

LAWS2018 Conflict of Laws

Study Notes — Choice of Law, Jurisdiction and Foreign Judgments

Created for 2026 Course

Colour key

John Pfeiffer Pty Ltd v Rogerson

Case names — plum, italics

UCPR r 11.4 and Sch 6

Legislation — navy

the lex loci delicti governs the substance of a tort

Key principles — teal

limitation periods are substantive, not procedural

Critical points — deep red, soft rose tint

Structure follows the LAWS2018/LAWS5017 Learning Guide (Semester 1, 2026). Unless stated otherwise, “UCPR” is the Uniform Civil Procedure Rules 2005 (NSW), “SEPA” the Service and Execution of Process Act 1992 (Cth), “TTPA” the Trans-Tasman Proceedings Act 2010 (Cth), “FJA” the Foreign Judgments Act 1991 (Cth) and “ACL” the Australian Consumer Law.

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Topic 1: Introduction to Private International Law and General Applicable Law Topics

1.1 Some Concepts and Persistent Issues

1. Themes of PrIL:

- (a) **How to deal with foreign legal issues:** Body of principles, rules and, at times, policies and approaches that indicate **how a foreign element in a legal problem** or dispute **should be dealt with**.
- (b) **3 main issues include:**
 - (i) **Jurisdiction:** Whether the local court — or '**forum**' — has the **power to hear and determine** the case, **or** whether the contacts the case has with another state or country limit or otherwise **restrain the forum court's power** or willingness to decide the case
 - It needs to first determine whether or not it has jurisdiction. That is the first thing.
 - **Discretion:** Court may decide not to exercise jurisdiction as there are discretionary powers.
 - (ii) **Choice of law:** Whether it will decide the case in accordance with the law of the forum, or in accordance with the law of the other state or country. What law and rules will the court apply to determine a cross-border dispute?
 - (iii) **Recognition and enforcement of foreign judgments:** Whether that **judgment in the foreign country can be recognised** or enforced in the forum? Must or will a court in one legal system give effect to [enforce] a judgment given by another court [or an arbiter tribunal] in another legal system
 - **Impact of policy in the area:** Schemes that make generous provision for the recognition — or 'circulation' — of foreign judgments often do so because the forum and foreign country have agreed to proportionate rules of jurisdiction that give the forum's law-makers confidence that the foreign judgment emerged from a credible judicial process.
- (c) **Private v Public International Law:**
 - (i) **Public:** Public international law comprises customary international law, treaties, conventions, and legislation passed by international agencies such as the United Nations. Regulates between **international personalities and countries** can voluntarily comply. It is **universal**.
 - (ii) **Private:** The traditional disregard for academic opinion in the common law, however, cannot be rigidly maintained in private international law, where there is a lingering view that academic opinion might have more weight in the field than it does in other areas of the common law. Regulates between **private persons and corporations**. It is **not universal** as municipal law varies country to country.
 - **PrIL has developed intra-national character:** Historically in common law countries, states and territories have been treated as foreign to each other
 - **Australia:** The older Australian cases certainly adopted this classification. In *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd*, Williams J observed that '[f]or the purposes of private international law, South Australia is a foreign country in the courts of New South Wales'.
 - **HOWEVER:** Now HCA has tried to align the status of interstate relations in conflicts law more closely to the political and economic reality of Australia as 'one country and one nation' (*Breavington v Godleman* (1988) 169 CLR 41 at 78, 134–5)
 - **UK:** United Kingdom comprises three distinct private law areas in England and Wales, Scotland and Northern Ireland, and for conflicts law purposes these regard each other as different countries

- **US:** During the Cold War an American judge could declare that 'Michigan's sovereignty is as foreign to Delaware as Russia's (City of Detroit v Proctor 61 A 2d 412 at 416 (1948))

1.2 Case Studies

1. *Oceanic Sun Line Special Shipping Co v Fay* [1988] HCA 32:

- (a) **Facts:** A resident of Queensland made a booking in New South Wales for a cruise of the Greek islands on a vessel owned by a Greek company. Upon payment of the fare the passenger was handed an "exchange order" which stated that it would be exchanged for a ticket when he boarded the vessel. In Athens the passenger obtained his ticket upon which was printed a condition that the courts of Greece should have exclusive jurisdiction in any action against the owner. The passenger was injured on the cruise. He sued the owner for negligence in the Supreme Court of New South Wales. The owner applied for a stay of the action.
- (b) **Held:** By the whole Court, that the **contract of carriage had been concluded in New South Wales**. The conditions on the ticket did not form part of the contract.

