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General Considerations

***Lex Causae***= the law of the cause of action (i.e., the law of the foreign jurisdiction)

***Lex Fori*** = the law of the forum (i.e., the jurisdiction of the court)

# Characterization: Substance and Procedure

* As a generally recognized rule, the **law of the forum governs procedure**. This rule raises an issue of characterization: which elements of the *lex fori* are procedural (so as to command application) and which elements are substantive (so as to be excluded)? Conversely, which elements of the *lex causae* are procedural (so as to be excluded) and which elements are substantive (so as to command application)?
* Certain rules are widely understood as procedural, including:
	+ The appropriate court
	+ The form of pleadings
	+ The service of process and notices
	+ The conduct of judicial proceedings
	+ The mode of trial and appeal
	+ The execution of judgments
* Canadian courts have begun to embrace a narrower view of procedure, citing policy concerns with inappropriate forum shopping and the need to extend comity to diverse state policies in a global marketplace.

## Limitation of Actions

* The traditional common law position was that limitation periods were procedural rules, with the result that forum limitation periods would apply regardless of whether the merits of the litigation were governed by local or foreign law. In 1994, however, the Supreme Court of Canada rejected the traditional common law characterization, and held that limitation periods are substantive rules (*Tolofson*). A key policy motivation of this rule was to prevent jurisdiction shopping – whereby someone with a substantive legal claim in one jurisdiction looks for a jurisdiction in which the limitation period to bring the claim has not passed.

**Tolofson v Jensen** (1994 SCC) *Limitation periods are substantive rules of law; when foreign law is applied, the limitation periods of the* Lex Fori *should not be considered.*

F: Tolofson was injured in a car accident in SK when he was 12 (Jensen was the driver of the other vehicle); Tolofson brought action against his father (driver) and Jensen 8 years after the accident. SK limitation period had passed, BC’s had not.

A: Court dismisses the old tendency to make a distinction between rights (which are substantive) and remedies (which are procedural); Procedural rules make the “machinery of the forum court run smoothly”, while substantive rules address the rights of both parties. Since limitation periods give a right to the defendant – the right to bar the action – they should be considered substantive.

## Statute of Frauds and Like Requirements

* Tolofson is implicit authority for the characterization of statute of frauds (i.e., the requirement for writing in contracts) as substantive.

## Parties – Status to Sue

**International Association of Science and Technology v Hamza (1995 ABCA)**

F: International Association sought declaration that defendants had no interest in certain property held in their names; D argued that P did not have the legal status to sue in AB because they were not registered corporations or societies in Canada.

A:

* As a general rule, entities which are neither natural persons nor statutory persons will lack the status to commence an action. If the plaintiffs were resident in AB, they would lack the status to commence an action. However, the plaintiffs are foreign litigants, so conflict of law rules must be considered.
* A foreign corporation that is properly incorporated under the laws of a foreign jurisdiction and given the power to sue may sue in a common law province.
* Overall, the law tends to support a granting of status in cases where the entity in question is recognized as a legal or juridical person by the laws of its home jurisdiction, in the sense of having the status to sue.
	+ If a foreign litigant cannot prove it has status to sue in the foreign jurisdiction, or that there are identifiable legal persons who are answerable for court directions and orders, then the court should require that proper parties be named.

D: Status of IASTD is a triable issue of law.

**Bumper Development v Police of Metropolis (1991 ENG. CA):** Court of Appeal gave legal standing to a Hindu temple because it was a legal person under the law of Tamil Nadu, the Indian state where it was situated. Comity compels that parties that have legal standing under foreign law be given standing in the forum to enforce their rights.

## Evidence

* The characterization of evidentiary rules proceeds on a case-by-case basis. A distinction is typically drawn between issues relating to the mode of proving a relevant fact, including admissibility (procedural) and the question of what facts must be proved and their effect once proved (substantive).
* Classic illustration can be found in ***In re Cohn***(1945), in which a mother and daughter died simultaneously in a bomb raid. The *lex fori* (British law) presumed that the mother died first, while the *lex causae* (German law) presumed that they died simultaneously. The Court determined that both rules were substantive and that, for this reason, the German rule should apply.
	+ Key point: The *mode of proving* a fact is procedural and determined by the *lex fori*; the *effect of that determination* is substantive and controlled by the *lex causae.*

# Exclusionary Rules: Public Policy and Public Law

* States reserve the discretion to invoke forum **public policy** to exclude or limit the application of the foreign *lex causae*, which would otherwise be applicable under the forum choice of law rules.
	+ Public policy also provides a defence to the recognition and enforcement of foreign awards and judgments rendered on the basis of a law that offends forum public policy.
* In addition, courts will refuse to apply or enforce the **public law** of foreign jurisdictions. As a general rule,courts will not entertain an action for the enforcement, either directly or indirectly, of a **penal, revenue or other public law** of a foreign state.
	+ Most of the case law focuses on penal and revenue (i.e., taxation) laws, with almost no consideration of what constitutes “other public law.”

## Public Law

### Penal Law

* The scope of private international law is *private*. Criminal law is the opposite of private law – it is the direct expression of a particular state’s views of socially acceptable practice. For this reason, states will not apply the penal law of foreign jurisdictions.
* The penal exception is limited to denying extra-jurisdictional enforcement of foreign penal law. It does not prevent Canadian courts from recognizing the existence (and possibly the violation) of foreign penal law, in other contexts (e.g., breach of contract for illegality).
* Canadian courts have given the concept of “penal law” a relatively narrow conception. The leading case is *Huntington v Attrill*.

Huntington v Attrill (1893) *Penal laws include the criminal law as well as public regulatory offences; civil remedies that “penalize” the defendant do not fall within the category.*

F: A NY statute (circa 1875) provided that any director or officer who signed a false corporate report would be personally liable for the debts of the corporation; H sued A, on the grounds that A was a signatory to a corporate report that contained misrepresentations. H obtained judgment in NY for $100k, sought to have the judgment recognized in Ontario, where A resided.

A:

* Canadian courts, when characterizing foreign laws, should not defer to the characterization that law receives in the foreign jurisdiction. Rather, they should determine the substance of the law and then consider whether its enforcement would involve the execution of foreign penal law.
* The essence of the rule is the distinction between civil rights and criminal wrongs. Penal laws include the criminal law as well as public regulatory offences (which are often provincial).
* Definition: “All suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalites.”

D: The provisions at issue are protective and remedial, designed to compensate creditors. For this reason, they are not penal in the public sense.

### Revenue/Tax Laws

Stringham v Dubois (1992) *Canadian courts will not entertain actions which, directly or indirectly, would involve the enforcement of foreign revenue* laws.

F: SD died domiciled and resident in Arizona; named American bank as executor, gave her Alberta farm to her niece; executor wanted to sell farm to cover estate taxes, Canadian niece sought to take possession of farm.

I: Does the rule against recognizing foreign tax laws allow the niece to take possession? Or should the property be sold to pay the estate taxes?

A:

* In *Harden*, the SCC made it clear that courts will not entertain an action which would have the effect of indirectly enforcing the revenue laws of a foreign country.

D: Court refuses to enforce Bank’s demands, niece takes possession.

## Public Policy

Society of Lloyd’s v Meinzer (2001) *Narrow public policy exception focused on fundamental values of the forum; even where such values are threatened, other factors must be taken into account.*

F: Lloyds applied to have English certain English judgments recognized and enforced in Ontario; Defendants argued that doing so would violate ON public policy (especially regarding the *Securities Act* requirement for minimum disclosure requirements prior to investment).

A:

* Public policy will only succeed as a bar to recognition if fundamental values are at stake. The foreign law must violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum.
* The public policy exception is narrow. The fact that the underlying policy objectives of a foreign law do not square with the objectives of a parallel forum law is not sufficient.
* Taken on its own, to condone a breach of securities disclosure obligations would be contrary to ON public policy – the requirements are essential to the protection of investors and the capital markets.
* Despite this conclusion, the court says there are factors which, when weighed against the breach, indicate that enforcing the judgment would not be against public policy (the main reason: an ON court had sent the parties to the UK to litigate the matter, implying that any decision reached there would be accepted).

D: Court recognizes UK judgment; not contrary to public policy

Kuwait Airways Corp v Iraqi Airways (2002) *Public policy shifts over time; Norms and rules of international law may influence forum public policy.*

F: Iraq invaded Kuwait, took KA’s planes; Iraqi council passed resolution that dissolved KA and purported to transfer all its property to IA. Later, IA brought action for conversion in UK; double actionability rule was in effect (since the transfer was not a tort in Iraq, KA could not succeed in UK); KA argued that the resolution authorizing the transfer was contrary to forum public policy and should not be taken into consideration.

A:

* The courts have a residual power, to be exercised in the narrowest of circumstances, to disregard a foreign law when to do otherwise would affront basic principles of justice and fairness.
* Public policy imperatives will change with the times. In the modern day, the need to recognize and adhere to standards and requirements of international law influences the standard.
* The seizure of the planes was a gross violation of established rules of international law. Enforcing such a law would be contrary to English public policy.

D: Court declines to recognize resolution that authorized transfer of planes.

United States of America v Ivey (1995)

F: CERCLA (an American statute) authorizes the recovery of environmental cleanup costs; USA sought to enforce two money judgments, obtained under CERCLA, in Ontario. Defendant was president of an Ontario corporation who had a controlling interest in the operator of the American site that required clean-up.

I: Does CERCLA fall within the category of “other public law”?

A:

* CERCLA is not penal – it creates a reimbursement obligation. Nor is it a revenue law.
* Court refuses to characterize CERCLA as falling within the “other public law” exception.
* Both the residual public law exception and the public policy defence are extremely narrow and should rarely succeed; this is consistent with principal of judicial comity.

D: No basis for refusing to recognize the CERCLA judgment.

