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LAWS5153 – Private International Law

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Introduction to PRIL

Private international law is not a body of substantive law. It is how you deal with a body of substantive law and applies to any area of law that applies between individuals.

The course will centre around the following 3 questions:

1. **Jurisdiction**
   Can the court hear the matter? – Jurisdiction to resolve matter between Australian P and foreign defendant OR two foreign defendants
   - Some of the rules that govern jurisdiction are covered in civil procedure but the course will focus on the principles that apply when you have a foreign defendant. The foreign defendant either wants to ignore the case, or if they want to defend it, challenge the court's jurisdiction.
   - The court will entertain a matter if the P and D are physically in Qld.
   - If the P can serve the originating process on the D in Qld, then the court has jurisdiction even if the matter has nothing to do with Qld.
2. **Choice of Law**
   Can the court resolve the dispute according to the law of another jurisdiction? This assumes that the jurisdictional battle has been resolved in favour of an Australian court hearing the matter.
   - Choice of law (a foreign or interstate law)
   - How does an Australian court decide which one of a number of competing laws will apply to resolve the dispute?
   - An Australian court can resolve a dispute according to the law of another jurisdiction.
3. **Enforcement**
   Will an overseas court recognise the Australian judgment and enforce it?
   - Once the P wins the case, how does the P get the judgement enforced?
   - Recognition or enforcement of a foreign or interstate judgement

General Principles

Lex fori = law of forum

- The lex fori will always apply its own law for procedural matters

Lex causae = the law of the cause and the substantive law of the dispute. This can be the law from another jurisdiction. This depends on the cause of the dispute (contract, tort, etc)

There are 3 ways by which conflicts of law can be reduced:

1. **Uniform Conflicts Rules** – this involves nations agreeing on uniform rules and does not require any country to surrender fundamental domestic policy (e.g. former refusal of Irish Republic to grant divorces). Countries are not forced to make their domestic law conform to some internationally-agreed norm and instead, unify the conflict of law rules that will be applied in the courts. The Hague Convention on Private International Law is the main agency in the area and has produced a number of draft conventions.

2. **International Conventions** – these conventions seek to avoid conflicts by unifying the substantive law of different countries by regulating relationships between private citizens and organisations. The International Institute for the Unification of Private Law at Rome (UNIDROIT) and the UN Commission for International Trade Law (UNCITRAL). Some progress towards unification has been made in relation to arbitration, international transport and sale of goods:
    - Hamburg and Rotterdam Rules governing carriage of goods by sea
    - Montreal Convention 1999 governing carriage of goods and passengers by air
    - New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958
    - 1980 Vienna Convention on the International Sale of Goods (CISG)

    Australia is a party to each of the above listed conventions and the law created by the conventions is both international and private. The international element means that it transcends municipal legal systems and, to the extent it succeeds it is likely to supersede the conflict of laws.

    Many international conventions have been drafted and signed but have not come into force because they have not been adopted by the requisite number of countries. If a country contemplating adoption, finds any provision of the convention contrary to its own values, it will not adopt the convention unless permitted to make a reservation. ***Reservations*** modify the 'all or nothing' nature of international conventions by permitting an adopting country to state it will not apply the convention's provisions on specified subjects.

3. **Model Laws** – these are designed to be a model for domestic legislation rather than a package of rules that must be applied in the adopting country. If a country finds the whole model acceptable, it can give the model law the force of law by domestic legislation. Alternately, a country may opt to adopt only parts of model law into its domestic legislation.

Regie National des Usines Renault SA v Zhang (2002) 187 ALR 1

Mr Zhang seeks Australian citizenship and according to law, he must travel overseas to make an application. Mr Zhang travels to New Caledonia and hires a car. He has an accident, is badly injured and has some medical treatment in New Caledonia. He travels back to Sydney where he undergoes long and extensive medical treatments which are very expensive. The cause of the accident arises from two reasons: either the car was negligently manufactured or improperly designed. Mr Zhang wants to sue the car manufacturer.

Mr Zhang will want to know which law applies (Australian or New Caledonia) to resolve the dispute. To sue a French defendant for a matter of negligence (torts), you must figure out what the Australian law rule about torts is. The private international law rule is the

lex loci delicti (law of the place of the tort). An Australian court will apply the law of the place where the tort occurred. The accident occurred in New Caledonia but this is not where the negligence occurred. Mr Zhang is arguing that the car was negligently designed or manufactured. The car was manufactured and designed in France and therefore the law of France applies. The D (Renault) challenged the jurisdiction of the Australian court.

There are different possible laws: Australian, New Caledonian and French. You need to resolve which law to apply and must look at the High Court's ruling to resolve this issue.

Does the court have jurisdiction over a foreign defendant? - If a French defendant does not have any money in Australia, they may simply ignore the writ from the Australian court. Even if you win, the matter must be enforced in France unless the defendant has sufficient assets in France – enforcement must be through a French enforcement order.

Example 2
An Australian seller and Dutch purchaser enter into a sales contract at a meeting in London. The contract is for cargo of oil from Kuwait to New Zealand. On reaching New Zealand, there is a dispute about the grade of oil.

What jurisdiction can hear the matter?

2. Australia
3. Holland
4. New Zealand – contractual default/tort discovered

What law will apply?

5. English law – contract entered into?
6. New Zealand law – delivery achieved and contractual default discovered

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Perrett v Robinson (1988) 169 CLR 172
Facts: In this case, Mr Perrett (P) was injured in a motor accident in the Northern Territory. The P was a NT resident and the car he was driving was also registered there. Mr Robinson's (D) car was registered in Qld and the himself was a resident of the NT. The only Qld connection is the registration of the vehicle and the law of the contract of insurance. The D admitted that the P's injuries were a result of his negligence. The P sought to bring the proceeding in Qld because the NT had introduced a no-fault compensation scheme which abolished the common law right to sue for damages. Instead, claimants under NT law were only entitled to receive benefits while their earning capacity was impaired and according to a scale for defined physical disabilities. Under Qld law, the P was entitled to claim for loss of future earnings, pain and suffering as part of common law damages.

The P elects to sue the D in Queensland. For the Queensland court to have jurisdiction, the D must be served in Qld. Mr Robinson agrees to travel to Mt Isa and is served with a Queensland originating process. Presumably, the D would prefer the NT law to apply because he is liable to pay less however Mr Robinson wants the P to get as much

compensation as possible because he feels guilty about causing the accident. The D does not have to pay, his insurance company does. By this stage, the insurance company is representing the D who argues that the NT law applies because the tort occurred there. The P is arguing that the Qld law applies.

Held: The court held that it had jurisdiction to hear the matter since the D was served in Qld (the D voluntary submitted to the jurisdiction of the Qld courts by travelling to Mt Isa). The court recognised that the only exception to the rule arises where the D has been fraudulently induced into entering the jurisdiction but no such inducement occurred in this case.

Commentary: The court is aiming to discourage forum shopping (i.e. P's looking around for different forums to see where is the best outcome). The elimination of forum shopping is one of the foundational principles of the course and underpins the court's reasoning in resolving choice of law issues – this provides certainty and uniformity of outcome. It does not matter where the P sues, he/she will obtain the same result (same rule applies no matter where you sue). This eliminates uncertainty about conflicting legal systems.

Example 4
A and B are both residents of Brisbane and are disputing ownership about a vehicle. The forum is the Queensland Court. The *Lex fori* is the law of the court where you hear the dispute (forum). The *Lex fori* will always apply its own law for procedural matters. Regardless of which law applies to resolve the substantive dispute, the procedural matters will be governed by the *Lex fori* (e.g. law of Queensland).

The *Lex causae* is the law of the cause and is the substantive law of the dispute and can be from another jurisdiction. This depends on the cause of the dispute (contract, tort, etc).

Example 5
Suppose the property in example 4 is actually real property (land) and located in Indonesia. If the dispute is brought in a Qld court, the *Lex fori* will be the Queensland law but the *Lex causae* will be the Indonesian Law.

We must apply Australian private international law rules to determine which states law applies having regard to the fact that the P is from State A, D from State B, the Event in State C and the Forum in State D.

Bodies of Law

There are three bodies of law that apply in Private International Law
a) Procedural Rules – civil procedure, evidence, legal professional rules
b) Substantive rules – Australian/qld law of contract, torts, property, family law, etc
c) Private international law – rules of choice of law (e.g. lex loci delecti)

However, private international law is not just about a conflict of substantive laws but also a conflict between different States' conflict of law rules. There may be a conflict between substantive Australian laws and those of foreign jurisdictions. Australian private international law rules may also conflict with the private international law rules of other jurisdictions.

Annesley, Davidson v Annesley [1926] Ch 692

An English testatrix (woman who makes a will) dies while domiciled in France leaving her will. She disowns her English son who disputes the validity of the will. The son pursues the matter in the English court however there is the possibility that the matter may have been heard in a French Court. The other party would be whoever actually inherited the property and may challenge the jurisdiction.

Assuming that such a jurisdictional challenge does not arise, do you apply English or French law to determine the validity of the will. For conflicts of law to be an issue, the English and French law must be compared and there must be a difference. Both laws state that the law is valid however French law allows you to leave property in your will but 1/3 of your property must go to your descendants. The son would prefer for the French law to apply while the other argues that English law applies.

English private international law: *lex domicili* at the time of death (law of where you are living). The same rule applies in Australia. The English court held that they will apply the *lex domicili* at the time of death (e.g. French law).

The other party argues that if the French law is to apply, is that merely the substantive French law or the French conflicts of law rules?

If the French conflict of law applies, then French law states that the validity of the will is determined by the nationality of the testatrix (i.e. English law). However, if English law applies, is that English substantive law or English conflict of law rules.

Renvoire (to return) – returning matter to another jurisdiction because there is a conflict of conflict of law rules. English Law states that in the first instance, French conflicts of law rules apply however if those rules transfer the matter back to English law, then English law will apply.

Policy/Theory Underpinning Private International Law

Why not have a rule that if you bring an action in Qld, the law of Qld applies? This would lead to forum shopping.

Suppose you defame a person on the internet and the defamatory statement is issued worldwide. The D will look at all international defamation laws and forum shop to obtain the best outcome. One of the foundational principles of private international law is to prevent forum shopping.

1. Consistency
    - Avoidance of forum shopping – there is debate about whether this is desirable

    - Same outcome irrespective of forum
2. Particular Justice
    - Reasonable expectations of the parties - the parties know that when they are interacting in an international sphere, they know which law applies
    - Forum public policy
3. Comity - respect for foreign legal systems
    - Policy considerations – interstate and international cooperation
    - There is an understanding that we will apply your law in certain circumstances and you will apply ours in certain circumstances, we will enforce judgements and you will too

Sources of Private International Law

The **common law** is the main source of Private International Rules in Australia. The common law of Australia in this area is the common law that the UK used to have but no longer has due to its integration in the EU.

The **constitutional sources** – there is more than one jurisdiction in Australia and constitutional arrangements were problematic but these problems have been done away with by agreement.

UNIDROIT – This international institution is based in Rome and its purpose is to unify private law. It inspects the common and civil law and seeks to obtain agreement on the law between countries where there are differences. This is one way of reducing conflicts of law. For example, where there are different laws in countries, UNIDROIT seeks to prompt those nations to agree on a particular set of law to apply to an area (e.g. family law).

UNICITRAL – The purpose is to unify the laws relating to international trade. The intent is to have uniform laws so that all nations have the same substantive law. If countries have the same substantive law, conflicts of law no longer exist.

The **Hague Conference on Private International Law** is an international organisation whose purpose is not to unify the substantive law of the countries. The intent is to unify the choice of law rules. If the choice of law rules are unified, the same rules apply where there is a conflict of laws and that will mean that the same result will be obtained in the courts of different countries. Family law is the main area of law that has been guided by the Hague Convention (and other international organisations) and the choice of law rules.

Multistate or Foreign Element

Private international law resolves around conflicts in jurisdictions. In Australia, the different states and territories are jurisdictions (due to federalism). Each jurisdiction in Australia that is constitutionally capable of having different laws, is, for the purposes of private international law, a foreign jurisdiction. Similarly, each different state in the US is a foreign jurisdiction. A foreign element can mean part of a national state if it is able to

adopt laws different to other parts of the national state. You can, therefore, have conflicts between Australia and France however this must involve laws legislated by the federal parliament. Other jurisdictions are unitary (e.g. France). There can also be conflicts between different elements (e.g. Qld and California).

Where federal legislation governs an area of law, there is no conflict of laws within Australia. Conflicts will arise where Australian federal law is distinct from the law of other foreign jurisdictions. For example, in Australia, family law is governed by the federal parliament whereas in the US, it is governed by states.

There can be NO conflict of laws in Australia where the common law is concerned. Conflicts will arise due to statute and if there is a difference between the statutes of two states. In ***Perrett v Robinson***, for example, the NT had replaced the common law with statute. There will always be a conflict where one set of rules favours one party and another set of rules favours the other party.

The HC has repeatedly held that there is only one common law in Australia. Conflicts between Australian law areas arise as a result of legislative intervention:

- Either two statutory provisions in different states conflict
- Statutory reform in one state clashes with unreformed common law of the other

Public v Private International Law

Public International Law is the law that applies between nation states. It is the relationship between national states in their capacity as nation states (e.g. public functions). Private international law is about matters which affect individuals and corporations, not the Australian government. Private law is about the ability to deal with a foreign element where both parties are acting in a private capacity. The source of Public International Law are conventions, treaties and customary international law. The source of Private International Law is the national law.

Private international law is often confused with public international law. Public international law is a supranational (global) law that exists independently of the legal systems and legislatures of each nation and is primarily concerned with relations between sovereign nations. Some provisions of public international law can become part of municipal law of individual countries however it can only be altered by international convention or upon implicit agreement between nations. Conflict of laws (private international law) is part of the domestic national law of each country (or states in the case of federations) and can be amended by its legislature. Choice-of-law rules vary between countries which can give rise to some problems.

Features of Private International Law

- The consequences of globalisation mean that interactions with foreign corporations are increasing and multistate legal problems are increasingly common.
- Private International Law is inherently and historically complex, with debated theoretical underpinnings. The rules of Private International Law is somewhat in

flux (i.e. common law changing) however the HC is reluctant to alter the law in this area.

- Private International Law is municipal law, therefore it is not universal, and differs from State to State (including differences in conflict of laws itself – different States may have different ways of addressing a foreign element in a legal issues).
- There is some degree of uniformity however, which is sometimes attempted through international conventions – e.g. Hague Convention on Exclusive Choice of Court Agreements

Background Reading: Nygh's Conflict of Laws in Australia – Chapter 2

Section 51(xxv) of the Constitution grants Parliament power to legislate with respect to the *'recognition throughout the Commonwealth, of the laws, the public Acts and records and the judicial proceedings of the States'*. The scope of this power has not been defined however it may enable parliament to enact statutory rules for resolving conflicts of laws between the states and territories. In ***Harris v Harris [1947] VLR 44***, Fullagar J proceeded on the assumption that Federal Parliament had the power to compel the courts of Victoria to give substantive recognition to the judgements of New South Wales. In ***Breavington v Godleman (1988) 169 CLR 4*** Mason CJ suggested that section 51(xxv) might support a legislative solution by the Federal Parliament of inter-jurisdictional conflict of laws problems in Australia and Wilson and Gaudron JJ suggested that section 51(xxv) allowed parliament to define the circumstances in which the laws of other states are to be recognised.

Section 118 of the ***Constitution*** states that *full faith and credit shall be given throughout the Commonwealth, to the laws, the public Acts and records and the judicial proceedings of every State*. Despite the omission, the court in ***Breavington v Godleman*** held that a constitutional obligation akin to that of full faith and credit is due to the law of the territories.

On the basis of ***s 118***, it could be argued that the common law choice of law rules have been displaced within Australia however the HC prefers the interpretation of ***s 118*** which does not interfere with the common law choice of law rules or state/territory legislation determining when the law of another state/territory can be applied in their courts.

Anderson v Eric Anderson Radio and TV Pty Ltd (1965) 114 CLR 20

Facts: The P was injured in the ACT through the negligence of the D and brought an action in NSW. It was found that the P was guilty of contributory negligence. The NSW common law provided that contributory negligence was a complete defence while, by contrast, ACT legislation provided that damages should be apportioned where there was contributory negligence.

Issue: The P argued that the effect of the full faith and credit provision (in the now-repealed ***s 18*** of the ***State and Territorial Laws and Records Recognition Act 1901***)[1] was to make ACT law application in the NSW court.

Held: The Court rejected this argument on the basis that the proper construction of the ACT legislation suggested that it only applied to proceedings commenced in the courts of the ACT. Therefore, full faith and credit could not be used to make the ACT provision part of NSW law and as such applicable in NSW courts. For the law of ACT to apply, the choice of law rules of NSW had to make the law of the ACT applicable to the matter before the court.

The High Court of Australia has found that ***s 118*** has no effect on the choice of law. The selection of the applicable law is the function of the common law (choice of law rules) while ***s 118*** provides for recognition by the courts of the forum so selected.[2]

4. The alternative interpretation was adopted by Napier J in ***F and B Chemicals and Wool Treatment Pty Ltd [1939] SASR 441*** who stated that ***s 118*** was a direction to the court of trial to ascertain and apply the proper law of the matter or transaction in question
5. The US initially adopted a similar position but gradually began to move away from this interpretation
    - In ***Richards v US 369 US 1 (1962)***, the court held that a *state court can constitutionally apply the law of any state which has a sufficiently substantial interest in the multi-state activity*
    - More recently in ***Baker v General Motors Corp, 522 US 222 (1998)***, the court held that the *full faith and credit clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate*

Section 118 operates so that once the choice-of-law rule of the forum has indicated the applicable law of another state or territory, full faith and credit must be given to the law chosen.[3] Further, once the choice of law rule of the forum refers to the law of another state or territory, considerations of full faith and credit will preclude the forum state from applying the safety valve of public policy to deny substantive effect to interstate laws.[4]

As discussed, s 118 does not possess a choice of law role or provide such a solution. The question remains whether any other constitutional provision, norm or implication from the federal structure operates in circumstances where two or more states purport to regulate or govern a single set of events.

Sweedman v Transport Accident Commission (2006) 226 CLR 362

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[1] Replaced by s 185 of the Evidence Act 1995 (Cth)
[2] McKain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 at 37 per Brennan, Dawson, Toohey and McHugh JJ
[3] Breavington v Godleman (1988) 169 CLR 41 at 50 per Dawson J
[4] Ibid at 577 per Rich and Dixon JJ, at 588 per Evatt J

Facts: In this case, Victorian and NSW legislation purported to address and regulate a motor vehicle accident in NSW between NSW and Victorian registered vehicles with drivers respectively from NSW and Victoria.

Held: The court rejected the greater governmental interests test and covering the field test (i.e. did either of the legislatures intend to cover the field by their enactment) for resolving clashes of law.

The court also held that there was no true conflict on the proper construction of both Acts. The NSW legislation did not speak to the availability of a statutorily-conferred right of indemnity from the tortfeasor which was granted by the Victorian legislation. Instead, the NSW legislation sought to place a cap on claims for damages.

In the absence of constitution guidance, the conundrum about how a clash/incompatibility between valid laws of co-ordinate legislatures speaking inconsistently to the same set of facts is to be resolved, remains.

Jurisdiction I

Jurisdiction is the combination of the ability to hear a matter and being able to enforce a judgment. Even if a court does have jurisdiction, it may decline to exercise its jurisdiction upon application by one of the parties.

Jurisdiction is the power that a court has to deal with a particular case. The Qld SC does not have unlimited jurisdiction and does not have the capacity to deal with disputes between two French nations that arose in Amsterdam, for example. In ***Regie National des Usines Renault SA v Zhang***, the court held it had jurisdiction – exorbitant exercise of jurisdiction. However, the D was not Australian, the D's assets are in France, the P was not an Australian national and the incident did not occur in Australia, therefore it may have been appropriate for French law to apply. Allowing the NSWSC to hear the matter is convenient for Mr Zhang who is hoping to obtain monetary compensation in Australian currency.

An Australian court may have jurisdiction over a D, because the D comes into Australia but this does not mean that the court can enforce the judgement because the D's assets may be elsewhere. Jurisdiction is a combination of the ability to hear a matter and being able to enforce a judgement. Even if the court has jurisdiction, the court may decline to exercise its jurisdiction upon application by one of the parties.

General Principles: International and interstate Jurisdiction

A. Jurisdiction at Common Law

At common, there were two alternate rules that underpinned a court's jurisdiction: territoriality and consent. If either rule is satisfied, then the court will have jurisdiction. **Territoriality** means the D is present in the territory of the forum and **consent** means that the D submits to the jurisdiction.

Territoriality

Jurisdiction on the basis of territoriality requires that the D is

1) present in the territory and
2) served with the initiating process

It does not matter who the D is or if the event occurred in Australia. No other connection is necessary other than the D is present in the territory.

In personam jurisdiction (i.e. jurisdiction related to a person) requires ONLY that the D is in the forum and served with the writ (initiating process). Provided the D is served within the jurisdiction, it is immaterial that the dispute has no connection with the court. The civil procedure process has two stages: (1) filing the claim in the court registry and (2) serving the claim on the D. When we say that a person has to be in the jurisdiction, it means that the D must be served in that jurisdiction.

Jurisdiction is perfected only when the claim is served, as only then can the D be said to be under a duty to obey the court's command to appear before it.

> *The D must be amenable or answerable to the command of the writ. His amenability still primarily depends upon nothing but presence in the jurisdiction -* ***Laurie v Carroll***

The duration of time or purpose for which a D has entered jurisdiction is immaterial (e.g. ***Maharanee of Baroda v Wildenstein*** - D served while in England for the Ascot Races). Sometimes referred to as 'tag' jurisdiction. It does not matter how long a D has been in that jurisdiction or for what the purpose the D is entering the jurisdiction, as long as the D can be served, the court will have jurisdiction. Therefore, the court will have jurisdiction even if, for example, the D disembarks a flight in Brisbane to catch a connecting flight elsewhere. Despite the fact that the D may only be in Brisbane airport for a short period of time, the court will still have jurisdiction. The only exception is where there is fraud (i.e. the D is fraudulently enticed or physically coerced into entering the jurisdiction for the purposes of being served).

It is immaterial that the dispute has no connection with the forum as long as the D can be served, the court will have jurisdiction. **UNLESS** the D is fraudulently enticed or physically coerced into the jurisdiction for the purposes of being served.

> This exception has been interpreted narrowly by the courts in Australia. In ***Evers v Firth (1987) 10 NSWLR 22***, the Queensland State Government Insurance Office did not succeed in having service set aside on the ground of collusion between P and D. The court refused to extend the principle of fraudulent enticement to the D's licensed insurer and there was nothing on the facts to suggest that the D had been subject to such fraud.

A person may be served having come within the jurisdiction in response to a summons, subpoena or otherwise by force of law.

Substituted Service

Generally speaking, you must be served within the jurisdiction. However, an exception was recognised in ***Laurie v Carroll*** where the court held that an order for substituted service could be made if the D

(1) is present in jurisdiction when the writ is issued,
(2) has knowledge that the writ has been issued and
(3) subsequently leaves the jurisdiction for the sole purpose of evading service

> Mere presence in the jurisdiction and subsequent departures without knowledge that the writ has been issued will **NOT** be sufficient for substituted service.
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> If the D is not in the jurisdiction when the writ is issued and is not served in the jurisdiction, the court will **NOT** have jurisdiction based on territoriality.

In personam v In rem Jurisdiction

Importantly, service is the act which perfects jurisdiction. In an action *in personam*, the rules related to the legal service of a writ define the limits of the court's jurisdiction.

In rem jurisidiction is jurisdiction against a thing – property. The most common D that is property is a ship. The Qld Court can exercise jurisdiction over any ship that sails into the port of Brisbane as if the ship was a legal person.

Consent

Alternately, a D may **consent** to a court's jurisdiction. This can be done in a number of ways:

- Submission by agreement - e.g. choice of forum clause in contract
    - Contracts usually contain both a conflicts of law clause (i.e. contract is governed by X law) and a clause which states that a dispute will be resolved in X forum (e.g. Qld courts).
- D authorising its lawyers/agents/representative to accept service of a writ even if authorisation is subsequently withdrawn ***(Filipowski v Frey [2005] NSWLEC 166)***
- Conduct inconsistent with protest against jurisdiction
    - E.g. asking court to do something in your favour amounts to submission to jurisdiction and acceptance of court's authority
    - E.g. raising substantive issues during proceedings challenging jurisdiction
    - E.g. D files unconditional appearance in a jurisdiction where the rules provide methods for setting aside a writ without entering an appearance
    - E.g. D files a conditional appearance and moves to set aside the writ or service but fails
    - E.g. D does not object to jurisdiction when objecting to P's application for interlocutory relief
    - E.g. D seeks interlocutory relief which is only consistent with an intention to contest the merits before entering an appearance
    - E.g. A foreign P who brings action within jurisdiction submits to any defence by way of counterclaim and any action by way of counterclaim arising out the same subject matter

  Note: A mere failure to object at the first opportunity does not amount to submission.

  Note: An application for stay of proceedings does not amount to a submission either.

  Note: A D who appears only to protest the jurisdiction of the court does not submit

  Note: A D does not submit by indicating that if submissions related to jurisdiction

fail, attempts will be made to strike out the case on bases that go to the merits of the case.

Appearances

The civil procedure rules in some jurisdictions permit appearances solely for the purpose of challenging jurisdiction. There is no need to file an appearance in the NT, NSW, TAS, VIC or WA to move for service to be set aside. In other jurisdictions, the D must appear as normal and challenge the court's jurisdiction at the first appearance. In South Australia, the D may make a conditional appearance which gives the D an opportunity to challenge jurisdiction. If the D fails to do so, the matter continues as normal.

In the alternative, you may raise substantive issues. At first instance, the D must be careful to only challenge the jurisdiction because If the D raises anything substantive in that situation, the court may allege that the D has submitted to the court's jurisdiction.

B. Jurisdiction in Interstate Cases (e.g. D is in another State/Territory)

A writ issued out of the HC of Australia or Federal Court may be served anywhere in Australia. Jurisdiction under the ***Jurisdiction of Courts Cross-Vesting Acts 1987 (Cth)*** allows each court to exercise the jurisdiction of another court. The legislation contemplates an agreement between the courts whereby for example, the Qld court will exercise NSW court jurisdiction if the NSW court agrees to exercise Qld jurisdiction. If the courts extend their jurisdiction across Australia in this way, there cannot be challenges to jurisdiction. ***Section 5*** of the Act permits the transfer of a matter from one Supreme Court to another.

> The cross-vesting scheme means that a matter can technically be raised in any state however it also includes a *more appropriate forum* test. This test allows matters which substantially relate to one jurisdiction to be transferred and heard in that particular jurisdiction.

The ***Service and Execution of Process Act 1992 (Cth)*** means that an initiating process out of any jurisdiction in Australia can be served anywhere in Australia. The service will perfect the court's jurisdiction. The legislation extends territoriality and effectively makes Australia one jurisdiction. This means that there is no need for any connection between the issue state and the serving state and allows, for example, a Qld court to initiate an action and serve the D in Victoria. The court has territoriality because SEPA extends the common law rule and therefore jurisdiction cannot be challenged. The legislation aims to remove the issue that arose in ***Perrett v Robinson*** whereby the D had to travel to Qld to be served.

- Service on corporations must be in accordance with the ***Corporations Act***

The Cross-Vesting Act has some limitations:

1. The Supreme Courts of each state cannot, constitutionally, cross-vest their jurisdiction to the federal and family law courts.

2. There is no cross-vesting of Federal and Family Court jurisdictions

C. Jurisdiction in International Cases (e.g. D is outside Australia)

Where a D is outside Australia, under common law rules, Australian courts have no jurisdiction as the D is not within the court's territorial jurisdiction and has not submitted the court's jurisdiction. There is a mechanism by statute to extend the court's jurisdiction to disputes concerning foreign defendants (i.e. ***UCPR Qld 1991, WASC Rules 1971, NTSC Rules 2006, UCPR NSW 2005, ACT Court Procedure Rules 2006, Federal Court Rules (Cth) 2011, Victorian SC (General Civil Procedure) Rules 2005, Tasmanian SC Rules 2000, SASC Rules 2006 and HC Rules (Cth) 2004***).

It means that the courts are serving somebody outside the court's jurisdiction. Usually, service was achieved through diplomatic channels because Australian courts are asking another country to go to one of its citizens and say that it is being summoned to appear before an Australian court. The ***Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965*** is an agreement between countries to allow the service of documents as between those countries. The convention came into force in Australia on 1 November 2010. The convention specifies how you serve a foreign defendant in that country and each country must elect a central authority through which such documents are channelled.

> There is some debate about whether the Hague Conventions replace the common law (on what basis you can serve the D) or merely explain the procedure to serve a foreign defendant. Most jurisdictions in Australia (with the exception of WA) have adopted the view that the convention governs **how** service must be made in a foreign convention state and **not when** you can serve a foreign D. Existing jurisdiction rules determine **when** service out of jurisdiction may be made.
>
> There is some uncertainty about the interaction of ***The Hague Convention*** with state and territory civil procedure rules and such uncertainty will remain until the HC clarifies the position. The US Supreme Court has ruled on this matter in ***Volkswagen Aktienfesellschaft v Schlunk*** where they held that the text of the Convention states that it only applies *'where there is occasion to transmit a judicial or extrajudicial document for service abroad'* however the Convention does not specify when there may be an occasion to transmit. On that basis, the US Supreme Court concluded that we must have reference to the internal law of the forum state to determine if there is an occasion to transmit.

Leave to Serve/Proceed Against Foreign D

Some jurisdictions in Australia do not want to put a foreign D to the time and expense of having to appear before an Australian court and therefore **leave of the court** must be obtained **to serve a foreign D** (Federal Court, NT, WA).

> If leave is required prior to service, the absence of leave will not render the service a nullity but it is an irregularity for which service may be set aside. It can be waived by the D or cured through exercise of court's dispensing power.

Other jurisdictions do not require the P to seek leave to serve the D however require **leave of the court to proceed against an absent foreign D** (ACT, VIC, NSW and Tasmania). This situation arises where the D has been served but does not respond to the claim. The P may then seek to proceed in court.

> Absence of leave in this situation will not affect the service but a subsequent order or judgement will be a nullity.

In SA and Qld, there is **no requirement to obtain the court's leave** to either serve or proceed against a foreign defendant.

Test to Obtain Leave of the Court

Where leave of the court is required and the D argues that leave to proceed should not be granted, the court will generally scrutinise 3 issues:

1. Does the P have a prima facie case? - *A high degree of certainty about the ultimate outcome of the proceedings is required* (per Gaudron, McHugh, Gummow and Hayne)
    a. Is there is a cause of action?
    b. The P bears the onus of establishing that a case exists. The court will view the statement of claim and supporting evidence and determine whether a prima facie case exists
2. Within the **grounds** of jurisdiction
    a. On what ground does the court exercise jurisdiction over the foreign D? Refer to r 124 UCPR (Qld)
    b. These rules provide some nexus between the matter and jurisdiction and therefore seek to connect the D and the forum
3. Even though a prima facie case exists, the D may argue that the court should not exercise its jurisdiction on the basis that it is a clearly inappropriate forum (*forum non conveniens* application) ***Agar v Hyde (2000) 201 CLR 552***

Qld does not impose any requirements to obtain leave however the court may turn its mind to the above issues if the foreign D seeks to challenge jurisdiction (after the P seeks to proceed against a previously absent foreign D). The most common challenge is that the D does not fall into one of the grounds of jurisdiction.

