

- **Assume:**
 - Foreign law is the proper law
 - Foreign law has been proven
- **Why:** State Sovereignty, prevent another state sovereign from coming in (**Oppenheimer**). Not to enforce the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government (**Heinemann**).
- **What is excluded:**
 1. **Penal laws & Tax laws**
 - **Rule:** An Australian court will not enforce penal laws of another sovereign.
 - **What is penal:** A penal law is one which awards a penalty to the state (or a public officer or member of the public on its behalf) suing in the interests of the community to redress a public wrong. E.g. due execution of a foreign country's public law process. (**USA v Inkley**)
 2. **Governmental interests of foreign states**
 - **Rule:** A claim which enforces interests of a foreign sovereign, which arises from exercise of certain powers peculiar to government, will not be enforced, unless there is clear legislative intention to the contrary (**AG v Heinemann; Spycatcher**). Court will look to the substance and purpose of the claim (**Evans**).
 - E.g. Import and export regulations, exchange control laws, antitrust legislation and security laws
 - **UNENFORCEABLE — Prerogative:**
 - **[National Security hiding under confidentiality claim] – AG (UK) v Heinemann** → Former spy writes book that releases state secrets, cant publish in UK, publish in AU, UK sought injunction. **HELD:** Claim under confidentiality is in reality claim for protection for prerogative of the Crown – being national security → governmental interest. Unenforceable, notwithstanding UK may be a friendly state, unless where legislature says otherwise.
 - **Lower court decision — Spycatcher (1988) 78 ALR 449** → British Government trying to enforce obligation of confidentiality owed by member of secret service. **HELD:** Governmental interest
 - **ENFORCEABLE – Private matter**
 - **ASK:** Whose interest is the claim trying to enforce
 - **[Private credit card fraud claim but US Act tells Court to appoint person to bring claim] – Evans v European Bank** → Credit card scheme, fraud scheme started by co in Vanuatu, Americans defrauded. Co deposited money in Citibank in Sydney. US Act → Court under Act appoints a person to try retrieve money back for the defrauded, person comes to NSW Court to ask for money. **Lower Court:** Government interest since govt appointed person doing govt Act. **COA:** Not government interest since ultimately enforcing credit card holders' rights → non-prerogative.
 3. **Forum public policy**
 - **Rule:** Australian courts may not enforce or apply foreign law if it is contrary to forum public policy. Must overcome a high hurdle (**Oppenheimer; Kuwait**). If official declaration of war → unfriendly state → could step in shoes of executive and mark it as “bad law”
 - **Gross violation of human rights**
 - **Rule:** Nazi was no longer in State, AU Court had no problem of excluding it
 - **Oppenheimer** → Oppenheimer German Jew leaves Germany and goes to England, stripped of German Nationality, received compensation after Germany lost war. Oppenheimer died, need to work out his Nationality to work out whether they needed to pay tax in Germany. Family of Oppenheimer wanted NAZI law to apply so they are not German so no need to pay tax in Germany. **HELD:** Does not matter who was relying on the law, law was too repugnant, cannot be applied. **NB:** NAZI no longer in State
 - **Violation of International Law**
 - **Rule:** Court will exclude foreign law where applying it would involve a flagrant violation of rules of international law of fundamental importance (**Kuwait**). Usually where the forum government/executive actively said Iraq bad, declared war.
 - **[Tortious conversion — Iraq law sayings Iraq Corps can take Kuwait corps assets] – (Kuwait v Iraqi)**

[1] PRESENCE

- [A] Common Law

- **Rule:** Defendant is present in the forum at the time of service [the time the jurisdiction of the court is invoked], therefore there is personal jurisdiction (*Laurie v Carroll*). Note that the 'forum' includes the territorial jurisdiction of the state of NSW but also all of Australian and New Zealand due to **SEPA 1992** and **TTPA 2010**.
- File originating process + serve it on the defendant
- **(1) Individual**
 - **Rule:** He/she need to be physically present within the forum at the time of the service of the originating process (*Laurie v Carroll*)
 - **NOT physically present**
 - **[Evading before filing in court → Before States/Territory were not treated as federation → treated as international → NO PRESENCE NO SERVICE NO JURISDICTION] – Laurie v Carroll (1958) 98 CLR 310** → Melbourne ballet Co, Carroll suing Laurie for unpaid funds to artist. 13th June 1957 Laurie leaves to Sydney, 14th Carroll starts proceedings in VSC. Cannot serve him in person in VIC, asks for substituted service. Lauries argues he was not present. HELD: No service, no jurisdiction.
 - **[Trustees of Superannuation fund not physically present in NSW] Gosper v Sawyer (1985) 160 CLR 548** → Employee injured and so made redundant. NSW Industrial Commission goes after superannuation fund, SF argued no jurisdiction, since all trustees of fund in VIC. HELD: No jurisdiction
 - Service is procedural, jurisdiction is substantive
 - **YES Physically present**
 - **[Deliberate avoidance of service after filing of originating process in court happened cf Laurie] – Joye v Sheahan** → 13 December 1994 originating process submitted to court, lawyer informs him he will be served, he gets on plane and leaves, plans never to return. February 1995 substituted service was allowed, March Joye asks for service to be set aside.
 - **Fraud/inducement**
 - **[Fraud (sufficient to displace jurisdiction) must be on the nominal defendant; not on a third party] – Perrett v Robinson** → Perrett drove, got into car accident in NT with Robinson together. NT Act no future economic damage. Parties go to Qld so Robinson could get better damages. Perrett told Robinson to sue him for everything because he has insurance. P served R in Qld. Was it fraud? NO
 - **[No lie no fraud] – Maharane of Baroda v Wildenstein** → D loved horse races, went to UK. Got served instantly, argued fraud. Not fraud.
 - **SERVICE MUST BE GOOD**
 - **Rule:** Service can be good in any state/territory or NZ if in line with UCPR requirements (**SEPA S15; TTPA S9**)
 - **Personal service within Australian ad NZ:**
 - **Required for:** originating process in Supreme Court, IRCM LEC, District Court and DDT. For Local Court, can be: (i) personally served, OR (ii) left at defendant's address with someone 16+, OR (iii) if served by LC, sent by post (**UCPR r10.20**)
 - **Effected by:** (i) leaving a copy of the document with the person, OR (ii) if not accepted, place copy down in person's presence and explain nature of document OR (iii) if person actual or threatened violent, deliver document as close as practicable. (**UCPR r10.21 can put on floor and walk away** → write file note + affidavit)
 - **UCPR r10.14 Substituted service (rarely tested)**
 - **Court order can be made when document:** (i) cannot practicably be served on the person, OR (ii) cannot practicably be served on the person in the manner provided by law (**UCPR r10.14(1)**)
 - **Result:** order can direct a document is taken to have been served and constitute personal service (**UCPR r10.14(4)**).
 - **Agreed method:** if there is an agreed method of service, it may be served in such a manner (**UCPR r 10.6; Federal Court Rules r10.43; Howard v NBNZ**)
- **(2) Corporations**
 - **UCPR 10.22 – (a) serve principal officer or (b) any other manner by law**

- [Implied by objecting on merits] – *Vertzys v Singapore* → no presence in AU, no office, arguing no jurisdiction. **Argued no claim under Convention** → going into the merits therefore implied submission.
- **Not Submission**
 - [Has to be in court proceedings itself; sending lawyer to hear default judgement is not submitting] – *Wimborne* → letters going back and forth → pre-court contemplations of court do not count as submissions to jurisdiction
 - Sending lawyer to hear default judgement is not submission
- **Cross-claims:**
 - **Rule:** Submitting to one is not submission to another, but you submit to the **same legal subject matter**. That is, is it asking the court to adjudicate the same thing. (*Marlborough v Charter Travel*)
 - **Same legal subject-matter = Submission**
 - [Indemnity (for employee negligence) and negligence (loss to ship) → adjudicating whether pilot negligent] – *Marlborough v Charter Travel* → Cruise ship hits rock in 1986, ship owner cross-claims for indemnity from pilot's employer. Pilot who drives the ship works for a separate co. NZ Co agrees and submits. Ship Co amends claim, adds another party, NZ Co claim lack of jurisdiction for loss of ship (fine with indemnity). **HELD:** Second claim based on same subject matter as to what you've submitted to, then you have submitted.

