

Private International Law A LAWS 2018 Semester 1 2015

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Topic 1. Introduction and Case Studies

1.1. Fundamental Approach to Conflict of Laws

- a) There are three stages of a Conflicts Problem:
- Jurisdiction – Which court has jurisdiction to deal with the matter? This requires a connection between the subject matter and the inherent jurisdiction of the court.
 - Choice of law – Which law is applicable to the matter?
 - Enforcing judgment – How can the judgment be enforced? For example, a Queensland judgment against a defendant living in NSW with no assets in Queensland may require asking the NSW court to enforce the Queensland judgment.

1.2. Terminology

- a) **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.
- The test is whether the court is a clearly inappropriate forum [*Oceanic Sun Line v Fay* [1988]]
- b) **Lex fori** – Laws of a forum: laws of the jurisdiction in which a legal action is brought (procedural)
- c) **Lex causae** – Laws chosen by the forum court to arrive at its judgment (substantive).
- d) **Lex loci delicti** – Law of the place the action was committed.
- e) **Lex situs** – Law of the place of the (corporation or property)
- f) **Lex loci contractus** – Law of the place of contracting
- g) **Lex loci solutionis** – Law of the place of performance (of contract)

1.3. Case Studies

- a) Note:
- Procedural issues governed by *lexi fori*.
 - Liability in tort governed by *lex loci delicti* (the law of the place the tort was committed).
 - Liability in contract governed by the proper law of contract (agreed between the parties or, in absence of agreement, the legal system with which the parties has its closest and most real connection).

Case Name	Oceanic Sun Line Special Shipping Co v Fay [1988] HCA 32
Facts	<ul style="list-style-type: none"> • Fay (resident of Queensland) was a passenger on Greek ship sailing in Greek waters. • Sustained serious injuries on ship and sued in negligence.
Issue	<ul style="list-style-type: none"> • Which court has jurisdiction? • Which law is applicable to the matter?
Held	<ul style="list-style-type: none"> • Court in Greece has jurisdiction.
Reasoning	<ul style="list-style-type: none"> • Tort occurred in Greece, occurred on Greek vessel, contract was governed by Greek law.

	<ul style="list-style-type: none"> • Oceanic has no connection with NSW or Queensland • The test for forum non conveniens is whether the court is a <u>clearly inappropriate forum</u> <ul style="list-style-type: none"> ○ Local court will be a clearly inappropriate forum if continuation of the proceedings in that court would be <u>oppressive</u> in the sense of <u>seriously and unfairly burdensome, prejudicial or damaging</u> or in the sense of <u>productive of serious and unjustified trouble and harassment</u>. [per Deane JJ]
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Case Name	Venter v Ilona MY Ltd [2012] NSWSC 1029
Facts	<ul style="list-style-type: none"> • Deceased was employee on yacht of respondent Owners and died in accident in Thai waters. • Exclusive jurisdiction clause in contract between Owners and manufacturers requiring any claim to be made in Germany. • Multinational parties with variety of claims however essentially: <ul style="list-style-type: none"> ○ Owners cross-claimed against manufacturers in NSWSC; and ○ Manufacturer sought to set aside cross claim in NSWSC on basis of exclusive jurisdiction clause.
Issue	<ul style="list-style-type: none"> • Whether forum non conveniens i.e. was NSWSC clearly inappropriate forum per <i>Oceanic</i>? • Which law was appropriate (NSW, German or Thai?)
Held	<ul style="list-style-type: none"> • Stay of NSWSC proceedings in favour of Germany
Reasoning	<ul style="list-style-type: none"> • German jurisdiction clause contractually bound parties to resolve disputes arising out of the contract in Germany. Owners failed to provide compelling reasons in favour of NSW. <ul style="list-style-type: none"> ○ Contract made in Europe and to be governed by German law ○ No part of the contract was purported or actually performed in Aus.

1.4. Sources of Law and Doctrine of Stare Decisis

1.4.1. Within Australia

- a) Only one common law [*Mabo*] however there is differing statutory law at the State and Federal level.
- 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. [*Farab Constructions v Say-Dee*]

1.4.2. Principles of precedent and statutory interpretation

- a) 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
- b) Persuasive authority:

- Court generally follows its own previous decision on legislation unless clearly wrong.
- High Court is not so constrained if it feels that interpretation is wrong.

