

PERSONAL JURISDICTION

Is the defendant subject to the power or authority of the Supreme Court of NSW?

COMMON LAW

- **Is the defendant present within the territory of the court?**
 - **Individuals:**
 - Common law jurisdiction is clearly established if the defendant is served with the originating process while present in the forum – *Gosper v Sawyer*
 - If the D leaves NSW before the originating process is commenced, then they are not subject to the jurisdiction of the NSWSC – *Laurie v Carroll*
 - If a D who was present in the forum at the time the originating process is issued but departed from the forum before the service of the originating process is not subject to the common law jurisdiction of the NSWSC unless they know of the issue of the originating process or departed the forum with the knowledge and intent to evade service of the originating process – *Joy v Sheahan*
 - Even the fleeting and transient presence of the D in the forum at the time of service of the originating process is sufficient to establish common law jurisdiction even though the defendant and subject matter of the proceedings have no connection with the forum – *Maharane of Baroda v Wilderstein*
 - **Corporations:**
 - A corporation will be present in the forum if it carries on business in the forum and must carry it on at a fixed and definite place for a substantial period – *National Consumer Bank v Winbourne*
- **Has the defendant voluntarily submitted to NSW jurisdiction?**
 - Has the D taken a step of willingness to be bound?
 - Filing an unconditional appearance in proceedings – *Paramasivam v Sabanathan*
 - Express agreement to submit to the court's jurisdiction – *Dunbee v Gilman*
 - Arguing merits of the case without filing an appearance – *The Messiniaki v Tolmi*
 - Filing an appearance in proceedings is treated as voluntary submission to any amendment of original claim which is grounded on/directly arises out of the same subject matter as the original claim as well as jurisdiction of courts with respect to D's cross claims – *Marlborough Harbour Board*
 - Submission of a cross claim – *Malborough Habour Board*
 - These acts do not constitute voluntary submission:
 - Agreement that the law of a particular country is the proper law of the contract
 - Objection to jurisdiction of NSWSC in accordance with UCPR (NSW) R 12.11
- **Has there been an objection to jurisdiction?**
 - Considering a foreign defendant, if they make an objection, that does not constitute a submission – *Part 11 Rule 12 UCPR*
 - Make sure you draw a distinction to the kinds of objection:
 - There is an objection to the existence of jurisdiction – this means there is no submission, no legal basis for the assertion of jurisdiction
 - Objection to the exercise of jurisdiction – recognition that the forum does have jurisdiction over the defendant but asks the court to reject the jurisdiction – this does constitute as a submission to jurisdiction
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SERVICE OUT OF THE JURISDICTION – AKA EXTRA TERRITORIAL JURISDICTION

- **Service within Australia**
 - **S15(1 Service and Execution of Process Act 1992 (Cth)**
 - An originating process issued in a State may be served in another State
 - **McEntee v Connor** – here the D in WA was subject to the jurisdiction of Tasmania
 - The Act extends the personal jurisdiction of all state and territory courts to the whole of Australia and its external territories
- **Service in NZ**
 - **S9(1) of the Trans Tasman Proceedings Act 2010** - An initiating document issued by an Australian court or tribunal that relates to the proceeding may be served in New Zealand under this Part.
 - the originating process of any Australian court, may be served on a D in New Zealand and there is no requirement of any nexus with any Australian state or territory
- **Service outside Australia and New Zealand**
 - Part 11 UCPR Rules 2005 – Only the SC has jurisdiction
 - Prior leave of the court is not required under the circumstances of Rule 11.4 (Sch 6)
 - If the D does not appear, the P cannot proceed except with leave from the court- the plaintiff will have to prove that one of the paragraphs in Schedule 6 apply – **Agar v Hyde**
 - The D can object to the exercise/existence of jurisdiction by demonstrating that service under Part 11 6(2)(a) is not demonstrated or forum non conveniens
 - The SC can also dismiss proceedings if the P's claim has insufficient prospects of success – 6(2)(c)
 - If the claim does not fall within one of the Sch 6 paragraphs, the court can grant leave if they are satisfied that: Rule 11.5(5)
 - The claim has a real and substantial connection with Australia
 - Australia is an appropriate forum for the trial
 - in all circumstances, the court should assume jurisdiction
 - the court may order substituted service if personal service is impracticable – Part 11 – **ASIC v Sweeney**

Bases for service of originating process in contract cases

- **Schedule 6 Rule 11.4 – UCPR Rules 2004**
 - (c) - Originating process can be served outside of Australia if the place of breach of the contract was Australia
 - (b)(i) - if the contract was made in Australia
 - (b)(ii) - If the contract was made on behalf of the defendant by or through an agent trading or residing in Australia
 - (b)(iii) – if the contract was to be wholly or in part performed in Australia
 - (b)(iv) – if Australian law is the governing law of the contract or the contract by its terms or by implication is to be enforceable or cognisable in an Australian court
- **Determining place of breach – (Breach committed in Australia)**
 - the place of breach will depend on the precise nature and stipulated place of performance of the contractual obligation – **Lewis Construction Co v M Tichauer**
 - if the repudiation takes the form of words over the telephone, the place of repudiation and breach is the place in which the repudiatory statement originated – **Safran v Chani (Sugerman P)**

