

Personal Jurisdiction

[Whether a court has J to hear the case – by personal J or D's submission]

Within AU & NZ

Personal Service

1. Jurisdiction

a. Individual

i. [什么时候送算有效 J]

The court only has J to hear a case if D is present in the J when the OP was served, and the original process has been effectively served **Laurie**

重点是看 **critical moment** 的时候 D 是否在 NSW

1. **Length of presence:** Does not matter how short their presence may be **HRH**
2. **Purpose of presence:** The purpose for which the D is within the forum is irrelevant to the question of the forum's J **Perrett**
 - a. Except where the P tricked, fraudulently enticed or physically coerced the D inside the forum in order to have the D served **Perrett**
 - i. **Perrett:** No fraud where Perrett wanted to sue in Qld, so he drove to Robinson to Qld where he served process on him
3. **The critical moment:**

文件送达前 D leave = NO J [甚至文件已经在送达路上了, 只要没交给 D, 就没有 J]

特殊情况: 未送达但 D 知道文件已发出故意离开 = J

但如果 D 去的新地方是其他 state/NZ, 还是可以根据 **PPTA/SEPA** 来送达从而有 J

- a. No J if D leaves the J before the OP was served. **Laurie** However, if D leaves the place after the OP was issued AND he either knew that process had been issued or leave to evade service of process will be regarded as within the J of the court **Joye**
 - i. **Joye:** there was strong evidence that Joye knew of the summons and left the country to evade service where:
 - a. 9 December: Sheahan's solicitors told Joye's solicitors that the summons had been issued and asking whether they had instructions to accept service
 - b. 13 December: Joye departed jurisdiction
 - c. 16 December: Joye's lawyers said to Sheahan's lawyers they had no instructions to accept service
- b. Unlikely that J will be established when the D was only in the forum's airspace at the time the OP was issued **Joye**

ii. [怎么送算有效 J]

Effectively served:

1. If D is present when the OP is served, **service in NSW**:
 - a. **Personal service** of the OP is required **UCPR r10.20(1)** and is effected by leaving a copy of the process with D in his presence and informing him of its nature **UCPR10.21(1)**
 - i. Threat: As service under **UCPR r10.21(1)** was prevented by violence or threat thereof, personal service can be effected by leaving the document as close as practicable to D: **UCPR r10.21(2)-(3)**.
 - ii. If the premises cannot lawfully be accessed: If the premises cannot lawfully or practically be accessed, it is alternatively effected on a person keeping house by placing the document in the mail-box/affixing the document to an outer door/affixing the document to a part of the premises as near as practicable to the principal door or entrance to the premises as the mail-box or door cannot be accessed **UCPR r10.26(1)(a)**.
 1. A notice is required to be posted to the person within 24 hours informing them that the document has been so placed **UCPR r10.26(1)(b)**
 - b. If personal service is not practicable, the court may direct steps to be taken that constitute **substituted service** **UCPR r10.14(1)** this constitutes personal service **UCPR r10.14(4)**
 - i. An application for substituted service requires an affidavit containing the matters under **UCPR r10.14(3A)**.
 - ii. The Court may also order that D has been served as a result of steps that have been taken (ie not under **r 10.14(1)**) **UCPR r10.14(3)**.
2. **[NSW proceeding serve to other states]** If D is present when OP is issued, but **later leave NSW to other state**:
 - a. The OP issued in one state/territory can be served in another and is effected the same way it would be in the place of issue. **SEPA s15**
 - i. Thus, can be effectively served by way of **UCPR r10.21**
3. **[NSW proceeding serve to NZ]** If D is present when OP is served, but **later goes to NZ**:
 - a. **TTPA s8** would apply as the P brought a ... claim in the NSW court.
 - b. Subject to **s9(1)** & **s10**, service has the same effect and gives rise to the same proceedings as if it was served in place of issue. Thus, can be effectively served

- a. **Kim Michael**: the place of payment was construed to be NSW because:
 - i. The payee was incorporated in NSW with an office in NSW
 - ii. The payee has no office elsewhere but NSW;
 - iii. All past payments between the payor and payee were paid in NSW;
 - iv. The payee issued an invoice to the payor from NSW for payment under contract;
 - v. Part payment of the sum was made in NSW; and
 - vi. The demand for payment was issued in NSW.
- b. **Showtime**: the breach was failure to acquire the artist, this was a failure to schedule, make travel arrangements etc which occurred in the US

iii. 3) Tort

- 1. A leave is not required for serving if:

- a. The **tortious act or omission** occurring partly or wholly in AU. **Sch 6(a)(i)** This is assessed by asking ‘where in substance did this cause of action arise?’
(**Distillers Co**, accepted by **Voth**; **Dow Jones**)
 - i. Negligent misrepresentation/ACL s18 claim is treated as a tort, where the breach occurs where the misleading or deceptive claim is directed to and expected to be acted upon, whether or not it was acted upon there 侵权核心是“使对方产生错误印象并据此做决定”，所以地点在接收地，不是发出地。 **Sigma**
 - 1. 例如 A 在 HK 看见工厂觉得不错，回悉尼后和 HK 的 B 工厂签合同。后面发现 B 工厂在说谎，sue misleading statement 的 tort 地点在 HK
 - 2. **Sigma**: D, a foreign company, sent misleading investment information into Australia, expecting the Australian recipient to rely on it. P received the misrepresentation in Australia and alleged that the misleading conduct caused loss there. The court held the place of tort in AU.
 - ii. Failure to warn/negligent marketing claim is treated as a tort, and the place of the tort is in where the manufacturer failed to warn. **Distillers Co**

不管制造地在海外，若产品意图进入澳洲市场且没有在澳洲提供警告，tort 在澳洲

1. Product liability claims against foreign manufacturers can be expressed as negligent marketing in the forum by a failure to give appropriate warning, where the product was intended to be distributed is relevant **Distillers Co**
- iii. Defamation is treated as a tort
 1. Defamation occurs where the damage to reputation occurs i.e., where it is read and comprehended. **Gutnick**
- b. The **damage of the tort sustained** partly or wholly in AU. **Sch 6(a)(ii)** Here, the damage is not limited to ‘damage’ claimable under a tort action, it includes all the detriment, physical, financial and social which the P suffered as a result **Flaherty**
 - i. Medical expenses incurred in the forum are damage **Flaherty**
 - ii. For a tort causing economic loss to a company incorporated in AU with its principal place of business in AU, the damage is suffered in AU, even if the tort was committed outside of AU **Sigma**
 - iii. Loss of earning capacity incurred in the forum is a form of damage **Flaherty; Darrell Lea**
 1. **Darrell Lea**: A loss of profits in Australia because of a machine damaged in Germany was sufficient.
 - iv. Expenses or the depletion of assets 资产损耗 / place of repairment as a result of a tort are ‘damage’ for the purpose of **Sch 6(a)(ii)** **Darrell Lea**
 1. **Darrell Lea**: Machine damaged in Germany, but the bill for repairs was paid in NSW for repairs conducted in Germany
- c. 4) The claim arises **under an Australian enactment** AND **Sch 6(j)** (E.g., claims under **ACL**)
 - i. (i) Any act / omission of the claim relates, was done or occurred in Australia, or
 - ii. (ii) Any loss / damage of the claim relates, was sustained in Australia, or
 - iii. (iii) The enactment applies expressly / impliedly to an act / omission that was done or occurred outside Australia in the circumstances alleged, or
 1. E.g., **ACL** has no application to extraterritorial acts or jurisdiction over people outside Australia
 - iv. (iv) The enactment expressly / impliedly confers jurisdiction on the court over persons outside Australia
 1. E.g., **ACL** has no application to extraterritorial acts or jurisdiction over people outside Australia

d. Other

- i. Any relief is sought against any person domiciled or ordinarily, or habitually resident in Australia **sch 6(g)**
- ii. Injunction sought **sch 6(d)(i)**
- iii. Australian land **sch 6(e)**
- iv. Necessary or property party **sch 6(h)(i)**
- v. D claims indemnity **sch 6(h)(ii)**

2. [If NOT **Sch 6** claims] If the subject matter of the claim is not captured by **sch 6**, leave is required for serving and can be issued by court if **r11.5(5)** is satisfied. **r11.5(1)**

- a. **(a)** the claim has a real and substantial connection with AU, with greater connection than mere citizenship **Emmott**; AND

[没有关联的 claim 不能起诉, 但只要有一个重要的因素关联即可]

- i. The place of conclusion for the K; place of tort
- ii. Governing law
- iii. Assets in AU **Emmott**

1. So that the co can only wind up in AU

- b. **(b)** AU is the appropriate forum for the trial; AND

- i. There is a credible view that this equals the **Voth**'s CIF test. **CSR**
- ii. E.g., Asset of co located in AU, assessing the case in other forum may cause the difficulty for P to obtain relief, so AU court is an appropriate forum to deal with the claim. **Emmott**
- iii. Consider:

1. If P lived in AU, there is juridical advantage in accessing wide **ACL** remedies
2. Location & availability of witness & evidence

- c. **(c)** in all circ. the court should assume J.

