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INTRODUCTION

Foundational Principles
Conflicts cases are cases which have a foreign element in them (foreign: anywhere other than BC). Conflicts of law rules are an exception to the concept of territorial sovereignty.

The current explanation for the continued existence of conflicts rules: it doesn’t seem fair not to – we need to do it! The SCC (left without a theory after the American “best of rights” theory proved to be logically impossible) decided on the concept of comity: polite, self-interested respect for other legal systems – it is basically the fairness argument. In certain circumstances, it is just and right to apply a foreign rule of law. So we don’t have a really good reason, other than fairness and justice to the parties, for conflicts of law rules, but we do it anyway.

Typical Questions
1. Where do I bring my action?
2. Will the court take jurisdiction?
3. What law will the court apply?
4. Will the jurisdiction where the party has substantial assets (if not the same as the jurisdiction where action is brought) recognize and enforce a judgment against that party?

Note: Dicey, Morris and Collins on the Conflict of Laws is the BIBLE

Three General Considerations
You must always consider these – can arise in jurisdiction, choice of law, and recognition and enforcement

1. Characterization
   • Issues: How to characterize? What to characterize? How do we go about the process?
   • One specific type of characterization: substance vs. procedure

2. Exclusionary Rules
   • You can persuade a court not to apply an otherwise applicable law if it is one which falls into one of the categories of exclusionary rules

3. Domicile & Residence
   • Known as connecting factors – they are connections between the party and the jurisdiction
   • For purposes of taking jurisdiction, or purposes of choice of law, domicile is a bit esoteric, residence is very straightforward – however, domicile is still a very important connecting factor

Other Notes
Note: In order to prove foreign law in the court, common law requires expert evidence. Foreign law is a question of fact in the forum court: so it must be pleaded and proven to the satisfaction of the court.

In personam action means an action between persons to determine private rights between the plaintiff and the defendant. In personam actions can result in a pecuniary judgment (money judgment) or a non-pecuniary judgment (injunctions, specific performance, etc. – equitable judgment).

In rem action determines the status/title to a thing. Most of what we are talking about are in rem judgments in cases dealing with title to property (movable or immovable). When we determine title to property, it should be good against the world (i.e. it should be recognized anywhere in the world).
CHARACTERIZATION: SUBSTANCE VS PROCEDURE

Characterization is a process that happens at various stages in a conflicts action. There are two options in terms of characterization: (1) How does the foreign jurisdiction characterize its own rule (\textit{lex causae})? (2) We’ll decide for ourselves (\textit{lex fori}).

Characterization is \textit{always done according to the law of the forum} (\textit{lex fori}) because if you rely on the foreign jurisdiction’s characterization of its own law, then you will have \textbf{internal inconsistency in the forum} (\textit{Huntington v Attrill 1893 UKPC}, “NY says it’s a penal law” case). The forum may \textit{consider} (and it might be very weighty) but is not \textit{bound} by the characterization of a law by the \textit{lex causae}.

\textbf{Exception: characterization of property}: the forum will defer absolutely to the legal system where the property is located (according to its own law, \textit{lex fori}) as to how that property should be characterized.

\textbf{Substance vs Procedure}

One specific type of characterization is substance vs procedure: \textit{“Is this law substantive or procedural?”}

You have to \textbf{consider procedure rules} any time you are considering \textit{where to litigate}. You want to think about not just the applicable substantive law to your action, but also the procedure of the relevant jurisdiction.

\textit{Every court uses its own procedural rules} and procedure is not uniform in every jurisdiction. Procedural rules of different jurisdictions may provide advantages or disadvantages. \textit{For example, American discovery process is far more generous than the Canadian discovery process so this is a practical consideration to take into account}.

\textit{Note: evidence rules are almost always characterized as procedural. Courts don’t want to learn all about other jurisdictions’ evidence rules when they are hearing a case}.

This characterization issue, in terms of substance vs procedure is only relevant if the substantive law to be applied on the merits is going to be a foreign law (foreign \textit{lex causae}).

There is no clear scientific, absolutely black and white definition of rules of procedure vs rules of substance – it is a matter of argument and persuasion, based partly on precedent and definitely based on the pragmatic approach in \textit{Tolofson v Jensen}.

The \textbf{old distinction between substantive and procedural rules} is that \textit{substantive rules deal with the rights} and \textit{procedural rules deal with the remedy}, but you can’t have a remedy without a right, so this is not a very easy definition.

You can probably argue that \textit{Tolofson v Jensen} \textbf{rethinks the characterization process}, not only for limitation periods, but for all allegedly procedural rules.

According to \textit{Tolofson v Jensen}, we now take a \textbf{pragmatic approach to characterization}. What is the basis for the substance vs. procedure rule? The reason for courts to apply their own procedural rules is for the convenience of the court. So if there is no inconvenience involved, you can apply the rule of the \textit{lex causae}.
LIMITATION PERIODS

Are limitation periods substantive or procedural? (*Tolofson v Jensen 1994 SCC*)

*Tolofson v Jensen* (accident in SK, BC plaintiff, limitation period of SK 1 year, BC 2 years) rethinks the characterization process for limitation periods (or you can argue, more generally, for all allegedly procedural rules), but this case is certainly binding with respect to limitation periods.

Limitation periods are *arbitrary* (although they have policy reasons behind them) so there is no inconvenience in using a different limitation period – you may not like the fairness of the result, but it is purely an arbitrary period of time. **So the BC court can apply whichever limitation period it thinks is more just and convenient.**

It is probably fair to say that these days, there is a bias against characterizing forum rules as procedural rules (in common law Canada). The more of your own rules you apply in a case in which you have decided to apply the law of some other jurisdiction, the more *anomalous* the product you get – it might be fair, but its neither ours nor theirs. So, if you have decided to apply the law of some other jurisdiction to the merits of the case, there is a logic to applying as much of their law as is convenient. **So: if in doubt, you characterize as substantive, not procedural.**

OTHER KINDS OF RULES

**Damages**

Heads of damage are substantive, but quantification of damages are procedural.

*Example:* accident in California, litigation in BC // What damages can the plaintiff claim (ex. pain and suffering, punitive, etc.)? – California law *(lex causae)* // How much will you get for those damages? – BC law *(lex fori)*

**Capacity/Legal Status of a Party**

The legal status of a foreign party depends upon its *own law* (this is a forum recognition rule, which is a conflicts rule – comity requires this, it requires us to look outward). If an entity has status to sue and be sued by its home law, then we will recognize them as having status here (*Intl Assn of Science and Tech v Hamza 1995 ABCA*). The *Hamza* case illustrates how the forum can extend its forum procedural rules and definitions using a recognition rule.

*Ruined temple in India:* The English Court of Appeal in *Bumper Development 1991 UKCA* used the exact same process as the ABCA in *Hamza*: In deciding whether a ruined temple in India had status to sue/be sued/act as intervenor in an action, the court looked at whether the temple would have capacity to sue in India, its home jurisdiction (through expert evidence). Sure enough, in Indian law (technically Hindu law), a ruined temple *does* have status to sue and be sued.

*Standing of a foreign corporation* (*Success International 1995 ONSC*): An Ontario rule restricts foreign corporations from bringing certain actions unless they were registered in Ontario. NY company brings an action against the ON company in Ontario. Defence raised by ON company: NY company had no status to sue in Ontario because it was not registered in Ontario (*this is a procedural rule* so the Ontario rule would apply – *lex fori*). **Held:** According to Ontario statute and common law definition, the NY company has to be registered in Ontario if it is carrying on business in Ontario. The NY company *was* carrying on business in Ontario – it had an office here, it had employees, etc. (interpretation and application of a particular procedural rule).

*Contract formality/limitation period/cap on damages* (*Naraji v Shelbourne 2011 UKQB, injured soccer player sues negligent US surgeon in the UK*): Issues: (1) Indiana law requires that if you want to sue in contract against a doctor, you have to have a signed, written contract (2) Indiana limitations period (3) Indiana had a cap on damages. **Held:** All of these issues were said to be procedural, therefore the English court didn’t have to pay attention to them, so the contract action proceeded.
EXCLUSIONARY RULES

Note: exclusionary rules also require characterization

The exclusionary rules apply both at the choice of law stage in a conflicts case and in connection with recognition and enforcement actions.

Summary: public policy is easy to raise though it may or may not succeed because it really does have to be a foreign law which offends forum principles of fairness and justice // penal law is easy // revenue law is easy // public law – good luck.

PUBLIC POLICY

Rule 2: Public Policy Exclusionary Rule (Dicey)

English courts [can read: Canadian courts] will not enforce or recognize a right, power, capacity, disability, or legal relationship arising under the law of a foreign country if the enforcement or recognition of such law would be inconsistent with the fundamental public policy of English law [can read: Canadian law].

Note: It is the fundamental public policy of the FORUM (the court where the action is taking place) that constitutes the basis for this rule.

The public policy exclusionary rule is a last-ditch, residual discretion that every court in the world keeps for itself. It is a narrowly defined exclusionary rule with a strict test: It must be a foreign law (or foreign judgment) which turns the stomach of the judges in the court, i.e. they find the foreign law so repulsive, that they cannot bear to apply it. It offends “some fundamental principle of justice, some prevalent conception of good morals, a deep-rooted tradition of the forum” (Society of Lloyd’s v Meinzer 2001 ONCA).

This defence is supposed to be restricted to the content of the foreign law, not the result – it is not supposed to be a defence because we find the result of the application to be unfair. You can make the argument, it has been accepted before, but don’t rest your case on it; it is a long shot.

Scope of public policy was extended by English HL to include flagrant/gross violations of international law as part of its forum public policy (Kuwait Airways. v Iraqi Airways 2002 HL, not a human rights violation, but the seizure and assimilation of Kuwaiti planes were flagrant violations of rules of international law of fundamental importance).

The argument was rejected that when there is an act of state involved, the public policy exception is limited to a breach of human rights. “Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws... Laws may be fundamentally unacceptable for reasons other than human rights violations.”

The public policy exclusionary rule is frequently invoked; its a shot-gun approach – you’ve tried everything, you might as well try this one too. Note however: In Canada, the judges aren’t aware of the very narrow definition of the public policy exclusionary rule – so the application of it is not terribly consistent.

Note: public policy is always changing – what once upon a time was contrary to public policy may not be now (ex. gambling was once considered to be criminal and immoral).
PENAL LAWS

Rule 3: Penal Law, Revenue Law & Other Public Law (Dicey)

English courts [can read: Canadian courts] have no jurisdiction to entertain an action:

(a) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign State; or
(b) founded upon an act of state.

NB: Direct recognition (choice of law context) will occur if the forum court decides not to apply the law of another foreign jurisdiction to the merits of a case (lex causae) // Indirect recognition (recognition and enforcement of a foreign judgment) will occur if a jurisdiction decides not to recognize and enforce the judgment of another jurisdiction because it is based on a law of that foreign jurisdiction which is contrary to the public policy of the forum (you have to look through the judgment to what law it is based on).

Courts will not apply a foreign law which is characterized as penal (Dicey Rule 3(a), Huntington v Attrill 1893 UKPC). A “penal law” involves a proceeding in the nature of a suit by the state whose law has been infringed, by the state, by an officer of the state, or by a member of the public in the character of a common informer (Huntington v Attrill). A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the state whose law has been infringed.

Huntington v Attrill: ON D raises defence that the NY law on which the NY judgment was based was a penal law, UK court (for ON) decides, applying that definition to the facts of this case, that it was not a state action, it was an action for compensation/damages by someone who is being misled.

Note: this is not an exclusionary rule that you are likely be able to invoke often successfully.

REVENUE LAWS

Rule 3: Penal Law, Revenue Law & Other Public Law (Dicey)

English courts [can read: Canadian courts] have no jurisdiction to entertain an action:

(a) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign State; or
(b) founded upon an act of state.

Courts will not apply a foreign law which is characterized as revenue law (Dicey Rule 3(a), USA v Harden 1963 SCC). “Revenue” means all forms of taxation at any level of government but there are some cases where the classification is not quite so obvious because it is not a straight-forward tax.

The revenue law exclusionary rule is not usually raised because the state itself is trying to collect taxes – no state is stupid enough to do that (except the Canadian government concerning tobacco taxes). The revenue law exclusionary rule is usually raised because someone has paid taxes and is seeking reimbursement (Stringam v Dubois 1992 ABCA, the fact that it was a bank, not the state, is irrelevant)

Stringam v Dubois: Executor (Valley Bank of Oregon) of Arizona-domiciled deceased wants to sell AB farm (which was left to deceased’s niece) in order to reimburse itself for taxes paid. ABCA applied USA v Harden.

Held: this is indirect enforcement of a foreign revenue law so it cannot be enforced in Canada.
OTHER PUBLIC LAWS

Rule 3: Penal Law, Revenue Law & Other Public Law (Dicey)

English courts [can read: Canadian courts] have no jurisdiction to entertain an action:

(a) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign State; or
(b) founded upon an act of state.

In common law countries, we don’t ordinarily divide our laws into public laws and private laws; this is probably one of the reasons the classification of the public law exception is so difficult.Originally, Dicey and Morris referred to penal laws, revenue laws, or other political laws, eventually the term “political laws” was changed to “public laws”.

“Public law” is defined as all those rules (which aren’t penal or revenue) enforced as “an assertion of the authority of the central or local government” (Dicey). In recent English decisions, they have talked about assertions of sovereign rights – it is very difficult to define the public law category more closely than that.

The English court has defined “public law” as one that is seeking to enforce governmental interests in contrast to a law that creates personal rights to the sovereign (Iran v Barakat 2002 UKCA). Even if the claims are framed in private law actions, if they are designed to promote sovereign state interests, the public law exclusionary rule will apply – the court will look through the form to the substance of the claim (Equatorial Guinea v Logo 2006 UK).

Iran v Barakat: Iran attempting to reclaim antiquities from Barakat (a gallery) who said it properly bought the antiquities (cultural property reclamation). Held: the Iranian law operated to vest title in the state; therefore, it is a personal rights provision, the “other public law” exclusion was held NOT to be applicable.

Equatorial Guinea v Logo: Damages claimed for the costs involved in putting down a coup attempt, cost of feeding prisoners, cost of food for suspected members, cost of medical treatment, etc. and damages for emotional distress caused to the President of Equatorial Guinea for fear of his family and his personal safety. Held: The tort claims were being brought to protect and enforce the sovereign public interest of ENG. You can't come to England and get an injunction to stop them from trying to engineer a coup, and you can't come to England to ask for costs for damages for putting down a coup attempt – that is a sovereign act, that is public. So the “other public law” exclusion WAS held to be applicable.

Suggested public laws: exchange control laws, those kinds of things, etc.

There is English precedent for this exclusionary rule, so if you’re really desperate and you can’t squeeze the foreign law you wish the court not to apply into the penal or revenue category, try the public law exception – it exists! It’ll be fun explaining it to the court! It should not be impossible if your facts are right.

Note: for exam purposes, cite United States v Ivey 1995 ONSC for the public law exception. It is authority for the proposition that the exclusionary rule does exist and that it is very narrow. But you don’t get much more out of it.
DOMICILE AND RESIDENCE

Domicile and residence are concepts which serve as connecting factors between a person and a particular legal system for jurisdiction and choice of law issues. Different legal systems use different connecting factors for different purposes.

Some possible connecting factors:
1. Presence – mere, temporary presence
2. Residence – a stronger connection and comes in more than one variety:  
   (a) actual residence  (b) ordinary residence  (c) habitual residence
3. Domicile – traditionally used by common law systems
4. Nationality – traditionally used by civil law systems

If you are involved in a case which concerns the application of a statute and the statute uses the phrase "domicile" or "residence", the first thing to do is look to see if there is a definition for domicile or residence in the statute. If there is no definition, then you have to fall back on the common law.

DOMICILE

Domicile becomes an issue mostly in choice of law cases (matrimonial law, succession law), not jurisdiction. No matter what the purpose of determining domicile, the concept of domicile doesn't change – it is a consistent concept. Domicile is always determined by the forum – the court seized with jurisdiction will always apply its own definition of domicile.

All "persons" (natural persons as well as legal persons, i.e. corporations) have a domicile, and you can only have one domicile at a time. Domicile comes in 3 varieties: (1) at the moment of your birth, you acquire a domicile of origin (2) until you reach the age of majority, you maintain a domicile of dependency (3) once you reach the age of majority, you acquire capacity to select a domicile of choice.

(1) Your domicile of origin depends on where your father was domiciled at the moment of your birth (BC legislation now gives a choice between mother or father); foundlings are domiciled where they are found. An investigation may have to take place into the life of your mother/father in order to determine where they were domiciled at the moment of your birth. EE comment: domicile of origin may not have been modified by legislation; CL: father + mother = father, mother only = mother, foundling = where you were found.

(2) Your domicile of dependence is the domicile you have between the moment of your birth and your age of majority. It is dependent on what the parent you are living with is doing (re geographical location + intention).

(3) Your domicile of choice: once you reach the age of majority (19 in BC), you acquire capacity (whether you exercise it or not) to acquire a domicile of choice (will be the same as your domicile of dependence until you acquire a new domicile).

Note: Married women became capable of obtaining an independent domicile in 1985 in BC – this may become relevant in cases where it is necessary to determine the domicile of someone as of an earlier point in time

Most people acquire a new domicile of choice the moment they leave the old one. But it is possible to abandon a domicile of choice without acquiring a new domicile of choice – and in that case your domicile of origin revives. To abandon your domicile of choice, you have to: (a) physically leave and (b) intend to never come back

Criticism: If you have not acquired a new domicile of choice, but you have completely rejected your domicile of origin, you still retain your Domicile of Origin. Why should your domicile of origin revive simply because you haven’t acquired a domicile of choice – it may be a place you have never set foot in, or it may be a country that doesn't even exist anymore!
There are two necessary elements that must be established to persuade the court that an individual has acquired a domicile of choice, and they must coincide at some point in time:

1. **Residence**: question of simple fact. It is treated by the common law simply as mere, physical presence.
2. **State of Mind**: also a question of fact, but not as easy to establish.

The definition of "state of mind" used to be a narrow one: originally, the definition of the state of mind necessary to establish domicile required the individual to have freely formed the intention of ending his days in a particular jurisdiction. Also: it took satisfaction of beyond a reasonable doubt for an individual to acquire a domicile of choice if his domicile of origin was England.

**Today**: we require that the person trying to establish domicile have intended to reside indefinitely in that jurisdiction. Indefinitely doesn’t mean to the end of your days, although that would satisfy the test. It means that you are residing somewhere and you don’t have a reasonably anticipated and clearly foreseen contingency to cause you to leave. The standard of proof is probably on a balance of probabilities.

**Scope of investigation in determining state of mind**: you don’t just consider the moment in time that is critical (ex. domicile at the moment of death), you have to consider the whole life of the individual – what was his pattern? *(Agulian v Cyganik 2006 UK)*. Typically, you get evidence given by various people and you get facts about his life and you ask: did he form an intention to reside indefinitely anywhere? *(Re Urquhart Estate 1990 HC)*.

**Domicile of a corporation** is easy to define: it is the jurisdiction in which it is incorporated. If the conflicts issue in a case is what law governs the internal organization of the corporation – it is the law of the corporation’s domicile, the law of the place where it is incorporated

**Various proposed law reforms**: create new domicile of origin // domicile of dependency rules for children acknowledging different types of families // lunatics (i.e. mentally incompetent people) // create presumptions about intention to make intention easier to establish (rebuttable presumptions) // abolish the revival of your domicile of origin and to replace it with the idea that your domicile of choice continues until you acquire a new domicile of choice.

**RESIDENCE**

Residence is a more modern connecting factor and is gaining traction in the common law. It is considered to be simpler and clearer.

**Actual residence** is a little more than mere presence, but it is temporary presence – not really used for much. **Ordinary residence** and **habitual residence** *(which are often very hard to differentiate)* are the two big contenders for a new connecting factor. They are becoming connecting factors for jurisdiction and choice of law in recent statutes.

In BC, we use both ordinary and habitual residence in different statutes. **Ordinary residence** is used for jurisdictional purposes in the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) – the statute that governs jurisdiction in BC courts. **Habitual residence** is used in the new *Family Law Act* conflict provisions (ss. 105–109) – although probably inadvertently.

**Residence as a connecting factor is statutory**: therefore, the first thing you want to do is see if there is a definition provision in the applicable statute. If there isn’t, then you fall back on the common law.

Habitual residence is a compromise fostered by the *Hague Conference of Private International law* between civil law’s “nationality” and common law’s “domicile”. It has not been defined in any convention or statute – there is no statutory definition and yet it is taking over the world.
There are two necessary elements that must be established for both ordinary and habitual residence: (1) Physical residence and (2) Intention.

But the balance for residence has been deliberately shifted from domicile. In ordinary/habitual residence, intent has been deliberately downplayed but residence has been enhanced – you can’t acquire ordinary/habitual residence in a day, it requires some duration (this could be a problem – you can lose it in a day, when you leave, but you can’t acquire it quickly, you have to spend some time in that place). Crudely: you have to establish that it is your home, at least for a limited period of time (but there is no minimum limit).

Scope of investigation in determining residence: length of time is important but not conclusive – it is the quality of residence (Adderson v Adderson 1987 ABCA) (unless you have something like the Divorce Act that says you have to be living together for a certain period of time). The courts emphasize that ordinary and habitual residence (they do seem to be interchangeable) is the settled purpose of the individual whose residence is in issue (Adderson).

“The purpose may be one or it may be several, it may be specific or general, all that the law requires is that there is a settled purpose… this purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for choice of regular abode and there may well be many others. All that is necessary is that the purpose of living in where one does has a sufficient degree of continuity to be properly described as settled.” (BCCA adopting language from English case)

Difficulties with replacing domicile with residence: (1) Some cases indicate that it is possible to have more than one habitual or ordinary residence concurrently – if you have two residences in two different jurisdictions, whose law governs? For jurisdiction, this is fine but for choice of law, your connecting factor is supposed to identify a jurisdiction whose legal system ought to be applied to the issue. (2) It is also possible for an individual to have no habitual or ordinary residence (3) It is arguable that determination of residence is more context-dependent than the concept of domicile.
Ava Aslani

LAW 325 Conflict of Laws

JURISDICTION: IN PERSONAM ACTIONS

Note: common law is significantly different from civil law in this area – the discretionary element is not something you can assume you will be able to invoke in a civil law court.

Jurisdiction decisions at common law involve two components:

1. **Rules: jurisdiction simpliciter/territorial competence** – refers to the rules governing jurisdiction. In BC (and other CJPTA provinces), we refer to this as “territorial competence” not “jurisdiction simpliciter” (simply an acknowledgement that the jargon in the statute has changed).

2. **Discretion: forum non-conveniens** – refers to judicial discretion, it has nothing to do with the rules.

In the jurisdictional decision, you **always consider the jurisdictional element first** before you consider whether you are the most appropriate forum for the action – you can’t exercise discretion unless you have jurisdiction.

In any common law jurisdiction, it is possible and permissible to object to the existence/the establishment of jurisdiction simpliciter/territorial competence and/or to invoke the discretion of the court. You don't have to do both, you can simply say: you have no jurisdiction (which is established either by service on the defendant in the jurisdiction; by submission of the defendant (in various ways); or (in Canada) by the existence of a real and substantial connection.

The procedure employable in each forum depends on the rules of the court of that jurisdiction (lex fori). For the most part, the procedures for objecting to jurisdiction simpliciter/territorial competence and for invoking the discretion of the court are going to be found in the forum’s Rules of Court or equivalent (Rule 21-8 in BC). The challenge is to figure out how to object to jurisdiction under Rule 21-8 without somehow submitting to the jurisdiction of the court (this is a practical problem and if you screw up, your client is dead in the water).

If in a common law court, the defendant does not object to the jurisdiction of the court, and doesn't ask the court to exercise any discretion, the court just continues – so it is up to a party (usually the defendant) to raise the issue (at an early stage) of jurisdiction and/or discretion.

JURISDICTION: JURISDICTION SIMPLICITER / TERRITORIAL COMPETENCE

**Summary of what to do if you are in BC:** You’re a plaintiff, you figure out who you want to sue and you discover your defendant is out of the province, can’t be sued in BC: (1) look first to CJPTA s. 3 (general jurisdiction rules) (2) look to CJPTA s. 10 (which expands on s. 3) and try to find a circumstance that fits your case (3) follow the appropriate procedure and get your process served (4) the ball is now in the defendant’s court (chances are good that there will be an objection to jurisdiction, territorial competence of the BC court).

In BC, the Court Jurisdiction Transfer and Proceedings Act (CJPTA, 2006) provides that it is the exclusive source of jurisdiction (territorial competence) in the province (CJPTA s. 2(2)). So in order to bring an action in BC, you have to satisfy the CJPTA.

PARTIES WITHIN THE JURISDICTION

In BC, we decided to go with the logic of Morguard, not with the express words (which apparently left the common law Maharani rule intact, that mere temporary physical presence in the jurisdiction is sufficient for service). So in BC, **mere presence in the province IS NOT sufficient for service, and therefore does not constitute jurisdiction. What is required now is ordinary residence of the defendant (CJPTA s. 3(d)).** This was probably also overturned for the rest of Canada by Van Breda, which held that mere physical presence is not sufficient. But for non-CJPTA provinces, there might be some flexibility as to what IS sufficient for jurisdiction simpliciter. Ordinary presence probably goes beyond the minimal constitutional requirement.
PARTIES OUTSIDE THE JURISDICTION

The CJPTA sets out 5 circumstances in which a BC court will have territorial competence (CJPTA s. 3).

CJPTA s. 3: Proceedings in a person

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

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim – [submission by the plaintiff: if you bring an action in BC, you are submitting to the jurisdiction of the BC court]

(b) during the course of the proceeding that person submits to the court's jurisdiction – [submission by the defendant: if at some point in the proceeding, the defendant submits, the BC court has territorial competence – there is no finite list of ways in which the defendant can submit to the jurisdiction of the court, and you don’t need to intend to submit]

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding – [submission by forum-selection clause: if you enter into a contract which has a jurisdiction selecting clause, you’ve submitted in advance]

(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding – [ordinary residence: this is a modified version of the traditional basis of “presence” for jurisdiction (Maharani). Ordinary residence is defined in ss. 7, 8, 9 for corporations, partnerships, and unincorporated associations, respectively] OR

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based – [real and substantial connection: applies whenever you have a defendant who has to be served outside of BC. BC will have territorial competence if there is a real and substantial connection between BC and the facts on which the proceeding is based. There is an expanded definition of 3(e) in s. 10]

CJPTA s. 10: Real and substantial connection

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) concerns contractual obligations, and
(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
(ii) by its express terms, the contract is governed by the law of British Columbia, or
(iii) the contract
   (A) is for the purchase of property, services or both, for use other than in the course of the purchaser’s trade or profession, and
   (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,
(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
(g) concerns a tort committed in British Columbia,
(h) concerns a business carried on in British Columbia,
(i) is a claim for an injunction ordering a party to do or refrain from doing anything
   (i) in British Columbia, or
   (ii) in relation to property in British Columbia that is immovable or movable property,
(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,
(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or
(l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

CJPTA s. 10 fleshes out s. 3(e), it gives a list of circumstances where a real and substantial connection is presumed to exist. If one of the circumstances in s. 10 is satisfied, there is a rebuttable presumption of jurisdiction (though it is rarely rebutted). This is a good approach – we want order, we want certainty (LeBell J in Club Resorts v Van Breda 2012 SCC).

The list in this section is not exhaustive (Van Breda). So if you can’t find a circumstances in s. 10 that fits, you can go back to s. 3 and argue that there is a real and substantial connection, but you have to make it out.

Extrapolating from the SCC’s decision in Spar Aerospace, the real and substantial connection as enunciated in Morguard requires only a minimal connection – you don’t have to go as far as Muscutt v Courcelles 2002 ONCA (which set out 8 considerations in establishing whether there is a real and substantial connection for purposes of jurisdiction simpliciter). Note: Spar Aerospace didn’t make a dent in the jurisprudence BUT Van Breda did: so the minimal connection is sufficient (Van Breda; the constitutional standard is a minimal connection Spar Aerospace v Mobile Satellite 2002 SCC, no minimum amount of damage required for real and substantial connection, $50,000 is okay). So in BC, you simply have to meet the criteria set out in CJPTA.

BCCA has decided not to apply Muscutt. The CJPTA has eclipsed the Muscutt approach and prospectively, CJPTA s. 10 sets out the circumstances to consider and these are the mandatory (though rebuttable) presumptions (Stanway v Wyeth Pharmaceuticals Inc 2009 BCCA). The fact is the BC courts see this as a slam dunk: if you set out the conditions in CJPTA s. 10, we’ve got jurisdiction. It is likely to be determinative. Note: Muscutt is probably now dead everywhere, even in Ontario because of the Van Breda case.

The cases since Morguard have established that our common law jurisdictional rules are very wide. We allow plaintiffs to serve process ex juris in an extraordinarily broad range of circumstances. So the jurisdiction rules are very broad, but then we use discretion to narrow things down – so discretion is a very important element. In the civil law system, the rules tend to be tighter but they do not exercise discretion.

Location of of a Tort
In deciding where a tort was committed, you can use the location of the tort or the situs of the tort (where in law did the tort occur). This is more important for choice of law purposes, because choice of law is premised on having a single location/situs whereas the common law jurisdiction rules are not premised on having a single location/jurisdiction for a cause of action.
We now have a flexible approach in determining where a tort has been committed – no arbitrary rules, no concept (express or implicit) that for jurisdictional purposes, there is only one place that the tort could have been committed. We regard the tort as having occurred in any jurisdiction 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 (Moran v Pyle National 1973 SCC, this opened up s. 10(g) a bit).

Applying this test to a case of careless manufacture: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which then enters into the normal channels of trade and he knows or ought to know both (a) that as a result of his carelessness a consumer may well be injured and (b) it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant (Pyle National, anticipating what subsequent courts have said: the damage is probably the most important component).

JURISDICTIONAL AND MATERIAL FACTS AND EVIDENCE
How you go about establishing the “what.”

How you establish jurisdiction simpliciter/territorial competence will depend on what the procedural rules of the forum in which you are bringing the action (in BC, 2010 Civil Rules of Court). Jurisdiction simpliciter/territorial competence (i.e. every common law province of Canada) is ordinarily going to be decided before the trial, based on documentary evidence, your notice of civil claim, your pleadings, etc.

These documents should provide the material facts establishing that the cause of action falls within one of the circumstances in CJPTA s. 10.

However, if there is an omission of material facts in the pleadings, it is possible to positively supplement these basic documents if necessary with affidavit evidence (Armeno Mines 2000 BCCA), however you cannot use argument or statements of counsel to supplement omissions of fact in the pleadings (MTU Maintenance 2007 BCCA).

Note: since the 1970s (when we abandoned the ex parte application to seek leave to serve a writ ex juris and moved to the more efficient service as of right), courts have had less evidence to look at if there is an objection to jurisdiction. If there was an ex-parte application, there was much more affidavit evidence submitted in advance because you had to persuade the court that your case fell within the circumstances allowed, that you had a good arguable case on the merits, and that the forum was the most appropriate forum for the action, etc., so you had to produce a lot of affidavit evidence. That went bye bye when we moved to service ex juris as of right. So the documents that do exist (pleadings, etc.) should provide material facts establishing that the cause of action falls within the CJPTA s. 10 classes, is arguable, and the BC is the forum conveniens.
Three issues arise with respect to discretion: (1) Formulation of the discretionary principles (2) Relevant factors to be considered in exercising discretion (3) Who bears the burden of proof and what is the quantum (standard) of proof?

For purposes of assuming jurisdiction, judicial discretion can be exercised in two ways (you have to choose for your client): (1) stay of proceedings (most commonly used) (2) anti-suit injunction.

In a stay of proceedings, you are asking the court to stay its own proceedings (this assumes there is an action commenced in the forum). You say “this court has no territorial competence” but you are also asking the court to exercise its discretion and decide that it is not the most appropriate forum for the action and to stay the BC proceedings. This is the BC court controlling its own proceedings.

In an anti-suit injunction, you are asking the court for an order prohibiting a party from commencing or continuing foreign proceedings (this assumes there is another jurisdiction and the action could be, or is already being, brought there). This is an equitable order (in personam) so it requires the court (the forum) to have jurisdiction over the party to be enjoined (i.e. the plaintiff). ***Note: Amchem modifies this: ordinarily, an anti-suit injunction will be restricted to continuation of foreign proceedings.

The leading English cases are still relevant because the SCC purports to interpret and apply them in Canada.

STAY OF PROCEEDINGS

In BC, the common law is modified by the CJPTA: “discretion” is provided for in the CJPTA s. 11.

CJPTA s. 11: Discretion as to the exercise of territorial competence

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

11(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
(b) the law to be applied to issues in the proceeding,
(c) the desirability of avoiding multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

CJPTA s. 11 is a complete codification of the common law test for forum non-conveniens, it admits of no exceptions (Teck Cominco 2009 SCC). So once you have jurisdiction under the CJPTA, you have to go to s. 11 for exercising discretion and THAT’S IT. There is no other source for the jurisdiction to exercise discretion.

BC courts (and any other court subject to the CJPTA) must consider these factors however, the list in s. 11(2) is inclusive, it is not exhaustive – if there are other circumstances that are relevant, counsel can raise them (Lloyd’s v Cominco 2007 BCCA).

The SCC has rejected the argument (which wasn’t actually made) that a prior foreign assertion of jurisdiction in an action is an overriding and determinative factor in the s. 11 analysis (Teck Cominco).

(cont’d)
Ex. if the law to be applied is the law of BC, that is a factor in favour of proceeding the action in BC. If the law to be applied is the law of China, maybe that’s a factor in favour of China as the forum. Or maybe it’s not, maybe its balanced by something else. In *Lloyd’s v Cominco 2007 BCCA*, the fact that was of great significance was the existence of the *parallel proceeding* in Washington because (a) it is certainly multiplicity of legal proceedings and (b) we might get conflicting decisions – these are 2 significant factors.

The SCC has rejected the argument of “first-in-time, first-in-right” i.e. that first in time means deference (*Teck Cominco 2009 SCC*). It is clear that there is no absolute deference to a foreign decision that it is the most appropriate forum for an action.

*Teck Cominco* put forward 2 arguments based on 3 SCC judgments:

(1) One of the cases relied on was the *Amchem* – respect the foreign jurisdiction’s discretionary decision (if there is a reasonable basis for it). The second case relied on was *Pro Swing Inc. v. Elta Golf Inc 2006 SCC* – recognition and enforcement of a non-pecuniary judgment: SCC said no, we’re not going to recognize Washington’s decision not to stay their action and therefore, stay our action.

(2) The third case relied on was the *ZI Pompey Industrie v. ECU-Line NV 2003 SCC* – the assertion of jurisdiction by the foreign court is a factor of overwhelming significance in the s. 11 analysis of forum non-conveniens: SCC says no, comity is not necessarily served by an absolute/automatic deferral to the first court that asserts jurisdiction.

Where does that leave litigants in BC (and other CPTA provinces) when there are parallel actions? *same parties, same issues, different states). EE thinks it leaves open the argument that was actually put. The argument that was actually put was that if you reject alternative #1, you go to section 11 and the fact that the foreign court (the Washington court) has decided on reasonable grounds (a reasonable facsimile of the forum non-conveniens doctrine here) that it is the most appropriate forum for the action – should be given very great weight – NOT overwhelming, NOT determinative, but very great weight. That was an argument which was modeled on the Pompey case – that’s exactly the approach that the SCC has said local courts (Canadian courts) use for jurisdiction selection clauses (if the parties have agreed to litigate somewhere else, well we give that very great weight in deciding if we’re forum non-conveniens) – it’s just a factor, but its a significant factor. EE thinks you can still make this argument.

**Formulation of the Discretionary Principles:** *McShannon 1978 UK* and *Spilliada 1986 UK* have collectively set out the doctrine of *forum non-conveniens*. The UKHL in 1986 adopted the *Scottish principle*: "The plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice" (*Spilliada 1986 UKHL*, leading case on statement and elaboration of the principles). This formula tells you that you consider suitability, taking into account: (a) the interests of all the parties and (b) the ends of justice (whatever that means) – not mere convenience, it has to be clearly more suitable. This is the governing formula both for discretion after service within England and service ex juris.

**In considering the ends of justice**, account must be taken not only of injustice to the defendant but also of injustice to the plaintiff – so you’re balancing (*Spilliada*). We might be the most appropriate forum for the action, but would it be unjust to the plaintiff if we issued an injunction. As a general rule: the court will not grant an injunction if by doing so it will deprive the plaintiff of advantages in the foreign court of which it would be unjust to deprive him. But the court is looking at all the factors in the case, looking at justice as between the parties (how can we make this a fair decision).

Note: English courts are quite willing about granting an anti-suit injunction (almost automatically) to protect their own jurisdiction. Ex. if it is a contract action and the contract has a clause that any disputes will be arbitrated in London. If one of the parties sues in Italy, the English court will grant an anti-suit injunction to protect English jurisdiction to arbitrate as the parties have agreed to.
The SCC has also incorporated the Scottish principle BUT we can’t assume that we just apply *Spiliada*. There are 3 factors in the *forum conveniens* principle of discretion (*Amchem 1993 SCC*):

(1) We don’t consider judicial advantages separately in Canada (referring to *McShannon*), we just throw it into the pot and consider it in the pre-stage process that *McShannon* uses.

(2) Burden of proof: for service *within the jurisdiction* is on the defendant (this hasn’t changed). Burden of proof for service *ex juris* is more difficult. Note: in England, if the defendant is served *ex juris*, the burden of proof is on the plaintiff in the *ex parte* application (England courts still require leave to serve *ex juris*). In BC, the BCCA had been interpreting the Rules of Court as imposing the burden of proof on the plaintiff in service *ex juris* cases (same as England; BCCA made this very clear).

_Amchem* (SCC, Sopinka J) couldn’t understand why the burden ever would have been put on the plaintiff, so it should always be on the defendant (although the allocation of the burden of proof on a defendant who is being called in to defend is inconsistent with the concept of comity that SCC elevates so much). In BC, even after _Amchem_, we continued to follow the English rule and put the burden of proof on the plaintiff if it was a *service ex-juris* case UNTIL the _CJPTA_ (2006). There has not been a single BC case (at least at BCCA level) that has discussed the burden of proof. But in the cases now, even in the BCCA, the court seems to be mindlessly placing the burden of proof on the defendant throughout. There is no legal reason why the CJPTA should have had that effect but apparently it has.

_Allocation of burden of proof can make a huge difference because a lot of these cases in which discretion is invoked are pretty evenly balanced in terms of appropriateness of the two possible fora for the action._

(3) The quantum of proof: it must be established that there is another forum which is *clearly* (quantum) more appropriate for this action (*Amchem*, consistent with *Spiliada*, followed by *Tyco 2008 ONCA*)

_Burden and Quantum of Proof in England:_ the main difference between the application of the formula after service in England vs service *ex juris* is in the allocation of the burden of proof. If the defendant has been *served in England*, then the burden of proof is on the defendant to persuade the English court that there is another forum which is *clearly* (quantum) more appropriate for this action. If the defendant has been *served ex juris*, the burden of proof is on the plaintiff in the *ex parte* application (English courts still require leave to serve *ex juris*) to persuade the English court that it is the most appropriate forum for the action (*Spiliada*).

_In England, the burden of proof is established. There is no question about it. It is used over and over again._

_Relevant factors to be considered in exercising discretion by non-CJPTA jurisdictions:_

Factors commonly considered by courts in exercising their discretion and deciding which of the two contended-for jurisdictions is the most appropriate forum for the action: (1) the location where the contract in dispute was signed (2) the applicable law of the contract (3) the location of witnesses, especially key witnesses (4) the location where the bulk of the evidence will come from (5) the jurisdiction in which the factual matters arose (6) the residence or place of business of the parties and (6) he loss of a legitimate juridical advantage (*Young v Tyco 2008 ONCA*, straight forum non-conveniens on grounds that Indiana would be the clearly more appropriate forum for the action). These are not exhaustive/determinative, they are discretionary.

In the preliminary/interlocutory stage in the trial (you’re not deciding the facts, it’s not a trial on the merits), the court should adopt a “prudential, not an aggressive approach, to fact finding”. It should be based on the plaintiff’s claim _if_ it has a reasonable basis in the record (if you’re going to accept the plaintiff’s version of the facts, assuming there is a reasonable basis the record). You are not going to decide based on the plaintiff’s version and the defendant’s version _at this stage_ – that comes later in the merits (*Young v Tyco 2008 ONCA*).
ANTI-SUIT INJUNCTIONS

Formulation of the Discretionary Principles: You don’t just apply the same principles as forum conveniens (Aerospatiale 1987 UKPC, overturning Castanho 1980 UKHL, which said we should be looking at what the most appropriate forum is). The Castanho approach is much too liberal.

Aerospatiale sets out the principles, but in applying those principles, we have to have due regard for Canadian principles. According to the SCC, there are two ordinary/general rules – “pre-conditions” (Amchem 1993 SCC):

(1) There should be no application for an anti-suit injunction in a Canadian court unless the foreign action has already been commenced (so you’ve got to have realized the risk not just be anticipating it).

(2) There should still be no application (assuming the foreign action has been commenced) for an anti-suit injunction in Canada until you have asked the foreign court to exercise its discretion and stay its own action. This won't help you very much if the action has been commenced in a civil law system (no discretionary element), but can be useful if it is a common law action.

The court is not bound by these “ordinary” rules; they can be disregarded if circumstances warrant (Hudson v Geos Language Corporation 1997 ONDC, ONDC did not treat pre-conditions as absolute, just ordinary rules).

(3) If the foreign court does not agree to stay its own action, then the Canadian court will evaluate the foreign decision not to stay. BUT we will do this ONLY IF we are the most appropriate forum for the action (natural forum, the one that is forum conveniens in light of the circumstances in the case) or an appropriate forum for the action (i.e. we have territorial competence) (Amchem, the SCC does not make it clear which it is). This should probably be interpreted consistently with Airbus Industrie v Patel and Aerospatiale, i.e. we should only grant an anti-suit injunction if we are the most appropriate forum for the action (the natural forum) but we shouldn’t do it if we are not, at the minimum, an appropriate forum for the action.

As a general rule, the English must conclude that it provides “the natural forum” for the action, i.e. it is “clearly the most appropriate forum for the action” (Aerospatiale 1987 UKPC) – we both have jurisdiction, but weighing the two, we are the most appropriate forum for the action. So we first have to decide whether we are the most appropriate forum for the action (not just that we have jurisdiction).

A qualification on the power of the court to issue an anti-suit injunction: a court will not take the extraordinary step of granting an anti-suit injunction against a party over whom it has jurisdiction (i.e. its residents) unless that court is the natural forum for the action, even if it is the natural forum for the injunction application (Airbus Industrie v Patel 1998 UKHL, we can’t simply police our residence for the benefit of other jurisdictions). So you can’t just go to the court where the parties you want the injunction against are located – it’s gotta be a court that coincides with the proper forum for the main action.

(4) To evaluate the foreign decision not to stay, we must decide, based on our own principles, whether the foreign court had a reasonable basis for its decision (Amchem). It’s not quite “would we have come to the same conclusion” and it is intended to take account of legal systems that don’t exercise discretion (i.e. civil law systems, which don’t have a doctrine of forum non-conveniens). What we do is think about what we would have done using the doctrine of forum non-conveniens in those circumstances, and ask “did they have a reasonable basis for that conclusion?” Only if they are blatantly wrong should we issue an anti-suit injunction.

(5) Lastly, we will only grant an anti-suit injunction if continuation of that foreign action is unjust or will produce an injustice (Amchem, note: this is not consistent with Aerospatiale, where the court upped the standard: where a remedy for a particular wrong is available in both an English court and a foreign court (i.e. you have two possible places to litigate, they both have jurisdiction) generally speaking, the English court will only restrain a plaintiff from proceeding in a foreign court if such pursuit would be vexatious or oppressive). The SCC (Sopinka J in Amchem) wants flexibility, we don’t talk about oppression and vexation in Canada. You only have to go to the level of persuading the court that continuing the action will produce an injustice.
JURISDICTION SELECTING CLAUSES

Jurisdiction selecting clauses and arbitration clauses are commonly found in contracts. Note re drafting: you want to make sure they are broad enough to cover any disputes that might arise out of a contract and you also want to make sure that they give exclusive jurisdiction to a particular court, if that is what you want.

The current position (and it is adhered to in the *Pompey Industrie v. ECU-Line 2003 SCC*) is that jurisdiction selecting clauses are given very great weight when it comes time for the court to exercise discretion (to decide whether or not it is the most appropriate forum for the action). The common law has never considered jurisdiction selecting clauses in contracts to be treated as absolute. We do not say, if there is a jurisdiction selecting clause in the contract, we have no jurisdiction simpliciter/territorial competence (that would move it from the discretion portion of the jurisdiction decision to the jurisdictional rule part).

It is permissible for jurisdiction selecting clauses to be made absolute by statute – so you always have to be on your guard. There is also some statutory law (consumer protection law) in some provinces in which jurisdiction selecting clauses and arbitration clauses in consumer contracts will be treated as void – these are imposed, not bargained for; we have to have to protect the consumer; etc.