C. Service in Australia & NZ

- **Australia: SEPA** Serve under Service and Execution of Process Act
 - **Rule:** Though the states/territories are separate law areas (*McKain*), an originating process issued in any state or territory can be served anywhere in Australia (**SEPA s15**) with no need for a connection between the cause of action and the place of issue (*McEntee v Connor*).
 - **Effective service:** for individual, service need be in the same way as the place of issue (UCPR) and for corporations, (i) can be left/posted to company's registered office OR (ii) delivered to director of company who resides in Australia (**SEPA ss 9, 15**). **Same effect as though served in place of issue (SEPA s12).**
 - **Appearance entered:** an appearance entered after service must state an address in Australia for service for it to be effective. Court must set aside appearance, upon application, if the address contained is false/misleading (**SEPA s18**).
- **New Zealand: TTPA** Trans-Tasman Proceedings Act 2010
 - **Rule:** (1) An initiating document issued by an Australian court or tribunal that relates to the proceeding may be served in New Zealand under this Part. (**TTPA S9(1)**).
 - **Effective service:** the document must be served in the same way as though served in the forum, and will have the effect as though it was served in the forum (**TTPA ss 9, 10**).
 - **Application to stay:** the defendant may apply to stay proceedings on the grounds that a NZ court would be more appropriate to determine matters in dispute. The application must be made within 30 days of service OR some other length an Australian court considers appropriate (**TTPA s17**)
 - Other notes:
 - Except certain matters incl family law (s8(2))
 - Non-NZ person in NZ? TTPA is silent

Service outside Australia & NZ

- **Rule: Apply when not present and not submitted** → UCPR. An originating process issued by the NSWSC may be served outside of Australia and NZ without leave if Sch 6 is satisfied (**UCPR r11.4(1)**). **Long-arm provisions** → statutory provisions that provide a court with jurisdiction over a person who is outside its territory
- **Legislations:**
 - **UCPR 11.4: Cases for service of originating process**
 - (1) Originating process may be served outside of Australia without leave in the circumstances referred to in **Schedule 6. [connections to the forum]**
 - (2) This rule extends to originating process to be served outside Australia in accordance with the Hague Convention.
 - If both parties signatory to the convention, must serve under their mode of service
 - WA has no UCPR
 - Leave required to serve outside of WA
 - Part 11 and Schedule 6 UCPR amended in 2016 → numbering system changed
 - **UCPR 11.5: Service with leave**

- NO Sch 6
 - **[Contract to source artists for performance in NSW, one artist did not turn up] – Showtime v Mosely** → Qld Co brings action in NSW against Florida artist and Florida Co for breach of contract. Florida Co meant to gather artists for performance in NSW. One artist did not turn up.
 - Contract made in AU?
 - NO, instantaneous messaging → where offeror receives acceptance. NY contract sent for acceptance, returned by email to NY. = NY
 - Breach in NSW?
 - Artist did not turn up, meant to turn up.
 - Contract was for offeree to source artists in Florida, hence breach by omission → place of intended performance = Florida.
 - Performance
 - Contract for offeree to source artists in Florida → Florida
 - **The searching process occurred in Florida → performance in Florida**
 - **HELD:** Did not get under Schedule 6 → no jurisdiction
- [B] Torts
 - Establish:
 - **Must have a tort**”; intentional tort (e.g. trespass to person or land, misrepresentation, deceit, conversion of goods, nuisance), or tort of negligence (requires duty of care breach, damage).
 - **Fall within a head of Sch 6:** in determining whether a head of Sch 6 is satisfied, the court will look at the nature of the claim, not the merits. The focus is on the statement of claim and if there is insufficient detail, the court may look at other evidence (*Agar v Hyde*).
 - Common Categories
 - **(a)(i) tortious act or omission wholly or partly in AU**
 - **(a)(ii) damage from tortious act or omission wholly or partly in AU**
 - **(j) when the claim arises under an Australian enactment (e.g. ACL) and--**
 - (i) any act or omission to which the claim relates was done or occurred in Australia, or
 - (ii) any loss or damage to which the claim relates was sustained in Australia, or
 - (iii) the enactment applies expressly or by implication to an act or omission that was done or occurred outside Australia in the circumstances alleged, or
 - (iv) the enactment expressly or by implication confers jurisdiction on the court over persons outside Australia (in which case any requirements of the enactment relating to service must be complied with),
 - **(n) cause of action arising in AU This category covers non-tort claims as well**
 - **[(a)(i) Tort committed wholly/partly in Australia]**
 - **Rule:** where in substance did the cause of action arise (*Distillers*)
 - **Negligence/trespass:** if in relation to the tort of negligence or trespass, where the defendant acted or failed to act is where in substance the cause of action arose, not where the consequences were felt (*Gutnick; Voth*).
 - ***Distillers*** → Failure to warn effect of medicine was committed in AU; the place where P should have been notified.
 - **Negligent misrepresentation:** where the misrepresentation was directed is where in substance the cause of action arose (*Sigma*)
 - Where it is directed from one place to another, the tort is committed at the place to which it was directed whether or not it was acted upon there, provided it was **a place where it could have been reasonably anticipated that it would be received by the plaintiff or brought to the plaintiff’s attention**, even if in fact it is received by the plaintiff elsewhere.
 - **Defamation:** if the defamatory material is in a comprehensible form, it is where the damage of reputation occurs. If not in a comprehensible form (e.g. internet content) it is normally where the person downloads/accesses the material and where the damage to reputation may be done (*Gutnick*)
 - ***Gutnick*** → DJ (NY) published online alleged misrepresentation of Gutnick. He downloaded the article in VIC and well-known there. Damages were clearly suffered in VIC, therefore (a)(ii) VIC equivalent satisfied.

- Is Defendant AU citizen
- **[Prove]** The court may grant an application for leave if satisfied that–
 - **a) the claim has a real and substantial connection with Australia, AND**
 - **YES –**
 - **[Division of AU company assets in liquidation] – Emmott** → Employee of Kazakhstan co; Emmott starts new business to compete; takes 2 Australian employees with him. Emmott was British. Two other partners filed for bankruptcy. Former-employer sues for breach of contract, trying to take a share in liquidation. **HELD:** Dividing up Australian partner assets therefore real and substantial connection with AU.
 - **Clement (2011) NZHC** → real and substantial connection with NZ because of its impact on a NZ industry, even though agreements were entered outside of the forum.
 - **NO – Industrial Group (2011) NZHC** → where defendants were Australians, there was no submission to NZ jurisdiction and the action related to shares in AU company.
 - **b) Australia is an appropriate forum for the trial, AND**
 - **Voth** → not clearly inappropriate forum test
 - **c) in all the circumstances the court should assume jurisdiction.**
- **‘Application to set aside’ — UCPR 11.6:**
 - 3 common bases to set aside:
 - **Service of originating process is not authorised by rules, THEN**
 - **Court is an inappropriate forum [U have jurisdiction but dont use it] THEN**
 - Claim has insufficient prospect of success [NOT EXAMINED] → based on impression of judge
 - Assume claim has
- **Mode of Service**
 - **UCPR r11.7/R11.8AC (old r11.6):** need not be personally served as long as ***in accordance with law of country where served***
 - **UCPR R11.A et seq** – applies to convention agreements between Australia and other countries **but not applicable if to be served in country which is a party to the Hague Convention (Part 11A)**
 - Print out the list of who is a signatory
 - **JUST SAY SERVE UNDER HAGUE**
 - **R11.9** provides for service in case of countries that are parties to international conventions and countries declared by the AG to a country to which the Division applies.
 - NZ: TTPA s10

DISCRETIONARY NON-EXERCISE OF JURISDICTION

RULE: Assuming the court has jurisdiction, asking court not to exercise it.

