TOPIC 1 – Introduction to Private International Law

OVERVIEW AND KEY CONCEPTS – Mortensen Ch. 1

The Three Core Issues

Private international law (PIL) is the body of principles, rules and policies that indicate how a **foreign element** in a legal problem should be dealt with. Three issues arise in cross-border cases:

- **Jurisdiction (adjudicative jurisdiction):** Whether the local court (the "forum") has power to hear and determine the case, or whether contacts with another state/country limit or restrain that power.
- **Recognition and enforcement of cross-border judgments (enforcement jurisdiction):** Where the case has proceeded to judgment elsewhere, whether that judgment can be recognised or enforced in the forum. Capacity to enforce depends on the law of the other place.
- **Applicable law (choice of law):** Whether the forum will decide the case by the law of the forum (*lex fori*) or the law of another country (*lex causae* / law of the cause). Only matters if application of different laws would produce different results, i.e., where there is "a conflict of laws." The rule directing application of forum or foreign law is called an **applicable law rule** or **choice of law rule**.

Relationship between jurisdiction and judgments: The forum's recognition/enforcement of a cross-border judgment depends significantly on the jurisdiction of the rendering court. Jurisdictional rules are largely mirrored in rules for recognising cross-border judgments. Schemes making generous provision for "circulation" of judgments often rest on agreed proportionate jurisdictional rules giving confidence in a credible judicial process.

Terminology

- **"Conflict of laws"** (US usage): only suggests the applicable law issue; a "conflict" is not essential for jurisdiction or enforcement questions.
- **"Private international law"**: misleading because the body of law applies to both interstate and international elements, not just international ones (as Joseph Story acknowledged).
- **"Cross-border litigation"**: more accurate when the subject is disputes, but less commonly used.
- **Distinction from public international law:** PIL is an aspect of **municipal law**; its sources are constitutions, statutes, and (in common law) judicial decisions. It differs from country to country and state to state. Public international law is universal and primarily governs relations between nation states.

The Concept of a "Foreign" Law/Country in PIL

- The relevant political unit in PIL is the **private law area** ("place"), not the nation state as in public international law.
- Different places are treated as foreign to each other even if not so for public international law purposes (e.g., Commonwealth members are foreign to each other: *Attorney-General of New Zealand v Ortiz* [1982] QB 349).
- Within federations (Australia, US, Canada, UK), states/territories/provinces are separate places for PIL purposes. Williams J in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 396: "For the purposes of private international law, South Australia is a foreign country in the courts of New South Wales."
- Since the 1980s, the High Court has tried to align the status of interstate relations more closely with Australia as "one country and one nation": *Breavington v Godleman* (1988) 169 CLR 41 at 78, 134–5, 160.
- Where Commonwealth/federal legislation governs a subject matter (e.g., corporations, insolvency, marriage), the relevant private law area is **Australia as a whole**, and PIL generally does not apply to purely interstate elements in those areas.

Historical Development

Ancient Approaches (personal law)

- The ancient approach was a **substantive law approach**: special courts decided cross-border cases by a separate body of laws.

- Law in ancient Greece and Rome was **personal**: the law a person lived by depended on citizenship, not location.
- *Ius civile* (Roman civil law): only for Roman citizens, applied by the urban praetor.
- *Ius gentium* (law of nations): developed by peregrine praetors from 242 BC for disputes involving foreigners; more adaptable than civil law; suited to Mediterranean trade.
- The Edict of Caracalla (212 AD) extended Roman citizenship to all Empire inhabitants, universalising civil law and removing the need for a cross-border body of law.

Scholarly Development: The Statutists (12th–17th century)

- Revival of Roman law study in Italian universities + decline of personal law under feudalism = emergence of PIL.
- Italian city-states developed *statuta* (municipal laws) conflicting with Imperial common law and with each other. Scholars resolving these conflicts were called **statutists**.
- **Aldricus** (probable founder): a judge dealing with conflicting *statuta* should apply the **better and more useful law** (a multilateral approach).
- More commonly, statutists took a **unilateral approach**: determine the proper territorial operation of the *statutum* and give it effect.
- Classification of rules as **real** (territorial, applying to property within the territory) or **personal** (extraterritorial, following the person) determined geographical operation. D'Argentré added a third **mixed** category.
- **Bartolus of Sassoferrato** (1314–57): illustrated the method with the "English Question" on primogeniture — whether the rule was expressed as applying to the property (real, stays in England) or the person (personal, follows the person to Italy).
- Lasting contributions of the statutists:
  - Procedure governed by the *lex fori*
  - Tort liability governed by the *lex loci delicti*
  - Property rights governed by the *lex situs*
  - **Charles du Moulin** (1500–66): for rights depending on the will of the parties, their express or tacit intention governs — the foundation of party autonomy and "the proper law of the contract."

Huber and the Sovereignty/Comity Framework (17th century)

Ulric Huber (1636–94), *On the Conflict of Laws* — first real departure from statutist theory. Three foundational assumptions:

1. **Territorial sovereignty:** "The laws of each state have force within the limits of that government and bind all subject to it; but not beyond." All persons within the sovereign's territory (permanently or temporarily) are subjects.
2. **Comity** (initially developed by Paul Voet): the local sovereign *may* give effect to a foreign sovereign's laws — only because of "convenience and the tacit consent of nations," not out of obligation.
3. **Theory of vested rights** (implicit): foreign laws cannot have direct force in the local realm, but the local sovereign recognises rights valid in the foreign country in the interests of "commerce and ... international usage."

Huber's internal tension: unlimited sovereignty is difficult to reconcile with recognising rights created by another sovereign. Nevertheless, Huber had more influence on the development of common law PIL rules than any other scholar or judge.

Story and the American Contribution (1834)

- **Joseph Story** (1779–1845), *Commentaries on the Conflict of Laws* (1834): integrated 506 common law decisions with European scholarship; coined the term "private international law."
- Placed great emphasis on **comity of nations**, which he held "stood upon just principles" as the explanation for why a forum court might apply foreign law.
- Courts should give effect to comity by presuming the government was prepared to recognise foreign laws unless **repugnant to public policy** or local interests.
- Profoundly influenced Dicey and Savigny.

- Contacts with another country/state may indicate that applying that country's/state's law will produce a **more just outcome**.
- Oldest rationale: Aldricus' suggestion to apply the "better and more useful law."
- Rarely openly admitted by judges; more often intuitively present in cross-border outcomes.
- **Key example:** *Haque v Haque* (1962) 108 CLR 230: Indian Muslim testator; polygamous marriage contracted in WA under Sharia; will leaving all property to his brother; High Court applied law of testator's domicile (India/Sharia) to movable property. Just because:
    - Sharia was the mental legal referent by which the parties organised their legal relations: "it was an attempt by Muslims honestly and genuinely to establish a relation which Muslim law would recognise" (at 249).
    - Application of Sharia honoured the pre-nuptial agreement and the reasonable expectations of the parties.
- **Honouring reasonable expectations** is an important mode by which foreign law serves particular justice — especially relevant in contract, where parties can choose the governing law.

(3) International and Interstate Comity

- Story's rationale for applying foreign laws; today more important in North America than elsewhere.
- **Hilton v Guyot** 159 US 113 at 163–4 (1894) (Gray J): "Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."
- *Hilton* also suggested comity imports **mutuality and reciprocity** — but this is questionable; private law retaliation should probably be avoided.
- **Criticism:** Comity does not indicate *how* the accommodation between forum and foreign interests is to be made, only that it *might* lead to application of foreign law. Dicey criticised comity for failing to explain the actual content of PIL rules — it only indicates the motive, not the reason the foreign law should be the applicable law.
- *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331 at 363 (Gummow and Hayne JJ): "comity is either meaningless or misleading; it is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties."
- **Better view**: comity is a principle obliging the forum court **unilaterally** to seek a reasonable accommodation between the interests of the forum, the foreign country, and the mutual interest all countries have in promoting a harmonious international legal order.

CASE STUDIES

***Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; [1988] HCA 32**

FACTS: Fay (Queensland resident) booked a Greek island cruise through a NSW travel agent, paying the full fare in Sydney and receiving an "exchange order" specifying ship, cabin, and sailing date. The ticket was not issued until he arrived in Greece. The ticket contained cl 12 (limiting recovery to US$5,000) and cl 13 (exclusive jurisdiction of Athens courts). Fay was injured during trap-shooting on board in Greek waters. He sued the Greek defendant in the NSW Supreme Court. The defendant applied for a stay.

ISSUES:

1. When and where was the contract of carriage formed?
2. Were the ticket conditions (especially cl 13) incorporated into the contract?
3. Which law governs those preliminary questions?
4. Should the NSW Supreme Court stay proceedings (forum non conveniens / inappropriate forum)?

HELD:

- **Contract formed in NSW** (unanimous): when the exchange order was issued on payment of the full fare, a binding contract of carriage arose. The defendant's reserved right to cancel did not make the promise illusory, the exchange order itself imposed obligations on both sides.

The Incidental Question

- **Nature:** Where a single case involves two related issues that would, if treated independently, be governed by different applicable law rules, and one issue must be determined before the other can be resolved.
- The preliminary issue is 'incidental' to the main issue.

Two Approaches: ***Schwebel v Ungar*** **(1963) 42 DLR (2d) 622**

Facts: Ungar (domicile: Hungary) married Waktor in Hungary. They divorced by Jewish gett ceremony in Italy while en route to Israel. She later married Schwebel in Canada. Schwebel sought a declaration the second marriage was void on grounds she was still married.

Two issues:

- Main issue: Did Ungar have capacity to enter the second marriage? (Governed by law of her domicile at time of second marriage: Israel.)
- Preliminary issue: Was the gett divorce effective?

Two approaches:

(1) **Independent treatment (McRuer CJ, High Court of Ontario):** Each issue governed by its own applicable law rule independently. The gett validity was governed by the parties' domicile at the time of divorce (Hungary), under which it was not recognised. Therefore Ungar lacked capacity and the second marriage was void.

(2) **Incidental question approach (Ontario Court of Appeal):** The preliminary issue is treated as incidental to the main issue, and both are determined by the applicable law rule for the main question. Under Israeli law (which governed capacity), the gett was recognised. Ungar was therefore free and capable of marrying. Second marriage valid.

Australian position: The incidental question approach is likely the law in Australia, based on *Haque v Haque* (1962) 108 CLR 230 (High Court). In that case, the main question (children's entitlement to share in movable property) was governed by Indian law/Sharia; the preliminary question of the children's legitimacy was determined consistently with Sharia, not Western Australian law. The court did not expressly address the doctrine but its conclusion is consistent with the incidental question method.

Rule: Where two related issues arise, the preliminary issue is determined in accordance with the applicable law rule for the main question.

Macmillan Inc v Bishopsgate Investment Trust plc (No 3) **[1996] 1 WLR 387**

Leading authority on the three-stage characterisation process in PIL; establishes that conflict of laws rules must be directed at the particular issue in dispute (not the cause of action), and that priority of title to shares in a company is governed by the lex situs (place of incorporation).

FACTS: Macmillan Inc, a Delaware company controlled by Robert Maxwell, was the equitable owner of 10.6 million shares in Berlitz International Inc, a New York corporation. The shares were held on trust by Bishopsgate Investment Trust plc, a Maxwell-controlled company. In breach of trust and without Macmillan's knowledge or consent, Bishopsgate pledged the shares as security for loans to Maxwell's private interests to three defendant banks (Shearson Lehman, Swiss Volksbank, and Credit Suisse). The loan and security transactions were negotiated and concluded in London; the transfers themselves were completed through the DTC depository system in New York. The defendants each claimed they were bona fide purchasers for value without notice of Macmillan's interest.
The preliminary issue on appeal was whether English or New York law governed the dispute. Macmillan argued the claim was restitutionary (pointing to English law as the place of enrichment); the defendants argued it was a question of priority of title to shares (pointing to New York law as the place of incorporation and lex situs).
ISSUE: Which law governed the dispute: was the question to be characterised as one of restitution/unjust enrichment (pointing to English law), or as one of priority of title to shares (pointing to New York law as lex situs)?
HELD: Appeal dismissed on the preliminary issue. The issue was one of priority of title to shares, governed by the lex situs of the shares, being the law of the place of incorporation: New York law applied.

REASONING

- **The three-stage process (Staughton LJ).** Finding the lex causae requires three stages: (1) characterise the issue before the court; (2) select the conflict of laws rule laying down the connecting factor for that issue; (3) identify the system of law tied by the connecting factor to the issue. The second and third stages are determined by the lex fori; characterisation at stage one is also by the lex fori, but presents greater difficulty.
- **Focus on the issue, not the cause of action.** Staughton LJ accepted that Macmillan's claim could be characterised as restitutionary in nature, but held that "the issue is not, or not any longer, whether Macmillan have a cause of action for restitution; it is whether the defendants have a defence on the ground that they were purchasers for value in good faith without notice." He concluded that the "rules of conflict of laws must be directed at the particular issue of law which is in dispute, rather than at the cause of action which the plaintiff relies on. We should translate lex causae as the law applicable to the issue, rather than the suit" [41]. The issue was whether the defendants were purchasers for value in good faith without notice so as to obtain good title to the shares.
- **Lex situs governs priority of title to shares.** All three judges held that priority of title to shares is determined by the lex situs. Staughton LJ concluded that the issue fell in the class "where there has been an act effectual by New York law to transfer the property in the shares" and that "an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs)," ordinarily the place of incorporation [63], [66]. Auld LJ agreed, holding that "issues of priority of ownership of shares in a corporation" should be treated according to the lex situs, normally the country where the register is kept or the country of incorporation [97]. Aldous LJ stated that "the appropriate law to decide questions of title to property, such as shares, is the lex situs which is the same as the law of incorporation" [143].
- **Auld LJ: characterisation not constrained by domestic categories.** Auld LJ endorsed a broader approach: classification is governed by the lex fori, but "the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence." Importantly, characterisation "should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system" [78]. This is a slightly more "rolled-up" approach than Staughton LJ's, incorporating awareness of the consequences of characterisation.

PRINCIPLES

- The three-stage process for finding the lex causae: (1) characterise the issue; (2) select the connecting factor rule; (3) identify the applicable law [Staughton LJ, [2]-[4]].
- Conflict rules must be directed at **the issue in dispute**, not the cause of action. The lex causae is the law applicable to the issue, not the suit [41].
- Characterisation is by the lex fori, but must not be constrained by narrow domestic categories that have no counterpart in the foreign system: Auld LJ [78]. This "enlightened lex fori" approach (Nygh [14.9]) involves awareness of the consequences of characterising one way or another.
- There is an "element of interplay or even circularity" in the three-stage process; it "does not depend on the application of rigid rules, but upon a search for appropriate principles to meet particular situations": *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] QB 825 at [28] (Mance J), endorsing and developing *Macmillan*.
- Priority of title to shares is governed by the **lex situs**, ordinarily the law of the place of incorporation [63], [66], [97], [143].
- Cited with approval in obiter by Callinan J in *Sweedman v TAC* [2006] HCA 8 and by Spigelman CJ in *Murakami v Wiryadi* [2010] NSWCA 7.

Individuals

Three possible tests: (i) proper law; (ii) lex loci contractus; (iii) lex domicilii.

***Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 (Young J)**

The capacity of an individual to enter into a commercial contract is governed by the proper law of the contract, determined objectively by the closest and most real connection rule.

FACTS: Homestake Mining Company (majority shareholder of Homestake Gold) announced a takeover bid for Homestake Gold's outstanding shares. The defendant (Peninsula Gold) lodged 918 transfers, each transferring 100 shares in Homestake Gold; the transferees were all minors. The effect was to inflate the number of shareholders to 4,357, potentially affecting Homestake Mining's ability to satisfy the compulsory acquisition threshold. Under the deed, the minor's parent or guardian purported to bind the minor; the minor was exposed to no liabilities; economic interest and voting control remained with the promoter. Clause 2 meant the minor never had to pay the purchase consideration. By the time of the hearing, the commercial scheme was spent and no opposition was made to orders correcting the register. The relevant issue was whether the minors had the contractual capacity to ratify or affirm the transfer contracts. The minors were domiciled in Australia, New Zealand, and the United Kingdom.

ISSUE: Which law governed the capacity of the minors to enter into the transfer agreements: (i) the proper law of the contract; (ii) the law of the place of contracting (lex loci contractus); or (iii) the law of the domicile of the minor (lex domicilii)?

HELD: Capacity to conclude a commercial contract is governed by the **proper law of the contract, objectively obtained**. Here, that was the law of NSW.

REASONING:

Young J:

- "Such modern authority as there is would indicate that capacity to conclude a commercial contract is regulated by the proper law of the contract objectively obtained." (at 74)
- The only decision directly on point in Australia is the Ontario Court of Appeal in *Charron v Montreal Trust Co*, a strong case that was compelled to make a deliberate choice.
- "Modern text writer opinion almost unanimously favours this view."
- The lex loci contractus is supported only by cases involving negotiable instruments or contracting marriage.
- Reference to lex domicilii "is unsatisfactory and should be abandoned" in modern commerce.
- The most recent edition of Dicey and Morris suggested either proper law or law of domicile and residence, but the proper law is preferred.
- "The question whether the guardians have the ability to bind the minors raises a question whether the agreement gives rise to legally enforceable rights and liabilities which is determined by the proper law of the contract." (at 74)
- His Honour specifically used the phrase "objectively obtained," suggesting the objective test applies to capacity rather than any express or inferred choice.

PRINCIPLES:

- The **proper law of the contract (objectively determined)** governs the capacity of an individual to enter into a commercial contract.
- The lex loci contractus and lex domicilii are disfavoured rules for capacity in commercial contexts.
- The reference to the proper law "objectively obtained" suggests that for capacity purposes, the objective test applies regardless of any express or inferred choice by the parties; this is consistent with Mortensen's view that capacity "would appear...to be the putative proper law as determined objectively by the closest and most real connection rule": Mortensen [21.32].
- Mortensen notes this may be another matter that "probably should be resolved by reference to the law of the forum, in keeping with the line of authorities" from *Oceanic* and *Trina Solar*: [21.32]. This remains unsettled.

Open question: In *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453, Edelman J distinguished between issues of consensus ad idem (whether a contract formed) and validity (whether a formed contract is valid). Nygh [19.50] suggests this decision may mean the proper law governs lack of capacity (as an aspect of validity), while formation is for the lex fori.

Incorporation of terms	Lex fori	*Venter*; *Hargood*; *Trina Solar*
Consideration	Putative proper law	Uncertain: may now be lex fori
Formal validity	Proper law	*Tipperary*; uncertain after *Ferngrove*/*Trina Solar*
Capacity (individuals)	Putative proper law (objectively)	*Homestake*; may shift to lex fori
Capacity (corporations)	Law of place of incorporation	*FCAL Act 1989*, s 7
Vitiating circumstances (voidable)	Proper law	*Jasmin Solar*; *Trina Solar* Beach J
Vitiating circumstances (void ab initio)	Uncertain	Possibly lex fori after *Oceanic*

ILLEGALITY AND FOREIGN PUBLIC POLICY

Forum Public Policy

- Whether a foreign law should be applied or enforced depends on the public policy of the forum.
- A contract legal under its proper law may still be enforceable in the forum even if it would be illegal under the forum's domestic law.

Paradise Enterprises Inc v Kakavas [2010] VSC 25, [93] (Davies J)

- A Bahamas casino loaned $1 million Bahamian to a Victorian to gamble. Gaming loans were void under Victoria law.
- Held: "the agreement was governed by the laws of the Bahamas. Reference to the law in Victoria governing the conduct of gambling here is not apposite to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria." [93]
- Key principle (Nygh [19.73]): "a wagering contract, although unenforceable by the domestic law of the forum, may nevertheless be enforced in the forum if it is valid by the proper law."
- But note: a contract will not be enforced if it offends a **mandatory forum statute** extending to the situation before the court. This is an instance of mandatory law overriding the proper law: Nygh [19.74].