Whenever there is a jurisdiction selecting clause, there are always going to be two potential issues:

(1) whether the clause is valid (there may be choice of law rules that determine whether the choice of law clause is valid)

(2) the effect of a valid choice of law clause

The test for determining whether there is a valid jurisdiction selecting clause is the original common law test set out in *Eleftheria* (leading English case), it is basically forum non-conveniens – the same factors (*Pompey Industries*). It is a multi-factorial analysis: you look at all the circumstances, all the factors that you consider for forum non-conveniens and you add in the jurisdiction selecting clause – and it has very heavy weight.

If the plaintiff has brought an action in federal court in breach of a jurisdiction selecting clause, then the burden of proof is on that party to show why he should not be held to the contract that was negotiated.

**TEST:** The burden is on the party who chooses to litigate in a jurisdiction other than the one selected by the jurisdiction selecting clause to persuade the court that there is a strong cause as to why the party should be permitted to do so and not be held to his bargain (this is a heavy burden) – ex. Unequal bargaining positions (i.e. really had no choice). In *Pompey Industries*, court found no strong reason why the litigation should not happen in Belgium – both parties sophisticated; equal connections with Belgium as with Canada.

**Note:** the SCC in 2012 appears to have moved the jurisdiction selecting clause from the discretionary element of the jurisdictional decision into an absolutejurisdictional decision: “you don’t have any jurisdiction because there is an agreement to litigate somewhere else – there is no subject matter jurisdiction.” However, the court says the Pompey case is still applicable (*Momentous 2012 SCC, court seems to treat jurisdiction selecting clause as going to jurisdiction not discretion*). So now the BCCA is struggling with the reconciliation of *Pompey, Teck Cominco* and *Momentous*.

**Note:** the BCCA in 2011 said the *Pompey “strong cause” test* will only apply if the jurisdiction selecting clause was void (*Viroforce v R&D Capital 2011 BCCA*).

**Note:** the BCCA in 2012 said: *Teck Cominco* says s. 11 is exhaustive. *Pompey* says jurisdiction selecting clause is a separate inquiry, so court engaged in common law inquiry outside CJPTA (*Preyman v Ayus 2012 BCCA*).

EE thinks in BC, the courts are going to continue to use the *Pompey “strong cause” test*. They are going to give significant but not determinative weight to the jurisdiction selecting clause (but they shouldn’t do it). EE thinks it’s not that difficult to simply factor *Pompey* into the *CJPTA s. 11* analysis. s. 11 is not exhaustive – it may be an exhaustive statement of the common law principle (in s. 11(1)) but s. 11(2), which sets out the factors, does not purport to be exhaustive and even if it is an exhaustive list, we can fit it in to one of those general factors listed.

**Important:** “strong cause” test will only be relevant if it is an exclusive jurisdiction-selecting clause.
There are 2 models of class actions: opt-in or opt-out. The majority of Canadian provinces have adopted opt-out – everybody is in unless you opt out in time.

There is no special rule for class actions. The forum must have *jurisdiction simpliciter/territorial competence* and if there is objection to that jurisdiction, it must find that it is the *most appropriate forum for the proceeding*. So you have the same basic principles operating but sometimes they require (because of the way these class actions are set up). We’re a bit looser with respect to class actions.

**Territorial competence:** the approach taken by BC courts in class actions is to go back to order and fairness. We are not concerned with a mechanical application of rules, we have to be flexible, we have to have fairness (*Harrington v Dow Corning 2000 BCCA*). However, the MNCA suggests there is nothing wrong/inadmissible with using the traditional rules to give us *jurisdiction simpliciter* (*Ward v Canada 2007 MBCA*).

**Forum non-conveniens:** MNCA simply says we're going to apply the usual factors using the *Amchem* case, setting out the principles governing *forum non-conveniens*, and decide whether MN is the most appropriate forum for the action (*Ward v Canada*).

**The point:** if the class action hasn't been certified yet, you’re not fixed with the decision of the court regarding jurisdiction – it is a preliminary decision. Once the case is certified and moves on, *if* circumstances/evidence/witnesses arise and we learn other factors, then the defendant can make an application with the case management judge later (*Ward v Canada, we have jurisdiction, we are the most appropriate forum for the action and you’re not bound by this, you can make an application later*).
RECOGNITION AND ENFORCEMENT: IN PERSONAM JUDGMENTS

Different jurisdictions may have different rules for recognition and enforcement so the plaintiff may have to satisfy different rules depending on the jurisdiction in which they want to have their judgment recognized and enforced. Every state in the world prefers to select which foreign judgments it is going to recognize and enforce.

Until such time that the BC court recognizes a foreign judgment, it remains a foreign judgment. Once it has been recognized in BC, however, it is effectively a BC judgment and enforceable as a BC judgment. So you can use all the BC methods for enforcing judgments once the BC court recognizes the foreign judgment.

**How do you convert in BC?** (1) using common law rules or (2) using statutory rules. A plaintiff/judgment creditor's eligibility to use a statutory method of enforcement depends on the place of origin of the judgment to be enforced: (a) *Enforcement of Canadian Judgments and Decrees Act* (ECJDA) can be used only for Canadian judgments (i.e. from other provinces) (b) *Court Order Enforcement Act Part 2* (used to be in the Reciprocal Enforcement and Judgments Act) can be used for judgments originating from the jurisdictions that are listed.

If you have a client with a foreign judgment which that client wishes to have recognized and enforced in BC the first thing you should ask is: **what is the originating jurisdiction?** If it is a Canadian judgment, go directly to the ECJDA, do not pass go, do not hesitate. If it is a Canadian judgment (except Quebec) or a non-Canadian pecuniary judgment from a jurisdiction listed in the regulations under the COEA, you may be able to use the COEA Part 2. For everything else, you have to use the common law.

As a plaintiff/judgement creditor with an extra-provincial/foreign judgment, you can use any or all methods (common law, statutory, whatever works), in the alternative, together, back to back, it doesn’t matter – it is not considered to be an abuse of process of court. And you can always fall back on the common law.

Be very conscious of the limitation periods for enforcement of foreign judgments – they may be different from place to place. In Canada, (at common law) we treat foreign judgments as debt actions, it is a judicially-created debt. In BC, the limitation period for actions in debt is 6 years BUT there are provisions in the current Limitation Act and the Limitation Act that is will replace the current one in 2013.

**In BC, the limitation period for bringing an action on a foreign judgment is:**
(a) 10 years commencing from the enforcement date of the foreign judgment OR
(b) the limitation period of the originating jurisdiction if it’s shorter.

PECUNIARY JUDGMENTS

**At common law**, to convert a foreign judgment in BC, the plaintiff has to persuade the BC court that:
(1) The foreign judgment is **final and conclusive** and
(2) The foreign jurisdiction had jurisdiction “in the international sense” (i.e. we think they had jurisdiction simpliciter/territorial competence).

**Defences that can be raised** to prevent recognition and enforcement:
(1) Exclusionary rules (penal law, revenue law, public law, contrary to forum public policy)
(2) There was a breach of natural justice in the originating jurisdiction
(3) A fraud on the court (note it is not the foreign court perpetuating a fraud, it is the plaintiff)
FINIALITY AND CONCLUSIVENESS

Note: this is not a requirement/condition that is often going to be an issue.

In order to establish that a judgment is final and conclusive, it must show that the court by which it was pronounced had conclusively, finally and forever established the matter so as to make the matter res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that the parties may return to that same court and have the matter adjudicated again, then that judgment will not be considered to be final and conclusive (Nouvion v Freeman 1889 HL). Basically, if you can go back to the same court and get that court to modify the judgment, it is not final and conclusive.

Note: maintenance/support orders are never final or conclusive (in Canada/North America) because the same court that issued the maintenance/support order can modify/adjust it. However, there is legislation that enables parties to get foreign maintenance orders recognized and enforced in another jurisdiction.

A default judgment at common law is final and conclusive because you can’t go back to the same court and get it modified; all you can do is get it set aside

The common law considers a judgment on appeal to be final and conclusive for purposes of recognition and enforcement. However, if the defendant is appealing the judgment, then there is a provision (under the Rules of Court) for the defendant to apply for a stay of the BC recognition and enforcement proceedings.

But the point is: you can commence your action in BC for recognition and enforcement of the foreign judgment and even if the BC court issues a stay of your action, which it undoubtedly will, you now have an action in existence in BC, and you might be able to get pre-judgment garnishment, Mareva injunction, etc.

JURISDICTION IN THE INTERNATIONAL SENSE

The common law bases for jurisdiction in the international sense (i.e. the forum’s view on what they will recognize) provided alternative bases for the foreign court’s jurisdiction:

(a) the defendant was present in the foreign jurisdiction when the action was commenced there OR
(b) the defendant somehow submitted to the jurisdiction of the foreign court OR
(c) a real and substantial connection (added by Morguard in 1990; so if there was a real and substantial connection between the action and the foreign jurisdiction, BC will recognize and enforce that foreign judgment). Note: No other common law jurisdiction in the world has adopted the Morguard rule. The Irish SC recently expressly rejected it because it’s too uncertain/vague and the UKSC rejected it in New Cap v AE Grant 2012. But, 3 years later the SCC constitutionalized the real and substantial connection rule in Hunt.

Presence

In common law, the courts will recognize mere, temporary presence as sufficient for establishing jurisdiction in the international sense for purposes of recognition and enforcement (Maharanai). The common law does not require a high level of connection for jurisdiction in the international sense (the qualification being if you were tricked into the jurisdiction, that probably wouldn’t count).

For corporations, there are statutory rules for “corporate presence”.

Submission

The basic requirement for submission or attornment is that it must be voluntary. If you stay and defend on the merits, you have clearly submitted to the jurisdiction of the foreign court.

But you don’t need to use express words to submit; it can happen without you intending to submit to the jurisdiction of the foreign court. The question is objectively what did the defendants actually do in the foreign proceeding? (First National Bank of Houston 1990 BCCA, didn’t matter that defendants had not instructed their attorneys to submit to the jurisdiction of the TX court). Note: if counsel is acting without your authority, that won’t be considered submission, but if counsel has authority and does something in the foreign proceeding which constitutes submission, you will have submitted objectively.

(cont’d)
(1) You can argue that the foreign court has no jurisdiction (i.e. jurisdiction simpliciter/territorial competence) – this is not submission.

(2) But if you ask the foreign court to exercise its discretion (forum non-conveniens), then you have probably submitted (unless Mid-Ohio changed the common law; Mid-Ohio v Tri-K 1995 BCCA said: if you do over there what you are allowed to do here, we will not consider you to have submitted because our rules say you haven’t submitted if you ask the court to exercise its discretion. But the status of this decision is a little uncertain, so it is not necessarily gospel law in BC; see note below).

This is because in common law Canada, we have to decide jurisdiction (jurisdiction simpliciter/territorial competence) first before we decide whether we’re the most appropriate forum for the action (discretion) because the logic is: you can’t exercise discretion unless you have jurisdiction.

Note re Mid-Ohio: The BC Rules of Court at that time allowed a defendant to ask a BC court to exercise its discretion and stay its proceeding without constituting acceptance of the jurisdiction of the court (Rule 13 and 14). Wood J said this changes the common law, at least for BC. He used Rule 14(8) to say that defendants in foreign actions have the same freedom there as defendants have in BC, so the defendants in foreign actions can (a) object to jurisdiction and (b) invoke the discretion of the foreign court, and BC will not consider them to have submitted.

The problem is, we don’t have Rule 14(8) anymore and it is not clear whether Mid-Ohio is a common law decision or a mistaken decision on the part of the BC court that Rule 14(8) had changed our recognition and enforcement rules. If Mid-Ohio changed the common law rules, that’s okay, but if it is tied to the civil Rules of Court, then Mid-Ohio is no longer good law.

Practical tip: If you did decide to argue discretion as well as jurisdiction and you lost, stay and defend on the merits because otherwise the defendant will walk all over you and get whatever he wants. But don’t walk away anymore on the assumption that you’re home-free because you haven’t submitted.

(3) BUT the minute you ask the court to do something for you, i.e. make any other orders which require the court to have jurisdiction in order to make that order – you have submitted (Mid-Ohio, BCCA distinguishes between asking the court to exercise its discretion and making technical arguments (Mid-Ohio did both)).

You can’t argue that your submission was involuntary because your property in the foreign jurisdiction was seized in advance of the trial on the merits. However, you may, at common law, in such a situation, object to the validity of the seizure without having submitted or you can object to the jurisdiction of the foreign court (Clinton v Ford 1982 ONCA, we consider this a common law decision applicable in all common law provinces). If the defendant had argued: “you are not entitled to seize my property” or “you have no jurisdiction,” he would not have submitted.

Real and Substantial Connection

In Canada, even if you sit on your hands and don’t do anything, the court may still find that there was a real and substantial connection (Morguard 1990 SCC).

Within Canada, there is a constitutional principle that a Canadian court must recognize another Canadian court’s judgment if the jurisdiction was properly and appropriately assumed.

Morguard also applies to non-Canadian judgments (Moses v Shores Boat Builders BCCA, with the blessing of the SCC in Beals v Saldanha 2003 SCC). However, there is no constitutional obligation to recognize non-Canadian judgments they way there is with respect to Canadian judgments (Beals v Saldanha).

Also, the SCC seems to require a greater connection for recognition and enforcement of non-Canadian judgments: “The ‘real and substantial connection’ test requires that a significant connection exist between the cause of action and the foreign court.” “A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one” (majority in Beals v Saldanha). But we are still talking about real and substantial connection – we are not in any of the cases talking about a “significant” connection. (cont’d)
It may be that the real and substantial test is considered to be the only test now, and you can use “presence” or “submission” to bolster the real and substantial connection. A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties” (majority in Beals v Saldanha).

But there hasn’t been an SCC case confirming that Beals is correct in its modification of the ordinary rules, in particular the rules for non-Canadian judgments – so you can still argue it. In practice, you can assume that the 3 traditional factors are independent bases for jurisdiction.

Example where a real and substantial connection was not established: BCCA declined to recognize and enforce a Texas action where the alleged defamatory material of the defendant consisted of information posted on a third party’s bulletin board. The court held that a distinction has to be drawn between “purposeful commercial activity on the internet and the mere transitory passive presence in cyberspace of the alleged defamatory material.” There was no evidence that the alleged defamatory material was read by anyone in Texas (Braintech v Kostiuk 1999 BCCA).

NON-PECUNIARY JUDGMENTS

In Canada, we now (at common law) recognize non-pecuniary orders, most commonly a foreign injunction, but also other forms of equitable orders from other Canadian as well as non-Canadian jurisdictions.

General framework: You start with the traditional rules for recognition and enforcement (Morguard) and then there are add ons for non-pecuniary orders: we’re not going to enforce orders that we would never make/enforce ourselves (sort of a reciprocity/mirror image) (Pro Swing v Elta 2006 SCC).

Factors to consider: may include the criteria that guide Canadian courts in crafting domestic orders, such as:
(a) Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? – [has to be clear so we don’t have to speculate about what the foreign judge meant when he made this order]
(b) Is the order limited in its scope and did the originating court retain the power to issue further orders?
(c) Is the enforcement the least burdensome remedy for the Canadian justice system?
(d) Is the Canadian litigant exposed to unforeseen obligations?
(e) Are any third parties affected by the order?
(f) Will the use of judicial resources be consistent with what would be allowed for domestic litigants?

The non-pecuniary order also has to be final and conclusive (majority), but not necessarily in the sense of being the last possible step in the litigation process. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration (Pro Swing; McLaughlin J clarifying in her dissent; an interlocutory orders could meet the final and conclusive criteria for purposes of recognition and enforcement; disagreement between majority and dissent in this case was the application of the principles to the case at bar).

Clarity requires that an order be sufficiently unambiguous to be enforced. The enforcing court cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of the judicial apparatus in the enforcing jurisdiction.

Note: there will probably be more non-pecuniary orders than pecuniary orders that we’ll reject to recognize and enforce because they tend not to be as clear in their terms as pecuniary orders.

Note re enforceability of “anti-suit injunctions”: an anti-suit injunction would seem to meet the above criteria pretty easily: limited in scope, etc. On the other hand, an “anti-suit injunction” may evoke feelings of hostility in the forum where it is being enforced.
DEFENCES

Even if the foreign court (Canadian or non-Canadian) had jurisdiction in the international sense and delivered a final and conclusive judgment (as defined by the lex fori) and we decide that the foreign judgment fits within our recognition rules, it is still possible for the defendant in the recognition and enforcement action to raise defences to avoid recognition and enforcement. Note: the burden of proof is on the defendant.

*Beals v Saldhana 2003 SCC* extended the **Morgaurd** rule to non-Canadian judgments. As a result, the courts are going to be faced with a much greater variety of foreign judgments and they all agreed that it might be necessary in the future to create a new defence. Practical challenge: if there is something extraordinary that happened in the foreign proceeding that you can’t bring under the common law defences or exclusionary rules, you can formulate a new defence.

THE EXCLUSIONARY RULES

The exclusionary rules (penal laws, revenue laws, public laws, judgments and laws contrary to public policy) are always available. Note: see public policy on next page.

FRAUD

Forget about drawing a distinction between intrinsic fraud and extrinsic fraud (extrinsic and intrinsic fraud are **evidentiary categories**: extrinsic would be evidence discovered after, intrinsic would be something that was part of the consideration (*Lang 2010 BCCA*)), we talk about fraud going to jurisdiction of the foreign court and fraud going to the merits of the foreign decision (*Beals v Saldhana*). These are **subject categories** (*Lang BCCA*).

**Fraud going to the jurisdiction of the foreign court** can always be raised if somehow, somebody tricked the foreign court into taking jurisdiction when its own law didn’t have jurisdiction (lying about facts, or getting someone to sign something, etc.). It’s the plaintiff who is tricking the court (not the court committing fraud) (*Beals v Saldhana*). The due diligence requirement for fraud going to the merits doesn't directly apply here but there should be a very great reluctance in the BC court recognizing a foreign judgment to find that the foreign court had no jurisdiction (*Lang BCCA*). So there is no due diligence, but it is a high threshold, it has to be very clearly established.

**But fraud going to the merits** can be raised as a defence only if the **allegations are new and not the subject of a prior adjudication** (or there are new and material facts not previously discoverable with due diligence). You can’t just sit back, let the plaintiff in the foreign action assert things, not challenge them, and then claim fraud. You have to do your best and you have to exercise due diligence (*Beals v Saldhana*).

BREACH OF NATURAL JUSTICE

Basically, the approach of the SCC is that we’re not sure if we can trust non-Canadian jurisdictions, so there is heightened scrutiny.

When this defence is raised, we’re looking to ensure that there was nothing that occurred in the foreign action which is **contrary to Canadian notions of fundamental justice** (by our standards) (*Beals v Saldhana*). **Fair process** is one that reasonably guarantees basic procedural safeguards such as judicial independence, fair ethical rules (*EE suggests that the old arguments about natural justice have to do with getting your day in court, getting an opportunity to be heard, getting notice of the action, etc.*).

The question is whether there was a breach of natural justice in this particular action (*this is the dissent in Beals v Saldhana but far more convincing, dissent finds breach of natural justice in Florida proceedings*). You can have a fair legal system on the whole, but things can go wrong in individual cases. **But if you’re acting for the plaintiff, you can argue the majority decision focusing on the legal system as a whole.**
CONTRARY TO FORUM PUBLIC POLICY
Is the foreign law contrary to basic morality? Major J is very reluctant to use the contrary to forum public policy defence (Beals v Saldhana) because when you do that, you are effectively condemning the foreign law, you’re saying the foreign law turns our stomach, it’s contrary to our fundamental notions and judges have a reluctance to saying that about the laws of other legal systems. Note: see exclusionary rules.

NO DEFENCE OF ERROR OF LAW
There is no “error of law” defence, i.e. that the foreign court got the law wrong (Goddard v Gray 1870 UKHL). French court gets the English law wrong, English court demonstrates extreme self-restraint and says, nope, res judicata, we are not going to sit as an appeal court on the merits of a foreign decision).

STATUTORY REGIMES
The legislature over the decades has gotten involved in enacting statutes to deal with recognition of foreign judgments and also of arbitral awards.

For foreign judgments, there are 3 statutes:
1. Court Order Enforcement Act Part 2 (used to be in the Reciprocal Enforcement and Judgments Act)
2. Enforcement of Canadian Judgments and Decrees Act
3. Supreme Court Civil Rules which apply to procedural rules

For arbitral awards, there are 2 BC statutes:
1. Foreign Arbitral Awards Act
2. International Commercial Arbitration Act

Note: there is also a statute for maintenance/support orders, which are not enforceable at common law (Interjurisdictional Support Orders Act – a special statute for foreign support orders).

In BC, the limitation period for enforcing a foreign judgment under statute is the same:
(a) 10 years commencing from the enforcement date of the foreign judgment OR
(b) the limitation period of the originating jurisdiction if it’s shorter.

Note: the limitation periods are in other provinces may be different.

JUDGMENTS AND ORDERS
A plaintiff/judgment creditor’s eligibility to use a statutory method of enforcement depends on the place of origin of the judgment to be enforced:
(a) Enforcement of Canadian Judgments and Decrees Act (ECJDA) can be used only for Canadian judgments (i.e. from other provinces)
(b) Court Order Enforcement Act Part 2 (used to be in the Reciprocal Enforcement and Judgments Act) can be used for judgments originating from the jurisdictions that are listed.

Both statutes are adoptions in BC of model acts drafted by the Uniform Law Conference of Canada. Virtually every province adopted the original model act, though not necessarily with identical wording in every province.

Both statutes modify the procedure for converting a foreign judgment. Instead of bringing a common law action and issuing a notice of civil claim, etc., that process of bringing a common law action on a foreign judgment is replaced by a registration procedure – cheap, efficient, nice short limitation periods.

If you have a client with a foreign judgment which that client wishes to have recognized and enforced in BC the first thing you should ask is: what is the originating jurisdiction? If it is a Canadian judgment, go directly to the ECJDA, do not pass go, do not hesitate. If it is a Canadian judgment (except Quebec) or a non-Canadian pecuniary judgment from a jurisdiction listed in the regulations under the COEA, you may be able to use the COEA Part 2. For everything else, you have to use the common law.
Canadian Judgments

*The Enforcement of Canadian Judgments and Decrees Act* takes the *Morguard* recognition and enforcement rule to its logical conclusion: we now have **blind full faith and credit** (for other province’s judgments) mandated by the *CEJDA (s. 6(3))*.

There hasn’t been a single case dealing with the application of the ECJDA. It appears to be working perfectly. It prohibits the recognizing court from considering whether the other Canadian court had jurisdiction, even in the *Morguard* sense – we don’t consider lack of jurisdiction in the other Canadian court. This is why it is blind full faith and credit – we pray they were right.

Secondly, the *ECJDA* requires the BC courts to recognize and enforce both **pecuniary judgments** and **non-pecuniary orders and decrees** (s. 1). So it also incorporates *Pro Swing v Elta*.

Lastly, *ECJDA* eliminates both defences of **fraud** and **breach of natural justice** in the foreign court. This is not evident on the face of the statute but that’s what the Uniform Law Conference of Canada said was intended its commentary on the provisions of the ECJDA so that’s how s. 6(3)(c) has been interpreted. **Error of law** is also not a defence (s. 6(3)(b)). But the “contrary to public policy” defence is still there (s. 6(2)(c)(iv)) but the chances of you successfully raising a public policy defence in BC for an Ontario judgment is pretty minimal.

Non-Canadian Judgments

*The Court Order Enforcement Act Part 2* is just a codification (and not a very good one) of the common law rules for recognition and enforcement. The *COEA regulations* have a list of jurisdictions declared to be reciprocating states for the purposes of the act: all Canadian territories and provinces (except Quebec) // **Australia**: all states and territories // **US**: Alaska, California, Colorado, Idaho, Oregon, Washington – note: New York, Texas not included // **Europe**: Austria, Germany, the UK. For jurisdictions with which we do not have reciprocating agreements, you have to go to the common law.

The *Morguard* basis (of real and substantial connection) for recognition and enforcement is not available under the *COEA* (*Central Guaranty Trust 1995 NWTR, TJ did his damnest to read Morguard in but couldn’t*). **BUT if you can rely on the traditional rules (presence or submission)** and if the judgment is from a reciprocating state, then the *COEA* is a good bet. **It is effectively pre-Morguard common law rules** for recognition and enforcement of judgments, the advantage being that it uses a registration process so you don’t have to start an action – that was the whole point of it. *But it is going to be infrequently used because it’s just not available, your judgments aren’t going to be eligible.*

The COEA has been interpreted as being limited to recognition and enforcement of **original judgments**. It was not intended to recognize judgments recognized by other jurisdictions (“chaining”) (*Owen v Rocketinfo 2008 BCCA*).

So you have a **very limited statute** in terms of its applicability. You have to have an original, pecuniary (common law pre- *Morguard*) judgment from a jurisdiction which has entered into a reciprocal agreement with BC and is listed in the regulations. So for non-Canadian judgments, you will probably want to go to the common law in the end because in the *COEA*, you get a simplified procedure, but you don’t get the *Morguard* rule and that limits the number of judgments that are going to be registrable.

**COEA procedure:** (1) the foreign judgment creditor registers a judgment (ex parte) (2) that judgment creditor has 30 days to notify the defendant, the BC judgment debtor (3) then the defendant in the recognition and enforcement action gets 30 days to raise defences (establish a lack of jurisdiction or one of the common law defences) which are incorporated and codified in the COEA.
ARBITAL AWARDS

For arbitral awards, there are 2 BC statutes:

1. Foreign Arbitral Awards Act
2. International Commercial Arbitration Act

Both these statutes require BC courts to recognize and enforce foreign arbitration 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).

Note: the arbitration acts are not the only route to go in getting recognition and enforcement of an arbitral award. It may be (as happened in Shreter v Gasmac) that the foreign arbitral award can be registered in the foreign court, it then becomes enforceable as a judgment which would be enforceable under the COEA as a foreign judgment. But under the arbitration statutes, you can go directly to asking the BC courts to have the arbitral award recognized and enforced.

We are not concerned with jurisdiction of the foreign arbitrator because it is consensual, but we are concerned that the agreement to arbitrate is valid. There may be some legal systems which do not consider an agreement to arbitrate valid for a particular contract. Example: there is legislation in Canada that renders agreements to arbitrate a consumer contract void.

If there is a valid agreement, then that agreement is subject to interpretation to ensure that it covers the particular dispute. It may be that the parties failed to make their agreement to arbitrate clause broad enough and it doesn’t cover the particular situation.

Then the question becomes: what defences can be raised.

(1) Note: merger of the arbitration and the judgment not a defence. The merger rule does not apply in a conflicts context (Shreter v Gasmac 1992 ONCA). ON (and BC) do not consider the foreign cause of action/foreign arbitration to be merged into the judgment, so you can go directly to the recognition and enforcement of the arbitral award, even if it has been registered somewhere else as a judgment, you don’t have to go to that judgment (this is a question for the forum using lex fori) (Shreter v Gasmac, arbitration award filed by GA corp in GA as a judgment, GA corp applies for recognition and enforcement of the arbitral award in ON. Defence argued: GA corp can’t bring an action for recognition and enforcement of the arbitral award because it has been registered in GA as a a judgment – failed. Note: this is an ON case, but same defences are available in BC and the disposition of the argument would likely be the same).

Note: common law domestic rule: your cause of action merges in the judgment (res judicata), you can’t bring another action on the original cause of action if there has been a judgment on it.

(2) breach of natural justice (provided for in statute in ON and BC): absence of reasons could be found to be a breach of natural justice (it is a valid defence). You need to know why the arbitrator came to the judgment that he did (how do you know how to deal with the merits of the award in GA in terms of appealing it, etc., unless you have reasons) (Shreter v Gasmac, defence argued: the arbitrator didn’t give reasons for the award. On the facts, ONCA did not find a breach of natural justice).

(3) breach of forum public policy: this is a residual defence to anything universally – every legal system in the world retains this residual, last bit of discretion (they don’t want to have to be in the position of having to enforce a judgment which is inconsistent with their fundamental values). This is a narrow defence: there’s got to be something that is inconsistent with our fundamental values. Acceleration of royalty payments could not be said to be so deplorable and distasteful that it is inconsistent with Ontario’s fundamental values (Shreter v Gasmac, defence argued: acceleration of royalty payments (which occurred under the contract) is inconsistent with our fundamental principles – failed.
We have to consider other conditions/circumstances when asked to recognize a foreign class action judgment, especially in a case in which the plaintiff doesn’t want it recognized and enforced (Currie v MacDonald’s 2005 ONCA, endorsed by SCC). We’re not talking about the defendant here – that’s the difficulty in class actions. It is the plaintiff who was included in the foreign action who now says, I don’t want to be bound by that, I want to bring my own action here.

Some criteria for the recognition and enforcement of foreign class actions:

(1) We start with the real and substantial connection or the traditional bases. (2) You then have to ask, in addition, whether the non-resident plaintiffs were adequately represented and also whether those non-resident plaintiffs were accorded procedural fairness, in particular, were the non-resident plaintiffs in the foreign class action properly notified about their options. In effect, we have built in some of the defences into the recognition rule for class actions: procedural fairness, adequate notice, did he have his day in court, did he have an opportunity to opt out.
JURISDICTION: IN REM ACTIONS

For jurisdictional purposes, a real and substantial connection is presumed to exist (i.e. BC will have territorial competence) if the (movable or immovable) property is located in BC (CJTA s. 10(c)(i)). Note, however, that this doesn't necessarily decide that we are the most appropriate forum for the action (discretion).

THE MOCAMBIQUE RULE

In common law jurisdictions (unless modified by statute), a forum court will not take jurisdiction in actions relating to title in land that is located outside of its jurisdiction (right to title/possession of land, trespass to land) (Mocambique 1893 UKHL reaffirmed in Hesperides Hotels 1979 UKHL, nothing has changed since 1893, we still don't have power to enforce our orders).

Justification: It would be pointless. We can’t enforce it. We could take jurisdiction and give the remedies but how can we stop the defendant going back to the place where the immovable is located and undoing what we’ve done?

EXCEPTIONS TO THE MOCAMBIQUE RULE

Dicey Rule 122(3): Mocambique Rule and its exceptions

The court has no jurisdiction to entertain proceedings for determination of title to, or the right to possession of, immovable property situated outside England/(Canada) EXCEPT where:

(a) the claim is based on a contract or equity between the parties;

So you are framing the claim as an in personam contract or equitable claim (Ward v Coffin 1972 NBSC; Minera Aguline 2006 BCSC). In Ward v Coffin, the court could award damages or an order for specific performance (equitable) – both of these are in personam remedies. The court could not transfer the title to the plaintiff, it could only order the defendant to get it done.

Note: in Canada, we are now also prepared to recognize and enforce in personam equitable orders (ex. specific performance) at least of Canadian courts, probably of foreign courts as well (Pro Swing v Elta).

(b) the question has to be decided for the purpose of the administration of an estate or a trust AND the property consists of immovable and movables in England as well as immovables outside of England.

So if you’re dealing with validity of wills/intestacy/etc and there is land and also movable property in BC (i.e. some of the estate is here) but there is also some land outside of BC, the BC court can take jurisdiction and decide succession to that property outside of BC.

Damage to movable and immovable property: In circumstances where there is damage to the foreign immovable property but the pleadings indicate that a substantial proportion of damages may well be found to be damages to movable property, the courts may be starting to make an incursion into the Mocambique rule (Godley v Coles 1988 ONHC, not very authoritative but may indicate a Canadian qualification of the Mocambique rule. ON court takes jurisdiction, the fact that there is some damage to immovable property should not disentitle P from bringing action in ON when title to land is not in dispute).

SO: the Mocambique rule (where the court will not take jurisdiction) is really only 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 claims involve a foreign immovable property, the court will take jurisdiction.
Canadian courts will not recognize and enforce foreign in rem judgments dealing with title to local land, nor will they recognize and enforce foreign in personam equitable orders dealing with title to local land (Duke v Andler 1932 SCC, CA judgment may have been in personam but the property was in BC and BC courts will not stand for a foreign court deciding what will happen to land here).

There have been no challenges to this case. So in theory, this is still good law BUT at the in personam level, we now recognize in personam non-pecuniary judgments (i.e. equitable orders) (Pro Swing v Elta 2006 SCC). So if a foreign in personam non-pecuniary judgment came to a common law court in Canada today, we ought at least to consider whether to recognize it. It is at least eligible for consideration.

At the in rem level, it may still be good law, but we may be constitutionally obligated to recognize the judgment if it is from another Canadian province (ECJDA s. 6(3), blind full faith and credit; ECJDA s. 1, definition of “Canadian judgment” a judgment that (c) declares rights in relation to a person or thing).
Even at the jurisdiction stage, you can't ignore choice of law issues. You need to have at least a good idea/be able to predict what law a potential forum will apply to the merits of the action if that court takes jurisdiction.

“If I litigate in State A, that court’s choice of law rules will likely produce application of a particular law – is that good or bad for my client? If I litigate in State B, what legal system will the choice of law rules of state B will select for application to the merits of the case?”

Note: if there is a choice of law issue in a conflicts case, you are permitted to not raise it, not to ask the court to apply the choice of law rule (conspiracy of silence: neither counsel wants to raise the choice of law issue). The only reason you would want to invoke a choice of law rule and persuade the court to apply that choice of law rule and apply the law of another jurisdiction is if the application of that law would benefit your client, otherwise, just go with BC law.

Remember: foreign law is treated as a question of fact. In a common law jurisdiction, you have to plead and prove the foreign law by means of an expert in that foreign law.

The typical common law choice of law rule has a connecting factor. The connecting factor points the court (the forum) to a particular legal system. Once the choice of law rule has pointed the court to a particular legal system, then the forum applies the relevant laws of that legal system. The approach is the same but the connecting factor may be different.

Example: traditional choice of law rule governing formal validity of a marriage: “formal validity of a marriage (the issue) is governed by the law of the place where the marriage was celebrated (the connecting factor).”

Example: traditional choice of law rule governing succession: “essential validity of a will relating to movables (the issue) is governed by the law of the domicile of the testator at the date of death (connecting factor).”

RENVOI & THE INCIDENTAL QUESTION

RENVOI

Renvoi focuses on an ambiguity in the traditional choice of law rule. The connecting factor in a choice of law rule will point the court to the laws of a particular legal system, but there is no definition in the choice of law rules of “the law” to be applied: do we mean domestic law or conflicts law (“whatever that court would do”)?

In BC, we have BC domestic laws but we have special rules (conflicts rules: jurisdiction, recognition and enforcement, choice of law) for situations where the facts are not Canadian/there are foreign elements.

(1) The ordinary choice of law rule applies the domestic law of the jurisdiction selected by the choice of law rule (the connecting factor). So most of the time, we would ask “what is the domestic law of the jurisdiction where the marriage was celebrated?” and just apply that domestic law.

(2) Partial Renvoi: Sometimes, the forum will look to the conflicts rules of the foreign jurisdiction (the lex causae, the law selected by our choice of law rules). If the forum looks at the conflicts rule of the lex causae instead of simply looking at its domestic law, the forum may wind up applying the law of a third legal system (transmission) or it may wind up applying its own law (remission).

In Partial Renvoi, the forum will look to the conflicts rule of the foreign jurisdiction and then apply the domestic law that the foreign jurisdiction’s conflicts rule would direct it to.

(cont’d)
So we may ask “what is the choice of law rule of the jurisdiction where the marriage was celebrated?” This first happened accidentally, but now it happens deliberately, although sometimes still accidentally if you ask the foreign law expert the wrong question.

**Example:** Ava and Colin got married in Greece. There is later litigation in NY; the issue is the formal validity of the marriage. NY choice of law rule says “formal validity is governed by the law of the place where the marriage was celebrated (which is Greece).”

- **Ordinary choice of law rule:** If the NY court uses an ordinary choice of law rule, it would then ask, “what is the domestic law of the place where the marriage was celebrated (Greece)?” So it would apply the domestic law of Greece.

- **Partial Renvoi:** If the NY court uses Partial Renvoi, it would then ask, “what is the choice of law rule of the place where the marriage was celebrated (Greece)?” Greece’s choice of law rule says “formal validity of a marriage is governed by the law of the place of nationality.”

  - **Transmission:** If Ava and Colin are nationals of Canada, there is transmission to a third legal system (Canada). So the NY court would apply the law of Canada.

  - **Remission:** If Ava and Colin are nationals of NY (USA), there is a remission back to the forum’s legal system (NY). So the NY court would apply its own law.

(3) **Total Renvoi:** The forum (actually, the idiot counsel who doesn’t know what he’s getting himself into) will look to the foreign jurisdiction and ask the foreign law expert: “how would your court solve this case?” Now you’re in deep shit, because you’re open to any result. There are four options you might get:

(a) In X, we would just apply our domestic law

(b) In X, we would apply our choice of law rule (results in Partial Renvoi)

(c) In X, we would use Partial Renvoi – so we would apply our choice of law rule, but we would look at your choice of law rule (if our choice of rule points there) and we would take a remission or a transmission

(d) In X, we use Total Renvoi – so our choice of law rule is: we would do whatever the foreign court would do (results in circulus inextricabilis)

**Some editorial comments:** this scenario (d) has never happened, and it gives nightmares to the theorists. The common law judges have never had to formulate a secondary rule for what would happen if the foreign court would happen to use a Total Renvoi too, because only the common law courts are stupid enough to insist on “Total Renvoi” and the common law jurisdictions usually have the same choice of law rule – and because they usually have the same choice of law rule, you don’t get any options. You need 2 common law systems to go head to head to get this scenario. But civil law systems are smart enough to only use Partial Renvoi if they use Renvoi at all, and in jurisdictions that use Partial Renvoi, there will usually only be one remission or transmission and that will usually end it.

So: In BC, using Total Renvoi, we would use our choice of law rule, which points to jurisdiction X. We would then say to X: “we would do whatever you would do.” X would come to the same result because they would use their choice of law rule and that would probably point them to their own law (because that’s how we got there in the first place).

All the common law courts say: if we use Renvoi at all, we use Total Renvoi but in fact, the results in the English cases are consistent with Partial Renvoi – there is a look at the conflicts rule and there is a transmission or a remission. How do they get from Total Renvoi to Partial Renvoi? It depends on the foreign expert and the questions you ask the foreign expert.

**How does Total Renvoi happen accidentally?** It can happen accidentally if you want Partial Renvoi but instead of asking the foreign expert “What is your conflicts choice of law rule for this issue?” (which gets you the conflicts choice of law rule, and then a transmission/remission), you ask the foreign expert “How would your court solve this case?” Once you ask the foreign expert this question, you’re in deep shit – you have left yourself wide open for any possible result.
In certain scenarios (ex. formal validity of a marriage), the courts will use Partial Renvoi as an alternative validating rule if they don’t get the desired result with the application of the domestic law of the lex causae (this is now built into the common law choice of law rule) \((\text{Taskanowska v Taskanowski 1957 Probate UKCA, English court looked at Italian domestic law, got the wrong result, marriage was invalid. English court then looked at Italian conflicts law, turned out there was not compliance with the conflicts law either}).\)

**Renvoi in marriage:** Choice of law rule governing formal validity of a marriage is now a double barrel rule: “formal validity of a marriage (the issue) is governed by EITHER (a) the domestic law of the place where the marriage was celebrated (the connecting factor) OR (in the alternative) (b) the conflicts rule of the place where the marriage was celebrated”

**Renvoi used in tort:** \(\text{Neilson v Overseas Projects 2005 HCA (Aus): first/only case in which Renvoi has been used in a torts case. HCA says it is going to use Total Renvoi, but they wind up using Partial Renvoi: we don’t blindly apply our choice of law rule and only ever apply the domestic law of the lex loci delicti – we can look at the conflicts rule of the lex loci delicti, they look at the chinese conflicts rule, they take a remission and they apply Australian domestic law.}\)

*Note:* usually we use either the old “double barrel rule” or the new “lex loci delicti” rule since 1993 \((\text{Tolofson and Jensen})\) and then we apply the domestic law of the jurisdiction that is selected.

**The Way We Do It in BC:**
In BC, if you have a case with an issue calling for an application of a choice of law rule, and the choice of law rule points you to another jurisdiction (lex causae):

1. First, research the domestic law of that foreign jurisdiction.

2. If the application of the domestic law of the foreign jurisdiction will not result in a favourable outcome for your client, there is nothing to prevent you and in fact you should research the conflicts rules of the foreign jurisdiction so you know what your options are. If your cause of action/juridical category is the kind of category that is amenable to the use of Renvoi (marriage, succession, title to immovable property, maybe torts, not contracts), you’re home-free.

3. You then have the option of arguing that the BC court should look at the conflicts rules of the foreign jurisdiction (note: you would only do this if you have discovered that, by remission or transmission, this would get a more favourable result for your client).

   *Do not even mention Total Renvoi! Jus say: “Renvoi/conflicts rule/transmission: apply domestic law, isn’t that easy, judge?” or “Remission: hey you get to apply your own law, isn’t that even easier?”*

4. Then you get a foreign expert and ask them to set out the conflicts choice of law rule and how it operates in their legal system. Do NOT ask the foreign expert: “what would your court do in this case?”

5. Counsel on other side is free to then argue: “Hey if we use Renvoi, we only use Total Renvoi.” How do you handle this? You pray.

*A note of caution:* Renvoi is not an approach that judges in Canada (or even in England) particularly like. So you’re not going to get a particularly receptive judicial audience but they acknowledge precedents so if there is a precedent in the area, they will defer to that. *Nor is* Renvoi encouraged by legislation; there are a number of statutes which expressly exclude Renvoi. The BC \(\text{Wills, Estates and Succession Act} (\text{enacted, but not yet proclaimed}) provides multiple independent alternatives that can be used to find the particular will valid. Once you have these alternatives in the legislation, you don’t need Renvoi anymore.*
At common law, Renvoi is an option in (a) validity of marriage cases and (b) testamentary succession (formal and essential validity of wills). In these two areas, there is a common policy, pretty much across the common law world, of wanting to uphold the document/institution – so you’re looking for options.

Another area in which there is precedent for use of Renvoi (assuming we take jurisdiction) is (c) transfers of title to immovable property. When we use Renvoi in this area, we are deferring to power. You can’t move immovable property, so we might as well do what the foreign court would do because they are in control.

Another area is (d) torts (Neilson v Overseas Projects). The policy in this area might be said to be hind liability for the plaintiff (we don’t know if this the proper policy, we’re not sure what was motivating the HCA).

Note: you cannot use Renvoi in contracts because the introduction of Renvoi into the choice of law rule produces uncertainty and when you choose a law to govern your contract, you want that domestic law, you don’t want to get into choice of law rules and whatever that legal system might choose in its conflicts system.

Note: The English CA has recently rejected using Renvoi for transfer of titles to movable property (?).

INCIDENTAL QUESTION
All you have to be able to do is recognize an incidental question if it should arise in a case you do (but do not assume you will have one on the exam).

The true incidental question is limited to situations in which (a) the subsidiary issue is a conflicts issue in its own right (it’s got to be solved by the application of a choice of law rule, otherwise we would just use our choice of law rule) AND (b) the application of the forum choice of law rule will produce a different result from the application of the lex causae choice of law rule – only then do you have to deal with the choice.

Classic example of an incidental question: There is a will – the essential validity of the will is determined by the law of jurisdiction A (ignoring choice of law rules for now, probably because it is the testator’s domicile). The testator T leaves everything to his wife A, but does not name the person. Question is raised by someone (who is not the wife, but wants the estate, let’s say, the sister X). The question is: Is A the wife of the testator? Assume that this subsidiary issue is a conflicts issue in its own right (because the parties got married in another jurisdiction, etc). Main issue: essential validity of the will. Subsidiary issue: is A the wife of the testator? (assume this is a conflicts issue).

The incidental question: The lex causae for the main question (validity of the will) has a choice of law rule that says: Yes A is the wife of T. The lex fori has a different choice of law rule, and it says: No A is not the wife of T. This is the incidental question: whose choice of law rule should BC courts use for this subsidiary issue? The choice of law rule of the forum or the choice of law rule of the lex causae – they give a different result.

So you have a choice! There are no precedents forcing the court in one way (forum law) or the other way (lex causae). You’re going to have to find arguments to justify/persuade the BC court (or whatever jurisdiction you’re in) to use forum law or lex causae. You can argue uniformity: let’s do what the foreign court would do because we’ve decided they’re the right legal system for the issue. You can argue internal consistency: forum characterization, let’s use our own laws all the time.

Note: one way to avoid the whole incidental question uncertainty is to bring the subsidiary issue to the court by itself and ask for a declaration about the validity of the subsidiary issue alone (ex. the Italian divorce) because the court has to use its own conflicts rules.

Schwebel v Ungar 1965 SCC, main issue (capacity to marry) turned on whether the gett divorce in Italy was recognized (subsidiary issue). Note: subsidiary issue was a conflicts (recognition) issue not a choice of law issue. Israel’s recognition rule for foreign divorces: “we recognize a gett divorce,” U had single status, she had capacity to marry. Canada’s recognition rule for foreign divorces: (1) divorces obtained or (2) recognized by domicile (Hungary): “Hungary does not recognize the divorce,” U did not have single status, she did not have capacity to marry. SCC decided to apply lex causae rule. How did they choose? We don’t know).
Originally, the common law courts had a single choice of law rule for marriage validity: the validity of a marriage is determined by the law of the place where the marriage was celebrated (lex loci celebrationis). The problem was that this led to "forum" shopping for marriages (people could search for a place to get married where the legal system won't say no just like the Americans coming up to Canada to get married).