1. To give effect to the parties’ choice of court agreement
2. The court is a ‘clearly inappropriate forum’ (later classes)
3. Some ‘mandatory law’ requires a stay
 - a. Eg International Arbitration Act 1974 (Cth), implementing the New York Convention
- Derogation clause v prorogation clause
 - Derogation = Picks NSW as jurisdiction
 - Prorogation = does not

Steps:

- a. **Is there an effective jurisdiction clause → incorporation – lex fori [PJ by Submission]**
 - i. **Rule:** In determining whether a clause is incorporated into the contract the question is one of contract law according to the *lex fori* (***Oceanic Sun per Brennan and Gaudron JJ***)
 1. **Contracted avoided ab initio:** jurisdictional clauses are treated as separate from the main contract so if the contract is voided, the jurisdiction clause survives by way of the doctrine of severability.
 - ii. **NO – incorporation**
 1. **[Exchange order contained no such condition, and the respondent was ignorant of it, ECJ was on ticket given after person in Greece] – Oceanic Sun** → Passenger buys exchange order in NSW; goes to Greece and got exchange ticket with jurisdiction clause on the back. **HELD:** Under *lex fori* → incorporation

sought declaration that reinsurance contract be voided for material non-disclosure and breach of good faith – contract had clause:

a. Dispute resolution clauses: **'This Reinsurance is subject to English jurisdiction' 'Choice of Law: English'**.

b. **Is it exclusive or not?**

i. Issue of construction = *lex fori*

ii. *Subject to* = bound? = no per Giles CJ

iii. Both parties were insurers → equal bargaining power; both would have read this as 'exclusive' because insurance co love to go to London

c. **Factors:**

i. (a) Whether a jurisdiction clause is an exclusive jurisdiction clause is a **question of construction** of the particular contract, with such regard to the circumstances surrounding the entry into the contract as is permissible.

ii. (b) The **word exclusive is not determinative**, and a clause may be held to be an exclusive jurisdiction clause notwithstanding the absence of that or a similar word or phrase...

iii. (c) ...when taken with other matters **mutuality may assist in finding a contractual intention** that disputes shall be submitted only to the courts of the relevant jurisdiction...

iv. (d) **Other language in the clause or the nature of the contract may point towards that contractual intention**, for example under the jurisdiction of the English courts and the assumed desire for certainty...

v. (e) **If the courts of the relevant jurisdiction would have jurisdiction in the absence of the clause**, that may indicate that the clause was intended to confer exclusive jurisdiction...

1. Forum will never stay proceedings if they don't know if the plaintiff has somewhere to go

c. **[IF THERE IS A EJC] Scope: What is the effect of the clause? That is, what must or should the courts do when faced with such a clause? Does it cover the case at hand? – *lex causae***

i. **Rule: Will uphold clause unless strong cause not to** (*FAI General Insurance; Oceanic Sun per Gaudron J*). Onus is on the plaintiff to show there are "strong countervailing reasons", and the court will consider all circumstances of the case (*Incitec*).

1. **Will interpret EJC broadly in commercial cases** (*Global Partners; incitec; Venter*):

a. "Arises out of" = contract + tort claims (*Venter*)

ii. **Should a stay be ordered due to EJC?** [T]wo powerful considerations in international litigation: **Allsop J at [47] *Incitec***

1. first, the desire of courts to **hold commercial parties to their bargain** in terms of exclusive jurisdiction clauses;

2. secondly, the desire of courts to **avoid disruption and multiplicity of litigation**, in particular a desire to **avoid parallel proceedings and the risk of inconsistent findings**, and to avoid the causing of **inconvenience to third parties**.

a. What really are of importance in weighing against the operation of the exclusive jurisdiction clause are:

i. (a)the **inconvenience, if any, whether financial or other, caused to third parties**;

1. **Third parties: not the parties to the ECJ**

a. *GPF v Babcock* → PI signed it → no inconvenience to third parties

b. *Incitec* → PI would have to wait for arbitration to get money if stayed – inconvenience to a third party not party to the clause = therefore do it all here

ii. (b)the effect, if any, upon the due **administration of justice**; and

iii. (c)any other **appropriate public policy consideration** that can be discerned in all the circumstances.' **Allsop J at [49]**

b. **Multiplicity of litigation**

i. **NO inconsistent findings then fine**

1. Breach of two different contracts (*Hive Marketing*)

ii. **Inconsistent findings**

extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.

- ii. Section 52 Where a provision of a contract of insurance ... purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void.

c. *Brandon J per Eleftheria*

- i. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
- ii. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
- iii. The burden of proving such strong cause is on the plaintiffs
- iv. In exercising its discretion the court should take into account all the circumstances of the particular case.

3. STAYED — [Anti-competitive behaviour brought on behalf of consumers – fundamental public interest issues] – EPIC GAMES, INC V APPLE INC [2021] FCAFC 122

- a. **FACTS:** Epic Games app on app store frozen. Epic Games starts different proceedings in different jurisdictions → alleging anti-competitive behaviour of Apple. Contract has ECJ to Northern California, NC no anti-competitive behaviour. Epic Games brings proceedings on behalf on consumers in AU, against Apple AU (if they win here, have to change IOS system, hence have to change everything everywhere).

b. Lower Federal Court:

- i. PI can have case heard here if judicial adv, e.g. cant afford overseas/mandatory law.
- ii. They said no judicial adv on Epic Games in suing Apple USA here (error).

c. **FFCA**

- i. Heard in AU – fundamental public interest issues

1. *The proceeding involves fundamental public interest issues in relation to conduct undertaken in an Australian sub-market, and involves an Australian company that is not itself a party to the exclusive jurisdiction clause. We also consider that there are considerations of public policy in relation to Pt IV claims that flow from the scope and purpose of the CCA in the sense contemplated by Akai (at 445, 447) and indicate this proceeding ought to be heard in this Court. The focus should not only be on the nature of competition law, but the significance of the provisions which allow the Commission to intervene, private parties to get the benefit of factual findings and admission, and the relevance of the Federal Court being chosen by the legislature as the court of its choice. In these circumstances, notwithstanding the countervailing public policy considerations, that Apple relies upon, there are strong reasons to refuse to grant a stay of Epic's proceeding and to decline to enforce the exclusive jurisdiction clause.*

4. STAYED — [Qualified EPIC Games; clause prohibiting US from joining class action & EJC in USA was unfair hence ACL applied → if stayed US proceedings = inconsistent findings] – Karpik v Carnival [2023] HCA 39 → Passengers suing Carnival who owns the Ruby Princess – COVID ship, they knew someone had covid and let passengers on. Class action of 3 different groups, AU, UK, USA.

- a. USA contract: clause saying not allowed to join class action, ECJ in USA.
- b. **Federal Court:** Tried to argue that under ACL, Ruby Princess carrying on business, unfair under ACL + public policy per *Epic Games*, FC to hear it. Also argued multiplicity of litigation.
- c. **FFCA:** overturns *Epic Games* (obiter) → the class action is not unfair, no place for ACL; no public policy.
- d. **HCA:** agreed with FFCA overturning public policy argument → i.e. public policy favoured ACL claims being determined in AU court
 - i. STAY NOT GRANTED; HEARD IN FCA

3. **Tort claim:** Tyne starts proceeding in NSW against UBS for misleading info for bad investment → under Trade Practices Act (now ACL).
 4. Is it a res judicata issue?
 - a. YES → Singapore handed final judgement; Telesto cannot deprive Singapore's jurisdiction
- f. **WHERE NZ IS THE COURT OF CHOICE & the action is not personal/family/employment**
- i. **Rule:** Proceedings must be stayed if an NZ court is the designated court: if (i) an application is made by the defendant in Australian civil proceedings, AND (ii) the court is satisfied an exclusive choice of court agreement designates a NZ court to determine the matter in issue. (**TTPA s20(1)(a)**)
 1. Exclusive choice of court agreement: (a) designates court/s of a country to the exclusion of all others to determine disputes; AND (b) parties not acting PRIMARILY for personal, family or household purposes [e.g. consumer contracts]; AND (c) not an employment contract. (**TTPA s20(3)**)
 - ii. **Designates AU Court as exclusive jurisdiction – then MUST NOT stay proceeding (s20(1)(b))**
 1. s20(2A) Paragraph (1)(b) does not apply to an exclusive choice of court agreement if the Australian court is satisfied that it is **null and void under Australian law** (including the rules of private international law).
 - iii. **Exceptions to the rule:**
 1. s20(2) Paragraph (1)(a) does not apply to an exclusive choice of court agreement if the Australian court is satisfied that:
 - a. (a) it is null and void under New Zealand law (including the rules of private international law); or
 - b. (b) a party to it lacked the capacity to conclude it under Australian law; or
 - c. (c) giving effect to it would lead to a **manifest injustice** or would be **manifestly contrary to Australian public policy**; or
 - d. (d) for exceptional reasons beyond the control of the parties to it, it cannot reasonably be performed; or
 - e. (e) the **court designated** by it as the court to determine the matters in issue between the parties to the proceeding has **decided not to determine those matters**.

