

Ross Anderson Stream of Private International Law A

<i>Clyne v FCT</i>	<p>NSW bar member who was struck off → then styled himself as an ‘international tax attorney’ and author of books on the international aspect of ‘tax avoidance’</p> <p><u>Not competent to give evidence on laws of Lichtenstein</u></p> <p>Not qualified to give evidence on laws of a foreign country with whom he had no relation</p>
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Questions of commercial practice or usage

Note cases where particular issue of foreign law is such that a person who is highly skilled in commerce, business or banking, but is not a legal professional may still be competent to give evidence

- High degree of factual specificity (*Ajami*: bank manger competent to give evidence: i) identifying legal tender was part of his job every day ii) had 24 years of experience in this particular field)

<i>Ajami v Comptroller of Customs</i> 1954	<p>A was leaving Nigeria – at passport control his bag opens – 9.8 million Francs of legal tender fall out</p> <ul style="list-style-type: none">• Comptroller had to prove that contents of the bag constituted legal tender in Nigeria under Nigerian Exchange control law• Evidence given by Nigerian bank manager with 24 years of experience as manager of a Barclay’s Bank branch <p>Privy Council said this was competence b/c 24 years of doing this business and identifying legal tender every day</p>
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Exclusionary Doctrines

Where foreign law is lex causae (i.e. lex loci delicti in tort/proper law of contract in contract), NSW court will endeavour to apply the substantive aspects of that law. H/w some exceptional circumstances will means that Australian courts will **not give effect to what would otherwise be applicable substantive law**. This is the ‘exclusionary doctrine’, which is relatively narrow in scope of operation.

Why?

Essentially based in **forum public policy** which reflects a golden thread derived from public international law that **one sovereign state may on no account seek to assert its sovereign authority within the territory of another sovereign state** (explicated e.g. in *Taylor*, based on essential principle from *Lotus Case*)

How?

Thus Aus courts will not enforce:

- Foreign revenue laws
- Foreign penal laws
- (Possibly) foreign public laws
- Foreign governmental interests

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- And foreign laws contrary to forum public policy

All five doctrines are guided by forum public policy, though forum public policy itself remains as a standalone residual catchall exclusionary doctrine. Note, h/w public policy cannot be used to exclude foreign law in **intranational cases** (*Rogerson*), though likely can be used in **international cases** (*Zhang*)

Foreign Revenue Laws

What does the doctrine target? (when doing menu – lead with general statement – and then split into direct/indirect claims)

Among oldest exclusionary rules in PIL – essentially ‘no country ever takes notice of the revenue laws of another’ (*Holman v Johnson*: Lord Mansfield). Thus will not enforce a debt (*Taylor*) or judgment (*Jamieson*) arising under a foreign revenue law. A ‘revenue law’ includes:

- **Imposition of income tax** (*Jamieson*: judgment in favour of IRS)
- **Capital gains tax** (*Taylor*; *Damberg*: English business bought by Indian government who is trying to sue in England for capital gains)
- **Customs duties**
- **Local council rates** (*Bull*: Sydney Council bringing proceedings in Eng)
- **Death succession duty** (*Bath v British and Malayan Trustees*)

The doctrine precludes direct attempts (*Taylor*; *Jamieson*) and indirect attempts (*Bath*; *Damberg*; *Bull*) to recover a debt arising under foreign revenue laws. (NB: this vernacular is a bit asinine; there is no ‘attempt’ by the foreign government’) → The policy is that: if a **particular outcome in proceedings would facilitate payment of a foreign revenue obligation, then the outcome will not be permitted**

Direct cases

<i>Government of India v Taylor</i>	<p>English company carrying out railway and electricity business – in 1947 when India becomes sovereign, sells its business – Indian government purchases the business, then remits all assets back to England – the remaining company is then liquidated</p> <ul style="list-style-type: none"> • During liquidation a claim is made for unpaid capital gains tax <p><u>Could India maintain an English suit for unpaid capital gains tax</u></p> <p>Enforcement of a claim for taxes is an extension of the sovereign power which imposed the taxes:</p> <ul style="list-style-type: none"> • An assertion of sovereign authority by one state within the territory of another is contrary to all concepts of independent sovereignties – should not facilitate an extra-territorial assertion of foreign authority (echoes Public International law rule explicated in <i>Lotus Case</i>) • This is the point of the doctrine, not to benefit the tax payer.
<i>Jamieson</i>	<p>Australian citizen died in the US – IRS chasing up unpaid income tax from them – had obtained judgment in the US to that effect → could they be a creditor on that citizen’s estate in Australian law?</p>

