

Topic 1: Introduction to International Commercial Law

International commercial litigation and conflict of laws

- International trade and commercial disputes arise from international trade and commerce.
 - These are disputes arising from or relating to international:
 - sales of goods*;
 - supply of services*;
 - carriage of goods* by sea, air, land or multimodal means;
 - international financing and banking*;
 - marine insurance and provision of international insurance services*;
 - tariffs and trade restrictions under the GATT and WTO Agreement;
 - regional economic cooperation;
 - foreign investment*;
 - operations of MNEs;
 - franchising;
 - licensing*;
 - distribution agreements*;
 - transfer of technology;
 - enforcement of international trade and commercial treaties; and
 - any other matters which fall into the category of international trade and commerce

*Most commercial disputes arise in these areas, along with international construction of work.

- International trade and commercial disputes can be divided into three categories:
 - **disputes between governments**
 - often covered by an international treaty or convention on international trade and commerce
e.g. WTO members may take each other to the panel proceedings of the WTO to resolve their disputes
 - **disputes between a government or international organisation and a private person**
 - largely governed by domestic law, except in the case of foreign investment disputes under the Washington Convention of 1965, and in the case of certain regional free trade agreements, where a private party may be able to directly sue a government which is participating in the free trade agreement
 - **disputes between two private persons (either natural or legal i.e. corporation)**
 - subject to domestic laws, which have incorporated various international treaties ratified by the countries concerned

Resolving disputes between governments

- These sorts of disputes can be further divided into:
 - **disputes taking place within an international trade organisation**
 - The dispute between the two governments, as members of the same trade organisation, should be resolved according to the mechanism adopted by the organisation concerned i.e. EU has its own court, WTO has special panel proceedings etc.
 - **disputes arising outside an international trade organisation**
 - the dispute should be resolved by the governments in pursuance of the relevant international trade or commercial treaty (if any) between them
 - in the absence of any agreement, international trade law requires negotiation
 - in special circumstances, where both parties have submitted to the compulsory jurisdiction of the court, disputing governments may refer their disputes to the ICJ

Statute of the International Court of Justice, Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Lex Mercatoria

- Flourishing of international economic relations in Western Europe at the beginning of the 11th century caused the creation of the law merchant, which may be described as a cosmopolitan mercantile law based upon customs and applied to cross-border disputes by the market tribunals of the various European trade centres.
 - The medieval trade community was trying to overcome the fragmented and obsolete rules of feudal and Roman law.
- The rise of nationalisms and the codification period of the 19th century saw the law merchant incorporated into the municipal laws of each country, and over time it lost its uniform character.
- In the early 1960s, scholars began to question the supremacy of national law in international economic relations. At the same time, they noted the renaissance of the law merchant phenomenon. Just as medieval merchants overcame feudal law, present time traders were adopting alternative solutions to avoid the application of national law to their transactions.
 - By means of standard clauses, self-regulatory contracts, trade usages and, especially, by recourse to international commercial arbitration, traders were creating their own regulatory framework independently from national law, the so-called new lex mercatoria.

Importance of conflicting rules in international commerce

- Conflict of laws is important to international commercial law because the different parties to an international transaction will usually come from different countries, or the transaction itself may involve the laws of different countries.
- International commercial law, public international law and conflict of laws (private international law) are related: **Grace v MacArthur (1959) (US DCED, Arkansas)**

Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197

- The plaintiff, from QLD, booked a cruise of the Greek Islands through the sale agent of the defendant in Sydney.
 - Plaintiff received the actual ticket in Athens, and on the ticket was a clause stating that any dispute arising from the ticket must be heard before the court of Athens.
- Plaintiff was injured on the boat while it was sailing in Greek waters, but sued the defendant in NSW where the ticket had been booked and paid for.
 - Defendant appealed to the HCA for a stay of proceedings.
- HCA dismissed the appeal and held that the terms of the ticket did not exclude the jurisdiction of the Australian courts, however the majority dismissed the appeal on divergent grounds.

Meaning of 'conflict of laws'

- The expression 'conflict of laws' simply means that the laws of different countries are in conflict with each other.

Pegasus Leasing Ltd v Cadroll Pty Ltd (1996) (FCA)

- Under cross-vesting legislation, a state court may exercise certain jurisdiction of the court in another state on a reciprocal basis.
 - On the other hand, the cross-vesting legislation which has been enacted individually by each state of Australia permits the relevant court to exercise discretion in determining whether to transfer a case to another competent and competing court.
- In this case, both the Federal Court and the Supreme Court of South Australia exercised the discretion against the transfer to the other court.
 - If the two courts reach different decisions, a conflict of laws may arise from the decisions because the two proceedings largely involve the same parties and the same issues.
- A court becomes concerned with conflict of laws issues when a plaintiff commences a proceeding pursuant to the rules of the court and the defendant raises issues of foreign law to challenge wither the appropriateness of the court's jurisdiction or the claims of the plaintiff.
 - The court has to first determine whether it has an appropriate jurisdiction over the dispute, and second, which law governs the dispute if the court has an appropriate jurisdiction.
 - In carrying out these steps the court applies the "conflicts rules" to make a "choice of jurisdiction" and "choice of law"
- "Conflict of laws" represents a body of rules or established practices for making a choice of jurisdiction and choice of law.