Now we have a bifurcation of validity of marriage into sub-categories (Brook v Brook 1891 HL):

1) **Formal validity** of a marriage is still governed by the law of the place of celebration of marriage (lex loci celebrationis) (Brook): EITHER domestic law OR (in the alternative) conflicts rule (Taskanowska).

   Partial Renvoi is now built into the common law choice of law rule: the courts will use Partial Renvoi as an alternative validating rule if they don't get the desired result with the application of the domestic law of the lex causae (Taskanowska v Taskanowski 1957 Probate UKCA, English court looked at Italian domestic law, got the wrong result, marriage was invalid. English court then looked at Italian conflicts law, turned out there was not compliance with the conflicts law either).

   The object of these choice of law rules, generally, is to achieve uniformity – and the one thing you want in marriage is uniform status. So Renvoi has a toe-hold in marriage choice of law rules because we're aiming for uniformity. "We'll do what the law of the place of celebration would do" because we want uniformity.

2) **Essential validity** (capacity to marry) is governed by, generally speaking, EITHER (not alternatives)

   a) **the dual domicile rule**: each party's anti-nuptial domicile – main contender OR

   Disadvantage: you have to satisfy two legal systems.

   b) **the law of the intended matrimonial home**: post-nuptial (when it's convenient/just/etc)


   These are not alternatives. But you have a choice. There is no Canadian precedent that says we apply only one or the other. Usually both are discussed and one is selected. If you can persuade the court that the intended matrimonial home test makes the most sense in the circumstances of your case, there is precedent for it (Narwal). If you can persuade the court that the dual domicile rule, which is the predominant one selected, makes the most sense in the circumstances of your case, there is precedent for that too (Sangha v Mander).

**Precedents for Proper Characterization of Defects:**

Defects that have been characterized by the common law as going to the formal validity of a marriage:

a) Bans/notices issue (?)

b) Witnesses: Do there have to be witnesses? How many witnesses?

c) Registration: Does the marriage have to be registered? Is it valid if it is not?

d) Is a civil marriage ceremony sufficient? Must there be a civil ceremony? Must there be a religious ceremony? Must there be both?

e) What about proxy marriages?

f) What about parental consent? Parental consent was classified by common law as a defect going to formal validity (in England), on the continent it was considered as going to essential validity.

g) Online marriages? Can you Skype? Can you email it? – hasn't come up yet but stay tuned...

Defects that have been characterized by the common law as going to the essential validity of a marriage:

a) Age: Is there a minimum age below which a party has no capacity to marry?

b) Consanguinity: Can you marry your first cousin? Etc.

c) Affinity: Relationship through marriage (Brook v Brook)

d) Single status: Does this person have capacity to marry or is he already married (Schwebel v Ungar)?

e) Consent: Parties must consent to marriage. Was there fraud? Was one of the parties tricked into a ceremony of marriage thinking it was something else? Was there duress?
(f) Was there mistake? A mistake as to the attributes of the other person? (Recent Chinese case)

(g) Mistake as to the nature of the ceremony: you thought you were going through a betrothal ceremony but you find out you were actually married

(h) Consent vitiated by mental illness

(i) Consent vitiated by mental reservations: I had my fingers crossed behind my back (common law and civil law have different views on this: common law says, you said I do, you’re done)

(j) Same-sex marriages

Depending on how you characterize the issue, the defect may go to formal validity or essential validity. For example, what is the effect of the law on a religious ceremony? (Hudson v Leigh 2009 UKHC, HC characterized religious ceremony in SA as going to formal validity, parties didn’t consent but also, minister knew parties weren’t intending to get married that day, marriage not valid).

If you want to argue that the marriage is formally invalid (so that lex loci celebrationus would apply), you have to argue that this particular ceremony is not recognized as a valid ceremony of marriage (by the lex loci celebrationus).

If you want to argue that the marriage is essentially invalid (so that dual domicile or law of the matrimonial home would apply), you want to argue there was no consent (I knew I wasn’t being properly married, I knew this wasn’t really a ceremony of marriage, it was just a blessing, a religious ceremony blessing what is to come).

Polygamous Marriages

(1) The forum will decide whether a marriage is polygamous (characterization question) by examining the incidence of the ceremony and the law where the ceremony took place. Ex: the choice of law rule in England examines the legal system where the ceremony occurred to see what incidence is attached to the marriage and then decides for itself (lex fori) whether that is a polygamous marriage.

If you are polygamosly married, we recognize that as a valid marriage, but that will prevent you having a capacity to enter into another marriage.

(2) Not capacity per se but capacity to enter into a polygamous marriage is governed by the law of the intended matrimonial home – no option, no uncertainty. Justification for this: only the legal system where the parties make their home should decide whether the parties can enter into a polygamous marriage (English Spinster and Egyptian Man Case, people domiciled in a monogamous jurisdiction can’t enter into a polygamous marriage, so if you apply dual domicile rule: she didn’t have capacity and 20 years of married life with children went down the drain).

(3) Consequences of a polygamous marriage: The common law rule (unless overturned by statute, which BC has not done): there is no matrimonial relief for parties to a valid polygamous marriage (Hyde v Hyde 1866 UK, we don’t know what matrimonial relief we should give to polygamous marriages, i.e. wife #2,3,4, etc.).

(4) It is possible to convert a polygamous union into a monogamous union by the acquisition of a domicile in a monogamous state. If you have only one spouse at the moment when you acquire a domicile in a legal system that permits only monogamy, your marriage can be considered to be converted to a monogamous marriage, and then you can get matrimonial relief for anything that happens post-conversion.

Presumably, if you acquire domicile in a jurisdiction that allows polygamous marriages, your monogamous marriage can be converted into a polygamous marriage and you can take another wife.
THE ORDINARY RULE

The ordinary choice of law rule (in Canada, likely including Quebec) is *lex loci delecti*: the law of the place where the tort occurred (*Tolofson v Jensen 1994 SCC*). However, this is not absolute. Because a rigid rule could give rise to injustice (in certain circumstances), there may be potential for exceptions (at the discretion of the court) but they would need to be very carefully defined (La Forest J in *Tolofson v Jensen*).

*EE suggests:* If a tort occurs in Canada, it is likely that the *lex loci delecti* rule would apply. If a tort occurs outside Canada, then there is an alternative rule to apply the law of the forum (because it would make more sense/be more just/appropriate to apply the law of some third country) but we not necessarily locked in to this.

**Heads of damages** are substantive. **Quantification of damages**, however, is procedural (so forum law applies). **Costs** are procedural, Pre-judgment interest is substantive (governed by *lex loci delecti*) (*Somers v Fournier 2000 ONCA*), argument for international exception to *lex loci delecti* rule failed. Court held: different states, but no reason to apply ON law. Note: BC would likely characterize these issues the same way.

EXCEPTIONS TO THE ORDINARY RULE

If you don't like *lex loci delecti*...

(1) It may be possible to create special choice of law rules for particular torts based on inherent characteristics. Example: LeBel J suggests that the choice of law rule governing defamation actions should be the law of the place of the most substantial harm to the reputation of the plaintiff (*Banro 2012 SCC*, it is likely that this law that will be applied by lower courts because we pay close attention to the SCC; the problem will be to decide what legal system is identified by that choice of law rule).

(2) If the tort occurred outside of Canada, it may be possible to apply an alternative choice of law rule using the “international-level” tort exception (because it would make more sense/be more just/appropriate to apply the law of some third country) (*Tolofson v Jensen*). It is not clear what is meant by an “international level” but it has to be clearly outside Canada. You will likely need very specific facts to persuade the courts. At the very least, the tort must have occurred elsewhere and the plaintiff and defendant must be of the same nationality. One alternative is to apply the law of the forum, but you could also use the law of some other country.

(3) It may be possible to play with the location of the tort for choice of law purposes. *Note:* a tort may be located in many places for purposes of jurisdiction.

(4) It may be possible to play with the characterization of the tort (substance vs procedure): tort vs contract, nature of contract, etc.

(5) It may be possible to use Renvoi: look to the foreign jurisdiction's choice of law rule (instead of the domestic law) and get the law shifted elsewhere (transmission) or back to the forum (remission) (*Neilson v Overseas Projects 2005 HCA* (Aus): first/only case in which Renvoi has been used in a torts case. HCA says it is going to use Total Renvoi, but they wind up using Partial Renvoi: we don't blindly apply our choice of law rule and only ever apply the domestic law of the lex loci delecti – we can look at the conflicts rule of the lex loci delecti. They look at the Chinese conflicts rule, they take a remission and they apply Australian domestic law).

(6) You can also argue the "public policy exclusionary rule" (*Dicey Rule 2*, English/(Canadian) courts will not enforce or recognize the law of a foreign jurisdiction if it would be inconsistent with the fundamental public policy of English/(Canadian) law). This is a narrowly defined exclusionary rule with a strict test; it must be a foreign law (or foreign judgment) which turns the stomach of the judges in the court, i.e. they find the foreign law so repulsive, that they cannot bear to apply it (*Lloyd's v Meinzer*).

(cont'd)
contractual relationship, you can, as contracting parties, include a choice of law provision to cover any tort actions arising out of the performance of the contract. For example, misrepresentation may be covered by choice of law clause. This will depend on the drafting of the contract.

You can also forum shop (but don’t say you’re doing it). If another jurisdiction has a different choice of law rule which would be more beneficial to you or your client, there is nothing unethical in exploring that option.

Mini-History Lesson:
Original English rule that was in force in Canada until 1994 was the “double-barrel rule”: the tort had to be (a) actionable in the forum AND (b) not justifiable in the place where the tort occurred (basically lex fori subject to the defendant persuading the court that the act complained of in the place where the tort occurred was totally innocent (some efforts to lex loci delicti)).

In the US, they used the lex loci delicti rule but it was thrown out by a “revolution” and replaced with a governmental interest approach (which state has the greatest interest in having its law applied to decide the action? Usually, courts find their own states).

England moved to a rule of “double actionability”: the tort had to be civilly actionable in the forum AND in the place where the tort occurred (i.e. coincidence of legal rights, i.e. the worst of both worlds).

CONTRACTS

This is the one area of conflicts where we do our best to defer to autonomy of the parties to a contract to decide what law will govern their contractual relations. However, this is not absolute. The primary choice of law rule in contracts is that the law to govern any contract action is the proper law of the contract. The proper law of the contract is always said to be the internal law of the jurisdiction selected as the proper law of the contract. There is NO Renvoi in contracts because Renvoi produces uncertainty and we want to have order and certainty in contracts.

At common law, a contract cannot exist in a legal vacuum. There has to be a proper law for the contract from the inception of the contract (Amin Rasheed). Also, the proper law of a contract cannot “float” (so you can’t say “if I sue you, you can choose the proper law, if you sue me, I’ll choose the proper law”). Also, the proper law of a contract cannot “shift” (it can’t be this law for the first 10 years and another law the next 10 years). However the parties can make a new contract and change the laws governing their contractual relations. The parties can also, in theory, choose different laws to govern different parts of the contract.

The proper law of the contract will govern most issues that might arise in a contracts case. However, some issues are not governed by the proper law of the contract: (a) Capacity to contract (b) Formalities of the contract (c) Formation of the contract (d) Illegality. Also consider characterization of substance vs procedure. So you must first characterize the relevant issues in the case. Is there some other relevant contractual issue which might be governed by a different legal system and a different choice of law rule? Breach of contract? – proper law. Question of formation (i.e. “is there a contract here at all?”) – forum law.

Note: when there is a choice of proper law to govern contractual relations, the law selected will be the law as it existed at the time of contracting whereas the law applied by the forum will be the law as it exists at the time of the litigation.

Connecting factors in a contracts action:
(a) the forum (in this case NS – a disinterested third jurisdiction)
(b) the lex loci contractus (LLC) – the law of the place where the contract was made
(c) the lex loci solutionis (LLS) – the law of the place where the contract is to be performed
(d) the proper law
THE PROPER LAW

The proper law of the contract may be:

(1) **Subjective**: (based on parties' actual intention) either **expressly** based on an express choice of law provision in the contract (Vita Foods) or **by implication** (there might be an implied choice of law) (Richardson International) OR

(2) **Objective**: if you can’t find an express or implied intention, the court can determine the objectively ascertained proper law of the contract (Imperial Life Assurance, gives formulation).

(1) Express choice of law provision

So you start with: “what did the parties intend?” Ordinarily, an express choice of law provision will determine the proper law of the contract. It is given very great weight but it is not considered to be absolute at common law (Vita Foods 1939 UKPC, in certain circumstances, court might not defer to party autonomy). However, the number of cases in which an express choice of law clause has not been deferred to are few and far in between; the whole point is that you are trying to avoid application of some law that would otherwise apply.

There need be no connection between the contract and the law selected to govern the contractual relations of the parties to the contract. The principle of party autonomy (as applied by the common law) allows parties to a contract to choose a completely uninvolved third legal system (Vita Foods).

(2) Implied choice of law

In theory, the parties may have selected the law governing their contract by implication but this is hard to show. You cannot take evidence subsequently as to what the parties actual intent was. You do it on the basis of what is written in the contract (“within in the four corners of the contract”). You do not look outside (Richardson International 2002 FCA).

Factors to consider (not exhaustive): (1) the language in which the contract is written (2) the terms used (common law vs civil law terms) (3) the currency for payment (4) validity of clauses in the contract (we assume parties intended to negotiate a valid contract so if terms aren’t valid under one of the possible legal systems, it is a strong indication the parties intended the contract to be governed by the law of the other legal system, under which the terms would be valid) (5) existence of arbitration clauses (in particular where there is a geographical location selected for the arbitration) and jurisdiction selecting clauses.

The court will use an arbitration clause as a pointer to the parties’ actual intention. It is a very weighty factor (Richardson International, court looks at contract itself incl arbitration clause, finds implied intention).

Other courts have also looked at the law of the flag (this can be problematic if there are different ships with flags of different nationalities) (case mentioned in Amin Rasheed).

(3) Objectively ascertained proper law

If you can't find an express or implied intention, you can objectively ascertain the proper law of the contract, looking at all the circumstances of the contract and in particular, what is to be done under the contract. The formula for the objectively ascertained proper law of the contract is: “that with which the transaction has its closest and most real connection” (Imperial Life Assurance 1967 SCC, sets out formula. Court looks at all factors: place where contract made, head office (which maintained control), parties’ expectation* – ON law).

Factors to consider (in addition to the contract itself): (1) the place where the contract is to be performed (2) what is to be done under the contract (is this a contract of insurance/shipping/sale of goods/consumer/employment?) (3) residence of the parties to the contract (less weighty but relevant) (4) place where the contract was made (also less weighty but may be relevant). Note: you should not necessarily exclude any consideration of the contract itself, that should be allowed to factor in (Miller v. Wentworth (?) Estates UKHL).
In determining the objectively ascertained proper law of a contract, you are listing and weighing all the relevant factors and deciding over all, this is the law to govern the contract. The problem is there are different formulations for this, and the way you formulate the test may limit the factors the court looks at when it is ascertaining the proper law objectively. Also different judges will give different weight to different factors. ([Amin Rasheed 1984 UKHL], L Dickson found implied intention, L Wilberforce objectively determined proper law. Weighing of circumstances for objective reflected particularly in Wilberforce’s judgment)

*Note: the determination of the implied proper law is difficult to distinguish from objectively ascertained proper law. SCC in Imperial Life Assurance considers the fact that the parties expected the contract would be governed by ON law – this looks like it may be slipping back into (implied) actual choice as distinct from objectively ascertained proper law. When you are objectively determining the proper law of a contract, you look to what reasonable contracting parties would have expected not what the actual parties expected.

Other possible choice of law rules in a contract action

The proper law of the contract will govern most issues that might arise in a contracts case. However, some issues are not governed by the proper law of the contract: (a) Formation of the contract (b) Formalities of the contract (c) Capacity to contract (d) Illegality. Also consider characterization of substance vs procedure. So you must first characterize the relevant issues in the case: Breach of contract? – proper law. Question of formation (i.e. “is there a contract here at all”)? – forum law. Is there some other relevant contractual issue which might be governed by a different legal system and a different choice of law rule?

**FORMATION**

Note: in BC, we probably wouldn’t come up against a question of contractual formation in a jurisdiction case because of CJPTA s. 10(e): a real and substantial connection between BC and the facts on which a proceeding is based is presumed to exist if the proceeding ... concerns concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
(ii) by its express terms, the contract is governed by the law of British Columbia, or
(iii) the contract: (A) is for the purchase of property, services or both, for use other than in the course of the purchaser’s trade or profession, and (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller

But if you don’t fall within s. 10(e), you have to fall back on s. 3 and establish a real and substantial connection. So you might wind up having to establish the existence of a contract.

At the jurisdictional stage, you really can’t say “we’ll leave it to the trial judge” because you need to apply some legal system to decide the issue of formation. So you have to assume that there was a contract in existence.

Determining whether there is a contract in existence is governed by EITHER (not alternatives (?))

1. **The law of the forum:** if there is an argument at the jurisdictional stage that there is no contract, the court should use the law of the forum and, unless the argument is “non es factum” (they simply didn’t agree at all), you treat the contract as being in existence for jurisdictional purposes. If there is a jurisdiction selecting clause, you then defer to that. So the argument that there is no contract would be decided by the substantive law that would be applied to the merits of the case (Mackender 1967 UKCA, there was clearly an agreement between the parties, argument was that non-disclosure voided that agreement, law of the forum should be the choice of law rule; CDN equivalent: Pompey, jurisdiction-selecting clause, even if the rest of contract goes down the tube, we’re going to sever and apply the clause) OR

2. **The putative proper law of the contract**: the law that would have been the proper law of the contract (i.e. would govern the contract) if we assume there is a contract in existence (Albeko Schuhmaschinen 1961 UKCA, even if letter of acceptance was posted, court would have held no contract came into existence because the PPLC would have been Switzerland; Parouth 1982 UKCA, not clear if there was an agreement, court finds PPLC would have been English law because they were going to arbitrate in London in event of dispute over the contract which now they say doesn’t exist) (can be used if argument is “non es factum”).
FORMALITIES

Issues that can be classified as going to formal validity of a contract are very easily characterized as issues going to substance vs procedure (procedural requirements and formal requirements seem to be very closely related).

**Formal validity** of a contract is governed either (a) by *lex loci contractus*: the law of the place where the contract was made or, in the alternative, (b) by the proper law of the contract (*Greenshields 1981 ABQB, TJ*: formal validity; CA: substance vs procedure; but same result at both levels. TJ decision apparently represents common law choice of law rule for formal validity of contract).

**Justification for having a choice of law rule in the alternative:** (a) for *lex loci contractus*: contracting parties should be free to take legal advice about formalities in the place where they happen to be contracting (so they are allowed to take local advice) (b) alternatively, if these 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 from that legal system for the formal validity of the contract.

*Practice Tip:* before you make the argument, figure out what is the best result for your client and argue that. If you characterize the issue as formal validity of the contract, you’re going to get two chances of having formed a valid contract: either one will work (in the alternative). Whereas if you characterize the issue as one of substance vs procedure, it is an either/or proposition: it is either procedural (*lex fori*) or substantive (*lex causae*).

**Formality vs substance/procedure:** (*Naraji v Shelbourne 2011 UKQB, injured soccer player sues negligent US surgeon in the UK*): Issues: (1) Indiana law requires that if you want to sue in contract against a doctor, you have to have a signed, written contract (formality) (2) Indiana *limitations period* (3) Indiana had a *cap on damages*. **Held:** All of these issues were said to be procedural, therefore the English court didn’t have to pay attention to them, so the contract action proceeded.

CAPACITY

There are certain categories of persons who lack capacity to contract: (a) married women (until recently) (b) minors (have limited capacity to contract) (c) California capacity (?) (d) corporations (*was the person who signed the contract authorized by the corporation*?). There may also be some statutes to protect certain classes of people.

**Corporation capacity** is ordinarily governed by the law of the corporation’s domicile (the place in which the company was incorporated). **Individual capacity:** ONCA suggests suggests that capacity to contract should be determined by the objectively ascertained proper law of the contract (*Charron v. Montreal Trust 1958 ONCA*, reasoning: an individual shouldn’t be able to bestow capacity on himself by selecting a proper law to govern the contract).

(cont’d)
ILLEGALITY: RULES OF MANDATORY APPLICATION

Given the proliferation of legislation in all legal systems which deal with contracts issues, when there is a contracts action started, the defendant looks around and asks: “what can I argue?” and tries to find a potentially relevant statute that can be invoked to say the contract was illegal.

STEP 1: Decide, first of all, whether the law applies. Four possible connecting factors for illegality:

(1) **proper law of the contract:** any alleged illegality by the proper law of the contract is obviously going to be relevant; it is **always going to apply**! (we don’t even need cases to illustrate this). Court will ask: What is the proper law of the contract? If this statute is part of the law of the proper law of the contract, prima facie it applies, so you interpret it and see the effect on the contract.

(2) **lex loci contractus** (law of the place where the contract was made): if LLC is the **only** connection to the jurisdiction whose law is being invoked (i.e. the LLC doesn’t overlap with another connecting jurisdiction), at common law, illegality by the LLC is **not considered to be relevant**; it is **not applicable** (Vita Foods UK).

(3) **lex loci solutionis** (law of the place where the contract is to be performed): there is a reluctance in the common law courts, from a **policy approach**, to enforce a contract in circumstances where the performance of that contract would breach the laws of the place where the contract is to be performed.

*Note:* it is not a matter of *foreign* public policy, but *domestic*, *forum* public policy of not enforcing unlawful bargains or requirement unlawful conduct – this is comity: you don’t want to require a party to a contract to breach the law of some foreign jurisdiction (Sutherland J in Gillespie 1989 BCCA).

(4) **lex fori** (law of the forum): the laws of the forum will be relevant if they can be classified as “laws of mandatory application,” laws which require the court, on reading and interpreting, feels it is obliged to apply in BC actions (whether or not there is a unilateral choice of law) (Avenue Properties 1986 BCCA, application of forum law of mandatory application to a contract which is governed by some other proper law: Jurisdiction (FNC) case. Choice of law clause/proper law: ON; D argues P’s prospectus did not comply with BC Real Estate Act (lex fori))

Circumstances in which a court (BC court) can apply the law of its own jurisdiction in **substitution or supplementation** for the proper law of the contract:

(1) where the local law is **procedural**

(2) where the local law, although substantive not procedural, is a **forum law of mandatory application** (i.e. is of such a nature that it should be applied) **(a)** if the statute has a **unilateral choice of law rule** (i.e expressly states that certain procedures must apply notwithstanding that the proper law of the contract may indicate otherwise, that’s easy; **(b)** if the statute **does not have an express choice of law rule**, that does not prevent the courts of the forum (looking at their own laws, thinking about the protective purpose of this statute and those whom it is supposed to protect) from saying “this is a law of mandatory application which I ought to apply” (Avenue Properties, BCCA reads REA s. 62 (which expressly applies to sale of land outside of BC) like a unilateral choice of law rule: it is designed to protect BC consumers).

(3) **contrary to public policy:** the court may also apply a provision of local law in preference to the foreign proper law of the contract if it were satisfied that it would be contrary to public policy to do otherwise (McLaughlin J in Avenue Properties).

*Note:* EE suggests that to say the REA should apply in this case as a matter of public policy is to undercut the very narrow definition of forum public policy (for conflicts purposes). It is preferable to treat this case as involving the application of a forum law of mandatory application to a contract which is governed by some other proper law.
STEP 2: Interpret that statute

If the law applies, you still have to interpret it to see whether it applies to this case and what the result/effect would be. If the law is relevant, it must be considered but this does not mean that it will be applicable.

In interpreting the scope of application of securities legislation, the BCCA held that because securities legislation is designed as consumer protection legislation (protecting investors), and so each province’s act is limited in its scope of application to the prospectus issued in that province. (Pearson v Boliden 2002 BCCA, class action. CA located the Ps in each jurisdiction (where they received a prospectus and made their investment) and limited each of these classes of Ps to the benefits, if any, of their own securities acts creating a statutory tort and setting any limitation periods. Result: AB and NB Ps were wiped out either because their SA would not have created a cause of action or the limitation period would have run out).

Consumer protection legislation is designed to protect consumers in that particular jurisdiction. From a constitutional point, you can’t create a statutory cause of action in BC and expect other provinces to directly apply it. If a BC court chooses to apply another province’s statute by virtue of a BC choice of law rule, that is different – that is not direct application, that is BC, through the medium of its choice of law rule, deciding to apply another province’s law.

UNJUST ENRICHMENT

For an unjust enrichment claim: (1) go to Dicey Rule 230 (2) go to Christopher v Zimmerman if it helps you (3) go to Minera Aguiline (para 200) if that helps you.

**Dicey Rule 230: choice of law rule for restitution**

230(1) the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.

230(2) the proper law of the obligation is determined as follows:

(a) If the obligation arises in connection with a contract, the proper law of the law applicable to the contract;

(b) If the obligation arises in connection with a transaction concerning an immovable, its proper law is the lex situs – the law of the place where the immovable is located;

(c) If the obligation arises in any other circumstances, its proper law is the law of the country where the enrichment occurs (often gets chosen by way of elimination Christopher v Zimmerman 2000 BCCA).

If the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, you can take a principled approach and examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems and decide on the law with the closest and most real connection to the obligation.

Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake. So, each of the factors listed by Dicey & Morris would be considered and weighed along with the following non-exhaustive list of factors to determine which set of laws has the closest and most substantial connection to the obligation: (a) where the transaction underlying the obligation occurred or was intended to occur; (b) where the transaction underlying the obligation was or was intended to be carried out; (c) where the parties are resident; (d) where the parties carry on business; (e) what the expectations of the parties were with respect to governing law at the time the obligation arose; and (f) whether the application of a particular law would cause an injustice to either of the parties (Minera Aguiline Argentina 2006 BCSC aff’d 2007 BCCA). Ps: claim arises out of contract, so should be governed by Rule 230(2)(a): proper law of contract (Colorado). Ds: claim is in connection with an immovable, so should be governed by Rule 23(2)(b): lex situs (Argentina).
"Property" includes: (a) transfers of property *inter vivos* (b) transfers on death (succession) (c) trusts and (d) bankruptcy. Each one of these sub-categories has its own choice of law rules.

**CHARACTERIZATION**

In each property case, there is a necessity to **classify/characterize the property** as either movable property or immovable property. The choice of law rule (as far as jurisdiction/recognition and enforcement) will *depend* on this classification. *Note:* common law conflict of laws classifies property as movable or immovable even if the legal systems involved are both common law jurisdictions.

*Note:* movable and immovable property do not correspond necessarily with personal and real property, respectively (although the overlap is enormous). So you have to go through exercise of classifying.

**The approach:** the *forum* court will decide (applying its own forum rules) *where the property is located.* The forum court will then consider expert evidence from *that* legal system (where it has decided the property is located) as to the *characterization of the property* (as movable or immovable). The forum court will then select the appropriate *choice of law rule* based on that characterization (*Hogg v Tax Commissioner SKCA*, SKCA decides mortgage is located in BC, asks BC "how would you characterize mortgages?").

So: (1) Forum court decides for itself *where the property is located* (using forum rules) (2) Forum takes evidence on *characterization* from the legal system where the property is located (3) Forum court selects appropriate *choice of law rule* based on that classification.

This is one of the only situations in which the *forum will defer absolutely to the legal system where the property is located* as to how that property should be characterized.

**Location of “Interest in Land”**

No legal system in the world is going to say that land is movable property. And the common law is always going to locate any *interest in land* as being located where the land is located. A mortgage (on land) is considered to be “an interest in land” so a *mortgage will be located where the land is located.*

But the *characterization of “mortgages”* will depend on how the legal system *where the land is located* classifies mortgages – different legal systems classify mortgages in different ways. *Hogg v Tax Commissioner* is *not* authority for the proposition that an interest in land/mortgage is considered to be immovable property.

**Location of Intangible Movable Property**

Tangible movable property has a physical presence and is therefore easy to locate. Intangible movable property (shares, debts, etc, which may or may not be evidenced by some tangible piece of paper) are harder to locate because they don’t have a factual, physical location. So they are usually located by *creating (rational) arbitrary rules* (*ex. a share is located where the owner is domiciled/resident/where the share registry is located/where the corporation is domiciled*). Shares are more likely to be found to be movable property, but there have been cases where *shares in landholding property* were found to be immovable property.

**SUCCESSION**

Choice of law rule governing succession: *succession to immovable property* is governed by *lex situs* (the law of the place where the property is located).

Choice of law rule governing succession: *succession to movable property* is governed by *the law of the place where the testator was last domiciled.*
APPENDIX A: OVERVIEW & CHECKLIST

OVERVIEW

How do I commence proceedings in a case involving extra-judicial elements?

JURISDICTION

1 – Jurisdiction *Simpliciter*/Territorial Competence

Can the forum take jurisdiction at all?

2 – Discretion: *Forum Non-Conveniens*

Should the forum take jurisdiction?
Or should the forum decline to take jurisdiction on the grounds of *Forum Non Conveniens*?

CHOICE OF LAW

What law should the forum apply to the merits of the case?

RECOGNITION AND ENFORCEMENT

Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Will this judgment be recognized by a foreign court?
CHECKLIST

I. General Considerations:

A. Characterization: Substance vs. Procedure
1. Always done according to forum rules (Huntington v Attril)
2. Pragmatic approach: will it inconvenience the court to apply lex causae? (Tolofson v Jensen, re limitation periods, possibly for all allegedly procedural rules; limitation periods = substantive)
3. When in doubt, characterize as substantive (more procedural rules = more anomalous result)

B. Exclusionary Rules
1. Public policy: easy to raise by it really has to be a foreign law that turns the stomach of forum
2. Penal law: easy; proceeding must in the nature of a suit in favour of state whose law infringed
3. Revenue law: easy; someone has paid taxes and is seeking reimbursement
4. Public law: good luck; seeking to enforce governmental interests (exchange control laws, etc.)

C. Domicile and Residence
1. Domicile:
   a) Residence (mere, physical presence) PLUS
   b) State of mind (not as easy to establish): must have "intended to reside indefinitely"
2. Residence (ordinary/habitual):
   a) Physical presence (requires duration, but no minimum limit): "quality of residence" PLUS
   b) Intention (downplayed)

II. Jurisdiction: in personam actions

A. Rules: Jurisdiction Simpliciter/Territorial Competence
1. For service within BC, mere presence is not enough, ordinary residence is required
2. For service outside BC: CJPTA is the exclusive source of jurisdiction:
   a) CJPTA s. 3: jurisdiction rules (submission/ordinary residence/real & substantial connection)
   b) CJPTA s. 10: do you fit in any of those categories where r&rs presumed? (if not, go back to s. 3)
   c) Follow the procedure and get your process served
   d) Ball now in defendant's court to object to jurisdiction/territorial competence of the BC court

B. Discretion: Forum Non-Conveniens
   a) In BC, common law is modified by CJPTA s. 11: provides for "discretion"
   b) CJPTA is complete codification of common law test for FNC, it admits of no exceptions (Teck)
   2. Stay of proceeding: asking court to stay its own proceedings (assumes there is an action in forum)
      (1) CJPTA s. 11(1): consider "interests of parties" and "ends of justice" (Scottish principle)
         a) 3 factors to consider (Amchem 1993 SCC)
            i) We don't consider juridical advantage separately (McShannon)
            ii) Burden of proof is on D, used to be on P *this is difficult: see notes*
            iii) Quantum of proof: another forum is clearly more appropriate (Amchem)
      (2) CJPTA s. 11(2): must consider circumstances relevant to proceeding:
         a) Includes: multiplicity of proceedings/conflicting decisions in different courts
         b) List may not be exhaustive; if there are other circumstances, raise them. Argue they are factors to consider (Teck Cominco, EE thinks this argument was left open).

3. Anti-suit injunction: asking court for order prohibiting party from continuing foreign proceeding
   a) Pre-Conditions:
      (1) Anti-suit injunction restricted to continuation of foreign proceedings (not commencing)
      (2) Must first ask foreign court to exercise its discretion to stay own action
   b) If foreign court does not stay own action:
      (3) Evaluate foreign decision not to stay BUT ONLY IF we are the most appropriate forum
      (4) Decide whether foreign court had a reasonable basis for its decision
      (5) We will only grant anti-suit injunction if foreign action is unjust or will produce injustice

4. Jurisdiction-selecting clauses will be given very great weight but are not absolute; two issues:
   a) Whether clause is valid: test is basically FNC (same s. 11 factors; just add in clause as factor)
      (1) Burden on P to show strong cause as to why clause should not apply
   b) Effect of a valid clause
III. **Recognition and Enforcement: in personam judgments**

A. **Canadian judgment: ECJDA**
   1. Blind full faith and credit (s. 6(3))
   2. No cases; it’s working perfectly

B. **Non-Canadian pecuniary judgment from certain jurisdictions: COEA**
   1. Aus, US (AK, CA, CO, ID, OR, WA; no NY, no TX), EU (Austria, Germany, UK) – that’s it.
   2. “real and substantial connection” basis for r& e is not available (only presence+submission)
   3. Advantage: registration process so you don’t have to start a new action

C. **Non-Canadian pecuniary judgment from non-COEA-recognized jurisdictions: Common Law**
   1. At common law, 2 requirements to recognize and enforce foreign judgment:
      a) Final and conclusive (res judicata)
      b) Foreign jurisdiction had jurisdiction “in the international sense”:
         (1) D was present in jurisdiction when the action was commenced OR
         (2) D submitted to jurisdiction of foreign court OR
            (a) Objecting to jurisdiction ≠ submission
            (b) Asking court to exercise discretion (FNC) = submission (probably)
            (c) Making technical arguments = submission (no doubt about it)
   3. **Real and substantial connection (likely to be found)**
      (a) SCC seems to require a greater connection for r e of non-Canadian judgments

D. **Non-Canadian non-pecuniary judgment: Common Law**
   1. Start with traditional rules for recognition and enforcement (common law)
   2. Add-ons for non-pecuniary orders (Pro Swing): clear/specific / limited in scope / least burdensome remedy / unforeseen obligations / third parties / use of judicial resources

E. **Defences:**
   1. Exclusionary rules (forum public policy; penal law; revenue law, public law)
   2. Breach of natural justice
   3. Fraud on the court

IV. **Jurisdiction: in rem actions**

A. **Mocambique Rule:**
   1. Forum will not take jurisdiction in action relating to land located in foreign jurisdiction

B. **Exceptions to the Mocambique Rule:**
   1. Claim is based on contract or equity: i.e. you’re framing as in personam action or equitable claim
   2. Administration of an estate or a trust and property consists of:
      a) Immovables and movables in jurisdiction AND
      b) Immovable outside of jurisdiction

V. **Recognition and Enforcement: in rem judgments**

A. Canadian courts will not r& e foreign in rem OR in personam actions dealing with local land

B. **This is good law in theory BUT:**
   1. At in personam level, we now recognize in personam non-pecuniary judgments (Pro Swing)
   2. At in rem level, we may be constitutionally obligated to r& e if from other Canadian province

VI. **Choice of Law**

A. **Renvoi**
   1. Ordinary choice of law rule applies domestic law of the jurisdiction selected by the rule
   2. Partial Renvoi applies the conflicts law of the jurisdiction selected by the rule and takes:
      a) A transmission (winds up applying law of a third legal system)
      b) A remission (winds up applying own law)
   3. Total Renvoi asks foreign expert “how would your court solve this case?” = nightmare!

B. **Incidental Question**
   1. The subsidiary issue (upon which the main question, which is also a conflicts issue, is dependent) is a conflicts issue in its own right (needs a choice of law rule) AND
   2. Application of forum rule will produce a different result from application of lex causae rule
C. Marriage
1. **Formal validity of marriage**: governed by law of the **place of celebration of marriage** either
   a) Domestic law OR *(in the alternative)*
   b) Conflicts rule
2. **Essential validity of marriage**: governed by EITHER *(not alternatives)*
   a) Dual domicile rule
   b) Law of the intended matrimonial home

D. Torts
1. **Ordinary rule**: *lex loci delicti* (law of the place where the tort occurred)
2. **Potential Exceptions**
   a) Special choice of law rule for particular torts based on *inherent characteristics*
      (1) *Ex. defamation*: law of the place of the most substantial harm
   b) "International-level" tort exception
   c) Play with location of the tort
   d) Play with characterization of the tort
   e) Renvoi: look to the foreign jurisdiction's *conflicts rules* instead of domestic law
   f) Public policy exclusionary rule
   g) Contract: include a choice of law provision
   h) Forum shop

E. Contracts: **primary choice of law rule**: proper law of the contract
1. **Proper law** (governs most issues):
   a) Subjective: *either* (1) expressly stated or (2) implied
   b) Objectively ascertained
2. **Formation**:
   a) Law of the forum OR *(not alternatives)*
   b) Putative law of the contract
3. **Formalities**:
   a) *Lex loci contractus* (law of the place where the contract was made) OR *(in the alternative)*
   b) Proper law of the contract
4. **Illegality**:
   a) Step 1: Decide whether the law applies: 4 possible connecting factors:
      (1) Proper law of the contract: relevant
      (2) LLC: not relevant
      (3) LLS: relevant (policy reason)
      (4) *Lex fori*: relevant IF they can be classified as "laws of mandatory application"
   b) Step 2: Interpret that law

F. Unjust Enrichment: governed by the proper law of the *obligation*
1. If obligation arises in connection with a *contract*: the law applicable to the contract
2. If obligation arises in connection with an *immovable*: *lex situs*
3. If obligation arises in any *other circumstance*: law of the country where enrichment occurs

G. Property
1. First, must **characterize the property**: immovable or movable. Approach:
   a) Forum will decide (applying its own forum rules) where property is *located*
      (1) Land: easy to locate – where is it?
      (2) "Interest in land": where the land is located *(mortgage is considered “interest in land”)*
      (3) Shares: located by creating (rational) arbitrary rules
   b) Forum will then consider expert evidence from that legal system on characterization
      (1) *Note*: no legal system in the world is going to say land is immovable property
      (2) *But*: "mortgages" may be classified differently by different legal systems
2. Forum will then **select appropriate choice of law rule based on that characterization**
   a) Choice of law rule for succession to immovable property: governed by *lex situs*
   b) Choice of law rule for succession to movable property: governed by the law of the place where the testator was last domiciled
APPENDIX B: HISTORICAL OUTLINE: JURISDICTION

- The way in which common law jurisdictional decision has developed
- Most recent SCC case, unanimous decision: *Club Resorts Ltd v Van Breda 2012 SCC*
  - EE is not convinced the SCC fully understands the way the common law jurisdictional decision has evolved over the years

JURISDICTION SIMPLICITER / TERRITORIAL COMPETENCE

Pre-19th century in England: service within England only
- If you wanted to sue someone in England, you had to commence the action by serving process on the defendant in England – if the defendant wasn’t in England, you couldn’t do anything, you couldn’t litigate in England.

1852 in England: Parliament enacted the *Common Law Procedure Act* – for the first time, it was possible to serve a defendant *ex juris*, *service ex juris* became permissible for the first time
- This eventually migrated to rules of the court – *Order 11* set out the circumstances in which an English court would consider permitting the plaintiff to serve the defendant outside of England (there was a list of circumstances)
- It was necessary under Order 11 to ask the English court’s permission (had to seek leave) to serve the writ *ex juris*

- In order to be granted leave for service *ex juris*, you had to establish:
  1. that that your *facts/cause of action fell within one of the circumstances in Order 11*
  2. that you had a *good arguable case on the merits* – this was not a frivolous action, you had a *prima facie case*
  3. that England was the *most appropriate forum* for the action (discretionary element) – *forum conveniens* (onus is on the plaintiff as opposed to *forum non-conveniens* under discretion, the onus for which would be on the defendant)

- The English courts were very conscious in 1852 (and into the present day) of territorial sovereignty and that in issuing a writ in England calling on a defendant in another jurisdiction to come to England to defend an England action, this was a sort of infringement of the sovereignty of the other jurisdiction – theorists since have rationalized this
- The burden of proof in persuading the England court to give the plaintiff leave to serve the writ *ex juris* was on the plaintiff
- The writ was served *ex juris*, and the defendant showed up in England
- The defendant could still object to the jurisdiction of the English court – so there was another hearing
- The first hearing was an *ex-parte* hearing, the second hearing was an adversarial hearing, at which point the court go the other side of the argument and it was permissible for the court to say, nope, we made a mistake, we don’t have jurisdiction

In BC: we copied Order 11 into our rules of court
- If you wanted to bring an action against a defendant in BC – fine, no problem
- If you wanted to bring an action against a defendant who is in another jurisdiction, you have to apply to the BC court for leave to serve *ex juris* using the same 3 elements above

(cont’d)
1976 in BC: the bright minds concerned with civil litigation thought this was too inefficient

- Why do we need two hearings? It is inefficient – let’s get rid of the *ex-parte* application
- Let’s let any plaintiff who wants to bring an action against a defendant *ex-juris*, and they can serve the BC writ *ex-juris* without asking the court’s permission
- We now refer to service *ex-juris* as of right
- So plaintiffs could simply fill out the appropriate forms stating which of the circumstances in *Rule 13(1) of the Supreme Court Rules* (which were similar to Order 11) they were relying on, and then serve the writ
- And if the defendant didn’t come and object to jurisdiction, the BC court could proceed even if the defendant completely ignored the BC writ

2006 in BC: CJPTA came into force

- Nothing much has changed in substance but the CJPTA provides that it is *the* source of jurisdiction in the province – so in order to bring an action in BC you have to satisfy the CJPTA
- *Bottom line:* if you’re not planning on practicing law in BC, the common law as modified by Morguard continues

**DISCRETION: FORUM NON-COVENIENS**

- Originally, in England, service as of right on someone in England
- England distinguished between discretion for service within England and service *ex-juris*
- If the defendant, at common law in England in the 19th century, was served in England (temporary presence was enough) the court did have *discretion* to set aside service of the English writ on the defendant in England but the discretion was a *very narrow discretion* – it was essentially an “abuse of process argument” – the defendant had to establish the plaintiff’s action was frivolous or vexatious or somehow an abuse of process of the court
- The number of cases where the English court was persuaded to stay the English action because the English action was an abuse of process, you could probably count on the fingers of one hand
- Apart from burdens of proof, there has been no change in the description/definition of discretion (*forum non-conveniens*) – ever
- But there was massive evolution of the abuse of process test, starting in 1976 – *1976 Atlantic Star Case* – this was the beginning of the evolution
  - The English courts looked around the world and realized England doesn’t have a monopoly on justice – we have to respect other legal systems
  - So maybe from time to time we should stay an English action
  - They didn’t change the terms of the test (continued to use those words), but they began to interpret them differently
  - So starting in 1976, we see rapid evolution in England of the discretionary principle
- We see landmark case after landmark case
- There is now in England and in Canada (in the common law provinces) – there is no difference in the discretion exercised after service within the province and the discretionary principles governing *service ex-juris* – **same principle**
- So two elements: (1) rules and (2) discretion – using same principle for *forum non-conveniens*
**APPENDIX C: IMPORTANT CASES**

**GENERAL CONSIDERATIONS**

**Characterization**

*Tolofson v Jensen 1994 SCC*

- Has jurisdiction issues, choice of law issues, and characterization (substance vs. procedure) issues

**Summary**

- BC is the place where the action was commenced
- Saskatchewan was the place where the accident occurred
- Ultimately, SCC said Saskatchewan (SK) law is the governing law
  - BC is the forum, but Saskatchewan law is the applicable law
  - What the BC court should have done was apply SK law to the tort claim
  - BC law is the *lex fori* (the law of the forum)
  - SK law is the *lex causae* (the law selected by the choice of law rule to govern the merits of the action; the applicable substantive law)

**Facts**

- Car accident in Saskatchewan
- P was 12 years old at the time, riding with his father; they run into SK-owned and driven car
- For tort action, it is easy to identify the location – SK is the *lex situs* (the law of the place)
- 12 year old boy was injured
- When he reaches age of majority, decides to sue father and the SK driver
- Defendants argue that BC should not take jurisdiction, it is *forum non conveniens* (it is not the appropriate forum)
- BC court decides it is the most appropriate forum for the action, claims jurisdiction

**The Merits of the Tort Action:**

- Pre-SCC decision in this case, we had a *double barrel rule* – the tort must have been actionable in the forum and not justifiable in the place where it occurred
  - Bottom line: the net result of the application of this double barrel tort choice of law rule in this case: all BC law would apply (procedural and substantive) – there would not have been any issue in the BC court about the application of any SK law
  - BC law would governs the merits of the tort action (substantive law)

- In this case, the SCC says: we don’t like that choice of law rule anymore, it doesn’t give enough weight to the law of the place where the tort occurred
- New choice of law rule: *lex loci delicti* – the law of the place where the tort occurred – so, SK law applies to the merits of the case, not BC law
- So the SCC had to deal with issues that weren’t relevant in the BC court because now we’ve got differences between SK law on the merits of the tort action

- At that time, SK typically was hostile to actions brought against drivers by gratuitous passengers
  - A *gratuitous passenger* could not sue the driver unless there was *gross* negligence, simple negligence was not sufficient
  - So the plaintiff had to establish gross negligence on the part of the driver

- Also: *limitation periods* – SK: 1 year, BC: 2 years
  - This is why the action was brought in BC in the first place
Question Before SCC: Is the limitation period rule procedural or substantive?

