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Week 1 – Introduction to International Commercial Law

Introduction

Features of International Commercial Law

- Most international business is contract-based.
- Key concepts:
 - Party autonomy – parties can choose which law governs their contract.
 - Privity of contract – only parties to the contract have rights and obligations under it.
- Contracts are central because they define the rules before disputes arise.

The issues relevant to 'go international'

- Desirability of a bigger market, global market
- More commercial opportunities – recruit international experts
- Technology, experience
- Costs and profits, 'competitive advantage'
- Risk allocation
- Utilising the resources of the market

It is limiting to not diversify and to only be operating in the local/domestic market.

Practical issues arising from international dealings

- Languages, distance, risks and uncertainties, cultural background, expectations...

Legal issues arising from international dealings

- Foreign law, unfamiliar judicial system, foreign government measures, commitments **between States, legal representation...**

Key to note regarding international commercial law:

- The application of Australian law cannot be assumed in the transaction/case
- It is not always the case that an Australian court is going to hear your case, a different court in a different country may be required to hear the case
- The common law tradition, such as the doctrine of precedent, no longer exists in the international context
- The sources of law are no longer limited to parliament-made law and cases
- You may not simply rely on the service of a local lawyer
- The risk and uncertainties associated with the above changes 'transaction cost'

The need for International Commercial Law (ICL):

- Provide a set of rules for the determination of the key matters, eg., what law applies, which court to bring a claim, how to enforce the outcome overseas

- Provide unified rules on the substantive matters to establish common grounds and reduce the transaction cost
- Facilitate the reaching of agreements between States and between private parties
- Provide a checklist for parties in negotiation

Why Domestic Law Doesn't Automatically Apply Internationally

- In Australia, laws bind domestic transactions because citizens consent to Parliament's authority through democracy.
- This rationale doesn't hold for international transactions involving foreign parties who aren't bound by Australian law or courts.
- Therefore, in cross-border dealings, we must determine which law applies — this is a key challenge of international transactions.
- States may also be involved (e.g. import/export controls or direct state participation).
- Hence, a distinct legal framework — international commercial law — is required.

Public vs Private International Law

2 types of parties(entities): private parties and States

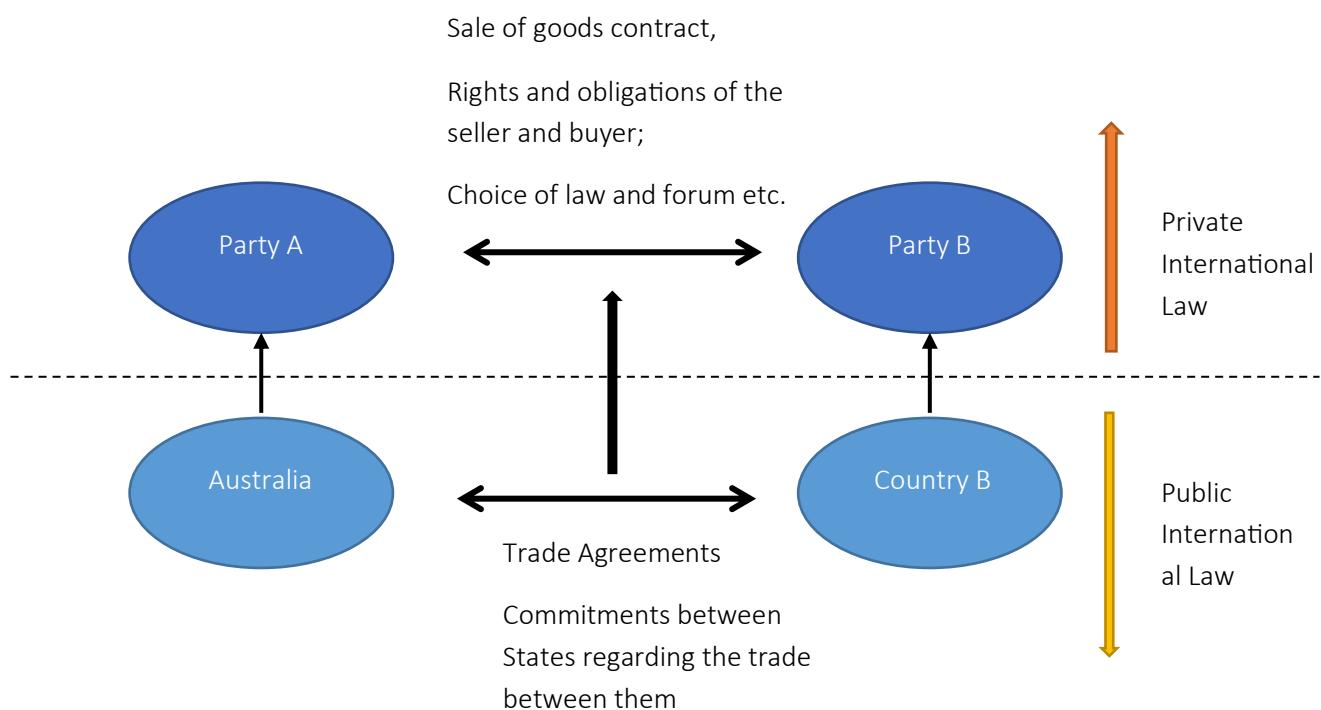
- There are transactions between **private parties**
- There are roles of the **States** as well, such as making State-level decisions, providing supervisions, making deals between States that affect private transactions
- There are even disputes between States, or between States and private parties