Illegality in the Place of Performance

- General principle (Nygh [19.75]): an Australian court "would excuse performance of the obligation if such performance was illegal as from the beginning or had become illegal by subsequent change of the law under the law of the place of performance, regardless of the proper law of the contract and the effect which such illegality would have under the proper law."
- Conversely, "a contract that is unlawful under the proper law is not saved by the fact that it was lawful under the law of the place of performance."

Fullerton Nominees v Darmago [2000] WASCA 4

A contract whose substantial or main purpose involves the commission of an illegal act in a foreign and friendly country will not be enforced by an Australian court on grounds of public policy, and an illegal clause infecting the whole contract cannot be severed.

FACTS: Fullerton Nominees wanted to win a contract to construct and commission an abattoir in Indonesia. Fullerton engaged Darmago as an agent to assist in obtaining the abattoir contract. The written contract provided:

- $180,000 commission payable to Darmago for services in obtaining the contract.
- "Invisible costs" of up to $360,000, understood by both parties (though not written) to be moneys to be used bribing Indonesian officials to facilitate the progress of the contract.

After the abattoir was built, Fullerton paid Darmago only $81,000 (part of the commission), not the $180,000 commission or the $360,000 invisible costs. Darmago sued for the unpaid commission and invisible costs. Fullerton counter-sued for the recovery of the $81,000 already paid.

ISSUES:

1. Was the "invisible costs" clause illegal and unenforceable?
2. Could the illegal clause be severed, leaving the remainder of the agency contract enforceable?
3. Could Fullerton recover the $81,000 it had already paid?

HELD (French CJ, Gummow, Hayne, Kiefel and Bell JJ): No. Section 5N(1) is **limited in its geographical scope** to contracts for the supply of recreational services **in NSW**. The exemption clause could not be relied upon; s 74 TPA was not excluded.

REASONING at [29]-[35]:

- "It is necessary to reconcile the generality of the language used in a provision like s 5N with the geographical limitation to which the legislative power of a State parliament is subject. And that reconciliation must be undertaken upon a consideration of the context and the subject matter of the Act in question."
- In some cases (of which *Wanganui-Rangitikei* is the pre-eminent example), the reconciliation is achieved by limiting the operation of the provision to contracts **whose proper law is that of the enacting State**. "But that is not the only form of geographical limitation that may be adopted."
- Unlike *Wanganui-Rangitikei*, Div 5 of Pt 1A of the *Civil Liability Act* is directed to limiting **liability for negligence in relation to recreational activities**.
- Sections 5J(1) and 5K define "recreational activity" partly by reference to **place** ("engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in" certain activities). "There is no reason to read those references to place as extending beyond places in New South Wales."
- Sections 5J(1) and 5K "point decisively to reading s 5N as reaching all cases in which the contract in question (wherever it is made and by whatever law it is governed) is for the supply of recreation services **in New South Wales**." [34]-[35]

PRINCIPLES:

- The geographical scope of a statute is always a matter of construction by reference to context, subject matter and purpose.
- The proper law criterion (*Wanganui-Rangitikei*) is one possible geographic limitation but not the only one; other criteria (such as place of performance) may emerge from construction.
- Both this case and *Wanganui-Rangitikei* apply s 12 of the *Interpretation Act 1987* (NSW): references to "a locality, jurisdiction or other matter or thing" are references to such in and of NSW.

D. HELPFUL PRESUMPTIONS: PEARCE & GEDDES [5.9]-[5.13]

- Legislation is presumed to be intended to be **constitutional** [5.11].
- Legislation is presumed **not to have extraterritorial effect** [5.12-5.14].
- **General words are presumed not to extend to cases governed by foreign law** [5.15], but this presumption is rebuttable if the policy of the Act so indicates [5.16].
- Legislation is presumed **not to violate international law** [5.24].

BUT:

- Parliament may override these presumptions by clear and unambiguous language.
- Forum statutory law prevails over common law if they lead to different outcomes.

Part 2: Specific Statutory Regimes

WCA & *United Airlines*

***Workers Compensation Act 1987* (NSW), ss 9AA and 150A-150F**

s 9AA: Liability for Compensation

- **(1)** Compensation under this Act is only payable in respect of employment that is **connected with this State**.
- **(2)** The fact that a worker is **outside this State when the injury happens** does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
- **(3)** A worker's employment is connected with:
    - **(a)** the State in which the worker **usually works** in that employment; or
    - **(b)** if no State or no one State is identified by (a): the State in which the worker is **usually based** for the purposes of that employment; or
    - **(c)** if no State or no one State is identified by (a) or (b): the State in which the employer's **principal place of business in Australia** is located.

- **(1)** It makes no difference for the purposes of this Division that under the substantive law of another State:
    - **(a)** the circumstances are such that they would not have given rise to a cause of action had they occurred in that State; or
    - **(b)** the circumstances do not give rise to a cause of action.
- **(2)** "Another State" means a State other than the State **with which the injury is connected**.

***United Airlines Inc v Sercel Australia Pty Ltd* [2012] NSWCA 24, [28]-[32], [77] (Allsop P)**

A NSW statutory indemnity under the *Workers Compensation Act 1987* (NSW) is governed by NSW law and is not affected by the *lex causae* of the underlying tort, even if that tort occurred overseas.

FACTS: Mr Arora, an employee of Sercel Australia Pty Ltd, sustained injuries (head, neck, knee) when a United Airlines aircraft on which he was travelling braked heavily on landing. The incident occurred **in Texas**. Sercel paid Mr Arora workers' compensation under the *Workers Compensation Act 1987* (NSW) because his employment was **connected with NSW** (s 9AA WCA), even though the tort occurred in Texas. Sercel then sought indemnity from United Airlines under s 151Z(1)(d) of the WCA: "If the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages." Mr Arora himself brought no direct claim against United Airlines. UA argued Sercel's indemnity claim was out of time under the two-year limit in the Warsaw Convention.

ISSUES:

1. Was Sercel's claim for statutory indemnity governed by NSW law or by Texas law (as the *lex causae* of the tortious claim)?
2. Was the indemnity claim statute-barred under the Warsaw Convention?

HELD: The claim was governed by NSW law. Texas law did not affect Sercel's rights.

REASONING (Allsop P):

- Allsop P at [27]: "The fact that the worker is outside the State when the injury happens does not prevent compensation being payable under the 1987 Act" (reflecting s 9AA WCA).
- UA argued the *lex causae* was Texas law (under the *Zhang* rule: *lex loci delicti* governs torts). Under Texas law, subrogation rights were derived from the worker's rights; if the worker's direct claim was statute-barred under the Warsaw Convention, the derived indemnity claim would also be barred.
- Allsop P at [30]: "*Regie Nationale v Zhang* concerned the rules for the determination of the *lex causae* for torts... The action by Sercel is **not in tort**; it is a claim under a **statutory indemnity governed by the law of New South Wales**. The action for which United may be liable to Mr Arora would, subject to the operation of the Act and the Convention, be governed by the *lex causae* of the tortious claim under the Warsaw Convention."
- At [31]-[32]: "Just as compensation under the 1987 Act is payable even if the injury took place out of New South Wales, the statutory indemnity applies to permit recovery of such sums in accordance with the operation of the New South Wales statute in accordance with New South Wales law... **Texas law does not affect Sercel's rights here.**"

PRINCIPLES:

- The *Zhang lex loci delicti* rule applies to determine the *lex causae* of the underlying **tort** claim. But where the forum's cause of action is a **statutory indemnity** under the WCA, that is a separate claim governed by **NSW law**.
- A statutory indemnity under the WCA can be pursued even where the underlying tort occurred overseas, because s 9AA WCA extends compensation to injuries connected with NSW regardless of where they occur.
- The key distinction is between the **tortious** cause of action (governed by *lex loci delicti*) and the **statutory** cause of action (governed by forum law).

***Defamation Act 2005* (NSW), s 11**

Background: Nationally uniform legislation to harmonise defamation litigation across Australia (defamation often arises simultaneously in multiple jurisdictions). The legislation **overrides common law choice of law principles** and provides its own test.

s 11: Choice of Law for Defamation Proceedings

Issue	***Peros* (QSC)**	***Aguasa* (WASC)**
Characterisation of s 12B	**Procedural**	**Substantive**
Weight of prior authority	Followed *Hamilton* and related cases	Acknowledged weight of authority but departed
Key distinguishing factor	s 12B encourages resolution without litigation; does not affect enforceability in the *Pfeiffer* sense	s 18 defence (offer to make amends) depends on a concerns notice; that defence is a substantive right
Effect	Concerns notice not required where proceedings commenced in a different forum	Failure to give concerns notice: proceedings dismissed
Status of reasoning	Arguably obiter (case resolved on statutory interpretation first)	Decided directly on the substance/procedure point

Tottle J in *Aguasa* [57]: "The matter that tips the balance in favour of that characterisation is the existence of the s 18 defence and its dependence on the giving of a concerns notice."

Both decisions were decided after *Hamilton* and both acknowledge *Hamilton* as authoritative. The tension between them is unresolved at appellate level.

3. Characterisation by the Lex Fori

The Principle
The question of whether an issue is substantive or procedural is decided by the **lex fori** applying its own rules. How the lex causae characterises a provision is **irrelevant** to the forum's determination.

This has a specific consequence for "self-characterising provisions": a legislature in State A cannot, by declaring its own provisions to be "substantive", bind a court in State B to treat them as such. The Parliament of Queensland can modify the common law for its own courts; it cannot vary the choice of law rule applied by the courts of another State.

***Hamilton v Merck & Co* (2006) 66 NSWLR 48**

Establishes that characterisation of a foreign law as substantive or procedural is done by the **lex fori** applying its own rules — self-characterising provisions of the lex causae cannot bind other courts — and holds that pre-proceeding notice and compulsory conference requirements in Queensland's *Personal Injuries Proceedings Act 2002* (Qld) are **procedural**, not substantive, under the *Pfeiffer* test.
FACTS: Queensland residents commenced representative proceedings in the NSW Supreme Court for damages for personal injuries caused by ingestion of Vioxx, a drug manufactured in the US and distributed in Australia. Causes of action were pleaded in negligence and under the *Trade Practices Act 1974* (Cth). The lex loci delicti for the Queensland claimants was Queensland. Under Queensland's *Personal Injuries Proceedings Act 2002* (Qld) (PIPA), a claimant was required to give written notice of claim (s 9(1)) and attend a compulsory conference (s 36(1)) before commencing proceedings. Neither requirement had been complied with. Section 7(1) of PIPA declared those provisions to be "substantive, as opposed to procedural, law." The question was whether these requirements, as part of Queensland's substantive law, had to be applied by a NSW court.
ISSUE: Were the notice and compulsory conference provisions of PIPA (a) substantive or procedural; and (b) did s 7(1) of PIPA (a self-characterising provision) bind the NSW court to treat them as substantive?
HELD: The provisions were **procedural**. The self-characterising provision in s 7(1) did not bind the NSW court. The NSW court was not required to apply the PIPA provisions.
REASONING
Handley JA: [125]-[127]

- s 7(1) of PIPA "settles the question for the courts of Queensland but not for other courts": [125]

Evidence

- Rules of evidence (admissibility, methods of proof, competency of witnesses) = generally **procedural**, governed by lex fori
- Satisfies the *Pfeiffer* test: rules regulating the mode or conduct of court proceedings
- Supported by s 79 of the *Judiciary Act 1903* (Cth) (State laws, including those relating to procedure and evidence, bind courts exercising federal jurisdiction)
- **However**, a distinction exists between:
  - Rules prescribing **what facts must be proved** — potentially **substantive**
  - Rules prescribing **how facts should be proved** — **procedural**
- Nygh [16.21]: not everything in a treatise on the law of evidence is procedural — "only provisions of a technical or procedural character — for instance, rules as to the admissibility of hearsay evidence"
- The full principle from Nygh [16.21], drawing on Lord Brougham in *Bain v Whitehaven Rly Co*: "Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not: that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it." This states the general principle — but it is qualified: not every rule in a treatise on evidence is procedural, only those of "a technical or procedural character — for instance, rules as to the admissibility of hearsay evidence or what matters may be noticed judicially."

Costs

- **Procedural** — governed by lex fori

Execution and Enforcement of Judgments

- **Procedural** — governed by lex fori

Presumptions and Burdens of Proof

- Generally **procedural** (part of evidence law)
- Potentially **substantive** where the burden of proof is tied to the existence or non-existence of a substantive right
- "Outcome determination test" may apply: if the burden of proof goes to the substance of the parties' rights, it may be substantive

Privilege

- Traditionally **procedural** (part of evidence law; relates to admissibility and mode of proceedings)
- Legal professional privilege is substantive in nature — it is "not merely a rule of evidence but… an important common law right": *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 at [9]-[11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. However, the governing choice of law rule for LPP is nonetheless the **lex fori**: *Stewart, Cornell and Hogan v ACC* [2012] FCAFC 151 per Besanko J (with whom the majority agreed on this point). The paradoxical result is that LPP is substantive in character but Australian courts apply their own LPP rules regardless of which substantive law governs the claim.

- His Honour surveyed the authorities. He referred to *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 for the proposition that foreign law is presumed to be the same as local law in the absence of proof, and to the Full Federal Court in *Tisand Pty Ltd v Owners of the Ship MV "Cape Moreton"* (2005) 219 ALR 48, which had engaged with *Damberg* and noted the difficulties and disparities in the authorities, including whether the presumption extends to statutory law and whether it is limited to statutes of a general character as opposed to those peculiar to local conditions [35]–[38]. He extracted the key passages from *Neilson*, noting that the majority applied the presumption in respect of Chinese law but that Gleeson CJ, McHugh and Kirby JJ each found it devoid of content [39]–[40].

Declining the presumption: the statutory non-uniformity exception [41]

- Applying these authorities, Graham J declined to apply the presumption: "As I understand the relevant authorities, the general presumption that, in the absence of evidence to the contrary, foreign law is the same as Australian law is not inflexible. Where the law of the forum is governed by a statute and the law within Australia is itself lacking in uniformity, I doubt whether it could be presumed that the defamation law in China, including the Special Administrative Region of Hong Kong, is the same as it is in New South Wales." [41] Australian defamation law at the time was governed by different statutes across the states and territories, making it particularly unsuitable as a baseline for presuming the content of Chinese law.

Further basis for caution: knowledge of the recipients [188]–[190]

- Graham J identified an independent further basis for caution. He found it inconceivable that the two recipients of the email, Curie Chen and Zhou Jie, were without detailed knowledge of the applicants' customs fraud convictions and FYG's own involvement in those offences by the time the email was sent. That finding undermined the factual foundation for any defamatory effect on those specific recipients regardless of which law applied, and Graham J cross-referenced these findings at [282] alongside the foreign law point.

Positive defamation findings but no damages: the consequence [225]–[237], [282]

- Despite declining the presumption, Graham J completed the full defamation analysis in respect of the 15 September email. He found at [225]–[237] that the email did convey defamatory imputations of and concerning the second applicant: that she had conducted the first applicant's affairs so as to warrant official ATO investigation into criminal conduct including taxation fraud, money laundering and predatory pricing [225]–[227]; that she was reasonably suspected of being implicated in a major taxation fraud [231]–[232]; and that she had defrauded everybody who had ever worked for her [235]–[237]. Positive findings were made on each imputation. However, at [282] his Honour confirmed that because the relevant defamation law of China and Hong Kong had not been proved, no award of damages would be made referable to the publication of the email to Curie Chen and Zhou Jie. The court expressly cross-referenced both the foreign law point and the findings at [188]–[190] as operating together to defeat any award.

PRINCIPLES:

- The presumption of similarity is **not inflexible** and must be assessed against the characteristics of both the subject matter and the foreign legal system
- A further exception arises where **(i)** the forum's law on the relevant subject is **governed by statute** and **(ii)** that statutory law is **not uniform across Australia**: in such circumstances the court will doubt whether the foreign law can be presumed to be the same as the lex fori
- Defamation law is a clear example: at the relevant time it was non-uniform across Australian states and territories, making it an unsuitable baseline for any presumption about Chinese law
- The **practical consequence** of declining the presumption where foreign law is not proved is that no relief can be granted for that publication, even where the court has completed the full legal analysis and made positive findings on the substantive claim
- Where the specific foreign recipients of a publication have detailed prior knowledge of the underlying facts, that may independently undermine the factual foundation for any defamatory effect, providing a further basis for denying damages
- *National Auto Glass* sits alongside *Damberg* and the minority in *Neilson* as authority for a restrained approach to the presumption, particularly where the foreign system is not common law-based and the forum's own law is statutory and non-uniform

***Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; [2005] HCA 54**

Foreign law is a question of fact to be proved by expert evidence, not presumed by the court; and where proof of foreign law is absent or incomplete, the court will presumptively apply the lex fori – though the majority and minority divided sharply on when that presumption can operate.

FACTS: Barbara Neilson (WA domiciliary) fell down unstaired stairs in an OPC-provided apartment in Wuhan, China; sued OPC (Victorian company) in the WA Supreme Court approximately six years after the accident. Chinese law applied as the lex loci delicti: Article 136 imposed a one-year limitation period (Neilson therefore out of time); Article 146 provided that where both parties were nationals of the same country or domiciled in the same country, the law of their own country or domicile "may also be applied". OPC tendered an English translation of the General Principles of Civil Law of the PRC 1986 and called Mr Liu (Chinese and Australian law degrees) as expert witness. Mrs Neilson adopted a "perilous" approach, informing the trial judge she would lead no evidence on Chinese law and intended to "keep well away from the China law" as much as possible [144]. Mr Liu's evidence contained no reference to Article 146; under cross-examination he said there was a "possibility" a Chinese court could apply Article 146 and that the discretion would be exercised on the basis of "fairness and justice", but in his opinion the article was irrelevant. The only evidence relating to Article 146 was therefore the English translation of the article itself and Mr Liu's brief cross-examination evidence

ISSUES:

1. Is foreign law treated as fact in Australian proceedings, and what does that require of expert witnesses?
2. Where a party fails to prove foreign law, does the court presume the foreign law is the same as the lex fori?
3. When is that presumption inapplicable or unavailable?

HELD (on the proof of foreign law issues):

- Foreign law is a question of fact; Australian courts have no presumed knowledge of it; decisions as to its content create no precedent and must be proved by expert evidence on each occasion: [115]
- Where proof is absent or insufficient, a majority (Gummow, Hayne, Callinan and Heydon JJ) applied the presumption that Chinese law was the same as Australian law; a minority (Gleeson CJ, McHugh and Kirby JJ) declined to apply the presumption in the circumstances of this case

REASONING:

Gummow and Hayne JJ [115]–[116], [125]:

- "The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence." [115]
- "In particular, an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there the difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction." [115]
- At [116], flagged that the "precautionary admonitions" about proof intersect with "the well-known rule that, absent proof of, or agreement about, foreign law, the law of the forum is to be applied"
- Applied the presumption: "neither the absence of pleading the relevant content of foreign law nor the absence of proof would be fatal" as the presumption would allow the WA court to exercise the Article 146 discretion "as an Australian court [would] under an Australian statute, having regard to its scope and the objects for which it was conferred" [125]

Callinan J [124]–[125]:

- Cited *F & K Jabbour v Custodian of Israeli Absentee Property* (Pearson J): "I did not feel entitled or qualified to look through volumes of Palestine or Israeli ordinances or statutes or law reports as they were not in evidence… It must be assumed that the Israeli rules of construction are the same as the English rules of construction" [124]
- Applied that approach to Article 146: "I propose accordingly to construe Art 146 as I would construe an Australian enactment." [125]

Heydon J [267]:

- The general correctness of the approach (presuming foreign law the same as lex fori where proof is absent or incomplete) "has been questioned, but no argument adverse to its general correctness was advanced in this appeal, and it was described by the respondents as 'trite'."