- Possibilities:
  - If the BC limitation rule is a rule of procedure, BC law applies and the plaintiff is okay to bring the action
  - If the BC limitation rule is substantive, it does not apply because SK law is the *lex causae*
    - **But** what if the SK limitation rule is procedural? – the BC court would not apply it
  - If the BC limitation rule is substantive, and the SK limitation rule is procedural – there would be no limitation period, in theory, neither rule would apply

- So the SCC rethinks the characterization process for limitation periods (or you can argue, more generally, for all allegedly procedural rules) – **this case is certainly binding with respect to limitation periods**

- The old distinction which is considered by the court is that **substantive rules deal with the rights and procedural rules deal with the remedy** – on its face, this is straightforward *but* issues arise:
  - Is there a right without a remedy?
  - You can’t have a remedy without a right – so we may not have an easy definition

- La Forest: why do we have this rule in the first place?
  - Why do we say a court applies its own procedure? – For convenience of the court
  - **This is the basis for the substance/procedure characterization rule**

- So, you take a **pragmatic approach** to characterization
  - La Forest cites BCCA decision: pragmatic – is it going to inconvenience us to use somebody else’s rules here?
  - Limitation periods are *arbitrary* (although they have policy reasons behind them)
  - There is no inconvenience in using a different limitation period; you may not like the fairness of the result, but it is a purely arbitrary period of time

- So, in terms of characterization, this case says you take a pragmatic approach
  - The reason for applying your own procedure is your convenience, the convenience of the court
  - And if there is no inconvenience involved, you can apply the rule in the *lex causae*
  - You don’t need to characterize both limitation periods if you are saying there is no inconvenience using theirs, so let’s just use theirs
  - So the BC court can apply whatever limitation period is more just and convenient

- **Note:** Evidence rules are almost always characterized as procedural – courts don’t want to learn about other jurisdictions’ evidence rules when they are hearing a case

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

- Deals with parties to an action – who can be a plaintiff, who can be a defendant? – **these are matters of procedure for the forum** (no one is arguing otherwise)
- **What they are doing in this case is extending eligibility beyond the parties that the forum law says can be parties**

- **Plaintiffs:** At common law, we didn’t have many exclusions/exceptions – natural persons and corporations (“legal entities”) could be plaintiffs
  - Common law exception: enemy aliens cannot bring actions in a common law jurisdiction (but there is a high standard, you have to have made a declaration of war against the country)
- **Defendants:** Parties who cannot be defendants: sovereign immunity – governed by statute (this is more public international law; we won’t go into this)

- The *Hamza* case illustrates how the forum can extend its forum procedural definitions
Facts

- Matrimonial action – Hamza wife is suing Hamza husband re division of property – she claims he has property and she wants part of it
- The IAST is the plaintiff because it is seeking a declaration that neither Hamza has any property interest in its assets
- Mrs. Hamza argues IAST has no status, therefore cannot sue – IAST, which is an association is not a natural person and it is not a corporation (AB does have rules that recognize some associations but this particular one, IAST, wasn’t one that AB recognized in its procedural rules as having standing to bring an action)
- But, the association, IAST, was created and registered in Switzerland – it is a Swiss society

Reasoning

- The question is not whether IAST is recognized as having status to sue in AB law, it is a question of whether AB law can look to Swiss law (the home of the association) to see whether it is a legal entity with capacity to sue and be sued under Swiss law
- **So, the legal status of a foreign party depends upon its own law** – this is a *forum recognition rule*, which is a conflicts rule
  - *Comity* requires this – it requires us to look outwards
  - If an entity has status to sue and be sued by its home law, then we will recognize them as having status here
  - It also defines what is required for status to sue and be sued in AB

*Note:* In order to prove foreign law in the court, common law requires expert evidence

- This case illustrates how you can extend your own procedural rules by a recognition rule

*Bumper Development Corporation v. Commissioner of Police for the Metropolis 1991 UKCA*

- English Court of Appeal Case
- The parties were fighting over ownership of a bronze statue, which at the time of litigation was in the hands of London police
- Bumper Development, who was a recent purchaser of the bronze statue, sued the London police for conversion, detinue, etc.
- Various interveners showed up wanting standing in the action, saying the statue was actually theirs
  - One claim was from a guy from India – years before, in the 1970s, Mr. Ramamurthi was digging around on his property and he found this bronze temple and sold it
  - The temple was sold and resold over time
  - The claim by this person is fine – he is a natural person
- Who wants to be an intervener?
  - India wants to be an intervener – this is fine, India is a sovereign state
  - The state where it was found wanted to be an intervener – this is fine as well
- What caused the problem? – the ruined temple wanted to sue
  - There was a stone in the temple, which wanted standing in the action

*The Issue:* Does a ruined temple in India have status to sue/be sued/act as intervener?

- To answer this, we have to look at whether it have the capacity to sue in India, its home jurisdiction
- The English judge looked at expert evidence for Indian law – and in Indian law (technically, in Hindu law actually), a ruined temple does have status to sue and be sued

- The process used in the Bumper Development case is exactly the same as the process in the Hamza case
**Success International Inc v Environmental Export International 1995 ONSC**

- In this case, the court is actually interpreting and applying its own forum procedural rule
- Issue: the standing of a foreign corporation
- Deals with an Ontario rule that restricted foreign corporations from bringing certain actions unless they were registered – this is a way of forcing foreign corporations which would be carrying on business in the province to register in the province (likely for regulatory purposes)

**Facts**

- We have a contract action proceeding in Ontario
- Contract between Success (a company incorporated in NY state) and Environmental Export (EE) (an Ontario company)
- The contract was for the purchase of used tire manufacturing equipment, which was located in Ontario and being purchased for resale to a Chinese company
- The contract contained an arbitration clause, which had been used a few times
- On one occasion, the arbitrator ordered EE to modify its operations but the Ontario company didn’t comply
- So the NY company brings an action in Ontario for enforcement of the arbitral award, pursuant to the Ontario Arbitration Act
- One of the defences raised by the Ontario company: the NY company had no status to sue in Ontario because it was not registered in Ontario (this is a procedural rule, no question about it, so the Ontario rule would be the one that applies – *lex fori*)

**Reasoning**

- Should Success (the NY company) have been registered in Ontario?
  - Looks up definition in Ontario statute, then looks at common law – you have to be registered if you are carrying on business in Ontario
  - Question: Was the NY corporation carrying on business in Ontario (this is simply the interpretation and application of a particular procedural rule)?
  - Answer: yes, it had an office here, it had employees here, etc.

**Naraji v Shelbourne 2011 UKQB**

- Ordinary medical malpractice case
- English soccer player tore his ACL and was advised to go to the US for surgery
- The surgery failed, his soccer career is over
- So he sues

- First he sues in Indiana (in tort)
  - There is some misunderstanding about why he withdraws that action
  - His solicitors thought they could stay the action in Indiana and pursue in England instead – turned out, in Indiana, it was considered a final judgment and his action was toast
  - First question for English court: Do we recognize the Indiana decision as having decided on the merits of the case – they decided it was (even though there was no decision on the merits in Indiana)

- Still left: the plaintiff’s claim in contract against the Indiana doctors (signed in Indiana)
  - Number of issues raised in the contract action (proceeding in England)
  - First issue: Do we pay any attention to Indiana law which requires that if you want to sue in contract against a doctor, you have to get that contract in writing (signed, sealed and delivered) – do we apply this?
  - Second issue: There was an Indiana limitations period
  - Third issue: There was an Indiana cap on damages
Each of these issues were subject to characterization analysis

In the end, each of those issues was said to be a procedural rule, and therefore the English court didn’t have to pay any attention to them – so the contract action proceeded

Exclusionary Rules

**Huntington v Attril 1893 UKPC**

**Facts**

- Written by Lord Watson
- It is a “recognition and enforcement of foreign judgments” case
- The court being asked to recognize and enforce a foreign judgment is Ontario
- The judgment is from NY state
- The Defendant in the action (in NY state) is Mr. Attril (Mr. A) – he is active in NY state as a director of a corporation carrying on business in NY
- An action is brought against Mr. A personally as a director (in NY state)
- The cause of action is based on a NY law – the law was to the effect that if any material issued by a company should contain a material false misrepresentation, the directors who signed it would be personally liable
- So A is a director, there is a false misrepresentation, Mr. Huntington (Mr. H), one of the persons misled, brings an action against Mr. A and he wins

The Recognition and Enforcement of a Foreign Judgment Action in Ontario

- Mr. A happens to be resident in Ontario and had no assets in NY against which Mr. H could enforce his judgment
- So Mr. H has to come to Ontario and ask the court in Ontario to recognize and enforce the NY state judgment
- There was no question that Mr. A had participated, so the NY court had jurisdiction
- The only possible defence, the one that was raised by Mr. A in Ontario (it is a defence to recognition and enforcement of a foreign judgment) – the argument: the NY law on which the NY judgment was based was a penal law

**PC Reasoning**

- The PC rejected that *characterization* (this is where characterization comes in: you’re looking at a foreign law, and asking, how do we characterize that law?)
  - There are two options in terms of characterization:
    1. How does that jurisdiction characterize its own rule? (*lex causae* approach)
    2. We’ll decide for ourselves (*lex fori*)
- PC has to address the approach issue because in the Ontario court, the judge said, “well the NY state says its a penal law, so its a penal law” – *lex causae* characterization
- PC says, No, that is not the way to go about it
- **If you go about it that way, you’re going to get internal inconsistency** because the characterization of a particular rule won’t be consistent within the forum – it will depend on what NY says its law is, and what every other state says its law is
  - We must have *internal consistency*

- So, now we get the rationalization/justification for the *lex fori* method of characterization
  - You can consider what the foreign state says about its own rule, its relevant, and it might be very weighty but we are not bound by it
  - We decide for ourselves whether that rule should be characterized, and how it should be characterized
• **Note:** the analysis is the same for direct (choice of law context) or indirect (recognition and enforcement of a foreign judgment) application of a foreign law
  - So if Mr. A had run off to Ontario the minute he knew Mr. H was judgment-proof in NY and brought his action in Ontario, if the Ontario court decided to apply NY law to the merits of the case, Mr. H still could raise the defence that this rule is a penal rule – and the same analysis would be used

• **Note:** Definition of penal rule: a penal law involves a proceeding in the nature of a suit by the state whose law has been infringed, by the state, by an officer of the state, or by a member of the public in the character of a common informer (a criminal action) (p. 106-107)

**Held**
- In this case, he decides, applying that definition to the facts of this case, that this is not a state action, this is an action for compensation/damages by someone who is being misled
- Mr. A might think of it as being penal and I suppose you can say that that was the intent of NY state, but it is not an action by the state – it is brought by an investor who has been misled and suffered damages

**So, things to take away from the case:**
- Penal law definition
- Justification for the *lex fori* method of characterization
- Application of the exclusionary rule of penal law

  - **Note:** “Penal” in the conflict of laws is not the same as criminal/constitutional law – provinces can enact laws that are eligible to be considered penal laws – it is the state, or someone on behalf of the state, bringing an action

- Is this an exclusionary rule that you are likely be able to invoke often successfully? – probably not
  - It is pretty clear and you have a pretty good definition of what the forum considers to be penal

- Try applying this to anti-trust actions:
  - In the US, you can get triple damages if you bring an action under anti-trust legislation
  - Is that a penal action?
  - Would we enforce that in Canada?

*United States of America v Harden 1963 SCC*
- It is a recognition and enforcement of a foreign judgment case – except that there is not really a foreign judgment, it was a settlement agreement in California, but it was treated as binding
- Harden owed taxes in California state, he lived in British Columbia, the US tried to collect the taxes that were owed
- The argument by USA in SCC: this is a settlement – it is not really a recognition and enforcement of a judgment based on a foreign law, it is merely a contact
- SCC didn’t buy it
- This case constitutes our **leading case** on the revenue law exception – at least for the straightforward cases

*Stringam v Dubois 1992 ABCA*
- This case represents the second category of revenue law cases, which is a little harder to justify
- There is a line of cases where sometimes the courts recognize the exception and sometimes they don’t

**Facts**
- The case involved a lady who was domiciled and resident in Arizona, and she died
- This case arose because she owned property outside of Arizona, in Canada (a farm in Alberta)
Ms. Dubois dies testate (leaves a will)
In this will, she leaves her farm in Alberta to her niece
The farm is worth $431,000
The executor is the Valley Bank of Oregon and because the farm constitutes immovable property, letters of administration are granted in Alberta – so the Alberta courts are given jurisdiction to decide what happens to the farm
The total estate is worth $1.1 million
There is estate tax due – US estate tax
This tax is paid
Of the global amount of estate tax payable, $149,000 is apportioned to the farm in Alberta
So the executor (Valley Bank of Oregon) pays the estate tax and then seeks to be repaid
Under the will, the niece is the beneficiary of the farm and she doesn't want to have the farm bear any of this estate tax
So she applies for an order from the Alberta court to direct the executor to convey the farm to her, clear of the taxes
The executor wants to sell the farm so he can get repaid for the $149,000 from the proceeds of the farm

Issue
Question: the applicability of US law??
Should we order the sale, or should we order that the farm be conveyed to the niece

Held
In the end, the AB courts says this is revenue law, and decided to convey the farm to the niece, free and clear of the taxes
So the rest of the beneficiaries had to bear the full amount of the estate taxes

Reasoning
This is an ABCA case, and this is not the only answer the court has ever given
The court cites the BCCA decision
So clearly this was originally tax, but it wasn't the state collecting, it was the executor seeking reimbursement from the estate – some courts are sympathetic to such parties and some aren't
The ABCA was more sympathetic to the beneficiary than it was to the executory (Valley Bank of Oregon)
But you can get a different result
This case represents the typical situation in which the revenue law exclusionary rule is usually raised – its not usually raised because the state itself is trying to collect taxes – it is raised because someone has paid taxes and is seeking reimbursement

Society of Lloyd’s v Meinzer 2001 ONCA
This is just part of a collection of Lloyd’s cases around that time
Major asbestos claim, major disaster
Lloyd’s insurance had to pay up
They call in their investors to pay up
The Ontario courts had been asked by the Meinzers who were resident in Ontario to void their contract with Lloyds on the grounds that there had been a breach by Lloyd’s, and Lloyd’s had not complied with the Ontario Securities Act
However, those investors had literally gone to England to sign the contracts and the contracts that had been entered into with Lloyd’s – those contracts all had jurisdiction selecting clauses (any disputes arising out of this contract shall be heard exclusively by English courts) and choice of law clauses (law governing these contracts shall be the law of England) – so all connections were with England, including the place where the contracts were made
And yet Meinzer brought their action in Ontario
So naturally, Lloyd’s defended on the grounds that, England is the more appropriate forum for the action because it is English law and all the other considerations, and there is a jurisdiction selecting clause and that carries a heavy weight in Ontario (as it does in BC)

So the Ontario courts stayed the Ontario actions
So they went off to England and the courts in England said, everyone pays up first, and then we’ll sort out the claims for fraud, etc. – but pay up first
Lloyd’s comes to Ontario with its English judgment saying to Ontario Meinzer asking it to pay up in full
Ontario Meinzer (defendants in the action) argued that that judgment was based on a law contrary to forum public policy (the forum public policy is the Ontario Securities Act) – the English legislation that was relevant in the action didn’t have such a provision as the Ontario Securities Act

Kuwait Airways Corporation. v Iraqi Airways Co. 2002 HL

Deals with the public policy exception but it takes it to a slightly new level because it is dealing with tensions between the Act of State doctrine and forum public policy
Note: Act of State doctrine is an exclusion which has received considerable attention in the English courts – it does not come up very often in Canadian cases

Facts
This case was triggered by political events
Iraq invades Kuwait – which caused George Bush I to draw a line in the sand
What happens when Iraq invades Kuwait:
- Iraq seizes 10 airplanes belonging to Kuwait Airways and takes them to Iraq
- Before it does that, it passes a law which purports to dissolve Kuwait Airways and vest title to those airplanes in Iraqi Airways (this is a confiscatory law)
Kuwait Airways eventually sues Iraqi Airways in England (a favourite place for such actions)
Kuwait Airways sues in tort for conversion

The Law
The English courts apply the English choice of law rule for tort actions
- The English choice of law rule is the choice of law rule that Justice La Forest threw out in Tolofson v Jensen 1994 SCC – our choice of law rule now says Canadian courts apply the law of the place where the tort occurred
At the time this case was commenced, England still had the old, but modified, double-barrel choice of law rule – English choice of law rule required civil actionability both in the place where the tort occurred and in the forum (it was a very narrow rule)
So now, the English court is applying its double-barrel choice of law rule: the tort of conversion is clearly actionable in England, but what about Kuwait/Iraq?
- In Iraq, the law rendered the alleged conversion not civilly actionable
So if the English court, applying its choice of law double-barrel rule (requiring double actionability), applies Iraqi law, there is no cause of action for Kuwait Airways – that’s where the exclusionary rules come in
The argument is that the English court should disregard the application of the Iraqi law confiscating the airplanes and vesting title to them in Iraqi Airways – this is the part of the Reasons for Judgment that is relevant here

Issue
So we have the English court saying should we disregard our choice of law rule based on public policy?

Reasoning
- As a result, we get discussions about public policy (p. 74-75 of casebook – definition of the scope of public policy)
- Two important passages:
1. Blind adherence to a foreign law can never be required of an English court (can read in Canadian court). Exceptionally and rarely, a provision of a foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English (/ Canadian) court. A result of this character would not be acceptable to an English (/Canadian) court. This public policy principle eludes more precise definition (p. 74).

2. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country (p. 75).

- The argument is that, when you are using this public policy exception, especially when there is an act of state involved (which this was), it is limited to a breach of human rights
  - “Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations.”

- And this was not a human rights violation, nevertheless “this seizure and assimilation were flagrant violations of rules of international law of fundamental importance”

- So what the HL is doing in this case is including gross violations of international law as part of its forum public policy – they are not going to stand for it

**What does this case add to the other case?**

- This case gives an extended definition of public policy – this is the standard to which Canadian courts should be adhering to for definition of public policy

**United States v Ivey 1995 ONSC**

- This is a recognition and enforcement action
  - *Note:* these exclusionary rules apply to choice of law and recognition and enforcement actions (Kuwait was a choice of law)
- The judgment which the US wants to have enforced is a Michigan judgment – a default judgment
- Mr. Ivey was director of a corporation carrying on business in Michigan, he did not appear, nobody defended – it was a default judgment
- The judgment is for damages for cost of remediation – under the American statute known as CERCLA (Comprehensive Environmental Response Compensation and Liability Act) – polluter-pays legislation

- Mr. Ivey is throwing every defence he can come up with to recognition and enforcement of this Michigan judgment in Ontario courts
- He uses all exclusionary rules: penal law, revenue argument, other public law argument, contrary to forum public policy, breach of natural justice
- He doesn’t succeed – CA shoots them all down

**Reasoning**

- CA is taking the *lex fori* approach, especially with respect to the revenue law argument – he is saying, we don’t care what anybody else says about the proper characterization of CERCLA as penal or revenue – it is not, and we are deciding it’s not because we are deciding (the forum)

- The only reason to read this case: the talk about the public law exception – the mystery category
  - Court doesn’t add anything to what we have discussed re: penal/revenue/public policy

- **First point:** Sharp J. acknowledges that the public law exception *does* exist (and it *has* been applied in subsequent English cases)
• The mystery part is what is it? What does it consist of? How do we define public laws?

• Sharp J discusses the cases in which the public law exception has been raised
  • But he doesn't provide us with any Canadian definition of the public law category of foreign laws for purposes of the exclusionary rules
  • He does say that CERCLA doesn't fall into it
  • But he doesn't provide us with a definition of the public law exception

**Government of Islamic Republic of Iran v Barakat Galleries 2002 UKCA**

• Question was whether Iran had standing in the UK to maintain an action for conversion against Barakat Galleries in respect of certain antiquities dating allegedly from 3000 BC
• Barakat Galleries says, we purchased them in France, Switzerland – we have title to them
• Iran's argument, which does succeed, is that by law, property in those items is vested in the State
• The court says there are many criminal penalties in the statutes (on which they had expert evidence) but the fact that the statute includes provisions with criminal penalties doesn't mean the statute is entirely criminal law – this particular provision vesting title in Iran is not criminal, it is a title provision, it is not penal
• But is it public law? – this leads to a long discussion
• The ultimate answer was: this is just Iran claiming personal ownership rights of the sovereign – that's what the law gave them: ownership
• So the contrast is between private ownership rights in antiquities and sovereign rights – and the analysis of the CA of the law as presented was, this was a private claim, not a sovereign claim

**President of Equatorial Guinea v. Logo Ltd. 2006 UK**

• This is a tort action brought in England – possibly for strange reasons
• The claims were against a corporation in England
• The claims were for conspiracy, intentional infliction of harm by unlawful means, for assault
• The damages claimed were for the costs involved in putting down the coup attempt, cost of feeding prisoners, cost of food for suspected members, cost of medical treatment, etc. and damages for emotional distress caused to the President of Equatorial Guinea for fear of his family and his personal safety
• Is this a claim that can proceed? Or is this based on some public law?
• Public law and act of state are both relevant
• The English court decides it is a public law exception – not going to allow these tort claims to proceed
• Because all of those costs in attempts to put down the coup were an exercise of sovereign authority – this is what Presidents in Africa have to do
• This is a sovereign act, you can't come to England and get an injunction to stop them from trying to engineer a coup, and you can't come to England to ask for costs for damages for putting down a coup attempt – that is sovereign, that is public
• So this is one example of a case in which the public law exception was applied

**Domicile and Residence**

**Agulian v Cyganik 2006 UK**

• Jurisdiction case
• Mr. Agulian died in England where he had resided most of the time for 43 years
• He left a will – this is a succession case
• The will divided up his estate – 6.5 million pounds – mostly between 2 daughters and a granddaughter
• But he had in his last 2-3 years of his life, a partner, she said he promised to marry her (the court accepts this) – he left her 50K – she is not happy
• She makes an application in England under the statute equivalent to our Wills Variation Act
• The testator’s will is challenged and a wannabe beneficiary says give me more – court has to decide whether to do it or not
• The English court says, application of this English statute is only available if the deceased died domiciled in England
• Mr. Agulian, his domicile at the moment of his death becomes the main issue in the case
• The CA decides that he did not acquire a domicile of choice in England
• He had never lost his domicile of origin in Cypress by means of an acquisition of a domicile of choice in England
• The CA says (para 51):
  • You don’t just consider the moment in time that is critical (domicile at the moment of death)
  • You have to consider the whole life of the individual – what’s his pattern?
  • Is it possible he could have intended to acquire domicile in England?

• This case sets out what the state of the mind necessary is and to a certain extent gives you an idea of the scope of the investigation

**Re Urquhart Estate 1990 HC**
• Also deals with acquisition of a domicile of choice concerning a deceased individual who (even more than Mr. Agulian) seemed to be incapable of settling down anywhere
• He has a domicile of origin in New Zealand, he acquires domicile of choice in New Zealand, gets married there
• Then, when marriage #1 breaks up, he leaves New Zealand
• He comes to Ontario, acquires another wife and a son – then they separate
• Then he keeps moving around
• Then he has another partner
• **He lives in various places before he dies:** Washington DC, Quebec, Ontario, Florida, was on his way to NYC
• Where is he domiciled at the date of his death?
• Did he acquire a domicile of choice in: New Zealand, Ontario, Quebec, Florida or New York City
• Since he hadn’t actually moved to NYC yet, they wipe that option off – that leaves NZ, ON, QC, FL

• **Typically, you get evidence given by various people and you get facts about his life – you ask:** did he form an intention to reside indefinitely anywhere?
• He had real property in QC
• His address in ON consisted of a room in a buddy’s house, which he used for tax purposes, drivers licence purposes, etc. – it seemed to be that the only stable element in his very pathetic life
• Question is: whether his last partner or his son gets the estate
• Court finds that his domicile of choice was Ontario – so he dies domiciled in Ontario even though he wasn’t physically there

**National Trust Company Ltd. v Ebro 1954 HC**
• Deals with the domicile of a corporation
• Easy to define
• All you get is basically that: the definition for the domicile of a corporation
• Is the jurisdiction in which it is incorporated
• Most often used for choice of law purposes, but can be used for jurisdiction
• If the conflicts issue in a case is what law governs the internal organization of the corporation, law of the corporation’s domicile – the law of the place where it is incorporated

**Adderson v Adderson 1987 ABCA**
• The ABCA is trying to determine the last joint habitual residence of the husband and wife for purposes of jurisdiction on the application of a provincial statute
- Talks about the quality of the residence
- So length of time is important but not conclusive – it is the quality of residence (unless you have something like the Divorce Act that says you have to be living together for a certain period of time)
- The courts emphasize that ordinary and habitual residence (they do seem to be interchangeable) is the **settled purpose** of the individual whose residence is in issue

- **BCCA** dealing with habitual residence for purposes of determining custody issue
- CA says there must be a degree of settled purpose
- Adopts extract from English case: “The purpose may be one or it may be several, it may be specific or general, all that the law requires is that there is a settled purpose – this is not to say that the propositus intends to stay where he is indefinitely [that’s domicile, we don’t need to go there]. Indeed this purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for choice of regular abode and there may well be many others. All that is necessary is that the purpose of living in where one does has a sufficient degree of continuity to be properly described as settled.”

**JURISDICTION: IN PERSONAM ACTIONS**

**Jurisdiction: Jurisdiction Simpliciter and Territorial Competence**

**Maharani of Baroda v. Wildenstein 1972 UK**
- This is a pure English common law case – it is probably still the law in all common law non-CJPTA jurisdictions in Canada
- It deals with the old common law service as of right within the jurisdiction rule

**Facts**
- Maharani was a very wealthy woman, she had property in England, France, etc. – CA calls her a citizen of the world
- The defendant, Mr. Wildenstein lives in France, where he runs a major art gallery
- Maharani purchases a painting from Mr. Wildenstein guaranteed to be genuine/original
- She takes delivery of the painting in Paris – so place of sale is in Paris, to someone in Paris by a French resident
- Maharani brings the painting to England, she takes it to an auction house but it doesn’t sell
- So she takes it to Christie’s, where someone looks at it and says, we don’t think it’s genuine
- Maharani issues a writ against Mr. Wildenstein in England – the writ gets issued but doesn’t immediately get served
- The defendant comes over to England for some races
- He gets served – he is served in England

**Question for CA (re jurisdiction):** Defendant argues that the English court doesn’t have jurisdiction but the English CA says we do – it was a valid service of the writ
- Then the defendant went on to argue *forum non-conveniens* but couldn’t satisfy the abuse of process test

- At *common law,* mere temporary physical presence is sufficient – that’s good service, you have satisfied the rules – there *might* be an exception to this: if you were to have lured the defendant into the jurisdiction by trickery
- This is good law in Ontario, etc. but NOT ANYMORE IN BC!!!

**Morguard Investments Ltd v De Savoye 1990 SCC**
- Landmark Canadian case – originated in BC
- BC courts were asked to recognize and enforce a judgment originating in Alberta
BC courts were at that point in time still straight common law – unadulterated by SCC (the Morguard case) – we had recognition rules which limited the BC courts to recognition of only those judgments in which the defendant was actually served in the jurisdiction where the judgment emanates from or had somehow otherwise submitted to the jurisdiction of that court

- BC – the recognizing court
- AB – originating court

**Question for BC courts:** can we recognize and enforce this AB judgment?

**Facts**

- The litigation in Alberta was a mortgage default case
- The land was in Alberta; at the time when the defendants became guarantors, they were resident (probably domiciled, but we don’t care) in Alberta – so, originally all the connections were with Alberta and the Alberta courts took jurisdiction
- What’s the problem? – the defendants had moved to BC before the AB action was commenced – they were served with AB process *ex juris* in BC
- So the defendants received process, they knew there was an action against them and they got good legal advice, which was: “You weren’t served in Alberta, don’t submit. Just stay in BC and do NOTHING”
- Those were the common-law rules: the BC court won’t recognize the AB judgment – there was no presence at the time when the action was commenced, and there was no submission
- The defendants should have been home-free (at least outside of Alberta – the judgment would have been enforceable there but no other common-law province would recognize and enforce that judgment)

- The case goes to SCC
- BC has a reputation for producing cases that go to SCC
- In BC, the court had flirted with the idea of reciprocity – and this was argued at the SCC
  - BC would have taken jurisdiction in similar circumstances so we ought to recognize the Alberta judgment
  - SCC did not accept that argument

**Instead, they came up with a new approach to recognition and enforcement (a new Canadian common law rule) and as a corollary to that rule, it came up with a new jurisdiction rule – a new approach to jurisdiction**

- There is a long discussion by La Forest J of comity, federalism, and the Constitution, etc., and finally comes down to conflicts
  - **Comity** (deference; the governing/operating principle for creation of conflicts: we do it because we think it is the right thing to do; it has to do with respect for other sovereign states and their legal systems)
  - **Federalism** is a very special application of comity – it’s comity between provinces
  - What’s implicit in federalism? – Federalism means *order and fairness*
  - But what does order and fairness mean in the context of conflicts, recognition and enforcement? He says order and fairness in a federal system requires that the units (provinces) in a federal system give full *faith and credit* to judgments emanating in other units in the federal system
  - Does this mean we have to recognize any judgment from another province? – No, there has to be some constraints – these constraints have to be at the jurisdiction end
    - There must have been *due process* in the originating court – what does due process entail? – due process requires that *jurisdiction be properly and appropriately restrained*
    - When can we say jurisdiction has been property and appropriately restrained – when there is a real and substantial connection
    - But what is it that there has to be a real and substantial connection with? – The parties? The action? – we now say it has to be between the action and the province (but this didn’t come from Morguard)
• **So where are we?** In Canada, our jurisdictional rules have been modified: We have a Constitutional standard against which all jurisdictional rules (read: CJPTA – circumstances in which you can serve a writ ex-juris) should/can be measured. The minimum constitutional requirement for a jurisdictional rule permitting a plaintiff serve their writ ex-juris is that the circumstances be such that there be a real and substantial connection between the action and the province

• In the course of his judgment in *Morguard*, La Forest J talked about common law defences and *forum non-conveniens* and he also said (and this caused to shake our heads a little bit) the traditional rules continue
  • Does this mean that mere presence for jurisdictional or recognition and enforcement purposes a real and substantial connection?

• This case apparently expressly leaves the Maharani rule intact – mere temporary presence is sufficient for jurisdiction
• In BC, we decided to go with the logic of *Morguard*, not with the express words – so when you look at the CJPTA, mere presence in the province DOES NOT constitute jurisdiction
• What is required now is ordinary residence of the defendant (but that is a statutory change – it just made it narrower, which is fine)

• For years, we had no idea how tight the real and substantial connection had to be – minimal or maximal? It is now sort of sorting itself out – it is at the minimal end of the spectrum
• It doesn’t take much of a connection to constitute a real and substantial connection for purposes of jurisdiction

• You can take this proposition as established by the cases since *Morguard*: our common law jurisdictional rules are very wide. We allow plaintiffs to serve process *ex juris* in an extraordinary broad range of circumstances – the jurisdiction laws are very broad (civil law rules tend to be tighter). But then we use discretion to narrow things down – so discretion is a very important element.

*Moran v Pyle National (Canada) Ltd 1973 SCC*

• Gives us the approach (more than the rule) for deciding where a tort has been committed – you can use the location of the tort or you can talk about the *situs* of the tort (where in law did the tort occur)
  • When you have a car accident, it’s easy
  • When you have other kinds of torts, ex. product liability, defamation – where you have components of the tort occurring in different jurisdictions – saying the tort was committed in a particular jurisdiction is a little harder
  • For purposes of jurisdiction only, conceivably, the tort could be considered to have occurred in more than one jurisdiction – the common law jurisdictional rules are not premised on having a single location/jurisdiction for every cause of action – there is no such thing as exclusive jurisdiction in *in personam* actions
  • For choice of law purposes, its a bit more difficult because we have to locate the tort for purposes of deciding what law applies – so the choice of law rule is premised on having a single location/situs of the tort
  • Jurisdiction is a little more elusive

• In this case, Dickson J is clearly expressing a jurisdictional rule or approach (not doing choice of law here, we’re just deciding whether the court has jurisdiction to hear this action

**Facts**

• Pyle National manufactures a lightbulb in Ontario with component parts from various places
• The lightbulbs get distributed
• A lightbulb manufactured by Pyle National gets purchased in Saskatchewan
• Mr. Moran is standing on a steel ladder, gets electrocuted and dies
• His widow wants to bring an action in SK against Pyle National – an ex juris defendant, a defendant with absolutely no presence in SK

• In SK at that time: the Queen’s Bench Act s. 54, provides: Notwithstanding anything in Section 53, no action shall be brought in Saskatchewan for damages in respect of a tort committed outside the province except by special leave of the Court or a judge.
• The SK court gave her leave

Held
• The case goes up to SCC – the SCC says SK didn’t need to give leave because applying our new flexible approach, the tort was committed in SK

Reasoning
• Two reasons to locate the tort in SK:
  1. The cause of action is founded on the Fatal Accidents Act – this Act gives a cause of action to the widow to sue the defendant
     • Dickson J is concerned that Mrs. Widow will not be able to make a claim under the SK statute unless he finds that the tort was committed in SK – he is concerned about extra-territoriality
     • What he is saying is: I don’t think the province has legislative jurisdiction to give a cause of action for a death occurring anywhere just because the claimant is here in SK (it is territorially limited)
     • So he has got to find, for Moran’s sake, that the tort was committed in SK
     • She doesn’t need a cause of action, she has been given leave to serve the defendant – so the action is procedible
     • The question is, does she have any law she can invoke, i.e. the SK statute
     • So it made a difference to her cause of action, not to the litigation
     • So having himself up that way, right at the beginning, he goes on to discuss all the different approaches to the problem of locating torts
     • There are 3 main approaches:
       1. Place of acting theory – if you use this rule here: the tort clearly occurred in Ontario because that’s where the lightbulb was produced
       2. Place of harm
       3. Last necessary act theory – the place where the last necessary element of the tort occurred

• Dickson throws all of these out and adopts what he thinks is a flexible rule:
  • “Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules.... Cheshire has suggested ... that 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.”
  • Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.
  • i.e. If the manufacturer could have foreseen that his product would end up in SK, then the tort was committed in SK – and he’s premised all this on the idea that, he doesn’t think the manufacturing by itself is a tort, you need damage occurring (it’s sort of like a last necessary act) but it’s more flexible because he is not insisting that the only place the tort was committed was in the jurisdiction where the damage occurred but clearly, anticipating what subsequent courts will/have said, damage is probably the most important component
• And certainly, leaving aside the Morguard issues, BC courts took this case and just ran with it – the damage occurred here, that is enough
• So this case is constantly used in Canada because it is flexible
• So we have the flexible approach, no arbitrary rules, no concept (express or implicit) that for jurisdictional purposes, there is only one place that the tort could have been committed
• So it opened up s. 10(g) and its equivalent in other provinces – this is important

Chronologically, we get the ONCA decision in Muscutt v Courcelles 2002 ONCA – one of 5 personal injury cases that were consolidated to go to ONCA and the lead case was Muscutt

Muscutt v Courcelles 2002 ONCA

Facts
• Car accident occurred in AB where the plaintiff had 3 weeks before he moved for work
• He is seriously injured, he comes home to Ontario
• He is actually in Ontario, he wants to bring an action in Ontario
• ON at this point in time (2002) had Rule 17 – in ON they had taken the logic of Pyle National and they did have a “tort committed in ON” rule, and they had elaborated on it in a separate rule, which was “damage occurring in ON” from various causes of action
• That’s basically what we had done in BC – it was the damage component for tort being committed in BC
• The problem with the use of that particular rule of court, “damage occurring in ON”, was that the plaintiff relied not so much on damage occurring originally in ON, but damage occurring somewhere else and then recovering/treatment continuing in ON – and that was happening in this case

Reasoning
• Sharp J (writing for a unanimous CA) is doing his best to give effect to Morguard
  • He recognizes upfront and expressly that “real and substantial connection” for purposes of jurisdiction is a real and substantial connection whereas the connection for purposes of discretion is the most appropriate jurisdiction/the most real and substantial connection
  • He states that La Forest J in Morguard intended real and substantial connection to be a flexible test
  • But then, he goes on to set out 8 considerations that a court ought to take into account in establishing whether there is a real and substantial connection for purposes of jurisdiction simpliciter

  The 8 Factors:
  1. The connection between the forum and the plaintiff’s claim
  2. The connection between the forum and the defendant
  3. Unfairness to the defendant in assuming jurisdiction
  4. Unfairness to the plaintiff in not assuming jurisdiction
  5. The involvement of other parties to the suit
  6. The court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis – this one was a lot of fun
  7. Whether the case is interprovincial or international in nature
  8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

• EE’s complaint: it says jurisdiction simpliciter and discretion are distinct components but then he creates a test for jurisdiction simpliciter which overlaps significantly with the factors you consider when you are exercising discretion

• This 8 factors were used religiously in ON – counsels and judges love checklists
• This test is fine – if ON wants to move from a minimal connection to a maximal connection for jurisdiction simpliciter, that’s their business
• Morguard set a constitutional minimum – you have to have at least this for your rule to be intra vires – if provinces want to tighten their jurisdiction simpliciter rules, that’s fine – and that’s what Muscott did
• So this case is at the maximal end of the spectrum – you need to satisfy a lot of concerns in order to persuade an ON court to take jurisdiction
• The consequence of having such a high standard for *jurisdiction simpliciter* is that by the time you got to discretion(?), you never stayed the ON action because you had satisfied all the concerns that would come up in *forum non-conveniens* – you would have no discretion left because you had exercised it all in *jurisdiction simpliciter*

• BC doesn’t care – we can go our own way

*Spar Aerospace Ltd v Mobile Satellite Corporation 2002 SCC*

*Reasoning*

• SCC finds that first of all, it was not necessary – we don’t need to consider real and substantial connection as an extra or additional criterion (satisfaction of *Art. 3148 of the Civil Code of Québec (CCQ)* is sufficient) – no need to go to real and substantial connection – (?)
• But LeBell J says, even if you do consider a real and substantial connection as set out in *Morguard* independently and separately of *Art. 3148* – it didn’t matter here – damage occurring in Quebec satisfies the real and substantial connection
• The court went on to say: there is no *minimum* amount of damage required for real and substantial connection – $50K is okay

• *So, extrapolating from this case and its consideration of the real and substantial connection, EE says that the real and substantial connection as enunciated in Morguard requires only a minimal connection – you don’t have to go as far as Muscutt, the minimal connection is sufficient*

• LeBell J’s judgment does contain some odd things: he says you read the Code (CCQ) as a whole – that is, *jurisdiction simpliciter* (*Art. 3148*) as modified by *Art. 3135* (the discretionary provision, *forum non-conveniens*) – the system of private international law is designed to ensure that there is a “real and substantial connection” between the action and the province of Quebec and to guard against the improper seizing of jurisdiction
• We might say this is inconsistent with the minimal connection because it does require a closer connection to exercise jurisdiction – you tighten things up when you exercise discretion – but regardless, EE is ignoring this

• The SCC did *not* say that to satisfy the real and substantial connection – *is considered just by itself for jurisdiction purposes* (?) – you have to go as far as *Muscutt* did
• And the SCC *could* have endorsed and approved *Muscutt* if was decided first – and this was a notable omission

• *Note:* There was no argument that the damage had been suffered at the head office and not at the branch plant in Quebec – so a corporation can suffer damage in multiple locations apparently

*Coutu v Gauthier 2006 NBCA*

*Facts*

• MVA (single vehicle accident) in Ontario – clearly easy to locate (not like product liability)
• The driver, Gauthier is a QB resident
• The passenger, Coutu is a NB resident
• They were temporarily in ON, but they were both going back to QB and NB respectively
• Coutu was killed in the accident
• So you now have the widow suing in NB, her home province for damages arising from the death of her husband, the passenger in the car
• There is no question about liability, it’s just a question of damages
• There are objections raised by Gauthier to the jurisdiction of the NB courts
Held (TJ)
- The TJ had ruled on the jurisdiction of the NB court having considered both *jurisdiction simpliciter* and discretion (*forum non-conveniens*).
- The TJ had found that the NB court did have jurisdiction.

Issue
- An issue arises because the TJ had used the Muscutt approach for jurisdiction and considered the 8 considerations set out by Sharp J. in Muscott.

Held (CA)
- Agrees with the result, but doesn't like how TJ got there because he used Muscutt and we don't want Muscutt applying in this province.
- The point is not that NBCA rejects Muscutt for NB purposes (although that is interesting) – the reason why this case is a useful case for us to consider is because it considers why Muscutt shouldn't be used.

Reasoning
- Why shouldn't Muscutt be used? – because we need some certainty in deciding on jurisdiction.
- Plaintiffs need to know where they can sue.
- You need to be able to say well we can argue that the tort occurred here, or the contract was breached here.
- We need this kind of certainty.
- You do not need the uncertainty of considering comity of the jurisdiction state, or considering fairness.
- So the NBCA finds that there is an overlap between the jurisdictional component (*jurisdiction simpliciter*) and discretion (*forum non-conveniens*) – there is too much uncertainty in applying the Muscutt criteria, so we will just go back to applying the first of the Muscutt criteria and focus on #1 and #1 is the connection between the action and the province – which is what our Rules focus on – the factual connection.
- He says: the driver should have foreseen (in the course of being negligent on the road) that if he killed his passenger, there would be suffering in the passenger’s home province of NB.
- Also considers the costs of not knowing where to bring an action – how many poor little widows have the financial resources to bring an action in 3 different provinces (*policy consideration*).
- Note: you never know how the court will exercise its discretion – it’s a bit of a lottery.
  - Even if the province takes jurisdiction under the *jurisdiction simpliciter/territorial competence rule*, the defendant can still say, there is a more important forum in another jurisdiction.
  - You still have this uncertainty but at least you have certainty in terms of where you can start the action.

*Stanway v Wyeth Pharmaceuticals Inc 2009 BCCA*
- This is a post-CJPTA case.
- It is absolute clear that Muscutt doesn’t apply in BC – there is not much justification for it, there is simply the invocation of the fact that now we’ve got a statute.
  - Although that doesn’t mean much because some provinces have have enacted a CJPTA but still consider Muscutt factors – have incorporated Muscutt into CJPTA.
- Pre-CJPTA, we had been using consistently using minimal connection as the standard for real and substantial connection.
- Stanway is a class action.
- Plaintiff is a BC resident and claims to have developed breast cancer after taking medication manufactured by the defendant.
- The defendants are all American corporations – no BC corporations involved.
- The cause of action is tort, negligence, etc.
- The American companies objected to the territorial competence of the BC court.
- BCCA affirms BCSC which holds that we have territorial competence under the CJPTA s. 3(e)
- But BCSC applied the Muscutt criteria (??)
BCCA says No, Muscutt does not apply here (?)

But they simply say in para 21-22
- The CJPTA has eclipsed that approach (Muscutt approach?) and prospectively, CJPTA s. 10 sets out the circumstances and these are to be considered mandatory presumptions – but they are rebuttable, they can be rebuttable
- But the fact is the BC courts see this as a slam dunk – if you set out the conditions in CJPTA s. 10, we’ve got jurisdiction
- It is likely to be determinative

The circumstances relied on in this case was s. 10(g) – a tort committed in the province
Why was the tort committed in the province? – Moran v Pyle National is applied: damage was suffered here, consumers were located here, etc., so we have jurisdiction

*Club Resorts v Van Breda 2012 SCC*

- The most recent SCC case
- In terms of what it actually decided, no harm done
- In terms of the discussion, LeBell J (who wrote Spar Aerospace writes this judgment too) writes as if the Quebec Civil Code invented the concept of jurisdiction simpliciter – (?)

