Some Concepts and Persistent Issues

What is Private International Law?

- Private international law is the body of principles, rules and, at times, policies and approaches that indicate how a foreign element in a legal problem or dispute should be dealt with.
- In Australia, applicable to both international and interstate cases, maybe more commonly used in interstate than in international cases.
  - The states and territories of Australia as separate countries, at least with respect to matters, such as tort, contract and property, within their legislative competence.

Difference between Public International Law and Private International Law

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<th>PUBLIC INTERNATIONAL LAW</th>
<th>PRIVATE INTERNATIONAL LAW</th>
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<td>Public international law comprises customary international law, treaties, conventions, and legislation passed by international agencies such as the United Nations.</td>
<td>Private international law has been recognised as an aspect of municipal law.</td>
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<td>Its effectiveness lies only in countries voluntarily complying with its rules and, at least in a “dualist” legal system like Australia’s, it cannot be enforced directly unless implemented through legislation passed by a competent parliament.</td>
<td>Its legal sources are new constitutions, statutes and, in common law countries, judicial decisions.</td>
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<td>Public international law is universal, in the sense that the rules of public international law are the same regardless of where in the world they are considered.</td>
<td>The ordinary courts can therefore enforce it.</td>
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Three Persistent Issues

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<th>JURISDICTION</th>
<th>APPLICABLE LAW</th>
<th>THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS</th>
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<td>Which court has jurisdiction to deal with the matter?</td>
<td>Which law is applicable to the matter?</td>
<td>How can the judgment be enforced?</td>
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Terminology & Case Studies

- Forum non conveniens – Common law legal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties.
  - Test is whether the court is a clearly inappropriate forum: *Oceanic Sun Line v Fay* [1988].
- Lex fori – Laws of a forum: laws of the jurisdiction in which a legal action is brought (procedural).
- Lex causae – Laws chosen by the forum court to arrive at its judgment (substantive).
- Lex loci delicti – Law of the place the action was committed.
- Lex situs – Law of the place of the (corporation or property).
- Lex loci contractus – Law of the place of contracting.
1. Introduction

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1. Plaintiff (Fay) booked a cruise in Greece from the Defendant (Oceanic Sun Line).
2. Upon paying the fare, Plaintiff was given an 'exchange order' which stated that it would be exchanged for a ticket upon boarding the cruise ship.
3. When the Plaintiff arrived at Athens for the cruise, he was handed a ticket containing a condition that Greek courts would have exclusive jurisdiction in any action against the owner.
4. Fay sustained an injury during the voyage and claimed negligence against Oceanic in the NSW Supreme Court (NSW is where he had purchased the ticket).
5. Oceanic Sun Line sought a stay of the proceedings, largely on the basis of an exclusive jurisdiction clause.

Oceanic Sun Line Special Shipping Co v. Fay [1988] HCA 32

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**Exclusive Jurisdiction Clause:**

- In this case, the exclusive jurisdiction clause read:
  - “Notwithstanding anything to the contrary contained herein, any action against the Carrier must be brought only before the courts of Athens Greece to the jurisdiction of which the Passenger submits himself formally excluding the jurisdiction of all and other court or courts of any other country or countries which court or courts otherwise would have been competent to deal with such action.”

- The general rule is that where the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its performance, the courts of this country regard that agreement as a submission of such disputes to arbitration and will, in the absence of countervailing reasons, stay proceedings brought here to decide those disputes. (Brennan J.)

- But when a clause purporting to confer exclusive jurisdiction on the courts of a foreign country to determine claims arising under or out of the performance of a contract of carriage is found in a ticket issued to a passenger who, in this country, has paid his fare for carriage on a ship, aircraft, or vehicle operated by the defendant, a preliminary question must be decided: is the clause a term of the contract of carriage? – i.e., threshold question – whether the jurisdiction clause was even a part of the contract?
  - Here, as the contract of carriage was made when the exchange order was issued and as the exclusive jurisdiction clause contained in cl. 13 of the ticket was not then known to Dr. Fay and as insufficient was done to bring such a clause to his attention, that clause was not a part of the contract.
  - As it was not a part of the contract, the Plaintiff was not bound by it.
  - On the other hand, Brennan J also considered the position if the exclusive clause had been a part of the contract at [19].
  - He pointed out if the plaintiff was bound by the clause (as it was a part of the contract), the plaintiff’s case should be determined by Athenian courts unless “a strong bias in favour of maintaining the special bargain” could be proved.
  - N.B. principles regarding stay on basis of exclusive jurisdiction clause are distinguishable from those relating to stay on basis of forum non conveniens.

