TOPIC 0: INTRODUCTORY SURVEY

Function and purpose
- To give legal practitioners a set of rules to resolve legal issues outside our own legal systems.

Rational of private international law
- Empirical reason: to promote justice, convenience (incl predictability of outcome and certainty), the promotion of reasonable and legitimate party expectations, uniformity of decision and respect for the territorial application of law **(*John Pfeiffer*).**
- **[Substantive proper law = *lex loci delicti*] – *John Pfeiffer*** → Pl was resident of ACT, carpenter lived and worked in ACT, employed by John Pfeiffer. JP told Pl to go a days work in NSW – injured as a result of negligence of JP to provide reasonably safe place of work. Pl brings negligence claim against PL. HCA: Reasonable party expectations justifies NSW law to be applicable law. Accords with territorial authority of NSW. Thirdly, certainty.
- **[Renvoi] – *Neilson*** → Forum for litigation was WA. Neilson injured in PRC, caused by negligence of VIC state-owned corporation. Brings negligence in WA – no problem of jurisdiction. PRC – much shorter period of limitation, 1 year. WA: 6 years. PRC limitation period expired when Neilson brought the claim. Choice of law rule = lex loci delicti applied = PRC. PRC law had choice of law rule → tort case where parties have same domicile or nationality, the law of the common domicile or nationality is to apply – WA law.
  - AU choice of law → PRC → AU … forever-going-on cycle
  - What would a Chinese Court applying Chinese law do?
    - Apply AU limitation law because of its tort choice of law rule
    - So WA Court will respect that → uniformity of decision-making

Theoretical speculation on the application of foreign law
- ***Huber Territorial Theory*** → 3 maxims
  1. The law of a country has exclusive authority within its territory but not beyond – BUT considerations of comity require the recognition of foreign law subject to forum public policy exclusionary doctrine
  2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily
  3. Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.
- **[UK agreement prohibited by USA law, UK cannot uphold because of international comity] – *Foster v Driscoll*** → Importation of whisky into USA, agreement entered in UK to purchase steam ship and carry whiskey into USA, prohibited by USA law. Contract governing law was UK; UK law did not prohibit the agreement but it contravened UK public policy of —- international comity bw UK and USA. UK law cannot uphold such agreement in violation of international comity.
- **[Forum only applies its own procedural law – use *lex fori* to determine if it is substantive or procedural] – *Re Cohn*** → UK Court to apply German law, NAZI regime. Cohn family were German nationals, couple and three children, domicile in Germany. They came as refugees, jews. 1918: Cohns made joint will → on the death of one of them, property passes to survivor, and if on death of survivor → equally distributed to three children. Husband died, Mrs Cohn inherit. Cohn and one of the three children died in plane – could not determine who had died first. Did the deceased daughter survive her mother? So her children would also inherit smt.
  - Succession to immovable property is governed by lex situs — where immovable property situated
  - Succession to movable property – lex domicilii – where they were domiciled at place of death
    - Cohn had not acquired domicile of choice in UK at time of death – it was Germany → issue of characterisation arose
      - Differences in laws:
        - UK presumption of survivorship → if you cannot determine who died first, the elder dies earlier
        - German Civil Code → died simultaneously
      - Question was substantive law of succession – cf procedural; so German law applies
        - Dies simultaneously → the two died together —- daughter did not survive her mother; so the remaining two children get ½ each?
      - Was presumption of survivorship a question of substance or procedure? Substance

Choice of law technique → Characterisation is determined by *lex fori*
- **[Whether non-physical presence at ceremony was matter of formal validity therefore governed by *lex loci celebrationis*] — *Apt v Apt*** → 1941, marriage ceremony in Argentina, woman was UK national, domiciled in England. Man was Argentina national domiciled in Argentina. Marriage was conducted without woman being present, she was

TOPIC 1: PERSONAL CONNECTING FACTOR

SCAFFOLD

1. **Apply law of NSW as *lex fori* (*Re Annesley; Hannema;* s4(4) Domicile Act 1979 (NSW))**
2. **Date: X 在哪一天的domicile**，**而不是我们在哪一天determine e.g.** 问：**1977年的时候她的domicile是哪里**
   - 2.1. **Determine X's domicile Before 1 July 1982** → determined by reference to the Common Law as if the Domicile Act was not enacted (**s4(1) Domicile Act).**
   - 2.2. **Determine X's domicile on or after 1 July 1982** → determined by reference to the Domicile Act as if it had always been in force (**s4(2) Domicile Act)**
3. **Before 1 July 1982: According to Common Law**
   - 3.1. **What is X's domicile of origin?**
     - 3.1.1. Nuptial child: takes domicile of child's father as at the date of the child's birth (***Udny***)
     - 3.1.2. Ex-nuptial child: takes domicile of child's mother as at the date of the child's birth (***Udny***)
   - 3.2. **X's age and circumstances**
     - 3.2.1. **If under age 18 – domicile of dependence**
       - 3.2.1.1. Nuptial child: takes domicile of dependence of father (***Udny***)
       - 3.2.1.2. Ex-nuptial child: takes domicile of dependence of mother (***Udny***)
     - 3.2.2. **If married and is a woman — Married Women's Domicile**
       - 3.2.2.1. **Rule:** takes domicile of her husband (***Raffenel* 265)**, upon cessation or decease of husband, regains her capacity to acquire Domicile of Choice, but her domicile of dependence continues as a quasi-domicile (***Raffenel*).**
   - 3.3. **Can X acquire a domicile of choice?**
     - 3.3.1. **Capacity:** If married women then no (***Raffenel*).**
     - 3.3.2. **Requirements:** (1) Lawful Physical Presence + (2) Present intention to make a place home indefinitely (***Winans; Re Annesley***)
       - **3.3.2.1. Lawful presence:** No more than a split second (***White v Tennant*; McaeElrath). [PAGE 4-5]**
         - 3.3.2.1.1. Unlawful: entering in violation of immigration law or absconding bail (***Solomon; Puttick*),** unlawful overstayer (***cf Mark v Mark***)
       - **3.3.2.2. Intention:**
         - 3.3.2.2.1. If refugee: intention must be independent from any compulsion to remain in Australia (***In the Marriage of Wu***)
         - 3.3.2.2.2. **No intention:** if contingency of returning to DOO is "clearly foreseen and reasonably anticipated" (***Bullock*** → return to Novoscotia on wife's death; ***Winans*** → non-integration with UK, anti-UK, referred to himself as citizen of Maryland US) rather than a "dim hope" or "doubtful" (***Re Furse*** → man saying will continue work on UK farm until unable to continue such "physical-active life")
         - 3.3.2.2.3. Length of presence not determinative: ***Haque*** → **29 years in WA; *Bullock*** → **39 years in UK.**
   - 3.4. **Did X acquire a new domicile?**
     - 3.4.1. If NO — You cannot abandon a domicile of origin, it may only be displaced by a domicile in another place (***Bell v Kennedy***)
     - 3.4.2. **Is it in a union?** I.e. in 1950 no AU domicile, only State. If one has intention to make AU but not specific state then no DOC (*Re Benko*)
4. **After 1 July 1982: According to Domicile Act**
   - 4.1. **X's age and circumstances**
     - 4.1.1. **If under age 18 – domicile of dependence**
       - 4.1.1.1. If parent living together, whether married or not: on father
       - 4.1.1.2. If parents living separately (whether married or not), or if only one living parent: follows parent with whom the child has the principal home (**s8).**
       - 4.1.1.3. If the living parent dies = domicile of the parent at the time of death (**s8)**
       - 4.1.1.4. At age 18 – gain capacity but DOD is a quasi-domicile until new one acquired (*Re Gulbenkian*)
     - 4.1.2. **If married and is a woman — Married Women's Domicile abolished (s5 Domicile Act)**
   - 4.2. **What is X's domicile of origin?**

live with said sister. Sailed, but ill-faited Lusitania, drowned. Where was he domiciled at death? Iowa – domicile is retained until new one acquired.