# Domicile and Residence

* Despite their decreasing importance, personal connecting factors continue to determine many jurisdiction and choice of law issues (esp. marriage, divorce and the succession). Personal connecting factors also affect the relationship between the citizen and state (e.g., voting eligibility, tax liability, access to education and healthcare and public benefits).
* Domicile is no longer the pre-eminent connecting factor. Some variation of residence, ordinary residence, or the “real and substantial connection” test is often used.

## Domicile

* Domicile is a combination of residence and intention to remain for an indefinite period of time. Residence requires little more than physical presence. Intention is difficult to prove, especially when the subject is deceased.
* Domicile is determined according to the rules of the *lex fori*.

Agulian v Cyganik (2006)

F: A died in London in 2003, leaving 50,000*l* to R, his partner. R sought to apply for additional financial provision from the state, which would require A to be domiciled in UK (and not Cyprus, where he was born). A resided for almost all of his life (43 years) in England, but retained strong ties to Cyprus.

A:

* Domicile is a combination of residence and intention. Domicile of origin may be supplanted by a domicile of choice. However, domicile of origin is “adhesive”, and a clear intent is required to show a new DC.
* Domicile of choice requires residency and the intention to remain indefinitely. The burden of proof is on the person asserting the change in domicile.
* A retained strong ties to Cyprus: he sent one of his daughters there to be educated; he sent large amount of money there; he bought property there. Requisite intention to remain in London indefinitely not formed.
* \*Court expresses dissatisfaction with the result, given that it is clearly out-of-step with reality and the habitual residence of A. Suggests that the inheritance statute be amended to rid domicile as the operative concept.

D: A was not domiciled in London.

Re Urquhart Estate (1990)

F: Urquhart lived with Taylor for 6 years before his death, left his assets to his son; Taylor brought a dependents’ relief application, seeking to vary the terms of the will; question was whether Urquhart was domicile in Ontario. Urquhart was very mobile – he lived near Ottawa for some time, then took a job which caused him to move throughout the United States. Urquhart was living in Florida at the time of his death; kept a mailing address in Ottawa, where he had a room at a friend’s place.

A:

* Court finds an intention to live in the Ottawa region indefinitely was acquired in the early 80s.
* An existing domicile is presumed to continue until it is proved that a new domicile has been acquired; insufficient proof that a new domicile was acquired in the US or Quebec. Therefore, still domicile in ON.
* Distinguishes an intention to reside “permanently” from an intention to reside “indefinitely”, holding that only the latter is required.

## Habitual Residence and Ordinary Residence

Adderson v Adderson (1987)

F: Court is interpreting “last joint habitual residence”, as a preliminary point of law in a divorce proceeding. Couple was married in Alberta and lived there for 14 years, separated for a short time then got back together and moved to Hawaii.

A:

* Habitual residence is somewhere between “residence” and “domicile”. Intention is not as important, but it still may factor.
* “Habitual” residence refers to the quality of the residence. Court finds that the couple did not make sufficiently “durable ties” to Hawaii; therefore, last joint habitual residence was Alberta.

National Trust Company Ltd. v Ebro Irrigation and Power (1954)

A:

* Domicile of a corporation is the country in which it was incorporated.
* The law of a corporation’s domicile govern its creation and continuing existence, management, etc.

Note: The *Court Jurisdiction and Proceedings Transfer Act* adopts “ordinary residence” as a basis for *in personam* judicial jurisdiction over both individuals and corporations.

Jurisdiction *In Personam*

# Jurisdiction: Jurisdiction *Simpliciter* and Territorial Competence

* Every jurisdiction question at common law has two components:
	+ **Jurisdictional *simpliciter***(territorial competence)
		- The rules for assuming jurisdiction
	+ **Residual discretion** (*forum non conveniens*)
		- Judicial discretion to refuse to hear an action because it would clearly be better dealt with in another jurisdiction
		- Only comes into play once jurisdiction *simpliciter* is established.
* See BC Civil Rules 4-5, 19-4 and 21-8; also see *Court Jurisdiction and Proceedings Transfer Act*

## The Constitutional Standard

* *Morguard* is a key decision in the development of conflicts rules in Canada. In that case, the SCC used federalism principles to create a new rule for recognition and enforcement of judgments interprovincial.
* The principles in *Morguard* are now viewed as constitutional standards that can be used to challenge the constitutional validity of conflicts rules.

Morguard Investments v De Savoye (1990)

F: Defendant’s AB properties were sold following foreclosure proceedings; judgments entered against the defendant for the difference between the amount recovered on the sale and the amount of the mortgage debt. Mortgagees commenced action in BC to have the judgment enforced against the defendant, successful at trial and on appeal.

I: Can a personal judgment, validly given in Alberta against a defendant, be enforced in British Columbia, where he now resides?

A:

* The rules of comity or private international law must be shaped to conform to the federal structure of the Constitution.
* Courts in one province should give full faith and credit to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action.
	+ It would be “anarchic and unfair” if an individual could avoid the consequences of a judgment simply by moving from one province to another.
* To what extent may a court exercise jurisdiction over a defendant in another province? Generally, there must be a “real and substantial connection” between the action and the jurisdiction.

Club Resorts v Van Breda (2012 SCC)

F: Two individuals were injured while on vacation in Cuba; actions brought in Ontario against Club Resorts, a company incorporated in the Cayman Islands that managed the hotels where the incidents occurred; Club resorts argued that Ontario courts lacked jurisdiction or, alternatively, that Cuba would be a more appropriate forum; motion judge concluded that Ontario had jurisdiction, affirmed at ONCA.

A:

* To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum.
* Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum.
* In a tort case, the following factors are “presumptive connecting factors” that *prima facie* entitle a court to assume jurisdiction over a dispute (there may be others, and the presumption may be rebutted):
	+ The defendant is domiciled or resident in the province
	+ The defendant carries on business in the province
	+ The tort was committed in the province
	+ A contract connected with the dispute was made in the province
* If jurisdiction is established, the claim may proceed, subject to the court’s discretion to stay proceedings on the basis of the doctrine of *forum no conveniens*.
	+ According to this doctrine, the court may decline to assume jurisdiction if a party shows that an alternative forum is clearly more appropriate.
	+ The purpose of this residual power to decline jurisdiction is to assure fairness of the parties and ensure the efficient resolution of the dispute.
* In *Van Breda*, a contract was entered into in Ontario, which allows the court to presume jurisdiction; defendants have not rebutted this presumption, and have not demonstrated that Cuba would clearly be a more appropriate forum.

D: Appeal dismissed; ON courts have jurisdiction.

## Parties Within the Jurisdiction

* At common law, English courts were entitled to assume jurisdiction over any person present in England on whom a writ could be served. This rule was adopted in *Morguard*, and continues to apply in all provinces that have not adapted the *CJPTA*.

Maharanee of Baroda v Wildenstein (1972)

F: Maharanee suing Wildenstein, arguing that W sold her a fake painting; W lived in Paris but did business in England and was served while he was at the races in England

A:

* Service on a defendant who is merely passing through the territory is enough to allow the court to assume jurisdiction.

## Parties Outside the Jurisdiction

* In England, a party who wants to serve a defendant *ex juris* must make an *ex parte* application to the court for leave to do so.
* Most Canadian jurisdictions do not require leave of the court before service may be effected on a party *ex juris*.

Moran v Pyle National (1973)

F: Moran was electrocuted in SK by a light fixture created by Pyle National; Pyle doesn’t carry on business in SK and has no assets or representatives in SK.

I: Can this tort action be brought in SK? Was the tort “committed in SK”?

A:

* CJPTA: real and substantial connection when the action concerns a tort committed in the province.
* A tort can be said to have been “committed in the province” if the forum is *substantially affected* by the tort. Generally, the fact that a plaintiff suffers damage in a forum is sufficient to meet the test.
* Manufacturers should be prepared to defend their products wherever they cause harm, so long as it was reasonably foreseeable that the products would be used in that place.

Cotu v Gauthier (2006)

F: Widow of C seeking compensation after her husband died in the vehicle driven by G; accident occurred in ON, widow sought to bring action in NB, her home;

A:

* The widow’s harm, suffered in NB, is sufficient to establish a real and substantial connection between the action and NB.
* The test for assuming jurisdiction requires *a* real and substantial connection, not the *most* real and substantial connection. A fleeting and relatively unimportant connection will not suffice; it must be substantial.

JTG Management Services v Bank of Nanjing (2015 BCCA)

F: Bank of Nanjing argues that BC Supreme Court does not have territorial competence to hear dispute over letter of credit.

A:

* Court reviews jurisprudence under the CJPTA.
* Section 10(e)(i) states that a BC court can assume jurisdiction over a contractual dispute if the contractual obligations were, “to a substantial extent”, to be performed in British Columbia.
	+ The key question is whether the performance of the obligations are connected to the forum. The focus is on the expectations of the parties at the time of formation.
	+ It may be the case that a contract is to be performed to a substantial extent in multiple jurisdictions.
* It was foreseeable that JTG would perform its obligations in BC (in particular, preparing the required documents and receiving payment).
* Parties may always include a forum selection clause in their agreements.
* Following a finding of territorial competence, it was open to the court to decline to exercise jurisdiction under s. 11 (*forum non conveniens*).

## Jurisdictional and Material Facts and Evidence

AG Armeno Mines and Minerals Inc. v Newmont Gold CO.

F: Armeno alleges that D induced a third party to breach a mining agreement with Armeno (i.e., alleging tort committed within BC); Newmont is a Delaware corp. that has never done business in BC, was served *ex juris* by Armeno.

A:

* Contract (of which induced breach is argued) was made in BC, and damage was suffered in BC; therefore passes Moran test of “substantially affected.”
* In order for the court to assume jurisdiction, the plaintiff must make out a “good arguable case”.
	+ \*If the defendant can establish on evidence that the plaintiff’s action is bound to fail, then jurisdiction should be refused, irrespective of whether the failure rests on narrowly jurisdictional facts or other material facts.
	+ The defendant’s case must rest on evidence (including affidavit evidence), not pleadings alone.
* Good arguable case = genuine issue to be tried = some chance of success

D: Since Newport had a contractual right to refuse Armeno taking an interest in the mining project, Newport could never be found guilty of inducing breach of contract; therefore, no chance of success for P on this issue.