SAMPLE

Topic 2. Personal Jurisdiction

2.1. Territorial Jurisdiction based on Defendant's Presence

No	Issue	Sub-issues
1.	Territorial jurisdiction based on defendant's presence	<ul style="list-style-type: none"> • <u>Individuals</u> (jurisdiction in personam) <ul style="list-style-type: none"> ○ Physical presence? [<i>Laurie v Carroll</i>] ○ Mode of personal service [UCPR r 10.20 and 10.21] ○ Mode of substituted service [UCPR r 10.14] • <u>Corporations</u> (jurisdiction in personam) <ul style="list-style-type: none"> ○ Carrying on business (common law) [<i>NCB v Wimborne</i>] ○ Carrying on business (statute) [<i>Corporations Act</i> s 21; 601CD] ○ Mode of service [UCPR r 10.22; <i>Corporations Act</i> s 109X; 601CX]
2.	Jurisdiction based on defendant's submission to the jurisdiction	<ul style="list-style-type: none"> • <u>Submission by agreement</u> <ul style="list-style-type: none"> ○ Express agreement? [UCPR r 10.6] ○ Authorising lawyers to accept process? [UCPR r 10.13] ○ Parties agree to method of service in writing or verbally? [<i>Howard v Bank of NZ</i>] • <u>Submission by conduct</u> <ul style="list-style-type: none"> ○ Party's actions in court proceedings inconsistent with maintaining objection [<i>Vertzyas</i>] ○ Contesting jurisdiction (not merits) without filing an Appearance [UCPR r 12.11; <i>Garsec v Sultan of Brunei</i>]

2.1.2. Individuals (jurisdiction in personam)

- a) General common law position is that the rules of legal service of originating process define the limits of the jurisdiction of the court [*Gosper v Sanyer* (1985)]
 - “The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction.” [*Laurie v Carroll* (1958)]
- b) It suffices that the defendant is physically present within the jurisdiction at the moment of service.
 - The length, presence and purpose of the defendant's presence is immaterial [*Maharaneef of Baroda v Wildenstein* [1972]; *Perrett v Robinson* [1985]]
- c) The court will not have jurisdiction by reason that the defendant was formerly in the jurisdiction even if proved that the defendant left earlier in order to avoid service [*Laurie v Carroll* (1958)]
 - However, if defendant knows that originating process exists and leaves – order of substituted service may be made against the defendant [*Joye v Sheaban* (1996)]

Case Name	Maharaneef of Baroda v Wilenstein [1972] QB 283
Facts	<ul style="list-style-type: none"> • French art dealer served with originating process while in England to attend the

	Ascot races.
Issue	<ul style="list-style-type: none"> Whether fleeting nature of physical presence in jurisdiction is sufficient for effective service.
Held	<ul style="list-style-type: none"> Length, presence and purpose of defendant's presence is immaterial.

Case Name	Perrett v Robinson [1985] 1 Qd R 83
Facts	<ul style="list-style-type: none"> Cause of action time barred under Qld legislation; not barred under NSW. Plaintiff convinced defendant (who was insured) to travel to NSW for purpose of attracting NSW jurisdiction.
Issue	<ul style="list-style-type: none"> Whether fleeting nature of physical presence in jurisdiction is sufficient for effective service and submitting to the NSW court's <i>lexi fori</i>.
Held	<ul style="list-style-type: none"> Length, presence and purpose of defendant's presence is immaterial.
NB	<ul style="list-style-type: none"> Following <i>John Pfeiffer v Rogerson</i> (2000), limitations statutes regarded as substantive law and no longer part of <i>lexi fori</i>.

