

LAWS2018

Conflict of Laws

Finals: Scaffold

Question 2: Personal Jurisdiction to Anti-Suit Injunctions

Question 3: Enforcement to Exclusionary Doctrines

Note: you may have to highlight WHERE proof of foreign law is required, but need to analyse it

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PERSONAL JURISDICTION

- ☐ Common Law Jurisdiction (Service Within NSW)
 - ☐ Was the defendant present in the jurisdiction at the time of service?
 - ☐ Person
 - ☐ Corporation
 - ☐ Has service been effective?
 - ☐ Has the defendant submitted to the jurisdiction?
- ☐ Service outside NSW, but Within Australia
- ☐ Service in NZ
- ☐ Service in Foreign Country
- ☐ FINAL WAY TO GET JURISDICTION OVERSEAS: LONG ARM STATUTORY PROVISIONS

Does the court have jurisdiction to hear and determine the dispute?

Jurisdiction: Common Law

[To establish jurisdiction you require presence or submission to jurisdiction]

The reason personal jurisdiction exists is because you submit to the laws of a particular country when you are there. It's not about whether we can physically reach the person. It's about the fact that them being present (or submitting to the jurisdiction) shows that they are subject to our courts of law.

[1a] Was the defendant present in the jurisdiction at the time of service?

NB: NSWSC - requires presence in NSW, FCA/HC requires presence in Australia

At Common Law, the court has jurisdiction if the defendant is present in the forum at the time of service
Gosper; Laurie

[a] Individuals

[Present at time of service]

- (1) As [defendant] was present when the statement of claim was served, the NSWSC will have jurisdiction,
Laurie
- (2) **How long was the defendant there?**
 - (a) Their **length of time** in the jurisdiction is irrelevant *Laurie*
 - (i) Does not matter how 'temporary his presence' or 'how fleeting the visit' *Laurie*
 - (ii) Transiting through the forum is sufficient *Sapphire Group*
 - (iii) Fine when someone just popped into the horse races briefly *HRH Maharanee*
 - (iv) In the USA it was accepted that, service could be effective when over the airspace of a state, granting jurisdiction *Macarthur (US Case)* however, unlikely to be followed in Australia *Joyce; Mortensen [2.8]*
- (3) **Why was the defendant there?**
 - (a) The **purpose** for the defendant's presence is irrelevant *Laurie v Carroll*

DISCRETION: NON-EXERCISE OF JURISDICTION - FOREIGN JURISDICTION CLAUSES

- ☐ International Cases Foreign Exclusive Jurisdiction Clauses (EJC)
 - ☐ Has a jurisdiction clause been incorporated into the contract?
 - ☐ Is the jurisdiction clause exclusive?
 - ☐ Is the dispute within the scope of the EJC?
 - ☐ Should the court exercise discretion to stay proceedings?
 - ☐ What is the result?
- ☐ New Zealand and Australian Choice of Law Agreements (CLA)
 - ☐ Is there a choice of law agreement in favour of NZ or Australia?
 - ☐ What is the result?
- ☐ Res Judicata and Avoiding Conflicting Judgments - has there already been a determination
 - ☐ Res Judicata (cause of action)
 - ☐ Issue Estoppel
 - ☐ Anshun Estoppel

*Although the court has jurisdiction, the defendant can apply for a stay on grounds that the parties agreed to the exclusive jurisdiction of a foreign forum as the court has discretion over whether to hear the matter or not **Karpik**.*

International Cases

[1] Has the FJC been incorporated into the agreement? **Oceanic**

- (1) The foreign jurisdiction clause must be incorporated into the contract, a question determined under the lex fori (forum not the proper law of the contract) **Oceanic; Venter**
- (2) If the term is contained on a website by clicking on hyperlinks, they are treated as part of the agreement **Karpik; Gonzalez**

In **Oceanic** the parties were not bound by a EJC as it was not incorporated into the contract as the EJC was printed on a ticket after the formation of the contract.

[2] Is it an **exclusive** jurisdiction clause? **Akai** (PLK)

Note: difference to COL clause

- (1) Whether the jurisdiction clause is exclusive is a matter of construction, considering the words, circumstances, subject matter governed by the PLK **FAI General Insurance; Akai**
 - (a) In **FAI** it was held that “This Reinsurance is subject to English Jurisdiction, Choice of Law: English” was exclusive.