Type	Governs	Example	Scope
Public International Law	Relationships between States	Australia–Korea FTA. Territorial disputes; war related issues; signing conventions and treaties; States' obligations to citizens...	Treaties, state rights & duties. Deals with the legal rights and obligations of States or between States ; go beyond the law of one State
Private International Law	Relationships between private parties across borders	ICC Incoterms 2010	Contracts, trade, dispute rules. Private international law: dealing with private parties' rights and obligations in the international context Broad meaning: any law dealing with private parties' rights and obligations in the international context. Narrow meaning: equivalent to 'conflict of laws', dealing with the issues such as the

			choice of law, choice of forum, enforcement of foreign judgments.
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International Commercial Law combines both:

- Public law governs how States join conventions (e.g. CISG).
- Private law governs the actual contracts between businesses (e.g. CISG applies to international sales of goods).



Sources of International Commercial Law

International commercial law draws from multiple sources, including:

1. International treaties & conventions

- International treaties- agreements among States. States reach/join treaties (at international level) and recognize them (at domestic level)
- State's obligation to apply/implement the treaties
- *Examples:*
 - *Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention)*
 - *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the 1967 Outer Space Treaty)*
 - *The Energy Charter Treaty (1994)*
 - *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*

- **Interpretation of Treaties:**
 - Governed by the Vienna Convention on the Law of Treaties 1969 (deems how to make treaties).
 - Art 27: A State cannot use its domestic law to justify failing to perform a treaty.
 - Arts 31–33: Provide interpretation rules (good faith, context, purpose, etc.).

2. Customary international law
3. Domestic legislation
4. Standard contract terms (e.g. Incoterms)
5. Case law – domestic & international tribunals
6. Model laws (e.g. UNCITRAL)
7. Industry practices, equity & fairness principles (*lex mercatoria*)

Conflict of Laws (Private International Law)

Meaning: 'Conflict of laws' = rules for which law and which court apply in cross-border disputes. Still part of domestic law (e.g. Australia has its own conflict of laws rules).

- Issues arising from the international nature of the transactions and disputes between private parties
- Usually domestic law, not international law. Each country has its own domestic conflict law.
- Does not deal with the substantive rights and obligations of the parties. It will not tell parties if it has breached contracts and what remedies are available.

Public International Law	Private International Law
Treaties.	National law.
Customary international law.	Model law given force as national law.
General principles of law.	Treaties and customary law applicable to private disputes.
Court decisions.	Standard contract clauses.
Scholarly commentary	Court decisions. Scholarly commentary

Two main roles of courts:

1. To adjudicate the dispute; and
2. To enforce a foreign judicial or arbitral award.

- Courts must first determine if they have jurisdiction, then interpret conflict-of-laws rules to identify the governing law.
- This process relies on domestic law, international conventions, and customs to ensure judgments are enforceable.
- Example: *Supermicro Computer Inc v Digitechnic SA* — the US court declined jurisdiction to avoid conflicting decisions with the French court, illustrating judicial restraint to prevent duplicative litigation.

Choice of Law

Key Issues:

1. *Choice of court/forum – Which court can hear the dispute?*
2. *Choice of law – Which country's law applies?*
3. Recognition/enforcement – Will a judgment be accepted in another country?

Example:

Sale of beef: Australian company ↔ Japanese company

- Which law applies — Australian or Japanese?
- Which court has jurisdiction?
- How to enforce a judgment?

Conflict of laws determines which legal system governs cross-border disputes.

- **It impacts:**
 - Substantive rights of parties (e.g. under contract or tort law), and
 - Procedural matters like jurisdiction and enforcement.
- **Terminology overlap:**
 - “Conflict of laws,” “private international law,” and “choice of law” often overlap but focus on different aspects.
- **Purpose:** to provide fairness, predictability, and uniform treatment of cross-border disputes.
- **Conceptual distinction:**
 - Substantive law – governs rights and duties of parties.
 - Procedural law – governs litigation and enforcement processes.
- **Codification:** ensures equal procedural and substantive protection to all parties, regardless of jurisdiction.
- **Difficulties:** no universal definition or uniformity across jurisdictions.
 - Nygh: conflict of laws arises from interactions between different legal systems.
 - Castel: defines it as a “technique” enabling courts to reach a solution by applying the domestic law most closely connected to the dispute.

Statute of the International Court of Justice, art 38

Court's function is to decide on disputes submitted in accordance with international law

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
- **international custom**, as evidence of a general practice accepted as law;
- **the general principles of law** recognized by civilized nations;
- subject to the provisions of Article 59, **judicial decisions and the teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

How to solve a conflict of law issue- eg., how to determine the applicable law?- Steps to Determine Applicable Law:

1. Characterise the issue – Is it contractual, tort, etc.?
2. Identify connecting factors – E.g. place of contract, place of performance, nationality of parties.
3. Apply relevant conflict rules – These rules point to which law governs.
4. Be aware of *renvoi* – when foreign law refers the matter back to another jurisdiction (creates uncertainty).