Grounds of Jurisdiction – r 124 UCPR

Each claim or cause of action must be specifically authorised by the relevant rules of the court (e.g. Qld UCPR). The rules provide for some form of nexus between the matter and jurisdiction and therefore seek to connect the D and the forum.

1. **Cause of Action Arising in the Jurisdiction** - It is not necessary that every element of a cause of action arise locally and instead, the question to ask is 'where in substance did the cause of action arise?' ***(Distillers v Thompson [1971] AC 458)***

   A drug was sold which had an effect on pregnant women (children were born deformed). The syrup was manufactured in Britain but distributed in Australia. The mothers wanted to sue the British company but had to locate the tort in Australia. They had to argue that the negligence was not necessarily the manufacture of the goods and instead the negligence that occurred in Australia was the failure to warn of the consequences of taking the product if pregnant. By articulating the tort this way, the court had jurisdiction and the lex loci delicti was Australian law.

2. **Actions in Contract** – proceedings are for the enforcement, rescission, dissolution, rectification, annulment of a contract or otherwise affect a contract or are for damages or relief in respect of the breach of a contract

The contract in question must be:

(i) made within the jurisdiction, either by the D personally or through an agent trading/residing within the forum – last act necessary to create binding obligation took place within jurisdiction (e.g. place of acceptance)
(ii) be governed by the law of the forum;
(iii) be breached in the forum wherever the contract may have been made;
(iv) contain a clause by which parties agree to submit their dispute to the jurisdiction of the court in question

3. **Tort** - Proceedings founded on or based on tort committed within the forum
   (a) In all jurisdictions except WA, service outside Australia is permitted where damage is suffered wholly or partly within the jurisdiction as a result of the tort, wherever it occurred
   (b) Service outside Australia is permitted where the P has suffered or continues to suffer within the forum any compensable damage caused by the tort, including economic loss
   (c) Locating the tort must be in accordance with the law of the forum

   In defamation cases, for example, it has been held that the place of the wrong is the place where the defamatory material was published and received NOT where it was spoken or written ***(Dow Jones v Gutnick (2002) 210 CLR 575)***

   In this case, Dow Jones, a foreign defendant, published an article about Mr Gutnick (a prominent Victorian businessman) who viewed it as defamatory and sought to sue. Australian law has to locate the tort and according to Australian law, the tort of defamation occurs when reputational damage is suffered. The publication was on the internet and therefore the D has suffered reputational damage globally and wherever the article has been read.

Held: Gleeson CJ, McHugh, Gummow and Hayne JJ (at 607):

It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

If the statement is made from abroad at a recipient in the forum and intended to be acted upon there, misrepresentation takes place where the message was received and acted upon. However, if the representation is made abroad to a local recipient, the tort is committed there, even though it was acted upon in the forum and caused damage there ***(Voth v Manildra Flour Mills (1990) 171 CLR 538)***

Distillers v Thompson [1971] AC 458: A drug was sold which had an effect on pregnant women (children born deformed). The syrup was manufactured in Britain but distributed in Australia. The mothers wanted to sue the British company but they had to locate the tort in Australia. They had to argue that the negligence was not necessarily the manufacture of the goods, the negligence that occurred in Australia was the failure to warn of the consequences of taking the product if pregnant. By articulating the tort in that way, the court had jurisdiction and the *lex loci delicti* was Australian law. They could have also argued that damages were suffered in Australia (as Mr Zhang did). By articulating the tort as negligent manufacture, the court would have applied the *lex loci delicti* and therefore applied UK law. In this case, Australian law was more favourable to the P and therefore the tort was articulated in an alternate manner.

Agar v Hyde (2000) 201 CLR 552 – In this case, two rugby players sustained serious injured during a rugby union game. The P's alleged that the international voluntary sporting board had a duty to take reasonable care to ensure that the rules did not provide for circumstances where risks of serious injury were taken unnecessarily. The board members were all residents outside Australia and were served on the basis that as members of an international board, they owed a duty of care to players worldwide including the P's. The P's injuries were suffered in Australia but the P's argued that the rules were drafted negligently. The HC found that the board was not liable as the board had failed to act (omission) and duties were not ordinarily imposed in those circumstances.

Therefore, as long as the P has suffered damages in Australia, Australian courts have jurisdiction.

4. **Statutory Actions for Misleading and Deceptive Conduct** Proceedings founded on a breach of an Act if the breach occurs in Australia (both Commonwealth and Qld respectively)

(a) NT, VIC and WA rules do not contain rules allowing overseas service for statutory claims or causes of action arising within jurisdiction

5. **Construction and Enforcement of Statutes and Delegated Legislation** – The Federal Court rules extend to regulations and executive/ministerial/administrative acts done under an Act or regulation
6. **Defendant domiciled or ordinarily resident in the jurisdiction** – this is not a test of nationality
7. **Defendant submitted to the jurisdiction** – WA rules do not list this as a head for overseas service
8. **Defendant necessary or proper party; claims for contribution or indemnity**
9. **Property within jurisdiction** – ownership or possession or affecting land (for latter, action must have direct effect on property itself such as possession or title)
    (a) obtaining evidence for future claim about property or perpetuating testimony relating to property
    (b) proceedings concern construction, effect or enforcement of any act, deed, contract, obligation or liability affecting any property
10. **Injunctive relief** – injunction sought to compel or restrain performance of an act within the jurisdiction
11. **Administration of estates** – for person who dies domiciled in jurisdiction
12. **Trusts** – proceedings for execution of trusts governed by law of the forum
    (a) Limited to trusts of property situated within jurisdiction (except in NSW, SA, TAS and FCA)
13. **Actions against air carriers**
    (a) NT, VIC and WA permit service in relation to action brought under Civil Aviation Act 1959 (Cth)
    (b) ACT and QLD – service permitted only if proceeding brought by resident of jurisdiction or in relation to damage that happened in jurisdiction
14. **Corporations and associations**
    (a) ACT, FCA, NSW, QLD and TAS allow service for proceedings affecting the person to be served in relation to that person's membership or office in a corporation incorporated in the jurisdiction or an unincorporated association formed or doing business there
    (b) FCA, ACT and TAS – includes corporations carrying on business in jurisdiction even if not incorporated there
    (c) WA more restricted – subject matter of action is any share or stock in a corporation having its principal place of business within state
    (d) No provisions dealing with corporations in NT, VIC or SA
15. **Taxes** – In WA, overseas service permitted if in respect of taxes or duty imposed or become due on or in respect of property situated in jurisdiction
    (a) ACT and Qld – P seeks to recover amount payable under statute of forum to an entity in the jurisdiction (covers taxes and rates and charges due to public authorities in that jurisdiction)
16. **Arbitration** – FCA permits service for proceedings related to arbitration carried out in Australia or proceedings under International Arbitration Act 1974 (Cth)
    (a) QLD – arbitration held in Qld
    (b) ACT, NSW and TAS – arbitration held in or governed by law of jurisdiction; or brought to enforce in the jurisdiction of an arbitral award wherever

made; or for orders necessary or convenient for carrying into effect in the jurisdiction the whole or any part of an arbitral award wherever made

(c) SA – proceedings for enforcement of arbitral award

(d) No provisions relating to arbitrations in NT, VIC or WA

17. **Enforcement of foreign judgments** – ACT, NSW, SA and TAS

18. Custody of Minors and others with Legal Disabilities

(a) FCA, NSW, NT, TAS and VIC – proceedings for custody, guardianship, protection or welfare of a minor

(b) ACT, NT, QLD and VIC – similar provisions extending to persons under legal incapacity or incapable of managing their own affairs however in QLD and ACT, that person must be domiciled or present or resident in the jurisdiction

Jurisdictional Limits

The court has discretion not to exercise jurisdiction that it has. There are very limited circumstances where an Australian court will not exercise jurisdiction (even if the D is located in Australian territory):

1. Substantive Limits – the law of the jurisdiction requires it not be exercised
2. Restraints on Proceedings - the law of jurisdiction gives the court a discretion allowing it to choose not to exercise jurisdiction

Substantive Limits on Jurisdiction

There are very limited circumstances where an Australian court will not exercise jurisdiction (even if the D is located in Australian territory):

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- Restraint on Proceedings - the law of the jurisdiction gives the court a discretion allowing it to choose not to exercise jurisdiction

1. Foreign immovable – property outside of jurisdiction

The modern rule denying jurisdiction in respect of land situated abroad stems from the decision in ***British South Africa Co v Companhia de Mozambique***. This case is authority for two propositions:

- An Australian court will not exercise jurisdiction in respect of the title to, or possession of, land situated abroad
- The court will not entertain an action for trespass to foreign land even if the P's title is not in issue

The first proposition is based on the principle that only the court of the place where the land is situated can effectively enforce an order as to title and/or possession: ***Potter v Broken Hill Pty Ltd (1906) 3 CLR 479***.

The second proposition was considered in ***Hesperides Hotels v Muftizade [1979] AC 508***.

> In this case, the P company had been dispossessed of its hotel on the coast of Cyprus as a result of the Turkish invasion of that island in 1974. Turkish Cypriot interests were trying, in England, to organise holiday tours to the hotel. The P sued seeking damages against the D for conspiring to commit trespass and seeking an injunction to restrain him from committing further trespasses to the hotel. The P's title to the hotel was not in dispute and the P did not seek possession of the hotel. The House of Lords unanimously refused to depart from the rule that no action could lie in England in respect of trespass to any foreign land. Lord Wilberforce clarified that an action based on the P's right to possession of foreign land whether framed in trespass, conspiracy to commit trespass or in negligence or nuisance is outside the jurisdiction of the English courts. These principles have been adopted in Australian courts and still apply today.

Note: The Mozambique rule has been abolished in NSW in its entirety and the second form of the rule (related to trespass) has been abolished in the ACT.

Dagi v Broken Hill Pty Company Ltd (No 2) [1997] 1 VR 428

BHP has a copper mine in Papua New Guinea (PNG) and the copper mine effectively polluted the rivers. PNG brought an action in Australia for damages done to its environmental and wellbeing. The P's came to Australia to sue because many of BHP's assets are located in Australian and other procedural advantages may exist in the Australian legal system (as compared to the PNG system). There is no question of jurisdiction since BHP can be easily served and it is well known that they are an Australian company. The P's put forward an action in nuisance, trespass and negligence. Nuisance is a direct interference with the use or enjoyment of land – the action is related to property rights. The courts held that the action in nuisance relates to a title and possession of land and therefore the Mozambique rule applies and the court could not entertain the action.

The action in negligence was that by the actions of BHP, environmental damages have occurred which affect people's health. This claim has nothing to do with land and is related to damage to the P's and the actions of the D. The court held that this was simply a tort action and since the P sought monetary damages and the action was not related to land, the court heard the action. The court will not hear actions where title, trespass or possession underpin an action but will entertain actions that indirectly relate to land.

Suppose A and B enter into a contract to sell property in Vanuatu. If A thinks that B has breached the contract, the claim can be brought in an Australian court because the action is based in contract. The court can order that B must transfer the property to A (and a failure to do so is a breach of the court order and therefore entitles A to damages) however cannot order that A is the title holder or require Vanuatu to transfer title to A.

Other examples of substantive limits on jurisdiction include breach of trust, fraud in management of land, breach of fiduciary obligation regarding management of land and actions for specific performance. It is not difficult to draft pleadings so that they are framed as personal obligations and do not fall foul of the Mozambique Rule. The Mozambique Rule arises out of an English decision but England itself has done away with the rule by statute.

There are two exceptions to the Mozambique Rule:

- Actions in contract or based on personal equity between the parties (i.e. equitable interests in land based on contract)
    - ***Penn v Lord Baltimore (1750) 1 Ves Sen 444; 27 ER 1132***
      In this case there was a dispute between two Lords concerning the boundary between their American possessions. They had previously settled the dispute by an agreement in England where they both were at the time resident. In the agreement, the D had agreed to convey several counties to the P.

      In the action before the court, the P sought specific enforcement of the agreement. To the D's objection that the dispute concerned land outside of England, the court held that that equity could act in personam against a D

who was present before the court by ordering that he carry out the conveyance as agreed or face sanctions against his person or his English assets.
    - The equitable jurisdiction in respect of foreign land depends upon the existence between the parties of some personal obligation, arising out of contract or implied contract, fiduciary relationship or fraud or other conduct which in the view of the court would be unconscionable
    - The breach may arise from:
        - A breach by the trustee of foreign land of his/her fiduciary obligations towards the beneficiaries under a will
        - Refusal of trustee of express or resulting trust to reconvey
        - Equities that arise between partners in long term de facto relationship
    - Personal relationships may also arise out of/in:
        - Fraud or other unconscionable dealing
        - Quasi-contract

- Actions in admiralty and suits for the administration of an estate or trust
    - The Mozambique rule does not apply to actions in rem in admiralty where it is no objection that the lien sought to be enforced against the ship arose out of damage caused by the ship to the P's land abroad
    - The rule also does not apply to probate and administration suits where the courts have assumed jurisdiction to determine questions on which the title to foreign land depends

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Other examples of substantive limits on jurisdiction include breach of trust, fraud in management of land, breach of fiduciary obligation regarding management of land and actions for specific performance. It is not difficult to draft pleadings so that they are framed as personal obligations and do not fall foul of the Mozambique Rule. The Mozambique Rule arises out of an English decision but England itself has done away with the rule by statute.

2. Foreign state immunity

If the D is a foreign state, then the ***Foreign State Immunities Act 1985 (Cth)*** applies and grants the foreign state immunity. Ideas of sovereignty underpin this legislation – things that countries do as nation states are beyond the jurisdiction of any individual nation state. These matters can be argued before the ICJ. There are two exceptions to this rule:

(i) **Commercial Activities** - when a State acts as though it is a private individual or corporation, then the state can be a D. For example, if Person A contracts with Vietnam (government that owns its own plantations) to import goods. Vietnam is acting like a company by entering into contract and supplying goods

(ii) **Submission** – a foreign State can submit to the jurisdiction of the Australian courts

Therefore, there are two types of sovereign immunity:

1. **Absolute sovereign immunity** whereby the courts will not entertain any action where the D is a foreign entity; and
2. **Lesser form of sovereign immunity** – you only have immunity where the State is acting like a State and if the State is acting like an individual, then the court will hear an action

3. Diplomatic and consular immunity

Diplomats and consular officials from another nation that are based in Australia have immunity when acting in their official capacity (representing state) per the ***Diplomatic Privileges and Immunities Act 1967 (Cth)*** and ***Consular Privileges and Immunities Act 1972 (Cth)***.

However, if an ambassador or consular official acting in his/her personal capacity (e.g. purchasing a car), then they can be a D.

Restraints the Forum Court Places on Itself

Even when the court has jurisdiction, the D may ask the court not to exercise jurisdiction. The exercise of jurisdiction in Australia is discretionary. In many other jurisdictions, courts do not have discretion and must exercise jurisdiction if they have jurisdiction.

If the P has asked the court to exercise jurisdiction and the court has jurisdiction, then it is the P's right to have the matter heard. The court will only refuse to exercise its jurisdiction and stay the proceedings if the D can establish that there is:

1. An injustice to it because either the proceedings are either oppressive or vexatious **OR** an abuse of process; **AND**
2. A stay would not cause an injustice to the P

Oppressive or vexatious means *moral delinquency* (i.e. something fundamentally dishonest about the way the P was going about the proceedings).

> E.g. ***Egbert v Short [1907] 2 CH 205*** - In this case, the P (an American) served the D (resident of India) on a visit to England with a writ concerning a dispute which had occurred in India. He served the writ the day before the D was due to embark for the return voyage to India and it was clear that the P had chosen the English forum solely to vex and annoy the D. The court held that conduct falling short of such deliberate provocativeness was insufficient.

An application for a stay of proceedings is NOT a challenge to the Australian court's jurisdiction. It may be an alternative to a jurisdictional challenge.

Forum Non Conveniens Applications

The English Position

Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460

> *A stay of proceedings will be granted ... "where the court is satisfied that there is some **other** available **forum** , having jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the **interests of all the parties** and the **ends of justice**. "*

The test has two stages:

1. Is there another, more appropriate forum?
2. Will the P obtain justice in the foreign forum?

The English court takes into account the interests of both parties and undertakes a balancing exercise.

The ***Spiliada Maritime Corporation v Cansulex*** test is the *'clearly more appropriate forum'* test. The court will consider the forum with which the proceedings have the most real and substantial connection. In making that decision, some of these factors (**Lord Goff Factors**) the court will consider may include:

- Residence and availability of witnesses
- Residence and place of business of parties to action
- Law of the cause – where the tort is determines which law the court will apply to resolve the dispute
- Legitimate jurisdictional advantage (e.g. longer limitation period, better recovery for damages, quicker trial, greater scope for discovery, etc).
    - If the P has instituted an action in Australia to obtain some procedural benefit, then the court (being P friendly) will take those advantages into account

The burden of proof rests on the D to persuade the court to exercise its discretion to stay the proceedings. The D bears the onus of showing that the forum court is not the appropriate forum AND that there is another forum clearly more appropriate.

If the court is satisfied that there is another available forum which is prima facie the appropriate forum for trial, the burden shifts to the P to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in the court hearing the stay application.

If the court concludes that there is no available forum which is clearly more appropriate,

it will ordinarily refuse a stay.

The Australian Position

Definition of Vexatious and Oppressive	***Maritime Insurance v Geelong Harbour Trust Commrs (1908) 6 CLR 194*** The HC held that a stay should only be granted in cases in which: *"the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious."* This case became authority for the proposition that a stay should only be granted where the Plaintiff was guilty of *moral delinquency or irresponsible pursuit of litigation.* The starting position was articulated in ***Oceanic Sun Line Special Shipping v Fay (1988) 165 CLR 197*** where the court held that: *"A party who has regularly* [i.e. in accordance with the court's rules] *invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have its claim heard and determined"* Australian courts therefore begin with a presumption in favour of the P. The burden of showing the forum is inappropriate falls on the D in Australia. The D must show that the forum is so inappropriate a forum that the continuation of the proceedings would be oppressive and vexatious to him (***Voth***). ***Oceanic Sun Line Special Shopping Co Inc v Fay (1998) 165 CLR 197*** This case presented an opportunity for the Australian courts to follow the approach articulated in ***Spiliada*** however there was no clear ration in this case due to a splitting of the bench. 1. **Brennan J** advocated following the approach taken in the ***Geelong Harbour Trust*** case 2. **Deane and Gaudron JJ** held that the test is not about balancing the factors and considering which court is more appropriate (as in ***Spiliada***) and instead, the inquiry should focus on whether an Australian court is clearly inappropriate 3. **Wilson and Toohey JJ** advocated following the ***Spiliada*** approach. In this decision, the court held that vexatious and oppressive does not require moral delinquency. Proceedings can still be stayed where there are enough factors that make the Australian court clearly inappropriate rather than merely being a case where the P has acted morally irresponsibly. • **Vexatious** = seriously and unfairly burdensome, prejudicial or damaging

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<td>Voth Test

Availability of relief in foreign forum</td>
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Oppressive = productive of serious and unjustified trouble and harassment
In Voth, the court clarified that the words should be read as describing the objective effect of a continuation of the proceedings and a particular forum as the venue of the proceedings NOT describing the conduct of the P in selecting or persisting with that forum

Voth v Manildra Flour Mills (1992) 171 CLR 538
In this case, a NSW company was bringing an action against an accountant based in Missouri (foreign D). The NSW court has jurisdiction because the company suffers financial damages in NSW. These damages arise because the company is unable to claim certain tax advantages under the Australian tax system. The company sues on the basis that the accountant negligently failed to advise the company's subsidiary (incorporated in Kansas). As a result, the subsidiary was unable to claim tax advantages and therefore the parent company was unable to claim tax advantages in Australia.

According to Mason CJ, Deane, Dawson and Gaudron - the action should be stayed on the ground that NSW was a clearly inappropriate forum.

According to Toohey J - the action should be stayed on the ground that Missouri was the more appropriate forum.

The question whether the local court is a clearly inappropriate forum requires attention to be directed towards the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum. In the application of the clearly inappropriate forum test, the factors articulated by Lord Goff provide valuable assistance.

The availability of relief in a foreign forum will always be a relevant factor in determining whether or not the local forum is clearly inappropriate. However, circumstances may arise where the local forum is clearly inappropriate despite the fact that there is no other forum competent to entertain the proceedings

Campell JA in Garsec v His Majesty the Sultan of Brunei (2008) 250 ALR 682 stated that the principle is simply that the availability of the foreign forum, while always relevant, is never conclusive. The Australian courts focus is on its own appropriateness or inappropriateness, not the availability of a foreign forum.
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Application of Law of Forum to Dispute	It is not dispositive [determinative] that the P could achieve a better result in Australia than in a foreign forum, but the factor comes closest to being dispositive when, as in ***Reinsurance Australia Corp v HIH Casualty and General Insurance (2003) 254 ALR 29***, the Australian forum provides a remedy that would not be available at all in the foreign forum. In this case, the court held that belief relief under the Trade Practices Act 1974 (Cth) was only available in Australia, the Federal Court could not be a clearly inappropriate forum.
Relevance of Foreign Lex Causae	In deciding whether or not a forum is inappropriate, the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration. This factor is an important one but the courts should not focus on this factor to the exclusion of all others ***(Voth)*** In ***Renault v Zhang***, the majority held that: *"An Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the lex causae."* Nevertheless, the fact that the *lex causae* is a foreign law is clearly a relevant consideration. In ***Voth*** itself, the majority stated the reverse proposition, that: *"in deciding whether it has been established that the chosen forum is clearly inappropriate, the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration."* *The courts have taken differing approaches to the importance of foreign law. In* ***El-Kharouf v El-Kharouf [2004] NSWSC 187****, the court held that the centrality of Jordanian law to the proceedings was an important consideration and led to the stay of the proceedings. Similarly, in* ***Seereederei Baco Liner v Al Aliyu [2000] FCA 656****, the Federal Court granted a stay as it gave weight to the fact that the lex causae would most probably be Guinean law.* *By contrast, the courts in* ***Renault v Zhang****,* ***Puttick v Tenon*** *and* ***O'Reily v Western Sussex Hospitals NHS Trust [2012] NSWSC 909****, seemed unconcerned with the application of foreign law as the lex causae.* In ***O'Reilly v Western Sussex Hospitals***, Studdart AJ noted that the relevant English law was similar to the law of NSW on the matter in issue. It may be inferred then that the reason for the differing

	approaches relates to the degree of foreignness: Jordanian and Guinean law seem more foreign than French and New Zealand law and English law hardly seems foreign. There is perhaps more force in Justice Callinan's statements in ***Renault v Zhang*** (despite the fact that he was in dissent). His honour stated that: > *"No doubt Australian courts can and do regularly apply foreign law, but it would be vain to claim that they can, or would do it with the same familiarity and certainty as the courts of the jurisdiction in which it was created."* The significance of foreign law may be elevated when controversial issues under it are anticipated, such that it would be better for them to be decided by the court which can authoritatively rule on them and whose judgements are subject to appeal. Foreign law must be applied by judges without day to day familiarity with its workings and this introduces a risk of imperfect application. The risk increases where foreign law needs to be translated into English. In ***Amwano v Parbery (2005) 148 FCR 126***, Justice Finkelstein held that Australian courts should only, as a last resort, if at all, give meaning and content to a foreign Constitution. The same view was expressed in ***Garsec v Sultan of Brunei***. It is obviously better for constitutional interpretation to be undertaken by courts of the relevant foreign country. Resolution of a dispute may call for application of foreign law but also an understanding of customs, practices and standards of a particular industry or profession in the foreign country. Australian courts are obviously less well equipped to make a judgement about such matters than the relevant foreign court – this is also a factor to consider in determining whether to grant a stay. In ***Voth***, for example, one of the factors to consider was the relevance of the professional standards of accountants in Missouri. In ***McGregor v Potts (2005) 68 NSWLR 109***, a veterinary surgeon was kicked in the face by a horse while working for a veterinary practise partnership (D) in England. She sued in the NSWSC and the D's applied for a stay of proceedings on *forum non conveniens* grounds. The court concluded that the NSWSC was an inappropriate forum and in reaching that conclusion, had regard to that fact that the heart of the case will relate to what are safe employment practises and appropriate professional standards in England.
Availability of Witnesses and Other Evidence	The expense and inconvenience of bringing witnesses and documentary evidence from foreign countries to Australia and the expense of

The Anchoring Effect of s 18 ACL	translation into English may be relevant factors however they are often counterbalanced by the corresponding expense and inconvenience of sending Australian witnesses and documentary evidence to a foreign country if a stay were granted. This factor may be diminishing in importance with the capacity of courts to take evidence from witnesses outside Australia by audio or video link and both federal and state courts may accept electronic copies of documents. The need to call foreign witnesses is of greater significance where the witnesses are not in the control of the party wishing to call them and must therefore be compelled. The letter of request procedure in this situation may be time consuming and expensive and may delay the hearing of the proceedings. Many jurisdictions have no direct equivalent to the action for misleading and deceptive conduct in breach of the ACL. Staying proceedings in a claim involving such conduct may deprive a P of the legitimate juridical advantage of being able to seek redress in Australia. The P could retain that advantage only if the relevant foreign law had equivalent provisions.
Hardship to Litigants	In ***Reinsurance Australia v HIH Casualty and General Insurance (2003) 254 ALR 29,*** an Australian insurance company and its subsidiary in Monaco entered into contracts of insurance and re-insurance with companies incorporated in the UK and US. The Australian company and its subsidiary sued in the Australian Federal Court claiming they were induced into entering the contracts by misleading and deceptive conduct. The respondents sought a temporary or permanent stays of the Australian proceedings on the basis that related proceedings in the UK and US were already well advanced (3 years). The court concluded that co-existence of local and foreign proceedings is not vexatious or oppressive where relief is available in one forum that is not available in another and concluded that relief under the Trade Practises Act may not be granted in the UK and US proceedings.
Availability of Insurance	In such cases, the court should not assume that relief under the ACL will not be available in the foreign forum, but should make some affirmative effort, either by hearing expert evidence or considering the relevant foreign laws to determine whether that is so before refusing to grant a stay. The P who has chosen the Australian forum may suffer financial or other hardships if the Australian proceedings are stayed or if he/she is forced to pursue the claim overseas. The same applies to the D if the application for a stay of proceedings is denied. These are appropriate

Jurisdiction Clauses	factors to consider in a *forum non conveniens* analysis but often cancel each other out. The D may be insured against liability for proceedings brought in the foreign forum but not for proceedings brought in Australia. This factor may be taken into account but its impact is greater in cases when the overall connection to the Australian forum is relatively weak and vice versa if the overall connection to the Australian forum is strong. Suppose you have a choice of forum clause in the contract that states that disputes are to be referred to a court of Queensland and the D then brings a *forum non conveniens* application. In this situation, the contractual clause will become a heavily weighted (most important) factor provided that it is an exclusive choice of forum clause. If it is not exclusive, then it is not heavily weighted and becomes one factor to be taken into account along with other factors. An Australian court will be reluctant to stay proceedings if there is a clause in its favour. Where parties have agreed to litigate all disputes in a jurisdiction other than the Australian forum, the presence of such an agreement is not determinative of the question whether a stay should be granted, but it is more than merely one factor to be considered among others in the usual *forum non conveniens* analysis. There is a strong bias in favour of keeping the parties to their agreement to litigate elsewhere. The party who seeks to proceed in the Australian court despite the exclusive foreign forum agreement bears the burden of satisfying the court that there are strong grounds for proceeding in the forum. ***The Eleftheria [1970] 94*** This is a UK decision in which Justice Brandon held that in exercising its discretion, the court must take into account: ○ Where evidence to be found and effect of this on expense and convenience of trial ○ Whether law of forum is to apply (choice of law clause) ○ Connection of parties and degree of connection ○ Merely seeking procedural advantage ○ Whether plaintiff might be prejudiced by having to sue in foreign court (eg. unable to enforce foreign judgment, faced with statute of limitation, political or racial reasons unlikely to get fair trial) ***Lewis Construction v M Tichauer SA [1966] VR 341*** In this case, there was a contract for a crane on the docks in Victoria. The crane falls and injures personnel. One party

Lis Alibi Pendens	sues the other party for breach of contract on the basis that they did not fulfil their contractual obligations by providing an unsafe crane. There was a contractual exclusive choice of forum clause in the contract which stated that the dispute was to be heard in the Commercial Court of Lyon. The Court held that despite the clause, it was not a clearly inappropriate court. Potentially the fact that citizens were killed and injured in Australia became an important factor. It is not automatically the case that an exclusive choice of forum clause will lead you to that forum. Lis Alibi Pendens is one factor that goes to forum non conveniens. It is the occurrence of parallel proceedings on the same subject matter. Where a D applies for a stay of proceedings on the ground that litigation is pending between the same parties on the same subject matter in another jurisdiction, the court must apply the ***Voth*** principles to determine whether the forum is clearly inappropriate. In ***Henry v Henry (1996) 185 CLR 571***, the court held that parallel litigation may by itself give rise to a presumption that the institution of proceedings is vexatious within the expanded meaning of that term in ***Voth***. It does not follow that an Australian proceeding should be stayed if it was begun after the foreign one. In ***Henry v Henry***, the court stated that the existence of simultaneous proceedings in different countries is highly relevant to the question of whether the proceedings are oppressive but not conclusive. Relevant considerations include: 1. Priority in commencing action 2. Recognition of eventual foreign judgement 3. Connection between parties and subject matter of litigation with jurisdiction in question 4. Equality of access to justice in competing jurisdiction However, in ***CSR v Cigna Insurance (1997) 189 CLR 345***, the court held that: *"neither principle nor authority supports the view that the institution of foreign proceedings is, of itself, vexation or oppression. Similarly, neither principle nor authority supports the view that foreign proceedings become vexatious or oppressive in accordance with those principles in the event that the party against whom they are brought later commences proceedings with respect to the same subject-matter in this country."* The order in which proceedings are brought and by whom they are brought is significant. A plaintiff who institutes proceedings in Aus

having first sued on the same claim abroad, or having actively participated in it as defendant, is likely to face a successful application to have the Australian proceedings stayed – suing in Australia in those circumstances is prima facie vexatious or oppressive. The matter is still governed by the clearly inappropriate forum test and therefore some exceptions may arise (e.g. matrimonial proceedings about property in Australia).
If the P sued in Australia first, the institution of foreign proceedings on the same claim does not necessarily make the Australian proceedings vulnerable to a stay but their continuation may do so. Foreign proceedings are to be viewed as oppressive or vexatious only if there is nothing to be gained by them over and above what may be gained in local proceedings. P's have been allowed to point to different remedies that foreign jurisdictions offer or tactical advantage of obtaining judgement effective against D's assets.

Different considerations arise whether the proceedings in the forum and those abroad are related but raise different issues. In ***CSR v Cigna Insurance***, the court held:

> "Where different issues are involved in the local and foreign proceedings, albeit that the different proceedings arise out of the same substratum of fact, the question is not whether the Australian court is a clearly inappropriate forum for the litigation of the issues involved in the Australian proceeding. Rather, the question must be, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the Voth sense of those terms, namely, that they are productive or serious or unjustified trouble and harassment or seriously and unfairly burdensome, prejudicial or damaging."

The court should therefore consider the whole context to determine whether the continuation of the Australian proceedings would be vexatious or oppressive, rather than considering only whether the Australian forum is appropriate for the litigation of the issues involved in the Australian proceedings. Proceedings brought in Australia with the purpose of preventing a party from pursuing remedies available abroad, but not in Australia, are oppressive in the ***Voth*** sense.