2. *Re Canavan* [2017] HCA 45:

- (a) **Facts:** Section 44(i) of the Commonwealth *Constitution* provided that any person who is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power, shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
- (b) **Held:** A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.
- (c) **Principle:** The key issue is whether when applying or interpreting Constitutional law, do we use our construction or theirs.
 - (i) "The only "conflict" possible is that in the mind of the judge who is to decide which system of law to apply to the facts before the court, whereas the term "choice of law" correctly indicates the existence of the possibility of the application of one or other system of law to the facts of the case under consideration" (*Pfeiffer* at CLR 527 [43])

1.3 Sources of Law and Doctrine of Stare Decisis

1. Sources of Law:

- (a) **Legislation:** Service and Execution of Process Act 1992 (Cth); Foreign Judgment Act 1991 (Cth); Foreign Evidence Act (1994) (Cth); Enactments of State and Territories; Cross-vesting legislation
 - (i) Starting point is text of provision, which must be considered in its context, including the statutory purpose; this includes legislative history and extrinsic materials – context "has utility if, and in so far as, it assists in fixing the meaning of the statutory text."
- (b) Rules of Court and Uniform Rules relating to procedure (State, Territory and Federal)
- (c) Common law - court cases - a very significant source of law in this area: One common law as interpreted by the High Court
- (d) International acts/treaties
- (e) Conventions (Hague Conference on Private Law); Trans-Tasman Proceedings Act; as applied through (mainly) Federal law
- (f) Model laws (implemented in domestic law)

2. Doctrine of Stare Decisis:

- (a) PIL includes both legislation and common law
- (b) One common law – therefore view of High Court definitive
- (c) If no High Court decision, what about a court not in the direct line of authority ie intermediate appellate courts in another jurisdiction?
- (d) **Apply consistent principles for federal matters:** Intermediate appellate courts and trial judges in Australia should **NOT** depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation **or** uniform national legislation **UNLESS** they are convinced that the interpretation is plainly wrong... Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law (*Farah Constructions P/L v Say-Dee P/L* [2007] HCA 22, [134])
- (e) *Gett v Tabet* [2009] NSWCA 76 at [263]–[301]: an intermediate appellate court should follow a decision of another Australian intermediate appellate court on the common law or on uniform national legislation unless convinced it is plainly wrong (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]).
- (f) **Foreign judgments persuasive but NOT binding:** *Cook v Cook* (1986) 162 CLR 376: “Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are **NOT** binding and are useful only to the degree of the persuasiveness of their reasoning.” (per Mason, Wilson, Deane and Dawson JJ [19])

Topic 2: The Law Applicable to Torts

2.1 Historical Background

1. Historically, 3 ways to choose the location of the tort:
 - (a) Lex fori: simplicity v. forum shopping
 - (b) Lex loci delicti (the place of the wrong): fortuitous
 - (c) Double actionability (X)
 - (i) The law of the place of the wrong test should be qualified by a Flexible Exception allowing application of some other law if clear and satisfying grounds are shown why it should be departed from.
 - (ii) Flexible Exception (X): the lex loci delicti rule should be applied without exception
 - Certainty, decrease cost
 - Difficulties: how to determine the place of the wrong
 - The place of the conduct and the place of the harm are different
 - Distinction between substance and procedure
 - Ancillary questions affecting liability in torts
 - (iii) In *Anderson v Eric Anderson Radio & TV Pty Ltd (1965) 114 CLR 20* (Windeyer J), the court applied the principle enunciated by Willes J. In *Phillips v. Eyre*, but expressed concern for a re-examination of the principle. The issue was what would happen when the two conditions are fulfilled, what law is to be applied?
 - **Facts:** A NSW resident sued in NSW regarding a car accident in ACT. Under ACT law, contributory negligence => apportionment. Under NSW law, contributory negligence => complete defence

2.2 Modern Australian Law

1. **Intra-national torts**
 - (a) **Lex loci delicti — law of the place of the wrong:** After determining that it is in substance/procedural issue, the next question is what law is applied. This question was dealt within in *John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503*. The Court emphasised that the legislation of other states and territories **must** be given full credit and cannot be ignored. It was determined that the lex loci delicti was the appropriate approach in choosing the choice of law (at [86])
 - (i) **Rationale:** The court referred to s 118 of the Constitution, starting that, “The matters we have referred to require that a somewhat different approach now be adopted with respect to Australian torts which involve an interstate element. Moreover, they favour the adoption of a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts in Australia (at [68]). The matters we have mentioned as arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a “public policy exception” (at [70]).”
 - (b) **Main principles:** Lex loci delicti applies to international torts subject to no ‘flexible exception’; the double actionability is rejected in international context; there is no role for forum public policy as an exclusionary principle in respect of international tort; all questions about the kinds of damage, or amounts of damages recoverable are substantive issues.

- (i) **Facts:** Forum was ACT where there was no limit to workers compensation, but the place of injury was in NSW and the Workers Compensation Act applied to limit the amount of damages for non-economic loss.
- (ii) **Issue:** The applicant submits that the Court should reformulate the principles that govern how a claim in tort, brought in the courts of one Australian jurisdiction (here the ACT), should be determined when some (or, in this case, all) of the relevant facts occurred in another Australian jurisdiction (here NSW). The particular question is what effect the courts of the jurisdiction in which the proceedings are brought should give to legislation of the jurisdiction in which the tort was committed.
- (iii) This circumvents forum shopping, and allows us to give full credit to other legislation. Rationale:
 - Notions of sovereignty over the place of commission of the tort giving existence to the obligation which is enforced
 - Reliance on the legal order in force in the law area in which people act or are exposed to risk of injury gives rise to expectations that should be protected
 - Liability is fixed and certain
 - Apply a single choice of law rule consistently in both federal and non-federal J in all courts and will recognize and give effect to the predominant territorial concern of the statutes of state and territory legislatures
 - The basic problem of persisting with double actionability adapted by this Court, is the constitutional error involved in treating the several component law areas of Australia as if they were, in relation to one another, “separate countries” (Kirby J)

