CHARACTERIZATION

**Substance or procedure?**

* Arises only if forum uses foreign lex causae, i.e. foreign law must be pleaded/proven
* **RULE**: apply procedural lex fori & substantive lex causae
* How to decide?
  + *Tolofson*: substantive concerns the ends of justice & procedural provides the means; not a working def
  + Convenience NOT a factor
  + Characterize in favour of substantive when in doubt; procedural ONLY if necessary for justice to fxn
  + Follow forum precedent

|  |  |
| --- | --- |
| **Procedural** | **Substantive** |
| Quantification of damages  \*costs & cap on NP damages in Ont (*Somers*) | Heads of damages  \*pre-jmt interest in Ont |
| Appropriate court, form of pleadings, service of process/notices, mode of conduct of judicial proceedings generally, execution of jmt (*Tolofson*) | Limitation (*Tolofson***:** Sask limitation; *Clark v Naqvi*: protect medical professionals)  \*may be overridden by statutes in some prov |
|  | Parties, i.e. who can sue (*Hamza*) |

**Who’s a party?** (*Hamza*)

* Foreign person
* Foreign corporation
  + **TEST:** “duly incorporated under the laws of a recognized foreign state & given power to sue, may sue in a CL prov in its corporate name” – COMITY
  + Must be pleaded/proven
  + Subject to statutory limitations
* Unincorporated foreign litigant
  + **TEST**: recognized as a juridical person by home jurisdiction, separate & distinct from its members, i.e. has the necessary characteristic of a party w standing (capable of assuming fully the rights/responsibilities of a legal person…answerable for jmt, crt discretions, costs, etc.)
  + Ex. Switzerland-registered societies in *Hamza*
  + Ex. Indian temple can sue in Eng as legal person bc it has status to sue under Indian law (*Bumper Development Corp*)

EXCLUSIONARY RULES

**1. Penal/revenue/public** 🡪 direct & INDIRECT; FORUM characterization (foreign crt characterization is persuasive)

* Penal law
  + Narrow def in *Huntington v Attrill* – “a suit in favour of the state whose law has been infringed & recoverable/enforceable by state/public, pursuing interest of community) – loosely applied in Cnd
  + Alternatively, draconian/discriminatory laws may be contrary to PP
* Revenue law
  + ALL forms of taxation at ALL levels of govt
  + INDIRECT enforcement may also be denied R+E, i.e. foreign govt doesn't have to be the one enforcing so long as *effect* is to enrich foreign treasury (*Harden*, *Dubois*)
* Public law
  + Leaves open the possibility but not enthusiastic – COMITY
    - Other high courts: *Ortiz*(exercise of sovereignty byd its territory), *Heinemann* (spy-catching using Cr prerogative)
  + Look to the *law*, not the *effect* of enforcement

**2. Residual PP discretion**

* Narrow def: breach of fundamental justice/morality OR law of mandatory application (Securities Act in *Meinzer*)
* Breach doesn’t mean unenforceable; should consider case history & competing PP
* Intl law, if incorporated into forum law, may inform forum PP – incl but not limited to gross HR violations (*Kuwait Airways*)

DOMICILE & RESIDENCE

* Forum decides the connection; ask whether they’ve made a home there
* Business
  + Domicile = place of incorporation
  + Residence = place where it carries on business

**1. Domicile** 🡪 mixed fact & law; may have multiple DD/DC in lifetime but only 1 at a time

* **Domicile of origin** (DO) – domicile of *a parent* at birth
  + *Infants Act*
  + Can’t be changed/abandoned so will revert to DO if DC is lost
* **Domicile of dependency** (DD) – domicile of parents (birth to 19yo)
  + *Infants Act, Law & Equity Act*
* **Domicile of choice** (DC)
  + Place of residence is DC unless it arises from a *clearly foreseeable & reasonably anticipated* contingency
  + **TEST for acquisition**: RESIDENCE + INTENTION
    - **Residence** = physical presence acquired the moment you land
    - **Intention** = freely informed (*Mark v Mark*: possible for illegal immigrants to acquire DC), more than mere declaration
    - Burden is on the party asserting the change to satisfy the conscience of the court (i.e. btw OBP & BARD, closer to OBP) on the weight of evidence (must consider entire life)
    - Ex. *Agulian*, *Re Fuld* – both reverted to DO
  + **Same TEST for abandonment**: leave physically w the necessary state of mind
    - Must be voluntary – not dictated by business, debt or health
    - Need not sever all ties or completely cease to reside, but need more than prelim steps or mere declaration (*Foote v Foote Estate*: Aus = principal residence)

