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# INTRODUCTION TO PRIVATE INTERNATIONAL LAW & GENERAL APPLICABLE TOPICS

Before you do anything...CHARACTERISE (MacMillan)

Test

**STEP 1 → CHARACTERISE THE ISSUE BEFORE THE COURT** (e.g. is it interpretation of contract, breach of tort etc.)

**STEP 2 → SELECT THE CONFLICTS OF LAW RULE WHICH LAYS DOWN A CONNECTING FACTOR**

- *Lex fori* – law of the forum
- *Lex causae* – governing law
- *Lex loci delicti* – the law of the place where in substance the wrong was committed (Distillers)
- **PLK** – Proper law of the contract:
  - Subjective proper law – the law of the place expressly or implicitly chosen by the contractual parties
  - Objective proper law – the law of the place with the closest and most real connection to the contract
- *Lex situs* – the law of the place where the property is located
- *Lex littori* – the territorial waters in which the tort occurred (Mackinnon)

**STEP 3 → IDENTIFY THE SYSTEM OF LAW TIED BY THE CONNECTING FACTOR TO THE ISSUE**

- E.g. the law of England? The law of NSW?

[ The analysis assumes that the NSW Court has the jurisdiction over this case, and the NSW Court decides to exercise the jurisdiction.

Characterisation

MacMillan establishes that characterisation in conflicts of law proceeds by a 3-step approach.

STEP 1

The issue to be characterised before the Court is a [tortious / contract formation / validity/enforceability of contract / performance/variation/discharge/interpretation of contract] issue.

STEP 2

The applicable COL rule for this issue is [LLD (Zhang - international; Pfeiffer - intranational) / PLK (Akai)], which identifies the relevant connecting factor being [insert].

STEP 3

The system of law tied by the connecting factor to the issue is not immediately clear, thus requires

## IV. RENVOI DOCTRINE

### 1. When will it occur?

- Think of it as we put ourselves in the shoes of the foreign judge and apply whatever rules the judge would in their court - we do whatever the foreign Judge would do.
- On the facts, it will only be if a **choice of law rule** is presented. If no choice of law rule, no choice of law to be decided.
- Remission → the foreign law refers the issue back to the forum
  - E.g. NSW Court applies LLD = France. French law says: apply law of domicile (Aus).
- Transmission → the foreign law refers the issue to a 3rd jurisdiction
  - E.g. NSW Court → applies France (LLD). French law says apply German law.

### 2. How to deal with it (*Neilson v Overseas Projects Corp of VIC*)

#### a. Double renvoi/Foreign Court theory (per majority) (Current Position)

- [1] [Aus law requires the Aus Court to apply lex loci delicti ('LLD') in tort cases, and the law of the LLD itself requires that another system of law governs the dispute.]*
  - [2] [Once it is proved that the applicable law rules of the place of the tort require non-local law to apply, an Australian forum court must determine how a court in the place of the tort would actually decide the case.]*
- [F] A WA resident (Mrs Neilson) brought a claim against a VIC co in WA SC for personal injuries suffered in PRC (LLD).
    - Art 146 of the General Principles of Civil Law of the PRC
      - 'With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country/domiciled in the same country, the law of their own country/ of their place of domicile (here WA Law) may also be applied.  
This second part is what makes it a renvoi issue.
  - [A] Foreign court theory (Majority)
    - STEP 1** → Apply the LLD rule to apply the law of the PRC, incl internal (substantive) law and PIL (incl its renvoi rule - in this case PRC didn't have renvoi).
    - STEP 2** → The forum court (Aus here) then decides the case in the same way as would the foreign court (PRC) if the case had been brought in that foreign court → lead to the result of WA Law. (Judge put himself in shoes of PRC Judge and determined that he would hypothetically determine that WA Law were to be applied).
    - STEP 3** → Apply WA Law.

## II. THE DETERMINATION OF THE PROPER LAW

### 1. Subjective Proper Law

NB: Even if it is quite obvious that there is no subjective proper law, still should explain why.  
*[There is no subjective proper law as the contract contains no express choice of law clause and the surrounding circumstances do not evince any implied intention as to governing law, and thus the proper law must be determined objectively by reference to the system of law with which the contract has its closest and most real connection (Akai).]*

#### 1) Express choice

##### (1) Parties autonomy

a. *[The parties have the autonomy to determine the legal system/law that will govern the contract (Merwin; Vita Food Products).]*

i. **Vita Food Products:**

1. [F]: P (NY co); D (Nova Scotia Ship owner).

a. Contract included:

i. Express choice of UK law

ii. Exclusion clause (valid under UK Law, not under Canadian Law)

2. [R]: UK law is PLK

a. Parties can choose UK law, so, the excl cl is valid.

b. Whether there is sth connecting the transaction to the UK is irrelevant.

b. **No connection b/w the transaction and the chosen legal system** is NOT a ground to exclude the parties' choices (*Vita Food Products*)

c. **Bona Fide Choice:**

i. **Generally**, it is not the ground to exclude the parties' choices (*BHP Petroleum*).