Gleeson CJ [16]:

- Declined to rely on the presumption: it is "devoid of content in this case"
- "The evidentiary presumption is only of assistance in a case where it can be given practical content"

- **Expert evidence alone is sufficient:** Foreign law may be proved by a qualified expert without producing the relevant code or statute, even where the subject matter is governed by written law
- **Court may construe tendered passages itself:** Where an expert refers to passages in foreign legislation, the court may examine those passages and consider their proper meaning
- **Weight, not admissibility:** Failure to produce the relevant foreign code or statute may affect the weight the tribunal places on the expert's evidence, but does not render that evidence inadmissible
- **Step-by-step proof:** Counsel is entitled to lead evidence on foreign law step by step; evidence is admissible if it constitutes a relevant step toward establishing the matter in issue, even if standing alone it does not prove the whole
- **Documents:** A consul's certificate and translation of foreign law, not conforming to the statutory requirements for tender of foreign legislation, are not admissible under the statutory mode, though expert oral evidence on the same subject matter would be

***McHugh v Australian Jockey Club Ltd (No 6)* [2011] FCA 1135 (Robertson J)**

Merely tendering foreign legislation is insufficient to prove foreign law or to invite inferences about its operation; what is required is expert evidence showing what the law is as demonstrated by its exposition, interpretation and adjudication.

FACTS: McHugh was a horse breeder challenging rules of various Australian racing authorities that restricted or prohibited registration of thoroughbred horses conceived by artificial insemination in the Australian Stud Book. He argued the rules constituted a restraint of trade and contravened s 45 of the Competition and Consumer Act 2010 (Cth). Late in the proceedings, McHugh sought to tender four foreign statutes – the Competition Act 1998 (UK), the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Sherman Act (US) – together with a letter from his solicitors and a copy of the Commerce Act 1986 (NZ). The purpose was to invite the court to infer that overseas regulators in equivalent positions to the Australian respondents would have a reasonable apprehension that, if the Australian rules were held unenforceable, their own similarly-worded rules might contravene those foreign statutes. No expert evidence explaining the foreign law was tendered alongside the statutes.

ISSUE: Whether the mere tender of foreign legislation, without accompanying expert evidence, is sufficient to prove what the foreign law is or to ground inferences about its operation.

HELD: The tender was refused on four grounds.

REASONING [5]–[9]:

Ground 1: Tender of foreign legislation does not show what the law is [5]

Robertson J accepted the proposition from Nygh (citing Lord Wright in *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 298): "If the law is contained in a code or written form, the question is not as to the language of the written law but what the law is as shown by its exposition, interpretation and adjudication." The mere tender of the statutory text did not show what the law was in that sense. Expert evidence was what was required and was what was missing.

Ground 2: Inappropriate to apply the presumption of similarity [6]

Robertson J declined to assume the foreign competition and restraint of trade law was the same as Australian law under s 45 or the common law. He applied the principles in *Damberg v Damberg* (2001) 52 NSWLR 492, which had declined to presume German tax law the same as Australian law. Competition and restraint of trade law was similarly an area too statutory and particular for the presumption to operate comfortably.

Ground 3: The material was brought too late [7]

Whatever the precise operation of the presumption, it is "a default position and the respondents are entitled to test it." The material was brought well out of time, and the respondents would suffer significant prejudice if they were required to respond to it at that late stage without adequate opportunity to test or challenge it.

Ground 4: The material was substantively insufficient [8]

Even putting the other difficulties aside, Robertson J would not on the basis of the mere language of the foreign statutes draw the inference sought – that overseas regulators would have a reasonable apprehension their own similarly-worded rules might contravene those statutes. The statutory text alone could not support that inference.

For completeness [10]–[11]

Robertson J noted that what had been permitted earlier in the proceedings (an expert report explaining what the foreign law was) was a different and appropriate exercise. The affidavits and tendered statutes did not perform that function. He also noted that the Evidence and Procedure (New Zealand) Act 1994 (Cth) s 40 (providing that proof is

s 97(2): The Australian court, or the person or body, may inform itself about those matters in any way that it considers appropriate

G. (vi) Filing of Notices (UCPR Part 6 Division 9)

In NSW, the UCPR requires that certain notices be filed when a party intends to rely on foreign law in Supreme Court proceedings.

UCPR

UCPR r 6.42 – Definitions

For Division 9:

- **"foreign court"** = a court of a country other than Australia
- **"foreign law"** = the law of a country other than Australia

UCPR r 6.43 – Filing of Notices

r 6.43(1): A party who contends that an issue in proceedings in the Supreme Court is governed by foreign law must file and serve on the other parties affected a **"foreign law notice"** setting out the relevant principles of foreign law and their application to the issue

r 6.43(2): The foreign law notice must be filed and served by the party contending that an issue is governed by foreign law not more than **6 weeks** after the filing by that party of a summons, statement of claim, statement of cross-claim or defence in respect of the proceedings

r 6.43(3): A party on whom a foreign law notice is served who disputes the principles of foreign law or their application must file and serve on the other parties affected a **"notice of dispute as to foreign law"**

r 6.43(4): The notice of dispute as to foreign law must be filed and served not more than **8 weeks** after the date of service of the foreign law notice

UCPR r 6.44 – Orders (step-out above at section E)

UCPR r 6.45 – Determination of Issues Arising in Foreign Court Proceedings

r 6.45: Proceedings for determination of an issue of **Australian law** – being an issue with respect to which the Supreme Court may exercise its jurisdiction and which is relevant to an issue in proceedings in a foreign court – may be commenced by **summons seeking a declaration** of the answer to a question in the form determined by the foreign court

Key point: This is the reverse scenario: not the foreign court answering a question of foreign law for the NSW court, but the NSW Supreme Court answering a question of Australian law for a foreign court

UCPR rr 10.6, 10.13, 11.4 and Schedule 6 para (k)

r 10.6 Service in accordance with agreement between parties

- (1): In any proceedings, any document (including originating process) may be served by one party on another (whether in NSW or elsewhere) in accordance with any agreement, acknowledgment or undertaking by which the party to be served is bound.
- (1A): In proceedings on a claim for possession of land, the agreement must be made after the originating process is filed but before it is served.
- (2): Service in accordance with (1) is taken for all purposes (including for the purposes of any rule requiring personal service) to constitute sufficient service.

r 10.13 Acceptance of service by solicitor

If a solicitor notes on a copy of:

- (a): any originating process; or
- (b): any other document required or permitted to be served but not required to be personally served, that they accept service of the document on behalf of any person, the document is taken to have been duly served on that person on the date on which the note is made or on such earlier date of service as may be proved.

r 11.4 Service outside Australia

Originating process may be served outside Australia without leave of the court in the cases enumerated in Schedule 6.

Schedule 6 para (k)

An originating process may be served outside Australia without leave "when the person to be served has submitted to the jurisdiction of the court."

Combined effect: Where a foreign defendant has agreed to submit to jurisdiction (by jurisdiction clause or service agreement), that agreement is both the jurisdictional foundation and the gateway for service outside Australia without leave under Sch 6 para (k).

***Howard v National Bank of New Zealand Ltd* (2002) 121 FCR 366**

Confirms that voluntary submission to jurisdiction can take many forms beyond entering an appearance; a foreign respondent who agrees to accept service of process thereby completes the court's jurisdiction without any need for leave under the service out of jurisdiction rules.

Note: The reading guide pinpoints [19] only. The case's broader holdings on the interaction between O 7 r 14 and O 8 are procedural detail not directly assessed.

FACTS: Applicants commenced proceedings in the Federal Court against a New Zealand bank and its executives. The bank's New Zealand solicitors informed the applicants' solicitor they had instructions to accept service on behalf of the respondents, and service copies of the originating process were delivered to them in Wellington accordingly. No leave to serve out of jurisdiction had been obtained. The respondents opposed confirmation of service under O 8 r 2(4).

ISSUE: Whether service effected pursuant to an agreement by a foreign respondent to accept service was sufficient to found jurisdiction without leave under the rules governing service outside the Commonwealth.

HELD: Service was sufficient. Confirmation under O 8 r 2(4) was unnecessary. The court had jurisdiction.

REASONING

- The foundation of jurisdiction in actions in personam is lawful service: *Laurie v Carroll* (1958) 98 CLR 310 at 323, applied at [2] and [15].
- A foreign respondent can submit to jurisdiction in many ways beyond entering an appearance. Drummond J stated at [19]:
    - "Submission by a foreign respondent to the jurisdiction of the local court can take many other forms ... a respondent outside the jurisdiction can so act to give the local court jurisdiction over it which it would not otherwise have by waiving objection to jurisdiction, for example, by taking

- (3): An application for leave must be accompanied by an affidavit stating any facts or matters related to the desirability of the court assuming jurisdiction, including the place or country in which the person to be served is or possibly may be found, and whether or not the person to be served is an Australian citizen.
- (4): The court may give leave if satisfied that:
  - (a): the proceeding has a real and substantial connection with Australia; and
  - (b): Australia is an appropriate forum for the proceeding; and
  - (c): in all the circumstances the court should exercise jurisdiction.
- (5): A sealed copy of every order made under this rule must be served with the document to which it relates.

The Leave and Setting-Aside Framework: *Agar v Hyde* (2000) 201 CLR 552 (cross-reference)

This case (dealt with in full in earlier) governs applications under rr 11.8AA and 11.6. Key rules:

- **Schedule 6 gateway:** Whether the proceedings fall within a category depends on "the nature of the allegations which the plaintiff makes, not on whether those allegations will be made good at trial": at [51]. Strength of the plaintiff's claim is irrelevant at this stage.
- **Leave to proceed (r 11.8AA):** Once the gateway is satisfied, leave should prima facie be granted. The statement of claim will usually be sufficient to reveal whether a category is engaged, though sometimes evidence is required: at [52].
- **Setting aside (r 11.6):** Three grounds – (1) service not authorised; (2) court is an inappropriate forum; (3) claim bound to fail, assessed to the same standard as summary judgment (high degree of certainty about the outcome): at [57]–[60].
- **Onus:** Plaintiff bears the onus of establishing Schedule 6 is satisfied. Defendant bears the onus on rr 11.6(2)(b) and (c): Mortensen [2.25]; *Sapphire Group v Luxotico* [2021] NSWSC 589 at [52]. Any doubt as to construction of the rules should be resolved in favour of the foreign defendant: Nygh [3.47].
- **Applying to set aside is not submission:** Filing an application under r 12.11 (or r 11.6) does not constitute submission to jurisdiction: r 12.11(4).

Defendant's response: flowchart

1. Defendant enters appearance: no jurisdictional issue; proceedings continue.
2. Defendant does not appear (42 days from service): plaintiff must apply for leave to proceed under r 11.8AA, without needing to notify defendant. Court applies *Agar v Hyde* criteria.
3. Defendant contests jurisdiction under rr 12.11/11.6: no appearance required to do so; no submission to jurisdiction. Court has unlimited discretion under r 11.6(1), informed by the r 11.6(2) criteria.

Onus of proof: summary

Issue	Who bears the onus
Schedule 6 category satisfied	Plaintiff
Court is an inappropriate forum (r 11.6(2)(b))	Defendant
Insufficient prospects of success (r 11.6(2)(c))	Defendant
Real and substantial connection (r 11.5(5)(a))	Plaintiff (leave application)

Mode of Service Outside Australia

The method depends on the destination country:

1. **Hague Convention country:** As of April 2026, there are 84 contracting states (HCCH status table last updated 21 March 2024; no new accessions since). See the full list provided separately. Service is through the central authority mechanism under UCPR Part 11A. UCPR r 11A.2 makes Part 11A provisions prevail over other methods. Australia's Central Authority is the Commonwealth AG's Department; registries of Federal and Supreme Courts are forwarding authorities. Plaintiff applies to the court registry with: draft request for service abroad; the document to be served; a summary; and (where required) a translation: rr 11A.4, 11A.5. Once service is effected, the foreign central authority issues a certificate of service: r 11A.6.
   - Art 10(a) Bypasses the central authority mechanism; the plaintiff simply mails the document directly. However, many states have issued reservations objecting to this method and it is

therefore unavailable in those states. States that have fully objected to Art 10(a) include: Argentina, China, Czech Republic, Egypt, Germany, Greece, Latvia, Lithuania, Luxembourg, Norway, Poland, South Korea, Slovakia, Sri Lanka, Switzerland, Turkey, Ukraine and Venezuela. States that accept Art 10(a) without objection include France, UK and USA. Australia itself accepts incoming postal service but requires registered mail (qualified acceptance).
  - Art 8 permits service through diplomatic/consular agents but most states have objected to this also unless the document is to be served upon a national of the originating state.
2. **Convention country (bilateral agreement with Australia, not Hague):** Service through Australian or British diplomatic or consular missions under Part 11, Div 2, r 11.8A.
3. **All other countries:** Service need not be personal as long as effected in accordance with the law of the country in which service is effected: r 11.8AC.

HAGUE SERVICE CONVENTION (1965) – CONTRACTING STATES

As of April 2026: 84 contracting states. HCCH status table last updated 21 March 2024. No new accessions since that date. Always verify current status at hcch.net (Convention #14) before relying on this list in practice.

Colour key (Art 10(a) postal service position):
Red — fully objected to Art 10(a); postal service NOT available.
Blue — no objection to Art 10(a); postal service available (e.g. France, UK, USA).
Green — qualified objection; postal service accepted only by registered mail with acknowledgment of receipt (e.g. Australia).
Purple — objects to Art 10(b)/(c) only; does NOT object to postal service under Art 10(a).

Albania, Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Canada, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Kazakhstan, Kuwait, Latvia, Lithuania, Luxembourg, Malawi, Malta, Marshall Islands, Mexico, Moldova, Monaco, Montenegro, Morocco, Netherlands, Nicaragua, North Macedonia, Norway, Pakistan, Paraguay, Philippines, Poland, Portugal, Romania, Russia, Saint Vincent and the Grenadines, San Marino, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, United States, Venezuela, Vietnam.

Substituted Service and the Hague Convention: Tension

UCPR r 10.14 permits substituted service where a document "cannot practicably be served" on the person or in the manner required by law. The standard requires the plaintiff to demonstrate using reasonable effort that personal service cannot be effected; the test is reasonable and practical impossibility, not strict impossibility: *Foxe* (cited in Huang, "Substituted Service in Australia" (2022) 18(1) JPIL 116).

Key tension: After Australia ratified the Hague Convention (1 November 2010), some courts and jurisdictions enacted specific rules for substituted service in Convention countries. NSW and most other Australian jurisdictions still maintain one rule of substituted service applicable for service both inside and outside Australia regardless of the Convention, creating a tension: if a defendant is in a Hague Convention country, can substituted service under r 10.14 be ordered instead of going through the central authority mechanism?

Relevant considerations (per Huang):
- "Practicably" in r 10.14 is generally interpreted as "practically impossible" or "not feasible," but later Federal Court cases treat it as "not sensible or realistic" (a lower threshold).
- Courts have granted substituted service where: the outcome is time-sensitive; case management benefits arise; personal service would cause significant delay frustrating the proceedings; or extensive search has failed to locate the defendant.
- Cost alone is not a sufficient ground, unless the plaintiff is in financial hardship.
- Substituted service cannot extend personal jurisdiction beyond the court's competence; r 10.14 is a mechanism of service only, not of jurisdiction.

court could find this brings the case closer to the fraud exception, and service could potentially be set aside as an abuse of process.

ACTIVITY: SERVICE OUTSIDE AUSTRALIA – Four Seasons Holdings Inc v Brownlie [2017] UKSC 80 (comparative reference only)

This case appears in the activity for comparison and is not on the reading guide. Key comparative point:

UK approach (majority, obiter – Lord Sumption, Lord Hughes): "Damage" in the tort service-out gateway means only direct damage to the protected interest – i.e. the physical injury or death as it occurs. Consequential financial losses suffered in the forum do not satisfy the gateway: [23]–[25]. Extending "damage" to financial consequences would confer near-universal jurisdiction on English courts for claims by English residents for serious injuries sustained anywhere in the world: [28].

NSW approach (contrast): Under Schedule 6 para (a)(ii), "damage" encompasses all consequential detriment – physical, financial and social – suffered by the plaintiff. Consequential financial losses in NSW satisfy the gateway: *Flaherty v Girgis* (1985) 4 NSWLR 248 at 266–267; *Darrell Lea* (1990) 25 NSWLR 568 at 576–577. The minority in *Brownlie* expressly endorsed *Flaherty v Girgis* as correctly decided: at [52] per Lady Hale.

Note on facts in *Brownlie*: The case ultimately turned on the identity of the correct defendant. Holdings was a non-trading holding company and neither owned nor operated the Cairo hotel; it had no vicarious liability for the driver: [14]–[15]. The "damage" discussion is obiter.

Exam use: In an NSW problem, apply the *Flaherty/Darrell Lea* approach. *Brownlie* is the UK comparator showing a narrower position but is not NSW law.

ISSUES:

1. Which test governs stay applications (and related service applications) in Australian courts?
2. Whether NSW was a clearly inappropriate forum on the facts.

HELD: Appeal allowed. Stay granted (Mason CJ, Deane, Dawson and Gaudron JJ; Brennan J accepting the test for institutional reasons but dissenting on result; Toohey J concurring in result). The **"clearly inappropriate forum" test** unanimously adopted as Australian law. NSW was clearly an inappropriate forum.

REASONING

Authoritatively adopting the test (joint judgment, at 552-560)

- Four propositions from *Oceanic Sun Line* accepted as common ground: (1) a plaintiff who regularly invokes jurisdiction has a prima facie right to insist on its exercise; (2) the power to stay is governed by the general principle empowering courts to dismiss oppressive, vexatious or abusive proceedings; (3) a mere balance of convenience or the availability of a more appropriate foreign forum does not justify a stay; (4) the jurisdiction is exercised "**with great care**" or "**extreme caution**" (at 554).
- The test: **a defendant will ordinarily be entitled to a stay if he persuades the local court that, having regard to the circumstances and the availability of a foreign tribunal to whose jurisdiction the defendant is amenable, the local court is a clearly inappropriate forum for the determination of the dispute** (at 554, applying *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197 at 247-248).
- "**Oppressive**" = seriously and unfairly burdensome, prejudicial or damaging; "**vexatious**" = productive of serious and unjustified trouble and harassment; these words describe the **objective effect** of continuation in the forum, not the conduct of the plaintiff in choosing it (at 554-555).

Why not the traditional St Pierre test

- The traditional test is "**apt to produce an extreme result**": a plaintiff may commence proceedings in a clearly inappropriate forum solely to obtain a local advantage, yet a stay would be refused notwithstanding the clear inappropriateness of the forum (at 556-557).

Why not Spiliada

- The two tests will yield the same result in most cases; the difference is only critical in the rare case where a foreign tribunal is the natural forum but the local court cannot be said to be clearly inappropriate (at 558).
- The "clearly inappropriate forum" test **focuses on the disadvantages of continuing in the selected forum** rather than requiring a comparative judgment about the foreign tribunal (at 558).
- The local court is better adapted to assess its own inappropriateness than the comparative appropriateness of a foreign tribunal of which it has little knowledge and no experience (at 559).
- Powerful policy considerations militate against Australian courts "sitting in judgment upon the ability or willingness of the courts of another country to accord justice" (at 559).
- To say (per Spiliada) that a court may decline jurisdiction merely because another forum is more appropriate is to acknowledge a court can abandon its obligation to exercise jurisdiction even where it is **not** an inappropriate court; that proposition is **"by no means easy to sustain as a matter of legal principle"** (at 559-560).

Role of Spiliada connecting factors

- Notwithstanding rejection of *Spiliada* as the governing test, Lord Goff's discussion of **"connecting factors"** (governing law, location of witnesses, place of parties' residence and business) and **"a legitimate personal or juridical advantage"** provides **"valuable assistance"** in applying the clearly inappropriate forum test (at 564-565).

Same principles for all three applications

- The same test applies to: (1) stay applications; (2) applications for leave to serve outside the jurisdiction; (3) applications to set aside such service. It would make no sense for different principles to apply to applications directed at the same ultimate question (at 563-564).
- The inquiry in all three settings focuses on the **inappropriateness of the local court, not the appropriateness or comparative appropriateness of the suggested foreign forum** (at 564).
- Onus differs: on the defendant for stay applications (served within jurisdiction); on the plaintiff on an application for leave to serve outside the jurisdiction (at 564).

Locus of the tort

- The relevant act was the providing of professional accountancy services on an incorrect basis, initiated and completed in Missouri; an omission takes its significance from that same act (at 568-570).