**Forum non conveniens:**

- The test for forum non conveniens is whether the court is a clearly inappropriate forum.
  - The defendant must prove that the continuance of the action would be an injustice, because it would be oppressive, vexatious or otherwise an abuse of process. – Here, the Oceanic Sun Line failed to do so.
  - Local court will be a clearly inappropriate forum if continuation of the proceedings in that court would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging or in the sense of productive of serious and unjustified trouble and harassment. (per Deane J.)

N. B. Onus on the defendant to show that the forum chosen by the plaintiff is clearly inappropriate.

**Objective Proper Law**

- In this case, Wilson and Toohey JJ identified the proper law of the contract was Greek law (Brennan agreed with them):
  - Subject matter of contract was cruise on Greek registered ship (Stella Oceanis)
  - Departed and returned to Greek port
  - Cruise almost entirely in Greece
  - Boat owned by Greek Co

**Relevance of exclusive jurisdiction clause:**

- If the Greek EFJC had formed part of contract of carriage, this would have been a ‘significant indicium that Greek law is the proper law of that contract’

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Consent: Offer and Acceptance -- Law Applicable to Incorporation of Term

- In this case, HCA applied NSW law (i.e., lex fori) to determine whether a term on the ticket was a term of the contract of carriage: i.e., lex fori applied to determine issue of incorporation of the term.
- This point of view was applied in Venter v Ilona MY Ltd, that is, forum law determined incorporation of terms.
1. Introduction

- N.B. the point is that the contract should be existed, but the issue is whether parties agreed on the term specified in the contract.
- Academics do no like this:
  - Michael Pryles, ‘Judicial darkness on Oceanic Sun’ (1988) 62 ALJ 774 critique: “All Anglo-Australian text-writers are unanimous in the view that the proper law determines the validity of a contract, including the validity of particular terms of a contract, and also determines whether terms are to be implied into the contract. Was it not, therefore, a matter for Greek law to determine whether cl 13 formed part of the contract?”

Venter v Hiona MY Ltd [2012] NSWSC 1029

- In this case, the issues were:
  - Whether forum non conveniens i.e. was NSWSC clearly inappropriate forum per Oceanic?
  - Which law was appropriate (NSW, German or Thai?)
- Established fact: yacht was in Thai waters at time of accident.
- The contract was made in Europe and to be governed by German Law.
- No part of the contract was purported or actually performed in Australia.
- Respondent failed to establish compelling reasons for requiring proceedings to be heard before NSWSC rather than Germany.
- Therefore, stay of proceedings ought to be granted having regard to all relevant factors.

Sources of Law and Doctrine of Stare Decisis

Sources of Law
- Only one common law however there is differing statutory law at the State and Federal level.
- Major sources include:
  - Constitution;
  - International Conventions — no direct operation unless ratified;
  - Legislation;
  - Judicial decisions;
  - Scholarly writings — rarely.

Doctrine of Stare Decisis

Within Australia
- Binding precedent:
  - Judge must extract concept from statute before him or her by interpretation
  - Decisions of other courts may be relevant but not binding in relation to the meaning of similar legislation even if words are identical or similar
  - Court must interpret statute as well as apply the statute to the facts
- Persuasive authority:
  - Court generally follows its own previous decision on legislation unless clearly wrong
  - Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Cth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. The same principle applies to non-statutory law: Forth Constructions v Say-Dee [2007] HCA 22.
  - Intermediate appellate courts are not legally bound by their own earlier decisions, but should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision is “plainly wrong” and, such an error having been identified, there are “compelling reasons” to depart from the earlier decisions: Gost v Tabet [2009] NSWCA 76.
  - High Court is not so constrained if it feels that interpretation is wrong.

Overseas Judgments
- Whatever may have been the justification for such statements in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal for this country, those statements should no longer be
seen as binding upon Australian courts... the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning: *Cook v Cook* [1986] HCA 73.