1. But it might be the ground for the Court refusing to allow the choice of law by the parties to operate.

a. [F]: the contract b/w BHP and OBL contained the clauses:

i. Cl 1 provided for its interpretation in accordance w NY law.

ii. Cl 2 provided that any disputes arising under the Contract should be referred to arbitration.

iii. No requirement that the arbitrator should be appointed in Vic/the arbitration should take place in Vic.

- iv. OBL commenced proceeding in Texas & NY; BHP required arbitration.
- b. [R]: NOT the circumstances that the choice of law in the agrmt intends to avoid the operation of a fiscal or policy provision of the law which would otherwise apply to the contract.
- ii. **However**, the Court might strike down the choice
  - 1. If the attempted choice of law is for **no other purpose** than to avoid the operation of the law which would otherwise apply to the contract (**Golden Acres**)
    - a. [F]: A Qld D appointed a HK agent (P, Golden Acres) to help sell land in Qld.
      - i. The agency contract incl an express choice of HK law as the PLK.
        - 1. Under **Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Act 1922 (Qld)**, Golden Acres was not able to recover remuneration if it was not registered as a 'real estate agent'.
        - ii. P did not register. P was not paid commission under contract and sued in the Qld SC.
    - b. [R]: the selection of the relevant law was for no other purpose than to avoid the legislation

## (2) Mandatory Forum Statutes

### a. **Insurance Contracts Act 1984 (Cth)**

#### i. **Application** of ICA:

#### 1. The contact should be **'contracts of insurance' and 'Proposed contracts of insurance' (s 8(1)), and**

a. *The application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.*

#### 2. **The objective PLK of the contract is the law of that S/T (s 8(2))**

a. *For the purposes of **s 8(1)**, if, but for an express provision to the contrary incl or to be incl in the contract or in some other contract, the PLK **would have***

# MANDATORY RULES AND THE LAW OF THE FORUM

- (1) Where a party seeks to apply a local statute, the Court constructs that statute with the presumption against the extraterritoriality
- (2) Where a party seeks to apply a foreign statute, the Court undertakes the choice-of-law analysis to find the lex causae and considered whether that statute forms part of the lex causae.

## I. GENERAL RULES

### 1. Basic Principles

- a. **Rule** → *[The forum statute can override the choice of law rules in tort & contract (Akai).]* Can override choice of law rules such as CL rules.
  - i. In **tort** – it can take over the LLD rule.
  - ii. In **contract**:
    - 1. It might substitute the parties' express choice of law in the contract, **or**
      - a. **Akai**:
        - i. [F]: People's insurance (Singapore co) provided insurance coverage for Akai (NSW co). The cl of the Insurance Policy indicated:
          - 1. "This policy shall be governed by the laws of UK. Any dispute arising from this policy shall be referred to the Courts of England.'
          - 2. **s 8 of ICA**:
            - a. ...for the purpose of the application of this Act, where the PLK would, but for an express provision to the contrary included in the contract, be the law of a S/T in which this Act applies...then, the law of a S/T is the PLK
          - b. **s 52 of ICA**
            - i. if a contractual provision seeks to restrict the operation of act to the prejudice of anyone except for the

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# JURISDICTION

## PERSONAL JURISDICTION - JURISDICTION AND SERVICE

### HEADING 1: Whether the Court has jurisdiction (*Mobil Oil Aus*)

(i.e. whether the Court has the authority to deal with a particular case)

*The Defendant must be 'amenable' to service of the court's originating process upon 2 circumstances under common law.*

### HEADING 2: Circumstance 1 → Defendant should be present in jurisdiction; or

*Court can est the jurisdiction over the D if the D is physically present in jurisdiction (*Gosper v Sawyer*).*

Note (*Gosper v Sawyer*): At the time of service, if:

1. D is present in NSW → NSWSC has jurisdiction
2. If D is in AU → FCA/HCA has jurisdiction

### SUB-HEADING A: Timing of Defendant's presence

1. **Test:** *D should be physically present in the jurisdiction at the time of service of the originating process (*Laurie; Joye v Sheahan*)*
  - a. Jurisdiction would still be est if D left the jurisdiction after he was served (*Laurie*)
  - b. No jurisdiction is established if (*Laurie*):
    - i. D is in jurisdiction when originating process is issued, but
      1. i.e. when P (P's lawyers) prepares originating process (e.g. writ/claim/originating summon/motion) and files w Court, which checks formalities and date stamps
    - ii. D leaves before that originating process is served
      1. And D should not know the existence of writ when he leaves (*Joye v Sheahan*)
  - c. **E.g.:** *Laurie*:
    - i. NB: currently, upon s 12 of SEPA, interstate service has the same effect as if the service had occurred in the place of issue → so... served in NSW would have the same effect as service in Vic