**2. Residence** 🡪 weaker state of mind than domicile; OR = HR but don’t mix up cases

* In BC
  + *CJPTA* uses OR
  + *Hague Abduction of Children Convention* & *Family Law Act* use HR
* **Ordinary residence** (OR) – “an ordinary mode of living w its accessories, relationships & conveniences” (*Nafie*)
  + Indefinite but not necessarily permanent
  + Doesn't require cont. physical presence (*MacPherson*: can leave for a few months but not indefinitely)
  + Can have >1 (*Knowles*)
* **Habitual residence**(HR) – “residence adopted voluntarily & for settled purposes” (*PA v KA*)
  + Refers to quality of residence for which duration may be a factor (no min. duration requirement, but needs more than mere physical presence)

JURISDICTION: IN PERSONAM

JURISDICTION SIMPLICITER

Aka territorial competence in BC

R/S connection

* **Created by *Morguard*; weakened by *Van Breda & Cassels Brock***
  + R/S = not weak or hypothetical
    - Minimal nexus required (*Spar Aerospace*: $50 is substantial; *Chevron*: no asset, still substantial), but residence in the forum of P alone isn’t enough
    - Argue lack of R/S connection or challenge constitutionality of family law provision if desperate
  + Jurisdiction for R+E
    - Constitutional standard of giving full faith & credit to inter prov jmt
    - R/S connection simply operates to ensure ORIGINAL court properly assumed jurisdiction (according to forum rules), i.e. default jmt can have no R/S connection to enforcing court (*Morguard, Beals, Chevron*) (*Braintech*: lacked R/S connection, didn’t properly assume jurisdiction)
* **Doesn’t oust traditional bases** (***Van Breda***)
  + If there’s presence/submission, need not consider connection
    - Clearly present if registered
    - May be present if carrying on business (*Chevron* has an office = present)

**CJPTA Part 2** (BC, Sask, NS)

* s 3(d) ordinary residence
  + Mere presence is sufficient per *Maharanee* & *Morguard*, but CJPTA seems to require more
* s 3(e) R/S connection as alternative
  + s 10 non-exhaustive, rebuttable presumptions
  + For service ex juris
    - Cause of action must be a s 10 category; argue R/S only if not listed
    - Must be an arguable case; low threshold; >1 court can assume jurisdiction (*Bank of NJ, Moran*)
  + **CONTRACTS**:
    - Where contract is made is not listed; may satisfy R/S connection (*Cassels Brock*)
    - Contract must be relevant to cause of action (*Tamminga* vs. *Cassels Brock*)
  + **TORTS**:
    - ***Van Breda* presumptive connecting factors** (residual s 3(e))🡪 challenging party has burden to rebut; lack therefor can’t be replaced by case-by-case exercise of discretion
      * D is domiciled/resident in prov (head office for legal person)
      * D carries on bus in prov
      * Tort was committed in prov 🡪 lex loci delicti, i.e. any jurisdiction *substantially affected* by D’s activities/consequences & ought to be in the *reasonable contemplation* of the parties (*Moran*)
      * Contract connected w dispute was made in prov

\*Non-factors incl mere presence of P & damage sustained in prov

\*Can create new factors based on case law & similarity to listed factors

* + - **Defamation:** showing an arguable case (OBP, someone in BC has directly or indirectly received it) is a sufficient presumptive connecting factor for jurisdiction; no need to show damage (*Debaie*)
    - **Internet activity**: America has the “sliding scale” test (*Zippo* cited in*Braintech*) – jurisdiction proportionate to commercial nature & interactivity; no R/S connection if not “purposeful commercial activity”

