Some Concepts and Persistent Issues

What is Private International Law?

✦ Private international law is the 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.
✦ In Australia, applicable to both international and interstate cases, maybe more commonly used in interstate than in international cases.
  * The states and territories of Australia as separate countries, at least with respect to matters, such as tort, contract and property, within their legislative competence.

Difference between Public International Law and Private International Law

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<th>PUBLIC INTERNATIONAL LAW</th>
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<td>✦ Public international law comprises customary international law, treaties, conventions, and legislation passed by international agencies such as the United Nations.</td>
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<td>✦ Its effectiveness lies only in countries voluntarily complying with its rules and, at least in a “dualist” legal system like Australia’s, it cannot be enforced directly unless implemented through legislation passed by a competent parliament.</td>
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<td>✦ Public international law is universal, in the sense that the rules of public international law are the same regardless of where in the world they are considered.</td>
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<th>PRIVATE INTERNATIONAL LAW</th>
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<td>✦ Private international law has been recognised as an aspect of municipal law.</td>
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<td>✦ Its legal sources are new constitutions, statutes and, in common law countries, judicial decisions.</td>
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<td>✦ The ordinary courts can therefore enforce it.</td>
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<td>✦ Private international law regulates legal relations between private persons and corporations.</td>
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<td>✦ It therefore deals with problems encompassed by different departments of the private law, such as family law, contract, tort, property and corporations, but only to the extent that these problems also involve a foreign element.</td>
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<td>✦ Not universal because municipal law frequently differs from country to country and even from state to state.</td>
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Three Persistent Issues

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<th>JURISDICTION</th>
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<td>✦ Which court has jurisdiction to deal with the matter?</td>
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<td>✦ This requires a connection between the subject matter and the inherent jurisdiction of the court.</td>
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<th>APPLICABLE LAW</th>
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<td>✦ Which law is applicable to the matter?</td>
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<th>THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS</th>
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<td>✦ How can the judgment be enforced?</td>
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Terminology & Case Studies

- Forum non conveniens – Common law legal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties.
- Test is whether the court is a clearly inappropriate forum: Oceanic Sun Line v Fay [1988].
- Lex fori – Laws of a forum: laws of the jurisdiction in which a legal action is brought (procedural)
- Lex causae – Laws chosen by the forum court to arrive at its judgment (substantive).
- Lex loci delicti – Law of the place the action was committed.
- Lex situs – Law of the place of the (corporation or property).
- Lex loci contractus – Law of the place of contracting.
1. Plaintiff (Fay) booked a cruise in Greece from the Defendant (Oceanic Sun Line).
2. Upon paying the fare, Plaintiff was given an ‘exchange order’ which stated that it would be exchanged for a ticket upon boarding the cruise ship.
3. When the Plaintiff arrived at Athens for the cruise, he was handed a ticket containing a condition that Greek courts would have exclusive jurisdiction in any action against the owner.
4. Fay sustained an injury during the voyage and claimed negligence against Oceanic in the NSW Supreme Court (NSW is where he had purchased the ticket).
5. Oceanic Sun Line sought a stay of the proceedings, largely on the basis of exclusive jurisdiction clause.

Held:
The Supreme Court of New South Wales could not be regarded as a clearly inappropriate forum. On the contrary, as the court of the locus contractus, it afforded the most appropriate forum.

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

**Jurisdiction Clause**

- In this case, the exclusive jurisdiction clause read:
  - “Notwithstanding anything to the contrary contained herein, any action against the Carrier must be brought only before the courts of Athens Greece to the jurisdiction of which the Passenger submits himself formally excluding the jurisdiction of all and other court or courts of any other country or countries which court or courts otherwise would have been competent to deal with such action.”

- The general rule is that where the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its performance, the courts of this country regard that agreement as a submission of such disputes to arbitration and will, in the absence of countervailing reasons, stay proceedings brought here to decide those disputes. (Brennan J)

- But when a clause purporting to confer exclusive jurisdiction on the courts of a foreign country to determine claims arising under or out of the performance of a contract of carriage is found in a ticket issued to a passenger who, in this country, has paid his fare for carriage on a ship, aircraft, or vehicle operated by the defendant, a preliminary question must be decided: is the clause a term of the contract of carriage? -- i.e., threshold question -- whether the jurisdiction clause was even a part of the contract?

- Here, as the contract of carriage was made when the exchange order was issued and as the exclusive jurisdiction clause contained in cl. 13 of the ticket was not then known to Dr. Fay and as insufficient was done to bring such a clause to his attention, that clause was not a part of the contract.

- As it was not a part of the contract, the plaintiff was not bound by it.