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	<p>No – this would be enforcing a foreign revenue judgment</p> <p>Application of <i>Taylor</i>.</p>
Indirect revenue cases:	
<i>Sydney Municipal Council v Bull</i>	<p>Sydney Council trying to recover council rates against a resident of England → British HC held that the Council cannot bring proceedings in England (and London Council could not bring proceedings in NSW) to enforce the debt</p>
<i>Bath v British and Malayan Trustees</i>	<p>Bath was NSW resident – mother lived in Singapore – mother dies in Singapore, thus her foreign assets were subject to payment of estate duty (Singapore revenue law)</p> <ul style="list-style-type: none"> • Her estate included NSW assets for the purposes of paying that estate duty • The executor of her estate wished to administer foreign assets in NSW and remit them to Singapore for satisfaction of any outstanding estate duties <p>Bath contended that the assets would be removed for no reason other than paying Singapore estate duty (and thus would be indirect revenue law satisfaction, even though administrator has legal title)</p> <p><u>Court refused to give priority to Singaporean executor</u></p> <p>Doing so would indirectly expose NSW property to satisfaction of Singaporean taxes.</p>
<i>Damberg</i>	<p>Father avoiding capital gains tax by giving plots of German land to son and daughter, but retaining beneficial interest – children argue that the resulting trust is a tax evasion scheme</p> <ul style="list-style-type: none"> • If presumption of similarity were sustained – then German capital gains tax was going to be enforced • If presumption were not to be sustained – this result would still flow <p>No conditions would be placed on father requiring him to confess and pay to German tax authorities because such an outcome would lead indirectly to the payment of revenue debt in Germany.</p>

Not a total exclusion

Note that the exclusionary doctrine has been qualified to some extent by statute and treaty provisions:

- *Foreign Judgments Act* makes provision for enforcement of particular foreign countries' judgments (esp. PNG)
- *Trans-Tasman Proceedings Act* allows for enforcement of NZ judgments (and vice-versa)
- *Service and Execution Act* allows for same intra-nationally
- **Treaties:** making provisions for the recovery in Australia of unpaid foreign income tax → the ATO acts on behalf of the foreign revenue authority to recover this

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- **Bilateral:** have 2 with France and Norway → given statutory force by *International Tax Agreements Act*.
- **Multilateral:** Finland/NZ/South Africa

Recognition of foreign revenue laws

Mansfield's statement about the ED ('no country ever takes notice of the revenue laws of another') is possibly 'too widely expressed' (*Regazzoni: Lord Keith*) - not going to avoid the revenue laws altogether - may still *recognise* those laws, simply won't *enforce* them. A distinction must be made between **enforcement** and **recognition**. Enforcement may be precluded, but the Court may recognise the **validity and effectiveness** of a foreign revenue law within the territory of the foreign country

- **Contract enforcement?** Thus Australian courts will not enforce a contract where the parties must do something in a foreign country, in breach of that country's foreign revenue laws - it will not enforce that contract on grounds of illegality (*Regazzoni*) - this is not extra-territorial assertion of sovereignty; it's recognition of the sovereignty of the foreign nation (Indian jute case with illegal transport to south africa)
- **Judicial assistance?** ED does not prevent a forum court rendering judicial assistance to a foreign court in connection with revenue enforcement proceedings (*Re Norway's Application*)

<i>Regazzoni</i>	<p>English defendant agrees to sell and deliver to Swiss person a cargo of hessian bags (made of jute)</p> <ul style="list-style-type: none"> • The seller repudiated the contract, and the Swiss brought claims in England to recover damages for breach of contract • Proper law of contract was English law but really nothing turns on this fact <p>When the contract was entered into, both parties were aware that country of origin of the jute was India</p> <ul style="list-style-type: none"> • Both parties knew they were delivered by port to Italy • Intention that the goods be shipped to South Africa • H/w performance of the terms of this transport was in breach of an Indian Revenue law <p><u>Refusal to enforce contract</u></p> <p>Whatever the proper law of the contract, it will never be enforced if that contract contemplates the doing of an act within the territory of foreign country in breach of the law of that country</p>
<i>Re State of Norway's Application</i>	<p>In 1982, a wealthy Norwegian shipowner died - same year, Norway issued retrospective tax assessments for previous 10 years - there was a tax debt accrued</p> <ul style="list-style-type: none"> • 2 English resident bankers had evidence as to financial affairs of deceased • Norwegian court asked English High Court for assistance - could they issue a subpoena to those 2 bankers, requiring them to give an oath and answer 12 specific questions