DISCRETION

**Forum non conveniens**

* ***Amchem*** adopting *Spiliada*
  + **RULE: stay only granted on FNC ground, i.e. there’s another *clearly* more appropriate forum** 
    - Balance interests of parties & ends of justice (*Spiliada;* CJPTA s 11(1))
    - Look to CONNECTION btw forum & action
  + **Factors are considered in totality** so nothing is decisive; weighing falls within reasoned discretion of TJ
    - Including but not limited to **s 11(2) factors which MUST be considered**
    - *Spiliada*
      * Incl governing law & places where parties respectively reside/carry on business
      * Juridical advt = procedural/substantive difference in law that constitutes advt for one party; reasonably expectation vs. forum shopping
      * Time bar: whether P acted reasonably; can grant conditional stay waiving time-bar
  + **Burden of proof always rests on D since CJPTA**, even though s 11(3) is silent on allocation of burden
    - Court MUST exercise jurisdiction unless D invokes FNC
    - D must *identify* the *clearly* more appropriate forum (failed to do so in *Van Breda*)

**Anti-suit injunction**

* In personam but affects foreign court – COMITY requires ASI to use a higher test than FNC
* English approachin *Aerospatiale*: D must show 1) Eng court is the natural/most appropriate forum; 2) Foreign action is vexatious or oppressive
* ***Amchem*** adopting *Aerospatiale*
  + Cnd court doesn't entertain ASI if no foreign action is pending, i.e. can’t prohibit commencement
  + Should ask foreign (common law) court to stay their own action before coming to Cnd court
    - If foreign court refuses, consider whether they applied similar FNC principles (whether it was reasonable for foreign court to conclude there was no clearly more appropriate forum)
      * If didn’t apply similar principles, consider whether it’s UNJUST to allow foreign action to cont. (DON’T use vexatious/oppressive language)
  + \*However, SCC still applied s 11(2) to allow *lis alibi pendens* in BC, even though foreign court has refused to stay their own action on similar FNC principles (*Teck Cominco*)

**Jurisdiction selection clause**

* JS clause is given heavy weight, but its enforcement is a matter of *discretion*
* Ordinarily, CJPTA s 11 applies (JS clause is one factor among many)
* **When defendant relies on JS clause, *Pompey* applies** –COMITY & freedom of contract
  + Party relying on clause has burden to show clause is valid, exclusive & applicable
    - Alleged breach doesn't displace an otherwise valid clause
  + Other party has burden to show strong cause why action should cont.
    - **Para 19 factors for strong cause**
      * Where the evidence is; convenience/expense of trial
      * Whether foreign law applies & how it differs from lex fori 🡪 P has burden to show foreign territorial competence (ex. *Douez* must show Santa Clara will extinguish her claim)
      * Parties’ connection to each forum
      * Whether D genuinely desire trial in foreign country (vs. forum shopping)
      * Whether D would be prejudiced in foreign action – deprived security for that claim; unable to enforce jmt; time-bar not applicable in Eng; no fair trial possible in that forum
    - Ex. P failed to show strong cause in *Momentous.ca*
  + Subject to statutory limitation
* In BC, it’s a separate CL test (1st conduct *Pompey*; then if necessary, conduct CJPTA analysis to show FNC)
* In Sask, it’s rolled into CJPTA but P still has to show strong cause (*Hudye Farms*)

R+E: IN PERSONAM

**Limitation period** = 10 yrs or limitation of originating jurisdiction, whichever is *shorter* (s 7(b) of *Limitation Act*)

PECUNIARY

**CL rules**

* Foreign jmt must be **final & conclusive** 
  + Res judicata: can’t be contested in court that pronounced it & can only questioned in an appeal (*Nouvion*)
* AND foreign court must have **jurisdiction in the intl sense**, according to forum rules
  + **Presence** (can be fleeting; *Forbes*)
  + OR **submission** (mixed law & fact; must be voluntary; objectively determined ex post facto)
    - Appearance = submission if D doesn’t protest or defends on merits (*1st National Bank*)
    - Appearance ≠ submission if D contests validity of seizure (*before* jmt) or foreign court’s jurisdiction
    - Arguing FNC may not be fatal in BC (*Mid-Ohio*)
  + OR **R/S connection** btw action & originating court
    - *Beals* has extended *Morguard* to intl jmt; in practice R/S connection is overriding but doesn’t replace traditional grounds
    - Possibly a tighter test than jurisdiction (*Beals*)