- On the other hand, Brennan J also considered the position if the exclusive clause had been a part of the contract at [19].
- He pointed out if the plaintiff was bound by the clause (as it was a part of the contract), the plaintiff’s case should be determined by Athenian courts unless “a strong bias in favour of maintaining the special bargain” could be proved.

- N.B. principles regarding stay on basis of exclusive jurisdiction clause are distinguishable from those relating to stay on basis of forum non conveniens.

**Forum Non Conveniens**

- The test for forum non conveniens is whether the court is a clearly inappropriate forum.
- 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. -- Here, the Oceanic Sun Line failed to do so.
- Local court will be a clearly inappropriate forum if continuation of the proceedings in that court would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging or in the sense of productive of serious and unjustified trouble and harassment. [per Deane J]

**N. B.** Onus on the defendant to show that the forum chosen by the plaintiff is clearly inappropriate.

**Objective Proper Law**

- In this case, Wilson and Toohey JJ identified the proper law of the contract was Greek law (Brennan agreed with them):
  - Subject matter of contract was cruise on Greek registered ship (Stella Oceanis)
  - Departed and returned to Greek port
  - Cruise almost entirely in Greece
  - Boat owned by Greek Co
- Relevance of exclusive jurisdiction clause:
  - If the Greek EFJC had formed part of contract of carriage, this would have been a ‘significant indicium that Greek law is the proper law of that contract’

**Consent: Offer and Acceptance -- Law Applicable to Incorporation of Term**

- In this case, HCA applied NSW law (i.e., lex fori) to determine whether a term on the ticket was a term of the contract of carriage. i.e., lex fori applied to determine issue of incorporation of the term.
- This point of view was applied in Venter v Ilona MY Ltd, that is, forum law determined incorporation of terms.
1. Introduction

- N.B. the point is that the contract should be existed, but the issue is whether parties agreed on the term specified in the contract.
- Academics do no like this:
  - Michael Pryles, ‘Judicial darkness on Oceanic Sun’ (1988) 62 ALJ 774 critique: “All Anglo-Australian text-writers are unanimous in the view that the proper law determines the validity of a contract, including the validity of particular terms of a contract, and also determines whether terms are to be implied into the contract. Was it not, therefore, a matter for Greek law to determine whether cl 13 formed part of the contract?”

Venter v Iona MY Ltd [2012] NSWSC 1029

- In this case, the issues were:
  - Whether forum non conveniens i.e. was NSWSC clearly inappropriate forum per Oceanic?
  - Which law was appropriate (NSW, German or Thai?)
- Established fact: yacht was in Thai waters at time of accident.
- The contract was made in Europe and to be governed by German Law.
- No part of the contract was purported or actually performed in Australia.
- Respondent failed to establish compelling reasons for requiring proceedings to be heard before NSWSC rather than Germany.
- Therefore, stay of proceedings ought to be granted having regard to all relevant factors.

Sources of Law and Doctrine of Stare Decisis

**Sources of Law**

- Only one common law however there is differing statutory law at the State and Federal level.
- Major sources include:
  - Constitution;
  - International Conventions — no direct operation unless ratified.
  - Legislation;
  - Judicial decisions;
  - Scholarly writings — rarely.

**Doctrine of Stare Decisis**

**Within Australia**

- Binding precedent:
  - Judge must extract concept from statute before him or her by interpretation
  - Decisions of other courts may be relevant but not binding in relation to the meaning of similar legislation even if words are identical or similar
  - Court must interpret statute as well as apply the statute to the facts
- Persuasive authority:
  - Court generally follows its own previous decision on legislation unless clearly wrong
  - Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Cth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. The same principle applies to non-statutory law: Fairh Constructions v Say-Dee [2007] HCA 22.
  - Intermediate appellate courts are not legally bound by their own earlier decisions, but should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision is “plainly wrong” and, such an error having been identified, there are “compelling reasons” to depart from the earlier decisions: Greer v Fisher [2009] NSWCA 76.
  - High Court is not so constrained if it feels that interpretation is wrong.

**Overseas Judgments**

- Whatever may have been the justification for such statements in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal for this country, those statements should no longer be...
seen as binding upon Australian courts... the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning: Cook v Cook [1986] HCA 73.