2. Inter-national torts

- (a) **Lex loci delicti:** In *Regie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491, it accepted the Pfeiffer approach regarding the lex loci delicti and applied it to the international context. The court stated that, “the selection of the lex loci delicti as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the lex causae engenders doubt as to liability and impedes settlement (at [66]).”
 - (i) **Extended to foreign torts, without any “flexible exception”:** The court accepted the submission that, “the reasoning and conclusion in Pfeiffer that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the lex loci delicti should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be **without the addition of any “flexible exception”** (at [75] in *Regie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491).
 - It is always the place of the wrong -- there is no exception to the rule
 - (ii) **Rejected “double actionability” rule:** “The “double actionability” rule should now be held to have no application in Australia in international torts. To the extent that the first limb of that rule was intended to operate as a technique of forum control, we should frankly recognise that the question is about public policy and confront directly the issues that this may present (at [60] in *Regie Nationale des Usines Renault v Zhang* (2002).”
 - (iii) **Substance/procedural not for damages:** The substance/procedural split was also accepted, **but not for damages** (*Regie Nationale des Usines Renault v Zhang* (2002))
 - (iv) **Note the difficulty, but still better than the old rule:** It is necessary to recognise that the place of the tort may be ambiguous or diverse. Difficulty will arise in locating the tort when an action is brought... Moreover, even if the place of the tort can be located in a single jurisdiction, it will often enough be entirely fortuitous when the tort occurred... But for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postured if the opposite universal rule is adopted (at [81]-[82] in *Regie Nationale des Usines Renault v Zhang* (2002)).”

3. Locating the place of the tort (lex locus delicti)

- (a) **Only one place for the tort:** Under choice of law, there can only be one place of wrong — some torts be straightforward, otherwise more complicated
- (b) **Where in substance did it occur:** Where in substance does the act on the part of the D which gives the P his cause of action occurs? (*Distillers*)

(i) **Steps of questions to ask:** **What is the plaintiff's cause of complaint? What act of the defendant gave rise to that cause? Where that act occurred is the location.**

- **Do not worry about consequence:** We are looking at the act of the defendant, not the consequences of their actions
- **Substance not form:** *Amaca* at [38]
 - Identify the place which gives the plaintiff cause for complaint (*Jackson v Spittall*)
 - Identify the place where in substance the cause of action arose (*Distillers*)
 - Identify the place where the act or omission assumes significance (*Voth*)
- **Summary:**
 - **Test:** Where in substance did the cause of action occur?
 - **Action of the defendant:** Regarding the quality of defendant's conduct, important where D acted, rather than where consequence of action were felt.
 - **Damage:** Mere fact that damage occurred in a particular jurisdiction is not sufficient
 - **Nygh:** Courts to emphasise place where the activity was directed, rather than place where activity complained of originated

(ii) **Torts:**

- **CONCEPT: Look at the substance of the statement, for the cause:** "If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonable to be expected that it will be brought to the attention in some third place. **But in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where, in substance, the act took place (at [63] in *Voth*).**"
 - **EXPLAIN THE WHOLE PROCESS OF IN SUBSTANCE: CAUSE OF COMPLAINT, ACT OF DEFENDANT, LOCATION**
 - **Do not just classify an omission as a failure to advise, and a positive act as a negligent misstatement of fact for torts. The Court in *Voth* stated that, "it is possible to speak of the place of the act or acts of the defendant in the context of which the omission assumes significance and to identify that place as the place of the "cause of complaint" (at [57] in *Voth*).**
- **Misrepresentation:** The location is where it is directed to.
- **Negligence:**
 - **One negligent act or omission:** The place where that negligent act or omission occurred, even though consequential injury (economic loss) was suffered elsewhere (*Distillers, Voth*). **Rather than classifying it into the torts here, go through the steps of 'WHAT IS THE CAUSE OF COMPLAINT', 'WHAT ACT GAVE RISE TO IT (what did defendant do)' and then 'WHAT IS THE LOCATION'.** **"But in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking... where, in substance, the act took place (at [63] in *Voth*).**"

Topic 7: Exclusion of Foreign Law

Exclusionary doctrines: Assume foreign law has been proved and chosen by the forum's usual choice of law rule to govern the relevant issue... the question then becomes whether the forum would refuse to apply the foreign law merely because it does not exactly accord with the forum's moral values? There are 2 main reasons:

- **Independence and territoriality of sovereignty:** each sovereign can only assert its interests within its own territorial bounds
 - (c) **Sovereignty:** By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority (*AG (NZ) v Ortiz* [1984] AC 1, 21 (Lord Denning MR))
- **Public policy of the forum:** Some foreign laws are just too offensive to the forum state to be given effect
 - (d) **Act of state doctrine — no matter if law good or bad, if it is category, then exclude:** "A principle of international law, which has long been recognised, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory. The principle rests partly on international comity and expediency (*AG (UK) v Heinemann Publishers* (1988) 165 CLR 309 (the Court minus Brennan J))

7.1 Foreign Penal and Revenue Laws

1. **Revenue Laws:** Includes taxes, charges, probate and death duties, capital gains, custom duties. A court will not entertain foreign claim that seeks to enforce a foreign revenue debt by indirect means.
 - (a) **Foreign courts cannot enforce revenue laws (whether tax or debt owing the foreign government):** *Government of India v Taylor* [1055] AC 496 (HL): Courts of one country **do not** have regard to the revenue laws of another and therefore **will not allow** judgments for foreign taxes to be **enforced**.
 - (i) **Would be extension of sovereign power ≠ not allowed:** "[E]nforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another...is (treaty or convention apart) contrary to all concepts of independent sovereignties." (Lord Keith of Avonholm)
 - (b) **Foreign tax judgments not enforced:** *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324: Australia **has not** included the new Art 27 in its treaty with United States. The *Foreign Judgments Act 1991* (Cth) **exclude** foreign tax judgments.
 - (i) **Not incorporated in domestic law + not even in treaty in this case:** A new Art 27 of the Model Convention with Respect to Taxes and Income on Capital 2003 (INT), seeks to abrogate the exclusionary rule. Australia has included the new Art 27 in its treaty with New Zealand, France and Norway. **However**, this article is not included in the treaty with United States. Furthermore, it was not incorporated into domestic law (**at [27]**)
 - (ii) **Cannot enforce foreign tax judgments:** Nor can a judgment of the United States Tax Court be enforced in Australia. The *Foreign Judgments Act 1991* (Cth) defines an "enforceable money judgment" to mean one under which an amount of money is payable other than an amount payable in respect of taxes or other charges of a similar nature."
 - **Facts:** Jamieson is the executrix of the estate of her late father, who died in the US in 2004. All the assets of the estate were situated in NSW. Probate of the will was granted to Ms Jamieson by this court in 2004. The Internal Revenue Service of the US obtained a judgment from the United States Tax Court against the estate for USD 1,149,104.05 in 2006. Ms Jamieson seeks a determination that she is not required to admit the Commissioner as a creditor of the estate and is entitled to distribute the estate to the persons entitled.

- (c) **Disguised tax ≠ unenforceable:** The action is in the nature of a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another (*Sydney Municipal Council*)
- (i) **Facts:** The NSW Moore St Improvement Act of 1890 authorised Sydney Municipal Council to carry out improvements on Moore St and recover contributions from property owners. One such owner was a British. Sydney Municipal Council sued in the UK to recover the unpaid contributions from the owner's indemnifier (ie like an insurer). The sole object and intention of the Act was to provide that within that area where the claim was recoverable, it might be recovered by an action.
- (d) **INDIRECTLY foreign rev. laws ≠ unenforceable:** *Bath v British and Malayan Trutees* [1969]: In **no circumstances** will the courts directly or indirectly enforce the revenue laws of another country
- (i) **Facts:** In Singapore, an executor (a private individual) got a grant of probate of Singapore resident who held property in NSW. The Singapore Court granted probate on the condition of remission to Singapore of the outstanding probate duties (ie the executor pays death tax). In NSW, the executor sought orders to deal with the NSW property of the deceased, to exclude the death tax.
- (ii) **Claims made on behalf of foreign states:** Claims made on behalf of a foreign state to recover taxes due under its laws are **unenforceable** in NSW, although the application of the executor's attorney was not in substance a claim on behalf of the revenue authority of a foreign state for the purpose of collecting its debts.
- **Held:** The court **would not** in this case make an appointment which had the effect of enabling the assets situated in NSW to be used to satisfy claims arising under the revenue laws of Singapore.
- (e) **Subject to Treaties: New Zealand, Papua New Guinea is exception to revenue laws:** Foreign Judgments Act and TPPA allow for the enforcement of some taxes (**NZ and PNG**) (**see later**).
- (i) See also *Application of Perpetual Trustee Company Ltd; Re: Estate of the late Evelyn Mary Dempsey* [2016] NSWSC 159 at [227]-[229] per Slattery J: "The plaintiff's submissions demonstrate that the general law principles of *Government of India v Taylor* still apply between Australia and the United Kingdom and that the UK tax gets are not able to be enforced against assets in this country. But the principles of *Government of India v Taylor* **are subject to modification by treaties made** between Australia and other tax jurisdiction."

2. Penal Laws

- (a) **What is penal? — can be direct or indirect penalty/punishment:**
- (i) **Enforcement by state, directly or indirectly:** In *Huntington v Attrill*, penal is any "proceeding even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly of punishment imposed for such breaches."
- (ii) **Public official recovering:** In order to render the imposition penal, the penalties **must** be recoverable "at the instance of the state or an official on its behalf or a member of the public in the character of a common informer" (*Doe v Howard*)
- **Note:** Even if there is a 'sniff' of a State being involved, it will be penal
- (iii) **Excludes foreign judgments of that kind:** Foreign judgments trying to enforce penal or revenue law also excluded
- (b) **Key Principles:** *United States of America v Inkley* [1989] 1 QB 255
- (i) **Whether it is penal is interpreted domestically using lex fori:** (1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law;

9.3 Anti-Suit Injunctions

1. **ASI v Stay:** Anti-suit injunction is not the same as a stay. A stay is a request in Court A for proceedings in Court A to halt. If the Court does allow the stay, then all they are doing is effecting their own proceedings. An anti-suit injunction is when you are asking Court A to restrain a person from going to Court B, so you are affecting another court. **Both** anti-suit injunctions and stays **may** be founded upon an exclusive jurisdiction clause. The difference is explained by *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] at [22]-[24].
 - (a) **ASI:**
 - (i) Application by a party to prevent actual or apprehended breach of contract by counterparty [23], **but** relief **may be refused** on equitable grounds or given on terms; plus to be exercised in accordance with principles of comity
 - (ii) Concerns whether foreign proceeding are vexatious and oppressive
 - (b) **Stay:**
 - (i) Attempt to stay proceedings commenced in breach of promise to litigate elsewhere; party generally not subject to personal jurisdiction of court; not a claim for injunctive relief and subject to jurisdiction of courts
 - (ii) Concerns whether local proceeding vexatious and oppressive.
2. **Definition:** An order by a court to restrain a person, subject to the jurisdiction of that court, from commencing or continuing proceedings in a court. It is directed to parties, not foreign courts. Personal jurisdiction over the party to be restrained is a prerequisite. Comity (respect for jurisdiction of foreign court) requires that the power to grant anti-suit injunction to be exercised with caution. May be permanent **OR** temporary. May be issued ex parte. Violation of the injunction may be contempt of court. Have to have personal jurisdiction over the person.
 - (a) **Contempt if proceedings despite ASI:** If a party initiates proceedings despite an anti-suit injunction on them, they will be in contempt of the Court.
 - (b) **Can support FNC:** If a party has an anti-suit injunction on them, the court can consider whether it is a forum non conveniens.
3. **Types of ASI: Argue Both, but just need one.** The **X Party** will argue that they want an anti-suit injunction. They will plead first that the domestic court is not inappropriate, and argue that the other party's proceedings in foreign jurisdiction will be vexatious or oppressive. At the same time, **X Party** will argue that as there are proceedings in NSW, the foreign proceedings will interfere with the court processes in NSW.
 - (a) **Inherent jurisdiction:** ASI in exercise of inherent jurisdiction to prevent abuse of process
 - (i) Focus is on disruption caused to Australian proceedings
 - (ii) Case-management considerations are openly relevant (think 'just, quick and cheap')
 - (iii) In theory, no need to prove Australian court is 'appropriate' first, because it is the only court with any interest in the matter: **CSR**
 - (b) **Equity: Anti-suit injunctions in exercise of equitable jurisdiction to restrain vexatious or oppressive foreign proceedings**
 - (i) Need to prove Australian court is 'appropriate' first
 - (ii) Then focus becomes whether foreign proceeding is problematic
 - (iii) The usual equitable defences apply: e.g. laches, unclean hands
 - (iv) Only available from Courts of Equity
4. **History:**
 - (a) In *Airbus Industries GIE v Patel* [1999], an aircraft crashed in India, killing or injuring two families of India origin who were British citizens living in London. Proceedings began in Bangalore against the airline and the airport authority. The natural forum was the Bangalore court in India and there were

proceedings on foot there. The Patels and other English passengers, however, having settled with the airline for its maximum liability, chose, in defiance of an order made by the Bangalore court, to sue the French manufacturers of the aircraft in Texas (which had no natural jurisdiction) on the basis of an American principle of no-fault liability, punitive damages and contingent fees. The Texas court had no principle of forum non conveniens and it was not an option for Airbus Industrie to apply to the Texas court to stay the proceedings there on that ground.

- (i) **Held:** The grant of an injunction, restraining parties from pursuing a remedy overseas, **must be supported** by clear evidence of a close connection with the UK jurisdiction. ‘... the domestic court as a matter of comity must take cognisance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens ... the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed.’ and ‘the former [the power to stay] depends on its voluntary adoption by the state in question and the latter [the power to make a restraining order] is inhibited by respect for comity’. The passengers were not to be restrained from suing in Texas. There were no English proceedings (other than the application to the English court for the injunction), and **nor did Airbus Industrie have any sufficient interest** in asking the English court for a remedy. As a general rule it was contrary to the doctrine of comity for an English court to grant an anti-suit injunction to restrain proceedings in a foreign jurisdiction unless the English forum had a sufficient interest in, or connection with, the matter in question to justify such interference;

5. **Procedure:** The Court should **FIRST** consider whether to stay proceedings **THEN** look into issuing an anti-suit injunction.

6. **Anti-suit injunction in international context:**

- (a) **Onus:** In *Sunland Waterfront (BVI) Ltd v Prudential Investments P/L [2013]*, (at [457]) the trial judge accepted that the onus is on the party seeking injunctive relief to establish prima facie vexation or oppression in terms of there being nothing to be gained by the party pursuing the foreign proceedings.

- (i) **Onus — Switches to other party arguing necessary:** It is then for the party resisting such relief to establish that there is some juridical advantage to be gained or legitimate interest in bringing and pursuing the foreign proceeding... [462] In our view, his Honour was correct in holding that once the applicant has established that a party is seeking to maintain two proceedings that seek substantially the same relief in two jurisdictions, the onus shifts to that party to show that maintaining the two proceedings is justified (*Sunland*).

(b) **Argue both, but either satisfied will give you ASI:**

- (i) **Inherent power — prevention of abuse of process:**

- **Test:** The Court will analyse the abuse of power. Whether there is an abuse of process depends on whether there is interference with the domestic process. If there is not, then there is no abuse (*TS Production LLC v Drew Pictures Pty Ltd (2008)*).
- **Application — no abuse:** In *TS Production LLC v Drew Pictures Pty Ltd (2008)*, it was held that there was “no evidence and no submission that the Illinois proceedings have interfered or will interfere with the Australian proceedings.” (at [54])

- (ii) **Equity — restrains unconscionable conduct:** In *CSR Ltd v Cigna Insurance Australia Ltd (1997)*, it emphasised the principle that the Court has the power to restrain unconscionable conduct or the unconscientious exercise of legal rights by granting anti-suit injunctions. In order for **X Party** to establish this, they must show

- **Limb One Test — Australian Court not clearly inappropriate:** Are the local courts unconscionable in the sense of the forum non conveniens test. Only in equity do we first ask “are we clearly inappropriate” for the sake of comity: “...the preclusive nature of an interlocutory anti-suit injunction and the importance of comity combine to require an Australian court to consider whether it is appropriate, in the sense that it is **not clearly**

10.3 Statutory Registration of Foreign Judgments

1. **Issue of registration:** No longer recognition and enforcement, it is called **registration** under the statute
2. **Relevant Legislation:** *Foreign Judgments Act 1991 (Cth)*, ss 3, 5-8, 10, 12 & *Foreign Judgments Regulations 1992 (Cth)*
3. **Purpose:** The Act extends the enforceability of foreign judgments in Australia by registration, thereby obviating the need to bring a cumbersome common law action based on the judgment debt. The aim of the Act has been described as being to establish a nationwide Commonwealth state cooperative scheme in which each jurisdiction would in effect be regarded as identical to each other, and hence with results akin to what might have been achieved by a wholly Commonwealth scheme.
 - (a) **Reciprocity of treatment:** If the Governor-General is satisfied that, in the event of the benefits conferred by this Part being applied to money judgments given in the superior courts of a country, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts, the regulations may provide that this Part extends in relation to that country (*FJA s 5(1)*) It is up to the Governor General to add countries to the Act. The nations that are included in the *Regulations*: here
4. **Relationship of legislation and common law:** Only the legislation applies to nations on the Regulations
 - (a) **Registrable judgments not to be otherwise enforceable:** No proceedings for the recovery of an amount payable under a judgment to which this Part applies, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia (*FJA s 5(1)*).
5. **Registration: procedure:**
 - (a) **Judgment creditor can apply:** (1) A judgment creditor under a judgment to which this Part applies may apply to the appropriate court at any time within 6 years after: (a) the date of the judgment; or (b) where there have been proceedings by way of appeal against the judgment, the date of the last judgment in those proceedings; to have the judgment registered in the court.
 - (i) **The approach court:** Supreme Court of a State or Territory or the Federal Court of Australia is to order the judgment to be registered (*s 6(2)*)
 - (b) **Procedural rules:** Registration proceedings conducted as per rules of the registering court (*s 6(3)*)
 - (c) **Power to make rules for notice of service:** Power to courts to make rules including for service of notice of registration (essential for time periods for D to apply to set aside registration) (*s 17(1)*)
 - (d) **Notice is important:** See *UCPR r 53.6* registration procedure in NSWSC — notice important: service of **notice** of registration on D **must generally** be personal **unless** otherwise ordered by Court or D has entered an appearance or is in default of appearance (*UCPR r 53.6(2)*)
 - (i) Service of the notice of registration of a judgment on the judgment debtor (*UCPR r 53.6(1)*)
 - *Notice is important especially when the person is abroad.*
 - (ii) **Exceptions:**
 - The judgment debtor has entered into an appearance or is in default of appearance (*UCPR r 53.6(2)(a)*)
 - The court otherwise orders (*UCPR r 53.6(2)(b)*)
 - (e) **Evidence:** Evidence required under *UCPR r 53.3*
 - (f) **If serving overseas, the service rules of that jurisdiction needs to be proved:** In *BP Exploration Co (Libya) Ltd v Hunt [1980] 1 NSWLR 496*:
 - (i) **Facts:** BP is a UK company and does not carry on business in AUS. Mr. Hunt is a resident of the US and has not been present in AUS. He has properties in AUS. BP registered the UK judgment according to FJA. Mr. Hunt applied to set aside the registration. FJA: service of the notice of registration must be personal unless, inter alia, the Court otherwise orders. Master dispensed with personal service, and, ordered that service be deemed to have been effected ten days after

a sealed copy of the notice had been forwarded by registered airmail and addressed to Mr Hunt at an address in Texas USA.

- (ii) **Cannot assume foreign law is the same as NSW law:** The procedure adopted by BP departs from the rules occurs in relation to its non-compliance with Pt 10, r 5, which requires non-personal service outside the NSW to be in accordance with the law of the country in which service was to be effected.

- **Application:** We **cannot assume** that Texas law is the same as that of the NSW, because this presumption is intended to operate against, not in favor of, the party whose obligation is to prove the foreign law. There was no evidence before the Master as to whether service by registered post was in accordance with the law of Texas. Service by such a mode was not proper. Nor was there any evidence before the Master as to why it was impracticable for any reason to serve the notice in accordance with the rules, to enable him to make an order for substituted service. Therefore, the service is void and of no effect

- (iii) **Registration should not be set aside — it is just void:** The registration should not be set aside. Until there has been validly served a notice of the registration of the judgment, the time in which Mr Hunt may move to have that registration set aside does not commence to run.

- The Court says that if you have not given notice, it does not change whether the registration fails or not. Usually when you register it, the Court will give a period of time where the judgment debtor gets a bit of time to set aside the judgment. Until you validly serve, that time does not start. Only then they have time to overturn it. During that period you cannot enforce that judgment until after that. It does not make the judgment invalid, it is just void.

6. Effect of registration:

- (a) **Same effect as if that Court is given:** Subject to sections 7 and 14:

- (i) (a) a registered judgment has, for the purposes of enforcement, the same force and effect; and
- (ii) (b) proceedings may be taken on a registered judgment; and
- (iii) (c) the amount for which a judgment is registered carries interest; and
- (iv) (d) the registering court has the same control over the enforcement of a registered judgment;

as if the judgment had been originally given in the court in which it is registered and entered on the date of registration (s 6(7))

1. Amount to be paid: Amounts can be paid in foreign currency or AUD (s 6(11))

- (a) **Reasonable costs can be added:** The registering court can add to the registered judgment reasonable costs associated with registration (s 6(15)(a))
- (b) **Must specify time period can be contested:** In the registration order, the registering court must specify time period within which the registration can be contested (s 6(4))
- (c) **Can enforce once that time period expires:** Can enforce once that period expires (s 6(10)) — the court will state the time period that the other person can enforce it. Until you validly serve the notice, that time period cannot start to expire. That time period is up to the Registrar and Courts.
- (d) **Appeal has to be done quickly once allowed:** The enforcement of the registered judgment **may** be stayed pending the outcome of an appeal (s 8(1)), which appeal **must** be pursued **expeditiously** (s 8(3))

2. What judgments can be registered/Foreign judgment in which the statute applies:

- (a) **Enforceable if final and conclusive:** This Part applies to an enforceable money judgment that:

- (i) (a) is **final and conclusive**; and (same in the common law sense)
- (ii) (b) was given in:
 - (i) a superior court of a country in relation to which this Part extends; or
 - (ii) an inferior court of such a country, being an inferior court in relation to which this Part extends (s 5(4))

(iii) **What is final and conclusive? Even if can be appealed:** For the purposes of paragraph (4)(a), a judgment is taken to be final and conclusive even though:

- (a) an appeal may be pending against it; or
- (b) it may still be subject to appeal;

in the courts of the country of the original court (s 5(5)).

1. **Exceptions — NZ and PNG:** NZ and PNG exception — excludes penal and revenue judgments except PNG income tax judgments and NZ tax judgments: s 3(1)

(a) **Cannot register judgment if already paid or not enforceable in original country:** A judgment is **not to be** registered if at the date of the application:

- (i) (a) it has been wholly satisfied; or
- (ii) (b) it **could not be** enforced in the country of the original court (s 6(6))

(b) **If partly paid, judgment not registered for whole amount:** If, on the day of the application for registration of a judgment, the judgment of the original court has been partly satisfied, the judgment is not to be registered in respect of the whole amount payable under the judgment of the original court, **but** only in respect of the balance remaining payable on that day (s 6(12))

(c) **Judgments means civil:** “Judgment” means civil judgment or judgment in criminal proceedings for compensation of injured party”: s 3(1)

(i) **Does not include:** Does not include matrimonial matters, administration of deceased estates, bankruptcy, winding up, mental health, guardianship of infants

(d) No regulations have been made under s 5(6) applying the statute to non-money judgments;

(e) **Does not apply judgment of superior court given on appeal from inferior:** The statute does not apply to a judgment of a superior court given on appeal from an inferior court unless the judgment of the inferior court is one to which the statute applies: s 5(9)

2. **Setting aside registration:**

(a) **Mandatory reasons to set aside:** A judgment **must** be set aside for: s 7(2)(a)

(i) **Ceased to be judgment:** (i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

(ii) **Registered for an amount greater than payable:** (ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or

(iii) **In contravention of this FJA:** (iii) that the judgment was registered in contravention of this Act; or

(iv) **Original court had no jurisdiction:** (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

- Lack of jurisdiction meaning: See ss 7(3)-(5) and 11 on when the original court had jurisdiction in personam

– **Had jurisdiction if:** The original court is taken to have had jurisdiction **if** the judgment debtor (s 7(3)):

- **Voluntary submitted + agreement:** Voluntary submitted, including by agreement (ss 7(3)(a)(i),(iii))
 - **Exception see below:** s 11 (see below)
- **Was plaintiff/counter-claim:** Was a plaintiff or had counter-claimed (ss 7(3)(a)(ii))
- **Resided in/principal place of business:** Had resided in or principal place of business in the country of the original court (s 7(3)(a)(iv)) (Look at common law definition)
- **Effected through/place of business:** If the judgment relates to a transaction that was effected through or at a place of business in the country of the original court (s 7(3)(a)(v)) (Look at common law definition)

10.4 New Zealand Judgments

1. **Background:** *Trans-Tasman Proceedings Act 2010* (Cth) Part 7
 - (a) **Must** be read in conjunction with the *Regulations* (*TTP Regulations 2012*)
2. **Enforcement of New Zealand Judgments Exclusively by Registration:**
 - (a) **Enforceable IF registered:** s 65 – registrable NZ judgment **can** be enforced in Australia **only if** registered
 - (b) **What is a “registrable NZ judgment”?:** s 66
 - (i) Must be final and conclusive
 - **Meaning:** *LFDB v SM [2015] FCA 725*
 - **Facts:** The applicants seek orders pursuant to s 72 of the *Trans-Tasman Proceedings Act 2010* (Cth) setting aside the registration of two freezing orders made by the High Court of New Zealand (“NZ High Court”) which have been registered in this Court. Each of the freezing orders is a “NZ judgment” within the meaning of the TTPA.
 - **How is final and conclusive interpreted?:** “Final and conclusive” should be interpreted according to common law
 - Attempt to set aside registration of freezing orders: successful because the orders are not final and conclusive
 - They are expressed to operate for a limited time “unless this order is continued or renewed by or no that date” – They are obtained in ex parte proceedings
 - (ii) Includes civil proceedings, compensation from criminal proceedings, criminal fines (as defined in *Regulations*), payment of expenses for meeting subpoena or appearing remotely, NZ market proceeding judgment
 - (iii) Includes non-money judgments
 - (iv) **But excludes** matters in s 66(2) and *Regulations*
 - (c) **Application:** Application to register NZ judgments (s 67)
 - (d) **AU Court MUST register:** AU court **must** register upon application (s 68)
3. **Setting aside registration — Public Policy:**
 - (a) **Must set aside if country to public policy / register in contravention / immovable property not in NZ:** s 72
 - (i) (1) An Australian court in which an NZ judgment is registered **must**, on application by a liable person under subsection (2), set aside the registration of the judgment **if**:
 - (a) the court is satisfied that enforcement of the judgment would be contrary to public policy in Australia; or
 - (b) the judgment was registered in contravention of this Act; or
 - (c) **both** of the following subparagraphs apply:
 - (i) the judgment was given in a proceeding the subject matter of which was immovable property, **or** was given in a proceeding in rem the subject matter of which was movable property;
 - (ii) that property was, at the time of the proceeding in the original court or tribunal, not situated in New Zealand
 - (ii) **Definition of public policy:** Substantial injustice may invoke public policy, but only if fundamental and of a high order (*LFDB v SM (No 3) [2017] FCA 80*)
 - Gross denial of procedural fairness can amount to judgment being contrary to public policy — high threshold

- Will not investigate propriety of proceedings in foreign court unless they offend against English views of substantial justice (*Pemberton v Hughes* [1899] 1 Ch 781)
- Fact that a foreign court takes a different approach to a problem is not gross procedural unfairness
- Courts slow to invoke public policy

(b) **Must not otherwise set aside:** Must **NOT** set aside otherwise s 72(3)

(i) S 73 - extensions of time: see *ANZ Bank New Zealand Limited v Cutfield* [2014] FCA 1214

(c) **Enforcement not subject to any rule of PIL i.e. common law:** s 79 – enforcement not subject to any rule of PIL in force in Australia; in particular may not refuse to enforce because would involve enforcement of NZ public law, NZ tax, civil pecuniary penalty

(i) (1) Enforcement in Australia of a registered NZ judgment is **not affected** by the operation of any rule of private international law (other than any rule in this Part) in operation in Australia.

(ii) **May not refuse enforcing NZ public law/revenue/civil pecuniary penalty:** (2) Without limiting subsection (1), an Australian court **may not refuse** to enforce, or delay, limit or prohibit the enforcement of, a registered NZ judgment on any of the following grounds:

- (a) enforcing the judgment would involve the direct or indirect enforcement in Australia of a New Zealand public law;
- (b) New Zealand tax is payable under the judgment;
- (c) the judgment imposes a civil pecuniary penalty or a regulatory regime criminal fine.

4. **Notice of registration and effect of registration:**

(a) S 73 - extensions of time

(b) S 74 - registered NZ judgment has same force and effect and may give rise to same proceedings for enforcement

(c) S 75 - enforceable in Australia only to extent it could be enforced in original court or other NZ court or tribunal

(d) S 76 - Aus court can stay enforcement to allow judgment debtor to appeal judgment in NZ (within a specified time) and give costs

(e) S 77 - costs and expenses of registration can be recovered (Aus criteria)

(f) S 78 - interest payable on judgment debt as if in NZ

5. **Stay of enforcement proceedings pending appeal by judgment debtor in New Zealand:**

(a) S 76 - Aus court can stay enforcement to allow judgment debtor to appeal judgment in NZ (within a specified time) and give costs

(b) **Application — allowed stay but on conditions:** *LFDB v SM (No 2)* [2016] FCA 295

(i) **Facts:** LFDB deposes that, because of that late service and the ensuing Christmas break, he had not been able to bring his appeal any earlier. He also deposes that the situation is further compounded by both the existing freezing orders which prevent him paying for legal representation in the appeal and an outstanding arrest warrant in New Zealand.

(ii) **Issue:** Should the AUS enforcement proceeding be stayed upon the appeal in NZ?

- Principles set out in *Dawn Jade* referred to (**see above**)

(iii) **Reasons for stay:**

- **Seek EOT:** First, purpose of the stay is to:
 - Enable the applicant to seek an EOT to apply Ellis J's final orders and to prosecute and appeal if an EOT is granted
 - If necessary, and depending upon the outcome of the NZ appellate proceedings, for the applicants to prosecute their originating applications in this Court to have the registered judgment set aside