TS Productions LLC v Drew Pictures Pty Ltd [2008] FCAFC 194

> In this case, two proceedings arose out of a dispute concerning copyright related to a film and a book based on the film. TS Production (TSP) brought proceedings against Drew Pictures (DP) in the Australian Federal Court seeking a declaration that is owned copyright in the film. DP then commenced an action in Illinois against TSP. DP asked the court to apply ***Voth*** and asked

Parallel Litigation Related Proceedings	the court to stay the proceedings on the basis that the Australian Federal Court was a clearly inappropriate forum. If the Australian Federal Court ruled that it was a clearly inappropriate forum, then the matter would be litigated in Illinois and DP was effectively able to choose the forum. The court will consider *lis alibi pendens* provided the matters are concerned with the same thing. The Court held that in Illinois, Drew Pictures was suing for breach of copyright which was to be determined by United States Law. TSP are suing DP under the same facts but seeking an alternate remedy because the matter will be determined pursuant to Australian Copyright Law. For parallel litigation to be an important factor that the court will consider, it must be about the same matter. It must be a dispute between the same parties (e.g. not TS productions and director of TS productions) and the matter itself must be the same substantive matter. The court held that the forum non conveniens application failed because the two proceedings were entirely different. This was because the remedies obtained under US Copyright Law and Australian Copyright Law would be different. In ***Whung v Whung (2011) 45 Fam LR 269***, Justice O'Reilly held that the matter in issue in the Australian proceedings for spousal property settlement was not the same issue raised in earlier divorce proceedings in Taiwan. The two proceedings involved different factual inquiry and the application of different legal principles. Justice O'Reilly held that it was appropriate to let the Australian proceedings continue because the wife was seeking a legitimate juridical advantage in Australia by pursuing a property settlement order that would not be available in the divorce proceedings in Taiwan. A different conclusion was reached on the same issue in the case of ***Yeo v Huy (No 2) [2012] FamCA 541***, where the court held that the proceedings for property settlement in Australia and divorce proceedings brought earlier in Taiwan were part of the same controversy because they arose out of the same substratum of fact. The court therefore concluded that the Australian court was a clearly inappropriate forum. The contrast between the two cases highlights that whether two proceedings are related lies, to some extent, in the eye of the beholder. ***Henry v Henry (1996) 185 CLR 571*** - The court held that if foreign

Temporary Stays	proceedings commenced first on same issue then *prima facie forum non conveniens* to initiate the action in Australia. This principle is in doubt. It may be that the factors weigh in favour of the UK party which means that the UK is likely to say that it is the most appropriate forum. In Australia, even though there is a more appropriate forum, that does not make the Australian court is an inappropriate forum. This may lead to parallel litigation. It is for the parties to work out the consequences of parallel litigation (perhaps through negotiation). *Forum non conveniens* applications are brought because a party wishes to end proceedings in Australia. The court does this by staying the proceedings to a point where the parties are able to get the matter resolved somewhere else. It stays the proceedings because under ***Geelong Harbour Trust***, the P has a prima facie right to have the matter litigated in the forum it was initiated. This gives the P an opportunity to come back and re-initiate the proceedings. Other jurisdictions dismiss the proceedings if a *forum non conveniens* application is made and successful. If you are asking for a temporary stay of proceedings (litigation occurring elsewhere), the D is not asking the court to exercise its discretion to stay proceedings and judge whether it is an inappropriate forum. Instead, the D is asking the judge to stay proceedings temporarily until the outcome of the other proceedings is known. In making an application for a temporary stay, the D does not have to argue based on ***Voth*** and instead the court must have regard to the following criteria (adopted by the HC in ***Henry v Henry***): 1. Which proceeding commenced first 2. Whether the termination of one proceeding is likely to have a material effect on the other 3. The public interest 4. The undesirability of two courts competing to see which of them determines common facts first 5. Consideration of circumstances related to witnesses 6. Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasteful 7. Undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues 8. How far advanced the proceedings are in each court 9. Law should strive against permitting multiplicity of proceedings in relation to similar issues 10. Generally balancing the advantages and disadvantages to each

	party This is one quick way of resolving parallel litigation. It allows the overseas litigation to continue and then if necessary, continue the Australian proceedings. ***Voth*** is applied where a party requires a permanent stay of proceedings.
Applications to Set Aside Service	Applications to serve process outside the jurisdiction are governed by the same rules articulated in ***Voth***. The court should not grant leave to serve until positively persuaded it should do so: ● Court must be satisfied that the proceedings will not be subsequently stayed as an abuse of process on forum non conveniens grounds - onus is on the P in this situation ● The reversal of the onus is sensible given that applications to set aside service effected outside jurisdiction require the court to consider whether it should assume jurisdiction. Applications to stay proceedings require the court to consider whether it should decline jurisdiction. In ***Renault v Zhang***, the court held that to obtain a stay of proceedings, the D would need to show that: *"… a trial in NSW would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment."* [at 521] *"An Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the lex causae."* [at 521] The court held that the fact that a choice of law rule leads to another jurisdiction is not a factor, which in itself, will influence the appropriateness of the forum.
Summary of test in Australia	1. The P has a prima facie right to have the chosen forum exercise jurisdiction regularly invoked by the P either through service of the D within the forum or outside, unless the forum is satisfied that it is clearly inappropriate. Too much weight should not be placed on this right however it may be significant if there is a finely balanced contest. 2. The onus of establishing that satisfaction lies on the party seeking a stay or the setting aside of service on that ground, except where the P was required to obtain prior leave to serve

	the D outside the jurisdiction. a. For forum non conveniens applications, the D must show that the forum is so inappropriate a forum that the continuation of the proceedings would be oppressive and vexatious to him (***Voth***) 3. The following factors are relevant to determine if a forum is clearly inappropriate however none of these factors is conclusive by itself: a. Any significant connection between the forum selected and the subject matter of the action and/or the parties (e.g. domiciles of parties, their places of business, place where the relevant transaction occurred, where the subject matter of suit is situated and other factors affecting convenience or expense such as the availability of witnesses) b. Any legitimate or juridical advantage to the P (e.g. greater recovery, more favourable limitation period, better ancillary procedures, or assets within the jurisdiction against which any judgement can be enforced) c. Whether the law of the forum will supply the substantive law to be applied in the resolution of the case or whether the matter is governed by foreign law The onus of satisfying the court that it is a *clearly inappropriate forum* rests on the party applying for the stay UNLESS the proceedings relate to a jurisdiction where prior leave to serve outside the jurisdiction is required. In those jurisdictions, the onus of satisfying the court that it is *not clearly inappropriate* remains with the P.

New Zealand Proceedings

New Zealand Proceedings	The ***Trans-Tasman Proceedings Act 2010 (Cth)*** creates a '*more appropriate forum*' test which must be applied when a stay is being sought and the other forum is New Zealand. The court must have regard to the following factors when determining which court is more appropriate: 1. Places of residence of the parties (or, if the party is not an individual, its principal place of business) 2. Places of residence of witnesses 3. Place where subject matter of proceeding is situated 4. Any agreement between the parties about the court or place in which proceeding should be commenced

	5. Law that it would be most appropriate to apply to the proceedings 6. Whether a related or similar proceeding has already been commenced against the D or another person in a New Zealand court 7. Financial circumstances of the parties 8. Any matter prescribed by regulations 9. Any other matter the Australian court considers relevant Subsection 19(2) states that the court must not take into account the fact that the proceeding was commenced in Australia.

Interstate Cases

This concerns proceedings between Australian jurisdictions. The ***Cross-Vesting Act*** allows for the transfer of proceedings and ***Voth*** is not important. ***Section 5*** of the Act looks similar to ***Spiliada*** (i.e. interests of the parties).

In BHP Billiton Ltd v Schultz (2004) 211 ALR 523, the court held:

There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised. It is not necessary that it should appear that the first [transferring] court is a "clearly inappropriate forum". It is both necessary and sufficient that, in the interests of justice, the second [transferee] court is more appropriate.

This is effectively ***Spiliadia*** within Australia. Cross vesting jurisdiction means that the court has complete discretion to transfer matters to another jurisdiction within Australia.

Jurisdiction III

Anti Suit Injunction	Suppose ZZ sues in California against AA and AA applies for a stay of proceedings. Suppose the Californian court refuses and finds that it is an appropriate forum and will hear the matter. AA can then travel to Qld and ask the Qld court to issue an injunction. The injunction is granted against ZZ personally (therefore you must have some jurisdiction over ZZ – in territory, consented or statutory nexus), to stop ZZ from litigating in California. This does away with all Californian litigation provided it can be enforced against ZZ. This is an anti-suit injunction as it stops a lawsuit from happening in another jurisdiction. The Australian company may either seek to make a forum non conveniens application in the Californian courts or apply for an anti-suit injunction in the Qld courts to quash the action brought in California. <u>Note:</u> ● Civil law systems do not usually recognise injunctions. ● The injunction is an equitable remedy and therefore at the discretion of the court o They can be granted on an interim or a quia timet basis ▪ Injunctions may be granted both to stop litigation but also in a pre-emptive sense (stops D from even starting litigation) o The entitlement to such relief is subject to standard equitable defences including laches and the doctrine of unclean hands ● Injunctions are typically prohibitive but may be mandatory ● The injunction is based on the *in personam* jurisdiction of the court. The court must therefore have jurisdiction over the party who is the subject of the injunction. o The modern anti-suit injunction extends to all litigants who are amenable to the jurisdiction of the court in which relief is sought (those who are either present or served within the jurisdiction, or those over whom the relevant court has extended jurisdiction to serve abroad by reference to the civil procedure rule ● Anti-suit injunctions may be sought ex parte (with full disclosure of all material facts to the court) o I.e. P can seek injunction without advising D that they are doing so and the D has no opportunity to be heard. Once the injunction is granted, the D subsequently has an opportunity to ask the court not to enforce the injunction. ● The limits to the power to grant an anti-suit injunction are determined by the concepts of equity and good conscience ● Anti-suit injunctions will not be granted where damages would otherwise be an adequate remedy for an infringement of a legal right.

- The consequences of ignoring an anti-suit injunction are contempt of court

Anti-suit injunctions are underpinned by 3 principles which were set out by Lord Good in ***Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] 1 AC 871*:**

1. The court exercising its jurisdiction does so in the interests of justice (not one of the parties). This is distinct from granting of a forum non conveniens stay of proceedings because in that case, the P is given the benefit of the doubt. The distinction arises from the fact that an anti-suit injunction is an equitable remedy.
2. Directed in personam to the plaintiff in the foreign proceedings not the foreign tribunal
3. Caution required given the implicit interference with a foreign court (comity)

There are 3 situations based upon which a court may grant an anti-suit injunction however more than one may apply in certain circumstances:

1. **To protect the jurisdiction of the Court and the Court's processes once set in motion**
   This is particularly the case where Qld is the first court and then later, the D has commenced proceedings in a foreign jurisdiction. If the foreign jurisdiction will interfere with the Qld proceeding, then the court may grant an anti-suit injunction.
2. **In aid of a Legal right** – the right to sue in the jurisdiction where you agreed in advance to sue in a particular jurisdiction (e.g. contractual clause).
3. **To restrain vexatious or oppressive foreign proceedings** – e.g. **Henry v Henry**

Concerns about Comity

Anti-suit injunctions bring comity into question. When the Qld court grants an anti-suit injunction that directs the D to discontinue litigation, this has a significant impact on Californian courts and lawyers - and on the sense that they are able to exercise the jurisdiction they think they have.

The reality is that no order is being directed to the Californian court and instead, it is being directed to the D personally. Indirectly, this amounts to an attack on the Californian court. Courts are therefore reluctant to grant injunctions because of the concept of comity. The degree to which a court is conscious of comity depends on the circumstances.

The exercise of this jurisdiction is ... "not on any arrogant assumption of

Anti Suit Injunctions versus Stay of Proceedings	*power in our court over foreign tribunals, but upon an undoubted control over the subjects of the realm, as a personal right to restrain them from committing injustice by [prosecuting inequitable claims]" (Lett v Lett [1906] 1 IR 618)* Originally, the courts held that anti-suit injunctions were about controlling nationals. However, now that jurisdiction has been extended beyond common law, the concept of the realm has been extended to include any D with nexus to the jurisdiction. Due to comity, Australian courts are reluctant to impose on Californian courts and prefer the P to obtain a stay of proceedings in the foreign jurisdiction using forum non conveniens applications. In Australia, comity is given effect to, in part by the requirement that Australian courts first satisfy themselves that they are not a clearly inappropriate forum before considering the grant of such relief - *CSR v Cigna Insurance* A party may seek an anti-suit injunction in the forum rather than seek a stay in the foreign forum for a number of reasons: 1. Certainty concerning the local forum and uncertainty concerning the foreign form 2. Cost - cheaper in local forum 3. Risk of not obtaining stay, particularly when difficult to challenge court's jurisdiction without at the same time somehow consenting by way of action o Seeking a stay may count as submission to the proceedings in the foreign jurisdiction with the consequence that any judgment ultimately given may be enforceable in another jurisdiction 4. Timing - might be quicker than seeking a stay 5. The foreign jurisdiction may lack the ability or will to grant a stay of proceedings on discretionary grounds 6. Even where a foreign court may grant a stay of proceedings on forum non conveniens grounds, a party may be skeptical as to its prospects of obtaining such relief (i.e. where the P in the foreign proceedings is a citizen or resident of the forum, especially one that has suffered physical injuries)
To Protect the Processes Once in Motion	This may occur if litigation is quite advanced before foreign litigation commences. This ground is often enlivened if there is a process that will clearly take place in Qld with assets in other jurisdictions and you are seeking to ensure other potential parties to the litigation do not go into the other jurisdiction to obtain the assets (e.g. bankruptcy, administration of deceased estate) E.g. a foreign creditor may seek to sue in a foreign jurisdiction to obtain

	assets located in a foreign location (and therefore get a better deal than other creditors). In those situations, Australian courts will readily grant an anti-suit injunction to ensure foreign creditors share in the assets according to Australian rules. Injunctions are also granted to stop people from interfering with the process. You may, for example, have a litigation in Qld and witnesses from different jurisdictions (multilateral contracts). Your opponent may do things in foreign jurisdictions because the procedural rules in foreign jurisdictions give them an advantage (e.g. evidence). This interferes with Qld processes and therefore the court will grant an anti-suit injunction. ***National Mutual Holdings v Sentry Corporation (1989) 87 ALR 539*** There was litigation ongoing in the Australian Federal Court and R discovered that P's solicitors used to be R's solicitors. No action was taken initially but further along in the proceedings, a party to a litigation before the FCA (R) commenced proceedings in New York seeking to prevent its former solicitors from acting for an opposing party (P) in the Australian proceedings. The Australian Federal Court held that this interfered with its process, it had no objection to the solicitors acting for P and that R did not take any action when the litigation first started. For that reason, the Federal Court granted an anti-suit injunction preventing R from continuing the litigation in New York. If halfway through the litigation, those solicitors were not able to act for P, that would interfere with Australian court processes. The court described the NY proceedings as a *procedure apt to bring about a situation whereby the other party changes its solicitor, a step of primary and paramount concern to this court* . ***Re Sirmoath Pty Ltd (No 3) (1991) 25 NSWLR 25*** – The NSWSC restrained proceedings which had commenced in Pennsylvania against the liquidator and provisional liquidator of a NSW company which was in the process of being wound up. His honour spoke of the need to protect officers of the court in the discharge of their official duties and described the foreign proceedings, brought by a trade creditor of the company, as intimidatory and oppressive. Both ***CSR v Cigna Insurance*** and ***Allstate Life Insurance v ANZ*** were at an advanced stage of preparation, having been the subject of intensive case management and allocation of court time when foreign proceedings were commenced. The foreign proceeding threatened not only the hearing dates but to undermine careful case management by the courts of the proceedings to date. ***Atlasnavios Navegacao v Ship Xin Tai Hai (2012) 291 ALR 797*** – A vessel had been arrested and a letter of undertaking filed to secure its release. The arrest had been challenged and a stay of Australian

	proceedings had been sought. At the same time, the shipowner had sought from Qingdao Maritime Court an order for delivery up of the letter of undertaking. It was this application that was the subject of the anti-suit injunction as, if granted, it would destroy the efficacy of the letter of undertaking which had operated as a substitute for the court's custody of the arrested vessel which was the foundation of its *in rem* jurisdiction. ***Weinstock v Sarnat [2005] NSWSC 744*** – an injunction was granted restraining a party from pursuing proceedings in Israel in circumstances where those proceedings had a tendency to interfere and/or overlap with the orderly administration of an estate which was being administered under the supervision of the NSWSC. The very existence of an advantage outside the forum may justify injunctive relief in cases where the P is considered to be evading the forum's important public policies (e.g. creditor seeks to move against assets outside jurisdiction and gain advantage over other creditors).
In Aid of Legal Right	The court will exercise discretion to grant anti-suit injunction where there is: ● an exclusive jurisdiction/choice of law clause in a contract ● a submission to arbitration ● agreements not to sue (e.g. deed of settlement/release) ● agreements to abide by an earlier decision Where an injunction is granted to restrain a breach of a legal right, questions may arise as to the true nature of the clause; namely whether or not it is exclusive. Commencement of foreign proceedings despite a party's prior agreement that an Australian court shall have non-exclusive jurisdiction will not constitute a breach of the agreement and therefore cannot found the grant of an anti-suit injunction. Prior to the decision in ***The Angelic Grace [1995] 1 Lloyd's Rep 87*** , common law courts were reluctant to grant anti-suit injunctions on the basis that they had the effect, in substance, of interesting with and stymieing (hindering) proceedings in foreign courts. Courts often held that since the grant of an anti-suit injunction was discretionary, it was preferable for the party to obtain a stay of the foreign proceedings in that jurisdiction. Such sensitivity to the concerns of international comity, at least in relation to where an anti-suit injunction was sought to restrain a breach of an arbitration or exclusive jurisdiction clause, was swept away

by ***The Angelic Grace*** case.

> *"There is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the D has promised not to bring them. Where an injunction is sought to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law, the English court need feel no diffidence in granting the injunction, provided that it is sought promptly and before foreign proceedings are too far advanced."*

Ace Insurance v Moose Enterprises [2009] NSWSC 724

> It was held that an anti-suit injunction would lie in equity's auxiliary jurisdiction in circumstances where a contract of insurance contained an Australian choice of law clause and one party commenced an action in a jurisdiction (California) in which the courts would not give effect to the choice of law clause.
>
> It was argued that the choice of law clause was an implied negative stipulation that the law of another country would not be invoked and the commencement of proceedings in California therefore breached the contract – breach ought to be restrained by anti-suit injunction.
>
> It was also argued that the commencement of foreign proceedings was in breach of the contractual term implied by law that a party would not do anything to deprive the other party of the benefit of the contractual bargain in respect of the choice-of law clause.
>
> It was further argued that the foreign proceedings constituted an abuse of process because if the party invoking Californian law succeeded, the other party would be entitled to recover equivalent damages for breach of the choice of law clause.
>
> The court held that the choice of law clause in question was not promissory and therefore incapable of forming an implied negative stipulation.

Anti-suit injunctions might not be granted even if proceedings are commenced in a foreign jurisdiction in breach of an exclusive jurisdiction clause, if the foreign proceedings involve third parties in addition to the parties to the agreement and the interests of justice, overall, recommend litigation in the foreign forum. In ***Sokana Industries v Freyre [1994] 1 Lloyd's Rep 56*** , the court declined to restrain proceedings in Florida brought in breach of a London arbitration clause in circumstances where Florida appeared to be the natural forum and where the impleading of a third party in those proceedings meant an injunction would generate a multiplicity of suits.

Restrain Vexatious or Oppressive Foreign Proceedings	The court will exercise its discretion to grant an anti-suit injunction where proceedings in a foreign court are vexatious or oppressive. In a multi-party dispute, if one forum lends itself to the resolution of all aspects of a dispute but the moving party elects not to proceed in that forum, such conduct may be characterised as vexatious and oppressive. The court in ***CSR v Cigna Insurance*** endorsed Goff LJ's view in ***Bank of Toyko v Karoom [1987] AC 45*** that foreign proceedings should be viewed as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings. This is distinct from considerations of vexation and oppression in *forum non conveniens* applications. ***CSR Limited v Cigna Insurance Australia (1997) 189 CLR 345*** – Litigation between the parties started in New Jersey and focused on a claim for indemnity for losses under the Sherman Act breaches (i.e. claim for indemnity where CSR had paid out damages for asbestos related claims) and argued that Cigna was obliged to indemnify them and had failed to do so. One of the advantages of going to New Jersey was that the Sherman Act awarded punitive damages (i.e. if successful, will obtain more than their actual losses). Cigna sued CSR in NSW and sought a declaratory judgment that they did not have an obligation to indemnify. At the same time, Cigna sought an anti-suit injunction from the NSW court stopping CSR from litigating in New Jersey. An injunction was granted at first instance, the decision upheld on appeal but overturned by the High Court. CSR is an Australian entity, and therefore clearly fell within the jurisdiction of the NSW court. When they were the subject of the NSW proceedings, CSR applied for a *forum non conveniens* application. This application failed. The HC held that the *forum non conveniens* application should have succeeded because the P had a legitimate reason for suing in New Jersey (i.e. advantage under Sherman Act). Essentially, the decision of the HC meant that if the *forum non conveniens* should have succeeded, then there should not have been an injunction issued against CSR. The HC agreed that proceedings should be stayed in NSW and by extension, held that the proceedings in New Jersey should be allowed to continue. The HC held that there was no basis for issuing an anti-suit injunction. ***Ace Insurance Ltd v Moss Enterprises Pty Ltd [2009] NSWSC 724*** In this case, there were two companies who were in dispute. Ace Insurance sued Moss Enterprises in NSW and Moss Enterprises sued Ace Insurance in California. Ace Insurance obtained an anti-suit injunction in NSW ordering Moss Enterprises to discontinue litigation in California. The court

issued the anti-suit injunction for a number of reasons. There was a clause in the contract which read as follows:

"Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia."

Commentary: Every jurisdiction within Australia is a separate jurisdiction (e.g. Qld, NSW) however the drafting of the contract clause as 'the law of the States and Territories' instead of naming a state, because insurance law is federal law.

There was an agreement that the parties would litigate in Australia and yet Moss Enterprises had commenced proceedings in California. The NSW court granted an anti-suit injunction in aid of a legal right (i.e. legal right being the right to sue where agreed).
It was also clear that there was no advantage to be gained by Moss Enterprises bringing a claim in California and furthermore, the Californian court would have applied Australian law. This was because the contract also contained a choice of law clause.
Therefore, the court found that the litigation in California was vexatious and oppressive. Therefore, the anti-suit injunction was ordered to preserve a legal right and on the basis that the foreign action was vexatious and oppressive.

Commentary: Justice Bereton equated vexatious and oppressive to a clearly inappropriate forum. His honour held that the court would grant an anti-suit injunction where a party has commenced an action in a foreign jurisdiction and that foreign jurisdiction is clearly inappropriate. This is quite a wide basis and wider than the court envisaged in **CSR v Cigna** (where the court considered comity and other circumstances to limit).

An anti-suit injunction is not only necessary to protect the jurisdiction of the issuing court and its processes but also where the foreign proceedings are vexatious and oppressive. In ***Allstate Life Insurance v ANZ (No 3) (1996) 64 FCR 1*** , Justice Lindgren held that the foreign proceedings were objectively vexatious and oppressive to the respondents but also posed a major interference with long-pending Federal Court proceedings on the verge of going to trial. In this case, an injunction was granted to restrain a party in proceedings pending in the FCA from invoking provisions of the US Rule of Civil Procedure to conduct oral depositions of witnesses of a cross-respondent in the Australian FCA proceedings. This case therefore suggests that anti-suit injunctions do not have to be for substantive relief.

In ***Allstate Insurance v ANZ*** , the court rejected considerations of

	administrative inconvenience and related costs as sufficient to justify the grant of an anti-suit injunction on the ground of vexation or oppression. In ***Henry v Henry*** , the court held that cases of pure concurrent litigation in different forums between the same parties in which complete relief may be had in both forums was vexatious and oppressive. In the ***Marriage of Dobson and Van Londen (2005) 33 Fam LR 525*** – A wife was restrained from pursuing spousal maintenance and child support proceedings in the Netherlands in circumstances where she was a party to property proceedings in the FCA against her former husband. The court held: *"It is vexatious and oppressive to commence and prosecute proceedings for spousal and child maintenance in a foreign court when:* o *both parties are seeking orders for property settlement in this country* o *when identical issues relating to the parties' financial positions and the needs of their children will need to be examined in all proceedings in question* o *when all financial matters can be determined in this country* *The oppression and vexation is confirmed when regard is had to the language differences and differences in the legal systems between Australia and the Netherlands and the wife's considerable advantages over the husband in relation to these matters."*
Anti Anti-Suit Injunctions	These are injunctions which order a party not to seek anti-suit injunctive relief in another forum in relation to proceedings in the issuing forum. Such an order was sought and obtained ex parte in ***Qantas Airways v Rolls Royce [2010] FCA 1481*** and similarly in ***Carlyle Capital Corporation v Conway [2013] 2 Lloyd's Rep 179*** . In both cases, anti-anti-suit injunctions were granted despite the fact that proceedings had been commenced in a forum other than the one nominated as having exclusive jurisdiction in the parties contractual arrangements.
Anti Anti Anti-Suit Injunction	These are injunctions which may be sought where a party considers it has a good case for restraining foreign proceedings on the basis of vexation or oppression but is also conscious of the possibility that, if the moving party in the foreign forum has notice of the proposed application to restrain its proceedings, it may seek to protect its vexatious strategy by seeking anti-anti-suit relief from its own forum. Suppose ZZ intends to sue in Qld but fears that AA will sue in a foreign court and therefore wants to pre-empt this with an anti-suit injunction. ZZ also fears that AA will get an anti anti-suit injunction in the foreign court preventing his original action (i.e. the anti-suit injunction application). ZZ's application for an injunction is technically an anti anti anti-suit injunction (stop litigation in foreign court + stop AA from obtaining

	injunction that stops ZZ's anti-suit injunction action). **Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (FCA 21 September 1995) Unreported** In this case, an anti-suit injunction was granted against another party's attempt to obtain an anti-suit injunction. Since the original action was for an anti-suit injunction, it amounted to an anti anti anti-suit injunction.

Personal Connecting Factors

From this point forward, assume that the matter is being litigated in Australian courts. From an Australian private international law perspective, nationality is not pertinent however nationality is pertinent in the private international law in other jurisdictions. These other jurisdictions view nationality as an important personal connecting factor. Australia uses 'domicile' in private international law to connect a person to a particular legal system.

Many choice of law rules use a personal connecting factor to determine the law of cause.

- The private international law rule for tort actions is *lex loci delicti* – there is no personal connecting factor in this instance.
- The choice of law rule for intestate succession (die without will) to movables is the law of the place where the deceased was domiciled at the time of the death.
- The choice of law for succession to immovable property is the law of the place where the immovable is situated (*lex situs*) – similar to Mozambique rule.

On what basis do people have different personal laws even though they are subject to the same jurisdiction? Certain legal systems state that if you are a certain type of person, these rules apply and if you are another type of person, other rules apply – i.e. religion (how you get married, who will obtain your property). The legal system allows this to happen – the law according to that legal system allows the different rules to apply. This does not exist in Australia. Personal connecting factors determine what law will apply to you individually as a person that might differ from another person but in the same legal system. The common law works on the basis of territorialism and therefore if you are in Australia, you are subject to Australian laws.

The three things that connect you to a jurisdiction are domicile, nationality (or citizenship) and residence. Increasingly, residence has been used in international conventions as a way of avoiding the clash between domicile and nationality.

A person can have three nationalities but only one domicile at common law. Legal systems that use nationality impose obligations on a person and impose their legal on a person but in certain circumstances, it becomes difficult to determine which of those is to apply. For example, if a person was killed in Europe, and one of the European legal systems was assessing the will it becomes difficult for that legal system to determine which of the nationalities is applicable. They are likely to use domicile as a way of differentiating between the nationalities. There are three different forms of domicile: (1) of origin (father's domicile at time of birth), (2) of dependence (minor – not capable of making decisions about domicile) and (3) of choice (chose where you will live). For many people, their domicile stays the same (e.g. born in Brisbane, parents live in Brisbane, stay in Brisbane) but the basis of the domicile changes in law.

A was born in Scotland (domicile of origin) but has British nationality. The nationality is an all-embracing concept that fulfils different requirements to domicile. Suppose A's parents move to Spain and intend to work in Spain indefinitely. The child, as a minor, has a domicile of dependence (usually based on dependence of the father) but not necessarily Spanish citizenship. At common law, the domicile of origin will be replaced

by the domicile of dependency. If A then moves to Australia, then that becomes the domicile of choice and A will lose the domicile of dependency. The domicile of choice is usually the most important (i.e. get married, buy property). A may acquire nationality in Australia and may have 3 nationalities. However, A may have ordinary residence in Brisbane and holiday homes in France and NSW – this amounts to three residences. International conventions use phrases like 'habitual residence' or 'ordinary residence' to distinguish between the types of residence. Therefore, you can have more than one nationality and residence but only one domicile.

The common law has developed rules to work out a person's domicile. The common law rules still exist but have been amended slightly by the Domicile Act 1982 (Cth) and Domicile Act 1981(Qld). The legislation states that if you are trying to work out a person's domicile after 1 July 1982, then the statutory rules apply (regardless of when a person is born) however if you are trying to work out a person's domicile prior to 1982, then the common law applies.

Parnell-Schoneveld v Repatriation (2003) 74 ALD 37

In this case, the legislation in 2001 allowed persons interned during WWII by the Japanese government to obtain compensation from the Japanese government. The legislation imposed a requirement that to obtain compensation, the person had to be a resident of Australia at the time. However, most Australians were not taken from Australia during WWII and instead were living in Jakarta and Singapore and at that point in time were interned during the war. These Australians were interned during the war and entitled to compensation under the 2001 legislation. In 2003, many people came forward arguing that they were interned and at the time of internment, were domiciled in Australia. The court had to consider factors about individuals dating back to 1943-44. The act did not apply at all – everything used to determine that person's domicile at that point in time (1942-44).

Domicile refers to a country. Scotland is a country for the purposes of private international law purposes in the same that Qld is a country. The choice of law rule, *lex domicile* must refer to a country (i.e. unitary legal system). The unitary legal system may be a state (e.g. NZ) or part of a state (e.g. Qld).

If A is domiciled in Egypt, died in Australia and has property in Egypt and Australia, the law that applies is the law of the place the person was domiciled. If the person was domiciled in Egypt, then property distribution to be made according to Egyptian law. If Egyptian law states that different rules apply to believers of Islam or Christianity, then that law will apply. Australian courts will follow the law of Egypt as the law of domicile. You cannot be domiciled in Christianity (in religion) – you cannot insist, from an Australian perspective, on your religion dictating what happens with your will. It is the law of the country in which you are domiciled that dictates that – Egyptian law may allow distinctions to be made based on religion but other jurisdictions do not.

At any point in time and for any one particular purpose, a person can only have one domicile. The constitution vests corporations and marriage power in the Federal Government. Therefore, there are no conflicts in relation to marriage rules because the rules apply consistently across the nation. However, for matters of tort, the law is state

based. For some purposes, a person's domicile is Qld if that domicile is related to a matter governed by state law. If the matter you are concerned with falls under the Commonwealth's federal jurisdiction, then a person's domicile is Australian. You can therefore technically have two domiciles (Australian and Qld) but you only have domicile for one particular purpose. Section 11 of the Domicile Act makes sure that, for the purposes of Australian law, you have one of those two domiciles.