Mason P (at 42)

- Mason P agreed it was **"not ... proper to have regard to the impact upon the workload of an already severely burdened Dust Diseases Tribunal"** [42], citing *Oceanic Sun* at 250-251, 254-255.
- He expressly noted: **"Had I done so, my conclusion may well have been in favour of a stay"** [42].
- Mason P also called for legislative reform but cautioned that any such restriction on foreign plaintiffs should address the scenario of Australian manufacturers dumping dangerous products in foreign markets with less stringent controls [42].

PRINCIPLES

- Under **current Australian law**, public interest considerations, including court congestion, burden on judicial resources, and the fact that a special tribunal regime was developed for the benefit of Australian residents, are **not permissible elements** in the FNC discretionary balance [40], following Deane J's rejection of the US doctrine in *Oceanic Sun* [40].
- This limitation flows from the adoption in *Voth* of Deane J's analysis, which expressly confined the relevant considerations to private interests as between the parties [40].
- Both Spigelman CJ and Mason P identified this as a **desirable target for legislative reform** [40]-[42].
- The case also illustrates: (a) that the place of manufacture in NSW, the NSW residence of the defendants, and a significant procedural advantage under s 25(3) can, together, prevent a finding of clearly inappropriate forum even where the tort occurred in a foreign country and the substantive law is foreign law; and (b) that public interest considerations, had they been permissible, would likely have changed the outcome.

Denial of justice in the foreign forum

The reading guide places *AK Investment v Kyrgyz Mobil Tel* under sub-topic A.3 (lack of judicial independence in the agreed foreign jurisdiction), already covered in detail there. Key principles already extracted in A.3 apply equally in the FNC context:

- "Real risk" test that justice will not be obtained suffices; no need to prove on the balance of probabilities: *AK Investment* at [95].
- No absolute bar (no rule of judicial restraint or act of state) preventing examination of whether a foreign legal system is corrupt or lacks independence: at [101].
- Cogent evidence required, more than generalised or anecdotal material: at [101]–[102].
- Specific procedural irregularities or irrational conclusions in past proceedings may suffice without proof of systemic endemic corruption: at [143]–[144].

How *AK Investment* sits with *Voth*'s rejection of comparative reasoning is unresolved; neither *Mortensen* nor *Nygh* squarely addresses this.

C.10 Unreasonable delay in foreign court

Toop establishes that unreasonable delay in the proposed foreign forum (with affidavit evidence of structural problems in that system causing trials to take four to five years) and practical inability to access the foreign forum (here, potential refusal of an entry visa) are relevant factors capable of preventing a finding that the local court is clearly inappropriate, even where conventional connecting factors (place of wrong, location of defence witnesses) point to the foreign forum.

These factors sit somewhat awkwardly with the no-comparison rule in *Voth*, since assessing "unreasonable delay" in a foreign court appears to require comparison. Practically, courts treat practical accessibility of the foreign forum as part of whether continuation in the local forum would itself be vexatious (forcing the plaintiff into an effectively unavailable foreign forum).

***Toop v Mobil Oil New Guinea Ltd* [1999] VSC 11**

Illustrates that unreasonable delay in a foreign court and inability to obtain a visa to enter the foreign jurisdiction are relevant factors capable of defeating an application to stay proceedings as a clearly inappropriate forum.
FACTS: Toop, an Australian barrister and solicitor, was employed in Papua New Guinea (PNG) and stabbed during an armed robbery at a service station there in December 1995. He subsequently returned to Melbourne and filed proceedings in the Victorian Supreme Court against the PNG operator of the service station (first defendant, a

Post-*Henry* caveat

***AMP Ltd v Wigmans* (2021) 270 CLR 623**

HCA observation that there is "no first-in-time rule or presumption" in the FNC context, but the considerations involved in resolving a contest between competing representative proceedings are not so confined.

REASONING: at [97] three members of the Court noted that Deane J's formulation in *Oceanic Sun Line* (relying on a strict version of the court's responsibility to prevent vexation and oppression) was "adopted in *Voth* and applied in *Henry* and *CSR*", and that there is no first-in-time rule or presumption in the FNC context. At [98]: "The considerations involved in resolving a competition between representative proceedings are not so confined." The context was a contest between five competing class actions against AMP.

How cited: *Mortensen* at [4.50] flags this as potentially affecting the *Henry* "prima facie vexatious to commence second action" point. Read narrowly, *Wigmans* distinguishes the representative-proceedings context rather than disturbing the *Henry* principle. Open whether it has wider implications for ordinary lis pendens FNC.

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C.13 The effect of a foreign judgment

Where the foreign proceeding has been determined, the principles of res judicata, issue estoppel, and *Anshun* estoppel may bar the local proceedings independently of any FNC analysis.

General position (*Nygh* [40.43]):

- The old fiction that foreign courts were not courts of record (treating foreign judgments only as prima facie evidence) is abandoned.
- A foreign judgment today has most, though not all, of the attributes of res judicata of a domestic judgment.
- But the foreign court cannot bind an Australian court on the issue of whether the foreign court had jurisdiction in the international sense.

Cause of action estoppel (res judicata):

- Comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has merged into judgment in a prior proceeding: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597.
- Can arise from a foreign judgment, treating it as having no greater conclusive effect than under the law of the foreign jurisdiction: *Nygh* [40.50].

Issue estoppel:

- A judicial determination of a particular issue of fact or law disposes of that issue once and for all between the parties or their privies: *Blair v Curran* (1939) 62 CLR 464.
- Distinct from res judicata: in res judicata, the cause of action itself passes into judgment; in issue estoppel, a state of fact or law is necessarily decided as a foundation for the prior judgment.
- Covers only matters "necessarily established as the legal foundation or justification" of the conclusion.

***Anshun* estoppel**:

- Bars the raising in later proceedings of a matter that was so relevant in earlier proceedings that it was unreasonable not to raise it.
- "Unreasonable" by reference to the proper conduct of modern litigation; not merely whether the matter could have been raised.
- Available from foreign judgments only where an equivalent doctrine exists in the foreign jurisdiction.

Telesto provides the leading worked example of all three doctrines arising from a foreign (Singapore) judgment (case note above):

- Res judicata established: substance, not form; focus on the underlying factual matrix: at [193]–[201].
- Issue estoppel: only narrowly established (one finding regarding the Standstill Agreement); brevity and wholesale adoption of submissions made "legally indispensable" matters hard to isolate: at [202]–[223].

The court's **general power to control its own proceedings** enables it to grant a temporary stay where proceedings are pending in another court and it is desirable that those proceedings should proceed to their conclusion first [22]. The court considers:

- Which proceeding was commenced first.
- Whether the termination of one proceeding is likely to have a material effect on the other.
- The public interest.
- The **undesirability of two courts competing to see which of them determines common facts first**.
- Circumstances relating to witnesses.
- Whether work done on pleadings, discovery, interrogatories and preparation might be wasted.
- The undesirability of substantial waste of time and effort if it becomes common practice to bring actions in two courts involving substantially the same issues.
- How far advanced the proceedings are in each court.
- That the law should strive against permitting multiplicity of proceedings on similar issues.
- Generally **balancing the advantages and disadvantages** to each party.

From this list, two core propositions emerge: (1) it is **undesirable** that two courts determine the same dispute; and (2) **practical considerations based on common sense and fairness** should dictate which action proceeds first [23].

Application (at [24]-[29])

- The New York action's earlier filing was disregarded because BP had been tricked into delaying the commencement of its action [24].
- The Federal Court Fast Track List offered a speedier outcome (trial within six months, judgment within six weeks of trial) compared to the New York action which would not be heard before June 2010 [25].
- BUT: CDI's principal witness (Greenberg) refused to travel to Australia, and CDI had five or six other US-based witnesses; BP had only one witness who spent significant time in the US [26]-[27].
- **"In this case, where the evidence the witnesses will give is likely to be very influential, a party will be disadvantaged if its evidence is provided by transcript or video link"** [28]. There was also considerable expense in compelling multiple witnesses to travel to Australia.
- These burdens could be avoided if the Federal Court action was temporarily stayed and trial took place in New York [28].
- Temporary stay granted, conditional on CDI undertaking not to object to BP reinstating its counterclaim in the New York action [29].

PRINCIPLES

- A **temporary stay** of local proceedings pending resolution of foreign proceedings is governed by the *Sterling Pharmaceuticals* test, not the *Voth* "clearly inappropriate forum" test [20]-[22].
- Under the *Sterling Pharmaceuticals* test, the court exercises its general power to control proceedings; the core considerations are: **undesirability of two courts determining the same dispute** and **practical fairness as between the parties** [23].
- **Location of witnesses** and the **disadvantage of evidence given by transcript or video link** are significant practical factors, especially where witness evidence is likely to be highly influential [26]-[28].
- A **temporary stay** avoids determining which forum is clearly inappropriate; it is a more flexible tool to manage parallel litigation by identifying which action should proceed to conclusion first.

Two known exceptions to *Voth* / *Henry* / *CSR* (*Nygh*)

The *Voth* test does not apply where:

- A related proceeding is pending in another Australian superior court or an application is made to cross-vest (covered in sub-topic E).
- The applicant seeks only a temporary stay pending determination of foreign proceedings (this sub-topic).

Open issue: temporary stay as a back door to res judicata

A temporary stay pending foreign proceedings will frequently result, once the foreign proceedings determine the merits, in res judicata or issue/*Anshun* estoppel barring the local proceedings (see *Telesto* above). This means a temporary stay can effectively operate as a soft permanent stay without satisfying the *Voth* threshold. Whether this is a legitimate exercise of the court's process or a "back door" to a stricter test is unresolved

- **(a)** designates the courts, or a specified court or courts, of a specified country, to the exclusion of any other courts, as the court or courts to determine disputes between those parties that are or include those matters; and
- **(b)** is not an agreement the parties to which are or include an individual acting primarily for personal, family, or household purposes; and
- **(c)** is not a contract of employment.

s 21 – How this Part affects powers of the court to stay proceeding

s 21(1) An Australian court cannot stay a civil proceeding on forum grounds connected with New Zealand otherwise than in accordance with this Part.
s 21(2) However, this Part does not affect any power of the Australian court to stay the proceeding on any other grounds.

s 22 – No restraint of proceedings

s 22(1) An Australian court must not restrain a person from commencing a civil proceeding in a New Zealand court on the grounds that the New Zealand court is not the appropriate forum for the proceeding.
s 22(2) Also, an Australian court must not restrain a party to a civil proceeding before a New Zealand court from taking a step in that proceeding on the grounds that the New Zealand court is not the appropriate forum for the proceeding.

s 23 – Suspension of limitation periods

Where a NZ proceeding is stayed by a NZ court under the NZ Act on the grounds that an Australian court is the more appropriate court, and the claim is to be made again in an Australian proceeding after the staying of the NZ proceeding, the Australian proceeding is treated as commencing at the time the NZ proceeding commenced for the purposes of every applicable Australian limitation period or defence.

F.2 Exclusive choice of court agreements (s 20)

The mandatory regime

TTPA s 20 imposes a **mandatory** regime, distinct from the discretionary common law "strong reasons" test:

- Where the parties have an exclusive choice of court agreement in favour of a NZ court, the Australian court **must** stay the proceedings: s 20(1)(a).
- Where the parties have an exclusive choice of court agreement in favour of an Australian court, the Australian court **must not** stay the proceedings: s 20(1)(b).
- The mandatory non-stay under s 20(1)(b) where an Australian court is chosen represents a significant modification of the common law: at common law, even a valid exclusive jurisdiction clause is subject to a discretionary "strong reasons" test; under s 20(1)(b), there is no discretion to refuse to enforce the clause (subject only to the narrow nullity exception in s 20(2A)).

Exceptions

- **s 20(2)** sets five narrow exceptions to the mandatory stay where NZ is chosen: nullity under NZ law (including its private international law rules); incapacity under Australian law; manifest injustice / manifestly contrary to Australian public policy; agreement cannot reasonably be performed for exceptional reasons beyond the parties' control; or the chosen NZ court has decided not to hear the case. These mirror the exceptions for enforcing arbitration agreements under the New York Convention, and case law on those exceptions is likely to be influential.
- **s 20(2A)** limits the exception to mandatory non-stay (where Australia is chosen) to nullity under Australian law (including its private international law rules). This includes claims that the clause is affected by fraud, misrepresentation, or mistake: *Z487 Ltd v Skelton* [2014] QSC 309.

Consumer and employment carve-outs

The s 20 regime does not apply to:

- Agreements where a party is an individual acting primarily for personal, family or household purposes: s 20(3)(b).
- Contracts of employment: s 20(3)(c).

For these, the common law "strong reasons" / Akai analysis applies.

Strict privity required for s 20(3)

For s 20(3) to apply, "the parties to the proceeding must personally be parties to the written agreement in the strictest contractual sense in accordance with the doctrine of privity of contract": *Australian Gourmet Pastes Pty Ltd v IAG New Zealand Ltd* [2017] VSCA 155 at [65]. A third party whose rights derive from the policy but who is not personally a party cannot engage s 20(3).

Public policy threshold

The public policy exception in s 20(2)(c) is expressed in strong terms ("manifest injustice" or "manifestly contrary"), signalling a higher threshold than ordinary common law public policy.

Application illustrations

See F.3 below for applicable illustrations.

Non-exclusive choice of court agreements

A non-exclusive choice of court agreement (whether favouring Australia or NZ), or one designating multiple countries, or one within the consumer/employment carve-outs, is merely one factor in the forum non conveniens analysis under s 19(2)(d): it does not mandate a stay.

F.3 Forum non conveniens in Trans-Tasman litigation (s 19)

The two preconditions for a stay

Under s 19(1), the Australian court may stay proceedings if satisfied that:

- **(a)** the NZ court has jurisdiction to determine the matters in issue; and
- **(b)** the NZ court is the **more appropriate** court to determine those matters.

Jurisdiction precondition

The NZ court must have actual jurisdiction to grant the specific relief sought. Where an Australian statute vests power only in named "Courts" (eg "Court" as defined in Corporations Act s 58AA), no foreign court can exercise that power; s 19(1)(a) will fail even if NZ is otherwise convenient: *Re Douglas Webber Events* at [34]–[40].

Spiliada-style test, not *Voth*

This is the *Spiliada* version of forum non conveniens, not the *Voth* "clearly inappropriate forum" test. The test under s 19 is "the more appropriate court": it does not require the NZ court to be "clearly and distinctly more appropriate"; importing the *Spiliada* "clearly or distinctly" formulation would elevate the test beyond a plain reading of the statute: *Australian Gourmet Pastes* at fn 71.

Mandatory factors

The court **must** take into account the s 19(2) factors and **must not** take into account the fact that proceedings were commenced in Australia. The list is non-exhaustive – "any other matter that the Australian court considers relevant" (s 19(2)(i)) preserves flexibility.

***Fraser v Fraser* [2017] NZHC 1055**: NZ High Court applied the mirror s 24 NZ Act analysis to a stay application between NZ and Western Australia. Factors were "relatively finely balanced", but the predominance of witnesses likely to be in Australia weighed slightly in favour of the Australian court. Stay granted by the NZ court in favour of Australian proceedings. Illustrates the closeness of analysis under s 19 factors and the weight given to witness location where other factors are evenly balanced.

Application illustrations

***Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544**

Illustrates the operation of *Trans-Tasman Proceedings Act 2010* (Cth) (TTPA) ss 19 and 20: a mandatory stay under s 20(1)(a) requires an "exclusive choice of court agreement" between the actual parties to the proceeding designating a NZ court for the specific matters in issue; a discretionary stay under s 19(1) requires the NZ court to

Prima facie vexation and oppression [443]-[456]

- Mere co-existence of proceedings in different countries is **not of itself** vexatious or oppressive [448], [455].
- Prima facie vexation or oppression arises where a party **seeks the same relief in both sets of proceedings** [451].
- Henry v Henry (1996) 185 CLR 571 (though a stay case, not an anti-suit case) establishes that "prima facie the continuation of one or the other should be seen as vexatious or oppressive" where "the identical issue or the same controversy is to be litigated in different countries" [443]-[444].
- The power to stay local proceedings and the power to grant an anti-suit injunction are governed by separate considerations, though the concepts of vexation and oppression are the touchstone of both; these concepts carry the same meaning in both contexts [454].

Onus and evidence required [457]-[465]

- The applicant bears the onus of establishing prima facie vexation or oppression (same relief sought in two jurisdictions) [457], [462].
- Once established, the **onus shifts** to the party pursuing the foreign proceedings to show a legitimate interest or juridical advantage [457], [462].
- The primary focus is **not** on additional cost, expense or harassment to the defendant; rather, the question is whether there is "nothing to be gained" from the parallel proceeding, or whether the foreign proceeding is "unnecessary, 'unjustified' or 'unfair'" [461].
- **"The balance is skewed heavily in favour of allowing a party to proceed when there is something substantial that may be gained in the foreign proceedings and is skewed heavily against so allowing when there is not"** [461].
- Absence of evidence that a defendant will incur additional cost or harassment does not preclude a finding of vexation or oppression, provided there is nothing of substance to be gained by the foreign proceedings [463]-[465].

Election [466]-[472]

- Where a party has pursued proceedings in one jurisdiction to near completion, equity may treat this as an election not to proceed in another jurisdiction, making continued pursuit of the foreign proceedings unconscionable [466]-[468].
- However, the threshold question is **whether there is a legitimate juridical advantage**; if there is such an advantage, no scope for an election arises [470].

No legitimate juridical advantage [473]-[492]

Each contended advantage was assessed:

- **Enforceability of a UAE judgment** [475]-[477]: where none of the defendants had any assets in the UAE (or within reach of such a judgment), obtaining a UAE judgment conferred no substantial advantage; the possibility that assets might later be brought into the jurisdiction was "entirely speculative."
- **Additional evidence available to the Dubai court** [478]-[481]: even accepting that further evidence was available to the Dubai criminal court (including search warrant evidence and witness testimony not available in Victoria), this conferred no advantage without assets available for enforcement in that jurisdiction.
- **Inchoate reputation benefits** [482]-[485]: any benefit to Sunland's reputation in Dubai from being seen to prosecute proceedings there was "insubstantial and speculative"; no evidence was led to substantiate this claimed advantage; allowing reputational benefit to constitute a legitimate advantage would validate multiple proceedings in any jurisdiction where a company had a reputation to protect.
- **Need to pursue civil claim to defend Dubai World cross-claim** [486]-[492]: the expert evidence was insufficient to establish that Sunland could not defend itself against the Dubai World civil claim without maintaining its own civil right claim; in any event, any such advantage was of no practical value given the absence of assets available in Dubai.

Protecting the court's processes [493]-[499]

- Once a judgment is obtained in local proceedings, allowing re-litigation of the same claims in a foreign jurisdiction would undermine the principles of **res judicata** and **Anshun estoppel** [495], [499].
- The court can grant an anti-suit injunction to protect the integrity of its own processes as an independent basis, distinct from the vexation/oppression analysis [493]-[495], [499].

creating the works. The primary judge stayed the Australian proceedings on *Voth* forum non conveniens grounds (Australian forum clearly inappropriate) and did not consider the anti-suit injunction. The Full Federal Court allowed the appeal: the stay was dissolved (3:0) but the anti-suit injunction was refused (Gordon and Stone JJ, Finkelstein J dissenting).

ISSUES:

1. Whether the Federal Court was a clearly inappropriate forum for claims under the Australian *Copyright Act*.
2. Whether an anti-suit injunction should restrain the respondents from continuing the Illinois proceedings.

HELD: Stay dissolved (3:0); anti-suit injunction refused (Gordon and Stone JJ, Finkelstein J dissenting).

REASONING

On the FNC stay (Finkelstein J at [20]-[21]; Gordon J at [44]-[49])

- An Australian court cannot be a "clearly inappropriate forum" to hear and determine claims for enforcement of rights under the Australian *Copyright Act*, which has no extraterritorial effect and whose rights can only be determined by an Australian court [21], [44], [47].
- The fact that the respondents' US copyright claims were appropriately brought in the US does not establish that Australia is clearly inappropriate for the separate Australian copyright claim; the two proceedings involved different rights [19]-[21], [48].