**Defences**

* Exclusionary rules
  + Foreign **penal/revenue** **laws**
  + Foreign laws contrary to **public policy** (*Huntington v Attrill*)
* Common law defences (*Beals*)

Burden on D to show OBP

* + **Fraud** in foreign court (applicable to default jmt)
    - Fraud going to jurisdiction can *always* be raised 🡪 PROCEDURAL
    - Fraud going to the merits can only be raised when there’s new & material facts not previously discoverable by due diligence 🡪 SUBSTANTIVE
  + Breach of **natural justice**
    - Lack due process, i.e. D wasn’t reasonably notified & given opportunity to defend 🡪 PROCEDURAL
  + Contrary to **public policy** – either as CL or as exclusionary rule
* Legal error by foreign court ISN’T a defence (*Godard*)
* Possible to create new defences (*Beals*)

NON-PECUNIARY

***Pro Swing*** *e*xtended *Morguard/Hunt* to non-pecuniary jmts, most of which are equitable (specific performance, injunction)

**CL rules**

* Satisfy rules for pecuniary orders (final + conclusive & jurisdiction in intl sense)
* Additional considerations (non-exhaustive)
  + **Sufficiently precise & clear** territorial scope so Cnd isn’t subject to unforeseen obligations
  + **Reasonably similar** to orders issued by Cnd court
  + **Judicial resources** – least burdensome for Cnd judicial system; no feasible alternative; litigant must show supervision isn’t costly & matter warrants expenditure

STATUTORY REGIMES

* 2 statutes in BC governing R+E of **jmt**
* Both modify procedure – authorize registration & eliminate issuance of civil process
  + What’s the nature of the order (pecuniary vs. NP, in rem vs. in personam?
  + Where’s the originating jurisdiction?
* Use common law (residual) for non-Cnd & non-reciprocating

|  |  |
| --- | --- |
| Enforcement of Canadian Judgements & Decrees Act (ECJDA), 2003 | Part 2 of Court Order Enforcement Act  (COEA), 1996 |
| **Another Cnd jmt** | **Non-Cnd reciprocating state** [Australia, Germany & Austria; Washington State, Alaska, California, Colorado, Oregon, Idaho, but NOT Texas] |
| **Pecuniary & non-pecuniary**   * s 1(c) in relation to a person *or thing* (implements *Pro Swing*) – so far uninterpreted * s 1(g) can’t enforce NP tribunal orders | **Pecuniary only** |
| Post-*Morguard*; **changes CL by implementing** **blind full faith + credit**   * s 6(2)(a-c) can modify, stay, or limit enforcement – wide jurisdiction * s 6(3) eliminates some defences * Can’t assess whether originating court properly assumed jurisdiction * Can’t assess error of fact/law * Can’t assess “defect” existed in the process of action 🡪 can’t use fraud & natural justice * s 6(2)(c)(iv) can only argue PP but unlikely | Pre-*Morguard*; **codifies CL grounds into defences**   * Can argue lack of *actual* presence/submission even if there’s R/S connection * Can still argue PP, fraud & natural justice |
| Time limit to register = limitation period | **Tight limitation period**; failure to defend in 30 days will result in loss of defence (*Central Guaranty*) |

* 2 statutes in BC governing R+E of **arbitral awards**
  + *Foreign Arbitral Awards Act*
  + *International Commercial Arbitration Act (Shreter)*
    - Can commence proceeding as either action or application
    - Forum decides whether award has merged into jmt
    - Mandatory R+E – burden on D to prove ground of refusal, refusal is discretionary even if proven
    - Defences – burden on D to establish PP or breach of natural justice (byd arbitrator’s jurisdiction or terms of submission)

JURISDICTION & R+E: IN PERSONAM CLASS ACTIONS

* BC has the only **opt-in** model in Canada – non-residents must ask to join
* Potential constitutional issue w **opt-out** model/national class: destruction of civil rights outside of prov
* Common issue = R/S connection for finding jurisdiction & jurisdiction in the intl sense for R+E 🡪 mirror image