MTU Maintenance Canada Ltd. v Kuhene & Nagel

F: P is a NB company that is registered in BC, business includes repair of aircraft engines; P contracted with K&N, who was to facilitate import and export of MTU’s products and deal with customs procedures; K&N sub-contracted this work to it’s American counterpart; P sued D for failure to carry out obligations and failure to reduce customs liabilities.

A:

* US defendant argues that pleadings don’t establish a real and substantial connection with BC
* Contract was with Canadian defendant, so CJPTA 10(e) doesn’t apply
* 10(h) doesn’t apply because there are no allegations that the action concerns a business carried on in British Columbia.
* Pleadings don’t state where advice was received (i.e., they don’t assert that the misrepresentation Occurred in BC).
* Court was not entitled to rely on counsel’s factual statements in chambers, because they were new facts and not explanations of evidence.
* In order to establish jurisdiction, the necessary facts must be present in the notice of civil claim or in supplementary affidavits.

D: Court refuses to grant jurisdiction because the pleadings did not disclose facts which would permit such a decision (KH: This is an example of terrible pleadings sinking a case before it even begins – had the pleadings been correct, the case would easily have passed the jurisdictional tests).

# Discretion: Stays and Anti-suit Injunctions

* Common law courts have always exercised a discretion to stay local proceedings commenced by service within the forum, to set aside service of a writ outside the jurisdiction, and to issue an injunction prohibiting the commencement or continuation of foreign proceedings.

## The English Principles

* The leading English case is *Spiliada*, which is relevant and, for the most part, binding in Canada.

Spiliada Maritime Corp. v Cansulex

F: Spiliada sought leave to serve the respondents *ex juris*, defendant wants the service set aside.

A:

* Where jurisdiction has been founded as of right (because the defendant was served within the jurisdiction), the defendant may ask the court to exercise discretion to stay the proceedings on the basis of *forum non conveniens.*
	+ The purpose of the doctrine is to ensure that proceedings are heard in the forum which is “most suitable for the ends of justice.”
	+ The question is whether there is another forum that is clearly and distinctly more appropriate.
* A stay will only be granted on the ground of FNC where the court is satisfied that there is some other available forum which is the appropriate forum for the trial of the action.
* The burden of proof generally rests with the defendant to persuade the court to exercise its discretion; if there is a *prima facie* case that another jurisdiction would clearly be more appropriate, the plaintiff will have the burden of showing that the interests of justice require the court to refuse to grant a stay.

D: Trial judge did not err in his decision not to grant a stay to Cansulex.

Societe Nationalte Industrielle Aerospatiale v Lee Kui Jak

F: SNI seeking an injunction to prevent the respondents from continuing an action commenced in Texas; SNI operated helicopter that crashed in Brunei, killing businessman; lengthy proceedings in Texas and Brunei.

A:

* Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties.
* The discretion to order this sort of injunction must be exercised cautiously and only where “the ends of justice” require.
	+ An example would be an injunction issued to protect the jurisdiction of the UK court (e.g., if an English court is dealing with a bankruptcy proceeding, the order may be necessary to prevent a defendant from bringing an action in a foreign jurisdiction to take sole-possession of assets which would otherwise be distributed to creditors)
* If an English court concludes that it is the natural forum (i.e., the forum with the closest connection with the parties and the action) for adjudication of the dispute, and that by proceeding in a foreign court the plaintiff is acting in an oppressive or vexatious manner, the court may grant an injunction restraining the plaintiff from proceeding in the foreign court.
	+ Vexatious = frivolous or useless
	+ Oppressive
* The rules in *Spiliada* (re the granting of a stay of proceedings under the doctrine of *forum no conveniens*) do not apply to the granting of injunctions.

D: In this case, allowing the plaintiffs to proceed in Texas (which is not the natural forum for the action), would be oppressive to SNI (Texas offers greater inducements to plaintiffs, including greater potential of damage awards); injunction granted.

Airbus Industrie v Patel and Others

F: English plaintiffs commenced an action in Texas and India following an airplane crash in India; Indian court granted anti-suit injunction, prohibiting continuance of the Texas action; this action commenced for recognition and enforcement of Indian injunction, or for a new anti-suit injunction preventing continuance of Texas action. This action was brought in England because the plaintiffs reside there, not because of any connection with the action.

A:

* Before an English court can grant an anti-suit injunction, the English forum must have a sufficient connection with the matter in question.
* Interference in this case would be inconsistent with the rules of comity; the English courts have no connection with the matter
* The fact that an interested jurisdiction may be powerless to enforce its own judgment will not give rise, on its own, to an anti-suit injunction.

## The Canadian Principles

Amchem Products Inc v BC (SCC)

F: BC court granted anti-suit injunction, preventing appellants from pursuing their action in Texas; Amchem is the owner of an asbestos mining operation in BC, which resulted in injury and/or death to hundreds of individuals. Appellants argue that exposure to asbestos occurred in multiple jurisdictions across North America and Europe.

A:

* In the modern world, it is increasingly difficult to identify one clearly appropriate forum for litigation that spans across borders. There may be several forums that are suitable alternatives.
* Forum shopping can cause injustice to one party of the action, and should be deterred. Two remedies for controlling choice of forum:
	+ 1) **Stay of proceedings**. Court may stay the action at the request of the plaintiff if persuaded that the case should be tried elsewhere.
	+ 2) **Anti-suit injunction**. Granted at the request of the defendant in a foreign suit, to prevent commencement or continuation in the foreign jurisdiction.
		- This remedy is far more aggressive, because the domestic court is, in effect, determining the matter for the foreign court.
* Adopts the principles set out in SNI.
	+ Generally, a domestic court should not entertain an application for an injunction if there is no foreign proceeding pending.
	+ An application for an injunction should only be entertained where it is alleged that the domestic forum is the most appropriate forum.
	+ Step 1: Is the domestic forum the natural forum (i.e., does it have the closest connection to the action and the parties)?
		- If the foreign court could reasonably have concluded that no other jurisdiction was clearly more appropriate, then that decision should be respected. (i.e., if the foreign court reasonably applied the doctrine of *forum non conveniens*, leave it alone)
	+ Step 2: If the foreign court assumed jurisdiction on a basis that is inconsistent with the principles of *forum non conveniens*, the court must consider whether it would be unjust to deprive the plaintiff in the foreign action of some advantage that is available there, having regard to the extent that the party and the facts are connected to that forum?
		- Also consider whether an injustice would arise if the plaintiff is allowed to continue in the foreign jurisdiction

**NOTE:** Tyco and Teck Cominco both deal with stays of local proceedings. The former is a common law decision, and the latter considers the principles under the CJPTA.

Young v Tyco Intl (2008 ONCA)

F: Young worked at Ontario Tyco operation for 8 years, then worked at plants in US; fired from Indiana plant for alleged sexual harassment – Young denied the claims and said he was fired for having seizures. Started action in Ontario; Tyco moved for stay.

I: Whether Appellant’s wrongful dismissal action against Tyco should be stayed in Ontario and tried in Indiana.

A:

* No dispute over whether Ontario has jurisdiction; question is whether Ontario should assume jurisdiction (i.e., whether the doctrine of *forum non conveniens* applies).
* In exercising FNC discretion, motion judges consider several factors, including: the location where the contract in dispute was signed; the applicable law; the location of witnesses; the location where evidence will come from; the jurisdiction in which the factual matters arose; the residence of the parties; and the loss of a legitimate juridical advantage.
* In some cases – such as this one – competing factual versions of events will have to be considered by the motions judge. The judge should accept the plaintiff’s version of the facts, as long as it has a reasonable basis in the record.

D: The record contains a reasonable basis for Young’s contention that the October 2004 agreement – made in Ontario – governed his subsequent employment. Proper approach was to analyze FNC factors by accepting Young’s claim; result is that Indiana is not a clearly more appropriate forum.

\***Insert section 11 CJPTA.**

Teck Cominco v Lloyds Underwriters (2009 SCC)

F: Teck seeking an order to stay two actions in BCSC by plaintiff insurers, who sought declaration that they had no obligation to defend or indemnify Teck in respect of environmental damage clams arising from activities in BC.

A:

* S. 11 CJPTA is a complete codification of the *forum non conveniens* test; it admits of no exceptions and must be considered in every instance in which an application is made asking a BC court to decline jurisdiction.
	+ The existence of foreign proceedings is only one factor, amongst many, to be considered in a FNC test.
* Court said that FNC principles do not require a stay in this case; the fact that parallel proceedings would exist if BC refused to decline jurisdiction do not change the analysis.

## Jurisdiction Selection Clauses

Pompey Industrie v ECU Line (SCC)

F: Appellant was to carry cargo from Antwerp to Seattle, aware that land transport could damage the goods; transported by land, goods were damaged; forum selection clause stated that any dispute arising under the contract would be determined by the Courts in Antwerp under the law of Belgium only. Action brought in Federal Court; appellant brought motion to stay proceedings, citing jurisdiction selection clause.

A:

* Federal Court applied the “strong cause” test – when a plaintiff sues in England breach of a forum selection clause, and a defendant applies for a stay, the stay should be granted unless strong cause for not doing so is shown; the burden is on the plaintiff. SCC approves of this approach and says that the strong cause test continues to apply with respect to forum selection clauses.
	+ While the factors considered are similar to a FNC test, the burden in the FNC analysis is on the defendant, who is asserting that the domestic forum is not one of convenience.

Momentous v Canadian Association of Professional Baseball

F: Respondents filed application to dismiss claim on the grounds that Ontario has no jurisdiction because the appellants agreed to have disputes litigated in North Carolina; filed application to dismiss after filing statement of defence.