However, if the precedents are based on a process of statutory construction which is not part of the Australian laws, in the absence of contrary authority, it can be followed: *Union Shipping New Zealand Ltd v Morgan* (2002) NSWCA 124.
Jurisdiction General

1. Jurisdiction is the authority that a court has to deal with a particular case, according to its own rules of competence.
2. Australian Courts will be jurisdictionally competent if they have both subject matter jurisdiction over the particular claims and defences, and personal jurisdiction over the parties to the dispute.
   - Subject matter jurisdiction
     * The superior courts of the states and territories have general common law and equitable jurisdiction.
     * The Federal and Family Courts' subject matter jurisdiction is limited to those matters granted by statute.
   - Personal jurisdiction
     * Principally concerns the amenability of the defendant to litigation.

Personal Jurisdiction

- There are only two grounds of personal jurisdiction at common law:
  1. The defendant is present in the forum; or
  2. The defendant submits to the jurisdiction of the forum court.

Territorial Jurisdiction based on Defendant’s Presence

**Individuals**

Element one: physically present.

- Generally rule: being physically present in the relevant state or territory at the time of service is sufficient; Gosper v Sawyer
  - Does not matter that the defendant’s presence is temporary; Laurie v Carroll
  - However, no jurisdiction if the defendant were only in the forum’s airspace at the time initiating process was issued; Joye v Sheehan
- Exceptions – defendant not being present at the time of service – however, still within the jurisdiction of the court
  - Defendant left the forum after initiating process was issued, either knowing that process had been issued, or leaving to evade service of process; Laurie v Carroll

Gosper v Sawyer (1985) 160 CLR 548

- The general rule is that a Supreme Court will have power to hear and determine an action when the defendant is physically present in the relevant state or territory at the time of service.
  - And that the Federal Court and the High Court (in its original jurisdiction) will have power to hear and determine an action when the defendant is physically present in Australia at the time of service.
  - Here, the Industrial Commission of New South Wales would have jurisdiction over the trustees in Melbourne based on their presence in New South Wales at the date of service of the originating process.
  - Accordingly, the registrar could not so order. The Industrial Arbitration (General) Regulations (NSW), reg 157, conferred power only to regulate proceedings that were within the jurisdiction of the commission. It did not confer power to enlarge jurisdiction by permitting service out of the jurisdiction. (per Gibbs CJ, Wilson and Dawson JJ).

Laurie v Carroll (1958) 98 CLR 310

- The case illustrates at common law, a plaintiff’s right to a court’s jurisdiction can depend on where the defendant was when the initiating process was issued or served.
  - The basic principle on which jurisdiction rests, according to Dixon CJ and Williams and Webb JJ, is that, at the issue of the writ, the defendant “may be regarded as falling under the command of the writ as an exercise of jurisdiction”.
  - The important point is that, it is the service of the writ which perfected the defendant’s duty to obey its command to appear before the court.
  - Therefore, jurisdiction is established when the defendant is served within the forum, even if the defendant subsequently leaves.
  - It follows that, jurisdiction is not generally established over a person who is in the forum at the time initiating process is issued but who leaves before it can be served.
  - However, a person who left the place after initiating process was issued and who either knew that process had been issued or who left to evade service of process will be regarded as within the jurisdiction of the court.
Joye v Sheahan (1996) 62 FCR 417

- Rule in Laurie v Carroll was confirmed and followed.
- Expand the rule in Laurie v Carroll -- jurisdiction is unlikely to be established if the defendant were only in the forum's airspace the time initiating process was issued.

Purpose of the presence does not matter.

- Generally, the purpose for which the defendant is inside the territorial borders of the forum is irrelevant to the question of the forum court's jurisdiction: Perrett v Robinson [1985].
- There is an established exception to this general principle if the plaintiff tricked, fraudulently enticed or physically coerced the defendant inside the borders of the forum territory in order to have the defendant served: Watkins v North American Land Timber Co Ltd [1904].

Perrett v Robinson [1985] 1 Qd R 83

- The case illustrates the general principle that the purpose for which the defendant is inside the territorial borders of the forum is irrelevant to the question of the forum court's jurisdiction.
- To Connolly J, the company could not have been defrauded since, under the contract of insurance, it had agreed to bear liability for any damages awarded in Queensland.
- McPheron J held that, in any event, even if FAI were the real defendant to the action it had a presence in the state as it conducted business there, and so it was within the jurisdiction of the SC.