Applicable principles on anti-suit injunctions: synthesis of prior authorities

Finkelstein J at [29]-[36]:

- *Aérospatiale* test (Lord Goff): the court restrains foreign proceedings only where "such pursuit would be vexatious or oppressive"; the forum must generally be the natural forum; account must be taken of injustice to both parties [29].
- *Airbus v Patel* (Lord Goff at 133): **"The broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it"**; comity requires caution [30].
- *CSR v Cigna*: power exercised "when the administration of justice so demands"; limits determined by equity and good conscience; anti-suit lies where foreign proceedings are "according to the principles of equity, vexatious or oppressive" [31].
- *CSR v Cigna* at 393: foreign proceedings vexatious/oppressive **"only if there is nothing which can be gained by them over and above what may be gained in local proceedings"** – Finkelstein J notes this does not depart from the English approach; if prima facie oppression is made out, an injunction will ordinarily be granted unless the respondent shows a legitimate juridical advantage in the foreign proceeding [32].
- Simultaneous proceedings do not of themselves establish vexation; "something more" is required: applicant must **"shew that there is vexation in point of fact, that is to say, that there is no necessity for harassing the Defendant by double litigation"** (Peruvian Guano) [33].
- Per *National Mutual Holdings* (Gummow J, cited with approval in *CSR*): **"conduct of proceedings which have a tendency to interfere with the due processes of the domestic court may ... generate the necessary equity to enjoin those foreign proceedings as vexatious and oppressive"**; once a court has begun to exercise federal judicial power, it has the exclusive right to control the exercise of functions incidental to it [34].
- *CSR* also confirmed an anti-suit injunction can lie in respect of "a matter in issue or, at least, that aspect of [the matter] involved in the application" – so an injunction directed at overlapping factual issues (even if not complete correspondence) is permissible in principle [36].

Gordon J (Stone J agreeing) at [51]-[67]:

- The principles governing a stay of domestic proceedings and those governing an anti-suit injunction are **not the same**: *CSR* at 390; setting aside a stay does not automatically require an anti-suit injunction [52].
- Independent inquiry required: could litigation of the factual substratum constitute vexation or oppression? Was the dominant purpose of the foreign proceedings to prevent the local proceedings? Neither was established [53]-[54].
- Where the subject matter of two proceedings is **not identical** (Australian rights vs US rights), it is not the case that "prima facie, the continuation of one or the other should be seen as vexatious or oppressive" (*Henry*); mere co-existence does not constitute vexation or oppression (*CSR* at 393) [55].

- Foreign judgments are enforced on the obligation theory, not comity: a judgment of a "court of competent jurisdiction ... imposes a duty or obligation on the defendant to pay the sum for which judgment is given": 513 (citing *Williams v Jones* (1845) 13 M & W 628; *Schibsby v Westenholz* (1870) LR 6 QB 155).
- Competence is judged by English conflict-of-laws rules — competence "in an international sense", not by the foreign court's own rules of jurisdiction: 513–514 (citing *Pemberton v Hughes* [1899] 1 Ch 781).

Individuals — voluntary presence suffices:

- "[T]he voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law": 519. Quaere whether residence without presence will suffice: 518.

Corporations — the two-limb presence test (central rule):

- An overseas trading corporation will be treated as present in another country only where either: (i) it has **established and maintained at its own expense a fixed place of business of its own** in that country and has for more than a minimal period carried on **its own business** at or from those premises through servants or agents (a "branch office" case); or (ii) **a representative has for more than a minimal period been carrying on the overseas corporation's business** at or from some fixed place of business: 530.
- In either case, presence depends on the corporation's business having been transacted at or from the fixed place; in the second case this requires "an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation": 530.

Relevant indicators in representative cases (non-exhaustive):

- Who acquired the fixed place; whether the corporation reimburses accommodation and staff costs; financial contributions; mode of remuneration (commission v fixed payments); degree of control; reservation of accommodation/staff for the corporation; display of the corporation's name; what business the representative transacts as principal; **whether the representative makes contracts in the corporation's name or otherwise binds it, and if so whether prior authority is required**: 530–531.

Authority to contract — the principal test:

- Endorsing Pearson J in *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139, 146: "in the case of an agency, the principal test to be applied ... is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval": 531.
- Such authority is neither exclusive nor conclusive but is "of great importance one way or the other"; conversely, "the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation": 531.

Application — NAAC and CPC:

- **NAAC**: although a wholly-owned subsidiary assisting in US marketing, "a substantial part of its business at all material times was, in every sense, its own business"; it had no general authority to contract binding Cape or Capasco, and no such contracts were ever in fact entered into: 544–547.
- **CPC**: was an independently-owned company (shares held by Mr Morgan); the post-1978 reorganisation was a deliberate attempt to reduce Cape's apparent US involvement and limit jurisdiction risk but was **not a "mere facade concealing the true facts"** warranting piercing of the corporate veil: 541, 544. CPC had no authority to bind AMC, Cape or Capasco, and there was no evidence it ever transacted in a way subjecting them to contractual obligations: 549.

Onus of proof:

- The onus is on the plaintiff seeking enforcement to demonstrate the foreign court's competence; in any event, the defendants had discharged the converse onus by showing they were not present in the US: 550.

Natural justice:

- The Tyler court's damages procedure — averages directed by the judge, bands and individual allocations selected by plaintiffs' counsel, with no judicial hearing, no evidence on individual plaintiffs and no judicial assessment of liability — was **"contrary to the requirements of substantial justice contained in English law"**: 568 (Held (4); summarised at 510–511).

- The defendants' failure to apply to the Tyler court to set aside the judgment did not preclude reliance on the natural justice defence in England, since the plaintiffs had given no notice of the unusual procedure, did not seek to dissuade the judge from adopting it, and the form of judgment served on the defendants did not show the procedure adopted: 572 (Held (5)), applying *Pemberton v Hughes* [1899] 1 Ch 781 and *Jacobson v Frachon* (1928) 138 LT 386.

PRINCIPLES

- **Obligation theory.** Foreign judgments are enforced because the judgment of a court of competent jurisdiction creates an obligation; competence is judged in the "international sense" by English conflicts rules: 513–514.
- **Individuals — voluntary presence.** Temporary voluntary presence of an individual in the foreign country at time of suit is sufficient: 518–519.
- **Corporations — two-limb presence test.** A foreign trading corporation is present only where (i) it has its own fixed place of business there from which it carries on its own business, or (ii) a representative is carrying on the corporation's business at a fixed place there for more than a minimal period: 530.
- **Representative cases — whose business?** The decisive question is whether the representative is carrying on the corporation's business or only its own; resolved by multi-factorial analysis of functions and relationship: 530–531.
- **Authority to contract is the principal indicator.** Whether the representative can bind the corporation by contract (with or without prior approval) is of "great importance"; absence of such authority, and absence in fact of binding contracts, is "a powerful factor pointing against" presence: 531.
- **Corporate veil and subsidiaries.** Mere ownership of a foreign subsidiary does not make the parent present where the subsidiary operates; the subsidiary's separate corporate personality is respected unless it is a "mere facade concealing the true facts": 541, 544.
- **Onus on plaintiff.** The plaintiff seeking enforcement bears the onus of establishing the foreign court's competence in the international sense: 550.
- **Natural justice defence.** Enforcement may be refused where the foreign procedure offended English notions of substantial justice (here, arbitrary banded damages selected by counsel without evidence on individual claimants and without judicial assessment of liability): 568.
- **No bar from failing to set aside abroad.** Failure to apply to set aside in the foreign court does not preclude the natural justice defence in the enforcing court, especially where the unusual procedure was not disclosed to the defendant: 572.

Close v Arnot **[1997] NSWSC 569 (Graham AJ)**

NSWSC authority on two points relevant to recognition of foreign judgments: (i) "presence" is judged at the date of service of process rather than the date of filing, and entrapment facilitating service does not vitiate presence unless the defendant would not have entered the jurisdiction but for the entrapment; (ii) in cases of undefended foreign proceedings where the defendant had good reason not to appear, the strict English rule that fraud unravels everything applies, and *Keele v Findley* is distinguished.

FACTS: Dr Arnot, a NSW resident, made voluntary periodic maintenance payments for his two children, who lived in the US with his former wife and her second husband (the first plaintiff, Mr Close). Close claimed he had advanced over US$281,000 for the children's necessaries. When Arnot planned a US trip including a stop in New York to visit his son, Close engaged in entrapment to enable service — booking Arnot into a Manhattan hotel and arranging a car at the airport. Arnot was served with NY Supreme Court proceedings at the hotel reception. Believing the NY court lacked jurisdiction over him and unable to afford the approximately US$20,000 retainer required by NY counsel, Arnot did not appear. A default judgment of US$313,590.97 was entered against him. In subsequent NSW enforcement proceedings, Close conceded under cross-examination that he had deceived the NY court — in particular by falsely claiming Arnot had ceased maintenance payments in October 1986 when regular monthly payments had in fact continued until July 1991.

ISSUES

1. Did the NY court have jurisdiction in the international sense, given (a) the relevant time for assessing "presence" and (b) the entrapment?
2. Were the NY proceedings so affected by fraud as to ground a valid defence to enforcement, given that they were undefended?

- An arguably incorrect foreign judgment is enforced according to its terms; incorrectness is not a ground for non-enforcement: *Macquarie Bank* at [32], adopting *Godard v Gray* (1870) LR 6 QB 139 at 148–149.
- Silence on compounding means simple interest only: where a foreign judgment provides for interest without specifying compounding intervals, the enforcing court will not imply a compounding obligation: *Macquarie Bank* at [29], [33].

Traditional rule against non-money orders

- Historically the fixed-sum requirement precluded enforcement of orders *in specie* (analogous to specific performance or injunction): Mortensen 5.22.
- Practical reason: B must usually be present in the forum, or have assets there, to ensure compliance with non-money orders.

Modernising trend

The strictness of the rule has been relaxed in equity and through Mareva relief:

- *Houlditch v Marquess of Donegal* (1834) 2 Cl & F 470: foundational authority that equity will enforce foreign equitable orders where there is sufficient connection between the defendant and the foreign jurisdiction.
- *White v Verkouille* [1990] 2 Qd R 191: a Nevada receivership order was recognised in Queensland on the sufficient-connection basis (McPherson J).
- *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425: an English declaration of equitable breach and an order for account on a wilful default basis were recognised in NSW (Bryson AJ) (see also A.1.3 on nationality).
- *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676: NSWSC has inherent jurisdiction to grant Mareva relief in aid of enforcement of a foreign judgment (Campbell J).
- *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1: HCA confirmed Mareva relief in aid of foreign proceedings.
- *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612: the Canadian Supreme Court abandoned the fixed-sum rule altogether. It is unclear whether Australian courts will follow: Mortensen 5.22.

***Eisenberg v Joseph* [2001] NSWSC 1062 (Brownie AJ)**

Short NSWSC authority confirming that a foreign judgment expressed in a foreign currency satisfies the "fixed sum" requirement for common law enforcement; and that a defendant's failure of natural justice attributable solely to his own foreign lawyer's conduct does not constitute a defence.

FACTS: Eisenberg (German resident) obtained a costs judgment of 186,801.10 Austrian schillings in the Innsbruck District Court against Joseph (Australian resident), after Joseph's negligence claim arising from an Austrian skiing collision failed. Joseph resisted enforcement on natural justice grounds: the 1993 Austrian hearing was conducted in German (which he did not speak), and his Austrian lawyer had acted without instructions or informing him of developments, leaving Joseph unaware judgment had been given until appeal time had passed.

ISSUES

1. Was the Austrian judgment for a "fixed sum" capable of enforcement notwithstanding it was expressed in Austrian schillings?
2. Was enforcement contrary to natural justice?

HELD: All elements of common law enforcement satisfied; judgment entered for 234,746.70 Austrian schillings: [5], [43].

REASONING

Fixed sum — foreign currency

- The judgment was "one for a fixed sum": [10]. A judgment expressed in a foreign currency is enforceable in that currency; foreign currency "best expresses the loss sustained" and reflects the costs incurred, at least in the main, in the foreign jurisdiction, citing *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448 at 464: [21].

Natural justice — failure of own lawyer insufficient

- Conducting proceedings in German was not a denial of natural justice; Joseph had an interpreter available and his own Austrian lawyer present: [16].
- A lawyer's failure to keep their client informed and take instructions is attributable to the lawyer, not the foreign court or the opposing party. The court distinguished *Macalpine v Macalpine* and *Terrell v Terrell*,

- A foreign law creating a different right from the forum's own law is not sufficient reason to refuse enforcement: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home": 201.
- The absence of similar local legislation does not establish a public policy bar; it merely fails to affirmatively negate one: 201.

Penal law — PIL definition

- A statute is "penal in the international sense" only when it awards a penalty to the State, or to a public officer in its behalf, or to a member of the public "suing in the interest of the whole community to redress a public wrong": 199 (citing *Huntington v Attrill*).
- Where the purpose is reparation to those aggrieved by the wrong (private parties), the statute is not penal in the PIL sense even if it awards punitive or exemplary damages: 199-200.

PRINCIPLES

- **Public policy threshold (Cardozo formulation)**: Courts will only decline to enforce a foreign right where enforcement would violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal": 201-202. This formulation is routinely cited and adopted in Australian courts: *Jenton v Townsing* at [7]; *Doe v Howard* at [136].
- **Penal law**: A foreign claim or judgment is penal in the PIL sense only when it vindicates a public wrong through State or public-interest proceedings; a private civil claim for damages (even punitive ones) is not penal merely because it punishes the wrongdoer: 199-200.

***Paradise Enterprises Inc v Kakavas* [2010] VSC 25 (Davies J)**

VSC authority on the **narrow scope of forum public policy** as a defence to enforcement of a foreign-law transaction: a contract that is **lawful and recoverable under its foreign governing law is not unenforceable in Victoria merely because, had local law applied, the same transaction would have been illegal**. Reference to the forum's own substantive law on the conduct in question is "**not apposite**" to a public policy challenge.

FACTS: Kakavas, an Australian high-roller gambler with a history of self-exclusions from Australian casinos, gambled at the Atlantis Paradise Island Casino in the Bahamas over three days in November 2006, drawing on a US$1 million line of credit which he lost. The Casino sued in the Supreme Court of Victoria to recover US$1,013,300. It was common ground that the law of the Bahamas governed the loan and the defences raised to it: [3]. Kakavas relied on three defences: (i) unconscionable conduct under Bahamian law (which applies principles materially identical to Australian general law); (ii) unenforceability under Bahamian gaming and money-lending statutes; and (iii) that enforcement in Victoria would be contrary to Victorian public policy because, had Victorian law governed, the gambling loan would have been illegal.

ISSUE: Whether a gaming loan, lawful and recoverable under its proper law (Bahamas), was nevertheless unenforceable in Victoria as contrary to Victorian public policy because it would have been illegal had it been governed by Victorian law.

HELD: Public policy defence rejected; judgment entered for the Casino: [93]–[95]. (Unconscionability defence also failed: the Casino had no knowledge, actual or constructive, of any special disability — Kakavas had requested the credit himself and projected himself as a high roller: [50], [71], [78]. The loan was lawful and recoverable under Bahamian law: [89]–[90]. The Money Lending Act (Bahamas) s 3 did not apply: [92].)

REASONING

Public policy and the role of forum law: [93]

- "**The short answer is that the agreement was governed by the laws of the Bahamas**": [93].
- "Reference to the law in Victoria governing the conduct of gambling here is **not apposite** to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria": [93].
- "[T]here is no basis for the argument and the argument must fail": [93].

PRINCIPLES

- **Narrow scope of forum public policy.** A foreign-law transaction that is lawful and enforceable under its proper law will not be refused enforcement in the forum merely because the same conduct would have been illegal under forum law: [93].
- **"Not apposite" reasoning.** Where foreign law properly governs the transaction, the substantive content of the forum's own law on the same conduct is **irrelevant** to a public policy challenge. Mere divergence between the proper law and the lex fori is insufficient to engage public policy: [93].

- **Transferable to recognition and enforcement.** The same high threshold applies when public policy is invoked against recognition of a foreign judgment: divergence of foreign law from forum law on the same subject matter is not, without more, contrary to public policy. Only a violation of fundamental principles of justice or morality will suffice.

***Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150 (Martin CJ, Murphy JA, Beech JA)**

WASCA authority on three propositions: (1) the public policy ground for setting aside registration of a foreign judgment under FJA s 7(2)(a)(xi) is narrow and of a high threshold; (2) in Australia's federal system, the relevant "public policy" is that of **Australia as a whole**, not the state of registration; and (3) **a judgment arising from a transaction that is lawful and enforceable in most or all Australian jurisdictions cannot be contrary to Australian public policy**.

FACTS: Resorts World at Sentosa Pte Ltd (a Singapore casino) obtained judgment from the High Court of Singapore for S$639,288 against Lim, a Malaysian resident, in respect of gambling credit extended to him as an "international premium player" under Singapore's Casino Control Act. The judgment was registered in the WASC under the FJA. Lim applied to set aside registration, arguing enforcement of a gambling credit judgment was contrary to WA and Australian public policy. The master dismissed the application; Lim sought an extension of time to appeal.

ISSUE: Whether enforcement of the Singapore judgment was contrary to public policy under FJA s 7(2)(a)(xi) because WA (and Australian) law prohibited provision of credit for gambling.

HELD: Extension refused; appeal dismissed; master was correct: [4], [48].

REASONING (Martin CJ)

Public policy threshold:

- Australian courts should be "slow to invoke public policy"; the standard requires a "violation of 'some fundamental principle of justice, some prevalent conception of good morals'" or an offence "fundamental and of a high order": [5], [17], [18].
- The fact that the foreign law does not accord with Australian law is not, of itself, sufficient: [15].

Public policy in a federal system:

- The FJA is a Commonwealth Act; "public policy" in s 7 refers to **the public policy of Australia as recognised by all Australian courts**, not the laws of the state of registration: [20].
- A principle "so sacrosanct as to require its maintenance at all costs" could not be peculiar to one state or territory: [21].

Transaction lawful across Australia (the decisive point):

- Lim conceded that most, if not all, Australian states and territories permit casino operators to provide credit to premium international players and authorise courts to enforce the resulting debts: [25].
- WA law (Gaming and Betting (Contracts and Securities) Act 1985 (WA) s 6) in fact expressly provides that money lent for lawful gaming is recoverable: [29]–[30].
- Counsel for Lim "was unable to identify any authority in any jurisdiction" supporting the proposition that a judgment from a contract lawful and enforceable in most Australian jurisdictions could be contrary to Australian public policy: [33].
- Courts cannot identify a "public policy" that contradicts constitutionally valid legislation which they are required to enforce: [32].

Poh Soon Kiat v Desert Palace Inc (Singapore CA) distinguished:

- In *Poh*, enforcement was refused because Singapore's Civil Law Act s 5 embodied a **statutory** public policy against gambling debts. Here, **Australian statute law does the opposite**: it permits and enforces such debts for premium international players. *Poh* therefore supported dismissal: [36]–[38].

PRINCIPLES

- **High threshold for public policy.** Under FJA s 7(2)(a)(xi), only a violation "fundamental and of a high order" justifies setting aside registration; mere divergence from Australian law is insufficient: [15], [18].
- **Federal public policy.** The relevant public policy is **Australian public policy generally**, not the particular laws of the state of registration: [20]–[21].
- **Uniformity test.** A transaction that is lawful and enforceable in most or all Australian jurisdictions **cannot** be contrary to Australian public policy; no basis for refusal of enforcement exists where Australian courts are required by their own legislation to enforce the same class of transaction: [22]–[25], [32].

those assets to a claim that the foreign revenue authority could not enforce directly in the forum: 119, citing *Permanent Trustee Co (Canberra) v Finlayson* at 45.

- **Beneficiary appointment as an available remedy.** Where appointing the executor's representative would indirectly serve foreign revenue interests, the court may appoint a beneficiary as local administrator to secure local assets for those entitled: 121.
- **Revenue rule and indirect enforcement.** The rule operates against indirect enforcement regardless of whether the foreign State is the nominal party; what matters is whether satisfaction of the right claimed would indirectly serve foreign revenue collection: 117–118.