Re Benko deceased [1968] SASR 243

Benko was a Hungarian resident and decides he wants to live in Australia but never decides where in Australia he wants to reside. He does not acquire Australian nationality and his domicile of origin is Hungary. He dies without setting roots anywhere and the court held that for the purpose of his in testate succession, he must be connected with one of the Australian states. It was not possible to determine his domicile of choice. If you cannot work out, at common law, what the domicile of choice is, you simply revert back to the domicile of origin. The court held that the domicile was Hungary. This case illustrated the problem with the rule of revival which states that a person's domicile of origin will fill a gap if your domicile of choice cannot be worked out. The problem is that a person's domicile of origin may be a domicile you have little connection with. It is not always where you are born and instead, is determined by the the domicile of your father at the time of your birth.

Section 11 sought to reverse the decision in **Re Benko** and instead, we must work out with which jurisdiction in Australia, *a person has, for the time being the closest connection*. This is usually the place the person died.

The laws in Australia, the US and England have changed so that citizenship is not automatically granted because a child was born in Australia. This change occurred because tourists were travelling overseas for the purpose of having a baby overseas.

Domicile of Origin

The common law rule is that a nuptial or legitimate child takes the father's domicile at the time of birth. An ex-nuptial (illegitimate) child takes the mothers domicile. Foudlings take the domicile of where they were found. The Marriage Act states that children no longer have a status and therefore it doesn't matter if parents were married or not married. If the parents believed they were married and it turned out that they weren't married (e.g. former divorce not valid), the Marriage Act 1961 (Cth) states that the child will then be legitimate (**s 91**).

The Domicile Act 1982 states that if the parents have separated or one had died, the child acquires the domicile of the surviving parent or the parent whim whom the child is living as his/her principal home (with whom they are living).

From 1 January 1979 (slide). At common law, a legitimate child took the domicile of the father and the rule essentially states that all children take the domicile of the father. Problems arise in the case of a single mother who doesn't know where or who the father

is. The act does not clarify the position in relation to this situation however common sense would suggest that you would replace the rule with domicile of the mother.

The common law always had the doctrine of revival and some jurisdictions still have this doctrine. It is used, for example, where somebody has a choice of choice but clearly give up that domicile of choice without acquiring a new domicile. Before and before they find a new domicile, something happens and at that point, we must determine the person's domicile. At common law, we fill in that gap with the domicile of origin. The Domicile Acts abolish the doctrine of revival but it only applies after 1982 and can still be applied if domicile needs to be determined at a date prior to 1982. To some extent, the doctrine still exists for those people whose domicile needs to be determined prior to 1982.

The revival doctrine has been abolished in Australia and replaced with the immediately passed domicile (one you have just given up).

Udny v Udny (1869) LR 1 Sc&Div 441

Colonel Udny was born in Scotland and lived in England from 1812-1844. From 1844-1853, he lives in France to escape his creditors. It was questionable whether he had a domicile of choice in France because he did not want to live there and was simply escaping creditors. He goes back to England in 1853 and his son is born out of wedlock. There was uncertainty about whether he intended to remain in England where he could be pursued by creditors. In 1854, he marries the mother. In some legal systems (including England), the son is regarded as illegitimate but under Scottish law, the illegitimacy is cured by the subsequent marriage. There is a conflict of law which turns on the domicile of the father at the time of the birth. The court could not establish his domicile of choice and therefore reverted to the domicile of origin under the doctrine of revival and therefore, the son was legitimate. However, the colonel had not been to Scotland or had any connection with it since 1812 (41 years prior).

The legal system states that Scotland is inherently connected with the Colonel but he had not been to Scotland in 41 years. Suppose that Colonel Udny was born to an Irish father. In that situation, Irish law would have applied to determine the legitimacy of his son in 1854. This is problematic as there is very little connection between the Colonel and Ireland (may have never visited Ireland). The doctrine of revival and the doctrine of domicile of origin is problematic because it may link a person to a legal system to which he/she has no connection and for this reason, the Domicile Act has done away with the doctrine of revival prospectively.

Domicile of Dependence

The domicile of minors follows that of their parents. Historically, at common law, married women had the domicile of their husband this was problematic where husbands deserted their wives (not divorced) and the wife followed his domicile. If the husband travels around the world, the wife's domicile is changing without going anywhere, doing anything or even being aware that her domicile is changing. This has

been abolished and no longer plays a part unless you are trying to establish the domicile of a person before 1982.

As long as the mentally ill stay incapable of making a domicile of choice, their domicile freezes. This is because you do not want guardians or trustees being able to change the person's domicile by moving from jurisdiction to jurisdiction.

Domicile of Choice

Domicile of choice has two requirements: presence (*factum*) and intention (*animus manendi*). The presence requirement is straightforward and requires that a person be present at the time they intend to acquire a domicile (i.e. passing customs at Australian airport). At the point where persons are making arrangements to move (e.g. selling property), Australia has not become domicile of choice. It is possible that persons may give up their old domicile of choice and not yet acquired a new domicile of choice because they are not physically in Australia and in that situation, the legislation fills in that gap with the domicile you have just given up (continue that domicile until you acquire a new one).

At common law, the test for intention was the *intention to reside permanently* in that place and it must be an intention that was freely chosen. It must not be because of some duty (e.g. military service, diplomatic role) or to escape creditors. If a person moves and then later forms intention, then the country becomes his/her domicile of choice.

Section 10 of the Federal Act and **Section 9 State Act** have revised the common law test as follows: it must be an *intention to reside permanently or indefinitely in the new country or state*.

The one area where personal connecting factors play an important role in private international law is in relation to intestate succession. This is because the rule is that intestate succession to movable property is determined by the *lex domicilli* at the time of death (who inherits property if you have not left a will or will is inadequate). This is a highly litigated area because you must work out the deceased person's intention yet the person whose intention you need to know if the person whose estate you are dealing with. This is one of the problems with domicile. In some cases dealing with people's estates, the courts have indicated that potentially a more objective test should be used (habitual residence or ordinary residence). We must determine the person's intention from the evidence as to what we think their intention was – there is no limit to the number of things you can have regard to, in order to determine a person's intension.

Intention

The subjective element requires establishing the persons intention however the very person's intention that needs to be ascertained is deceased. In some cases, dealing with a person's estate, the courts have held that domicile may not be the best way of dealing with the matter.

In the **Marriage of Ferrier-Watson and McElrath**, the court held that 'residence is the very best evidence of required information'. The starting point is therefore to look at the

person's residence. However, there is no limit to the factors that ought to be considered and can include for example, the purchase of property, extent of business dealings and acquisition of nationality, where you work, dual nationality, conversations about intentions, etc.

An intention to leave domicile of origin in itself is insufficient for you to lose that prior domicile nor is intention to acquire a new domicile in the future sufficient to acquire that new domicile. For example, until you have left the country, you have not given up domicile of choice even if you intend to do so and in this regard, presence is important!).

Ascertaining intention is difficult, especially where a person is living somewhere but clearly indicating an intention to live elsewhere or an intention not to reside in the place.

"It was not so much the hopes and expectations of the person concerned that were in issues by the probability, in his subjective assessment of the contingencies he has in contemplation being transformed into actualities" - ***The Estate of Fuld (deceased) (No. 3) [1966] 2 WLR 717***

It is not a person's hopes and expectations about where they may live and is instead, about the things you are thinking about that may happen in the future and the likelihood of those things happening, that will determine whether or not you obtain domicile.

Re Furse deceased Estate; Furse v Inland Revenue Commissioners [1980] 3 All ER 838

> An English resident stated if he is ever unable to manage the farm in England, he would move to his house in New York. He dies and the question is whether he is domiciled in England or in New York. There was a contingency and based on that contingency, his domicile would change. The court held that at the time he died, there was nothing to suggest that he was unable to manage his farm and therefore the extent to which the contingency would occur was unlikely. Therefore, he must have obtained a domicile in England.

Osvath-Latkoczy v Osvath-Latkoczy [1959] SCR 751, 19

> The person had a Hungarian domicile of choice but moves to Canada. He states that he would go back to Hungary if the Russians were out of Hungary and admitted that the likelihood of the Russians leaving was slim. The question was whether he had acquired a Canadian domicile on the basis he had decided to live in Canada permanently or indefinitely. The court held that he himself viewed the likelihood of the contingency occurring as low, and therefore held that his domicile of choice was Canada.
>
> Commentary: The case concerned relatives fighting over property where X is entitled to property under Canadian and Y is entitled to property under Hungarian law. The private international rules are therefore raised.

Inland Revenue Commissioners v Bullock [1976]

He comes to the UK to serve in the RAF and gets married to an English spouse. In his mind, upon retirement, he would move back to Canada but his wife wants to remain in England. The court held that the contingency was fairly clear (either wife is convinced to move or she dies) but the likelihood of that contingency occurring, in his mind, was quite likely. The court held that the never acquired a domicile of choice in England because he never intended to stay there permanently or indefinitely. He always wished to return to Canada.

Jamieson v Commissioner for Internal Revenue (2007) 210 FLR 210

In this case, an Australian was a resident of the US and working in the US. The court that he had not acquired domicile in US because he repeatedly expressed his intention to return to Australia, owned property in Australia and had successfully applied for jobs in Australia. His subjective intention was always to come back to Australia.

A person's domicile also determines their personal capacity to get married (i.e. right age and/or parental consent, single (has divorce been recognised)). The formal requirements are governed by the *place the marriage is celebrated*.

At the time, you acquire domicile of choice in Australia, you have to be in the country legally. That you become illegal at some stage in the future does not matter (e.g. overstay visas). The domicile determines, for private international law purposes, the law that applies to you however public law still applies (e.g. immigration, tax and criminal law). Domicile is not an immigration issue. For example, a person domiciled in Australia may still be deported but private international law rules will apply for the purposes of ascertaining status of property and marriage, etc.

Mark v Mark [2005] 3 All ER 912

Australian authorities suggest that illegality is a bar to domicile of choice. This has changed in other jurisdictions including the UK. In this case, the court held that for those people who enter the UK illegally and have lived there for a long period of time and have done things in the UK related to their personal life (and that do not relate to broader community), the law of the UK should apply.

In this case, a couple migrated illegally from Nigeria to the UK. They lived in England for a long time and got married in England. They then wanted to get divorced in England and the court held that the fact that they were illegal and may be deported is beside the point. In relation to their personal relationship to each other and capacity to be married, that is governed by the law of the place in which they had the most real connection (i.e. the UK).

This seems like a sensible approach but has not yet been decided in Australia.

The other category that becomes problematic is refugees. The concept behind refugee law is that a country provides persons with refuge while a conflict is continuing and then the refugees will return to their countries of origin. Therefore, acquiring status as a refugee is necessarily inconsistent with acquiring domicile of choice in Australia.

However, refugees may, at some point while physically in the refuge providing country may develop an intention to remain.

A person will lose domicile of choice when they (1) leave the domicile with (2) no intention of returning.

There are very few cases which turn on domicile and usually only relate to relatives fighting over property (e.g. validity of will or intestate succession).

Nationality

Even though Australia does not use nationality, other jurisdictions do and it may be the case that foreign choice of law rules may apply. To know whether somebody has nationality in another jurisdiction, you must apply the law of the other jurisdiction.

Historically, prior to the ***Australian Citizenship Act 1948 (Cth)***, persons were Australian citizens and British subjects (categories of citizens). The ***Australian Citizenship Act 2007 (Cth)*** states that citizenship may be acquired by:

- Birth
- Adoption
- Descent
- Grant
- Residence

Loss of Australian Citizenship

- Renunciation by application (e.g. if other states do not recognise dual citizenship)
- Revocation by minister (e.g. conviction of certain offences)
- Service in hostile armed forces – this was conceived at a time where Australia would have declared war on another country and this does not occur anymore
- Children of responsible parents who cease to be citizens

Foreign Citizenship – When will Australian Law recognise it?

Sykes v Cleary (No 2) (1992) 176 CLR 77 – In this case, senators had dual nationality and were potentially in breach of the Constitution as a result. The problem was that Greek law did not allow the senator to renounce its Greek citizenship/nationality. Australian law recognises that a person has a foreign citizenship or has lost that foreign citizenship when the foreign law recognises that person as such – must look to foreign law to determine if citizenship obtained or renounced.

The effect would be that no Greek Australians could become MP's and therefore the court held that Australian law does not recognise the foreign citizenship when the foreign law does and if the person has taken reasonable steps to discharge the foreign citizenship.

The choice of law rule for citizenship is the law of the citizenship. The only exception is set out in ***Sykes v Cleary***

Residence

Australia does not use residence for private international law purposes but it does apply for public law purposes. It is increasingly used in different forms including 'ordinary residence' and 'habitual residence' in international law instruments particularly to do with the rights of children (i.e. adoption, custody, financial support). Many international conventions try to use concepts that are not nationality or domicile based and instead, based on concepts that from an objective perspective locate somebody in one particular spot and one spot only.

Residence – it is uncertain whether a person's presence must have some degree of relative permanence. You could live in NSW for 2-3 months per year in a holiday house – this is still a residence but is not a permanent residence.

Ordinary Residence

Akbarali v Brent London Borough Council [1983] 2 AC 309, 343-4
Lord Scarman: "... a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration ...."
His Lordship referred to where a person is regularly living at a particular point of time.

The Hague Child Abduction and Protection Conventions both use the phrase 'habitual residence'. To take a child from its habitual residence is unlawful and the child will be returned to that habitual residence rather than domicile or nationality playing a role.

You will not be examined on residence. Be aware that it exists and comes up in certain family law contexts (domestic and international legislation).

DOMICILE EXAMINED IN WILLS CONTEXT

Choice of Law I

Jurisdiction and enforcement are about how to give effect to conflicts of laws but are not about conflicts of law as such. Without conflicts of law rules, forum shopping would be rampant. Jurisdiction and enforcement impose limitations on forum shopping but these are practical limitations (limitations that the party must consider). Choice of law aims to eliminate forum shopping – putting aside issues of jurisdiction and enforcement, if an issue was adjudicated in any country, we want the same result. Whatever the case is about, it is desirable that legal systems agree that it makes sense to resolve the dispute according to a particular legal system. This also allows the parties to have confidence that the contract will be governed by a particular law (e.g. if contract has connections with Japan – governed by Japan) and this gives effect to the intention of parties. Furthermore, choice of law rules gives effect and respect to other legal systems (comity). However, there is no one theory that underpins why we engage in the process of conflicts of law.

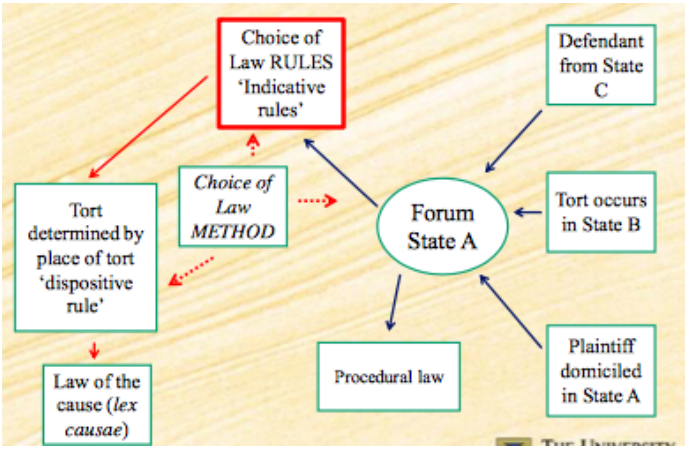
Read Chapter 12 Nyghs – by end of week 8 (Not needed for mid semester exam).

Regie National des Usines Renault SA v Zhang 210 CLR 491

There are at least 3 other legal systems connected with this case (other than NSW where it is being adjudicated): France, New Caledonia and China. The question is whether any of those legal systems matter in this particular case. It is up to the parties themselves to raise this if there is some advantage to doing so. There is nothing that says you must give effect to conflict of choice rules – it is for the parties to tell the courts how they want the matter to be adjudicated. If both parties make their case according to the law of NSW, despite the fact that the tort occurred in France, then the court will adjudicate the matter based on the law of NSW.

In this case, Renault may have seen an advantage in the tort law of France rather than the tort law of Australia. Tort law differs across legal systems (e.g. cap on damages in the Qld CLA). The first thing you must do when faced with a conflicts of law position is to work out where you will adjudicate the matter (jurisdiction). What is also important about jurisdiction is not only that tort law is different across legal systems but so are the choice of law rules. Australia uses the *lex loci delicti* rule absolutely and thus it does not matter who the parties are however in other jurisdictions, like China, it does matter who the parties are. Chinese law will also use the *lex loci delicti* however if neither party is Chinese and instead, both are from the same foreign jurisdiction, then Chinese courts (according to its choice of law rule) will apply the foreign law – exception to choice of law rule.

Part of the *forum non conveniens* issue – one of the factors is what is the lex causae (law of the cause) that will apply to the adjudication to work out who wins and who loses.



The P is domiciled in State A (or a national of State A). the tort occurs in State B. the D is from State C and the forum is State A. there are a range of different connections with different foreign legal systems. State A will apply three different sets of rules:

a) State A - procedural laws
b) Choice of Law (indicative) rules
c) Dispositive rules

Procedural laws are always the law of the forum. According to the procedural laws, the court must recognise whether the P or D will succeed. The court must then figure out which law (State A, B or C) should be applied. In order to do that, a set of indicative rules are required. Indicative rules are choice of law rules and the term indicative explains what the rules do (i.e. indicate broadly which substantive rules will apply as a starting point to resolve the dispute). Hopefully the indicative rule will lead you to the substantive rule. For example, if *lex loci delicti* is the indicative rule, then the *lex fori* locates the tort (the tort occurred in France) and therefore, the indicative rule states that the law of France must be used to resolve the tort. The dispositive rules are the substantive rules of whichever jurisdiction the indicative rule leads to (substantive rules) and dispose of/resolve the case. The *lex causae* is the law of the cause – the cause can be intellectual property, tort, contract, etc.

Choice of Law Method – **Renault v Zhang**

- NSW applies procedural rules
- NSW applies indicative rules of Australia – *lex loci delicti* which leads to France
- France dispositive rule disposes of the case

The French legal system was not engaged in the process and the matter was not sent to France. It was the NSW court deciding that in order to work out whether Renault owes damages to Zhang, French law must be applied.

The process of working out what is the indicative rule and working out which dispositive rule emerges at the end is called the choice of law method. At the heart of this method, are the indicative rules. Indicative rules are made of two components: characterisation/category and connecting rule that leads to another jurisdiction (e.g. domicile, situs, celebrationis). The categories are listed below (in bold):

- **Liability for tort** is governed by the *lex loci delicti* (law of the place of the tort)
- **Succession to immovable property** is governed by the *lex situs* (law of the place of the situation)
- **Formalities of marriage** is governed by the *lex loci celebrationis* (law of the place of the celebration ceremony)
- **Juristic capacity** to marry is governed by the *lex domicili* (law of the person's domicile)

The above are just some of the indicative rules in Australia and are common law rules. Working out the categories (where the tort occurred, where you are domiciled, etc.) are always determined by the court who will deal with the matter (the *lex fori*).

A. Choice of Law Method

The choice of law method is the method by which courts tried to identify conflicts o of laws, work out the indicative rule and then work out the dispositive rule.

1. Is there a conflict of law?
2. If so, what is the indicative rule?
3. Apply the dispositive rules

The process is not as simple as the 3 stages listed above. Instead, there is a five-step process. The five-step process does not describe what the courts have to do or what they appear to do in the cases. It is a useful way of working out how courts are most likely to work through the problem, even if the judgement itself, they do not explain that.

The choice of law method is the method by which a court determines whether a choice of law rule is invoked in a particular case. This approach is not prescribed by law and is not always or habitually applied. There is an element of circulatory. Often the method is determined by the area of law involved. For example, succession law leads to a more convoluted choice of law process than contract and property (which are simpler processes).

The Method

1. Identification of a conflict of laws
2. Classification of the subject matter – categories (tort, immovable property, capacity to marry, celebration of marriage).
3. Classification of substantive or procedural law
4. Identification of choice of law rule – this identifies which law applies to resolve the substantive issues
5. Application of the law of the cause

Part of the classification process is problematic. Although the *lex fori* deals with procedural laws and the dispositive rules are those of the substantive laws, knowing what is substantive and what is procedural is not clear. Part of the classification also involves how much of the dispute falls within the category (e.g. limitation periods)

There is an element of circulatory in this method – stages 1 and 5 are essentially the same. There are two ways to approach this:

- Analytical – step by step process per the method identified above

What happens in practicality is that one party spots an advantage in raising a conflict of laws and to do so, the party must have applied the law of all possible causes to their cases and then raised it as a conflict of law.

For example, Mr Zhang's lawyer identifies a foreign element (French D and tort occurred in New Caledonia). The articulation of the claim was in this case, informed by the choice of law rule and therefore lends itself to a particular legal system.

Step 1 is whether different parties have looked at the different legal systems and identified what is best for them. Step 5 is where the court makes a decision.

Identification of Conflict of Laws

There must be at least two legal systems which produce different results. There is only a need to invoke a choice of law rule where there is more than one legal system and applying the laws of different legal systems will produce different outcomes. Therefore, you need to know:

1. Which legal systems are possibly relevant to the case; and
2. The likely outcome by application of internal rules of each legal system

There is no conflict of law if the outcome of proceedings in both jurisdictions would be the same. For example, if there is a tort case between somebody based in NSW and somebody based in Qld. A conflict of law may exist because the Qld and NSW Civil Liability Acts may be different.

To determine if there is a conflict of laws, you must apply the laws of a foreign legal system to the substantive facts of your case.

Renault v Zhang

In this case, there were a number of relevant jurisdictions: France (place of negligent manufacture), New Caledonia (place of accident), China (nationality), NSW (domicile). The fact that Mr Zhang was a Chinese national is immaterial because Australian conflicts of law rules do not refer to nationality and therefore, China is not a legal system to consider. Nationality is not a connecting factor in Australian conflict of law rules.

In that case, the lawyers considered the connecting factors, the laws of each jurisdiction and decided to frame their case in light of the different jurisdictions and laws. They then decided which law was most preferable.

In practise, you must follow the following steps:

1. Look for any possible alternative legal systems that are relevant to the case (e.g. domicile, nationality, place of tort).
2. Consider Australian choice of laws generally to determine which possibilities might 'match' (i.e. domicile and tort since nationality is not considered in Australian choice of law rules).
3. Eliminate the legal systems which clearly have no possible relevance.
4. Consider the internal rules of each possible legal system
    a. True Conflict occurs when there is a difference between the application of laws. In this instance, a choice of law rule is needed to break the deadlock (e.g. law of NSW and law of France in ***Renault v Zhang***)

b. False Conflict occurs where the outcome would be the same under either legal system OR there is no evidence of the other legal system and so it is presumed to be the same as that of the forum (e.g. France and New Caledonia in ***Renault v Zhang***)

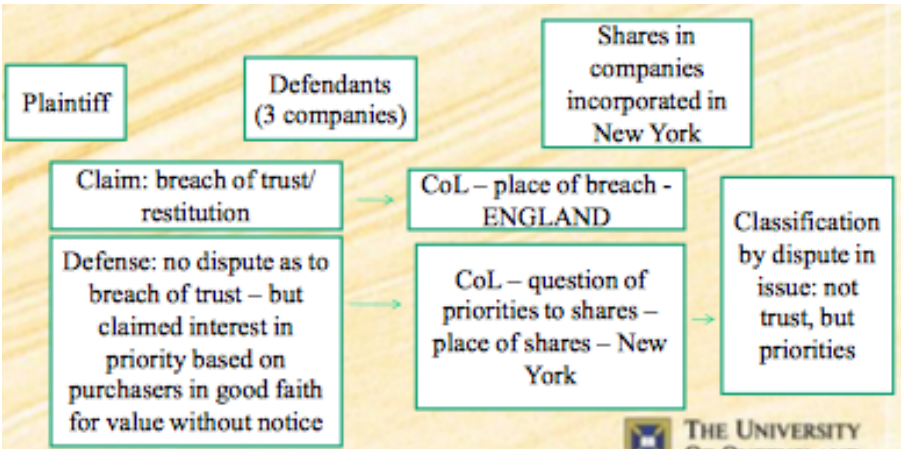
Classification of Subject Matter

Characterisation of the subject matter is a task of the forum (*lex fori*). The fact that Australian courts characterise a matter in a different manner than a foreign legal system would does not matter. The only exception to characterisation is immovable property – immovable property is characterised by the law of the place in which the property is situated. The reason for that is because we have little control over property situated in a foreign jurisdiction (similar to the Mozambique rule).

Where a conflict exists, the need arises to apply a choice of law rule. These differ according to the classification (characterisation/qualification) of the matter under dispute (i.e. property, contract, tort).

Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 All ER 585

Facts: The P brings an action against the D who is entitled to some shares. The P alleges that the shares have been sold to the D in breach of trust and the remedy sought is the restitution of the shares. The shares are in the hands of the D. The D concede that there is a breach of trust but claim their interest in priority based on the fact that they are purchasers in good faith for value without notice (equitable defence).



When the parties are making their claims and defence, they are doing so in relation to two legal systems. The P (breach of trust) is assuming on the facts that the place where the trust was breached was England. The subject matter of the dispute are shares in companies incorporated in New York. The D makes its defence according to the law of New York.

There is a clear conflict of law in this case. According to English law, the P would win and according to New York law, the D would win. The court must characterise the matter.

If the matter is characterised as a breach of trust giving rise to restitution, the dispute is placed in that 'box', then the English choice of law rule will be where the breach occurred. If the matter is characterised in terms of priority to property, then the choice of law rule in England would say that the law of the place where the property is situated applies. The English choice of law rules are applicable because the matter was heard

before an English court. The property is situated in New York because the subject matter are shares in New York companies. The matter for the court was how to characterise the dispute.

The court held that they do not at the way in which either the P or D has articulated the case. Instead, the court determines what in essence is in dispute between the parties and characterise that dispute. In this case, the court that breach of trust was not in dispute because both parties agreed that such a breach had occurred. The dispute was about whether the court should give effect to the D's defence (whether there is a defence). On that basis, the dispute was characterised as a property issue and therefore, the law of New York applied (law of the place where property is situated). Once the court has decided the characterisation, the case is decided because the D has a defence.

Lee v Lau [1967] P 14

Under Hong Kong law, it is possible to have a wife and a number of concubines (i.e. women who do not have the status of wife but have legal relationship with the man, entitling them to certain benefits including property successions and rights when children are born from that relationship). Hong Kong law does not recognise the other relationships as marriage relationships and therefore the marriage is considered monogamous (only one wife). When there was a dispute as to who was entitled to property in this relationship, the Australian courts classified the marriage as polygamous – characterise relationship where man has obligations relating to property and to support the children of more than one woman as a polygamous marriage.
It does not matter what another legal system characterises matters as; it is for our legal system to characterise matters and then resolve the dispute according to that characterisation.
If there is a dispute concerning property in Hong Kong, then the matter can be heard before Hong Kong courts can hear the matter with reference to a monogamous marriage. Australian characterisation is in issue where the parties bring a dispute before Australian courts (potentially in relation to Australian property).

Apt v Apt [1947] P 127

The bride, residing in England, was to be married in Argentina. She decides she does not want to travel to Argentina and asks some close friends/family to represent her at the marriage in Argentina (marriage by proxy). Under Australian law, you cannot get married by proxy however Argentinian law allows for this to occur. The court had to decide whether the marriage was valid – Argentinian law would recognise the matter but English law doesn't. The dispute was about the validity of marriage but there are two relevant choice of law rules.
For the formal validity of marriage, the *lex loci celebrationis* applies (law of the place where the marriage is celebrated) however for the personal capacity to enter into a marriage, the *lex domicilii* (law of domicile) applies. The question for the court was about whether obtaining a proxy relevant to the formal validity of marriage or personal capacity to get married. If the issue was about formal capacity, then Argentinian law applies and the marriage will be valid. If the personal capacity rule applies, then English law applies and the marriage will not be valid.

The court held that the issue was about the ceremony itself (who can witness, etc) and therefore about the formal validity of the marriage. Therefore, Argentinian law applied.

Re Korvine's Trust [1921] 1 CH 343

A Russian man (domiciled in Russia) made a conditional gift of movables property situated in England to a friend, believing he was about to die. Under common law, this situation is valid and referred to as the *donatio mortis causae* (transferring property on deathbed) and overrides a person's will – the condition is that you must actually die. In Russia, there is no such concept and it is what is written in your will (not what you say on your deathbed) that matters. If English law applies, then the friend can obtain the property however Russian law would not permit this transferal. The matter was being litigated in England.

The English legal system did not have a choice of law rule for *donatio mortis causae* and therefore had to apply the closest rule by analogy. There are two rules that are similar:

- Gifts *inter vivos* (gift during lifetime of parties) – the choice of law rule in England is the *lex situs* (where is the property at the time of the giving)
- Succession to movables on death – the choice of law rule in Russian is the *lex domicilli* at the time of death

The property is situated in England however the man died and was domiciled in Russia.

The court held that they recognise the *donotio mortis causae* principle in English law but did not have a choice of law rule – the courts had never had a situation where a gift *inter vivos* was overseas. The question was whether the situation was more like a gift *inter vivos* or more like succession to movables on death. The issue was one of characterisation.

The court held that the matter was most analogous to a gift *inter vivos* (person alive, giving property). In doing so, the court created a conflict rule for *donatio mortis causae*: the *lex situs*. This choice of law rule creates precedent. On that basis, English law applied and the friend obtained the property.

Whether the property is movable or immovable is determined by the law of the forum (i.e. English Law).

In most cases, characterisation is not problematic.

Classification of Procedural and Substantive Law

If the subject matter to be classified is one of substance, then the choice of law rule is used to identify the law of the cause. If the subject matter is procedural, then the law of the forum applies exclusively (*lex fori*).

The ability to distinguish between substance and procedure varies between jurisdictions. In Australia, it used to be based on the rights and remedies distinction. In cases like ***McKain v RW Miller (1991) 174 CLR 1***, the court held that a right to something is a substantive issue but working out the remedy (i.e. value of damages) is a procedural issue. In that case, Chief Justice Mason dissented and his approach was given effect in ***John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503***.

> In this case, the court conceived a much broader category of substantive law and limited procedural laws to a narrower category. The court held that procedure was those which are directed to governing or regulating the mode or conduct of court proceedings. Justice Callinan held procedure to comprise only 'laws and rules relating to procedures such as the initiation, preparation and prosecution of the case, the recovery processes following judgment and the rules of evidence. Everything else was held to be substantive law.

> **Per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ**: Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. ... Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in McKain, 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive.
>
> **Kirby J** limited procedural rules to those that 'will make the machinery of the forum court run smoothly as distinguished from those, determinative of the rights of both parties.'

Only the matters explicitly identified by Callinan J are procedural and everything else is substantive law. Procedure is therefore to be read narrowly.

Despite the proclamations of the High Court, there are still uncertainties. For example, the entire body of law relating to evidence is likely to be classified as procedural. The burden of proof is also likely to be procedural. Presumptions like evidence will be procedural (***Re Cohn [1945] Ch 5***). Statutes of fraud were previously regarded as procedural but we are yet to have a case determining whether statutes of fraud are to be applied as procedural. Statutes of fraud state that certain things must be reduced to writing (evidence of certain things you can bring before the court must be reduced to writing).

Remedies have largely been conceived as procedural in the past but this position is now in doubt. In relation to damages, heads of damages were regarded as substantive while the quantification of damages (such as caps) were regarded as procedural until the case of ***Pfeiffer***. Today, heads of damages and quantification are all regarded as substantive. Heads of damages are the categories of damages for the kinds of losses you have suffered (e.g. economic, psychiatric harm, future earnings, pain and suffering). Heads of damages will be determined by the substantive law of the law of the cause. The quantum of damages will also be determined by the substantive law of the law of the cause.