FORUM NON CONVENIENS – Inappropriate forum test

ASSUMING THE JURISDICTIONAL CLAUSE IS NOT EXCLUSIVE — Is there any other proceeding? Where is the other proceeding?

- Int
- AU
- NZ → TTPA; notwithstanding Co may be somewhere else

Three different tests

1. International cases

- a. **When do we apply it:** Where the other forum is international
- b. **English Approach: *Spiliada Test***
 - i. **FACTS:** English insurer, two Libyan ships, chemicals leak and damages everything. Insurer wants to serve Libyan parties. Argued that England should not hear this.
 - ii. **Lord Goff:**
 1. Only stay action if defendant satisfied court some other forum is more appropriate
 - a. But will not grant stay if PI can show a stay would 'deprive P of a legitimate personal or judicial adv'
 2. Plaintiff needs to show England is the most appropriate forum
 - iii. UK approach requires comparison with other courts – AU Court hates this

c. Australian Approach [EXAM]

- i. **Rule:** An Australian court can decline exercising its jurisdiction if the court is a 'clearly inappropriate forum' because a continuation of proceedings would be vexatious (productive of serious and unjustified trouble and harassment) or oppressive (seriously and unfairly burdensome, prejudicial or damaging). (***Oceanic Sun per Deane J accepted by the Majority in Voth***). It is not a balancing act (***Zhang***).
 1. **Onus:** where a defendant seeks stay of proceedings, on the defendant. If plaintiff seeking leave to proceed then r11.5 UCPR requires satisfying the ***Voth*** test.
 2. **Rationale:** Either clearly inappropriate or NOT clearly inappropriate (***Voth*** affirming ***Deane J per Oceanic Sun***). No comparison with other jurisdictions, just whether if we are clearly inappropriate,

no balancing or else 'more appropriate' test applied. If we are Clearly Inappropriate forum, stay the proceeding.

ii. The **Voth** approach

1. Plaintiff who has invoked jurisdiction of AU court has **prima facie right to insist upon its exercise**
2. AU court will stay proceedings which are '**vexatious**' or '**oppressive**' to the defendant, so the court finds itself a '**clearly inappropriate forum**'
 - a. **Adopting *Oceanic Sun*** → Deane J – Court naturally leans towards not staying. **If oppressive or vexatious on D** → AU inappropriate.
 - i. Oppressiveness = seriously and unfairly burdensome, prejudicial or damaging
 - ii. Vexatiousness = productive of serious and unjustified trouble and harassment
3. **No need to show a 'more appropriate forum'**: [27] "The reasons of the plurality in **Voth** pointed out that the focus must be 'upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum'." **Puttick v Tenon Ltd**
4. Onus is on party seeking a stay (Defendant), unless in seeking leave to serve (Plaintiff)

5. The *Spiliada* factors are of assistance:

- a. **Connection between forum and action/parties: domicile, place of business, place of transaction or events;**
 - i. Use of memorandums of understanding: NSWSC has agreements with NY, Singapore, Shanghai, Guangzhou and Hubei so can have any questions on foreign law answered. Therefore less likely to be 'clearly inappropriate forum' (**Fleming v Marshall**).
 - ii. Connection to AU is a strong factor (**Xin Tai Hai**)
 - iii. Place of wrong/tort will not be given extra weight (**Renault**)
- b. **Convenience or expense**
 - i. **Rule:** if justice can be done at some other forum at 'substantially less' inconvenience or expense, weighs towards local proceeding being 'vexatious' or 'oppressive'
 - ii. eg availability witnesses and whether it could be ameliorated by video link **Colosseum; Fleming v Marshall**; application of foreign law;
 - iii. Lack of evidence in AU does not of itself justify stay (**Puttick**)
 1. **Puttick** → all the witness for respondent and majority of documentary evidence was in NZ — but could not show that AU was CIF.
- c. **Governing law**
 - i. **If AU** → strong factor (**Lighthouse**)
 - ii. **If foreign** → not of itself pointing to AU CIF (**Renault; Puttick**)
- d. **Legitimate and substantial juridical advantage to Plaintiff litigating in AU court (Voth)**
 - i. Damages awarded on a higher scale in the forum (**Telesto**)
 - ii. Access to objective standard and/or a reversal of onus of proof (**Telesto**)
 - iii. More complete procedure of discovery (**Ship Chou Shan**)
 - iv. Power to award interest
 - v. More general limitation period BUT plaintiff must have acted reasonably by attempting to proceed in the foreign court and be barred by no fault of their own (**Fleming v Marshall**).

iii. **Bombardier WASCA** → Summary of test

1. "The question whether the local court is a clearly inappropriate forum focuses on the **inappropriateness of the local court** and not the appropriateness or comparative appropriateness of the suggested foreign forum. That is, a court is not a clearly inappropriate forum merely because another one is more appropriate.
2. Similarly, whether the **substantive law of the forum is applicable** in the determination of the dispute which is the subject of the action is a **significant factor** in the exercise of the discretion to set aside service outside the jurisdiction, but it is **not determinative**. An Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which

Marine asked the cross-claim to be stayed – arguing that it is vexatious and oppressive to split the case like this.

b. Court summarised factors court may look at

- i. 1.a consideration of the true nature and full extent of the issues involved in proceedings in the local court and in the foreign court [**is it identical**]; 2.whether, in the light of that consideration, the foreign court has jurisdiction to deal with the same subject matter as is before the local court; 3.the **degree of connection** which both proceedings share with the law of the foreign court and the law of the local court; 4.where the relevant acts or omissions occurred; 5.**where the parties reside and carry on business (Spilliada)**; 6.whether local professional or other standards of care have a bearing on the legal quality of the relevant acts or transactions or the liability of the parties (**Voth**); 7.**where and how the damage was suffered (Spilliada)**; 8.**where the relevant evidence** in the action is to be found (**Spilliada**); 9.whether the application to the local court for a stay or dismissal has been made with reasonable promptness; 10.the stage which proceedings in the foreign court have reached in comparison with the stage of proceedings in the local court; 11.the order in which the two sets of proceedings were instituted and the costs which have been incurred in each; 12.whether each court recognises the orders and decrees of the other; 13.which court can provide more effectively for the complete resolution of the whole of the controversy between the parties [**which court can deal with the entire matter**]; that a party properly invoking the jurisdiction of the local court has a prima facie right to insist upon the exercise of that jurisdiction, so long as that prima facie right is not given undue emphasis; 14. that considerations of comity and restraint should be taken into account where a defendant carries on business in a foreign country and the jurisdiction of the courts of that country would be recognised under local conflict rules [**if dissolving Co e.g. liquidation**]; 15. the undesirability of allowing two independent actions involving the same question of liability to proceed contemporaneously in the courts of different countries [**multiplicity of proceedings**]; 16. whether the dominant purpose of a party in commencing proceedings in one jurisdiction or another is to prevent another party from pursuing remedies available in the courts of another country having jurisdiction [**dominant purpose of starting proceeding in our forum to block a remedy**]; 17. Oceanic Sun Line at 248; Voth at 570-571; Henry at 578-579, 588-589, 590, 592-593; Agar v Hyde [2000] HCA 41; (2000) 201 CLR 552, at [42]-[43]; CSR v Cigna at 399, 401.

c. Cross-claim in NSW; then starting proceedings in Seattle → we were NOT clearly inappropriate forum because **our proceedings came first = not vexatious nor oppressive.**

- i. **FOR STAY:** inconvenience to US witnesses (though could be ameliorated by video link)
- ii. **AGAINST STAY:** *lex causae* was NSW law, enforcement orders easier in NSW, NSW first-in-time.

d. **NSW was the only forum who could deal with the entire matter** → damages were sought here, only indemnity sought in Seattle.

v. **CLEARLY INAPPROPRIATE FORUM**

1. [Limitation bar in Missouri; if stayed NSW proceeding PI left with nowhere to go; AU was clearly inappropriate forum → stay ordered on condition D not to invoke limitation] – **Voth (HCA)** picks up **Deane J** per **Oceanic Sun** → accounting advice from Voth, suing Voth. Voth accountant in Missouri US.