- Comes from ONCA
- Van Breda re-argues the Muscutt approach
- Van Breda is the consolidation of two tort cases

- Personal injuries were suffered by 2 sets of Ontario residents in Cuba
- First pair was a couple (Mr. and Mrs. Charron) who went scuba diving
  - Mr. Charron drowned
- Second pair (Mr. and Mrs. Van Breda) undertake to teach tennis in Cuba at a resort in exchange for free accommodation
  - They go to the beach right after arriving, Ms. Van Breda does chin-ups on some equipment on the beach, the equipment collapses on her and she is rendered a paraplegic
  - The Van Bredas return to Alberta (where Ms. Van Breda’s parents are and then they move to BC)
  - They begin their litigation in ON but they are actually in BC

- Both wanted to sue the Cuban defendants in Ontario
- They commenced separate actions (which are consolidated) in Ontario and they serve the Cuban defendants ex juris in Cuba
- They point to several connecting factors:
  - They are claiming damage in Ontario, contract was made in Ontario
- The Cuban defendants disputed the jurisdiction of the Ontario courts
- The Cubans lose at trial

- CA: at this point in time, the governing approach to jurisdiction simpliciter in Ontario was Muscutt, which requires counsel to speak to 8 different factors/criteria
- The parties in the Van Breda case disagree with that approach

  - If you want the CA to overrule a previous CA decision, they need a larger panel – so they ask for a panel of 5 (Muscutt was written by a panel of 3) and they got a panel of 5
  - Funny enough, one of the members of the panel was Sharp J (who wrote the Muscutt decision)

- All sorts of arguments were put forth
- Sharp J is somewhat persuaded – what does he do in the ONCA in Van Breda:
He looks at all the criticisms and he decides that the core of the Muscutt test is the **first factor** – the connection with the forum (the connection between the action and Ontario) – this is the CORE of the test

So how do you apply the core of the test? – you look to Rule 17.02 of the Rules of Civil Procedure and if one of the circumstances set out in Rule 17.02 (tort committed in ON) is satisfied, you **presume** that the real and substantial connection test is satisfied

However, he decides that two of the circumstances set out in Rule 17.02 really don’t establish a real and substantial connection so probably shouldn’t be relied on for a presumption – one of them is “damage in Ontario”, the other one is “necessary or proper party”

But that is not the end of it – Sharp doesn’t admit that Muscutt was wrong, he just modifies it – so yes, you can focus on the connection (#1) but the remaining 7 factors become general legal principles bearing on the analysis

So what happened after Van Breda in Ontario?
- All the judges, including the CA – all they did was focus on the Rules of the Court (Rule 17.02) – if you satisfy a circumstances = jurisdiction simpliciter – they reverted to the pre-Muscutt situation and the other factors were ignored
- However, counsel applied for leave to appeal to the SCC, was granted
- SCC also granted leave to appeal in two other Ontario cases – Conrad Black and Bano case (defamation cases)

In each of these 4 tort cases (personal injury and defamation), the parties had contested both the jurisdiction simpliciter of the Ontario courts and the discretionary aspect (the discretion of the court to stay their own action if they had jurisdiction)

In BC, we wondered why SCC wanted to reconsider the whole law of jurisdiction simpliciter etc. by hearing only ON cases – there were BC, NS, etc. cases where leave to appeal was sought but no leave was granted

So we hoped that the SCC was deciding the law for Ontario only and not for the rest of us (this is of course completely inconsistent with the concept that the SCC should be taking cases dealing with matters of national concern/national interest)
- This is EFFECTIVELY what the court did

All cases were handed down by SCC on same day
- In each case, the judgment for the court was written by LeBell J

The only case we are dealing with is the Van Breda case – and we are only discussing the parts of the decision dealing with jurisdiction (LeBell also discusses the discretionary element)

**Propositions based on the Reasons for Judgment**

1. You have to distinguish between the constitutional standard and conflicts rules – they are two separate concepts
   - This should not come as a great surprise – Morguard, supplemented by Hunt, constitutionalized the real and substantial connection
   - But it’s all very clear that the constitutional principle is a standard against which provincial rules can be measured

2. LeBell J says positively and clearly, that the SCC is not about to replace all conflicts/choice of law rules with the real and substantial connection test
   - So this a distinct constitutional standard – not a replacement for conflicts
3. The constitutional standard reflects the territorial limitations of provincial legislative power and provincial adjudicative power

4. The constitutional standard does not require uniform provincial jurisdictional rules
   - BC can be different from Ontario
   - Why is he saying this? – the CJPTA was put to him as an argument and different rules – it has always been the case that each province had their own list of circumstances and the lists were never completely identical (although there was overlap) and they do not need to be
   - So rules don’t need to be identical
   - Now, we have CJPTA
   - What LeBell J is thinking is that other provinces don’t have to adopt the CJPTA, they can have different rules

5. The forum of necessity (a provision in the CJPTA which is relied on heavily by Sharp J in the ONCA decision of Van Breda modifying Muscutt) had not been an issue before the court
   - What does this mean?

6. A rejection of a straw man (which makes EE worry about LeBell’s grasp of common law rules) – he says, we can’t have complete discretion in jurisdiction – we never did
   - Perhaps he is thinking about the Muscutt factors and the inclusion in the jurisdiction simpliciter decision of all the discretionary factors – maybe that is what he is talking about – certainly, traditionally jurisdiction simpliciter has never been about complete discretion

   - Another 5 propositions respecting jurisdiction simpliciter
   7. The real and substantial connection test does not oust traditional bases of jurisdiction (para 79)
      - What are the traditional bases of jurisdiction? – (a) presence (can be mere, temporary presence) and (b) submission (unless modified by statute)
      - So traditional bases are still good – they still satisfy the real and substantial connection standard

8. The presumptive factors approach is the right approach
   - You can confine your consideration to the Muscutt first factor – is there satisfaction of a circumstance listed in the Rules of Court/statute – it’s a rebuttable presumption (though its rarely rebutted) – this is a good approach, we want order, we want certainty

9. The presence of the plaintiff is not sufficient to satisfy real and substantial connection
   - So if the only connection/circumstance connecting the action to the province is that the plaintiff is a resident of the province, you haven’t made out jurisdiction
   - Arguably this is necessary because there have been some lower court judgments that have been very plaintiff-oriented (the plaintiff is here, that’s enough, the plaintiff should be able to choose his own forum) – he makes it clear that that is not enough

10. 4 presumptive factors which are relevant to tort actions (para 90-91) – he’s not saying these are the only possible connecting factors, the list is not closed – legislature or courts can expand/create new categories
    (a) Domicile or residence of the defendant in the province
        - Difficulty with this: this is jurisdiction as of right in the traditional sense
    (b) Carrying on business in the province
        - *eyebrow raise*
        - These two are strange since both of those are presence in the province giving jurisdiction as of right
        - The next two clearly fall within the category of the presumptive factors that are traditionally set out in the rules of court
    (c) Tort committed in the province
(d) Contract connected with the dispute was made in the province

11. He seems to approve the concept of pendant jurisdiction (para 99)
   - By that we mean he seems to be saying, well if the court has jurisdiction over one part of the case, then they can take jurisdiction over everything – they don’t have to split the case

*AG Armeno Mines and Minerals v Newmont Gold 2000 BCCA*

**Facts**
- Concerns a mining project in Indonesia
- They are acquiring interests in an Indonesian company
- Armeno Mines, a BC company, wants to add Newmont as a defendant in the BC action
- Newmont is out of province – Delaware corporation
- The allegation against Newmont is that it induced breach of contract
- Newmont does not want to litigate in BC, objects, argues no jurisdiction simpliciter, BC is forum non-conveniens

**Issue**
- Question for BCCA: Can jurisdiction be resolved on the basis of the pleadings?

**BCCA**
- Ordinarily, jurisdictional issues ought to be able to be resolved based on the pleadings
- However, if there is an omission of material facts in the pleadings, it is possible to supplement that omission by affidavit evidence
- And if one party can produce affidavit evidence, the other party can do the same
- The court is not in the business of deciding the merits of the case at this point in time – just the jurisdictional issue – all it wants to know is whether you fit in under the circumstances
- In this particular case, affidavits were submitted by Newmont
- Newmont’s affidavit evidence was to the effect that it couldn’t have complied and it hadn’t induced breach of contract – it had a contractual right (doesn’t matter)
- The point is, the plaintiff hadn’t produced any affidavit evidence to counteract that and there was no arguable case – it was just a tenuous allegation

- So no jurisdiction against Newmont because there was no good arguable case on the merits against Newmont

- This is a conflicts issue which is of particular importance when the defendant is served ex juris – whenever you serve process, you are calling the defendant into the forum to defend
  - The traditional view of the English judgments was that that was that that interfered with the sovereignty of the jurisdiction in which the defendant was located
  - Even if we rationalize this, there is still the problem that we are pulling someone else into our forum – that is why in the ex parte application, the plaintiff who wanted to serve ex juris had to establish the 3 factors: (1) circumstances, (2) good arguable case on the merits, and (3) that the court was the most appropriate forum for the action

- So while you don’t see a reference to it in the CJPTA, it’s still there in the jurisprudence – and it is obviously not going to be an issue if it’s not raised by the defendant (so that means, its not going to be an issue in every single case)

- “Good arguable case” – it’s both a domestic and a conflicts issue – BCCA says that it may or may not coincide with what domestically is considered a good arguable case
• This is a phrase that comes up in a variety of contexts and it is determined on the balance of probabilities, a *prima facie* case

**MTU Maintenance Canada Ltd v Kuehne & Nagel Int’l Ltd 2007 BCCA**
• BCCA saying you can’t use arguments of counsel and statements by counsel to supplement omissions of fact in the pleadings, etc.
• If you want to litigate in a particular common-law forum, you have to make sure you get all the material, jurisdictional and other facts in your documents

**Discretion: Forum Non-Conveniens**

**Atlantic Star Case 1974 UKHL**
• Radical changes with respect to the evolution of the discretionary principles when the defendant has been served within England (the application of the principles governing discretion after the defendant served in England)
• That principle starts with the *abuse of process test* – simply meant in result that English courts rarely ever stayed English proceedings when the defendant had been served in England – that was common law, traditional, jurisdiction as of right – they had power, they were the best courts in the world, how could they possibly stay the English proceeding in favour of some other jurisdiction?
• The principle read this way: it came in two parts
  1. The defendant had to establish that continuance of the action would be unjust to him because it would be oppressive or vexatious or somehow otherwise would constitute an abuse of process of the court *and*
  2. This stay would not be unjust to the plaintiff

This was the test used for decades until 1974 – the *Atlantic Star case* (the case that started the evolution)
• Ship collision
• HL said well we’re not going to change the *formula*, we’ll just give the words “oppressive” and “vexatious” and “abuse of process” a new reading
• Counsel in this case acting for the defendant was trying to get a stay of the English action – succeeded in getting a stay
• HL says we have to respect the Belgian courts
• Counsel for the defendant was Robert Goth, who in 1974 was arguing for the English HL to adopt the Scottish principle
• HL said we can’t do that, we’ll just modify the abuse of process test a little bit

**MacShannon v Rockware Glass Ltd 1978**
• This case did modify the formulation, but it was a balanced approach
• Ultimately, they said you have to balance these two things – fairness to the plaintiff and fairness to the defendant – it’s a balancing act

**Spiliada Maritime Corp v Cansulex Ltd 1986 UKHL**
• A case connected to Vancouver, sulphur was loaded onto boats in the harbour
• One rainy day, the sulphur gets wet and corroded the inside of the boats
• There was litigation commenced in England, Canada, France, and there were arbitration proceedings, etc.
• The significant point: all the boats had English insurers
• A particular boat, Spiliada is owned by a Liberian corporation – its managers are Greek and English (located in Greece and England)
• The defendants consist of a Canadian corporation carrying on business in BC (Cansulex Ltd)
• The ship was chartered to an Indian company to carry cargo from Vancouver to India
• In the bills of lading, there was an arbitration clause and a choice of law clause selecting English law to govern the contract – so you have a clear English connection
• The English courts would have had jurisdiction, gave leave to serve the writ on Cansulex *ex juris* because there is a contract governed by English law – so we have a real and substantial connection, even though English courts didn’t talk about real and substantial connection – but in our terms, they would have had a real and substantial connection
• Cansulex applies in England to set aside service of the writ and stay the English action

**Held**

• If nothing else, this case establishes how difficult it is to predict the outcome when the courts are exercising discretion
  • Queen’s Bench refused to stay the action
  • Court of Appeal set it aside, stayed the action
  • House of Lords restores the trial decision
  • *So you get different judges, considering the relevant factors, giving different weight to the relevant factors, and getting different results*
    • Each judge, along the way, gave different weights to the different circumstances and factors for consideration

**Reasoning**

• What Lord Goth does in this case: is give you the complete statement of English discretionary principles
• Remember: this is a service *ex juris* case – Cansulex was served in BC
• *He deals with the formulation of the discretionary principles after service *ex juris*
  • He also takes the opportunity to deal with the discretionary principles after service within England
  • So we have the complete version of English principles set out very clearly in this case

• It’s still the leading English case as far as the statement and elaboration of the principles

• *So we have, first of all, adoption of the Scottish principle*
  • "The plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."
  • That’s your formula, it doesn’t tell you what to look at, it just tells you that you consider the suitability, taking account the interests of all the parties and the ends of justice (whatever that means)
  • This is the governing principle both for discretion after service within England and after service *ex juris* – *SAME FORMULA*
  • Look at suitability, appropriateness, etc. – NOT mere convenience – we are not flipping a coin – it has to be clearly more suitable

• What is the main difference between the application of the formula and the application of the formula after service in England and the application of the formula after service *ex juris* – *the difference consists in the allocation of the burden of proof*
  1. If the defendant has been served in England, then the burden of proof is on the defendant to persuade the English court that there is another forum which is *clearly* (quantum) more appropriate for this action
    • You have to say *xyz* jurisdiction is clearly more appropriate
    • There has to be another forum which will have under its rules jurisdiction to hear the action
    • So the defendant has to be able to say, *xyz* will have more jurisdiction over this action based on its own rules AND is *clearly* more suitable to hear this case
  2. If the defendant has been served *ex juris*, the English courts have not abandoned their view that calling a defendant who is out of the country (that that defendant has to come and defend an action in England) is an exercise of exorbitant jurisdiction
• It is seen to be an infringement on the sovereignty of the other state

• So because the English court still requires the plaintiff to seek leave to serve, the plaintiff on the ex parte application always has the burden of persuading the courts that England is the most appropriate forum for the action

• The point is: the defendant can object
• The English plaintiff may get leave, may serve ex juris, but the defendant can still come in and object – at that stage, in England, under Spiliada, the burden REMAINS on the plaintiff
• The plaintiff still has the burden of persuading the court that England is the most appropriate forum for the action

• The allocation of the burden of proof can make an enormous difference to the outcome because a lot of these cases in which discretion is invoked are pretty even balanced in terms of appropriateness of the two possible fora for the action
• So it’s the burden of proof is going to make a difference – it is very important

• It’s clearly understood in all the English cases, that we are going to put that burden on the plaintiff if process has been served outside of England

• Because we have the principles so clear, there should be no mistake in the future
• The appeal courts generally do not interfere with the exercise of discretion of unless the TJ has clearly ignored a relevant factor that should have been considered or completely misunderstood the principle
• But: discretion is discretion is discretion

• The two most important resulting factors in this case:
  1. The burden of proof
  2. The Scottish principle

*Castanho v Brown & Root 1980 UKHL*

• The first case that came to the HL after the evolution began in 1974 (Atlantic Star) for consideration for an anti-suit injunction
• Involved an employee of a ship docked in an English port, services were being provided by Brown & Root (an American company)
• Castanho was a Portuguese Seaman, who happened to be serving on this ship
• Castanho’s foot got tangled in a rope, he was pulled off the deck, and then they just released the rope and dropped him on his head
• He became a paraplegic
• An action was commenced in England – that’s where the tort/negligence occurred
• Some American lawyers (from Texas) tracked him down in the hospital and told him to sue in Texas – he’ll get a lot more money in damages
• So Castanho started an action in Texas

• In the meantime, Castanho was shipped off back to Portugal
• This case ends up in the HL – there are all sorts of jurisdictional maneuvers

• **Issue**: At the end of the day, HL is deciding whether to stay the English action or enjoin continuation of the Texas action

• One argument: English damages will be fine, he doesn’t need Texas damages – HL was pissed off about this – don’t ever use this argument
What did the HL say about what we do in an anti-suit injunction? – we apply the same principles – what is the most important principles for this action?

- We should be looking at what the most appropriate forum is
- However, one judge said you should use extreme caution in issuing an injunction prohibiting the commencement/continuation of a foreign proceeding – recognizing that foreign courts might be a bit insulted as England is interfering (although indirectly) with proceedings in other jurisdictions
- The indirect effect is to interfere with foreign proceedings
  - Anti suit injunctions were in fact few and far between in England – either applications for them were rare or granting them was rare

*Societe National Industrielle Aerospatiale (SNIA) v Lee Kui Jak 1987 UK PC*

- On appeal from Brunai
- This case is a statement of English principles
- The source of the litigation was a helicopter crash in Brunai
- One passenger, who was carrying a multi-million dollar business – a wealthy deceased
- The helicopter itself was manufactured by a French company (SNIA), owned by an English company and serviced by a Malaysian company

- Who is suing? The deceased’s widow (Lee Kui Jak) – also executor of the estate
  - She commences multiple actions against a number of defendants
  - She commences an action in Brunai against the French manufacturer and the Malaysian servicer
  - She commences an action in France against the French manufacturer (discontinued and drops out of the picture)
  - She commences an action in Texas against the French manufacturer and an unknown number of associated companies and the Malaysian company and its associates

- The texas court had jurisdiction under its own rules, under Texas law
- There was a settlement reached in Texas against the Malaysian defendant but not the French company – the French company does not want to be sued in Texas

- So SNIA (Aerospatiale) asked the Texas court to stay the Texas action – asking the Texas court to stay the LOCAL proceedings in Texas – that application is dismissed by the Texas Court

- What’s worse than being sued in texas? – Being sued in Texas and Brunai

- In Malaysia, the Malaysian company is willing to submit to the jurisdiction of the Brunai court

- What happened in Brunai?
  - Brunai goes on appeal
  - The court gets a copy of Spiliada hot off the presses and applies those principles but doesn’t grant an injunction
  - Case goes up to the PC

**Issue**

- Privy Council gets to rethink the formulation of the principle governing anti-suit injunctions
  - Lord Goth holds that *Castanho* was wrong – you shouldn’t just apply forum conveniens – the Castanho approach is much too liberal – we have to tighten this test up
  - We have to be more cautious
  - We have to go back to the abuse of process test and the question of vexatious
  - Most of the judgment is concerned with discussing the old cases on injunction and anti-suit injunctions
Relevant passage: p. 308 of casebook – **sets out the proper English approach when a party has applied for anti-suit injunction**

- In a case such as the present where a remedy for a particular wrong is available in both an English (or Brunei) court and a foreign court (so you have two possible places to litigate – they both have jurisdiction), the English court will generally speaking only restrain a plaintiff from proceeding in a foreign court if such pursuit would be vexatious or oppressive (so you have upped the standard)
  - The proceedings in Texas, to satisfy this new test, must be perceived by the English court to be oppressive and vexatious
  - This presupposes that as a general rule, the English (or Brunei court) must conclude that it provides the _natural forum_ for the trial of the action
  - So the English (or Brunei) court has to make an application of discretionary principles
  - “The _natural forum_” – that’s simply another way of referring to “clearly the most appropriate forum for the action” – they have jurisdiction, but weighing the two, we are the most appropriate forum for the action

- That analysis has been adopted and the English court is deciding about ITS appropriateness

**Aerospatiale** says we are being asked for an anti-suit injunction prohibiting the Texas proceedings, first thing we have to do is decide whether we are the most appropriate forum for the action (not just that we have jurisdiction)

- And further, since the court is concerned with the ends of justice, account must be taken not only of injustice to the defendant but also of injustice to the plaintiff if he is not allowed to do so – so you’re still balancing – _look up this quote_
  - We might be the most appropriate forum for the action, but would it be unjust to the plaintiff if we issued an injunction – you are balancing the justice

**So as a general rule:** the court will not grant an injunction if by doing so it will deprive the plaintiff of advantages in the foreign court of which it would be unjust to deprive him

- Important point: “Fortunately, that problem can often be overcome by appropriate undertakings given by the defendant or by granting an injunction on appropriate terms
  - Just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay upon terms.”

- So you’re exercising discretion – important point – you’re asking the court to exercise discretion to prohibit the continuation of that proceeding, stay the local proceeding
  - But you probably have already taken some steps either in the forum or in Texas (ex. Discovery – American rules for discovery are more generous than Canadian rules) – so it is often the case that that is an advantage and that might be the reason for commencing your action in Texas

- So what kind of conditions can we attach?
  - **The court may attach conditions to the stay of the English action proceedings or to the anti-suit injunction** – it’s not absolute

- Lord Goth returns to the oppression and vexation standard as a way of inhibiting English courts from distributing anti-suit injunctions here, there and everywhere because that interferes indirectly with the foreign proceedings

- **But you’ll notice that the court is still looking at all the factors in the case, looking at justice as between the parties (how can we make this a fair decision)**

- **But generally speaking, rarely will an anti-suit injunction be issued in a straight here or there situation – not many English cases even since this one dealing with should we enjoin**
continuation of Texas proceedings

- There is one category of cases in England however in which anti-suit injunctions are issued almost automatically – English courts are quite willing about granting an anti-suit injunction to protect their own jurisdiction (p. 305)
  - So if it is a contract action for example (the contract has a clause that any disputes will be arbitrated in London) and one of the parties sues in Italy, the English court will grant an anti-suit injunction to protect English jurisdiction to arbitrate as the parties have agreed to

_Airbus Industrie GIE v Patel et al 1998 UK HL_

- Simply reiterates/confirm one of the points in Aerospatiale

- It arose from the crash of an airplane in India
- Passengers were killed/injured/etc
- Actions were commenced in India
- Some of the parties in the action commenced in India were resident, domiciled British nationals – some of the plaintiffs were resident, present in England

- These British citizens, having commenced an action in India, they also commenced an action in Texas
- The defendants in the Indian action applied in the Indian court for an anti-suit injunction and they got it – the Indian court issued an anti-suit injunction prohibiting these plaintiffs from continuing their action in Texas (actually it was a world-wide anti-suit injunction)

- The plaintiffs simply ignored it and continued the action – this is the weakness of an *in personam* order – all you can do is punish the parties who have breached the order

- So the defendants look around and they say where are these plaintiffs?
  - They came to the English courts having observed that the parties they wanted enjoined were to be found physically in England
  - They asked the English courts to *either* recognize the Indian injunction or *to* issue an anti-suit injunction

- The English TJ said we can’t recognize the Indian injunction – *note:* this is not consistent with the current Canadian law, we now recognize both pecuniary and non-pecuniary foreign orders
- They had to proceed on the alternative, to issue an anti-suit injunction
- **This is clearly a case where the English court had power over the parties to be enjoined**

- The HL says we can’t do that because we are not the natural forum for the *action* (meaning the action concerning the airplane crash)
- We can’t simply police our residents for the benefit of other jurisdictions, we can only take the extraordinary step of granting an anti-suit injunction for our residents if we are the natural forum for the action
- They might have been the natural forum for the injunction application, but they weren’t the natural forum for the action arising from the airplane crash

- So that’s a qualification on the power of the court to issue an anti-suit injunction – you can’t just go to the court where the parties you want the injunction against are located – it’s gotta be a court that coincides with the proper forum for the main action
Amchem Products Inc v BCWCB 1993 SCC

- Probably still the leading case both on the doctrine of forum non-conveniens and on anti-suit injunction (2 ways in which the forum – the court which has jurisdiction over the action – can exercise its discretion
- Amchem deals with both
- Case arising in BC – WCB of BC is one of the parties

Facts

- The plaintiffs are mostly BC residents
- There are some workers and survivors (asbestos litigation)
- They are suffering the consequences of being exposed to asbestos
- Some of them have died, and the survivors are bringing the action
- Vast majority of the 194 plaintiffs are located in BC

- Defendants consist of corporate defendants primarily American companies but not exclusively
- They are not concentrated in any particular single American state
- And many of the workers were exposed in BC – in fact they claim they were all exposed in BC while they were working here
- The workers have already been paid some compensation for their work-related injuries by the WCB and the WCB is bringing this action in all their names and it wants to recover what it has paid out to the workers and anything extra would be repaid to the workers

- So what do these 194 plaintiffs do? They commence an action in Texas
- Texas at this time, early 1990s, the Texas courts were virtually a mini-industry of asbestos-related claims – it was the place to go to bring an asbestos-related action
- The corporate defendants requested the Texas courts to stay the action in Texas – proper thing to do – sue us somewhere else
- The Texas courts declined to stay the Texas action

- Having not succeeded in staying the Texas action, the defendants in the Texas action come to BC (1989) and they bring applications in BCSC and what they really want is an anti-suit injunction – they want the BC court to prohibit the BC plaintiffs from continuing the action in Texas
- Because they weren’t sure if they could get just an anti-suit injunction without having some kind of substantive claim attached to it, they also bring an action claiming damages for abuse of process or some other fluff
- Sopinka J. says no you don’t have to do that

- So what happens?

- There are anti-suit injunctions (an order prohibiting the plaintiffs from continuing their action), there are anti-anti-suit injunctions (an injunction prohibiting anyone from getting an injunction to prohibit the original injunction), there are anti-anti-anti-suit injunctions (one level further) – dear Lord – we have all three of them here

- This is a classic case of jurisdictional maneuvering by the plaintiffs and the defendants

- Sopinka J. ignores all of that in the SCC judgment

BCSC – TJ

- BCSC grants an anti-suit injunction
- He was annoyed at the Texas attorney
BCCA
• Upholds TJ, continues the anti-suit injunctions
• Apparently at this time, Texas didn’t have a forum non-conveniens doctrine

SCC Issue:
• Should SCC continue the anti-suit injunction? Should the SCC confirm the order prohibiting the BC plaintiffs from continuing the action in Texas?

SCC Reasoning:
• SCC case divides itself into 3 general parts:

1. **1st part consists of musings about the problem of forum shopping**
   • Globalization promotes forum shopping, trying to get a litigation advantage – and this is a classic case
   • This is a common problem

2. **2nd part is that in Canada, the paramount principle that we use in all these jurisdictional decisions is comity**
   • But then he has to concede that comity is not universally respected
   • EE is puzzled by this: comity is not a fixed concept, it is a concept about respect of the other legal system, it doesn’t require any specific rules
     • The fact that a legal system has conflicts rules is an indication that they accept the concept of comity
     • Any legal system in the world that has conflicts rules at all respects comity but their rules are not necessarily the same as ours
   • Then he says Canadian courts have to step in whenever there is injustice abroad
   • When will there be injustice in the jurisdictional context? – there will be an injustice in the jurisdictional context whenever foreign courts should decline jurisdiction and don’t
   • EE – civil law systems generally don’t exercise discretion – they tend to have narrow jurisdictional rules and they don’t stay their own actions – common law is a jungle – we go really wide to start with and then we exercise discretion and narrow it down (that’s the Patel case)

   - We have now to set out when we think that courts should decline to exercise jurisdiction, should stay their own action – we have to discuss forum non-conveniens
     • Collectively, cases (spilliada and the other one) have spelled out forum non-conveniens
     • We haven’t done it since the Antares Shipping Corp case in 1978 (a service ex juris case)
     • Since then, there’s been McShannon and Spilliada, and collectively these cases set out the doctrine of forum non-conveniens
     • And then he discusses the concept and he concludes that we’re all concerned about securing the ends of justice (Spilliada)
     • “Accordingly, Canada was the most convenient forum for both "the pursuit of the action" and "for securing the ends of justice" – incorporating a Scottish principle – we’re all on the same page he says

   - Can we leave it there? – No we can’t
   - Can you assume that we just apply Spilliada? – No You can’t

3. **He talks about 3 factors in the forum conveniens principle of discretion**
   1. First of all (thinking about McShannon) – he talks about juridical advantages
      • We’re not going to consider them separately in Canada – just throw them into the pot – not a separate factor – just consider it in the pre-stage process that McShannon uses

   2. Talks about the burden of proof – he puts the burden of proof always on the defendant
Why doesn’t he retain the English allocation of burden of proof that is carefully set out in Spilliada?
Because he says it’s an Order 11 quirk, it’s a statutory quirk
In Spilliada, it was clearly explained why the burden of proof should remain on the plaintiff in service ex juris cases – because it’s England reaching its exorbitant jurisdiction so the plaintiff has got to justify it
But Sopinka J. says it’s just a quirk of England – no rationale – he said forget it unless there are rules in the province that require it
BCCA had been interpreting and continued to interpret the BCSC Rules as imposing the burden of proof on the plaintiff in service ex juris cases
ON did the same thing – so many jurisdictions in Canada which continued to impose/allocate the burden of proof onto the plaintiff in service ex juris cases
So Sopinka didn’t really care what we did in the provinces but he couldn’t see any justification for the allocation so he said, ordinarily it’s on the defendant unless you have your own statutory quirks

3. It must be clearly established (this is the quantum issue) that there is a more appropriate forum somewhere else (consistent with Spilliada)
   You’re not flipping a coin

   Amchem is most frequently used for what it says about forum non-conveniens because there are so many cases involving invocation of judicial discretion in jurisdictional cases and it’s only forum non-conveniens at issue

3. Then he moves on to the anti-suit injunction
   He notes that the most recent English PC case is the Aerospatiale case – he sets out the principles, then he says in applying those principles, you have to have due regard for Canadian principles
   EE has no idea what he’s talking about

   So: how do we do it in Canada? – this critical recipe is found in p. 321 of casebook
   He sets out, first of all, 2 ordinary/general rules – “pre-conditions” – they are “ordinary” which means that a court is not bound by them

1. Ordinary Rule 1: Parties in a foreign action can’t have an application for an anti-suit injunction in a Canadian court unless the foreign action is already commenced – so you’ve got to have realized the risk not just be anticipating the risk
   The traditional English way is: anti-suit injunction to commence or continue foreign proceedings
   So we’ve tried to restrict it to continuation of foreign proceedings – ordinarily

2. Ordinary Rule 2: There should still be no application (assuming the foreign action has been commenced) for an anti-suit injunction in Canada until you’ve asked the foreign court to exercise its discretion and stay its own action
   Won’t help you very much if the action has been commenced in a civil law system, but useful if it is a common law action
   You have to give the court a chance to decline to stay the action

   Hudon v Geos Language Corporation 1997 ONDC – ONDC did not comply/did not treat those pre-conditions as absolute, just as ordinary rules
   Was a case in which the plaintiff in the Ontario case had signed on with the Language Corporation to teach English in Japan
   She went to visit China and had got in a car accident in China
   In the contract she had signed it said any disputes would be governed by Japanese law and provided for benefits?
• So she gets badly injured in China
• She comes home to Ontario
• Under the contract for $143,000 – that’s not enough
• She wants to bring an action in Ontario
• She is asking for general damages of $10 million, etc.
• Bottom line: she makes an application in Ontario for an anti-suit injunction without having asked the Japanese court to stay its own action
• First 2 rules are ordinary rules: they can be disregarded if circumstances warrant

• Now: interesting part – we are already different from Aerospatiale – in that case, we said Bruani was the natural jurisdiction for the action and went from there
• We’re saying, you guys, you do it first – if the foreign court says, we’re staying, go home, then problem solved

3. Then we get to the difficult part: if the foreign court does not agree to stay its own action, now we have to make a difficult decision:
• We have an action in being
• Should we now grant you an injunction staying that action?

• This is what happens: foreign court makes a decision: we are going to continue the action here (we have jurisdiction)
  • Now, we’re in a bind in Canada and have to decide what to do
  • So what do we do? – we EVALUATE the foreign decision not to stay
  • When will we do that? – we will do that only if we are the most appropriate forum for the action (natural forum, the one that is forum conveniens in light of the circumstances of the case) or an appropriate forum for the action (we have territorial competence)? – we don’t know which
  • Middle para on p. 321
  • EE would interpret it consistently with Patel and Aerospatiale if I were a judge – I would stay we should only grant anti-suit injunction if we are THE most appropriate forum for the action (the natural forum)
  • But we are not sure

• But we shouldn’t do it if we’re not, at the minimum, an appropriate forum

4. How do we evaluate the foreign decision not to stay?
• This is why we have the section on forum non-conveniens – we have to understand our own principles and decide based on those principles whether the foreign court had a reasonable basis for its decision
• It’s not quite: would we have come to the same conclusion and it is intended to take account of legal systems that don’t exercise discretion
• Suppose that the foreign legal system where the action is commenced is a civil law system that has no doctrine of forum non-conveniens, that doesn’t mean we automatically grant an anti-suit injunction because that forum doesn’t have a doctrine of discretion
• What we do is think about what we would have done using the doctrine of forum non-conveniens in those circumstances – and say, did they have a reasonable basis for that conclusion?
• Only if they are blatantly wrong, should we issue an anti-suit injunction

5. One more stage of thinking to go through before the anti-suit injunction is actually issued (we’ve gone through the pre-conditions, foreign court has declined a stay, we have evaluated their decision, we have come to the conclusion that there was no basis for it) – do we automatically grant an anti-suit injunction?
• We will only grant an anti-suit injunction if continuation of that foreign action is UNJUST or will produce an injustice – that is not consistent with Aerospatiale
• In Aerospatiale, the court deliberately reinjected the concept of oppression and vexation in an anti-suit injunction to slow the whole process down and make judges really cautious in granting injunctions
• Sopinka wants flexibility – talks about injustice – don’t talk about oppression and vexation in Canada
• You only have to go to the level of persuading the court that continuing the action will somehow produce an injustice
• Then you should get your anti-suit injunction

• BCSC and BCCA gives an anti-suit injunction in this case
• SCC says – no, you can continue in Texas – can’t see any injustice
• You don’t always get the results you expect
• This case is one of the few Canadian cases in which an anti-suit injunction has actually been issued

Young v Tyco Int’l of Canada Ltd 2008 ONCA
• Straight common law
• Wrongful dismissal/contract action
• Young suing Tyco
  • First worked in Ontario for Tyco
  • Then in American states, primarily in Indiana

• He gets fired allegedly for sexual harassment
• He brings an action in Ontario
• Tyco asks the Ontario court to stay the Ontario action – straight forum non-conveniens on grounds that Indiana would be the clearly more appropriate forum for the action
• The only issue in this case is forum non-conveniens

• Makes several propositions about applying the principle of forum non-conveniens
• First of all, Laskin J lists a number of factors commonly considered by courts in exercising their discretion and deciding which of the two contended-for jurisdiction is the most appropriate forum for the action (para 26) - the factors that he lists include 2 factors peculiar to contract actions:
  1. The location where the contract in dispute was signed;
  2. The applicable law of the contract;
  3. The location of witnesses, especially key witnesses;
  4. The location where the bulk of the evidence will come from;
  5. The jurisdiction in which the factual matters arose;
  6. The residence or place of business of the parties; and
  7. The loss of a legitimate juridical advantage.

• These are not exhaustive/determinative, it is discretionary – no limit to the factors that can be considered, counsel is free to argue any factors that are peculiar to the case but over the years, courts have come up with standard lists

• He states, consistently with Amchem, the standard to displace choice of forum is high – there’s got to be a clearly more appropriate forum somewhere else
• And then he talks about the fact that in this particular case, on the merits of the contract action, the parties were in disagreement about what the contract was, whether the contract was an Ontario or Indiana contract, etc.
• And he says that in this preliminary/interlocutory stage in the trial (you’re not deciding the facts, it’s not a trial on the merits), the court should adopt a “prudential, not an aggressive approach, to fact finding” – so it should be based on the plaintiff’s claim IF it has a reasonable basis in the record – if you’re going to
accept the plaintiff’s version of the facts, assuming there is a reasonable basis the record – you are not going to decide based on the plaintiff’s version and the defendant’s version at this stage – that comes later in the merits

- So: he accepts Young’s version of the facts about the contract, and makes his decision on that basis
- He finds to stay the Ontario action

**Typical approach, typical list of factors in the discretionary decision**

*Lloyd’s Underwriters v Cominco Ltd 2007 BCCA*

- CJPTA
- This is a case of much jurisdictional maneuvering
- What we now call Teck Cominco, starts way back in 1906,
- Teck Cominco generates slag in the lead-zinc smelting process and it discharges the slag into the Columbia river
- Teck at all points throughout its life since 1906 has complied with provincial law – it has never been polluting illegally
- Teck discharges slag into the Columbia river and it’s position throughout is: slag is inert, not hurtful or harmful to the environment – they said we could do it, we did it, we didn’t hurt anybody
- Unfortunately for Teck, at some point in the 1940s in the US, slag started to collect at the bottom of Lake Roosevelt and that apparently did pose a hazard to the environment
- Along comes Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Environmental Protection Agencies comes up and chats with Teck about its discharge and ultimately, Teck complies with whatever the EPA wants
- 1995 – Teck ceases to discharge slag into the river
- Unfortunately for Teck, in 2004, the Confederated Tribes of the Colville Reservation commence an action in Washington state against Teck under CERCLA – they want damages, big damages – *Pakootas v Teck Cominco 2004*
- In that case there is jurisdictional proceedings down in Washington
- Teck applies to have the Washington action dismissed for lack of jurisdiction, Canada actually supports it and Washington refuses
- Washington says, no, we are the best place for this action pursuant to CERCLA
- That application for CERCLA raises concerns among some people on the grounds that it is an extra-territorial application of CERCLA – but that is a red herring
- Teck sees the writing on the wall – sees it’s not going to succeed in persuading the Washington state courts to not hear the Pakootas action under CERCLA so it starts contacting its insurance companies
- Teck has always been well-insured
- It says: we’re going to be claiming on these – we have environmental actions going in Washington, probably some in BC, we’re going to be claiming on the policies, we want to make sure you will pay up
- Insurance company says, nope, we are not covering – that’s the standoff between the insurance companies and Teck

- Now Teck and the insurance companies enter into a confidentiality agreement about their legal discussions and a stand-still agreement, meaning we won’t sue you, you won’t sue us
- Stand-still agreements have a termination date – the termination date for the stand-still agreement between Teck Cominco and the insurance companies (including Lloyds) is November 23, 2005
- After that date passes, either side can commence an action against the other side

- This is where Teck does something that the BC courts didn’t like very much

- **One minute after midnight on November 23, 2005 at 12:01 AM (on November 24), Teck commences proceedings in Washington State**
On November 24, 9 hours later, when the registry opens here, the insurance companies commence an action against Teck in BC

How could you start an action in Washington State after midnight?
- Turns out, one of the ways you can commence an action in Washington state is for an agent who was an ex-judge to get himself invited to dinner at the home of another judge and hands him the papers shortly after midnight – that starts the action
- The action is commenced first in Washington state

And then you get jurisdictional jockeying – this is the dreaded *lis alibi pendens* (simply means an action pending elsewhere) – **parallel actions**

So there is an action in BC and an action in Washington state
- Washington state: Teck v Lloyds
- In BC: Lloyds v Teck

Both parties asked for stays of local actions
- Insurance companies asked in Washington state
- Teck asks in BC

Washington court makes its decision first – says, no, this is the most appropriate forum for the action
- Washington state does exercise discretion (*forum non-conveniens*), does use a process/factors very similar but not identical to that employed in BC

But different courts even in common law Canada can consider different factors so the Washington court doesn’t consider precisely the same factors that a BC court will consider but they are pretty similar – the overlap is very big
- So action is proceeding in Washington state (the insurance action)

Up here, in BC, Teck tries to persuade the BCSC to stay the BC action
- The insurance companies are not BC companies, they are international, they keep changing their names, etc.

- So they are not all in Washington state, but neither are they concentrated in BC
- Teck however is BC (?)

The tort/whatever it is occurred in Washington state, that’s where the damage occurred anyway
- So Teck asks for a stay of the BC action and we have now become in BC subject to the CJPTA so it is not straight common law anymore
- The question is: is there discretion under the CJPTA – you just have to read the CJPTA to know there is discretion in the statute to know there is discretion, it authorizes discretion (s. 11)

**CJPTA s. 11: Discretion as to the exercise of territorial competence**

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

- s. 11(1) is basically the Scottish principle

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
(b) the law to be applied to issues in the proceeding,
(c) the desirability of avoiding multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

- s. 11(2) is the operating section

- **So BC courts (and any court subject to the CJPTA) has to consider all those factors – they HAVE to consider them**
- And this is inclusive – not exhaustive – if there are other circumstances relevant, counsel can raise them
- If the law to be applied is the law of BC, that a factor in favour of proceeding the action in BC
- If the law to be applied is the law of China, maybe that's a factor in favour of China as the forum – maybe it's not, maybe its balanced by something else, but its possible

- BCSC works its way through those factors
- The fact that was of great significance in this case: the existence of the parallel proceeding
  - Because (a) we might get conflicting decisions and (b) it is certainly multiplicity of legal proceedings – these are 2 significant factors

- The argument that Teck made at trial was that BC courts are moving towards deferring to foreign courts when those foreign courts have already asserted jurisdiction – that is, a proceeding has been commenced and they have already decided that they are the most appropriate forum for the action (Amchem)
- This is essentially what Sopinka said you should be doing in Amchem for anti-suit injunctions – that was argued at the BCSC and TJ scrutinized the Washington state judgment probably too closely and said that they differ, so he refused to stay the BC action

- EE would not regard the approach that the BCSC took to the evaluation of the Washington state decision in terms of discretion as a model for Amchem, you’re supposed to see if there is a reasonable basis

- And if I had to say do they have a principle of forum non-conveniens and do we have a principle, I would have said yes, they’re virtually identical but not identical

- BCSC decision was: No, they retained jurisdiction

- What the court really objected to was the commencement of the action in Washington state one minute after midnight – pure forum-shopping

**BC Court of Appeal**
- The case goes up to the BCCA
- The BCCA declined to change the BCSC decision as is common with appellate courts reviewing discretionary decisions
  - Did he employ wrong principles? No, so there is no reason to overrule him
- With respect to CJPTA, what BCCA says: you’re right, the CJPTA does codify the common law
  - There aren’t substantive changes to the common law
  - The factors in s. 11(2) are not exhaustive, and furthermore
- The BCCA also declines to give weight of any kind for the parallel proceedings in Washington state – we weren't going in that direction, she says
- What was put to the BCCA and put again to SCC: what are we going to do if they, in Washington state, reach a judgment first?
  - We have our recognition and enforcement rules
  - BCCA says we don’t know what we'll do
**Teck Cominco Metals Ltd v Lloyd’s Underwriters 2009 SCC**

- You get a very short SCC decision
- In the end what it did was strike down a straw-man (a first-in-time, first-in-right)

Teck put 2 arguments, based on SCC judgments
- One of the cases relied on was the *Amchem* case, respect their discretionary decision
- The second case relied on was the *ZI Pompey Industrie v. ECU-Line NV 2003 SCC* case, strong parallel action
- The third case relied on was *Pro Swing Inc. v. Elta Golf Inc 2006 SCC* – recognition and enforcement of a non-pecuniary judgment

The first argument based on *Amchem* – a recognition argument
- In Amchem, Sopinka J said you let the foreign court decide first whether or not to stay the foreign action
- And if the foreign court has a reasonable basis for declining to stay the foreign action, then you don’t issue an anti-suit injunction
- Yeah there might be parallel actions and that’s too bad, and parties can figure out what to do
- Amchem represents the SCC giving some recognition to a foreign discretionary decision

In *Pro Swing*, the SCC said we can recognize and enforce foreign non-pecuniary judgments (not just a judgment in damages, we can recognize injunctions, we can recognize discretionary orders / equitable orders)

Putting Amcam and Pro Swing – there was a reasonable argument to put to the SCC to say you should recognize the Washington state decision to not stay
- They have a reasonably similar doctrine to our forum non-conveniens, yes it’s non-pecuniary and yes its interlocutory but you can recognize it – you have jurisprudence, you have the foundations there
- Amchem didn’t say they would recognize the foreign judgment, they said we’ll stay the BC action – so an extension was required from that
- That was the first argument: just recognize it and stay the BC action

In the alternative is that the assertion of jurisdiction by the foreign court is a factor of overwhelming significance in the s. 11 analysis of forum conveniens
- Teck Cominco certainly put an alternative argument and said that a factor to be considered for the BC court, or any court faced with this situation was that the foreign court which has jurisdiction and has exercised discretion – that that court has made a decision about jurisdiction and that ought to be factored in to the s. 11 analysis – not of overwhelming significance but a factor of considerable weight analogous to jurisdiction selection clauses as elaborated on and upheld in Pompey Industries

Does the SCC respond to those arguments?
- Re Alternative #1: SCC said no, we’re not going to recognize the Washington state decision and stay our own action
- Re Alternative #2: SCC starts discussing section 11 – along the way, SCC says some things that are of some significance about the CJPTA:
  - Para 22: Section 11 is a complete codification of the common law test for forum non-conveniens, it admits of no exceptions
  - So once you have jurisdiction under the CJPTA, you have to go to s. 11 for exercising discretion and THAT’S IT
  - There is no other source for the jurisdiction to exercise discretion
  - You have to consider the factors in s. 11
- Para 23: court backs again into concept of comity
• Comity is not necessarily served by an automatic deferral to the first court that asserts jurisdiction (reference to the first alternative argument)

• Para 24: SCC rejects the argument (which was never made) that prior foreign assertion of jurisdiction is an overriding and determinative factor in the s. 11 analysis – that argument wasn’t made – SCC is knocking down a straw man

• Court goes on to say the cases relied on by Teck were clearly different cases but they indicate a trend of BC to deferring to foreign courts’ assertion of jurisdiction

• Para 30: blind acceptance of a foreign court’s prior assertion of jurisdiction is not good

• So: as interpreted and responded to by the SCC, there is really no difference between alternative argument #1 and alternative argument #2
• SCC apparently understands both arguments as requiring from the BC courts, an absolute deferral to the foreign court’s decision

• Where does that leave litigants in BC (and other CJPTA provinces) when there are parallel actions? (same parties, same issues, different states)
  • EE thinks it leaves open the argument that was actually put
  • The argument that was actually put was that if you reject alternative #1, you go to section 11 and the fact that the foreign court (the Washington court) has decided on reasonable grounds (a reasonable facsimile of the forum non-conveniens doctrine here) that it is the most appropriate forum for the action – should be given very great weight – NOT overwhelming, NOT determinative, but very great weight
  • That was an argument which was modeled on the Pompey case – that’s exactly the approach that the SCC has said local courts (Canadian courts) use for jurisdiction selection clauses (if the parties have agreed to litigate somewhere else, well we give that very great weight in deciding if we’re forum non-conveniens) – it’s just a factor, but its a significant factor
  • EE thinks you can still make this argument

• But it is clear from this case that there is no absolute deference to a foreign decision that it is the most appropriate forum

• So what they’ve rejected is first in time means deference

• In a majority of cases, there will be 2 actions pending – there will be applications to stay the actions but there won’t be a decision made by either court yet
• What Teck Cominco is saying is that once they’ve actually made a decision, you should give them a little more weight because they’ve considered it already (using principles that are similar to ours)

• The result not to stay was a legitimate result – that’s not the complaint
• The court could have come to that conclusion even with proper consideration of the argument
• The complaint is that SCC didn’t actually come to grips with the argument and that’s a little disappointing

Club Resorts Ltd v Morgan Van Breda 2012 SCC

• A service ex juris case
• Mostly about jurisdiction simpliciter but at the end, Lebel J made a few comments on forum non-conveniens

• 1st comment (para 103): the burden of proof is always on the defendant who raises the question of the appropriateness of the forum (EE doesn’t like this comment – thinks the allocation of the burden of proof
on a defendant who is being called in to defend is inconsistent with the concept of comity that SCC elevates so much)
• 2nd comment (para 109): one of those parts of the judgment where he is really going from the Quebec civil code approach to forum non-conveniens and not from the common law (EE suggests that this comment is also somewhat inconsistent with the concept of comity which is so elevated)
  • In Quebec, the introduction of discretion is relatively recent
  • He says that resort to forum non-conveniens is exceptional, that once jurisdiction is properly assumed (territorial competence or jurisdiction simpliciter), ordinarily, it should be exercised
  • Why does EE object to this? – because it is inconsistent with the common law – the common law takes a broad approach to jurisdiction simpliciter or territorial competence – we go really wide – we say that real and substantial connection, which is pretty minimal now, is sufficient for us to have jurisdiction – so once you go really wide, you need to have discretion to narrow it down – you shouldn't *ordinarily* be exercising jurisdiction just because your procedural rules give it to you – that’s where discretion comes in
  • So at common law, traditionally, forum non-conveniens is not exceptional – it is exercised and invoked pretty regularly and there are probably more cases where the court has said yes, you’ve got jurisdiction but we’re not the most appropriate forum for the action
  • And there are cases where forum non-conveniens has been denied so you could probably ignore that “it's exceptional” comment but he said you are free to rely on it

**ZI Pompey Industrie v. ECU-Line NV 2003 SCC**
• It’s a shipping case involving a shipment by Pompey Industries (vendor) to the purchaser of a photo-processor equipment from Belgium to Seattle
• The carrier is the ECU-Line
• The bill of lading is executed in France, made in France, to carry the cargo from Belgium to Washington
• There is a clause in it: *[t]he contract evidenced by or contained in this bill of Lading is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts.”*
• *So the jurisdiction selected is Belgium*
• Within Belgium, they have selected the courts in a particular city and they have drafted the clause so that those courts have exclusive jurisdiction

• What happened?
• The cargo was transported from Belgium but instead of going all the way by sea to Seattle, it gets offloaded in Montreal and they put it on a train
• Trains are bumpier than ships and somehow the cargo is damaged
• The action is brought by the vendor (Pompey) against the carrier (Ecu Line) for damage to cargo
• *The action for damages is commenced in the Federal Court of Canada (shipping/maritime)*

• *The carrier Ecu Line applies for a stay of proceedings – yes you have jurisdiction but you are not forum conveniens, you are forum non-conveniens, because of the jurisdiction selecting clause in the contract*

• **There is a validity issue here**

• The argument was that the contract had evaporated, it was frustrated – the deviation frustrated the contract so there was a fundamental breach so jurisdiction selecting clause vanished with the rest of the contract
• That argument was rejected by the SCC

• *SCC (and this is a common way of dealing with these jurisdiction selecting clauses when there is a breach argument)*
• Ways to deal with that: one is to say we’ll leave it to the proper law of the contract to determine, which is what the court says here, and the other is to say we’ll treat them as separate contracts
  • Either way, the courts are not about to decide on the validity of the contract when they are at the interlocutory jurisdiction state
  • So the jurisdiction selecting clause is found by the court to have survived whatever arguments there are on the merits about the contract

• The federal court had applied a different test for deciding whether or not to stay the action – applied the RJR McDonald test (which is the test for injunctions, which traditionally is not the test used for jurisdiction selecting clauses)

• SCC considers whether that was the appropriate test and decides that there is no policy reason for departing from the original common law test which is set out in Eleftheria, which is the leading case (para 7) – English case
  • It is basically forum non-conveniens – same factors
  • It is a multi-factorial analysis – you look at all the circumstances, all the factors that you consider for forum non-conveniens and you add in the jurisdiction selecting clause – and it has very heavy weight

• That’s what SCC approves – and then he adds: if the plaintiff, in this case Pompey, has brought an action in federal court in breach of a jurisdiction selecting clause, then the burden is on that party to show why he should not be held to the contract that was negotiated
  • So in a stay action, you’ve got the defendant in the action applying for the stay (so they are the plaintiff in the stay action)
  • The plaintiff in the original action is the defendant in the stay action – this is the guy who has to bear the burden to show why he should not be held to the negotiated contract

• So we apply the traditional common law test – we put the burden on the party who has brought the action in the wrong place to persuade the court how unjust it would be to hold him to his bargain – that’s basically what it comes down to

• All this is straightforward (everything so far is consistent with a long line of English and Canadian cases) – the problem/complication is that (para 21):

  “In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted. I am not convinced that a unified approach to forum non conveniens, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable.”