	<ul style="list-style-type: none"> The banks objected on grounds of <i>Taylor</i>, arguing that they'd be facilitating the satisfaction of a foreign debt <p><u>Not an infringement – it was judicial assistance</u></p> <p>Judicial assistance in relation to tax proceedings already commenced in Norway → the courts were not enforcing the Tax laws of Norway, they were simply helping them gather necessary evidence</p>
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Foreign Penal Laws

A court will refuse to enforce a 'penal law' (*Attrill*), that is a law which awards a penalty to the state as redress for a public wrong and thus purports to be a 'vindication of public justice' (*Standard Oil: Cardozo J*) → the **penalty must be recoverable by or on behalf of the government**. The reason for this is that foreign penal laws have local effect only and are 'cognizable and punishable in the country where they are committed' (*Attrill: Lord Watson*)

- The doctrine means the foreign law will not be enforced where it is penal in nature
 - E.g. a fine for a criminal offence is penal in the relevant sense → or a claim by a foreign government to recover an amount to be paid by an offender if they do not appear at their trial – because the claim is payable to the state (*Inkley*)
- Factual scenarios where exclusionary doctrine would not apply is where the law is not penal in the relevant sense:
 - Exemplary damages in tort are not penal in the private international law/relevant sense** – because they are not recoverable by or on behalf of the state, they are recovered for the benefit of an individual litigant (*Prider*)
 - Personal liability on a director as a "penalty" for misrepresenting corporation's finances** are not penal in relevant sense, where payable to a creditor of the corporation and not the state of New York (*Attrill*)
- Possible good factual discussion then – **query the connection of the penalty to public dimension** (*Inkley*: US government argument that appearance bond was a contract and thus vindicating a private right cf. the finding which held that it was a penal law b/c it was 'intimately connected' with the criminal law of the US, as it secured appearance at a criminal trial)

<p><i>Huntinton v Attril</i> 1893 Canadian case (still good law in NSW 2018)</p>	<p>NY Corporations statute → if an officer made a material false statement, they are personally liable for debts of corporation → is penal in the 'punitive' sense</p> <ul style="list-style-type: none"> D (a resident of Ontario) breaches the statute P gets judgment in NY, now goes to Ontario to enforce the foreign judgment there – all requirements are satisfied bar one (exclusionary doctrine to enforce foreign judgment if it is penal) <p><u>Not penal b/c not about state but individual</u></p>
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	<p>Penalty here was not recovered for benefit of the state → personal liability changed who had to pay the debts – the creditors were still the ones being paid</p>
<p><i>Loucks v Standard Oil</i> 1918</p>	<p>NY resident killed in motor accident in Mass. – family brings fatal accident claim in NY – they have LLD</p> <ul style="list-style-type: none"> • Not in contention that applicable substantive law was that of Mass. and not that of NY • Mass. statute said that where a person negligently causes death of another, there was a cap on damages, and it was calculated by reference to degree of culpability cf. NY law which said it was calculated by reference to loss suffered • Mass. statute said that damages were recoverable by the executor/administrator of the deceased for the benefit of deceased’s widow/children/next of kin <p>Was this penal?</p> <p><u>Not penal</u></p> <p>Cardozo J</p> <ul style="list-style-type: none"> • “The question is not whether the statute is penal in some sense. The question is whether it is penal within the rules of private international law.” • The punishment of the wrongdoer is not designed as atonement for a crime; it is solace to the individual who has suffered a private wrong • The executor is ‘not the champion of the peace and order and public justice of the commonwealth of Mass. He is the representative of the outraged family. He vindicates a private right.’ <p>Forum public policy?</p> <ul style="list-style-type: none"> • “we may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right...if a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him” • NY has a different mechanism, but shares the same ‘fundamental policy’ – atonement for the wrong → ‘we cannot give them the same judgment that our law would give...very likely we cannot give them as much but that is NO reason for refusing to give them what we can’
<p><i>USA v Hinkley</i> 1989 QB</p>	<p>British person who sold non-existent oil wells to US citizens (federal US Crime)</p> <ul style="list-style-type: none"> • Was arrested in US when doing more fraudulent conduct • Signed a bond which said “I agree to pay 48k if I do not appear at my trial” • His father dies – he was allowed to travel to England for 30 days – but he never returns