***Schnabel v Yung Lui* [2002] NSWSC 15 (Bergin J)**

NSWSC application of the **unified exclusionary rule** for foreign penal, revenue and other public laws. Confirms (i) the rule applies to "**penal, revenue or other public law**" as a single category (Dicey Rule 3); (ii) **characterisation is determined by forum law**, applying the *Huntington v Attrill* / *Inkley* test; and (iii) **purpose is decisive** — what matters is whether the foreign law/award is in substance a vindication of governmental interests, not its label or the identity of the recipient.

FACTS: Commercial partnership dispute over Chinese amusement-park rides; the plaintiffs obtained a US District Court judgment including compensatory damages and US$8,710,416 in punitive damages awarded as a sanction for the defendant's discovery misconduct. The plaintiffs sued to enforce in NSWSC. The penal-rule analysis at [161]–[181] (extracted in detail in the "Penal judgements" note below) articulated the broader exclusionary framework that also governs revenue judgments.

ISSUE (relevant to revenue): What is the test for characterising a foreign law or judgment as falling within the **penal, revenue or other public law** exclusionary rule?

HELD (relevant to revenue): The exclusionary rule embraces "penal, revenue or other public law" as a single category; characterisation is for **forum law**, applying the *Inkley* factors; the **purpose** of the foreign law and the **party in whose favour the right is created** are decisive: [167], [174].

REASONING

The unified rule (penal + revenue + other public law):

- Dicey & Morris Rule 3 adopted at [174]: "English Courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of **a penal, revenue or other public law of a foreign State**".
- *Huntington v Attrill* [1893] AC 150 at 156 (Lord Watson): the rule rests on the principle that breaches of public law "are local in this sense, that they are only cognizable and punishable in the country where they were committed"; **"no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly"** of such laws should be admitted in another country's courts: [164].

Characterisation is for forum law:

- ***United States v Inkley*** [1989] 1 QB 255 at 265 (Purchas LJ), adopted at [167]:
    - whether the foreign claim involves the assertion of foreign sovereignty (penal, revenue, or other public law) is "**to be determined according to the criteria of English law**";
    - regard is had to the foreign court's attitude (sometimes decisive);
    - **category depends on (i) the party in whose favour the right is created, (ii) the purpose of the foreign law/enactment, and (iii) the general context**;
    - the fact that the right is "penal in nature" does not deprive a private claimant of recourse; but **"if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained"**;
    - the availability of a civil remedy in the foreign jurisdiction does not change the true nature of the right.

Application within Schnabel (cross-ref to Penal note):

- The framework was applied to characterise the **punitive damages** portion of the US judgment as falling within "**either a penal law or other public law of the foreign jurisdiction**" and therefore unenforceable: [175]–[177]. Application detail and severance: see "Penal judgements" note below.

PRINCIPLES (relevant to revenue judgments)

- **Unified rule.** Foreign **penal, revenue and other public laws** are treated as a single category for exclusionary purposes (Dicey Rule 3): [174]. Revenue rule sits alongside the penal rule and is governed by the same characterisation methodology.

country of the original court) receive notice of those proceedings in sufficient time to enable the debtor to defend, and did not appear; or
        - (vi) that the judgment was obtained by fraud; or
        - (vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or
        - (viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
        - (ix) that the judgment has been discharged; or
        - (x) that the judgment has been wholly satisfied; or
        - (xi) that the enforcement of the judgment, not being a judgment for New Zealand tax, would be contrary to public policy; or
    - (b) **may** set the registration aside if satisfied that the matter in dispute had, before the date of the original judgment, already been the subject of a final and conclusive judgment by a court having jurisdiction (res judicata / issue / cause-of-action estoppel; the earlier judgment need not be Australian, but must pre-date the registered judgment: *Nyunt* at [59]).

Section 7(3) — when the original court is taken to have had jurisdiction (for s 7(2)(a)(iv)), subject to s 7(4):

- (a) in an action *in personam*:
    - (i) if the judgment debtor voluntarily submitted to the original court; or
    - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings; or
    - (iii) if the judgment debtor was a defendant and had agreed, before the proceedings commenced, to submit to that court or the courts of that country in respect of the subject matter; or
    - (iv) if the judgment debtor was a defendant and, when proceedings were instituted, resided in (or, being a body corporate, had its principal place of business in) the country of that court; or
    - (v) if the judgment debtor was a defendant and the proceedings were in respect of a transaction effected through or at an office or place of business it had in the country; or
    - (vi) if there is an amount payable in respect of New Zealand tax under the judgment; or
- (b) in an action whose subject matter was immovable property, or an action *in rem* whose subject matter was movable property: if the property was situated in the country of that court at the time of the proceedings; or
- (c) in any other action: if the jurisdiction of the original court is recognised by the law of the State or Territory of registration.

Section 7(4) — when jurisdiction is NOT taken to exist (despite s 7(3)):

- (a) if the subject matter was immovable property situated outside the country of the original court; or
- (b) except in the cases in s 7(3)(a)(i), (ii), (iii) and (c), if bringing the proceedings was contrary to an agreement to settle the dispute otherwise than in the courts of that country (e.g. a foreign judgment obtained in breach of an exclusive jurisdiction or arbitration clause, where the debtor did not participate: Nygh [41.25]); or
- (c) if the judgment debtor was entitled under public international law to immunity and did not submit.

Section 7(5) — what is NOT voluntary submission (for s 7(3)(a)(i)): a person does not voluntarily submit by:

- (a) entering an appearance; or
- (b) participating only to the extent necessary; for the purpose only of one or more of:
- (c) protecting, or obtaining release of, property seized or threatened with seizure, or subject to a restraining order;
- (d) contesting the jurisdiction of the court;
- (e) inviting the court in its discretion not to exercise jurisdiction.

s 7(5) mirrors the common law and FJA s 11 protection (A.1.2): a protest to jurisdiction, or an application for a discretionary stay, is not submission. Submission by prior agreement under s 7(3)(a)(iii) requires the jurisdiction clause to have been actually incorporated by Australian common law rules of contract formation: *Privatbrauerei Erdinger Weissbräu Werner Brombach GmbH v World Brands Australia Pty Ltd* [2016] WASC 9 (full case note at A.1.2). Whether the foreign court had jurisdiction is judged by the **law of the place of registration**, not the foreign

C.6 Stays of enforcement (s 8)

A registered judgment may be stayed pending a foreign appeal.

Section 8 — Stay of enforcement of a registered judgment

- s 8(1): if the court in which a judgment is registered is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, against the judgment, the court **may** order enforcement stayed pending final determination of the appeal, until a specified day or for a specified period.
- s 8(2): if the order is made on the ground that the debtor is entitled and intends to appeal, the court must require the debtor, as a condition, to bring the appeal by a specified day or within a specified period.
- s 8(3): every order is to be made on the condition that the judgment debtor pursues the appeal in an expeditious manner.
- s 8(4): an order may be made on such other conditions, including conditions as to giving security, as the court thinks fit.

Governing principles. A s 8 stay is governed by the same principles as a stay pending appeal from a local judgment: onus on the applicant to show a proper basis fair to all parties; balance of convenience and competing rights; risk of asset dissipation; risk that the appeal will be rendered abortive if no stay is granted; and no speculation on prospects beyond whether the appeal is bona fide. Any security or condition must preserve the existing value of the judgment, not improve the creditor's position.

***Dawn Jade Limited v Himanshu Girdhar Dua* [2014] NSWSC 1085 (NSWSC, Adamson J)**

Illustrates the s 8(1) FJA 1991 (Cth) discretion to stay enforcement of a registered foreign judgment pending appeal; the governing principles mirror general stay principles, and conditions (including security) must only preserve the existing value of the judgment rather than improve the creditor's position.

FACTS: Dawn Jade and Gao Fu (BVI investment companies) obtained a Hong Kong default judgment against Dua (an Australian resident) for deposit monies paid under share sale contracts. The judgment was registered in NSW in January 2013. Dua appealed in Hong Kong, arguing estoppel, but his application to set aside the default judgment was twice rejected. A further appeal to the Hong Kong Court of Appeal was pending. Dua applied under s 8(1) FJA for a stay of enforcement of the NSW registered judgment pending the Hong Kong appeal. The plaintiffs offered to consent to a stay only if Dua paid the judgment monies into court; Dua offered only an undertaking not to dissipate his assets.

ISSUES

1. What principles govern a s 8(1) FJA stay application.
2. Whether a stay should be granted and on what conditions, particularly whether payment into court was required.

HELD: Stay granted on condition that Dua file an asset verification affidavit and pursue the appeal expeditiously; payment of judgment monies into court was not required as a condition: [53]–[55].

REASONING

Section 8 and the governing principles:

- Section 8(1) FJA: court *may* stay enforcement where the judgment debtor has appealed against the judgment in the original court, pending final determination; s 8(3): every such order must be conditioned on expeditious pursuit of the appeal; s 8(4): other conditions including security may be imposed: [33].
- The principles governing s 8 applications are **the same as those applying where the appeal is from a judgment of a court within the jurisdiction**: [34]. These are:
  - Onus on applicant to demonstrate a proper basis for the stay that will be fair to all parties: [34(1)].
  - Court weighs balance of convenience and competing rights: [34(2)].
  - Risk that applicant's assets will be disposed of may lead the court to refuse a stay: [34(3)].
  - Where there is a risk the appeal will prove abortive if applicant succeeds and no stay is granted, courts will normally exercise discretion in favour of a stay: [34(4)].
  - Courts do not generally speculate about prospects of success, given argument on the appeal is necessarily attenuated: [34(5)].

Balance of convenience:

CONFLICT OF LAWS
LAWS2018
MID SEMESTER EXAM
SCAFFOLDS
2026

READING TIME PLANNING CHECKLIST

STEP 1: Read the Facts and List Every Claim

Write these down before anything else. One line each.

- [Party A] v [Party B] – [tort / contract / cross-claim / other]
- [Party C] v [Party D] – [tort / contract / cross-claim / other]
- [Party E] v [Party F] – [tort / contract / cross-claim / other]

Each claim gets its own separate answer. You work through Steps 2–5 below for each claim individually.

STEP 2: Map the Assumptions to Modules

Do this before you plan the structure of any individual claim. Every assumption in the problem is a signal pointing you to a specific module. Identify which module each assumption triggers and note it next to the assumption.

If the assumption is about...	It triggers...
A foreign limitation period	Module E (substance/procedure) + Module G (proof)
A foreign damages cap or restriction	Module E (substance/procedure) + Module G (proof)
A proposed expert witness	Module G (proof – competency analysis)
A foreign statute tendered without expert evidence	Module G (proof – tender + McHugh)
A ChatGPT translation or unofficial translation	Module G (proof – Neilson [115] translation warning)
Illegality, sanctions, or a foreign prohibition	Module C (illegality in place of performance)
A forum statute (ICA, ACL, WCA, Defamation Act, IRA)	Module D (mandatory rules)
A choice of law clause in a contract	Module C (express/inferred PLK)
An exclusive jurisdiction clause	Module C (inferred PLK – Lewis Construction)
Capacity of a foreign company	Module C (anterior – FCAL Act s 7)
Intoxication, mistake, or formation dispute	Module C (anterior – lex fori, Oceanic/Trina Solar)
Renvoi / foreign choice of law rules	Module F (renvoi – Neilson)
International sale of goods between parties in different countries	Module C – C3(b) CISG check before PLK analysis
NZ or foreign no-fault compensation scheme barring proceedings	Module D – D9 (foreign compensation schemes)
Performance, discharge, variation, or frustration of a contract	Module C – C9(b) performance and discharge

STEP 3: For Each Claim, Work Through This Sequence

This is your writing order. Work through every row. If the answer to the trigger question is NO, skip that module and move to the next row. If YES, open that module and write the paragraph.

Every Claim Starts Here

Order	Trigger question	Answer	Module to open
1	Always	Always	**A0** – Forum sentence (identical every time, never skip)

Order	Trigger question	Answer	Module to open
2	Always	Always	**A1** – Characterisation paragraph (always write this)

If the Claim is in TORT, continue here

Order	Trigger question	If YES	If NO
3	Is this international (party or events outside Australia) or intranational?	**A2** – State lex loci delicti rule (cite Zhang for international; Pfeiffer for intranational)	N/A – always write A2 for any tort
4	Does the tort involve a ship or aircraft?	**Module B** – Open maritime/aerial sub-module before locating locus	Skip to row 5
5	What type of tort is it?	**A3.1–A3.6** – Open the relevant locus delicti sub-rule (see tort type table below)	N/A – always need to locate locus
6	Is the locus uncertain or unknown?	**A4** – Uncertain locus paragraph (state all scenarios)	Skip
7	Is there a forum statute in the facts? (WCA, Defamation Act s 11, IRA s 106)	**Module D** – Mandatory rules analysis	Skip
8	Is there a damages cap, limitation period, or restriction on recovery?	**Module E** – Substance/procedure analysis	Skip
9	Is this an international tort with a foreign lex causae that might refer back?	**Module F** – Renvoi flag (brief, one paragraph)	Skip
10	Does a foreign law govern any issue in this claim?	**Module G** – Proof of foreign law	Skip
11	Always	Always	**Conclusion sentence for this claim**

Tort Type Table – Which A3 Sub-Rule to Open

What is the complaint?	Sub-rule	Key case
Physical act causing personal injury	A3.1	*Distillers* at 469
Failure to include a warning or disclose a risk	A3.2	*Distillers* at 469
A statement or advice made in one place, received in another	A3.3	*Voth* at [63]–[64]
Misleading or deceptive conduct under ACL	A3.3	*Sigma* at [48]
A product dangerous by nature (not a manufacturing flaw)	A3.4	*Amaca* at [41]–[44]
A flaw or defect in the manufacturing process itself	A3.5	*Amaca* at [42]
Defamatory material published online	A3.6 (internet)	*Gutnick* at [44]
Defamatory material published in print or broadcast	A3.6 (print)	*Gutnick* at [44]

If the Claim is in CONTRACT, continue here

Module A: Tort — Locus Delicti Analysis

A0: Forum and Governing Choice of Law Rules

Trigger: Always. First sentence of every claim. Never skip.

Copy-paste paragraph:
"The forum is the NSW Supreme Court. It is axiomatic that 'the governing system of law binding on the court of the forum furnishes the rules for choice of law': *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [42]. NSW choice of law rules govern throughout; the lex fori governs all procedural matters."

Note: After the first claim, replace this with "As above, NSW choice of law rules govern." Do not repeat the full paragraph for every claim.

A1: Characterisation

Trigger: Always. Second paragraph of every claim.

What to look for:

- What is the legal nature of the issue – tort, contract, property?
- Characterisation is by the lex fori but must not be constrained by domestic categories that have no counterpart in the foreign system
- If the same facts give rise to both tort and contract claims, characterise each separately and address each under its own module

Copy-paste paragraph:
"The issue in [X v Y] is characterised as [tort/contract] by the lex fori, following the three-stage process in *Macmillan Inc v Bishopsgate Investment Trust plc* [1996] 1 WLR 387 per Staughton LJ: identify the issue, select the connecting factor rule, and identify the applicable law. Characterisation must not be 'constrained by particular notions or distinctions of the domestic law of the lex fori which may have no counterpart in the other's system': Auld LJ at [78]. The applicable choice of law rule is therefore [lex loci delicti / proper law of the contract]."

A2: The Lex Loci Delicti Rule

Trigger: Issue characterised as tort at A1.

What to look for:

- Is this international (one party or events outside Australia) or intranational (all parties and events within Australia)?
- Is the tort a maritime or aerial tort? If yes, open Module B after writing this paragraph
- No flexible exception or proper law of the tort is available in Australia under any circumstances

IF/THEN:

- IF one party is foreign OR events occurred outside Australia THEN international tort: cite *Zhang*
- IF all parties and events are within Australia THEN intranational tort: cite *Pfeiffer*
- IF facts suggest a most-significant-connection argument THEN reject it explicitly using the quote below

Copy-paste paragraph (international tort):
"The lex loci delicti governs all questions of substance: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [75], extending the rule from *Pfeiffer* to international torts. No flexible exception is available; a proper law of the tort approach 'leads to difficulties in practice' and was categorically rejected in *Zhang* at [75] and *Pfeiffer* at [78]–[80]. The test for locating the locus delicti is 'where in substance did this cause of action arise': *Distillers Co (Biochemicals) Ltd v Thompson* [1971] 1 NSWLR 83 at 468. Procedure remains governed by the lex fori: *Pfeiffer* at [99]."

Module B: Maritime and Aerial Torts

When to open this module: You have written A2 (the lex loci delicti rule) and the facts involve a tort occurring on or involving a ship or aircraft. Open this module instead of going straight to A3. Once you have worked through Module B and identified the applicable law, write your A7 conclusion as normal.

B0: Trigger Check

What to look for:

- Tort occurring on board a ship or aircraft
- Collision between vessels or aircraft
- Injury to crew, passengers, or cargo handlers on a vessel or aircraft
- Environmental damage caused by a vessel or aircraft (e.g. oil or fuel spill)
- The critical question in every maritime/aerial tort is: where was the vessel or aircraft at the time of the tort?

IF/THEN – first decision:

- IF the location of the vessel/aircraft at the time of the tort is known THEN go to B1 and apply the relevant rule
- IF the location is unknown or disputed THEN go to B4 (uncertain location) and state all scenarios

B1: Territorial Sea (Within 12 Nautical Miles)

Trigger:

- Vessel or aircraft was within 12nm of a coastline at the time of the tort
- The coastal state's law applies as the lex littori
- This rule applies regardless of the nationality of the vessel, the parties, or the flag state

What to look for:

- Is the vessel/aircraft within 12nm of a specific country's coast?
- Facts will usually state this expressly or describe proximity to a coast, port, or island
- The internal economy argument may still arise even in territorial waters – see B3

IF/THEN:

- IF vessel/aircraft is within 12nm of a coast THEN lex littori applies: law of the coastal state governs
- IF the tort has no external characteristics and is wholly internal to the vessel THEN internal economy argument may arise: go to B3 after writing this paragraph
- IF vessel is at its destination and engaged in loading/unloading operations THEN lex littori clearly applies – external characteristics present: *Morgan*

Copy-paste paragraph:
"The vessel/aircraft was within the territorial [sea/airspace] of [Y] at the time of the tort, within 12 nautical miles of the coast. The lex littori applies: the law of the coastal state governs torts committed within its territorial waters: *MacKinnon v Iberia Shipping Co* [1955] SC 20 per Lord Carmont; [for aircraft:] *Georgopoulos v American Airlines* (NSWCA, 5 August 1998). The applicable law is therefore [Y] law as the lex loci delicti."

B2: High Seas (Beyond 12 Nautical Miles)

Trigger:

- Vessel or aircraft was beyond 12nm from any coast at the time of the tort
- There is no lex loci delicti on the high seas
- Lex fori applies unless another jurisdiction has a better claim

What to look for:

- Any facts identifying that the vessel/aircraft was in open ocean, beyond coastal waters

Module C: Contract — Proper Law of the Contract (PLK)

When to open this module: You have characterised the issue as contract at A1. Work through every step in order. Steps C1–C3 are anterior issues that must be resolved before the PLK analysis. If an anterior issue voids the contract, the PLK analysis is moot – state this and move to Module G if any foreign law was identified.

C1: Anterior Issue – Formation (Consensus Ad Idem)

Trigger:

- Any dispute about whether the parties actually reached agreement
- Intoxication, mistake, offer and acceptance disputed, terms disputed, incorporation of terms disputed
- Whether a clause was incorporated into an already-formed contract (*Oceanic*)
- Always check this first – it is logically prior to identifying the PLK

What to look for:

- Did anything happen before or at the time of contracting that may have prevented agreement?
- Were the terms communicated before the contract was formed?
- Was there intoxication, duress, mistake, or some other vitiating factor affecting formation?
- Is a ticket or standard form clause being argued to form part of a contract already made?