Some clarifications are now evident from:

- ***Regie Nationales des Usines Renault SA v Zhang (2002) 210 CLR 491***
- ***BHP Biliton Limited v Schultz (2004) 211 ALR 523***
- ***Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 221 ALR 231***

Limitation periods are the time within which you must bring an action. Many jurisdictions, including Australia, regard limitation periods as procedural. Following the decision in ***McKain v RW Miller & Co (South Australia) Pty Ltd (1991) 174 CLR 1***, parliament issued legislation stating that limitation periods were to be construed as substantive law (e.g. ***Choice of Law (Limitation Periods) Act 1996 (Qld)***). The purpose was to ensure that if, for example, the Qld court would apply the law of the NT, then it would also have to apply the limitation periods in the NT. The amendment of the law in this manner eliminates forum shopping. The ***Pfeiffer*** case endorses the legislative approach and regards limitation periods as substantive law.

In the case of ***Renault v Zhang***, what is the problem with saying that the damages will be determined by the law of France (or another foreign jurisdiction)? The problem is that damages will be paid in a foreign currency.

Regie National des Usines Renault SA v Zhang (2002) 210 CLR 491, 520

> **Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ**: "In ***Pfeiffer***, reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. The conclusion was reached that the application of limitation periods should continue to be governed by the lex loci delicti and, secondly, that:
>
> > ... all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti.
>
> We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort."

To date, the occasion has not arisen. This gives rise to uncertainty – will caps on damages in a foreign jurisdiction be procedural or substantive?

Identification of Choice of Law Rule

Apply the indicative rule of whichever 'box' you classified the issue into.

Application of the Law of the Cause

You will have already identified the rules to determine whether there is a conflict. The last step is simply to apply whichever rule you came to by this process.

Example

Vladimir was a Russian citizen and Australian resident and had a contract of employment (oil rig worker) with BHP LNG company (incorporated in Australia). A contract was entered into in South Africa. Payment was to be made in South African Rands. The contract contains choice of forum clause which nominated the courts of Queensland for the resolution of disputes. The Contract also contains a clause exempting the company from all liability to employees for personal injury. Vladimir was injured due to the failure of company employees to adhere to OHS rules in an oil rig in Nigeria. Vladimir brings an action in tort and breach of contract before a Queensland court.

- Australian law has a 6 year limitation period
- South African law has a 3 year limitation period
- Nigerian law has a 2 year limitation period

Step 1: **Identification of Conflict of Laws**

- Australian law recognises liability in tort and gives effect to the exemption clause
- South African law recognises liability in tort and gives effect to the exemption clause
- Nigerian law recognises liability in tort and does not give effect to the exemption clause

Despite Vladimir being a Russian citizen, Russian law is not relevant because Australian courts do not consider nationality. Further, there is no conflict between Australian and South African law. Vladimir wants Nigerian law to apply and BPH wants South African or Australian law to apply.

Step 2: **Classification of Subject Matter**

- Tort – lex loci delicti (Nigeria)
- Contract – proper law of the contract; law of the jurisdiction with which the contract has the most substantial and real connection (South Africa)
- The courts look at what is essentially in dispute between the parties (***MacMillan***)

Sayers v International Drilling Company NV [1971] 3 All ER 163

Mr Sayers was employed by an oil drilling company and agreed to work on a drilling rig off the Nigerian coast. He signed a form which governed the employment arrangement and stated that in the event of personal injury, the employer would accept benefits received under the company disability compensation program as his/her exclusive remedy. He was injured in an accident in Nigeria as a result of negligence by his fellow employees.

Held: The opening paragraph of clause 8 which stated in terms that the employers were a Netherlands corporation, that the contract would be performable wholly outside the United Kingdom, and that the employee signing it realised that United Kingdom law was not applicable. should be interpreted as decisively excluding the law of England as the proper law of the contract.

Where a contract was framed and intended to cover, and did apply to, employees of different nationalities working together outside their own countries, it would lead to confusion if their rights and obligations were to depend on a variety of municipal systems of law. Accordingly, in all the circumstances and in particular in view of the fact that the employer company was situate in Holland under which law the exemption clause 8 was valid, the law of Holland was the law with which the contract had its closest and most real connection and was the proper law to be applied.

The P's only remedy for his injuries were the benefits provided by the Company Compensation program and his English action for damages and for the tort of negligence were dead.

Australian courts are likely to take a similar approach to the English court in ***Sayers***.

Step 3: Classification of Substantive or Procedural Law

Are limitation periods a matter of substantive or procedural law? This depends on how Australia classified limitation periods (not foreign forums). The classification exercise under Australian law is very narrow and therefore limitation periods are regarded as substantive law.

Step 4: Identification of Choice of Law Rule

- Contract – proper law of the contract (South Africa)
- Limitation period – substantive (***Pfeffer***)

Therefore, South African law applies which recognises liability in tort and gives effect to the exemption period. However, the claim was brought 4 years after the injury and therefore the South African 3 year limitation period has expired.

Step 5: Application of the Law of the Cause

Courts will usually have identified the result of the application of foreign law as the law of the cause, so its application is simply then endorsed. South African law is the proper law of the contract and governs the exemption clause. The exemption clause is therefore

operative (liability in tort not in dispute) and since limitation periods are regarded as substantive, Vladimir is out of time and his action fails.

Choice of Law Method II: Complications

Required Reading - Nygh Chapter 15 Renvoi and the Incidental Question

If all legal systems around the world employed identical choice of law rules (identical in content and interpretation), uniformity of outcomes would result. Such rules would lead all courts in all legal systems to apply the same dispositive rules to decide the disputes before them. In reality, choice of law rules differ. For example, most civil law countries refer matters affecting personal status to the law of the person's nationality whereas common law countries refer such matters to the law of the domicile.

If the forum's choice of law rules point to the law of a foreign legal system, does that mean the forum court must apply the domestic law of the foreign legal system or the whole of its law, including its choice of law rules? The renvoi question arises where the choice of law rules of the foreign legal system select a different law (i.e. that of a third legal system or that of the forum court itself).

Simmons v Simmons (1917) 17 SR (NSW) 419 – In this case, a man whose domicile of origin was NSW lived for several years in New Caledonia where he eventually died intestate. He left both movable and immovable property in NSW and the NSWSC was asked to determine by which law the deceased's assets out to be distributed.

The NSW choice of law rule was that succession to movable property is governed by the law of the deceased's last domicile – i.e. New Caledonia. Thus, the NSWSC concluded that the assets out to be distributed according to the law of New Caledonia. However, evidence was raised that the New Caledonian court (if its jurisdiction had been invoked) would not have applied its own law. Under the law of New Caledonia, a foreigner, who did not obtain the necessary permit of the authorities, could not acquire a domicile in that territory. Since the deceased had not obtained such a permit, the New Caledonian choice of law rules considered him to still be subject to the law of his nationality. The deceased was British and it was assumed that law of his nationality meant law of his last domicile within the British empire; that being NSW. Therefore, it appeared that a New Caledonian court would have distributed his movables in accordance with the law of NSW relating to intestate succession.

The situation whereby NSW was referred by its choice of law rules to the law of New Caledonian only to be informed that the choice of law rules in New Caledonia referred the matter back to the law of NSW is referred to as **remission**.

If the deceased in the above case had been an Italian citizen, then New Caledonian courts would have referred the matter on to the law of Italy. This situation is referred to as **transmission**.

Renvoi refers to both remission and transmission situations.

There are three possible ways to solve the issue of renvoi (however each is flawed in some way):

1. ***Rejecting Renvoir*** – This approach essentially ignores the problem of renvoi and suggests that the reference in a choice of law rule to the law of a foreign country means the domestic law of that country. This approach is also referred to as the single reference approach.

   This approach has the advantage of simplicity. Australian choice of law rules serve Australian policy objectives and there is nothing to be gained from taking foreign choice of law rules into account.

   Critics ask whether the achievement of a uniform result is an important policy objective of Australian courts. If so, it seems strange for a NSW court to distribute moveable property located in NSW of a person who died domiciled in New Caledonia according to the law of New Caledonia knowing that New Caledonian courts would distribute the moveables situated in New Caledonia according to the law of NSW.

2. ***Single Renvoi*** – This approach takes into account foreign conflict of law rules, but on the basis that the reference by the foreign system back to the law of the forum or on to the law of a third country, is a reference to the domestic law of the forum. On this approach is followed by most civil law systems.

   This solution produces a more rational result. If the law of NSW refers a matter to New Caledonia and a New Caledonian court would have applied its own law, uniformity is achieved. If New Caledonian Law refers the matter on to Italy, both NSW and New Caledonian courts would concur in applying Italian law.

   If the law of New Caledonia refers the matter back to the law of NSW and vice versa, at least each court ends up applying its own law to such assets as are under its control.

3. ***Double renvoi*** – This approach requires a court to approximate its decision as closely as possible to the decision which would have been reached in the circumstances of the particular case by the court of the foreign system referred to by the choice of law rules of the forum. On this approach, the forum puts forward no solution of its own and instead, simply adopts whatever solution the foreign court uses having regard to its choice of law rules and its answer to the problem of renvoi. This approach is referred to as double or total renvoi and sometimes, as the foreign court theory.

   Where the choice of law rules in NSW refer a matter to the law of New Caledonia, the NSW judge must enquire what a New Caledonian judge would have done had he/she assumed jurisdiction in the instant case.

   In theory, this approach ensures uniformity of result. Ideally, it should not matter whether the jurisdiction of NSW or New Caledonia is invoked. In each case, the same rule will be applied because NSW adopts the entire conflict solution method of New Caledonia.

In ***Neilson v Overseas Projects Corporation of Victoria (2005) 233 CLR 331***, the HC rejected the first alternative (refusing renvoi) by a majority of 6:1 (McHugh dissenting). Only one member of the court (Callinan J) choose between the second and third alternatives. The remaining 5 members of the majority acted in a manner consistent with the third approach (double renvoi) but 4 of them expressly refused to say whether that approach should be taken in all cases. Thus, ***Neilson*** confirmed that renvoi applies, at least in torts cases, but gave no clear answer about which solution should be used.

Neilson and the Whole of the Foreign Law

The P in ***Neilson*** was severely injured when she fell down a flight of stairs in her apartment in China that had been provided to her husband by the D. She was an Australian citizen domiciled and ordinarily resident in WA. Upon her return to WA, she sued the defendant in tort in the WASC. The D relied on several defences it said were provided by Chinese law.

Trial Decision: Applying the choice of law rule stated in ***Renault v Zhang***, Justice McKechnie (trial judge) held that the P's tort claim was governed by the law of the place of the tort; which was held to be Chinese law. The trial judge rejected the D's reliance on Chinese defences holding that Chinese law gave him the right to apply the law of Australia because both P and D were Australian. This amounted to the single renvoi approach – considering the Chinese choice of law rule and then applying Australian domestic law.

Appeal: On appeal, the Full Court of the WASC concluded that there should be no renvoi in international tort cases.

High Court: The **first question** the HC had to decide was whether the Zhang choice of law rule, which selects the law of the place of the wrong (lex loci delicti) requires the court to look at the whole of the foreign law or only foreign domestic law. By majority of 6:1, the court held it was necessary to consider the whole of Chinese law, including the Chinese choice of law rules. To do otherwise would risk the result that an Australian court might apply Chinese law when a Chinese court considering the same case would not apply its own law because Chinese choice of law rules would direct it to the law of another legal system. The court held that there would be reduced incentive for forum shopping if the Australian court were to decide the case exactly as a Chinese court would, applying all relevant Chinese laws.

Of the six judges in favour of considering the whole of the foreign law, only one (Callinan J) made a clear and unequivocal choice between single and double renvoi. His honour chose single renvoi, accepting the reference by the Chinese choice of law rules to Australian law and thus applying Australian domestic law.

The other five justices (Gleeson CJ, Gummow, Hayne, Kirby and Heydon JJ) approached the case consistent with double renoi which called for consideration of the Chinese renvoi rule as well as the other Chinese choice of law rules. All five confined themselves to the facts of the case, asking only whether a Chinese court would look to Australian conflicts principles. Four of the five (Gleeson CJ, Gummow, Hayne and Heydon JJ)

concluded that if a Chinese court were to apply Australian law, it would apply Australian domestic law and not Australian choice of law principles. Kirby J disagreed, saying that there was insufficient evidence to come to any conclusion about whether China had a renvoi rule.

The majority (minus Kirby J) concluded that Chinese law has no renvoi rule or would reject renvoi. Therefore, the infinite regression problem created by the double renvoi approach did not arise on the facts and will only occur where both the forum court and foreign law use double renvoi. Gummow, Hayne and Heydon JJ did not consider it necessary to comment on what should happen if double renvoi does lead to infinite regression; their task was only to decide the case before them. None of the five justices who used double renvoi on the facts of this case was prepared to commit to using it in all cases.

McHugh J dissented entirely on the basis that applying the whole of the foreign law would include the renvoi rules of the foreign law. This would lead to double renvoi and subsequently infinite regression if the foreign law were also to respond to renvoi by applying the whole of the foreign law.

In what kinds of cases does renvoi apply?

Strictly speaking, ***Neilson*** decided only that some form of renvoi is to be applied in tort cases where the choice of law rule selects the law of the place of the wrong (lex loci delicti). Prior to Neilson, the double renvoi rule had also been applied in the following situations:

- Formal validity of wills
- Intrinsic validity of wills of movables
- Intrinsic validity of wills of immovables
- Intestate succession to movables and it seems, immovable
- Recognition of foreign legitimations at common law

It is generally thought that there is no reason to apply renvoi in contract cases. The choice of law rule in contract cases places strong and understandable emphasis on the parties' own choice of governing law, where such a choice is discernible or can be inferred. When choosing the law to govern their contract, the parties presumably did not contemplate application of the conflict of laws rules of the chosen law, which may lead to application of a law different form the one that they chose. It seems even less likely that the parties might contemplate application of the renvoi rule.

In ***O'Driscoll v J Ray McDermott [2006] WASCA 25***, both parties accepted that ***Neilson*** requires consideration of the choice of law rules of the lex causae even in contract cases, at least where the governing law of the contract is selected on an objective basis by the court, rather than expressly by the parties themselves. In this case, the choice of law rules of the lex causae had no practical effect because the 'closest and most real connection' choice of law rule indicated that Singapore law was the governing law of the contract, and the evidence showed that Singapore's contract choice of law rule was the same as the rule in WA.

This case shows that the question of whether to apply the choice of law rules of the governing law is significant only when those rules are in some way different from those of the Australian forum. If that is the case, the forum court in Australia is then forced to decide what to make of that choice.

> For example, if an Australian and Japanese party were to choose New York law as the governing law of a contract to be performed in Japan, should they be taken to know that a New York court would not enforce a choice of law rule if the transaction bears no reasonable relation to the state of New York.
>
> If an Australian court were to apply New York's domestic law to a dispute arising out of that contract, it would be doing the very thing that prompted the ***Neilson*** majority to call for consideration of the whole of the foreign law, namely applying New York when a court in New York would not do so.

However, it is the law of the forum that gives effect to the parties' choice of governing law, not the chosen law itself. The parties did not choose to have the dispute decided in the way that a New York court have decide them. There is a difference between choosing to have the contract governed by the rules of New York law and choosing to have a dispute arising out of the contract decided as it would be by a judge hypothetically hearing the case in New York. Unless the parties have chosen to have their dispute decided as they would be in New York, their choice of New York law as the governing law of their contract must be a choice of the dispositive rules of New York's domestic law; a choice that is given binding force by the law of the forum.

The situation may be different when a choice of governing law by the parties cannot be identified or inferred, so that the lex causae must be selected for the parties by the forum court using its choice of law rules. In those circumstances, the court does not select the governing law that it thinks the parties would have chosen if they had turned their minds to the question, but rather it selects the system of law with which the transaction has the closest and most real connection. The default rule in contract depends on objective connection rather than the will of the parties, and this makes the reasons given in ***Neilson*** for applying the whole of the foreign law seem more compelling.

If the choice of law rules of the legal system with which the transaction has the closest and most real connection would indicate that the contract is governed by some other law, then a party could seek an advantage by suing in Australia rather than in the courts of the other jurisdiction.

[Review remaining section of chapter]

<u>Critique of Double Renvoi Theory</u>

Several serious objections can be raised against the double renvoi approach:

1. The approach only works when the foreign court has a solution to the renvoi problem. If the foreign court also adopts the double renvoi theory, there is no way out of the circulatory that results. Some argue that this is unlikely to occur because the only other legal systems that use double renvoi are other common

law countries that have mostly the same conflict of law rules and connecting factors as Australia.

However, Justices Gummow and Hayne made provided some examples in ***Neilson***:

- Law of the forum and law of the place choose different connecting factors to determine the applicable law
- Law of the forum and law of the place use the same connecting factor but apply it differently
- Two jurisdictions characterise problem differently
- If the law of the place applies no single connecting factor but seeks to identity the so-called proper law of the tort

The only way out of infinite regression is to sacrifice logic to pragmatism and apply a solution other than double renvoi. This leaves the position where double renvoi is acceptable so long as it is harmless. Thus, the foreign renvoi rule should be considered and applied if it is not also a double renvoi rule and if it is a double renvoi rule, then it must be ignored to avoid infinite regression. This violates the principle that an Australian court can only refuse to apply the foreign law indicated by its choice of law rules in a very limited class of cases: revenue law, expropriatory law or against public policy.

2. The theory is based on a myth that it is possible to determine the case in the same manner a foreign court would be decided it. This is impossible for three reasons:
    - Many foreign legal systems have not settled their attitude to renvoi. Common law judges purporting to apply double renvoi have often had to make more or less arbitrary decisions as to what the foreign court would have decided.
    - Many of the conflicts in conflictual rules have arisen because the law of the domicile referred the matter to the law of the nationality of the de cuius (deceased). This is particularly problematic where a foreign legal system's choice of law rules remit the case to Australian law (on the basis that both parties are Australian nationals) but he case concerns tort, for example, which is regulated by state law and not commonwealth law.
    - Assumption that foreign court would have assumed jurisdiction in the matter at all (e.g. discretion to deny exercising jurisdiction; assets situated outside jurisdiction of foreign court). If the foreign court declines to apply its own law, there seems to be little reason why Australian courts should do so. If for some reason, the foreign court would not have or retain jurisdiction according to its own rules, the forum court should apply its own law, the lex fori, there being no other viable alternative.

The usual justification given for the application of double renvoi is that it ensures uniformity of decision and defeats forum-shopping. The P can only be accused of forum shopping if the foreign court would have or retain jurisdiction.

3. Infinite regression occurs under the double renvoi approach if the other jurisdiction also uses double renvoi. The only possible way out of this problem involves abandoning, the ***Neilson*** majority's commitment to look at the whole of the foreign law. The single renvoi approach involves a lesser commitment while also avoiding the problem of infinite regression.

The Incidental Question

Haque v Haque (No 1) (1962) 108 CLR 230 – Abdul, an Indian domiciliary who was a Muslim by religion married Azra, also an Indian Muslim, in WA. The marriage was celebrated in Muslim form and was void under WA law. Abdul died, leaving property in WA, being still domiciled in India. Two children were born to the couple in WA. The question arose whether they were entitled to the fixed share in their father's estate which Muslim law awards to legitimate issue.

The major question, that of the succession rights to the movables of the deceased, was governed by the law of India applicable to Muslims. Before that, a **subsidiary or incidental** problem had to be answered. To be entitled to their share, the claimants had to be legitimate. By what conflict rules was that to be decided – by the rules of India as part of the main question of succession (in which case they were the legitimate issue of Muslim marriage) or by the rules of WA as an issue separate from the major question?

A court considering a major question such as succession to movables may have to determine a preliminary or incidental question for which there exists a separate choice of law rule under the law of the forum. Most judges have not realised there is a problem and the HC is no exception. In ***Haque***, the HC simply applied the law governing the succession (i.e. law applicable to Muslims in India). The court held that Muslim law recognises the marriage celebrated as a union the issue of which would be legitimate whatever the law of WA might say. The HC therefore, implicitly sided with those who argue that the incidental question should be determined according to the law (including the conflicts law) which governs the main issue.

A similar approach was adopted in the Canadian case of ***Schwebel v Ungar [1964] 1 OR 430***. In that case, a woman whose domicile at the time was Israel married in Ontario. She had been previously married when she was domiciled in Hungary. While the spouses were still domiciled in Hungary, they obtained a rabbinical divorce in Italy which was recognised by the law of Israel but not by the law of Hungary. The Canadian court had to determine whether she was still married to her first husband at the time of the second ceremony. Her capacity to marry was governed by the law of Israel and by that law, she was free to remarry. This still left an apparently undissolved marriage. The question was whether the validity of her earlier divorce be treated as subsidiary to her capacity to marry and thus governed by the law of Israel? Or whether the court should apply its own rule as to the recognition of foreign divorce which would lead to the application of Hungarian law? The court chose the former.

Lawrence v Lawrence [1985] Fam 106 – The English Court of Appeal had to consider a situation where a woman, while domiciled in Brazil, had obtained a divorce in Nevada. She married her second husband in Nevada and went to live with him in England. The Nevada divorce was entitled to recognition in England, but would not be accepted in

Brazil. Assuming that her capacity to remarry was governed by the law of her antenupital domicile, the law of Brazil denied her that capacity. The majority of the Court of Appeal treated the question of capacity to marry as incidental to the question of recognition of the divorce.

There is little objection to the application of the foreign choice of law rules to the incidental question in ***Haque v Haque***, if one accepts the principle that the succession to movables should be determined in as close conformity as possible to the law that the court of the domicile would have applied. It is less obvious in cases dealing with the capacity to remarry.

Choice of Law Method III

Renvoi Exercise

Double renvoi – foreign court theory (what does the foreign court do?). Start the process in the foreign court and whatever outcome you get is the outcome the English court would apply. Double renvoi means that you adopt the foreign jurisdiction's substantive law and conflict of conflict of laws rules.

Single renvoi – adopt foreign court's conflict of conflict of laws rule

i Forum court ignores the renvoi – partly valid
ii Forum court adopts single renvoi and accepts remission – valid
iii Forum court adopts single renvoi but rejects remission – partly invalid

Why might the forum court adopt a policy where it will consider applying a renvoi but reject the remission? The policies that drive a court to adopt a single renvoi are about the elimination of forum shopping (all foreign jurisdictions apply same substantive law) and certainty of outcome. However, the same substantive law cannot be applied if there is a conflict of conflicts of law and so the policy considerations here are still to eliminate forum shopping and ensure certainty. Domicile is perceived as the most applicable connection between a person and their property (law of the place where you were living at the time you died, not nationality) – policy is driving choice of law rule and the policy that leads us to reject the remission when the French court would apply our law. Applying our law is inconsistent with the idea that property should be governed by domicile (connecting factor to link property to legal system). However, remitting the matter to France will mean that nationality is the governing personal connecting factor. This is why a court may adopt a single renvoi but reject remission.

Exam Question: How to reconcile policies behind the scenes and make sense of different approaches to renvoi in conflicts of conflicts of law situation

iv Form court applies disistement theory – valid
v Forum court adopts double renvoi theory and French court adopts single renvoi theory and accepts remission – (start process from France, France will look to English rule and apply its internal rule – therefore, what the English court would do)
vi Forum court adopts double renvoi theory and French court approach to renvoi is to reject any remission – English rule (valid)
vii Forum court adopts double renvoi theory, and French court ignores renvoi theory – valid
viii Forum court adopts double renvoi theory, and French court adopts double renvoi theory – no outcome

The double renvoi theory was adopted in ***Neilson v Overseas Projects Corporation of Victoria***. The reality is that you can never eliminate forum shopping, especially because procedural laws are always different. The double renvoi theory has many problems associated with it which is why many courts will adopt a single renvoi theory. One of the

problems with Neilson is that when the HC judges dealt with the issue of renvoi, they did not make it clear whether they were applying single or double renvoi theory (it seems that most applied double renvoi theory). When the court discussed renvoi, they did not talk about it simply in relation to tort, but instead talked about double renvoi in broad terms as if that is how every conflicts of conflicts of law issue should be dealt with.

The problem with double renvoi is that not only do you need to know the foreign court's internal law and choice of law rules but also the foreign court's approach to the problem of renvoi. Australia does not have an answer to that – it is likely that many other jurisdictions do not have an answer either. There is usually no evidence as to how foreign jurisdictions will deal with conflicts of conflicts of laws, usually because the courts have not heard that issue. This is probably because parties have not raised the issue due to associated costs and uncertainty.

The Incidental Process

Working out whether or not a couple has been married may require consideration of three choice of law rules: *lex celebrationes* and *domicilii* of bride and *domicilli* of groom

Where you have preliminary issues, the incidental approach states that you characterise what is essentially in dispute between the parties and take that indicative rule to all the issues before the court. this means that you only have one body of internal law to deal with to every aspect of the dispute irrespective of what jurisdiction the other element is connected to.

Schwebel v Ungar (1964) 42 DLR (2d) 622

Ungar was born in Hungary (domicile of origin) and meets and marries W in Hungary (during WWII). They flee Hungary because they are Jewish and are Italy at the time when the marriage dissolves. They got divorced through a religious ceremony called a 'get' which under Jewish law, would consider them divorced (rather than through Italian authorities). Ungar adopts a domicile of choice in Israel and lives in Israel for some time. She then moves to Canada and marries Schewel but that marriage falls apart. Schwel argues that there was formal validity to the marriage because they went through a Canadian marriage ceremony but that Ungar did not have capacity to marry because she was already married. The main issue is whether Ungar had capacity to enter into the second marriage. She was still domiciled in Israel when she got married in Canada. The law of Israel states that marriages must be monogamous and would not recognise the second marriage. The preliminary issue becomes whether the divorce is valid.

The question is what is the choice of law rule for determining the validity of divorce (lex domicilli at the time of the divorce). The divorce was obtained in Italy merely because they were fleeing Italy at the time (but not using Italian legal system). At the time of the divorce, she was domiciled in Hungary but she was fleeing Hungary. The Canadian judge applied Hungarian law to determine if the divorce was valid however Hungarian law did not recognise a 'get' as a valid means of dissolving the marriage. The Canadian judge concluded that therefore, there was no marriage. His honour dealt with the matters as if

they are completely different (capacity of marriage and divorced) and of equal weighting.

The case goes on appeal and the appeal court states that you must determine what is the central issue before the court: did Ungar have the capacity to marry? The relevant indicative rule should be used to resolve all matters. The indicative rule is lex domicilli at time of marriage and the 'get' is the incidental question. The main question is dependent on the preliminary question but should not be a separate classification – we ask the preliminary question and state that it is governed by the indicative rule of the primary question.

The question becomes whether the law of Israel recognises the 'get' as a valid divorce. Israeli law does and therefor the court concluded that Ungar had the capacity to marry. To find that an Israeli citizen who obtained a 'get' while fleeing another jurisdiction should not have that 'get' recognised when it complies with the law of her domicile, seems odd. In some ways, this seems like a way to make the decision more palatable.

Haque v Haque (No 1) (1962) 108 CLR 230 – incidental question approach seems to be followed in Australia.

You must first identify the main issue, characterise the main issue and apply the relevant indicative rule to the main and incidental issues.

If a matter is not incidental and is of equal weighting, then you must look at the separate indicative rules. If this was a question about marriage, there is no question that you apply the Hungarian law as to the validity of the marriage. Formal and substantial validity of a marriage concern two different indicative rules.

The incidental rule method is a mechanism by which courts have used one indicative rule to resolve multiple questions where they can say that the question is incidental to the main issue. There are not many instances where you can find the court adopting that approach.

Pleading and Proof of Foreign Law

To determine whether or not there is a conflict of law, you must know about the differences between your law and the internal law of a relevant foreign jurisdiction. you need to identify a conflicts of laws and to do that you need to know something about a foreign body of law. when we have talked about applying foreign law in domestic courts, the reality is that there is no such thing and Australian courts only ever apply Australian law. When the choice of law rule requires the courts to apply the domestic law of China, we are using the foreign law as evidence of how our law states that we should resolve the case. Our law states that we should resolve the dispute as closely as we can to how the foreign court would resolve the matter.

Foreign law must be **pleaded and proved** as a question of **fact**, not law before the court. Australian law allows that fact to be used as a mechanism to give effect to our law (including choice of law process - e.g. law of the place where the person died).

If a foreign law is advantageous to a particular party, that party has the burden of pleading the foreign law and proving the content of that foreign law. The P will often commence proceedings in their own jurisdictions, simply not understanding that there may be an application of foreign law. The difficulty with pleading and proving foreign law is that it is expensive and difficult. Usually, a P will not plead foreign law unless the advantage in doing so will outweigh the expense and difficulty. It is usually the D who tries to find a conflict of laws or a conflicts of conflicts of law.

The presumption is that the foreign law is the same as the law of the forum. The party wishing to rely on foreign law bears the onus of proving the foreign law as a question of fact. If you fail to prove something in the court, the forum court will fill the gaps with law of the forum.
Since it is a question of fact and not of law, it is not binding on subsequent occasions. If the court finds, for example, that on this occasion the internal law of France would require the will to be 2/3 invalid, you cannot rely on that case for that proposition in a future case. You must plead and prove the content of law anew. Since it has no precedential value it may be dependent on the evidence and on the evidence the courts may find that the internal law of the country is different to what was found in a previous case. In civil law systems, then the content of the law will be found in codes. When you consider a foreign court decision, that is nothing more than evidence of how a foreign court might resolve the issue and has no precedential value in our jurisdiction as to how the law is that foreign jurisdiction. It is merely an example of the way in which a court in the foreign jurisdiction has interpreted the law. It may be persuasive but as a matter of the content of the foreign law, it is a fact (i.e. a fact that the court of a foreign jurisdiction interpreted the law to be X). While the decision of a court of the foreign state must be regarded as presenting a correct exposition of the law of that country, that foreign court is merely regarded as an expert of law.

A question of fact of a peculiar kind so that always dealt with like other questions of fact (e.g. usually require it to be determined by a judge not a jury; and more liberal rules in appeals only).

A distinction also needs to be drawn between the content of the foreign law and the application of it to the facts of the particular case that the forum court is considering. Just because the forum court is dealing with a case with facts analogous to a foreign case, it does not mean that the forum court has to have the same rules as the foreign jurisdiction because the application of that fact of the foreign court to the facts of the case is a matter that falls solely on the forum. It is for the forum to decide how it applies that to the facts. There is no precedent that comes out of the jurisdiction that dictates how the forum will deal with that. The fact that a foreign court applied the law in a particular way does not mean the forum court must apply the law in the same way to analogous facts.

Since the determination of the content of the foreign law is a question of fact, not law, it is not the subject of appeals. You cannot appeal as a matter of law something in dispute

as a matter of fact. That said, it is not exactly the same kind of fact as other facts before the court so courts may hear appeals.

Documentary Proof

Documentary evidence of the foreign law is required. Australian statutes dictate what rules of evidence are applicable in our courts - the foreign law being pleaded and proved as fact is subject to the procedural laws of the forum (e.g. what foreign documents will be accepted as evidence, lodging documents, translation of documents). This becomes time-consuming and expensive. For this reason, parties to a litigation will agree (to save expense and eliminate unnecessary litigation), will agree that particular text represents the foreign law and then do not have to call expert evidence as to its content. Without expert evidence to explain documentary evidence, that evidence will be construed in accordance with statutory construction rules of the forum. The way in which a common law judge may interpret a civil code will be different from the way a civil judge will interpret the code.