Contract

- **Is the contract made/to be performed in Australia or be governed by Australian law?**

- Determined with reference to the place of the last Act necessary to create a binding consideration - communication of the acceptance to the offeror
- Acceptance of a fax sent in NZ and received in NSW, acceptance occurred in NSW therefore the contract is made in Australia – *Reese Bros*
- in relation to telex and fax transmissions which are near instantaneous methods of communication, the contract is made where the acceptance is received – *Dyer v Dyno Nobel*
- Where the postal acceptance rule applies, i.e where the parties contemplated that acceptance may be communicated by post, then *acceptance is communicated and the contract is made at the time and place the letter of acceptance is posted* – *Lewis Construction v M Tichauer*
- A contract will be governed by Australian law if it has an express choice or inferred choice of NSW law or if NSW has the closest and most real connection to the contract
- **Is it a contract made by or through an agent in Australia?**
 - A contract may be made through an agent trading or residing in Australia even though the agent does not have the authority to bind the foreign principle – *National Mortgage v Gosselin*

Tort

- **Is the tort committed or the tort damage suffered in Australia?**
 - **Schedule 6 Part A** – originating process may be served outside of Australia if the tort was committed wholly or partly in Australia or the plaintiff suffered some tort damage in Australia
 - a tort will be committed in NSW if that was where the place of the act or omission on the part of the defendant which gives the plaintiff his or her cause of complaint in law or where “in substance the wrongdoing occurred – *Distillers*
 - workers compensation case re P suffering PI when he fell through the hole in the deck of ship in VIC but the deck was manufactured in NY, tort was committed in NY – *Buttergeig v Universal Terminal*
 - the tort of misrepresentation was committed in the place where the miscommunication is received – *Diamond and Bank of London*
 - the tort of defamation, a defamatory article placed on the internet is published in the place where the article is downloaded = this is the place where the tort is committed – *Dow Jones v Gutnick*

Discretionary non exercise of jurisdiction

- once you have established that there is a basis for jurisdiction, the next step is to consider whether there is a discretionary ground upon which the court may decline to exercise their jurisdiction
 - foreign jurisdiction clause OR forum non conveniens

Foreign jurisdiction clause

- **Is there an agreement on an exclusive foreign jurisdiction clause?**
 - Whether a jurisdiction clause in a contract is an exclusive jurisdiction clause is dependent on the construction of the contract – *FAI Insurance v Ocean Marine* – note that the word ‘exclusive is not essential’
 - A foreign jurisdiction clause is non exclusive where the parties agree that a particular court or the courts of a particular country is competent in the event of litigation but not exclusively so
- **What are the matters the court will take into account when exercising discretion?**
 - The onus is on the plaintiff to prove why a NSW court can hear this case when it is in breach of a foreign jurisdiction clause, why is it just and proper for the plaintiff to continue in NSW in breach of the exclusive jurisdiction clause
 - Factors to take into consideration:- *Brandon J in Eleftheria*
 - what country the evidence on the issues of fact is situated, or more readily available and the effect of that on the convenience and expense of a trial in the forum or foreign court

- does foreign law apply? Does it differ from the lex fori
- what country either party is connected to and how closely

SUBSTANCE AND PROCEDURE

Distinguishing between the substantial and procedural aspects of a claim:

- *All matters of procedure are governed by the lex fori*
- *all matters of substance are governed by the lex causae*

What is the rationale of the distinction and characterisation?

- Procedural issues: mode or conduct of court proceedings – e.g. kind of process which may be used to initiate proceedings, rules which govern pleading and admissibility of evidence and form of remedy – *Lumley, Phrantzes, Slater v Mexican Railway*
- Substantive issues: existence, extent or enforceability of rights or duties of parties to the action – *John Pfeiffer*

Is it a substantive or procedural law? Which legal system determines whether a particular law is substantive or procedural?

- Characterisation of a law as either substantive or procedural is governed by the lex fori – e.g. Whether a Chinese statute is substantive or procedural will be determined in NSW with reference to the NSW regarding substance and procedure
- Whether a SA law was substantive or procedural was to be determined by reference to the Victorian law as the lex fori – *Nalpanidis v Stark*
 - This was reaffirmed in *Hamilton v Merk* whereby the two provisions in question were so obviously connected with the mode or conduct of court proceedings that they had to be considered as procedural
- a provision will be determined to be procedural if it is to do with the mode or conduct of court proceedings – *Wickham Freight Lines*

Form of remedy

- form of remedy is considered to be a matter of procedure and is governed by the lex fori
- only remedies available in respect of a foreign legal right are recognised by the lex fori – *Lumley v Wagner*
- where there is no foreign legal right for which there is no remedy under the lex fori, there is no means for the forum to enforce the legal right – *Phrantzes v Argenti*
- if the remedy awarded under the forum changed the nature of the legal right in foreign law, then it cannot be granted – *Slater v Mexican National Railway*