• This is causing us problems now – does he really mean that the discretion exercised in the face of a jurisdiction selecting clause is completely different, a separate process/analysis, from forum non-conveniens? Or is he simply trying to say that the burden of proof is different, and there is a special weight to be attached to that factor?

• This is important in light of what was said in Teck Cominco – s. 11 in the CJPTA is exhaustive, it admits of no exceptions

• This case is saying 2 things:
  1. Yes the strong? test for jurisdiction selecting clauses still applies, but how do we factor it in to s. 11 after Teck Cominco
• EE's explanation: Teck Cominco was 2011, this case was only a few years before that, they couldn't possibly have intended to overrule the Pompey case with what they said in Teck Cominco
• You can cherry pick – people take that section and they try to make something of it

2. ???

Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd 2012 SCC
• 12-paragraph SCC judgment which is internally inconsistent and creates even more complications
• When leave to appeal was granted, most academics were completely bemused – thought ONCA had done a pretty good job

• The case is about a minor league baseball team playing in Ottawa in 2008
• It plays one season and loses money and it wants out
• It tries to withdraw from the league and the league says no, if you get out, we will take your $200K L/C that you had to deposit when you entered the league
• Rapidz (the baseball team) sues the league in Ontario seeking declaratory relief, contract, tort, seeking damages

• The problem with bringing the action in Ontario – there is a contract between the league and Rapidz and it contains choice of jurisdiction and arbitration clauses, and a choice of law clause
• It reads: all disputes with the league will be resolved in North Carolina and are subject to arbitration

• There is no submission in the contract to the jurisdiction of any other state, including Ontario – and the league wants the Ontario court to respect that decision

• Part of the problem arises because the league gets involved in the Ontario action to start with, files a statement of defence and pleadings but they both include a defence on the merits and plead the jurisdiction selecting clauses
• It’s not as if they had completely abandoned their jurisdictional objection and submitted on the merits – they’ve included their objection in their pleadings

• They ultimately applied under a particular provision in the rules of civil procedure – they applied under 21.01(3)(a) instead of the provision in the rules which most defendants use (s. 17.something dealing with service ex juris)

• ONCA says we have discretion even under 20.01(3)(a) to stay the Ontario action – applies the Pompey case

• SCC gives leave to appeal
• SCC says we are not going to comment on the submission issue raised in the Ontario courts
• We’re not concerned with the proper interpretation of the jurisdiction selecting clause or the choice of law or arbitration clauses

• The only question we’re concerned with in the SCC is the stay of the Ontario action pursuant to Rule 21.01(3), which reads: a defendant may move before a judge to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action

• So clearly there is discretion involved as well as jurisdictional rules – but “the court has no jurisdiction over the subject matter of the action” sounds like a jurisdictional rule – we can’t do divorce, we can’t do contracts, we can’t do claims over $25K, we simply don’t have subject matter jurisdiction – we don’t have discretion – that’s the one that is used
That’s the one that is approved in para 7 by SCC (McLaughlin) – EE suggests that there was no doubt that the ON courts had jurisdiction over the subject matter of the action (contract, tort, damages) – no subject matter problems
Para 7 of the SCC McLaughlin expressly approves the use of this rule (21.01(3))

What is the implication of this? EE thinks what she is doing is moving the jurisdiction selecting clause from the discretionary element of the jurisdictional decision into an absolute jurisdictional decision
You don’t have any jurisdiction – there is an agreement to litigate somewhere else – there is no subject matter jurisdiction

However, she goes on to say that Pompey case is still applicable

So what have we got? Confusion.

What used to be a really simple circumstance (a jurisdiction selecting clause) was just happily dealt with under Eleftheria, then the Pompey case, has now become completely confusing
And the BCCA is struggling with the reconciliation of Pompey, Teck Cominco and Momentous

**Viroforce Systems Inc v R&D Capital 2011 BCCA**
- Action is brought in BC in breach of an exclusive jurisdiction selecting clause selecting Quebec
- CJPTA case
- Court goes to s. 11 (consistent with Teck, that’s what you have to do)
- Says we can stay this BC action either because of the jurisdiction selecting clause or because of s. 11
- The clause alone may be sufficient, it’s not always necessary to determine territorial competence – huh?
  You have to determine territorial competence first, logically, before you have any jurisdiction to stay
- Then says: the Pompey “strong cause” test will only apply if the jurisdiction selecting clause was void

**Preyman v Ayus Technologies 2012 BCCA**
- Action in BC in breach of a jurisdiction selecting clause selecting Austria
- Case in which counsel relies on Teck and argues that the clauses can’t be considered
- The CJPTA is exhaustive and there is no mention in s. 11 of jurisdiction selecting clauses – so you can’t consider it
- Argues that the Viroforce case is wrong because it failed to consider Teck
- Court says: No way, Teck says s. 11 is exhaustive, Pompey says it’s a separate inquiry so I’m going to engage in a common law inquiry outside the CJPTA

EE thinks in BC the courts are going to continue to use the Pompey “strong cause” test – they are going to give significant but not determinative weight to the jurisdiction selecting clause (but they shouldn’t do it)

EE can’t tell us what the basis is that they are going to rely on to justify application of the Pompey case – EE thinks it’s not that difficult, you just inject Pompey into s. 11 CJPTA and factor it in – s. 11 is not exhaustive – it may be an exhaustive statement of the common law principle (in s. 11(1)) but s. 11(2) which sets out the factors does not purport to be exhaustive and even if it is an exhaustive list, we can fit it in to one of those general factors listed
But clearly we are confused, and Momentous does not help – because Momentous seems to treat a jurisdiction selecting clause as going to jurisdiction not discretion

If you’re in this position, find a way to persuade the courts that they can still use Pompey
The common law provinces – no problem
CJPTA provinces like BC – you might have a challenge
**Harrington v Dow Corning Corp 2000 BCCA**

- Has to do with jurisdiction simpliciter (now territorial competence)
- Action in BC
- Plaintiffs suing defendants – women who have had breast implants manufactured by Dow Corning Corp
- Desire is to have both a resident and non-resident class of plaintiffs – non-residents have to opt in
- DC was served ex juris
- DC argues special jurisdiction – argued that *every* member of plaintiff class has to satisfy the jurisdictional requirements for BC
- Problem with some of the non-resident plaintiffs was that they never had *any* connection with BC – argument by DC was: they don’t have a real and substantial connection

  TJ – decided that BC did have jurisdiction simpliciter, that there was a real and substantial connection and it consisted of the *common issue* – it wasn’t a sufficient connection to give the BC court jurisdiction simpliciter

- Case goes up to BCCA
- Ultimately BCCA decides that that common issue was a sufficient real and substantial connection for this national class (for the non-resident plaintiffs to join the BC action)
- However there is a long discussion of how things have to be adapted in class actions – procedure rules have to be adapted
- The approach she takes is to move up a level in the *Morguard* reasoning
- She goes back up to order and fairness – we are not concerned with a mechanical application of rules – we have to be flexible – we have to have fairness

**Ward v Canada 2007 MB**

- Deal with both jurisdiction simpliciter and forum non-conveniens
- The defendant is present in every province
- What’s the action about? – about the spraying of herbicide in NB affecting soldiers who suffer consequences
- Ward, who is a Manitoba resident, wants to bring a class action in Manitoba
- Manitoba is not NB
- Canada doesn’t want the Manitoba action to proceed – so there are objections
- There are also class actions in other provinces as well
- First question is whether Manitoba *has* jurisdiction, bearing in mind that the alleged tort occurred in NB
- So: do we have jurisdiction?
- **Point made by MNCA is:** we still have the traditional rules operating – there is nothing wrong/ inadmissible with using the traditional rules to give us jurisdiction simpliciter
- It doesn’t matter where the alleged tort occurred, Canada is here, the defendant is here – presence in the jurisdiction give the MN court jurisdiction simpliciter
- **Then as far as forum non-conveniens is concerned,** the MNCA simply says we’re going to apply the usual factors using the Amchem case, setting out the principles governing forum non-conveniens
- We’re going to apply the usual factors and we’re going to decide whether Manitoba is the most appropriate forum for the action
- **And the class action point:** this case isn’t even certified yet, once it moves on, IF circumstances/evidence/witnesses arise and we learn other factors, then Canada can make an application with the case management judge later – so you’re not fixed with this decision, this is our preliminary decision
- We have jurisdiction, we are the most appropriate forum for the action and you’re not bound by this, you can make an application later
Pecuniary Judgments

**Nouvion v Freeman 1889 HL**
- Deals with the first of the conditions for recognition and enforcement of a foreign judgment – requirement that the foreign judgment be final and conclusive
- This is not a requirement/condition that is often going to be an issue in a recognition and enforcement case, most of the cases have to do with jurisdiction in the international sense
- Continues to be the leading case defining what is meant by final and conclusive
- Case in which England was the forum for recognition and enforcement – was being asked to recognize a Spanish judgment
- The point is: there was a judgment from a Spanish court – a specific kind of judgment
- There is evidence presented to the HL describing the nature of the Spanish judgment
- The HL decided that it was not a final and conclusive judgment and because it was not a final and conclusive judgment, it was not one that could be recognized in England
- HL gives us a description of the issue: (p. 401 of casebook)

“In order to establish that final and conclusive judgment has been pronounced, it must be shown that the court by which it was pronounced had conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive in this country, so as to make the matter res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that court”

- What he is saying: if you could go back to the same court and get that court to modify the judgment, it’s not conclusive – apparently that is the status of the Spanish judgment

**Forbes v Simmons 1914 ABSC**
- The Alberta court is being asked to recognize and enforce a judgment originating in BC
- The defendant in the BC action had been temporarily present in BC visiting his sick wife
- Is Alberta going to recognize and enforce the BC judgment when the defendant was only temporarily in BC – yes, pleading presence is sufficient for recognition and enforcement (jurisdiction in the international sense) in common law (*Maharani*)
- Common law does not require a high level of connection for jurisdiction in the international sense
- The qualification being if you were tricked into the jurisdiction, that probably wouldn’t count
- Domicile, residence, etc – don’t need to go that far

**First National Bank of Houston v Houston 1990 BCCA**
- The basic requirement for submission or attornment: it must be voluntary
- The issue: what is “voluntary”

- **This case tells us:** you needn’t have INTENDED to submit – it can just happen without you actually intending to submit to the jurisdiction of the foreign court
- This is a Texas default judgment – most of the cases in which there is objection to recognition and enforcement are default judgments
- It’s not clear whether or where the defendants in the Texas action were served – it’s a complete denial so hard to know what the facts were
• The BC court finds that the defendants in the Texas action had somehow submitted even though they argued that they have not submitted
• The argument was that they submitted through their attorneys
• Their argument was, we did not instruct our attorneys to submit – we were giving them instructions, but we had no intention of submitting
• And because we never instructed our attorneys to submit to the jurisdiction of the Texas court, we didn’t submit

• BCCA says too bad, you don’t have to use express words
• The question is objectively what did the defendants actually do in the foreign proceeding?

She didn’t say that one can never have participated in a foreign proceeding without having an attorney
• She says if you have an attorney acting in the foreign proceeding, if counsel is acting on your behalf completely without authority, we won’t consider that submission but if your counsel has authority and has does something in the foreign proceeding which constitutes submission, you will have submitted
OBJECTIVELY – it depends on what is done not what the defendant thought he was doing

**Clinton v Ford 1982 ONCA**
• We consider this a common law decision and consider that this now represents the common law rule in all Canadian common law provinces

• Common law action in Ontario for recognition and enforcement of a judgment originating in SA
• Under South African procedure, three pieces of real property were seized in advance of the judgment (Mareva/pre-judgment garnishment analogy) – it is not unique to SA to at least freeze the defendant’s property in advance of getting a judgment so that once one gets that judgment, one can get satisfaction of the judgment from that property

• During the proceeding, the defendant was in Ontario – happened to be someone who had practiced law in SA and had come to Canada at some point
• The defendant was served in Canada

• So: can’t argue jurisdiction in the international sense on the basis of presence in SA, the only basis for recognition and enforcement of the SA judgment (this is pre-Morguard) is submission

• **What had the defendant done in the SA proceeding?**
  • He entered an appearance by mail
  • He had filed a notice of intention to defend
  • He had filed an affidavit of defence in the summary trial – argues that was filed without his instruction

• At no point in the SA proceedings had he objected to the jurisdiction of the SA court nor had he contested the validity of the seize of his real property in SA in advance of judgment

• **What was his argument?** – this was duress, it was voluntary – they seized my property in advance of judgment, so that made my participation in the proceedings involuntary – I did that in duress

• And initially there had been some suggestions in old case law that that might actually work – but think about it – if there is a SA action and no body seizes your property in advance, and you lose and there is a pecuniary judgment, any property you have there is liable to be seized in satisfaction afterwards
• So why should you get a free ride just because property is being in advance? – that’s the reasoning of the Ontario court
• You can't say this was involuntary just because your property was seized in advance of the trial on the merits.
• However, you may, says the ONCA, at common law, in such a situation, object to the validity of the seizure without having submitted or you can object to the jurisdiction of the SA court.

• So if the defendant in the SA action had either in person or through counsel said "you are not entitled to seize my property", or "you have no jurisdiction," he would not have submitted.
• But he went on and entered a defence and he lost.

• He was found to have voluntarily submitted so the SA judgment was recognized in ONCA.

_Mid-Ohio Imported Car Co v Tri-K Investments Ltd 1995 BCCA_

• The status of the decision in this case is a little uncertain at the moment – so don't take this as gospel law in BC anymore – we don't know.
• BC decision, BC recognition and enforcement action for a judgment from Ohio.

• The plaintiff was an Ohio corporation, had entered into a K with BC defendants to deliver 7 high-end cars to Ohio.
• One car gets delivered – that's it, no other cars were delivered.
• There was a dispute under the contract.
• There was a judgment for $335K US.
• This is 1995 – post Moregard.

• Did the Ohio court have jurisdiction?
  • 3 grounds for jurisdiction – presence, submission, real and substantial connection.

• What had happened in the Ohio proceedings – the defendants had retained Ohio attorneys.
• Those Ohio attorneys had argued that:
  1. Ohio had no jurisdiction under their own rules.
  2. Ohio was not the most appropriate forum for the action (discretionary issue).
  3. The defendants in the Ohio action had made what are called generically, technical arguments – they had gone beyond saying to the Ohio court, you don't have jurisdiction.

• Now: in Canada, the common law provinces, we have to decide jurisdiction first before we decide whether we’re the most appropriate forum for the action because the logic is: you can't exercise discretion unless you have jurisdiction – so you have to decide jurisdiction first.

• So when you look at what the BC defendants had done in the Ohio proceedings – they had said you don't have any jurisdiction, but then they had said you're not the most appropriate forum for the action – exercise your discretion, and then they had made technical arguments.

• #1 they could do – common law says, you can argue that the court has no jurisdiction – you haven’t submitted, but the minute you start asking the court to exercise discretion or make any other orders which require the court to have jurisdiction to make the order, you have submitted – you've asked the court to do something for you, and the minute you ask the court to do something for you, you have submitted.

• Even if at that point, you withdraw from the proceedings and never even mention the merits of the case, you’ve submitted because you’ve asked the court to do something which CONCEDES that the court has jurisdiction – that’s the common law.

• The BCCA recognizes that that is the common law position and recognizes that the BC defendant had gone beyond objecting to the jurisdiction simpliciter of the Ohio court.
BCCA distinguishes between asking the court to exercise its discretion (to decide it is not the most appropriate forum for the action) and the technical arguments.

BCCA makes what was perceived at the time to be a very helpful modification of the common law rules for submission in this case.

BCCA looks at the then-BCSC rules and discovers that in BC, we have rules of court (Rule 13 and 14, now Rule 21-8something) which say you can object to the jurisdiction of the BC courts, you can ask the BC court to exercise its discretion and stay its proceeding – and Rule 14 says an application made under Rule 13 or subsection 6 of this rule, invoking the discretion of this court, does not constitute acceptance of the jurisdiction of the court – that’s the domestic court, because we can’t control Ohio.

Wood J says that changes the common law, at least for BC.

So he says, I’m going to use Rule 14(8) and I’m going to say that defendants in foreign actions have the same freedom there as defendants have in BC.

In foreign actions, defendants can:
1. Object to jurisdiction
2. Invoke the discretion of the foreign court

and BC will not consider them to have submitted.

This was helpful for the defendants, because defendants very often assume (erroneously) that they could go in and argue jurisdiction and invoke discretion and still not have submitted and then they get caught when they go home.

So Wood J in this case says you can do both of those things and we won’t consider you to have submitted.

But then he says you did submit because you made technical arguments – and those assumed that the court had jurisdiction – sorry you went too far.

The problem/ambiguity about this case: we don’t have Rule 14(8) anymore – now its not clear whether Mid-Ohio is a common law decision or a mistaken decision on the part of the BC court that Rule 14(8) had changed our recognition and enforcement rules.

EE hopes that BC courts will say that Mid-Ohio changed the common-law rules because if it’s tied to the civil rules, Mid-Ohio is no longer good law.

Be very cautious if this situation comes up.

If I did decide to argue discretion as well as jurisdiction and I lost, I would stay and defend on the merits because otherwise the defendant will walk all over me and get whatever he wants.

But don’t walk away anymore on the assumption that I’m home-free, I haven’t submitted.

**Morguard Investments Ltd v De Savoye 1990 SCC**

Alberta judgment, action for recognition and enforcement in BC.

Within Canada, BC and any other Canadian provinces must recognize and enforce any other Canadian judgment if there was a real and substantial connection between the action and the originating court.

There is no doubt about the real and substantial connection in Morguard – the parties were all there, the land was there.

The degree of connection required by this new test (R&S connection) was an issue on the facts – but in terms of going forward – how are we going to apply this new test?

Almost immediately after Morguard, Moses v Shores Boat Builders (BCCA) – BC court was being asked to recognize and enforce an Alaska judgment.
The defence in the BC court was: there was no presence, no submission, and Morguard does not apply to non-Canadian judgments
BC courts didn’t buy it
The Alaska judgment was found to be enforceable in BC
On that very issue (does the Morguard rule extend to non-Canadian judgments), there was an appeal to the SCC — SCC refused leave to appeal
Everyone assumed that the Morguard rule applied to non-Canadian judgments as well as Canadian judgments

But then in 2003, we get Beals v Saldanha

**Beals v Saldanha 2003 SCC**
- The judgment was a Florida judgment
- Everyone by this time assumed that Morguard applied to non-Canadian judgments
- But the SCC wanted to hear arguments on it
- **Morguard continues to apply with the blessing of SCC in this case to non-Canadian and Canadian judgments**

- **HOWEVER, Beals v Saldanha opened things up again a bit and there is no CONSTITUTIONAL obligation to recognize non-Canadian judgments the way there is with respect to Canadian cases**
- Within Canada, there is a constitutional principle that says: you have to recognize another Canadian judgment if jurisdiction was properly and appropriately assumed
- We don’t have any constitutional obligation to recognize non-Canadian judgments

**Facts**
- Originates in Ontario, starting in 1981
- 2 Ontario couples purchase property in Florida for $4000
- At some point before 1984, these Ontario residents are called by someone in Florida asking if they want to sell, to which they agree for $8000
- Issues arise as to which lot is being sold, they fixed it up, but the construction company constructed the building on the wrong lot
- The Florida purchasers brought the action in Florida and claimed the cost of the lot, the cost of the construction and lost profits
- The Ontario residents were notified and there were various proceedings/amendments/etc in the Ontario action and one of the Ontario defendants at one point filed a defence but nobody else did anything
- Ultimately, there was a judgment in the Florida action and the Ontario defendants were given an opportunity to have the judgment set aside
- They took legal advice and the Ontario lawyer, bless his negligent little heart, advised them to NOT DO ANYTHING – he was unaware of Morguard

- The jury had awarded the plaintiff $200K in lost profits, $14K in expenses and $50K in punitive damages – this judgment, which the Ontario defendants did nothing about was drawing post-judgment interest at 12%
- By the time the case gets appealed to SCC, this little lot that was bought for $4K and sold for $8K turned into a $1 million judgment by the Florida plaintiff
- The Ontario plaintiffs never had to pay because it was covered by the Lawyers’ Insurance Fund

- **So: the SCC did decide that the Morguard rule should be extended to Non-Canadian judgments**
- There are three reasons for judgment: majority and 2 dissenting judgments
The problem with this case is that we are no longer sure, however, in light of what each of the judgments said, whether these (requirements for jurisdiction in the international sense) are independent alternatives, or whether the modified Morguard rule (for non-Canadian judgments) somehow eats up the other two possible bases (presence or submission).

Majority suggests that the Morguard rule, as applied to foreign judgments perhaps should be somewhat modified (para 32, 35, 37)

- They appear to be saying that there must be (para 32) – “The “real and substantial connection” test [the Morguard test] requires that a significant connection exist between the cause of action and the foreign court.” – does this mean you have to require a greater connection between Ontario and Florida than Ontario and BC?

  “Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.” – in other words, the SCC in the majority judgment appears to be upping the ante a little bit, requiring a GREATER connection for recognition and enforcement of non-Canadian judgments

- So we MIGHT have two standards: (1) the within Canada standard for real and substantial connection (if you have territorial competence, you’re home free) and then (2) a tighter connection for non-Canadian judgments

- In para 37: “There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in Morguard, supra.” – okay so far

  “A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.” – wtf he is saying? We read that as saying, presence and submission are gone – this is the only rule, you can use them to bolster the real and substantial connection, but this is the only test – the R+S connection is OVERRIDING, and will be bolstered by presence or submission

- Clear majority of the SCC in 2003 though that you couldn’t apply the Morguard rule straight up to non-Canadian judgment
- If I were acting for a defendant and the defendant is a judgment-debtor in a non-Canadian jurisdiction and I was looking for some way of procrastinating defending, I’d be arguing this case – I’d be saying minimal connection is not enough
- There hasn't been an SCC case that confirms that Beals is correct in its modification of the ordinary rules in particular the rules for non-Canadian judgments – so you can argue it

- Lebell J expressly said Morguard replaced the traditional categories – but this was in dissent, so you can ignore him

- MOST LIKELY FOR PRACTICE: assume the 3 traditional factors are independent bases for jurisdiction
Braintech v Kostiuk 1999 BCCA

- Shortly after Morguard
- What is the point of including this case?
- It is representative of the very small number of cases in which the BC court has been unable to apply the Morguard rule – i.e. has said this connection between the action and the foreign jurisdiction doesn't even meet the minimum threshold
- There haven't been very many of these, which gives us an idea of just how minimum the threshold is for satisfaction of the Morguard rule
- This is why the Beals case has some significance because it seems to suggest that for non-Canadian cases, the threshold would move up – we just haven't seen it yet

- This case involves a Texas action
- A BC court is being asked to recognize and enforce a judgment in Texas
- Defendant is a BC resident
- Plaintiff is a Nevada corporation (incorporated in Nevada, carrying on business in BC)
- However, for a short, 3-month period in 1996, its technical development activities were located in Texas
- Mr. Kostiuk was alleged by Braintech to have defamed Kostiuk
- Kostiuk had posted his opinions on a bulletin board established by a 3rd party
- Braintech brought an action against him in Texas
- Kostiuk was never served but apparently he knew that an action had been commenced against him – but he didn't participate
- He wasn't present, and he didn't submit

- So the only basis for meeting the jurisdiction in the international sense requirement for recognition and enforcement was that there was a real and substantial connection between the action and Texas

- The BCCA declines to recognize and enforce the Texas action, holds that a distinction has to be drawn between "purposeful commercial activity on the internet and the mere transitory passive presence in cyberspace of the alleged defamatory material" – i.e. BCCA considered the American approach to defamation in cyberspace and considered the American minimum contacts rule and said: modeling our Morguard approach (real and substantial connection) on an American approach, this action doesn't satisfy the minimum level (this is acceptable) – ?

- What worries EE is some probably loose language: where he suggests that we can't recognize and enforce that Texas judgment because the Texas court didn't have jurisdiction under its own rules – THAT'S WRONG

- The rules for determining whether the foreign court was a competent court are OUR rules, OUR standards – it's whether WE think the Texas court had jurisdiction “in the international sense”

- There was no evidence that the alleged defamatory material was read by anyone in Texas – so it may have failed on that

- This case is worth noting because it's one of the few cases where there was no real and substantial connection established so it wasn't recognized in our courts

- We know for certain that we apply the Moguard rules for non-Canadian judgments
- But we don't know whether the reality and substantiality of the connection is higher for non-Canadian judgments
- It's very difficult to read reasons for judgment and tell because you can use the same formula but when you apply it, its a bit tighter
- But we are still talking about real and substantial connection – we are not in any of the cases talking about a "significant" connection
**New Cap Reinsurance Corporation v A E Grant 2012 UKSC**

- *Real and substantial test in Morguard:* recognizes that SCC has gone this way and is not impressed.
- It would be too upsetting to suddenly have a new basis for recognition and enforcement.
- We are the only jurisdiction in the world that recognizes so many judgments out of so many jurisdictions on such a tenuous basis.
- Adds that this is something that should be done by legislature – it is not a mere incremental change, this is a significant change which Parliament should deal with, not the courts.
- Also cites the Irish SC judgment which rejected Morguard.
- So nobody likes Morguard, but alas we must deal with it in Canada.

**Non-Pecuniary Judgments**

**Pro Swing Inc v Elta Golf 2006 SCC**

- Case in which SCC was asked to recognize and enforce an Ohio injunction.
- SCC is considered to have decided to change the law – that we could now recognize non-pecuniary orders – of which the most frequent one that comes up is a foreign injunction (but it could be another form of equitable order).
- Majority declines to recognize and enforce the particular injunction and other orders from the Ohio court for a variety of reasons, one of which is that the court found it was not sufficiently certain.
- Enforcing an equitable order requires more Canadian judicial resources than recognizing and enforcing a pecuniary judgments.
- Once a pecuniary judgment is recognized and enforced, there is virtually nothing that you have to go back to court for – all enforcement is up to the judgment-creditor of the converted foreign judgment (now a local judgment).
  - It is the judgment creditor that initiates the enforcement mechanisms and while some do allow for judicial oversight, its not significant/substantial.
- Whereas equitable orders do require judicial oversight and if there is a failure to comply with an equitable order, you get contempt proceedings – so we have to be more careful about enforcing equitable orders than we do pecuniary judgments.
- This case has been applied by the ONCA in a case called *USA v Yemec 2010 ONCA*.
- So: we do now have recognition and enforcement rules despite the ambiguity of the majority judgment in Pro Swing v Elta – we are willing to consider recognizing and enforcing a foreign, non-pecuniary order.

*Note* that Deschamps J is saying this particular injunction should *not* be recognized and enforced so she is not having to think about the details of the application of the rule – she is setting out a framework that she assumes will be filled in in later cases but she considers.

- In terms of the bases for recognition and enforcement of a non-pecuniary order, refer to para 30–31:
  - Deschamps J: “This review ensures that the Canadian court does not extend judicial assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation.”
- So you start with the traditional rules for recognition and enforcement and then there are add ons for non-pecuniary orders – we’re not going to enforce orders that we would never make/enforce ourselves (sort of a reciprocity/mirror image).

**Factors to Consider:** Relevant considerations may thus include the criteria that guide Canadian courts in crafting domestic orders, such as: (para 30)

- Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? – *has to be clear* so we don’t have to speculate about what the foreign judge meant when he made this order.
- Is the order limited in its scope and did the originating court retain the power to issue further orders?
• Is the enforcement the least burdensome remedy for the Canadian justice system?
• Is the Canadian litigant exposed to unforeseen obligations?
• Are any third parties affected by the order?
• Will the use of judicial resources be consistent with what would be allowed for domestic litigants?

• She does say that the non-pecuniary order has to be final and conclusive – but when you think about it, non-pecuniary orders are often interlocutory orders

• McLaughlin J does deal with the requirement of finality in her dissent: (para 95–96)

“Finality demands that a foreign order establish an obligation that is complete and defined. The obligation need not be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step; orders for interest and costs may often follow. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration."

Clarity, which is closely related to finality, requires that an order be sufficiently unambiguous to be enforced. Just as the enforcing court cannot be asked to supplement the order, so it cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of the judicial apparatus in the enforcing jurisdiction.” – SO: we shouldn’t be left to guess

• There was a split in opinion in the finality and clarity of this particular order

• In the Yemek case, the ONCA was able to examine the foreign order which originated in Illinois and found that it was clear, precise and sufficiently final – recognized and enforced the order

• So: this is an option – Pro Swing case is a common law case – so this is a common law option

• So: at common law, we have the extended Morguard rule for foreign judgments as well as for Canadian judgments and we have Pro Swing, which applies the Morguard basis for recognition and enforcement, to non-pecuniary judgments which (since it involves an American order) clearly extends to non-Canadian judgments as well

• So the common law rules for recognition and enforcement in Canada are really extremely generous – it’ll be the rare pecuniary judgment that you will find a Canadian court unwilling to recognize and enforce under Morguard

• EE suggests there will be more non-pecuniary orders that we’ll reject to recognize/enforce because they tend not to be as clear in their terms as pecuniary orders

• Remember: you can ALWAYS fall back on the common law in any common law province in Canada – the legislation varies from province to province but the common law is uniform

Defences

Beals v Saldhana 2003 SCC

• The Ontario residents had bought land for $4K sold it for $8K, got a judgment that ended up being over $1 million

• The Ontario defendants raised defences, every possible defence they could

• So we have effectively got 3 common law defences which are discussed in Beals
  • Defence of fraud
  • Defence of breach of natural justice
• Defence of contrary to public policy

• For the most part, the SCC leaves those areas of the existing common law defences untouched

• **With respect to fraud (para 43)**
  
  • Major J throws out some old terminology – says let’s forget about drawing a distinction between intrinsic fraud and extrinsic fraud
  
  • Lets instead talk about fraud going to jurisdiction of the foreign court and fraud going to the merits of the foreign decision

  • Fraud going to jurisdiction can always be raised (para 51–?)
    
    • If somehow somebody tricked the foreign court into taking jurisdiction when, either, its own law didn’t have jurisdiction (lying about facts, or getting someone to sign something, etc.)
    
    • It’s the plaintiff who is tricking the court (not the court committing fraud)

  • But fraud going to the merits can be raised as a defence only if the allegations are new and not the subject of a prior adjudication (or there are new and material facts not previously discoverable with due diligence) (para 52)
    
    • So you can’t just sit back, let the plaintiff in the foreign action assert things, not challenge them, and then claim fraud
    
    • You have to do your best and you have to exercise due diligence
    
    • So there have to be NEW facts that you couldn’t possibly have discovered at the relevant time and you should have made an attempt (that’s where the due diligence comes in)

• Under these new terms (fraud going to jurisdiction, fraud going to the merits) there was some uncertainty in BC about whether the due diligence requirement (which does apply to fraud going to the merits) also applies to fraud going to jurisdiction – should you have had to exercise due diligence to discover the fraud going to jurisdiction

• That issue was argued and decided in 2010 case in BCCA:

  **Lang case 2010 BCCA**

  • KD Lang applies in BC to have the California judgment recognized and enforced in BC
  
  • The court considers the defence of fraud
  
  • Finch J explains that extrinsic and intrinsic fraud are evidentiary categories – extrinsic would be evidence discovered after, intrinsic would be something that was part of the consideration
  
  • Fraud going to jurisdiction and fraud going to the merits are subject categories – so don’t try to match extrinsic and intrinsic to jurisdiction and merits – forget about making them analogous
  
  • We’re now dealing with the new categories

  • **Finch J says that the due diligence requirement set out in Beals for fraud going to the merits doesn’t directly apply to fraud going to jurisdiction BUT there should be very great reluctance in the recognizing court (BC court) recognizing a foreign judgment to find that the foreign court had no jurisdiction**
    
    • So: there is no due diligence, but it is a high threshold – it has to be very clearly established

• Then he goes on to deal with the particular allegation that the defendant raised in the recognition action
  
  • The defendant alleged that KD Lang’s lawyers had lied about her residence in the California court
  
  • Finch J examines the California decision and says that was relevant to the discretionary decision in the California court – there is jurisdiction (territorial competence) and there is discretion
  
  • And in terms of what the California court considered, the address was not relevant to territorial competence, the address was relevant only in the forum non-conveniens component of the jurisdiction decision – he says that belongs to the MERITS, that’s not jurisdictional for purposes of this defence
• Forum non-conveniens is consideration on the merits, which is consistent with our recognition and enforcement rule and so it is subject to the due diligence requirements
• And he does not find that due diligence was established in this particular case

• This decision elaborates and explains how the fraud defence operates in BC

*Beals v Saldhana 2003 SCC*

• Burden is on the defendant (same as fraud)

• SCC is concerned that there should be heightened scrutiny to ensure fair process in the foreign jurisdiction

• Remember the differences in the judgments in Beals – LeBel J was dissenting – he wanted a completely different rule for foreign judgments

• Basically, the approach of the SCC is that we’re not sure if we can trust non-Canadian jurisdictions, so there is heightened scrutiny

• What are we looking for when this defence is raised? – we’re looking to ensure that there was nothing that occurred in the foreign action which is **contrary to Canadian notions of fundamental justice**

• Fair process is one that reasonably guarantees basic procedural safeguards such as judicial independence, fair ethical rules (EE suggests that the old arguments about natural justice have to do with getting your day in court, getting an opportunity to be heard, getting notice of the action, etc.) – so fundamental justice is our standard (it’s procedural)

• At that point, Major J looks at the Florida legal system generally and says it’s not so different, it’s pretty similar to the Canadian system, so I don’t think there was a breach of natural justice in the Florida action

• **This is the point on which Binnie J and L’Abbeucci J dissent** – they look at the Florida legal system as a whole but they also focus on what happened in this particular action
  • They find that in these particular proceedings, there was a breach of natural justice
  • They find there wasn’t proper notification of the defendants in the Florida action, they kept starting and restarting the action, moving it from county to county, etc.
  • The dissent finds that there was a breach of natural justice in the Florida proceedings
  • EE thinks Binnie and L’Abbeucci is correct in their focus (whether you agree with their finding or not is irrelevant) – EE thinks the question is whether there was a breach of natural justice in THIS PARTICULAR ACTION because it is this particular action that is in issue – it’s not the Florida legal system generally – you can have a fair legal system on the whole, but things can go wrong in individual cases
  • So EE suggests if you are counsel invoking the defence of breach of natural justice, I would say “what happened here?”
  • If you’re acting for the plaintiff, then argue the majority decision

• We haven’t had a case subsequent to this which actually raises this issue – but it is a real issue

• Major J leaves defence of **contrary to public policy** intact, sticks with the traditional view
• Is the foreign law is contrary to basic morality?

• Issue in this particular case was the exorbitant damages and he does not find that exorbitant damages are contrary to forum public policy and he is very reluctant to use the contrary to forum public policy defence because when you do that, you are effectively condemning the foreign law – you’re saying the foreign law turns our stomach – it’s contrary to our fundamental notions
• And judges have a reluctance to saying that about the laws of other legal systems
**Goddard v Gray 1870 UKHL**
- It demonstrates extreme self-restraint on English courts
- Was being asked to recognize a French judgment against an English defendant
- The French court got the English law that it was applying wrong
- English court said, nope, *res judicata* – not a defence on the merits, we are not going to sit as an appeal court on the merits of the foreign decision
- So: that is NOT a common law defence

**Class Actions**

*Currie v MacDonald’s Restaurants 2005 ONCA*
- Has more or less been approved by SCC
- Class action case
- Question in issue: do we have any special rules that we need to use in connection with recognition and enforcement in addition to the Morguard rule?
- Class action in Illinois against MacDonald’s
- It has to do with the availability of prizes at MacDonald’s
- There is a national class, and Canadians are included

- Currie lives in Ontario, he did not opt out of the class action after the settlement was reached in the class action in Illinois (after a settlement is reached, you still have an opportunity to opt out)
- What’s relevant to Currie opting out – he wants to sue MacDonald’s in Ontario
- The question is: is he bound by the Illinois action? – he is part of the plaintiff class there but he didn’t participate
- Question for ONCA: are we going to recognize and enforce that Illinois settlement/judgment?

- ONCA held that it would not recognize THIS Illinois class action judgment as binding on Currie

- ONCA certainly says that Illinois had a real and substantial connection to the cause of action – that wasn’t the issue
- So if that were the only basis for recognition and enforcement, the Illinois judgment would be recognized
- But Sharp J says: we have to consider OTHER conditions/circumstances when asked to recognize a foreign class action judgment, especially in a case in which the plaintiff doesn’t want it recognized and enforced – we’re not talking about the defendant here – that’s the difficulty in class actions – it’s the plaintiff who was included in the foreign action who now says, I don’t want to be bound by that, I want to bring my own action here – it’s not the defendant saying No, no, no

- Sharp J sets out some criteria for the recognition and enforcement of foreign class actions (para 30)
- We start with the real and substantial connection or the traditional bases
- You then have to ask, in addition, whether the non-resident plaintiffs were adequately represented and also whether those non-resident plaintiffs were accorded procedural fairness
- In particular, were the non-resident plaintiffs in the foreign class action (like Currie) properly notified about their options
- So: what Sharp J has done is build a couple of defences (maybe a breach of natural justice defence) into the recognition rule for class actions – procedural fairness, adequate notice, did he have his day in court, did he have an *opportunity* to opt out

- Looking at the notice that was given in Canada in the Illinois action against MacDonald’s, Sharp J finds it was not adequate
- So even if Currie had seen it, he likely wouldn’t have understood it (it was advertised in McLean’s magazine)
- The calculations by the “notice experts” was that it wouldn’t have reached much of the population of Canada
• It just wasn’t adequate to notify the Canadian population

• So: we’ve got a special recognition rule for class actions

• The SCC in the Lopine case (sp?):
  • LeBel J agrees with Currie

• So Currie probably is the case that best represents the recognition and enforcement rule for foreign class actions

• In Canada, we fight it out at the jurisdictional level

Statutory Regimes

**Central Guaranty Trust v De Luca 1995 NWTR**

• Point of this case: the TJ in this case did his damnedest to read Morguard in and had to concede that while he could do it in one part, it was negatived by the defences that the defendant can raise in the relevant section of the NWT equivalent of the COEA

• **So the Morguard basis for recognition and enforcement is not available under the COEA**

• But if you can rely on the traditional rules, presence or submission, and if the judgment is from a reciprocating state, then the COEA is a good bet

• But you can see that it is going to be infrequently used because it’s just not available – your judgments aren’t going to be eligible

• All the cases deal with the use of the COEA or its equivalent in the other provinces – it is a common statute in all the provinces

• What these cases do is limit the availability of the COEA Part 2: Reciprocal Enforcement of Court Orders

• NWT case

• Important limitations

• This case is representative of a number of cases in which the judgment creditor has tried to persuade the court that the Morguard common law recognition rule should be incorporated into the statute

• And in all cases like this one, the attempt has been unsuccessful – it’s not that the courts aren’t willing to try but these statutes (the reciprocal enforcement of judgment statutes) typically have the common law defences built in, so even if you can interpret Morguard in a broad interpretation at one point in the statute, it’s going to get cancelled out because the defendant can raise a common law defence – you didn’t have jurisdiction because I wasn’t served there, I wasn’t present there, I didn’t submit etc.