However, if the precedences are based on a process of statutory construction which is not part of the Australian laws, in the absence of contrary authority, it can be followed: Union Shipping New Zealand Ltd v Morgan [2002] NSWCA 124.
Jurisdiction General

• Jurisdiction is the authority that a court has to deal with a particular case, according to its own rules of competence.
• Australian Courts will be jurisdictionally competent if they have both subject matter jurisdiction over the particular claims and
   defences, and personal jurisdiction over the parties to the dispute.
   + Subject matter jurisdiction
     • The superior courts of the states and territories have general common law and equitable jurisdiction.
     • The Federal and Family Courts’ subject matter jurisdiction is limited to those matters granted by statute.
   + Personal jurisdiction
     • Principally concerns the amenability of the defendant to litigation.

Personal Jurisdiction

+ There are only two grounds of personal jurisdiction at common law:
  • The defendant is present in the forum; or
  • The defendant submits to the jurisdiction of the forum court.

Territorial Jurisdiction based on Defendant’s Presence

1. An employee in New South Wales applied to the Industrial Commission of New South Wales for orders under the
   Industrial Arbitration Act 1940 (NSW), s 88F(1), to avoid or vary provisions of a superannuation fund of which he was a
   member.

2. Membership of the fund was a condition of his employment. It was administered by trustees all of whom are ordinarily resident
   in Victoria.

3. The registrar ordered that process be served on the trustees in Melbourne.

4. They entered a conditional appearance and moved to have service of process set aside.

Held.
The Industrial Commission had no power under New South Wales law to order service of the application out of the jurisdiction.

Exceptions -- defendant not being present at the time of service -- however, still within the jurisdiction of the court
+ Defendant left the forum after initiating process was issued, either knowing that process had been issued, or
   leaving to evade service of process: Laurie v Carroll.

Gosper v Sawyer (1985) 160 CLR 548

• The general rule is that a Supreme Court will have power to hear and determine an action when the defendant is physically
   present in the relevant state or territory at the time of service.
   • And that the Federal Court and the High Court (in its original jurisdiction) will have power to hear and determine an
     action when the defendant is physically present in Australia at the time of service.
   • Here, the Industrial Commission of New South Wales would have jurisdiction over the trustees in Melbourne based on their
     presence in New South Wales at the date of service of the originating process.
   • Accordingly, the registrar could not so ordered.
The Industrial Arbitration (General) Regulations (NSW), reg 157, conferred power only to regulate proceedings that were
   within the jurisdiction of the commission. It did not confer power to enlarge jurisdiction by permitting service out of the jurisdiction. (per Gibbs CJ, Wilson and Dawson JJ).

Laurie v Carroll (1958) 98 CLR 310

• The case illustrates at common law, a plaintiff’s right to a court’s jurisdiction can depend on where the defendant was when
   the initiating process was issued or served.
• The basic principle on which jurisdiction rests, according to Dixon CJ and Williams and Webb JJ, is that, at the issue of the writ,
   the defendant “may be regarded as falling under the command of the writ as an exercise of jurisdiction”.
• The important point is that, it is the service of the writ which perfected the defendant’s duty to obey its command to appear
   before the court.
• Therefore, jurisdiction is established when the defendant is served within the forum, even if the defendant subsequently leaves.
• It follows that, jurisdiction is not generally established over a person who is in the forum at the time initiating process is issued
   but who leaves before it can be served.
• However, a person who left the place after initiating process was issued and who either knew that process had been issued or
   who left to evade service of process will be regarded as within the jurisdiction of the court.
2. Personal Jurisdiction

1. In this case, the issue before the court was the power of a Registrar of the Federal Court to order substituted service upon a person not then present in Australia of a summons issued pursuant to s159A of the Corporations Law to attend for examination about a corporation's examinable affairs.

Joye v Sheahan (1996) 62 FCR 417

- Rule in Laurie v Carroll was confirmed and followed.
- Expand the rule in Laurie v Carroll — jurisdiction is unlikely to be established if the defendant were only in the forum's airspace at the time initiating process was issued.

Purpose of the presence does not matter.

✦ Generally, the purpose for which the defendant is inside the territorial borders of the forum is irrelevant to the question of the forum court's jurisdiction: Perrett v Robinson (1985).
✦ There is an established exception if the plaintiff tricked, fraudulently enticed or physically coerced the defendant inside the borders of the forum territory in order to have the defendant served: Watkins v North American Land Timber Co Ltd (1904).

Perrett v Robinson (1985) 1 Qd R 83

* The case illustrates the general principle that the purpose for which the defendant is inside the territorial borders of the forum is irrelevant to the question of the forum court's jurisdiction.
* To Connolly J, the company could not have been defrauded since, under the contract of insurance, it had agreed to bear liability for any damages awarded in Queensland.
* McPherson J held that, in any event, even if FAI were the real defendant to the action it had a presence in the state as it conducted business there, and so it was within the jurisdiction of the SC.