Case Name	Laurie v Carroll (1958) 98 CLR 310
Facts	<ul style="list-style-type: none"> Contractual dispute between Carroll and Laurie re profits from Australian tour by ballerina. 13 June - Laurie acted on advice of solicitor to "get out of Victoria and back to NSW as quickly as possible". 14 June – Originating process issued in Vic court. 20 June – Laurie left NSW to London. 21 June – Order that originating process be served by substituted service on defendant's solicitor in Victoria.
Issue	<ul style="list-style-type: none"> Whether Vic court had basis to make order for substituted service re amenability of defendant to Vic jurisdiction.
Held	<ul style="list-style-type: none"> As defendant had left Vic before the issue of the originating process – not amenable to Vic court jurisdiction.
Reasoning	<ul style="list-style-type: none"> It is critical that the defendant be in the jurisdiction <u>at the time</u> of the service (personal or substituted) of the writ. <ul style="list-style-type: none"> Applies even if defendant knows of the writ and leaves the jurisdiction for purpose of evading the writ. Applies notwithstanding how temporary his presence may be. Limited exception – defendant enticed there fraudulently for purpose of being served writ.
NB	<ul style="list-style-type: none"> Affirmed in <i>Joye v Sheahan</i> (1996) that: <ul style="list-style-type: none"> Presence in jurisdiction at time of issue of writ is necessary (but not necessarily sufficient) element before substituted service Mere presence, without more, at time of issue is insufficient.

2.1.3. Personal Service Rules

- a) Originating process in courts requiring personal service: [UCPR r 10.20(2)(a)]
- Supreme Court, District Court, Industrial Relations Commission, LEC or Dust Diseases Tribunal.
- b) Effecting personal service:
- Leaving copy of document with the person; [UCPR r 10.21(1)]
 - If the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document; [UCPR r 10.21(1)]
 - If, by violence or threat, a person attempting service is prevented from approaching the person to be served – personal service by delivering document to the person as near as practicable. [UCPR r 10.21(2)]

2.1.4. Substituted Service Rules (regarded as personal service)

- a) Circumstances for substituted service: [UCPR r 10.14(1)]
- If document to be served cannot practically be served on the person; or
 - Document cannot be practically served in accordance with the law.
- b) Effecting substituted service:
- Court will order certain steps to be taken [UCPR r 10.14(1)]
 - If steps taken, otherwise than in accordance with court orders, to bring the document to the person's notice – court may order that the document has been personally served [UCPR r 10.14(3)]

2.1.5. Corporations

- a) Effecting service to corporation:
- Personally serving document on a principal officer of the corporation [UCPR r 10.22(a)]
 - 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)]
 - Leaving or posting to company's registered office [s 109X(1) *Corporations Act*]
 - Personally delivering to director who resides in Australia [s 109X(2) *Corporations Act*]
 - In the case of registered foreign corporation, leaving it at or by sending post to address of local agent [s 601CX *Corporations Act*]
- b) Is the foreign corporation permitted to carry on business in this jurisdiction?
- Registered, or applied to be registered, under *Corporations Act*
- c) Does the corporation carry on business in Australia or a State or Territory? [s 21 *Corporations Act*]
- If it has a place of business in Australia or State or Territory [s 21(1) *Corporations Act*]
 - **Common law** examples of carrying on business: [*NCB v Wimborne* (1979)]
 - Must be carrying on business through an agent with authority to make binding contracts with persons in NSW.
 - Business must be carried on at some fixed and definite place
 - Business must have continued for a sufficiently substantial period.
 - **Statutory** examples of carrying on business:
 - Offering debentures in the jurisdiction [s 601CD(2)(a) *Corporations Act*]

- Guarantor body for debentures in the jurisdiction [s 601CD(2)(b) *Corporations Act*]
- Share transfer office in Australia [s 21(2)(a) *Corporations Act*]
- 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) *Corporations Act*]
- Non-carrying on of business:
 - Party to proceedings or effect settlement
 - Holds meetings of directors or shareholders re internal affairs
 - Maintains bank account
 - Effects sale through independent contractor
 - Conducts isolated transaction completed within 31 days, not being a number of similar transactions repeated from time to time.
 - Invests its funds or holds any property.

Case Name	National Commercial Bank v Wimborne (1979) 11 NSWLR 156
Facts	<ul style="list-style-type: none"> ● NCB was corporation established under Saudi Arabian law. ● NCB had no branch office, agency or place of business in NSW. ● NCB had arrangement with NSW bank which involved bank collecting proceeds from NSW importers and remitting proceeds to NCB in Saudi Arabia.
Issue	<ul style="list-style-type: none"> ● 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.
Held	<ul style="list-style-type: none"> ● No, NCB was not carrying on business in NSW. Claim stuck out as NCB was not present in NSW for purpose of jurisdiction. ● Test for whether corporation is present – Whether corporation carries on its business within the territory of NSW.
Reasoning	<ul style="list-style-type: none"> ● Indicia of carrying on business: <ul style="list-style-type: none"> ○ Must be carrying on business through an agent with authority to make binding contracts with persons in NSW. ○ Business must be carried on at some fixed and definite place ○ Business must have continued for a sufficiently substantial period.
NB	<ul style="list-style-type: none"> ● Presence not established by appointing solicitor to commence or defend particular legal proceedings in the jurisdiction.