You need documentary evidence of the foreign law but also evidence of how the document actually functions in the jurisdiction it comes from (through expert evidence).

Expert evidence

Lazard Bros & Co v Midland Bank [1933] AC 289

> *"The evidence it is clear must be that of qualified experts in the foreign law. if the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication."*

It is for you to show how the foreign law actually works in that foreign jurisdiction – what do those words actually mean when applied to case with analogous facts. To prove this, you need an expert from the foreign legal system to explain how the law works.

A person can be an expert if he/she is by reason of his being generally skilled in the law of the foreign country. The expert does not have to be a lawyer but someone who is familiar with that area of law (e.g. banker applying banking law on daily basis). Expert evidence can be given orally or by affidavit depending on the procedural laws of the forum. The ultimate meaning and effect of foreign law is a matter for the judge. If conflicting or ambiguous evidence arrives, the court can arrive at its own conclusions. The court cannot go beyond the evidence put to the court. If experts give conflicting opinions, it is for the judge to decide which of the experts is more compelling.

Presumption of Similarity

If neither party has dealt with an issue, the judge fills that gap with the presumption that the foreign law must be the same as the domestic law (presumption of similarity).

At common law, the court cannot take judicial notice of the foreign law (i.e. that the judge knows of some foreign law that has not been pleaded). The presumption is usually applied to broad principles and the court can refuse to apply it in matters where it is unlikely to actually be the case. If the parties agree on a particular law and are asking the court to do something which is blatantly impossible to be the case, then he court does not have to do that (e.g. if parties ask the court to consider foreign judgements instead of the code in a civil system). Similarly, the court will not fill in the gap if it is blatantly obvious that the gap cannot be filled.

Damburg v Damburg (2001) 52 NSWLR 492

> *"The courts are averse to pronouncing judgments or hypothesis which are not correct. ... Court will act on admissions of or agreement about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do where there is reason to question the correctness of the facts admitted or agreed."*

Exclusion of Unacceptable Laws

Once the choice of law process has been completed, the court can step in and end the process because we might end up applying some law that is not private in nature. Private international law does not deal with public laws and courts will refuse to enforce the public laws of foreign jurisdictions.

We can get to a point where we have been through the entire choice of law process, and when the courts get to the stage of applying the foreign law, the courts feel that applying such law would be contrary to public policy (e.g. validity of child marriage). As a matter of public policy, courts may refuse to apply the foreign law.

AG for the UK v Heinemann Publishers (1987) 10 NSWLR 86; (1988) 165 CLR 30 – A member of MI5 (British secret service) wrote an expose about the British secret service and tried to publish in the UK but such publication would be contrary to the British ***Secrets Act***. The book was being sold in Australian and the AG of the UK brought an action in Australia against the publication to stop the publication on the basis that it was contrary to the UK ***Secrets Act***. The Australian court held that they did not give effect to foreign public laws.

Issues like taxation, national security and criminal laws from a foreign jurisdiction will not be enforced by Australian courts.

AG for New Zealand v Ortiz [1982] QB 349 – The English court held that the matter was public law and therefore refused to give effect to the NZ Customs Laws.

If Australia has an international obligation to give effect to foreign public laws, then that obligation will be embodied in legislation.

Public Policy

- To enforce the foreign law is seriously detrimental to the interests of the forum
- To enforce the foreign law would cause injustice in the circumstances of the case

- The content of the foreign law is morally unacceptable (including that it is in breach of public international law to the extent that public international law conforms to the domestic law)

Kuwait Airways Corporation v Iraqi Airways

When Iraq invaded Kuwait, a law was adopted in Iraq which stated that all assets of what was Kuwaiti Airways vested in Iraqi Airways. There was litigation related to those aircraft and Lord Hope stated that:

> *"It would seem therefore to be contrary to principle for our courts to give legal effect to legislative and other acts of foreign states which are in violation of international law, as declared under the Charter of the United Nations."*

The choice of law process in England stated that the ownership it would be determined by the *lex rei sitae* of movable property (law of place where party obtained their right to the aircraft). Applying these choice of law rules, Iraqi law was to be applied however Iraq had done so in violation of UNSC resolutions. The Iraqi legislation was doctored in contravention of general principles of public international law. This allowed the court to refuse to give effect to Iraqi law.

Royal Boskalis Westminster NV v Mountain [1999] QB 674

Foreign vessels blockaded in a country and the country agreed to enter into a contract to release the vessels in exchange for a large sum of money. Royal Baskalis signed the contract but once the vessels were out, refused to pay the money. The other party took Royal Baskalis to court for breach of contract. The UK court held that the law of the foreign jurisdiction applies but the law was so unpalatable, i.e. the degree of coercion underpinning the contract allowed by that law was so unpalatable that the court decided not to apply the foreign law.

Oppenheimer v Cattermole (Inspector of Taxes) [1976] AC 249

The law of determining who earns particular property is the *lex rei situs* and the law stated that the party could not own property because they were Jewish. The content of that internal law was so unpalatable that the court refused to apply it as a matter of public policy and the courts fill that gap with domestic law.

MULTIPLE CHOICE EXAM WILL BE ON ALL TOPIC COVERED TO DATE (UP TO LECTURE 8).

Exam – bring pencil, eraser, student ID

Enforcement and Recognition of Judgements

Australia exercises exorbitant jurisdiction – very readily entertain P's actions. However, when an action is brought in Australia, the courts also readily apply foreign bodies of law and therefore the advantage of coming to Australia may not be that great because the dispute is resolved by foreign law. Even if you get a judgement in Australia according to foreign law and the D if not a domestic defendant, you have to enforce the judgement against the foreign D (in the jurisdiction where the D's assets are).

There is uncertainty about how a foreign jurisdiction may enforce an Australian judgement. Analysing how Australian courts enforce foreign judgements may provide an indication of how foreign courts may enforce Australian judgements (especially, in common law countries).

There is a close link between jurisdiction and judgement.

> While Australian courts may exercise exorbitant jurisdiction – may be of no effect if the D has no assets within Australia and judgement cannot be enforced in a foreign state in which the D has no assets.

At **common law**, the basic principle is that if a foreign court exercised jurisdiction over the D in the same way the Australian courts would have exercised jurisdiction, then the Australian courts will enforce the judgement. In Australia, common law jurisdiction only arises as a result of presence (territoriality) or consent and if the foreign court exercises jurisdiction on one of these bases, then the Australian court will enforce the judgement.

In addition to the common law exercise of jurisdiction, Australian courts are granted **jurisdiction by statute** (e.g. UCPR Qld). In the same way, for recognition and enforcement of foreign judgements, statutory recognition applies. Common law jurisdiction applies to judgements from some countries and statutory recognition applies in relation to other countries.

Enforcement at Common Law

If you have a foreign judgement from Columbia and you want to get it recognised in Australia, how do you do so? You must initiate a new action in Australia.

> Choice of forum clauses amount to consent (choice of law is insufficient) and if that exists, Australian courts view the Columbian courts exercise of jurisdiction over the D is acceptable – i.e. legitimate exercise of jurisdiction. Who knows on what basis the Columbian court exercised jurisdiction? We are not interested in how the Columbian court, in accordance with its own rules, exercised jurisdiction. Instead, we consider whether the D is of the type over which Australian courts would have jurisdiction. If the judgement was rendered on the basis that the D appears on TV, for example, Australian courts may consider that the D was not present in Columbia nor consented and therefore refuse to enforce the judgement – does not mirror Australian jurisdictional basis. Even if Columbia has something equivalent to the UCPR, Australian courts, on the basis of

common law, will not enforce the judgement (because Australian common law jurisdictional bases are more limited and do not mirror the UCPR).

Assume the original action in Columbia was breach of contract and the choice of law clause was Columbian law. The Columbian court had jurisdiction over the D as a result of a choice of forum clause. If you are successful and obtain a judgement, you must initiate an action in Australia for enforcement – the dispute is not contractual and instead, are asking for recognition of the foreign judgement.

You are suing for the recognition of an obligation by the D to pay money (fulfil the judgement). The obligation to pay under the contract has been transferred to an obligation to pay under the judgement – new action and substance is enforcement of judgement.

At common law, in order to bring a new action against the person who lost the case in the foreign courts (D in this case), what circumstances must exist? The D must be either present or have consented to Australian jurisdiction because that is the only way an action can be initiated under common law.

The D has to be both susceptible to Australian jurisdiction and on the same basis, susceptible to Columbian court's jurisdiction.

For the forum to enforce a foreign judgment at common law, you must satisfy the following conditions:

1. 'International Jurisdiction' refers to the jurisdiction which could be the basis for the Columbian action – foreign court has jurisdiction recognised by enforcement court
2. There must also be a final judgement from that jurisdiction (e.g. not one subject to an appeal)
3. Judgment must be for a fixed some of money
4. Enforcement of judgment must be sought between the same parties.

If those requirements are met, the Australian courts will enforce the judgement.

The International Jurisdiction is assessed by the law of the forum and assumes that the foreign court had jurisdiction under its own rules. We are not interested with the way in which the foreign court exercises jurisdiction but rather whether that exercise mirrors Australian common law jurisdiction.

Common law jurisdiction arises either as a result of:

- Territoriality
- Consent (express or by conduct)
    - Express = choice of forum clause in contract (even if D refuses to appear)
        - Choice of law clause insufficient to establish international jurisdiction
    - Merely express agreement to submit, usually through lawyers (unconditional appearance)
    - Conduct inconsistent with protest against jurisdiction

A choice of law clause itself is insufficient to amount to consent to jurisdiction because Australian courts can decide the action on the basis of foreign law and the fact that the *lex causae* is foreign does not in itself make the Australian courts a clearly inappropriate forum. It must be a choice of forum clause.

Harris v Taylor [1915] – There was a foreign court exercising jurisdiction and what appears to be common law rules. The D in the foreign jurisdiction challenged jurisdiction and lost. When they lost, because they did not have assets in the foreign jurisdiction, they disappeared (withdrew). They played no part in the proceedings and lost the case. The D then found itself before an English court in relation to an enforcement action. The English Court held that if the foreign court had jurisdiction on the basis of presence or consent, the judgement will be recognised even if you did not participate because you challenged jurisdiction and lost. and therefore enforced the judgement.

Henry v Geoprosco International – In this case, the D recognised that the court had jurisdiction but tried to stay proceedings in the foreign court using forum non conveniens application. They lost that application and subsequently withdrew from the proceedings (on the basis that it had no assets in the jurisdiction). They were later sued in England for enforcement. There, the court held that there was jurisdiction (presence or consent) and the D lost the challenge to jurisdiction.

The effect of those decisions no longer applies at common law and have been reversed by statute. The statutory and common law regimes overlap. The statutory regime is separate except for s 11 where one aspect of the common law is replaced. Section 11 ensures that neither of the decisions above (***Henry v Taylor*** and ***Harris v Geoprosco International***) are enforced in Australia.

Section 11 Foreign Judgments Act 1991 (Cth)
For the purposes of proceedings brought in Australia for the recovery of an amount payable under a judgment given in an action in personam …,the court is not taken to have had jurisdiction to give the judgment merely because the judgment debtor:

- *(a) Entered an appearance in proceedings in the court; or*
- *(b) participated in proceedings in the court only to such extent as was necessary; for the purpose only of one or more of the following: (*
- *(c) protecting, or obtaining the release of:*
  - *(i) property seized or threatened with seizure, in the proceedings; or*
  - *(ii) property subject to an order restraining its disposition or disposal;*
- *(d) contesting the jurisdiction of the court;*
- *(e) inviting the court in its discretion not to exercise its jurisdiction in the proceedings*

Section 11(d) reverses the decision in ***Henry v Taylor*** while **section 11(e)** reverses the decision in ***Harris v Geoprosco*** (*forum non conveniens*).

Property is usually seized in admiralty actions when you have an in rem action against a ship and the owner simply wants to enter proceedings to get the release of their ship. This will not be recognised as jurisdiction for the purposes of enforcement. The basis

upon which the court exercises jurisdiction is not absolutely reflected in the common law rules because e.g. if the D had challenged jurisdiction and lost and then not taken part in further proceedings – then that is not regarded as consent.

Suppose there is a contract between C and D and has a non-exclusive choice of forum clause. The claimant brings an action against the D and argues that the dispute is not related to the forum selected. Can you stay proceedings? Suppose the Columbian Court argues that it is not a clearly inappropriate forum but the D refuses to appear in further proceedings. Suppose the Columbian court then gives judgement and the P brings an action for enforcement in Australia. The D argues that it had no part in the proceedings. The P must satisfy the court that there was: international jurisdiction for a fixed sum, be final and conclusive, and between same parties

This jurisdiction requires D to be present or consents. The Australian court has jurisdiction over the D because the D is an Australian resident. The first thing the court will ask (after establishing jurisdiction over the d) whether there was international jurisdiction – jurisdiction in Columbia that mirrors Australia.

The answer is yes. Somebody who fails to convince the court of *forum non conveniens* is susceptible to jurisdiction under common law. However, s 11 overrules the common law. The concern is that you may have a D who may appear to have good reason to challenge the court's jurisdiction and had no part to play in the proceedings (e.g. ***Voth*** test may not be used for *forum non conveniens* test in foreign jurisdiction). The lesson is to consider enforcement when bringing an action in a foreign court. The P's only option if **section 11** applies is to sue in Australia and must re-litigate the foreign case in Australia.

In the European Union, the statutory scheme states that you are bound to sue in the place where the D is located.

Reciprocal Jurisdiction

- While reciprocity underpins recognition of foreign judgment, it is not applied in sense wider than common law (except by way of statute in relation of recognition of marriages, annulments and divorces)
- So, while foreign court may exercise a wide jurisdiction under its statute to allow for service on defendant outside the jurisdiction of that court, and that basis is the same (mirrors) that of the Australia court in which enforcement requested, this is insufficient to found 'international jurisdiction' ***Crick v Hennesy [1973] WAR 74.***

Enforcement at Common Law

The judgement must be **final and conclusive**. It must not be subject to re-litigation in the foreign jurisdiction. If there is an ongoing appeal, then enforcement is not possible but if appeal rights exist (but have not been utilised), then enforcement is possible.

Nouvian v Freeman (1889) 15 App – Under the Spanish rules, it was possible to get default judgment against the D. In Spain, the D may reinvigorate the case to challenge

the default judgement but this is not the case at common law. You must wait until the right of the D to reinvigorate the proceedings is barred, to enforce the judgement. Otherwise, the judgement is not final and conclusive.

The judgement must be one **rendered in monetary terms**, not specific performance. Judgement for specific performance will not be enforced in Australia under common law. Some other limited types of judgement may be recognised (e.g. appointment of receiver – recognise that executor to take control of Australian assets to render the bankruptcy).

White v Verkouille – appointment of receiver

The enforcement action must be between the **same parties** that litigated the original action. In ***Blohn v Desser***, the initial Austrian action was against the partnership however the enforcement action in England was brought against an individual partner. Under Austrian law, an individual partner cannot be liable for actions against the partnership. The court held that the D's in the original and enforcement must be identical.

It must be a form of jurisdiction exercised by the foreign court that resonates with our own (presence or consent), final and conclusive, for monetary sum and between the same parties. An Australian judgement will be issued ordering payment of a sum but at the heart of that is the obligation to pay the Columbian judgement.

Defences at Common Law

The judgement debtor can raise a number of defences.

(i) Foreign judgement obtained by fraud

The problem with foreign proceedings is that you do not want to re-litigate the matter. The purpose of an enforcement action in Australia is merely to enforce the result however Australian courts may be concerned about how the D was treated in the foreign court. The Australian asks whether the judgement was rendered against the D as a result of fraud that took place in the course of the proceedings (intrinsic fraud) and the foreign court refused to address the fraud. If the fraud was fraud which could have been taken into account in the foreign court, should the Australian court have taken it into account? What if the court was not aware of the fraud and it only becomes apparent later that there was fraud? Fraud which couldn't have been known of by the court that rendered the initial decision is extrinsic fraud. Different jurisdictions take different approaches.

In Canada, the defence is not available for intrinsic fraud. This is because ultimately, taking into account extrinsic fraud means that matter has to be re-litigated in Australia. The approach taken is jurisdiction specific.

Ahmed v Habib Bank - In the UK, the court held that the foreign proceedings lacked any good reasoning. The documents submitted by one party suggested they were fraudulent and the court simply accepted the documents. In this

case, the English court allowed the D to raise intrinsic fraud as a defence and accepted the defence. The New Zealand approach also allows intrinsic fraud to be taken into account.

There is no consistent approach in Australia. It is a possibility for the D to raise intrinsic or extrinsic fraud in the foreign proceedings as a defence. The public policy defence allows courts to refuse to enforce the judgement on the basis that the court does not have confidence in the decision.

(ii) Debtor denied natural justice

The Australian court has little confidence in the foreign decision potentially because the debtor took no part in the proceedings, potentially because they were not aware of the foreign proceedings. In those cases, they are denied natural justice.

Where a D challenges jurisdiction or loses a *forum non conveniens* application and takes no part in subsequent proceedings, when does that decision become suspect such that Australian courts do not want to enforce it?

Showlag v Mansour [1995] 1 AC 431 – There was parallel case and the parties each had a judgement in their favour. The court held that whoever obtained judgement first wins. The court is reluctant unless there is a defence, to examine either judgement in depth and assumes that both judgements are enforceable in the English court.

(iii) Enforcement would amount to enforcement of foreign penal law, revenue law or other governmental interest

This is the same as was discussed in relation to choice of law.

(iv) Recognition or enforcement would be contrary to forum's public policy

This is the same as was discussed in relation to choice of law.

Enforcement by Statute

The ***Foreign Judgements Act 1991 (Cth)*** replaces all reciprocal arrangements. The schedule of the legislation lists the countries from which judgements are recognised and include:

- Canada
- France
- Germany
- Italy
- Japan
- Korea
- New Zealand
- Poland
- Singapore

Where the legislation applies, the common law does not apply.

Judgements are defined, by the legislation, as a '*final and interlocutory judgement or order given or made by a court on civil proceedings*'. However, the legislation permits enforcement of criminal judgements which award compensation to the victim. Arbitral awards are also included.

The legislation allows enforcement of proclamations which allow specific performance or injunctions. However, so far there is no recognition of such awards because no such proclamations have bene made to date.

Under the statute, you do not have to initiate an action and instead, simply register the award. It is the process of registration which nationalises the award (e.g. turns English award into an Australian award). It is a process of registration and it means that within 6 years of the appeal, provided that it satisfies certain requirements:

- Final judgement,
- Judgement is one to which act applies,
- Judgment not wholly satisfied and
- Judgment enforceable in the place where it was made

then it will be enforced.

It is not an action that you are bringing against the D and therefore, you do not have to establish that the court has jurisdiction over the D. The Act allows for merely registration of the judgement. You therefore do NOT have to establish jurisdiction over the person who owes money. The D does not have to be present or consent – no basis of exercising jurisdiction over D is necessary. The connection with Australia is that the D has assets here.

There is no need for the court to have jurisdiction over the judgment debtor - ***Hunt v BP Exploration Co (Libya) Ltd (1979) 144 CLR 605***

> *"at common law a judgment creditor who sought to enforce a foreign judgment in Queensland by suing on the judgment in the Supreme Court could only do so if the judgment debtor was answerable or amenable to the jurisdiction of the court"*
> *The Act dispensed with this requirement, since "the application for registration does not involve an action in personam requiring service of the Supreme Court's process in or outside the jurisdiction"*

SEPA means that judgments registered in any Australian Supreme Court can be registered in any other State Supreme Court.

Setting Aside Registration

Most of the courts require notice to be given to the judgment debtor – given opportunity to have registration set aside. These bases mirror defences at common law:

- Judgment is one to which the Foreign Judgments Act does not apply
- If the judgment registered was for sum greater than the amount payable at time of registration
- Judgment wholly satisfied
- Section 7 Foreign Judgments Act – if condition for registration were not met (grounds which mirror common law to large extent)

You can raise as a defence, the judgement in your favour from another jurisdiction clearly inconsistent with a judgement being raised against you.

The statutory scheme is different but mirrors the common law in many ways. The reciprocal scheme means that you can register the foreign judgements and if the criteria can be satisfied, then the judgement will be enforced. The D has some defences (s 7):

- If foreign court not exercising recognised international jurisdiction
    - Submission does not include:
        - Contesting jurisdiction of court
        - Inviting court in its discretion not to exercise its jurisdiction in the proceedings
- If not identical parties
- If judgment obtained by fraud
- If no natural justice – D had insufficient or no notice AND did not participate in proceedings (***Barclays Bank v Piacun***)
- If contrary to public policy of Australia
- If incompatible judgment – being judgment obtained in foreign court AFTER a final and conclusive judgement made elsewhere in court having international jurisdiction

It is still a requirement under registration that foreign jurisdictions have some form of jurisdiction that Australian courts recognise.

Section 7 applies to the countries that are bound by the scheme and states that submission does not include contesting the jurisdiction of the court or inviting the court in its discretion not to exercise its jurisdiction in the proceedings. If either of those apply, the D may apply to have the registration set aside.

Interstate Judgements

To that extent that NSW is as foreign to Qld as to Mongolia. SEPA allows for recognition of judgements between states/territories in Australia:

- ss 104-106
- s 109

Required Reading: Nyghs Textbook Chapter 40

The common law rules for enforcement of judgments given by other courts as in principle applicable both to interstate and overseas judgements. However specific rules applicable to Australian judgements render the common rules irrelevant to intra-Australian enforcement. For foreign judgments not covered by the statutory scheme, the only basis for recognition and enforcement are the common law principles.

To entitle a foreign judgement to recognition at common law, 4 conditions must be met:

1) the foreign court must have exercised a jurisdiction that Australian courts recognise
2) the foreign judgement must be final and conclusive (according to the law under which it was pronounced)
3) there must be an identity of the parties
4) if based on a judgment *in personam*, the judgement must be a fixed debt

The party seeking to enforce the foreign judgement bears the onus of establishing the above.

If the first two elements are satisfied, then the judgment is prima facie entitled to enforcement unless the D can establish one or more of the recognised defences.

Jurisdiction

Jurisdiction does not refer to jurisdiction of the foreign court according to its own rules, but jurisdiction in the international sense – i.e. competence recognised under Australian rules. The foreign court must have had jurisdiction over the D at the time the jurisdiction of the foreign court was invoked. Such jurisdiction arises out of one of the two ways:

- presence/residence of D in the foreign jurisdiction
- voluntary submission by the D to that jurisdiction

Presence/Residence

Australian courts will recognise a foreign judgement if the D was personally served with the originating process while he/she was physically present within the jurisdiction of the adjudicating court – even if the presence was only temporary. An exception may arise if the D was induced to come within the foreign jurisdiction by fraud for the concealed purpose of serving him/her.

The presence must be of the D personally – not an agent or partner carrying on business in foreign jurisdiction on D's behalf.

It is sufficient if the D is ordinarily a resident of the foreign jurisdiction but is served elsewhere.

> ***Marshall v Houghton* [1923] 2 WWR 553** – Manitoba Court of Appeal recognised English judgement given against D domiciled and ordinarily resident in England but who had been served with the writ during a visit to Minnesota.

The traditional view is that the D's residence in the jurisdiction must exist at the time the jurisdiction of the foreign court is invoked. If the D was resident in the foreign jurisdiction when the obligation or cause of action arose is not sufficient if the D has left the jurisdiction by the time proceedings are commenced (***Bushfield Aircraft v Great Western Aviation (1996) 16 SR (WA) 97***).

This view was challenged by the Supreme Court of Canada in ***Beals v Salanha [2003] 2 SCR 416***, where the court held that a foreign judgement should be recognised or enforced if the D had a 'real and substantial connection' with the foreign jurisdiction.

> The P's brought an action in Florida for fraudulent misrepresentation and rescission of contract for sale of vacant lot owned by D's in Florida. The initiating process was served on the D's in Ontario where they lived. The court held that by entering into a property transaction in Florida, the D's had established a 'real and substantial' connection with Florida such that they could reasonably have expected to be subject to the jurisdiction of the courts of Florida.

The Canadian view is based on the fact that the Canadian courts use a 'real and substantial connection' test as the basis of jurisdiction over absent D's. It is unlikely that Australian courts will adopt the same approach.

The rule requires some modification in the case of corporations. It is artificial to speak of the residence or presence of corporations and instead these terms are used to indicate the degree of connection required to render a corporation liable to the involuntary jurisdiction of the foreign court.

The older English courts held that in order to be amenable to the jurisdiction of a foreign court, the corporation must carry on business in that country at a definite and to a reasonable extent, permanent place – either by maintaining a head office or carrying on business of company in that country through agent for more than a minimal period of time.

If the company is represented by an agent, that agent must have authority to bind the company. A mere commercial agency does not constitute 'presence'. A company is not present through a wholly owned subsidiary unless that subsidiary is shown to be a mere façade concealing the true facts.

Canadian courts have adopted a broader approach and recognised and enforced judgements rendered in foreign courts based on the D's corporation business having a 'real and substantial' connection with the foreign jurisdiction.

Voluntary Submission by the Defendant

A party can submit to the jurisdiction of a foreign court either by appearing as a party in the proceedings or be agreeing in advance to accept the jurisdiction of that court.

A non-resident D who has served outside the jurisdiction of the foreign court but nonetheless appeared to argue the merits of the case, has thereby submitted to the jurisdiction of the court.

- mere filing of an unqualified appearance is submission unless appearance was entered by solicitor without authority from client or appearance was withdrawn with the leave of the foreign court or in accordance with its rules
- filing appearance to protest the jurisdiction is NOT a submission, unless the D proceeds to argue the merits
- litigant who commences proceedings in foreign court as P is bound by the outcome

    - P cannot complain if the D recovers damages by way of set-off, cross-action or counter claim
- Appearance must be voluntary – not under physical coercion or threat thereof or procured by error, fraud or undue influence
    - Appearance entered into to prevent potential seizure of property located in foreign jurisdiction due to default judgement - is voluntary

Section 11 of the Foreign Judgements Act 1991 (Cth) states that appearance will not be regarded as establishing jurisdiction of foreign court if its purpose is to:

- protect or obtain the release of property seized
- contesting the jurisdiction of the court
- inviting court in its discretion not to exercise its jurisdiction

A party appealing against a judgment given in default of an appearance submits to the jurisdiction of the appellate court.

A D who successfully defends an action on the merits in a foreign court cannot then withdraw his/her submission before a regular appeal from that decision is heard but must be taken to have submitted to the jurisdiction of the appeal court.

If the D is forced by a foreign court's procedure to contest the merits in order to make his/her point about jurisdiction, then the submission should be regarded as merely for the purpose of making the D's jurisdictional argument.

Jani-King Fundraising v Jason [2013] QSC 155 – The Court held that the D had taken sufficient steps in the foreign court to be taken to have submitted to its jurisdiction, even though he had entered into a special appearance there, seeking an order dismissing the complaint on the ground that the foreign court had no jurisdiction.

- opposed joinder of other D's without reserving his rights
- sought an order that the P pay him 'reasonable attorney's fees and expenses' of opposing the application for joinder

Therefore, the court held that the engagement with the proceedings in the foreign court went beyond 'merely' entering an appearance to contest the jurisdiction of the court. These steps took the D's case outside the operation of s 11 and constituted sufficient submission to the foreign court's jurisdiction to justify recognition of its judgment in Australia.

The law of the foreign court and the law of the forum may differ on what amounts to submission for the purposes of jurisdiction. In ***Akai v Peoples Insurance Co [1998] 1 Lloyd's Rep 90***, the D entered a conditional appearance in an action brought in the NSWSC, seeking a stay of proceedings. Under the law of NSW, the steps taken by the D amounted to submission to the court's jurisdiction. Nonetheless, in subsequent proceedings in England, it was held that the D had not submitted to jurisdiction for the purposes of the UK Statute.

> The court held that if a step would not be regarded as submission by the domestic law of the foreign court, it should not be regarded as submission even if it would amount to such under the law of the forum.

If a step would be regarded as submission by the domestic law of the foreign court, but not by the law of the forum, the forum court is free to disregard the foreign court's characterisation and to hold that there has been no submission.

The court ultimately found, in this case, that there was no submission and relied heavily on a provision of the UK statute which states that a court in the UK shall not be bound by any decision of an overseas court about whether there has been a submission to the jurisdiction.

No equivalent section exists in the Australian statutory regime. The question posed by s 11 is whether the D appeared before the foreign court for the purposes of contesting its jurisdiction or asking it not to exercise its jurisdiction. These should be simple questions of fact, not calling for interpretation of whether such steps amounted to submission either by the law of the forum or that of the foreign state.

Submission by Agreement

The most obvious example of submission in this manner is a contractual clause that stipulates that a specified tribunal shall have jurisdiction in respect of any disputes arising between the parties. In interpreting such a clause, it has been held that the court should take a wide view of its scope (***Telesto investments v UBS AG [2013] NSWSC 503 at [268]-[272]***).

A submission also occurs when the D has given a person who resides within the foreign country authority to accept service on the D's behalf or where it has been agreed that service may be affected by leaving documents at a given address within that jurisdiction.

It is no objection that the D was not actually aware of the existence of the submission clause in the contract, or even that the clause permitted a method of service which made it most unlikely that the D would ever have personal notice of the existence of the action (***Copin v Adamson (1875) LR 1 Ex D 17***).

A choice of law clause where parties agree that their contract shall be construed under the law of a particular country does not amount to a submission to the courts of that country.

<u>Suggested Additional and Alternative Bases for Jurisdiction</u>

Reciprocity or Comity

The principle of reciprocity is that an English court, for example, should recognise the exercise of a foreign jurisdiction in circumstances similar to those in which an English court was entitled to assume jurisdiction.

- Principle adopted in relation to recognition of foreign divorces in ***Travers v Holley [1953] P 245***
- However, in ***Re Trepa Mines [1960] 3 All ER 304n***, the court held that the principle of reciprocity was only relevant in matrimonial cases

Attempts to persuade courts to accept the principle in relation to judgements *in personam* have failed in England, New Zealand and Western Australia.

Nationality or Domicile of the Defendant

This issue arose before the NSWSC in ***Federal Finance & Mortgage v Winternitz SC (NSW), BC8901479 unreported***. The P, a corporation formed under the law of Hawaii, had obtained judgement in that state against the D who was a citizen of the US and registered as voter in Hawaii. At the time of the judgement, the D had established permanent residence in Australia and had been served with the Hawaiian writ in Australia. Justice Sully held that the D could properly be regarded as a 'subject' of the state of Hawaii and consequently, the court in Hawaii had jurisdiction over him.

A similar approach was adopted in ***Independent Trustee v Morris (2010) 79 NSWLR 425*** where the court held that the D's citizenship of the UK was a sufficient basis for accepting the effectiveness of a default judgement of the UK in NSW even though the D resided in and have been served in NSW.

There are obvious difficulties with nationality as a basis for recognition.

- If Winternitz had not maintained the registration as a voter in Hawaii, his US citizenship would have been of little relevance
- Both above cases suggest that the connection must be an active one (i.e. evidenced by holding passport or an application for a pension and voter registration)
- This may exclude a long-term resident of Australia who still holds the nationality of the country or birth without active participation in its political life and a dual national

Domicile might also serve as a basis for international competence but authority is slight. It is usually seen as a technical and difficult notion – the use of which is generally in decline and should not be extended.

Subject Matter Present or Cause of Action Arising in Foreign Jurisdiction

The fact that the litigation concerned property of the D situated within jurisdiction of the foreign court was rejected as basis for jurisdiction in the international sense by the Court of Appeal in ***Emanuel v Symon [1908] 1 KB 302*** unless foreign court rendered judgement against that property in rem. It also does not suffice that the obligation which the P seeks to enforce against the D arose in the jurisdiction of the foreign court.