2. **Domicile of choice** → Rule: lawful physical presence + present intention to make a place home indefinitely
    a. Choice of law rule: Use *lex fori* AU law to determine what was the domicile of the parties at the time in issue e.g. marriage (***Hannema***). Capacity to acquire a domicile of choice is governed by the *lex fori* and not by the putative lex domicilii.
        i. **[*lex fori* used to determine domicile at death with will] – *Re Annesley**** → Court was concerned with validity of will made by Annesley who had lived in France for 58 years before her death in France in 1924, lived in France for the preceding 14 years. Where was she domiciled before her death? France. She left will, given all of her movable to different people, except for her two daughters. French Law did not allow this.
    b. **Presence**
        i. **Lawful Physical Presence**
            1. Length of presence – no more than a split second
                a. ***White v Tennant*** → WVA and Pensylvania. They have a farm in WVA, and lived there for all of their lives. Found a good place for farm in Penn, 7 April 1885 the couple sold their farm and rented another farm just across Penn. Move took place 2nd April 1885. Woman visited brother in WVA to rest/rewind. Woman had typhoid fever, husband contracted it and died, left no will – died intestate. Which law governed intestate succession with movable property? Law of the domicile of the person at death. Penn — Woman only took half; if under WVA, she would take all.
                b. **[No residence requirement, Domicile Act is not code] – *McaeElrath*** → Concerned with question of jurisdiction. Married in Fiji, Man was citizen of US, resided in Fiji for many years. Parties married in Fiji in 1970 and had matrimonial home there. Separated in 1994, wife was citizen and resident of Fiji. 8 September 1998 man entered in AU, he visited AU many times alr as visitor/temprary resident. 15 Sept 1998 husband applied for dissolution of marriage,
            2. Precarious or permissive presence is valid and effective → in AU on visitor visa = lawful, so long it was lawful at the time they formed the intention to stay indefinitely. Presence cf residence, residence requires a settled purpose.
            3. **[Moved to Qld, next day he was in hospital, died two weeks later] – *Blackett v Darcy*** → died domiciled in Qld. Applicant went QLD, stayed for one day and fell ill. Had present intention to make QLD home indefinitely, NSW legislation required deceased to be domiciled in NSW.
        ii. **Unlawful entry/unlawful presence –**
            1. **Rule:** unlawful physical presence denies ability to acquire domicile of choice **(*Solomon; Puttick*)**
            2. ***Solomon v Solomon* →** person called James Solomon who entered AU in 1902 in breach of AU immigration law. His intention was to make his home indefinitely in NSW. Entering unlawfully. James Solomon married in 1905, a NSW woman — domicile was NSW. Woman files petition for dissolution of marriage in Supreme Court of NSW. husband continue to be domiciled in Solomon island,c
            3. ***Puttick v A-G*** → Federal Republic of Germany arrested Puttick for murder etc in 1971, during trial she absconded on bail to UK in 1974 on forged passport.
        iii. **Unlawful presence as an "overstayer"**
            1. **Bad UK law — [Could acquire a domicile of choice in England if during the period of unlawful presence, one formed the intention to make home indefinitely in England] – *Mark v Mark* [2005] 3 All ER 912** → UK Court for dissolution of marriage brought by wife. Married women domicile CL was abolished. Husband was a general in Nigerian Army, also involved in military politics in Nigeria. Nigerian govt in 1993 decided they wanted to get rid of husband — exiled from Nigeria. Husband arrived in UK – given indefinite right to remain (PR), Wife was doing a course in Florida then to join her husband. Wife was not added to application of her husband for indefinite residence in UK. Wife entered not as indefinite, she had limited right of entry. Entry permit expired, breakout of marriage, Husband's exile was lifted and decided to return to Nigeria. Wife had enough, wanted to stay in the UK. She

UK, parties went to live in the South of England, purchased by Mr Bullock. Substantial assets were all in Canada, court accepted that on the basis of evidence that during the period of 39 years, Bullock had no intention of making UK home indefinitely. "If my wife shall pre-decease me, I will return to Novascochia"

3. **[29 years spent in WA operating family business, father returned to India, son no intention to make it home indefinitely at any point in time] — *Haque*** → Haque was nuptial child, his father came to WA in 1870, established a business that flourished. Father had emotional connection with West Bengal - India. 1927 Haque came to AU to work for his father, his father then returned to India and his father died in India. Haque remained in WA, continued business. 1956 (29 years later) Haque died, where did he die domicile? Not long before his death, he made a will in WA, gave the whole of his very substantial property (various kinds) to URAL (his brother), under Indian law – their personal law would be their religious law being Islamic law. Under Islamic law, no person had power of testamentary disposition – reserved for lawful wife or wives and legitimate children of the deceased. Haque married in India and his wife remained in India, two children born of that marriage when Haque visited India from WA. Haque remarried in WA, if AU law is relevant then this is illegal. Children of second marriage argued we want your estate. **HCA:** At no point of the lengthy 29 years in WA Haque had the intention of making WA home indefinitely. Therefore he continued to be domiciled in India, which was his domicile of origin and domicile of dependency before he reached majority age.
    a. Succession to movable property is done by *lex domicilii* at death = Islamic law
    b. Succession to immovable property (land and interests in land) is done by *lex situs* = WA, where the property sits.
    c. **HCA:** All of his property was movable including interests in land – where contract to sell land, uncompleted, Haque's interest is unpaid vendor = movable. Validity of second marriage to be determined for succession purposes also to be determined by the choice of law rule for succession. 1951 - ASZRA was second wife (who just finished uni in India), ceremony complied with Islamic law but no intention to comply with AU law.

iii. **YES intention**

1. **Vague contingency = intention to make UK domicile not lost—**

   [Certain contingency one would live and work in UK until unable to do physical activity on farm – died at age 80] – *Re Furse* → Husband banker in US, married wife in NYC. 1923 couple came to UK following death of child, 1924 Husband purchased farm. Husband died in 1963. Couple regularly visited US, sometimes for 8 months. Question was where did he die domicile? Substantial assets were in US, could it be subject to UK stamp duty? Matrimonial home in NYC leased out on monthly tenancy until 1932. Contingency of return: Husband said he will continue to live and work on farm in UK, until such time as he is unable to continue his active physical work on the farm. TJ considered the contingency was too vague thus subject to UK stamp duty.

d. **Voluntary act**

i. Rebuttable Presumption:
   1. That refugees do not intend to make their country of refuge home indefinitely. Well founded fear of persecution. Rebuttable (***Wu***).
   2. Criminal visa - lawful presence for those who enter AU on extradition

ii. ***In the marriage of Wu*** → Domicile of origin in PRC, came to AU in 1986 for the express purpose of study, at the time very clear he would return to PRC once studies completed. 1989 PRC extreme violence of Beijing against students; AU response was that persons in Wu's situation were offered humanitarian visa on the grounds of refugee status. 1993 Wu made an application to the family court of AU for dissolution of marriage, the only ground FCAU could make order was that if in 1993 Wu was domiciled in AU. Held: No precide point but Wu clearly wanted to make AU home - convincing evidence in person by Wu.

e. **Proof of change of domicile**

a whole)] – *Re Benko* [1968] SASR → Succession – intestate succession = person dying without will. Benko was Hungary national (born) – domicile of origin in Hungary. 1931 married woman called Maria, WWII, Benko disappears during the period of the war. End of war, Benko was alive and lived in displaced camp in Europe, accepted as refugee by AU – comes by sea in April 1950 to Victoria. Benko made very clear to fellow passages – he was a political refugee – 'I'm coming to Australia to get away from the Russians'. No doubt Benko intended to make AU home indefinitely. June 1950 Benko travels to SA, lived and prospered there, died in 1964. No doubt he intended to make home in SA indefinitely, died there domiciled in SA.

- 5th August 1950 – Court in Hungary declared Benko dead. Maria remarried after that.
  - Should this Hungarian decree be deemed to affect Benko's status? If a peron's place of domicile declares one dead, then one is dead. Was Benko domiciled in Hungary on 5th August 1950? If not where? Hungary
  - Maria was not spouse of Benko given Hungarian law declared Benko dead – no entitlement to Benko's estate.
- If decided now → s10 → part of union with closest connection was SA = SA
- Principle: A person cannot simply abandon a domicile of origin until he has acquired a domicile of choice of another country

- **Domicile of corporations**
  - **Rule:** Place of which it is incorporated is the domicile and determined capacity to contract/whether entity is dissolved or amalgamated etc (***National bank of Greece and Athens v Metliss;*** *Foreign Corporations (Application of Laws)* Act 1989 (Cth) s7(2), (3)) – international comity requires AU to respect and recognise that a corporate entity has corporate legal personality as determined under a foreign law.
    - CF Substantive proper law determines whether contractual obligation is discharged (***Adams v National Bank of Greece***).
  - **Facts of both *Metliss* & *Adams***
    - 1927 National Mortgage Bank of Greece issued bonds and loans – to large English residents, Metliss and Adams. Nominated in English POUND sterling, repayment guaranteed by National Bank of Greece as guarantor.
    - 1953 Greek Parliament passed law to amalgamate National Bank of Greece and Bank of Athens to create → National Bank of Greece and Athens → statute said the new bank was the universal successor to all the rights and obligations of the two old banks.
  - **Law of incorporation/domicile**
    - **[Recognition of corporate entity] *National Bank of Greece and Athens v Metliss* [1958] AC 509**→ Alleged 29000 English pounds in bonds interest unpaid, suing the new bank. Court held new bank amalgamated two old banks, simply stand in shoes of the two old banks. Justice and Comity requires recognition of the place of incorporation → so to pay up. Greek Govt objected, enacted second Greek statute retrospectively to amend the 1953 amalgamation law to say the new bank succeeded to the obligations of the two old banks but not with respect to the Bonds (obligations to the foreign bond holders). HELD: NO.
    - **[Contractual capacity] *Carse v Coppen*** → Scotland case concerning capacity of corporation incorporated in Scotland, entered into transaction which involved the creation of security over its assets in England → floating charge. Scottish law does not recognise floating charges – entity incorporated in Scotland has no capacity to do so.
  - **Substantive law**
    - **[Discharge of contractual obligations] *Adams v National Bank of Greece* [1961] AC 255** → Not related to characterisation of law of incorporation but rather discharge of contractual obligations – proper law of the contract determines this.

