in this case, to enforcement, in form of the ensuing denial to KAC of a right of action.

One must always ponder what will be the effect of acceptance or rejection of a foreign rule. It could be said that by disregarding the objectionable *lex loci delicti*, the forum's view of substantial justice is reinforced by application, by default, of the *lex fori*. If the forum perceives that the *lack* of a right of action under the *lex loci delicti* offends the forum's public policy (eg, interspousal immunity under the *lex causae*), then disapplication of the *lex loci delicti*, and application by default of the *lex fori* (which confers no such immunity) would provide exactly such a right of action. This would be an example of positive, proactive use of public policy in conflict of laws resolution, which is rare (but perhaps possible now under the 1995 Act, section 14, a matter which remains to be seen). Accordingly, in certain cases, application (by default) of the

<sup>70</sup> Para 194. Lord Scott's judgment is concerned principally with tort—and not with property except so far as he distinguishes between different considerations pertaining to actions *in rem* and actions *in personam*; nevertheless, one can infer from para 194 that on the confiscation point, his Lordship does not dissent from his brethren.

<sup>71</sup> [1902] AC 176, at p 189: '... I am of the opinion that no English tribunal is capable of going behind that declaration and saying that the Sultan of Muscat was wrong in his exposition of his own law... [I]t appears to me that any other decision would be open to very serious questions of policy, if, in every case where the lord of a country has declared what the law of his own country is, it were open to an English tribunal to enter into the question and to determine, as against him, what was the law of his country.' (Para 184).

<sup>72</sup> [1976] AC 249.

<sup>73</sup> Para 195. (That is to say, while we would not order the delivery up to IAC of the aircraft positioned at Heathrow Airport [as to which see Morris, above, n 58], it is not justifiable for us to deny the content of Iraqi law at the time in question).

<sup>74</sup> [1976] AC 249, at 278.

*lex fori* will, in substance, bring about the result which the forum desires, but in a less objectionable manner than application by the forum of a forum-modified *lex loci delicti*.<sup>75</sup> But on occasion outright rejection may be the most honest course.

#### IX. CONCLUSION

It is submitted that the approach of Lord Scott is the preferable one in terms of the integrity of our conflict rules: it is not for an English forum to distort the picture of Iraqi law, as painted by Iraq; and it is not desirable for an English forum to distort the application of our own conflict rule. His Lordship pronounced that, '[i]t is not a function ever claimed for English law to provide tortious causes of action to citizens of foreign countries who are injured by acts in those countries committed by other citizens of foreign countries. Nor should it be . . . a foreign tort not actionable in the foreign country in question cannot be sued on in England.'<sup>76</sup> Rather than re-working the substantive provision of the *lex loci delicti*, it is submitted that, for the purposes of an *in personam* claim in tort, the English court, if purporting to apply the *lex loci delicti*, ought to have applied Iraqi law as it then stood, in the eyes of Iraqi law. Neither the double rule, nor the flexible exception, authorises the forum to censor the substantive *lex loci delicti*. The forum is not empowered to re-write the foreign law by picking and choosing only those parts of the *lex loci delicti* which echo its own notions of justice. Rather, to determine civil actionability, the forum is required to apply the foreign law *in toto*.<sup>77</sup> If the forum's sense of justice is outraged by the foreign law *per se*, or by the result of applying that law, a less artificial approach would be to refuse to apply that law *in toto*, and apply, in its place, by default, the *lex fori*. But the forum should not assert that it is applying the *lex loci delicti*, when, in reality, it is knowingly applying its own modified version of that law.<sup>78</sup> It should simply disapply—if it feels it must—the *lex loci delicti* on public policy grounds.

The current authors would respectfully contend that the majority of their Lordships were loose in their resort to public policy to delimit the meaning of the *lex loci delicti*

<sup>75</sup> See PB Carter, *op cit*, and R Leslie 'The Relevance of Public Policy in Legal Issues Involving other Countries and their Laws' 1995 *JR* 477.

<sup>76</sup> Para 198. His Lordship's bar on litigation in England ('cannot be sued on in England') relates not to the issue of jurisdiction, but rather to the issue of choice of law. Cf Lord Reid in nullity: *Ross Smith v Ross Smith* [1963] AC 280 at 306. This is the mirror opposite of *The Halley*, above, and can be contrasted also with *Szalatney-Stacho v Fink* [1947] 1 KB 1. But of course the discretion now available under the 1995 Act, section 12, renders possible regulation by English law of the forum the consequences of injurious actings abroad, which were not actionable where done—not perhaps so extreme a scenario as Lord Scott's, however. This could arise by reason of failure to prove the foreign law, perhaps where the claimant wished to secure a tactical advantage in terms of a longer prescriptive period under the *lex fori*, or absence of a statutory cap on damages by that law. However, in general, there can be no denying the truth of Lord Scott's remarks, and, it is submitted, the wisdom of his misgivings.