HRH Maharanee of Baroda v Wildenstein [1972] 2 QB 283

- In this case, the Privy Council held the writ had been properly served on the defendant in this country ... [M] has validly invoked the jurisdiction of our courts in this, the one and only action she has brought. per Lord Denning MR.
- The decision was supported by Edmund Davies LJ who added that: “Both in taking ... out [the writ] and serving it (albeit when the defendant was only fleetingly on British soil) [M] was doing no more than our law permits ... Some might regard her action as bad form; none can legitimately condemn it as an abuse of legal process ...”

Forum Non Conveniens

- In the present case, in considering the forum non conveniens test, one of the important considerations for the court was the admission of the evidence and the unreasonable delay in French court.
- We are told that the courts of France appoint their own court experts and might hesitate about receiving the opinion of experts from England. It would be a matter for their discretion. In any case, the French courts might not themselves see the witnesses or hear them cross-examined, but might only read their reports. ... [T]here would be no difficulty in M Wildenstein’s experts ... giving evidence here orally with all the advantages that that carries with it. So there is no injustice in that regard in having it tried in England.
- Apart from the admission of evidence, there is the question of delay. We have been shown a speech which was made by the Premier President de la Cour de Cassation on October 2, 1970, in which he greatly regretted the delays in the civil procedure in France. He gave instances, such as a case started on December 22, 1953, which was finally decided on March 5, 1970; another started in 1950 decided in 1968; another of 1957 decided in 1969. It is said that this is due to the delaying tactics of lawyers. We are used to something of the kind here, but somehow we get over them in less time. So it does appear that the delay would be a good deal greater in France than in England. I have no doubt that this case could be brought for trial in England within a year.
A writ issued out of the HC or the FC may be served on any defendant anywhere in Australia. On the other hand, any process issued out of a state or territorial court must be served in accordance with the SEPA. Thus, it is no longer possible to serve process within Australia in pursuance of the civil procedure rules of the states and territories as an alternative option.

**Substituted Service**

Service in accordance with UCPR r 10.14 is taken to constitute personal service: UCPR r 10.14(4).

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<th>Statutory examples of carrying on business:</th>
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<td>* Offering debentures in the jurisdiction: s 601CD(2)(a), CA;</td>
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<td>* Being a guarantor body for debentures offered in this jurisdiction: s 601CD(2)(b), CA;</td>
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<td>* Administering, managing or otherwise dealing with property in Australia as an agent, legal personal representative or trustee, whether by employees, agents or both: s 21(2)(b), CA;</td>
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<td>* Non-carrying on business: s 21(3), CA;</td>
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<td>* Being or becoming a party to a proceeding or effect settlement of a proceeding;</td>
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<td>* Holding meetings of directors or shareholders re internal affairs;</td>
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**Corporations**

CA requires any foreign company intending to carry on business in Australia to be registered with the ASIC (s 601CD, CA), and to nominate a registered office (s 601CT, CA) and a local agent in Australia (s 601CG, CA).

Supreme Court;
District Court;
The Industrial Relations Commission;
The Land and Environment Court;
The Dust Diseases Tribunal.

**Methods of service (for originating process):**

- May be personally served on the defendant; (i)
- May be left, addressed to the defendant, at the defendant's business or residential address, with a person who is apparently of or above the age of 16 years and apparently employed or residing at that address, (ii)
- if served by the Local Court, it may be sent by post, addressed to the defendant, to the defendant's business or residential address in an envelope marked with a return address. (iii)

**Effective substituted service:**

- Court may order, instead of service, certain steps to be taken for the purpose of bringing the document to the notice of the defendant. [UCPR r 10.14(1)]
- If steps have been taken, the court may, by order, direct that the document be taken to have been served on that person on a date specified in the order. [UCPR r 10.14(3)]
2. Personal Jurisdiction

- Maintaining bank account
- Effecting a sale through an independent contractor
- Conducting an isolated transaction completed within 31 days, not being a number of similar transactions repeated from time to time.
- Investing any of its funds or holding any property.

Although the CA is federal legislation, the company must still nominate a state or territory for registration s 119A, CA.

However, even if the company is registered in a different state or territory to the forum, it will still be amenable to the initiating process of forum courts served in accordance with the provision of the SEPA -- see service below.