- a. **Starting pt – prima facie right:** A plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise.
 - i. Will only grant a stay or dismiss the action for forum non conveniens with “**great care**” or “**extreme caution**”
- b. If considering “more appropriate forum test” → naturally leans towards the defendant

- e. Whether legal work be wasted
 - f. Progress of each proceeding
 - g. General balancing of the advs and disadvs to each aptry
3. **[Temporary stay on local proceeding granted – witnesses all in US (influential), costly to fly to AU] – *Bella Products Pty Ltd v Creative Designs International Ltd* (2009) 258 ALR 538** → Bella makes toys. AU and US Co dispute. Clearly inappropriate forum test not the applicable test. Just apply Court discretion to control litigation/proceedings.
- a. **FOR STAY:** many influential witnesses would need their evidence to be heard before the court. If evidence delivered by transcript or video link, would be a significant disadvantage to the parties. It would also be too costly to fly them to AU.
 - b. **AGAINST STAY:** Judgement would be delivered faster by the FCA

2. Intra-Australian cases

- a. **Rule: For NSWSC** – Cross-vesting test applied, which is the ***Spiliada* test** → balancing exercise (***BHP Billiton***). For inferior = ***Voth*** factors.
 - i. **NSWSC:** In the interests of justice, a relevant proceeding may be transferred from NSWSC to another SC (***s5 Jurisdiction of Courts (Cross-Vesting) Act***)
 - 1. **Considerations:** availability of witnesses in either forum, lex causae and lex loci delicti in tort claims, which court would give effect to the reasonable expectations of the parties, which court would give effect to cross-vesting legislation (*Spiliada*)
 - 2. **[SA more appropriate forum – lex loci delicti for asbestos] – *BHP Billiton*** → SA resident exposure to asbestos while working for BHP in SA, brings claims in NSW Dust Tribunal, technically SA law applies. BHP asks for matter to be transferred to SSC.
 - a. ***Spiliada* factors:**
 - i. Tort occurred in SA
 - ii. BHP in Vic, do carry on business in SA. PI in SA
 - iii. *Lex loci delicti* = *lex causae* is SA
 - 1. This is a major factor
 - iv. Judicial adv for PI in using that statutory claim
 - b. **The natural seat is SA**
 - ii. **Inferior:** Court may order stay if satisfied that a court of another State that has jurisdiction to determine all the matters in issue is the appropriate court (***s20(3) SEPA***).
 - 1. **Considerations:** a) The places of residence of the parties and of the witnesses likely to be called b) The place where the subject matter of the proceeding is situated c) The financial circumstances of the parties d) Any agreement between the parties about the court or place in which the proceeding should be instituted e) The law that would be most appropriate to apply in the proceedings f) Whether a related or similar proceeding has been commenced against the person served or another person (*s20(4) SEPA*)
 - 2. **Can order condition:** if just and appropriate to do so, to facilitate determination without delay or undue expense (***s20(5)***).
 - 3. **[] – *Joshan v Pizza Pan Group Pty Ltd* [2021] NSWCA 219** → Franchise agreement by Pizza hub with Joshan, abandoned the store in SA – in breach of contract. Joshans also signed guarantees for such agreement. Pizza Pan starts proceedings in the District Court of NSW.
 - a. Is SA or NSW the appropriate court?
 - i. **SA factors:** Store is in SA, applicants' witnesses in SA;
 - ii. **NSW factors:** CFO and CEO of respondents (Pizza) were in Sydney (witnesses), non-exclusive jurisdiction clauses in NSW — cl23.7 of the Franchise agreement and cl7.6 of the Guarantee → “parties agree to submit to the non-exclusive jurisdiction of the courts of NSW”
 - b. **HELD: SA**
 - i. Balancing exercise
- b. **[ONLY APPLY TO SUPREME COURTS] – Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) s 5**
 - i. **s 5(2) Where:**
 - 1. (a) a proceeding ... is pending in the [NSWSC] ..., and
 - 2. (b) it appears to the [NSWSC] that: ... it is **more appropriate that the relevant proceeding be determined by that other Supreme Court**, or (iii) it is otherwise in the interests of justice that

the relevant proceeding be determined by the Supreme Court of another State or of a Territory, the [NSWSC] shall transfer the relevant proceeding to that other Supreme Court...

- c. **[INFERIOR COURTS] – Service and Execution of Process Act 1992 (Cth) s 20 → limited to applying prescribed factors:**
- i. **S20 Stay of proceedings**
 1. (1) This section does not apply in relation to a proceeding in which the Supreme Court of a State is the court of issue.
 2. (2) The person served may apply to the court of issue for an order staying the proceeding.
 3. (3) The **court may order that the proceeding be stayed** if it is satisfied that a **court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court** to determine those matters.
 - ii. **Relevant factors (see s 20(4)):** a) The places of residence of the parties and of the witnesses likely to be called b) The place where the subject matter of the proceeding is situated c) The financial circumstances of the parties d) Any agreement between the parties about the court or place in which the proceeding should be instituted e) The law that would be most appropriate to apply in the proceedings f) Whether a related or similar proceeding has been commenced against the person served or another person
- d. **Look to factors relevant to the claim → e.g. claim for failure to pay services**
- i. **E.g.** Film Comp in Victoria, catering comp in NSW to provide food. Vic comp decides to not pay, NSW Co sues for breach of contract. Proper law NSW. Where did the breach occur? Performance of catering was in Vic, but had to pay NSW Co → NSW. Clearly NSW

3. Trans-Tasman cases → TTPA

- **General rule:** on application by a D in Australian civil proceedings, court **may** stay proceedings if satisfied NZ court: (a) **has jurisdiction** (b) **is the more appropriate court to determine those matters** (s19(1) TTPA). **If however, s20 TTPA is invoked [Exclusive choice of court agreement to NZ, not personal, not employment] Court must stay.**
 - **s17(1)** – Can apply to stay on the ground that NZ court is the more appropriate court to determine the matters in issue
 - **s19(1)** Aus court **may stay proceeding** if satisfied that
 - NZ court has jurisdiction to determine the matters in issue; and
 - Is the more appropriate court to determine those matters
- **s19(2) Compulsory factors court must take into acc**
 - In determining whether a New Zealand court is the more appropriate court to determine those matters, the **Australian court** must take into account the following matters:
 - (a) the **places of residence of the parties** or, if a **party** is not an individual, its principal place of business;
 - (b) the **places of residence of the witnesses likely to be called** in the **proceeding**;
 - (c) the **place where the subject matter of the proceeding is situated**;
 - (d) **any agreement between the parties about the court or place in which those matters should be determined** or the **proceeding** should be commenced (other than an **exclusive choice of court agreement** to which **subsection 20 (1)** applies);
 - (e) **the law that it would be most appropriate to apply** in the **proceeding**;
 - (f) whether a related or **similar proceeding** has been commenced against the **defendant** or another person in a court **in New Zealand**;
 - (g) the financial circumstances of the parties, so far as the **Australian court** is aware of them;
 - (h) any matter that is prescribed by the regulations;
 - (i) any other matter that the **Australian court** considers relevant; and **must not take into account the fact that the proceeding was commenced in Australia.**
 - **I.e. who was first**
 - (3) An order under **subsection (1)** may be made subject to any conditions the **Australian court** considers are appropriate in order to facilitate, without delay or undue expense, the determination of the matters in issue between the parties to the **proceeding**.
- **Where exclusive jurisdiction clause → s20**
 - **Must stay** if satisfied there is an exclusive choice of court agreement designating a NZ court as the court to determine the matter (s20(1)(a)). Must not if designated AU court (s20(1)(b)).
 - **Exclusive choice of court agreement: s20(3):**
 - (a) Be exclusive of other courts AND

Agreement bw Endeavour (AU) and insurer (NZ), EJC to NZ. IAG asks for transfer to NZ, county court of Vic, initial judge stays proceedings.