A:

* Appellants submit that a party that delivers a statement of defence on the merits is precluded from relying on a forum selection clause. SCC disagrees.
* Respondents did not argue that there was no R+S connection nor that there was a more convenient forum; argued simply that Ontario had no jurisdiction, because parties had agreed to litigate in another forum.
* In the absence of specific legislation, the proper test in determining whether a forum selection clause is enforceable is the “strong cause” test.

D: Applicants have not met the strong cause threshold; no evidence that Ontario should displace agreed-upon forum.

Douez v Facebook (2015 BCCA 279)

F: FB appeals from an order declaring that BC is not *forum non conveniens* and certifying a class action. Terms of Use include a forum selection clause in favour of courts of California.

A:

* Party seeking to rely on forum selection clause must show that it is valid, clear and enforceable; burden then switches to other party to show “strong cause” for the court to decline to enforce clause. [This is the *Pompey* test].
* Trial judge held that s. 4 of the *Privacy Act* confers exclusive jurisdiction on BCSC, and that it therefore overrules any forum selection clause.
	+ BCCA disagrees with this analysis; Clause of privacy act cannot determine territorial competence of California court.
* In BC, when the defendant relies upon a forum selection clause, the *Pompey* test is a separate standalone inquiry that is conducted first. The CJPTA analysis may be conducted second, if necessary.
	+ No evidentiary burden rests on the party relying on the clause (though challenging party may adduce evidence).
* If the plaintiff shows strong cause under the *Pompey* test, the defendant may then argue that the court is *forum non conveniens*, under s. 11.
	+ In cases in which there is no forum selection clause, the analysis proceeds directly to s. 11.
* If the effect of the stay would be to extinguish a claim entirely, this might be strong cause not to enforce a forum selection clause.

D: Clause should be enforced.

Recognition and Enforcement of *in personam* Judgments

* A fundamental tenant of territorial sovereignty is that the laws and orders of one sovereign cannot be directly enforced in the territory of another.
* All jurisdictions have rules that provide for the conversion of foreign orders to local orders
* The traditional English approach to recognition and enforcement was narrow. This was the approach of the provinces, until Morguard in 1990. The test under Morguard now extends beyond Canadian borders, and is thought to be much broader and more imprecise than the traditional approach.
* More recently, the common law rules for recognition and enforcement have been supplemented and modified by provincial legislation.

# Pecuniary Judgments: Common Law

* Traditional common law rules require the foreign judgment creditor to persuade the forum that: (1) The foreign judgment is **final and conclusive** and (2) that the **foreign court had jurisdiction in the international sense**.

## Finality and Conclusiveness

* Judgment is considered final and conclusive for purposes of recognition and enforcement even if there is still time to appeal the originating judgment, and even if that judgment is under appeal.
	+ But, in BC, defendant can apply for stay, asking the court to wait for the matter to be determined.
	+ However, the mere commencing of the action opens the window for the plaintiff to apply for a mareva injunction or a pre-judgment garnishing order, to ensure that assets are available upon recovery.

Nouvion v Freeman (1889)

F/I: Court considering whether to recognize Spanish debt judgment.

A:

* Foreign judgment will only be recognized if final and conclusive.
* Pecuniary judgments are not final until they can no longer be disputed in the court which made the order (i.e., until they have been rendered *res judicata* in that court).
* Appeals do not have to be exhausted for an order from a lower court to be considered final and conclusive.

## Jurisdiction in the International Sense

* A foreign court will be held to have had jurisdiction in the international sense for purposes of recognition and enforcement of a particular judgment if **any one of three** conditions is satisfied:
	+ 1) The defendant was **present** in the jurisdiction at the time the action was commenced;
	+ 2) The defendant voluntarily **submitted** to the jurisdiction of the foreign court; or
	+ 3) There was a **real and substantial connection** between the action and the jurisdiction.

### Presence

* Presence for natural persons is easy to determine as a matter of fact.
* Presence for legal entities is a question of mixed fact and law.

Forbes v Simmons (1914)

F: Defendant domiciled in AB but served in AB while visiting his wife in the hospital.

A:

* Special circumstances for which the defendant was present in BC do not modify the general rule that presence in a jurisdiction brings one under the laws of that jurisdiction.

### Submission

* A voluntary step taken in response to an action may be interpreted as submission to the jurisdiction.

First National Bank of Houston (1990 BCCA)

F: Plaintiff seeking enforcement of $50,000US judgment. Defendants argue that they did not attorn to the jurisdiction of the Texas court, because they did not authorize representation in that court (even though it was present).

A:

* To appear without protest has always been considered a voluntary submission.
* Intent to attorn is not required, so long as the defendant takes some action that can be viewed as submitting.

Clinton v Ford (1982 ONCA)

F: D sold P Land Rover in South Africa in 1976, moved to Ontario in 1977; P later obtained judgment in SA, seeking to have that judgment enforced in ON.

A:

* D argues that he didn’t voluntarily attorn to jurisdiction of SA court, and that defending the case on its merits was only to protect his SA assets.
* Court: defendant should have had the right to appear in the SA court for the purpose of contesting the validity of the seizure of his property and contesting the jurisdiction of the SA court. However, he chose instead to defend the action on its merits; the result is that he submitted to the jurisdiction.
	+ Court suggest that, had the defence been focused on challenging the seizure and challenging the jurisdiction of the court, D could have avoided attorning.

Mid-Ohio Car Co v Tri-K (1995)

F: Seeking enforcement of Ohio judgment in BC; trial judge concluded that respondents had not attorned to jurisdiction of Ohio court; defendants disputed jurisdiction of Ohio court and argued *forum non conveniens*; after these arguments failed, defendants withdrew and a default judgment was entered against them.

A:

* Common law rule was strict: any submission not made under duress is deemed to have been made voluntary.
	+ Some common law authority for the proposition that arguing against jurisdiction (and not fighting the case on its merits) cannot be considered attornment.
		- Whether this proposition holds has never been authoritatively decided, at common law.
* Former rules of court in BC stated that applications to challenge service *ex juris* and challenges to jurisdiction can be brought without submitting to the jurisdiction of the court.
* Respondents challenged jurisdiction, and also challenged plaintiff’s fraud claim because it lacked particularity; challenging one aspect of the case is considered attornment to the jurisdiction.

### Real and Substantial Connection

Beals v Saldanha (2003 SCC)

F: Whether pecuniary Florida judgment should be recognized in ON.

A:

* Principles set out in *Morguard* can and should be extended beyond the recognition of interprovincial judgments; real and substantial connection test applies to the recognition and enforcement of non-Canadian judgments.
* In the absence of unfairness or other compelling reasons, default judgment and judgment after trial are treated the same.
* R+S test requires that a significant connection exist between the cause of action and the foreign court . . . the connection to the foreign jurisdiction must be a substantial one.
* In this case, appellants purchased land in Florida – this is a positive engagement with the foreign legal system, and clearly meets the R+S test.
* Defences are available to prevent recognition and enforcement in Canada. They include natural justice, public policy and fraud.
* Lebel: Argues that application of R+S test to non-Canadian judgments should be contextual; also argues that R+S test should supersede the traditional common law grounds for determining jurisdiction in the international sense.

Braintech v Kostiuk (1999 BCCA)

F: B obtained default judgment in Texas against K, commenced an action to have it recognized in BC. K denies ever having been served notice of the Texas proceeding because the defendants served the wrong West Vancouver address. Question becomes whether there was a real and substantial connection between the action and Texas.

A:

* In *Amchem*, the Court said that, on occasion, a serious injustice may be done by the failure of a foreign court to decline jurisdiction.
* Posting on the internet, and having that post read in Texas, is not enough to ground a real and substantial connection between Texas and the defendant (even if defamatory, it is not enough to come to the conclusion that a tort was committed there).
* There is no connection between the parties and Texas – BC is the only natural forum; court refuses to recognize judgment.

# Non-Pecuniary Judgments

Pro Swing v Elta Golf

F: Pro-Swing commenced a trademark infringement action in Ohio, naming Elta (Ontario resident) as a defendant; PS and E reached a settlement agreement where E undertook not to purchase or sell club components that infringed trademark; E failed to comply with agreement, PS sought and was granted an order declaring E in contempt. PS filed application in Ontario for recognition and enforcement of agreement and contempt order. E objected, argued that non-monetary judgments can’t be recognized.

A:

* Recognizing and enforcing non-pecuniary judgments is more complex than interpreting and applying monetary judgments. It may require the domestic court to interpret and apply the other jurisdiction’s law (e.g., a detailed injunction from a foreign court essentially allows that court to dictate enforcement in Canada).
* Court decides that non-monetary orders should be recognized in Canada, but that additional factors must be considered to preserve the structure and integrity of the Canadian legal system.
* When enforcing equitable orders, the rules for enforcing money judgments apply (i.e., finality and conclusiveness and jurisdiction in the international sense). Further considerations, specific to the particular nature of the order, should also be considered, such as:
	+ Are the terms of the order clear and specific enough?
	+ Is the order limited in scope? Did the foreign court retain power to issue further orders?
	+ Is the Canadian litigant exposed to unforeseen obligations?
	+ Will the use of judicial resources be consistent with what would be allowed in Canada?
* The overarching consideration is whether the principle of comity requires enforcement. This involves a balance of deference to foreign jurisdictions and protection of the Canadian legal system.

D: The order in this case should not be enforced: the contempt order is quasi-criminal in nature and the intended scope is unclear.

# Defences: The Exclusionary Rules, fraud and natural justice

* Judgments based on foreign **penal** or **revenue** laws are not enforceable, and neither are those that are contrary to the **public policy** of the forum (see section on exclusionary rules).
* Judgments that were obtained by fraud or in which there was a breach of procedural fairness are also not enforceable.
* It is not a defence to argue that the foreign court erred in law – the recognizing court is not an appellate court.
* *Beals v Saldanha* is the leading case on fraud, breach of natural justice and forum public policy.

Goddard v Gray (1870)

F: P trying to enforce French judgment. Judgment is based on an incorrect construction of an English contract, rendering a judgment that it larger than it otherwise would have been.