Jurisdiction

* Traditional rules: presence, submission, tort committed in jurisdiction (incl *Moran*) 🡪 no need to look to R/S connection if traditional rules can ensure comity
  + In *Ward*, Crown presence in every prov is sufficient
  + But in *Meeking*, D carrying on business in Ont isn’t sufficient, found R/S in common issue
* Post-*Morguard*: common issue = R/S connection; once foreign court properly assumes jurisdiction over D & representative P, common issuebtw representative P & non-resident P is a PRESUMPTIVE connecting factor (*Harrington, Meeking*)
  + Doesn’t confer jurisdiction to a matter that otherwise falls outside
  + Rebuttable, but minimal connection is required per *Van Breda*

Discretion

* **TEST:** must consider CJPTA s 11(2) factors, incl the existence of parallel proceeding
* Case management J **may reconsider stay** during c.a. certification procedure, if court receives fresh evidence on parallel proceeding or non-resident class (*Ward v Canada*, implemented in *Kaynes*)

R+E

* Usually it’s D who wants to R+E jmt to raise *res judicata* shield
* **TEST**: Did original court properly assume jurisdiction over non-resident P?
  + Did it have jurisdiction in the intl sense? common issue = R/S connection
  + Were rights of non-residents adequately represented?
  + Were non-residents accorded **procedural fairness incl adequate notice**?
    - *Lepine*: Both mode (*likely* reach intended recipients) & wording adequately inform non-resident members of c.a.’s impact
    - If notice isn’t adequate, can argue no jurisdiction OR raise breach of natural justice defence

JURISDICTION & R+E: IN REM

* Classification
  + Whether property is movable/immovable is determined by *lex situs* (*Hagg*) 🡪 a question of fact determined by expert evidence
* Jurisdiction
  + CJPTA s 10 gives BC jurisdiction over *movable + immovable* property located in BC
  + **Mocambique rule** – BC court has no jurisdiction
    - To determine TITLE to foreign land
    - To award damages for TRESPASS to foreign land 🡪 relaxed if trespass/damage to immovables is incidental (*Godley*)
  + **Exception** (*Dicey*)
    - Contract/equity btw parties regarding foreign land (*Ward v Coffin*: specific performance of agreement of sale)
    - The questions have been decided for the administration of an estate/trust
* R+E
  + *Duke v Andler*: can indirectly ordered D to re-convey (equitable) but can’t directly order LTO to re-convey **🡪** OVERRULED;can now register equitable orders under ECJDA s 1(c) (Cnd)or *Pro Swing* (foreign)

CHOICE OF LAW

* Characterize the **issue**
  + Formal/essential validity, etc.; forum characterization based on precedent
* Follow the **connecting factor**
  + Domicile, proper law, etc.; forum definition is applied
* Must cite a **CoL rule**: formulated as an issue & a connecting factor that points to another legal system
  + **Plead** application of foreign law AND
  + **Prove**, as a fact (expert evidence), that application of foreign law produces a diff outcome
* Apply law selected by CoL rule
  + Forum characterization – can’t apply foreign penal/revenue law or produce a result contrary to PP

RENVOI

Dicey rule 1.1 & 1.2

* Argue renvoi if domestic lex causae produces wrong result
* **Partial renvoi** – single transference
  + Lex causae conflicts rules look to the DOMESTIC LAW of another legal system
    - Remission – back to Cnd
  + Transmission – to a 3rd country
* **Total renvoi**
  + Lex causae conflicts rules look back to FORUM CONFLICTS RULES
  + A court committed to total renvoi is at mercy of experts
  + Can’t tell if it’s PR or TR from result; TR was recently applied to torts (*Neilson*, 2005 HCA)

MARRIAGE

**Formal validity** (lex loci celebrationis)

* **Issue**: notice, witnesses, registration, civil/religious marriage, proxy/online marriage, parental consent
* **CoL rule**: governed by 3 independent, alternative rules
  + Lex loci celebrationis
    - Domestic law
    - Conflicts rules – transmission under partial renvoi (*Taczanowska v Taczanowski*)
  + Common law marriage