HRH Maharaneene of Baroda v Wildenstein (1972) 2 QB 283

* In this case, the Privy Council held the writ had been properly served on the defendant in this country ... [M] has validly invoked the jurisdiction of our courts in this, the one and only action she has brought", per Lord Denning MR.
* The decision was supported by Edmund Davies LJ who added that: “Both in taking ... out [the writ] and serving it (albeit when the defendant was only fleetingly on British soil) [M] was doing no more than our law permits ... Some might regard her action as bad form; none can legitimately condemn it as an abuse of legal process ...”

Forum Non Conveniens

* In the present case, in considering the forum non conveniens test, one of the important considerations for the court was the admission of the evidence and the unreasonable delay in French court.
* We are told that the courts of France appoint their own court experts and might hesitate about receiving the opinion of experts from England. It would be a matter for their discretion. In any case, the French courts might not themselves see the witnesses or hear them cross-examined, but might only read their reports. ... [T]here would be no difficulty in M Wildenstein’s experts ... giving evidence here orally with all the advantages that that carries with it. So there is no injustice in that regard in having it tried in England.

Element 2: Service

- It suffices that the defendant is physically present within the jurisdiction at the moment service.
- The length of presence and the purpose for the defendant’s presence are immaterial: HRH Maharaneene of Baroda v Wildenstein; Perrett v Robinson.
- Provided that the defendant has been served in the jurisdiction, it is immaterial that the dispute has no connection with the forum. — e.g., it may concern a contract made and to be performed abroad between parties who normally reside there: Oceanic Sun Line Special Shipping Co v. Fox.
- The onus lies on the defendant to show that the forum chosen by the plaintiff clearly inappropriate: Fox.

General Service
A writ issued out of the HC or the FC may be served on any defendant anywhere in Australia.
On the other hand, any process issued out of a state or territorial court must be served in accordance with the SEPA. Thus, it is no longer possible, to serve process within Australia in pursuance of the civil procedure rules of the states and territories as an alternative option.

Substituted Service
- Service in accordance with UCPR r 10.14 is taken to constitute personal service: UCPR r 10.14(4).

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10.20(2)(a) Personal service required in originating process, for following courts:
- Supreme Court;
- District Court;
- The Industrial Relations Commission;
- The Land and Environment Court;
- The Dust Diseases Tribunal.
10.20(2)(b) Methods of service (for originating process):
- May be personally served on the defendant; (i)
  - May be left, addressed to the defendant, at the defendant's business or residential address, with a person who is apparently of or above the age of 16 years and apparently employed or residing at that address, (ii)
  - if served by the Local Court, it may be sent by post, addressed to the defendant, to the defendant's business or residential address in an envelope marked with a return address. (iii)

10.21 How personal service effected generally
- Leaving copy of document with the person; [UCPR r 10.21(1)]
- If the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document; [UCPR r 10.21(1)]
- If, by violence or threat, a person attempting service is prevented from approaching the person to be served — personal service by delivering document to the person as near as practicable. [UCPR r 10.21(2)]

Corporations
- CA requires any foreign company intending to carry on business in Australia to be registered with the ASIC (s 601CD, CA), and to nominate a registered office (s 601CT, CA) and a local agent in Australia (s 601CG, CA).
  - either has been registered under the CA;
  - or has applied to be so registered and the application has not been dealt with.
- Statutory examples of carrying on business:
  * Offering debentures in the jurisdiction: s 601CD(2)(a), CA;
  * Being a guarantor body for debentures offered in this jurisdiction: s 601CD(2)(b), CA;
  * Administering or using a share transfer office in Australia: s 21(2)(a), CA;
  * Administering, managing or otherwise dealing with property in Australia as an agent, legal personal representative or trustee, whether by employees, agents or both: s 21(2)(b), CA.
- Non-carrying on business: s 21(3), CA.
  * Being or becoming a party to a proceeding or effect settlement of a proceeding;
  * Holding meetings of directors or shareholders re internal affairs;
Maintaining bank account
Effecting a sale through an independent contractor
Conducting an isolated transaction completed within 31 days, not being a number of similar transactions repeated from time to time.
Investing any of its funds or holding any property.
Although the CA is federal legislation, the company must still nominate a state or territory for registration: s 119A, CA.
However, even if the company is registered in a different state or territory to the forum, it will still be amenable to the initiating process of forum courts served in accordance with the provision of the SEPA -- see service below.