A:

* Error of law by foreign court is not a defence.

Beals v Saldanha (2003 SCC)

F: Beals purchased a lot from Saldanha (Ontario residents) in Florida; Beals sued S in Florida, was awarded default judgment; trial held to determine damages, S did not appear; over $250,000 in damages awarded, plus interest of 12% per year. S sought legal advice and was told by Ontario lawyer that judgment couldn’t be enforced against them. Beals sought enforcement in Ontario some years later, at which time judgment total had increased to over $800,000.

A:

* Once a real and substantial connection is found between the foreign action and the foreign jurisdiction, the court should examine the common law defences, including fraud, public policy and natural justice.
	+ **Fraud**: neither foreign nor domestic judgments will be enforced if obtained by fraud. Distinction between extrinsic and intrinsic fraud should be discontinued. Fraud going to jurisdiction of the court can always be raised; fraud as to the merits can only be raised where the factual allegations are new and could not have been raised in the foreign court.
	+ **Natural justice**: party seeking to impugn the judgment must prove (BOP) that the foreign proceedings were contrary to Canadian notions of procedural fairness. Canadian procedural fairness requirements include: adequate notice, opportunity to defend, fair and impartial tribunal, etc.
	+ **Public policy**: recognition and enforcement can be refused if the judgment is contrary to Canadian concepts of justice. Question is whether the foreign *law* is contrary to basic morality.
* All of the above defences should be construed narrowly, and the court finds that none apply.
* Unusual situations might arise that may require the creation of a new defence to the enforcement of a judgment.

# Statutory REgimes

## Judgments and Orders

* Add notes on statutory materials.

Central Guarantee Trust Co. v Deluca (NWT)

F: Defendants applying to set aside registration of Ontario judgment under *Reciprocal Enforcement of Judgments Act*. Key issue: what effect does the *Morguard* decision have on the Act?

A:

* Statutes for the reciprocal enforcement of judgments did not alter the common law rules – they simply provided for a more convenient procedure (i.e., applying to register vs. commencing an action).
* Section 2(3) of the act says that *ex parte* application can be brought so long as defendant personally served; Act cannot be read to require personal service *within the jurisdiction*.
* Restrictions in 2(4) of the Act are applicable, even in the face of Morguard. If enforcement cannot be obtained under the statute, an action can still be commenced to seek common law recognition.

Owen v Rocketinfo, Inc.

F: Judgment obtained in Nevada and registered in California; question is whether judgment can be recognized under reciprocal judgment provisions of *Court Order Enforcement Act*, when California is a reciprocal state but Nevada is not.

A:

* Section 29 provides for the registration of a judgment in BC if “it has been given in a court in a reciprocating state.”
* Since the judgment was given in Nevada, and not California, the judgment cannot be recognized as one stemming from a reciprocating state.

## Arbitral awards

* See *Foreign Arbitral Awards Act*

Shreter v Gasmac (1992)

F: Applicant obtained arbitration award in Georgia, had the order confirmed by judge; D argued: (1) Matter should have been commenced as action, not application; (2) outstanding counterclaim; (3) breach of natural justice; (4) Counter to public policy of forum.

D: Arbitration award recognized under *International Commercial Arbitration Act* (of Ontario); all of D’s arguments in opposition rejected.

Class Actions

* Two basic models for class actions: opt-in and opt-out.
* Once judgment (or settlement) is finalized, all members of the class are bound by it and prohibited from commencing another action against the defendant.
* Class actions give rise to unique jurisdictional issues as well as unique issues surrounding recognition and enforcement.

Harrington v Dow Corning Corp (2000 BCCA)

F: Appeal from class certification order; class contains both resident and non-resident members. Appellants (non-BC manufacturers of the implants) argue that case management judge erred in law when he certified the class to include members who are non-resident in BC (argue no R+S connection because injury caused by implants in non-residents did not occur in BC and, therefore, non-residents could not bring an action here).

A:

* Failure of a non-resident to allege that a cause of action arose in B.C. cannot be decisive of jurisdiction simpliciter.
* Some cases won’t require the court to move beyond the traditional rules (i.e., if a defendant is within the jurisdiction, or has submitted, or if the tort was committed in the jurisdiction).
	+ However, where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant (i.e., if there’s no presence and no submission, and normal R+S test isn’t satisfied, there still may be some flexibility for the court to assume jurisdiction over the entire class).
* Manufacturers who create products which they are aware will be consumed and used in several provinces can be called to account in any one of those provinces, if the product is allegedly defective.
* Doctrine of FNC will protect defendants in cases where the forum is not ideal.

Ward v Canada (2007 MBCA)

F: P commenced action in Manitoba alleging that he was injured by herbicides sprayed by the Crown in New Brunswick. Crown is resident in every province and territory. Plaintiff class will likely include persons not resident in MB.

I: Does MB court have jurisdiction over class action against Crown that includes non-resident plaintiffs?

A:

* R+S test does not override the common law tests (presence and submission).
* Proceeding by class action does not change the jurisdictional rules, unless statute so provides.
* The Crown is present in MB, therefore any plaintiff from any province could sue the Crown in MB, therefore MB has jurisdiction over both resident and non-resident class members.
* Court then went on to consider whether Manitoba was *forum non conveniens*, assessing a number of factors in the analysis, including:
	+ Location of the parties; location of key witnesses and evidence; jurisdiction-selecting clauses; avoidance of multiple proceedings; juridical advantages, etc.
* Court rejects Crown’s argument that MB is FNC.

Currie v McDonalds (2005 ONCA)

F: Curie attempting to bring class action against McDonalds; McDonalds argues that the issue has already been litigated in Illinois, and that Currie is bound by that settlement; question is whether Illinois settlement precludes Currie’s class proceeding in ON.

A:

* If Illinois judgment is recognized in ON, Currie is bound by it.
* In this case, the defendant is seeking to enforce the judgment so as to preclude further litigation.
* The approach to recognition and enforcement in a traditional two-party lawsuit may need to be modified when considering complex, cross-border class actions. The court must consider the rights and interests of unnamed plaintiffs who did not participate in the foreign proceedings.
* It may be appropriate to enforce a judgment against an unnamed plaintiff when three conditions are met:
	+ 1) There is a R+S connection linking the action to the foreign jurisdiction
	+ 2) The rights of the non-resident class members are adequately represented
	+ 3) Non-resident class members are accorded procedural fairness, including adequate notice.
	+ \*Court notes it may be easier to justify the assumption of jurisdiction in interprovincial cases.
* Notice requirements were not met in this case, so the judgment is not binding on Currie.

Meeking v Cash Store (2013 MBCA)

F: P brings class action claim against D, in MB, for broker fees; similar class action started in Ontario, which was already certified and settled; settlement class included persons in MB, and said that any persons who do not opt-out waive any claims against D. P said he did not notice posters and did not read mail sent to him, which contained notices.

A:

* In circumstances where the court has territorial jurisdiction over both the defendant and the representative plaintiff in a class action proceeding, common issues between the claim of the representative plaintiff and that of non-resident plaintiffs is a presumptive connecting factor, one sufficient to give the court jurisdiction over non-resident plaintiffs.
* When jurisdiction is properly assumed, recognition and enforcement will only be granted if there was procedural fairness. In this case, Ontario properly assumed jurisdiction over the plaintiff. However, there was a lack of procedural fairness regarding the notice provisions, as they pertained to one of the defendants (Instaloans).
* Settlement is unenforceable against Instaloans customers, because Instaloans was not included in heading of notice.

*In Rem* Actions: Jurisdiction and REcognition and Enforcement

* In private international law, no distinction is made between realty and personalty. Instead, the distinction is between **movables** and **immovables.**

Hogg v Provincial Tax Commissioner

F: 37 mortgages on BC property form part of an estate in Saskatchewan; SK can only levy succession duty if the mortgages devolve according to the law of SK; movables devolve according to the law of BC (the *lex situs*) while immovables devolve according to the law of the domicile. Question is whether the mortgages are movable or immovable property.

A:

* Whether property is moveable or immovable must be determined by the law of the jurisdiction where the property is situated (*lex situs*).
* Expert testified that, in BC, charges are immovables. Therefore, mortgages not subject to succession tax in SK.

# Exercising jurisdiction over foreign immovables

* The general rule is that courts of a country have no jurisdiction to adjudicate on the right and title to lands not situated within that country.

British South Africa v Mozambique

F: P was in possession of large tracts of land in South Africa; D took possession of those lands, wrongfully.

A:

* Two parts to the Mocambique rule:
	+ British court has no jurisdiction to entertain an action for the determination of title to, or the right of possession of, any immovable situated outside England
	+ British court has no jurisdiction to entertain an action in trespass with respect to lands situated abroad.

Hesperides Hotels v Muftizade

* UKHL considers some of the criticism levelled against the Mozambique rule, but refuses to change it.

# Exceptions Based on Contract or equity between parties

Godley v Coles (ONHC)

F: P and D reside in Ontario, but both have condos in Ontario; P seeks to recover from D, alleging D’s condo caused water damage to P’s condo.

A:

* D argues that Mozambique rule prevents P from bringing action in Ontario.
* A substantial portion of the damage is to *moveable* property. It is open for the court to assume jurisdiction over an action for moveables.
* Where an action is for damage to immoveable property, rather than an action for possession or title, the Mozambique rule should be relaxed.

Ward v Coffin

F: Issue of whether P can bring an action in NB (where D is situate) to enforce an agreement of sale of lands in QC. Plaintiff seeking specific performance

A:

* The contract was made in NB and the parties to the contract are subject to the law of NB.
* Court can adjudicate disputes regarding a land contract, so long as the court has jurisdiction over the contract or the parties to the contract.

# Recognizing foreign judgments affecting land in the forum

* Foreign courts cannot make orders with respect to land in Canada, and any such orders will not be recognized and enforced by Canadian courts.

Duke v Andler (SCC)

F: Contract for purchase of real estate in Victoria, BC; contract amongst California residents; California court ordered defendants to convey property to P, refused to do so.