Nationality

- Common Law: Relevant for dissolution and annulment of marriage for Federal Family Circuit Court – jurisdiction over AU nationals. Relevant for public law purposes.
  - Difficulties in non-unitary legal systems — no national law to determine nationality e.g. AU, Canada, US, UK
- Civil: Nationality = personal connecting factor akin to domicile in CL systems.
- **Rule:** A person's nationality is determined by the law of the nation of which the nationality is in question (***Oppenheimer*** affirmed by ***Sykes*** but qualified)
- **[Depriving persons of nationality by race or other discriminants would be violations of human rights – against UK Public Policy] – *Oppenheimer v Cattermole* [1976] AC 249** → Oppenheimer had by birth German nationality, refugee

TOPIC 2: RENVOI & THE INCIDENTAL QUESTION

[A] RENVOI
Source of problem of renvoi – different legal systems have different choice of law rules and use different connecting factors.
Problem: Does the law of a foreign country include its private international law choice of law rules or merely internal law? AU approach → all of it; double renvoi.
Solutions

1. **Internal law solution (Denmark, Norway, PRC, Sweden)–** suppresses the problem of renvoi, forum's choice of law rule is only a reference to the internal law of the foreign country excluding its private international law rules.
2. **Single renvoi solution (France, Germany, Indonesia, Italy 1995 onwards, Japan, NK)**– reference to foreign legal system is a reference to the whole of the legal system; if the foreign choice of law rule refers back to forum law – the forum judge interprets that reference back to the "internal" laws of the forum. So it ends here.
3. **Foreign court theory – Double/Total Renvoi [GOOD LAW]** – reference to foreign legal system is a reference to the whole of the legal system; if the foreign choice of law rule refers back to forum law – the forum judge stands in the shoes of the forum court, and decides the case in the way the forum court would decide it. (***Re Annesley; Simmons v Simmons; Re Ross; Re Duke of Wellington; Re O'Keefe***)
   - **<u>Requires proof/expert evidence of:</u>**
   a. Foreign legal system choice of law rule, AND
      i. Civil states use law of nationality as personal connecting factor — but many cases e.g. There is no British National law of succession — therefore it is a <u>reference to that part of the nationality which constituted the person's domicile of origin</u> (***Keefe***).
   b. Foreign legal system solution to renvoi

History

- Common law rule: formal validity of a will disposing of movable property is governed by the law of the testator's domicile *at the date of death* → why is it not when they made the will? Renvoi was an escape device

Development through decided Cases

- **Reference to law of foreign state includes its international law rules (*Collier v Rivaz*)**
- ***Stands in the shoes of Foreign Court* — but not sure entirely how to do this**
  - **[UK reference to Belgian law includes its private international law rules; Belgian referred back to UK (law of nationality), HELD: stands in shoes of Belgian Court] – *Collier v Rivaz* (1841) 163 ER 608** → Two legal systems, English and Belgium. British National, Philli Ryan died in 1829 in Belgium. Long before his death established a home in Belgium, per English law, no doubt acquired a domicile in Belgium. Phillip executed will in Belgium disposing of his movable property, question arose in proceedings in the English court as to the validity of this will. Will was made in accordance with English law but non-compliance with Belgium law. **<u>Succession with movable property with will</u>** — governed by the **<u>law of the domicile of the person at death,</u>** Belgian law.
    - Choice of law rule refers to the Belgian law – if only look to internal Belgian law, this will is invalid; failure to register in presence of notary.
    - **<u>HELD:</u>** Reference to the law of Belgian as lex domicile is a reference to the whole of Belgian law.
      - Belgian law had a choice of law rule – nationality, being English law.
      - Stands in shoes of Belgian Court
        - Expert evidence as to Belgian choice of law rule
        - But no expert evidence as to Belgian solution to renvoi
      - Found valid under UK law so fine; but did not ascertain Belgian solution to renvoi
    - <u>NB: Belgian law actually rejected renvoi; so if dealt today</u> → if expert evidence given to this effect, Belgian law choice of law rule refers to nationality, Belgian judge only apply UK internal law. So UK court apply UK internal law.

DOUBLE RENVOI APPLICATION – how to

- **[First UK Case adopting forum court theory; DOUBLE RENVOI] – *Re Annesley* [1926] Ch 692** → Sybil Annesley died in 1924. Annesley made a will in France, she lived in France for 58 years. The will was meticulously accorded with the formal requirements of French law and English law. Testamentary capacity – essential validity of the will disposing movable property in France and England; governed by the lex domicile at death — French law.
  - Annesley passed away survived by her two children, both not mentioned in the will. Under French succession law, ⅔ movable property were reserved for her daughters who survived her.
  - Reference to French law includes choice of law rules → French law says governed by law of nationality → UK law.
  - **<u>What would a French Judge do?</u>**

- There is no British National law of succession — therefore it is a reference to that part of the nationality which constituted the person's domicile of origin
  - So Irish law
- **Step 3:** Italian solution to renvoi is internal law only
  - So apply Irish internal law only → UK court must apply the same
  - NB: Her only connection to Ireland was when she visited there with her father when she turned 18, but this determined succession for her sake.

(iv) Scope of operations

- **Formal Validity of Marriage**
  - **What is it:** matters pertaining to the marriage ceremony
  - **Rule:** Law of the place of celebration, reference includes the private international law rules (***Hooper v Hooper; Taczanowska v Taczanowski***)
  - ***YES, includes COLR***
    - **[Transmission] – *Taczanowska v Taczanowski* [1957] P 301** → Test case, 3000 other cases with just about the same facts. Marriage took place in Rome in 1946, end of the aftermath of the end of the WWII. Marriage between two Polish Nationals, both domiciled in Poland. Takes place in a Roman Catholic Church in Rome, with Roman Catholic priest officiating. Civil law country, religious ceremony of no legal significance. Priest is officer in Polish Army in belligerent occupation as part of the Allied forces, the Polish army was in belligerent occupation of Italy. Husband also Polish army, woman was refugee of the war living in a convent in Rome. Failure to comply with two mandatory requirements of Italian law (1) to read certain provisions of the civil code prior to ceremony and (2) mandatory of a civil ceremony. Parties came to live in England, was the marriage valid?
      - **Step 1:** UK COL: reference to Italian law as law of place of ceremony
      - **Step 2:** Italian law
        - Italian law – Art 226 Italian Civil Code say the law that may be applied to the formal validity of a marriage in Italy is the law of the nationality of the parties → Polish law.
        - Polish – no civil ceremony so no marriage
    - **[Iraq law was law of place of celebration, COL pointed to UK as common nationality, UK law applied in determining it — marriage did not comply = void] – *Hooper v Hooper* [1959] 1 WLR 1021**→ 1954 Marriage in Iraq, parties were domiciled in UK. Forum Choice of Law rule pointed to law of place of celebration. Under Private International Law of Iraq pointed to law of nationality of the parties if they had a common nationality. Failure of parties to comply with mandatory requirement of UK law, giving notice of intending marriage. Marriage was void.
- **Essential Validity of Marriage**
  - **What is it:** Capacity of the parties and the reality of their consent
  - **Rule**: Law of the domicile of each party at the date of marriage, including the choice of law rules. (***Brentwood*****).**
  - ***YES***
    - **[Capacity to marry was essential validity – COLR = antenuptial domicile; antenuptial domicile was Swiss law; Swiss law COLR was Italian; applied this COLR] – *R v Brentwood Superintendent Registrar of Marriage*** → Application by parties to marry in England. Ms Arias and Mr Galli, woman spanish national domiciled in Switzerland, no impediment on her capacity to marry. Galli was Italian national domiciled in Switzerland, he lived there for 20 years or so. Galli married a Swiss national previously, dissolved by Swiss Court decree in 1957. First wife had remarried under law of Switzerland. Under Swiss law, capacity to marry is not governed by law of domicile, but by the law of Nationality: Italian. Italian law says the Swiss Dissolution of the first marriage was not recognised.
- **Succession to immovable and movable property on death**
  - **Rule:** Reference to *lex domicile at death* (***Simmons; Re Ross)*** and *lex situs* includes choice of law rules (***Re Duke of Wellington***)

Transfer of tangible movable property

- **Choice of law rule for tangible movable property**: *lex situs* – place at which the movable property situated at when the purchase occurred
- **Question:** Does the renvoi doctrine operate in the context of the transfer of tangible movable property as between living persons?
- ***YES (following Neilson in AU so — this more force?)***

- **AU**
  - **Rule**: Renvoi does apply
  - **[Reference to Singaporean law as proper law includes its COLRs] – *O'Driscoll v J Ray McDermott* →** Litigation in WA, personal injury brought in contract, breach of implied term of contract of employment. Employee injured in accident in oil drilling in Indonesia. Proper law was Singaporean, including its choice of law rules.
  - **[Reference to PRC includes choice of law rule] – *Zou v Young*** → Queensland District Court affirmed by Qld COA. Concerned claim brought in Qld, **loan contract governed by law of PRC. Did it include PRC choice of law rule? Yes** it did. Reference to PRC choice of law rule indicated a court in PRC would apply PRC internal law.