• So this is a real limitation on the COEA in BC

• It doesn’t incorporate Morguard

• **It’s effectively pre-Morguard common law rules for recognition and enforcement of judgments – the advantage being is that it is registration, you don’t have to start an action – that was the whole point of it**

**Re Carrick Estates and Young 1987 SKCA**

• Illustrates the fact that once you put conflicts rules into a statute, the courts have to interpret the statutory language

Facts

• There was a football player who came to BC to play for the Lions

• He gets served with process while he is here and the plaintiff in BC wants to get this judgment recognized and enforced in SK under *their* Reciprocal Enforcement legislation
• SKCA says we don't consider them to have had jurisdiction within the meaning of the statute – temporary presence

• So: whatever the original intent of the legislatures, the rules may get changed once they are codified because courts have room to interpret them
• SK judgment – so we're not too concerned with them

**Owen v Rocketinfo Inc 2008 BCCA**

• A little more restrictive
• It cuts off at the pass a potential expansion of the pool of foreign judgments which could be converted to BC judgments under the COEA

• We have entered into reciprocal arrangements with a number of foreign jurisdictions but not that many
• When you go province to province however, different provincial governments have entered into reciprocal arrangements with different foreign jurisdictions

• So what parties began to do until this case was say: I've got a Nevada judgment and NV is not a reciprocating state with BC – and BC is where I want to enforce the judgment because the defendant has assets there
• But lets say NV has a reciprocating agreement with AB, so why don't I register my NV judgment in AB – the catch is the judgment debtor has no assets in AB
• AB is a reciprocating jurisdiction with BC (all Canadian provinces except QC)

• So you get chaining – I register my NV judgment in AB, and then I take my AB judgment and register it in BC

• This happened – there are cases where it happened
• The point is: nobody objected

• Then finally in this case, the defendant objected – you can't do that under COEA, that's not what was intended to be done
• And the BCCA buys it
• They interpret the statute and they say, we didn't intend that – the stat wasn't intended to recognize judgments recognized by other jurisdictions
• We have to interpret the COEA to being limited to recognition and enforcement of ORIGINAL JUDGMENTS
• So the loophole was cut off at the pass

**Arbitral Awards**

**Schreter v Gasmac Inc 1992 ONCA**

• Good example of a case in which 2 of the possible defences are raised and discussed
• There was a K between a Georgia, US corporation and a Canadian corporation and it's US subsidiary
• There is an arbitration clause in the contract, which is invoked
• There is arbitration in Atlanta as is required by the arbitration clause
• The Canadian corporation pays little attention to the arbitration and doesn't make any objections

• The arbitration award is then filed in the GA courts as is possible in many legal systems so it becomes enforceable as a judgment of the GA court
• There is some participation of the Canadian defendant in appealing that but they lose
• The GA corporation applies in Ontario for recognition and enforcement of the arbitral award – not the GA judgment, but the arbitral award
3 objections are raised to the recognition and enforcement process in Ontario by the Ontario defendant
1. 1st argument: the GA plaintiff can't bring an action for recognition and enforcement of the arbitration award because the registration in GA has become a judgment for the arbitral award
2. 2nd argument has to do with natural justice
3. 3rd argument has to do with the public policy defence

All 3 defences are available/could be raised in BC but the disposition of those arguments and the discussion of them would likely be the same in BC

First of all: Merger of the arbitration and the judgment
- This is a question for the forum, we don't care what GA says (though we may consider it) – its our decision
- Does Ontario/BC consider that the foreign cause of action/foreign arbitration merged into the judgment such that you can't go directly to recognition and enforcement of the arbitration anymore – you have to go to the judgment
- This is similar to domestic law: your cause of action merges in the judgment – res judicata – you can't bring another action on the original cause of action if there has been a judgment on it
- That common law domestic rule has never been applied in the conflicts context

- So if you have a foreign cause of action and you have a foreign judgment, in theory at common law, you can still bring an action here again on the original cause of action
- So if you lost somewhere else, you can choose to bring an action on the original cause of action again
- When might you want to do this? You might have wanted to do it before Morguard, when we wouldn't have recognized or enforced a foreign judgment because of the narrow traditional rules – so you might have to bring another action on the original cause of action – and you could have done it

- Same argument is made in connection with the arbitration – you can't argue the arbitration as a new cause of action
- The court says: No – the merger rule simply doesn't apply in a conflicts context
- So the GA corporation is entitled to continue with the application for recognition and enforcement of the arbitration award in GA

Second: Breach of natural justice
- Defence of breach of natural justice is provided for in our statute as it is in Ontario
- The argument for breach of natural justice is based on the fact that the arbitrator didn't give reasons for the award
- The ONCA says: in principle, that's probably a pretty good defence – how do you know how to deal with the merits of the award in GA in terms of appealing it, etc., unless you have reasons – you need to know why the arbitrator came to the judgment that he did
- So: absence of reasons could indeed be found to be a breach of natural justice
- On the facts here, the ONCA did not find a breach of natural justice
- But it COULD BE – it's a good defence

Third: Breach of foreign public policy
- This is a residual defence to ANYTHING universally – every legal system in the world retains this residual, last bit of discretion – they don't want to have to be in the position of having to enforce a judgment which is inconsistent with their fundamental values
- The basis for the argument in this case: that acceleration of royalty payments, which had occurred under the contract, was inconsistent with our fundamental principles
- In terms of the discussion of the defence in terms of the recognition and enforcement of arbitration awards, the discussion parallels the common law defence for recognition and enforcement of a foreign judgment – i.e. it's narrow – there's got to be something inconsistent with our fundamental values
• ONCA finds that acceleration of royalty payments couldn’t be said to be so deplorable and distasteful that it is inconsistent with Ontario’s fundamental values

• The case illustrates that defences are available to recognition and enforcement of foreign arbitration
• No reciprocity is required – we apply the statutes to arbitrations, wherever in the world they occur

• You’re going to want to use the statutes for arbitration awards (instead of the common law or the COEA)
• You’re going to want to use the ECJDA for any Canadian judgment – don’t even consider using the common law
• COEA – meh, if you have to

• Bottom line: it is not considered to be an abuse of process of the court, i.e., it is permitted, to use these modes of recognition and enforcement in the alternative, cumulatively, consecutively – you can go from one to the other, and you can always drop back to the common law
• The common law recognition and enforcement is the default regime – you can always use it if you choose

• If you have a Canadian judgment, go directly to the ECJDA (read definition to see if you have the right kind of judgment)
  • There are virtually no defences
  • You will get a Canadian judgment recognized and enforced (subject to directions, in s. 6) under the ECJDA
  • Because you can go directly to ECJDA, you can forget about the COEA and common law
  • Pecuniary or non-pecuniary, possibly something else
  • Blind full faith and credit

• If you have a non-Canadian pecuniary judgment from one of the listed reciprocating jurisdictions, go directly to the COEA – simple registration
  • Easy
  • Inexpensive
  • Quick – short period allowed for defendant to object
  • But that’s a small pool of jurisdictions (8 American states, Australia, UK, Germany, Austria)
  • If your original judgment is from one of these states, go for it

• For everything else, you have to use common law

• To sum up: for all except Canadian judgments, you will probably want to go to the common law in the end because in the COEA, you get a simplified procedure, but you don’t get the Morguard rule – and that limits the number of judgments that are going to be registrable
**JURISDICTION: IN REM ACTIONS**

*British South Africa Co v Companhia de Mocambique 1893 UKHL*

- Set the common law rule in place
- 1893 HL case – litigation in England
  - The litigation in England is related to immovable property located in SA
  - **The immovable property consisted of mines and minerals (mines and minerals are classified by SA as immovable property)**

- Does the English courts have jurisdiction to hear a claim relating to immovable property outside England?

**Facts**

- The claim brought in England was that the defendant had wrongfully taken possession of their mines and minerals and ejected the plaintiffs
- The plaintiff sought a declaration that they were rightfully entitled to these mines and minerals
- The defence raised by the defendants in the English action: you don’t have jurisdiction (territorial competence) over foreign land
- The HL had to decide this issue carefully because of recent legislation in England

- **HL decided there is no justification for an English court to take jurisdiction over title to foreign land or actions in trespass to foreign land because trespass requires a determination of title**
  - Why did the English court decline to take jurisdiction over immovables located outside England? – because it would be pointless: we could take jurisdiction and give the remedies but how can we stop the defendant going back to the place where the immovable is located and undoing what we’ve done? – we can’t enforce it
  - Same reasoning when you are granting an injunction/specific performance

- Mocambique rule is applied whenever necessary

*Hesperides Hotels Ltd v Muftizade 1979 UKHL*

- The HL read the arguments as inviting the HL to overturn the Mocambique rule
- Action brought in tort – conspiracy
- Plaintiffs claimed damages for conspiracy to trespass
- It was framed as an in personam action
- **HL decided they are trying to get around Mocambique so we are going to reconsider Mocambique**

**Facts**

- Hotels located in Cypress
- Hotels are built on dirt, dirt is clearly land, land is always an immovable
  - No discussion of whether it is immovable or movable
  - Land = immovable

- The hotels were still owned by Greeks
- But they were now located in the Turkish half of Cyprus

- So the original Greek owners of the hotels are in England and they discover that there is a company in England and it is booking tours in their hotels – they are unhappy about this
- They attempt to get damages and an accounting of profits and an injunction in TORT

**Reasoning**
• HL says no, you’re just dressing it up trying to get around Mocambique so we will reconsider Mocambique

• By 1979, the HL had announced that they can overturn their own decisions – so they had the ability to do this

• There is nothing to support this argument that we should overturn Mocambique which has stood since 1893 except reason, logic, justice and the weight of academic opinion

• Reasons not to overturn:
  • 1. All the common law countries are using Mocambique, think what we would do to their jurisprudence if we overturn Mocambique (rolls eyes, EE thinks we could have dealt with that – not a big deal)
  • 2. This would be a matter of some delicacy – it should be left to the legislature – it is not our business to make law
  • 3. No longer a good reason but it was at the time: if we were to overturn Mocambique, that would produce a lot of forum shopping – a lot of people would come to England to complain about what is happening in other jurisdictions – and we are not ready to deal with that yet because the doctrine of forum non-conveniens is still in the process of being developed – this doesn’t make sense now
  • 4. Nothing has changed since 1893 (no relevant circumstances have changed since 1893):
    • Land is still there
    • We are still here
    • We still don’t have power to enforce our orders

• **SO: the Mocambique rule stands in England as far as common law is concerned**

  *Godley v Coles 1988 ONHC*

• Not a very authoritative case (lower court in ON, not BC) but it might indicate a qualification/a Canadian qualification of the Mocambique rule

• In this case, plaintiffs and defendants in the action brought in ON are all ON residents

• Both parties own condos in Florida
  • Condos = immovable property, no problem
  • The defendant’s toilet leaks, water damage occurs to the plaintiff’s condo below and contents of the condo
  • Action is brought in Ontario for damages
  • The ON court decides to assume jurisdiction

• Obviously no one is contesting title but it does involve damage to a foreign immovable and Canadian courts have been kind of literal in the way they treated the Mocambique rule – almost any action involving a foreign movable, we would not take jurisdiction

• **In this case, the ON court takes jurisdiction**
  • Yes there is damage to the foreign immovable but the statement of claim and defence indicate that a substantial proportion of damages may well be found to be damages to movables
  • The fact that there may some damage to immovable property should not disentitle the plaintiff from bringing their action in the province of ON when title to land is not in dispute

• **This case is authority for the proposition that in circumstances similar to this, we might be starting to make an incursion into the Mocambique rule in addition to the exceptions (after the break)**

  *Ward v Coffin 1972 NBSC*

• Action was commenced in NB to enforce a contract for the sale of land, the land was located in QC
• The plaintiff in the action in NB wanted either specific performance or damages
• The defendant was served in NB – so no doubt in terms of jurisdiction (for in personam actions) – the NB court had jurisdiction – service within the jurisdiction gives the court jurisdiction
• Question is: does the NB court have jurisdiction over the action?
• Answer is yes – it is a contract action – it is an in personam action
• It is not an action where the parties are fighting for title to land
• The title is in the defendant, the plaintiff wants it
• A contract action can proceed because if the action is framed in contract, it falls into one of the exceptions to the Mocambique rule (in personam)
• You may think: an award for specific performance – isn’t that pretty much like determining title to land in QC? – the answer is yeah: but it is indirect
  • There is an order for specific performance – it is an in personam equitable order and if the defendant in NB fails to comply with the order to perform the contract specifically, then that defendant can be handled by NB courts by way of contempt
  • This is why you want to think about issuing equitable orders because you want to be sure that you can enforce them
  • The only way of enforcing an equitable in personam order like that is through contempt proceedings
• So in this case, could have gotten damages, could have gotten an order for specific performance – both of those constitute in personam remedies
• The NB court could not TRANSFER the title to the plaintiff – it could only order the defendant to get it done
  • Note: we are now in Canada prepared to recognize and enforce in personam equitable orders at least of Canadian courts, probably of foreign courts as well – Pro Swing

So these 4 cases all have to do with jurisdiction of the forum (common law court) when land/immovable property is located outside of the jurisdiction
• It is a fairly narrow exclusionary rule – the cases where we will not take jurisdiction in involve title to land and trespass to land
• For in personam actions, it doesn't matter if they involve a foreign immovable property, we will take jurisdiction – so you frame your action properly or else you go to the other jurisdiction

RECOGNITION AND ENFORCEMENT: IN REM JUDGMENTS

_Duke v Andler 1932 SCC_

• SCC case
• Deals with recognition and enforcement of a foreign judgment dealing with local land
• BC is the forum for the action
• There is a California connection
• The Dukes and the Andlers live/reside/are domiciled in California
• The Andler family owns immovable property in BC
• They are living in California
• They agree to sell the land which they own in BC to Mr. Duke
• So they enter into a contract in California

The plaintiff vendors in the California action (the Andlers) own the BC property in equal shares, by contract dated 1925, the plaintiffs agree to sell their property to the defendant for $55,000
• The contract provided that on the vendor’s depositing proof of good title in escrow, the purchaser would pay $10,000 in cash and deliver a promissory note for the balance of $45,000 secured by a mortgage on the property in California
• The vendors deposited the deed which on delivery would vest title in the purchaser
• Somehow, the purchaser managed to obtain the title deed without paying the $10,000 and without delivering the secured promissory note
• Duke then obtains registration of the property in his name in the LTO registry in Victoria, he obtains a certificate of indefeasible title, he mortgages the property for $35,000, leased it for a term of years and then transferred the property to his wife (who may or may not be an innocent party)
• The vendors haven’t got paid – they commence an action in California against Duke
• They allege breach of contract and fraud – EXCEPTIONS TO MOCAMBIQUE
- The California courts also have the common law Mocambique rule, and they say oh, yes we can take jurisdiction because this is a contract action and an equitable action
- The California court ordered the defendants (the Dukes) to specific performance
- The California court recognizes that Duke is a deutsch so they say: in the even that the defendant should fail or refuse to comply, they authorize a commissioner to force him to do this

- The defendants (Dukes) failed to comply with the order of specific performance
- So the court clerk executed the conveyance and the plaintiffs applied to the registrar in the LTO in Victoria to have this registered and the registrar refused
- And that’s when the shit hit the fan

- Plaintiffs wanted to have the BCSC make an order to the registrar to enforce the California judgment

**Issue**

- Should BC R&E judgments from courts which exercise jurisdiction on the same basis we would??
- Answer given by SCC is No!

**Ratio**

- Would not R&E because it involves immovables in BC and do not want foreign jurisdictions playing around with our immovables
- California judgment may have been in personam, but the property is in BC and BC courts won’t stand a foreign court deciding what will happen to land here.
- If you want specific performance to convey immovable property, you better go to that jurisdiction to litigate b/c the courts in that jurisdiction are the only ones who will have the ability to convey title to that immovable property. You can try to get specific performance in another jurisdiction, but the defendant may not obey the in personam order.
Renvoi & Incidental Question

Taskanowska v Taskanowski 1957 Probate UKCA

- Illustrates the use of Partial Renvoi as an alternative validating rule – i.e. It is Partial Renvoi being used when you don’t get the result you want to get when you apply the domestic law – you get 2 chances to get the result you want

- Part of the Polish marriage group of cases

- How does Renvoi work in this case?

- This is a case of the English court using Partial Renvoi as an alternative validating rule and that use is actually now built in to our choice of law rule

Facts

- The parties get married in Italy, they both happen to be in Italy post-war and they get married in a church in Italy by a Catholic priest
- Unfortunately, certainly articles of the civil code that the priest was supposed to read out when they married was never read out and they never registered their marriage in Italy
- Both parties are Polish nationals
- They try to comply with the local Italian law – the law of the place where the marriage was being celebrated – but through no fault of their own, they don’t manage to do it
- Subsequently, they wind up in England and the validity of their marriage in Italy is challenged in England

Issue

- So England is the forum and the cause of action, the juridical subcategory is “formal validity of the marriage”
- Easy connecting factor because it is geographical – where did the ceremony take place? Italy
- English court says formal validity of marriage – Italy

Reasoning

- Automatically, the English court looks at Italian domestic law
- There was not compliance with Italian domestic law
- So by the law of the place where the marriage was celebrated, the marriage was formally invalid
- Ordinarily this would be the end of it

- Nor was the common law exception available (because they had made an attempt to comply)

- But, says the English Court of Appeal, the Italian conflicts rule says the [formal] validity of a marriage is governed by the law of the nationality
- So what is the nationality of the alleged spouses? Poland – so you go to the law of Poland
- And had they managed to comply with Polish law, they would have lived happily ever after
- But unfortunately Taksanowska and Taksanowski had failed to comply with Polish law too

- The point is: the english court used PARTIAL RENVOI
- They looked at the domestic law first – got the wrong result
- And then they asked: But what would Italy do in this situation – Oh, they go with nationality, they have to be Polish nationals – so let’s look at the domestic law of Poland
• So now, as a result of this case, you get a **double barrel rule** – formal validity of a marriage is governed by: *either* the law where the marriage was celebrated OR the conflicts rule of that jurisdiction – so it’s built in, you get two options
• So this case is **Partial Renvoi** as an alternative validating rule and is built in now to the common law choice of law rule

*Neilson v Overseas Projects Corporation of Victoria Ltd 2005 Aus (HCA)*

• First/only time case in which Renvoi has been used in a torts case
  • Usually we either use the old double barrel rule or the new rule since 1993, *lex loci delectai* (Tolofson and Jensen) then we apply the domestic law of the jurisdiction that is selected
  • That didn’t happen here

**Facts**

• Mr. and Mrs. Neilson are employed by Overseas Projects Corporation of Victoria, Australia – OPC is an Australian company
• OPC has some business being conducted in China
• Mrs. Neilson is living in housing in China provided by her employer OPC, she falls down the stairs at night
• She claims it wasn’t her fault
• She claims that OPC is responsible for her damages because they hadn't properly maintained the housing or something to that effect

• She sues OPC in Western Australia (that’s where she is from) – an Australian forum
• She sues in order to recover for the damages sustained in the housing owned by OPC

• There is a question in Australia as to the choice of law rule – they are using a rule similar to our Canadian common rule, *lex loci delectai*

• Ordinarily, the forum says, we will apply to the merits of this damages claim the law of the place where the accident occurred and the accident occurred in China

**Issue**

• What's the problem? Why can't they just apply Chinese law?
• More than a year has passed since the accident
• Chinese domestic law has limitation periods and the limitation period set by Chinese law (*Article 136* in their Code) is 1 year – and it has passed
• *Remember:* Limitation periods are substantive law – then the forum will apply the limitation period of the *lex loci delectai* (for tort) – now we’re in trouble – she has no cause of action

• So counsel (ingeniously) looks around at other provisions, and finds that there is a provision (*Article 146*) that says: (it’s a conflicts rule) ordinarily, compensation is determined by the *lex loci delecti* (choice of law rule) – if that was the only choice of law rule, then the choice of law rule would also point to China
• But there is an alternative – an exception: If both parties are nationals of the same country or domiciled in the same country, the law of their own country or domicile *may* be applied – it's flexible – seems to give some discretion
• Both Mrs. Neilson and the defendant company are Australian nationals and domiciled in Australia
• So prima facie, this Chinese conflicts rule is available

**Held**

• Mrs. Neilson wins

**Reasoning**

• The HCA finds a way to apply Australian law
• They opt for a Renvoi rule for tort – we don’t blindly apply our choice of law rule and only ever apply the domestic law of the lex loci delictai – we can look at the conflicts rule of the lex loci delictai
• The HCA engages in a statutory interpretation of Article 146 and say that’s Partial Renvoi
• They focus on the theory of Renvoi and they say Total Renvoi is a problem but here all we have to do is apply the law selected by the Chinese conflicts rule, that is Australian domestic law – we can apply Australian domestic law and Mrs. Neilson wins

• But EE says it seems what the HC says is that if we are going to use Renvoi at all, we are going to use Total Renvoi – but they wind up using Partial Renvoi

• So: they look at the chinese conflicts rule, they take a remission and they apply Australian domestic law
• They don’t have to decide how to solve the *circulas inextricabulus* because miraculously (and typically) they don’t have to

**Tezcan v Tezcan 1992 BCCA**
• BCCA defines Partial Renvoi and Total Renvoi – they are good definitions

**Schwebel v Ungar 1965 SCC**
• Sequence of events that brought this case to SCC:
  • 1945 in Hungary, there is a marriage between husband and wife (Ungar)
  • The husband and wife are domiciled in Hungary, and get married in Hungary
  • The wife (Ungar) had always lived in Hungary
  • Both wanted to leave Hungary so they did – but they got married where they were domiciled
  • The first marriage was absolutely valid – no problem
  • They leave Hungary with an intention of never returning – but it is their domicile of origin, and you can’t abandon your domicile of origin until you acquire a new one
  • For 3 years, they are on their way to Israel (their ultimate destination), living in various camps, etc.
  • 1948 they are in a camp in Italy on their way to Israel and they get a *gett divorce* (not by Italian law but by Jewish law)
  • Shortly after, they both arrive in Israel and both undoubtedly acquired a domicile of choice in israel
  • They were physically there, they both intended to stay there (although we don’t know what the husband thought because he couldn’t be found)
  • One of the difficulties (that by coincidence was avoided): we still had the domicile of dependency – so the domicile of the wife was dependent on the domicile of the husband but because they both went to same place and independently would have acquired domicile there, that issue didn’t come up

  • 10 years later, Ungar comes to Canada to visit relatives, she gets married to Schwebel, they have a daughter
  • Schwebel finds out about husband #1 and asks for an annulment on the grounds that at the time she married him, she had no capacity to marry him

• Question: did the wife have capacity to enter into a second marriage? – question of essential validity of the marriage

  • Choice of law rule says: the essential validity of a marriage is governed by the law of the domicile of the parties at the moment of marriage
  • **So our choice of law rule looks to domicile to determine whether the wife in the second marriage had capacity to marry husband #2**
    • If she was single, it was fine
    • But if her divorce in Italy was not a valid divorce, she did not have capacity to enter into marriage #2

  • So the whole thing turned on the validity of the divorce – that’s a conflicts rule – but it’s a recognition rule (it’s not a choice of law rule)
  • The question is: will we RECOGNIZE this decree?
So your subsidiary issue is a conflicts issue (not choice of law rules, but conflicts rules)

We then, and now, have special recognition rules for foreign divorces (just as for pecuniary and non-pecuniary judgments, our recognition rules have broadened, so too have our recognition rules for foreign divorces)

In 1964, they were very narrow

Canada had rules for recognition of foreign divorces  
Israel also had rules for recognition of foreign divorces

SO: the main issue (capacity to marry) turned on whether the divorce in Italy was recognized

Israel would recognize the gett divorce in Italy – as far as Israel was concerned, Ungar had single status and had capacity to marry husband #2 – So: Yes, Single

But the Canadian/Ontario recognition of foreign divorce rules were very narrow – we would recognize, at that time, (1) divorces obtained in the common domicile (Hungary) or (2) divorces recognized by the domicile

- Where was the domicile of the parties at the time of the divorce? – Hungary
- So you get evidence as to whether Hungary would recognize the gett divorce in Italy – the answer was: No, Hungary would not recognize it and they weren't in Hungary at the time of the divorce – So: the divorce was not recognized by our foreign divorce rules

SO: if the Ontario court had applied its own conflicts recognition rule – the answer was: No, they were still married

But the lex causae recognition rule says: Yes, we recognize the divorce

The SCC said, let's apply the lex causae rules – she is single, sorry Schwebel, can't get the marriage annulled

So did the SCC explain why it chose to use the lex causae conflicts rule on the subsidiary question and not the forum rule? – Not really

Not a single reference to the incidental question and yet that's why Schwebel v Ungar is famous – because there WAS an incidental question, the incidental question WAS solved – so if it is a precedent for using the conflicts rule of the lex causae on the subsidiary question but it's not a binding precedent because there is no reasoning given – they just did it

This case COULD have been explained by creating a new recognition rule and this was suggested by academics – maybe now we have a recognition rule that says we recognize divorces in the domicile, we recognize divorces recognized by the domicile, or we recognize divorces by subsequently acquired domiciles – we rejected that

But Schwebel v Ungar is an incidental question case, but you can't really use it as a guide prospectively for this critical issue of "how do we choose?"

Note: marriages have to be both formally and essentially valid

- Essential validity is traditionally governed by the dual domicile rule – means you look at domicile of the husband to see if he had capacity at the moment before he says "I do" and then you look at the domicile of the wife to see if she had capacity to marry him, if she has capacity at the moment before she says “I do”

- So it is a dual domicile rule

- In this case, he was fine, but the only issue was if she had capacity to marry him, whether she had single status

One way to avoid the whole incidental question uncertainty is go for a declaration about the validity of the Italian divorce

You can then bring that to the court by itself – there is no issue, the court has to use its OWN conflicts rules
So it all depends on the way in which the case arises and it partly depends on what the court says is the main issue and what is the subsidiary issue

Exam note: all we have to be able to do is the ability to RECOGNIZE an incidental question

Marriage

Brook v Brook 1891 UKHL

- The parties went off looking for a place where they could get married
- They could not get married at home in England because their marriage was forbidden
- They looked around Europe
- The Brooks went off to Denmark, went through a ceremony of marriage there
- As far as the law of Denmark was concerned, there was no impediment
- They came back to England, things happened, people died, in the 3rd generation – the Attorney General says there is no heir because there was no valid marriage, we get the property

- The HL invents a new choice of law rule that we can't recognize this marriage in Denmark
- So in Brook v Brook we get the bifurcation of validity of marriage into sub-categories:
  1. Formal validity (still governed by the law of the place of celebration of marriage, lex loci celebrationus)
  2. Essential validity (governed by generally speaking either (a) the dual domicile rule or (b) when it's convenient or just or something, by the law of the intended matrimonial home)

- In this case, on the facts, the dual domicile rule selected England and the matrimonial home rule selected England so you didn't need to choose – they both floated but would have made no difference to the result (they coincided in fact)
- Very often, it WILL make a significant difference though – one will say yes, one will say no (like the incidental question)
- So you have to remember: you have a choice – there is NO Canadian precedent that says, we apply only one or the other
- They are usually both discussed and one is selected
- In a vast majority of cases, it doesn't make any difference

- The alleged defect in Brook v Brook is affinity
- Mr. Brook married his sister-in-law after his wife died – that was forbidden in England at the time – no problem now, in Canada

- This case is a good illustration of how the issues around validity of marriage come up in litigation – they do not always come up between the parties, they may come up in subsequent generations, in a succession case
- So marriage is often a subsidiary issue – COULD be a true incidental issue but even if it is not a TRUE incidental question, it is often a subsidiary issue
- That's essentially what happened here

- Bear in mind, marriage and divorce was a new toy for the common law courts, they only got jurisdiction in 1957
- So this is an example of the common law courts playing with a new toy and not being sure how to handle it

Facts

- 1840: William Charles Brook marries Charlotte Armitage, they have 2 children
- Within 7 years, Charlotte dies
- 3 years later, William Brook marries his sister in law, Emily Armitage, they have 3 children
- 5 years later, Emily and William Brook both die of cholera
There are 5 remaining children

William Brook leaves a will and leaves the residue of his property to the 5 children, and names all 5 – no problem so far
But then: one of the children of marriage #2 dies

**Issue**

The question is over the ¼ share of that son – so it’s a succession case
But it’s not between the parties, it’s the Attorney General of England claiming the ¼ share of the deceased son of the 2nd marriage

The AG’s argument: marriage #2 to the sister in law was void so the ¼ share passes to the Crown as *bona vacantia*

**Re the validity of marriage #2**

- Typically, William Brook and his sister-in-law knew that they could not marry each other (at that point in time, a man could not marry his sister-in-law)
- Europeans at this time, were traveling around to find somewhere where they could marry
- The Brooks went to Denmark, where you could marry your sister-in-law

So the question now is will England consider the Danish marriage to be valid

Until 1961, there is a single choice of law rule: it says: *lex loci celebrationus* (or *lex loci contractus* – because marriage is a contract)
- The law of the place of contracting for contract purposes was quite prominent in the mid 19th century – and it was the choice of law rule in marriage

But House of Lords says, No, we can’t bring ourselves to recognize this Danish marriage
- HL talks about the domicile of the parties (both in England) and they came back to England to make their home there – both of these connections are floated in Brook v Brook and it made no difference to the outcome of the case whether the HL said the anti-nuptial domicile of the parties should determine the validity of the marriage or whether they went with the intended matrimonial home

The one thing that the court did not use was “contrary to foreign public policy” – and yet that’s clearly present
What the court did was change the choice of law rules – you get a bifurcation:
- Formal validity
- Essential validity
- Yes, formal validity *lex loci celebrationus* continues to govern
- But for essential validity, the capacity to marry each other, that has to be either the law of dual domicile or the law of the intended matrimonial home

What the Brooks end up with is a limep旅游 marriage – a marriage that is considered to be a valid marriage in some jurisdictions and not to exist in other jurisdictions

The object of these choice of law rules, generally, is to achieve uniformity – and the one thing you want in marriage is uniform status – you want to be considered validly marriage wherever in the world you go

SO: *Renvoi* has a toe-hold in marriage choice of law rules because we’re aiming for, rarely achieving, uniformity – “we’ll do what the law of the place of celebration would do” – because we want uniformity
- So *Renvoi* is an eligible doctrine – don’t forget about it – it is built in to the choice of law rule:
- **Formal validity** of a marriage is governed by the law of the place of celebration (partial *Renvoi*)
- **Essential validity** of a marriage is governed by: (1) dual domicile rule (main contender) – governed by the law of each of the parties’ anti-nuptial domicile – may have to satisfy laws of two different legal systems OR the other contender (2) the law of the intended matrimonial home (post-nuptial) – where you live after the ceremony
- These are NOT ALTERNATIVES

*Canada v Narwal 1990 FCA*
- Affinity case
- The wife marries one brother, gets divorced, moves into the home of her in-laws because she wants to get married again and her father wants another son, so she marries her brother-in-law
- She marries him
- But she gets married in England and they want to come to Canada to live
- There is a problem with immigration – can't get him in – ?
- He's Indian
- Under the law of his domicile, India, he didn't have capacity to marry his sister-in-law
- The FCA applies the law of the intended matrimonial home
- But they hadn't acquired a matrimonial home
- So he applies the SPIRIT of the intended matrimonial home
- Canada is where they WANTED to make their matrimonial
- So we'll apply Canadian law
- So they're validly married
- **This case illustrates the weakness of applying the law of the intended matrimonial home** – they may never have a matrimonial home, or they might live temporarily somewhere (where they got the ceremony for example) and then settle somewhere else
- **How do you select the intended matrimonial home?** – Is it the first place they settle, even if they stay there only temporarily?
- Perhaps they never reach their intended matrimonial home – they get married somewhere, get on a plane, and the plane crashes – and they don’t reach their matrimonial home?
- So what is the law you use if you want to use the law of the intended matrimonial home?

- **So there are problems with using this approach but to a certain extent it makes a lot of sense because it is a single legal system as distinct from 2 separate legal systems**

*Sangha v Mander 1985 BCSC*
- It canvasses all the possibilities
- The husband had disappeared and they had no idea where it was
- They choose the dual domicile rule in the end
- The point is: YOU HAVE AN OPTION for essential validity
- If you can persuade the court that the intended matrimonial home test makes the most sense in the circumstances of your case – there is precedent for it
- If you can persuade the court that the dual domicile rule, which is the predominant one selected, makes the most sense in the circumstances of your case – there is precedent for that too

- There is room for argument about the best choice of law rule bearing in mind there is no single choice of law rule in the common law rule in any category which doesn't produce anomalous results when applied to a particular set of circumstances
- What you're looking for in formulating/modify choice of law rule is a rule that, in the vast majority of the cases selects a legal system which has a real and substantial connection with the legal issue – a justification for being applied
- And the choice of law rules that we have were 19th century attempts to do that – but because they are 19th century attempts – they are open for modification if you can come up with a better choice of law rule – that's the challenge
**Hudson v Leigh 2009 UKHC**

**Facts**

- Has to do with the validity of a marriage which took place in South Africa
- Both the parties were domiciled in England but living in SA
- They met in SA and they had a relationship in SA, they had a child in SA, and then they decided to get married

  "It is common ground that the parties' beliefs of a religious nature could not have been more different. Miss Hudson is a devout Christian; whereas Mr Leigh is described in his Counsel's Opening presentation as 'an atheist Jew'. She wished to have a religious marriage ceremony; he did not. She would only have regarded herself as properly married by way of a religious ceremony; he, only by way of a ceremony in a Register Office."

- So they compromise – they agree that they would have something religious in SA and then they would fly back to England and have something civil in the register office in England

- They do the ceremony in SA
- Unfortunately for them, somewhere between the religious ceremony and the civil ceremony in England, the relationship breaks down – they never go through with the civil ceremony

- Ms. Hudson applies for a divorce in England – in order to get the financial remedies
- Mr. Leigh says, we’re not married – we didn’t know the ceremony in SA was a marriage ceremony

- They had 2 experts on the law in SA and they disagreed on the effect of SA law on the ceremony – so they couldn’t solve this by expert evidence

- So you want to argue formal validity – what are you arguing about the ceremony? – if you want to argue that the marriage is **formally invalid** (so we get the law of SA applying – the law of the place of celebration), you have to argue that SA law would not consider this particular ceremony to be a valid ceremony of marriage

- On the other hand, if you want to get this into the choice of law rules for **essential validity**, you want to argue there was no consent – I knew I wasn’t being properly married, I knew this wasn’t really a ceremony of marriage, it was just a blessing, a religious ceremony blessing what is to come

- So you can characterize the alleged defect two ways
  - The way in which the English HC characterized it: they said it is a question of formal validity – that's why they went with SA experts
  - In the end, the English HC decides the parties were not formally validly married in SA because all the parties knew at the time that it wasn't a real marriage ceremony (including the minister) – so it wasn't just the consent of the parties, it was the minister himself who knew the parties weren't really intending to get married that day

- This is a nice example of the defect focusing on an event which could have been characterized either way, but was in fact characterized as formal validity – went to the nature of the ceremony

- The court had to go into what the minister knew because the SA experts disagreed on the effect of the ceremony in SA law

- So she didn’t get a divorce, he got a declaration that they weren’t validly married
• The judge could have just refused to grant the divorce/financial consequences but if the parties wanted to get married again, there may be question as to whether they had single status – so he gave a declaration that they weren’t validly married

**English Spinster and Egyptian Man Case**

• There was an English case which held that not capacity *per se* but capacity to enter into a polygamous marriage is governed by the law of the intended matrimonial home – no option, no uncertainty
• Justification for this: only the legal system where the parties make their home is entitled/should decide whether parties can enter into a polygamous marriage
• In that particular case, the parties had been married (English spinster and Egyptian man) – they got married in an Egyptian embassy in Paris and went off to Egypt to live there for 20 years and had kids
• Did the English spinster, then domiciled in England, have capacity to enter into a polygamous marriage?
• If you apply the dual domicile rule – people domiciled in a monogamous jurisdiction can’t enter into a polygamous marriage, so if you pled the dual domicile rule, she didn’t have capacity and that 20 years of married life with children went down the drain
• The English judge decides that the only choice of law rule for capacity enter into a polygamous marriage should be the law of the intended matrimonial home (which made perfect sense in this particular case)

**Hyde v Hyde 1866 UK**

• Mr Hyde went off to Utah, went through what was assumed to be a polygamous marriage
• He was validly polygamosly married
• He leaves Utah, winds up eventually in England
• His wife gets married
• Mr. Hyde is back in England
• He wants matrimonial relief
• He wants to know whether he is free to marry
• The English court says no, we can’t give you matrimonial relief – we don’t know what matrimonial relief we should give to polygamous marriages
• What are we supposed to do for the 6th wife?
• We know how to give matrimonial relief/financial divorce/etc for the first wife (monogamous union) but we don’t know how to handle wives 2, 3, 4, 5, 6
• So Mr. Hyde didn’t get anything because the rules in Hyde v Hyde (in addition to the definition – marriage is an institution between one man and one woman to the exclusion of all others) – NO MATRIMONIAL RELIEF

• That is still the common law rule today in BC – has been overturned by statute in some jurisdictions but the consequence of Hyde v Hyde is that if the parties are validly married polygamosly, they cannot be granted matrimonial relief
• What is meant by matrimonial relief – no definition but it certainly includes divorce, probably financial relief (support, maintenance, etc.)
• SO: the common law rule (unless overturned by statute, BC has not done this): there is no matrimonial relief for parties to a valid polygamous marriage

**Vervaeke v Smith 1983 UKHL: the pimp and the prostitute**

• Classic marital dispute case
• It is actually a succession case, like *Brook v Brook*, but the validity of a marriage comes up as a subsidiary question

**Facts**

• 1937 in Shanghai: George Smith marries a Russian lady named Vervaeke?
• They separate and George ends up in England and Vervaeke ends up in the US
• Subsequent research discovers that in 1946, she obtained a Nevada divorce
• 1954: George is down and out – he is a homeless person on the streets in London
• He goes through another ceremony of marriage to Maria Theresa, a Belgian lady – for 50 lbs and a ticket to South Africa
• Why did he go through a ceremony with Maria Theresa? – because she was working in London as a prostitute for the Massina organization (?) and every time she was arrested for soliciting for the purposes of, she was deported to Belgium – this interfered with her productivity
• The Massina organization decided they should find a way to avoid deportation
• They look around and they find George – if they go through a marriage ceremony, she won't be deported
• So he does and she does – this was a classic case of “I had my fingers crossed behind my back” because she is only going through this marriage ceremony (which was perfectly formally valid) for purposes of immigration (it’s a sham marriage) – they never saw each other again
• She continues to work in London and never gets deported
• 1965: she retires
• Meanwhile, one of the Massina brothers whose been in jail in Belgium gets released from jail
• He and Maria Theresa get together and they get married in Italy
• But they don’t live happily ever after
• He died after the wedding

• This case comes up because he doesn't leave a will BUT he owns very valuable leasehold property in England
• So she is claiming the property

• The English court has to decide whether Maria Theresa is validly married to the Massina brother and should get the property or whether another Massina brother should get the property – contest between the pimp and the prostitute

• They need to determine whether the marriage in London with George and Maria Theresa was valid – that’s how they find out about George’s marital history
• They discover he had never been divorced – wherever the ex-wife is, somewhere in the states, that divorce will be recognized by the Nevada courts – we recognize divorces recognized by the law of the domicile
• So in the end, they found that he was validly divorced so he had single status so he could be validly married to Maria Theresa AND even though it was clearly a sham marriage and Maria Theresa said, I didn’t consent, the HL decides that they would recognize the sham marriage
• BUT they use public policy in the end

• The point is: this is not an untypical case in terms of (just like Brook v Brook): the way the validity of the marriage comes up and the tracing of the marital history and how you have to solve the issues chronologically as you go along

Torts

_Tolofson v Jensen 1994 SCC_

• We know the facts: accident in SK, action brought in BC
• Under the law, the double barrel rule dictated that BC law would apply – law of the forum subject to any lack of innocence in SK
• Problem with this: BC Limitation Act would apply

• La Forest J (for a unanimous court) decides that limitations are substantive law, and depend on the lex loci delicti – and the lex loci delicti is the new rule!
• So we replaced the double-barrel rule with a lex loci delicti rule
• There was no doubt where the tort had occurred in this case – it was a car accident, they are easy to locate – here, that is Saskatchewan – that’s the lex loci delicti
So if we are changing the choice of law rule, Saskatchewan law applies to merits of the case and the unfortunate plaintiff is out of luck because the SK limitation period had passed, also got SK law which required gross negligence in those circumstances.

Why does La Forest J decide to change the choice of law rule?

- There are 2 main factors which persuade the SCC that it is time to change the choice of law rule
  
  1. **Forum shopping**
     - We are worried that people will go around looking for a forum in which to recover
     - This seems pretty bunk because that is where discretion comes in – if a court has jurisdiction but it is not the most appropriate forum for the action, then they shouldn't hear the case
     - And you don’t have to ambush the parties
  
  2. **Constitutional Concerns**
     - Territorial concerns/sovereignty/etc – it is the forum deciding on the legal relations between the victim and the tortfeasor for a tort which happened somewhere else
     - These may not be as significant as La Forest J thinks

- The court considers other possible choice of law rules
  1. Governmental interest
  2. The English rule
- And both are rejected because he wants order and fairness! – we've got to have a CERTAIN choice of law rule
- So as our ordinary law rule, we have adopted the choice of law rule discarded by the US

- **So we have lex loci delecti as the ordinary choice of law rule**
- **However, it is NOT ABSOLUTE**

- La Forest J (656-657) suggests: **there may be room for exceptions but they would need to be very carefully defined**
- “Because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances.”
- What he contemplates is that the lex loci delecti rule will apply for all Canadian tort cases
- If the tort should occur outside Canada (doesn’t specify what he means by an international level but clearly outside Canada), then there is an alternative rule
- In the alternative rule, is to apply the law of the forum

- EE questions why if the facts of the case call for an exception because the tort is at an international level, why would we apply the law of the forum – because it might be that it would make more sense/be more just/appropriate to apply the law of some third country
- This may still be possible given the language used – we are not necessarily locked in to the alternative rule of lex fori

- What the courts really want is an ordinary rule with the potential for exceptions – because potential exceptions to an ordinary rule allows them to satisfy their sense of “justice” in a case (more flexible)
- So, **THIS IS WHERE YOU START IN A TORT CASE – ordinary rule = lex loci delecti**

*Somers v Fournier 2000 ONCA*

- Involves an argument for an international exception to the lex loci delecti rule – this argument fails
- The lower courts generally were very enthusiastic about finding an international exception and applying the alternative rule of lex fori
- This case is typical in that the Court of Appeal shoots it down and says, no, this isn't it
Facts

- This was a car accident in NY between an Ontario and NY resident
- The Ontario resident sues in Ontario
- The Ontario plaintiff wants to invoke the international exception – he wants Ontario law to apply
- The NY defendant applied for declaration that NY law would apply – he wants the ordinary rule

- There are a number of related issues which require the court to make a decision about the proper characterization (procedural/substantive)
  - Costs
  - Pre-judgment interest
  - Quantification of damages

- CA says this is not a fact pattern that deserves to get out of the ordinary choice of law rule and into the exception – different states but no reason to apply Ontario law

- The 3 characterization issues are quite interesting and the BC courts would probably characterize these issues the same way as the ONCA:
  - Costs are procedural (so Ontario laws apply)
  - Quantification of damages is procedural
  - Heads of damage, however, are substantive
    - Once you figure out the head of damages, the forum then decides on the quantification
  - Prejudgment interest is substantive
    - Because it is substantive, it will be governed by lex loci delicti (NY law)

- This is probably how a BC court would do this

- The English disagree:
  - English Court of Appeal in 2009 said pre-judgment interest is procedural
  - Somers case was actually cited in the Eng CA
  - Why did they do this?
    - First thing the court said: it's different statutory language
    - Also court pointed out that pre-judgment interest in England is discretionary
    - Eng CA says you can't get pre-judgment interest unless you are successful in your litigation
    - So you can't plead it

- This case is typical of the appellate view on the international exception but we haven't had a good case on it yet

Banro Corporation Case 2012 SCC

- Involved defamation
- In this case, LeBel J floated a different choice of law rule for defamation actions

Facts

- Banro was a book publisher in Quebec, they published a book (Noir Canada) which dealt with Canadian mining companies mining internationally, and said nasty things about them
- Caused 2 mining companies to claim defamation
- They bring an action in Ontario

- The publication in Ontario: 5000 French editions were printed, 93 copies were distributed in Ontario, they were also available online and in libraries
- So Ontario has jurisdiction, because the tort “occurred” in Ontario for jurisdiction purposes (Van Breda – real and substantial connection – tort occurred there, that is a sufficient connection for real and substantial connection for jurisdiction simpliciter)
Court went on to consider whether Ontario was the most appropriate forum for the action. In the course of considering this, LeBel J considers what law will be applied – he considers the choice of law rule (which is what you have to do when dealing with jurisdiction – it is a relevant factor). He concludes that they should decide this another day, but we should pay close attention to these kinds of discussions by SCC – so this is a very important case on the choice of law rule in defamation.

Goes back to Tolofson – LeBel says it is flexible and the case left room for creating new exceptions. He suggests that the applicable governing law for defamation actions should be the law of the place of the MOST SUBSTANTIAL HARM to the reputation of the plaintiff. This selection of a single legal system to govern defamation makes sense in light of the fact that the publication can happen all over the world (especially with the internet).