A:

* Judgment of a foreign court on the question of title and ownership of property situated in Canada will not be enforced.

Choice of law

# Choice of Law Theories and Methodology

## Theories

* There are several theories which seek to explain why courts sometimes apply the law of another state. For more, see chapter 2.

## Methodology

### Choice of Law as part of the system of private international law

* Choice of law rules allow people and property to move from one country or province to another, and to undertake cross-border transactions, without having the disparities in local laws undermine their personal status or the security of their rights.

### The Standard or Classical approach to choice of law

* Choice of law principles have traditionally been expressed in rules that say that a particular type of legal issue is to be determined according to the domestic law of a country with which the case has a defined connection.
	+ **Examples:**
		- Formal validity of a marriage is governed by the law of the country in which the marriage was celebrated.
		- Liability in tort is governed by the law of the country in which the tort was committed
		- Matters of judicial procedure are governed by the law of the forum
* Importantly, a choice of law rule only comes into play if a party to the legal dispute (1) pleads that an issue should be decided by a law *other than* that of the forum (2) proves, as a fact, that the outcome of the issue is different under the foreign law than it is under the law of the forum.
	+ If no party raises a choice of law issue, or if the party fails to satisfy the court as to what the rule is or how it applies, then the *lex fori* will be applied.
* Some choice of law rules are rules of **alternative reference**: they allow a party to invoke any one of several systems of law in order to resolve the dispute.
	+ **Example:** When considering whether a testamentary disposition is formally valid, a court may consider the law of X, Y, or Z.
* Other choice of law rules are rules of **cumulative reference**: they require a court to apply the rules of two legal systems, not as alternatives but in conjunction with one another, and the claim must satisfy the requirements of both systems.
	+ **Example** (old rule): P has a claim in tort *only if* what D did was a tort in the forum and a tort in the place in which the action occurred.
	+ Presently, the only area in which rules of cumulative reference exist is in family law.

### Process of applying the choice of law rule

* There are three steps in the application of a choice of law rule:
	1. Characterize the issue and determine which choice of law rule applies
		+ For example, is a rule that a person under 18 needs the consent of a parent to marry a rule of capacity to marry (which is subject to one choice of law rule) or is it a rule of the formal validity of a marriage (which is subject to another rule)?
		+ Characterization of a forum’s choice of law rule is an exercise in interpretation of the forum’s law (i.e., no deference is owed to the manner in which the rule would be characterized in another jurisdiction)
	2. Follow the choice of law rule and determine the applicable law
		+ This is relatively straight forward in many cases. If the rule is based on the location of property or the location of a marriage celebration, that can usually be ascertained.
		+ This may be difficult in some cases. What if, for example, a tortious action occurred in one country but harmed the plaintiff in another?
	3. Apply the law
		+ Choice of law rules will be barred from application if one of the exclusionary rules apply:
			- Penal law
			- Tax or revenue law
			- Against public policy of the forum
* In provinces other than QC, the choice of law rules are largely common law. Statutory choice of law rules are relatively rare.

### Renvoi

* Renvoi is a controversial aspect of the classical choice of law method. It stems from the following ambiguity:
	+ Country A’s choice of law rule says: “Issue X is governed by the law of B.”
		- Does the “law of B” include only the domestic law of B, or does it also include the choice of law rules of B?
			* If it includes the conflict of law rules, what do those rules say?
				+ They may point back to the law of country A (**remission**)

If so, the Country A will apply its law, which will point to country B’s law, which will point back to country A, etc.

* + - * + They may point to a third jurisdiction (**transmission**)
				+ They may point to the law of country B
* The term **renvoi** is a term used to describe the above problem as well as a court’s approach to solving that problem.
* The point of *renvoi* is to ensure that the forum achieves the same result as would be achieved in the foreign court.
* In the EU, *renvoi* has been expressly excluded by Rome II: “The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.”
* In order to determine what approach a foreign court would take to a *renvoi* problem, the court must rely on testimony of experts, which may be controversial or inaccurate.
* *Renvoi* has been expressly excluded in certain parts of choice of law, notably contracts and family law.
* *Neilson* is the leading case.

Neilson v Overseas Projects Corp of Victoria (Australian HC)

F: N’s husband worked for OPC in China; N fell down the stairs and sued OPC in negligence in Australia. Australian choice of law rule stated that the law governing tort liability was the law of the jurisdiction where the tort occurred (i.e., China); this was a problem for the plaintiff, because China had a one-year limitation period on such actions, which had expired. P argued that, when applying the “law of China”, the Australian court must also apply the Chinese choice of law rules, as this is what a Chinese court would do. The result would be that the law of Australia (including a longer limitation period) would apply, because Chinese law states that if both parties are nationals of the same country, the law of their country (i.e., Australia) may be applied.

I: What is meant by “the law of the location of the tort”? Does it include choice of law rules?

A:

* A reference to the *lex loci delicti* (i.e., the law of the country where the tort was committed), includes a reference to the whole law of that country, not just to its substantive law.
* Court notes that this may lead to an “infinite regression” of references.
* Concludes that, in this case, article 146 (i.e., the clause allowing the matter to be resolved by application of the law of the parties’ domicile) was not a reference to Australia’s choice of law rules and, therefore, Australian substantive law should be applied.

Dissent:

* McHugh J. rejected *renvoi* because he could see no way out of the infinite regression of “total renvoi” (also known as double renvoi).

### The Incidental Question

* “The incidental question” is a logical dilemma that, like *renvoi*, arises because different countries have different choice of law rules. This dilemma arises in the following circumstance:
	1. The forum’s choice of law rule says to apply the law of X to a particular issue
	2. That issue itself turns on a sub-issue that also raises a choice of law question
	3. The answer given to that incidental question is different, depending on whether the private international law of X or that of the forum is applied to the question.
* **Example:**
	1. **Main issue:** How a deceased person’s estate is to be distributed (died intestate). Choice of law rule says that intestate succession to moveable property is governed by the law of the deceased’s last domicile. Deceased died domiciled in X. Law of X states that surviving spouse inherits a certain portion of the estate.
	2. **Sub-issue:** whether claimant, A, was the spouse of the deceased. Deceased was A’s second wife, and A’s first marriage was dissolved by decree of court in Y. Validity of the divorce decree raises a separate choice of law question (an **incidental question**).
	3. The divorce is recognized as valid by the private international law of X, but not by the private international law of the forum. Therefore, the validity of A’s claim to a portion of the estate turns on which conflicts rules are applied.
* Should the incidental question be decided according to the conflicts rules of the country whose law governs the main question? Or according to the conflicts rules of the forum? The dilemma is this:
	+ If the court chooses to apply the law of X (and treats the divorce as valid) the court is abandoning its own standards as to which divorces ought to be recognized.
	+ If the court chooses to apply the law of the forum, it is denying a claim for a party who would have a valid claim in the other jurisdiction (whose law is being used to decide the main issue).
* There is no universally satisfactory manner in which to solve the incidental question problem.
* Best example is *Schwebel v Ungar*, below.

# Validity of Marriage

* Whether a marriage is valid or not usually arises as a preliminary issue in other litigious proceedings (e.g., in challenging a will).
* The common law has traditionally distinguished between the formal requirements for a valid marriage and the more substantive requirements (referred to as “essential validity”).

## Formal validity

Brook v Brook (1861)

F: Question is about the formal validity of a marriage performed in Denmark between two British subjects, domiciled in England, who subsequently returned to England as husband and wife. They married in Denmark in order to avoid an English statutory provision which prohibited marriage between widower and deceased wife’s sister.

A:

* While formal validity is governed by the law of the place in which the marriage contract entered, essential validity depends on the law of the domicile.
* If a marriage contract is contrary to the law of the domicile, it is invalid in that country.
* The marriage between the parties is not recognized by English law. While it is formally valid (according to the law of Denmark) it is essentially invalid.

## Essential validity

* Essential validity is governed by the law of the domicile of the parties at the time of marriage (*Brook*)
* In some cases, however, the domicile of the parties is not the same or, if it is, there is clear intent for that domicile to change after the marriage.
* There are two alternative choice of law rules for dealing with this situation: the dual domicile rule and the intended matrimonial home rule
	+ **Dual domicile:** according to this rule, each party must be capable of marrying the other according to the law of each party’s ante-nuptial domicile.
	+ **Intended matrimonial home:** according to this rule, the law of the intended matrimonial home governs the capacity of the parties to marry.
* Courts have tended to favour the dual domicile rule, even though it is more onerous.

Canada v Narwal (FCA)

F: Court considering validity of marriage, celebrated in England, between two Indian citizens, one of whom was Canadian immigrant. Wife made application to sponsor husband’s return to Canada.

A:

* Marriage was prohibited in India, not in Canada. Applying the dual domicile test, therefore, would render the marriage invalid.
* Court applies “intended matrimonial home” test – since the marriage is valid in Canada, it’s valid for the purposes of the application.

Schwebel v Ungar (1965 SCC)

F: U married W in Budapest. Left Hungary for Israel. Obtained a religious divorce (a “get”) in Hungary. This document was not recognized in either Italy or Hungary as bringing the marriage to an end, but it was recognized in Israel. U married S in Toronto; S wants the marriage declared null, because U and W were never divorced.

A:

* According to the law of her domicile (Israel), U was a single woman who had the capacity to marry.

Sangha v Mander

F: S married to M in BC; both resident in BC at time of marriage, but M’s domicile of origin remains the Punjab, because no domicile of choice proven; S sought declaration of nullity because of M’s impotence;

A:

* Court says that there is a presumption that unproven foreign law is the same as that of the forum. Since the defendant M didn’t appear, this presumption arises.
	+ Because of the presumption, its not necessary to choose between the ante-nuptial domicile of M or the intended matrimonial domicile.
	+ Under domestic law of BC, the marriage is void because of M’s incapacity to consummate it. Therefore, marriage set aside.