What if the foreign company present in the jurisdiction but not registered? -- Common law

At common law, a company is considered to be present in a place and within the common law jurisdiction of its courts if it carries on business there.
Common law criteria for carrying on a business in the forum: NCB v Wimborne.
  * The company is represented in the forum by an agent who has authority to make binding contracts with persons in the place;
  * The business is conducted at some fixed and definite place in the forum; or
  * The business has been conducted in the forum for a sufficiently substantial period.
Note, presence is not established by appointing solicitor to commence or defend particular legal proceedings in the jurisdiction: NCB v Wimborne.

**National Commercial Bank v Wimborne (1979) 11 NSWLR 156**

**Presence**
- The issue, for our purpose, was whether NCB was present/carrying on business in NSW and therefore subject to common law jurisdiction of NSWSC for abuse of legal process in Switzerland.
- As a company's separate legal identity is a legally constructed fiction, it naturally does not have a tangible presence anywhere.
- At common law, a company is considered to be present in a place and within the common law jurisdiction of its courts if it carries on business there.
- Here, Holland J identified three criteria that tend to establish that a company is carrying on a business in the forum:
  * The company is represented in the forum by an agent who has authority to make binding contracts with persons in the place;
  * The business is conducted at some fixed and definite place in the forum; or
  * The business has been conducted in the forum for a sufficiently substantial period.

**Submission**
- For submission, Holland J stated that in order to establish such a waiver, "the facts must show a voluntary act unequivocally evinced an intention to abandon or not assert a right"; -- a question of fact.
- If the defendant consistently maintains its objection to jurisdiction, it will not be taken as having submitted even it makes other applications which go beyond a protest to the jurisdiction.
- Further, here, letters by the solicitor re intention to proceed in court was not held to constitute submission to court's jurisdiction.
  * This is because in determining whether conduct constitutes submission to a court's jurisdiction, regard only to what happens in court proceedings.

**Agency relationship?**

**Adams v Cape Industries plc (1990) Ch 433**
- In the present case, the tort victims tried to enforce the judgment in the UK courts.
- The requirement, under conflict of laws rules, was either that Cape had consented to be subject to Texas jurisdiction (which was clearly not the case) or that it was present in the US.
- The question was whether, through the Texas subsidiary, NAAC, Cape Industries plc was 'present'.
- For that purpose, the claimants had to show in the UK courts that the veil of incorporation could be lifted and the two companies be treated as one.
- In this case, the Court of Appeal held that for a company to have a presence in the foreign jurisdiction, both of the following must be established:
2. Personal Jurisdiction

- the company has its own fixed place of business (a branch office) in the jurisdiction from which it has carried on its own business for more than a minimal time.
- the company's business is transacted from that fixed place of business.
- On the facts, the Court of Appeal held that Cape had no fixed place of business in the US such that recognition should not be given to the US judgment awarded against it.
- whether it has authority to contract on behalf of the principal;
- factors of relevance of carrying on the business;
- did the UK company reimburse the representative for accommodation of staff etc.?
- Therefore, to prove an agency relationship, need to find a close degree of control so that the subsidiary is not running its own business.

Jurisdiction Based on Defendant's Submission

At common law, a court can also establish jurisdiction over a person by that person's consent or voluntary submission to the court's jurisdiction. -- two particular means by which this submission might be established:

- submission by agreement; and
- submission by conduct.

Submission By Agreement

- Express agreement -- e.g., parties agree to exclusive jurisdiction of the courts of NSW: UCPR r 10.6.
- Instructing lawyers to accept service: UCPR r 10.13.


- Therefore, compare the following positions:
  - If the defendant left the jurisdiction before the originating process was issued, and does not subsequently submit to jurisdiction or enter an appearance, the court has no jurisdiction by reason of the fact that the defendant was formerly in the jurisdiction even if it can be proved that the defendant left earlier in order to avoid service: Laurie v Carroll.
  - However, the position will apparently be different if, although absent from the jurisdiction, the defendant, at the time the originating process was issued, had authorised a representative or agent to accept service, and this will be so even though authority to accept service may have been withdrawn subsequently: see this case, and Filipowski v Frey.

Submission by Conduct

Submission by Appearance

- Generally speaking, a defendant who actively challenges the jurisdiction of the court must act consistently with a protest against jurisdiction, otherwise, their acts may be regarded as being inconsistent with maintaining objections.
- In considering whether the conduct constitutes submission to court's jurisdiction, regard only to what happens in court proceeding. Accordingly, letters by solicitors re intention to proceed in court does not amount to inconsistent acts: Wimborne.
- Examples of inconsistent acts:
  - Where the defendant agreed to allow the substantive claim to be heard: National Commercial Bank v Wimborne;
  - Where the defendant's lawyer made oral submission on the merits: National Commercial Bank v Wimborne;
Where the defendant counterclaimed on a ground related to the plaintiff’s claim: National Commercial Bank v Wimborne, Vertzyas v Singapore Airlines.