- i. HNOE arranged with A&J to be exclusively managed by TM
- ii. EFJC of Eng HC
- 3. [R]: because TM/MMM did not directly provide the service to A&J, which was thru HNOE under the 2015 Contract which contained the EFJC

Minor Heading V: Whether the Court would grant the stay for AU/NSW proceedings?

i.e. Court's discretion

1. *The Court retains a discretion whether to stay the proceedings (Karpik). Generally, the parties would be held to their bargain (Akai; Aus Health). The prima facie position is that the Court will enforce the clause and grant the stay (Global Partners).*

2. Unless there are 'strong, countervailing reasons,' to justify the Court not to grant the stay (Akai; Venter)

i.e. continue to proceed the Aus proceedings

a. **Onus of proof:** P (i.e. the party seeking that the proceedings be heard) (Oceanic Sun)

b. **Strong reasons:**

i. **Public policy:**

**1. Insurance Contracts Act (Cth) Case (Akai)**

a. Insurance Contract:

- i. EFJC of Courts of Eng (2nd Pt of Cl 9)
- ii. Expressed PLK → UK law (1st Pt of Cl 9)
- iii. Objective PLK → NSW law

b. Insurance Contracts Act (Cth)

- i. ICA would be applied if the objective PLK is S/T law (s 8(2))
- ii. If K provision restricting the operation of ICA to the prejudice of anyone except for insurer, it is void (s 52)

c. [R]: NOT to stay

- i. 1st Pt of Cl 9 would be voided under s 52 bc ICA would not be applied if UK law applies;
- ii. But UK Court may disregard or refuse to effect ICA (i.e. it would not be applied in UK)

- 1. It would contravene the policy of the law as discerned from a consideration of the scope and purpose of the particular statute (i.e. defeat the legislative policy that Par intended the ICA to achieve)

## 2. CCA (Cth) Case (**Epic Games**)

- a. In Apple Developer Program License Agrmt, EFJC of the Northern District of California
- b. [R]: NOT to stay
  - i. Bc CCA concerns the protection of competition in Aus markets; and promotion of production, distribution and sale of gs and ss → enhance the welfare of Australians
    1. Enforcing the EFJC created a real risk that the competition protections and public policies embodied in the CCA would not be applied. This is a strong reason not to enforce the EFJC

### ii. **Fracturing of the litigation (Karpik)**

1. Mr Ho (passenger of the voyage) signed an agrmt containing
  - a. EFJC of US; **and**
  - b. A class action waiver clause in the agrmt, which is void under s 23 ACL (unfair term)

#### 2. [R]: **NOT to stay for 2 reasons:**

##### a. **Reduce the potential to participate in litigation:**

- i. A stay would substantially reduce Mr Ho's and other passengers' ability to participate in litigation concerning the voyage
- ii. Mr Ho had signif juridical adv in remaining in the FCA class action
- iii. He may be unable to obtain equivalent participation or benefits in US proceedings

##### b. **Fracturing the litigation:**

- i. A stay would fragment substantially identical claims across diff courts
- ii. This would waste party and judicial resources and create a risk of inconsistent outcomes
- iii. Parties would be forced to commence the indiv proceedings in US when essentially identical claims for the vast majority of passengers would be heard in the class action in the FCA

### iii. **Inconvenience to 3rdP:**

#### 1. **3rdP means 3rdP of the EFJC (Incitec)**

- a. Cargo on ship got damaged
- b. Incitec (who have interests in Cargo) sued ASC (ship owner) and Hyundai (time charterer)
- c. ASC then CCed against H