What if the foreign company present in the jurisdiction but not registered? -- Common law

- At common law, a company is considered to be present in a place and within the common law jurisdiction of its courts if it carries on business there.
- Common law criteria for carrying on a business in the forum: NCB v Wimborne.
  - The company is represented in the forum by an agent who has authority to make binding contracts with persons in the place;
  - The business is conducted at some fixed and definite place in the forum; or
  - The business has been conducted in the forum for a sufficiently substantial period.

Note, presence is not established by appointing solicitor to commence or defend particular legal proceedings in the jurisdiction: NCB v Wimborne.

National Commercial Bank v Wimborne (1979) 11 NSWLR 156

Presence:
- The issue, for our purpose, was whether NCB was present/carrying on business in NSW and therefore subject to common law jurisdiction of NSWSC for abuse of legal process in Switzerland.
- As a company's separate legal identity is a legally constructed fiction, it naturally does not have a tangible presence anywhere.
- At common law, a company is considered to be present in a place and within the common law jurisdiction of its courts if it carries on business there.
- Here, Holland J identified three criteria that tend to establish that a company is carrying on a business in the forum:
  - The company is represented in the forum by an agent who has authority to make binding contracts with persons in the place;
  - The business is conducted at some fixed and definite place in the forum; or
  - The business has been conducted in the forum for a sufficiently substantial period.

Submission:
- For submission, Holland J stated that in order to establish such a waiver, “the facts must show a voluntary act unequivocally evincing an intention to abandon or not assert a right”: -- a question of fact.
- If the defendant consistently maintains its objection to jurisdiction, it will not be taken as having submitted even it makes other applications which go beyond a protest to the jurisdiction.
- Further, here, letters by the solicitor re intention to proceed in court was not held to constitute submission to court’s jurisdiction.
  - This is because in determining whether conduct constitutes submission to a court’s jurisdiction, regard only to what happens in court proceedings.

Agency relationship?

Adams v Cape Industries plc (1990) Ch 433
- In the present case, the tort victims tried to enforce the judgment in the UK courts.
- The requirement, under conflict of laws rules, was either that Cape had consented to be subject to Texas jurisdiction (which was clearly not the case) or that it was present in the US.
- The question was whether, through the Texas subsidiary, NAAC, Cape Industries plc was ‘present’.
- For that purpose, the claimants had to show in the UK courts that the veil of incorporation could be lifted and the two companies be treated as one.
- In this case, the Court of Appeal held that for a company to have a presence in the foreign jurisdiction, both of the following must be established:
2. Personal Jurisdiction

- the company has its own fixed place of business (a branch office) in the jurisdiction from which it has carried on its own business for more than a minimal time.
- the company's business is transacted from that fixed place of business.
- On the facts, the Court of Appeal held that Cape had no fixed place of business in the US such that recognition should not be given to the US judgment awarded against it.
- whether it has authority to contract on behalf of the principal;
- factors of relevance of carrying on the business;
- did the UK company reimburse the representative for accommodation of staff etc.?

Therefore, to prove an agency relationship, need to find a close degree of control so that the subsidiary is not running its own business.

Service

- by personally serving the document on a principal officer of the corporation: UCPR r 10.22(a).
- by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation: UCPR r 10.22(b).

Jurisdiction Based on Defendant's Submission

- At common law, a court can also establish jurisdiction over a person by that person’s consent or voluntary submission to the court's jurisdiction – two particular means by which this submission might be established:
  - submission by agreement; and
  - submission by conduct.

Submission By Agreement

- Express agreement – e.g., parties agree to exclusive jurisdiction of the courts of NSW: UCPR r 10.6.
- Instructing lawyers to accept service: UCPR r 10.13.

**Howard v National Bank of New Zealand Ltd (2002) 121 FCR 366**

- Therefore, compare the following positions:
  - if the defendant left the jurisdiction before the originating process was issued, and does not subsequently submit to jurisdiction or enter an appearance, the court has no jurisdiction by reason of the fact that the defendant was formerly in the jurisdiction even if it can be proved that the defendant let earlier in order to avoid service: Laurie v Carroll.
  - However, the position will apparently be different if, although absent from the jurisdiction, the defendant, at the time the originating process was issued, had authorised a representative or agent to accept service, and this will be so even though authority to accept service may have been withdrawn subsequently; see this case, and Filipowski v Frey.