- **HELD:** Nothing to do with actual claim bw AGP and the two defendants, the insurer undertook that risk by agreeing to insure a foreign party. Factors supporting the refusal of stay manifestly outweigh any factors in favour of the grant. Without taking into acc the fact that the proceeding was commenced in AU.
- **NB:** IAG wanted all proceedings to be stayed, if IAG cross-claimed; the indemnity claim may be stayed.
 - **If cross-claim → EJC to NZ → s20 TTPA; court has to stay it**

ANTI-SUIT INJUNCTION

- **What is it:** Asking Court to stop another proceeding [in another court] – stopping another party of another court
 - Anti-suit injunction ('ASI') = an order by a court to restrain a person, subject to the jurisdiction of that court, from commencing or continuing proceedings in a court Directed to parties, not foreign courts.
 - **Required: Personal jurisdiction over the party to be restrained is a prerequisite. Comity (respect for jurisdiction of foreign court) requires that the power to grant anti-suit injunctions be exercised with caution.**
 - May be permanent or temporary
 - May be issued ex parte
 - Stop before other party file
 - Violation of the injunction may be contempt of court
 - **Background case**
 - **Airbus** → Two families Indian Origin, British Citizens. Taking plane under Indian Airways to India, terrible landing, four people of the two families dies, the rest suing. Sued in India against Indian Airway originally – settled. Also started proceedings against airport authority, starts proceeding in Texas against Airbus. Airbus comes to India, asking for declaration that PI cannot sue outside India – anti-suit injunction, succeed. PI ignored it, they were Indian origin but British Citizens. Airbus asking UK court to “enforce” the Indian Court injunction/to issue injunction to prevent Indian Citizens from continuing proceeding in UK?
- **State: There are two types of injunctions: (Airbus)**
 - A. **Inherent jurisdiction to prevent abuse of processes**
 - a. No test, up to discretion of court
 - b. E.g. inconsistent findings
 - B. **Equitable jurisdiction to restrain vexatious or oppressive foreign proceedings**
- **EQUITABLE INJUNCTIONS:**
 - **Rule:** A court may restrain foreign proceedings through an anti-suit injunction through its equitable jurisdiction. (**CSR; TS Production**)
 1. The first step is whether Australian Court is a Clearly Inappropriate forum (**Voth test**) (**CSR**)
 - a. **If so** → **Court will dismiss proceedings and not deal with anything**
 2. **Since NSW is not Clearly Inappropriate forum** → **Ask whether the foreign proceeding is vexatious or oppressive; two elements be satisfied: (CSR)**
 - a. **Is there something to be gained above what may be gained in the AU proceedings; AND**
 - b. **Is the claim completely correspondent**
 - i. **[AU not clearly inappropriate forum, neither is foreign proceeding → not completely correspondent claims – claiming copyright breaches under different laws] – TS Production** → Dispute re merchant (copyright to image) bw Owner of Book and Owner of Film, claim made to Federal Court AU for anti-suit injunction for another proceeding in Illinois. **HELD:** Every country has its own laws for copyright → so it is **not completely correspondent**, suing for copyright breaches under different laws – not identical. No inconsistent findings.
 1. E.g. ACL, Copyright, Corporations Acts → different laws all over the world
 2. **NB:** if you bring all proceedings on different laws re breaches of copyright in the same place; you can no longer sue elsewhere on that law → e.g. to ask NSW court to apply Copyright laws of all the world.
 - a. **NB:** Most of these statutes will prescribed that only a Court of that Country is capable of administering that law so you would not face such situation.
 3. **Once the party seeking anti-suit injunction shows that the foreign proceeding is evidentially vexatious or oppressive; the onus shifts onto the other party to show there is something to be gained/judicial advantage (Sunland)**

- **Must not restrain continuation of proceedings:** Australian court must not restrain a party to a civil proceeding before a NZ court from taking a step in that proceeding on the grounds that the NZ court is not the appropriate forum for the proceeding (**s22(2)**).
- **INTRANATIONAL → SEPA**
 - Cannot restrain other state proceeding (**s21**)
 - S118 Constitution, whoever is first wins → go to their registrar and they will cancel it

RECOGNITION & ENFORCEMENT OF FOREIGN JUDGEMENTS

1. Common Law

a. GENERAL

- i. **Judgements not covered by statutory scheme:** The common law is applicable here because the statutory scheme does not cover the foreign judgements.
- ii. **Terminology:**
 - 1.
 2. Judgements in personam — imposes a personal obligation
 3. Judgment debtor – person subject to judgement to pay
 4. Judgement creditor
- iii. **Test: Four conditions must be satisfied (*Adams v Cape; Telesto; Schnabel; Eisenberg*)**
 1. [A] The foreign court must have exercised a **jurisdiction** that Australian courts recognise; AND
 - a. Presence; OR
 - b. Submission
 2. [B] The foreign judgement must be **final and conclusive**; AND
 3. [C] There must be an **identity of parties**; AND
 - a. Ensure it is the same party – i.e. Apple USA is the debtor; you can't enforce it against Apple AU
 4. [D] If based on a judgement in personam, the **judgement must be for a fixed debt**
- iv. NB: Do not touch merits – do not consider if the other judgment is correct

b. [A] Foreign jurisdiction

- i. **Rule:** The foreign court must have had jurisdiction and exercised it over the person of the defendant at the time when the jurisdiction of the foreign court was invoked. This is done by:
 1. **Presence; or**
 - a. **Natural persons**
 - i. **Rule:** The natural person must be physically present in the foreign forum at the time of service (*Buchanan v Rucker; Close v Arnot*).
 - ii. **Present**
 1. **[Relied on paid visit promised by Son Roommate to visit Son; Son's roommate served him in airport] – Close v Arnot [1997] NSWSC 569**
→ Roommate 1 wants to sue father of another roommate, told father roommate missed him and paid for all tickets etc. Roommate father got served at New York airport. HELD: No fraud, not entrapment. Service was sufficient.
 - a. Cf → if Son not there and roommate lied to father he was not there. Or free holiday but no holiday.
 - iii. **Not Present**
 1. **[Physically not on island] – Buchanan v Rucker (1808) 103 ER 546** → Service in that place is by nailing the writ on the door, defendant not on the island at the time. **HELD:** Natural person needs to be actually present on the island at the time of service of the writ.
 - b. **Corporations**
 - i. **Rule:** The extent to which the company has a place of business in the relevant territory — requires some **residential feature**, eg. a building, physical office, agent who is authorised to contract (*Adams v Cape*).
 - ii. **Agents:** Principle test is determining whether the agent has authority to enter contracts on behalf of the corporation and does som being more than a mere 'ministerial agent' (*Wimborne*)