<sup>77</sup> See R Leslie, *op cit*, 'The Relevance of Public Policy in Legal Issues Involving other Countries and their Laws' 1995 *JR* 477. Then Dr Leslie notes, at 479, the question is 'with what do we replace it?' Cf 771 above.

<sup>78</sup> Even where the forum intends to apply the foreign law as it would be applied by the foreign court, and not as filtered by the forum, it is significant that, in many cases, the foreign law will be misapplied. (BJ Rodger and J Van Doorn 'Proof of Foreign Law' 1997 *ICLQ* 154, citing Zweigert (1973) 44 *Colorado L Rev* 283, 298: a survey showed that in 32 out of 40 cases where foreign law was pleaded, it was misapplied by the American courts).

in the operation of the double rule. Paradigm policy case though this may be, and even paying due attention to the need for coherence within the judgment,<sup>79</sup> arguably there is an overuse of the policy tool both in substance and in reference thereto, which confuses, and which may have done unnecessary damage to the pre-1995 tort rule. Certainly it is the policy consideration which has led their Lordships into an expansion of the flexible exception, which is arguably more than it should bear,<sup>80</sup> or more than is necessary for it to bear in this case.

However, since the English court refused to recognise the confiscation, it refused, in effect, to accept that KAC was divested of ownership. On that basis, it would be difficult for the court to do other than excise resolution 369 from Iraqi law (ie, the English court's understanding of Iraqi law). To apply the whole corpus of Iraqi law in respect of the action in tort does not sit easily with the conclusion that KAC still owned the aircraft.

Misgivings may arise from the fiction that the English (arguably inappropriate) forum applied the Iraqi law of tort trimmed to please, in order to reach its decision. It can be more plausibly suggested that the truth is that, on policy grounds, the forum was anxious *not* to apply Iraqi law.

There should be noted Lord Scott's rationalisation of his countervailing view, namely, that although (for the purposes of rights *in rem*) the English court may refuse to give effect to 'odious' Iraqi confiscatory legislation, nevertheless, for the purposes of the action in tort (ie, rights *in personam*) legislation must be recognised as a fact.<sup>81</sup> As commented above, there is perhaps some artificiality in this escape route; a bifurcated approach is not intrinsically attractive.<sup>82</sup> Both in the majority, and minority, view(s), there may be said to exist an element of a worthy end justifying the means.

Is it always a defeat to conclude that a case is *sui generis*? This note itself demonstrates that the circumstances of *KAC v IAC* provoke without difficulty comments on analogous situations or areas of conflict of laws experience. Yet the facts narrate a major international incident; the choice of forum is unusual and led directly to the form of action by which reparation was sought; the decision on tort was inevitably linked with the preceding decision on the validity of the confiscation and its impact upon property rights, thereby both informing and inhibiting the forum in its decision in tort, by reason of the need to produce an internally consistent and coherent result,<sup>83</sup> and the judgments, one might suggest, were certainly influenced by United Nations resolutions and by international opinion generally. In sum, the whole cannot be regarded as an orthodox conflict case in tort. Therefore, it is suggested that neither undue concern nor undue significance should attend this decision in its tortious aspect, especially since the sphere in which the double rule operates is now greatly reduced.<sup>84</sup> Naturally, in this result, the decision is to be welcomed.<sup>85</sup>

<sup>79</sup> Ie between Stage 1 (property) and Stage 2 (tort).

<sup>80</sup> Cf remarks at VII. above.

<sup>81</sup> Para 195.

<sup>82</sup> Cf P B Carter 'Rejection of Foreign Law: Some Private International Law Inhibitions', 55 *BYBIL* (1984) 111, at 124, '[i]t is to be noticed that in this framework within which resort to public policy operates there is implicit something of an 'all or nothing' attitude. If a foreign law is unacceptable, it is totally unacceptable regardless of the context.' Cf n 63 above.

<sup>83</sup> That is to say, the property decision enabled the first limb of the tort rule to be satisfied, and made it difficult for the second limb not to be satisfied.

<sup>84</sup> Applying only to those cases where the allegedly tortious act or omission occurred before 1 May 1996, and in defamation claims (section 13, 1995 Act).

<sup>85</sup> In relation to the findings of fact, see the decision of Steel, J: *Kuwait Airways Corporation v Iraqi Airways Corporation* [2003] QBD (Comm Ct.); [2003] *EWHC* 31.

*Strictu sensu*, a case can be made that rigid application of established international private law rules and precedents would have returned a different answer on both points (confiscation and tort); equally clearly, such an outcome would not have attracted general approval. Better, though, to see their Lordships' decision resting, given the extraordinary nature of these facts, on the basis of comity. But one cannot fail to notice that comity means different things to different people at different times.

Janeen M Carruthers and Elizabeth B Crawford\*

\* School of Law, University of Glasgow.