Where the defendant asked or particulars or asked the plaintiff to submit to medical examination: Vertzyas.

Where the defendant contested the merits of the case: Garsec v Sultan of Brunei.

Where the defendant consented to interlocutory orders in the cause;

Where the defendant argued against the extension of the limitation period applicable to the claim;

Where the defendant produces documents in response to a subpoena; or

Where the defendant applied for an order for security for costs.

Generally, a party has submitted to the jurisdiction of the court in one proceeding does not mean that it has submitted that jurisdiction for all purposes. However, if a different cause of action raised by a cross-claim is nevertheless founded on or directly arose out of the same subject matter as that of the initial action, submission to the jurisdiction for the purpose of the initial action would also extend to the different course of action raised in the cross-claim: Marlborough Harbour Board v Charter Travel Co.

Vertzyas v Singapore Airlines (2000) 50 NSWLR 1

• In the present case, the Court held in order for a party to be treated as having submitted to the jurisdiction of the court so as to waive an objection to such jurisdiction, it has to do acts in the court proceedings that are inconsistent with its maintaining such an objection, such as raising the merits of the other party’s case. However, not every act that seeks to raise the merits of the other party’s case will be regarded as inconsistent with maintaining an objection to jurisdiction: only those acts that manifest an unequivocal intention to contest those merits will be regarded as inconsistent with maintaining an objection to jurisdiction.

• Here, the following acts of the defendant manifested an unequivocal intention to contest the case on its merits. (which was inconsistent with maintaining an objection to jurisdiction):
  • asking for particulars; and
  • asking the plaintiff to submit to medical examination.

• The rationale was that asking for particulars and for medical examination clearly dealt with the substantive issues of the case and therefore was inconsistent with objection that the court had no jurisdiction.

National Commercial Bank v Wimborne (1979) 11 NSWLR 156

Marlborough Harbour Board v Charter Travel Co (1989) 18 NSWLR 223

• In present case, the issue for the court to decide was whether Marlborough also submitted to jurisdiction of NSW court re Ship Claim by submitting re Indemnity Claim.

• For this point, the court held while the mere circumstance that a foreign party has submitted to the jurisdiction of the court in one proceeding does not mean that it has submitted to that jurisdiction for all purposes, the fact that a cross-claim involves a different cause of action from that which a party has brought does not preclude it from being raised.

• However, if a different cause of action raised by a cross-claim was nevertheless founded on or directly arose out of the same subject matter as that of the initial action, submission to the jurisdiction for the purpose of the initial action would also extend to the different cause of action raised in the cross-claim.

• Here, the essential subject matter was the sinking of the ship. Both the Indemnity Claim and Ship Claim arose from the subject matter of the ship sinking.

• As a result, where a New Zealand company had submitted to the jurisdiction of a New South Wales court to hear an action for damage to property and personal injury, it could not object to an amended claim raising other aspects of damage to property where the amended claim was founded on and arose out of the same subject matter as the original claim.

Garsec v His Majesty the Sultan of Brunei (2008) NSWCA 211

• The case is mainly about “Forum non conveniens” doctrine.

• For our purpose here, the issue was whether the Sultan could withdraw appearance and went to another court.

• Here the facts indicated that the Sultan had took steps relating to the merits of the case despite legal advice re preserving jurisdiction.

• Accordingly, he could not withdraw appearance and went to another court.

• So, contesting the merits of the case is a significant factor here.

Forum Non Conveniens
• The defendant argued that the proper law of the contract was that of Brunei, pursuant to which the Sultan was immune from suit in any court, and that New South Wales was a clearly inappropriate forum.
• In this case, the Court held the fact that there was no other available forum in which to litigate the proceedings was relevant, but not decisive, in deciding whether a stay of the proceedings should be granted.
• Accordingly, there might be some circumstances in which the Australian court was a clearly inappropriate forum even if there was no alternative foreign forum.
  • If the subject matter of a dispute had a tenuous connection with Australia such that an Australian court would have jurisdiction concerning it, but all the witnesses and documents were in another country and the transaction was governed by the law of that other country it would be easy to reach a conclusion that the Australian court was a clearly inappropriate forum, regardless of whether there was another place that could hear the dispute.
  • In the present case, the defendant enjoyed the immunity conferred by Article 84B of the Constitution of Brunei, which, according to the Court, were matters of substance, rather than procedure.
• Here, the Court held bringing proceedings in New South Wales to prevent the defendant from pursuing remedies available in Brunei but not available in Australia was in itself oppressive.