Submission by Conduct

Submission by Appearance

- Generally speaking, a defendant who actively challenges the jurisdiction of the court must act consistently with a protest against jurisdiction, otherwise, their acts may be regarded as being inconsistent with maintaining objections.
- In considering whether the conduct constitutes submission to court's jurisdiction, regard only to what happens in court proceedings. Accordingly, letters by solicitors re intention to proceed in court does not amount to inconsistent acts: Wimborne.
- Examples of inconsistent acts:
  - Where the defendant agreed to allow the substantive claim to be heard: National Commercial Bank v Wimborne;
  - Where the defendant’s lawyer made oral submission on the merits: National Commercial Bank v Wimborne;
Where the defendant counterclaimed on a ground related to the plaintiff’s claim: \( \text{National Commercial Bank v Wimborne; Vertzyas v Singapore Airlines} \).

Where the defendant asked or particulars or asked the plaintiff to submit to medical examination: \( \text{Vertzyas} \).

Where the defendant contested the merits of the case: \( \text{Garsec v Sultan of Brunei} \).

Where the defendant consented to interlocutory orders in the cause:

Where the defendant argued against the extension of the limitation period applicable to the claim:

Where the defendant produces documents in response to a subpoena; or

Where the defendant applied for an order for security for costs.

Generally, a party has submitted to the jurisdiction of the court in one proceeding does not mean that it has submitted that jurisdiction for all purposes. However, if a different cause of action raised by a cross-claim is nevertheless founded on or directly arose out of the same subject matter as that of the initial action, submission to the jurisdiction for the purpose of the initial action would also extend to the different course of action raised in the cross-claim: \( \text{Marlborough Harbour Board v Charter Travel Co} \).

\( \text{Vertzyas v Singapore Airlines (2000) 50 NSWLR 1} \)

• In the present case, the Court held in order for a party to be treated as having submitted to the jurisdiction of the court so as to waive an objection to such jurisdiction, it has to do acts in the court proceedings that are inconsistent with its maintaining such an objection, such as raising the merits of the other party’s case. However, not every act that seeks to raise the merits of the other party’s case will be regarded as inconsistent with maintaining an objection to jurisdiction: only those acts that manifest an unequivocal intention to contest those merits will be regarded as inconsistent with maintaining an objection to jurisdiction.

• Here, the following acts of the defendant manifested an unequivocal intention to contest the case on its merits, (which was inconsistent with maintaining an objection to jurisdiction):
  
  • asking for particulars; and
  
  • asking the plaintiff to submit to medical examination.

• The rationale was that asking for particulars and for medical examination clearly dealt with the substantive issues of the case and therefore was inconsistent with objection that the court had no jurisdiction.

\( \text{National Commercial Bank v Wimborne (1979) 11 NSWLR 156} \)

\( \text{Marlborough Harbour Board v Charter Travel Co (1989) 18 NSWLR 223} \)

• In present case, the issue for the court to decide was whether Marlborough also submitted to jurisdiction of NSW court re Ship Claim by submitting re Indemnity Claim.

• For this point, the court held while the mere circumstance that a foreign party has submitted to the jurisdiction of the court in one proceeding does not mean that it has submitted to that jurisdiction for all purposes, the fact that a cross-claim involves a different cause of action from that which a party has brought does not preclude it from being raised.

• However, if a different cause of action raised by a cross-claim was nevertheless founded on or directly arose out of the same subject matter as that of the initial action, submission to the jurisdiction for the purpose of the initial action would also extend to the different cause of action raised in the cross-claim.

• Here, the essential subject matter was the sinking of the ship. Both the Indemnity Claim and Ship Claim arose from the subject matter of the ship sinking.

• As a result, where a New Zealand company had submitted to the jurisdiction of a New South Wales court to hear an action for damage to property and personal injury, it could not object to an amended claim raising other aspects of damage to property where the amended claim was founded on and arose out of the same subject matter as the original claim.

\( \text{Garsec v His Majesty the Sultan of Brunei (2008) NSWCA 211} \)

• The case is mainly about “Forum non conveniens” doctrine.

• For our purpose here, the issue was whether the Sultan could withdraw appearance and went to another court.

• Here the facts indicated that the Sultan had took steps relating to the merits of the case despite legal advice re preserving jurisdiction.

• Accordingly, he could not withdraw appearance and went to another court.

• So, contesting the merits of the case is a significant factor here.