[只要**(b)**过了, 直接说 *In the circumstances, NSWSC would likely assume jurisdiction.*]

- i. Although most events occurred abroad, evidence showed that partnership assets and accounts were located in Australia, foreign court unlikely to order a relief. **Emmott**

3. Notice

- a. If service is allowed as [the claim is captured by **sch 6**/the leave is obtained], notice in accordance with **UCPR r11.7** must be accompanied with any service of OP. This includes:

- i. **(a)** the scope of the jurisdiction of the court in respect of claims against persons who are served outside of Australia,
- ii. **(b)** the grounds alleged to found jurisdiction (ie **sch 6** under **11.4** or discretion under **r 11.5**), and
- iii. **(c)** the person's right to challenge service (**r 12.11**) or jurisdiction (**r 11.6**)

- ii. **Incitec**: the charterer was held within the scope of the EJC because the cross-claim against it “arose out of or in connection with” the charterparty, and the phrase was interpreted as having the widest import, capturing all disputes related to the contractual relationship.
- ii. *If there is EJC – Go next; if no – consider FNC* (as there is no bargain to hold the parties to because they have agreed to a court will be competent, but not necessarily the only possible court to hear their dispute)
- iii. **Discretion to stay the proceeding (i.e., enforce the EJC) or non-enforce the EJC:**
 - 1. Opening sentence:
 - a. [If relevant EJC] As the clause is a valid EJC and applies to the current claim, a court will typically stay proceedings in favour of the nominated J absent strong countervailing considerations **Oceanic Sun**, as parties should usually be held to their bargain **Incitec**. [Plaintiff] bears the burden of proving strong countervailing considerations. **Incitec**
 - b. [If not relevant EJC] Even if the clause is [not an EJC/does not apply to the current claim], a court may have refuse to stay the proceedings anyways, however, this requires strong countervailing considerations **Oceanic Sun**, as parties should usually be held to their bargain **Incitec**. [Plaintiff] bears the burden of proving strong countervailing considerations. **Incitec**
 - 2. **[EJC nominates NZ as forum] → Exclusive Choice of Court Agreement**
 - a. **[Definition]** An exclusive choice of courts agreement is: **s20(3)**
 - i. A written agreement b/w the parties that:
 - 1. Designates the courts (or courts)
 - 2. Of a specified country
 - 3. To the exclusion of any other courts
 - 4. As the courts to determine disputes between the parties that include the matters in dispute between the parties to a proceeding
 - ii. Not an agreement the parties to which are, or include an individual acting primarily for personal, family, or household purposes
 - iii. Not a K of employment
 - b. If an EJC nominates NZ, the AU court must stay the proceedings **TTPA s20(1)(a)** UNLESS: **TTPA s20(2)**
 - i. (a) It is null and void under NZ law
 - ii. (b) A party to it lacked the capacity to conclude it under AU law
 - iii. (c) Giving effect to it would lead to a manifest injustice or would be manifestly contrary to AU public policy

- iv. (d) For exceptional reasons beyond the control of the parties to it, it cannot reasonably be performed
 - v. (e) The court designated by it as the court to determine those matters
- 3. **[EJC nominates AU as forum]**
 - a. If an EJC nominates AU, the AU court must NOT stay the proceedings. **TTPA s20(1)(b)**
- 4. **Res judicata**
 - a. If the claim rises the same cause of action that already determined by a judgment, any subsequent action on the same right cannot be brought as said right is now gone – stay the proceeding **Telesto**
- 5. Relevant considerations:
 - a. Commercial agreements
 - i. Courts have a stronger disposition to hold parties to their commercial bargain and avoid multiple proceedings. **Incitec; Bobcock**
 - 1. Particularly if there is a commercial advantage for the parties having agreed to that jurisdiction e.g. insurance companies having an EJC in favour of London **FAI**
 - b. Public policy considerations
 - i. Court will likely refuse to enforce the EJC if it offends the public policy of the forum **Akai, Epic Games**
 - 1. Court will refuse to enforce EJC if agreed forum would not apply Australian substantive legal principles which give effect to Australian policy (i.e., not applying AU mandatory law) **Akai, Epic Games, Telesto**
 - a. E.g., **ACL, Insurance Contracts Act**
 - b. **Epic Games**: Cases that involve fundamental public interest issues in relation to conduct undertaken in an Australia sub-market and that affects many Australian consumers/competition in Australia generally constitute a strong reason for non-enforcement of the EJC
 - c. Connection between parties and foreign country
 - i. If there is an overwhelming connection between the matter and the forum, then most likely court will decide against a stay **Akai**
 - d. 3rd party to proceedings not privy to the EJC
 - i. EJC might not be enforced if the proceedings involve a co that is not itself a party to the EJC **Incitec; Venter**