<u>Judgements in Rem</u>

An example of such a judgement is one given against a ship in Admiralty. Such a judgement will be recognised by Australian courts if the ship in question was present

within the jurisdiction of the foreign court at the commencement of the proceedings there.

Judgement in rem also refers to situations where:

- Party has movable or immovable property adjudged to that party in title or possession
- A party obtains a judicial sale of the property

Judgement made by the courts of the country where the property is situated will be recognised in Australia as passing the title or right of possession.

A foreign judgement, in order to be recognised in Australia as affecting the title to property must under the lex situs purport to affect the title or other interest in the property involved. If the effect of the judgement under the lex situs is merely to create a right in personam against the D which may be enforced against the D's property, should it come within the jurisdiction of the foreign court, the judgement can only be recognised in the forum if the foreign court had personal jurisdiction over the D.

Final and Conclusive Judgement

The judgement must put an end to the particular proceedings pending between the parties and must settle the controversy between the parties which led to the proceedings.

The key test of finality is whether the foreign court treats the judgement as *res judicata* of the particular issues between the parties to the litigation.

> ***Blohn v Desser [1962] 2 QB 116*** – An Austrian court gave judgement against a partnership of which the D was a member. The P sought to enforce the judgement against the D personally in England. Under Austrian law, a judgement given against a partnership did not bind each partner individually unless further proceedings were taken against that partner in which certain defences could be raised (that were not available in an action against the partnership). On that basis, the court concluded that the judgement obtained against the partnership was not final and conclusive in relation to the D personally.
>
> ***Bank Polska Opieki Spolka Ackyjna v Opara* (2010) 238 FLR 309** – A Polish court had given judgement that court be set aside by anti-enforcement proceedings in Poland. The Qld SC held that the fact that the judgement could be set aside by successful anti-enforcement proceedings did NOT mean it was not final or conclusive. Under Polish law, any anti-enforcement action would be brought in separate proceedings and thus the original judgement created a res judicata on the issue with which it was concerned (i.e. the D's debt to the P).

The fact that appeal rights exist from the decision of the foreign court or even that appellate proceedings are pending does not affect the finality of the judgement. However, it may be appropriate in some cases for the court to give judgement enforcing the foreign judgement but then to order a stay of enforcement of the Australian judgement pending the outcome of the foreign appeal.

Default judgments can be problematic. In most countries, a default judgement can be set aside by the court that made it upon application of the D. until steps are taken to set the default judgement aside, it is enforceable as being final and conclusive. Some older decisions have commented that where the D has a right to seek the judgement be set aside within a specific period, the judgement cannot be final and conclusive until that period has expired.

If an Australian court gives judgement entirely on the basis of a foreign judgement which is later overturned and set aside – good reason exists to set aside the judgement relied on.

In many countries, an order for spousal or child maintenance can be varied or set aside with retrospective effect by the court that made it. Such orders are therefore not final or conclusive and cannot be enforced in Australia.

The P bears the burden of establishing that the judgement to be enforced is final and conclusive.

The Identity of the Parties

The parties to the enforcement proceedings must be the same as those in the foreign judgements.

> ***Blohn v Desser [1962] 2 QB 116*** – One of the grounds on which the Austrian judgement was refused recognition was because under Austrian law, the judgement was only effective against the partnership. The P in the English proceedings however was seeking to enforce judgement against the D personally.
>
> ***Newcom Holdings v Funge Systems [2006] SASC 284*** – the SA SC declined to enforce an order made in bankruptcy proceedings in the US because the order only affected parties to the bankruptcy proceedings, which did not include the person against whom enforcement was sought in SA.

However, it is not the case that all defendants to the foreign judgement must be made defendants to the enforcement proceedings in Australia. If the foreign judgement is expressed against several defendants acting as separate legal entities, enforcement proceedings may be brought in Australia against any or all of them.

What Judgements can be Enforced?

Australian courts can only enforce foreign judgements that are for a fixed, or readily calculable, sum of money. However, this restraint never applied to judgements in equity:

> ***White v Verkouille [1990] 2 Qd R 191*** – the Qld SC allowed a receiver appointed by the District Court of Nevada to administer the assets of the D and to take possession of the Qld bank accounts of the D without requiring as a prerequisite that the Nevada judgement be made a judgement of the Qld court.

Davis v Turning Properties (2005) 222 ALR 676 – the NSW SC made a Mareva order (freezing order) to give effect in NSW to a Mareva order previously made by the SC of the Bahamas.

The Effect of a Foreign Judgement

Courts have come to accept that provided a foreign court had jurisdiction, the merits of its decision cannot be called into question. However, a foreign court cannot bind an Australian court on the issue of whether the foreign court had jurisdiction.

By Way of Defence, Cause of Action Estoppel, Issue Estoppel or Anshun Estoppel

A foreign judgement can be used as both a sword and a shield. A foreign judgement which has been satisfied may be pleaded by way of *cause of action estoppel* to bar any action between the same parties or their privies in the forum on the same cause of action.

- Parties must be identical
- Causes of action and heads of damage recoverable must be the same
- Not essential that the law applicable and possible result in each jurisdiction be the same
- Not essential that the foreign proceedings be instituted before the local proceedings, provided they come to judgement before the local proceedings

Cause of action estoppel assumes that the matter has been fully litigated on the merits in the foreign court. If a party to the foreign proceedings has deliberately withdrawn from those proceedings, that party cannot afterwards complain that there was no trial 'on the merits' of his/her claim.

The defence of cause of action estoppel may be waived expressly, by failing to plead it or where circumstances arise whereby a party is estopped from relying it.
A foreign judgement can also be relied upon by way of issue estoppel to prevent the reopening of any issue in subsequent proceedings that has previously been litigated between the same parties or their privies. In ***Carl Zeiss Stiftung v Rayner and Keeler (No 2) [1967] 1 AC 853***, Lord Brandon held that for the doctrine of issue estoppel to apply in the second proceedings, the following requirements must be met:

- That the same question has been decided
- That the judicial decision which is said to create the estoppel was final
- That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies

This formulation was adopted by the HC of Australia in ***Kuligowski v Metrobus (2004) 220 CLR 363***.

In The Sennar (No 2) [1985] 1 WLR 490, Lord Brandon explained that the second requirement (of finalty) had two sub-components:

- That the foreign decision is final and conclusion
- That it was on the merits – one which establishes certain facts as proved or not in dispute, states what the relevant principles of law applicable to the facts are and expresses a conclusion by applying those principles.

It is therefore possible for a foreign judgement to found a subsequent issue estoppel in Australian proceedings however the need for caution has been urged in such cases – possible injustice and inconvenience that might be caused to D's unfamiliar with procedures in a foreign court.

In determining whether issue estoppel applies, it is necessary to identify with precision the issue that was decided in the earlier proceedings to determine if it is identical with an issue sought to be raised in the later proceedings.

Anshun estoppel prevents a party from raising an issue that could have been, but was not, raised in earlier proceedings. The principle is based on reasonableness of conduct so that the issue in question must have been so relevant in the first proceedings that it would have been unreasonable not to raise or rely on it. Whether an Anshun estoppel may be based on the final judgement on a foreign court depends on whether or not there is an equivalent doctrine in the relevant foreign jurisdiction (***PCH Offshore v Dunn (No 2) (2010) 273 ALR 167***)

Can a Judgement that is Defective under its own law have International Validity?

Suppose a foreign court lacked jurisdiction under its own law with the result that the judgement it ordered is a complete nullity. Can the D in enforcement proceedings challenge the validity of the judgement under its own law?

It is necessary to distinguish between a complete lack of jurisdiction on the one hand and a mistake as to the procedure or law in the exercise of jurisdiction on the other. Therefore, if a foreign court lacks jurisdiction under its own law, the judgement should be treated as a nullity even if the foreign court may have had jurisdiction in the international sense.

If the foreign court did have jurisdiction under its own law to deal with the particular type of action before it, its judgment must be given effect within the forum even though it may be open to challenge under the law where it was made, on account of some error of fact or law. The forum is not competent to decide whether a foreign court has properly applied its own law.

Unless the lack of jurisdiction is obvious on the facts of the judgement, the party who alleges the judgement of a foreign court is a nullity under the law of that court must first have the judgement set aside in the country it was made.

Defences to Enforcement

It is not open to the D to challenge the intrinsic merits of the foreign decision by alleging that a foreign court made a mistake as to the facts or the law.

The D cannot raise in the enforcement proceedings any defence that was or could have been raised in the foreign proceedings even though it would have been a complete answer to the claim. It may be otherwise if the defence was not available under the law of the foreign court, or material evidence on which the defence could be based was not

available at the time of the proceedings before the court. The comments of Stephenson LJ in ***Israel Discount Bank v Hadjipateras [1983] 3 All ER 129***, suggest that only defences based on the distinctive public policy of the forum (e.g. duress, undue influence) can be raised in the forum if not available in the foreign jurisdiction.

The number of defences that a D can raise to the enforcement of a foreign judgement in Australia are limited:

1. That the Foreign Judgement was Obtained by Fraud

   A judgment can only be challenged on these grounds if the facts on which the allegation of fraud are based were not before the court in the original action and did not become known to the party seeking to have the judgement set aside until after the hearing of the original proceedings.

   - Fraud = actual + constructive fraud
   - Fraud can be on part of the P, the court or even the D
   - Proof of perjury by a witness is insufficient unless the P perpetrated the fraud by procuring the witness's perjury
   - Perjury on behalf of an agent of the P is insufficient because such perjury would lie beyond the scope of the agent's authority unless the P procured the perjury

   English decisions have found that the defence of fraud may be raised in enforcement proceedings even if it was raised and adjudicated on in the foreign proceedings. The issue first came before Australian courts in ***Keele v Findley (1990) 21 NSWLR 444***, where the court refused to follow the English authority primarily on the basis that the same rule should apply for enforcement of local and foreign judgements (i.e. where fraud unknown to party alleging the same at time of original trial).
   Two more recent Australian cases have adopted the English approach in ***Close v Arnott (1997 unreported)*** and ***Ki Won Yoon v Young Dung Song (2000) 158 FLR 295***.

   Most recently, the position in ***Keele v Findley*** has been accepted, albeit in obiter comments, by the NSWSC in ***XPlore Technologies of America v Tough Corp [2008] NSWSC 1267*** and ***Allardyce Lumber v Quarter Enterprises (No 2) (2012) 265 FLR 217***.

2. That the Foreign Judgement is Contrary to Public Policy

   A foreign judgement may be denied enforcement because it is founded on a law that is unacceptable to the public policy of the forum (e.g. judgement for wages of prostitute).

   A foreign judgement may also be contrary to public policy because it was obtained in a manner obnoxious to the law of the forum, such as by duress or undue influence. However, except for the case of fraud, the offense of public policy defence cannot be raised in the forum if a similar defence was available under the law of the foreign court.

Denial of enforcement is only available where the offence to public policy is of a high order, as in cases involving fundamental questions of moral and ethical policy, fairness of procedure and illegality: ***Stern v National Australia Bank [1999] FCA 1421***.

The interests of comity require Australian courts to be slow to invoke public policy as a ground for refusing recognition or enforcement of a foreign judgement (***Jenton Overseas Investment v Townsing (2008) 21 VR 241***). The fact that Australian law would have produced a different result is in some sense evidence that Australian law has a different policy from the relevant foreign law, but that should not be sufficient. The offence against Australian public policy must be profound before refusal to enforce is warranted.

An award of punitive damages may be regarded as contrary to public policy but this is not always the case. In ***Benefit Strategies v Prider (2005) 91 SASR 544***, the court refused to enforce the foreign court's award for punitive damages as it sought to punish the D for failing to comply with court orders and was therefore penal in nature. The court clarified that where punitive damages were awarded to punish the D for deliberate and callous disregard for the P's rights, then enforcement of that award would not be contrary to Australian public policy.

3. That the Foreign Court acted Contrary to Natural Justice

The requirement of natural justice relates to the procedure of the foreign court and is generally seen as imposing two requirements:

- Each party must have had the opportunity to present his/her case before an impartial tribunal
- Each party must have been given due notice of the proceedings

Australian courts have been careful not to impose the standards of the forum on foreign courts.

In ***Adams v Cape Industries [1990] Ch 433***, the court held that the concept of denial of natural justice extends to other situations where the forum's concept of substantial justice is infringed (e.g. D was given notice of proceedings and given opportunity to attend but there was a failure to notify D that damages would be determined summarily without judicial assessment).

This expansion seems inconsistent with the general principle that a foreign default judgement is final and conclusive unless the D actually takes steps in the foreign court to have it set aside.

4. That the Foreign Judgement is Penal or a Judgement for Revenue Debt

In some jurisdictions, a judge or magistrate trying a criminal action may add to the penalty imposed an award of compensation to the victim. The penalty can be severed from the remainder of the judgement in that case.

Similarly, if an award for punitive damages are unenforceable, it can be severed from an award of compensatory damages if practicable to do so.

5. That the Foreign Court acted Perversely in Refusing to Apply the Appropriate Law

   This defence is doubtful as it is impossible to say when the foreign court has acted perversely. The court in ***Carl Zeiss Stiftung v Rayner and Keeler (No 2) [1967] 1 AC 853***, held that English courts could not sit in judgement on the conflicts principles applied by foreign courts.

   In ***Air Foyle v Center Capital [2003] 2 Lloyd's Rep 753***, the court held that a foreign judgement has no effect if it is perverse, in the sense that it is at variance with generally accepted doctrines of private international law.

   E.g. If a foreign court were to decide a transnational contract case by applying the law of the more populous nation, rather than the parties' chosen law, the forum court could deny enforcement on the ground that the choice of law was perverse.

6. That the Party Seeking Enforcement or Recognition is Estopped from Relying on the Foreign Judgement by Reason of Estoppel Arising out of a Prior Judgment within the Forum Between the Same Parties and Concerning the Same Issue(s)

   If there is a conflict between a foreign judgement and an earlier judgement in the forum on the same matter between the same parties, the forum will prefer its own.

   In ***Vervaeke v Smith [1983] 1 AC 145***, a marriage was celebrated in London between a Belgian prostitute (V) and a citizen of the UK (S), solely for the purpose of preventing V's deportment from the UK as an undesirable alien. The parties did not intend to cohabit and never did. In 1970, V married her former employee Messina who died during the wedding feast. V sought, as his widow, to assert her claim to his considerable investments in England however S was still alive and the prior marriage had not been dissolved.
   V sought annulment of the marriage with S on the ground that she lacked consent because she was not aware of the true nature of the ceremony at the time. Her petition was dismissed on a finding of the facts that she had been fully aware of the nature of the ceremony and had consented to it. V subsequently returned to Belgium and obtained an annulment and then applied to the English courts for recognition of the Belgium annulment and a consequential declaration that her marriage to Messina was valid.

   The House of Lords unanimously rejected the enforcement application. The appellant was estopped by *cause of action estoppel* from raising again a cause of action based on the alleged invalidity. She was also estopped by *issue estoppel* from raising again the issue of her consent to the first marriage in the proceedings for a declaration that the marriage to Messina was valid.

   It is obvious that a party cannot go shopping around to overturn an earlier decision. In ***ED & F Man (Sugar) V Yani Haryanto (No 2) [1991] 1 Lloyd's Rep 129***, H sought a declaration that he was not bound by a contract for the sale of sugar to him by M.

The action and a further appeal was dismissed. H and M then entered into a settlement agreement by which H agreed to pay M US$9M. H then sought and obtained judgement from a court in Indonesia annulling the settlement agreement and underlying sale contract on which M's claim had been based. The English court refuges to recognise the Indonesian judgement because it was inconsistent with the earlier English decision.

If there is a conflict between two foreign decisions, the earlier should prevail. It would also seem that an earlier foreign determination should prevail over one in the forum.

The Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth)

This legislation was enacted to protect Australian business from excessive jurisdiction exercised by foreign courts, especially in the US, in antitrust proceedings. Complaints have been made that courts of the US have violated the territorial sovereignty of other states by purporting to exercise jurisdiction in respect of persons, matters or conduct outside the US by reason of some alleged impact on business within the US.

Section 9 allows the federal AG to make a declaration in respect of a foreign antitrust judgement if he/she considers such to be desirable in the national interest, or considers the exercise of power by the foreign court to be contrary to international law or inconsistent with international comity or practise. The effect of the declaration is to prevent enforcement of the judgement as a whole in Australia, or if the declaration specifies a sum of money, to limit enforcement to that sum of money.

Section 14 allows the federal AG to prohibit compliance with any foreign order or injunction requiring something to be done in Australia or prohibiting the doing of something in Australia.

Required Readings: Chapter 41 Enforcement of Foreign Judgements by Statute

The ***Foreign Judgements Act 1991 (Cth)*** makes certain foreign judgements to which the Act extends enforceable in Australia by registration. Prior to its commencement, provision was made in each state/territory for the enforcement of foreign judgements on the basis of reciprocity. After 27 June 1993, the state laws became ineffective and the Cth legislation prevailed as the sole statutory scheme.

The legislation does not apply to judgements given in a foreign court before the date on which the Act was extended to the country of that court. In that situation, the judgement can only be enforced at common law.

The federal statute does not apply to the enforcement of interstate judgements

The Courts to which the Act Extends

The legislation is based on the principle of reciprocity. It provides for the enforcement of judgements rendered by superior and specified inferior courts in countries to which the Act has been extended by regulation. In the absence of specific provision in the regulation, the legislation only applies to the enforcement of money judgements rendered in the first instance by superior courts (i.e. courts of the level and standing of a supreme court).

Without specification being made, a judgement rendered by a court at district or county court level or by super court on appeal from such a court cannot be enforced under the Act.

The Act extends by virtue of its Regulations to the superior courts and specified inferior courts of:

- Alberta (including the Provincial Court of Alberta)
- Bahamas
- British Columbia (including the Provincial Court of British Columbia)
- British Virgin Islands
- Cayman Islands
- Dominica
- Falkland Islands
- Fiji
- France
- Germany
- Gibraltar
- Grenada
- Hong Kong Special Administrative Region of the People's Republic of China
- Israel
- Italy
- Japan
- Korea
- Malawi
- Manitoba (including the Provincial Court of Manitoba)
- Montserrat
- Papua New Guinea
- Poland (including the District Court)
- St Helena
- St Kitts and Nevis
- St Vincent and Grenadines
- Seychelles
- Singapore
- Solomon Islands
- Sri Lanka
- Switzerland
- Taiwan
- Tonga
- Tuvalu
- United Kingdom (including County Courts of England, Wales and Northern Ireland and the Scottish Sheriff Courts)
- Western Samoa

Notably, the act dos not extent to the judgements of any courts of the USA. US judgements must be enforced under the common law principles.

New Zealand judgments are dealt with under the ***Trans-Tasman Proceedings Act 2010 (Cth)***.

The definition of judgement includes foreign arbitral awards.

The Act provides a method of enforcement through registration. The common law requirement that the judgement debtor be served within or voluntarily submit to the jurisdiction of the enforcing court does not apply – no objection to registration that the judgement debtor resides out of the jurisdiction. The judgement debtor must, however, be served with notice of registration.

What Judgements can be Registered?

A P who has obtained judgement of a superior court in an overseas country to which the Act extends may, under **s 6(1)**, within 6 years file an application in the supreme court of any state or territory for registration of the judgement.

In the case of a money judgement given pursuant to the Commerce Act 1986 (NZ), application **may** also be made to the Federal Court of Australia and in the case of a non-money judgement given under that Act, application **must** be made to the Federal Court.

There is no requirement that the judgement creditor intends to enforce the judgement in the state or territory in which is registered – the judgement creditor is at liberty to choose the state or territory in which the judgement is enforced.

The judgement must be final and conclusive.

- A default judgement is final and conclusive even though it may be set aside on the D showing cause
- A judgement will be final and conclusive even though an appeal is pending in the overseas country or the time for appealing has not yet expired

- The court may grant a temporary stay of the enforcement proceedings on condition, if need be, that the appeal be pursued in an expeditious manner

The judgement must be for a sum of money, unless it is a specified non-money judgement to which the Act has been extended.

The judgement must have been given in civil proceedings or on a civil claim within criminal proceedings whereby a sum of money is payable.

Judgements for taxes, fines and penalties are generally excluded except:

- New Zealand tax – including penalties or interest
- PNG tax – excluding penalties or interest

Punitive damages are not excluded from registration (***SA General Textiles v Sun and Sand [1978] 1 QB 279***)

Orders for costs can also be registered (***Connop v Varena [1984] 1 NSWLR 71***).

A foreign judgement is NOT registrable, if at the date of the application:

- It has been wholly satisfied; or
- It could not be enforced in the country of the original court

A foreign judgement may not be enforceable in the country of the original court if, for example, the relevant limitation period for its enforcement in the jurisdiction of the original court has expired (***Society of Lloyd's v Marich (2004) 139 FCR 560***). If the judgement has been partially satisfied, the judgement can only be registered as to the part unsatisfied.

Applications for registration are usually made ex parte – there is no requirement to serve notice of intention to register on the judgement debtor. There is a requirement to serve notice on judgement debtor following registration and it is from the date of such notice that time runs from any application under ***s 7*** to have the registration set aside.

A judgement registered in the Supreme Court of one state or territory may be registered in the Supreme Court of another state or territory under ***Pt 6 of SEPA***.

<u>When Registration Must be Set Aside</u>

Section 7(2)(a) of the Foreign Judgements Act sets out the grounds on which a registration **<u>MUST</u>** be set aside if established to the satisfaction of the court. the onus of satisfying the court rests on the party seeking to set aside the registration. The grounds are:

(i) That the judgement is not, or has ceased to be, a judgement to which the Act applies

- The judgement is not a judgement of a court to which the Act extends
- The judgement is not an enforceable money judgement within the meaning of ***s 3(1)***

- The judgement was given before the Act was extended to the country concerned

(ii) That the judgement was registered for an amount greater than was payable under it at the date of registration
- The judgement debt may have bene overstated or satisfied in part
- The court may order that the judgement be registered in respect of the amount still payable at the date of application

(iii) That the judgement was registered in contravention of the Act
- If the judgement was wholly satisfied or not enforceable at the date of registration in the country of origin
- In the latter case, the setting aside of registration does not prejudice a new application for registration if and when the judgement becomes enforceable in the country of origin

(iv) That the courts of the country of original court had no jurisdiction in the circumstances of the case
- The question here is not whether the foreign court had jurisdiction under its domestic law, but whether, in the terms of the law of the place of registration, the foreign court possessed jurisdiction in the international sense
- The act defines in s 7(3) when a foreign court shall be deemed to have had jurisdiction for both actions in rem or actions in personam
    - It seems that the list is exhaustive and if the jurisdiction of the foreign court falls outside the statutory definition, it could not be recognised under the Act

(v) That the judgment debtor did not receive notice of the proceedings in sufficient time to enable to judgement debtor to defend the proceedings and did not appear
- Proceedings refers to the action for principal relief only and it is no objection that the D did not receive notice of interlocutory proceedings in the foreign court
- Notice means actual notice – sticking up of notices, substituted service by advertisement and service by post are excluded
- Giving notice requires more than informing the person that the proceedings either exist or will exist
- The onus is on judgement debtor to establish that he/she did not receive sufficient notice of the overseas proceedings
- ***Barclays Bank v Piacun [1984] Qd R 476*** – The court held that a failure to give notice of proceedings abroad resulting in default judgement was not cured by giving the D notice of the registration of that judgement in Qld, even though the D under the terms of that notice had amble time to seek to set aside the default judgment abroad.

(vi) That the judgement was obtained by fraud
- This has the same meaning as the defence of fraud to an action at common law to enforce a foreign judgement debt and the same conditions apply

- Intentional and deliberate misleading of the foreign court must be demonstrated (***Allerdyce Lumber Company v Quarter Enterprises (No 2) [2012] NSWSC 438***)
- The material to be relied upon must not have been available to the party advancing the argument when the foreign judgement was obtained (***Keele v Findley (1990) 21 NSWLR 444***)

(vii) That enforcement of the judgement, not being a judgement for the payment of NZ tax, would be contrary to public policy

- Apart from barring judgements that are immoral or offensive to local policy, the Act also incorporates the common law rule that our courts will not enforce judgements based on penalties or revenue debts
- Common law principles have shaped this category and therefore apply in interpreting immoral or offensive conduct

The registration of a judgement MAY be set aside pursuant to s 7(2)(b) if the court of registration is satisfied that the mater adjudicated upon has before the date of judgement in the original court been the subject of a final and conclusive judgement by a court having jurisdiction in the matter. This provision permits recognition to be given of the doctrine of res judicata and issue and cause of action estoppel. The earlier judgement need not be one of an Australian court.

<u>The Jurisdiction of the Foreign Court</u>

To determine whether a foreign court acted with jurisdiction, ***s 7(3)*** sets out a definition of jurisdiction depending on whether the judgement is based on an action in personam or in rem.

Action in Personam

Actions in personam do NOT include proceedings in connection with:

- Matrimonial matters
- Administration of estates of deceased persons
- Bankruptcy or insolvency
- Winding up of companies
- Mental health or the guardianship of infants

A foreign court will have jurisdiction over an action in personam under ***s 7(3)(a)*** in the following circumstances:

(i) If the judgement debtor voluntarily submitted to the jurisdiction of the original court

(ii) If the judgement debtor was P in, or counter-claimed in, the proceedings in the original court

(iii) If the judgement debtor was a D in the original court and had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court

- E.g. contractual agreement or written/oral statement before commencement of proceedings where D indicates willingness to submit to jurisdiction of foreign court

(iv) If the judgement debtor was the D in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court
- More stringent than common law where branch office or contractual agency suffices
- Resided in is likely to mean even a temporary presence will suffice (***Emanuel v Symon [1908] 1 KB 302***)

(v) If the judgement debtor was a D in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgement debtor had in the country of that court
- Broader than common law which does not permit an individual to be 'present' in a foreign jurisdiction by an agent or employee

(vi) If there is an amount of money payable in respect of NZ tax, under the judgement

Action in Rem

Where the subject matter is movable or immovable property, the foreign court is deemed to have jurisdiction under s 7(3)(b) if the property was situated within its jurisdiction at the time of the proceedings in that court.

Actions in rem concern those in admiralty or actions in which the title or possession of property is in issue.

Other Actions

For all other actions, foreign courts are deemed to have jurisdiction if the jurisdiction of the original court is recognised by the law of the place of registration. This potentially comes into play in relation to matters expressly excluded from the definition of action in personam (e.g. matrimonial matters, etc).

In each of the above categories, the foreign court will not be recognised as having jurisdiction under s 7(4) if:
- The subject matter of the proceedigns was immovable property situated outside the country of the original court
- Except in the case of voluntary submission or in relation to actions which do not fall within the definition of either an action in personam or in rem, the bringing of proceedings in the foreign court was contrary to an agreement between the parties that the dispute was to be settled elsewhere
- The judgement debtor was entitled to sovereign, diplomatic or consular immunity

<u>Effect of Registration</u>

A judgement registered under the Act has, for the purposes of enforcement, the same force and effect as if the judgement had been originally given in the court of registration.

Registration does not constitute recognition of the underlying right or cause of action that gave rise to the foreign judgement – any enforcement proceedings after registration are not for the purpose of enforcing the underlying cause of action

New Zealand Judgements

Pt 7 of the Trans-Tasman Proceedings Act 2010 allows the following judgments to be enforced through registration:

- NZ money judgments
- Non-money judgments
- Judgments given in criminal proceedings consisting of requirement to pay compensation, damages or reparation to injured party
- Judgments consisting wholly of a regulatory regime criminal fine which meets conditions prescribed by regulations
- Judgments in NZ market proceedings
- Judgments registered in a NZ court under the Reciprocal Enforcement of Judgments Act 1934 (NZ)

Certain judgments are excluded from registration including:

- Orders under proceeds of crime legislation
- Order relating to granting of probate or letters of administration of estate of deceased person
- Guardianship order
- Orders relating to care, control or welfare of child

Under the act, judgments are required to be registered within 6 years of the date after the judgment (or appeal judgment) was given. The grounds upon which judgment may be set aside are more limited than under the Foreign Judgements Act 1991 (Cth) and include where:

(a) Judgement is contrary to Australian public policy
(b) Judgement was registered in contravention of Act
(c) Subject matter of judgment given was either immovable property or was an in rem judgement given in respect of movable property, whether neither immovable or movable property was situated in NZ

It is not a ground for refusing or prohibiting enforcement of NZ judgement that the judgement involves enforcement in Australia of NZ judgment which involves NZ public law including payment of NZ tax or imposition of NZ civil pecuniary penalty or regulatory regime criminal fine.

Law of Contracts

Contracts is the most common area in which conflicts of law arises and contracts are the most common way in which you engage with a foreign legal system. Most contracts have a mechanism to deal with conflicts of law so that they do not become disputed issues.

A contract is a product of the **WILL** of the parties (principle of party autonomy) – free will to decide how you wish to decide. Parties enter into contracts with the intend to create legally binding rights and obligations. The question is in accordance with whose law do you create these legal rights?

Every contract (and the rights and obligations under it) must be governed by the laws of a state. This is the proper law of the contract.

What is the Proper Law of the Contract?

The proper law of the contract is:

> *"… the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection".* **– Dicey and Morris**

There are 3 different approaches to determining the proper law of the contract:

- **The system of law the parties intended the contract to be governed** – if the parties agree that the contract is to be governed by the Law of England (and one party is in Australia and another in Pakistan), this will be accepted by the court. Contracts are the product of the will of the party.
    - Choice of law clauses are the most obvious way of evidencing this intention.
    - This is a subjective approach
- If you cannot find the intention of the parties, the court will not view this issue subjectively, but instead objectively. The court will look at the contract and determine the system of law with which the contract has the **closest and most real connection**.
    - Rely upon evidence about contract objectively
- What happens if the parties have not expressly made their intention clear but it might be **inferred** from the circumstances? There may be something about the contract which suggests to the court that the parties had agreed to a choice of law but it was not reflected in the contract?
    - Infer subjective intention from other facts other than choice of law clause

Municipal Law

The system of law which governs the contract must be municipal law. It must be the law of a state, in the private international law sense (i.e. including Qld). It cannot be Sharia or Jewish law or law relating to a particular religious group. If a particular state embodies such religious law in its national law, that is no problem. If Sharia law is the governing law of a particular state, it is given effect not as Sharia law but as the law of the state.

Parties drafting a choice of law clause must refer to the law of the state not any other body of law.

The three approaches articulated by Dicey and Morris have been endorsed and adopted by the HC in ***Akai v The People's Insurance Company (1996) 188 CLR 418***. The following sequential approach must be taken:

1. Subjective proper law approach
    a. Express choice – choice of law clause
    b. Implied choice – look for evidence to suggest that the parties had agreed the proper law of the contract

2. Objective proper law approach

Subjective - Express Choice of Proper Law

This is a product of party autonomy and the free will of parties to contract upon terms that are agreed upon.

***Vita Food Products Incorporated v UNUS Shipping Co* [1939] AC 277**

Choice of law recognised provided ... "the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on grounds of public policy." (at 290)

This reflects that idea that there is nothing *mala fides* (i.e. bad faith) about the choice of law, then that choice will be given effect by the courts.

***Vita Food Products Incorporated v UNUS Shipping Co* [1939] AC 277** concerned a bill of lading contract (carriage of goods from one destination to another). The goods are to be moved from Nova Scotia in Canada to New York. The ship-owner is a nova Scotian ship-owner and the consignee is in New York. The parties included an express choice of law clause selecting English law. English law exempts the ship-owner from any liability for damage to the goods.