- **Tort**
  - **YES Renvoi**
    - **[AU] [Proper law was *lex loci delicti* being PRC including its choice of law rules] — **Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 221 ALR 213**→ Neilson was AU national domiciled in AU. Injured in accident in PRC, negligence of defendant. Proper law was *lex loci delicti* → should the choice of law rule be included? Yes. PRC refers to common nationality/domicile of the Pl and Defendant. If PRC Court looked at it, how would they decide? Apply law of common nationality, and PRC private international law rule in referring to law of nationality would not include CoLR of law of nationality — therefore apply Law of Nationality in deciding the case. WA limitation had 6 years, PRC only 1 year.
  - **NO Renvoi**
    - **UK**
      - ***M'Elroy v M'Allister*** → Fatal motor accident in UK, proceedings brought in Scotland. The applicable law was the law of UK, *lex loci delicti*. Did it include UK choice of law rule? No
    - ***Rome Reg** – European Union
      - Default: Law of place of damage is the general rule
      - But if there is common habitual (usual) residence: Law of common habitual residence
      - Art 24: exclusion of renvoi
    - ***NZ** → Statute excludes renvoi in the context of choice of law in tort ***Private International Law (Choice of Law in Tort) Act 2017***
      - General choice of law rule for tort is law of place where tort occurred, this rule may be displaced if it is "substantially more appropriate" for some other law to be applied AND renvoi is excluded
- If foreign court also double renvoi, Australian judge will adopt the single renvoi solution as backup plan.

(v) Public Policy – rejection of foreign law

- **Rule:** If the operation of the renvoi doctrine identifies as the applicable law a foreign law which violates a fundamental conception of justice or morality as understood in the forum, that law may be excluded or rejected as contrary to forum public policy (***Vladi v Vladi***).
- **[German law was law to be applied in determining matrimonial property, German COL pointed to Iranian Law, which said divorced wife entitled to no more than symbolic token; contrary to public policy of the Novoscotia Court — *Vladi v Vladi* (1987) 39 DLR (4th) 563 (Nova Scotia Supreme Court)** → Vladis were a couple, Iranian Nationals, married in the Federal Republic of Germany, the only matrimonial home of the couple. Marriage was dissolved by a decree of the FRO Germany. Mrs Vladi comes to live in Nova Scotia, Mr Vladi was a person of great wealth, he loved purchasing islands. Mrs Vladi applied to Nova Scotia Supreme Court for division of matrimonial property. Choice of law rule for division of matrimonial property was the law of the last common matrimonial residence of the parties — being Germany. **Germany choice of law rule pointed to Iranian law, Novo Scotia invoked forum public policy to reject the application of the law of Iran. Iran law said that the divorced wife is entitled to no more than a symbolic token gift from her former husband.** Therefore the Court referred to Novo Scotia internal law only.

[B] INCIDENTIAL QUESTION

- **(i) The problem of the incidental question**
  - E.g. deceased's spouse to claim compensation post-tort, the incidental question is: are they married?
    - Do I have regard to the distinct forum choice of law rule or suppress it and simply answer it by reference to the law that governs the main question?
    - **Rule**: Use the COL for main issue to determine the incidental issue (***Haque v Haque No 1; Schwebel v Ungar***)
- **(ii) Two illustrative cases**

TOPIC 3: PROPERTY

(a) SITUS OF PROPERTY; CHARACTERISATION

- **(i) Respective roles of the lex fori and the lex situs**
  - **Rule:** Law of the forum is NSW , this determines the situs (***Air Foyle v Centre Capital***), the situs then determines whether the property is movable or immovable.
  - **Exemption**
    - **[Forum public policy may reject *lex situs*, where foreign law gave effect to stealing of property] – *Kuwait*** → Property in issue was 10 commercial aircraft owned by Kuwait airways, registered in Kuwait. Stolen while on the ground in airport in Kuwait by Iraqi government following its invasion. Removed from Kuwait to Iraq, Iraqi govt decree said it was now property of Iraqi airline. Lex situs governs this, i.e. Iraqi. But rejected on the basis of public policy, taking of property was the stealing of the aircraft.
- **(ii) Situs of property. Land and goods; ships and aircraft; debts and other choses in action**
  - **Rule:** If the Choice of Law Rules refers to the *lex situs,* where is the situs?
  - **Land and interest in land & goods** → physically where it is located (***Haque v Haque No 2 per*** **Windeyer J**)
  - **Ships and aircrafts**
    - In or in flight over state territory
      - **Rule:** including territorial waters of a coastal state = place of physical location (***Lorentzen v Lydden & Co***)
      - **[Russian registered aircraft in Netherlands] — *Air Foyle v Centre Capital* [2003] 2 Lloyd's Rep 753** → Aircraft registered in Russia sold to claimant Air Foyle pursuant to an order of a Dutch court at a time the aircraft was physically situated in Netherlands. Situs was Netherlands cf Russia.
      - **[Norwegian ship in England] – *Lorentzen v Lydden & Co*→** Norwegian registered ship moored in an English harbour is situated in England
      - **[Qatar registered ship physically in NZ, situs is NZ] – *Thor Shipping v The Ship Al Duhail* [2008] FCA 1842** → Ship situated in NZ, where it was being built. Ship registered in Gulf State of Qatar.
      - **[Netherland ship in Thailand] – *WD Fairway* [2009] 2 All ER (Comm) 399**→ Ship registered in Netherlands, physically located in naval dockyard in Thailand, subject of transaction transferring title of the ship. Situs = Thailand.
      - **[Aircraft on ground, situs = territory of the State] – *Blue Sky One v Mahan Air* [2010] EWHC 631** → Aircraft on ground in Netherlands, registered in UK — situs is Netherlands.
        - **Applied *Air foyle*** → Russian registered aircraft located in Netherlands, situs was Netherlands.
    - **[Bad law, place of registration is the situs at all times] – *Tisand v The Owners of the MV "Cape Moreton"* (2005) 219 ALR 48** → Ship registered in Liberia, hooked in Brisbane. Transaction involving sale of the ship under contract governed by English law. One of the three judges died during the trial, the remaining two allowed to continue. The two Australian federal court judges considered the place of registration is the situs.
      - Dismissed by ***WD Fairway* [2009] 2 All ER (Comm) 399** → Title to a Dutch registered ship physically located in a naval dockyard in Thailand, subject to a transaction. Situs was Thailand.
    - **High Seas** → place of registration/flag state = situs (artificial situs) (***Kuwait***)
  - **Debt [Intangible movable]**
    - Specialty debt created under deed → physically where the deed is located (***Haque v Haque (No 2))***
    - Simple contractual debt →
      - **Rule:** where debtor resides, for corporations → it resides where it carries on business (***Kwok* [1040]** because this is where the corporation can be sued**)**. If multiple → ***where the debt primarily is payable*** (***New York Life Insurance***) **OR** where the debt would be paid in the ***ordinary course of business*** (***F & K Jabbour***)
      - **Insurance Proceeds:** insurance contracts creating simple contractual debts
        - **Express agreement where policy proceeds payable**
          - **[Policy entered into in UK debt, said to be payable in UK, Insurer was NY headquartered but carried on business in Europe. Situs = UK, where proceeds payable] – *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101** → A number of German nationals took out life insurance policies with the NYLI

only the person in actual possession of the goods could sue for trespass; so HOL said for Plaintiff to amend claim, as conversion to goods.