- ii. **[PRC citizens will by virtue of that nationality submit to PRC jurisdiction] — *Liu v Mia*** → PRs of AU, but sued in China. They held PRC passport, had financial additives in PRC, married in PRC, born in PRC, PRC does not recognise dual citizenship.
 - iii. **Better view and especially with dual citizenship** → is the citizenship active? Maintaining passports and use it etc (*Liu v Mia*)
 - iv. Have not been up to the HCA
- c. **[B] Final and Conclusive**
 - i. **Rule:** Final and conclusive as long as it stands in the jurisdiction, if steps taken to set aside Court will temporarily stay the proceeding (*Schanbel v Lui*). The test of finality is the treatment of the judgement by the foreign court as *res judicata*. Plaintiff bears the onus of proof (*Schnabel*)
 - ii. **YES**
 - 1. **[Default judgement is also final and conclusive] – *Schnabel v Lui*** → Schanbel contracted Lui to build amusement park. They used sub-part materials, off standard. Sued in the US, Luis had assets in AU. US case was a default judgement. **HELD:** Final and conclusive until say defendant appeals within the statutory period to appeal.
 - iii. **NO**
 - 1. **[Judgement enforced and then the original judgement appealed and won; reversed → foreign judgement no longer final and conclusive] – *Benefit Strategies v Prider*** → the judgement enforcing it now must be reversed since finality is lost. In 2002, P got default judgement in Californian court. In 2004, P got summary court in SA to enforce judgement. In 2005, default judgement set aside. D sought to have SA summary judgement set aside and was successful because it relied on a judgement which was now *void ab initio*.
- d. **[C] Debtor is the debtor**
- e. **[D] Fixed Sum**
 - i. **Rule:** Will only enforce money orders, the court will not do calculations, if it contains interest and costs you must set it out, how and what the sum is. **Court will only enforce what is in the judgement (*Macquarie Bank*)** – e.g. where judgement contains no interest you cant seek enforcement for interest.
 - ii. **[Give a fixed sum, including what interest was under foreign law] – *Eisenberg v Joseph*** → Enforcing Austrian judgement in the 90s, show court exchange rate at the time of the order. Had to prove what interest is. Prove foreign law (what interest meant under Austrian law) as a fact.
 - 1. On the evidence of Di Guertler, and particularly para. 9 of his affidavit of 23 December 1998, in the circumstances of this case interest runs for Austrian purposes on the Austrian Court judgment at 4 percent per annum and I think it would be appropriate, generally speaking, to award interest at that rate from the date of judgment in the Austrian Court until the date of judgment in this Court.
 - 2. To pay D's cost of 186k Austrian shillings.
 - iii. ***Bao v Qu; Tian*** → interest rate changes. Give everything.
 - iv. **[Compound interest sought by enforcer went beyond original judge, not fixed and cannot be enforced]** → (*Macquarie Bank v Juno Holdings*) → Dutch judgement to Mac with Interest at some % of cash rate. Mac argued court should look at contract to construe this rate was compound, not simple interest. Court refused to look beyond the judgement itself given the cause of action stems solely from that, and construed it was simple interest.
- f. **DEFENCES**
 - i. **Fraud**
 - 1. **What is it:** Judgement based on evidence that is incorrect. Actual and constructive fraud – such as person under fiduciary duty making a private profit.
 - a. Domestic If you pointed out fraud in original judgement proceeding but court rejected it; you can only point to fraud when enforcing it if new material available.
 - 2. **Can point to same material proving fraud in the forum you're trying to enforce it; despite original judgement says no fraud** → *Abouloff v Oppenheimer*
 - a. **[Extrinsic fraud → only new evidence] – *Keele v Findley* (1990) 21 NSWLR 444** → disagreed with and rejected *Abouloff*. NSW action to enforce Arizonian judgement, D alleged judgement obtained by fraud in the sense it rests on perjured evidence [action brought under common law, not FJA]. Foreign judgement was enforced, D's argument was not enough to warrant such a 'drastic and exceptional relief'.

- i. Can only bring fraud if you have new evidence
 - b. **[Intrinsic fraud – can bring up evidence in original proceeding] – Yoon v Song (2000) 158 FLR 295** → told to follow **Keele** but followed **Abouloff**
 - i. P sued D in SK for alleged failed joint venture, and obtained judgement. South Korean court ignored fraud, brought up in AU. Found fraud on fresh evidence as P had failed to disclose to the foreign court that money claimed was owned by a third party. Satisfied both **Abouloff** and **Keele**
 - 1. If **Abouloff** be changed, it be parliament.
 - 2. Criticism: But **Abouloff** is common law.
 - c. **Obiter affirming Keele (Quarter Enterprises NSWCA)** → not answered in ratio, in obiter Court gave preference to **Keele** → can only invoke fraud if basing on evidence not available at prior trial.
 - i. Court was determining fraud in s7(2)(a)(vi) FJA – said Keele to apply to this too. So, obiter that both Common Law and FJA to follow **Keele**.
- ii. **Breach of natural justice**
 - 1. **Rule:** Denial of natural justice – procedural fairness. Apply the foreign procedural rules (*lex fori* is applied when assessing merits issues which are procedural in nature not here) (**Boele v Norsemeter [28]: A defence is available where: Boele [24]**)
 - a. **Each party be given opportunity to present their case before an impartial tribunal**
 - i. Legal representative was acting without authority + party does not know anything of the proceedings.
 - b. **Each party be given due notice**
 - i. Failure to serve on lawyer
 - ii. Is the foreign forum's notice rules met? (**Boele**)
 - c. **Potential third category — cogent evidence of corruption or lack of independence**
 - i. **[Asking/accepting one side in default judgement re evidence of damages (judge did not assess himself); where defendant cannot contest/appeal because they are contesting jurisdiction – if appeal on merits = submission] — Adams v Cape UK 1990 (persuasive obiter for us)** → Suing Cape through subsidiary in Texas US, enforcing in UK. Court realise US has no jurisdiction. Default judgement asks factory workers for evidence of how to assess damages, did not ask the other side. Cape argues no jurisdiction + judge corrupt. **HELD:** Generally never accept argument of corruption in trial judge → appeal in that court; but here Cape cannot do that, if they do = submission to jurisdiction.
 - ii. **Nyunt** → does not accept [131] **Adams v Cape** third category
 - 2. **[No knowledge of proceeding + ended retainer with lawyer + conditional authority to lawyer to inform him of anything before taking next steps; lawyer files cross-appeal] — Boele v Norsemeter Holding [2002] NSWCA 363** → Hearings in Norway, Mr Boele does not go but sends lawyers to Norway – submitted. Email from lawyer “the case was a success”, thinks matter ended. As he was terminating agreement with lawyer; says ongoing matters to be decided on case by case basis. Norsemeter matter concerned arrest order; Boele tells lawyer – you have to tell me whatever you were to do next. PI serves Boele's lawyer, not Boele, lawyer does not tell Boele. PI comes to enforce the judgement.
 - a. Submission to the proceeding = submission to any appeals → first element of the enforcement requirements
 - b. Boele argues denial of natural justice — did not know
 - i. **HELD: Denied of natural justice [37]**
 - ii. Legal representative was acting without authority + party does not know anything of the proceedings.
 - 3. **Serving by public announcement + Chinese citizens (jurisdiction)**
 - a. **What is it:** PRC allows serving by public announcement where you have no idea where the defendant is.
 - b. **Unenforceable – [Clearly knew where defendant was; cannot do public announcement under PRC law] – Xu v Wang (Victoria)** → Court did not allow public

c. **Violation of International Law**

- i. **Rule:** Court will exclude foreign law where applying it would involve a flagrant violation of rules of international law of fundamental importance (*Kuwait*). Usually where the forum government/executive actively said Iraq bad, declared war.
- ii. **[Tortious conversion — Iraq law sayings Iraq Corps can take Kuwait corps assets] – (Kuwait v Iraq)**
 1. **FACTS:** Iraq invades Kuwait, UK officially declares war on Iraq and goes in. Iraqi pass law, that Iraq corporations can take Kuwait corps assets. Iraq airlines go take airlines from Kuwait airlines, war ends.
 2. **HELD:** UK courts will not adjudicate on the sovereignty acts of a foreign government or state. Use of force against Kuwait → breach of international law.
 - a. No active State Doctrine breach where **Executive actively said Iraq bad, declared war against Iraq, went to UN**

