

What is Private International Law

A body of principles, rules, policies and approaches that indicate how a foreign element in a legal problem or dispute should be dealt with.

Three General Classifications

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 courts power or willingness to decide the case.

Recognition and Enforcement

Where the case has preceded to judgment in other state or country, whether that judgment can be recognised or enforced in the forum.

Choice of Law

Even if the court has or will exercise jurisdiction to decide the case, the question as to whether it decides the case based on the law of the forum (*lex fori*) or in accordance with the law of the other state or country, whether the forum or the foreign law is to be the “law of cause” (*lex causae*) – This question is only relevant where the differing forums laws are likely to give a differing result.

Key Terms

Lex fori

The law of the forum/place

Lex loci delicti

The law of the place (locus) of the wrong (dereliction) where tort or crime occurred.

This is the fallback.

Forum non conveniens

An inconvenient forum

Lex causae

The law applicable to a settlement of a particular case.

Lex situs

The place where the property is situated.

Proper law of the K

The system of law governing K.

Oceanic Sun Line v Fay (1988)

FACTS: Fay, a Queensland resident, made a booking in New South Wales through a New South Wales travel agent, JMA, for a cruise in the Greek Islands on the ‘Stella Oceanis’, a vessel owned by a Greek company, Oceanic Sun Line

Fay was given an 'exchange order' by JMA which stated that it would be exchanged for a ticket when he arrived in Greece; that ticket contained a condition that the courts of Greece should have exclusive jurisdiction in any action against Oceanic, and also that it should be governed by Greek law

Fay was severely injured while taking part in trap shooting on board – Fay consequently brought a cause of action in negligence against Oceanic Sun in the Supreme Court of New South Wales, seeking damages for his injuries. Oceanic Sun unsuccessfully sought a stay of the proceedings in the High Court, largely on the basis of exclusive jurisdiction clause.

HELD: High Court unanimously held that the exclusive jurisdiction clause was not incorporated into the contract, being formed in New South Wales– and it was unknown to Fay and no attempts were made to bring it to his attention (Brennan J).

The contract was governed by New South Wales law, being the law which the parties intended to govern their contract or in the absence of such an express or implied intention, the legal system with which the transaction has its closest connection (Gaudron J).

Regarding the test for a stay of proceedings, the High Court declined to follow the House of Lords' test of the availability of a 'more appropriate forum' "for the interests of all the

parties and the ends of justice" – **Move away from UK method of 'more appropriate forum' to test from *St. Pierre* (1936):**

1. The defendant must prove that the continuance of the action would be an injustice, because it would be **oppressive, vexatious** or otherwise an **abuse of process**.
2. The stay must not cause an injustice to the plaintiff.

'Oppressive' means "seriously and unfairly burdensome, prejudicial or damaging" and 'vexatious' to mean "productive of serious and unjustified trouble and harassment" (Deane J).

The High Court concluded that the Supreme Court of New South Wales was not a clearly inappropriate forum, because:

1. The contract was formed in New South Wales.
2. The applicable substantive law was New South Wales law as the proper law of the contract.

Venter v Ilona (2012)

FACTS: Venter, **South African** engineer on the 'Ilona', was crushed to death at sea in **Thailand** when a hatch cover malfunctioned and collapsed. The 'Ilona' was owned by companies registered in **Jersey** and **New South Wales**, but itself was registered in **Australia**.

If case brought in Thailand statute of limitations of 1 year had expired. If in international waters, Australian jurisdiction with 3 year limitation applied.

Venter's American wife, brought a cause of action in negligence under NSW Act for the death of her husband, seeking damages for her depression. She settled her claim with the ship-owners, but in seeking contribution as a joint tortfeasor, the ship-owners joined as a cross-defendant the manufacturer of the hatch cover, MD Engineering, a German company.

MD Engineering sought to stay the proceedings in NSWSC, on the basis of the existence of an exclusive jurisdiction clause for all claims to be heard in Bochum, Germany, in its contract with the ship-owners.