- **[**If the claim **only concerns the infringement of intellectual property right but not title]** (***KK Sony v Van Veen; Lucasfilm v Ainsworth;*** cf ***Hesperides v Aegean Turkish Holidays***) (notwithstanding, the Mocambique rule did deal with both title to land but also the equivalent to infringement i.e. trespass) (***Hesperides v Aegean Turkish Holidays***).
    - **[NZ proceedings for infringement of KK Sony copyright in UK and HK, justiciable as no issue re title] – *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179** → NZ proceedings for infringement of KK Sony copyright in PS2. Place of alleged infringement was UK and Hong Kong. i.e Plaintiff had copyright in UK and Hong Kong. **No issue of title,** distinguished ***Potter v BHP***.
    - **[UK proceedings for infringed to copyright in Star Wars movie character in USA, no issue of title] – *Lucasfilm v Ainsworth* [2010] 2 All ER (Comm) 1101** → UK Supreme Court adopts same position as NZ. Infringement with no issue of title in the USA of the plaintiff's copyright, copyright to the design of characters in Star Wars movie.
- **Infringement of copyright in country (Berne Convention Country)**
    - **Rule:** Australian is a party to the Berne Convention, given effect by Copyright (International Protection) Regulations 1969 (Com). This means Australia will protect from infringement *within its territory* copyright which subsists under the law of another state party provided that the foreign copyright material would have been entitled to copyright protection under Australian law (the Copyright Act 1968 (Com)).
    - **E.g.** Cinematograph film made in Hong kong and is protected by copyright under law of the PRC (a Berne Convention country), that copyright will be protected in Australia provided that the cinematograph would have been protected by copyright under the Copyright Act 1968 (Com) if it had been made or first published in AU: ***TVBO Production Ltd v Australia Sky Net Pty Ltd* (2009) 82 IPR 502.**

- **(ii) Exceptions to the *Mocambique* rule**
    - **Rule:** Subject matter of proceedings may concern foreign land but Mocambique does not apply. Does not involve (1) title (2) possession (3) trespass.
    - **Contract or personal equity relating to foreign land (**Tritech Technology v Gordon* (2000) 48 IPR 52)**
        - **Lease to foreign land, claim to recover unpaid rent by lessor**
        - **Sale of foreign land, purchaser fails to pay purchase price, claim to recover unpaid price**
        - **In personam Remedies**
            - **Rule:** Acting directly on person is not subject to Mocambique
            - **Special performance** — **[Contract for setting boundary bw their estates in USA] – *Penn v Lord Baltimore* (1750) 27 ER 1132** → Contract between two residents in England entered into in England. Contract set out the boundary between their estates in the USA, between State of Pennsylvania and State of Baltimore. Specific performance is a remedy that acts in personam, acts on the person of the defendant, does not raise any of the three categories falling with Mocambique.
            - **Injunction** —- ***Re Clunies-Ross; Exp Totterdell* (1987) 72 ALR 241** → Injunction restraining WA resident Clunies from dealing with Cocos Keeling Islands.
            - **Fraud therefore injunction ordered** (creditor (of judgement debt) defeating transaction) — ***Singh v Singh* (2009) 253 ALR 575** → Dispute between partners of business, plaintiff sought injunction against defendant, d's spouse and daughter, with dealing with land in Malaysia. Plaintiff obtained judgement against defendant, one of the principal assets was land in Malaysia. Defendant was WA resident; executed transfer of Malaysian land in favour of his spouse and daughter.
    - **Admiralty actions (ship related)**
        - ***The Tolten* [1946] P 135** → Trespass to foreign land, a large container terminal wharf in Nigeria. The Tolten crashed with the wharf – clear trespass to land.
    - **Succession on death**
        - ****Re Duke of Wellington* [1947] Ch 506** → questions of entitlement, title to foreign land arising in the context of devolution of property on death does not come within Mocambique.
    - **Abolition of the *Mocambique* rule in NSW (and partially in the ACT)**
        - **NSW**
            - ***Jurisdiction of Courts (Foreign Land)* Act 1989 (NSW) ss 3, 4, 5 →**

- **[Oil in storage in Fujairah, UAE; *lex situs* at the time] – ****Glencore International v. Metro Trading International*** **[2001] 1 Lloyd's Rep 284 (Materials, p 49Bi)** → Entity to whom oil delivered became insolvent. Deficiency in oil. Glencore argued better proprietary interest in that oil than the Banks who had lent money. Which legal system determined when Glencore delivered the oil the title to the oil? *Lex situs* was Fujairah.
- **[Pledge of whisky in Scotland, Scottish law was *lex situs* at the time of the transaction] – ****Inglis v. Robertson*** **[1898] AC 616 (Lord Watson) (Supplementary Materials, p 66)** → *Camel v Sewell* in reverse. Transaction in effective under *lex situs*. Transaction entered into in England between two English merchants, Mr Inglis lent Mr Goldsmith a sum of money, took pledge of large quantity of whisky as security, stored in warehouse in Scotland. Written document called letter of hypothecation – pledge. Endorsement of delivery warrant also presented. Valid under UK law, but not under Scottish law — notice must be given to warehouse keeper. Not complied. Goldsmith becomes insolvent, too late to give notice to perfect security. **House of Lords:** Validity and effectiveness of security is to be determined by the *lex situs* at the time of the transaction being Scottish law.

- **Security interests in goods *Personal Property Securities Act 2009 (Com) s 238(1) (Supplementary Materials, p 66)**
  - **Rule:** Law that governs the validity and effectiveness of a security interest in goods is the ***lex situs.*** PPSA says the *lex situs* does not include the conflict of laws rules of the *lex situs* — **NO RENVOI** when dealing with security interest in goods.
- **A comparative approach to stolen tangible movables**
  - **US Rule:** stolen property – law that determines the acquisition and loss of title is not the *lex situs;* but the legal system which has the greatest interest in the litigation —- it was the law of NY in this case; because the last thing the law of NY would desire is that NY becomes a place for the trading of stolen art works. **A purchaser from a thief obtains no title at all — *nemo dat* –** you cannot give what you don't have. NY gallery obtained no title at all, Swiss' also defective title. (***Bakalar v Vavra***)
    - **[NAZI looted art work from Austrian National, Swiss Art gallery got it, sold to NY Art gallery, sold to NY purchaser] – ****Bakalar v. Vavra*** **619 F 3d 136 (2010) (Supplementary Materials, p 68) US Court of Appeal Second Circuit** → 1938 Austrian National, jew, arrested and taken to concentration camp outside Munich, died in 1941. Man had in his apartment in Vienna Austria, substantial and valuable art collection, looted by the German authorities. Governmental seizure, expropriation. 1956 Swisse art gallery has possession, 1963 sold to NY art gallery. Resident of Massachusetts purchases it. Pl argues being owner of artwork, defendants are the successors of the long deceased 1938 National. BFP of stolen goods acquires good title to goods under US law. Swiss law there is a presumption of BFP of goods, matter of complete irrelevance that it may have been looted by NAZI regime in Austria. US COA: insurmountable obstacles in establishing under Swiss law that BFP (Swiss art gallery) had no good title. Apply *lex situs* → good title by Swiss gallery, passed to NY art gallery, then to NY purchaser. **COA: Will depart from *lex situs* principle** – or else produce unacceptable result. **Stolen property – law that determines the acquisition and loss of title is not the *lex situs;* but the legal system which has the greatest interest in the litigation —- it was the law of NY in this case; because the last thing the law of NY would desire is that NY becomes a place for the trading of stolen art works. A purchaser from a thief obtains no title at all — *nemo dat* –** you cannot give what you don't have. NY gallery obtained no title at all, Swiss' also defective title.
  - **NB: *AU Court would not likely adopt it — so *lex situs* still applies but may be rejected as contrary to public policy of the forum (NSW) — i.e. NAZI regime looting etc**

- **(ii) Choice of law: involuntary assignment by foreign governmental act or decree**
  - **Rule**: Validity and proprietary effect of expropriation/foreign governmental seizure: governed by the **lex situs** ***at the time of the expropriation/foreign governmental seizure***, **subject to forum public policy** exceptions; the relevant act or decree must be that of the "government" of the situs, an issue which may require consideration of Australian government policy on the recognition of foreign governments and judicial criteria for recognition particularly in circumstances of revolution, internal armed conflict or civil war)
  - **Lex situs rule and foreign Act of State Doctrine:**
    - **STEP 0: state the rule –** So long as property in question was situated in territory of foreign country at date or time of expropriation, if that expropriation is valid under the *lex situs*, then that expropriation will be recognised in Australia. The expropriation will be treated as divesting the former owner of title. It did not

matter if the property was later transferred to Australia. (***Princess Paley Olga v Wiesz***). **The corollary is that no extraterritorial application will be given to foreign state acts re property —** *"This court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory."*

- **May extend to property of non-nationals:** Generally AGAINST THE EXPROPRIATING STATES' **OWN NATIONALS: BUT *Upjohn J*** rejected the submission that the act of state doctrine applied only to the property of nationals of the confiscating state – he suggests it applies to **property of non-nationals who bring their property into the state** (***Helbert Wagg* [1956] 1 Ch 323)**.