	<p>Proceedings in Florida to recover amount – successful. The US seeks to enforce this judgment in England where I is resident with his assets – US argue this is a term of a contract, therefore can enforce b/c it vindicates a private right</p> <p><u>Can't enforce: is penal and therefore unenforceable</u></p> <p>Substance – not form → the bond was an agreement to pay money and was connected to criminal law of the the US (secured his attendance at a criminal trial) – therefore penal</p>
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May nevertheless recognise **validity and effectiveness** of a foreign penal law (*Regazzoni*; *Viscount Simonds*) → (refuse to enforce jute contract where doing so would enforce an act that would contravene a foreign *penal* law).

Foreign Public Laws

Lord Denning recognised a new doctrine which precludes enforcement of foreign **public laws** (*Ortiz*). This was however a minority view in the case – and its application in Australia is even more uncertain given ‘the expression ‘public laws’ has no accepted meaning’ in Australia (*Spycatcher*).

- Australian public laws ED focuses on narrower conception: will not enforce foreign **governmental interests** (*Spycatcher*; *Robb Evans*)
- What is a ‘**governmental interest**’ depends upon ‘scope, nature and purpose’ of particular provisions sought to be enforced (*Robb Evans*) → must involve an ‘exercise of power peculiar to a government’ (*Spycatcher*)
 - **Is an interest:** (*Spycatcher*: UK government couldn’t get NSWSC to enforce an injunction against publication of memoirs of former MI5 agent which allegedly disclosed official secrets) – national security a great starting point
 - *Empire of Iran*: such immunity is limited to those matters which fall ‘within the central sphere of state immunity’. In *Spycatcher*, two examples were given: **defence/national security**.
 - **Not an interest:** (*Robb Evans*: official acting on behalf of US federal trade commission to recover proceeds of a scam for those who had been defrauded) – thus governmental connection insufficient (this is also not penal)
 - “the identification of a public interest protected by legislation does not constitute sufficient grounds for application of the rule” (*Robb Evans*: *Spigelman CJ*)
 - The law is a practical one designed to help otherwise incapable plaintiffs to recover small amounts of money for which they have been defrauded – it was a practical mechanism to ensure the normal application of the civil law – nothing extraordinary
- Entirely plausible that such an interest will encompass a revenue law/penal law (*Robb Evans*: *Spigelman CJ*)

<p><i>AG v Ortiz</i></p>	<p>NZ farmer found a Maori carving with significant NZ cultural heritage – sold to O who was a NY dealer</p> <ul style="list-style-type: none"> • O, in breach of NZ law, and without consent of NZ government removed that article from NZ • NZ Act rendered it a crime to remove historical articles from NZ without government assent. A fine was applicable + such goods were forfeit to the NZ crown • O brought the carving to England to sell it at auction. At this point NZ government becomes aware of article • Govt. brought proceedings in English HC to recover article by reference to that legislation <p><u>ED of public law, but also penal law:</u></p> <p>(Lord Denning)</p> <ul style="list-style-type: none"> • Foreign law will be a public law for purposes of exclusionary rule if enforcement of law in the forum involves an extra-territorial assertion of sovereign authority in the foreign state <p>(Majority)</p> <ul style="list-style-type: none"> • Other judges did not think a novel ED was necessary – found the law to be penal on basis that the goods were recoverable on the behalf of the NZ government
<p><i>Spycatcher Case</i></p>	<p>Former MI5 agent aiming to publish memoirs which he had made by drawing on substantially on confidential information acquired whilst he was an agent – UK government suing in NSW (and then High Court) for an injunction against publication</p> <p><u>Narrower ED doctrine of governmental interests enunciated</u></p> <p>ED applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government.</p> <ul style="list-style-type: none"> • Substance question → not about whether it is public law or private law → focus is on whether it is an interest (and thus the sovereign authority) that relates to an exercise of foreign governmental power → here governmental interest b/c it concerned national security

Forum Public Policy

Irrespective of whether foreign law or foreign judgment, there is a general rule that Australian courts will refuse to enforce that law or judgment if it offends Australian public policy in the sense that it **violates a fundamental principle of justice of morality as understood in Australia**. Thus mere inconsistency with Australian laws is not grounds to reject its application on public policy grounds.