Held: 虽然 Canada 可能是适合的 forum 但证据证明 WASC 不是 CIF, 所以 no stay

- (1) Identify all the connections between the parties and the subject matter of the litigation within the local forum
 - 1.1 All of the written agreements were made in Western Australia. While these written agreements were governed by the law of New York, that is not determinative against the conclusion that WASC is not a CIF.
 - 1.2 The subject matter of the dispute is the oral agreements, which were governed by the law of WA.
 - 1.3 AVW's offices are based in WA, and any witnesses it might wish to call are either resident in WA or, at the least, there was no suggestion that they would not be willing to attend to give evidence here.
 - 1.4 W at a trial in the WASC may give evidence by videolink, and no reason suppose that this method would affect the credibility of the evidence
 - 1.5 A considerable volume of the evidence at the trial will be documentary evidence. 大多证据为文件资料, 不依赖现场证词。
- (2) Connection with other forums
 - There are clearly some factors that demonstrate a connection between the proceedings and **Canada**.
 - Bombardier is based in Canada.
 - Some of the witnesses it is likely to call at the trial are resident in Canada.

iv. Specific factors to consider:

1. **Availability of foreign forum**

- a. Unavailability of alternative forum for P to seek remedies is relevant (and ordinarily will be very important), but not determinative in deciding AU is the appropriate forum **Garsec; Bombardier**
 - i. Weighty in favour not granting a stay

2. **Significance of applicable law issues** [D may argue CIF as it will need to apply a foreign law]

- a. The issue of applicable law is a relevant and material consideration, however local forum is not a CIF merely because of this. **Zhang; Voth; Puttick**
- b. If foreign law uses a common law system (e.g., UK/NZ/HK/Canada etc.), then will have less weight on this factor **Puttick**

3. **Lis pendens** [看外国法院的进程, 如果已经有 judgment, 提一下 res judicata]
 - a. Generally, where foreign proceedings are already pending (i.e., commenced first, but no judgment is issued, so not res judicata) and the proceedings are identical, it is prima facie vexatious and oppressive to commence proceedings in an AU court in relation to the same subject matter. **Henry**
 - i. If the proceedings are merely related, the issue is not whether the AU court is a CIF, but rather, the issue is whether, considering the controversy as a whole, the AU proceedings are vexatious and oppressive. **CSR**
 - ii. If proceedings brought for the dominant purpose of preventing the party from pursuing remedies available in court of another country, this is likely oppressive in the **Voth** sense of the word **CSR**
 1. **CSR**: NSW proceedings brought in attempt to prevent access to 3x damages under US statute
 - iii. However, the nature and degree of connection between the proceedings and the forum are fundamental factors **Xin Tai Hai**
 - b. Consider relevant factors in **Henry**: 对于海外法院和本地法院的进程, 如果海外法院刚开始, 不能说本地法院 oppressive
 - i. Whether the foreign court has jurisdiction to deal with the dispute
 - ii. Whether judgments of the forum and foreign courts would be recognised in the other place
 - iii. Whether the forum judgment would be enforced in the place of enforcement
 - iv. The stage of foreign proceedings have reached
 - v. The costs incurred in the foreign proceedings
 - vi. The relative connection each party had with the foreign and forum courts
 - vii. The ability of each of the parties to participate in the proceedings in the foreign and forum courts on equal footing
 - viii. Do proceedings in Australia involve different remedies or issues **Telesto**
 - c. Relevant factors in **Xin Tai Hai**: 对比两个国家法院的进程
 - i. Which forum can provide more effectively for complete resolution of the matters involved in the parties' dispute
 - ii. The order in which the proceedings were instituted; 哪个先开庭
 - iii. The stage that each proceeding had reached and the costs that had been incurred;