- **NB: [Foreign Court Order will not be enforced outside its territory i.e. on property outside its territory] – European Bank v. Citibank (2004) 60 NSWLR 153** → EB had account with NSW Citibank, US Federal Court made order for seizure and forfeiture of credit balance of EB's acc at the NSW branch at Citibank. Situs of the bank acc was NSW, situs of property intangible movable – money on page.
- **STEP 1: IS THE FOREIGN GOVERNMENT RECOGNISED?**
  - **Rule**: Taking of the property must be on behalf of the government of the foreign state.
    - **Government recognition factors:** "[T]he factors to be taken into account in deciding whether a government exists as the government of a state are: (***Sierra Leone* p 321)**
      - (a) whether it is the ***constitutional government*** of the state;
      - (b) the **degree, nature and stability of administrative control,** if any, that it of itself ***exercises over the territory of the stat***e;
        - Low: areas under control were devoid of law and order, merely in control of capital city (less control compared to exiled govt)
      - (c) **whether Her Majesty's government has any dealings with it** and if so what is the nature of those dealings; and
        - Little weight be given if: continue to deal with old proper govt
      - (d) in ***marginal cases***, **the extent of international recognition** that it has as the government of the state."
    - **Pre-19Jan1988:** executive certificates ordinarily given by executive government of the forum, recognising or not, of the foreign state. (**Statement of the Minister for Foreign Affairs and Trade, 19 January 1988, *Recognition of governments – change in Australian policy,* 12 Australian Year Book of International Law 357 (1988))**
  - **[NOT recognised, not consti, no control, no dealings] – *Republic of Somalia v. Woodhouse, Drake & Carey (Suisse) (The Mary)* [1992] 2 Lloyd's Rep 471 (Hobhouse J)** → 1991: Government of Somalia was overthrown after lengthy civil war. Before collapse, constitutional government of Somalia purchased quantity of rice, loaded on ship Mary, arrived at port of Mongidishu, clearly unsafe to offload due to war. Mary sailed off with cargo of rice, incontestably the property of the Republic of Somalia. Dislocation Somalia for many years. Under order of UK Court, rice sold $2m usd, proceeds placed in account in name of Somalia. Who was entitled to this?
    - The government of Somalia, group of individuals with connections with the ousted government, tangential connection with Constitutional govt.
      - Not constitutional govt, no control over territory, no dealings, no recognition.
  - **[Non-recognition of Northern Turkish Military force saying they are govt of Cyprus] – **Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts 917 F 2d 278* (1990) (Supplementary Materials, p 75)** → 1974: Things fell apart in Eastern Mediterranian, Northern part of Cyprus was operated by Turkish Military force. Ancient Church owned and operated by Plaintiff as Greek Orthodox Church. 1976: Priests decide to depart to Greek Cypria part of Cyprus. Byzantine mosaics (art made of mosaic tiles). Persons unknown entered the Church and ransomed the church. 1988: Mosaic turned up at Geneva airport Switzerland, next day transferred to Indiana, Indiana art gallery purchased it from a seller, Court found the gallery must have known how it came about. Law to be applied is law of Indiana, tort of conversion. If your title is defective, the title you transfer is also defective.
    - Contention: Dealer acquired good title, Northern Cyprian law enacted laws that removed title of Greek Orthodox Church
      - **Court: we do not recognise this government. We recognise those in the Southern part as the govt for the whole of Cyprus.**

Year Book of International Law 630-633 (2007) (Supplementary Materials, p 31) → Artefacts unlawfully removed from Iran, 3 to 5000 years old. Excavated in Iran relatively recently. Artefacts find their way to Barakat Gallery in London, Iran now makes claim in UK Courts. In 1979, Iranian govt enacted law Legal Bill 1979, declared that any undiscovered artefacts in Iran were the property of the State. These artefacts were removed and discovered after the Legal Bill 1979 came into effect. By reference to *lex situs*, the artefacts were Iranian property.

- **NO, go to Step 3**
    - **[Forfeiture of goods unlawfully removed from NZ to NZ by NZ law; but not automatic forfeiture; UK will not enforce penal law of NZ] – Attorney - General (New Zealand) v. Ortiz [1984] AC 1** → 1972, a farm worker in NZ found a Maori Artefact, turns out to be regarded as most valuable NZ cultural heritage. Panelling from a temple, contacted NY dealer and unlawfully removed it from NZ. NZ legislation made it a criminal offence to remove historic articles without consent of NZ govt. NY buyer sold to Ortiz, Ortiz living in Switzerland, his daughter abducted so he had to raise money. Ortiz put article up for sale, NZ AG sees this. Brought proceedings in UK Courts. The Historic Articles Act → if one removes lawful it "shall be forfeited". **This means acts had to be taken cf automatic, acts were not taken while the article was in NZ, this meant NZ was asking UK Courts to enforce penal law now. Invalid. If automatic forfeiture = valid.**
        - **Historic Articles Act 1962 (NZ) s 12 ("shall be forfeited")**
        - **Cf AU equivalent where forfeiture is automatic** → where someone approached post box with au historical artefact = forfeiture. So foreign courts would say AU govt got title while the property was in AU. Foreign protected object imported/unlawfully removed and brought into AU after 1st July 1987 → forfeiture automatic to AU govt for purpose of being returned to the country of origin. (***Protection of Movable Cultural Heritage Act* 1986 (Cth))**

- **STEP 3: IF NOT WITHIN THE FOREIGN STATE, IS IT DURING STATE OF WAR?**
    - **Rule:** To give effect of foreign law where ordinarily would not be applied under common law private international law.
    - **Foreign law given effect — i.e. exceptional circs rendering recognition [WAR]**
        - **[UK recognised Norwegian decree on property in UK at times of War against Germany] – *Lorentzen v. Lydden & Co [1942] 2 KB 202 (see Materials, p 49v)** → German invasion of Norway in 1940, Norwegian govt be evacuated from Norway to UK. Practical problem of shortage of shipping, large number of Norwegian merchant ships at anchor in English harbours. Norwegian issued a decree whereby Norwegian govt compulsorily acquired those ships. 1942; Validity of that Norwegian decree. The lex situs principle would say that decree of Norwegian decree could only operate on property situated in Norway. HELD: Looking at the circumstance of grave national emergency, for UK and our ally Norway, consistence with principles of comity of nations, with public policy of the UK to give effect to this Norwegian decree, even though it is not entitled to recognition under strict interpretation of common law, lex situs.
        - **[US recognised Norwegian decree on property in US at times of War against Germany] Anderson v. NV Transandine Handelmaatschappij 36 AJIL 701 (1942)** → (New York Court of Appeals) (comity of nations required recognition of 1940 wartime decree of the Royal Netherlands government which vested in the Royal Netherlands government for safekeeping property situated in New York owned by residents of German-occupied Netherlands given that, at the date of the Court's decision, Germany was the common enemy of the United States and The Netherlands)
    - **NOT given effect, not during war-like emergencies — YOU CANNOT USE PUBLIC POLICY AS A SWORD outside of War Emergencies**
        - **[Money in bank in UK, Netherlands govt in exile in UK decree to transfer not recognised] – *Bank voor Handel en Scheepvaart NV v. Slatford [1953] 1 QB 248 (see Materials, p 49v)** → German invasion of Netherlands in 1940, Netherlands govt in exile in UK, Netherlands bank deposited large quantity of gold in UK for safekeeping before WWII. Royal Netherlands govt gave decree to transfer this to Netherlands. Court applied *lex situs*, did not adopt foreign public policy as sword.

TOPIC 4: SUCCESSION TO DEATH

- **Rule:** *Lex domicile at death* governs movable property; *lex situs* governs immovable property.
- **Movable**
  - Right of unpaid vendor or mortgagee of land where land situated in Australia (***Haque***) or New Zealand (***O'Neil***); cf UK law (not followed by HCA in ***Haque***)
    - **[Unpaid vendor's lien & purchase price of land in WA, WA law considered this movable property, governed by *lex domicile at death* — Islamic law] – *Haque v Haque (No 2)* (1965) 114 CLR 98→** Interest of unpaid vendor of freehold land situated in WA. Haque entered into contracts for sale of three parcels of freehold land of which he was the registered proprietor before his death. Islamic law was Haque's *lex domicile at death* governs all movable property. **HCA:** Beneficial title in land passed to the purchaser, the vendor has a right to be paid the purchase price and a security over the land unpaid vendor's lien. He was to be treated as a mortgagee of his own land. Primary right is the right to be paid money cf the security interest (accessory). Followed *O'Neil*.
      - **Incidental question** i.e. validity of second marriage does NOT have a life of its own → succession on death to movable governed by Islamic law (*lex domicile at death*) = therefore persons entitled to movable property [incidentally the validity marriage in WA] be determined with Islamic law
      - **BUT NOW** — **Rule:** application of Pt VA where the validity of a foreign marriage is an incidental question, not by reference to the legal system which would govern the main question (**s 88F)**
      - **s88F:** *Notwithstanding any other law, the question whether a marriage solemnised in a foreign country is to be recognised in Australia as valid shall be determined in accordance with the provisions of this Part, whether or not the determination of the question is incidental to the determination of another question.*
    - **[Mortgage interest in land in NZ, NZ law considered it movable property, so governed by *lex domicile at death* – Victorian law] – *In re O'Neill* [1922] NZLR 468** → Person domiciled in Victoria, died intestate (without will). Succession to mortgage interest in land. The mortgage interest was situated in NZ along with the land. In NZ, mortgage interest in land is movable interest, so it is governed by *lex domicile at death* — being Victorian law.
  - Right of partner in **land-owning partnership upon death** (***Haque No 2***) → share in the partnership was dissolved by his death and the right of the deceased's estate to be paid out by his co-partnership which continued after his death were choses in action
  - **Money owing to the deceased** (chose in action) (***Haque No 2***)
  - **Two life insurance policies** and **partnership interests in a motor vehicle** (***Haque No 2***)
  - **A fishing vessel and furniture** (***Haque No 2***)
- **Immovable**
  - Leasehold interest in land situated in a common law system is immovable property for private international law purposes (***Freke v Carberry***).
  - Security interest in land (by itself) (***Haque No 2* per Menzies J)**
    - NB: Interests of a mortgagee – (1) mortgage debt as primary and (2) mortgage security merely accessory; therefore movable. But if we have a pure security interest or if the two are to be separated, the security interest over the land ofc may be immovable.