Three operating areas of conflicts rules

- Conflict of laws issues arise when there are foreign elements in a dispute and these elements lead to a conflict between competing laws of different legal systems.
- We may classify the circumstances where conflict of laws issues arise into three categories:
 1. determination of jurisdictional issues (choice of forum/choice of jurisdiction)
 2. determination of the substantive law governing the dispute (choice of law)
 3. enforcement of foreign judgements

Determination of jurisdictional issues

- In a conflict of laws situation, a court of law deals with the appropriateness of its jurisdiction as opposed to whether it has jurisdiction or not.
 - The court has to decide which court of the competing jurisdictions is the best/more appropriate/more convenient.
- Two issues are involved in the determination of a court's jurisdiction under the conflicts rules:
 - why does a court want or have to engage in a process of questioning or considering the appropriateness of its own jurisdiction
 - what are the tests for a court to use when making a choice between two or more competing jurisdictions

Determination of governing law

- The determination of the governing law is crucial because the duties and rights of the parties and the remedies available under competing laws may differ significantly.
- In most cases, an express choice of the governing law will be upheld by a court unless illegality under the local law or public policy arises as an issue.

Enforcement of foreign judgements

- Although English and Australian courts have long recognised and enforced foreign judgements, at common law, a person must apply to a local court for the enforcement of a foreign judgement locally.
 - The foreign judgement so enforced is executed through the authorisation of the competent local court.
 - The reason for this process comes down to sovereignty.
- In this process, the local court is actually making a decision as to the local validity of the foreign judgement.
 - Generally, in the absence of any treaty obligation, a local court recognises and enforces a foreign judgement only when such enforcement is consistent with the local law governing the matter decided in the foreign judgement, and consistent with the public interest or public policy of the court's own country.
- Presently, the enforcement of foreign judgements in Australia is mainly dealt with by the relevant federal and state legislation, such as the *Foreign Judgments Act 1991* (Cth)

True conflict and false conflict

- A true conflict refers to a situation where the application of the laws of relevant countries results in different or conflicting results.
 - e.g. in *Chaplin v Boys* [1971] AC 356, Maltese law and UK law were in real conflict because Maltese law only permitted the plaintiff to recover 53 pounds special damage, but UK law would permit the plaintiff to claim more heads of damages for much higher amounts. The House of Lords determined that UK law should apply.
 - e.g. in ***FDC Co Ltd v The Chase Manhattan Bank, NA* [1990] 1 HKLR 277**, the plaintiffs were two Hong Kong companies and one Panamanian company, and the defendant was a US bank with a number of branches in Hong Kong. The IRS obtained a court order against the head office of the defendant for the production of documents concerning the plaintiff's financial transactions with the defendant. The plaintiff's applied to the High Court of Hong Kong for an order prohibiting the defendant from producing the said documents. The Hong Kong court found that the documents concerned contained confidential dealings between a Hong Kong registered bank and its Hong Kong customers, so it decided that the matter was subject to Hong Kong law and prohibited the defendant bank from disclosing the documents to the IRS.
 - most cases of conflict of laws involve a true conflict
- A false conflict refers to a situation where the application of the laws of different countries will not result in any real difference to the interest of the parties e.g. in the case where a dispute is to be decided according to a treaty or international convention.

Renvoi

- This is a French word used to describe a situation where, due to the inconsistencies between the conflicts rules of countries, a selected forum determines under its own conflicts rules that the law of country X is the governing law, but the law of country X says the law of the selected forum in the governing law or alternatively, says the law of country Z governs the matter in dispute.
 - However, the law of country Z or of the selected forum may subsequently refer to matter back to country X, or another country
- Three methods have been developed for resolving the problem of *renvoi*:
 - Ignoring the conflicts rules of the country X which is referred to by the conflicts rules of the selected forum.
 - Single *renvoi*: this means that *renvoi* can only occur once. So if country X refers back to the selected forum or country Z, the selected forum will ignore its own conflict rules or that of country Z. This method shows respect to the integrity of the country X's law. It ignores the conflict rules of country Z only when the law of the country X has transmitted the matter to the law of the country Z.

- Total renvoi: this refers to a situation where the selected forum makes a decision presumable in the capacity of a court of country X. The law of country X should be examined as a whole and the position of country X to *renvoi* should also be taken into account.
- The recent development of conflicts rules within the European Union may provide useful experience for the future search for a set of universal conflicts rules.