**Essential validity** (lex domicilii: matrimonial vs. antenuptial)

* **Issue**
  + CONSENT: fraud/duress/mistake, mental illnesses/reservations; numbers (polygamy)
  + CAPACITY: minimum age (16yo), consanguinity, affinity, single status, etc.
* **CoL rule**: governed by 2 non-alternative rules (*Brook v Brook*)
  + Dual domicile: usually applied; law of domicile of EACH party at time of marriage; may use renvoi
  + Intended matrimonial home: exceptionally applied in immigration context; intention required is uncertain (*Canada v Narwal*: hasn’t been to Canada but rule is “met in spirit”)
  + *Sangha v Mander*: applied forum domicile rule bc DD rule isn’t proven & IMH coincides w forum

**Recognition of divorce**

* **Forum** **has a choice** btw lex fori & lex causae if issue isn’t property
  + Can apply its own recognition rules
  + Or apply recognition rules of the domicile (*Schwebel v Ungar*)
* **Public policy** plays a significant role (*Vervaeke v Smith*)

TORTS

Lex loci delicti

* *Moran*: can have multiple jurisdictions, but only ONE CoL
* *Tolofson*:
  + Rejected application of forum rules & double actionality rule
  + No exception in Canada
  + No PP exception
  + **May need exception for intl torts**, where parties are nationals/residents of forum
    - No appeal decision; in *Wong v Lee*, NYS law applied even though all parties were Ont residents
    - **Defamation** may need an alternative rule – place of most substantial harm to reputation (*Banro*)
* *Somers v Fourniers:* turns on procedural/substantive characterization

CONTRACTS

Proper law w exceptions; no renvoi

* K can’t exist in a legal vacuum
* Proper law can’t shift – determined as of the time of contracting
* Rare but possible for K to have multiple proper laws, i.e. **depecage**
  + Absent express/implied agreement, presumes ONE proper law applies (*RE Pope & Talbot*)
  + Use *Cansulex* factors to determine intent: where K’s made, where parties operations are, subject matter of K, where claims might be expected to rise
* May be relevant to finding jurisdiction (*Amin Rasheed*) (CJPTA requires an express CoL clause)

**Proper law**

|  |
| --- |
| ***Bonython*** cited in *Amin Rasheed*: the substance of the obligation must be determined by the proper law of the contract, i.e. the system of law by reference to which the contract was made (ACTUAL INTENT), or that with which the transaction had its closest & most real connection (OBJETIVE) |

1. **ACTUAL INTENT: look at four corners of K** (language, terms, currency, arbitration or JS clauses, etc.)
   * **Express CoL rule**
     + Prima facie governs if bona fide + legal & not contrary to PP (*Vita Foods*)
     + No doctrine of evasion in Canada; likely conclusive is not contrary to PP
   * **Implied CoL rule**
     + Arbitration/JS selection clause indicates implied intent; not decisive but compelling (*Richardson*)
2. **OBJECTIVE: look at obligations under K** (place where it’s made, place of performance, place of parties)
   * If there’s no CoL rule or if the “CoL rule governs” presumption is rebutted, ask which legal system has the CLOSEST & MOST REAL connection with the obligations?
   * Place where K is made isn’t decisive; must weigh all factors (*Imperial Life v Colmenares*)
   * Courts sometimes confuse implied intent w objective determination
     + In *Amin Rasheed*, one J was found implied intent & the other objectively determined; *Richardson* found implied intent but considered obligations under K in so doing
     + 1st try to find implied intent (K only); alternatively, objectively determine (obligations under K)
     + Either way, looking for the legal system w the CLOSEST & MOST REAL connection

**Exceptions**

* **Lex loci contractus may apply if it coincides w lex fori** (*Vita Foods, Mackender*)
* **Lex loci solutionis always applies** **subject to SI**, i.e. if illegality renders K void/unenforceable; also turns on whether claim depends on the illegal transaction (*Gillespie*)
* **Lex fori may apply** if procedural, law of mandatory application (*Avenue Properties*), or forum PP (*Lloyds v Meinzer*)
* For **formation**, may apply lex fori (*Mackender*) or putative law (*The Parouth*)
* For **proper law of the obligation**, look to the legal system w the closest & most real connection (*Minera*)
* For **formal validity**, may apply proper law or lex loci contractus; alternatively, characterize as procedural/substantive (*Greenshields*)