TOPIC 5: MARRIAGE

(a) CONCEPT OF MARRIAGE

- **(i) Marriage according to Australian law**
  - **Rule:** union of 2 people to the exclusion of all others, voluntarily entered into for life"; definition applies to marriages celebrated in Australia on or after 9 December 2017 and marriages celebrated outside Australia on, before or after 9 December 2017: ***Marriage Act 1961* (Com) s 5(1)**
- **(ii) The rule in Hyde v. Hyde and foreign polygamous marriages** (characterisation of a marriage as polygamous by reference to the nature and incidents of the marriage under the lex loci celebrationis i.e. the law of the country in which the marriage was solemnised or celebrated; at common law, no relevant distinction, in this regard, between a potentially polygamous marriage and an actually polygamous marriage; effect of the rule in Hyde v. Hyde: denial of matrimonial remedies, e.g. dissolution of marriage, in respect of a polygamous marriage; common law recognition of polygamous marriages for other purposes, e.g. succession, family provision)
  - **Rule:** Potentially polygamous marriage is not recognised as marriage under Common Law, therefore cannot award matrimonial decrees, such as dissolution. However, the person will be recognised as "married", therefore they cannot second-marry another person (***Hyde v Hyde; Khan v Khan***).
  - **Mormon marriage in Utah**
    - **[Potentially polygamous marriage, dissolution sought by husband in UK] – Hyde v. Hyde (1866) LR 1 P & D 130 (Lord Penzance)** → Marriage takes place in 1853 in Utah, Salt Lake City. Both parties domiciled in Utah, both were of Mormon faith, at the time polygamy was common practice. Husband had legal right to marry additional spouse during the term of marriage. 1856: Husband went as missionary to Hawaii, renounces Mormon faith. Displeased the authorities in Utah, forbidden to return to Utah, threatened he would be killed if he tried to. Husband was by birth English, returned to England and resumed an English domicile. Wife remained in Utah, Mormon authorities declared that the husband was legally dead. Husband wants to remarry, brings proceedings for decree of dissolution for the Utah marriage, base was wife's sexual relationship with new husband in Utah. **HELD:** Marriage as per common law is confined to monogamous union of opposite sex entered into indefinitely, therefore this court cannot dissolve it; but common law recognises the husband's status as a married person.
  - **Muslim marriage in Pakistan**
    - **[Potentially polygamous marriage, dissolution sought by wife in VIC] – Khan v. Khan [1963] VR 203**→ Application to the Supreme Court of Victoria for dissolution of marriage, custody for children, and maintenance for children of the marriage. Woman was Australian national domiciled in Victoria. 1955 Woman went to Pakistan, married man, muslim domiciled in Pakistan. Marriage was in accordance with Islamic faith, no doubt it was a potentially polygamous marriage under law of place of celebration being Islamic law. Shortly after marriage, parties came to Australia, man acquired domicile of choice in Victoria, became an Australian national.
  - **Limited common law recognition**
    - **Rule:** Rule in *Hyde v Hyde* limited to matrimonial remedies, has no application where party instituting decree is not a party to the polygamous marriage (***Baindail*)**, or in succession on death (***In re Sehota***)
    - **[Party applying for decree not party to a polygamous marriage (potential or actual)] — Baindail v. Baindail [1946] P 122** → 1928 marriage in India according to rites of the Hindu faith between Husband and Wife 1. H had under Indian law right to marry additional spouse during term of marriage. H emigrated to England, in 1939, H resident in England, went through marriage ceremony, with domiciled English woman, Wife 2. Wife 2 knew nothing about the previous marriage. Wife 2 then found out about invitation to 1928 wedding in H's suitcase, she made application to English court for decree of nullity of marriage.
      - In 1939: did H have capacity to marry W2? No, 1928 marriage recognised to establish H was already married, so no capacity to marry a second person.
    - **[Succession on death] – In re Sehota [1978] 1 WLR 1506** → Husband in India married W1 and also married W2 while still in India, all three emigrate to England. 1976: Husband dies, has a will, given all property to W2.
- **(iii) Abolition of the rule in Hyde v. Hyde re foreign polygamous marriage**
  - **Rule:** For purposes of proceedings under the Family Law Act 1975 (Com), a foreign polygamous marriage "shall be deemed to be a marriage" (**Family Law Act 1975 (Com) s 6 (Materials, p 105))**
- **(iv) Polygamous marriage solemnised in Australia as an incidental question**

- **<u>Rule:</u>** therefore determined by the same rules of the main question i.e. succession to movable property is *lex domicile on death* (***Haque v Haque*****).**
- **Haque v. Haque (No 1) (1962) 108 CLR 230 (Supplementary Materials, p 21)**
    - **<u>Incidental question</u>** i.e. <u>validity of second marriage does NOT have a life of its own</u> → succession on death to movable governed by Islamic law (*lex domicile at death*) = therefore persons entitled to movable property [incidentally the validity marriage in WA] be determined with Islamic law

(b) FORMAL VALIDITY

- **(i) What are matters of form? (e.g. whether a civil or a religious ceremony is mandatory or sufficient; the necessity for the presence of an official or witnesses at the ceremony or the use of particular words; whether the parties must be present personally or may be represented by proxy; parental consent to the marriage)**
    - **<u>Rule:</u>** the formal validity of a marriage is governed by the *lex loci celebrationis* – law of the place of marriage celebration (***Berthiaume v. Dastous [1930] AC 79 (Viscount Dunedin)***
        - Compliance with formal validity of law of place of celebration is essential.
    - **Valid as per law of place of celebration**
        - **[Malta law contrary to public policy, substantial denial of justice so far as wife was concerned, UK marriage ceremony was valid under English law] – *Gray v. Formosa* [1963] P 259** → Parties married in England in civil ceremony in 1948. At the time of marriage, both husband and wife were domiciled in England, husband was a national of Malta, wife was national of UK. Husband was a member of the Roman Catholic Church. Husband visits Malta and never returns, wife was impregnated with child. Husband obtained a decree of annulment of English marriage from Maltese Court, on the ground of non-compliance with Maltese law which said Marriage ceremony to occur in Roman Catholic Church. Wife seeking financial support for herself and children, was the 1948 marriage valid? **<u>HELD:</u>** Maltese decree of annulment was not entitled to recognition in UK.
        - **[Cyprus law no role in determining sufficiency of civil ceremony of marriage in UK] – *Papadopoulos*** → Civil marriage in England, complied with UK law. Years later, found that non-compliance with the law of Cyprus, the man (husband) being a member of Greek Orthodox Church must marry in a Greek Orthodox Church in presence of a Priest. Was it valid? **<u>HELD:</u>** Law of Cyprus may have role to play re capacity of parties to marriage, but the issue dealt with here, the form of the ceremony – i.e. whether civil ceremony was sufficient or was religious one required = formal validity. Matter to be determined by reference to English law.
    - **Invalid as per law of place of celebration**
        - **[French law is *lex loci celebrationis;* Priest forgot to tell parties of a mandatory civil ceremony was necessary under French law; religious one had no legal significance] – *Berthiaume v Dastous* →** Young couple married in Paris in 1913, woman and man were both Canadian nationals and members of the Roman Catholic Church. Woman 17, finished school and goes on cruise to Paris, met man. Couple married in RCC with priest. Priest forgot to tell parties a mandatory civil ceremony was necessary under French law, in its absence, the religious one had no legal significance.
- **(ii) Characterisation (formal validity or essential validity of marriage?)**
    - **Rule:** The ***lex fori* is used to determine characterisation**, except where it is concerned with property, i.e. whether it is movable or immovable (this is determined by the *lex situs*).
    - **Formal validity**
        - **Rule:** Aspects of the ceremony are generally formal validity therefore governed by the law of the place of the ceremony (***Apt v Apt*****).**
        - **Proxy marriage — [At least one party not physically present, presence was required under uK law, marriage in Argentina, Argentinian law to determine formal validity] – Apt v. Apt [1948] P 83 →** Marriage in Argentina in 1941, women domicile in UK, man Argentina. Woman was represented at marriage by power of attorney to consent to marriage on her behalf. Personal presence was mandatory under UK law. What was the nature of the issue? Aspects of the ceremony, formal validity. Choice of law rule: governed by lex loci celebrationis
        - **Parental consent**
            - **[UK marriage between H 29, W 22; void under French law, did not ask parental consent] – Simonin v. Mallac (1860) 164 ER 917 (Sir Cresswell Cresswell)** → Woman under 25 and man under 30, parties must ask for parental consent under French Civil Code, if you dont get it you must wait for 3 months. Woman 22, Man 29 wanted to get married. Parties domiciled in France. <u>At the</u>