When the goods were damaged, the consignee sued the ship-owner. The ship-owner argued that English law applies and the consignee argued that this was contrary to public policy because there was no connection with England. The court held that the parties were free to select any law to apply to the contract UNLESS the law of the court overrides that choice in some way.

This approach applies to contracts, in the strict sense, but also to quasi-contracts (contract like arrangements):

- **Claims for *quantum meruit*** – claim for an amount of money that someone has benefited from without a contract being entered into and in return, that person ought to reward you. The relationship between the parties is

contract-like and the law imposes an obligation and you look at the proper law of the assumed contract.

- **Direct actions against insurers under compulsory third-party insurance schemes** A may have been injured in an accident and may want to claim against the person who injured you (B). B has an insurance contract that governs or covers their liability. Instead of suing B, some legislation allows you to sue the insurance company despite the fact that you have no contract with the insurance company. However, since the law allows A to take direct action against the insurer, the relationship A has with B's insurer is contract like
- **Actions for Indemnity –** Suppose A needs to be indemnified for your labiality against another party. A can take action against the other party as if there was a contract.
- **Assignment of Benefit of Insurance Contract –** Suppose there is a contract and B has fulfilled its part of the contract. A benefit is therefore owed to B but before that benefit is rendered, B assigns that benefit to C. Suppose, B is entitled to be paid $100 at the end of next month, B can sell the benefit to somebody else. B essentially sells C the right to obtain the $100 if C pays B $90 now. C is not a party to the original contract but due to the assignment, C then has a relationship with the original contracting party. The proper law of the original contract will be determined by C and the original contracting party.

Raiffeisen Zentralbank Osterrecih AGC v Five Star General Trading LLC [2001] 3 All ER 257

The ship-owners are a Dubai company, the insurers are a French company and contract is governed by English law. The ship-owners need money and use the benefit under the contract (i.e. insurance payment if ship sinks) and sign it to a bank to obtain cash. The bank then becomes a beneficiary to the assigned contract. What law governs the contract between the ship-owners and the bank?

Under the contract of assignment, there is no proper law of the contract. Does it relate to the assignment obligation or the original law of the contract?

The proper law of the contract approach would say that the assignment is contract-like and merely replaces the beneficiary of the contract by another party (bank) and English law continues to govern that obligation. When the Dubai ship sinks, and the insurance company has to pay out, they must pay out to the bank. The proper law of the obligation to pay arises under English law.

Even though the bank was not a party to the contract, nevertheless the rights under the contract are governed by English law.

Scope of Express Choice of Proper Law

It becomes important to make it clear in the contract that the parties have chosen the law to govern the contract AND make it clear what the scope of the clause is. How broad do you intend the law to govern the disputes?

- What if the dispute is not about contractual obligations but about the existence of a contract tin the first place? How can a clause in the contract be used to determine the issue of whether there is a contract?

"This contract shall be interpreted in accordance with Ruritanian law"

This is the narrowest approach. The only aspect of Ruritarian law that applies if this clause is invoked is the law relating to interpretation. How does Ruritarian law require us to interpret contracts?

- Literal meaning?
- Golden rule?
- Extrinsic evidence permissible or not?

This approach says nothing of the content of the law itself. Ruritarian principles of interpretation must be applied when looking at the contents of the Contract.

"This contract is governed by Ruritanian law"

What does governed mean? Does it mean it governs every aspect? What if one party alleges that it entered into the contract but Ruritarian law states that you cannot enter into the contract until you are 25. Since the party had no capacity to enter into the contract, the party had no capacity to agree to the choice of law perspective.

Or does governed mean that it only applies once it has been established that a contract actually exists.

"The proper law of this contract is Ruritanian law"

The use of 'proper law' suggests that the parties intended to make Ruritarian law the governing law in a conflicts of law sense. In a conflicts of law sense, this clause will also govern formation of the contract.

"The law of Ruritania shall govern all disputes under, arising out of or in relation to this contract"

This is the widest and most all-encompassing approach. There is an attempt to govern the contractual relations agreed but also other things such as whether the contract was formed and whether the parties have actually fulfilled contractual obligations.

Limits to an Express Choice of Proper Law

1. **Bad Faith** (debatable) – the choice of law clause must be one made in good faith. This is a debated limitation. It is hard to know what is meant by good and bad faith. If one party knew of a benefit under the contract and did not inform the other party, that is contractual free will.

   ***Vita Food Products Incorporated v UNUS Shipping Co* [1939] AC 277**
   Golden Acres Ltd v Qld Estates Pty Ltd [1969] Qd R 378

2. **Unconnected Law (debatable)** – if the law has no connection with the contract.

   Qld Esytates Pty Ltd v Collas [1971] Qd 75 – Parties were trying to evade statutory obligations in a particular jurisdiction. In this case, Queensland law

stated that if you act as an agent for another party, then the agency law of Queensland must apply. the parties agreed that their agency obligations would be governed by another case. The court held this choice of law was not acceptable. However, the reality is that the reasoning behind the court's decision was due to overriding legislation not unconnected law.

3. **Overriding legislation** – Where a jurisdiction legislates that for certain types of contract, free will is taken away from the parties and the law of the forum applies absolutely.

   Section 11 Carriage of Goods by Sea Act 1991 (Cth) – complete. This section states that any contract for the carriage of goods out of Australia will be covered by Australian law, no matter the contractual terms. Australian courts will disregard choice of law clauses and Australian law will apply.

   Suppose there is a contract dispute between Party A based in London and Party B based in China. The contract is for the collection of iron ore in Australia to be shipped to Japan. The contract provides that English law applies. Suppose Party A and B have a dispute. Immediately, this gives rise to a conflicts law issue. In an Australian court, Australian law will apply due to the legislation but in any other forum, the courts will apply a different body of law. You must also consider whether the content of the law is different and whether other forums have overriding laws.

   Trade Practises Act 1974 (Cth) – partial

4. **Public Policy** – This is always a mechanism whereby the forum court will not give effect to a foreign body of law if to do so would be contrary to public policy.

   E.g. Australian courts would not give effect to foreign law which allows rendering of service without pay (i.e. slavery).

Subjective – Implied Choice of Proper Law

The implied proper law is that which the parties intended the proper law to be but failed to make this explicit. The choice of law may be implied from contractual terms and surrounding circumstances such as:

- Choice of forum clause – parties often include choice of forum clauses not realising that these are distinct from choice of law clauses
- Arbitration clause
- Technical language that reflects a particular legal system

There is often a strong presumption created by choice of forum or arbitration clauses or language reflecting a particular legal system unless there is something to suggest the contrary.

From these clauses, you gather enough evidence to conclude what the parties intended. There is no limit to the amount of evidence that can be adduced to suggest the parties impliedly had an agreement (the above are the most common).

> What if you use a standard form contract from a particular jurisdiction without a choice of forum or law clause? Does the fact that you are using a standard form contract from a particular entity in a particular jurisdiction suggest you intended the law of that jurisdiction to apply? – Probably yes.

Objective – Implied Choice of Proper Law

This test requires consideration of which legal system the contract has the closest and most real connection with at the time the contract was entered into. You must consider evidence to link the contract with a particular legal system. It is a legal system, not the country, with which the link must be forged (i.e. In Australia, the legal system is one of the states) (***Amid Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50***)

There is some dispute about the scope of what we are looking at. There is disagreement as to whether the connection is with **the contract** (merely the document signed)

> ***Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583**

OR

The **transaction underlying the contract** (the things intended to arise out of the document). For example, if the contract intended one party to build a hotel in the jurisdiction of a third party, do we look at the hotel and where it is built? Do we consider the things the contract intended to bring into existence?

> ***Compagnie D'Armement Maritime SA v Compagnie Tunisienne De Navigation SA* [1971] AC 572**

This dispute has not been resolved however largely depends on the context. ***James Miller*** suggests that the debate is not resolved but in most cases where it has arisen, the court has been looking at the contract.

When considering the factors that connect the contract to jurisdiction, the following are some to consider:

- Place of contracting
- Place of performance – weight placed on this factor reflects position in debate
- Place of residence or business of parties
- Nature of subject matter (e.g. immovable property)
- Currency of payment
- Flag of vessel carrying goods
- Validation (e.g. seal – under one system but not another).

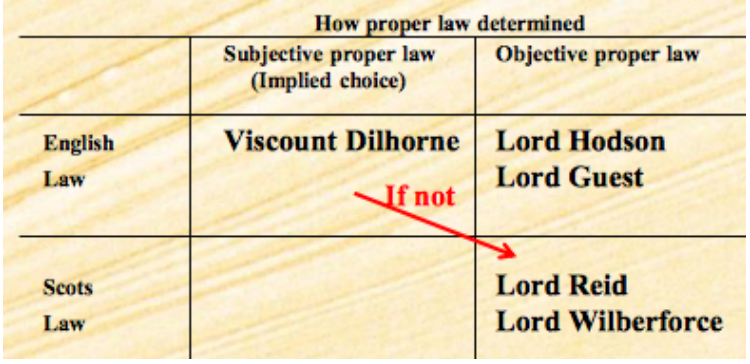
The ***Rome Convention*** does not apply in Australia but contains a rebuttable presumption in Art 4(2) that *"the contract is most closely connected with the country where the party which is to effect performance which is characteristic of the contract has his habitual residence or central administration"*

- Look to jurisdiction where party who must fulfil contractual performance resides
- Payment of money does not characterise the contract – it is what the other party is doing for money that characterises the contract
    - Sale of goods
    - Carriage of goods
- Habitual residence = connecting factor which connects contract with a legal system
    - This is unfamiliar since Australia uses domicile and most civil law countries use nationality
    - This is a compromise between domicile and nationality

Problems of the Objective Proper Law Approach

The way in which you approach a proper law approach is to look at the subjective proper law first and then an objective proper law. Absent a choice of law clause, you must look at factors connected with the contract that suggest the parties had intended and had agreed a proper law of the contract. If you cannot find that, you must look at the objective law of the contract.

1. Possibility of distinguishing between an implied choice and a place with the closest and most real connection
   Under both tests, you are looking at the same evidence but for different purposes. At the second stage, you are looking at things in the contract which suggest that parties had agreed a proper law but at the second stage, you are looking at the same factors to determine whether they connect with a particular legal system. There is a fine line between the two tests.
   ***James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583**
   In this case, there was a Scottish Builder (Miller) who enters into a contract within English company (Whitworth Street Estates) to renovate a building in Scotland (English Company to renovate). The English company was part of the Royal Institute of British Architects (RIBA) and proposes to use standard RIBA contract. Miller agrees and signs the contract.
   The contract has no choice of law or forum clause. There are differences between English and Scottish law. Scottish law provides that you cannot appeal from the final decision of an arbitrator whereas English law states that appeals on matters of law can be made to the English law.
   The question becomes which law governs the contract, given the absence of choice of law clause in the contract. According to ***Akai***, the approach is to determine whether there is any agreement in mind between the parties even though it wasn't contained in the contract.



Lord Hodson and Lord Guest looked at the evidence and concluded that the contract was a standard form English contract. Their honours noted that the reason the contract did not

contain a choice of law or choice of forum clause was because the standard form contract was generally used by English parties who resolve disputes in England according to English law. The parties must have assumed that by using the English standard form contract, that English law applied. The Scottish party must have, by agreeing to the use of the contract, impliedly agreed that English law applied. Their honours therefore concluded that English law applied to the contract having reviewed the objective evidence.

Lord Reid and Lord Wilberforce concluded that the contract concerned a Scottish building in Scotland being renovated for a Scottish owner. Therefore, Scottish law must apply. Objectively, you must assume that a building in Scotland being renovated in Scotland must be renovated in accordance with Scottish law.

Viscount Dilhorne concluded that because according to ***Akai*** (persuasive precedence in England), you must first consider the parties implied choice, English law applies subjectively. He concluded that the parties must have agreed and had a meeting of minds. The Scottish builder must have agreed by signing the standard form contract that English law applies. However, he held that if he was wrong on that point, the contract has more connection with Scotland than England objectively.

Outcome: English law applies and therefore the arbitral decision can go on appeal. The 3 judges make it clear on different bases that English law should apply. There was no majority in terms of a ratio.

This case captures the scope of the proper law of the contract and why the Rome Convention is a better way of locking onto one jurisdiction and making it clear to the parties that that jurisdiction will apply. It is very difficult to resolve when the same factors can be used for the implied subjective approach and objective approach and the line between the two approaches is very fine.

2. Evenly balanced factors as to latter

   ***James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583**

Can parties decide that the proper law of a contract will change? E.g. the proper law of the contract is English law but on the happening of a certain event, the proper law changes. This is referred to as a floating law.

- **There is no provision for the proper law, but on the happening of a given event the law of State A is the proper law**
  - i.e. Contract says nothing but once goods arrive from Liberia, Liberian law applies.
- **The law of State X is the proper law, but on the happening of a given event the law of State Z is the proper law**
  - i.e. The law of England is the proper law but when the goods land in Liberia, then Liberian law applies.
- **Some time after the contract has been formed, the parties agree expressly that the law of State Y is now to be the proper law**
  - Suppose the parties agree a contract and say nothing about the proper law of the contract and after the fact decide the proper law (i.e. after A makes first deposit into B's bank account, English law is the proper law).

***The Armar* [1981] 1 All ER 498** – The Court held that floating and changing laws are permissible but you must have a proper law of the contract for the different stages. The first situation is in doubt because no provision for the proper law of the contract at the

start and therefore the courts are reluctant to give effect to the floating law because there is no change.
There is no reason why the court could not find an objective proper law of the contract but to the extent that it suggests that parties have not thought the clause through, there is a risk the courts will not give effect to the clause.
Otherwise, floating proper law of the contract is permissible.

Multiple Proper Laws

There can be a situation where there appears to be more than one proper law of the contract.

One of the principles the courts have consistently adopted is that disputes in relation to a contract should, wherever possible, be governed by 1 lex causae (e.g. incidental approach). We want 1 choice of law rule to apply to all disputes arising out of the contract. Sometime this is not always possible.

There may be instances where there are different choice of law rules to different aspects of the problem (e.g. marriage – formal validity and capacity). You can have a case where the choice of law of the contract is English law but where you are building a contract in Australia, it may be that the performance of that obligation is in accordance with Australian law (e.g. Australian health and safety rules). This is not possible in the contract itself.

There are 3 situations:

1. **True depecage** (i.e. to divide) – This usually arises where you have a contractual obligation and part of the obligation is imposed by some legislation

   ***Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, at 604 per Evatt J**

   ... the whole theory which lies at the root of private international law, however difficult that theory may be in application, is that the law of one country, and one country alone, can be the proper or governing law of the contract.

   This is reflected in the incidental question approach. We try and identify the proper law of the contract and then cover all contractual disputes using that proper law even if that is difficult in theory. This is a practical approach, even if not theoretically preferable.

   BUT

   In exceptional circumstances some aspect of the contract may be determined in accordance with the law of a State other than the proper law of the contract

   (e.g. laws dealing with the methods and incidence of performance including, local building standards)

   A well drafted contract will make this clear and will allow the governing law to change. We strive, where there is no express choice of law clause, to apply 1 law.
2. **Incorporation**

   Sometimes, you will have what looks like 2 proper law clauses. For example, the Contract states that the law will be governed by the law of England and then

numerous contractual clauses which refer to Australian law. The Australian law is nothing other than contractual terms – terms by incorporation. The law which governs whether you have complied with the terms, is English law.

Where term, governed by State A, is simply incorporated into the contract by its terms, with the contract governed by the law of State B. Incorporated terms require validity to be determined by the proper law of the contract (law of State B).

3. **More than one contract** – i.e. obligations on A to send shipment to X company and Y company (subsidiary of X company). These are two separate contracts despite being in the same document.

Disputes about Issues Related to Contract

The problem with contracts is that although case law (***James Miller***) suggests you need only look at the contract, most disputes are about things related to the contract (e.g. performance). Disputes are not about whether the contract exists or what obligations are, but about performance or whether capacity to enter the contract existed.
The proper law may not govern all aspects of the **formation** and **performance** of the contract.

- Formation – capacity to contract/need to comply with formalities (e.g. did signatory have capacity to bind JV or partnership)
- Performance – whether contract is enforceable/legal/obligations implied by law/failure to perform (e.g. is the law governing performance different?)

In a well drafted contract, the above will be clear. There are different approaches to deal with this issue however we have settled largely on the **putative proper law of the contract**.
Suppose the dispute is about whether A had the capacity to sign the contract on behalf of the JV. The other party is alleging there is no contract because A had no capacity to enter into the contract. The court concludes that it will apply the putative proper law of the contract to determine the dispute. The putative law is the apparent/supposed law which means that you apply the choice of law clause in the contract. Theoretically this doesn't make sense because you are trying to determine the existence of a contract assuming the contract is in existence but this is the most practical approach. This approach allows all matters arising before or after the contract comes into existence to be governed by the contractual choice of law clause.
The proper law is chosen as the putative proper law of the contract to resolve:

- Whether contract gives rise to legally enforceable rights and duties (eg pay money, render specific performance)
- Whether contract rendered unenforceable for illegality, or avoided on grounds of innocent misrepresentation, failure to disclose etc

Where the parties have NOT included a choice of law clause in the contract, the inferred subjective or objective approach is used to determine the proper law. The proper law, as determined is then applied to all disputes.
NOTE: Performance of the contract may be governed by some other law, usually because there is some overriding legislation.

Illegality in the Place of Performance

What if the obligation to be performed is not illegal in either the law of the forum or under the proper law, but is illegal in the place of performance? This issue is unresolved. Under the common law, we will not enforce a contract that is illegal in the place of performance. It is unclear whether that is an application of the law of the forum (the law of the forum says we will not make you do something that is illegal in the place of performance) or a choice of law process (the choice of law says that we look to the law of the place of performance and it is that law that governs the performance).

***Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287** makes it unclear whether we are applying English contractual law, the forum's contractual law or giving effect to the law of the place the obligation is to be performed. However, the court held that under either approach, we will not enforce a contract where the agreed obligation is illegal in the place of performance.

Legislative Incursion on Proper Law

Legislative incursion on areas such as:

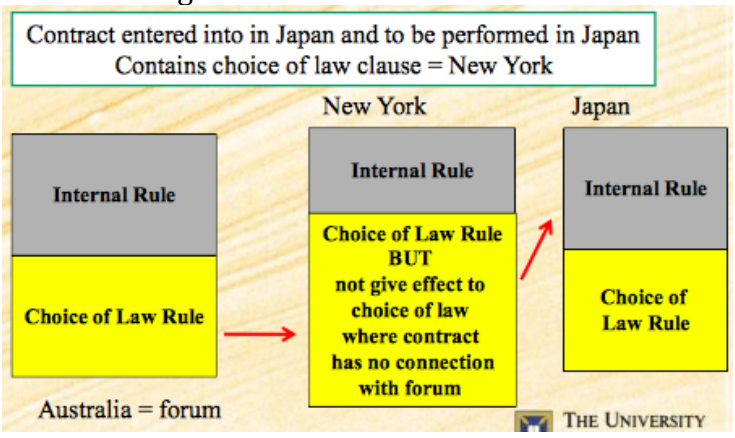
- International carriage of goods by sea
- International sale of goods
- Insurance
- Hire purchase
- Consumer sales
    - ***Carriage of Goods by Sea Act 1991* (Cth)**
    - ***Insurance Contracts Act 1984* Cth)**

These pieces of legislation OVERIDE the proper law of the contract (however determined).

- Overriding (Mandatory) statute must, on its proper construction, apply to cases where the proper law of the contract is a foreign law
- Some statutes also provide that a subjectively chosen proper law might be avoided if it is a result of unfair, oppressive conduct (see ***Contracts Review Act* 1980 (NSW)**)
- Argument for also including inequality of bargaining power.

Renvoi and Contracts

The judgement in ***Neilson*** articulated the application of double renvoi suggesting that it could apply to contracts. Therefore, when you look to English law, you must also consider English choice of law rules.



Suppose you entered into a contract in Japan which contains a choice of law clause nominating New York.

The choice of law rule in Australia states that we must give effect to the express subjective proper law of the contract (New York).

However, ***Neilson*** suggests that you must look to the substantive and choice of law rules in New York. Assume that NY law

includes a choice of law rule however will not give effect to a choice of law where the contract has no connection with the forum. New York concludes that it would apply the law of Japan.
The problem is that if the parties knew this, would they have chosen New York law? No. ***Neilson*** makes no sense in the context of contractual choice of law rules.
O'Driscoll v J Ray McDermott SA* [2006] WASCA 213 –** the court considered the approach adopted in ***Neilson but did not have to apply the double renvoi approach because there was no conflict of conflicts of laws.
If the parties elect English Law in the choice of law clause, they assume that only substantive and not choice of law rules that will apply.
However, if we are looking at the objective proper law of the contract and with which legal system the contract has the closest connection (parties intentions not being taken into account), and that legal system would resolve the matter differently, then there is an argument that renvoi may have some validity.

Reform

In 1992, the ALRC said that:

> *"…. the proper law of the contract as developed by the common law is ill- defined and uncertain in scope and inadequate to deal with modern developments in international contracts"*

James Miller illustrates the difficulty of doing anything other than giving effect to express choice of law clause or determining proper law objectively. As international connections increase, there are different factors leading to different jurisdictions – becomes more difficult to find 1 jurisdiction with which the contract has the closest jurisdiction. The proper law of the contract is increasingly becoming an arbitrary jurisdiction.
There has been an international working group which has agreed something similar to the Rome Convention (adopted 19 March 2015). This is not mandatory and Australia has not adopted this.
Hague Principles on Choice of Law include:

- Enhance part autonomy–choice of law
- Allow multiple choice of law to different parts of contract
- The choice may be made or modified at any time
- No connection is required between the law chosen and the parties or their transaction
- An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law
- Whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to
- A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.
- A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise
- The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to –
    - Interpretation
    - rights and obligations arising from the contract;

- performance and the consequences of non- performance, including the assessment of damages; *d)* the various ways of extinguishing obligations, and prescription and limitation periods;
- validity and the consequences of invalidity of the contract;
- burden of proof and legal presumptions;
- pre-contractual obligations

Law of Torts

The choice of law rule for torts in Australia is ***lex loci delicti*** (law of the place where the tort occurred):

- ***John Pfeiffer Rogerson (2000) 203 CLR 503***
- ***Renault v Zhang (2002) 210 CLR 491***.

History – the Double Actionability Rule

Prior to these decisions, there was a different choice of law rule for torts called the double actionability rule. In ***Phillips v Eyre (1870) LR 6 QB 1***, Willes J:

In order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly the act must not have been justifiable by the law of the place where it was done.

This is referred to as the double actionability rule because in a sense, it requires you to look at the law of two jurisdictions. The P will only succeed if both those jurisdictions would entertain an action in tort:

- It must be a tort under English law
- It must be a tort in the place where it occurred

This approach requires you to consider the substantive law of two jurisdictions.

It was not entirely clear what was meant by the second condition: that *the act must not have been justificable by the law of the place where it was done*. This suggests that the act must have been a wrong in the place where it was done but it wasn't clear whether that law applies or was merely a precondition before the P could bring an action.

The High Court has held that the double actionability rule is not the law in Australia. In ***John Pfeiffer Rogerson (2000) 203 CLR 503***, the court held:

the common law should now be developed so that the lex loci delicti is the governing law with respect to torts committed in Australia but which have an interstate element.'

There is some question about the scope of the application of the lex loci delicti. In ***John Pfeiffer v Rogerson (2000) 203 CLR 503***, one of the things the court said was about the characterisation of matters that are substantive and procedural. The court held that procedural matters should be narrowly defined and any substantive matters should be governed by the choice of law rule. This means that when we apply the lex loci delicti, we embody a whole range of foreign laws including the foreign choice of law. From ***Neilson***, it is apparent that we apply the double renvoi theory in torts.

The majority in ***Renault v Zhang*** said the following:

*The question then is whether, consistently with **Pfeiffer**, and by way of extension to it, it is the lex loci delicti which should be applied by courts in Australia as the law governing questions of substance to be determined in a proceeding arising from a foreign tort. If so, there is a subsidiary question as to whether, as the respondent would have it, there should be appended to that choice some "flexible exception" doctrine resembling that found in **Boys v Chaplin**.*

A Flexible Exception?

Boys v Chaplin is about the same situation as in Neilson. There were 2 British servicemen injured in a foreign jurisdiction and one brings an action against the other. There is an English Court, an English P and English D. The place of tort happens to have occurred in a foreign jurisdiction. The court held that the lex loci delicti or double actionability rule should apply however everything about this case is related to English

law. In this case, the court proposed flexibility to apply a law other than the law of the place where the tort occurred.

The court in ***Renault v Zhang*** considered whether such a flexible exception should apply and answered no.

- US – differs between States, but many adopt proper law approach
    - ***Badcock v Jackson 191 NE 2d 279 (1963)***
- UK –*International Law (Miscellaneous Provisions) Act* 1995 – and adopts a proper law approach
- Canada – ***Tolofson v Jensen [1994] 3 SCR 1022*** – *lex loci delicti* with a proper law exception

In ***John Pfeiffer v Rogerson (2000) 203 CLR 503***, the court held:

Adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing a flexible rule in terms such as "real and substantial" or "most significant" connection with the jurisdiction will not give sufficient guidance to courts, to parties or to those, like insurers, who must order their affairs on the basis of predictions about the future application of the rule.

In ***Renault v Zhang***, the court held:

the determination of rights and liabilities in respect of intra-Australian torts is the lex loci delicti should be extended to foreign torts ... and that this should be without the addition of any "flexible exception"

Australia has taken a strict approach to the lex loci delicti rule with no flexible exception. However, there are some problems with this approach. When it came time to apply the lex loci deliciti, as broad as it is, and the prospect became that an Australian D and Australian P was liable to pay the P a very small sum of money due to the currency in the place where the tort occurred, the court reserved the right to reconsider this approach.

In ***Renault v Zhang***, the court said:

*In **Pfeiffer**, reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. The conclusion was reached that the application of limitation periods should continue to be governed by the lex loci delicti and, secondly, that: ... all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti.*

We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort.

Torts and Renvoi – Flexibility in Disguise?

Neilson v Overseas Projects Corporation of Victoria (2005) 221 ALR 213

The case concerned an Australian P and D but the tort occurred in China. Nonetheless Australian law was applied to determine the dispute. The Chinese choice of law rule applies the lex loci delicti and a flexible exception. The court also had to decide the Chinese approach to renvoi (single transmission/ignore).

The effect of this decision is the same effect that would have resulted if Australia adopted a flexible exception approach. There has been debate as to whether this case is flexibility in disguise.

Some academics have supported ***Neilson*** arguing that theoretically, the case provides the right result:

- **Keyes** – providing flexibility
- **Briggs** – delivers uniformity in outcome between forum and foreign court

Others have rejected the decision in ***Neilson***:

- **Mortensen** – undermines territoriality, predictability and stability
    - Territoriality meaning that Chinese law applies = substantive law
    - In ***Neilson***, everything hinged on the approach we thought Chinese courts would take and the evidence on this issue was scant **– unpredictable**

The other exception to the *lex loci deliciti* is the public policy defence. If the result of applying the strict rules (*lex loci delicti* and double renvoi) is unpalatable, the courts can refuse to apply it on the basis of public policy. However, courts are reluctant to take such an approach because it undermines the principles underpinning conflicts of laws. Public policy is a last resort.

Determining the Place of the Tort

To apply the *lex loci delicti*, we must determine where the law occurred. You must apply the law of the forum to determine where the tort occurred. Locating the tort will always be for the forum. The P can manipulate the place of the tort by articulating the tort in a specific way.

Locating the tort is also important to determine whether:

- a foreign law will apply for the purposes of finding jurisdiction and
- a foreign law will apply as one of the things to take into account in a *forum non conveniens* application

Some torts can be difficult to locate:

- Defamation – where publication received in communicable form
- Failure to do something – it is difficult to locate something that you did not do
    - E.g. failure to warn – ***Distillers v Thompson***

P's can use such uncertainty to frame the tort in their favour.

In ***Distillers Co (Biochemicals) Ltd v Thompson [1971] AC 458*** per Lord Pearson stated:

> *The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question: where in substance did the cause of action occur?*

- If tort alleged is negligent manufacture, then place of manufacture
- If tort alleged is negligent failure to warn, then place where product marketed or sold

Australian tort law identifies the place of the tort:

- Defamation – where publication received in communicable form (***Dow Jones v Gutnick***)
- Misrepresentation – where communication was received (***Voth v Manildra Flour Mills***)
- Maritime Accident – where the accident occurs outside any state's jurisdiction, the law of the flag (where ship is registered) but if there are two vessels involved, then two jurisdictions may be involved. If the ship is in the port, then the law of the port state applies.

Contractual Defences to Tort Actions

Can you contractually exclude the application of tort law? Can you have a contractual defence that provides an exemption for liability arising from tort? If you are relying on a contractual exemption, do you look at the lex loci deliciti or the proper law of the contract?

This becomes an issue of characterisation. If the dispute between the parties is about the tort itself, then the lex loci delicti applies. However, if there is no dispute about the tort and instead, the dispute is about whether the contractual exemption to the tort applies, then the characterisation of the dispute is about the contract between the parties. In that case, the proper law of the contract applies.

This defence only arises where the P and D have a contractual relationship. It usually arises in an employment relationship (e.g. ***Sayers v International Drilling Co NV [1971] 3 All ER 163***). In ***Sayers***, the court held that there was no dispute about whether the tort occurred and instead was about whether the contractual defence applied. The lex loci delicti does not govern all matters related to a tort. Liability arising out of a tort may be governed by contract for example.

Classification of Specific Issues

It is unclear whether some issues as characterised as tort matters or something else. These problems relate to tort but flow onto all the matters that are tort-like: wrongful death and survival of actions.

Wrongful Death

Wrongful death is a claim not by the person who died but by the persons reliant on the person who died. The tort is not of killing the person but of doing a wrong to the persons reliant (e.g. wife suing person who negligently killed breadwinner of family).

To the extent, wrongful deaths are usually underpinned by negligence, that is governed by the *lex loci delicti*.

Can the family suing the D sue separately and if they do so, is it governed by the *lex loci delicti* or some other jurisdiction? The ALRC has identified two approaches:

- Lex loci delicti governs the issue OR
- Lex fori governs the issue

This issue has not been definitively decided. If the matter is governed by the *lex loci delicti* and the deceased is injured in Zimbabwe, the wife and daughter may sue the tortfeasor in Zimbabwe. The deceased person cannot sue – the wife and daughter cannot sue on the deceased's behalf. Should the right to wrongful death be governed by the lex fori or the tort that governs the tortfeasor's liability to the deceased (Zimbabwe). This is problematic because Australian courts will be reluctant to rule that the lex loci delicti does not allow for wrongful death actions and therefore no relief is granted.

Survival of Actions

In common law, there is no action for persons deceased. however, there are survival of actions. A person's ability to sue and be sued after death continues to exist however usually this is governed by a statutory mechanism. It is uncertain in Australia whether

the survival of actions is governed by the law of the place where the tort occurred or if it is a separate matter governed by the lex fori. This is also an uncertain area of law.

The resolution of these issues depends on the law of the place where the tort occurred. The more similar that area of law is to Australian law, the more likely the court is to say that these are lex loci delicti issues. These issues would then be classified as matters of substance. However, where the foreign jurisdiction doesn't allow survival of actions or actions for wrongful death or small damages claimable, the court will be reluctant to follow the lex loci delicti rule.