4. **NOT public policy**

- a. **[Enforcing gambling loan contracts in VIC, legal in Bahamas] — Kakavas** → Bahamas law allowed gambling loans, but was not detrimental to Australia. Therefore public policy is not made out.
- b. **[Enforcing gambling contracts] – Kok v Resort World** → Judgement reached in Singapore for monies lent for gambling not repaid. P registered judgement in WASC, D sought to set aside under *FJA s7(2)(xi)*.
- c. **[Not allowed to give evidence in Singaporean judgement] – Jenton Overseas Investment v Townsing (2008) 221 FLR 398** → Summary of all cases. Judgement from Singapore, done under Foreign Judgements Act. Contended that they were not allowed to give evidence in Singapore — arguing denial of substantive justice in Singapore → therefore against public policy in Australia. **HELD:** Must be of a high order to establish the defence.
 - i. Ground of public policy be narrowly confined
 - ii. Au law would have produced different result is not itself sufficient to establish public policy
 - iii. Offence against AU public policy should be profound before a refusal to enforce the foreign judgement is warranted – otherwise the court would be close to undertaking a review of the merits of the foreign decision
- d. **[s118 SEPA cannot argue public policy internally] – Merwin** → Cannot argue intra-AU. Not possible for VSC to refuse application of the NSW statute on the ground of public policy. *It is, in my view, not permissible for a Victorian Court to adopt such an attitude here. All that the Legislature of New South Wales did, was, in a period of unexampled economic crisis, to revise, alter, suspend or discharge certain contractual obligations over which it could exert its constitutional power. The Legislature of Victoria too enacted a law which differed in degree only from that of New South Wales. And, further, the Commonwealth Constitution expressly requires that "full faith and credit shall be given, throughout the Commonwealth, to the laws ... of every State" (sec. 118 Constitution).*
- e. **Prove the same for NZ as if for internationally but apply TTPA** → *TTPA s20 Exclusive choice of court agreements s20(2)(c) can be excluded where giving effect to it would lead to a manifest injustice or would be manifestly contrary to Australian public policy*

2. **Equity [Generally not examined]**

- a. **Rule:** Need only show sufficient connection between the defendant and the jurisdiction in which the foreign order was made (*Independent Trustee v Morris [33]*).
 - i. Freezing orders
 - ii. Appointing a receiver

3. **Statute**

- a. **RULE:** **Foreign Judgements Act 1991 (Cth) – overrides the common law**, any State mentioned in the regulation is bound by the Act; if unenforceable under FJA, cannot enforce under common law.
 - i. **Ask:** Does it fall under the FJA? Apply the Act. do not assess enforceability at common law. Register it (s10)

- a. **Judgement:** civil judgements or judgement in criminal proceedings for compensation of injured party (**s3(1)**)
 2. **FJA s5(4) enforceable money judgement that is:**
 - a. Final and conclusive; and
 - b. Was given in
 - i. A superior court of a country in relation to which this Part extends; or
 - ii. An inferior court of such a country, being an inferior court in relation to which this Part extends.
 3. **s5(5) for the purposes of s5(4)(a)**, taken to be **final and conclusive** even though:
 - a. (a) an appeal may be pending against it; or
 - b. (b) it may still be subject to appeal; in the courts of the country of the original court.
 4. **Partial payment s6(12), remaining amount registrable**
 - a. **s6(6)(a)** → if wholly paid; no longer can be registered
- d. **Effect of registration**
- i. **Can choose currency** – s6(11)
 - ii. **Court will specify time of which registration may be contested:** Registering court must give a time period that the registration is allowed to be contested (**s6(4)**), can enforce once that period expires **s6(10)**.
 - iii. **Staying of enforcement of registration pending appeal (s8(1)), appeal must be pursued expeditiously (s8(3)).**
 1. May stay it where there is intention to appeal & entitled to appeal or has appealed (s8(1)) → stay still specific day
 2. Must stay if Court makes order that person entitled and intends to appeal (s8(2)) → make order that person bring the appeal by a specified day or within a specified period
 3. Generally made on conditions
 4. **Legislation:** s8(1) If the court in which a judgment is registered is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, against the judgment, the court may order that enforcement of the judgment be stayed pending the final determination of the appeal, until a specified day or for a specified period. s8(2) If the court in which a judgment is registered makes an order on the ground that the person is entitled and intends to appeal against the judgment, the court must require the person, as a condition of the order, to bring the appeal by a specified day or within a specified period. s8(3) Every order is to be made on the condition that the judgment debtor pursues the appeal in an expeditious manner. s8(4) An order may be made or such other conditions, including conditions relating to giving security, as the court in which the judgment is registered thinks fit.
 5. **Considerations in granting stay on appeal (Dawn Jade)**
 - a. Onus on applicant to demonstrate proper basis
 - b. Court will weight considerations such as convenience vs competing party rights in discretion
 - c. Real risk of applicant's assets being disposed of if stay granted
 - d. Risk that an appeal will prove abortive if stay is not granted and appeal is successful
 - e. Will not speculate about appeal's prospect of success
 6. **Dawn Jade v Himanshu** → Judgement in HK, one side got appeal. PI (judgement creditor) argues that D must hold monies in trust. Court to balance: risk of D extinguishing money v need of D to use money to fund appeal etc. **HELD:** Not granted conditional holding of money on trust, undertaking given by D.
- e. **Apply duly to set aside a registered judgement that is enforceable, or would be enforceable but for s8: (s7(1))**
- i. s7(1) A party against whom a registered judgment is enforceable, or would be enforceable but for an order under section 8, may seek to have the registration of the judgment set aside by duly applying to the court in which the judgment was registered, or (where applicable) a court in which the judgment was registered under Part 6 of the Service and Execution of Process Act 1992, to have the registration of the judgment set aside.
- f. **Must set aside 7(2)(a)** must set the registration of that judgment aside if it is satisfied
- i. (i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

- ix. (ix) that the **judgment has been discharged**; or
 - x. (x) that the judgment has been wholly satisfied [**paid the day before etc**]; or
 - xi. (xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, **would be contrary to public policy [revenue law, penal law, public policy – but not NZ tax]**;
- g. **May set aside 7(2)(b)** may set the registration of the judgment aside if it is satisfied that the matter in dispute in the proceedings in the original court had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter. **[RES JUDICATA]**
- h. **Jurisdiction — ss7(3)-(5) for s7(2)(a)(iii) ground**
- i. Voluntary submission including by agreement (s7(3)(a)(i), (iii))
 - ii. Was a plaintiff or had counter-claimed (ss7(3)(a)(ii))
 - iii. Had resided in or principal place of business in the country of the original court (s7(3)(a)(iv))
 - iv. If judgement relates to transaction that was effected through or at a place of business in the country of the original court (s7(3)(a)(v))
 - v. s7(4) on which original court is **not taken to have had jurisdiction**
 - 1. 11 [The original court] is not taken to have had jurisdiction to give the judgment merely because the judgment debtor: (a) entered an appearance in proceedings in the court; or (b) participated in proceedings in the court only to such extent as was necessary; for the purpose only of one or more of the following: ... (d) contesting the jurisdiction of the court; (e) inviting the court in its discretion not to exercise its jurisdiction in the proceeding

i. TTPA Part 7 — NZ

- i. **Can only be enforced by registration: S65** NZ enforcement must be registered under the Act
 - 1. **COMMON LAW cannot be entertained when it comes to NZ (s79)**
- ii. **Requirements:**
 - 1. **S66 must be final and conclusive**
 - a. **NOT**
 - i. **[Freezing orders] – LFDB v SM** → should ‘final and conclusive’ in the TTPA have the same interpretation as in common law OR equity? Common law, hence freezing orders are not. Contravened the Act, not final and conclusive so set aside under s72(3).
 - 2. Includes civil proceedings, compensation from criminal proceedings, criminal fines (as defined in Regulations), payments of expenses for meeting subpoena or appearing remotely, NZ market proceeding judgment
 - 3. **Includes non-money judgements**
- iii. **AU courts have obligation to register upon application (s68)**
 - 1. Must be made within 6 years of judgement (**68(5)(c)(i) TTPA**)
- iv. **Grounds for setting aside are exhaustive (s72(3)):**
 - 1. **Contrary to public policy (s72(1)(a))**
 - a. I.e. it is repugnant
 - b. Revenue law allowed under s7 FJA
 - c. Penal laws allowed under TTPA
 - 2. **Contrary to Act (s72(1)(b))**
 - 3. **Must NOT set aside otherwise than in accordance with s72 (s72(3))**
- v. **Notification of registration procedure s73**
 - 1. Judgement creditor must give notice of registration to **every liable person** in the form and manner prescribed and within 15 working days; but can apply for longer period
- vi. **Effect of registration S74** –registered NZ judgment has **same force and effect [as AU judgement]** and may give rise to same proceedings for enforcement

(1) A registered NZ judgment :

(a) has the same force and effect; and

(b) may give rise to the same proceedings for enforcement;