- iv. The connection, if any, of the parties and their controversy to each jurisdiction and the issues on which relief might depend in those jurisdictions;
 - v. The resources of the parties, the relevance of their and the witnesses' understandings of languages in each jurisdiction.
- d. Examples:
- i. **Telesto**: UBS AG Singapore branch, entered into investment arrangements with Telesto and its director Tyne, K governed by Singapore law. After UBS commenced proceedings in Singapore, Telesto and Tyne initiated separate proceedings in NSW alleging misleading and deceptive conduct under **ss 52 & 51A** of the **Trade Practices Act 1974 (Cth)**. The court held no stay and not abuse of process as the NSW proceedings were based on a distinct statutory cause of action that offers remedies unavailable under Singapore law.
 - ii. **CSR**: CSR and its US subsidiary sued Cigna in US over unpaid insurance coverage for US asbestos liabilities, while Cigna later commenced separate NSW proceedings seeking declarations about both US and Australian asbestos claims. As US proceedings only concerned US asbestos exposure and included Sherman Act treble-damages claims unavailable in Australia, while the NSW action extended to both US and Australian asbestos claims, the two suits were based on different issues and were therefore not identical proceedings.
4. **Public interests consideration** [这里的 public interest 指的是司法资源的有限性，也就是说，法庭是否应该考虑让 foreign citizen 在 NSW，就 foreign tort issue 起诉，是否会占用 AU taxpayer 的公共资源]
- a. Public interest factors such as judicial resource constraints are not relevant **James Hardie**
 - i. **James Hardie**: As a NZ citizen, brought proceeding in NSW in Dust Diseases Tribunal against D, claiming tort committed in NZ law
5. **Unreasonable delay in foreign court** [Difficult to argue]
- a. If likely delayed, less likely to stay **Toop**
 - i. **Toop**: Potential for chronic delay 长期延误 in PNG court system (5 years) and potential for grave injustice to P if PNG failed to grant the visa to P (Very hard ground to argue, this is a special case where P obtained evidence from GG)

v. Further non-exhaustive factors from **Colosseum**:

- i. True nature and full extent of the issues involved in proceedings;
- ii. Whether the foreign court has jurisdiction to deal with the same subject matter as is before the local court;
- iii. The degree of connection which both proceedings share with the law of the foreign court and the law of the local court;
- iv. Where the relevant acts or omissions occurred;
- v. Where the parties reside and carry on business;
- vi. Whether local professional or other standards of care have a bearing on the legal quality of the relevant acts or transactions or the liability of the parties;
- vii. Where and how the damage was suffered;
- viii. Where the relevant evidence in the action is to be found;
- ix. Whether the application to the local court for a stay or dismissal has been made with reasonable promptness;
- x. The stage which proceedings in the foreign court have reached in comparison with the stage of proceedings in the local court;
- xi. The order in which the two sets of proceedings were instituted and the costs which have been incurred in each;
- xii. Whether each court recognises the orders and decrees of the other;
- xiii. Which court can provide more effectively for the complete resolution of the whole of the controversy between the parties;
- xiv. That a party properly invoking the jurisdiction of the local court has a prima facie right to insist upon the exercise of that jurisdiction, so long as that prima facie right is not given undue emphasis;
- xv. That considerations of comity and restraint should be taken into account where a defendant carries on business in a foreign country and the jurisdiction of the courts of that country would be recognised under local conflict rules;
- xvi. The undesirability of allowing two independent actions involving the same question of liability to proceed contemporaneously in the courts of different countries;
- xvii. Whether the dominant purpose of a party in commencing proceedings in one jurisdiction or another is to prevent another party from pursuing remedies available in the courts of another country having jurisdiction;

- c. Therefore, the local forum is (not) a CIF, and a stay will (not) be granted. Therefore, the court of ... has (no) J to hear the case.

Temporary Stay

1. **Temporary stay** [Alternative pathway instead of granting permanent stay]

- a. The Court can grant a temporary stay 'where proceedings are pending in another court, and it is desirable that those proceedings should proceed to their conclusion first'. **Bella Products** 如果另一个法院（国内或国外）已经有相关诉讼正在进行且让那个诉讼先结束，会更有效率、避免重复诉讼、减少成本。澳洲法院可下达 temporary stay（暂时中止本地诉讼）→ Case management
 - i. **Bella Products**: Most of witnesses were in the US, giving evidence in person will be advantageous, and travel costs were relevant, so it was beneficial to wait.