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## Personal Jurisdiction

Abbreviation: P (Plaintiff); D (Defendant); OP (originating process); CA (Corporations Act); CL (Common Law); FJC (foreign jurisdiction clause); FNC (Forum non conveniens); SC (Supreme Court)

# Does the court have the jurisdiction to hear and determine a matter with a foreign element?

## Individuals at Common Law – Presence

- ✧ Courts need to have personal jurisdiction in order to make binding orders on the D
- ✧ If the P cannot establish jurisdiction → no proceeding → application to set aside the originating process or an application to set aside service of the originating process – UCPR r 12.11

Steps:

1. State: Common law personal jurisdiction is established if the service of the originating process on the D when the D is within the territorial jurisdiction of the court – **Gosper v Sawyer ; Laurie**
2. Present?
  - Present at service: D is present in the jurisdiction when the OP is served → jurisdiction☑ – **Laurie**
  - D leave before Service → jurisdiction☑ – **Laurie**
    - Exception: D has knowledge of the issue of the OP → jurisdiction☑ – **Joye v Sheahan** (court would grant an order for substituted service)
  - Presence in forum is temporary/transient → jurisdiction☑ – **HRH Maharanee**
  - P ‘tricks, fraudulently entices or physically coerces’ D into the territory for purpose of service – **Perrett v Robinson**
    - Exception: if D came willingly → jurisdiction☑ – **Perrett**
3. How to serve? Personal service under UCPR
  - UCPR r 10.20 – Op must be personally served
  - UCPR r 10.21(1) – leaving a copy of the document with the person OR if they don’t accept the document by putting it down in their presence and telling them the nature of the document

- UCPR r 10.21(2) – if service is prevented by D’s violence, leave the document as close as possible to the person
4. Substitute Service under UCPR
- Can be served when:
    - UCPR r 10.14(1)(a) – cannot practicably be served on the person, or
    - UCPR r 10.14(1)(b) – cannot practicably be served on the person in the manner provided by law,

## Corporations at Common Law – Presence

Steps:

- 1) State: all companies conducting business in Australia are amenable to the jurisdiction of all state and territory courts even if they do not conduct business in the state or territory forum
- 2) State: Foreign Corporations carrying on business in Australia must register as foreign corporations, establish a local office, and appoint a local agent – CA ss 601CD, 601CT
- 3) Corporations Registered in Australia (corporations from NSW)
  - How to serve? UCPR r 10.22
    - ◆ Personally service to principle officer – r 10.22(a)
    - ◆ Other manner allowed by law – r 10.22(b)
      - ⇒ For Australian company: – CA s109X
        - \* Leave the document at or posting the document to the registered office of the corporation – s 109X(1)(a), (c), (d)
        - \* Personally serve the document to a director of the company who resides in AUS – s 109X(1)(b)
      - ⇒ For foreign company: – CA s601CX
        - \* Leaving or sending the document to the registered office or local agent – s601CX(1)(a), (b)
        - \* Personally serve the document to 2 or more directors of the company who resides in AUS – s601CX(3)

## Anti-Suit Injunctions [ASI] – Intra-Australian case – SEPA

- 1) Prohibition on Restraint of proceedings
  - When proceedings have been initiated in a state or territory, a foreign court must not restrain a party in the proceeding from taking a step in the proceeding on the ground that the original state is not the appropriate forum for the proceeding – s21 SEPA

## Anti-Suit Injunctions [ASI] – NZ case – TTPA

- 1) Prohibition on Restraint of proceedings
  - AUS court must not restrain a person from commencing proceedings in a NZ court on the basis that the NZ court is not the appropriate forum – s21(1)
  - AUS court must not restrain a party before a NZ court from taking any further steps in that proceeding on the basis that the NZ court is not the appropriate forum – s22(2)