Case Name	Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; [1988] HCA 32
Area of Law	Private International Law – Conflict of Laws – Forum Non Conveniens – Incorporation of Jurisdiction Clauses
Facts	<ul style="list-style-type: none"> • Mr Fay, an Australian resident, booked a cruise in Sydney on the Greek ship <i>SS Oceanic Sun</i>, operated by a Greek company. • The booking was made through a Sydney travel agent who issued a Passenger Ticket Contract. • The ticket (received after payment) contained a clause stating that all disputes “shall be decided in the courts of Athens, Greece” under Greek law. • Fay was injured onboard when a glass door shattered and sued the company in the NSW Supreme Court. • The company argued the case should be heard in Greece due to the jurisdiction clause.
Issues	<ol style="list-style-type: none"> 1. Was the Athens jurisdiction clause part of the contract? 2. Should the Australian court decline jurisdiction or stay proceedings in favour of Greece?
Held	The High Court dismissed the appeal – the case could proceed in New South Wales. The jurisdiction clause was not incorporated into the contract.
Reasoning	<ol style="list-style-type: none"> 1. Incorporation of Terms – The jurisdiction clause appeared on the back of the ticket, issued after payment and contract formation. Fay had no reasonable notice of it before or at the time of contracting. 2. Jurisdiction – Since the clause was not incorporated, the NSW Supreme Court retained jurisdiction. 3. Forum Non Conveniens (Obiter by Deane J) – Introduced the idea that an Australian court should only stay proceedings if it is a “clearly inappropriate forum” (later adopted in <i>Voth v Manildra Flour Mills</i>).
Legal Principles	<ul style="list-style-type: none"> • A term in a ticket is not part of a contract unless the passenger had reasonable notice before or at contracting. • A foreign jurisdiction clause must be clearly incorporated to be binding. • Established the “clearly inappropriate forum” test (Deane J) for declining jurisdiction.
Significance	<ul style="list-style-type: none"> • Clarified when contractual terms in tickets are incorporated. • Key development in Australian forum non conveniens doctrine. • Foundation for <i>Voth v Manildra Flour Mills (1990)</i> and later jurisdictional cases.
Keywords	Jurisdiction clause, incorporation, forum non conveniens, foreign law, private international law

- Purpose: To identify the law that defines the rights and obligations of the parties.
- Courts must ensure:
 1. They have appropriate jurisdiction; and
 2. They apply the correct governing law.
- Tests and examples:
 - In *Bank of India v Gobindram Naraindas Sadhvani (1988)*, the court compared the governing laws of India, Japan, and Hong Kong—showing how connecting factors (e.g. place of contract, performance, or registration) influence the chosen law.

- In *PS Chellaram & Co Ltd v China Ocean Shipping (1989)*, the court upheld the express choice of law clause, rejecting convenience-based arguments.
- General rule: Courts uphold the parties' chosen law unless contrary to public policy or local illegality.

Characterisation and Conflict Rules

- Characterisation = classifying the legal issue (e.g., contract, tort, property) to select the appropriate conflict rule.
- Helps courts apply the correct legal category and relevant connecting factors.
- Mischaracterisation can lead to conflicting results across jurisdictions.
- Key cases:
 - *Oceanic Sun Line v Fay* – characterised as a tort (personal injury).
 - *Voth v Manildra Flour Mills* – characterised as negligent misstatement (tort).
- The process affects both core and subsidiary issues; different judicial characterisations can alter the applicable law.

Terminology:

Term	Meaning	Explanation / Use
Lex domicilii	<i>Law of the domicile</i>	Refers to the law of the place where a person has their permanent home or residence. Often used to determine issues of personal status (e.g. marriage validity, capacity to contract, succession).
Lex causae	<i>Law of the cause (or governing law)</i>	The law chosen or identified by the court as governing the substantive rights and obligations in a dispute. It's the applicable law after applying conflict-of-law rules.
Lex fori	<i>Law of the forum</i>	The law of the court hearing the case. It governs procedural matters, such as rules of evidence, jurisdiction, and remedies.
Lex situs	<i>Law of the place where the property is situated</i>	The law governing rights in property (especially immovable property). For example, disputes over land are governed by the law of where the land is located.
Lex loci	<i>Law of the place</i>	A general term that refers to the law of a particular place relevant to an event. It's often used in combinations like: – Lex loci contractus → law of the place where the contract was made – Lex loci delicti → law of the place where the tort occurred – Lex loci celebrationis → law of the place where the marriage was celebrated.

Lex Domicilii

- Law of a person's permanent home or legal residence.
- Determines personal status (e.g. marriage, capacity).
- Supported by the Brussels and Lugano Conventions — the court where a defendant is domiciled has jurisdiction.
- Distinguish from residence, which may not establish permanent connection.

Lex Causae

- The governing law identified by conflict rules.
- Not predetermined—it results from the court's identification of the most relevant connection between the dispute and a jurisdiction.