IF/THEN:

- IF formation is disputed for any reason THEN lex fori governs: *Oceanic*; *Trina Solar*
- IF a ticket or written terms were provided after the contract was already formed THEN those terms are not incorporated: *Oceanic* (unanimous)
- IF intoxication is raised THEN lex fori governs whether it prevented formation – apply NSW law
- IF vitiating factor renders contract void ab initio THEN possibly lex fori governs: Mortensen [21.36]
- IF vitiating factor merely makes contract voidable THEN proper law governs: *Jasmin Solar* (Edelman J at [80])

Copy-paste paragraph:
"Before identifying the proper law, an anterior question arises as to whether a contract was formed at all. Questions of consensus ad idem – whether the parties reached agreement and what terms the contract contains – are governed by the lex fori: *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197 per Brennan and Gaudron JJ, confirmed as binding by *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6 per Beach J at [128]. This is because formation questions are 'necessarily antecedent to a determination of the proper law' and cannot be determined by reference to a law that has not yet been identified: *Oceanic* per Gaudron J at [12]. Applying NSW law: [state whether agreement was reached – e.g. 'the intoxication of both parties at the time of contracting raises the question whether there was valid offer and acceptance under NSW law, which would hold that intoxication of this degree prevented formation' / 'the ticket was issued after the contract was formed in NSW and its terms, including [the clause], were not incorporated']. [If contract void: 'If no contract was formed, the PLK analysis below is moot.'] [If contract voidable: 'As the vitiating factor here renders the contract merely voidable rather than void ab initio, the proper law governs whether it can be avoided: *Jasmin Solar* at [80].']"

C1(b): Anterior Issue – Consideration

Trigger dot points:

- A contract is argued to be unenforceable for want of consideration
- One party argues the promise is not binding because no consideration was given
- The foreign law does not require consideration (e.g. civil law systems)

IF/THEN:

- IF consideration is in dispute THEN traditionally governed by the proper law: *Re Bonacina* [1912] 2 Ch 394
- IF lex fori approach from *Oceanic*/*Trina Solar* extends to consideration THEN NSW law governs instead – this is uncertain: Mortensen [21.35]

Module D: Mandatory Rules and Forum Statutes

When to open this module: You have identified a lex causae at Module A or Module C and the facts contain a forum statute, a reference to Australian legislation, or any assumption about a statutory regime. Always check this module before applying the lex causae. If a mandatory forum statute applies, it overrides the lex causae for that issue.

D0: Threshold – Identifying the Type of Provision

Trigger: Always. First step of every mandatory rules analysis.

What to look for:

- Is there a specific statute in the facts or assumptions that might apply?
- Does the statute have its own scope provision telling you when it applies?
- Or is it a generally-worded statute with no indication of its territorial scope?

IF/THEN:

- IF statute has an express scope provision stating when it applies (e.g. ICA s 8, ACL s 67, WCA s 9AA) THEN it is a self-limiting provision: go to the relevant sub-section below
- IF statute contains no scope provision but might apply THEN it is a generally-worded statute: go to D6
- IF statute is itself a choice of law rule (e.g. Marriage Act s 88C, Defamation Act s 11) THEN it is a statutory choice of law rule: it displaces the common law rule entirely – go to D4 for Defamation Act or apply directly

Copy-paste paragraph (threshold):
"Having identified [X law] as the lex causae, the court must ask whether any forum statute overrides this outcome. Forum statutes fall into three categories under Mortensen's taxonomy: statutory choice of law rules, which directly modify the applicable common law rule; self-limiting provisions, which stipulate the circumstances in which forum legislation applies; and generally-worded statutes, which contain no specific indication of their territorial scope. [The relevant statute here – [name] – is a [self-limiting provision / generally-worded statute / statutory choice of law rule] and is addressed below.]"

D1: Insurance Contracts Act 1984 (Cth) s 8

Trigger:

- Contract is one of insurance
- Question arises whether the ICA applies despite an express choice of foreign law
- The ICA applies on the basis of the objective PLK, not the subjective PLK chosen by the parties

What to look for:

- Is this a contract of insurance?
- What is the objective PLK (assessed without regard to any express choice of law clause)?
- Is the objective PLK the law of an Australian state or territory?
- Is there an express choice of foreign law that purports to exclude the ICA?

IF/THEN:

- IF contract is one of insurance AND objective PLK is Australian THEN ICA applies regardless of express choice: *Akai* at [43]–[54]
- IF express choice of foreign law present THEN disregarded for purpose of determining whether ICA applies: s 8(2)
- IF ICA applies THEN s 52 voids any clause purporting to exclude or restrict the Act's operation: *Akai* at [43]
- IF objective PLK is genuinely foreign (not Australian) THEN ICA does not apply

Copy-paste paragraph:

Module E: Substance and Procedure

When to open this module: The facts or assumptions raise a specific issue about whether a particular rule or provision is substantive (governed by the lex causae) or procedural (governed by the lex fori). Most commonly triggered by: a foreign limitation period, a damages cap or restriction, a pre-proceeding notice requirement, a statutory immunity, or a formal writing requirement. Always characterise by the lex fori – how the lex causae classifies its own provisions is irrelevant.

E0: The Core Test

Trigger: Always. First paragraph of every substance/procedure analysis.

What to look for:

- What is the specific provision or rule being characterised?
- Does it affect the existence, extent or enforceability of the parties' rights? If yes, substantive.
- Does it merely regulate the mode or conduct of court proceedings? If yes, procedural.
- Has the lex causae classified its own provision as substantive or procedural? Irrelevant – state this explicitly.

IF/THEN:

- IF provision affects whether a right exists, its extent, or whether it is enforceable THEN substantive: lex causae governs
- IF provision regulates how proceedings are conducted, commenced, or managed THEN procedural: lex fori governs
- IF lex causae has self-characterised its own provision (e.g. PIPA s 7(1)) THEN irrelevant: *Hamilton* at [125]–[126]
- IF foreign law describes its own limitation period as procedural THEN still substantive in Australian courts: *O'Driscoll* at [59]

Copy-paste paragraph:
"The distinction between substance and procedure is governed by the test in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [99] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ: 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and governed by the lex fori; 'matters that affect the existence, extent or enforceability of the rights or duties of the parties' are substantive and governed by the lex causae. Characterisation is always by the lex fori; how the lex causae classifies its own provisions is 'wholly irrelevant': *Garsec Pty Ltd v His Majesty the Sultan of Brunei* [2008] NSWCA 211 at [108] per Campbell JA; *Hamilton v Merck & Co* (2006) 66 NSWLR 48 at [125]–[126] per Handley JA."

E1: Limitation Periods

Trigger:

- A foreign limitation period is raised as a defence
- A forum limitation period is argued to bar a claim governed by foreign law
- An assumption states that a foreign jurisdiction treats its limitation law as procedural

What to look for:

- Is the limitation law from the lex causae or the lex fori?
- Does the foreign law treat its own limitation period as procedural? (Irrelevant in Australian courts)
- Is this an intranational or international tort? (Both treated as substantive by courts)
- Is there NSW legislation characterising limitation laws? (Choice of Law (Limitation Periods) Act 1993 (NSW) s 5)

IF/THEN:

- IF intranational tort THEN all limitation periods are substantive, governed by lex loci delicti: *Pfeiffer* at [100]

Module F: Renvoi

When to open this module: You have identified a foreign lex causae for an international tort at Module A, or an objectively determined PLK for a contract at Module C, and either (a) the facts provide information about the foreign country's choice of law rules, or (b) you need to flag the issue even where no such information is provided. For intranational torts, renvoi does not arise – skip this module entirely.

F0: Threshold – Does Renvoi Arise?

Trigger: Always check this before writing anything in Module F.

What to look for:

- Is this an international tort? If yes, renvoi potentially applies: *Neilson*
- Is this a contract where the PLK was expressly or impliedly chosen by the parties? If yes, renvoi does not apply: *Proactive*
- Is this a contract where the PLK was objectively determined? If yes, renvoi may apply but is uncertain: *O'Driscoll*
- Do the facts provide any information about the foreign country's choice of law rules (e.g. a foreign article, provision, or expert evidence about foreign PIL)? If yes, develop the full analysis
- If no information about foreign choice of law rules, write a one-sentence flag only

IF/THEN:

- IF intranational tort THEN skip this module entirely – renvoi does not arise
- IF international tort AND facts provide foreign choice of law rules THEN full renvoi analysis: go to F1
- IF international tort AND no information about foreign choice of law rules THEN flag only: use F0 flag paragraph
- IF contract AND express or inferred choice of PLK THEN renvoi does not apply: use F0 exclusion paragraph
- IF contract AND objective PLK THEN renvoi may apply but uncertain: flag only

Copy-paste paragraph (flag only – no information about foreign choice of law rules):
"As this is an international tort, the reference to [foreign law] as the lex loci delicti incorporates the whole of that law, including its choice of law rules: *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331 at [102] per Gummow and Hayne JJ. On the available facts there is no evidence of [foreign country's] choice of law rules that would redirect the analysis. The matter therefore proceeds on the basis that [foreign] domestic law governs."

Copy-paste paragraph (contract – express or inferred choice, renvoi excluded):
"Renvoi does not apply where the parties have expressly or impliedly chosen the proper law of the contract. The reference to [X] law as the PLK is taken as a reference to the internal domestic law of [X], excluding its choice of law rules: *Proactive Building Solutions v Mackenzie Keck* [2013] NSWSC 1500 at [27] per McDougall J. The parties' choice is respected as a choice of [X] domestic law only."

Copy-paste paragraph (contract – objective PLK, flag only):
"Where the proper law is objectively determined rather than chosen by the parties, renvoi may apply: *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25 per McLure JA. However, this remains uncertain and is rarely applied in practice: Mortensen [21.6]. On the facts, [there is / is not] evidence of [foreign country's] choice of law rules. [If no evidence: 'The matter proceeds on the basis that [foreign] domestic law governs.']"

F1: The Renvoi Doctrine – What It Means

Trigger: Facts provide information about the foreign country's choice of law rules and the issue is a live one.

What to look for:

- Does the foreign choice of law rule use a connecting factor other than place (e.g. nationality, domicile)?

Module G: Proof of Foreign Law

When to open this module: A foreign lex causae has been identified in any claim and a party seeks to rely on it, or the facts/assumptions raise specific issues about expert evidence, translations, foreign statutes, or the presumption of similarity. Open this module at the end of each claim where foreign law governs. Address each proof issue separately – if there are two experts or two foreign laws in the same claim, work through each one in turn.

G0: Threshold – Foreign Law as Fact

Trigger: Always. First paragraph of every proof of foreign law analysis.

What to look for:

- Has foreign law been identified as the lex causae for any issue?
- Has any party pleaded or given notice that they intend to rely on foreign law?
- Neither party is required to plead or prove foreign law unless seeking to rely on it – but if a party does seek to rely on it, it must be pleaded and proved

IF/THEN:

- IF foreign law governs and a party seeks to rely on it THEN it must be proved as a question of fact
- IF neither party pleads or proves foreign law THEN the presumption of similarity may apply or the claim may fail: go to G4
- IF the foreign law is from another Australian state or territory THEN no proof required: go to G5
- IF the foreign law is from New Zealand THEN no proof required: go to G5

Copy-paste paragraph:
"Foreign law is a question of fact in Australian courts. 'The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence': *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331 at [115] per Gummow and Hayne JJ. Neither party is required to plead or prove foreign law unless seeking to rely on it: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [66]. [Here, [X] seeks to rely on [foreign law] to [description of purpose – e.g. 'establish a statutory immunity' / 'argue the limitation period has expired' / 'establish that the contract is valid']. [Foreign law] must therefore be proved as a question of fact.]"

Evidence Act s 176 – Judge Decides Foreign Law in Jury Trials
"In jury proceedings, foreign law questions are decided by the judge alone, not the jury: *Evidence Act 1995* (NSW) s 176. Where a tribunal has no appellate review of factual findings, the treatment of foreign law as fact may make it a clearly inappropriate forum: *Studorp Ltd v Robinson* [2012] NSWCA 382 at [21] per Allsop P."

G1: Expert Competency

Trigger:

- The facts or assumptions identify a proposed expert witness on foreign law
- Always assess competency before considering what the expert says
- If the expert is not competent, their evidence is inadmissible and you move to G4 (presumption of similarity)

What to look for:

- Is the witness a practising lawyer in the relevant foreign jurisdiction?
- Is the witness an academically qualified lawyer in the relevant foreign law?
- Does the witness have practical commercial knowledge of the specific legal matter in question?
- Is the witness merely a layperson with some incidental familiarity with the foreign law?
- What is the specific issue the witness is being called to address? Competency depends on the precise question.

CONFLICT OF LAWS
LAWS2018
FINAL EXAM SCAFFOLDS
2026

THE DIRECTORY

Conflict of Laws Final: Jurisdiction, Discretion, Enforcement, Exclusion

Use this during reading time (30 minutes). Do not just label. For every matter in every question, run the decision tree, write your module sequence and write-order in the margin, and note the cases and provisions you will need. Walk into writing time transcribing a plan, not building one.

THE THREE TRAPS THAT LOSE MARKS

Read these before anything else. They are the recurring failure points and the directory is built to force you past them.

1. **Wrong test in Module B.** Voth "clearly inappropriate forum" (international, no clause), strong reasons (foreign clause), interests of justice / more appropriate (intra-Australian), and TTPA ss 19/20 (New Zealand) are four different thresholds. Never collapse one into another, and never apply Spiliada "more appropriate" as if it were Australian law for an international dispute.
2. **Wrong regime in Module C.** Common law, FJA, TTPA Pt 7 and SEPA Pt 6 are mutually exclusive by source of judgment. Where the FJA, TTPA or SEPA applies, registration is the only method and the common law has no role. Picking the wrong regime is a wrong answer, not a partial one.
3. **Confusing a Module C defence with a Module D exclusion.** Penal, revenue and public policy do the same doctrinal work in both, but Module C operates when the forum enforces a foreign judgment and Module D operates when the forum applies foreign law to decide a live dispute. Identify which stage you are at before you reach for the doctrine.

And the discipline underneath all three: once you open a module, run every condition, limb and defence to the end. Do not stop at the first satisfied element.

STEP 1: List Every Matter and Label What Is Being Asked

Write one line per matter before anything else. A "matter" is a single party-pair question (can A sue B here), a single judgment to be enforced, or a single forum dispute. Each gets its own answer.

- [Party A] seeks to sue / has sued [Party B] in NSW: jurisdiction / discretion
- [Party B] resists [court] / wants the matter heard in [forum]: discretion / stay
- [Creditor] seeks to enforce the [foreign / interstate] judgment against [Debtor]: enforcement
- [Party] seeks to stop [other party] suing / enforcing in [forum]: anti-suit / anti-enforcement
- A foreign law governs an issue and [Party] argues it should not be applied: exclusion

Then label each matter against the table.

What the question looks like	Label	Module
"Does the NSW court have jurisdiction over D?" / "Can P serve D?" / "Advise whether the court would have personal jurisdiction"	JURISDICTION	Module A
"Should the court stay / decline?" / "Is NSW a clearly inappropriate forum?" / "Should it be transferred to [State]?" / there is a jurisdiction clause naming [court]	DISCRETION / STAY	Module B
"Can P prevent D suing / continuing in [foreign or interstate court]?" / "Should the court restrain the foreign proceedings?"	ANTI-SUIT	Module B6
"Can D stop enforcement of a judgment already obtained against it?"	ANTI-ENFORCEMENT	Module B6.7 (then C)
"Will the [foreign / interstate] judgment be recognised or enforced in Australia?" / "Advise the judgment debtor / creditor"	ENFORCEMENT	Module C
"Will the court apply [foreign law]?" / "Is this foreign law penal / revenue / contrary to public policy?" / foreign law is the lex causae and a party wants it excluded	EXCLUSION	Module D

A single question commonly carries several matters and several labels. "Advise whether the NSW court would have, and would likely exercise, jurisdiction" is JURISDICTION then DISCRETION. "Advise the judgment debtor" on a foreign default judgment is ENFORCEMENT, and the defences inside it may pull in the same doctrines as EXCLUSION.

Facts say...	Sub-module
D in New Zealand	A7 (TTPA ss 9, 10)
D outside Australia, not NZ	A8 framework, A9 gateways
Contract claim, service out	A9.1 ((b),(c),(n); Showtime; Kim Michael)
Tort claim, service out	A9.2 ((a)(i),(a)(ii),(n); Distillers)
NSW plaintiff suffers economic loss here	A9.2 ((a)(ii); Sigma; Colosseum)
Internet defamation downloaded in NSW	A9.2 (Gutnick [44])
Injunction / property / domicile / necessary party / statute	A9.3
D contests service out / no appearance / leave to proceed	A10.1 (Agar v Hyde)
Mode of service abroad / Hague Convention	A10.2
DISCRETION (B)	
Exclusive foreign (non-NZ) jurisdiction clause	B1 (strong reasons; Oceanic Sun; Akai)
Is the clause incorporated, exclusive, covers the dispute?	B1.1 (lex fori; Oceanic Sun; FAI; Global Partners)
Clause on a ticket / document issued after contracting	B1.1 (Oceanic Sun [14]–[16], not incorporated)
Standard terms on reverse of quotation, not provided	B1.1 (not incorporated)
Strong reasons: overriding statute / lost juridical advantage / fragmentation	B1.2 (Akai; Epic Games; Karpik)
Local statutory claim pleaded to anchor jurisdiction	B1.2 (HNOE anchor)
Not all litigants bound by the clause	B1.3 (Hive; HNOE)
Foreign forum corrupt / lacks independence	B1.4 (AK Investment)
Foreign judgment exists / parallel proceedings	B1.5 (Telesto; Incitec; Venter)
Exclusive NZ jurisdiction clause	B2 (TTPA s 20 mandatory)
International dispute, no clause, foreign forum	B3 (Voth)
Significance of applicable law	B3.2 (Zhang; Puttick; Timor Leste)
Availability of the foreign forum	B3.3 (Garsec; Bombardier)
Parallel foreign proceedings (lis pendens)	B3.4 (Henry v Henry; CSR v Cigna)
Court congestion / denial of justice in foreign forum	B3.5 (James Hardie; AK Investment)
Unreasonable delay in foreign court	B3.6 (Toop)
Temporary stay pending foreign proceedings	B3.7 (Bella Products; Sterling)
Alternative forum another Australian State	B4 (interests of justice; Schmidt v Won)
Supreme Court to Supreme Court	B4.1 (cross-vesting s 5; Schultz)
Inferior / intermediate court, SEPA service	B4.2 (SEPA s 20; Joshan)
Intra-Australian choice of court agreement	B4.3 (Joshan [88])
NZ more appropriate, no exclusive clause	B5 (TTPA s 19; IAG; Douglas Webber)
Restrain a party suing / continuing abroad	B6 (Airbus; CSR)
Foreign proceedings vexatious or oppressive	B6.1 (CSR three questions; Sunland; TS Production)
Foreign proceedings breach exclusive clause / arbitration	B6.2 (Ace Insurance; A.I. Film)
Foreign proceedings interfere with local proceedings	B6.3 (inherent jurisdiction; CSR)
Anti-anti-suit injunction	B6.4 (Bolin Technology)
Foreign anti-suit already granted against local proceedings	B6.5 (Telesto)
TTPA s 22 / SEPA s 21 prohibitions on restraint	B6.6
Restrain enforcement of a judgment already given	B6.7 (Ecobank; Masri; Kea)
ENFORCEMENT (C)	

MODULE A: PERSONAL JURISDICTION

When to open: a party questions whether the NSW Supreme Court has authority over a particular defendant, that is, whether the court can hear the claim against this defendant at all. Gateway question, logically prior to whether the court should decline to exercise jurisdiction (Module B) and prior to choice of law.

Master sequence:

1. A0: frame the question and route to the correct regime (always).
2. Then open only the regime the facts engage:
   - A1 / A2: defendant present in NSW (individual / corporation)
   - A3 / A4: submission (agreement / conduct)
   - A6: elsewhere in Australia (SEPA)
   - A7: New Zealand (TTPA)
   - A8 to A9: outside Australia (service out)
3. A5: subject-matter overlay, only if raised.
4. A10: defendant's objection / setting aside.
5. A11: conclusion.