### General applicable law topics

## Adopt Mortensen's 5-Step Choice of Law Method

- ✧ Mortensen sets out a method for resolving choice of law issues – this does not have status in law and is one of many ways to approach choice of law issues – however: will be adopted here for sake of clarity and convenience:
- ✧ **① Identify Conflict of Laws** – involves identifying the relevant legal systems and how their purported application may conflict.
- ✧ **② Classify (characterise) Subject Matter** – characterise the nature of the legal issue (e.g. tort or contract)
- ✧ **③ Classify: Substantive vs Procedural Law** – determining whether the matter is substantive or procedural
- ✧ **④ Identify Choice of Law Rule** – given the characterisation of the law, what is relevant choice of law rule – i.e. go to the tort or contract applicable law sections.
- ✧ **⑤ Apply Law of the Cause** – once the applicable law is identified, the court should then apply the applicable dispositive rules to the dispute. An issue of Renvoi may arise at this point.

## Step: ① Identify Conflict of Laws

- 1) Which legal systems are possibly relevant to the case?
  - Factors:
    - ◆ places of citizen ship of both parties; the place that has contracts with; places where a marriage is solemnised; places where the parties are domiciled; maybe not foreign nationality; where an obligation should be performed
  - list out all the relevant legal systems
- 2) The likely result in the case on application of the internal rules of each of those possibly relevant legal systems
  - E.g. applying AUS internal rule, the court would decide that the marriage was valid
  - E.g. applying Ruritania internal rule, the result would be different. They need to seek a declaration of validity without applying for an annulment or divorce.
- 3) True conflict
  - Arise when a different substantive outcome would result from applying the different sets of dispositive rules
  - E.g. assessment of damages of two countries are different. One is under statute, another one is under CL. True conflict.
  - Need to go through a choice of law process to determine the applicable law

## Step: ② Classify(characterise) Subject Matter

- 1) court must characterize the Q in issue but not cause of action – *Macmillan v Bishopgate*
- 2) Tort / Contract
  - E.g. if it is a claim for damages for defamation → tort
- 3) Tort → lex loci delicti
- 4) Contract → proper law
  - the law that has the closest connection with the cause of action
- 5) Procedure → lex fori (the law of country in which an action is brought)

### Step: ③ Classify: Substantive vs Procedural Law

- 1) Principle – **John Pfeiffer**
  - law of forum governs the procedure used in that forum, therefore, even when substantive law of another jurisdiction is the applicable law, procedural law of forum will apply
- 2) TEST: **Substantive vs Procedural Law**
  - State: Procedural comprises only ‘laws and rules relating processes following any judgement and the rules of evidence’ – **John Pfeiffer**
  - State: Substantive comprises ‘matters that affect the existence, extent and enforceability of the rights and duties of the parties to an action’ – **John Pfeiffer**

Intranational cases	International cases
<b>Limitation period:</b>	
Substantive – s5 Choice of Law (Limitation Periods) Act 1993; <b>Brear v James Hardie</b> *Also Substantive in NZ case* Apply the limitation period in the jurisdiction of the applicable law	Substantive – <b>John Pfeiffer; Renault v Zhang; O’Driscoll</b>  Apply the limitation period in the jurisdiction of the applicable law
<b>Damages:</b>	
Substantive – <b>John Pfeiffer</b>  ■ Q about the kind of damage/amount of damages	Procedural – <b>Renault v Zhang</b>  Apply lex fori
<b>Evidence:</b> Procedural – <b>John Pfeiffer</b>	
<b>Statutes of frauds:</b> Substantive – <b>Tipperary Developments</b>	
<b>Legal Professional Privilege:</b> Procedural – <b>Stewart v Australian Crime Commission</b>	

- 3) If procedural → law of forum (lex fori) applies
- 4) If substantive → lex loci/ law of the cause. But the procedural element (e.g. evidence, remedies) will be governed by the law of the forum. Now categorize the issue into tort/contract.
- 5) Tort → lex loci delicti
- 6) Contract → proper law