

Discretionary Non-Exercise of Jurisdiction

- **Step 1: Foreign Jurisdiction Clause (FJC)**
 - **Agreement on Exclusive Foreign Jurisdiction?**
 - **No Effect on Court Jurisdiction** — FJC does not oust the jurisdiction otherwise enjoyed by a Court — *Oceanic Sun Line*
 - **Exclusive VS Non-Exclusive?: Q of Construction; Circumstances Surrounding Entry into Contract** — whether FJC is exclusive or non-exclusive is a question of construction — *FAI Insurance v Ocean Marine Mutual*: words not determinative; agreement on UK law + nature of contracts of reinsurance suggest UK jurisdiction
 - **Non-Exclusive Jurisdiction Clause** = submission to the jurisdiction of the Court but parties are still able to commence proceedings in another Court
 - **Exclusive FJC** — *The Eleftheria*
 - **Strong Presumption in Favour of Granting Stay Discretion** — **Unless Unless Strong Reasons/Strong Causes** shown by plaintiff
 - **Court to Take into Account All Relevant Circumstances...**
 - **Location** — the location of evidence or witnesses
 - **Differences in Substantive Law** — if foreign law applies, then does it differ from *lex fori* (i.e. NSW law) in any material respect?
 - **Connections between Parties and Foreign Country**
 - **Procedural Advantage?** — whether the defendant genuinely desires the trial to be held in the foreign jurisdiction, or whether it is only seeking a procedural advantage in the stay
 - **Prejudice to Plaintiff**
 - Plaintiff subject to political, racial, or religious discrimination
 - Plaintiff barred from claiming due to statute of limitations
 - Unable to enforce judgement in foreign jurisdiction
 - **“Strong Bias” in Commercial Contexts** — *Global Partners v Babcock & Brown*
 - in commercial context, the purpose of EJC is to ensure that all disputes are determined in a coherent manner by a single jurisdiction
 - **Incorporation of EJC Determined by Lex Fori** — *Venter v Ilona MY*
 - **Material Change in Circumstances** — fundamental change in the legal system of foreign country — *Carvalho v Hull, Blyth (Angola)*: revolutionary Angola; previous Portuguese law displaced; the Angolan Court at the time was no longer the one that the parties had agreed upon
 - **Quality of Justice in Agreed Foreign Jurisdiction**
 - **NOT to compare quality of justice** — in application brought in breach of EXCLUSIVE FJC — *El Amira*
 - **Discrimination or Persecution in the Agreed Foreign Jurisdiction** — *Oppenheimer v Louis Rosenthal*; *Ellinger v Guinness*: Nazi Germany, unable to obtain any justice from German court, impossible to go to Germany because of grave danger
 - **Lack of Judicial Independence/Corruption in Agreed Foreign Jurisdiction**
 - **Comity** — Considerations of International Comity Militate Against Findings of Corruption or Lacking in Independence

- Requires Cogent Evidence that there is a Real Risk a party would not obtain justice in a foreign legal system by reason of lack of independence or corruption in that legal system — *AK Investment CJSC v Kyrgyz Mobil*
- **Step 2: Clearly Inappropriate Forum — FNC**
 - **FNC** — an Australian court will decline to exercise its authority to decide if it is a ‘clearly inappropriate forum’ — *Voth v Manildra Flour Mills*; adopting Deane J’s approach in *Oceanic Sun Line*
 - **Plaintiff’s Prima Facie Right** — a plaintiff who has regularly invoked the jurisdiction of the court has a prima facie right to insist upon the court exercising that jurisdiction to determine the dispute
 - **Oppressive or Vexatious: abuse of process** — under the court’s inherent power to prevent abuse of process in order to do justice to the parties, it will stay proceedings for being oppressive or vexatious — various factors for or against this finding listed below.
 - ‘**oppressive**’ — proceedings are seriously and unfairly burdensome, prejudicial, or damaging
 - ‘**vexatious**’ — proceedings are productive of serious and unjustified trouble and harassment
 - **Grant Stay with Care and Caution** — the power to stay or dismiss proceedings for FNC should be exercised with great care and extreme caution
 - **Relevant Factors**
 - **Substantial Connexion with Juris** — *Grigor*
 - **Domicile of Plaintiff/parties** — *Grigor*
 - **Location of Evidence, documents, witnesses** — *Grigor*
 - **Place of Events** — *Grigor*
 - **Foreign Law is Lex causae** — not decisive — *Renault v Zhang*
 - **Juridical Advantages to Plaintiff in NSW** — legitimate, substantial, significant juridical (e.g. evidentiary) advantage to plaintiff of litigating in NSW — *Grigor*: Dust Disease Tribunal Act; admissibility of historical evidence
 - **Juridical Disadvantage in Foreign Forum** — e.g. proceedings in a Thai court will be in Thai and require continuous interpretation — *Hargood v OHTL*
 - **Statute Barred in Alternative Forum** — *Fleming v Marshall*: the plaintiff did not render the alternative forum unavailable through carelessness, significant part of damage crystallised after limitation period
 - **Inconvenience to Travel or give evidence via video link?** — not sufficient — *Hargood v OHTL*
 - **Unreasonable Delay in Foreign Court** — linked to **Juridical (Dis)advantage**
 - *HRH Maharanee v Wildenstein*: great delay in French civil cases. Decided under old FNC rule, but should be decided in the same way today
 - **Decisive Element** — e.g. case would take 5 years in PNG — *Toop v Mobil Oil New Guinea*
 - **Denial of Justice but NOT Public Interest Considerations!**
 - **SPECIAL AND UNSUAUL CIRCUMSTANCES** — Where proceedings are stayed in favour of a more appropriate forum... the plaintiff would have no means of obtaining representation... essential if

these claims were to be justly decided... amount to a denial of justice
 — *Lubbe v Cape*: poor plaintiffs who won't be entitled to legal aid in South Africa

- **NO Considerations of Public Policy unrelated to private interest of parties** — e.g. can't say suing in Aus puts pressure on judicial resources

Anti-Suit Injunctions

- **Vexatious/Oppressive** — according to the principles of equity — *CSR v Signa*
- **Binds *in personam* only** — *Turner v Grovit*
 - effective only insofar the party is amenable to the jurisdiction of the forum courts
- **Grant only Exercised with Caution** — *Airbus v Patel*
- **Foreign Proceedings Unconscionable, Oppressive or Vexatious 'for the purposes of equity'**
 - **Equitable power — In Breach of Forum EJC** — *Akai v People's Insurance Co (UK)*
 - HCA: EJC is void under *Insurance Contracts Act (Com)*. Case has greatest connexion with NSW. Refused stay of proceedings.
 - English HC: granted ASI restraining Akai from continuing proceedings in Supreme Court of NSW – for it's clear that parties have freely bargained for English Law
 - **Inherent Power to Protect Integrity of Process of the Court — Having Tendency to Interfere with integrity of the processes of a court of the forum** — *Re Siromath (No 3)*: proceedings in Penn brought against NSWSC-appointed liquidator for fear of abuse of Court's own processes
 - **Brought in bad faith for the purpose of frustrating/obstructing proceedings in the forum** — *Turner v Grovitt* (ECA; HOL)
- **Remedies in foreign Proceedings Unavailable in the Forum**
 - **ASI NOT Granted if remedies available to P in foreign system but not in Aus law** — *CSR v Signa*: treble damages under Sherman Act
- **Role of Comity** — Respect for the Jurisdiction of the Foreign Court — *Airbus v Patel*
 - Comity requires that the **forum Court has a sufficient interest in or connection with, the matter in question** to justify the indirect interference with the foreign court which an ASI entails