# Torts

Tolofson v Jensen (1994 SCC)

F: P (residents of BC driving car insured in BC) were in a MVA with D (resident of SK driving car insured in SK). Which province’s law governs the resulting personal injury suit?

A:

* *Phillips v Eyre* was the law for some time: in order to sue in England for a tort committed elsewhere, the wrong must have been a tort both in England and in the foreign jurisdiction (the “double barrel” approach). This rule has caused numerous problems, most of which arise by the extension of forum law into matters which really have no connection to the forum.
* As a general rule, the law to be applied in torts is the law of the place where the tort occurred.
	+ In some cases, the act will take place in one jurisdiction but the effects will be felt in another; generally, the location where the effects are felt is the location of the tort.
		- One of the policy bases for this rule is that activities, generally, should be governed by the law of the place where they occur. It would be contrary to general principles of international law if, for example, Canadian law were to govern activity in Hawaii.
* The court retains a discretion to apply the law of the forum, but this will be exercised in the rarest of circumstances.
	+ However, court says that, on balance, no exception should be made for litigants who are both resident of the forum.

D: Law of SK applies; limitation periods are substantive, not procedural, therefore action is barred.

Somers v Fournier (2002 ONCA)

F: Negligence action, commenced in ON, arising out of MVA in NY; trial judge found that substantive law of NY applies and that procedural law of ON applies.

I: Which law governs costs, prejudgment interest and non-pecuniary damages?

A:

* Rules which are determinative of rights are substantive, those which “make the machinery of the forum court run smoothly” are procedural; procedure is the “vehicle” by which the substantive legal rights and obligations are given effect.
* Prejudgment interest is designed to be compensatory – to provide relief to a successful litigant against declining value of money between start and conclusion of action.
	+ Court says that prejudgment interest is akin to a “head of damages”, which falls under the substantive law of ON.
* Plaintiff has asked court to exercise discretion to apply the law of ON, instead of law of NY. Court refuses.
	+ The exception is only available in circumstances where the application of the general rule would give rise to an injustice.
	+ Ordinary differences between the law of the forums that favour or disadvantage one side is not an “injustice”.
* Laws which deny a remedy in respect of a particular head of damage are substantive; laws which affect the quantification of damages are procedural. Therefore, non-pecuniary cap is procedural.

D: Costs and “cap” on non-pecuniary damages are procedural matters governed by the law of ON; pre-judgment interest is substantive, and governed by the law of NY.

Banro v Editions Ecosociete (2012 SCC)

F: Banro, Ontario-based corporation exploring mining properties in DRC, brings defamation action against D, a QC-based corporation; books distributed in QC and in Ontario, and can be purchased online. EE says that ON had no jurisdiction over the action, and that ON is *forum non conveniens*.

A:

* There is a real and substantial connection between Banro’s claim and ON. Book was distributed in ON.
* In the defamation context, there may be room for an exception to the *lex loci delicti* rule. It may be the case (though not decided here) that the law that should apply is the law of the place where the most substantial harm to reputation occurs.
	+ In this case, whether the *lex loci delicti* rule is applied or whetherthe law of the place where most substantial harm occurred is applied, the outcome is the same: Ontario law.
* When considering which jurisdiction has the closest connection with the harm that occurred, Australian courts consider the following factors:
	+ (A) Ordinary residence of the plaintiff
	+ (B) Extent of publication in each jurisdiction
	+ (C) Extent of harm in each jurisdiction
	+ (D) Other relevant matters
* \*Court considers choice of law rule in context of *FNC* analysis.

# Contracts

* Choice of law in contracts is governed by the common law in Canada.
* Some international contracts (e.g., shipping contracts) are subject to uniform international conventions that have been adopted by Canadian statute.

## The Proper law of the contract

* Most of the choice of law rules are resolved by reference to the “proper law of the contract.”
* In determining the proper law, the parties’ intention (i.e., their objectively determined common intention) is key.

### Express choice of law clause

Vita Food Products v Unus Shipping Co.

F: Nova Scotia-based shipping vessel carrying herring from Nfld. to NY. Bill of Lading said that any disputes were to be governed by English law. Also stated that it was subject to the Canadian *Water Carriage of Goods Act*, which declared void any clauses that exempted ship owners from liability (one such exemption clause was contained in the contract).

A:

* The law governing contracts is the law the parties intended to apply. If not express, it will be inferred from the terms of the contract and the surrounding circumstances.
	+ Express language of the contract must be given effect: the contract is governed by English law.
	+ So long as the express choice is *bona fide* and legal, and does not violate public policy, it will be given effect.
	+ Connection with the forum selected is not required
* Despite the fact that the English law was the proper law of the contract, the rules enacted by England did not apply because the shipment was not from an English port.
	+ Under English law, it is permissible to incorporate the provisions of the law of another country (the US and CAD shipping rules, in this case).
	+ In short, parties can agree to have contract governed by law of X, but incorporate rules that are part of the the law of Y or Z.
		- This may give rise to choice of law complications: by what system of law is the validity or construction of such a clause to be determined?
	+ The application of English law involves the application of relevant English statutes, common law *and* the conflicts rules.
		- This may give rise to *renvoi* problems

### No Express choice of law clause

* NOTE: There are two rationales for determining the proper law of the contract in the absence of an express choice of law clause. Those two rationales are conflated in *Richardson*. The **first** approach is to determine, through interpretation, the implied intention of the parties, as to the applicable law. When the contract shows neither an express nor an implied intention, the **second** approach is to determine the system of law which has the “closest and most real connection” with the contract. This latter test is not a matter of discerning intention.

Richardson International Ltd. v Chikhacheva

F: Richardson (fish trading company) claimed a maritime lien over the Chikhacheva. This lien was available under American law, but not under Canadian law. Availability of the lien depended on the proper law of the contract.

A:

* If there is no express choice of law clause, the court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances. The goal is to identify the system of law that has the **closest and most real connection** to the contract.
	+ Court says that the presence of an arbitration clause is highly persuasive: the clause stated that arbitrations were to take place in Seattle by the Chamber of Commerce, so the implication is that the parties intended American law to apply.

Imperial Life Assurance v Colmenares (SCC)

F: Canadian insurance company issued life insurance policies through its branch office in Havana, Cuba. Question arose as to whether proper law of the contract was Cuba or Ontario. If Ontario law applies, respondent entitled to sum; if Cuban law applies, payment would be prohibited without approval of National Bank of Cuba.

A:

* Facts surrounding contract: written in Spanish; applied for and issued in Cuba; applications addressed to “Imperial Life Assurance Canada”, and were processed in Ontario; policies prepared in Ontario in the standard-form of Ontario; payouts were to be in USD, but premium payments were made in pesos.
* Contract was formed when head office approved and distributed the policies, in ON.
	+ However, the place where the contract is made does not decide the matter. All the circumstances must be considered to determine the law that has the closest and most substantial connection to the contract.
* Importantly, Havana had no authority to approve policies. Decision had to be made at head office.

Amin Rasheed Shipping v Kuwait Insurance

F: Claim brought for payout on insurance policy for ship; policy followed English standard form but was issued in Kuwait by insurer, who’s head office is in Kuwait. In order to bring claim in English court, plaintiff had to show that the proper law of the contract was English law.

A:

* When determining the proper law of the contract, courts will look to (1) The system of law that the parties intended to apply (either expressly or impliedly); or (2) If intent is not clear, the law with which the contract has its closest and most real connection.
* The “proper law of the contract” refers only to the substantive law; there is **no *renvoi***in contract cases.
* Kuwait does not have an “indigenous law of marine insurance”; English marine insurance law was necessary in order to interpret and give meaning to the language used in the contract. For this reason, English law is the proper law of the contract.
* This case is an example of there being no express or implied intention, forcing the court to decide which body of law the contract had its closest and most real connection.

## Formation of contract

Mackender v Feldia

F: Insurance policy for diamond merchants, stated that policy “shall be governed exclusively by Belgian law and subject to Belgian jurisdiction.” Diamonds stolen from merchant, claim of $50k made against policy. Insurer rejected claim, arguing that merchant failed to disclose the fact that he was smuggling diamonds across borders. Insurer began proceedings in London, seeking to have the contract declared void for illegality and non-disclosure; merchants began proceedings in Belgium; merchants want London action stayed, pointing to clause.

A:

* Contract was made in London. Rules of court give jurisdiction over contracts “made within the jurisdiction”. Question is whether court should exercise discretion to determine whether the contract is void.
* Court said that, if there was an issue as to whether the contact ever came into existence (e.g., non-est factum, consensus ad idem, offer/acceptance, etc.), then the law of England would apply (because the contract was made in England). But when the question is whether or not the contract is voidable for non-disclosure, it is a question about the rights and obligations under the contract, which is governed by the proper law of the contract (which is determined by the jurisdiction selecting clause, here).

## Formalities

Greenshields v Johnston

F: Defendant company owed plaintiff company $15k. Defendant personally guaranteed company’s debt, but argued that this guarantee was void for non-compliance with Alberta *Guarantees Acknowledgement Act*. Plaintiff said that guarantee was stated to be governed by the law of Ontario and does not need to comply with AB Act.

A:

* A contract is formally valid if it meets the requirements of either (a) the place where it was made or (b) the proper law of the contract.
	+ Does not comply with (a), question as to what the proper law of the contract is.
* Stated law of the contract (Ontario) will be applied so long as it is *bona fide* and legal and does not offend public policy grounds.
	+ Public policy discretion will only be exercised if the application of foreign law would violate an “essential principle of justice or morality”.
* Choice of law clause does not offend public policy, Ontario law applies and the guarantee is valid.

## Illegality: Rules of Mandatory Applicaition

* In some cases, a law other than the law the parties have chosen will determine the rights and obligations under the contract.
* In some cases, statutes have been passed to expressly govern contractual dealings in certain contexts.

Avenue Properties v First City Development (BCCA)

F: P (BC company) purchased three strata units in Ontario from defendants; contracts said they were to be governed by the law of Ontario. P refused to complete the contract, on the grounds that defendants failed to comply with disclosure obligations under the BC *Real Estate Act*.