2.2. Jurisdiction based on Defendant's submission to the jurisdiction

2.2.1. Overview

- a) Defendant can submit to court's jurisdiction through agreement by:
- Express agreement [UCPR r 10.6]
 - Authorising lawyers to accept process [UCPR r 10.13]
 - Parties may agree verbally or in writing to the manner of service [*Howard v Bank of NZ (2002)*]
 - Parties may agree through conduct i.e. Appearance

2.2.2. Submission by agreement (voluntary submission)

- a) Express agreement [UCPR r 10.6]
 - Parties agree to the exclusive jurisdiction of the courts of NSW
- b) Authorising lawyers to accept process [UCPR r 10.13]
 - i.e. Party A appoints for the purpose of service of process [name of law firm].
- c) Parties may agree verbally or in writing to the manner of service [*Howard v Bank of NZ* (2002)]
- d) NB: Originating process may be served outside Australia if the proceedings are those that the person has submitted or agreed to submit to the jurisdiction of the court. [UCPR r 11.2 and Schedule 6(h)]

Case Name	Howard v National Bank of New Zealand Ltd (2002) 121 FCR 366
Facts	<ul style="list-style-type: none"> • Service of originating process outside jurisdiction. • Respondents in NZ; solicitors also in NZ • Instructions by respondents to accept service in NZ • Service outside jurisdiction within Federal Court Rules
Issue	<ul style="list-style-type: none"> • Whether service sufficient
Held	<ul style="list-style-type: none"> • Service pursuant to verbal or written agreement is sufficient.

2.2.3. Submission by Appearance (by conduct)

- a) Parties may agree by conduct
 - Parties may protest the power to serve however note that going beyond this runs the risk of the court saying that the party submitted to the jurisdiction of the court. [*Garsec v Sultan of Brunei* (2008)]
- b) Test: Party has waived objection to jurisdiction where the party's acts in court proceedings are inconsistent with maintaining the objection. [*Vertzyas v Singapore Airlines* (2000)]
 - Contesting the merits of the case is inconsistent with maintaining objection [*Garsec v Sultan of Brunei* (2008); *Vertzyas v Singapore Airlines* (2000)]
 - Only actions in court proceedings are relevant to this test. [*NCB v Wimborne* (1979)]
- c) Submission to jurisdiction to one matter also extends to different causes of action that arise from the same subject matter. [*Marlborough Harbour Board v Charter Travel* (1989)]
- d) Note also that parties may turn up without filing Appearance [UCPR r 12.11]

Case Name	Vertzyas v Singapore Airlines (2000) 50 NSWLR 1
Facts	<ul style="list-style-type: none"> • Flight from Sydney to Singapore. • Plane encountered turbulence and passenger was injured. • Charter disputed jurisdiction of the NSW court and <u>also contested the merits</u> by: <ul style="list-style-type: none"> ○ Asking for particulars; and ○ Asking passenger to submit to medical examination.

Issue	<ul style="list-style-type: none"> Whether charter submitted to NSW court's jurisdiction.
Held	<ul style="list-style-type: none"> Yes, submitted to jurisdiction. The test for whether party has waived objection to jurisdiction is <u>whether the party's acts in the court proceedings are inconsistent with maintaining the objection.</u>
Reasoning	<ul style="list-style-type: none"> 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.
NB	<ul style="list-style-type: none"> Attempting to contest jurisdiction and merits issues at the same time guarantees loss of the jurisdiction objection.

Case Name	Garsec v Sultan of Brunei (2008) NSWCA 211
Facts	<ul style="list-style-type: none"> Commercial dispute re purchase of miniature Quran. Sultan submitted appearance; turned up to argue that the court has no jurisdiction. Sultan also took steps <u>relating to the merits of the case</u> despite legal advice re preserving jurisdiction.
Issue	<ul style="list-style-type: none"> Whether Sultan may withdraw Appearance and go to another court.
Held	<ul style="list-style-type: none"> No, cannot withdraw Appearance and go to another court.
Reasoning	<ul style="list-style-type: none"> Contesting the merits of the case was a significant factor.