- **[Intended matrimonial home in Egypt, polygamous marriage valid; woman domiciled in UK no issue] – Radwan v. Radwan (No 2) [1973] Fam 35** → Marriage in France in 1951, takes place in Egyptian Consulate General in Paris, man domiciled in Egypt, woman domiciled in England. Polygamous marriage as man already married, woman knew. Parties intended to establish an matrimonial home in Egypt. Had capacity under Egyptian law. Marriage lasted 19 years, produced 8 children.
- **[Intended matrimonial home in England = determines capacity] – *Lawrence v. Lawrence [1985] Fam 106 (Supplementary Materials, p 97)** → Brazil and Nevada, woman Helena, man Norman. Helena Brazilian national and domiciled there; had husband in Brazil but left to go Neveda. Norman domiciled in England. Helena applies for decree of dissolution of her marriage with husband in Nevada and is granted. Enters into marriage with Norman, the next day. Made their matrimonial home in England. Under Brazilian law, the decree by Nevada court was not recognised, woman was still domiciled in Brazil at the time. UK law applied as intended matrimonial home.

- **Dual domicile theory**
    - **<u>Rule:</u>** Each party must have capacity to marry under their respective domiciles at the time of marriage (***Brook v Brook; Sottomayor*). *Brook v Brook* and *Sottomayor* affirmed** i.e. antenuptial domicile governs the capacity to marry **(*Barriga*)**
    - **Exception:** <u>If one party domiciled in place of marriage, the other a foreign country; the Place of marriage is given preference where the foreign law may invalidate one party's consent, the law of the place of marriage determines capacity.</u> (***Sttomayor No. 1 and 2***)
        - One party domiciled in Australia (forum & place of marriage), one in a foreign country (where parties would not have capacity under this foreign law), undue preference is given to the forum law (***Sottomayor*).**
        - **[Ratio limited, if both parties domiciled in Portugal; Portuguese law applied to determine capacity to marry] – **Sottomayor v. De Barros (No 1)* (1877) 3 PD 1 (Cotton LJ) (modules)** → Marriage took place in England in 1866. Parties to the marriage, woman and man were relatively young. W was 14 and man was 16. The woman and the man were first cousins, very significant connections with Portugal. Under Portugal law, first cousins are in a prohibited relationship of consanguinity – blood relationship; if the law of Portugal was relevant, the first cousins lacked capacity to marry. Under English law, first cousins were not in a prohibited relationship.
            - English COA: said will determine which legal system determines capacity to marry; and then let another case to determine domicile. Approached it on presumed facts that they were domiciled in Portugal at the time of the marriage.
                - By antenuptial domicile principle – Portugal law determines capacity, then it is invalid marriage due to no capacity.
                - Cottom LJ: if one party is domiciled in UK, all different.
        - **[UK marriage in UK, one domiciled in UK, one in Portugal — UK given preference to determine capacity] – **Sottomayor v. De Barros (No 2)* (1879) 5 PD 94 (Sir James Hannen P) (modules)** → Woman domiciled in Portugal, man domiciled in England. Man's domicile of dependency was of his father, when woman married man she swapped her domicile of dependency on husband; so of her father in law.
    - **Invalid marriage**
        - **[Persons in a prohibited relationship under UK law, wife was husband's deceased wife's sister, marriage ceremony in Denmark; UK was the domicile & intended place of matrimonial home] – *Brook v Brook* (1861) 9 HLC 193 (House of Lords)** → introduced distinction between formal validity of marriage and essential. Foreign Country was Denmark, 1850: 2 British nationals and domiciled in England married in Denmark, marriage valid under the law of Denmark. Under UK law this was invalid, under Denmark law it was fine. Parties came back to England after the marriage. 1855: both husband and wife died, survived by 3 children. UK law is the law of the antenuptial domicile and the law of the intended place of matrimonial home.
            - **How would a case like Brook v. Brook (1861) 9 HLC 193 be decided in Australia today?** Regardless of the date of the marriage (1850 or 2025), an Australian court, applying the provisions of the Marriage Act 1961 (Com) Pt VA, which gives effect to the Hague Marriage Convention 1978, would determine the validity of a marriage in Denmark by reference to the law of Denmark as the lex loci celebrationis: if the marriage is recognised as valid under the law of Denmark, the marriage will be recognised as valid in

- Argued William was already a married person at time of marriage: when William was member of Shanghai Municipal Police 1937, he had married a 20 year old Russian woman. 1946 dissolution of marriage by decree in Nevada, USA. Recognised in UK. So William had capacity to marry at the date on which he married Marie.
- Marie was an already married person when she married the deceased husband, she lacked capacity to marry, was not his lawful widow therefore not entitled to his estate.
- **Consent to be determined by English law as law of place of celebration where one party was domiciled in England**, Marie got decree from Belgian court later that the marriage with William was annulled; but cannot recognise as it would be contrary to public policy — i.e. trying to annul a marriage valid under UK law.

(d) Relationship between Common law choice of law rules and statute

- **(i) Hague Marriage Convention 1978 and the dominant role of the lex loci celebrationis**
  - **Rule:** Both formal and essential validity is governed by the law of the place of celebration of the marriage, wherever the marriage is celebrated (**Hague Convention 1978 Incorporated into Marriage Act 1961 by Marriage Amendment Act 1985)**
  - Hague Convention on Celebration and Recognition of the Validity of Marriages 1978, ATS 1991 No 16 (ratified only by Australia, Luxembourg, The Netherlands)
- **(ii) Australian Marriage**
  - Distinguish between marriage on and after **7 April 1986** & before this date → Marriage Amendment 1985 s13 came into effect.
  - **Grounds of invalidity of marriage**
    - **[A] Before 7 April 1986: Section 23(1) of the Marriage Act 1961**
      - **existing valid marriage (s 23(1)(a));**
      - parties within **a prohibited relationship as defined in s 23(2) (s 23(1)(b));**
        - Ancestor/descendant = parents, grandparents, brothers or sisters full or half blood, adopted child treated as nuptial child (s23(3))
        - NB: Aunts and cousins not prohibited, brothers-in-law etc not prohibited
      - **non-compliance with the formal requirements of Australian law (s 23(1)(c));**
        - Two witnesses over 18 and understand and speak English; parties physically present; file notice of marriage at least one month before.
      - **lack of real consent (s 23(1)(d));**
        - Duress, fraud etc
      - either party **not of marriageable age (s 23(1)(e)) → 18**
      - **Section 22: subject to the rules of private international law**
        - I.e. prohibited relationships = capacity to marry = essential validity = governed by lex loci celebrationis = place of celebration
    - **[B] On and after 7 April 1986: Marriage Act 1961 (Com) ss 23A, 23B**
      - **Rule**: AU law as law of place of celebration governs it.
      - Only those grounds set out in s23B(1) = grounds in s23(1)
        - **existing valid marriage (s 23(1)(a));**
        - parties within **a prohibited relationship as defined in s 23(2) (s 23(1)(b));**
          - Ancestor/descendant = parents, grandparents, brothers or sisters full or half blood, adopted child treated as nuptial child. NB: Aunts and cousins not prohibited
        - **non-compliance with the formal requirements of Australian law (s 23(1)(c));**
          - Two witnesses over 18 and understand and speak English; parties physically present; file notice of marriage at least one month before.
        - **lack of real consent (s 23(1)(d));**
        - either party **not of marriageable age (s 23(1)(e)) → 18**
      - Exclusion of private internal law rules (s23A(1))
- **(iii) Foreign Marriage: Pt VA Recognition of Foreign Marriages Marriage Act 1961 - Commenced 26 April 1985**
  - **Step 1: Rule:** If marriage is valid under the ***local law of place of celebration***, then it is valid prima facie, subject to certain exceptions (**s88D(1) Marriage Act 1961 (Com)**).
    - **Application:** The provisions of this part are **prospective and retrospective (s88C(1)**).
    - **Applies to Marriage on ship →**