A:

* A court can **apply the law of its own jurisdiction in substitution or supplementation for the proper law of the contract** in two circumstances:
	+ 1) Where the local law is procedural
	+ 2) Where the local law, although substantive, is of such a nature that it should be applied (either because it is required by legislation or because it would be contrary to public policy not to apply the local law).
		- For example, where local legislation states that certain procedures are required, notwithstanding the proper law of the contract.
* The statute expressly applies to sales of real estate in BC for properties that are situated outside of BC.
	+ There is a good chance that a BC court would apply s. 62 of the *REA*, and it is unlikely that an Ontario court would do so. This gives rise to a fair juridical advantage to proceeding in BC.

 Gillespie Management Corp v Terrace Properties (BCCA)

F: Respondent was to manage Appellant’s apartment building in Washington state. Agreement made in BC. Required three-month’s notice for termination, but no notice was given by the appellant; respondent brought action for breach of contract. Appellant argued, in defence, that respondent was not licensed to act as rental property manager in Washington, and therefore was not legally entitled to commission in Washington. Can respondent recover under the contract?

A:

* Trial judge concluded that proper law of the contract was BC.
* Rule: In the absence of evidence to the contrary, the mode of performing the contract (as distinct from the substance of the obligations) is governed by the law of the place at which the obligation is to be performed.
	+ Applying this rule, the illegality of the respondent’s acts (i.e., in performing property management services in WA) render its claims unenforceable.
	+ (Previous authorities had held that a court would not require performance, if performance would be illegal in that jurisdiction; this case seems to go a step further and hold that, if performance was illegal, obligations relating to that performance are not enforceable).

Society of Lloyds v Meinzer

F: Lloyds applied to have judgments registered in ON; defendants argued against it, arguing that the judgments were based on agreements that were unenforceable in Ontario because they contravened the Ontario Securities Act. Court agreed, but said that, on balance, public policy did not weigh against enforcing the judgment. See above (section on residual public policy discretion).

# Restitution and Unjust Enrichment

* While restitutionary claims are district from contractual claims, the handling of the choice of law problems in restitution bear a strong resemblance to those in contract.

Christopher v Zimmerman (BCCA)

F: Appeal of trial judge’s conclusion that applicant’s claim for constructive trust is governed by law of Hawaii. Parties met in Hawaii in 1988, resided there for 5 years then moved together to mainland for 4 years in various states. Moved to BC in 1997, separated in 1998. Ms. Christopher seeks constructive trust over Zimmerman’s moveable property, arguing unjust enrichment. Trial judge said that law of the matrimonial domicile should be applied, and that that was Hawaii.

A:

* When determining the proper law, the court must first characterize the issue and then identify the applicable choice of law rule.
	+ This cannot be a case about marital property: the parties were not married
	+ Rather, this is a claim in unjust enrichment.
		- Choice of law rule: proper law is the law of the country where the immediate or ultimate enrichment occurs.
* Court sends back for trial to establish sufficient record.

Minera Aquiline v IMA Exploration (2007 BCCA)

F: Minera was granted a constructive trust over “Navidad Project”, combined with an order that IMA transfer the property to Minera. Question as to whether IMA made unlawful use of confidential information obtained by a subsidiary. Appellants challenge the availability of constructive trust (i.e., they argue that *in rem* remedies cannot be ordered against foreign immovables).

A:

* At common law, court drew distinction between determining legal title to foreign land (which it had no power to do) and enforcing a contract or equity between the parties, in the context of a land dispute (which it did have the power to do).
	+ Here, the trial judge had the jurisdiction (and was right) to order a constructive trust over the property.
* When determining the applicable choice of law rule, courts should look at the nature of the *claim*, not the remedy sought. In this case, the claim is one in unjust enrichment, even though the remedy sought relates to property.
	+ Courts have jurisdiction to enforce rights affecting land if those rights are based in contract, trust or equity and the defendant resides in Canada. In doing so, the courts are enforcing a personal obligation between the parties (*in personam*).
* In this case, BC law has the “**closest and most real connection**” to the obligation between the parties, so it should apply.

# Property

## Moveables: *Inter Vivos transfers*

* There is a general rule that, in relation to moveables, the governing law is the law of the place where the property is located **at the time of transfer**.
* Note: PPSA has statutory choice of law rules
* Transfers of intangible property causes special problems, and some argue that such property should be governed by a different choice of law rule.

### Transfer of tangible moveables

Cammel v Sewell

F: Prussian ship, consigned to English merchants, left Russia and ran ashore in Norway. Cargo (wood) was not damaged in the crash, but it was unloaded and subsequently damaged from exposure. Merchants claimed for a total loss against their insurers (the plaintiffs). Wood was sold to another party, plaintiff objected by Norwegian court confirmed the sale. When the goods were shipped to England, the plaintiffs claimed the rights to them and to the proceeds of sale. Lower court held that Norwegian judgment was *in rem* and determined the title to the goods.

A:

* If Norwegian law applies, innocent purchaser would have valid title to the goods.
* Conflicts rule: if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.
* Does not matter that the goods were not intended to be sent to that country. They were disposed of by a mercantile agent in that country, which is sufficient to transfer title to an innocent third party.

Winkworth v Christie Manson and Woods

F: Art stolen from plaintiff in England, taken to Italy and sold to one of the defendants. Then sent back to England to be sold at Christie’s. English owner brings action against Christie’s and the Italian purchaser to recover the art and for damages. Question is whether English domestic law or Italian domestic law should be applied to determine title to the goods and the proceeds of their sale.

I:

* The general rule is that the validity of transfer of moveable property is determined by the *lex situs*. There are four exceptions:
	+ If goods are in transit and their *situs* is not known, a transfer which is valid by its proper law will be valid in England.
	+ Where purchaser claiming title has not acted *bona fide*
	+ Where English court declines to recognize the *lex situs* because doing so would be contrary to English public policy.
		- “Wholly contrary to justice and morality”
	+ Where a statute of the forum obliges the court to apply its own law
* The presence of the goods in England at the time of the action, and the fact that the plaintiff did not consent to them leaving England, does not change the fact that the impugned transfer took place in Italy. The rule is that Italian law governs the transfer, **unless** the plaintiff can demonstrate that one of the exceptions applies.
	+ None of the exceptions apply here. Italian law governs the transfer.

## Succession: Wills and trusts

* When a person dies, a personal representative is appointed to pay off the deceased’s debts and to distribute property to those beneficially entitled.
	+ When a representative is appointed by will, he or she is known as an **executor**.
	+ When a representative is appointed by the court, he or she is known as an **administrator**.
* The executor or administrator is not empowered to act until authorized by the court.
* There is an important distinction between **administration and succession**: the conduct of the executor/administrator is treated separately from questions about the deceased’s property.
	+ Generally, questions of **administration** are governed by the location of the assets, while questions of **succession** are governed by the last domicile of the deceased.

### Administration

* The common law required the separate administration of an estate in each jurisdiction where assets were located, and refused to recognize the authority of a foreign personal representative without a local grant of authority.
* Today, foreign grants of probate authority are regularly given local confirmation (“resealed”). However, issues still arise, as representatives are required to administer the estate according to local rules.

Jewish National Fund v Royal Trust (SCC)

F: Testator left residue of estate to the trustees of the Jewish National Fund, for the purpose of purchasing land for settlement of Jewish colonies. Trustees given discretion as to *where* the land would be located (BC, New York, or Commonwealth state). Question was where was the place of administration of the trust?

A:

* SCC said place of administration was not the location of the trustees. Rather, the place of administration is where the land (which is ultimately purchased) is located.
* Gift would be a valid charitable trust in NY, but would be invalid private purpose trust in BC.
	+ Court seems to say that, if trust is invalid in *any* of the places where property could be purchased, it is invalid.
		- Dissent disagrees: the trust would be valid in NY and was to be administered by NY trustees; should not interfere.

### Intestate succession

* Choice of law rules that apply to intestate succession distinguish between **moveable property** (governed by the law of the last domicile) and **immovable property** (governed by the law of the *situs*).

Re Thom (MB QB)

F: Applicant is the widow of a man who died intestate in Saskatchewan, owning land and moveables. Respondents are the children of the deceased. On death, deceased was domiciled in SK. In addition to assets in SK, deceased owned half section in MB. Widow received $40k + 1/3 of residue, according to intestate rules in SK. Also wants to sell land in MB.

A:

* Widow says that, under MB intestate rules, she is entitled to first $50k of proceeds from sale of land + ½ of residue. Respondents say she is only entitled to 1/3 of the sale of the land, because SK Act states that all assets, wherever located, are to be calculated in net value of estate.
* Court said that, since the spouse has already received $40k under SK law, she is entitled to the first $10k of the sale of land, plus half the residue.
	+ MB court doesn’t apply renvoi (i.e., doesn’t apply the law of SK) because it says that Canadian courts typically do not do so.
	+ Instead, applies the law of MB, taking into account the preferential share that the widow already received in SK.

### Testate succession

***Formal Validity***

* The formal validity of a will is generally assessed according to the law of the place where the will was made.

***Essential Validity***

* Essential validity deals with issues of substance (e.g., is a specific disposition of property valid?).
* General rule is that essential validity of land is governed by the *lex situs* and the essential validity of moveables by the law of the deceased’s last domicile.

Estate of Groos

F: Deceased made a will in Holland. Then moved to England, where she was domiciled at the time of her death.

A:

* Will was valid under the law of Holland and that validity was not lost when the deceased became domiciled in England.

Re Groos

A: By the law of Holland, woman only allowed to dispose of ¼ of her estate, ¾ was required to go to her children. However, the woman became domiciled in England after making the will, question is whether she gained the capacity to dispose of the entirety of her estate to her husband.

* Disposition under the will is governed by the law of the last domicile. The effect of the will, in England, is to entitle her husband to the entirety of the estate, so that effect stands.