Case Name	Marlborough Harbour Board v Charter Travel Co (1989) 18 NSWLR 223
Facts	<ul style="list-style-type: none"> Ship sank off NZ; surviving passengers sued owner of ship and the travel agent (Respondents) in negligence. Respondents initiated cross-claim against Marlborough Harbour Board and the captain re indemnity for passengers' claim (Indemnity Claim). Cross-claim extended to the loss of the ship itself (Ship Claim). Marlborough submitted to NSW court jurisdiction re Indemnity Claim but contested jurisdiction re Ship Claim.
Issue	<ul style="list-style-type: none"> Whether Marlborough also submitted to jurisdiction of NSW court re Ship Claim by submitting re Indemnity Claim.
Held	<ul style="list-style-type: none"> Yes, submission to jurisdiction to one matter also <u>extends to different causes of action that arise from the same subject matter.</u>
Reasoning	<ul style="list-style-type: none"> 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.

Case Name	National Commercial Bank v Wimborne (1979) 11 NSWLR 156
Facts	<ul style="list-style-type: none"> Letters by solicitors re intention to proceed in court.
Issue	<ul style="list-style-type: none"> Whether that conduct constituted submission to court's jurisdiction.
Held	<ul style="list-style-type: none"> No, in determining whether conduct constitutes submission to a court's jurisdiction – regard only to what happens in court proceedings.

2.2.4. Objection to jurisdiction

- a) Defendant can object to jurisdiction by applying for court order via notice of motion: [UCPR r 12.11]
- Without filing an Appearance [UCPR r 12.11(3)(a)]
 - The court order will be in the nature of setting aside the originating process or service.

<p>Service within Australia?</p>	<ul style="list-style-type: none"> • Initiating process may be served in any part of Australia [s 15(1) <i>Service and Execution of Process Act</i>] <ul style="list-style-type: none"> ○ Individuals - service in the same manner as that process is served in the place of issue [s 15(2) <i>SEPS</i>] ○ Registered corporations - service in similar manner to UCPR and Corporations Act [s 9 <i>SEPS</i>] ○ Unregistered corporations – service in manner prescribed by law of state or territory where service is to be effected or by leaving the process at, or mailing it to, that body’s principal office or place of business. [s 10(1) <i>SEPS</i>] • Service of process under Service and Execution of Process Act 1992 has the same effect and may give rise to the same proceedings. [s 12 <i>SEPS</i>]
<p>Service outside Australia</p>	<ul style="list-style-type: none"> • <u>Serving outside Australia</u> <ul style="list-style-type: none"> ○ No prior leave required in NSW; different for other States (i.e. WA) ○ Once served in accordance with method of service (see 2.5.4. below), further hearing where plaintiff seeks leave [UCPR r 11.4] and defendant challenges jurisdiction (without filing Appearance) [UCPR 11.7, 12.11] • <u>Plaintiff to prove claim falls within UCPR r 11.2 and Schedule 6</u> <ul style="list-style-type: none"> ○ Cause of action arises in NSW – where the action giving rise to the cause of action occurred [<i>Distillers</i>; Schedule 6(a)] ○ Breach of contract in NSW [Schedule 6(b)] ○ Contract made in NSW [Schedule 6 (c)(i)] ○ Agreement to NSW jurisdiction [Schedule 6(c)(ii)] ○ Domiciled or ordinarily resident in NSW? [Schedule 6(g) UCPR] ○ Cause of action arising in NSW? [Schedule 6(a) UCPR] ○ Specific rules re contract? [Schedule 6(b) and 6(c)] ○ Specific rules re torts? [Schedule 6(d) and 6(e)] ○ Other rules in Schedule 6? ○ NB: Schedule 6(w) provides that proceedings that fall partly within one or more of the paragraphs re originating process will fall under Schedule 6 – <u>partial claims possible.</u>

2.3. Service elsewhere in Australia

- a) Initiating process may be served in any part of Australia [s 15(1) *Service and Execution of Process Act*]
- Individuals - service in the same manner as that process is served in the place of issue [s 15(2) *SEPS*]