Considerations

- (b) Using the term ‘exclusive’ is not mandatory, but it is a strong indicator **FAI**
 - (i) If they usually use exclusive, but then don’t this is an indicator that it is not **ACE Insurance**

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (COMMON LAW)

- ☐ Recognition and enforcement of foreign judgments (common law)
 - ☐ General Statement
 - ☐ Did the foreign court exercise jurisdiction in the international sense
 - ☐ Presence
 - ☐ Submission (agreement or conduct)
 - ☐ Property
 - ☐ Nationality
 - ☐ Is the foreign judgment final and conclusive
 - ☐ Is the foreign judgment for a fixed (definite) sum of money?
 - ☐ Are the parties to the foreign proceedings identical to the parties in the enforcement proceedings?
- ☐ Defences
 - ☐ Judgment obtained by fraud
 - ☐ Public Policy
 - ☐ Standard
 - ☐ Violation of fundamental principles of justice or morality
 - ☐ Gross violation of human rights
 - ☐ Violation of International Law
 - ☐ Denial of Natural Justice
 - ☐ Revenue Judgment
 - ☐ Penal Judgment
 - ☐ Denial of Natural Justice
 - ☐ Anti-Trust Judgments
 - ☐ Intra-state (see later scaffold)

WHERE DO I GO?

State/Territory → see statute intra-Australia

NZ → see statute TTPA one

[IMPORTANT] Is it a court in FJA schedule → see statute

None of the above → common law

Recognition and enforcement at common law (go to sample responses)

Recognition of Foreign Judgment

To be recognised, the foreign court must have international jurisdiction, the judgment must be final and conclusive, for a fixed sum and the parties identical *Prider* the forum court must also be able to exercise jurisdiction over the judgment debtor.

[1] Is there Jurisdiction in the international sense

- (1) The foreign court must have exercised jurisdiction in the international sense, in the circumstances that would establish jurisdiction according to forum's common law principles *Buchanan* this is can be

established through (1) presence, *Lucasfilms* (2) voluntary submission, *Telesto*, (3) property in the foreign country, *Pacific Star* or (3) (potentially) nationality *Morris*

- (a) The foreign courts rules are irrelevant *Buchanan* in this case, service was effective in Tobago (nailing SoC to door), but it would not be effective under the forums law, therefore jurisdiction not established in international sense

[A] [Presence] Was the debtor present in the jurisdictional area at the time of service? *Laurie*

Individuals

- (1) [debtor] was within the jurisdictional area when the SoC was served, therefore the foreign court would have jurisdiction *Arnot* in the international sense even if the debtor left after service *Razelos*
 - (a) The length of presence in the jurisdiction is irrelevant, *Laurie* and includes transiting through the forum *Sapphire Group* the purpose is also generally irrelevant *Baldry*

[Fraudulently Induced]

- (b) **HOWEVER**, the defendant must not have been fraudulently induced to enter the jurisdiction for service *Arnot*
 - (i) but if the person would have gone without the fraud, jurisdiction still established *Arnot*

[Did the person leave before service?]

- (c) Where a person has left before being served, jurisdiction is generally not established unless
 - (i) They left the jurisdiction to evade service? *Laurie; Mobil Oil; Joyce*
 - (ii) They were aware the originating process had been issued before leaving? *Laurie; Mobil Oil; Joyce*

Corporations

- (2) As [debtor] is a company, they will be present in the jurisdiction of they conduct business in the forum *Wimborne; Adams*
 - (a) This requires that they
 - (i) Carry on business in a definite or fixed place; or
 - (ii) Where they have an agent in the country who conducts business of the corporate exclusively with authority to bind contracts onto 3rd parties *Adams*
 - (1) **[Subsidiary]** A company is not present through a 'wholly owned subsidy' **UNLESS**, it is a agent in the absence sense *Adams*

[conducting business online?]

- (b) Where the defendant is conducting business online (or advertising), this is not enough to establish jurisdiction *Lucasfilm*

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