Choice of law issue -- substantive & procedural
• As to the choice of law issue, the Court held sovereign immunity, established under the law of Brunei, was substantive, not procedural, because it was not directed towards “governing or regulating the mode or conduct of court proceedings”.
  • A law whereby no duty is owed is substantive law.
  • Similarly, a law whereby a person has no liability is substantive law.
  • This is because it does more than govern or regulate the mode or conduct of court proceedings - it stipulates the inevitable outcome of them.
• Substance and procedure distinction aims to minimise difference in way forum and foreign court might handle the case, but the focus is not to eliminate the difference.
  • Even rules that are clearly ones relating to the mode of conduct of court proceedings can make a difference to the ultimate outcome of litigation conducted in one place rather than another. For example, a piece of evidence inadmissible in one legal system, but admissible in another, might make a crucial difference to the outcome, or a document obtained on discovery in one legal system might cause the outcome to be different to what the outcome would have been if the action had been run in a legal system which did not permit discovery. Given that litigation is inevitably run in courts or tribunals, that have rules and procedures, such differences are inevitable. What the dividing line between substantive and procedural for the purpose of choice of law aims to do is to minimise any advantage that a plaintiff can obtain by suing in one forum rather than another, by restricting any such advantage to one that is a necessary concomitant of disputes being decided in courts or tribunals, which have their own rules and procedures. (Per Campbell JA at [121])
• The Australian choice of law rules require an Australian court, when hearing an action for alleged breach of contract governed by Brunei law, to seek to achieve the same outcome as a Brunei court would have achieved.

Objection to Jurisdiction
• Defendant can object to jurisdiction by applying for court order via notice of motion: UCPR r 12.11
  • May be filed without entering an appearance: UCPR r 12.11(3)(a);
  • Must be filed within the time limited for the defendant to enter an appearance in the proceedings: UCPR r 12.11(2);
  • Such application by the defendant does not constitute submission to the jurisdiction of the court: UCPR r 12.11(4).
• The court order will be in the nature of setting aside the originating process or service.

Service
Service Elsewhere in Australia
• A writ issued out of the HC or the FC may be served on any defendant anywhere in Australia: s 18, Federal Court of Australia Act 1976 (Cth).
• Any process issued out of a state or territorial court must be served in accordance with the Service and Execution of Process Act 1992 (Cth).
• s 8(4) of the SEPA excludes the concurrent operation of state and territorial laws with respect to service within Australia of process to which the Act applies.
• Service of process in civil proceedings is dealt with Pt 2 of the SEPA.
According to s 5(1), each Territory is to be regarded as a State.

Section 15(1) enables initiating process whereby a person becomes a party to the proceedings, such as a writ, summons or third party notice, issued out of any state or territorial court to be served throughout Australia and each external territory.

By virtue of s 12 and s 15(2), such service of a process and service on an individual is to be effected on an individual in the same manner as that process is served in the place of issue.

Under s 18, an appearance is effective only if contains an address for service within Australia.

If an appearance under the law of the place of issue of the process does not require the giving of an address of service, the address of the person entering the appearance will be taken to be the address for service: s 18(5).

The court of issue must set aside the appearance if it is satisfied that the address for service given is false and misleading: s 18(3).

There is no requirement of leave, or connection between cause of action and the forum: McEntee v Connor.

McEntee v Connor (1994) 4 Tas R 18

In this case, the court held that the defendant’s submission to the Tasmanian Court was entirely proper because the defendant entered a conditional appearance to the writ but deliberately did not proceed with an application to set aside service of the writ.

In result, Rules of Court, O13, r24(3) operated to convert the conditional appearance into an unconditional appearance and the defendant thereby submitted to the jurisdiction of this Court.

It was pointed out that the Service and Execution of Process Act 1992, s20 gives a court power to stay proceedings if it is satisfied that a court in another State has jurisdiction and that court “is the appropriate court to determine those matters.”

Although the section does not apply to a SC, as provided by s 20(1), there is no express provision in either the Service and Execution of Process Act or the cross-vesting legislation to oust the common law principles governing a stay of proceedings on the basis of forum non conveniens.

However, in the present case, the defendant failed to prove that the Tasmanian Court is an inappropriate forum to continue the proceedings. – The defendant’s solicitor relied on the provocation provisions in the Criminal Code (WA) to argue that these provision “may provide the defendant with a defence at law to the plaintiff’s action”. – But there was no actual material to suggest that provocation had any relevance in the proceedings at all.

Service in New Zealand

An initiating document issued by an Australian court or tribunal that relates to the proceeding may be served in New Zealand: s 9(1).

By virtue of s 10, such service is to be effected in the same manner as that process is served in the place of issue.

A defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue: s 17.

Limitation period is 30 working days of the Australian court after the defendant is served, or as the Australian Court ordered (according to the plaintiff’s or the defendant’s application).

The Australian court may determine the defendant’s application under section 17 without a hearing unless so requested: s 18(1).

On application under section 17, the Australian court may, by order, stay the proceeding if it is satisfied that a New Zealand court: s 19(1):

(a) has jurisdiction to determine the matters in issue between the parties to the proceeding; and

(b) is the more appropriate court to determine those matters.

Service Outside Australia

An initiating document issued by an Australian court or tribunal that relates to the proceeding may be served in New Zealand: s 9(1).

By virtue of s 10, such service is to be effected in the same manner as that process is served in the place of issue.

A defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue: s 17.

Limitation period is 30 working days of the Australian court after the defendant is served, or as the Australian Court ordered (according to the plaintiff’s or the defendant’s application).

The Australian court may determine the defendant’s application under section 17 without a hearing unless so requested: s 18(1).

On application under section 17, the Australian court may, by order, stay the proceeding if it is satisfied that a New Zealand court: s 19(1):

(a) has jurisdiction to determine the matters in issue between the parties to the proceeding; and

(b) is the more appropriate court to determine those matters.

Statute: Service Outside Australia

For a defendant in Victoria, SC of NSW does not have jurisdiction in common law. But can have jurisdiction by virtue of the long arm provisions in SEPA.

- COA arising in NSW;
- NSW contract: made breached in NSW;
- NSW tort;
• Damage in NSW;
• D is domiciled or ordinarily resident in NSW.
• For a defendant in NZ, using TTPA.

General
✦ The FC, HC, Australian Capital Territory, NSW, Queensland, South Australian and Tasmanian rule allow service outside Australia when the defendant has submitted, or agreed to submit, to the jurisdiction of the court.
✦ NSW rules:
* Only Superior Court may serve overseas: r 11.1, UCPR.
* Originating process may be served outside Australia in the circumstances referred to in Schedule 6: r 11.2(1), UCPR—

(a) if the proceedings are founded on a cause of action arising in New South Wales,
(b) if the proceedings are founded on a breach in New South Wales of a contract (wherever made), whether or not the breach is preceded or accompanied by a breach (wherever occurring) that renders impossible the performance of any part of the contract which ought to be performed in New South Wales,
(c) if the subject-matter of the proceedings is a contract and the contract:
   (i) is made in New South Wales, or
   (ii) is made on behalf of the person to be served by or through an agent carrying on business or residing in New South Wales, or
   (iii) is governed by the law of New South Wales, or
   (iv) is one a breach of which was committed in New South Wales,
(d) if the proceedings are founded on a tort committed in New South Wales,
(e) if the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in New South Wales caused by a tortious act or omission wherever occurring,
(f) if the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the court,
(g) if the person to be served is domiciled or ordinarily resident in New South Wales,
(h) if the proceedings are proceedings in respect of which the person to be served has submitted or agreed to submit to the jurisdiction of the court,
(i) if the proceedings are properly commenced against a person served or to be served in New South Wales and the person to be served outside New South Wales is properly joined as a party to the proceedings,
(j) if the proceedings are for the perpetuation of testimony relating to property in New South Wales,
(k) if the proceedings concern the construction, effect or enforcement of an Imperial Act or Commonwealth Act, or a regulation or other instrument having or purporting to have effect under such an Act, affecting property in New South Wales,
(l) if the proceedings are for the construction, rectification, setting aside or enforcement of a deed, will or other instrument or of a contract, obligation or liability, affecting property in New South Wales,
(m) if the proceedings are for an injunction as to anything to be done in New South Wales or against the doing of any act in New South Wales, whether damages are also sought or not,
(n) if the proceedings are for the administration of the estate of a person who dies domiciled in New South Wales, or are for relief which might be granted in proceedings for administration of such an estate,
(o) if the proceedings are for the execution of trusts which are governed by the law of New South Wales, or are for relief which might be granted in proceedings for the execution of such trusts,
(p) if the proceedings affect the person to be served in respect of his or her membership of a corporation incorporated in New South Wales, or of an association formed or carrying on any part of its affairs in New South Wales,
(q) if the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act,
(r) if the proceedings concern the effect or enforcement of an executive, ministerial or administrative act done or purporting to be done under an Act or regulation or other instrument having or purporting to have effect under an Act,
(t) if the proceedings:
   (i) relate to an arbitration held in, or governed by the law of, New South Wales, or
   (ii) are commenced to enforce in New South Wales an arbitral award wherever made, or