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- No forum public policy rule is to be applied for intranational torts (*Rogerson*), given the full faith and credit provision of the Constitution (*Merwin; 118*) which requires that states give full credit to the legal system of other states and territories.

Violation of principles of justice or morality

Mere inconsistency of laws is insufficient for states in a federal system are rarely 'so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home' (*Standard Oil: Cardozo J*).

- **Must be a fundamental contradiction:** *Standard Oil*: look to the fundamental policy, and then standards of justice or morality.
 - **High bar:** (*Pancotto*: broader than Australian view – difference in quantum of damages b/w Mozambique and Illinois sufficient, h/w this might be a procedural issue
- **Examples when standards of justice or morality are offended**
 - Foundation of a contract under moral pressure that might not *technically* constitute duress (*Kaufman*) or severe physical and financial duress (*Mountain*) cf. enforcement of foreign gaming contracts that might not be enforceable in England (*Saxby*)
 - Gross violation of human rights such as deprivation of nationality of particular races (*Oppenheimer*)
 - Law comes into circumstances involving flagrant violation of international law – e.g. validates the appropriation of property acquired after wrongful use of force to invade a country (*Kuwait Airways*)

<p><i>Loucks v Standard Oil</i> 1918</p>	<p>NY resident killed in motor accident in Mass.; compensation scheme calculated by different standard in Mass. than NY – not a penal law, was it public policy?</p> <p><u>No scope for public policy</u></p> <ul style="list-style-type: none"> • “we may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right...if a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him” • NY has a different mechanism, but shares the same ‘fundamental policy’ – atonement for the wrong → ‘we cannot give them the same judgment that our law would give...very likely we cannot give them as much but that is NO reason for refusing to give them what we can’
<p><i>Pancotto v Sociedad...Mocambique</i></p>	<p>Illinois resident goes on safari to Mozambique and is injured – brought tort claim in Illinois – LLD therefore Mozambique law applies:</p> <ul style="list-style-type: none"> • Mozambique had cap on damages, and could not recover for pain and suffering, or loss of enjoyment of life (Cf. Illinois law). <p><u>Bad law: forum public policy ED</u></p>

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	<p>Also query whether assessment of damages is a procedural issue that is to be dealt with by lex fori (<i>Zhang</i>) – even though such a conclusion is unlikely</p>
<p><i>Kaufman v Gerson</i> 1904</p>	<p>Mrs. Gerson lived in France with her husband – her Husband was employed by Kaufman → Her husband had embezzled K's property – K threatened criminal prosecution against the husband unless the wife repaid what was stolen – thus situation of duress emerged</p> <ul style="list-style-type: none"> • Governing law of contract was French law • She moves to England – K brings proceedings there <p><u>FPP precluded enforcement</u></p> <p>Contract was valid under French law despite the duress because it constituted 'moral pressure'</p> <ul style="list-style-type: none"> • H/w the contract conflicts with what are deemed in England to be essential public or moral interests' • The degree of coercion was unconscionably high, even if not technically against lex causae.
<p><i>Royal Boskalis v Mountain</i> 1999 QB</p>	<p>Invasion of Kuwait by Iraq in 1990 – universal condemnation under prohibition on use of force (2(4) UN charter)</p> <ul style="list-style-type: none"> • Security Council imposed sanctions on Iraq – so did Netherlands • Prior to invasion a Dutch company was carrying out work in a port in Iraq under contract with their government • Iraqi government threatened to use those employees as human shields if UN forces should enter Iraq + impounded their equipment <p>A new contract was entered into – to continue dredging, the Netherlands company agreed to waive all contractual rights under the original dredging agreement</p> <p><u>Not valid – extreme situation of duress</u></p> <p>Even though valid in Iraqi law</p>
<p><i>Saxby v Fulton</i></p>	<p>Plaintiff made a contract with solicitor in Monte Carlo – would loan the money to gamble with – the solicitor dies – Plaintiff suing estate to get money back</p> <ul style="list-style-type: none"> • Estate says “offends British principles to recognize a gaming contract that is unenforceable under British law” <p><u>Not a sufficient offence to morality and justice</u></p> <ul style="list-style-type: none"> • Gaming contracts were not illegal in Britain per se- there was still plenty of gaming going on • The activity was relatively benign – gambling in a country which had more liberal gambling laws • No element of unconscionability like in <i>Kaufman</i> or <i>Mountain</i>.
<p><i>Oppenheimer v Cattermole</i></p>	<p>Nazi Law deprived German Jews of nationality – Oppenheimer was a refugee who returned to England in 1939</p>

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	<ul style="list-style-type: none"> • After the war, he started receiving a pension (income) from German government as compensation for persecution • Could he be exempted from tax on this in the UK on the basis of dual-nationality? (i.e. would UK recognize the revocation of his nationality by the old law) <p><u>No – violation of human rights</u></p> <p>The Nazis used the confiscated assets of those who fled to finance the Holocaust – it was totally dehumanizing and so grave an infringement on human rights</p>
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Flagrant violations of international law

Foreign law will be disregarded as contrary to FPP where it was enacted in circumstances involving a flagrant breach of public international law (*Kuwait Airways* [Nos 4 and 5])

<p><i>Kuwait Airways</i></p>	<p>During Iraqi invasion of Kuwait, Iraqi Airways seizes 10 Kuwait Airways aircrafts, and removes them to Iraq.</p> <ul style="list-style-type: none"> • A law is enacted which declares it to be the property of IA – this law is thus enacted in circumstances of the wrongful use of force • IA starts using and dealing with the aircraft <p>Kuwait commences proceedings against IA in England</p> <p><u>Had jurisdiction, FPP would not enforce Iraqi law</u></p> <ul style="list-style-type: none"> ➤ Personal jurisdiction: D was an international airline that had business in England (thus was a proper person) ➤ FNC: no grounds for FNC b/c Kuwait is under occupation and Iraq has Iraqi law – which is the law alleged to be improper in this case ➤ Choice of law: tort is tort of conversion – wrongfully dealing with someone else’s goods – the place of the tort is where that dealing occurs (Iraq) – NB still <i>Phillips v Eyre</i> time. <ul style="list-style-type: none"> ○ Limb 1: unlawful in England? Yes – tort of conversion exists in England ○ Limb 2: liability in Iraq? Yes – tort of usurpation exists. The only defence is the new law which is put in place. H/w once this law is ‘shut out’ the liability exists. It is to be shut out on public policy grounds – it comes into being to protect an act done during a flagrant violation of public international law (acquisition of aircraft only occurred because of an invasion that involved wrongful use of force)
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Intrastate operation – no operation

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In light of *Merwin* (contracts) and *Rogerson* (torts) and 118 no public policy ED to be applied in intrastate scenarios.

<i>Merwin v Moolpa</i>	<p>Victorian residents contracting in Vic in 1926 – one sold to the other a NSW Sheep station</p> <ul style="list-style-type: none">• In 1930 there is an economic crisis – NSW Act comes out, putting certain consequences on land sales payable in instalments (as the station contract was) → namely, purchaser was relieved of all personal liability to make any further payment of instalments• Vendor could recoup those instalments by way of security against the land <p>Two points HCA makes in overturning VSC decision</p> <ul style="list-style-type: none">• According to 118 of the Constitution – VSC had to apply law of NSW once it was identified as the proper law of the contract – forum public policy has no role to play as VSC must give full faith and credit to NSW statute• The governing law was not the law of Vic, but of NSW → where (1) contract has no choice of proper law clause and (2) is immovable, the proper law is where the property lies
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Choice of Law in Contract

The central concept in choosing the law in contract cases is the proper/governing law of the contract. Two issues arise:

- How do we **identify** the proper law of the contract
- What **substantive issues** exist in other areas which require a different approach

The 'proper' law of the contract

In tort there is one rule: LLD. H/w in contract there are several choices available on top of the **proper law** – e.g. (1) **lex loci solutionis** (place where the bulk of the obligations will be performed) (2) **lex domicili** (place where party is domiciled/where entity is incorporated) (3) **lex loci contractus** (place where contract was made).

Identification of the proper law occurs in a three-step approach:

- **Express choice:** Parties given large degree of autonomy to select the proper law of the contract (*Merwin*) – and will be allowed to do so provided that intention is **bona fide** and **legal** (*Vita Food*)
- **Inferred choice:** Failing express choice, does it include an 'inferred' choice, based on the construction of the contract? (*Amin Rasheed Shipping*) – do the provisions 'point ineluctably' to the conclusion that parties intend a **particular system** to govern the contract?
 - It is only permissible to have regard to a fact or circumstance which exists at the date the contract was made (thus breach that occurs in a certain