I. General Considerations 2

A. Characterization; Substance and Procedure 2

B. Exclusionary Rules 3

C. Domicile and Residence 5

1. Domicile 5

2. Residence 7

II. Jurisdiction *In Personam* 8

A. Jurisdiction Simpliciter and Territorial Competence 8

1. The Constitutional Standard 8

2. Parties within the jurisdiction 9

3. Parties outside the jurisdiction 9

B. Discretion; Stays and Anti-Suit Injunctions 13

1. The English Principles 13

2. Canadian Principles 14

3. Jurisdiction Selection Clauses 15

III. Recognition and Enforcement of *In-Personam* Judgments 17

A. Pecuniary Judgments 17

1. Finality and Conclusiveness 17

2. Jurisdiction in the International Sense 17

B. Non-Pecuniary Judgments 19

C. Defences to R&E of Foreign Judgments 20

D. Statutory Regimes 21

1. Judgments and Orders 21

2. Arbitral Awards 21

IV. *In Personam* Class Actions: Jurisdiction and R&E 21

V. *In Rem* Actions: Jurisdiction and R&E 23

VI. Choice of Law 25

A. Renvoi 26

B. Marriage 27

1. FORMAL VALIDITY 27

4. Essential Validity 28

C. Torts 29

D. Contracts 30

1. The Proper Law 30

2. Formation 31

3. Formalities 31

4. Illegality: Rules of Mandatory Application 32

E. Unjust Enrichment 33

F. Property 33

1. Moveables: *Inter Vivos Transfers* 33

2. Succession: Wills and Trusts 34

APPENDIX – STATUTORY MATERIALS 35

# General Considerations

## Characterization; Substance and Procedure

**3 categories/subdivisions:**

1. Characterize cause of action
2. Decide forum:
	1. Jurisdiction: Where can I start the action?
	2. Choice of Law: If the action is started in *x,* what law will the *x* courts apply to the merits of my action? What law will *y* courts apply to the merits of my action?
	3. Recognition & Enforcement: Where will I be able to enforce the judgment easily?
* Want to litigate in the jurisdiction that has the most favourable procedural rules for your client.
* Every court employs own procedural rules; refuses to apply the procedural rules of any other jurisdiction.
* Old definition (pre-*Tolofson*): substantive rules deal with the right, procedural with the remedy.
* *Lex Causae =* law of the cause of action (law of foreign jurisdiction); *Lex Fori* = law of forum.

**Forum/*Lex Causae:*** Four possible combinations of characterization in which there are similar rules.

1. Forum law = procedural, equivalent = procedural, which rule applies? Law of the forum
2. Forum law = substantive, *lex causae =* substantive*,* which law applies? *Lex Causae*.
3. Forum law = substantive, *lex causae* = procedural, which law applies? Neither.
4. Forum law = procedural, *lex causae* = substantive, which law applies? Both

|  |
| --- |
| ***Tolofson v Jensen*, [1994] 3 SCR 1022 (originated BC**) |
| SCC modifies right/remedy distinction. *Limitation periods substantive rules of law = when foreign law applied, the limitation periods of* Lex Fori *shouldn’t be considered.* Presump against characterizing rule of forum as procedural rule. |
| **Facts:** Tolofson was injured in an MVA in SK when he was 12 (Jensen was the driver of the other vehicle – SK resident); Tolofson brought action against his father (driver – BC car & resident; BC has jurisdiction over its own residents) and Jensen 8 years after the accident. SK limitation period had passed, BC’s had not.**Analysis:** 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. **Takeaway:** Choice of law rule for limitation periods should be *lex loci delicti* – law of the place the tort occurred/jurisdiction of the choice of law.  |

* Certain rules are understood to be procedural, including: appropriate court, form of pleadings, service of process and notices, conduct of judicial proceedings, mode of trial and appeal, execution of judgments.
* Cdn = narrower view of procedure, policy concerns with inappropriate forum shopping + extend comity.

**Standing to Sue**

The forum (jurisdiction in which litigation is occurring) may have subsidiary law rules as to who can be a party.

* Natural persons are always parties
* Corporations are almost always parties

|  |
| --- |
| ***International Association of Science and Technology v Hamza* (1995 ABCA)** |
| **Facts:** Matrimonial property dispute between Hamzas. Mrs Hamza believed husband had more property than he was admitting, wanted fair share. IAST sought declaration that neither Hamza had a property interest in any of their assets. Mrs Hamza claims IAST cant be plaintiff because they have no standing to sue in AB b/c not registered corps or societies in Canada.**Issue:** Does IAST have standing to be a party in an action in AB? Can an unincorporated society (wouldn’t have standing in Alberta under Alberta rules) have standing for this application?**Analysis:** * Association = Swiss, registered in Switzerland as a society.
* Not “incorporated” in the Alberta sense
* Yes, the IAST can have standing because of the concept of comity
* Para 38: Court sets out criteria that for the entity to have standing, the entity *in its home jurisdiction*:
	+ Must be able to assume all the rights and liabilities of a corporation
	+ Foreign litigant is a legal person separate and apart from its members in a foreign jurisdiction.
	+ There are identifiable legal persons answerable for court directions and orders
 |
| ***Bumper development v police of metropolis* (1991) Eng Ca** |
| **Facts:** Litigation in England concerning title to a bronze statue. 20-years prior, a Cdn citizen discovered the statute at a site. He sells it, and it keeps being resold – eventually purchased by Bumper Development (in London). Police seize the statute from Bumper and return it to India. Bumper sues the police for conversion.**Issue:** Bumper has standing, as does India BUT does the temple have standing to be a litigant?**Analysis:** Court follows a similar approach to the Alberta CA. Follows the home jurisdiction. Temple is in India, therefore looks to the Hindu law and discovers that in India that the ruined temple has status to sue.**Takeaway:** If the entity in question doesn’t have standing to be a party under the rules of the forum, there is still a *possibility* that looking to the home jurisdiction of the entity, one might find that the entity has standing to be a party. |

**Choosing a Forum:** Want to go to a place that has favourable procedural rules for your client. Consider procedural rules when deciding on the jurisdiction in which to bring the action.

* Rules of Substance
* Rules of Procedure

See Tolofson v Jensen*,* bias against classifying forum rules as rules of procedure. The question of whether a foreign rule is substantive or procedural arises only if there is a foreign *lex causae*; only when application of choice of law of the forum is to apply laws of the other forum. Otherwise, if everything will be determined by the law of the forum, substance/procedure is not an issue.

\*Note = *Tolofson v Jensen* applies across Canada and in all common law jurisdictions.

## Exclusionary Rules

**Dicey’s Exclusionary Rules:** Excl rules relevant to choice of law and recognition & enforcement of foreign judgments. An opportunity/obligation to characterize a foreign law. Note, these rules are common law and apply in Canada.

**Rule 1 (public policy):** English courts will not enforce or recognize a right, power, disability, or relationship recognized under a foreign country IF the enforcement or recognition of such law would be inconsistent with the fundamental public policy of English law.

* Available at choice of law stage & at the recognition and enforcement of foreign judgments based on such laws.
* Case law has a very narrow definition of against public policy (note – there are some exceptions)
* Public policy is not given the same definition that we give it in law school; concerned with a much narrower definition of ‘public policy’

**Rule 2 (public law):** English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign state or (2) found upon an act of state.

* Not everyone agrees with a blanket statement on this.
* Forum doesn’t have to evaluate the foreign law – if everything was left to public policy, the court would have to evaluate the merits of the foreign law.

|  |
| --- |
| ***Huntington v Attrill* *(1893)* Privy Council *–* PENAL LAW** |
| *Leading Canadian & English common law case on the penal law exclusionary rule.* |
| **Facts:** Action brought in Ont for R&E of a judgment from NY. Attrill was a director of a company carrying on business in NY with NY investors; Attrill signed report of his company containing a material false representation. NY had law stating any officer of company who signs such a report would be personally liable for all the damages ensuing from the statement. Huntington = investor who relied on the false statement, decided he had suffered damages and sued Attrill in NY based on NY law. Under NY law, Attrill found liable for damages. Attrill then moved to Ontario.**Issue:** Ont courts had to decide whether R&E judgment of NY courts. Ont would have recognized the NY judgment but for the defense that Attrill made that the law relied on by Huntingdon was a penal law. *Should the NY judgment be recognized in light of this defense? Is the NY law penal or non-penal?***Analysis:** * “*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*.”
* Must look at substance of law and whether R&E would involve execution of foreign penal law.
* In this case, protective/remedial designed to compensate creditors. NOT penal in public sense.
 |
| ***Stringham v Dubois (1992)* AB CA – Revenue** |
| *Revenue exclusionary rules includes ALL sources of revenue – municipal, provincial, federal.* |
| **Facts:** Dubois (lives in US) dies testate, leaves farm in AB to niece. Entire estate is worth $1.9 million. Probate tax due – of total tax bill, $149,000 is apportioned to the farm in Alberta. Niece wants farm conveyed free and clear to her. US Executor of the estate wants the farm sold so that they could be reimbursed for the taxes they paid. **Issue:** Whether or not the exclusionary rule (revenue law rule) would be breached by selling the farm at the instance of the executor and using some of the proceeds to pay the executor (who had already presumably paid the tax)?**Court:** * In USA v Harden: Owed taxes to the Revenue Service in California, entered into court as a judgment. Question for SCC: can the judgment from California be R&E in British Columbia? No, it was a settlement of a revenue debt/law so it is not R/E.
* ABCA decided sale of farm would breach law if proceeds went to executor – orders farm conveyed to the niece.
* Case cites and discusses other precedents (*including ones that go the other way*) – tax debts that have already been paid and they want to be reimbursed.

**Takeaway:** Revenue rule is very dependable – can rely on it with some confidence if foreign law is revenue law. |
| ***Society of Lloyd’s v Meinzer*** **(2001) – Public Policy (narrow)** |
| **Facts:** Society of Lloyd’s trying to R&E debt (against investors for unlimited liability in asbestos litigation) against Meinzer based on a UK judgment. Argument brought by Ds in the action R&E would violate *Ontario Securities Act* therefore contrary to ON public policy. Problem - there had been a considerable history of litigation in Ontario concerning Society of Lloyd’s leading up to the UK judgment. Investors in Ontario had brought an action several years before for a declaration from the Ontario courts that their contracts with Lloyds were void for failure to comply with the *Securities Act.* Lloyd’s defended and argued that the appropriate forum (due to a clause) was UK. Stayed litigation in Ontario and sent it to UK. **Analysis:** ON CA R&E UK judgment and emphasizes the narrowness of the public policy exclusionary rule in the conflict of laws. Fundamental principles of justice – morality, ethics, values (high bar) to be found for a foreign law (law of *lex causae*) to be found to breach forum public policy. Just being “different” doesn’t count.  |
| ***Kuwait Airways Corp v Iraqi Airways* (2002) House of Lords – Public Policy** |
| **Facts:** Iraq invaded Kuwait and seized 10 planes belonging to Kuwait Airways. Planes flown to Iraq, Iraq dissolved Kuwait Airways passed title of planes to Iraqi Airways. Kuwait restored, Iraq repealed law dissolving Kuwait Airways but didn’t give back planes. KA brought conversion action in England. At time in UK – KA had to show (1) IA acts were civilly actionable under law of country occurred (Iraq) (2) would have been civilly actionable had they occurred in England. Transfer of planes to IA prevented KA from satisfying (1), KA argued transfer contrary to UK public policy.**Court:** * “*This public policy principle eludes more precise def’n. Flavour captured by much repeated words of Judge Cardozo that court will exclude foreign decree only when ‘it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonwealth”.*
* Seizure of planes flagrant violation of rules of international law but generally, UK courts will not refuse to R&E a foreign decree on basis it violates international law. But here, breach was plain and acknowledg by Iraq.
 |
| ***United States of America v Ivey* (1995 ONCA) – other Public law** |
| **Facts:** State of MI obtained default judgment under polluter/cleanup legislation. Wants R&E in Ont.**Court:** * Argument via Lord Denning “*laws should not be enforced if they involve an exercise by gvt of its sovereign authority over propery beyond its territory”.*
* Public law exception is infrequently invoked and has never been applied in Canada.
* Even if public law exemption exists, would not apply in this case and shouldn’t have extended scope.
* By R&E judgment, US not asserting sovereignty within Ont, but holding its citizens to account for cost of remedying harm their activity caused.
 |

Note: in conflicts cases in which the *lex fori* is applied as the *lex causa*, there is no need to use the exclusionary rules

##  Domicile and Residence

Domicile and/or residence help courts to determine jurisdiction. There are a number of different ways to determine what jurisdiction should apply to an individual:

* Presence
* Residence (actual, ordinary, habitual; often used by modern statutes)
* Domicile (used by common law) – CAN ONLY HAVE ONE AT A TIME.
* Nationality (used by civil law)
* ***National Trust Company:*** Domicile of corporation is jurisd in which corp was incorporated.

### Domicile

**Domicile of Origin**

* Common law: father’s domicile at moment of your birth (not necessarily the place where you were born)
* Modified for single mothers (your mother’s domicile) and foundlings (the place where you were found)
* Your DofO may no longer exist in same form in which it did when born due to civil unrest/changing borders
* Will revert to DofO if DofC is lost.

**Domicile of Dependency**

* Common law: between birth and reaching the age of majority, your DofD is located wherever father is domiciled
* ***Infants Act****:* in BC, the DofD of a child wherever the person who is looking after you is located
* Never comes up in litigation

**Domicile of Choice**

* Can be acquired after reaching the age of majority and settling in a new place. Residency = DofC unless it arises from *clearly foreseeable and reasonably anticipated contingency.*
* If you have abandoned a domicile of choice but haven’t yet decided where to settle, your DofO is revived.
	+ 99% of the time, an individual who has acquired domicile of choice acquires another domicile of choice – there’s normally never a revival problem.
* To acquire a domicile of choice, 2 elements must be established: **(1) Residence** (effectively arrival/physical presence, no min duration req’d **(2) Intention to remain** (must be freely formed to make locality home, must be absence of an intention to leave in the event of a clearly forseseen and reasonably anticipated contingency).
	+ Eg: If you are from Ontario but are attending law school in BC, but intend to return to Ontario if you cannot find a job in BC, then you have not acquired a domicile of choice

|  |
| --- |
| ***Foote v Foote Estate*, 2011 ABCA – Legal principles establishing domicile** |
| *Need clear evidence on state of mind to acquire new Domicile of Choice.* |
| **Facts:** Concerns deceased Eldon Foote. Mr. Foot was born in Alberta in 1924 and died in Edmonton in 2004. Mr. Foote left 3 wills and 3 wives (2 former, 1 current), many children, many properties worldwide, and many corporations and charities in existence. The estate was worth $130 million. Had to leave 3 wills to ensure that he was able to dispose to the beneficiaries he wished to. One each of BVI, Norfolk, Alberta. Each will contained a “poison pill” clause - “*If any beneficiary in any manner directly, or indirectly, objects to or attacks the will or provisions, their share is revoked and shall become part of the residue of the worldwide estate”*. The widow and five of Mr. Foote’s children were considering making applications for dependency relief. They made an application to the Alberta courts for determination of the domicile of Mr. Foote on his death.**Issue:** Where was Mr. Foote domiciled at the time of his death? (1) Alberta – *actus reus* upon death. (2) Norfolk Island – somewhere in South Pacific which is a good tax haven, Mr. Foote had made a home there (Foote North Residence – lived there with his third wife). (3) BC – he had purchased a condo in Victoria and had talked about moving there. *Did Mr. Foote obtain a new domicile of choice in BC or did he abandon his domicile choice in Norfolk island?***Analysis:*** Facts about Mr. Foote:
	+ Mr. Foote was a lawyer who practiced law in Alberta for several years.
	+ He then left Alberta and went into business producing/selling cleaning products
	+ Became a world traveler, acquiring global properties and wealth
	+ Since 1972, had been living on Norfolk Island.
	+ Domicile of Origin – Alberta
	+ Domicile of Dependency – Alberta
	+ Domicile of Choice – Norfolk Island; had he abandoned it at the time of his death?
* The factor which ultimately decided the ABCA that he hadn’t abandoned his DC on Norfolk Island is that Mr. Foote hadn’t taken any tax advice. Impossible for him to have abandoned his domicile (tax haven) without receiving tax advice.
* At the moment of his death, Mr. Foote was domiciled on Norfolk Island.
* He hadn’t formed the intent to have a DC in Victoria – no clear evidence on his state of mind (yes he bought a condo, but he also had acquired properties all over the world).
 |
| ***ANGUILAN V CYGANIK,* [2006] EWCA** |
| **Facts:** Angulian 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. **Analysis:**  * 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.

**Conclusion:** A was not domiciled in London. **ADDITIONAL ANALYSIS:**Examines in Re Faul: Originated in Germany, moved to London and eventually moved to Canada – attending law school at U of T. He had acquired Canadian citizenship, but had he domiciled in Canada? He spent years away from Germany, but he wanted to go back to the family business in Germany (he couldn’t because he couldn’t get a position in the family business and couldn’t bear to live with his mother), but he never acquired a domicile of choice anywhere else. Assessment of all the evidence was that Peter Faulx couldn’t make up his mind about where to settle. **Takeaway:** From *Faul* If you abandon a DC without immediately acquiring a new DC, the DO arises. However, cases are ambiguous as to what it takes to abandon a DC. *Must physically depart the DC either with (a) an intention never to return or (b) without an intention to return*. If there is hostility about the DO/chance of DO reviving, requires an intention never to return to abandon DC. If by abandoning, one has abolished the revival of the DO, it doesn’t matter their intention.**Note:** In BC, probably leaving a DC with an intention to never return will most likely be required by the court to prove abandonment of DC. |
| ***NATIONAL TRUST COMPANY LTD V EBRO IRRIGATION AND POWER* (1954) HC** |
| 1. Domicile of a corporation is the country in which it was incorporated
2. Law of a corporation’s domicile govern its creation and continuing existence, management etc.
 |

### Residence

TEMPORARY < ACTUAL < ORDINARY < HABITUAL < PERMANENT

**Note:** Really a negligible difference in case law between ordinary and habitual residence.

**Note:** In each of the following cases, it is residence for purposes of *jurisdiction* of the court. When the question is one of jurisdiction of the court, the assumption is usually that if the court doesn’t have jurisdiction, the parties can then go to another court that has jurisdiction. Not “all or nothing” like choice of law.

|  |
| --- |
| ***NOFIE V BADAWY,* 2015 ABCA** |
| **Facts:** Married in Egypt (on a trip), lived in AB for 10 years following. In 2011, the husband gets a one-year contract to teach in Saudi Arabia. Family joins him and they physically move to Saudi Arabia. During this year, they leased their AB home, left a vehicle behind, used AB credit services, kept mail receivable. They hadn’t completely cut ties with AB (husband one-year contract might not be renewed). In 2012, the wife and children returned to AB and stayed with her parents. The wife and children never returned to Saudi Arabia. The wife then filed for divorce in Alberta. **Issue:** Does the AB Court have the jurisd. to grant divorce? *Divorce Act* requires either party have ordinary residence in AB immediately before app. Was the wife ordinarily resident in Alberta for 1 year immediately proceeding application?**Court:** * Ordinary & habitual residence does not require actual/physical residence. Can take holidays – do not have to physically be there the whole time.
* Court asks whether ordinary residence is the same concept as habitual residence?
	+ Para 75*: some cases have put ordinary and habitual on the same footing. Doesn’t decide on this – but floats they might be the same concept. Since corollary relief wasn’t required, only ordinary residence was required.*
* Majority: decides that the wife was not ordinarily resident in Alberta for the year proceeding because their home was in Saudi Arabia.
	+ At time of application was brought neither wife or husband was ordinarily resident for the year prior.
* Dissent: They were ordinarily resident, and had only been away for temporary assignment.
 |
| ***KNOWLES V LINDSTROM,* 2014 ONCA** |
| **Facts:** Application under *Family Law Act* of Ontario. Has to be decided on a common law basis.**Takeaway:** Court holds it is possible to have more than one ordinary residence concurrently. Can only have one domicile at a time, but can have more than one ordinary/habitual residence. |
| ***PA V KA*, 1987 ABCA – HABITUAL RESIDENCE FOR PURPOSES OF JURISDICTION** |
| **Facts:** Division of property depends on the matrimonial history. Was AB last joint habitual residence?**Court:** * Couple spent first 14 years together in Alberta
* Went back and forth to Hawaii and couldn’t quite settle anywhere
* AB Court concludes texts say habitual residence refers to quality of residence: duration may be a factor; it requires a state of mind between domicile and residence, importing something more durable than res.

**Takeaway:** Has to be some passage of time, no case specifies a minimum duration, but cannot immediately acquire ordinary/habitual residence unlike how you can immediately acquire domicile. |

# II. Jurisdiction *In Personam*

Two components: MUST BE BOTH. In BC, there is a statute (*CTPTA*) that applies to determine the jurisdiction decision.

1. ***Jurisdiction* *simpliciter****:* “territorial competence”/rules for assuming jurisdiction.
2. **Residual Discretion:** “*forum non conveniens”* even if the parties satisfy the rules for jurisdiction, the court can exercise discretion and not hear the action b/c clearly better dealt with in another jurisdiction.

## A. Jurisdiction Simpliciter and Territorial Competence

### 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) SCC – Real and Substantial Connection** |
| **Facts:** D’s AB properties were sold following foreclosure proceedings. Judgments entered against D for the difference between amount recovered on sale and amount of mortgage debt. Mortgagees commenced action in BC to have judgment enforced against D, successful at trial and on appeal.**Issue:** Can a personal judgment, validly given in AB against D, be enforced in BC where he now resides?**Court:** rules of comity or private int’l 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.
 |

**What is a *real and substantial connection****?* Originally took it literally. Has to be something real & substantial. Courts then reverted to the old approach requiring *some* connection – couldn’t always be described as substantial.

**Note:** BC uses the *CJPTA*, an attempt by the Uniform Law Conference of Canada to apply *Morguard* create real & substantial connections between BC and the cases.

|  |
| --- |
| ***Club Resorts Ltd v Van Breda,* 2012 SCC** |
| *Constitutional standard: Courts in a province can only assume jurisdiction over an ex-juris defendant in circumstances in which there is a real and substantial connection between the action or the defendant and the province.* **Issue:** Can the Ontario courts assume jurisdiction over an accident that happened in Cuba, and can they assume jurisdiction over Club Resorts – a Cayman Islands company?**Law:** In Ontario, the law had been modified in 2002. When *Club Resorts* came through the courts, the Ontario law had merged jurisdiction with discretion. To determine a real and substantial connection between the action and Ontario for purposes of assuming jurisdiction, had to consider connection and factors that are only considered when exercising discretion (ONCA).**Analysis:** Justice Lebel: discusses the definition of the constitutional standard.* The constitutional standard is not the same as the conflicts standard, and the two are often confused.
* Test suggests that the connection between a province and a dispute cannot be weak or hypothetical (significant difference from real and substantial).
* **SCC ESTABLISHES FOUR PRESUMPTIVE CONNECTING FACTORS PARTY MAY RELY ON TO ESTABLISH REAL AND SUBSTANTIAL CONNECTION BETWEEN DISPUTE AND JURISDICTION IN WHICH THEY SEEK TO ADVANCE A CLAIM:** Presumptive connecting factors in torts: D domiciled or resident in province, D carries on business in province, Tort committed in province, contract connected with dispute made in province.
* Contract entered into in Ontario allows court to assume jurisdiction.

**Takeaway:** Demolishes previous Ontario case law. Can relax about the validity of the *CJPTA*. It sets the bar higher for BC than the common law provinces that haven’t enacted the *CJPTA*. |

### Parties within the jurisdiction

Common law – English courts entitled to assume jurisdiction over any person present in England on whom a writ could be served. Rule adopted in *Morguard* and continues to apply in all provinces WITHOUT *CJPTA*.

|  |
| --- |
| ***Maharanee of Baroda v Wildenstein* [1972] – In Person Presence** |
| **Facts:** Plaintiff is a citizen of the world – has homes worldwide, owns racehorses and other property in England. Wildenstein lives in France and is a French art dealer. Wildenstein sold a picture to the plaintiff as an original. P delivers it to Christie’s. Christie’s doubted paintings authenticity. P sues Wildenstein in England – does not serve him in France waits until he comes to watch the races at Ascott where he gets served. English CA says good/valid service.**Court:** It is good service and all required by common law to serve defendant who is merely passing through the territory – court can assume jurisdiction. BUT not supposed to trick someone into entering jurisdiction. |
| ***Chevron Corp v Yaiguage*, 2015 SCC 42** |
| **Facts:** Texaco left environmental damage in Ecuador from JV with gvt. Class action in NY stayed against them in favour of Ecuador b/c they didn’t clean it up. Judgment eventually 9.5bn USD (from Ecuador). Chevron buys Texaco (accepting liability. Complete submission to the Ecuador court – participated and vigorously defended. In 2012, the Ecuador Ps sue Chevron and Chevron Canada in Ontario for R&E of Ecuador judgment. Chevron has no presence in Ontario, it has many subsidiaries including Chevron Canada. Chevron Canada is described as a 7th generation subsidiary – between Chevron and Chevron Canada are 6 other corporations. Chevron Canada is not a defendant in the action.**Issue:** Is Chevron Canada a defendant within the jurisdiction?**SCC (Gascon):** * Yes, Chevron Canada was present in Ontario – they had a brick and mortar office.
* Foreign court must have had a real and substantial connection with the litigants or subject matter of dispute, or traditional bases of jurisdiction were satisfied.
* Presence, consent or a real and substantial connection.
* Currently, common law requires some physical presence in carrying on business.
* But, they were never in Ecuador nor were they a party to the Ecuador judgment.
* If a corporation is physically present and carrying on business in a province, the court has jurisdiction.
 |

### Parties outside the jurisdiction

**Statutory in BC**

If the defendant is not in the jurisdiction, they cannot make a mandatory service to appear. Not directing the defendant to show up and defend, just notifying them and giving them the opportunity to defend.

In BC, need to know the *CJPTA* – attempt to incorporate/codify *Morguard.* Sets bar higher than we now know from *Club Resorts v Van Breda* requires for real & substantial connection. Enacted in Saskatchewan, Nova Scotia & BC.

* S.2: Territorial competence/jurisdiction of the court should be made solely in reference to this section. NO MORE COMMON LAW IN BC.
* S.3 of the *CJPTA* sets out the general principles governing territorial competence (rules). It has five subsections, none of which say presence of the defendant in the province.
	+ The court has territorial competence in a proceeding only if
		- (a) person is plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim
		- (b) during course of proceeding person submits to the court’s jurisdiction
		- (c) there is an agreement between plaintiff and person to the effect that court has jurisdiction
		- (d) The defendant is ordinarily resident in BC at the time of commencement of the proceedings. (BC equivalent of *presence*).
		- (e) There is a *real and substantial connection* between BC and the facts on which the proceeding against that person is based.
* In *Van Breda,* Lebel J repeated that rules & certainty are required, parties need to know when a court is going to find a real and substantial connection. Can have different circumstances in different provinces, but they all have to meet the constitutional standard. If plaintiff can’t fit their cause of action in one of the circumstances in s.10, can still fall back on an argument that there was a real and substantial connection in addition to the ones in s.10. S.10 is not limited/exhaustive, it is merely examples.
* S.7: A corporation is ordinarily resident in BC for the purposes of this part only if (a) the corporation has or is required by law to have a registered office in BC (b) pursuant to law it has address or person who can be served in BC (c) place of business in BC (d) central management is exercised in BC.
* S.10: Real and substantial connection is presumed to exist if the proceeding:
	+ (a) is brought to enforce, assert, declare of determine proprietary or possessory rights or a security interest in property in BC that is immovable or movable property.
	+ (b) concerns the administration of the estate of a deceased person in relation to (i) immovable property in BC of deceased (ii) movable property anywhere of deceased if at time of death ordinarily resident in BC.
	+ (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to (i) property in BC immovable or movable (ii) movable property of deceased
	+ (d) is brought against trustee in relation to carrying out of a trust in any of following: (i) trust assets include property in BC that is immovable or movable property and relief claimed is only to property (ii) trustee is ordinarily resident in BC (iii) administratin of trust is principally carried on in BC (iv) by express terms of a trust document, the trust is governed by law of BC.
	+ (e) Contractual: action concerns contractual obligations to a substantial extent that are to be performed in BC OR by its express terms the contract is governed by the law in BC OR governs property, services, or use in the trade of profession resulting by a trade of business in BC.
	+ (g)Tort: The action concerns a tort committed in BC. Not always straight-forward e.g. defamation, product liability – can be difficult to locate the tort, question of application of legal principles/rules.

|  |
| --- |
| ***Moran v Pyle National*, 1973 SCC** |
| *Dickson J decision, important but has not been picked up and followed around the world.***Facts:** Concerns product liability – a defective light bulb manufactured in Ontario with parts manufactured in the US and elsewhere. The light bulb is purchased and installed in Saskatchewan. Mr. Moran is installing the light bulb, is electrocuted and dies when he puts the steel ladder, and touches the base of the bulb. Mrs. Moran (widow) brings an action for compensation under the *Saskatchewan Fatal Accidents Act.* Pyle National is fighting the jurisdiction of the Saskatchewan courts. **Issue:** Whether the permission to serve *ex-juris* was correct or incorrect? Can tort action be brought in SK? **Analysis:** * If legislation of Saskatchewan is being used, then it should be construed to limited to a wrongful act committed in Saskatchewan. Not enough that Mr. Moran died in Saskatchewan – the wrongful act must also be committed in Saskatchewan.
* *CJPTA:* real and substantial connection when action concerns tort committed in province.
* Lower courts had given permission to Mrs. Moran to serve *ex-juris*, and had served Pyle National in Ontario.
* Where was the tort committed? Dickson J considers all the previous case law (England, Australia etc) on finding the location of a tort. Rules had been used in cases, previously focus on a stage for the tort. Dickson J doesn’t want hard rules, he wants an approach.
	+ 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

**Conclusion:** Saskatchewan courts decision to allow Mrs. Moran to serve ex-juris was not correct, because permission was not needed as the tort had been committed in Saskatchewan. |
| ***Club Resorts v Van Breda*, 2012 SCC - Locating Tort** |
| **Facts:** Company incorporated in Cayman Islands, running resorts in Cuba. The Van Breda’s go down to Cuba and Mr. Van Breda is a squash pro and is going to coach tennis in return for room/board (free holiday). Mr. Van Breda goes to the beach and uses some exercise equipment, then Mrs. Van Breda uses it and it collapses on her, rendering her a quadriplegic. The Cheron’s also go to a hotel in Cuba and he goes scuba diving on the first day and drowns. His widow is also bringing actions against Club Resorts for similar contract and tort actions. **Issue:** Do the Ontario courts have *jurisdiction simpliciter*? What connection is btw Ont and the accidents that occurred?**Analysis:** Looks to *presumptive connecting factors:* Lebel J has to decide whether there is a sufficient connection to satisfy between Ontario and the action:* Domicile/residence
* A tort commited in the province
* A contract connected with the dispute made in the province
	+ This factor is a sufficient presumptive connecting factor for the Charron & Van Breda causes of action. Lebel J finds the contract was made in Ontario – important because it provided with room/board for them in exchange with tennis lessons (Van Bredas).
* Ontario had *jurisdiction simpliciter.*

**Takeaway:** Two additional points made by Lebel J: (1) presence of the plaintiff alone is not a real and substantial connection.  |

Despite ***Morguard* & *Van Breda***, the SCC says more than once in each judgment that the traditional rules satisfy the standard BUT in BC, now require ordinary residence.

* If you want to litigate in BC, if the defendant is anywhere outside of BC, have to serve the person and have to find a rule that allows you to serve them *ex-juris.*
* Emulated UK – requires an application by the plaintiff to issue a writ/process to be served *ex-juris*.
* Must satisfy three things:
	+ Establish that the cause of action/facts fit into a sub-rule.
	+ That they have an arguable case
	+ That the court is the most appropriate forum for the action (burden was on the plaintiff).

|  |
| --- |
| ***Court v Debale*, 2012 ABQB** |
| *Some consideration given to the procedural rules.* **Facts:** Mrs. R has a sister & a daughter. Sister lives in Ont and daughter in NS. They posted non-complimentary things on Fbook to daughters of Mr. R. The daughters brought an action defamation in AB – didn’t allege publication in Alberta. **Issue:** IN the circumstances, was there publication? Is hearsay admissible? On the jurisdictional decision.**Analysis:** Plaintiffs pleadings of fact are taken to be true in jurisdictional decisions. May be contested by defendants but unless and until there is a trial or a contestation the pleadings are taken as true. Court can draw inferences of publication in Alberta – can distinguish Facebook from other messages. **Takeaway:** have to apply/conform to the procedural rules of the Province in which you want to bring an action, standard is not high in terms of what you need to establish to get into court.  |
| ***TAMMINGa v TAMMINGa,* 2014 ONSC.** |
| **Facts:** Ms. T is an Ont resident and is visiting a relatives’ farm in AB. She falls off a truck and is injured. She goes back to Ont to recoup from her injuries and commences action in Ont (suing relative who is resident of AB). *Ex-juris* defendant, has to serve the defendant in AB. **Court:** Ont court has no jurisdiction to hear claim from MVA in AB even though one of Ds was insurer who issued her policy to her in Ont. Nothing to connect Ms T’s insurance contract to Ds. Connection with insurer and it being issued in Ont not sufficient “presumptive connecting factor” to give court jurisdiction over the non-resident Ds |
| ***JTG Management Services v Bank of Nanjing*, 2015 BCCA** |
| Connection was held to be provided for in s.10 of the *CJPTA* **Facts:** JTG is a BC business; plaintiff is in the province in the business of exporting lumber and it exports a quantity of softwood lumber from BC to China. Nanjing Bank is supposed to pay $2million USD to JTG on presentation of the specified documents. Bank doesn’t pay –The BC company has shipped the lumber and not been paid. **Issue:** Does BC have territorial competence?**Analysis:** goes to BCCA – discusses the obligation of parties under letters of credit and on the application of s.10(e)(i). * BC court can assume jurisd over k dispute if k obligations were “to a substantial extent” to be performed in BC.
* Key: whether performance of obligations are connected to forum (expectations of parties at time of formation).
	+ Can be multiple jurisdictions.
	+ Foreseeabe that JTG would perform obligations in BC.
* might find an express choice of law clause in the contract choosing the law of BC to govern the contract 10(e)(2).
* Finding territorial competence, open to court to decline exercising jurisdiction under s.11 (*forum non conveniens*)
 |
| ***Lapointe v Cassels Brock*, 2016 SCC** |
| *SCC clarifies fourth Van Breda presumptive connecting factor – jurisdiction may be assumed where contract connected with dispute was made in the province.*  |
| **Facts:** 2009 gvt bailout of Cdn automotive companies. GM required to close dealerships across Canada. Offered compensation to dealers in Wind-Down Agreements (WDA). GM required each dealer get independent legal advice. 200+ dealers who signed WDAs commenced class-action against Cassels Brock for failure to provide appropriate legal advice. Cassels commenced 3rd party claims for contribution and indemnity aginst 150 firms across Canada that provided independent legal advice. Non-Ont firms brought motion challenging jurisdiction of Ont courts over claim. Uncertainty arose from letter GM management wrote stating WDA not effective unless “*GM Canada provided written notice to dealers that acceptance threshold condiions had been met or waived”.* Motion was denied at all levels.**Court:**Majority (six justices lead by Abella J): * WDAs were formed in Ontario where GM management accepted and signed agreements returned by dealers
* Then issue becomes: *Were WDAs sufficiently connected to the dispute?* **TEST**:
	+ (1) Identify the dispute
	+ (2) determine whether the dispute is connected to a contract “made” in the province.
* Test doesn’t differ whether a case involves one or multiple contracts
* Test doesn’t require tortfeasor be a party to contract or that liability flows immediately from k obliagtions.
* Requires conduct of the party brought them within scope of contractual relationship and events giving rise to the claim flow from relationship created by contract.
* Dispute = tort claim for professional negligence. Dispute connected to WDAs which on application of Ontario contract law, were made in Ontario. Was core of dispute.

Dissent (only Cote J)* Benchmark of acceptance was reached only when GM notified dealers by email that acceptance threshold had been waived.
* Fourth PCF should only be applied where TF liability flows directly from their k obligations.
* Applied Ontario laws on instantaneous communicated in k formation and determined formation in Quebec.
 |

## B. Discretion; Stays and Anti-Suit Injunctions

### The English Principles

* 2nd element – encompasses stays of proceedings.
* Have territorial competence but choose not to exercise it in this case
* Stays & Anti-suit injunctions (order to not to start or continue action in another jurisdiction).
* Territorial rules drawn widely – discretion narrows the range of cases in which jurisdiction is actually exercised.
* Discretion is generally not appealable.

|  |
| --- |
| ***SPILLIADA MARITIME CORP V CANSULEX*, 1987 HofL(concens BC) - STAYS** |
| *Key English case about exercise of discretion/forum non-conveniens.**Forum conveniens:* burden on the plaintiff to establish that the jurisdiction is the most appropriate forum for the action*Forum non-conveniens:* burden on defendant to establish to court that its not the most appropriate forum for the action. |
| **Facts:** Wet sulfur loaded onto two ships in BC causing damage to them. Action brought in England by Liberian owners of ship for damage against sulfur exporter. Both ships insured by English insurers. Plaintiffs apply to serve Ds *ex juris*. CofA – expenses and existence of BC limitation period not enough to allow claim to England.**Court (Lord Goff, unanimous):** 1. A stay only granted where court is satisfied there is some other available forum in which case may be tried more suitably for interests of all parties and ends of justice.
2. Burden of proof rests of D to persuade court to exercise discretion to grant stay, but if court is satisfied there is another available forum that *prima facie* the appropriate forum for trial of action, burden shifts to P to show special circumstances by which justice requires trial take place in this forum.
3. Where there is another forum which is appropriate forum, burden resting on D is not just to show that this forum is not natural or appropriate forum, but to establish there is another available forum clearly or distinctly more appropriate.
4. Where there is another forum clearly more appropriate, court will look first to see what factors there are which point in the direction of another forum including availability of witnesses, law governing relevant transaction, places where parties reside or carry on business.
5. If court concludes no other available forum clearly more approp for trial of action, will ordinarily refuse a stay.
6. If court concludes other avail forum *prima facie* clearly more approp, will ord grant stay unless other reason.

**Note:** discretion not appealable unless trial judge got principles wrong or if things are ignored that shouldn’t have been. |

**Anti-suit Injunction:** Directs a party not to commence or not to continue a legal action in another jurisdiction.

* When issuing an anti-suit injunction, are indirectly interfering with legal proceedings in another jurisdiction.
* Much rarer

|  |
| --- |
| ***Societe Nationalte Industrielle Aerospatiale v Lee Kui Jak,* 1987 HofL** |
| *On appeal from Brunei.* Until this case, had been very few recent applications in England for an anti-suit injunction *Can assume that this case sets out English law.* |
| **Facts:** Helicopter crash – helicopter was manufactured by a French company, owned by an English company, and serviced by a Malaysian company. Lots of potential Ds for the victims. Lee Kui Jak was a wealthy man who died in the crash, widow commences litigation and wants comp for his death. Commences actions simultaneously in Brunei, France, and Texas. The French action discontinued. Aerospatiale applies for a stay of the Texas action on the basis of discretion, stay doesn’t succeed and the action continues. In Brunei there is an application for an anti-suit injunction.**Issue:** On what principles should anti-suit injunctions be issued, bearing in mind that the whole trend of English jurisprudence had been to make it easier to get a stay of local proceedings?**Court (Lord Goff):** * Anti-suit injunction has to be *in personam*, the person must be amenable to the jurisdiction of the forum.
* Discretion must be exercised with great care.
* Three-step analysis:
	+ (1) Court has to consider whether it is the natural forum for the action.
	+ (2) Is the litigation in the other jurisdiction abuse of the process of the court? Is it oppressive/vexatious?
	+ (3) Will it be unjust to deprive the plaintiff of the foreign action?
* The Malaysian company misread the maintenance manual and didn’t clean the engine when it needed to is not going to submit to the jurisdiction of the court.

**Conclusion:** Issues the anti-suit injunction. |
| ***Airbus Industrie v Patel and Others*, 1998 HofL** |
| **Facts:** Airplane crash in India, passengers were killed and injured. Among the survivors were two families of Indian descent who resided in England. Inquiry in India, identified the cause of the accident as pilot error. Litigation commenced in India and plaintiffs settled with airline. Ps then defied order by court and sued Airbus in Texas (no natural jurisdiction – forum shopping). English Court doesn’t recognize the Indian injunction.**Court (Lord Goff):** * Grant of anti-suit injunction must be supported by clear evidence of a close connection with UK jurisdiction.
* Domestic court for comity must take cognizance that foreign court assumed jurisdiction.
* If foreign court could have reasonably concluded no alternative forum clearly more appropriate, domestic court should respect decision and application should be dismissed.
* Passengers should not be restrained by UK court for suing in Texas. No English proceedings and Airbus has no interest in asking UK court for remedy.

**Note:** In Canada, would likely accept the anti-suit injunction from the Indian Court. |

### Canadian Principles

***CJPTA****:* burden always placed on the defendant to pursuade (based on s. 11.2) that it is not the most appropriate forum for the action. No reference to the quantum of proof – but BC courts are fairly straightforward.

**Discretion as to the exercise of territorial competence**

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

|  |
| --- |
| ***AMchem Products Inc v BC (WCB)*, 1993 SCC** |
| **Facts:** BC court granted anti-suit injunction, preventing appellants from pursuing their action in Texas (plaintiff friendly location); Amchem is the owner of an asbestos mining operation in BC, which resulted in injury and/or death to hundreds of individuals (most plaintiffs BC residents). Appellants argue that exposure to asbestos occurred in multiple jurisdictions across North America and Europe. **Court:**  * 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 *Societe National Industrielle*
	+ Generally, a domestic court shouldn’t entertain app for injunction if no foreign proceeding pending.
	+ Application for injunction should only be entertained where it is alleged that the domestic forum is the most appropriate forum.
	+ **Step 1:** Is the domestic forum natural forum (does it have closest connection to 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.
 |
| ***Teck Cominco metals v Lloyds underwriters,* 2009 SCC – stay of proceedings** |
| **Facts:** Teck seeking an order to stay two actions in BCSC by plaintiff insurers, who sought declaration they had no obligation to defend or indemnify Teck WRT environmental damage claims arising from activities in BC.**Court:** s.11 *CJPTA* = complete codification of *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.* Existence of foreign proceedings only one factor amongst many to be considered in *forum non conveniens* test
* 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 analysis.
 |

\*\*\* See also ***club resorts v van breda***

### Jurisdiction Selection Clauses

* If litigation is commenced in BC in breach of a forum selection clause, BC does not refer to s. 11 CJPTA and instead applies the common law test set out in Pompey [Douez v Facebook 2017 SCC]
* After the Pompey test (strong cause test) is conducted, the court may then conduct a *forum non-conveniens* analysis in accordance with s. 11 of the *CJPTA* [Douez v Facebook 2017 SCC]
* BC, s. 11 only comes in for FNC whereas in Sask s.11 incorporates forum selection clauses.

|  |
| --- |
| ***ECU Line NV v ZI Pompey Industrie,* 2003 SCC – IMPORTANT FOR BC** |
| **Facts:** Transport clause –goods arrived damaged in Montreal, suspicion was rail transport damaged them. Parties agreed law of Belgium would govern contract, and any litigation/disputes arising from the contract would be litigated in Belgium. Action brought in Fed court, appellant brought motion to stay proceedings citing jurisdiction selection clause.**Issue (in Canada):** Whether the agreement should be respected/enforced?Generally accepted – two parties have agreed to litigate in a particular jurisdiction and what law will govern their contractual relations. **Court (Bastarache J)**: no policy reason in Canada to depart from this approach to jurisdiction clauses.* “strong cause test” – stay should be granted unless strong cause for not doing so is shown – burden on plaintiff to satisfy court there is no good reason it shouldn’t be bound by forum selection clause. STILL APPLIES TO FORUM SELECTION CLAUSES.
* SCT is similar to FNC test, but burden in FNC is on defendant asserting domestic forum is *non conveniens* whereas on plaintiff in SCT.

**Takeaway: (20)** Clauses should be encouraged by courts, create certainty in transactions. Test *rightly imposes the burden on the plaintiff* to establish “strong cause”. **(21)** Some issues for *CJPTA:* similarity between factors to be taken into account when considering a stay for forum selection clause and whether to apply same stuff as for regular stays.* Parties should be held to bargain
* Plaintiff has burden
* For CJPTA jurisdictions: what do you do with forum selection clauses? *Teck* holds s.11 codifies *forum non conveniens*. Issue for BC.
 |
| ***Momentous v Canadian-American Association of Professional Baseball*, 2012 SCC** |
| **Facts:** Transport clause –goods arrived damaged in Montreal, suspicion was rail transport damaged them. Parties agreed law of Belgium would govern contract, and any litigation/disputes arising from the contract would be litigated in Belgium. Action brought in Fed court, appellant brought motion to stay proceedings citing jurisdiction selection clause.**Issue (in Canada):** Whether the agreement should be respected/enforced?Generally accepted – two parties have agreed to litigate in a particular jurisdiction and what law will govern their contractual relations. **Court (Bastarache J)**: no policy reason in Canada to depart from this approach to jurisdiction clauses.* “strong cause test” – stay should be granted unless strong cause for not doing so is shown – burden on plaintiff to satisfy court there is no good reason it shouldn’t be bound by forum selection clause. STILL APPLIES TO FORUM SELECTION CLAUSES.
* SCT is similar to FNC test, but burden in FNC is on defendant asserting domestic forum is *non conveniens* whereas on plaintiff in SCT.

**Takeaway: (20)** Clauses should be encouraged by courts, create certainty in transactions. Test *rightly imposes the burden on the plaintiff* to establish “strong cause”. **(21)** Some issues for *CJPTA:* similarity between factors to be taken into account when considering a stay for forum selection clause and whether to apply same stuff as for regular stays.* Parties should be held to bargain
* Plaintiff has burden
* For CJPTA jurisdictions: what do you do with forum selection clauses? *Teck* holds s.11 codifies *forum non conveniens*. Issue for BC.
 |
| ***Douez v Facebook*** **(2015 BCCA 279) – BC APPLICATION** |
| **Facts**: Douez sues FB because they were using her name and pictures for promoted stories. FB appeals from an order declaring that BC is not *forum non conveniens* and certifying a class action. Terms of Use include a choice of law and a forum selection clause in favour of courts of California. **Analysis:** * 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 s. 4 Privacy Act confers exclusive jurisdiction on BCSC, and that it therefore overrules any FSC.
* BCCA disagrees with 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.

**Conclusion:** Clause should be enforced.  |
| ***Hudye farms v canadian wheat board*, 2011 SKCA – WITH CJPTA** |
| **Facts:** Hudye Farms appealed Chambers decision declining territorial competence over action and transferring it to Manitoba pursuant to *CJPTA*. Contract btw parties had forum selection clause deeming Manitoba exclusive jurisdiction.**Court:** Appeal dismissed – decision to decline territorial competence when s.11 CJPTA (SASK IS DIFFERENT THAN BCs). at issue in the face of forum selection clause is essentially a discretionary decision (generally not appealable). * S.11 SASK CJPTA incorporates FSC. P required to prove strong cause for non-compliance with FSC.
 |

# III. Recognition and Enforcement of *In-Personam* Judgments

1. Pecuniary: damages
2. Non-pecuniary: specific performance, injunction

Territorial sovereignty requires that a foreign judgment be converted into a local judgment. Based on good reasons – prefer to select which foreign judgments we choose to enforce and we prefer not to have foreign agents coming into our territory and operating locally. In Canada, decided it is appropriate for Canadian courts to recognize and enforce both pecuniary and non-pecuniary awards.

## A. Pecuniary Judgments

Traditional common law rules require foreign JC 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.

**Three ways:**

1. **Common law:** Traditional common law rules require foreign JC 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.
2. *COEA* (Court Order Enforcement Act)pt 2.
3. *ECJDA:* Enforcement of Canadian Judgments and Decrees Acts. Implements “full faith and credit” from *Morguard.* Each province must recognize judgments of other provinces.

### Finality and Conclusiveness

* Judgment is considered final and conclusive for purposes of R&E even if there is still time to appeal originating judgment, and even if that judgment is under appeal.
* BUT, in BC, D can apply for stay asking court to wait for the matter to be determined
* Mere commencing of action opens the window for P to apply for a Mareva injunction or a pre-judgment garnishing order to ensure assets are available upon recovery.

|  |
| --- |
| ***NOUVIAN V FREEMAN,* 1889 HOFL** |
| **Facts:** Court considering whether to R&E Spanish judgment debt**Court:** * Foreign judgment will only be R&E if final and conclusive
* Pecuniary judgments are not final until they can no longer be disputed in the court which made order.
* Appeals do not have to be exhausted for an order from a lower court to be considered final and conclusive.
* E.g. has gone as far as it can in BCSC, still could be appealed to BCCA.
 |

### Jurisdiction in the International Sense

A foreign court will be held to have had jurisdiction in the international sense for purposes of R&E of a particular judgment if **any of the three conditions is satisfied:**

1. Defendant was present in the jurisdiction at the time the action was commenced;
2. 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:**

* Even though *CJPTA* in BC, all that is required is mere presence in the forum for natural persons (matter of fact).
* Presence for legal entities is a question of mixed fact and law.
* Other possible connections have been floated in common law cases, but haven’t been acted upon.

|  |
| --- |
| ***Forbes v Simmons* (1914) Alta SC** |
| **Facts:** Simmons is having a BC judgment enforced against him in Alberta. He was served in BC, wasn’t in BC long – went to visit his sick wife. He was present and was served. All that was required. **\*\*\*Note** – for a corporation, all that is required for a corporation to be present is that they have a permanent address and are carrying out business in the Province.**Takeaway:** 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 jurisdiction.

* Did you participate in any way in the trial on the merits?
* *Did you, as defendant in this action in the foreign jurisdiction, make any motions/preliminary motions beyond arguing that the foreign court has no jurisdiction?*
	+ Common law says the defendant goes beyond saying “no jurisdiction” and argues discretion, opt not to exercise the jurisdiction then they have submitted.
	+ By arguing discretion, there is an acceptance of *jurisdiction simpliciter.*

\*\*\*NOTE: If the defendant was not served in the foreign jurisdiction and has refrained from submitting, the defendant will not be liable under the common law rules (*except for Canada now*).

|  |
| --- |
| ***First National Bank of Houston v Houston E&C Inc*  (1990 BCCA)** |
| **Facts:** Texas judgment which the FNB wishes to have R&E in BC. Defendant – JD from Texas, raises all sorts of objections/defences. One defence was interesting – the defendant didn’t submit to the jurisdiction of the Texas court EVEN though he had made defences there saying they didn’t authorize representation in that court even though present.**Court: “***Submission is objectively determined – nothing subjective about it”.** Defendant cannot come to a common law court and say they didn’t mean to submit, it is what they actually did.
* Suggested loophole: if a defendant says they didn’t give their attorney in the other jurisdiction instructions and their attorney just did their own thing, might be different.
 |
| ***Clinton v Ford,* 1982 ONCA** |
| **Facts:** Three pieces of land. Ford = defendant, had lived in South Africa and came to Ontario. While in SA, he acquired property and then he moved to Ont. He entered into a contract for the purchase of a vehicle he hadn’t paid for. Action is not concerning the real property in SA but for the car contract in SA. Ford is served with notices of proceedings, his land is seized. Mr. Ford is a lawyer, he participates in the SA proceeding. However, at no point did Mr. Ford ever contest the jurisdiction of the SA court. Judgment is issued (for $7k) and the South African plaintiff comes to Ontario to commence an action of R&E of the South African judgment.**Issue:** D argues submission not voluntary, and that submissions must be voluntary. Claims submission was under duress. **Court:** Allowed to participate but for a very limited purpose. He chose to defend action on its merits = submitting. He could have contested validity of seizure by contesting jurisdiction of SA court instead. Judgment recognized and enforced.  |
| ***Mid-Ohio Imported Car Co v Tri-K Investments* (1995) BCCA** |
| **Facts:** Plaintiff = Ohio corporation. D owns BC companies. Contract entered into btw BC companies and Ohio company. Seeking R&E of Ohio judgment in BC. Ds disputed jurisdiction of Ohio court arguing *forum non-conveniens,* after failing that argument Ds withdrew and default judgment was entered against them. **Issue:** Whether Ohio court, which had assumed jurisdiction & issued judgment, had jurisdiction in international sense?**Analysis:** Common law was strict; any submission not made under duress deemed to have been voluntary.* BC companies were never present in Ohio but retained Ohio attorneys who argued (1) OH has no jurisdiction (2) even if jurisdiction, Ohio not *forum conveniens* (3) technical arguments
* Had the BC companies/defendants somehow submitted to the jurisdiction of the Ohio court?
	+ What had the Ohio attorneys done on behalf of the defendants?
	+ Argued Ohio had no jurisdiction
	+ Also argued *forum non conveniens.*
* BC in 1995, post-Morguard: was there a real and substantial connection between the action and Ohio? Trial judge says no, and it is not re-argued.
* It is possible for a defendant to argue both territorial competence and *forum non-conveniens*.

**Decision:** Technical arguments went beyond mere jurisdiction = submission. At common law, all that D was allowed to do is go to foreign court and argue no jurisdiction.  |

**Real and Substantial Connection:**

* R&S connection is ambiguous
* From *Morguard v De Savoye:* Jurisdiction because of the real and substantial connection doctrine – third alternative for establishing jurisdiction in the international sense within Canada.
	+ Presence & Submission somewhat outdated
	+ New Common law recognition rule only for judgments coming from other Cdn courts = standard for reciprocity = real and substantial connection, can include cause of action, parties, geographical things.
* Satisfy one of three alternatives = foreign court will have jurisdiction in the international sense.
* Defendant must err on side of caution b/c has to guess if R&S connection ahead of time – if any doubt, D most likely has to make some appearance in foreign court and run the risk of having judgment recognized because of submission.

|  |
| --- |
| ***Beals v Saldanha* (2003 SCC)** |
| **Facts:** Whether pecuniary Florida judgment should be recognized in Ontario.**First point:** *Real and substantial connection requires a significant connection.*Recognition and enforcement of non-Canadian judgment, court talks about content of a real and substantial connection between cause of action and foreign jurisdiction. * Look back to *Van Breda* – Constitutional standard – cannot be weak or hypothetical. This is perhaps not the same thing as a significant connection.
* SCC arguably primary focused on recognition and enforcement of a non-Canadian judgment and *maybe* the connection need not be quite so significant among and between provinces in a federal system.

**Second point:** this part was unanimous – the real and substantial connection is now the overriding principle (only principle?). Presence & submission are *indicia* but the only principle is the real and substantial connection. NOTE: courts have appeared to not follow this case – as if this case has not been decided, trial courts continue (from *Morguard*) to use presence & submission as basis for recognition and enforcement of foreign judgments (Canadian and non-Canadian). \*If the defendant is served in foreign jurisdiction, probably enough to say that they were served in that jurisdiction.  |
| ***Braintech v Kostiuk,* 1991 BCCA** |
| **Facts:** Kostiuk is a BC man. Braintech is carrying on business in BC (not domiciled in BC). For four months, its offices had been in Texas. Braintech claimed it had been defamed in Texas by Mr. Kostiuk. Commenced action against Mr. Kostiuk in Texas – he had posted the alleged defamation on a bulletin board established by a third party – to exchange information about technology, stock, and investments. **Issue:** Whether Texas had a real and substantial connection to the action?**Court:** looks at the American jurisdictional rules. Adopts American approach – is merely posting on a bulletin board sufficient to qualify as a real and substantial connection?* From ***Anchem*** *–* on occasion a serious injustice may be done by failure of foreign court to decline jurisdiction
* Finds no real and substantial connection – won’t recognize judgment from Texas.
* Posting on internet, having post read in Texas isn’t enough to ground R&S connection b/w Texas and D (even if defamatory, it is not enough to come to the conclusion that a tort was committed there).
 |

## B. Non-Pecuniary Judgments

|  |
| --- |
| ***PRO SWING INC V ELTA GOLF*, 2006 SCC** |
| **Facts:** Pro Swing wanted it’s Ohio injunction and contempt order against Elta enforced by the ON courts after Eltacontinued to sell is “Rident’ golf clubs which infringed Pro Swings’ “Trident” copyright**Court:*** Order was not R&E because found not to be sufficiently precise; however, recognized that such orders may

be R&E by Canadian courts if sufficiently precise* Because equitable orders require judicial supervisions the imprecision rationale is highlighted in this case:

such an order requires the Canadian court to supervise, so must be very clear about what it has to do* Also need: are terms of order clear and specific enough? Is the order limited in scope? Did the foreign court retain power to issue further orders? Is the Cdn litigant exposed to unforeseen obligations? Will the use of judicial resources be consistent with what would be allowed in Canada?
* COMITY=OVERARCHING CONSIDERATION. Balance of deference to foreign and protection of Canadian legal system.
* Equitable orders – there tends to be more of a requirement of judicial supervision which requires judicial

renounces AND going back to the court for directions – it is harder to convert because discretion might beexercised differently in the different jurisdictions**Takeaway:** ONCA states that after *Morguard* and the invocation of the comity principle, the courts are prepared torecognize foreign injunctions. This is also truly foreign – not Canada – so SCC took a giant leap forward by R&E truly foreign non-pecuniary order. |

## C. Defences to R&E of Foreign Judgments

* Judgments based on foreign penal or revenue laws are not enforceable, and neither are those that are contrary to public policy of the forum (see *exclusionary rules*).
* Judgments obtained by **fraud** or in which there was a **breach of procedural fairness/breach of natural justice** are also not enforceable.
* It is not a defence to argue foreign court erred in law – recognizing court IS NOT AN APPELLATE COURT.

|  |
| --- |
| ***Goddard v Gray* (1870)** |
| **Facts:** English court asked to enforce a French judgment on a contract that was governed by English law. Argument = English court should not recognize a foreign judgment in which there was an error of law. **Court:** Error of law is not a defence that can be raised in the UK. More or less settles error of law as a defence *although* it is possible that you will be able to find BC cases in which manifest error was allowed to operate as a defence (but THIS IS WRONG – has been overruled).  |
| ***Beales v Saldanha*, 2003 SCC – leading case on fraud, bofnj and forum public policy** |
| Gets rid of extrinsic/intrinsic fraud and makes switch to *subject matter distinctions/categories of fraud.* Para 51: *fraud going to jurisdiction can always be raised.* Para 52: *other category of fraud, fraud going to the merits is a defence only if the allegations are new and not the subject of a prior adjudication or there are new facts not previously discoverable.*  |
| **Facts:** Beals purchased lot from Saldanha (Ont residents) in Florida. Beals sued Saldanha in Florida and awarded default judgment. Trial held to determine damages, Saldanha didn’t appear. Over 250k damages awarded plus 12% interest per year. Saldanha sought legal advice was told by Ont lawyer judgment couldn’t be enforced against them. Beals sought R&E in Ont few years later, judgment total now over $800k.**Court:** Once R&S connection found b/w foreign action and foreign jurisdiction, court should examine CL 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 as to jurisdiction of court can always be raised; fraud as to merits can only be raised where factual allegations are new and could not have been raised in foreign court.
* **Natural Justice:** party seeking to impugn judgment must prove (BoP) that foreign proceedings were contrary to Cdn notions of procedural fairness. Cdn PF requires – adequate notice, opportunity to defend, fair and impartial.
* **Public Policy:** R&E can be refused if judgment contrary to Cdn concepts of justice. Is foreign law contrary to basic morality?

Defences construed narrowly, court here finds none apply. Leaves door open to creation of new defences. |

## Statutory Regimes

***COEA* (Court Order Enforcement Act) Part 2-4**

**HERE LIMITED TO PECUNIARY -** Limited to presence & submission as the only basis of jurisdiction of the foreign court. Operates by way of reciprocity. If the foreign judgment the foreign creditor is looking to have enforced originates in a reciprocating state, can be registered under this statute. **States in reciprocal agreements:** (1) Canada except QB (2) Australia (3) Washington, Alaska, Oregon, California, Colorado & Idaho (4) UK (5) Austria (6) Germany

***Enforcement of Canadian Judgment & Decrees Act:* NOT LIMITED TO PECUNIARY** If a Canadian judgment, go to this Actand register. This statute is not enforced in every province, but in BC you can take full advantage of it – only have to register judgment. Only possible argument the judgment debtor could make is that the other province law is inconsistent with BC’s public policy (difficult to persuade court).

Note: Can use any of these options at any time, assuming the judgment is eligible. In any of these processes – have to persuade BC court (or use legislation) that the judgment obtained elsewhere is one that is really to be recognized. BC prefers to select which judgments it recognizes. Always local rules for selecting which judgments to enforce.

**Defences**: Available at common law and *COEA* BUT NOT *ECJDA:* (1) fraud (2) natural justice (3) public policy

### Judgments and Orders

|  |
| --- |
| ***Central guaranty Trust v De Luca,* 1995 NW Territories** |
| **Facts:** Defendants applying to set aside registration of Ont judgment under *Reciprocal Enforcement of Judgments Act.* Key Issue: what effect does *Morguard* have on the Act?**Court:** * Statutes for the reciprocal enforcement of judgments did not alter common law rules, they simply provided for a more convenient procedure
* S.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 s.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.
 |

### Arbitral Awards

See *Foreign Arbitral Awards Act.*

|  |
| --- |
| ***SHRETER V GASMAC INC*, (1992) ONT** |
| **Facts:** Applicant obtained arbitration award in Georgia, had 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.**Court:** Arbitration award recognized under International Commercial Arbitration Act (of Ontario); all of D’s arguments in opposition rejected. |

# IV. *In Personam* Class Actions: Jurisdiction and R&E

* Two models:
* Opt in
* Opt out
* At this time, BC is the only Province left with the opt-in model. Every other Province has an opt-out model.
* Once judgment or settlement is finalized, all members of the class are bound by it and prohibited from commencing another action against the defendant.

|  |
| --- |
| ***Harrington v Dow Corning Corp* (2000 BCCA)** |
| **Facts:** Class actions in BC: *opt-out* for BC residents, *opt-in* for non-BC residents. A number of non-BC residents wanted to opt-in and join the BC class action. If you opt-in, you submit to the jurisdiction (no question of territorial competence). Dow Corning objects to the BC court having jurisdiction over the non-residents: don’t let the non-residents be a member of the class action in BC. Received breast implants outside of BC, Dow Corning is not a BC corporation.**Court:** * At BCSC: R&S connection between BC and non-residents was the common issue with the BC class. Mckenzie J: *sufficiently real and substantial connection to allow non-residents to opt-in to the BC class action.*
* BCCA: agrees with trial judge (3-2 majority). Para 99: New types of proceedings require re-consideration of old rules if the fundamental principles of order and fairness are respected.
* Failure of a non-resident to allege that a cause of action arose in BC not decisive of *jurisdiction simpliciter*
* Some cases won’t require court to move beyond traditional rules (defendant within jurisdiction, has submitted, tort committed in jurisdiction). But sometimes, where not adequate to ensure fairness other considerations become relevant (some flexibility for court to assume jurisdiction over entire class).
* Manufacturers are aware products will be consumed and used in several provinces and can be called to account in any one of those provinces.
* Doctrine of *forum non conveniens* can still protect defendants when forum is not ideal.
 |
| ***Ward v Canada* (2007 MBCA)** |
| **Facts:** Ward was a Manitoba resident – wanted to commence a class action against the Crown of Canada. Complaining about when he was in New Brunswick he was in the army and was sprayed with herbicide including Agent Orange. Caused health problems. Is complaining about the tort that occurred in New Brunswick and wants to sue Canada. **Issue:** Whether Manitoba can take jurisdiction over the Federal government?**Court:** Crown right of Canada is present in every Province. *Morguard:* presence & submission is still good. Manitoba has jurisdiction over the Crown in right of Canada because the Crown in right of Canada is present in Manitoba. * But everything happened in New Brunswick – would this be the better?
* Decision is not finite – could be varied when more evidence comes to light.
 |
| ***Kaynes v BP Plc,* 2014 ONCA 580 (kaynes #1)** |
| **Facts:** Kaynes had shares in BP, purchased the shares on the NYSE. BP incorporate in England – has no assets in Canada. Bringing misrepresentation action based on the *Ontario Securities Act* – wants to bring a statutory action against BP, and hadn’t even purchased his shares in Ontario. **Court:** * Was a tort in Ontario: misrepresentation is effective where received, Mr. Kaynes received it in Ontario.
* ONCA is able to find a R&S connection with Ontario because there was a tort that occurred in Ontario.
* Ontario has jurisdiction, but in this case there was a class action going on in the US.
* Assumption at time of first Kaynes case – Mr. Kaynes could join the class action in the US – *Ontario Securities Act* would be applied in the US.
* Ontario = *forum non conveniens.*
 |
| ***kaynes v bp plc,* 2016 ONCA 601 (kaynes #2)** |
| **Facts:** Pending class action in Texas including current plaintiff who purchased BP securities on NYSE.**Court:** ONCA lifts stay previously in place based on *forum non conveniens* ground in light of changed circumstance.* (1) Texas court ruled plaintiff & other Cdns not entitled to assert separate class action based upon a claim that the lead plaintiffs had not pursued.
* (2) Texas court ruled plaintiff claim was time-barred under *Ontario Securities Act*.
* But under Ont securities law, plaintiff free to pursue individual claims in US
* US court didn’t claim exclusive jurisdiction over litigation, and given that if a case were to go ahead in the US it would be subject to Ontario law, the stay was lifted.

**Takeaway:** *forum non conveniens* is live and evolving, not static. |
| ***Currie v Macdonald’s restaurants* (2005) ONCA** |
| **Facts:** Currie 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.**Court:** * 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 R&E in 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. Requirements were not met in this case, so the judgment is not binding on Currie. |
| ***Meeking v Cash store and instaloans*, 2013 MBCa** |
| **Facts:** 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.**Court:** * 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, R&E 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.
* Lurking Constitutional issue never fully raised about preventing/taking away civil rights in another province for someone who didn’t participate – if you didn’t join, how can you have the right to commence an action taken away
* If P wants to start a new action and has failed to opt out according to the procedure set by the foreign court, the decision in the foreign action is said to be final.
 |

# V. *In Rem* Actions: Jurisdiction and R&E

In conflict of laws, all property is divided into either (a) movables or (b) immovables. There are different jurisdiction, choice of law, recognition and succession rules for immovable property.

|  |
| --- |
| ***Hogg v Provincial Tax Commisioner* (1941 Sask CA) - classification** |
| **Facts:** 37 mortgages on BC property form part of an estate in SK; 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.**Court:** * Step One: decide where the asset to be classified is located
	+ Interests are intangible, but land is easy to locate. Here, land is in BC so mortgages located in BC.
* Step Two: Get expert evidence on *lex citus* classification – defer absolutely to the classification of that legal system; the legal system where the property is located.
* Mortgages are interests in land – in BC, characterizes generally as moveable from *Personal Property Act*.
* Mortgages located in BC because the land is in BC.
 |
| ***British South Africa v Mocambique,* [1893] HofL – jurisdictin over foreign immovables** |
| **Facts:** Plaintiff was in possession of large tracts of land in SA. Defendant wrongfully took possession of lands.**Court:** * Concerned about inability to exercise judgment. Could just give damages BUT suppose that something happens in South Africa – plaintiff in action repossess? Would have both mine and damages. Can’t force defendant to get out of the land. English House of Lords concerned they would issue an ineffective judgment with inconsistent results with respect to the immovable in another jurisdiction.
* British court no jurisdiction to entertain action for determination of title or right to possession of any immovable situated outside England
* British court no jurisdiction to entertain action in trespass WRT lands abroad.

**Takeaway: (Mocambique Rule) no foreign law has exclusive jurisdiction over immovables in UK and, as corollary, a UK court will not assume jurisdiction to decide title of foreign immovables. (usually followed in Canada)** |
| ***Hesperides hotels v muftizade,* 1979 Hofl** |
| **Facts:** Attempt by plaintiff to get around *Mocambique* rule. Greek plaintiff owned property in Cyprus, in the part that was no longer under Greek jurisdiction – had been taken over by Turkey. Their hotels located in that part of the island were no longer in their control. Defendant was in England, organizing tours for English people in Cyprus. Tours were going to the hotels formerly owned by the plaintiffs. Framed in conspiracy – want an action to stop tours. Trying to frame cause of action as a tort instead of a trespass in a foreign jurisdiction. **Court:** Nothing else is new since *Mocambique.* Plaintiff’s counsel had been counting on the exceptions to the rule overwhelm the rule itself. BUT three big exceptions in which court will take jurisdiction:1. Contracts related to immovable
2. Equities among parties as long as the order is *in personam* (see *Penn v Baltimore*)
3. Context of administering an estate if there is a portion of the estate which consists of a foreign immoveable the court may take jurisdiction to settle questions regarding the estate.
 |
| ***Godley v Coles*, 1988 Ont**. |
| **Facts**: P and D reside in Ont. Both own condos in FL. D = upstairs; P=downstairs. Condos = foreign immovable. Ds toilet leaks and damages Ps lower condo. P seeks to recover from D, alleging D’s condo caused water damage to P’s condo. Damage to immoveable property and to furniture and other moveables. P brings action in Ont for damages. D argues that Mozambique rule prevents P from bringing action in Ontario.**Court:** 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. **Takeaway:** Where the bulk or substantial amount of damage is to moveables, and a minority of the value of claim is damage to immovable, Cdn court will probably take jurisdiction.  |
| ***Ward v coffin,* 1972 NBSC – Exceptions to *mocambique* rule** |
| Example of exceptions to the *Mocambique* rule. Action commenced in NB to enforce a contract for sale of land in QB. Possible for the court to classify the cause of action as an action in contract. |
| ***Duke v Andler,* 1932 SCC** |
| *Canadian common law rule for R&E of foreign judgments dealing with immovable.***Facts:** California takes jurisdiction in a contract action regarding sale of BC land and makes an order for specific performance to re-convey title (*in personam* order)… but to affect title. Re-conveyance executed by force in CA – P comes to BC and commences action of declaration they are owners of BC land by either CA conveyance or CA judgment. **Issue:** Should BC R&E judgments from courts which exercise jurisdiction on same basis we would?**Court:** * Will not R&E because it involves immovable in BC = do not want foreign jurisdictions playing around with our immovables
* CA judgment may be *in personam* but property is in BC and BC courts won’t let foreign court decide what happens to land in BC.If you want SP to convey immoveable property, need to go to that jurisdiction to litigate.
 |

# VI. 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.

**Applying 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.

## A. Renvoi

* **Renvoi: the rule that in some jurisdictions the capacity of a nonresident to sue upon a cause arising locally may be determined by the court looking into the law of her domicile rather than local law.** An application of the renvoi doctrine occurs when the whole law of a foreign state, including its conflict of laws rules, is looked to for a solution. If reference is to the whole law and not merely the internal law of the other state, then use of the renvoi concept is involved.

•Common law choice of law rules just reference “the law” of the foreign jurisdiction it does not say whether it is talking about the foreign jurisdiction’s domestic law or its choice of law rules.

•Civil law systems do not usually use domicile as a connecting factor. Traditionally, civil law systems use nationality whenever CL systems use domicile. CL choice of law rules, do not specify whether the reference is to the domestic law of the domicile or its C of L rules. E.g. if testator dies domiciled in France, but testator was not of French nationality, do the French C of L rules govern? In this situation, it is open to a party who doesn’t want the French domestic law to apply to argue that French C of L laws apply and therefore the law that actually governs the merits of the case is the law of the country of which the testator was a citizen.

•95% of the time, the rule is that the choice of law rule points you to the *domestic* law that is to apply to the merits (e.g. there are cases that say that this is always the case in contracts cases)

•Renvoi relies on the ambiguity in the choice of law rules to rely either on the domestic law of the legal system that has been selected *or* its choice of rules.

•Foreign choice of rules may be the same as the forum’s or they may direct the action back to the forum’s law or they may deflect to a third legal system.

**Two Types of Renvoi:**

1)  ***Partial Renvoi*** – Gives the forum a choice btw the domestic law of the *lex causa* or whatever domestic law the *lex causa* C of L rule would apply. The CL cases, w/very few exceptions, reach the result as if they used partial renvoi although they pay lip service to total renvoi.

2)  ***Total Renvoi* – occurs when the question asked of the foreign expert is how would your court solve this problem**; you just turn the whole thing over to the foreign expert and follow whatever he/she says. The leading case on total Renvoi = *Re: Anisley*. The Justification for total renvoi is uniformity i.e. that we are trying to produce the result here in the forum that would have occurred if the litigation had occurred in the other jurisdiction whose laws we’ve decided to apply. This is usually a deference to the control of the foreign court over the matter. Total revoi, in Edinger’s opinion, is not useful b/c it leads to uncertainty b/c who knows what the foreign expert will say that his jurisdiction would do.

* Edinger can’t say which is the law of BC.
* If you want total renvoi, just ask the foreign expert what his/her legal system would do.
* If want partial renvoi, ask the foreign expert what their legal system’s C of L rules would be in the situation.

|  |
| --- |
| ***Nielson v Overseas Projects Corp of Victoria* ( 2005 Australian HC)** |
| **Facts**: Nielsens were working oversees for a State of Victoria corporation. Mrs. Nielsen fell down some stairs in their residence provided by OPC. When she returns to Australia, brings an action against OPC for the accident (tort) which occurred in China. At this point in time, all Australian states conflict rules are a matter of state law not national law (same in Canada). Same as *Tolofson v Jensen*: apply the law of the state in which the tort occurred. In Australia no possible exceptions to this rule. **Issue:** What law should the HC of Australia apply to the action brought by Mrs. Nielson? China had a one-year limitation period (Mrs. Nielson has exceeded this). HCA would need to find a way around the China law and limitation period. **Court:** * Want certainty and simplicity in choice of laws rules.
* Distinction ordinarily drawn between domestic law of the *lex causae* and conflicts rules. Imposing an artificial distinction on foreign legal system.
* Para 102: *lex loci delicti* is the whole law of that place. Aus HC says: In tort actions, look at the whole law not just domestic law – look at what would the Chinese court do.
* Counsel for Mrs. Nielson argues: China wouldn’t apply law of China to this action because Nielsons are domiciled in Australia and OPC is domiciled in Australia. China would apply law of Australian state.
* Get expert evidence on what a Chinese court would do: would they apply
* OPC found liable
 |

**Deference to power justification:** NO point in forum coming to a conclusion on title because that court/law has complete power (immovable property = immovable property).

**Nielson:** QUESTION MARK IN CANADA – no tort choice of law case in Canada yet in which Nielson has been followed (good law in Australia, but doubts as to it in Canada).

## B. Marriage

* Harper government: Zero Tolerance for Barbaric Practices (anti-polygamy) irked Edinger (haha)
* Rules concerning validity of marriage illustrate the traditional jurisdiction selecting method.
* Even though there are choice of law rules concerning validity of marriage, they are still not settled. Area which should provoke you to thinking critically about choice of law rules.
* Validity of marriage may be a subsidiary issue in succession cases. Original parties to the marriage may be dead and it is their heirs fighting over whether the marriage was valid.

**Marriage must be both FORMALLY and ESSENTIALLY valid** :**Identify the defect alleged, and characterize it as going to either formal or essential validity**

•Precedent gives some categorization, which is pretty complete (not exhaustive), but you can mostly find a precedent of the classification of the defect

•Age for capacity to marry; consanguinity; affinity; fraud; mental reservations; consent (various was to vitiate); sex (same sex okay in Canada not in other places); number (polygamy)

### FORMAL VALIDITY

Notice or banns; witnesses (need and number); registration; civil / religious requirements; proxy marriages; UK CL says to form but civil law systems say essential – parental consent

**Rule:**

1. Formal validity of marriage governed by place of ceremony
2. Common law marriage if not possible to comply with llc and not matter of choice (e.g. Jewish people in Nazi Germany).
3. Renvoi apply domestic choice of law rule of place where marriage ceremony took place

|  |
| --- |
| ***BROOK V BROOK,* 1891 HOFL – FORMAL VALIDITY** |
| **Facts:** 1840 – William and Charlotte get married but she dies in 1847. William is a widower with two kids, he wants to remarry to Emily (his sister in law) in 1850. At this point in time in England, that marriage is prohibited (can’t marry your sister in law). **Issue:** Law of the place where the marriage occurs governs. Denmark permitted a man to marry his sister in law. William and Emily take a trip to Denmark and marry there. They proceed to have three children. In 1855, William and Emily both die. Five orphans – William leaves a will, residue of property to five children. No issue with will validiy. In 1856, one of the sons of the second marriage dies. Fight over that one son’s share over the Brook estate. Attorney General arguing for the 1/5th share – argues marriage #2 was void and so the property that was left to the son is now passing to the Crown.* 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

Capacity: Age for capacity to marry; consanguinity; affinity; fraud; mental reservations; consent (various was to vitiate); sex (same sex okay in Canada not in other places); number (polygamy)

* 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,* 1990 FED CA** |
| **Facts:** 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.**Court:** * 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,* 1990 FC** |
| **Facts:**  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.**Court:** * According to the law of her domicile (Israel), U was a single woman who had the capacity to marry.
 |
| ***SANGHA V MANDER,* 1985 BCSC** |
| **Facts**: 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; **Court:** * 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.
 |

## C. Torts

* The old rule was “double barrel” the rule in *Phillips* –forum applied its own law subject to any substantive defences arising under the law of the place where the tort occurred
* Choice of law rule of torts in Canada – *Tolofson* changes the CL dramatically and surprises everyone

|  |
| --- |
| ***TOLOFSON V JENSEN*, 1994 SCC** |
| **Facts:** 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?**Court:*** *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.
* Law of SK applies; limitation periods are substantive, not procedural, therefore action is barred
 |
| ***SOMERS V FOURNIER,* 2000 ONCA** |
| **Facts:** 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.**Issue:** Which law governs costs, prejudgment interest and non-pecuniary damages? **Court:** * 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.

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.  |
| ***Editions Ecosociete v Banro,* 2012 SCC** |
| * In the defamation context, there may be room for an exception to the lex loci delicti rule. It may be the case that the law that should apply is the law of the place where the most substantial harm to reputation occurs
* In the defamation context, hen considering which jurisdiction has the closest connection with the harm that occurred, consider the following factors: (1) Ordinary residence of the plaintiff, (2) Extent of publication in each jurisdiction, (3) Extent of harm in each jurisdiction, and (4) Other relevant matters
 |

## D. Contracts

### The Proper Law

Proper law = test formulated in different ways.

* Express choice = means contract has express COL clause and can avoid difficult process of trying to ascertain the proper law absent express COL clause.
* Implied Choice: must look at intention of parties. Can be determined by looking at choice of forum. Need to draw inferences about parties actual intentions.
* If unable to determine intention = need to objectively ascertain based on terms of the contract and relevant surrounding circumstances.

|  |
| --- |
| ***VITA FOODS V UNUS SHIPPING,* 1939 – Express Choice of Law Clause** |
| **Facts:** Shipping from Newfoundland to NY – bills of lading issued in NFLD. Makes a stop in NS b/c of storm. Cargo loaded onto another ship and goes to NY. Bills of lading issued in NFLD – recently implemented Hague rules, NFLD statute stated “*every bills of lading issued in NFLD shall expressly state it is subject to Hague rules”.* Bills issued were old pre-Hague forms that didn’t contain required statement. Litigation ensues in NS. Argument that bills void b/c didn’t comply with NFLD statute.**Court:** * Two main issues: **(1)** what is proper law of contract? **(2)** What is the proper interpretation of the NFLD statute and its effect on the bill?
* Party autonomy is primary rule for determining PL of C = legal system parties expressly selected to govern contract.
* As long as the **(i)** intention is *bona fide* and **(ii)** legal and **(iii)** there is no reason for not honouring the choice on the grounds of public policy, then that is the law that should be applied.

Connection with forum selected is not required. |
| ***RICHARDSON INTERNATIONAL LTD V MYS CHICKHACHEVA*, 2002 - implied** |
| **Facts:** Richardson = fish trading company. Claimed maritime lien over Chikhacheva. Lien available under American law, but not under Cdn law. Availability of lien depended on the proper law of the contract.**Court:** * If no express CofL clause, court must determine whether proper law can be inferred from terms of contract and surrounding circumstances. Goal is to identify system of law that has closest and most real connection to k.
* Presence of arbitration clause = highly persuasive.
 |
| ***IMPERIAL LIFE ASSURANCE CO V COLMENARES,* 1967 SCC – objective determination.** |
| **Facts:** Life insurance policy issued in Cuba to Cuban resident; home office of insurer is in Ont and Ont form used. Contract is in Spanish. No Choice of Law clause. Payout is illegal under Cuban law and would not have been able to receive any of the money. **Issue:** What is proper law of contract where there is no CofL clause?**Court:** * Need to consider the contract as a whole in light of all the circumstances which surround it and apply the law which appears to have the closest and most substantial connection.
* Objective test; not what actual parties to the contract intended, but in terms of reasonable business people and their position.
* Where no express choice and no way of determining from terms of k what meant – objective determination.
 |
| ***AMIN ROSHEED SHIPPING V KUWAIT INSURANCE,* 1984** |
| **Facts:** 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. **Court:** * 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.
 |
| ***RE POPE & TALBOT,* 2009 BCSC** |
| A contract may be subject to more than one proper law of the contract. Different sections of a contract may be governed by different legal regimes. |

### Formation

|  |
| --- |
| ***MACKENDER V FELDIA AG,* 1967 QB CA** |
| **Facts:** Insurance policy on jewelry store; diamonds go missing; insurer alleges smuggling and argues that makes the contract void – never meant to insure a smuggling operation. Contract contains a choice of law clause stipulating Belgium. Insurers want to bring action in England and argue that if contract is void, then choice of law clause also doesn’t exist. **Issue:** Which law is applied to determine the formation of the contract?**Court:** * When there is an issue as to whether there is a contract, the forum can apply to its own law to determine whether there is a basic agreement
* See s.10 of *CJPTA.*
* Need to apply forum law to determine whether there is a contract. However, this is basic offer and acceptance without any technicalities (consideration is viewed as a technicality). Need to ask whether there was an agreement

Role of forum is to determine if there is a consensus |

### Formalities

|  |
| --- |
| ***GREENSHIELDS V JOHNSON* (1981)** |
| **Facts:** AB statute required notarization of contracts that included a guarantee. There was no notarization, but the choice of law clause selected ON law. **Issue:**• Which law governs the formalities required for a valid contract? **HELD:**• contract is formally valid because it complies with ON law. **Court:** a rule of alternative validity - sufficient to comply with any formal requirements of the PCL, but alternatively if the parties do not comply with the formal requirements of the PLC it will be sufficient if they comply with the formal requirements of the llc * A contract is formally valid if it meets the requirements of either (a) the law of the place where the contract was made or (b) the proper law of the contract
* contracts have to be formally and essentially valid (like marriage) but there are very few formal requirements. NOTES

•  the CA took a different approach, regarded it as one of procedure and substance. Said that the statute was substance (rather than procedure) and thus did not apply to the action in ON (which only applies ON substantive law). •  the exclusionary rules remain relevant (as they are in all cases, this is just a nice example of TJ going through entire analysis) AND it is also possible for one (or other or both) of the rules going to formal validity as being substantive or procedural  |

### Illegality: Rules of Mandatory Application

* 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*, 1986 BCCA** |
| **Facts:** 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*. **Court**: * 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 V TERRACE PROPERTIES*, 1989 BCCA** |
| **Facts:** 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? **Court:** * 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,* 2001** |
| 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). |

## E. 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.

|  |
| --- |
| ***MINERA AQUILINE ARGENTINA SA V IMA EXPLORATION,* 2007 BCCA** |
| **Facts:** 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). **Court:** * 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. |

## F. Property

### Moveables: *Inter Vivos Transfers*

|  |
| --- |
| ***CAMMELL V SEWELL* (1860)** |
| **Facts:** Plaintiffs are insurers of property – lumber shipped from Russia. Ship runs aground in Norway, cargo is unloaded. Defendants were involved in the purchase of the lumber in Norway (lumber was in Norway when the defendants purported to purchase it). Lumber was abandoned and a claim in England from plaintiffs for compensation for total loss (someone else purchased it in Norway and will now sell it). Want lumber – if not, want proceeds from sale of lumber. Insurers tried to stop the sale in Norway. **Rule:** *lex situs* at time of transfer.**Issue:** (*Barend* case): Whether *renvoi* could be used? Is it part of law of transfer of title of movable property *inter vivos?***Court:** Renvoi is not part of the law on transfer of immovable property (*Manson*): no binding authority that English private law will apply doctrine of renvoi. Largely a question of policy – applied most frequently in the context of the law of succession, not applied contractual relations or tort (*pre Nielsen*).  |
| ***IRAN V BEREND*, 2007 – REJECTS RENVOI** |
| **Facts:** fragment of limestone originating from fifth century BCE. Berend allegedly acquired title after sold to her through an agent at a NY auction. Decades later, sought to sell at auction (2005) but Iran sought and was granted an injunction to prevent sale. Berend argued fragment = movable property and English conflict of laws rules dictate French law governs question of title to fragment (since she obtained title to it in France). Relies on an article of French Code saying she obtained it. Iran argued English court should also apply French conflict of law rules (ie apply doctrine of renvoi), which would demand return of fragment.**Court:** * Court shouldn’t undertake the task of trying to ascertain how a foreign court would decide the question, unless the advantages of doing so clearly outweigh disadvantages. Most situations = interpret reference to foreign law to mean its domestic rules.
* *Lex situs* in terms of domestic law.
* No good reason to introduce doctrine of renvoi to moveables (fragment determined according to French domestic law).
 |

### 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.
	1. When a representative is appointed by will, he or she is known as an **executor**.
	2. 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.

Succession

* Can be movable or immovable property
* Have *Wills, Estates, and Succession Act.* (ss.79-83)Since 2014.
* Does not give the testator (will-maker) dispel party autonomy. Can’t choose the law you want to govern your will.
* Transfer post-mortem of movable and immovable property is divided into (1) administration and (2) succession.
* At common law, all property of the deceased vests in (1) executor if a will or (2) administrator.

Effect of Marriage on Property

* Breakup
* Community regimes
* Contracts
* Mostly dealt with in Family Law Act.

In BC, have the *Family Law Act*.

* S.107 defines proper law for matriomonial relationship. Excludes *renvoi*. There is a definition of the internal/domestic law.
* S.108 recognizes the existence and validity of domestic contracts – might be governed by non-BC law.
* S.108(5) recognizes community property regimes: parties will be subject if their first common habitual residence was in a jurisdiction whose law authorized community property regimes.
* In BC – triggered only by separation
* CPR – lasts for life, even if you stay together still subject to CPR – limitations on what you can deal with in your will.

Trusts

Common law courts use *lex situs* for movable property. Wherever it is located at the time of the transfer, that is the law common law courts apply to determine who has title.

Law Applicable to Trusts

* Uniform law conference of Canada two acts (both enacted in BC): International Trust Act, Conflict of Law Rules for Trusts Act.
* Very similar statutes in what they provide.
* ITA: both provide for party autonomy – the settlor has the right to choose the law to govern the trust. Can be express or implied.
* If you don’t choose or choose a law that wont work (ie civil law system for trust) the court will have to select a proper law for you. ITA provinces in Article 8

# APPENDIX – STATUTORY MATERIALS

*Wills, Estates, and Succession Act,* ss.79-83

***Court Jurisdiction and Proceedings Transfer Act***

**Part 2 — Territorial Competence of Courts of British Columbia**

**Application of this Part**

**2**  (1) In this Part, **"court"** means a court of British Columbia.

(2) The territorial competence of a court is to be determined solely by reference to this Part.

**Proceedings against a person**

**3**  A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

**Proceedings with no named defendant**

**4**  A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between British Columbia and the facts upon which the proceeding is based.

**Proceedings against a vessel**

**5**  A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in British Columbia.

**Residual discretion**

**6**  A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that

(a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or

(b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

**Ordinary residence — corporations**

**7**  A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

(a) the corporation has or is required by law to have a registered office in British Columbia,

(b) pursuant to law, it

(i) has registered an address in British Columbia at which process may be served generally, or

(ii) has nominated an agent in British Columbia upon whom process may be served generally,

(c) it has a place of business in British Columbia, or

(d) its central management is exercised in British Columbia.

**Ordinary residence — partnerships**

**8**  A partnership is ordinarily resident in British Columbia, for the purposes of this Part, only if

(a) the partnership has, or is required by law to have, a registered office or business address in British Columbia,

(b) it has a place of business in British Columbia, or

(c) its central management is exercised in British Columbia.

**Ordinary residence — unincorporated associations**

**9**  An unincorporated association is ordinarily resident in British Columbia, for the purposes of this Part, only if

(a) an officer of the association is ordinarily resident in British Columbia, or

(b) the association has a location in British Columbia for the purpose of conducting its activities.

**Real and substantial connection**

**10**  Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property in British Columbia of the deceased person, or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in British Columbia,

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) property in British Columbia that is immovable or movable property, or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in British Columbia;

(iii) the administration of the trust is principally carried on in British Columbia;

(iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,

(ii) by its express terms, the contract is governed by the law of British Columbia, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,

(g) concerns a tort committed in British Columbia,

(h) concerns a business carried on in British Columbia,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in British Columbia, or

(ii) in relation to property in British Columbia that is immovable or movable property,

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,

(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or

(l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

**Discretion as to the exercise of territorial competence**

**11**  (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

**Conflicts or inconsistencies with other Acts**

**12**  If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

(a) confers jurisdiction or territorial competence on a court, or

(b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

***Court Order Enforcement Act,* parts 2-4.**

**Part 2 — Reciprocal Enforcement of Court Orders**

**Definitions and interpretation for Part**

**28**  (1) In this Part:

**"judgment"** means a judgment or order of a court in a civil proceeding if money is made payable and includes an award in an arbitration proceeding if the award, under the law in force in the state where it was made, has become enforceable in the same manner as a judgment given by a court in that state, but does not include an order for the periodical payment of money as support, alimony or maintenance for a spouse, a former spouse, a reputed spouse, a child or any other dependant of the person against whom the order was made;

**"judgment creditor"** means the person who obtained the judgment, and includes the person's executors, administrators, successors and assigns;

**"judgment debtor"** means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the state in which it was given;

**"original court"** in relation to a judgment means the court that gave the judgment;

**"registering court"**, in relation to a judgment, means the court in which the judgment is registered under this Part.

(2) All references in this Part to personal service mean actual delivery of the process, notice or other document to be served, to the person to be served with it personally, and service must not be held not to be personal service merely because the service is effected outside the state of the original court.

**Application for registration of judgment**

**29**  (1) If a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to have the judgment registered in the Supreme Court unless

(a) the time for enforcement has expired in the reciprocating state, or

(b) 10 years have expired after the date the judgment became enforceable in the reciprocating state.

(1.1) On application under subsection (1), the Supreme Court may order that the judgment be registered.

(2) An order for registration under this Part may be made without notice to any person in any case in which

(a) the judgment debtor

(i) was personally served with process in the original action, or

(ii) although not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court, and

(b) under the law in force in the state where the judgment was made,

(i) the time in which an appeal may be made against the judgment has expired and no appeal is pending, or

(ii) an appeal has been made and has been disposed of.

(3) In a case to which subsection (2) applies, the application must be accompanied by a certificate issued from the original court and under its seal and signed by a judge or the clerk of that court.

(4) The certificate must be in the form set out in Schedule 2, or to the same effect, and must set out the particulars as to the matters mentioned in it.

(5) In a case to which subsection (2) does not apply, notice of the application for the order as is required by the rules or as the judge considers sufficient must be given to the judgment debtor.

(6) An order for registration must not be made if the court to which the application for registration is made is satisfied that

(a) the original court acted either

(i) without jurisdiction under the conflict of laws rules of the court to which application is made, or

(ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor,

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, even though he or she was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court,

(d) the judgment was obtained by fraud,

(e) an appeal is pending or the time in which an appeal may be taken has not expired,

(f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or

(g) the judgment debtor would have a good defence if an action were brought on the judgment.

(7) Registration may be effected by filing the order and an exemplification or certified copy of the judgment with the registrar of the court in which the order was made, and the judgment must be entered as a judgment of that court.

(8) If a judgment provides for the payment of money and also contains provisions for other matters, the judgment may only be registered under this Part for the payment of money.

**Jurisdiction to issue certificate**

**30**  If the original court is a court in British Columbia, that court has jurisdiction to issue a certificate for registration of a judgment in a reciprocating state.

**Application of *Foreign Money Claims Act***

**31**  If a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada,

(a) the [*Foreign Money Claims Act*](http://www.bclaws.ca/civix/document/id/complete/statreg/96155_01) applies to ascertain the amount of Canadian currency payable under it,

(b) the registering court must certify the amount payable under the judgment, in accordance with paragraph (a), on its registration, and

(c) on its registration, the judgment is deemed to be a judgment for the amount so certified.

**If judgment is in language other than English**

**32**  (1) If a judgment sought to be registered under this Part is in a language other than the English language, the judgment or the exemplification or certified copy of it, as the case may be, must have attached to it for this Part a translation in the English language approved by the court.

(2) On approval being given under subsection (1), the judgment is deemed to be in the English language.

**Effect of registration**

**33**  If a judgment is registered under this Part,

(a) the judgment, from the date of the registration, is of the same effect as if it had been a judgment given originally in the registering court on the date of the registration, and proceedings may be taken on it accordingly, except that if the registration is made under an order made without notice to any person, a sale or other disposition of any property of the judgment debtor must not be made under the judgment before the expiration of one month after the judgment debtor has had notice of the registration or a further period as the registering court may order,

(b) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself, and

(c) the reasonable costs of and incidental to the registration of the judgment, including the costs of obtaining an exemplification or certified copy from the original court and of the application for registration, are recoverable in the same manner as if they were sums payable under the judgment if the costs are taxed by the proper officer of the registering court and the officer's certificate is endorsed on the order for registration.

**Order sought by one party only**

**34**  (1) If a judgment is registered under an order made without notice to any person

(a) within one month after the registration or within a further period as the registering court may at any time order, notice of the registration must be served on the judgment debtor in the same manner as a notice of civil claim is required to be served, and

(b) the judgment debtor, within one month after he or she has had notice of the registration, may apply to the registering court to have the registration set aside.

(2) On an application under subsection (1) (b), the court may set aside the registration on any of the grounds referred to in section 29 (6) and on terms the court thinks fit.

**Rules of Court**

**35**  Rules of Court may be made for practice and procedure, including costs, in proceedings under this Part and, until rules are made under this section, the rules of the registering court, including rules as to costs, apply with the necessary changes.

**Exercise of powers**

**36**  Subject to the Rules of Court, any of the powers conferred by this Part on a court may be exercised by that court.

**Reciprocating jurisdictions**

**37**  (1) If the Lieutenant Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside Canada for the enforcement of judgments given in British Columbia, the Lieutenant Governor in Council may by order declare that state to be a reciprocating state for this Part.

(2) The Lieutenant Governor in Council may revoke an order made under subsection (1), and the state for which the order was made ceases to be a reciprocating state for this Part.

**Saving**

**38**  (1) Nothing in this Part deprives a judgment creditor of the right to bring action on the judgment, or on the original cause of action,

(a) after proceedings have been taken under this Part, or

(b) instead of proceedings under this Part.

(2) The taking of proceedings under this Part, whether or not the judgment is registered, does not deprive a judgment creditor of the right to bring action on the judgment or on the original cause of action.

**General purpose**

**39**  This Part must be interpreted so as to effect its general purpose of making uniform the law of the provinces that enact it.

**Part 3 — Asbestos Litigation**

**Loss or injury caused by asbestos**

**40**  (1) In this section:

**"asbestos"** means naturally occurring, highly fibrous, heat insulating and chemically inert silicate minerals belonging to either serpentine or amphibole groups and includes chrysotile, crocidolite, amosite, anthophyllite, tremolite and actinolite and any other mineral commonly known as asbestos;

**"judgment"** means

(a) a judgment or order given in a proceeding outside Canada, or

(b) a judgment or order given in another province of Canada resulting from an action on or registration of a judgment or order described in paragraph (a).

(2) Despite this or any other Act or law, if a judgment is given for loss or injury that arises out of exposure to or the use of asbestos that has been mined in British Columbia,

(a) the judgment must not be registered in or enforced by a court, and

(b) a proceeding in respect of the judgment must not be commenced in a court or, if a proceeding was commenced before May 31, 1984, the proceeding must not be continued.

(3) If a person has a cause of action under the domestic law of British Columbia for loss or injury that is suffered outside Canada and arises out of exposure to or the use of asbestos mined in British Columbia, the person may commence an action under the domestic law of British Columbia, even though a judgment has been given in respect of the loss or injury or a proceeding might have been commenced outside Canada for the same relief.

**Part 4 — Canada — United Kingdom Convention**

**Definition for Part**

**41**  In this Part, **"convention"** means the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, the English language version of which is set out in Schedule 4.

**Convention in force in British Columbia**

**42**  Effective January 1, 1987, the convention is in force in British Columbia and the provisions of the convention are law in British Columbia.

**Request to designate British Columbia and courts**

**43**  The Attorney General must

(a) request the government of Canada to designate British Columbia as a province to which the convention extends, and

(b) determine the courts of British Columbia to which application for registration of a judgment given by a court of the United Kingdom may be made and request the government of Canada to designate those courts for the purpose of the convention.

**Publication of date and courts**

**44**  The Attorney General must publish in the Gazette the date the convention comes into force in British Columbia and the courts to which application for registration of a judgment given by a court of the United Kingdom may be made. *[Note: Convention in force in the Province January 1, 1987; see Notice, Part II Gazette, Vol. 29, p. 431.]*

**Regulations**

**45**  The Lieutenant Governor in Council may make regulations that are necessary to carry out the intent and purpose of this Part.

**This Part prevails**

**46**  If there is a conflict between this Part and any enactment, this Part prevails.