How to use this module:

- A0 is SEQUENTIAL: always open first; it forces the regime choice.
- Everything after A0 is SITUATIONAL: open the regime sub-module matching where [D] is and how service will be effected. A problem may involve several defendants, each routed separately.
- Submission (A3 to A4) and objection (A10) can run alongside any regime.
- Within the chosen regime run every limb the facts engage to the end; in particular, at A9 one satisfied gateway authorises service, but run each arguably engaged and plead the strongest, do not stop at the first.
- Module redirects appear only in routing and IF/THEN, or inline as a bracketed **[NB:** ...]; never inside copy-paste prose.

A0: FRAMEWORK AND ROUTING

SEQUENTIAL. Open first, always.

What to look for: where is the defendant when served, and how is service to be effected. That answer routes you to one regime.

Routing table:

Defendant's situation	Regime	Open
Present in / served in NSW	Common law presence	A1 (individual) / A2 (corporation)
Submitted by agreement or conduct	Submission	A3 / A4
Elsewhere in Australia	SEPA	A6
In New Zealand	TTPA	A7
Outside Australia (not NZ)	Service out: *UCPR* Pt 11 / Sch 6	A8 to A9
Contesting jurisdiction	Objection / setting aside	A10

IF/THEN:

- IF [D] is or was present in NSW at service, THEN common law presence: A1 / A2.
- IF [D] has submitted by agreement or conduct, THEN submission: A3 / A4.
- IF [D] is elsewhere in Australia, THEN SEPA, with no leave and no nexus required: A6.
- IF [D] is in New Zealand, THEN the TTPA: A7.
- IF [D] is outside Australia and not in NZ, neither present nor submitted, THEN service out under *UCPR* Pt 11 and Sch 6: A8 to A9.

How to use this block: MAIN + ADD-ON. Write the framework; if a Schedule 6 category applies, go to A9 and do not write the leave block; write the leave block only if the claim is outside Schedule 6.

COPY-PASTE (service-out framework: write always):

As [D] is outside Australia and is neither in New Zealand nor amenable at common law or by submission, service must be effected outside Australia under Part 11 of the *UCPR*, which applies only to Supreme Court proceedings (r 11.1). Originating process may be served outside Australia without leave where the claim falls within a category in Schedule 6: r 11.4.

[Here: the claim [falls within Schedule 6 para [X], so service is authorised without leave: A9 / falls outside Schedule 6, so leave is required under r 11.5].]

COPY-PASTE (leave under r 11.5: write only if the claim is outside Schedule 6):

Where no Schedule 6 category applies, leave to serve out requires all three conditions in r 11.5(5): a real and substantial connection with Australia, that Australia is an appropriate forum, and that in all the circumstances the court should assume jurisdiction. The connection "must arise from the facts of the case itself, not the fact that those facts are interwoven with facts that were in issue in some other case brought in Australia", and Australian citizenship of a party is not normally a connecting factor: *Michael Wilson & Partners Ltd v Emmott* [2019] NSWSC 218 at [55].

[Here: as in *Michael Wilson*, where a connection said to flow only from prior Australian proceedings was insufficient, here the connection [arises from [facts] of this claim, so leave should be granted / depends only on [e.g. prior proceedings / a party's citizenship], so leave should be refused].]

A9: SCHEDULE 6 GATEWAYS

SITUATIONAL. Open to identify the gateway matching each head of claim.

How to use A9: assess each head of claim separately against the table; a claim may fall within several gateways, and combinations are expressly covered by para (s). The act-based gateways turn on *Distillers*: "where in substance did this cause of action arise", identifying "the act on the part of the defendant which gives the plaintiff his cause of complaint": *Distillers Co (Biochemicals) Ltd v Thompson* [1971] 1 NSWLR 83 at 89.

Gateway selection table:

Claim	Gateway	Key authority
Tort: act/omission wholly or partly in Australia	(a)(i)	*Distillers* at 89
Tort: damage sustained wholly or partly in Australia	(a)(ii)	*Flaherty* 266–267; *Darrell Lea* 576–577
Cause of action arising in Australia	(n)	*Distillers* at 89
Contract made or entered in Australia	(b)(i)	*Showtime* [38]–[40]
Contract made through an Australian agent	(b)(ii)	Nygh [3.64]
Contract performed wholly or partly in Australia	(b)(iii)	*Kim Michael* [29]–[34]
Contract governed by Australian law / cognizable here	(b)(iv)	*Michael Wilson* (NSWCA) [89]
Breach in Australia of any contract	(c)	*Showtime* [43]
Injunction / interim / ancillary / freezing order re thing in Australia	(d)	—
Property situated in Australia	(e)	—
Relief against person domiciled / resident in Australia	(g)	Mortensen [2.28]
Necessary or proper party / contribution	(h)	*Michael Wilson* [30]
Claim under an Australian enactment	(j)	*Sigma* [48]

MODULE B: DISCRETIONARY NON-EXERCISE OF JURISDICTION

When to open: jurisdiction over [D] is established (Module A complete) but a party argues the NSW court should not exercise it, or should restrain a party from litigating elsewhere. Logically posterior to personal jurisdiction; prior to choice of law.

Master sequence:

1. B0: frame the discretion stage and route to the correct test (always).
2. Then open only the test the facts engage:
   - B1: foreign jurisdiction clause (non-NZ) → strong-reasons discretion
   - B2: foreign jurisdiction clause naming a NZ court → TTPA s 20 (mandatory)
   - B3: international, no clause → clearly inappropriate forum (*Voth*)
   - B4: another Australian State/Territory → interests of justice (*Schultz* / cross-vesting / SEPA s 20)
   - B5: NZ more appropriate, no exclusive clause → TTPA ss 19 (more appropriate court)
   - B6: party seeks to restrain foreign/interstate proceedings → anti-suit injunction
3. B7: module conclusion.

How to use this module:

- B0 is **sequential**: always open first; it picks the test.
- Everything after B0 is **situational**: open the test sub-module the facts engage. More than one may run (e.g. a clause argument *and*, in the alternative, *Voth*; or a stay *and* an anti-suit injunction).
- The single most important discipline: **match the right test to the right scenario and run every limb to the end.** The four tests are different thresholds and must not be collapsed into one another. B0's routing table forces that choice before you write.
- Module redirects (open B3, see B6) appear only in routing and IF/THEN, never inside copy-paste prose; where useful mid-answer they sit inside a bracketed placeholder.

B0: FRAMEWORK AND ROUTING

SEQUENTIAL. Open first, always.

What to look for: is there a jurisdiction clause, and which court does it name; if no clause, where is the alternative forum (overseas, another Australian State, New Zealand); is a stay of the local proceeding sought, or an order restraining proceedings elsewhere; has a foreign court already given judgment on the same controversy. Those answers route you to one test.

Routing table:

Scenario	Governing test	Open
Exclusive foreign jurisdiction clause (court outside Australia, not NZ)	"strong reasons" discretion, not *Voth*	B1
Exclusive jurisdiction clause naming a New Zealand court	*Trans-Tasman Proceedings Act 2010* (Cth) s 20: mandatory	B2
International dispute, no operative clause	*Voth* "clearly inappropriate forum", not *Spiliada*	B3
Alternative forum is another Australian State or Territory	"interests of justice / more appropriate" (*Schultz*), a different and lower threshold	B4
NZ is the more appropriate forum, no exclusive clause	TTPA s 19 "more appropriate court" (*Spiliada*-style)	B5
Party wants to stop another suing elsewhere	anti-suit injunction (equity / inherent jurisdiction)	B6
A final foreign judgment on the same controversy already exists	res judicata / issue / *Anshun* estoppel (a bar, not a test)	B1.5

IF/THEN:

[Here: as in *Incitec*, where third parties not bound by the clause were already litigating in the forum, the duplication is live, so the risk of inconsistent findings weighs against a stay; [or, as in *Venter*, where the parallel proceedings had settled, the concern has fallen away and the clause should be enforced].]

B1.6: COCA (CHOICE OF COURT CONVENTION) CONTEXT

SITUATIONAL. Open only if asked to address the Hague Choice of Court Convention; context only, not operative Australian law (Australia is not a party).

How to use this block: write only if the question invites mention of COCA.

COPY-PASTE (COCA context: write only if invited):

For completeness, the *Convention of 30 June 2005 on Choice of Court Agreements* (COCA) ensures the effectiveness of exclusive choice of court agreements in international commercial matters: the chosen court must hear the case (Art 5), a non-chosen court must suspend or dismiss subject to limited exceptions (Art 6), and resulting judgments circulate among contracting states. The agreement is treated as independent of the contract, so its validity cannot be contested solely because the contract is invalid (Art 3(d), the same severability principle at B1.1); consumer and employment agreements are excluded (Art 2). Australia has not signed COCA, so the common law strong-reasons analysis governs.

[Here: COCA is noted only as context; the operative analysis remains the strong-reasons test above.]

B2: EXCLUSIVE NEW ZEALAND JURISDICTION CLAUSE (TTPA s 20)

[B2.0 opening, B2.1 qualifying agreement, B2.2 mandatory outcome unchanged in substance; reformatted to MC conventions below. B2.3 as confirmed in the test.]

B2.0: OPENING THE TTPA s 20 ANALYSIS

SITUATIONAL. Open if the clause nominates a New Zealand court (or nominates an Australian court and a party seeks a stay in favour of NZ). Do not run the B1 strong-reasons discretion: it is displaced. The clause regime here is mandatory and statutory: a NZ-court clause produces a mandatory stay, an Australian-court clause a mandatory non-stay, both subject only to narrow statutory exceptions.

How to use this block: write always when s 20 is engaged.

COPY-PASTE (opening: write always):

The clause nominates [a New Zealand court / an Australian court]. Because the alternative forum is New Zealand, the common law strong-reasons discretion is displaced and an exclusive choice of court agreement is governed by s 20 of the *Trans-Tasman Proceedings Act 2010* (Cth), invoked on a s 17 application. The regime is mandatory, not discretionary: the Court must give effect to a qualifying agreement subject only to the narrow statutory exceptions.
[Here: the question is not whether there are strong reasons, but whether there is a qualifying exclusive choice of court agreement under s 20(3) and, if so, whether any exception applies.]

B2.1: IS THERE A QUALIFYING EXCLUSIVE CHOICE OF COURT AGREEMENT (s 20(3))?

SEQUENTIAL within B2. The mandatory outcome follows only if the agreement satisfies s 20(3).
What to look for: is the agreement written and exclusive (designating courts of one country to the exclusion of any other); are the parties to the proceeding personally parties to the agreement (privity); is it a consumer or employment contract (carved out).

IF/THEN:

- IF written, exclusive, and between the actual parties, THEN s 20(3) is satisfied and the mandatory regime applies.

B3.4: LIS PENDENS (PARALLEL PROCEEDINGS IN ANOTHER FORUM)

SITUATIONAL, but a frame-setter: when parallel proceedings exist, resolve this at the threshold (per the B3.0 triage), before the input factors. Open if proceedings between these parties are pending in another jurisdiction. Identify the overlap first, then PICK the test. [NB: if the foreign proceeding has concluded in a judgment, that bars the local proceedings under res judicata / estoppel: B1.5.]

What to look for: are the foreign proceedings between the same parties on the same subject matter, or different issues on the same sub-stratum of fact, or unrelated; could the local relief be obtained by cross-claim abroad; what, if anything, can [A] gain here that it cannot gain abroad; is the dominant purpose of the local suit to block the foreign one.

Routing table:

Foreign proceedings	Test
None	*Voth*: is NSW clearly inappropriate?
Yes, unrelated facts and issues	*Voth* applied to the local proceedings in isolation
Yes, different issues, same sub-stratum of fact	Having regard to the controversy as a whole, are the NSW proceedings vexatious or oppressive in the *Voth* sense: *CSR v Cigna*. Comparison permitted
Yes, same parties, same subject matter	Prima facie vexatious and oppressive to commence a second action; simultaneous proceedings highly relevant but not conclusive: *Henry v Henry*

IF/THEN:

- IF same parties and same subject matter, THEN prima facie vexatious and oppressive to maintain the second action: *Henry v Henry* (1996) 185 CLR 571 at 591.
- IF different issues on the same sub-stratum of fact, THEN ask whether, having regard to the controversy as a whole, the NSW proceedings are vexatious or oppressive: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 400–401.
- IF the local relief is available by cross-claim abroad but the foreign relief is not available here, THEN that supports a stay: *CSR v Cigna* at 402.
- IF the dominant purpose of the local suit is to prevent a party pursuing remedies available only abroad, THEN the local proceedings are oppressive in the *Voth* sense: *CSR v Cigna* at 401.

How to use this block: PICK ONE, but note this is a frame-setter, not an input factor. When parallel proceedings are on foot, fix the tier here first, then weigh the connecting factors (B3.1), applicable law (B3.2) and availability (B3.3) inside the frame this sets. In the *CSR* tier the operative lever is whether something can be gained here that cannot be gained abroad, which is the legitimate-juridical-advantage factor (B3.1) doing the decisive work; identify that advantage and the CSR conclusion follows from it. Write the branch matching the degree of overlap.

COPY-PASTE (lis pendens: write the matching overlap branch):

[**Same parties, same subject matter (*Henry v Henry*):** as in *Henry v Henry*, where the same marital controversy was litigated in Monaco and Australia, where the identical controversy is litigated in two countries each having jurisdiction "prima facie the continuation of one or the other should be seen as vexatious or oppressive" in the *Voth* sense (at 591), relevant considerations being mutual recognition of orders, which forum can more completely resolve the controversy, the order, stage and costs of the proceedings, and the parties' connection with each jurisdiction (at 592–593); here the same controversy is on foot in [foreign court], so continuing here is prima facie vexatious, and weighing those considerations, [conclusion].]

[**Different issues, same sub-stratum (*CSR v Cigna*):** as in *CSR v Cigna*, where the question was whether, having regard to the controversy as a whole, the local proceedings were vexatious or oppressive (at 400–401), here the NSW and foreign proceedings arise from the same facts but raise different issues, so the operative question is whether something can be gained here that cannot be gained abroad, and [[A] retains a legitimate juridical advantage available only in NSW, e.g. [a materially higher recovery or better security], so something can be gained here and the

MODULE C: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

When to open: [P] (a judgment creditor) seeks to recognise or enforce in NSW a judgment given by a court outside NSW, or [D] (a judgment debtor) seeks to resist that recognition or enforcement. Logically posterior to how the foreign court reached its judgment; the only question here is whether the forum will give that judgment effect.

Master sequence:

1. C0: identify the source of the judgment and route to the correct regime (always).
2. Then open only the regime the facts engage:
    - C1: judgment from a country not covered by statute (e.g. US, China) → common law
    - C2: foreign antitrust / excess-of-jurisdiction judgment → FPEJA overlay
    - C3: foreign non-money equitable order → equity
    - C4: substantive law of another Australian State resisted on public-policy grounds → full faith and credit
    - C5: judgment from a listed FJA country → FJA registration
    - C6: New Zealand judgment → TTPA Pt 7
    - C7: judgment of another Australian State or Territory → SEPA Pt 6
3. C8: international conventions (information only).
4. C9: conclusion.

How to use this module:

- C0 is SEQUENTIAL: always open first; it forces the regime choice. This is the single most important step, because where the FJA, the TTPA or SEPA applies, registration is the EXCLUSIVE method and the common law has no role, so the wrong regime is a wrong answer.
- Everything after C0 is SITUATIONAL: open the regime sub-module the facts engage. Usually one regime governs a given judgment, but a problem may involve several judgments (e.g. one US and one UK), each routed separately.
- Within the chosen regime, run every condition or registration requirement AND every available defence or ground for setting aside to the end. Do not stop at the first satisfied condition, and do not conflate the regimes' different defence sets.
- The common law penal, revenue and public policy defences (C1.5) are the same doctrines relied on in Module D (exclusion of foreign law); they are built here and cross-referenced there.
- Module redirects appear only in routing and IF/THEN, never inside copy-paste prose; where useful mid-answer they sit inside a bracketed placeholder.

C0: FRAMEWORK AND ROUTING

SEQUENTIAL. Open first, always.

What to look for: which court gave the judgment and in what country; is it a money judgment or a non-money order; is the country one to which the FJA has been extended by regulation; is it New Zealand; is it another Australian State or Territory. Those answers route you to one regime.

Routing table:

Source of the judgment	Regime	Open
Country NOT listed under the Foreign Judgments Regulations 1992 (Cth) (notably the US; the PRC)	Common law action on the judgment debt	C1
Foreign antitrust / excess-of-jurisdiction judgment	FPEJA overlay (Attorney-General instrument)	C2
Foreign NON-MONEY equitable order (receiver, freezing order, specific restitution)	Equity	C3

COPY-PASTE (gross violation of human rights: write only if the law is said to be a grave human-rights infringement):

PICK ONE. A foreign law is refused recognition where it constitutes so grave an infringement of human rights that the forum ought to refuse to recognise it as law at all.

[Grave infringement: as in *Oppenheimer v Cattermole*, where the 1941 German law revoking the nationality of Jews and confiscating their property was held not to be law at all, here the foreign law [e.g. effects racially discriminatory denationalisation or confiscation], so it is disapplied: at 277 to 278 (Lord Cross).]

[Ordinary legislation: unlike *Oppenheimer*, here the foreign law is ordinary penal or confiscatory legislation, however harsh, so it does not reach the threshold and is recognised.]

[NB: same doctrine as the public-policy enforcement defence at C1.5.2.]

COPY-PASTE (violation of international law: write only if the law flagrantly breaches established international law):

Exceptionally, a provision of foreign law is disregarded where it would lead to a result wholly alien to fundamental requirements of justice; the forum may have regard to international law, which itself recognises that a national court may decline to give effect to foreign acts in its violation: *Kuwait Airways Corp v Iraqi Airways Co* [2002] 1 AC 883 at [16], [26] (Lord Nicholls). A measure flagrantly breaching a fundamental rule, judged by contemporary standards, is refused recognition, and non-justiciability is no bar where the standards are clear and the outcome not in doubt: at [25] to [26], [28] to [29].

[Here: as in *Kuwait Airways*, where Iraq's decree giving effect to its UN-condemned invasion of Kuwait and seizure of aircraft was disregarded, here the foreign [law / decree] [flagrantly breaches [an established rule, e.g. the prohibition on the use of force], so it is disregarded / involves no such breach, so it is recognised]: at [29].]

[Blue pencil (add-on): where only part offends, the offending [provision] is excised, leaving the remainder of [foreign] law to govern, as in *Kuwait Airways*: at [29].]

[NB: same doctrine as the public-policy enforcement defence at C1.5.2.]

[NB: the cases are sometimes organised into three categories (enforcement seriously detrimental to forum interests; injustice in the particular case; morally unacceptable content: Carter, in Mortensen 12.58) and Nygh 18.37 frames three protected interests; organising frames only, the *Jenton* standard doing the operative work. Reference only.]

[NB: public policy may also justify non-recognition of a status conferred by foreign law where recognition would produce an absurd constitutional result, e.g. a foreign power mischievously conferring nationality to disqualify members under s 44(i): *Sykes v Cleary* (1992) 176 CLR 77 (Brennan J); discussed in *Re Canavan* [2017] HCA 45. A constitutional-eligibility context, not an ordinary choice-of-law exclusion. Reference only.]

D5: CONSTITUTIONAL FULL FAITH AND CREDIT (s 118)

SITUATIONAL. Open if the law a party seeks to exclude is that of another Australian State or Territory. The constitutional overlay distinctive to the intra-Australian context: it narrows, and as between substantive laws effectively eliminates, the exclusionary doctrines, so a public-policy or injustice argument against another State's law fails at the threshold.

What to look for: a law of another Australian State or Territory, rather than a foreign state; a party seeking to refuse it effect on public policy, "manifest injustice" or similar grounds; a substantive defence created by the other State's law (which the forum must give effect to even if harsh or contrary to its own statutes).

IF/THEN: