Conflicts of Law (Edinger) – Sarah Hannigan

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# INTRODUCTION

Conflicts cases are cases which have a foreign element to them (foreign = anywhere outside BC). Conflict of laws rules are an exception to the concept of territorial sovereignty.

**COMITY**

Conflicts rules are currently justified on the basis of **comity**—a principle of “enlightened self-interest”. Comity is premised on the idea that deference to foreign law promotes international harmony by accommodating the views of a foreign sovereign in the expectation of receiving reciprocal treatment. From a foreign relations perspective, the alienation of other (foreign) states is not a good thing.

**KEY QUESTIONS** 🡪 Private international law deals w/three central procedural Qs:

1. **Jurisdiction** (Jx) 🡪 *Does the court have authority to pass a decision that is binding on the parties?*
2. **Choice of law** (CoL) 🡪 *Which state’s rules will be applied to resolve the dispute?*
3. **Recognition/enforcement** (R/E) 🡪 *Under what circumstance will the judgment be enforced in another Jx?*

**TERMINOLOGY**

* **Forum** 🡪 The place where the action is commenced (and the litigation is occurring)
* ***In personam* action** 🡪 An action b/w persons to determine *private rights* b/w the plaintiff & defendant; can result in either a pecuniary or non-pecuniary judgment
* ***In rem* action** 🡪 An action which determines the status/title to a thing (e.g. title to movable/immovable property; once title is determined, it should be good against RoW (i.e., it should be recognized everywhere))
* **Jurisdiction** (Jx) 🡪 Any geographical area that has its own set of laws
* ***Lex fori*** 🡪 Law of the forum (in which the legal action is brought)
* ***Lex causae*** 🡪 Law of another Jx selected by a choice of law rule to determine the merits of the case

# GENERAL CONSIDERATIONS

There are three general considerations that may be relevant at any point of time during the course of litigation (Jx, CoL, R/E). These might have a significant bearing on where one decides to bring the action (e.g. if ∆ only has assets in Texas, π may want to bring the action in Texas).

1. **Characterization**
2. **Exclusionary rules**
3. **Domicile & residence**

## CHARACTERIZATION: SUBSTANCE & PROCEDURE

The process of characterization involves choosing the cause of action (CoA) and deciding whether a given rule is **procedural** or **substantive**. Essentially, every court in the world—wherever it’s located—employs its own procedural rules. The corollary of this principle is that every court in the world refuses to apply the procedural rules of any other Jx.

**Strategy:** We want to make arguments to *characterize* laws in a manner that is favourable to our clients.

* **E.g.** If a marriage issue is characterized as an issue of *formal* validity, then the operative BC CoL is the “law in place where the ceremony occurred”; if characterized as an issue of *essential* validity, then CoL depends on the law of domicile of each party when they were married.

**SUBSTANTIVE vs. PROCEDURAL RULES**

In determining where to litigate, one must consider not only the application of **substantive** law to the action, but also of the **procedure** of the relevant Jx. This involves some degree of strategy.

* **E.g.** The American discovery process is far more generous than the Canadian discovery process—this may be a practical consideration parties take into account.
* Note that **evidence rules** are almost always characterized as procedural (courts don’t want to learn all about other Jxs’ evidence rules when they are hearing a case)
1. **The process of characterization is always done according to the law of the forum**
	* The forum may consider, but is not bound by, the characterization of the *lex causae*
	* **Exception:** When characterizing property, the forum will defer absolutely to the legal system in which the property is located (according to its own law) as to how that property should be characterized
2. **Characterize rules as substantive or procedural using the pragmatic approach (set out in *Tolofson*)**
	* **BACKGROUND:**
		+ Pre-*Tolofson*, we distinguished between substantive and procedural rules as follows: **substantive rules deal with rights; procedural rules deal with remedies**. However, this approach was problematic (you can’t really have a remedy without a right…) and was overturned on the basis that it was too simplistic.
		+ In *Tolofson*, the court rethought the characterization process not only for LPs, but for the substantive/procedural distinction more generally. We now take a **pragmatic approach** to characterization.
	* **PRINCIPLES:**
		+ Courts will apply their own procedural rules on the basis of **convenience**
			- * Since the substance/procedure distinction is based on convenience (courts apply their own procedural rules out of convenience), **if there is no inconvenience involved, the rule of the *lex causae* can be applied**.
		+ **Rule:** The forum court should only classify as “procedural” those domestic rules that it needs to make its process /machinery run smoothly
		+ **Bias against characterizing the rules of the forum as procedural** 🡪 If it doesn’t make any difference to the court which law applies (in terms of convenience), then consider the law to be *substantive* (*Tolofson*) = *err on the side of characterizing forum rules as substantive*

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| **Substantive** | **Procedural** |
| **Def’n:** Creates rights & obligations; concerned w/the ends which the administration of justice seeks to attain**E.g.** Payment of pre-judgment interest (*Somers v Fournier*)* Purpose = compensative victims, taking into account the effects of inflation
* Presumptive right
* Court only has discretion to restrict it or take it away (not to *grant*)

**E.g.** Requirement that person see notary public before signing a K of guarantee (as per AB’s *Guarantees Acknowledgement Act*) (*Greenshields*) | **Def’n:** Regulates conduct of the court & litigants in respect of the litigation itself; allows machinery of court to run smoothly**General agreement that the following rules are procedural:*** Appropriate court, form of pleadings, service of process & notices, conduct of judicial proceedings, mode of trial, execution of judgments

**E.g.** Awarding costs (*Somers v Fournier*)* Purpose = encourage settlement, making the machinery of the court run smoothly
* Court has discretion to grant or deny it (unlike interest)

**E.g.** Cap on non-pecuniary damages (*Somers v Fournier*)* Purpose = avoid excessive & unpredictable damage awards
* Should be contrasted w/heads of damages (*substantive*)
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* + **Note re: damages:** Heads of damages = substantive; quantification of damages = procedural
		- **E.g.** MVA in Cali; litigation in BC 🡪 what damages π can claim = determined by Cali law (*lex causae*); how much π receives for thee damages = determined by BC law (*lex fori*)
1. **Determine which rule applies**
	* If there is a *lex fori* rule and a *lex causae* rule, there are four possible characterization combinations that could occur:

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| ***Lex fori* characterization of rule** | ***Lex causae* characterization of rule** | **Result** |
| Procedural | Procedural | The ***lex fori*** rule applies |
| Substantive | Substantive | The ***lex causae***rule applies (*Tolofson*) |
| Substantive | Procedural | **Neither** rule applies |
| Procedural | Substantive | **Both** rules apply |

**LIMITATION PERIODS** (LPs) 🡪 = **substantive**; if there’s a foreign *lex causae*, then the *lex causae* LP ought to be applied (*Tolofson*)

* **Strategy:** Counsel would want to argue for whichever of the first two combinations benefits his/her client

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| ***Tolofson v Jensen***, 1994 SCC 🡪 Modified the right-remedy distinction; adopted a *pragmatic approach* for characterization |
| **Facts:** | π and father (BC residents) involved in MVA in Sask; π injured. Other driver (J) resided in Sask. π was 12yo at the time; upon reaching age of majority 8yrs later, π brought action against both his father + J. π sued in BC because **(1)** the action was statute-barred by Sask LP, and **(2)** Sask law didn’t permit a gratuitous passenger to recover in the absence of willful/wanton misconduct on the part of the host driver. **NB:** Until this point in time, LPs had always been considered to be rules of *procedure*. |
| **Issue:** | Should LPs be characterized as *substantive* or *procedural* rules? **Substantive**  |
| **La Forest J:** | * Since tort took place in Sask, the substantive law of Sask governs (*lex loci delicti*)
* “The court takes Jx not to administer local law, but for the *convenience of litigants*, w/a view to responding to modern mobility and the needs of a world or national economic order”
* An LP can be understood either as giving ∆ a remedy or giving ∆ a right not to be sued while extinguishing π’s substantive right—essentially, this is an arbitrary distinction
* **Policy:** Allowing the court of the forum to impose its view, instead of the legislature’s, would invite **forum shopping**
* If it doesn’t make any difference to the court which law applies (in terms of convenience), then consider the law to be *substantive* 🡪 **presumption against characterizing a rule of the forum as a procedural rule**
* LP = substantive = the Sask LP applies and bars π’s claim
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 **NB:** Some Jxs have added provisions in their *Limitation Acts* in attempt to reverse the effects of *Tolofson*.

**CAPACITY/LEGAL STATUS of a PARTY**

Parties are always a matter of procedure, but *Hamza* qualifies this principle—in some cases, the forum may have subsidiary choice of law rules to determine who can be a party.

**General rule** (*Hamza*) 🡪 A party’s standing to sue is governed by the *lex fori* (issue of procedure, not substance)

* In a dispute governed by a foreign *lex causae*, the foreign law can’t give π a status it doesn’t have under the forum’s law

**Exception** (*Hamza*) 🡪 If an entity has legal/juridical person status to sue or be sued in its home Jx but not in the forum, then it may be granted status in the forum anyway depending on its characteristics (rationale = comity)

* Foreign Cxs validly created under foreign law can sue as Cxs in Canadian CL courts
* This can be extended to unincorporated foreign entities that have status to sue in their home Jxs
* *Bumper Development* further suggests that there is a wide scope of comity in giving a party standing

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| ***International Assn of Science & Tech (IAST) v Hamza***, 1995 ABCA 🡪 Forum recognition rule |
| **Facts:** | Matrimonial property action. Husband sheltered assets in Swiss organization (IAST); wife sought division of property. IAST (π) sought a declaration from AB court that neither had legal/equitable interest in the assets (it owned the entirety of the property itself). IAST was a society incorporated in Switzerland—not a Cx or natural person. Wife sought to strike IAST’s action on the basis that it lacked the legal status to sue in AB and therefore couldn’t be π. |
| **Issue:** | Does the unincorporated society—which lacked standing under the AB rules—have standing in this application? **YES** |
| **Conrad JA:** | * Had the respondents been resident in AB, they would lack the status to commence an action—however, as foreign litigants, it’s necessary to consider AB private international law rules
* The court isn’t bound by its own rules; it can supplement them with foreign procedural rules and thereby extend eligibility beyond the parties that the forum law contemplates
* The law supports a granting of status in cases where the entity is recognized as a legal/juridical person by the laws of its domicile, in the sense of having status to sue
* The principle of **comity** further strengthens this position
* **Forum recognition rule** = if the entity has status to sue and be sued by its home laws, it will be recognized here
* *Expert evidence* is req’d to prove legal status to sue
* **Criteria:**
* Must be capable of assuming fully the rights and liabilities of a legal person
* Must be answerable for judgments, court directions, costs, etc.
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| ***Bumper Development v Commissioner of Police of the Metropolis***, 1991 Eng CA 🡪 Wide scope of comity in giving a party standing |
| **Facts:** | An argument was made that a Hindu temple should have legal standing because it was a legal person under the law of Tamil Nadu, the Indian state where it was situated. |
| **Issue:** | Does the temple have standing to sue? **Yes** |
| **Court:** | * **Comity**—except as limited by forum public policy—compels that parties that have legal standing under foreign law be given standing in the forum to enforce their rights
* To hold otherwise would be to permit a “fetter of an artificial procedural nature” to deny such parties rights, and, ultimately, to frustrate justice
* If the entity in Q lacks standing to be a party under the rules of the forum, there’s still a possibility that, by looking at the entity’s home, one might find that the entity does in fact have standing to be a party
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## EXCLUSIONARY RULES

States invariably reserve the discretion to invoke public policy (*ordre public*) to exclude/limit the application of their general private international law rules. These exclusionary rules focus on *assertion of sovereignty* and are highly relevant to two areas:

* **CoL** 🡪 Public policy may operate to deny effect to an otherwise applicable foreign rule either because the application of that rule would derogate from fundamental forum values or because a mandatory policy of forum law is interpreted as intended to override the foreign rule
* **R/E** 🡪 Public policy provides a defence to the R/E of foreign awards & judgments rendered on the basis that a law that offends fundamental forum public policy may also play a role at a jurisdictional level

Here, we’re not characterizing our *own* law—we’re trying to characterize a *foreign* law. Dicey sets out the following defences against applying a foreign law:

**PUBLIC POLICY DEFENCE** 🡪 Courts won’t R/E a law of a foreign country if the R/E of such law would be inconsistent w/the fundamental public policy of the registering court (*Meinzer*; *Kuwait Airways*)

* **Rule:** The matter must relate to fundamental values (principles of justice, conception of good morals/ethics, or some deep-rooted tradition of the forum) (*Meinzer*)
	+ **“Public policy”** is narrowly defined: must be a foreign law that “turns the stomach” of the judges in the court
	+ *Kuwait Airways* extended the scope of public policy to include flagrant/gross violations of international law
		- However, although int’l laws may inform public policy, the public policy doctrine still depends on the standards of the forum (*Kuwait Airways*)
	+ ***US v Ivey*:** A law cannot be found to be contrary to forum public policy when the forum itself has enacted similar legislation (the law in Q wasn’t found to be contrary to public policy bc the forum had the exact same legislation)
* **Test:** *Would it be morally repugnant to R/E this judgment?*
* **Likelihood of success:** Frequently invoked, although rarely successful due to the narrow def’n of “public policy” (although it succeeded in *Kuwait Airways*);
* **Examples:** Fraud, bribery, prostitution, coercion

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| ***Society of Lloyd’s v Meinzer***, 2001 ONCA 🡪 Public policy defence is limited to moral imperatives, fundamental values, & essential principles of justice; the exception is narrow and rarely applied |
| **Facts:** | ON residents entered K w/English company (Lloyd’s). Ks signed in London; contained choice of forum & law clauses (England). Lloyd’s obtained judgments against investors in England; applied for R/E in ON. Argument that R/E should be denied bc it would violate ON public policy to enforce a judgment obtained in the UK from an action that would’ve failed in ON bc Lloyd’s traded securities in breach of ON statutory disclosure requirements (*Securities Act*).  |
| **Issue:** | Would it be contrary to ON public policy to R/E judgments where the party violated *Securities Act* requirements? **NO** |
| **Feldman JA:** | * The fact that a foreign law differs from the *lex fori* is not enough to deny R/E
* The prospectus requirement is fundamentally important for the orderly, fair, and reliable operation of our financial markets—condoning a break of this obligation would be contrary to ON public policy
* This doesn’t really speak to a *moral* imperative, but protection of financial markets & investors = a *fundamental value*
* Whether R/E of the UK judgment should be denied depends on whether the enforcement would be contrary to the public policy of ON by considering the historical and factual context of the proceedings which led to the granting of the judgment and, where there are competing public policy imperatives, whether overall, registration would be contrary to public policy
* **Ultimately:** Our public policy of enforcing the rules of **comity** where justice, necessity, and convenience all favour enforcement outweighs the concerns we might otherwise have where there has been a breach of the prospectus requirement of our *Securities Act*
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| ***Kuwait Airways v Iraqi Airways***, 2002 HL 🡪 Int’l law, if incorporated into forum law, may inform forum public policy |
| **Facts:** | Iraq invaded Kuwait, seized planes belonging to Kuwait Airlines (KAC), and enacted a law/resolution to dissolve KAC; title to planes was transferred to Iraqi Airways (IAC). UN then ordered Iraq out of Kuwait. In 1991, KAC took legal action against IAC in England, seeking damages in tort (conversion). KAC argued that the English courts should disregard the resolution on grounds that it was in breach of forum public policy.  |
| **Issue:** | Should the English courts disregard the Iraqi resolution as contrary to public policy? **Yes** (court didn’t apply Iraqi law) |
| **Lord Nicholls:** | * The court will exclude a foreign decree only when it “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal” (*Loucks v Standard Oil*)
* Blind adherence to foreign law can never be req’d of a court—exceptionally & rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice
* Iraq’s seizure & assimilation were flagrant violations of rules of international law of fundamental importance
* **Problem:** This was an exercise of Iraq’s sovereign power, and courts are not to judge foreign acts of sovereign states
* An English court will not sit in judgment on the sovereign acts of a foreign gov’t, and will not adjudicate upon the legality, validity, or acceptability of such acts either under domestic or international law—for a court to do so would offend against the principle that the courts will not adjudicate upon the transactions of foreign sovereign states
* **Result:** The resolution is against public policy (court decided not to apply Iraqi law after considering all the circumstances of the acquisition of title by IAC; court refused to condone the acquisition)
* In judging the resolution against contemporary standards and established rules of international law, Iraq’s invasion and seizure of assets was clearly unacceptable
* The resolution would cause deep concern to the worldwide community of nations
* Enforcement of the resolution would be contrary to England’s obligations under the UN Charter
* The argument that the public policy defence is strictly limited to laws attacking human rights was rejected
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**PENAL EXCEPTION** 🡪 Denies foreign sovereign the power to enforce its crim laws outside the territory of enactment (*Huntington*)

* **Rule:** For a proceeding to come within the scope of this rule, it must be in the nature of a suit in favour of the state whose laws have been infringed (“penal” is intended to distinguish civil rights from criminal wrongs) (*Huntington*)
	+ **“Penal” law** = where penalties are recoverable at the instance of the state, or an official duly authorized to prosecute on its behalf, or a member of the public in the character of a common informer (*Huntington*)
* **Principle:** All breaches of public law punishable be pecuniary mulct or otherwise are only cognizable & punishable in the country where they were committed—no proceeding which has for its object the enforcement by the state of punishment for such breaches by the *lex fori* ought to be admitted in the courts of any other country (*Huntington*)
* In accord with judicial attitudes to the general public policy exception, courts have given the concept of “penal laws” a relatively narrow construction for the purposes of applying the exclusionary doctrine. *Huntington* is the leading case on this matter.
* ***US v Ivey*:** The penal exception failed—the law was deemed not penal, but restitionary wrt the environment

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| ***Huntington v Attril***, 1893 PC 🡪 Leading Canadian/English common law case on the penal law exclusionary rule; recognition/enforcement case |
| **Facts:** | NY statute: “if any certificate/report made by the officers of any Cx shall be false in any material representation, all the officers who have signed shall be jointly & severally liable for all the debts of the Cx contracted while they are officers thereof”. On this basis, π sued ∆ alleging a material misrepresentation; the NYSC ruled in favour of π. When ∆ didn’t pay, π brought an action in ON for R/E of NY judgment, where ∆ now resided. ∆ argued that the NY judgment was based on a foreign *penal* law and therefore irrecoverable in ON courts.  |
| **Issue:** | Is the NY law *penal*, so as to fall within the exclusionary rule? **No** |
| **Lord Watson:** | * Here, the law imposes heavy penalties, but they’re civil in nature (remedy for creditors) ≠ penal
* Here, the penalty is recoverable “in the name of the people of the state of NY… and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such country”
* Looked at entirety of statute 🡪 The law was not penal in the narrow sense that had been defined
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**REVENUE EXCEPTION** 🡪 Denies foreign states from directly/indirectly enforcing their tax claims outside their Jx (*Stringam*)

* **Rule:** Courts won’t entertain an action brought by an individual or foreign state which directly/indirectly has the effect of enforcing the revenue laws of a foreign country (*USA v Harden*)
* **Strategy:** The revenue exclusionary rule is *dependable*—you can rely on it w/some confidence if the foreign law is a revenue law, even if there is direct enforcement of it (such as reimbursement in *Stringam*)
* ***US v Ivey*:** The revenue exception failed here bc the law concerned reimbursement for costs, not taxation

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| ***USA v Harden***, 1963 SCC 🡪 Represents the general Canadian position on revenue/tax exclusion |
| **Facts:** | Harden (BC resident) failed to pay income tax; judgment was entered against Harden. The US brought an action to enforce its judgment in the BCSC. US argued that although it couldn’t directly enforce its revenue laws in Canada, it could sue in Canadian courts to enforce a judgment obtained within its own borders. |
| **Issue:** | Should Canadian courts R/E a foreign tax claim? **No** |
| **Court:** | •A foreign state can’t escape the application of this rule by taking a judgment from its own courts and brining suit here on that judgment |

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| ***Stringam v Dubois*, 1992**, ABCA 🡪 The indirect enforcement of a foreign revenue law will not be enforced in Canada  |
| **Facts:** | Testator (domiciled & resident in AZ) left AB farm to her niece. Executor (bank) sought to sell the farm to reimburse itself for US estate taxes paid. Niece opposed this and asked the AB court to convey the farm to her.  |
| **Issue:** | Would selling the farm constitute indirect enforcement of a foreign revenue law? **Yes** (farm was conveyed to niece)Would the exclusionary revenue law rule be breached by selling the farm at the instance of the executor? **Yes** |
| **Stratton JA:** | * This case cites and discusses other precedents, including cases that go the other way (this is a difficult area of law)
* The revenue exclusionary rule is *dependable*—you can rely on it with some confidence is the foreign law is a revenue law, even if there is indirect enforcement of it (i.e. reimbursement?)
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**PUBLIC LAW EXCEPTION** 🡪 Laws won’t be enforced if they involve an exercise by a gov’t of its sovereign authority over property beyond its territory (*US v Ivey*)

* **Rule:** Laws won’t be enforced if they involve an exercise by a gov’t of its sovereign authority over property beyond its territory (*US v Ivey*)
* **Likelihood of success:** Very low—this exception is rarely invoked and yet to be applied in Canada (use as last-ditch resort)
* **Examples:** This exception might be successful in matters concerning exchange-control and export-control legislation (examples provided by the court in *US v Ivey*)

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| ***United States v Ivey***, 1995 Ont Gen Div 🡪 The “other public law” category is narrow, but may be evoked as a last-ditch resort |
| **Facts:** | USA applied for R/E of a Michigan default judgment for costs of environmental remediation. Action was brought pursuant to US environmental law (polluter has to pay state for clean-up costs). ∆ raised all possible defences including “penal, revenue, or other public law” (from Dicey & Morris’ *The Conflict of Laws*).  |
| **Issue:** | Should ON decline R/E of the judgment because Michigan laws were “penal, revenue, or other public law” in nature? **NO** |
| **Court:** | * ***Other public law?*** 🡪 No—the statute didn’t fall under the def’n of “other public law”
* The court confirmed that this category exists, albeit it is narrow and ambiguous
* Here, the court rejected ∆s’ public law argument because the US wasn’t trying to exercise discretion over Canadian property—this case didn’t fall within the circumstances of previously established cases
* **Comity** is highly important, and strongly favours enforcement
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## DOMICILE & RESIDENCE

In CL systems, domicile was traditionally regarded as the most appropriate connecting factor to establish personal law, although its importance has declined markedly in recent years. Domicile/residence may be relevant in deciding whether the court can assume Jx. Domicile is very necessary at the CoL stage—it is employed in a number of CoL rules. The concept of domicile is also highly relevant in cases involving the validity of marriages & divorces, succession, matrimonial property, and corporate law. BC has made very few statutory modifications to the concept of domicile.

**Domicile is always determined by the *forum*.** It is well established that a court must determine a person’s domicile according to the rules for ascertaining domicile accepted by the *lex fori*.

**THREE VARIEITIES of DOMICILE**

1. **Domicile of origin** (DoO) 🡪 The place in which your father was domicile at the moment of your birth; *involuntary*
	* Not necessarily the place in which you were born—your DoO could be a country you have never set foot in
	* If illegitimate, your DoO was the domicile of your *mother* at the moment of your birth (at CL)
	* If a foundling, your DoO was where you were found (at CL)
	* **E.g.** Born in ON, but father was domiciled in Russia 🡪 DoO = Russia
2. **Domicile of dependency** (DoD) 🡪 Prior to reaching age of majority, place in which the ppl looking after you are domicile
	* At CL, infants, lunatics, and married women (outdated) were subject to their DoD
	* Now, for infants, look to the *Infants Act* for guidance
	* Upon reaching the age of majority, a former infant has the capacity to acquire a DoC
	* Mentally ill persons who are incapable of forming intent remain subject to DoD
	* You can go straight from DoO to DoC w/o ever being domiciled where you’re living if your parents haven’t acquired domicile there
3. **Domicile of choice** (DoC) 🡪 Acquired upon abandonment of one’s DoO (with the intention of never returning)
	* **Eligibility:** Must have reached the age of majority + must have capacity to form a domicile
	* **Requirements:** To acquire DoC, these two elements must coincide at the same point in time:
* **RESIDENCE 🡪** Physical presence; arrival in a place (easy to establish); no minimum residency period is req’d
* ***MENS REA*** (intention to remain) 🡪 To acquire a DoC, intention must be *freely formed* (hard to establish)
	+ - **Test:** A DoO can only be replaced by clear, cogent, and compelling evidence that the relevant person intended to settle permanently and indefinitely in the alleged DoC (Lord Longmore in *Agulian*)
			* **Burden of proof:** On person alleging change in domicile (*Agulian*)
			* **Standard of proof:** The necessary intention must be clearly & unequivocally proved (*Agulian*); closer to the civil standard in CAN
		- **Evidence:** In determining a person’s domicile, *everything* is relevant—consider the whole of the person’s life in retrospect to see whether an inference could be made that he/she intended to make his/her home permanently somewhere (Lord Mummery in *Agulian*)
		- **To establish, look for:** Intention to make one’s locality one’s home; absence of an intention to leave in the event of a clearly foreseen and reasonably anticipated contingency
		- **Don’t need:** To establish DoC, you don’t necessarily need an intention to “end your days” at the location (as English courts formerly required)—that is much too far down the road, and people are far too mobile
		- This requirement poses problems for invalids, prisoners, and illegal immigrants
			* *Is it possible to acquire a domicile when you’re not legally there?* Courts have indicated that “it’s possible” to acquire a domicile despite being subject to deportation
	+ **Doctrine of revival:** At CL, if you ever abandon your DoC w/o acquiring a new DoC, your DoO is revived
		- While 99% of the time there’s no revival problem, there are occasional instances where DoO might revive at CL (this principle could be troubling to refugees)
	+ *Udny v Udny*, 1886 (quoted in *Foote*): “DoC is a conclusion/inference which the law derives from the fact of a man fixing voluntarily his sole/chief residence in a particular place, w/an intention of continuing to reside there for an unlimited time… There must be a residence freely chosen, and not prescribed/dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a ltd period or particular purpose, but general & indefinite in its future contemplation”
	+ *Re Fuld*, 1986 (quoted in *Agulian*): “DoC is acquired when a man fixes voluntarily his sole/chief residence in a particular place w/an intention of continuing to reside there for an unlimited time”

**ABANDONMENT** 🡪 To abandon a DoC, you must: **(1)** physically leave, and **(2)** intend to never return (although vacations are OK)

* Dicey: “A DoC is lost when *both the residence and the intention* which must exist for its acquisition are given up. It is not lost merely by giving up the residence nor merely by giving up the intention”
* A mere declaration of intent ≠ sufficient to abandon one’s long-standing DoC (*Foote*)
* If you abandon a DoC without acquiring a new DoC = your DoO is **revived** (*Re Fuld*)

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| ***Agulian v Cyganik***, 2006 EWCA 🡪 How to establish intent for acquiring a DoC  |
| **Facts:** | Testator died in England; left estate of £6.5m; left partner (fiancée) of 2yrs w/£50k. Partner challenged will, seeking a variation. Partner’s eligibility to apply for variation was dependent on whether the testator was domiciled in England & Wales at the time of his death, or had retained his DoO in Cyprus—born in Cyprus, but worked in England for 43yrs. He returned to Cyprus quite regularly (never got Cyprus “out of his system”), and evidence suggested that he intended to go back there; he had purchased real property in Cyprus. |
| **Issue:** | Where did the testator die domicile: DoO (Cyprus) vs. DoC (England)? **DoO** (conclusion: he had always intended to return to Cyprus—the TJ erred in placing too much weight on the last few yrs of his life) |
| **Lord Mummery:** | * He didn’t acquire a DoC because he didn’t intend to live in England permanently—it could not reasonably be inferred that he had formed a different intention about his permanent home prior to his death
* The Q isn’t whether he intended eventually to return to live permanently in Cyprus, but whether it had been shown that, by the date of his death, he had formed the intention to live permanently in England (default = DoO)
* His engagement and subsequent wedding plans were not determinative in themselves
* **Analysis:** Consider—at the date of his death—the whole of the testator’s life in retrospect in order to see whether an inference could be made that he intended to make his home permanently or indefinitely in England
* In this case, the deputy judge concentrated on his later years, and did not take into account all the materials relevant to an inference about the testator’s intentions
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| **Lord Longmore:** | * He maintained his links w/Cyprus: he sent one of his daughters to be educated there (where she remained); bought property there; etc.
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| ***Foote and Foote Estate***, 2011 ABCA 🡪 Domicile case |
| **Facts:** | At the time of his death (in AB), testator was domiciled in Norfolk Island (Austrialian protectorate). Wife + children contemplated challenging this finding, arguing that the proper domicile is either AB or BC. Wills were executed in AB; had properties in AUS + BC; went to AB for cancer treatment; “lived a colourful life which took him all over the globe”. Testator practiced law in AB; later went into business and left AB; became a world traveler and acquired properties and wealth. There was no dispute that he had acquired a DoC in Norfolk Island—the Q was whether that was still his DoC at death. |
| **Issue:** | DoO (AB) vs. DoC (Norfolk Island) vs. DoC (BC)? **DoC** (Norfolk Island) |
| **Court:** | * DoO = AB (where he was born and where he lived for the first 43yrs of his life)
* It isn’t necessary for a person to completely cease to reside in a location to abandon it as his domicile
* When the testator died, Norfolk Island remained his principal residence (the AUS property was only used for brief visits)
* Testator didn’t abandon Norfolk Island as his DoC when he declared his intention to return to CAN
* A mere declaration of intent ≠ sufficient to abandon one’s long-standing DoC
* Ultimately, the testator did not have the requisite intent to abandon his DoC, so it still stands
* Testator hadn’t taken any tax advice = he couldn’t have abandoned his DoC in Norfolk Island (he never would’ve moved to BC/AB without taking tax advice, given his business acumen)
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| ***Re Fuld***, 1968 PC 🡪 Domicile case |
| **Facts:** | Fuld acquired Canadian nationality (born in GER).  |
| **Issue:** | Had he acquired domicile in Canada? |
| **Scarman J:** | * Fuld couldn’t make up his mind where to settle
* Spent years away from GER, but really wanted to go back into the family business there (he couldn’t get a position in the business, however, and he didn’t want to live with his mother there)
* Thus, he never acquired a DoC anywhere else = DoO is **revived**
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**DOMICILE of a Cx** 🡪 As per *National Trust Company v Ebro*, the domicile of a Cx = the place where the company was incorporated

**RESIDENCE**

* The concept of residence is gaining traction in BC statutes (likely because it’s an easier concept for legislatures to grapple with; e.g. *Family Law Act*)
* **Theory:** There’s a spectrum from *temporary residence* to *actual residence* to *ordinary residence* to *habitual residence* to *permanent residence*
* **Ordinary vs. habitual residence** 🡪 *Nafie* floats the idea that “habitually” & “ordinarily” resident are in fact the same concept
	+ There are cases that expressly define ordinary residence in terms of habitual residence
	+ Essentially, there’s little—if any—meaningful difference between these concepts (= they’re placed very close together on the spectrum, and are nearly indistinguishable)
* Note that it’s possible to have multiple ordinary residences (*Knowles*)

**ESTABLISHING ORDINARY/HABITUAL RESIDENCE** 🡪 Consider the following factors:

* **Quality of the residence** 🡪 Look for an intention to settle or to make a home (*Nafie*)
* **Duration** 🡪 Unlike domicile, there must be some passage of time (*PA v KA*)
* **Presence of immovable property** 🡪 Immovable property in a Jx constitutes a substantial connection w/the Jx (*Knowles*)

These 3 cases deal with Jx of the court; operate under the assumption that, if the court lacks Jx, the parties can go elsewhere (thus, the Q of Jx is less crucial than CoL, where we decide on the applicable legal system—“all or nothing”)

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| ***Nafie v Badawy***, 2015 ABCA 🡪 Residence case (ordinary residence) |
| **Facts:** | Deals w/Jx to grant a divorce. *DA* requires either party to have *ordinary residence* in AB for one year immediately preceding the application. This form of residence doesn’t require constant physical presence—it’s possible to “come and go” (holidays, trips, etc.). Lived in AB for 10yrs. In 2011, husband got 1yr renewable K to teach in Saudi Arabia—rest of family moved there and joined him (but didn’t completely sever ties with AB—kept one car there; financed out of AB institution; leased family home).In 2012, wife + children returned to AB and stayed w/wife’s parents—they never returned to Saudi Arabia, and the wife filed for divorce in AB.  |
| **Issue:** | Does the AB court have Jx to grant a divorce?  |
| **Majority:** | * **Result:** Neither the husband nor the wife were ordinarily resident in AB because their home was in Saudi Arabia (ask: *where did they make their home?*)
* At the time of the application of divorce, neither had been ordinarily resident in AB for the year immediately preceding—now, however, this requirement is satisfied and the wife can re-file for divorce
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| **O’Ferrall JA (dis):** | * They were ordinarily resident here—they were merely away on temporary assignment
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| ***Knowles v Lindstrom***, 2014 ONCA 🡪 Residence case |
| **Facts:** | ON’s *FLA* has no jurisdictional provisions, so Jx is decided on a CL basis. Parties were ordinarily resident in ON. Lived in each place for 6 months (?). |
| **Doherty JA:** | * It is possible to have more than one ordinary residence concurrently (unlike domicile)
* Immovable property in the province = very substantial connection
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| ***PA v KA***, 1987 ABCA 🡪 Residence case (habitual); deals w/residence for purposes of Jx |
| **Facts:** | Jurisdictional question under AB’s *Matrimonial Property Act*. |
| **Issue:** | Was AB the last joint habitual residence of the parties? **Yes** |
| **Laycraft CJA:** | * Had spent first 14yrs together in AB 🡪 separated for 3mo 🡪 reconciled 🡪 went back and forth to HI
* **Result:** Texts that refer to “habitual residence” refer to the *quality of the residence*; duration may be a factor depending on the circumstances
* Mid-point between domicile and residence; more durable than the latter term
* AB was the last place they had really lived together as husband and wife
* Defect of both ordinary and habitual residence: mere arrival in a location with the necessary state of mind doesn’t produce ordinary/habitual residence—there must be some *passage of time* (unlike domicile)
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# JURISDICTION *IN PERSONAM*

At common law, the question of Jx has two components:

1. **Jx SIMPLICITER** (BC: *territorial competence*) 🡪 rules for Jx enunciated in the *CJPTA* ss 3, 10
2. **DISCRETION** 🡪 courts retain the ability to decline to hear a case even if it meets the rules of the Jx

Even if the rules for Jx are satisfied, the court can still exercise discretion and not hear the action. In BC, we look to the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*) to determine the jurisdictional decision. Similar statues are in force in Sask & NS, but no other provinces.

## JURISDICTION SIMPLICITER & TERRITORIAL COMPETENCE

**CONSTITUTIONAL STANDARD**

* We still lack a coherent statement from the SCC on what this standard actually is, although now we have some clues…
* Since 1990 (*Morguard*), there has been a complete merger of constitutional law and the conflict of laws such that any conflicts rule which breaches the constitutional standard is challengeable
* The *CJPTA* provides that it is the exclusive source of Jx (territorial competence) in the province of BC
	+ **Purpose:** Gives substantive rules of Jx an express statutory form instead of leaving them implicit in each province’s rules for service (although it usually provides the same results as the CL)

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| ***Morguard Investments Ltd v De Savoye***, 1990 SCC 🡪 Created constitutional standard for R/E of judgments extraprovincially as long as there’s proper Jx originating in the province (rasc); encompasses both R/E rules and Jx rules |
| **Facts:** | DS was an AB resident and guarantor of property in AB (assumed the obligations of the mortgagor), although he later moved to BC. The mortgages fell into default; Morguard brought action in AB. DS (now judgment debtor) was served pursuant to AB rules for service outside the Jx (similar to BC’s rules). DS didn’t appear or defend the action. A sale of the properties was insufficient to satisfy the debt. Morguard obtained pecuniary (*in personam*) judgment against DS for the deficiency. Morguard pursued R/E of the AB judgment in BC, where DS now resided. |
| **Issue:** | Can a personal judgment validly given in AB against an absent ∆ be enforced in BC, where ∆ now resides? **YES** |
| **La Forest J:** | * Canadian courts have a constitutional obligation to R/E judgments that originate in other provinces—this is because the constitution has an implied “full faith & credit principle” operating within the parts of the federal system
* **Federalism** requires a closer relationship b/w provinces (more intense comity)
* Need to give greater recognition to judgments from sister provinces vs. those from rest of the world (outside CAN)
* **In Canada, we must give full faith & credit to judgments from sister provs only if the originating prov has properly and appropriately assumed Jx** (i.e. when there’s a **rasc b/w the action & the province**
* Here, the action/everything occurred in AB before DS moved = the rasc couldn’t be stronger
* We now have a general standard for the assumption of Jx—every jurisdictional rule in every prov must meet that standard
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**NB:** In essence, the *CJPTA* is an attempt to apply *Morguard*.

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| ***Club Resorts Ltd v Van Breda***, 2012 SCC 🡪 The constitutional standard is *not weak or hypothetical* |
| **Facts:** | When the action began in ON, everyone assumed that *Muskot v Corselles* would apply (no longer good law), but counsel argued that it should not be followed. ON assembled a 5-judge panel; case went up to the SCC. |
| **Issue:** | Can ON assume Jx over an accident that occurred in Cuba?Can ON assume Jx over Club Resorts, a Cayman Island company? |
| **Lebel J:** | * Addresses what *Morguard* meant re: rasc—the rasc test focuses on 2 issues: **(1)** the risk of judicial overreach by provs, and **(2)** the recognition of decisions rendered in other Jxs within the Canadian federation and in other countries
* The constitutional standard ≠ the conflicts standard (the two are often confused; EE might beg to differ)
* **The rasc test requires that the connection b/w the action & the province cannot be weak or hypothetical**—a weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute
* **Effect:** Essentially, the court backs away and suggests that it doesn’t take much to reach the threshold for rasc
* Lebel J also says he’ll clarify when there’s a challenge to the rule (i.e. never)
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**PARTIES WITHIN the Jx** 🡪 Parties who can be served within the geographical boundaries of the province

* The CL rules set out in these two cases apply in each and every prov

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| ***Maharnee of Baroda v Wildenstein***, 1972 Eng CA 🡪 Transient presence = sufficient for Jx |
| **Facts:** | ∆ lived in France (art dealer); sold a painting to π as an original. π bought the picture to resell; took it to England but failed to sell it. Doubts surfaced re: painting’s authenticity. π decided to commence an action in England; waited for ∆ to come for Royal Ascot and served him personally in England. ∆ objected—he was only visiting temporarily. |
| **Issue:** | Was the service valid? **Yes** |
| **Gascon J:** | * At CL, all that is req’d for good service (satisfaction of the jurisdictional rules) = *service within the Jx*
* Satisfaction of the jurisdictional rules 🡪 by finding the ∆ in the Jx, and serving him/her = good service (that’s all that is req’d at CL)
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| ***Chevron Corp v Yaiguage***, 2015 SCC 🡪 Even a subsidiary’s presence in the prov is sufficient to establish presence of the Cx  |
| **Facts:** | Ecuadorian villagers obtained judgment in Ecuador for damages caused by environmental pollution against Chevron (Delaware Cx—no assets/presence in ON). Chevron refused to acknowledge or pay the award. Villagers commenced action for R/E of the Ecuadorian judgment in ON against Chevron + Chevron Canada (7th-gen. subsidiary). Chevron Canada argued that it wasn’t a party to the Ecuador judgment and that ON had no Jx over it. |
| **Issue:** | Does the ON court have Jx, despite Chevron Canada not being present in the prov? **Yes** |
| **Gascon J:** | * Canadian courts should take a generous & liberal approach to the R/E of foreign judgments
* Applicant doesn’t have to prove a rasc b/w the prov where the foreign judgment is sought to be registered & ∆ (the judgment debtor)—*so long as a rasc exists b/w the foreign court and the original action, and so long as ∆ was properly served w/the original claim, the enforcing Canadian court has Jx to R/E the judgment*
* This position further reiterates Canadian courts’ commitment to the principle of **comity**; upholds *Van Breda*
* **The fact that Chevron had some type of presence there was sufficient** (via subsidiary)
* **For out-of-prov corporate ∆:** show that the Cx was carrying on business at the time of the action
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**PARTIES OUTSIDE the Jx** 🡪 Parties who have to be served outside the geographical boundaries of the province

* Since *Morguard*, Canadian CL jurisdictional rules have allowed πs to serve process *ex juris* in an extraordinarily broad range of circumstances
* The jurisdictional rules are v broad, but we then use **discretion** to narrow things down
* By contrast, civil systems have tighter jurisdictional rules since their courts do not exercise discretion
* **Former model:** For service *ex juris* in BC, CL req’d that π must establish three elements. We followed this model in all CL provs until the 1970s, when it was abolished by legislature.
1. **Jx simpliciter** 🡪 I.e., *does the case fit into the circumstances listed in the CJPTA?*
2. **Whether π has a good, arguable case** 🡪 I.e. not frivolous or vexatious
3. **Discretion** 🡪 The court is the most appropriate forum for the action
* **Now:** You don’t have to justify before a court to get permission to serve *ex juris*

**Summary of service *ex juris* 🡪** What to do if you are a π looking to sue a ∆ located outside of BC:

1. ***CJPTA* s 2(2) provides that it is the exclusive source of Jx (territorial competence)—thus, in order to bring an action in BC against a ∆ located elsewhere, the *CJPTA* must be satisfied.**
2. ***CJPTA* s 3provides the circumstances in which a court has territorial competence in a proceeding:**
	* **3 Proceedings against a person** A court has territorial competence in a proceeding that is brought against a person only if:
3. **π has already submitted:** ∆ is π in another proceeding in the court to which the proceeding in Q is a counterclaim [*if you’re already bringing an action in BC, then you’ve already submitted to the Jx of the BC court*],
4. **submission by ∆:** during the course of the proceeding that person submits to the court’s Jx [*if ∆ submits at some point during the proceeding, the BC court has territorial competence—there is no finite list of ways in which ∆ can submit, and there’s no requisite intention req’d to do so*],
5. **submission by Jx-selection clause:** there’s an agreement b/w π & ∆ to the effect that the court has Jx in the proceeding [*if you entered into a K which had a Jx-selecting clause, then you have pre-emptively submitted*],
6. **ordinarily resident:** ∆ is ordinarily resident in BC at the time of the commencement of the proceeding [*this is a modification of the mere “presence” requirement set out in Maharanee—ordinary presence is defined in ss 7–9 for Cxs, partnerships, and unincorporated associations*], **or**

**7 Ordinary residence – corporations** A Cx is ordinarily resident in BC only if either:

1. the Cx has has or is req’d by law to have a registered office in BC
2. pursuant to law, it
3. has a registered address in BC at which it may be served
4. has nominated an agent in BC who can be served
5. it has a place of business in BC
6. its central management is exercised in BC
7. **where ∆ needs to be served outside of BC:** there’s a rasc b/w BC and the facts of the proceeding against ∆ [*the rasc test applies wherever a ∆ has to be served outside of BC*]. \*\*\*Extrapolating from the SCC’s decision in *Spar Aerospace*, the rasc as enunciated in *Morguard* requires only a **minimal connection**\*\*\*
8. ***CJPTA* s 10fleshes out s 3(e) by providing a list of circumstances in which a rasc b/w BC and the facts of the proceeding is presumed to exist (although, as per *Van Breda*, this list is not exhaustive—s 3(e) can still be satisfied by some other means).**
	* **Route #1: 10 Real & substantial cxn** W/o limiting the right of π to prove other circumstances that constitute a rasc b/w BC and the facts on which a proceeding is based, **a rasc b/w BC and those facts is presumed to exist if the proceeding:**
9. is brought to enforce/assert/declare/determine proprietary or possessory rights or a security interest in **property in BC (either movable or immovable),**
10. concerns the administration of the **estate of a deceased person** in relation to:
11. **immovable property** in BC of the deceased person, or
12. **movable property** anywhere of the deceased person **if** at the time of death s/he was **ordinarily resident in BC**
13. is brought to interpret/rectify/set aside/enforce any **deed/will/K/other instrument** in relation to:
14. **property in BC** (either movable or immovable), or
15. **movable property anywhere** of a deceased person who at the time of death was **ordinarily resident in BC**
16. is **brought against a trustee** in relation to the carrying out of a trust in any of the following circumstances:
17. the trust assets incl. **property in BC (movable/immovable)** & the relief claimed is only as to that property
18. that **trustee is ordinarily resident in BC**
19. the **administration** of the trust is principally **carried on in BC**
20. by the **express terms** of a trust document, **the trust is governed by the law of BC**
21. concerns **contractual obligations**, and
22. the contractual obligations, to a substantial extent, were to be **performed in BC** (*Nanjing*; *JTG Management*)
23. by its **express terms, the K is governed by the law of BC**, or
24. **the K**
25. is for the purchase of property and/or services, for use other than in the course of the purchaser’s trade or profession, and
26. resulted from a solicitation of business in BC by or on behalf of the seller
27. concerns **restitutionary obligations** that, to a substantial extent, arose in BC,
28. concerns a **tort committed in BC** [this can get quite complicated—see “TORTS” section below!]
29. concerns a **business carried on in BC**,
30. is a **claim for an injx** ordering a party to do or refrain from doing anything
31. in BC, or
32. in relation to property in BC (either movable or immovable)
33. is for a determination of the **personal status/capacity** of a person who is **ordinarily resident in BC**
34. is for **enforcement of a judgment** **or arbitral award made in or outside BC**, **or**
35. is for the **recovery of taxes** or other indebtedness and is **brought by the gov’t of BC or by a local authority in BC**.
	* **Route #2:** Since we know that s 10 isn’t exhaustive, it is open to π to argue that there are other circumstances giving rise to a rasc (*Van Breda*). Essentially, if you can’t establish that one of the s 10 circumstances exists, you can fall back on an argument that there was a rasc *in addition* to the examples of situations that would constitute a rasc in s 10. From *Van Breda*, *Cassels Brock*, & *Chevron*, we know that the bar has been lowered—a minimum connection is all that’s req’d.
		+ **For tort/K actions** 🡪 here, look to the factors set out in *Van Breda* to make your argument
	* **Route #3:** Try relying on s 6, which provides residual discretion:

**6 Residual discretion** A court that lacks under s 3 lacks territorial competence in a proceeding may still hear the proceeding if it considers that:

1. there is no court outside BC in which π can commence the proceeding, or
2. the commencement of the proceeding in a court outside BC cannot reasonably be req’d
3. **If one of the circumstances in s 10 is satisfied, there is a rebuttal presumption of jx (which is rarely rebutted).**
	* **Rationale:** As per LeBel J in *Van Breda*, we want order and certainty in making this determination
4. **Follow appropriate procedures; serve notice.**
5. **The ball is now in ∆’s court—∆ will likely object to BC’s Jx (territorial competence).**

**TORTS** 🡪 Locating a tort is relevant both for **Jx** (it’s one of the *CJPTA*’s rasc factors—see s 10(g)) and **CoL** (the location of the tort is one connecting factor). Whereas the location of MVAs might be straightforward, torts like defamation (*Court v Debaie*) and product liability make the issue of the location of the tort quite complex.

* **Jx** 🡪 The tort could conceivably be considered to have occurred in more than one Jx—the CL jurisdictional rules aren’t premised on having a single location/*situs* of the tort (*Moran*)
* **CoL** 🡪 We have to locate the tort for purposes of deciding what law applies, so the CoL rule is premised on having a single location/*situs* of the tort

**General Rule** (*Moran*)**:** Canadian courts take Jx over torts committed within their territorial limits

**Negligence Rule** (*Moran*)**:** Where a foreign ∆ carelessly manufactures a product in a foreign Jx which enters into normal channels of trade and he knows (or ought to know) both that:

* the consumer may be injured from his carelessness, **and**
* it’s reasonably foreseeable that the product would be consumed in the forum where π consumed it,

then the forum in which π suffered the damage is entitled to take judicial Jx over the foreign ∆.

* Most important component = where the damage was suffered, since the purpose of negligence torts is to protect against carelessly inflicted injury (*Moran*)
* In *Moran*, the injury was suffered in Sask, and the manufacturer should’ve had Sask in its contemplation bc the product was sold **interprovincially** (**result:** Sask got Jx even though Cx didn’t carry on business in Sask and wasn’t registered there)
* **Policy:** General speaking, in determining where a tort has been committed, it’s unnecessary and unwise to resort to any arbitrary set of rules (*Moran*)

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| ***Moran v Pyle National***, 1973 SCC 🡪 Canadian courts take Jx of torts committed within their territorial limits; set out **test** (above) |
| **Facts:** | Defective lightbulb manufactured in ON. π died of electrocution. Purchased and installed in Sask. Widow brought action for comp under Sask *Fatal Accidents Act* and served the Cx *ex juris* in ON. ∆ objected to the Sask court’s Jx. |
| **Issue:** | Where did the tort actually occur? **Sask** |
| **Dickson J:** | * Took an approach that avoided a hard rule; geared to product liability cases
* “Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to resort to any arbitrary set of rules.”
* It would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant’s activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties = tort occurred in Sask
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| ***Club Resorts v Van Breda***, 2012 SCC 🡪 Attempt to elucidate the constitutional standard (but LeBel ultimately gave up) |
| **Facts:** | Tort action. CR located in Cayman Islands, but managed hotels in Cuba. The VBs went down to Cuba; Mr. VB (squash pro) was to coach tennis there in return for room & board (free holiday for the fam). Exercise equipment on beach collapsed on Mrs. VB (became a quadriplegic). VBs came back and sued. Mr. Charron went scuba diving and drowned; widow also bringing actions in K and tort. Continuing damage was suffered in ON (beyond initial damage from the accident). CR objected to ON’s Jx simpliciter. |
| **Issue:** | Were the ON courts right to assume Jx over the claims?Were the ON courts right to exercise that Jx and dismiss an application for a stay based on forum *non conveniens*? |
| **LeBel J:** | * To make the law clearer, the court identified four **presumptive connecting factors** for tort/K cases:
1. **∆ is domiciled or resident in the prov** (not the case here)
2. **∆ carries on business in the prov** (not the case here)
3. **the tort was committed in the prov** (not the case here)
4. **a K connected w/the dispute was made in the prov** (YES—the K was made in ON = sufficient connecting factor)
* *This is not a closed list*—these aren’t the only circumstances that could establish a rasc = you have to find a circumstance that meets the constitutional standard
* Consequential/indirect damages alone aren’t sufficient (e.g. come home and see Dr.)
* **The presence of π alone ≠ rasc** (just because π is in the Jx ≠ sufficient to give the court Jx)
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| ***Court v Debaie***, 2012 ABQB 🡪 Publication of online posts in a prov = sufficient to establish connecting factor for tort = rasc |
| **Facts:** | πs lived in AB; ∆ lived in NS. ∆ published defamatory comments on FB wall (public posts).  |
| **Issue:** | Rasc b/w the action and AB? **Yes**  |
| **Ross J:** | * You must conform to the procedural rules of the province in which you want to bring the action
* The standard is not v high in terms of what you have to establish to get into court
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| ***Tamminga v Tamminga***, 2014 ONCA 🡪 Fact that an insurance K was made in the Jx ≠ sufficient presumptive connecting factor  |
| **Facts:** | T (ON resident) fell of truck in AB. T served *ex juris* in AB—relied on the insurance K for the fact that the K was made in ON. ∆ argued that ON lacked Jx simpliciter (and *fnc*).  |
| **Issue:** | Is the insurance K a “presumptive connecting factor” under *Van Breda*, sufficient to give ON court Jx? **No** (stayed) |
| **Strathy JA:** | * K of insurance was clearly made in ON, *but this K had nothing to do with the accident* = ON did not have Jx simpliciter (no real and substantial connection)
* Distinguishes *Van Breda*, where the K b/w Club Resorts and the VBs *was* connected w/their presence in Cuba (wouldn’t have gone to Cuba but for the K)
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| ***JTG Management Services v Bank of Nanjing***, 2015 BCCA 🡪 K obligations just need to be performed to a substantial extent in BC |
| **Facts:** | JTG exports lumber from BC to China. Lumber was shipped, but JTG was never paid = sues in BC. Nanjing argued that the relevant performance/obligations under the letter of credit were to take place in China. |
| **Issue:** | Does BC have territorial competence? **Yes** |
| **Kirkpatrick JA:** | * Obligations under the letter of credit were to be performed “to a substantial extent” in BC (preparation of docs; payment under the letter of credit)
* In cases involving int’l commerce, more than one court can assert Jx over the parties’ dispute
* **Performed to a substantial extent** = K can be performed in multiple Jxs
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| ***Chevron Corp v Yaiguaje***, 2015 SCC 🡪 Jx must be established before determining whether a foreign judgment can be R/E |
| **Facts:** | Chevron = Delaware Cx; head office in Cali; no presence/assets in Canada = *ex juris* ∆. However, Chevron had a 7th-gen subsidiary in ON. Ecuadorian πs sought R/E of judgment. |
| **Issue:** | Can ON take Jx over Chevron to R/E the ON judgment? **Yes** (but EE doesn’t like this) |
| **Gascon J:** | * **Justification** must be established before determining whether a foreign judgment can be R/E
* SCC distinguished all previous cases; prior SCC cases had involved ∆ who were *present in the Jx* (thus establishing a real and substantial connection)—now, SCC wanted to extend recognition to foreign courts
* **NB:** *Tracy v Iran*, 2016 ONSC cited this case for not needed a rasc for R/E of a foreign judgment
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| ***Lapointe v Cassels Brock***, 2016 SCC 🡪 Court req’d existence of rasc; but case criticized for its “mindless & mechanical” application  |
| **Facts:** | Federal gov’t bailout of GM req’d GM to close dealerships across Canada. Dealerships commenced a class action in ON alleging that CB had been negligent in failing to provide proper legal advice. But not all dealerships went to CB for legal advice—most consulted local law firms. CB joined all of these firms. Firms outside ON challenged the Jx simpliciter (CL rules) of the ON courts and lost. Qc law firms appealed to SCC—didn’t see why they had to litigate in ON |
| **Issue:** | Was there a rasc b/w the Quebec law firms and the province of ON? **Yes** (w/dissent) |
| **Judge:** | * K was made in ON; had to be signed and returned to GM Canada = rasc b/w the K and the prov
* This lowers the bar even further than *Van Breda* re: what constitutes a “minimal connection”
 |
| **Dissent:** | * EE likes the **vigorous dissent**
* The Ks weren’t made in ON—they were made in Qc, and weren’t effective until dealerships received notice from GM headquarters
* Even if Ks were made in ON, they weren’t connected w/the claims
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## DISCRETION; STAYS & ANTI-SUIT INJUNCTIONS

Discretion is the second branch of any consideration of Jx. Even if π establishes Jx simpliciter, every CL Jx in Canada can still exercise discretion (*forum non conveniens*). The cases in this section formulate the principles guiding discretion, discuss the relevant factors, and deal w/the burden of proof.

**Jx SIMPLICITER vs. *FORUM NON CONVENIENS*** (*Muscutt*)

* **Jx simpliciter** 🡪 Legal rule that is general in nature
	+ **Q:** *Can the forum assume Jx over the claims of πs in general against ∆s in general?*
* ***Forum non conveniens*** (*fnc*) 🡪 Discretionary test focused on the particular facts of the parties and the case
	+ **Q:** *Should the forum assert Jx at the suit of this particular π against this particular ∆?*

**FORMS of RELIEF** 🡪 These are the two main forms of relief, of which applications for stays are far more common

* **Stay** 🡪 If the court finds it has Jx, but chooses not to use it, then the court grants an order staying the local proceed’gs
* **Anti-suit injx** 🡪 Order prohibiting a party from commencing/continuing proceed’gs in another Jx (*Aerospatiale*; *Amchem*)

**ENGLISH PRINCIPLES**

These concepts continue to be important because Canadian case law purports to follow them (albeit poorly, perhaps). Since Canadian courts have adopted these English cases, it is useful to read them.

England now embraces the “**Scottish principle**” for both service *ex juris* and within England: the court exercises its discretion if satisfied that there is “some other tribunal, having competent Jx, in which the case may be tried clearly more suitably for the interests of all the parties and for the ends of justice”. Note that the court is looking at the *suitability* and *appropriateness* of the forum—not its practical convenience. The court will also consider potential injustice to both π and ∆ in the balancing process.

**For stay cases:**

1. **Scottish principle** 🡪 The court must ID the forum in which the case can be suitably tried for the ends of the parties & for the ends of justice (*Sim v Robinow*)
	* **Evolution:** Lord Goff unsuccessfully argued for its adoption in *Atlantic Star*; eventually adopted in *Spiliada*
	* **Application:** This principle governs discretion, whether ∆ is being served in England or *ex juris*
2. **Burden of proof** 🡪 Although the Scottish principle is common to both, the BoP is allocated differently depending on whether service occurred *ex juris* or within England
	* **Service *ex juris*** 🡪 BoP rests on π to establish that England is clearly (*quantum*) the more appropriate forum (*fc*)
		+ **Factors:** ∆’s residence or place of business; relevant ground invoked by π
		+ Any doubt as to the forum is resolved in favour of ∆
	* **Service within England** 🡪 BoP rests on ∆ to persuade the court that **(1)** England is *not* the appropriate forum for the action (*fc*), **and (2)** There’s another available forum which is clearly more appropriate than the English forum ((+)ve oblig’n) (*fc*)
		+ **Factors** (favouring a different forum): Convenience, expense, law governing the relevant transaction, place where parties reside, place where the parties carry on business
		+ If court finds no other available forum that’s clearly more appropriate 🡪 will likely refuse a stay
		+ If court finds that there’s another forum that’s *prima facie* more appropriate 🡪 will likely grant a stay
			- Then, burden switches to π and the court will consider connecting factors with the other Jx (π might argue that it won’t obtain justice in the foreign Jx)
			- The court may impose **conditions** attached to the stay to modify/mitigate juridical advantages (*Spiliada*)

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| ***Spiliada Maritime Corp v Consulex Ltd***, 1987 HL 🡪 **Leading stay case**; in deciding whether to exercise Jx, courts must ID the forum in which the case can be suitably tried for the ends of the parties & for the ends of justice; if not England, then stay proceedings |
| **Facts:** | Sulpur damaged before loaded onto boat by Consulex (BC Cx). Owners of boat (the Spiliada) = Liberian Cx. Liberian Cx sued Consulex; chose to litigate in England, but had to serve *ex juris* in Vancouver. Consulex applied for a stay; Liberian Cx had to convince the English court that it was *forum conveniens*. |
| **Issue:** | Should the English court exercise its Jx? **Yes** (decided not to stay the English action) |
| **Court:** | * **Principle:** In deciding whether to exercise Jx, the court must ID the forum in which the case can be suitably tried for the ends of the parties and for the ends of justice
* This principle governing discretion is identical for service both inside and outside England
* The object of ***forum non conveniens*** is to find the most appropriate forum
* **Service in England** 🡪 BoP on ∆ to show England is *fnc* and to show which forum is *fc*
* **Service *ex juris*** 🡪 BoP remains on π throughout
* **Juridical advantage ≠ determinative:** it’s a factor that will be considered, but it’s not a trump card—the court can also attach **conditions** to a stay to modify/mitigate any juridical advantages
* Discretion isn’t appealable unless there’s a blatant error or the TJ applied erroneous principles
* Court IDed the ***Cambridgeshire* factor** to be the most weighty: there’s an enormous learning curve to litigation, so the fact that one party’s JDs already had experience in the Jx had to be considered
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**For anti-suit injx cases:**

1. Court must find that England is clearly the most appropriate (“natural”) forum for the action (*Spiliada* discretionary principle)
2. If England is the most appropriate forum, then the court must consider whether continuation of the foreign proceeding would be “**oppressive & vexatious**” (*Aerospatiale*)
3. The court must then consider whether it would be unjust to deprive π of the foreign action (and the advantages of the foreign court) (*Aerospatiale*)
	* **General rule:** The court will not grant an anti-suit injx if, by doing so, it will deprive π of advantage in the foreign forum of which it would be unjust to deprive him
	* Ask whether ∆s can be joined in a single action (*Aerospatiale*)

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| ***Societe Nationale Industrielle Aerospatiale v Lee Kui Jak***, 1987 PC 🡪 **Leading anti-suit injx case**; see 3-part test above; difficult  |
| **Facts:** | Helicopter crash in Brunei killed wealthy Brunei resident. Widow commenced action against various ∆s in Brunei, France, & Texas. Aerospatiale applied for a stay of the Texas action = unsuccessful. Aerospaciale then applied for an anti-suit injx in Brunei to stop widow from continuing the Texas action. |
| **Issue:** | Should the Brunei court issue an anti-suit injx to stop the Texas action? **Yes** |
| **Court:** | * Discretion to issue an anti-suit injx must be issued v carefully; **comity** is a prime consideration
* **3-step analysis** guides the issuance of anti-suit injxs:
	1. Court has to consider whether it’s the natural forum for the action
	2. Court has to consider whether continuation of foreign proceedings would be oppressive & vexatious
	3. Court has to consider whether it would be unjust to deprive π of the foreign action
* **Most determinative factor:** *Can the ∆s all be joined in a single action?*
* Since the Malaysian Cx (∆) wasn’t going to submit to the Jx of the Texas court, but would submit to Brunei, it made sense to consolidate litigation there (in Brunei) instead of Texas
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| ***Airbus Industries GIE v Patel et al***, 1999 HL 🡪 **Anti-suit injx case**; application of principles set out in *Aerospaciale* |
| **Facts:** | Plane crash in India due to pilot error. πs commence action against airline, manufacturers, etc. Patel families = Indian; reside in England. Patels commence litigation in India then in Texas. Airbus successfully applied for anti-suite injx in India. Airbus then applied in England for R/E of the Indian anti-suit injx |
| **Issue:** | Should the English court issue an anti-suit injx prohibiting English residents from continuing Texas proceedings? **No** |
| **Court:** | * England ≠ natural forum 🡪 England has Jx of π, but not of the cause of action (there’s no basis for taking Jx over an air crash that occurred in India, and ∆s weren’t in England
* Jx is req’d—control over the parties is not enough
 |

**CANADIAN PRINCIPLES**

Canadian courts undertake the discretion analysis “to ensure if possible that the action is tried in the Jx that is the closest connection to the action and the parties” (*Amchem*).

**For stay cases:**

1. **Principle:** As per *CJPTA* s 11(1), the court must balance the interests of the parties & the ends of justice in deciding whether to exercise territorial competence (essentially an adoption of the principle set out in *Spiliada*)
	* From *Teck*, we know that s 11 is a complete codification of the CL—it governs discretion
2. **Factors:** As per *Teck*, the court must consider the factors set out in s 11(2), although the use of the word “including” suggests that the list is not exhaustive:
3. the **comparative convenience & expense** for the parties their witnesses,
4. the **law to be applied** to issues in the proceeding,
5. the desirability of avoiding a **multiplicity of proceedings**,
6. the desirability of avoiding **conflicting decisions** in different courts,
7. the **enforcement of an eventual judgment**, and
8. the **fair and efficient working of the Canadian legal system** as a whole.
* *Amchem* provides that **loss of juridical advantage** is one factor that should be considered in deciding the appropriate forum—juridical advantage depends on a party’s connection to the Jx and whether there’s a rasc
* ***Lis alibi pendens*** = “dispute elsewhere proceeding” (*Teck*)
	+ *Teck* suggests that an argument of ***lis alibi pendens***can be raised… so why not?
	+ This fact that a Jx exercising similar discretionary principles decides not to stay its action isn’t conclusive (as suggested by *Amchem*), but should still be given great weight
* *Pompey* says to consider the presence of a Jx-selecting clause either by incorporating it into one of the provided factors or by considering it separately
1. **Burden of proof:** In *Amchem*, Sopinka J held that, in Canada, the burden ought to always be on ∆ in cases of *fnc* to persuade the court that it’s not the most appropriate forum for the action
	* Unlike England, the SCC opted not to distinguish between cases of service *ex juris* and service within the Jx—Sopinka J suggested that this was merely a quirk of the English rules
	* It could be argued that this single allocation of the BoP is inconsistent w/comity
2. **Quantum of proof:** As per *Amchem*, the other forum must be “clearly” more appropriate—a heavy burden

**For anti-suit injx cases** (steps set out in *Amchem*)**:**

1. **Eligibility:** The domestic court shouldn’t entertain an application for an anti-suit injx if there’s no foreign proceeding pending
	* *Amchem*: anti-suit injxs can’t be *anticipatory*—proceedings must have already commenced)
	* While you can make a “pre-emptive” strike in England, in Canada you can’t apply for an anti-suit injx to prevent the *commencement* of an action—you can only try to prevent its *continuation*
2. **General rule:** The Canadian court should give the foreign court the opportunity to decline to exercise discretion
	* This is problematic when dealing w/a civil system, where there’s no discretion to exercise…
3. If the foreign court **stays** its action 🡪 problem resolved (there’s no need for an anti-suit injx) = end here
4. If the foreign court **declines to stay** its action 🡪 the Canadian court must evaluate the foreign court’s decision not to stay
	* We *only* do this if the domestic forum has been alleged to be the most appropriate forum (consistent w/*Patel*)
5. To evaluate the foreign decision not to stay, **ask whether the foreign court could reasonably have concluded that there was no clearly more appropriate forum** (*Amchem*)
	* Essentially, consider whether the foreign court had a reasonable basis for its conclusion
	* To determine whether there were reasonable grounds, look at whether the foreign court assumed Jx on a basis consistent w/*fnc* principles
6. Finally, the court will only grant an anti-suit injx **if continuation of the foreign action would be unjust or would produce an injustice** (*Amchem*)
	* Continuation of the action doesn’t have to rise to the “oppressive & vexatious” level—only need to persuade the court that the action will produce an injustice (lower bar)
	* If the foreign court’s assumption of Jx satisfies our *fnc* discretion, then that ought to be sufficient and **comity** should prevail (we respect the foreign court’s decision)
	* **Factors** that would make continuation “unjust” include: loss of juridical advantage, residence, etc.

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| ***Amchem Products Inc v BC (WCB)***, 1993 SCC 🡪 Leading CAN case on *fnc* + anti-suit injxs; adoption of *Spiliada* & *Aerospatiale*  |
| **Facts:** | Asbestos/WCB case. πs = mostly BC residents. Texas courts were v experienced in asbestos litigation. πs commenced action in Texas; ∆s requested that the Texas court stay the Texas action. ∆s sued for abuse of process in BC, but really sought a declaration that BC was the most appropriate forum and an anti-suit injx to stop Texas litigation (granted by TJ). |
| **Issue:** | Should the anti-suit injx be set aside? **Yes** (SCC allowed the Texas action to continue) |
| **Court:** | * In modern world, it’s increasingly difficult to identify one clearly appropriate forum—might be several suitable fora
* **Forum-shopping** can cause injustice to a party and should be deterred
* **Doctrine of *fnc* 🡪** In Canada, burden always remains on ∆ whether service is within or outside the Jx
* Canada should generally follow UK precedents (*Spiliada*), except wrt the BoP
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| ***Teck Cominco Metals Ltd v Lloyd’s Underwriters***, 2009 SCC 🡪 ***Lis alibi pendens*** (dispute elsewhere proceeding) |
| **Facts:** | Teck discharged slag into WA river; stopped in ’95, but there were probs re: effects of the accumulation of slag. Teck entered into standstill agreement w/Lloyd’s (no choice of Jx clause). One second after agreement expired, Teck commenced an action in WA. Lloyd’s commenced an action the next day, but had to wait until the registry opened = action was commenced in WA first. Both parties objected to the Jx of the other court. WA court decided it was the most appropriate forum and refused to stay the WA action. 3 days later, BCSC decided it was the most appropriate forum = parallel proceedings continued in both Jxs. Here, Teck argues that BC should’ve deferred to the judicial discretion of the WA court, that it was the most appropriate forum. |
| **Issue:** | Given WA’s decision that it was the most appropriate, should BC stay its action? **No**  |
| **Court:** | * SCC rejected the argument of ***lis alibi pendens*** because it would produce a race to commencing proceedings (“first to file”)—the speed at which a case progresses is different in different Jxs
* s 11 still applies even where there’s *lis alibi pendens* and the foreign court has exercised discretion
* However, there’s nothing in s 11 to prevent you from arguing the existence of a *lis alibi pendens*… so argue it!
* **There’s no rule that we have to recognize a discretionary decision of a foreign court**—SCC rejected an interpretation of s 11 that would take into account the fact that the foreign court exercises similar principles governing discretion
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| ***Club Resorts v Van Breda***, 2012 SCC 🡪 ***Fnc***; burden always on ∆; v Quebec-centric approach = not significant to CL provs |
| **Facts:** | Tort action. CR located in Cayman Islands, but managed hotels in Cuba. The VBs went down to Cuba; Mr. VB (squash pro) was to coach tennis there in return for room & board (free holiday for the fam). Exercise equipment on beach collapsed on Mrs. VB (became a quadriplegic). VBs came back and sued. Mr. Charron went scuba diving and drowned; widow also bringing actions in K and tort. Continuing damage was suffered in ON (beyond initial damage from the accident). CR objected to ON’s Jx simpliciter. |
| **Issue:** | (Discussion re: discretion) |
| **LeBel J:** | * Discretion will only be exercised if ∆ asks for it
* If discretion is invoked, it’s the most difficult part of the judge’s jurisdictional decision—reasonable people can differ on the decision based on how much weight is given to each factor
* Burden is always on ∆ (EE: although this is arguably inconsistent w/comity)
* If you have Jx simpliciter, you ordinary ought to be retaining Jx (EE: this is not consistent w/the CL approach)
* EE: This case will most likely be disregarded on this issue by CL provs
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**Jx-SELECTING CLAUSES**

Central to K law is **freedom of K**. When parties enter into a K, we start w/the presumption that they are free to add whatever clauses they want including CoL, arbitration, and Jx-selecting clauses. Jx-selecting clauses are encouraged (& advantageous) because they “create certainty & security” (*Pompey*).

**Purpose:** The insertion of such clauses is a desirable litigation-avoidance technique as parties often spend a lot of time (and resources) simply litigating about where to litigate.

**Types of clauses:**

* **Jx-selecting clause** 🡪 If there’s a dispute under this K, this is where we’ll litigate (*what we’re looking at here*)
* **Arbitration clause** 🡪 If there’s a dispute under this K, we will go to arbitration (and might even designate where)
* **Choice of law clause** 🡪 If there’s a dispute under this K, it will be governed by the law of this Jx

**Judicial treatment of clauses:** Generally, clauses can be considered **(1)** void, **(2)** to carry great weight, or **(3)** absolute

* **Common law:** The CL regards Jx-selecting clauses as carrying great weight where the court is exercising discretion to decide whether it’s the most appropriate forum (*Pompey*; *Momentous.ca*)
* **Statutes:** Statutes generally consider Jx-selecting clauses to be either void or absolute

**“Strong cause” test** 🡪 π must satisfy the court that there is good reason it shouldn’t be bound by the Jx-selecting clause (*Pompey*; *Momentous.ca*); i.e. unless there’s a *strong cause* as to why a domestic court should exercise Jx, order & fairness are better achieved when parties are held to their bargains

1. First, establish that the prov has **territorial competence (Jx)**
	* Jx-selecting clauses are only considered at the discretionary stage, after determining that the court has territorial competence (*Huyde*)
2. If so, ∆ must establish that the Jx-selecting clause is **valid, clear & enforceable, and applicable** to the CoA
	* Probably would want to make note here of whether we’re dealing with a *commercial* or *consumer* K (see *Douez*)
3. If so, π must show **strong cause** why the court should not give effect to the Jx-selecting clause (*Pompey*; follow the framework set out in *Douez*)
	* **Start w/BoP on π:** “the presence of a forum selection clause… is, in my view, sufficiently important to warrant a different test… where π has the burden of showing why a stay should not be granted” (*Pompey* at 21)
	* **Factors** from *Pompey***:**
		+ Where the evidence is located, and the effect on convenience & expense
		+ Whether the law of the foreign court applies and, if so, whether it differs from English law materially
		+ With what country either party is connected, and how closely
		+ *Do ∆s genuinely desire trial in foreign country, or just procedural advantages?*
		+ Whether πs would be prejudiced by having to sue in the foreign court because they would:
			- be deprived of security for that claim;
			- be unable to enforce any judgment obtained;
			- be faced with a time-bar not applicable in England; or
			- for political, racial, religious or other reasons be unlikely to get a fair trial
	* It’s essential that courts give full weight to the desirability of holding contracting parties to their agreements (*Pompey*; *Momentous.ca*)
		+ But if it’s a consumer K, look to *Douez*
	* Generally, courts will only find a strong cause where there have been changes in circumstances subsequent to the original K (e.g. party moved)
	* **Then, burden switches to ∆ to argue discretion:** Look to the non-exhaustive list of factors provided by *CJPTA* s 11(2)—can either try to work the clause into one of these factors or consider it separately:
4. the **comparative convenience & expense** for the parties their witnesses,
5. the **law to be applied** to issues in the proceeding,
6. the desirability of avoiding a **multiplicity of proceedings**,
7. the desirability of avoiding **conflicting decisions** in different courts,
8. the **enforcement of an eventual judgment**, and
9. the **fair and efficient working of the Canadian legal system** as a whole
10. If π hasn’t shown strong cause, the court should consider transferring the proceeding to another territory pursuant to *CJPTA*

**Rationale of “strong cause” test:** Provides sufficient leeway for judges to take improper motives into consideration and prevents ∆s from relying on Jx-selecting clauses to gain an unfair procedural advantage

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| ***ECU Line NV v ZI Pompey Industrie***, 2003 SCC 🡪 Leading CAN case on Jx-selecting clauses |
| **Facts:** | Shipping case. π sold equipment in FRA; ∆ was to carry cargo by sea from Belgium to Seattle. Contrary to K, cargo was shipped to MTL then offloaded onto freight train to SEA. Cargo arrived damaged, allegedly due to freight train. π commenced action in CAN in Fed Court (maritime law). ∆ applied for a stay bc there was a Jx-selecting clause (Belgium)—wanted the Court to exercise discretion. |
| **Issue:** | Should the Jx-selecting clause (in favour of Belgium) be respected & enforced? **Yes** |
| **Bastarache J:** | * **Starting point:** Parties should be held to their bargain = there must be *strong cause* to disregard the clause
* Although it was alleged that ∆ fundamentally breached the K, the SCC held that the Jx-selecting clause was still valid
* A court must not delve into whether one party has deviated from or fundamentally breached an otherwise validly formed K—such inquiries would render the clauses illusory and give rise to a plethora of allegations of breaches
* The factors the court considers in deciding whether to grant a stay bc of a Jx-selecting clause are similar to those it considers in deciding a stay in “ordinary” cases applying the *fnc* doctrine (consider s 11(2) factors)
* **Jx-selecting clauses are considered at the discretionary stage**
* BoP on π to prove why the forum should retain Jx despite the clause
* **Result:** Here, the K was still intact = defer to Jx-selecting clause (Belgium)
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| ***Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd***, 2012 SCC 🡪 Nonsensical SCC case (lol) |
| **Facts:** | Ottawa semi-pro baseball team (π) lost money and informed league (∆) they wanted out. π sued ∆ in ON. K b/w team & league included a Jx-selecting clause + CoL clause selecting N Carolina. ON courts agreed to **stay** the action in consideration of Jx-selecting clause—exercised discretion and decided to defer. |
| **Issue:** | Should the ON court have issued a stay based on the Jx-selecting clause in the K? **Yes** |
| **Court:** | * “[I]n the absence of specific legislation, the proper test in determining whether to enforce a Jx-selecting clause is **discretionary in nature**. It provides that **unless there is a “strong cause” as to why a domestic court should exercise Jx, order & fairness are better achieved when parties are held to their bargains**”
* **EE:** This case seems to go against *Pompey*, then asserts that *Pompey* was correct…?
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| ***Huyde Farms Inc v Canadian Wheat Board***, 2011 SKCA 🡪 **Need strong cause to not comply w/Jx-selecting clause** |
| **Facts:** | π sued ∆ for breach of K, breach of fiduc duty, & defamation. K had Jx-selecting clause (MB). ∆ applied for stay of Sask action due to the clause. TJ agreed; π appealed. |
| **Issue:** | Should the Sask court have issued a stay based on the Jx-selecting clause in the K? **Yes** (appeal dismissed) |
| **Jackson JA:** | * A question as to the appropriate forum doesn’t arise unless the Jx/territorial competence is first established
* The validity & effect of a Jx-selecting clause arise as a part of the determination whether the Jx should *decline* to exercise Jx—it’s not a determination of whether the territory has competence at all
* The presence of a Jx-selecting clause is one factor among many
* **Analysis:**
	+ 1. *Does the prov have Jx over the matter?*
		2. *If so, has ∆ established that the Jx-selecting clause is valid, clear & enforceable, and applicable to CoA?*
		3. *If so, has π shown strong cause why the court should not give effect to the clause?*
		4. *If π hasn’t shown strong cause, then the court should consider whether it’s appropriate to transfer the proceeding to another territory pursuant to the CJPTA.*
* TJ appropriately considered the factors in declining territorial competence in light of the Jx-selecting clause
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| ***Douez v Facebook***, 2017 SCC 🡪 Case dealing w/**consumer K**; throws Jx-selecting clauses into complete confusion (EE) |
| **Facts:** | Douez brought action vs. FB for using her name & pic in sponsored stories w/o consent (breach of *Privacy Act*). FB terms of use contained Jx-selecting clause + CoL clause (CA). Douez argued that *PA* s 4 invalidated the Jx-selecting clause: “despite anything contained in another Act, an action under this Act must be heard & determined by the BCSC”.BCSC found that s 4 invalidated the clause in the FB K. BCCA disagreed w/that interpretation of s 4—said the Jx-selecting clause wasn’t invalidated, so must consider whether Douez showed “strong cause” (even though the entirety of her argument was based on the *PA*). Case appealed to SCC |
| **Issue:** | Does the *PA* invalidate the Jx-selecting clause? **Yes** (split decision) |
| **Karakatsanis, Wagner, & Gascon JJ:**(“majority”) | * Strong cause factors should be modified in the context of consumer Ks
* Consumer K might provide strong reasons not to enforce the Jx-selecting clause—alter the *Pompey* factors
* Canadian courts have a greater interest in adjudicating cases impinging upon constitutional & quasi-constitutional rights—essential to free & democratic societies
* *PA* s 4 doesn’t invalidate the clause
* This is a **consumer K** (not commercial); it’s a K of adhesion—we can’t treat them the same
* The combination of the K being a **consumer K** + the *PA* being **quasi-constitutional** in nature = enough to not give effect to the Jx-selecting clause
* **EE:** *Could a different result have been reached had it been a commercial K?* We don’t really know…
 |
| **Abella J:** | * Agreed w/”majority” re: the Jx-selecting clause being unenforceable/invalid/void; talked about unconscionability
 |
| **McLachlin CJ, Moldaver & Côté JJ:**(dissent) | * Even in consumer Ks, there are good reasons for the existence of Jx-selecting clauses (e.g. in theory they allow vendor to lower prices)
* Here, Douez hasn’t come close to showing strong cause (agreed w/BCCA)
 |

# RECOGNITION & ENFORCEMENT of *IN PERSONAM* JUDGMENTS

If π is successful, ∆ becomes a **judgment debtor**. In this section, we’re looking at situations where ∆ doesn’t have assets in the Jx—thus, π needs to go to another Jx to get the judgment recognized/enforced (**R/E**). The **originating Jx** is the foreign legal system (assume non-Canadian), and the Q is whether the court will recognize the non-Canadian judgment and allow its enforcement processes to be utilized.

Judgments can be distinguished as being either ***in personam*** or ***in rem***.

* ***In personam*** 🡪 Judgments against another party; results in either damages (**pecuniary**) or an order (**non-pecuniary**)
* ***In rem*** 🡪 Judgments concerning status (e.g. married/unmarried, adopted/not adopted), property, & maritime claims

**METHODS of CONVERSION** 🡪 There are three methods of conversion:

* + - 1. **Common law:** Used for non-Canadian judgments where there is no reciprocating agreement w/the originating Jx
			2. **Part 2 of the *Court Order Enforcement Act*:** Available where there’s an agreement w/the originating Jx
			3. **The *Enforcement of Canadian Judgments and Decrees Act*:** Available only for other Canadian judgments (not every prov)

The statutory methods are advantageous bc you only have to register the judgments and ∆ (judgment debtor) can object, whereas at CL you have to actually commence an action. The cases in this section illustrate how the CL and statutory methods operate, and the advantages/disadvantages of both.

**LIMITATION PERIODS**

BC is v generous in regards to LPs. As per s 7 of the *Limitation Act*, a court proceeding to enforce/sue a judgment must not be commenced after the earlier of:

1. the LP of the Jx where the extraprovincial judgment was made; or
2. **10 years** after the judgment became enforceable where the extraprovincial judgment was made

**Examples:** If the originating Jx has a 30yr LP, we go with BC’s (10yrs). If the originating Jx has a 6yr LP, we go with 6yrs.

## PECUNIARY JUDGMENTS

**Framework:** CL rules require that a π seeking to have a foreign judgment R/E in BC establish that:

1. **The foreign judgment is final & conclusive** (*Nouvion*) 🡪 this is generally not at issue
	* **Rule:** As per *Nouvion*, final & conclusive means *res judicata* b/w the parties
	* The judgment cannot be re-litigated in the same court, but it can be appealed; you also can’t go back and have the pecuniary amount adjusted (*Nouvion*)
	* **Judgment on appeal** = final & conclusive for the purposes of R/E
	* **Maintenance/support orders** ≠ final & conclusive
	* **Default judgments** = final & conclusive
2. **The originating court had Jx in the internat’l sense** 🡪 Under CL, there are three alternative bases for the foreign court’s Jx:

**#1: PRESENCE** 🡪 ∆ was in the foreign Jx when the action started (*Forbes*)

* **Rule:** Fleeting or transient physical presence is sufficient to constitute presence for purposes of R/E (*Maharanee*)
	+ *Forbes*: π’s “casual visit” to his wife in a BC hospital was sufficient (despite π not being BC resident)
	+ **Exception:** Perhaps if you were “tricked” into visiting the Jx (*Forbes*)
	+ **Cx:** Presence is established if the Cx is *carrying on business* in the Jx

**#2: SUBMISSION** 🡪 ∆ voluntarily submitted/attorned to the foreign Jx

* **Rule:** Submission must be voluntary
* **Analysis:** Submission is *objectively* determined based on how ∆ actually acted—not what he subjectively intended (*First Nat’l Bank of Houston*)
* **Submission:**
	+ If you make any sort of defence/arguments going to the merits of the action (as ∆ did in *Clinton*)
	+ If you ask the foreign court to exercise discretion or argue *fnc* (*Mid-Ohio* says this is probably submission)
		- **NB:** BC *Civil Rules* have since changed, allowing ∆ to argue only Jx simpliciter and not *fn*—thus, if you want to argue that ∆ hasn’t submitted, argue that **this decision changed the CL rule**
	+ Where counsel has authority and does something that constitutes submission
	+ Where you argue *fnc* (would have to argue against the application of *Mid-Ohio*; say it’s not clear if it’s good law)
	+ Presence of a Jx-selecting clause (*Douez*)
	+ If you send a letter to foreign court effectively setting out your defence (BCCA case EE mentioned in class lol)
* **Not submission:**
	+ If you argue that the foreign court has no Jx (Jx simpliciter/territorial competence)
	+ Where counsel is acting without your authority
	+ Where you argue *fnc* (would have to rely on *Mid-Ohio*)

**#3: RASC** 🡪 There’s a rasc b/w the CoA and the foreign Jx (*Morguard*; extended to non-CAN judgments in *Beals*)

* **Canadian judgments:** There’s a constitutional principle that a Canadian court must recognize another CAN court’s judgment if the Jx was *properly & appropriately assumed*; connection need only be **minimal**(*Morguard*)
* **Foreign judgments:** Rasc must be **significant/substantial**—a fleeting or relatively unimportant connection ≠ sufficient (*Morguard* principle extended to foreign judgments in *Beals*)
* **NB:** The UKSC rejected *Morguard* on the basis that it was unfair to ∆s bc it made it hard for them to strategize when they were unsure whether or not there was an rasc = too much uncertainty (*Rubin v Eurofinance SA*, 2012 UKSC)

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| ***First National Bank of Houston v Houston E&C Inc***, 1990 BCCA 🡪 Submission is objectively determined; can submit w/o intention |
| **Facts:** | Bank wished to have Texas (default) judgment R/E in BC. ∆/judgment debtor raised many defences against R/E in BC, including that ∆ didn’t give Texas attorneys instructions to submit to Texas Jx. |
| **Issue:** | Did ∆ voluntarily submit to the Texas court? **Yes** |
| **Judge:** | * **Submission is objectively determined**—∆ can’t come into a BC court and say “I didn’t mean to submit”
* ∆ can submit even if he has been given erroneous legal advice as to what constitutes a submission
* **Exception:** If lawyer acts completely w/o authority (but not proven here)
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| ***Clinton v Ford***, 1982 ONCA 🡪 Anything > than contesting Jx = submission; this case is likely applicable in BC (says EE) |
| **Facts:** | Action for R/E of a South African judgment. In accordance w/SA law, π took SA land owned by ∆ as security against a potential judgment for breach of K. ∆ served in ON (where he lived). ∆ filed notice of intention to defend and an affidavit—never contested Jx. ∆ claimed that plea was filed on his behalf w/o instruction. π got judgment in SA against ∆; brought action in ON for R/E. ∆ said he didn’t voluntarily submit to Jx of SA court—claimed he was under duress. |
| **Issue:** | Did ∆ voluntarily submit to the South African court? **Yes** |
| **Southin JA:** | * ∆ argued on the merits = counts as submission
* ∆ never contested the validity of the seizure of the land or the Jx of the SA court
* Fact that property had been seized *in advance* of the trial doesn’t give the defendant a free pass
* **No matter how reluctant ∆ might be, doing anything more than objecting to Jx = voluntary submission**
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| ***Mid-Ohio Imported Car Co v Tri-K Investments Ltd***, 1995 BCCA 🡪 Arguing territorial competence or *fnc* ≠ submission! |
| **Facts:** | K action. ∆s = BC companies; π = Ohio company. BC court was asked to R/E an Ohio judgment. During Ohio proceedings, ∆s had argued that Ohio had no Jx simpliciter, that Ohio was the most convenient forum (*fnc*), & made technical motions wrt the Ohio proceeding. |
| **Issue:** | Did the BC ∆s submit to the Jx of the Ohio court? **Yes** (due to technical motions) |
| **Wood JA:** | * In BC, ∆ in a foreign action can argue both territorial competence + *forum non conveniens* w/o submitting
* **Implications:** We’re not sure whether this altered the CL across all provs or not… Edge thinks this could/should work
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| ***Morguard Investments Ltd v De Savoye***, 1990 SCC 🡪 SCC created new category for Jx in the international sense: **rasc**  |
| **Facts:** | BC court didn’t want to R/E an AB judgment bc there was no presence or submission. |
| **Issue:** | Is there another basis—aside from presence & submission—on which Jx in the int’l sense can be established? **Yes** |
| **La Forest J:** | * CAN courts have a constitutional obligation to R/E judgments that originate in other provs—this is bc the constitution has implied a “full faith & credit principle” operating within the parts of the federal system
* **Federalism** requires a closer relationship b/w provs (more intense comity) = more liberal rules for R/E
* Need to give greater recognition to judgments from sister provs vs. those from rest of world (outside CAN)
* **In Canada, we must give full faith & credit to judgments from sister provs only if the originating prov has properly & appropriately assumed Jx** (i.e. when there’s a **rasc b/w the action & the prov**)
* Here, the action/everything occurred in AB before DS moved = the rasc couldn’t be stronger
* Now have a general standard for assumption of Jx—every jurisdictional rule in every prov must meet that standard
* However, still uncertainty re: what rasc actually means—for Jx (territorial competence, rasc just has to be minimal
* **NB:** This decision was limited to other Canadian judgments—La Forest J wasn’t suggesting that this basis should be extended to non-Canadian judgments
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| ***Beals v Saldhana***, 2003 SCC 🡪 SCC extended *Morguard* rule to non-CAN judgments; requires higher cxn vs. CAN judgments |
| **Facts:** | ON residents sold property in FLA to π (FLA contractor). Real estate agent sold the wrong lot; ON residents corrected it. π had already commenced construction on the wrong lot; sued ON residents. ∆ never participated. Damages awarded. ∆ consulted an ON lawyer who said the FLA judgment would never be enforceable bc they weren’t present + didn’t submit. |
| **Issue:** | Did FLA have Jx in the international sense? **Yes** (via rasc) |
| **Major J:** | * *Morguard* rule extends to non-Canadian judgments 🡪 rasc applies, subject to any provincial modifications
* **Canadian judgments** 🡪 only a minimal connection is req’d (lower standard)
* **Foreign judgments** 🡪 = connection must be **significant/substantial**—a fleeting or relatively unimportant cxn ≠ sufficient
* Rasc is the *overriding factor* in the determination of Jx
* **NB:** Major J suggests that rasc is the only test now, but we continue to use all 3 grounds for Jx in the international sense
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| **LeBel J:** | * Forget the CL basis—let’s just use rasc (NB: we don’t actually do this—we can still use all 3)
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| ***Braintech v Kostiuk***, 1991 BCCA 🡪 One of few cases where CAN court held there was no rasc b/w action & foreign Jx (Texas) |
| **Facts:** | Braintech (Nevada Cx) carried on business in BC; had presence in Texas for 3 mo. Braintech obtained a judgment in Texas against ∆ (BC resident w/assets in BC) for defamation—∆ made defamatory post on bulletin board established by 3rd party.  |
| **Issue:** | Was there a rasc w/Texas, giving the Texas court Jx in the international sense for R/E in BC? **No** |
| **Goldie JA:** | * Distinguish b/w purposeful commercial activity on the internet vs. mere passive posting presence on the internet
* Look at facts: no evidence that the defamatory material had been read by anyone in Texas = **no rasc**
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## NON-PECUNIARY JUDGMENTS

At CL, Canada recognizes non-pecuniary orders (usually injxs) from both Canadian and non-Canadian Jxs:

* *Hunt* essentiallyexpanded the *Morguard* rule to other Canadian provs in the context of a non-pecuniary judgment
* *Pro-Swing* decided that it was time for the CL rules to expand and include non-pecuniary foreign judgments

**Framework:** We use the same general framework as with pecuniary judgments, with some “add-ons”/modifications:

1. **The foreign judgment is final & conclusive** (requirement set out in *Nouvion*)
	* **Rule:** For non-pecuniary judgments, the order has to be “final” in the sense of being **fixed & defined** (*Pro-Swing*)
		+ The order doesn’t have to be the last step in the litigation process, but the enforcing court can’t be asked to add to or subtract from the obligation (*Pro-Swing*)
	* **Clarity:** The order must also be **sufficiently unambiguous** to be enforced; must clearly establish what is req’d of the judicial apparatus in the enforcing Jx (*Pro-Swing*)
	* Maintenance/support orders ≠ final & conclusive
2. **The originating court had Jx in the internat’l sense** 🡪 Under CL, there are three alternative bases for the foreign court’s Jx:

**#1: PRESENCE** 🡪 ∆ was in the foreign Jx when the action started (*Forbes*)

* **Rule:** Fleeting or transient physical presence is sufficient to constitute presence for purposes of R/E (*Maharanee*)
	+ *Forbes*: π’s “casual visit” to his wife in a BC hospital was sufficient (despite π not being BC resident)
	+ **Exception:** Perhaps if you were “tricked” into visiting the Jx (*Forbes*)
	+ **Cx:** Presence is established if the Cx is *carrying on business* in the Jx

**#2: SUBMISSION** 🡪 ∆ voluntarily submitted/attorned to the foreign Jx

* **Rule:** Submission must be voluntary
* **Analysis:** Submission is *objectively* determined based on how ∆ actually acted—not what he subjectively intended (*First Nat’l Bank of Houston*)
* **Submission:**
	+ If you make any sort of defence/arguments going to the merits of the action (as ∆ did in *Clinton*)
	+ If you ask the foreign court to exercise discretion (*Mid-Ohio* says this is probably submission)
	+ Where counsel has authority and does something that constitutes submission
	+ Where you argue *fnc* (would have to argue against the application of *Mid-Ohio*; say it’s not clear if it’s good law)
	+ Presence of a Jx-selecting clause (*Douez*)
	+ If you send a letter to foreign court effectively setting out your defence (BCCA case EE mentioned in class lol)
* **Not submission:**
	+ If you argue that the foreign court has no Jx (Jx simpliciter/territorial competence)
	+ Where counsel is acting without your authority
	+ Where you argue *fnc* (would have to rely on *Mid-Ohio*)

**#3: RASC** 🡪 There’s a rasc b/w the CoA and the foreign Jx (*Morguard*; extended to non-CAN judgments in *Beals*)

* **Canadian judgments:** There’s a constitutional principle that a Canadian court must recognize another CAN court’s judgment if the Jx was *properly & appropriately assumed*; connection need only be **minimal**(*Morguard*)
	+ **Rationale:** Must give full faith & credit to non-pecuniary judgments from other provs (*Hunt*)
	+ This principle is applied in *Hunt* to non-pecuniary judgments!
* **Foreign judgments:** Rasc must be **significant/substantial**—a fleeting or relatively unimportant connection ≠ sufficient (*Morguard* principle extended to foreign judgments in *Beals*)
* **NB:** The UKSC rejected *Morguard* on the basis that it was unfair to ∆s bc it made it hard for them to strategize when they were unsure whether or not there was an rasc = too much uncertainty (*Rubin v Eurofinance SA*, 2012 UKSC)
1. **Canada will not enforce orders that it would never make/enforce itself**
	* Consider whether the use of judicial resources is consistent with those allowed for domestic litigants
	* Consider whether the order could result in a drain on local judicial resources
2. **Relevant factors to consider for the R/E of non-pecuniary judgments (not an exhaustive list) include** (*Pro-Swing*)**:**
	* Whether the order’s terms are clear & specific (somewhat addressed by finality & conclusiveness req’ment)
	* Whether the order is limited in scope
	* Whether the enforcement is the least burdensome remedy for the Canadian justice system
	* Whether the Canadian litigant will be exposed to unforeseen obligations
	* Whether any 3rd parties will be affected by the order

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| ***Hunt v T&N Plc***, 1993 SCC 🡪 Courts must recognize judgments from other provs; R/E of non-pecuniary judgment in Canada |
| **Facts:** | Dispute as to the R/E of a non-pecuniary judgment stemming from an asbestos case. Litigation was commenced in BC. ∆s = asbestos companies incl. Qc companies. In BC action, judge made an order for discovery 🡪 ordered ∆s to release docs that were located in Qc for the purposes of the BC action. ∆s objected on the basis of a Qc statute saying they didn’t have to comply.  |
| **Issue:** | Should the BC order be R/E by the Qc court? **Yes** |
| **Judge:** | * SCC said Qc had to recognize the BC order—must give **full faith & credit** to judgments from other provinces
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| ***Pro-Swing Inc v Elta Golf Inc***, 2006 SCC 🡪 CAN courts can R/E non-pecuniary foreign judgments; subject to extra scrutiny |
| **Facts:** | π (Pro-Swing) sued ∆ (ON Cx) in Ohio (trademark dispute). ∆ submitted to Jx of Ohio court, which issued a consent order. ∆ refused to comply w/consent order, so π applied for a contempt order in Ohio which included an injx. |
| **Issue:** | Should the Canadian court R/E the non-pecuniary order? **Yes** |
| **Deschamps J:** (maj) | * Foreign equitable orders aren’t ineligible for R/E (**comity**), but should be subjected to extra scrutiny
* For non-pecuniary orders, there are extra factors to be considered (listed above)
 |
| **McLachlin CJ:** (dis) | * Agrees that it’s time for the CL rules to expand and encompass non-pecuniary foreign orders (**comity**)
* Disagreed as to the application of the principles to this case
 |

## DEFENCES

Even if the foreign court (Canadian or non-Canadian) has Jx in the international sense and delivered a final & conclusive judgment which fits within our R/E rules, it’s still possible for ∆ to raise defences to avoid R/E. The **burden of proof** always remains on ∆ to raise these defences. *Beals* is the leading Canadian case on defences.

**Error of law in a foreign court ≠ defence** (***Godard v Gray***, 1870 QB)

* This represents extreme self-restraint and reflects comity—a domestic court shouldn’t sit as an appeal court on the merits of a foreign decision

**Additional defences** 🡪 The list of CL defences is not exhaustive—the door is not closed (= if all else fails, invent a new one!!!)

* “Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment… Should the evolution of private int’l law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by existing defences” (*Beals* at 42)

**#1: EXCLUSIONARY RULES** 🡪 public policy defence, penal exception, revenue exception, public law exception (see CAN pg. 4)

* **Public policy defence:** Prevents the enforcement of a foreign judgment which is contrary to the Canadan concept of justice (*Beals*)
	+ **Ask:** *Is the foreign law contrary to our view of basic morality?* (*Beals*)
		- Remember: this defence is directed at repugnant *laws*, not repugnant *facts*
	+ **Damages:** In *Beals*, it was the award of damages by the FLA court that was at issue:
		- “The award of damages by the FLA jury does not violate our principles of morality. The sums involved, although large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada… The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a rasc to the CoA for the sole reason that the claim in the foreign Jx would not yield comparable damages in Canada.”
		- **Ratio:** The size of an award of damages is not a basis on which the public policy defence can be invoked
	+ **Policy:** The breach of forum public policy is not a defence to be lightly applied by local courts because the effect is to condemn the foreign law—this doesn’t produce better relations w/foreign legal systems

**#2: FRAUD 🡪** neither foreign nor domestic judgments will be enforced if obtained by fraud (*Beals*)

* **Types of fraud:** In *Beals*, Major J distinguished b/w these two types of fraud (but the distinction is of no apparent value):
	+ (Extrinsic) 🡪 **Fraud going to the Jx of the issuing court**; fraud that misleads the court into believing it has Jx
		- Although *Beals* suggested that the due diligence requirement doesn’t apply here, the *Lang* decision indicates that there is probably the same due diligence requirement applying to fraud going to the Jx
		- Courts are *reluctant* to recognize fraud going to a foreign Jx
	+ (Intrinsic) 🡪 **Fraud going to the merits** of the case or the existence of a CoA
		- Intrinsic fraud can only be raised if the allegations are new and not the subject of prior adjudication
* **Due diligence:** The defence of fraud will fail where the decision was based on fraud that could have been discovered and brought to the foreign court’s attention through the exercise of reasonable diligence (*Beals*)
* **If raising fraud defence:**
	+ Argue that ∆ exercised due diligence—any “new & material facts” couldn’t have been discovered in foreign proceeding (*Beals*)
* **If refuting fraud defence:**
	+ Argue that ∆ failed to exercise due diligence—any “new & material facts” must be limited to those facts that ∆ couldn’t have discovered and brought to the attention of the foreign court (*Beals*)
	+ Courts should treat the defence of fraud narrowly—if they didn’t domestic courts would be increasingly drawn in re-examination of the merits of foreign judgments, which would be contrary to finality (*Beals*)
	+ Argue that ∆ is just trying to use this defence as a means of relitigating an action previously decided (what Major J warned about in *Beals*)

**#3: BREACH of NATURAL JUSTICE** 🡪 no R/E if the foreign proceedings were contrary to CAN notions of fundamental justice (*Beals*)

* **Rationale:** A domestic court enforcing a judgment has a *heightened duty* to protect the interests of ∆s (*Beals*)
* **Fair process:** The enforcing court must ensure that ∆ was granted a fair process (*Beals*)
	+ Fair process = one that reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system (*Beals*)
	+ 🡩 similarity/familiarity of the foreign legal system to our own = 🡩 ease of conducting this assessment (*Beals*)
* **Analysis:** The SCC in *Beals* disagreed as to whether natural justice is generic to the legal system or individual to the case
	+ **Major J** 🡪 Look at the system generally (concluded that FLA legal system compled w/req’ments of nat’l justice)
	+ **Binnie J** 🡪 Look at what *actually happened* in the specific case (EE agrees w/this approach, despite it being the dissent)

## STAUTORY REGIMES

In BC, there are three statutes that authorize the R/E of foreign judgments:

* + - * 1. Part 2 of the ***Court Order Enforcement Act*** (***COEA***)
				2. The ***Enforcement of Canadian Judgments and Decrees Act*** (***ECJDA***)
				3. The ***Interjurisdictional Support Orders Act*** (***IJSOA***)

We also have two statutes that deal with arbitration awards:

* + - * 1. The ***Foreign Arbitral Awards Act*** (***FAAA***)
				2. The ***International Commercial Arbitrations Act*** (***ICAA***)

Finally, our ***Limitations Act*** governs the enforcement of a foreign judgment. As per s 7, a court proceeding to enforce/sue a judgment must not be commenced after the earlier of:

1. the LP of the Jx where the extraprovincial judgment was made; or
2. **10 years** after the judgment became enforceable where the extraprovincial judgment was made

**JUDGMENTS & ORDERS**

Here, let’s assume that ∆ (judgment debtor) has assets worth seizing in BC. The eligibility of π (judgment creditor) to use a statutory method of enforcement depends on the place of origin of the judgment to be enforced:

* *COEA* 🡪 can be used for judgments originating from the Jxs that are listed
* *ECJDA* 🡪 can only be used for Canadian judgments (from other provs)

**Route #1: If the judgment is from within Canada** 🡪 Go directly to *ECJDA* (don’t even contemplate any other possible mode of R/E)

* There have been no cases litigating any aspect of the *ECJDA*, so we can only assume that it’s working perfectly
* **FRAMEWORK:**
	+ **Def’n:** Start at s 1, which provides the def’n of a **Canadian judgment**: “a judgment, decree, or order made in a civil proceeding by a court of a prov/territory of Canada other than BC”…
1. that requires a person to pay money (**pecuniary**), including:
2. an order for the payment of money that’s made in the exercise of a judicial function by a tribunal of a prov/territory of CAN other than BC and that is enforceable as a judgment of the superior court of unlimited trial Jx in that prov/territory, and
3. an order made and entered under s 741 of the *Criminal Code*
4. under which a person is req’d to do or not do an act or thing (**non-pecuniary**), **or**
5. that declares rights, obligations, or status in relation to a person or a thing (**could be *in rem***)**.**

\*Note here that this list doesn’t include orders for maintenance & support, penalties/fines, orders relating to the control/care of minors, non-pecuniary tribunal orders, and orders relating to the granting of probate

* + s 6 gives the BC court **control** over the judgment which has been registered
	+ **Blind full faith & credit:** s 6(3)takes the *Morguard* R/E rule to its logical conclusion: we now have blind full faith & credit towards other provs’ judgments
		- I.e. this means that a BC court is prohibited from checking to see whether the [AB] court had Jx under its own law, or even if there was a rasc to [AB]
	+ **Defences:**
		- s 6(3)(c) has been interpreted to mean that the *ECJDA* eliminates the defences of fraud & breach of natural justice in the foreign court
		- Error of law is also not a defence as per s 6(3)(b) (which is consistent w/*Godard v Gray*)
		- The **public policy defence** still exists under s 6(2)(c)(iv), but it’s unlikely to succeed (i.e. the chances of a BC court accepting a public policy defence for an ON judgment is pretty minimal)
	+ **Non-merger rule:** s 9 replicates/codifies this rule:
		- “Neither registering a Canadian judgment nor taking other proceedings under this Act affects an enforcing party’s right to bring an action on the Canadian judgment or on the original CoA”

**Route #2: If the judgment is from another foreign Jx with a reciprocal agreement** 🡪 Go to the *COEA*

* **Reciprocating Jxs:** Under s 37 of the *COEA*, the following are reciprocating Jxs:
	+ **AUS** 🡪 NSW, Queensland, S. AUS, Victoria, AUS Capital Territory, AUS Antarctic Territory, Coral Sea Islands, Heard & McDonald Islands, N. Territory, Ashmore & Cartier Islands
	+ **USA** 🡪 WA, Alaska, Cali, Oregon, Colorado, Idaho
	+ **Europe** 🡪 Germany, Austria, UK
	+ **Canada** 🡪 AB, MB, NB, NFLD, NS, ON, PEI, Sask, NWT, Nunavut, Yukon
* **Registration:** To effect conversion under the *COEA*, the foreign judgment must be **registered** (s 29(1))
* **Limitation periods:**
	+ BC LPs still apply (see above re: *LA* s 7)
	+ After registration, the judgment creditor (π) has 30 days after *ex parte* registration to notify the judgment debtor (∆) that a judgment has been registered against it
	+ The, the judgment debtor has 30 days to object to the registration on some ground
	+ If the judgment debtor fails to object within 30 days, chances are exceptionally high that the judgment will stand
* **Defects:** There’s only a small number of reciprocating states; this statue has failed to implement *Morguard* in any way, shape, or form; only works for original, pecuniary judgments from reciprocating states
* **Chaining** = when you get a judgment from a non-reciprocating state, then register it in a reciprocating state, then register it in the place you really want it to be enforced
	+ The court in *Owen v Rocketinfo Inc*, 2008 BCCA held that chaining is not permitted—**the only judgments that are registrable under the *COEA* are original judgments, and not any subsequent conversions of an original judgment by the process of registration**
	+ **Rationale:** BC has selected which Jx it wants to reciprocate with—this shouldn’t be overriden

**Route #3: If the judgment is from another foreign Jx without a reciprocal agreement** 🡪 Fall back on CL

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| ***Central Guaranty Trust v De Luca***, 1995 NWTSC 🡪 Example of how the *COEA* works |
| **Facts:** | Object was to get ON judgment R/E in NWT. To enforce judgment against ∆ (NWT resident), the court had to convert the judgment via reciprocal enforcement. π (judgment creditor) made *ex parte* registration of ON judgment. ∆ didn’t make any application to set aside the registration as he was entitled to do until it was too late. |
| **Issue:** | Should the ON judgment be R/E by the NWT court? **Yes**  |
| **Vertes J:** | * s 29(2) of the *COEA* authorizes *ex parte* applications
* The *COEA* (and all reciprocal enforcement of judgment acts) are straight CL and cannot be modified by judicial interpretation (unless they have been amended subsequent to *Morguard*)
* Full & frank disclosure is one requirement
* LPs are strictly enforced (this case was decided on strict enforcement of LPs)
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**ARBITRAL AWARDS**

In BC, arbitration awards can become enforceable (like judgments) if they’re registered in court. It’s also possible to get arbitral awards enforced directly.

Both the *Foreign Arbitral Awards Act* and the *International Commercial Arbitration Act* require BC courts to R/E foreign arbitral awards—however, this requirement is not absolute. There are **defences** available under the statutes, so they are subject to the interpretation of the statute by the court.

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| ***Shreter v Gasmac Inc***, 1992 Ont Gen Div 🡪 R/E of foreign arbitral award; statutory + CL defences available (though difficult) |
| **Facts:** | K b/w parties in ON and Georgia (USA). K had arbitration clause saying there would be arbitration in Georgia if any dispute arose from the K. CoL clause selected Georgia as well. The ON Cx didn’t participate/complain until the Georgia Cx sought to get its arbitral award R/E in ON; the ON Cx raised various defences |
| **Issue:** | Should the arbitral award be R/E in ON? **Yes** (∆’s defences all failed, so the arbitral award was enforced) |
| **Feldman J:** | * **Defence #1:** The arbitral award has merged into the judgment bc it was registered w/the Georgia court (no)
* Defence failed—**the merger rule, if there is one, is a matter for the law of the forum** (i.e. not the law of Georgia)
* Merger rule = rule of the forum
* **Defence #2:** Breach of natural justice (arbitrators in Georgia didn’t give reasons for the result (no)
* In ON, failure to give reasons normally constitutes a breach of natural justice
* In this case however, arbitration is under Georgia law and the ON Cx has failed to persuade the ON court that there had been a breach of *Georgia* law in the failure to give reasons
* **Defence #2:** Arbitral award was inconsistent w/forum public policy (no)
* Given that this defence is extremely narrow, it unsurprisingly also failed
* The public policy defence is virtually identical to the public policy defence under R/E of foreign judgments—has to be inconsistent with or offend basic notions of morality and justice
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# *IN PERSONAM* CLASS ACTIONS: Jx & R/E

Conflicts rules are somewhat modified in the context of class actions. For our purposes, class actions legislation is only *procedural*. There are two class action models in Canada:

* **Opt-in model (BC)** 🡪 Each person must opt-in to the proceedings (BC is the only prov that operates under this model)
* **Opt-out model** 🡪 Court declares a class; each person must opt-out if he/she wishes to not be a part of the proceedings

We’re mainly looking at two issues with regard to class actions:

* **Jx** 🡪 *Does the court have territorial competence (Jx simpliciter), and is it the most suitable court for the action (forum non conveniens)?* (*Harrington*; *Ward*)
	+ From *Harrington*, we know that the common issue can be used as a rasc for purposes of Jx simpliciter
* **R/E (post-settlement)** 🡪 *Where there’s a settlement but also a class action continuing locally, does the court have to recognize the settlement?* (*Currie*; *Meeking*)
	+ *Currie* sets out three criteria for a court to R/E a foreign (non-Canadian) class action:

Court must have **Jx in the international sense** (based on presence/submission/rasc b/w action & forum)

Non-residents must be **adequately represented** (we haven’t seen this litigated much, if at all)

Non-residents must be accorded **procedural fairness**, incl. adequate notice(to avoid breach of nat’l justice)

* + - Notice must be comprehensible to ordinary claimants and reasonably brought to their attention

**Jurisdiction**

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| ***Harrington v Dow Corning***, 2000 BCCA 🡪 For class actions, **common issue will suffice to establish a rasc**; out-of-prov πs can opt-in |
| **Facts:** | A number of non-BC residents wanted to opt-in/join the BC class action re: exploding breast implants. |
| **Issue:** | For the purpose of a class action, can BC assume Jx over non-residents? **Yes** |
| **Huddart JA:** | * The court has to have Jx over ∆, π, and the matter
* π lived and purchased the implants in BC = rasc b/w the representative π and the Jx = Jx over ∆
* **Out-of-prov litigants wishing to opt-in to BC class action:** use the common issue as grounds for establishing a rasc
* “New types of proceedings require reconsideration of old rules of the fundamental principles of order & fairness are to be respected. To permit what the appellants call ‘piggy-backing’ in a class proceeding is not to gut the foundation of conflict of laws principles.”
* To exclude the out-of-prov πs would be to contradict the principles of order & fairness that underlie the Jxal rules
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| ***Ward v Canada***, 2007 MBCA 🡪 Trad’l bases for Jx continue to operate; for *fnc* look to normal factors incl. juridical advantage  |
| **Facts:** | MB resident wanted to commence a class action against Crown (sprayed w/herbicide while serving in army, which led to health probs). Essentially, wanted to sue Canada. Crown argued that MB was *fnc* bc there were hardly any πs in MB. |
| **Issue:** | Can the MB court take Jx over the federal gov’t? **Yes** |
| **Freedman JA:** | * **Jurisdiction simpliciter**
* The Crown and right of Canada is present in every province = no Jx problem
* *Beals* didn’t eliminate the CL bases for Jx—they continue to operate and presence is sufficient
* ***Forum non conveniens***
* Have to assess the normal *fnc* factors as well as juridical advantage
* Here, MB’s legislation provided the prov with a very π-friendly class regime = strong juridical advantage for π
* MB = *forum conveniens* = action not stayed
* …BUT court retains discretion to stay the decision in favour of another action—the *fnc* decision could be varied if more evidence came to light
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| ***Kaynes v BP plc***, 2014 ONCA 🡪 Parallel actions |
| **Facts:** | Action against BP for misrepresentation. BP didn’t have any assets in Canada, but was a reporting issuer on the TSX. Kaynes proposed a “national class”; wanted to bring a statutory CoA under ON’s *Securities Act* against BP, but hadn’t even purchased his shares in ON. |
| **Issue:** | Should the ON court exercise Jx despite the parallel class action in the US? **No** (ON court stayed the proceedings) |
| **Sharpe JA:** | * Court decided that there was a tort that occurred in ON = rasc (under the meaning of *Van Breda*) = ON has Jx
* BUT ON court declined to exercise its Jx—there was already a class action underway in the US
* Thus, Kaynes could join the US class action and get the benefit without bothering the ON courts (ON = *fnc*) 🡪 this highlights one of the main differences in exercising discretion in the context of class actions
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| ***Kaynes v BP plc***, 2016 ONCA 🡪 Court can lift a stay of proceedings if the parallel class action fails |
| **Facts:** | Kaynes sought an order lifting the stay of proceedings due to post-stay developments: SCOTUS dismissed the claims. |
| **Issue:** | Given the failure of the US class action, should the ON court lift the stay to avoid an injustice? **Yes** |
| **Judge:** | * Court has Jx to set aside or vary an order on the basis of “facts arising or discovered after” the order was made
* Now that Kaynes can’t proceed with a class action in the US, these developments are sufficient to justify lifting the stay
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**Recognition/enforcement**

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| ***Currie v MacDonald’s Restaurants***, 2005 ONCA 🡪 **Leading case for R/E of foreign class actions**; adopted by SCC in *Lepine* |
| **Facts:** | Illinois class action involving promotional games/prizes. Illinois had defined the class as extending to Canadian customers of McDonald’s. McDonald’s sought R/E for shield purposes: the ON courts shouldn’t let Currie sue again because he didn’t opt-out of the Illinois action in time. Opt-out notice had been advertised in Canada: Maclean’s mag and 3 French papers (publications which weren’t widely read).  |
| **Issue:** | Does the ON court have Jx for the class action? **Yes**—∆ had presence in ON + lots of consumers thereShould the ON court R/E the Illinois class action? **No**—court allowed Currie to start a parallel class action in ON |
| **Sharpe JA:** | * The Illinois class action is *prima facie* recognizable (court had Jx), but recognizing the judgment could be unfair to Canadian consumers
* **Three criteria have to exist for a court to recognize a foreign, non-Canadian class action:**
1. **Jx in the international sense** 🡪 Here, there was presence and rasc (McDonald’s operated in Illinois); also no issue re: finality & conclusiveness = Illinois court had Jx in the international sense
2. **Adequate representation of non-residents**
3. **Non-residents must be accorded procedural fairness** 🡪 Here, notice was full of legal jargon
* Notice must be comprehensible to ordinary claimants and reasonably brought to their attention
* Here, the notice was inadequate and Currie was not found to have been wilfully blind—even if Currie had seen the notice, he probably wouldn’t have understood it
* Lack of procedural fairness = reason not to R/E class action = Currie allowed to start a class action in ON
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| ***Meeking v Cash Store and Instaloans***, 2013 MBCA 🡪 Adopted *Harrington* as a rule for R/E of class actions (common issue = rasc) |
| **Facts:** | Class action re: payday loans. Meeking wanted to bring a class action in MB, but didn’t opt-out of the ON action. As per ON class action, all MB residents were members of the national class which the ON court had declared to exist. Since Meeking hadn’t opted-out, he was apparently bound by the result. Cash stores wanted the ON judgment R/E in MB to use as a shield against further action. |
| **Issue:** | Should the MB court recognize the result (settlement) reached in the ON class action (thereby preventing π from commencing an action in MB)? **Yes** |
| **Cameron JA:** | * If π fails to opt-out, the foreign class action is said to *bind* π and prevent the party from commencing an action again
* Adopted *Harrington* as a rule for R/E of a class action: common issue = sufficient to establish rasc
* Then, the decision will be R/E against an individual (Meeking in this case)
* **Result:** Meeking was barred from bringing an action against Cash Stores, but not Instaloans
* **Constitutional issue** **(EE)**
* A prov can’t prohibit a party in another prov from commencing an action in that other prov—that would be unconstitutional
* BUT if *Meeking* is upheld, and there was an rasc due to common issue b/w out-of-prov resident and class action prov, then the class action prov has Jx over the parties
* **Basically:** If you didn’t join, how can you have the right to commence an action taken away?
* This would give the class action prov Jx for an *in personam* order (“you can’t commence an action anywhere else” = constitutional issue resolved
 |

# *IN REM* ACTIONS: Jx & R/E

Whereas *in personam* actions are only binding on the parties to the action and nobody else, *in rem* actions are good against the world. Examples of *in rem* actions involve:

* Title to land
* Status actions (single/married/adopted)
* Admiralty actions (vs. ships)

## CHARACTERIZATION

In most of these types of actions, the first step is always to **classify/characterize the property** (*Hogg*). Most basic: (im)movable? Note that *the forum does not characterize property*—this is one exception to the principle that the forum applies its own laws. **Characterization of property as movable/immovable must be determined by the law of the country where the property is located.**

* **STEP #1:** *Situs—where is the property located?*
	+ If land 🡪 easy to locate geographically
	+ If interest in land (e.g. mortgage, lease) 🡪 located where the land is located (e.g. land in BC = mortgage in BC)
	+ If intangible interest (e.g. share) 🡪 law is unclear
* **STEP #2:** *How does the Jx where the property is located characterize the property?*
	+ I.e. *does BC characterize a mortgage on land as movable or immovable property?*

**Example:** Let’s look at *Hogg* to get a picture of this (v exciting) process in action:

* The deceased owned mortgages
* Mortgage = interest in land
* Interests in land are located where the land is located
* Land is located in BC
* *How does BC classify mortgages?*
* In BC, mortgages = immovable property
* The deceased owned immovable property in BC
* Sask could only collect taxes if the beneficiaries’ claim to the mortgages was based upon a devolution under the law of Sask—only movables devolve upon beneficiaries under Sask law
* **Result:** Taxes could not be collected on the mortgages

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| ***Hogg v Provincial Tax Commissioner***, [1941] Sask CA 🡪 **Leading CAN case on characterization**; sets out process |
| **Facts:** | Lady held a number of mortgages at the time of her death, which were on land in BC. Sask wanted to tax her estate. The question turned on the Sask tax statute, which said the prov could impose tax if the property devolved by, or under, the law of Sask. (BC = *lex causae*). |
| **Issue:** | What law governs entitlement to succession of these mortgages? **BC** |
| **Mackenzie JA:** | * CL has developed CoL rules for succession to immovable & movable property
* **Movables** 🡪 depend on the domicile of the deceased at the date of death
* **Immovables** 🡪 depend on the *situs* (location) of the property
* Classification of property = **BIG exception to forum characterization & application of own law** 🡪 **complete deferral to foreign characterization**
* **Characterization process:**
1. ***Situs—where is the property located?***
* CL rule 🡪 interest in land (incl. mortgages) is located where the land is located
1. ***How does the Jx where the property is located characterize the property?***
* So, Sask asks how BC law classifies mortgages 🡪 expert witnesses are called from BC to answer this Q
* **Result:** The more correct expert says that mortgages are considered immovables
* Mortgages in Sask devolve under the law of BC = they aren’t subject to the Sask tax
 |

## Jx for *IN REM* FOREIGN ACTIONS

For jurisdictional purposes, **a rasc is presumed to exist** (giving BC territorial competence) **if the movable/immovable property is located in BC** (*CJPTA* s 10(c)(i)). However, remember that this only decides Jx simpliciter, not necessarily discretion (whether BC is in fact the most appropriate forum).

***MOCAMBIQUE* RULE** (*Mocambique*) 🡪 **A forum court won’t take Jx in actions relating to title in land that’s located outside of its Jx**

* **RATIONALE:** It would be pointless for a forum court to do otherwise due to unenforceability—*how could we ever stop ∆ from going back to the place where the immovable is located?*
* **EXCEPTIONS** (Dicey Rule 122(3): *Mocambique Rule and its exceptions*)**:**
1. Where the claim is based on a **K or equity b/w the parties** (*Ward*)
	* If you’re framing the claim as an *in personam* K or equitable claim, the court can award damages or an order for specific performance (*equitable*)—these are both *in personam* remedies
	* The court in *Ward* couldn’t actually *transfer* the title to π, but it could *order* ∆ to get it done
	* From *Pro-Swing*, we also know that Canada will R/E *in personam* equitable orders (e.g. specific performance) of Canadian courts, and probably foreign courts as well
2. Where the question has to be decided for the purpose of the **administration of an estate/trust and the property consists of immovable & movables in England + immovables outside of England**
	* If you’re dealing with the validity of wills/intestacy/etc. and there’s land + movable property in BC, the BC court can take Jx and decide succession to the property outside of BC
* **CANADIAN QUALIFICATION** (*Godley*)**:** Damage to movable & immovable property
	+ Where there’s damage to foreign *immovable* property, but pleadings indicate that a substantial proportion of damage may well found to be damage to *movable* property, the court may make an incursion into the *Mocambique* rule and take Jx

As a result, the *Mocambique* rule (where the court *won’t* take Jx) is really limited to situations involving **right to title/possession of land** and **trespass to land**. For an *in personam* action, it doesn’t matter if the claim involves foreign immovable property—the court will take Jx.

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| ***British South Africa Co v Mocambique***, [1893] HL 🡪 **Domestic court has no Jx over actions concerning title/trespass to foreign land** |
| **Facts:** | Dispute in England (forum) over mines (immovable) in SA. π alleged that ∆ had wrongfully taken property and ejected π. CoA = trespass to land (not directly concerning title). π sought an injx + damages.Since the litigation involved land in SA, HL needed to determine who actually owned the land. Essentially, HL was concerned it would issue an ineffective judgment w/inconsistent results. |
| **Issue:** | Does the court have Jx over actions concerning title or trespass to foreign land? **No** (HL refused to take Jx) |
| **Lord Herschell:** | * **General rule** 🡪 In actions concerning title or trespass to foreign land, the domestic court has no Jx
* Trespass to land necessarily involves the question of who has title to the land—it assumes that π has title
* *But how do we actually know who has title? And even if we knew, how could we avoid having inconsistent decisions b/w England & SA?*
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| ***Hesperides Hotels Ltd v Muftizade***, [1979] HL 🡪 π tried to circumvent *Mocambique* rule; HL wans’t fooled |
| **Facts:** | π (Greek) owned immovable property in Cypress, in an area that had fallen under Turkish rule. π discovered that an English company was booking tours on its property; commenced action in England vs. M (rep of Turkish gov’t) and ∆s for **conspiracy to trespass, w/an account of profits + injx**. Basically, π was being sneaky and intentionally avoided arguing trespass to foreign immovable property. ∆s argued that the English court had no Jx as per *Mocambique*.  |
| **Issue:** | Does the court have Jx over “conspiracy to trespass” (*Mocambique* work-around) on foreign land? **No** (lol nice try) |
| **Judge:** | * HL wasn’t fooled—refused to re-argue *Mocambique*, and π’s didn’t bring nearly enough support to overturn it
* Justifications for not overruling:
* *Mocambique* rule had already been adopted by many CL countries
* These kind of issues are politically charged (issues relating to title to land in other Jxs)
* Revising the *Mocambique* rule could lead to forum-shopping
* The circumstances haven’t changed significantly to warrant a change in the HL’s own rule
* This still stand 🡪 **you can bring an action for trespass to *chattels* on the property, but you can’t bring an action relating to title of immovable because the court will not take Jx**
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| ***Godley v Coles***, [1988] Ont DC 🡪 ON qualification to the *Mocambique* rule (argue that it applies to all of Canada?) |
| **Facts:** | Both parties were ON residents = ON had Jx. Parties owned condos in FLA. ∆’s condo was directly above the π’s. ∆’s toilet leaked & damaged π’s condo—both movable + immovable elements. π commenced action in ON for damages both for the contents of the downstairs condo (movable property) and also to the condo itself (immovable property). |
| **Issue:** | In light of the *Mocambique* rule, does the ON court have Jx of this action? **Yes**  |
| **Carnwath DCJ:** | * Clearly ON can assume Jx over an action to recover damages caused by negligence to movables
* …BUT should **minute/some damage** to immovable in a foreign Jx raise the application of the *Mocambique* rule and preclude π from bringing the claim? = **NO**
* The presence of *some* damage shouldn’t disentitle πs from bringing their action in ON
* **Title to the foreign immovable was not an issue here**—whereas both parties were claiming the same mine in *Mocambique*, nobody here was claiming anything that wasn’t already owned by them
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| ***Ward v Coffin***, [1972] NBSC App Div 🡪 Example of the Ks exception to the *Mocambique* rule |
| **Facts:** | Parties entered into a K for the sale of land in Qc. π brought action in NB (in K) seeking either damages or specific performance (equitable order). K was said to have been made in NB. |
| **Issue:** | In light of the *Mocambique* rule, does the NB court have Jx of this action? **Yes** |
| **Judge:** | * **Ks exception:** if you can characterize the action as K/equity, then you fall within the Ks exception to the *Mocambique* rule
* The fact that the land was in Qc didn’t disentitle the NB court from assuming & exercising Jx over the *in personan* action
* **If you have Jx over the party, you can make an equitable order affecting that party = affect land indirectly by making an order for specific performance**
* Even if ∆ doesn’t comply, you still have remedies vs. the party even if you can’t face the transfer of title to land directly
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## R/E of *IN REM* FOREIGN ACTIONS

Canadian courts won’t R/E foreign ***in rem* judgments** dealing w/title to **local land**, nor will they R/E foreign ***in personam* equitable orders dealing** w/title to **local land** (*Duke*).

Although *Duke* has not been challenged, we now R/E *in personam* equitable orders as per *Pro-Swing* (or at least the order would be eligible for consideration).

At the *in rem* level, *Duke* may still be good law although we may be constitutionally obligated to R/E the judgment if it’s from another **Canadian prov** (*ECJDA* s 6(3): blind full faith & credit; s 1: def’n of “Canadian judgment”)

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| ***Duke v Andler***, [1932] SCC 🡪 CAN courts won’t R/E a foreign judgment dealing w/local immovable property |
| **Facts:** | K action (for the sale of land in BC) in Cali. All parties to the K were Cali residents. Cali court took Jx on the basis of the K exception to the foreign immovables rule. Duke got title to land in BC; raised a $30K mortgage. Andlers wanted the K set aside; wanted title back. Cali court decided to issue an equitable order: ordered Duke to re-transfer title to the property to the Andlers, but Duke refused. Case came to BC courts—at both trial and appeal, courts recognized that this was an *in personam* action in Cali. |
| **Issue:** | Should the BC court R/E the aspect of the Cali judgment that is really foreign direct enforcement of an *in rem* action? **No** |
| **Smith J:** | * **BC courts**
* BC courts were helpful to Cali πs—found the decree to be valid = the action is an *in personam* action
* The Cali court wasn’t assuming Jx to decide title to BC local immovable—it just took Jx in the same way it would’ve done to resolve the K dispute
* BUT BC wasn’t happy about the Cali order for an officer to reconvey the land (this was pre-*Pro-Swing*, when we were only enforcing pecuniary judgments at the time)
* **Result:** Decided BC shouldn’t refuse R/E, but ordered transfer using its own BC statute bc didn’t like what Cali did
* **SCC**
* Refused to R/E the Cali judgment—didn’t approve of the BC courts’ decision
* **Characterized** the Cali judgment as an *in rem* action concerning local immovable = **not enforceable** (despite the judgment not directly dealing w/title and the fact that it was a K action)
* Refused to recognize the foreign *in personam* equitable order (which would now be recognized as per *Pro-Swing*)
* **Under CL, Canadian courts will not recognize a foreign judgment dealing w/local immovable property**
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**INTELLECTUAL PROPERTY** 🡪 The HL decision in ***Lucas Films*** seemed to suggest that the *Mocambique* rule extends to IP

* LF brought action in Cali for c’right infringement against a sculptor in England (figurines, etc.)
* Default judgment for $20N (even though sculptor only made $14K)
* LF sought R/E of the Cali judgment in England
* **CA** 🡪 C’right = property = let’s extend the *Mocambique* rule to c’right law
* **UKSC** 🡪 In 2011, decided that the *Mocambique* rule should not be extended to c’right law after all

# CHOICE of LAW (CoL)

**Overarching question:** *What law will apply to the merits of the dispute if a particular court decides to take Jx?*

Up until now, we’ve mostly been looking at BC rules (e.g. when we take Jx, what law governs the assumption of Jx, which judgments we recognize in courts, etc.)—it has always been the law of the forum that is applied.

Now, we’re looking at the law the court applies to resolve the merits of the CoA. This question should be kept in mind even at the point of determining Jx—*if I persuade the court to take Jx, what law is likely to be applied to the merits of the CoA?*

**THEORIES**

Theories have been devised/invented to justify why we would ever apply another state’s law—*why modify territorial sovereignty?* However, these theories don’t attempt to answer the question of why we actually do it. What is more critical (to us, at least) is the **method** that the CL employs in these CoL areas. *Theories are not going to provide us with the answer*.

**METHODS**

In Canada, we use the **traditional Jx-selecting method**. The CoL direct the court which laws apply (subject to argument). This is as opposed to the *governmental interest approach*, which is employed by American courts.

**CONSPIRACY of SILENCE** 🡪 No party to an action *has* to argue it as a conflicts action, no matter what the facts

* Declining to raise the fact that a case is a conflicts case is known as the **conspiracy of silence**: you won’t raise it, I won’t
	+ In this specific context: **if neither side raises the possible application of a foreign law, nobody will**
* *Pro-Swing* is the only case in which it’s suggested that a judge might want to raise a conflicts issue on his/her own—it might be more appropriate where **public policy** is involved (otherwise, judges just rely on arguments made by counsel)
* If it’s in the interest of either party to raise the existence of the application of a foreign law, then that party has to plead & prove the foreign law to the satisfaction of the court
	+ Must bring in higher retained experts in the foreign law
	+ This gets particularly complicated when both sides bring in experts—*whose evidence do you accept?*

## RENVOI

**PREMISE:** The court is directed to consider “the law” of a foreign Jx. *What does this actually mean?* This is where *renvoi* (“sending back” arises—the phrase “governed by law” is ambiguous because it doesn’t specify which law is intended. There are three modes of contesting this issue (listed below).

**E.g.** To illustrate, let’s say that A + B got married in Greece then later commenced litigation in BC re: the formal validity of their marriage. The BC CoL rule says: “formal validity is governed by the law of the place where the marriage was celebrated” (Greece).

**No renvoi** 🡪 Reference to the law of the foreign Jx = the substantive domestic law of that Jx (not its conflicts rules)

* + **E.g.** If the BC court uses an ordinary CoL rule, it would ask, *what is the domestic law of the place where the marriage was celebrated (Greece)?*

**Partial renvoi** 🡪 Reference to the law of the foreign Jx = not only its substantive domestic law, but also its CoL rules

* + **E.g.** If the BC court uses partial renvoi, it would ask, *what is the CoL rule of the place where the marriage was celebrated (Greece)?*
		- Let’s now say that Greece’s CoL rule says, “formal validity of a marriage is governed by the place of nationality”
			* **Transmission** 🡪 sends us to a 3rd Jx (iIf A + B are Canadian nationals, there’s a *transmission* to a 3rd legal system: Canada = BC court would apply the law of Canada)
			* **Remission** 🡪 refers us back to the forum’s legal system (**i**f A + B are US nationals, there’s a *remission* back to the forum’s legal system: BC = BC court would apply its own law
		- Apparently partial renvoi is “manageable & useful” (lol)

**Total renvoi** 🡪 The forum court chooses which system of law to apply based on its own CoL rules, then decides the case exactly as if it were the court of the Jx that was chosen

* + **E.g.** If BC court uses total renvoi, it would look to the foreign Jx (Greece) & ask, *how would your court solve this?*
	+ This is where you’d bring in an expert, as was the case in *Neilson*; you would **defer entirely to the expert**
	+ This mode sucks because it could result in one of four options:
1. In [foreign Jx], we would just apply our **domestic law**
2. In [foreign Jx], we would apply our **CoL rule**
3. In [foreign Jx], we would use **partial renvoi**—we would apply our CoL rule, but we would look at your CoL rule (if ours points there) and take a *remission* or a *transmission* (see above)
4. In [foreign Jx], we use **total renvoi**—so our CoL rule tells us to do whatever the foreign court would do (thus resulting in *circulus inextricabilis*/infinite regression)
	* + Thankfully, this nightmarish scenario has never actually happened—it seems to only exist in theory

**Basically, we’re asking:** *Should the court apply the Jx’s intended law, or the Jx’s entire law (including its CoL rules)?*

**Application:** Most of the time, the forum will apply the domestic law of the foreign Jx (no renvoi) to resolve the case. But sometimes the forum is persuaded that it shouldn’t look at the domestic law—it should look at the foreign Jx’s *conflicts rules*. If the domestic rules produce a negative result, then you can turn to the conflicts rules of the *lex causae* to give the court another chance to achieve the desired result. Renvoi becomes useful when the court has a policy of **upholding** something (e.g. will, marriage, title to immovables).

* **Wills** 🡪 The essential validity of a will (relating to movables) is governed by the domicile of the testator at the date of death
	+ **Rationale:** We use renvoi here bc CL wants to find a positive outcome—we want to find wills valid
* **Marriages** 🡪 The formal validity of a marriage is governed by the law of the place where the marriage was celebrated (*geographical connecting factor*); then ask: *what is the law of the Jx in which the ceremony took place?*
	+ **Rationale:** We use renvoi here bc CL wants to find a positive outcome—we want to find marriages valid
* **Title to immovable** 🡪 But we don’t use renvoi for movables (this was rejected by the English High Court
	+ **Rationale:** Deference to power—no point in reaching a conclusion that differs from others
* **Torts** 🡪 You could possibly try using renvoi here (follow *Neilson*; might not be binding but at least persuasive)
* Remember that there is no renvoi in the context of K law

**Expert evidence:** Any time you’re dealing w/*lex causae*, you need an expert to speak to what the law actually is

**Strategy:** Total renvoi might be seen as undesirable because it provides counsel with a lesser sense of certainty

* **Partial renvoi** 🡪 Counsel (and the court) remains in control of what happens; generally employed by civil legal systems
* **Total renvoi** 🡪 Everything’s in the hands of the expert in foreign law; generally employed by CL systems

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| ***Neilson v Overseas Projects Cx of Victoria***, 2005 HCA 🡪 **Total renvoi** (apparently, but looks like partial to EE) |
| **Facts:** | Ns were working in China for OPC. Mrs N had bad accident. After returning to AUS, Mrs N decided to sue OPC in AUS for damages from personal injuries (tort action vs. employer)… but tort occurred in China = conflicts issue. AUS had adopted the *lex loci delicti* principle (*Tolofson v Jensen*)—apply the law of the state in which the tort occurred (China). **Prob:** China had a LP of 1yr, which Mrs N had already exceeded. **Forum =** AUS. ***Lex cause*** = China. |
| **Issue:** | What law should the AUS court apply to the action brought by Ms. N? **AUS law** (via remission) |
| **Gummow & Hayne JJ:** | * AUS had decided that LPs were substantive… but wanted to find in favour of Mrs N
* According to China’s CoL rule: **if both parties were nationals of the same country or domiciled in the same country, the law of their nationality/domicile could be applied** 🡪 CoL rule using nationality/domicile as connecting factor
* If a CoL rule, AUS could take **remission** and apply AUS law to the tort claim, or could also apply AUS LP law
* Expert re: Chinese law said that a Chinese court would apply its conflicts rules + AUS domestic law (not AUS CoL)
* **Ultimately:** Court imported renvoi into AUS law—just wouldn’t decide whether it’s partial or total
* **Result:** AUS tort law + AUS LP law = OPC was found liable for Mrs N’s injuries
* **EE:** It’s unclear exactly what the justices did here—they all seemed to use a different methods (idiots)
* Apparently this is a case of total renvoi, but it’s indistinguishable from partial renvoi
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| ***Re Annesley***, 1926 UK 🡪 **Total renvoi** |
| **Facts:** | Will case. Mrs A married an English army officer; had 2 kids w/him but he died 4yrs later. Then Mrs A moved to France continued to live there until her death 40yrs later—she hardly ever visited England, but never took any steps to become a French citizen or acquire French domicile.Mrs A’s estate consisted of immovable property in France + movable property in France & England. Will was left in English form. Under French civil system, there was a mandatory amount that had to be left to heirs (as opposed to the testator having complete autonomy to leave estate to anyone). Application in England to determine Mrs A’s proprietary capacity (daughters were pissed). |
| **Issue:** | Which law applies? **French** (daughters were v happy) |
| **Court:** | * **English rule:** The essential validity of a will related to movable property in the context of succession 🡪 the connecting factor is domicile of the testator at death 🡪 ***lex causae* = France**
* English court determined that she was domiciled in France
* Court then looked to **France’s CoL rule** (not its domestic law) = renvoi
* French law pointed to her nationality (English) = **remission to England**
* English court said that they had already decided to apply French law 🡪 judge looked at what the French judge would’ve done 🡪 **total renvoi**
* English judge then decided that the French court would accept the reference back bc civil systems only use partial renvoi
* **Summary:** English asked *what would French court do?* 🡪 French court would apply its own CoL rule, which would cause remission back to English law 🡪 English law could mean either domestic or conflicts law 🡪 Expert said France would accept partial renvoi, which referenced back to French law via remission
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| ***Tezcan v Tezcan***, BCCA 1992 🡪 Provides neat summary of partial & total renvoi, although renvoi isn’t actually applied here… |
| **Facts:** | Marriage in Turkey b/w Turkish Citizens. Moved to BC later that year, then returned to Turkey 7yrs later, where they separated & divorced. Wife brought action under BC’s *Family Relations Act*. TJ found that the proper law to be applied was that of BC, and took into account the value of the properties in Turkey. Husband appealed the TJ’s decision (in favour of wife) |
| **Issue:** | (not of much importance to us) |
| **Cumming JA:** | * Both Turkey & BC would characterize the issue as related to property (not a matrimonial claim, just happens to arise in this context)
* **For proprietary claims arising in the context of marriage:**
* Claims to movable property are governed by the *lex domicilii*(law of the matrimonial domicile)
* Claims to immovable property are governed by the *lex situs* unless a marriage K (express/impled) provides otherwise
* **Three modes of renvoi:**
* **No renvoi** — Reference to the law of the foreign Jx is taken to be only the substantive domestic law of that system. It is not to include any of the conflicts rules of that Jx. Only the substantive law of that Jx need be proven as a matter of fact.
* **Partial renvoi** — Reference to the law of the foreign Jx is taken to include not only its substantive domestic law, but also the CoL rules of that system. The court does not ask simply what the domestic law of the foreign Jx is, but also what law the other Jx would look to. The court then applies the law of a 3rd Jx (transmission), or its own law (remission) if that is what the choice of law rules of the foreign Jx dictate. The CoL rules of the other Jx must be proven as a matter of fact.
* **Total renvoi** — The forum court chooses which system of law to apply based on its own CoL rules. It must then must decide the case exactly as if it were the court of the Jx chosen. Therefore, it must ask itself not only which law the foreign court would apply having regard to its conflicts rules, but also whether the foreign court would look to the conflicts rules of other Jxs (i.e. would it apply renvoi). This requires proof of the foreign courts' CoL rules as well as its rules regarding renvoi.
* Not necessary to determine this case w/either partial or total renvoi
 |

**INCIDENTAL QUESTIONS** 🡪 For exam purposes, must be able to *recognize* an incidental question in the case that one arises

**True incidental Qs** are limited to situations where:

1. the subsidiary issue is a conflicts issue in its own right (needs to be solved by application of a CoL rule), and
2. the application of the forum CoL rule will produce a different result from the application of the *lex causae* CoL rule

**Requirements:** An incidental Q must be a subsidiary issue and an independent conflicts issue in its own right.

**Example of incidental Q** (*Sangha*)**:** Let’s say the **main issue** is capacity to marry (which goes to essential validity). As we know, this can be determined by the law of the domicile of the parties at the time of marriage (e.g. Israel). The **incidental question** must be a conflicts question in its own right: single status, for instance.

* **Basically:** The main issue (capacity to marry) depends on the incidental Q (single status)

**Options:**

* Bring arguments to justify/persuade the BC court to use either the forum law of the *lex cauae*
	+ Argue **uniformity** 🡪 let’s do what the foreign court would do bc we’ve decided they’re the right legal system for the issue
	+ Argue **internal consistency** 🡪 Forum characterization—let’s use our own laws all the time
* OR avoid the entire incidental Q by asking the court for a declaration on the subsidiary issue (since the court has to use its own conflicts rules)

## MARRIAGE

Post-*Brook*, marriage requires both **formal** and **essential validity**.

**GENERAL FRAMEWORK:**

1. Characterize the issue as either formal or essential (see table below)
2. Apply the relevant CoL rule to figure out the *lex causae*
	* **Formal** 🡪 *lex loci celebrationis*
	* **Essential** 🡪 dual domicile rule or law of the intended matrimonial home
3. Apply the relevant *lex causae*/foreign conflicts rule
4. Consider any defences
	* **Sham marriages** do not vitiate consent—these are valid marriages on public policy grounds (*Veraeke* HL)
	* The **defence of public policy** is always an argument that can be raised in marriage validity cases

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| **Defects going to formal validity** | **Defects going to essential validity** |
| * Existence of bans/notices
* # of witnesses
* Registration
* Whether there has to be a religious/civil ceremony (or both)
* Proxy marriages (someone stands in for you)
* Parental consent
 | * Age
* Consanguinity (relationship by marriage)
* Affinity (blood relationship; *Narwhal*)
* Single status (CL believes in monogamy; *Schwebel*)
* Consent
* Fraud
* Duress
* Mistake (as to ID, attributes of other party, or ceremony)
* Impotence (*Sangha*)
* Sham marriage (parties have no plan to live together; has its own special rule! See: *Vervaeke*)
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**FORMAL VALIDITY**

Formal validity is governed by the law of the place of celebration: the ***lex loci celebrationis*** (*Brook*)

1. Look to the **foreign domestic law**
2. In the alternative, look to the **foreign conflicts rule** (*Taczanowska*)

**Partial renvoi** is now built into the CL CoL rule: courts can either use partial renvoi as an alternative validating rule if they don’t achieve the desired result through the application of the foreign domestic law.

**ESSENTIAL VALIDITY**

Essential validity is governed by either (*Brook*):

1. The **dual domicile rule** (the predominant approach); or
	* **Rule:** Each party has to have capacity according to the law of his/her domicile at the moment of marriage
	* **Prob:** *Double trouble*—since the couple has to pass the test of two legal systems, there are two chances that the marriage could be found invalid if they were domiciled in different legal systems
2. The **law of the intended matrimonial home** (applied in *Narwhal*)
	* **Rule:** The marriage must be essentially valid according to the law of the first Jx in which the parties live together as partners (post-nuptials)
	* **Prob:** It can be difficult to ascertain where the matrimonial home will be, and what if the matrimonial home is never reached? (*Narwhal*)

**Strategy** 🡪 In making an argument for/against essential validity, you can choose b/w either rule—just convince the court what makes more sense in the circumstances.

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| ***Brook v Brook***, 1891 HL 🡪 Created the bifurcation of marriage validity; **formal** = *LLC*; **essential** = DDR/intended matrimonial home |
| **Facts:** | H + W married in Denmark bc they weren’t allowed to marry in England—W was the sister of H’s first wife! After H + W died, one of their kids also died. Hence, dispute arose as to who was entitled to the dead kid’s share of his father’s estate.  |
| **Issue:** | Was marriage (to the 1st wife’s SiL) valid? **No** (seems like they found the marriage to be formally valid, but not essentially) |
| **Court:** | * If the HL simply applied the existing CoL rule 🡪 no problem (marriage to a SiL was fine in Denmark)
* But HL couldn’t bring itself to do that and opted not to apply the law of Denmark
* ***Lex loci celebrationis* persists for the formal validity of marriage** (*did you follow the formal procedures?*)
* But for **essential validity**, there are alternatives for each CoL rule:
* **Domicile** 🡪 Dual domicile rule (this is the predominant rule used)
* **Intended matrimonial home** 🡪 post-nuptial; first Jx in which the parties live together as partners
* Court noted that the couple were domiciled in England and planned to come back and live there
* Court also said that Denmark’s law (permitting marriage to SiL) turned its stomach
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| ***Taczanowska v Taczanowski***, 1957 UK 🡪 **Partial renvoi**; not on reading list, but useful nonetheless |
| **Facts:** | H + W (both Polish) were married in a Catholic church in Italy. The ceremony was performed by Catholic priest, but certain req’d articles of the *Italian Civil Code* weren’t read and the marriage wasn’t registered (also req’d in Italy). **Forum =** England. ***Lex causae* =** Italy. |
| **Issue:** | Is the marriage formally valid? **No** |
| **Gummow & Hayne JJ:** | * **Characterization of issue:** Formal validity; connecting factor = *lex celebrationis* (place where marriage was celebrated)
* **First:** Look to Italian domestic law—*did the ceremony comply w/the domestic law of Italy?***= no, it didn’t**
* If we apply Italian domestic law, then there was not a valid marriage
* **Second:** Court policy was to try to uphold marriages, so court employed **partial renvoi** 🡪 looked at Italian CoL rule
* Italian CoL rule said that validity of marriage was governed by the *law of nationality* = the law of Poland = **transmission to 3rd legal system** (England 🡪 CoL 🡪 Italy 🡪 CoL 🡪 Poland)
* Court looked to law of Poland to see if H + W had complied w/Polis law = they hadn’t = **not a valid marraige**
* **Partial renvoi:** A single reference to another legal system; never look at the CoL rule of the 3rd Jx (or the forum’s in the case of remission)
* 1st try domestic law of *lex causae*, then the CoL rule of the *lex causae* (or forum if there’s remission), then apply the domestic law of the 3rd Jx (or the forum)
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| ***Canada v Narwhal***, 1990 FCA 🡪 Court applies the **intended matrimonial test** (in spirit) to essential validity (affinity case) |
| **Facts:** | W came to Canada as the fiancée of one brother. They marry & divorce. Then W marries the other brother who lives in India (marriage took place in England). Husband (bro #2) returned to England to apply for admission to Canada, which caused the validity of the marriage to become an issue. Bro #2 = domiciled in India; W domiciled in Canada. |
| **Issue:** | Is the marriage to bro #2 essentially valid?  **Yes** |
| **Court:** | * Immigration Board applied the **dual domicile rule** (one of 2 options flagged in *Brook*)
* Under law of India (W’s domicile), there is no capacity to marry your SiL (like in *Brook*) = not essentially valid marriage
* Fed CA then applied the **intended matrimonial home** **test** 🡪 Canada = essentially valid marriage
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| ***Schwebed v Ungar***, 1965 SCC 🡪 Application of **dual domicile rule** |
| **Facts:** | Couple married in Hungary (where they were domiciled at the time). Later that year, they left for Israel and planned never to return to Hungary. It took them years to get to Israel. When they got to Italy (en route), they divorced. Eventually they both got to Israel, where they lived independently for a number of years (became their DoC). Wife came to Canada & married Schwebel; they had daughter then divorced. Schwebel found out about her 1st marriage and asked for an annulment. At the time, Canada wouldn’t recognize the divorce in Italy = she wasn’t single = lacked capacity to remarry. |
| **Issue:** | Is the marriage essentially valid? **Yes**  |
| **Court:** | * Issue goes to essential validity 🡪 capacity depends on wife’s domicile (Israel)
* Israeli law said that the divorce was valid = the re-marriage was valid
* Israeli law recognized the divorce in Italy
* **Incidental question:** The issue of recognition of the divorce in Italy = a conflicts question in its own right
* SCC had 2 choices: **(1)** To apply the recognition rule for divorces of the forum, or **(2)** To apply the conflicts recognition rule for foreign divorces of the *lex causae* (Israel)
* Had Schwebel asked the court for a declaration as to whether Canada would recognize the divorce in Italy, the answer would’ve been “no”
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| ***Sangha v Mander***, 1985 BCSC 🡪 Impotence case; application of dual domicile rule |
| **Facts:** | Wife (domiciled in BC) married H (who moved from India and was probably still domiciled there. H was impotent & they were unable to consummate the marriage. H left 7 days after ceremony. W wanted the marriage declared void on grounds of impotence (sought annulment). No problems re: formal validity. |
| **Issue:** | Is the marriage essentially valid? |
| **Huddart J:** | * Application of **dual domicile rule**, which is the dominant CoL rule (the one that most ppl are likely to think of in this context)
* The **intended matrimonial home test** should be used as an alternative
* Here, since there was no evidence of the law of India, we presume the law of the forum = apply BC law = able to resolve the validity of the marriage
* **If there’s no evidence about the *lex causae* or if the evidence is unsatisfactory (e.g. duelling experts) 🡪 the law of the forum applies**
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| ***Vervaeke v Smith***, 1983 HL 🡪 **Sham marriage case**; special CoL **rule:** the Jx with which the “sham” marriage has the most rasc |
| **Facts:** | “Sham” marriage (we don’t care about the facts). |
| **Lord Simon:** | * Only judge to create a CoL rule for sham marriages: **the Jx w/which the sham marriage has the most rasc**
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## TORTS

1. **Start w/ordinary rule** (*Tolofson*) 🡪 ***lex loci delicti*** = the torts claim is governed by the law of the place where the tort occurred
	* Heads of damages = substantive 🡪 governed by *lex loci delicti*
	* Quantification of damages = procedural 🡪 forum law applies
	* Pre-judgment interest = substantive 🡪 governed by *lex loci delicti* (*Somers v Fournier*)
2. **See if any exceptions** **apply** 🡪 there are several “work-arounds” that can be argued:

**Narrow exception for international torts** (can only use this if the tort occurred outside Canada)

* + Court retains limited discretion to apply *forum law* in int’l litigation where necessary to avoid injustice (*Somers*)
	+ Use this if the forum law > *law loci delicti* in the circumstances
	+ No Canadian case has applied this exception yet

**Argue for a different CoL rule based on the inherent characteristics of the tort**

* + Rely on *Banro*, which could signal the possibility of special CoL rules for particular torts like defamation—*can we extrapolate from this and expand it?*
	+ Possible examples include conspiracy, product liability, and defamation
	+ **Defamation:** In *Banro*, Lebel J suggests that the CoL rule governing defamation should be the law of the place of the most substantial harm to the reputation of π

**Rely on renvoi** (by relying on *Neilson*)

* + Cite *Neilson* and see what happens, even though it hasn’t been used in Canada yet (but used in AUS)

**Play around with the characterization of the tort** (substance vs. procedure; tort vs. K, etc.)

**Argue the public policy exclusionary rule** (Dicey Rule 2)

* + Courts won’t R/E the law of a foreign Jx if it would be inconsistent w/fundamental policy
	+ This is a narrowly defined exclusionary rule with a strict test: *must be a foreign law/judgment that turns the stomach of the judges in the court* (they find it so repulsive that they can’t bear to apply it) (*Lloyd’s*)

**Contest the location of the tort**

* + For Jx purposes 🡪 a tort can be located in multiple places
	+ For CoL purposes 🡪 we require a single location/*situs* of the tort so we get a single legal system (some torts are more amenable to manipulation than others

**If π & ∆ have a Kual relationship, look for a CoL provision to cover any tort action arising out of performance of the K**

* + E.g. Misrepresentation could be covered by a CoL clause—it depends on the drafting of the K

**Forum-shop!**

* + If another Jx has a CoL rule which would be more beneficial to your client, there’s nothing unethical in exploring that option (although the SCC doesn’t like this)
	+ As counsel, it’s your obligation to think about the different for a in which you could bring your client’s action

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| ***Tolofson v Jensen***, 1994 SCC 🡪 Tort CoL rule = ***lex loci delicti*** (place where the tort occurred); possible int’l tort exception |
| **Facts:** | Car accident in Sask w/Sask driver. Tolofson = π; didn’t commence an action until he was 20 (he was 12). Sued both father and other Sask driver. Commenced action in BC (fine), but Sask had v short LP. Sask law req’d that gratuitous passenger must establish wilful and wonton misconduct (“gross negligence”) on behalf of the driver.  |
| **Issue:** | Does BC or Sask law apply? **Sask** (*lex loci delicti*) |
| **La Forest J:** | * Critiqued *Phillips*’ **double barrel rule**; provides his own explanation
* New CoL rule = ***lex loci delicti*** = easy to apply
* We have to find a single *situs* for a tort for CoL purposes
* La Forest J concedes that sometimes it might be difficult to locate the place where the tort occurred (e.g. products liability)—might have to play around with where the tort occurred
* Have to find a single situs for a tort for choice of law purposes
* SCC contemplated the possibility of an international exception to the *lex loci delicti* where it doesn’t work appropriately 🡪 then we would go back and apply the law of the forum (if international tort)
* To date, parties have been unsuccessful in arguing that the forum law should be apply instead of *lex loci delicti*
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| ***Somers v Fournier***, 2000 ONCA 🡪 **The int’l exception requires int’l facts and an injustice if the *LLD* were applied** |
| **Facts:** | MVA occurred in NY b/w π (ON resident) and ∆ (NY resident). π brought action in ON against ∆; wanted ON law to apply. π tried to convince the court that the tort fell within the international exception raised in *Tolofson*. |
| **Issue:** | Does the international exception apply here, causing the law of ON to apply? **No** |
| **Cronk JA:** | * **The bar is set v high**—court is only willing to apply forum law instead of *LLD* where an injustice would occur
* Here, it wouldn’t be unjust to apply the NY law
* If 2 ON residents had collided in NY state, maybe that would’ve been a justification for applying the law of the forum
* **Characterization:** costs = procedural; pre-judgment interest = substantive; availability of heads of damages = substantive; quantification of damages = procedural
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| ***Editions Ecosociete v Banro***, 2012 SCC 🡪 This case is one of the *Van Breda* quartet; possible exception for **defamation** |
| **Facts:** | ∆ (Qc Cx) published something that dealt w/mining activities of some Canadian Cxs. π (ON mining company) sued for defamation in ON. |
| **Issue:** | Does the ON court have Jx in this action (where Qc Cx is being sued)? |
| **LeBel J:** | * Applying *Van Breda*, Lebel J said that ON had Jx—clearly there had been publication in ON
* *Tolofson* left room for the creation of exceptions to the *LLD* rule
* Suggested that the applicable law governing defamation should be **the place of the most substantial harm to the reputation of π** (there’s AUS authority for this)
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## CONTRACTS

**CONNECTING FACTORS in a K ACTION**

1. **The forum** 🡪 the place where the K issues are being litigated
2. ***Lex loci contractus* (*LLC*)****🡪** the place where the K was made
3. ***Lex loci solutionis* (*LLS*)** 🡪 the place where the K is to be performed
4. **The proper law of the K (PLK)**

**The PROPER LAW of the K**

The primary CoL rule for K law is the **proper law of the K (PLK)**. The following propositions hold true:

* **A K cannot exist in a legal vacuum**—there has to be a PLK from the moment the K first came into existence (its inception)
* **The PLK can’t float**—you can’t have a CoL clause that narrows down the PLK to a few Jxs (e.g. could be law of China or BC)
* **The PLK can’t shift**—can’t start out with one PLK, then have it shift to another PLK partway through the life of the K (you would have to enter a new K altogether)
* **Ks can be divisible**—while the PLK can’t shift, and there’s usually one PLK governing the entire K, courts have mused that it’s possible to have a K in which one part is governed by one PLK and another part is governed by a different PLK (*Re Pope*)

The PLK governs *most* K issues, but there are a few **exceptional issues which aren’t governed by the PLC**:

* **Formation** (whose law governs the Q of whether a K has come into existence)
* **Formalities**
* **Capacity** (e.g. minors; agency for a Cx)
* **Illegality**

**DETERMINING the PROPER LAW of the K**

Determining the PLK is often a—if not the—critical issue. The PLK can be subjectively or objectively determined through the application of a **multi-factorial approach**:

* **Subjectively** = parties decide the PLK
	+ **Express** (clause in K) 🡪 “this K should be governed by the law of X”
		- The clause must be ***bona fide***, **legal**, and in accordance w/forum **public policy** (*Vita Foods*)
		- There need be no connection b/w the K and the law selected—the principle of party autonomy allows contracting parties to choose a completely uninvolved 3rd legal system (*Vita Foods*)
	+ **Implied** 🡪 despite lack of *express* CoL clause, there’s an *implied* CoL clause in the K (\*\*less common\*\*)
		- Look @ the **entirety of contractual relations** to ascertain the parties’ subjective intentions (*Richardson*)
		- The presence of an arbitration clause preferring a Jx is v persuasive, but not determinative (*Richardson*)
		- You can’t look outside of the K in this analysis—must look within the K’s four corners (*Richardson*)
		- **Factors to consider** (*Richardson*)**:**
			* The language in which the K was written
			* The terms used (i.e. CL vs. civil law terms)
			* The currency for payment
			* The validity of clauses in the K (we assume parties intended to negotiate a valid K)
			* The existence of an arbitration clause (v weighty: *Richardson*) or a Jx-selecting clause
			* The law of the flag (ship in *Richardson* was sailing under the Russian flag)
* **Objectively** = parties fail to consider the PLK, so it’s objectively ascertained by the courts (\*\*most Ks w/o CoL clauses\*\*)
	+ **Imputed** 🡪 completely objective assessment by the court (in theory, the court determines what the PLK was at the moment of contracting despite either party knowing of it)
		- **Consider the K as a whole, in light of all the circumstances surrounding it, applying the law which appears to have the closest & most substantial connection** (*Colmenares*)
			* **Factors to consider & weigh:**
				+ The place where the K is to be performed
				+ What is to be done under the K (i.e. K of insurance/shipping/sale of goods/consumer)
				+ Residence/domicile of the parties to the K (less weighty, but still relevant)
				+ The place where the K was made (although *Colmenares* says this isn’t determinative)
				+ The fact that one legal system doesn’t have rules to handle the dispute (*Amin Rashid*)
				+ The form of the K (*does it resemble the typical form of a particular legal system?*)
			* **Assess in light of the 4 connecting factors:** *lex fori*, *lex loci contractus*, *lex loci solutionis*, & PLK

**The TIME ELEMENT PROBLEM** 🡪 The PLK is *determined* as of the time/date when the K was made, but the law that is actually *applied* to K issues is **the law as it exists at the time of litigation**

**NO RENVOI** in the context of K law—don’t forget!

* The primary CoL rule is the PLK, meaning the domestic law of the Jx—renvoi never comes into play

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| ***Vita Foods v Unus Shipping***, 1939 PC (Canadian case appealed to PC) 🡪 **Express CoL clause**; deals w/a number of K issues: express CoL; incorporation of law; illegality |
| **Facts:** | K to ship goods from Nfld to NY was entered into in Nfld. Shipwreck on shores of NS (where ship was registered). Goods were reconditioned; kept sailing to NY. π (Vita Foods) brought claim for damages against ∆ (Unus Shipping) in NS (no Jx issue). The K exempted ∆ from negligence, so π had to argue that the K was void/illegal bc it was in breach of a Nfld statute (K was supposed to contain an express statement staying it was subject to Hague rules). The K also contained a CoL clause selecting the law of England to govern the K.  |
| **Issue:** | What effect should be given to the express CoL clause?What effect should be given to the argument that the K was void for breach of Nfld statute?  |
| **Lord Wright:** | * **Express CoL clause**
* The K is governed by the PLK: *the law which the parties intended to apply*
* The PLK is objectively ascertained and, if not expressed, it will be presumed from the terms of K & relevant surrounding circumstances
* If parties include a CoL clause, it will apply if it’s **(1)** *bona fide*, **(2)** legal, **(3)** if there’s no countervailing public policy reason to avoid the choice
* Principle: **parties to a K are encouraged to exercise party autonomy, although their choice isn’t absolute**
* Parties can choose to have the K governed by any law they want—there doesn’t have to be any connection b/w the K or the parties and the law that they select to govern their K
* You’re not guaranteed that your CoL clause will be respected by the courts, which have the discretion to set aside your choice on three possible grounds: (1) ***Bona fide***, (2) **Illegality**, (3) **Public policy**
* **Incorporation of law**
* The parties had incorporated an American statute + a Canadian statute—*how does this incorporation by reference affect the CoL?* 🡪 **it doesn’t**—you can incorporate any statute by referring to its name, which freezes the statute at the time you incorporated it
* **Illegality:** *Is the K void for illegality (i.e. because it contravenes a Nfld statute)?*
1. Look at the statute & interpret it—*is it obligatory or directory?* 🡪 **obligatory** = K is still valid
* **Obligatory** = a failure to comply would result in a void K
* **Directory** = hoping for compliance, but no consequences for failing to comply
1. Look at the relationship b/w the Nfld statute to the K in question
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| ***Richardson International Ltd v Mys Chikhacheva***, 2002 FCAS 🡪 **Implied CoL clause**; look within 4 corners of K; arbitration clause |
| **Facts:** | R (WA Cx) = π; entered into K w/Russian company. π asserted that it supplies necessaries for a trawler + 2 other vessels owned by the Russian company. π sued the trawler (∆); ship arrested in Nanaimo. π brought an action against the vessel claiming a maritime lien, but the right to claim the lien depended on the PLK. No express CoL clause. |
| **Issue:** | In the absence of express choice of law clause, what’s the PLK? **US law** (which the arbitration clause pointed to) |
| **Malone JA:** | * Must weigh a multiplicity of factors, but most important factor here was the **arbitration clause** 🡪 this indicated an *implied intention* to have US law apply
* But other factors were also considered—an arbitration clause isn’t necessarily determinative (see list above)
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| ***Imperial Life Assurance Co of Canada v Colmenares***, 1967 SCC 🡪 **Provides formula for objectively determining the PLK** |
| **Facts:** | Life insurance policy was issued through the company’s branch office in Cuba. Policy was written in Spanish, but the K itself was drafted in a common standard form used in ON (where insurance company’s head office was). Mr. C didn’t stay in Cuba—he wanted to cash in his life insurance policy & recover cash-surrender value. However, such payment was going to be illegal by the law of Cuba. |
| **Issue:** | What is the PLK of the life insurance policy K—Cuba or ON? **ON** (place where it turns out that the K was made) |
| **Judge:** | * **Substance of the obligation must be determined by the PLK: the system of law by reference to which the K was made or the place where the K had its closest & most real connection**
* **First:** Look at where the K was made
* Assumption that K was made in Cuba, where it was issued…
* … BUT the policies were prepared in ON; ON form was used; any request for payment had to come from head office (ON) = **the K was made in ON**
* **Then:** Since the place the K was made isn’t determinative, still have to decide the PLK by considering the K as a whole in light of all surrounding circumstances and applying the law with which it ahs the closest & most substantial connection
* Look at both the K and what has to be done under the K
* **Result:** The PLK = the law of ON = Mr. C can recover
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| ***Amin Rasheed Shipping Corp v Kuwait Insurance***, 1984 HL 🡪 Difficult to distinguish b/w implied CoL & objective determination |
| **Facts:** | π = Liberian shipping company; head office in Dubai. ∆ = Kuwait insurance. In England, π brought claim against ∆ for loss of ship confiscated by Saudi authorities. Question of PLK was to determine whether English courts had Jx.  |
| **Issue:** | Solely for Jx purposes, what’s the PLK? **England** |
| **Diplock & Wilberforce JJ:** | * **Key factors:** K written in English, on English form, Kuwait currency, K made in Kuwait
* **HOWEVER** at the time the K was entered into (critical time for determining the PLK) **Kuwait had no indigenous law of marine insurance**
* Court decided that the PLK = English law

**Diplock** 🡪 found an **implied CoL** in favour of England (which was strange bc nobody actually argued this)**Wilberforce** 🡪 came to same conclusion, but determined the PLK **objectively** |

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| ***Re Pope & Talbot***, 2009 BCSC 🡪 case in which a K was found to be governed by more than one proper law |
| **Facts:** | Receivership of PT (products company w/various branches in BC). PT maintained DIR + OFR liability insurance. In BC, wage claims were made against DIRs. Q for insurance companies: what’s the PLK of the DIR + OFR liability policies? The PLK would determine whether there was liability: law of Oregon, BC, or *dépeçage* (principle which recognizes >1 MLK). |
| **Issue:** | Is the law of Oregon or BC the PLK and, if not, does the principle of *dépeçage* apply? **BC** |
| **Walker J:** | * **The parties chose not to choose** = the chose *dépeçage*, despite having ample opportunity to select one PLK
* However, we still need to look at the K as a whole
* Court looked @ thee factors:
* Where K was made = likely BC 🡪 favours BC
* Form of the K = no evidence 🡪 this factor is neutral
* Where parties’ operations were located = bulk of operations in BC 🡪 favours BC
* The subject matter of the K = worldwide liability insurance 🡪 this factor is neutral
* Where claims might be expected to arise = most were expected to arise in Canada 🡪 favours BC
* **Conclusion:** Parties would reasonably have expected BC law to apply
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| ***Miller v Whitworth Estates***, 1970 HL 🡪 Balancing of factors; no express CoL clause |
| **Facts:** | K b/w English and Scottish companies. Scottish company was to carry out conversion work on building in Scotland owned by the English company. K was made in Scotland; the form of the K was English. The architect on the plan was English. There was also an arbitration clause that governed the selection of an arbitrator (ended up being Scottish).  |
| **Issue:** | What’s the PLK? **Law of England** |
| **Court:** | * Factors were fairly balanced (which is quite common)
* **In the absence of an express CoL clause, it’s difficult to get any kind of “slam dunk” result**
* Need to look at the K as a whole
* **Relevant factors included:**
* Place where K was made (usually not weighty)
* Parties to the K (where they’re domiciled, where they carry on business, their nationalities)
* The K itself (language, terms used, money of account, validity of clauses, etc.)
* What is to be done under the K (what the K is for, where it’s to be performed)
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| ***BP Explorations v Hunt***, 1976 QB 🡪 Can use parties’ intention to circumvent a law as a factor to eliminate it as a potential PLK |
| **Facts:** | Litigation b/w Hunt brothers (in Texas) who entered into a K w/BP (head office in England). K was to develop an oil concession in Libya. However, Libya expropriated all the oil concession. This was a Jx case in which the Q was the PLK. |
| **Issue:** | What’s the PLK (i.e. does the English court have Jx to hear the dispute)? **Not Libya** |
| **Court:** | * Court looked to evidence, which was to the effect that parties to the K had **intended to circumvent Libya law** 🡪 this was a factor sufficient to **eliminate Libya** as an option = either England or Texas
 |

**FORMATION**

This section deals with the question of **whether a K has come into existence**. Here, we can’t simply use the PLK because someone is arguing that there is no K.

**To determine whether a K has come into existence, we can look at either** (argue what’s favourable to your client)**:**

1. ***Lex fori*** (*Mackender*) 🡪 Argue that since there’s no K, the court should use the law of the forum
	* Basically, we’re treating the K as if it existed for jurisdictional purposes
2. **The putative PLK** (*Shoe Machine*; *Parouth*) 🡪 Argue that the law that *would* have been the PLK should be applied
	* We assume that the K had come into existence and apply its PLK
	* As per *Parouth*, this is a viable option when parties are communicating/negotiating back and forth but there is no physical K (also the case in *Shoe Machine*)

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| ***Mackender v Feldia AG***, 1967 QB 🡪 Used **law of the forum** to determine whether there was a K (authority for this approach) |
| **Facts:** | Insurance policies. CoL clause selected the law of Belgium to govern the K. Jx-selecting clause also selected the courts of Belgium. Loss occurred in Italy. Lloyd’s argued that the K was void for illegality, public policy, and non-disclosure: the merchants didn’t disclose that they were smuggling diamonds into various countries. Lloyd’s said that since the K was void, the CoL/Jx-selecting clauses were invalid—the entire K was eliminated. On this basis, Lloyd’s applied in England for a declaration that the K was void. |
| **Issue:** | What law determines whether the K came into existence? **English law** (which said that the K wasn’t void) |
| **L Denning:** | * Applied the law of the forum (English law) = the K wasn’t void 🡪 the clauses are enforceable 🡪 go to Belgium
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| **L Diplock:** | * Raised the possibility of applying the **punitive PLK**, but still wound up applying the law of the forum (English law)
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| ***Shoe Machine Case*** 🡪 Used the **putatitve PLK** to determine whether there was a K (authority for this approach) |
| **Facts:** | Swiss & English companies exchanged letters negotiating a K where π (Swiss company) would be the agents in Switzerland for ∆ (English company). π sold four machines, then ∆ claimed that the K was void—didn’t get the letter.**Swiss law** 🡪 there’s no K made until the letter is received = favoured ∆ **English law** 🡪 the K is concluded on the posting of acceptance = favoured π  |
| **Issue:** | What law determines whether the K came into existence? **Swiss law** (which said that the K hadn’t come into existence) |
| **Court:** | * If it had been established that the letter was posted, the putative PLK would’ve been Swiss = there would’ve been no K
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| ***Parouth***, 1982 CA 🡪 Used the **punitive PLK** to determine whether there was a K; useful when parties are negotiating a K |
| **Facts:** | π wanted to litigate in England. Court had to decide whether there was a K for the purposes of service *ex juris*. K consisted of a bundle of telexes. One party suggested/stated that: “there should be arbitration in London in the event of a dispute”. |
| **Issue:** | What law determines whether the K came into existence? **English law** |
| **Court:** | * Based on the potential arbitration clause, the putative PLK = English law
 |

**FORMALITIES**

Issues that can be classified as going to the formal validity of a K are very easily characterized as issues going to **substance vs. procedure**. Strategically, we’ll want to find the outcome in our client’s favour and argue for the application of that law.

**Rule of alternative reference 🡪** Can use either the PLK of the *lex loci contractus* to establish formal validity (*Greenshields*, TJ):

1. **The PLK** (*Greenshields*)
	* **Rationale:** Contracting parties should be free to take legal advice about formalities in the place where they happen to be contracting (i.e. they should be allowed/encouraged to seek local advice)
2. ***Lex loci contractus*** (the law of the place where the K was made)
	* **Rationale:** If contracting parties are *selecting* a proper law to govern their contractual relations, they ought to be able to rely on that law and satisfy any requirement for that legal system wrt the formal legality of the K

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| ***Greenshields v Johnson***, 1981 ABQB 🡪 **Rule of alternative reference @ trial level:** can use either PLK or *LLC* to find validity |
| **Facts:** | AB statute intended to protect ppl guaranteeing a loan. Parties to the K selected the law of ON as the PLK (express choice).  |
| **Issue:** | Which law applies—the PLK, or *lex loci contractus*? **PLK** (QB); Is the K formally valid? **Yes** (TJ) |
| **TJ:** | * Characterized the issue as going to the formal validity of the K 🡪 there are 2 CoL rules; can use either to find K valid
* **PLK** = **ON 🡪** would find the K valid
* ***Lex loci contractus*** = AB **🡪** would find the K invalid
* Since only one of the two options needed to be satisfied, the K is formally valid under option #2: the PLK
 |
| **QB:** | * Characterized the issue as substance vs. procedure (not an issue re: formal validity)
* If the statute is characterized as a procedural rule = AB law would’ve applied
* If the statute is characterized as a substantive rule = ON law would’ve applied (the PLK) 🡪 this is what they also chose
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**ILLEGALITY: RULES OF MANDATORY APPLICATION**

The issue of illegality frequently arises in the context of Ks being regulated by legislative action. Statutory rules of the *lex fori* sometimes apply to Ks governed by foreign laws, giving rise to tension b/w **party autonomy vs. legitimate desires of legislature** to impose restrictions based on fairness, social policy, & economic regulation. We don’t want to enforce unlawful Ks—this is **comity**.

Strategically, **illegality is a good argument to raise as ∆**: try to find a relevant statute that can be invoked to say the K was illegal.

**Framework:**

1. **Determine whether the statute applies to the K based on the four possible connecting factors for illegality:**
2. **PLK** (proper law of the K) 🡪 Any alleged illegality by the PLK is considered relevant—it will always apply
3. ***Lex loci contractus*** (law of the place where the K was made) 🡪 If *LLC* is the only connection to the Jx whose law is being invoked, then the illegality is considered to be not relevant or applicable (*Vita Foods*)
4. ***Lex loci solutionis*** (law of the place where the K is to be performed) 🡪 Courts are reluctant to enforce Ks in circumstances where the performance of that K would breach the laws of the place it is being performed = this factor may be relevant (*Gillespie*)
	* This is in accordance w/**comity**: we don’t want to require a party to a K to breach the laws of a foreign Jx (Sutherland J in *Gillespie*)
5. ***Lex fori*** (forum law) 🡪 Circumstances in which a court will apply the law of its own Jx (set out in *Avenue Properties*)
	* Where the local law is **procedural**
	* Where the local law, though substantive, is a law of **mandatory application** (as was the case in *Avenue Properties*)
		+ As per *Vita Foods*, a statute is merely *directory* if the legislature is hoping for compliance, but there’s no actual consequence for failing to comply
	* Where it would be contrary to **public policy** to enforce a K which contravenes the local statute (McLachlin J in *Avenue Properties* (but EE says that this undercuts the v narrow def’n of “public policy” that courts have held)
		+ This argument failed in *Meinzer*—the threshold here should be pretty high (re: ON’s *Securities Act*)
6. **Statutory interpretation** – If the statute is deemed applicable, interpret it to see whether it applies to the given case
* Consider whether the statute is merely **directory** (*Vita Foods*) or **mandatory** (*Pearson*)
* Consider the scope of the legislation
* Consider the effect of the legislation on the K

**Note on illegality vs. public policy defence:**

* Public policy defence = narrowly defined; has to do w/fundamental values, etc.
* Illegality = doesn’t reach as far as fundamental values—it’s a slightly lesser kind of statutory prohibition

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| ***Avenue Properties Ltd v First City Development Corp***, 1986 BCCA 🡪 involves **forum** and ***lex loci contractus***  |
| **Facts:** | π = BC company. π entered into K to purchase immovable property in ON from ∆ (AB company carrying on business in ON). CoL + Jx-selecting clauses selected ON. π informed ∆ that it wasn’t going to complete the purchase bc ∆ hadn’t delivered a prospectus which was req’d by BC’s *Real Estate Act*, thereby making the K unenforceable by forum law. ∆ commenced action in ON; π later commenced action in BC for a declaration that the K was unenforceable + return of monies deposited. The *REA* expressly applied to land sold outside of BC. |
| **Issue:** | Should BC stay the action in favour of ON based on *fnc*? **No** (BC action proceeds) |
| **McLachlin J:** | * BC *REA* didn’t contain a unilateral CoL rule, but it was a statute of the forum = BC court must apply it
* It’s v unlikely that the ON courts will apply BC statute to this action; however, it’s more likely that a BC court will apply the *REA* (same reasoning as in *Douez*: if we (BC) retain Jx, there’s a good chance that forum law will be applied) = decide not to stay the BC action
* Illustrates the approach that was floated in *Vita Foods* where there’s a coincidence b/w the forum and the statute
* If the forum law happens to coincide w/the statute in the *lex loci contractus*, then the forum court might apply the statute which would otherwise be disregarded
* **Result:** The *REA* should be applied bc it’s a **forum law of mandatory application** and not applying it would be in contravention of forum **public policy** (EE: this seems weak; public policy def’n is supposed to be v narrow)
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| ***Gillespie Management Corp v Terrace Properties***, 1989 BCCA 🡪 *Lex loci solutionis* (place where K is to be performed) |
| **Facts:** | Terrace (π) and Gillespie (∆) entered into an agreement whereby π would manage properties for ∆ in WA. π commenced action in BC for breach of K. ∆ raised the defence of illegality: π wasn’t licensed to manage properties in WA. PLK = BC law.  |
| **Issue:** | What relevance, if any, is π’s failure to be licensed in WA? **Illegality** (π’s action failed; ∆’s illegality defence succeeded) |
| **McLachlin J:** | * First must decide what relationship WA had to the K 🡪 *lex loci solutionis*
* **A BC court will not enforce a K which is illegal by the law of the place where the K is to be performed**
* The doctrine of illegality is founded on considerations of domestic public policy of not enforcing unlawful bargains or requiring unlawful conduct
* BC court won’t enforce a K that depends on illegal performance in the place where the K is performed
* Illegality in the place of performance—even part performance—renders the K unenforceable in BC if π has to rely on unlawful conduct
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| ***Society of Lloyd’s v Meinzer***, 2001 ONCA 🡪 Illegality argument failed here |
| **Facts:** | In contracting w/ON residents, Lloyd’s didn’t comply with ON’s *Securities Act* re: disclosure requirements).  |
| **Issue:** | Should ON’s *Securities Act* render the K void for illegality? **No** |
| **Feldman JA:** | * ON court decided not to apply its statute due to lack of connection
* Not strong enough to be considered contrary to public policy
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## UNJUST ENRICHMENT

1. **Dicey Rule 230(1): CoL rule for restitution 🡪** the obligation to restore the benefit of an enrichment obtained at another person’s expense if governed by the **proper law of the obligation (PLO)** (Dicey rules = adopted by the BCCA in *Zimmerman*)
2. **Determine the PLO**

**Route #1 🡪 Dicey Rule 230(2):** The proper law of the obligation is determined as follows:

1. If the obligation arises in connection with a contract, the PLO = the law applicable to the contract
2. If the obligation arises in connection with a transaction concerning an immovable, the PLO = the *lex situs* (the place where the immovable is located)
3. If the obligation arises in any other circumstance, the PLO = the law of the country where the enrichment occurs (often chosen by way of elimination)

**Route #2** 🡪 **Rely on the additional ground provided by *Minera*:** If the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign lands, then examine all the factors that could be relevant to the strength of the connection b/w the obligation and the competing legal system to decide on the law with the **closest and most real connection to the obligation**; factors include (*Minera*):

* + Where the transaction underlying the obligation occurred (or was intended to occur)
	+ Where the transaction underlying the obligation was to be carried out (or was intended to be carried out)
	+ Where the parties are resident
	+ Where the parties carry on business
	+ What the expectations of the parties were w/respect to governing law at the time the obligation arose
	+ Whether the application of a particular law would cause an injustice to either of the parties

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| ***Minera Aquiline Argentina SA v IMA Exploration Inc and Inversiones Minera Argentina SA***, 2006 BCSC; aff’d 2007 BCCA  |
| **Facts:** | Parties entered into K for sale of mineral claims in Argentina, but ∆ then staked out a nearby claim which wasn’t covered by the confidentiality agreement. π argued that ∆ breached the K by using confidential info obtained in negotiations. PLK = law of Colorado, but BC court applied BC law since nobody adduced evidence about Colorado law. |
| **Issue:** | What is the proper law of the obligation (PLO)?  |
| **Koenisberg J:** | * **Result:** BCSC decided that the breach of confidence was covered by the K—everything was resolved by the K—but decided the conflicts issue too
* Did the K include information re: the 2nd site? **🡪 Yes** = breach of K
* What’s the lex causae: proper law of the K, or law of the situs?
* **Apply a principled approach where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land** 🡪 examine all the factors that could be relevant to the strength of the connection b/w the obligation and the competing legal systems (factors listed above)
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## PROPERTY

This is a v large, complex, and important juridical category in the area of conflicts. **Characterization** is critical in dealing with property issues.

1. **Characterization** 🡪 *Is the property movable or immovable?*
	* The CoL rule will often depend on this classification
2. Then, go the relevant **category**:
	* *Inter vivos* transfer of movable property (*Cammell*)
	* Effect of marriage on property (*FLA*)
	* Post-mortem transfers (wills)
	* Trusts

***INTER VIVOS* TRANSFER of MOVABLE PROPERTY**

**Rule** (*Cammell*) 🡪 **Apply the *lex situs* of the movable at the time of the transfer** (the law of wherever the movable property is located at the time of the transfer)

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| ***Cammell v Sewell***, 1860 ER 🡪 Sets out basic CL CoL rule for transfer of title to movable property |
| **Facts:** | π = property insurer. Ship carrying lumber (insured) ran aground in Norway; cargo unloaded. ∆ was involved w/the purchase of the lumber in Norway. π brought a claim in England for compensation for their loss. Essentially, π’s action was on the basis that it paid for the lumbar, only for someone else to sell it themselves in Norway.  |
| **Issue:** | Which law applies? **Nowegian** (*lex situs* of movable at time of transfer) |
| **Court:** | * **Rule: CL courts apply the *lex situs* of the movable at the time of the transfer** (wherever movable property is located at time of transfer, that’s the law that CL courts apply to determine who has title)
* Thus, ∆ got good title under Norwegian law
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| ***Iran v Berend***, 2007 QB 🡪 No renvoi; apply ***lex situs*** rules |
| **Facts:** | Dealt w/a temple fragment from Iran (dated 531 BCE). Litigation over who owned the property. |
| **Issue:** | Can renvoi be used as part of the law of transfer of title of movable property (*inter vivos*)? **No** |
| **Court:** | * **Renvoi is not a doctrine of general application**—doesn’t apply in this context
* The *lex situs* at the time where title passd = French law
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**EFFECT of MARRIAGE on PROPERTY**

If there’s a family law case involving conflicts issues we go directly to the *FLA*, whichcontains its own CoL and jurisdictional rules.

**106 Determining whether to act under this Part**

* This section contains the jurisdictional rules as to when as BC court can assume Jx in a family law action

**107 Proper law of the relationship**

* This section defines the proper law of the matrimonial relationship
* It also clarifies that there is no renvoi in family law litigation—you’d only apply the foreign Jx’s domestic law to the division of property

**108 Choice of law rules**

* Subsections (3) & (4) recognize the existence & validity of domestic Ks, which might be governed by non-BC law
	+ **Essentially:** If parties to marriage want to enter into a domestic K, they can theoretically choose the law that they want to govern their relationship
* Subsection (5) recognizes “community property regimes” 🡪 if the spouses’ 1st common habitual residence during their relationship was in a Jx in which a community property regime applies (the community property regime imposes restrictions on wills

**SUCCESSION: WILLS & TRUSTS**

* ***WESA* ss 79–**82 🡪 These sections contain CoL provisions
	+ **79** eliminates renvoi (can’t use it to determine the formal validity of a will)
	+ **80** sets out the requirements for the formal validity of a will; contains many options, making it difficult to find a will invalid
	+ Note that there’s no provision dealing with *essential* validity of wills = revert back to CL CoL rules (movables = domicile; immovable = *lex situs*)
* Most important thing to remember: *WESA* does not give the testator (will-maker) party autonomy—you can’t choose the law you want to govern your will
* **Administration**
	+ At CL, all property of the deceased vests in either an executor (if will) or administration (if no will)
	+ That person has obligations: collects the estate, might have to distribute it in many Jxs, pay debts, distribute estate to beneficiaries (if will) or to whoever’s entitled by law (if intestate)
	+ Executor may have to probate the will—prove, in litigation, that the will is valid
	+ If court is vested w/Jx to determine whether will is valid 🡪 court will use forum CoL rules
* **Succession**
	+ Testate 🡪 involves document/will
		- Will must be formally + essentially valid (this is important)
			* No provisions dealing w/the essential validity of wills (but there are some for formal validity I think)
		- Testator may have had to make multiple wills to ensure property goes where he/she wants (because *lex situs* has control)
		- If testator purports to dispose of all property in will, then there may not be proprietary capacity bc some of the property didn’t belong to him/her
	+ Intestate 🡪 deceased never got around to making a will
		- Succession here is relatively straightforward: the estate goes to the beneficiaries determined by law (see *WESA*)
		- If property is spread out across the world…
			* Movable property = principle of **scission 🡪** look to the law of the domicile
			* Immovable property = most Jxs will look to the law of the place where the immovable is located (deference)

***International Trusts Act*, RSBC 1996**

* This act provides for party autonomy—the settler has the right to choose the law to govern the trust (can be express choice or implied choice)
	+ Failure to choose a governing law in the trust document or choice of a law which won’t work = article 8 provides what factors the court should look at to determine the proper law of the trust (4 factors): from these, court determines the proper law of the trust
		- **Where is trust being administered**
		- **Situs of the assets**
		- **Location of residence of trustee**
		- **Objects of the trust**
* *Re Pope* and *Talbot* dealt w/splitting the proper law (one law governed one part of K, one law another)—this is expressly authorized by the *ITA* (usual split b/w administration and the trust itself)
* Don’t need to worry about renvoi in the context of trusts