HELD: The effect of the valid exclusive jurisdiction clause did not necessarily mean that the claim must be heard in Germany.

Nevertheless, the effect of the valid exclusive jurisdiction clause was that "the court will hold the parties to their bargain, and grant a stay of proceedings, unless the party seeking that the proceedings be heard can show that there are strong reasons against doing so", citing Hammerschlag J in *Global Partners Fund v Babcock & Brown (in liq)* (2010).

There were no strong countervailing reasons for it being inappropriate to hold the parties of the ship-owners and MD Engineering to their

bargain, so the exclusive jurisdiction clause was upheld and the proceedings were permanently stayed.

Objectives of Private International Law

Promote uniformity or predictability of legal consequences; Validation of legal transactions or relationships; Respect for the interests of other countries and states; International and interstate cooperation; Justice.

Three General Objectives

Consistency

One of the most widely accepted and longstanding notions attached to the objectives of modern conflicts law.

A reason a court might apply the law of Russia for example is to deliver an outcome similar to that which a court in Russia would have delivered had the case been heard in that forum. The result of this is that parties can predict the legal consequences of their actions even when they have contact with parties in other states or countries.

Discourages forum shopping, a practice denounced in *Brevington* (1988); *McKain* (1991); *Stevens* (1993); *Oceanic Sun Line* (1988).

The High Court also adopted choice of law rules for interstate and international tort cases to

deter forum shopping, in *John Pfeiffer* (2000); *Renault* (2002).

Rules of private international law are still bound by municipal laws, for that reason complete consistency is an unattainable goal.

Particular Justice

The fact that a case has foreign elements might indicate to the judge that the case might be best applied under the laws of that foreign jurisdiction.

The notion of the 'better law', where judge might apply the laws they think is most appropriate is one of the oldest reasons given by a judge for the application of a foreign law.

The 'better law' notion has also been one of the most openly decisive reasons used in USA.

Elsewhere and otherwise, judges rarely justify their use of foreign laws due to justice'.

Hague v Hague (No 1)

International/Interstate Comity

The idea of comity represented a discretionary power for recognising foreign law, short of an obligation to do so.

The idea that a French court must enforce a ruling from New York however in an act of

reciprocity is not necessary under the rule of comity – this would be too hard and fast. The general idea of comity is harmony.

The notion of comity does little explain how differing forums will utilise each others laws – instead it is regarded as a more broad concept.

Hilton v Guyot (1994)

"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 legislature, 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"

Sources of Private International Law

Five Primary Sources

1. Constitutional
2. International Conventions
3. Legislation
4. Judicial Decisions
5. Scholarly Writings

Constitutional

The Australian Constitution contains a number of provisions important to private international law questions within the Australian federation.

Under s 75(iv) the HC has an original jurisdiction in 'diversity matters' that arise between the residents of different states. However the scope of this has been narrowed somewhat through interpretation.

There has been debate about s 118 on 'full faith and credit' and interstate cases. With the HC hesitant through the 80s and 90s to provide it with a role in shaping the way interstate cases would be dealt with. Thus, in *John Pfeiffer* (2000) the clause was seen as proving that the law of a state where a tort occurred would govern an interstate tort case.

International Conventions

International instruments have no direct operation in any Australian jurisdiction. However Australia is signatory to:

1. ***The Hague Conference on Private International Law***
2. ***The International Institute for the Unification of Private Law***
3. ***United Nations Commission for International Trade Law***

This has led to a large number of conventions providing the basis for federal and state legislation relevant to private international law or harmonising Australian private law with that of other countries.

A large number of other conventions have been adopted by federal or state parliaments, all with implications on the determination of multi-state cases.

Legislation

There is a large body of federal legislation relating to the jurisdiction and powers of the Federal, Family and High Courts.

The ***Service and Execution of Process Act 1992 (Cth)*** is the most important law relating to the interstate jurisdiction of state and territory courts.

The states and territories also have legislation defining the jurisdiction of courts in multistate cases. However, since the ***Service and Execution Act*** came in to place in Australia, state legislation is rarely utilised in resolving international cases.

Increasingly the reform of PIL in Australia is marked by the passage of uniform legislation by all Australian parliaments.

Judicial Decisions

The main source of choice of law rules in Australia remains the common law. The decision in *Lane v ABC* (1997) ensured that any cross-jurisdictional decision must still conform to the Australian Constitution.

As Australia is a single common law system (i.e. common law extends across and through all states) this means that when a matter is solely based in the common law there can be no conflict. I.e. there must always be one issue of a statutory nature.

Scholarly Writings

Rarely recognised as a direct, authoritative source of law. However in PIL scholarly input is highly regarded. In many instances scholars will be called upon to clarify and give evidence on foreign laws.

Personal Jurisdiction

Common Law

Two grounds for personal jurisdiction at Common Law:

1. The defendant is present in the forum
2. The defendant submits to the jurisdiction of the forum

Presence: Individual

Gosper v Sawyer (1985)

Where the defendant has not submitted to the jurisdiction, a court *prima facie* has jurisdiction **“only against those present within the limits of its territory at whatever be the relevant time”** (Mason and Deane JJ).

It is immaterial that the defendant is not a resident of the territory of the forum court, as long as they are present.

Laurie v Carroll (1958)

A court has jurisdiction when the defendant is amenable to the court’s originating process, which is the time at which the writ is both issued and served.

The High Court reiterated that the amenability of the defendant to jurisdiction “still primarily depends upon nothing but presence within the jurisdiction”

If the defendant leaves the territory of the court before being served, then the court has no jurisdiction over that defendant (except, as in this case, if the person knew of the issue of the writ but left the jurisdiction to evade service).

Joye v Sheahan (1996)

FACTS: Following a corporate collapse – Sheahan set up a meeting with Joye, ostensibly to interview him, but Joye learnt that he was going to be served with originating process – so he left Australia and did not return.

HELD: Applied the HC judgment in *Laurie v Carroll*, which said: “If a defendant knowing of the issue of the writ goes abroad before personal service, or although he does not positively know of the fact of the issue of the writ, goes abroad to evade service, doubtless he may be treated as under notice of the obligation of its command”.

Perrett v Robinson (1980)

The purpose for which the defendant is inside the territorial borders of the forum is irrelevant, so service is valid in Australia even if the defendant came into jurisdiction for the particular purpose of being served.

The purpose for which the defendant is inside the territorial borders of the forum is irrelevant. The exception being where a plaintiff tricks, fraudulently entices or physically coerces the defendant into the forum – *Balrby v Jackson* (1976).

FACTS: Perrett was injured in a motor vehicle collision in the NT, due to the negligence of Mr Robinson, who was driving a car registered in Queensland. Although the plaintiff and the defendant were residents of the Northern Territory, the plaintiff requested the defendant to willingly travel to Queensland to be served, where the plaintiff would be entitled to higher damages than the Northern Territory.

HELD: McPherson J held that there could be no fraud where the defendant has entered the jurisdiction “willingly and knowingly for the purpose of being so served”, while Connolly J stated there was no injustice “in exposing the licensed insurer to the liability which it contracted to bear”

The defendant willingly complied with the plaintiff’s request, because his insurer would ultimately pay the damages. But FAI Insurance, joined to the action, argued that the Supreme Court of Queensland did not have jurisdiction, as the plaintiff and defendant had conspired to defraud it. The Queensland Court of Appeal held that there was jurisdiction as the defendant was validly served, with no fraud committed.

Personal Service

r 10.20(1)

UCPR

“Any document required or permitted to be served on a person in any proceedings may be personally served, but need not be personally served unless these rules so require or the court orders personal service”.

r 10.20(2)(a)

UCPR

Any originating process under the NSW Courts must be personally served. For something to be personally served the document must be either:

- > Accepted by the person when you provide it to them
- > Put down in the persons presence and telling them the nature of the document
- > If they are violent the document need only be left as near as practicable to the person.

Substituted Service

r 10.14(1)

UCPR

If a document that is required to be served on a person cannot practicably be served on the person, then the court may make an order directing that “such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the persons concerned”.

(2) Such substituted service constitutes person service.

Presence: Corporation

Wimborne (1979)

For a court to have jurisdiction over corporation, it must be carrying on business in the forum. 3 criteria establishing if corporation is carrying on its business in the forum:

1. The corporation is represented in the forum by an agent, who has authority to make binding contracts with persons in that place.
2. The business of the corporation is conducted as some fixed and definite place within the forum.
3. The business of the corporation has been conducted in the forum for a sufficiently substantial period – (Holland J)

Other factors: Whether the name of the corporation is displayed at the agent's place of business; Whether the corporation owns or leases premises; Whether the corporation employs staff.

Pan Australia v 'Comandate' (No 2) (2006)

A foreign plaintiff (individual or corporation), who is not otherwise subject to the jurisdiction of the court yet brings proceedings in the court, submits itself by necessary implication to any counter-claim which would operate as a defense to the proceeding or could be relied upon as a set-off or cross-claim arising out of the same subject matter which would reduce or extinguish the plaintiffs claim (Rares J).

Presence: Corporations and Statute

Every corporation conducting business in Australia is amenable to the jurisdiction of all courts, even if the corporation does not conduct business in the forum of the particular State or Territory.

s 601CD

Corporations Act (Cth)

Requires any foreign corporation desiring to carry on business in Australia to be registered with the Australian Securities Investments Commission and to nominate a registered office and local agent in Australia.

ss 9 and 15

SEPA

Provides that a foreign corporation that is registered in any State or Territory is amenable to the originating process of courts in every State or Territory.

Presence: Corporations Service

r 10.22

UCPR (NSW)

Personal service on a corporation may be effected by personally serving the document on a principle officer of the corporation, or by serving the document on the corporation in any other manner according to law.

s 109X

Corporations Act (Cth)

A document may be served by:

- a. Leaving it at or posting it to the corporations registered office.
- b. Personal service to a director of the corporation who resides in Australia or an external Territory.
- c. Leaving it at or posting it to the liquidator's office (if a liquidator has been appointed).
- d. Leaving it at or posting it to the administrator's address (if there is one).

s 601CX

Corporations Act (Cth)

A document may be served on a foreign corporation by:

- a. Leaving it at or sending it by post to the registered office of the foreign corporation – s 601CX(1)(a)
- b. Leaving it or sending it to the office of the local agent of the foreign corporation – s 601CX(1)(b)
- c. Delivering a copy personally to 2 directors, where 2 or more directors of the foreign corporation reside in Australia or an external Territory – s 601CX(3)
- d. Delivering a copy personally to the director of a foreign proprietary corporation who resides in Australia – s 601CX(3A)

Jurisdiction Based on Submission

By Agreement

r 10.6(1)

UCPR (NSW)

The D can submit to the jurisdiction of the court by “any agreement, acknowledgment or

undertaking by which the party to be served is bound”.

This extends to allowing the service of originating process of a D outside Australia, where the person to be served has submitted or agreed to submit to the jurisdiction of the court – **r 11.2(1)** and para **(h)** of **sch 6**.

Submission to agreement is most commonly found in a forum clause which constitutes a voluntary submission to the jurisdiction of the forums courts in a binding contract, as was the case in *Garsec v Sultan of Brunei* (2008).

***Howard v National Bank* (2002)**

“If a defendant in or outside the Commonwealth agrees in a formal or informal ad hoc way that the originating process may be served on it at a place in or outside the Commonwealth, service in accordance with that agreement will be effective to give the Court jurisdiction in the action over the defendant”.

By Appearance

***Wimborne* (1979)**

A foreign plaintiff who brings an action in the jurisdiction does not make an ‘unlimited’ submission to it, but a submission “limited by reference to the subject matter he has placed before the court” (Holland J).