- d. H then sought stay relying upon EFJC (Lon) in the agrmt b/w A and H
- e. [R]: NOT to stay bc otherwise it will cause inconvenience to Incitec
  - i. If Incitec cannot proceed in FCA, Incitec could only choose NOT to pursue the claim **OR** go to Lon to arbitrate/litigate, which is w the additional risk of inconveniencing 3rdP
- 2. **When 3rdP is involved in the proceedings** (i.e not all parties to the proceedings are parties to the EFJC) → **the Court should NOT start w a prima facie disposition in favour of a stay of the proceedings** (Aus Health)
  - a. **Factors that the Court should consider:**
    - i. The risk of inconsistent decisions; **and**
    - ii. Weighed against the consequence of one party losing the real benefit of an EFJC that it bargained for and secured as part of the K
- 3. **E.g. Australian Health:**
  - a. RTA (with EFJC of Eng Court) (S, E, H)
  - b. PA agrmt (w NEFJC of NSW) (R, S, H)
  - c. R&S together sue E&H in the NSWSC (E sought a stay upon the EFJC in RTA)
  - d. [R]: NOT to stay
    - i. In this case, there may NOT have a multiplicity of proceedings
      - 1. Bc if R succeeds in its claim against H in NSW, there will be no necessity for S to pursue E in the UK (unless H is not sufficiently solvent to satisfy the judgment debt)
- iv. **Lack of judicial independence/corruption in the agreed foreign jurisdiction** (Kyrgyz)
  - 1. **Only need to est a real risk that justice will not be obtained** in the foreign court bc of e.g. lack of independence, competence, corruption
    - a. No need to prove that 'justice will not be obtained'
    - b. **Examples:**
      - i. Whether or not the proceedings will continue is solely dependent on if a local prosecutor/gov official is persuaded to bring the proceedings – indicates lack of judicial independence (Kyrgyz)
  - 2. **The evidence should be cogent:**

		<ul style="list-style-type: none"> <li>● US proceedings involved: <ul style="list-style-type: none"> <li>○ Claims for damages against Cigna, and</li> <li>○ Claims under Sherman Act (CANNOT be used in NSW)</li> </ul> </li> <li>● NSW proceedings involved: <ul style="list-style-type: none"> <li>○ Aus asbestos claims, and</li> <li>○ US asbestos claims</li> </ul> </li> </ul>
Yes	Yes, and the <b>parties are identical and the same subject matter</b> is involved in both proceedings (Henry v Henry)	<p>It is prima facie V &amp; O in the <b>Voth</b> sense of the term to commence a second or subsequent action in the forum.</p> <p>Although parallel proceedings in diff countries are highly <b>relevant</b> to the Q of whether the local proceedings are V or O, the stay is not automatic → considered the factors of:</p> <ul style="list-style-type: none"> <li>● Recognition: Orders would be recognised in Aus</li> <li>● The entirety of resolution: which forum would provide effective/complete resolution of dispute b/w the parties?</li> <li>● Order in which the proceedings were instituted</li> <li>● Stage of proceedings and costs incurred already</li> <li>● Connection of the parties to each jurisdiction (incl issues upon which relief might depend in those jurisdictions)</li> <li>● Party resources and ability to understand proceedings (e.g. language)</li> <li>● Can they participate on equal footing in the proceedings</li> </ul>

- iv. **Public interest considerations** (*James Hardie v Grigor*)
1. The court should consider the public interest considerations (e.g. limited judicial resources avail for the administration of justice in NSW)
  2. **Grigor:**
    - a. P (NZ resident) commenced proceeding in Dust Diseases Tribunal (NSW) against D

## **HEADING 4: Defences**

*There are number of defences, the relevant ones are: X, Y, Z*

### SUB-HEADING A: Fraud

Minor Heading I: STEP 1 → if the JD can est that the FJ is obtained by fraud, then the forum will not recognise/enforce that FJ (Doe v Howard)

1. **Onus of proof** is on the party alleging the fraud
2. **The allegation of fraud** needs to be specifically pleaded
3. The **basis** of the fraud must be provided
  - a. Mere suspicion of fraud is insufficient
4. The **successful party** must be **responsible** for the fraud

Minor Heading II: STEP 2 → There are two approaches – Canadian and British approach

#### Mini Heading 1: Canadian Approach (extrinsic fraud) (Doe v Howard)

1. *The JD needs to demonstrate that there has been a new discovery of sth material (i.e. fresh facts discovered since the og judgment) which would provide a reason for setting aside the judgment (Keele).*
  - a. **New discovery**: the allegation of fraud rests on E not previously avail to be produced in the foreign court; **and**
    - i. i.e. it is a new discovery – fraud arising out of the E discovered after the foreign judgment was entered (Keele)
  - b. **Material facts**: The E would probably have altered the result in the foreign court
    - i. i.e. the facts are material and such as to make it reasonably probable that the case will succeed (Keele)
      1. Perjury will ordinarily not be enough
  - c. **Keele**:
    - i. D raised defence of fraud in enforcement proceedings
    - ii. Alleged that the foreign court relied on perjured E

#### Mini Heading 2: British Approach (intrinsic fraud) (Doe v Howard)

1. *A D resisting the enforcement of the FJ may raise an allegation of fraud before the local court, even where that allegation was previously raised and determined in the foreign proceedings*
  - a. **No need to prove new facts** which provide reason to set aside the judgment (Yoon)
  - b. Can show foreign court was **misled into coming to the wrong decision** by **false E** (Yoon)