Lex loci delicti doesn't work because the tort occurred in every jurisdiction where the publication happened – but you need for choice of law purposes to select a single legal system so it makes most sense (says LeBel J) to select as the governing law for the merits of a defamation action the place/legal system where the plaintiff’s reputation has been most damaged.

It is LIKELY the law that will be applied by lower courts because we pay close attention to the SCC – the problem will be to decide what legal system is identified by that choice of law rule.

### Contracts

**Amin Rashid** shipping case:
- One judge finds the parties actually chose a proper law for their contract (even though they failed to include a clause)
- The other judge says there is no hint, and objectively determines the proper law
- It doesn't make a difference in the end

**Vita Foods v Unus Shipping 1939 UKPC**

- Canadian case on appeal from NS
- Typically, the PC is stating “Canadian law” (common law) as well as “English law” at the same time
- So this case is an important case in the common law world of contract rules

- It is a shipping contract
- The contract was to carry goods (herring?) from NFL to NY
- **Note:** This is 1939 – NFL was not yet part of Canada, a separate Dominion
- The contract is made, the bills of lading are issued in NF
- They are to be delivered/performed in NY
- The bills of lading had two important clauses:
  - First – exempting the defendant from liability arising from negligence of the master
  - Second (of critical importance) – stated the contract should be governed by English law

- What happened: there is a storm at sea, the master is negligent, the ship washes up in NS, and the herring are damaged
  - **Note:** They reconditioned the herring and sold them

- There is litigation in NS
  - That’s where the ship was, where the company was, where the defendant was, so there was no jurisdiction issue

- At the trial, in NS, the plaintiff argued that the bills of lading were void and therefore the ship was a common carrier and there was no exclusion for negligence
The argument was: if the bills of lading (which was governed by the law of England) were void, then the ordinary rules of tort/negligence would apply and so there would be no exclusion of negligence

- If the law of England governs, the bills of lading are valid, the Hague convention applies, and there is no liability for negligence
  - Note: the Hague convention only applies to contract
- If the bills of lading are invalid, the Hague convention doesn’t apply, ordinary tort law applies, there is liability for negligence

On what basis could the plaintiff be arguing that bills were void?

- The argument was the contract was illegal because it failed to comply with the NFL statute of 1932 which required that every bill of lading issued in NFL
- Therefore the contract was void

In NS, they ignored the conflicts issues

The case goes up to PC and there are a number of issues in the case which are important contract issues in conflict of laws:
1. The proper law of the contract
   - What is the proper law of the contract?
2. Question of illegality
3. Issue about incorporation of law
   - Because not only did the parties to the bills of lading accidentally fail to comply with the 1932 statute, but the bills of lading also referred to the American Carter Act? and incorporated that

Note: Incorporation of a law or statute by reference is not the same as selecting the proper law to govern the contract

- If you incorporate a law (in conflicts), it is as if you have reenacted the whole thing
- So you have all the provisions of the statute, but then you have chosen the law to govern all the contract as the law of England

So the first question for the PC is what is the proper law of this contract?

- Is it the law of England or is it some other law?
- The PC decides (this is the current rule) that ordinarily, an express choice of law clause will determine the proper law of the contract BUT the PC was not willing to give absolute deference to the parties’ choice of law (party autonomy)
- They gave it very great weight but not considered to be absolute at common law

In certain circumstances, we might not defer to party autonomy

- The passage cited (p. 708) – “But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.”
- Number of cases in which an express choice of law clause has not been deferred to are few and far in between
- The theory is: you are trying to avoid application of some law that would otherwise apply
- Contrary to forum public policy – makes sense – that is another issue

So we have a rule that says an express choice of law clause is almost absolute but not quite absolute, so you might have some chance of getting out of it (but EE thinks slim)

The other important thing about this case

- There need be no connection between the contract (what is to be done under the contract), and the law selected to govern the contractual relations of the parties to the contract
On its face, there is no connection between NS and NF and NY – you don’t have to have a connection – **you ARE permitted/principle of law of autonomy (as applied by the common law) allows parties to a contract to choose a completely uninvolved third legal system**

BUT there is a risk for contracting parties when they choose a legal system about which they known zilch

One of the reasons that so many English contract conflict cases exist is that many contracting parties choose the law of England

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Practical tip: you want to make sure you have drafted your choice of law clause sufficiently broadly so as to encompass any issues arising out of the contract (if that is what you want)

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So prima facie, the bills of lading is governed by the law of England

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The next question is: what to do about the NFL 1932 statute – what is the effect of the statute?

- The statute which is part of the law of the place where the contract was made
- We break down the connections in a contract action
- We look at:
  - **The forum** (in this case NS – a disinterested third jurisdiction)
  - **The lex loci contractus (LLC)** – the law of the place where the contract was made
  - **The lex loci solutionis (LLS)** – the law of the place where the contract is to be performed
  - **The proper law**

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In this case:
- Forum is NS
- LLC is NF
- LLS is NY
- Proper law – law of England

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There is NO coincidence of any of the connections – in another case, you might get the forum corresponding with the proper law, for example

- In this case, there is no coincidence/overlap

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So the question is: what is the forum going to do – it is going to apply the law of England?

- Assume that the NF statute would render the bills of lading void
- **What does the proper law (law of England) say about illegality by the law of the place where the contract was made?**
  - Lord Wright says: we don’t care – we don’t take any notice of illegality in the place where the contract was made

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- If it is illegality by the proper law – that’s a problem, that is a slam dunk
- If it is illegality by the LLS – that’s relevant
- If it is illegality in forum – may would be interest
- But if it is illegality in the LLC – this is the only one we don’t pay any attention to

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However: if we were sitting as a NFL court, we might have to apply the law of NFL
- When the legislature enacts a law in BC and it is a mandatory law, BC courts have to apply it, depending on the interpretation of the statute

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**Proposition**: forum courts **might** approach the interpretation and application of their OWN forum laws differently from the courts of a 3rd legal system
- So if we were sitting as a NFL court, we might feel that we had to apply the 1932 NFL statute because there would be a coincidence between the LLC and the forum
• However if the 1932 statute were relevant, then Lord Wright says we would have to decide how it
should be interpreted and whether it should indeed void the contract
• The categories used: directory and mandatory/obligatory
  • Are you just advising us or are you requiring us to include this statement in the bills of lading?
  • Lord Wright says: just directing
• So even if NFL law were held to be applicable, it wouldn’t void the contract

• This is the leading case on express choice of law clauses and their qualifications
• Also on illegality by the LLC

Richardson International Ltd v Mys Chikhacheva 2002 FCA
• Litigation involving the existence of a maritime lien?
• Richardson is a Washington state company
• The main ship, Chikhacheva is a Russian troller
• Richardson supplies necessaries for the troller and 2 other vessels in the Russian fleet
• The vessel in question is arrested in Nanaimo (it had nailed something to the mass)
  • This gives in rem jurisdiction

• Action is brought claiming a lien against the troller in the amount of $337,000
• The existence/validity of the maritime lien depends on the proper law of the contract

• Choice between Russian law or American law of some American state
• There is no choice of law clause in the contract

• The question for the court is, do we find an implied choice or do we go for the objectively ascertained
  proper law of the contract

• The reasons for judgment stress all the factors that are considered
  • They talk about the totality of the contractual relationship between the parties

• One of the clauses considered in the contract is an arbitration clause
  • Arbitration is to take place in the US

• The court uses the arbitration clause as a pointer to the parties’ actual intention – they agreed that
  they would arbitrate, they agreed WHERE they would arbitrate
• Court finds that the arbitration clause is very weighty and the parties have an implied intention that the
  law of Washington state should govern the contract

• One other point – this case is typical in that it looks at the arbitration clause as a pointer to the parties’
  actual intention
• The court says:
  • The TJ took oral testimony of one of the parties to the contract to what was intended
  • FCA says you don’t take evidence subsequently as to what was intended, you do it on the basis of
    what is written in the contract

• This is one of the few cases in which you can say that the court actually found implied intention because it
  says that’s what it is doing
• Looked at the contract itself as well as another clause

• Other pointers courts have looked at:
  • Law of the flag, etc.
One case referred to in *Amin Rashid*: the parties put a clause in the contract saying the proper law is the law of the flag
- This made perfect sense but when the court looked at the facts, they found that they used 6 different ships of different nationalities

**SO: You can look in the contract**
- If you're looking for implied intent – you're looking within the 4 corners of the contract – the language used, etc. - you're NOT looking outside to try to determine the intention of the parties

**Imperial Life Assurance Company of Canada v Colmenares 1967 SCC**
- Leading case in Canada
- Gritchie J.

Involved insurance policies
- The insurance policies were issued through the company’s branch office in Havannah
  - The contracts were written in Spanish but they were in Ontario form
  - Payment was to be in American dollars, bank draft drawn on a bank in NY
  - But all the premiums were paid in Cuban currency in Cuba

- The policy-holder wanted to surrender the policy and get the cash surrender value

- The question for SCC: whether the insurance company was obligated to pay
  - If the contracts were governed by the law of Cuba, then the insurance company could get out of paying cash surrender value because there was a Cuban law that rendered payment illegal

- The SCC had to decide where the proper law of the contract was the law of Ontario or the law of Cuba
- The SCC held that the proper law of the contract was the law of Ontario
- Because the proper law of the contract was the law of Ontario, the insurance company was obligated to pay up

**The question is: how did the SCC go about determining the proper law of the contract?**
- There is no express choice of law clause
  - If we take party autonomy to its logical conclusion, the parties ought to be able to say the proper law of the contract is the law of England as it existed at that time – why can’t you select the law as it exists at the time you enter into the contract – this hasn’t been tested by parties to a contract
  - The circumstances under which you might want to contemplate this is if you know there is legislation on the table that might change
  - But you might not succeed

Ritchie J. speaking for a unanimous court finds that the law of Ontario
- **Formula he adopts: taken from English case** – “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 or that with which the transaction had its closest and most real connection.”
- He is putting these two phrases in the alternative
  - “the system of law by reference to which the contract was made” – referring to actual subjective choice
  - “that with which the transaction had its closest and most real connection” – referring to objectively ascertained proper law

- This is the formula adopted
The SCC looks at all the factors:
- Looks at the place where the contract was made – decides it was made in Ontario
- Looks at other relevant factors and decides the proper law of the contract was the law of Ontario
  - This is where the head office was
  - The head office maintained control
  - They expected it would be governed by the law of Ontario
  - **Note:** EE thinks this is slipping back into actual choice as distinct from objectively ascertained proper law
  - *When you are into objectively ascertained proper law of the contract, you look to what reasonable contracting parties would have expected not what the actual parties expected*

- So this is the leading case for objectively ascertained proper law

**Amin Rasheed Shipping Corp v Kuwait Insurance 1984 UKHL**
- This was a major house of lords case in the period when the house of lords was developing jurisdiction rules
- It is a jurisdiction case not a choice of law case

The action had been brought in England (under Order 11) and the defendants in the English action have objected not just to the jurisdiction of the English court but also to the appropriateness of the English court

- There is an insurance contract at issue
- The ships that are insured are operating in the Arabian gulf
- The particular vessel is seized by the Saudi Arabian authorities, its master and crew are imprisoned and the ship is apparently confiscated on the basis that it was involved in smuggling

- So this is a claim in England against the insurance company for the loss of the ship which had been insured

- The insurance contract (typically) had no choice of law clause
- Yet the English Order 11 (basis for service *ex jursis*) was premised on the existence of a contract which was governed by English law
- The way in which order 11 had been interpreted was: a contract governed by English law expressly or objectively ascertained – didn’t really make too much difference

This case is fairly typical of many House of Lords cases because these are jurisdiction cases – not choice of law – they haven’t gotten to the merits yet
- **The argument is you don’t have jurisdiction because this contract is not governed by English law and the plaintiffs are saying, yes it is**
- **So they go all the way up the HL to decide what is the proper law of the contract in order to find if they even HAVE jurisdiction so they can start over again on the merits – *rolls eyes***

Think about it: You can’t have a contract in a legal vacuum
- But these parties had been living in a legal vacuum for years because they had this deal which had no choice of law clause
- They didn’t know what law applied to their contract

There is no connection with England except for the fact that the actual insurance policy was an English form

The parties:
- The plaintiffs (ship owners) were a Liberian company carrying on business in Dubai
- The defendants are a Kuwaiti insurance company
Neither one is connected to England

But they used this English form – marine insurance policy form
  • It is in English language
  • It is a form in accordance with an English Act
  • The money is Sterling (pounds) but it is payable in Kuwait and the contract of insurance is made in Kuwait

At the time that these parties entered into a contract of insurance in Kuwait, Kuwait had no indigenous marine law – they hadn't invented it yet/copied it yet
  • They had done so by the time of the litigation but he new Kuwaiti maritime insurance law was not retroactive

So the question is: what is the proper law of this contract? England or Kuwait?
  • We need to know that to know whether we have jurisdiction

On the way up to the House of Lords, there were marked divisions of judicial opinion

Ultimately, the HL decided that the proper law of the contract was English (so they have jurisdiction)
But they then went on to decide that the appropriate forum for the action was Kuwait – so they sent the parties back to litigate in Kuwait

The interesting aspect of the case from the point of view of the proper law of the contract:
  • In the two judgments – Lord Diplock and Lord Wilberforce – they come to the same conclusion – that English law is the proper law of the contract

  • Lord Diplock finds an implied choice
    • Strange thing about this: nobody had argued that – ever (trial, CA, ever)

  • Lord Wilberforce says: objectively ascertained proper law of the contract
    • Various circumstances and factors they look at – they vary from case to case
    • The point is: the process of determining the proper law (objectively ascertained) is that it is like forum non conveniens – you list all the relevant factors but different judges and counsel/parties give different weight to different factors

    • You’ve got that weighing of the circumstances reflected particularly in Lord Wilberforce’s judgment

How could the English House of Lords send the litigation back to Kuwait when Kuwait didn’t have any indigenous maritime insurance law?
  • Kuwait had conflicts rules
  • So the English HL was sure that Kuwait would be able to solve the problem of the proper law of the contract by applying English law
  • They would find a law to apply because they have conflicts rules

**Miller v. Wentworth(?) Estates UKHL**
  • The circumstances were very evenly balanced between the contents of the contract and the form of the contract and what was to be done under the contract, and where it was to be done

  • This is a case in which the relevant contractual provisions and the relevant parts of what is to be done under the contract provision are almost equally balanced
  • HL had to reach a conclusion as to the proper law of the contract

**Facts**
• The parties were from 2 different countries – between an English company and a Scottish company
• The Scottish company agrees to carry out certain work converting buildings located in Scotland but owned by the English company
• So it is a building contract
• The contract was concluded in Scotland
• The form of the contract was the standard "English Royal Institute of British Architects” form – a standard English form
• The contract contained an arbitration clause but there was no place identified for the arbitration should arbitration be needed
• Instead, the President of the Royal Institute of British Architects was given the responsibility to nominate the arbitrator
  • It was a Scottish arbitrator who was nominated
• The architect for this conversion was an English architect
• So you have almost evenly balanced factual connections from which deductions can be drawn

Held
• Case goes up to House of Lords
  • 2 lords: proper law of the contract is the law of England
  • 2 lords: proper law of the contract is the law of Scotland
  • 5th lord: he went with the majority
    • He looked back to the trial, court of appeal, house of lords and a bare majority of judges along the way had gone with English law

• Ultimately, the result was that the English law was the proper law of the contract

• The point: when you get to determining the proper law of the contract objectively, you should not necessarily, absolutely, exclude any consideration of the contract itself – that should be allowed to factor into it

**Mackender v Feldia AG 1967 UKCA**
• A jurisdiction case
• The question is: is there some other basis for service ex juris that assumes the existence of a contract?
• In England, it is the contract is MADE in England

• It involves an insurance policy issued by an insurance company
• This insurance policy was intended to cover diamond merchants, which were incorporated in Switzerland, Belgium and Italy
• The insurance policy, which was issued in 1964, contained a choice of law clause in a choice of jurisdiction clause
• The choice of law clause names the law of Belgium as the proper law of the contract and gives exclusive jurisdiction to the courts of Belgium

• 1965: the diamond merchants of Italy – there is a loss of diamonds
• Naturally, they claim on the insurance policy
• Naturally, the insurance company investigates

• The defendant in this action claims to have discovered that the diamond merchants were smuggling diamonds into Italy and that these diamonds that had been lost had been smuggled into Italy
• So they say they are not obligated to pay up because of non-disclosure
• The action originally is commenced in Belgium and then Lloyd's (the insurance company) starts this action in England – so we have parallel actions (Teck Cominco)

• Service ex juris has been effected
• The question for the CA is whether England has jurisdiction and whether England is the most appropriate forum for the action

• The argument is that the contract has been voided by non-disclosure, therefore, because the contract is void, the choice of jurisdiction clause doesn’t exist
  • If the choice of jurisdiction clause doesn’t exist, that’s a very weighty factor that the court will not have to consider in exercising its discretion

• As far as jurisdiction was concerned, the court relied on the fact that the contract had been made in England

• This discussion is only about discretion and the effect of the argument on the jurisdiction selecting clause – is it gone or does it exist?
  • Lord Denning and Lord Diplock take slightly different approaches

• Lord Denning automatically applies English law
  • Of course there was a contract
  • He applies English law
  • Effective non-disclosure

  • He takes the view (remember SCC in Pompey Industry where the argument was that frustration voided the contract and Bastarasch J treats the jurisdiction selection clause as having survived regardless of the outcome of the defence of the contract) – this is what Lord Denning does
  • He says, the jurisdiction selecting clause applies anyway, we will treat it as separable and we will work it into our exercise of our discretion

• Lord Diplock addresses the conflicts issues
  • This question it is argued is to be determined not by Belgian law but by putative, objective, proper law, a concept which I find confusing but which is said in this case to be English law
  • Lord Diplock doesn’t agree that that should be the English choice of law rule

  • Decides that if there is an argument made (at the jurisdictional stage) that there is no contract, the English court should use the law of the FORUM and unless the argument is “non es factum” (they simply didn’t agree at all), you treat the contract as in existence for jurisdictional purposes, and then, deferring to the jurisdiction selecting clause presuming they had a jurisdiction selecting clause, the effect of that non-disclosure would be decided by the substantive law applied to the merits – and that would be the law of Belgium
    • Because if it is on the merits, you’re going to decide on the merits
    • In this case, it is hard to say there was no contract because there HAD been an agreement – but the argument was that the non-disclosure voided that agreement

• So this case is authority for the proposition: if it is a non es facutum, if the argument is there is no contract at the jurisdictional stage, we’ll decide that there is a basic agreement between the parties – not all the terms necessarily but some form of agreement
  • The authority for the putative proper law of the contract rule, which Lord Diplock does not apply

Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co 1961 UKCA
• Another jurisdiction case
• Defendants are in England, the plaintiffs in Switzerland, had been negotiating the terms of a contract with an exchange of letters
• They were attempting to negotiate an arrangement under which the Swiss plaintiffs were going to be agents in Switzerland to sell shoe machines manufactured in England by the defendant
Swiss plaintiffs actually sold 4 machines and they said, now pay us

The English defendants said, nope, we didn’t agree to pay you

Swiss plaintiffs said we posted a letter of acceptance – you sent us an offer, we accepted it and we posted that acceptance to you

The defendants in England say, we never got the letter

There was no evidence to show that this letter was ever posted

The problem in this case was that English law had one rule for deciding on the formation of a contract by post and Swiss law had a different rule

- English law: the contract is concluded upon posting the acceptance
- Swiss law: there is no contract until the letter is actually received
- So whose law is going to be governing the contract?
- English CA held that even if it had been established that the letter had been posted, he still would have held that no contract had come into existence because the putative proper law of the contract would have been the law of Switzerland

**The Parouth 1982 UKCA**

- Another jurisdiction case
- The plaintiff is a shipowner (a Panamanian company)
- The defendant is a Florida company
- The ship (the Parouth) is registered under a Greek flag, is managed by a Belgian company and the shipmates are German
- The cargo was to be shipped from Germany to Mexico
- The payments are to be made in Belgium in US dollars
- The question for the English court is: do we have jurisdiction?
- The alleged contract consists of a bunch of telexes
  - One of the telexes proposes that in the event of a dispute under this contract in the process of being negotiated, there should be arbitration in London
- The CA fixes on this: says the putative proper law of the contract would have been English law because they were going to arbitrate in London in the event of a dispute over the contract which now they say doesn’t exist

**Greenshields Inc. v Johnson 1981 ABQB**

- The trial level decision (apparently) represents the common law choice of law rule for determining formal validity of a contract
- There are no other contenders as there were for formation of a contract

But the choice of law rule itself is a rule IN THE ALTERNATIVE (just like formal validity of a marriage)

- The justification for having a choice of law rule in the alternative (satisfy this legal system or this other legal system) is that:
  - For lex loci contractus: contracting parties should be free to take legal advice about formalities in the place where they happen to be contracting – so they are allowed to take local advice
  - Alternatively, if these 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 from THAT legal system for the formal validity of the contract

- SO: formal validity of a contract is governed EITHER by the law of the place where the contract was made OR by the proper law of the contract

In this case, the contract itself was made in Alberta

The parties to the contract selected the law of Ontario as the proper law of the contract – there was an express choice of law clause

The contract in question is a contract of guarantee
Defendant is an Alberta defendant
His defence is this guarantee is void – it did not comply with the Alberta Guarantee Acknowledgement Act
Under that statute, they would have had to have gone to a notary before signing the guarantee
- The objective was to protect people guaranteeing other people so they knew what they were doing and when they would be liable

There had been no appearance by the contracting parties before a notary so there clearly was a breach of the Guarantee Acknowledgement Act of Alberta (the place where the contract was entered into and performed?)

Characterization issue: formal validity of the contract
- Alternative #1: Lex loci contractus? – Alberta
- Alternative #2: Proper law of the contract? – Ontario

Ontario has no Guarantee Acknowledgement Act

Is there any reason not to apply the law of Ontario in this case?
- Bona fide
- Legal
- Not contrary to public policy
- Ontario is the proper law of the contract
- SO: contract is formally valid

Case goes on appeal
- The Alberta Court of Appeal comes to the same result but on a completely different basis
- The CA does not accept the characterization of the alleged defect as an issue going to the formal validity of the contract
- They said this is an issue of substance vs. procedure – “How should we characterize the Alberta Guarantee Acknowledgement Act? Is it a question of substance or a question of procedure?”
  - If it is a rule of procedure, the law of the forum applies
    - The contract would be void because there hadn’t been compliance with the Alberta statute
    - There would be no recovery from the guarantor
  - If the statute is characterized as substantive law, the contract is governed by the law of Ontario and not the law of Alberta, so it doesn’t apply
    - And this is what the CA decides
    - The statute does not apply because it is substantive
      - EE doesn’t agree – but we don’t care – that is a characterization issue
      - If in doubt, you characterize as substantive not procedural

The point is this: if you characterize the issue as formal validity of the contract, you’re going to get two chances of having formed a valid contract – either one will work, in the alternative
Whereas if you characterize the issue as one of substance vs. procedure, it is an either/or proposition – either it is procedural or substantive, either it applies or it doesn’t

**Naraji v Shelbourne 2011 UKQB**
- The soccer player who was injured and had surgery in the States but the surgery was botched
- He wanted to sue the doctors in Indiana who operated on him and in Indiana, there was a statute which said you could not sue an Indiana doctor in contract unless there was a written contract signed by the doctor
- Naturally there was no signed contract here
- So the question for the English court was: how to characterize this issue?
- There is no discussion in the reasons for judgment as to whether this goes to formal validity or whether it is a question of substance vs. procedure
• The TJ goes directly to substance vs procedure – decides it is procedural
  • The statute requiring that the contract be evidenced in writing and signed by the doctor is procedural
  • Because it is procedural, it doesn’t apply
  • So the action was allowed to proceed

• SO: there is a very close relationship between these 2 – courts go back and forth in the characterization

_Vita Foods v Unus Shipping 1939 UKPC_
• Earlier proposition: the _Vita Foods_ case states the current English law
• Back in the 19th century there was a slightly different choice of law rule governing contracts
• The choice of law rule then (and it is still true in some countries) was that the proper law of the contract is the _lex loci contractus_
• But even then it was "unless parties indicate otherwise"
• Over the decades/centuries, the law of the place where the contract was made has diminished in importance
  • The contracting parties might be anywhere in the world
  • Also: we have so many different ways of completing contracts: fax, phone, e-mail, etc.
• For these reasons, the LLC has seriously diminished in importance which explains the way in which the PC disregards the LLC

_Gillespie Management Corporation v Terrace Properties 1989 BCCA_
• Deals with illegality by the law of the place where the contract is to be performed
• Illustrates the relevance of the LLS

• Gillespie (a BC company) owns an apartment building in Washington state
• It enters into a contract with Terrace Properties to manage the apartment building located in Washington and also to do other stuff in BC

• This contract is made in BC
• It is held to be governed by the proper law of BC
• But it is to be at least partly performed in Washington state
• Gillespie management is unhappy with the performance, so it terminates the contract
• Terrace brings an action in BC for breach of contract and it is claiming damages consisting of the management fees it has already earned

• The problem is an illegality problem
  • The problem is that Terrace Properties was not licensed to do what it was doing under the contract in the state of Washington
  • The Washington licensing requirement provision: No suit or action shall be brought for the collection or compensation of a real estate broker ... without alleging and proving that the plaintiff was a duly licensed real estate broker
  • Terrace, the plaintiff, has no licence in Washington state (Washington = LLS) and is claiming in BC for management fees earned under the contract

• The question for BCCA is the relevance of the Washington State law – should we pay any attention to it? The law of the LLS

• Sutherland J refers to the doctrine of illegality as a matter of forum public policy
  • It is not foreign public policy but domestic public policy of not enforcing unlawful bargains or requiring unlawful conduct – this is comity
  • You don’t want to require a party to a contract to breach the law of some foreign jurisdiction
• This particular case has probably taken the English common law a bit farther than the other English cases

• It is a policy approach which is to be found in common law courts whenever performance of the contract breaches the laws of the place of performance
• There is a reluctance to enforce the contract in those circumstances

• EE doesn't think the law in other jurisdictions in Canada is different from these cases – these are standard applications of the common law choice of law rules
• This is the best case BC has to offer

*Avenue Properties Ltd. v First City Development Corporation 1986 BCCA*

• Illustrates illegality by the law of the forum
• Avenue properties case is used as an example of the law of the forum to a contract which is governed by some other proper law
• There is a lot of mandatory application – laws that courts feel obliged (because of the way they are drafted) to apply REGARDLESS of proper law of the contract

• This is not a choice of law case
• **BC courts are deciding whether or not they are the most appropriate forum for the action**

**Facts**
• The case comes up because a BC company (Avenue Properties) decides to purchase 3 units in an Ontario development
• The property purchased is in Ontario, the purchaser is in BC, the vendor is an Alberta company carrying on business in Ontario and BC (so BC can take jurisdiction)

• The contract has a choice of law clause and a jurisdiction clause
  • **Choice of law clause** says this contract is governed by the law of Ontario
  • **Jurisdiction clause** says the parties attorn to the jurisdiction of the province of Ontario
  • Note it is not an exclusive jurisdiction clause – this is important

• Then AP says we don't want to complete
• They tell the vendors they are not completing the purchase because the vendors have not delivered a prospectus as required by the BC Real Estate Act

• AP, the BC defendant, is not completing and so First city Developments (the Alberta vendor) starts an action in Ontario for breach of contract

• 5 months later, AP starts an action in BC for a declaration that the contract is unenforceable
• They want their deposits returned

• So we have parallel actions

• The Ontario plaintiff (the defendant in BC) applies in BC for a stay of the BC action
• That's the issue being discussed in the BCCA (by McLachlin J as she then was)

• AP's argument: we are claiming the benefit of the Real Estate Act and that is a juridical advantage for us – and that ought to tip the balance in favour of BC so BCCA should reject the application to stay

**The Law**
BC Real Estate Act s. 62 stated (at that time): No promise or agreement to purchase a lease, any subdivided land or timeshare interest, is enforceable against the purchaser or tenant by a person who has breached any of the provisions of this part.

The provision that AP claims that First City has breached is the requirement to issue a prospectus – and the prospectus provision is expressly made applicable to sales of land outside of BC.

So the argument is: this statute applies to the 3 units in Ontario

They should have issued a prospectus

REA s. 62 says you can’t sue me

Discussion

The bases for application of the law of the forum in this action

She is not deciding that the law of the forum will apply because this is just a jurisdictional decision

She is not deciding anything on the merits

This is a contract governed by the law of Ontario – so the proper law is a different law

The only connection with BC is that the purchaser is here and BC is the forum for the action

BCCA discusses the circumstances in which a court (the BC court) can apply the law of its own jurisdiction in substitution or supplementation for the proper law of the contract

2 circumstances (but she states 3 circumstances):

1. Where the local law is procedural
2. Where the local law, although substantive rather than procedural, is of such a nature that it should be applied
3. “The court has no alternative where the statute expressly states that certain procedures must apply notwithstanding that the proper law of the contract may indicate otherwise. This sort of provision is referred to by the authorities as a choice of law rule. Where the legislation cannot be characterized as a choice of law rule, the court may nevertheless apply a provision of local law in preference to the foreign proper law of the contract if it were satisfied that it would be contrary to public policy to do otherwise”

Re #1: TJ: classified s. 62 as an issue of procedural vs substantive (CA: doesn’t decide that issue)

Decides it is substantive law

Note: we err on the side of classification of forum rules as substantive, not procedural

So she eliminates option number 1

If s. 62 were classified as procedural, clearly AP would have a legitimate juridical advantage by litigating in BC

But it might not be procedural

So what about the other options?

Re #2: McLachlin J talks about a choice of law rule – what she is referring to is a unilateral choice of law rule

Think Vita Foods – the NFL statute required that every bill of lading issued from a port in NFL contain a particular clause – this is a unilateral choice of law rule because it applies to bills of lading in every port in NFL

McLachlin’s reading of the Real Estate Act is that when it says the provisions are applicable to sales of land wherever, she is interpreting the statute and she is saying the Real Estate Act is designed to protect BC consumers – so it is like a unilateral choice of law rule

So the court has NO alternative – it HAS to follow the dictates of the legislature of the province

Another way of describing the Real Estate Act is to classify it as a forum law of mandatory application

The common law has not traditionally talked about laws of mandatory application
It is fairly typical for legislatures to pass laws that are designed to protect their citizens – they are protective statutes (protecting consumers, purchasers, investors).

Whether they include a unilateral choice of law rule and indicate that the legislature wants this legislation to apply in particular circumstances or whether they are drafted in general terms.

They may or may not write in a unilateral choice of law rule but that doesn’t prevent the courts of the forum (looking at their own laws, thinking about the protective purpose of this statute and those whom it is supposed to protect) from saying this is a law of mandatory application which I ought to apply here.

But if you DO have a unilateral choice of law, it does make it easier.

EE:

To say that the REA should apply in this case as a matter of public policy is to undercut the very narrow definition (for conflicts purposes) of forum public policy.

It is better treated as application of a law of mandatory application of the forum to a contract which is governed by another law.

It is preferable to treat this case as a case involving the forum deciding that a forum law is a law of mandatory application.

EE doesn’t like believing that it should be applied as a matter of forum public policy.

So LOOK for unilateral choice of law rules in statutes.

Where you litigate, even in a contracts action, can make a significant difference to what laws the court ends up applying.

**Pearson v Boliden 2002 BCCA**

- Not really a conflicts case but it comes close.
- It is relevant because it deals with with statutory interpretation.

**This is the second stage of the Vita Foods case:**

1. **You decide first of all whether the law applies**
2. **If the law applies, you still have to interpret it to see whether it applies to this case and what the result/effect would be**

- The TJ decided to treat it as a claim in tort and apply the tort choice of law rule.
- CA says that is not the way to do it.

It is a class action brought in BC.
- BC is an opt-in province.
- A number of non-residents had opted in.
- BC legislation says you have to subdivide the plaintiffs into classes by residence.

The action is brought under the BC Securities Act which creates a statutory cause of action against Boliden (a mining corporation).

There had been an environmental catastrophe in Spain (by a subco) and the share price had fallen.

The claim was that Boliden, the defendant, had made a misrepresentation in the prospectuses.

The problem in this particular class action was/continues to be that all these securities acts are slightly different.

- Every securities act in Canada has a statutory cause of action for misrepresentation in a prospectus.
- But they are a bit different, and limitation periods might be different.

Boliden was applying in this class action to exclude certain classes of plaintiffs.
The question for the CA was whether or not to uphold the TJ which said this is a cause of action in tort (a statutory tort) – so *lex loci delecti*, the law of where the tort occurred, would apply

- It had reasoned that the tort might have been found to have occurred in Ontario where the head office was
- The argument then was maybe we can locate the statutory tort there
- Then we would get Ontario legislation applied to this class action and we’ll all recover something

The object of the exercise for the plaintiffs in this case was to keep everyone in the class so they could get a settlement

Boliden wants them excluded

Argument of the plaintiff was: you can’t decide the case on the merits (what law to apply) until we’ve heard all the evidence

**BCCA:**
- We don't think this should be characterized as an action in tort
- We have to reanalyze the problem
- **The court looks at the relevant Securities Acts**
  - Each province has a SA designed to protect the investors of that province

**Should Ontario law (in this case) be open and applied to all members of the class?**
- We have to analyze it in terms of what is the scope of the Ontario Securities Act and then we have to analyze the scope of each of the acts
- Given that they are consumer protection legislation, each act is limited in its scope of application to the prospectus issued in each province

So we are not in this class action using a tort choice of law rule
- What the CA is doing is locating the plaintiffs in each jurisdiction (where they received a prospectus and made their investment) and limiting each of these classes of plaintiffs to the benefits, if any, of their own securities acts creating a statutory tort and setting any limitation periods

**EE: CA is correct in its interpretation of the scope of application**
- Each of the statutes is clearly intended to protect consumers in the provinces
  - That’s a constitutional point – you can’t create a statutory cause of action in BC and expect other provinces to apply it
- But if BC chooses to apply an AB statute by virtue of a BC choice of law rule, that is not a direct application, that is BC, through the MEDIUM of its choice of law rule, deciding to apply an AB law
  - That should NOT be a reflection on the validity of the AB statute from the point of view of constitutional law
- But the CA decides to avoid choice of law rules – so that is not an issue
- So the question is: could the Ontario statute apply directly in BC? – this is direct application so the interpretation approach is correct

The result of the application is that the AB and NB plaintiffs get wiped out because under their own securities acts, they wouldn't have had a cause of action or the limitation period would have run out (one of the two)

This case is a working out of the Vita Foods interpretation of the contract – does it apply and what would be the consequence?
Unjust Enrichment

**Dicey Rule 230: choice of law rule for restitution**

230(1) the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation

230(2) the proper law of the obligation is determined as follows:

(a) If the obligation arises in connection with a contract, the proper law of the law applicable to the contract
(b) If the obligation arises in connection with a transaction concerning an immovable, its proper law is the lex situs – the law of the place where the immovable is located
(c) If the obligation arises in any other circumstances, its proper law is the law of the country where the enrichment occurs

**Christopher v Zimmerman 2000 BCCA**

- A claim for imposition of a constructive trust arising out of a relationship
- BCCA says the relevant choice of law rule is 230(2)(c) – the “other circumstances” option is said to be the relevant choice of law rule

- In this case, there is no selection of the place where the enrichment occurs because the claim is arising from a relationship between Christopher and Zimmerman
  - Their relationship has been enjoyed over 5 different jurisdictions

- The question is: where did the enrichment which the plaintiff wants rectified occur?
- This case comes as a s. 18(a) matter (which doesn’t exist anymore) – there is lack of evidence in the case
- BCCA says this claim is not covered by statute so we have to resort to the common law
  - We characterize the issue as unjust enrichment
  - We apply the choice of law rule
  - Applies the Dicey rule

- But then says we need more evidence so we’re sending it back to trial because we really can’t tell on this s. 18(a) application where this enrichment occurred
- **The point is that she chose option (c) but there is not much discussion why (other than by way of elimination)**

**Minera Aguiline Argentina SA v IMA Exploration Inc 2006 BCSC aff’d 2007 BCCA**

- BCSC relevant paragraphs dealing with unjust enrichment issues: paras 182–207

- The issue was different here
- Had to do with mining claims of Argentina
  - Mining claims are immovables

- There was also a contract between a couple of corporations, one of which was the BC company, IMA

- SO there is a contract and there is immovable property

- **The claim is that there has been a breach of confidential information**
- On the merits of the unjust enrichment claim, the parties were arguing for different choice of law rules

- **The plaintiffs in the action were arguing: this claim arises out of a contract, so our unjust enrichment claim ought to be governed by Dicey Rule 230(2)(a)**
  - The proper law of the obligation is the proper law of the contract – law of Colorado (common law)
• The defendant (BC corporation) IMA was arguing: this claim arises in connection with an immovable, so the claim ought to be governed by Dicey Rule 230(2)(b)
  • Lex situs – the immovable is located in Argentina
  • The hope of the defendant was that Argentina didn’t have unjust enrichment law
  • The main complaint of the defendants was that the TJ got the facts all wrong, misunderstood them
  • But then the fall back on the law was: they are claiming unjust enrichment (imposition of a constructive trust)
  • So our best hope is to get the law of Argentina applied

• The question: Are options (a), (b) and (c) hierarchical or independent alternatives?

• TJ: declined to use any of Dicey (a), (b) or (c)
• Relevant paragraph: 200 of BCSC decision:
  • In my view, a more principled approach to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, would be to examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake. Thus, each of the factors listed by Dicey and Morris would be considered and weighed along with the following non-exhaustive list of factors to determine which set of laws has the closest and most substantial connection to the obligation.
    • Where the transaction underlying the obligation occurred or was intended to occur;
    • Where the transaction underlying the obligation was 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 with respect to governing law at the time the obligation arose; and
    • Whether the application of a particular law would cause an injustice to either of the parties.
  • In many cases, perhaps most, it may be that the court will find after examining all the connecting factors that the law of the place where the enrichment occurred is in fact the law with the closest and most real connection to the obligation. However, in my view, that is a conclusion that the court should reach only after full examination and analysis.

• The other aspect of this case: the TJ imposes a constructive trust (which is an in personam remedy)
  • They argued a constructive trust was an inappropriate remedy because it would have to be enforced against immovable property in Argentina
  • Suppose the defendant doesn’t obey – it has to be recognized and enforced in Argentina – Argentina isn’t going to recognize and enforce any BC order dealing with title
  • This is the issue that is at issue in Duke

Property

Hogg v Provincial Tax Commissioner 1941 SKCA
• Case which tells you how to approach the classification problem – it is the METHOD
• Succession case
• Tax commissioners want to impose succession duty on the estate
• The SK court has to interpret the local statute and decide how that statute is going to apply to the estate of the deceased
• The SK statute imposes tax (succession duty) if the property devolves by or under the law of SK
So it doesn’t apply based on location of property – though that is indirectly implicated
It applies if SK law determines who is going to inherit

So the SK court has to look at the estate and look at the domicile of the deceased when she died to decide whether the beneficiaries have to pay succession duty
- The deceased in this case died domiciled in SK
- This is the area of law in which domicile comes into its on
- The deceased at the time of her death held a number of mortgages (37 of them)
  - The mortgages were mortgages of land in BC
  - Note: the deceased doesn't own the land in BC, she holds mortgages on the land in BC

The land is in BC
The forum is SK

The question for the SKCA is whether those mortgages are going to by or under the law of SK or BC – that depends on how mortgages on land are classified – are they movable or immovable property?
- As far as land is concerned – that’s easy – it is physically located in BC
- What about mortgages? – mortgages are an interest in land (says the SK court applying its own law) and decides that interests in land are located where the land is located

Now we come to the rule: the SITUS of the property (location in law) is a matter to be determined by the law of the place where the property is located
- We (the SKCA) have decided that the mortgages are located in BC because they are an interest in land and the land is located in BC
- Now what is required is expert evidence from BC practitioners as to how BC would classify mortgages – you have to take expert evidence from the place WHERE THE PROPERTY IS LOCATED
- One BC expert was more expert than the other one
  - One BC expert said we don't know anything about movables and immovables in BC, we think about real and personal property – our succession laws are based on real/personal property classification
  - The other BC expert said, BC would classify mortgages on land as immovable property (note: this is not what this case is authority for)
- SO: Now SK knows how to classify this property in the estate of the person who died domicile in SK – the analysis:
  - The deceased owned mortgages
  - Mortgages are an interest in land
  - Interests in land are located where the land is located
  - The land is located in BC
  - How does BC classify mortgages?
  - BC classifies mortgages as immovable property
  - SO the deceased owned immovable property in BC

So now the SK court has to go to the choice of law rules governing succession
- The SK choice of law rule (same as that in BC) is the common law rule
- It says succession to immovable property is governed by the law of the situs (the situs being BC)
- SO: it is immovable property, it is located in BC, so BC law will govern succession to these 37 mortgages
- Because BC law is governing, those mortgages are devolved by or under the law of BC within the meaning of the SK Succession and Duty Act

Beneficiaries win, the tax commissioner loses
• So the forum has to locate the property – uses forum law to locate the property
• And then having located the property, the forum considers expert evidence from that legal system (the location of the property) as to how THAT legal system would characterize/classify the property
• This is one of the only situations in which the forum accepts foreign classification absolutely
• You defer absolutely to the legal system where the property is located as to how that property should be classified

Note: this case is not precedent/authority for the prop that the common law considers interests in land to be immovable property
• That is going to depend on how the legal system where the land is located classifies mortgages and mortgages are one of those forms of property which are classified in different ways by different legal systems
• If the land was somewhere were the classification of mortgages is movable property, SK would have applied the choice of law rule for movable property, which is governed by the last domicile of the testator/intestate

• So you accept whatever classification of the legal system where the property is located gives you
• Note: no legal system in the world is going to say that land is movable property
• An interest in land – the common law is always going to locate any interest in land as being located where the land is located
**APPENDIX D: IMPORTANT STATUTORY PROVISIONS**

**CJPTA: COURT JURISDICTION TRANSFER AND PROCEEDINGS ACT**

- It follows the old Rule 17 model – similar to what is considered in the Van Breda case
- CJPTA was enacted in 2003 and proclaimed in 2006

**Definition section:** "territorial competence" means the aspects of a court’s jurisdiction that depend on a connection between

(a) the territory or legal system of the state in which the court is established, and
(b) a party to a proceeding in the court or the facts on which the proceeding is based.

- You have a definition of "territorial competence" which is the phrase we use in BC now instead of jurisdiction simpliciter because it is a phrase which is intended to take into account Canada’s understanding of Morguard (Morguard does create, ultimately, a constitutional framework)

**Section 2(2):** territorial competence of a court is to be determined solely by reference to this Part

- Makes the CJPTA the exclusive body of rule
- It replaces Rule 13, the old 1976 Rule of the court
- In theory, this is the only source of territorial competence rules – nothing to do with subject matter, only territorial competence

**CJPTA s. 3: Proceedings in a Person**

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

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
(b) during the course of the proceeding that person submits to the court's jurisdiction,
(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

- This is the heart of the statute
- Sets out 5 different circumstances in which a BC court will have territorial competence

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

- This is submission – if you brought an action in BC, you are submitting to the jurisdiction of the BC court

(b) during the course of the proceeding that person [the defendant] submits to the court’s jurisdiction,

- There is no finite list of ways in which the defendant can submit to the jurisdiction of the court – you don’t need to intend to submit
- If at some point during the proceeding, you (the defendant) submit, the BC court has territorial competence
(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

- This is a forum-selection clause
- If you enter into a contract which has a jurisdiction selecting clause (in the event of a dispute arising out of this contract, you agree to submit to the jurisdiction of the BC courts), you’ve submitted in advance

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

- This is a modified version of the traditional basis for jurisdiction (discussed in Maharani), which is presence
- Mere presence – service of process on the defendant who is in BC is no longer good enough
- 3(d) requires that the defendant be ordinarily resident in BC at the time of the proceeding
- Mere presence will not work anymore – we have upped the necessary connection from Maharani
- Re “ordinary resident” – see ss 7, 8, 9 – you get statutory definitions of ordinary residence for corporations, partnerships and unincorporated associations, respectively

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

- This applies every time you have a defendant who has to be served outside of BC – provides that BC has territorial competence if there is a real and substantial connection between BC and the facts on which the proceeding is based
- However, you do not have to invent categories every time you have to bring an action in BC
- We have an expanded definition of s. 3(e) in s. 10

**CJPTA s. 6: Residual discretion**

- 6 A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that
  - (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or
  - (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

- This is the forum of necessity – which LeBell didn’t want to talk about
- What does this section say? – it says that if there is no territorial competence, we can still hear the action if (a) or (b) is met

- EE proposes that this may not be constitutionally valid. The real and substantial connection test defines judicial jurisdiction – if there is no real and substantial connection and none of the other conditions/bases apply, how can you take jurisdiction constitutionally? May apply in a human rights case or something – it is not really used.

**CJPTA s. 10: Real and substantial connection**

- 10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
  - (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
  - (b) concerns the administration of the estate of a deceased person in relation to
(i) immovable property in British Columbia of the deceased person, or
(ii) movable property anywhere of the deceased person if at the time of death he or she was
ordinarily resident in British Columbia,
(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument
in relation to
   (i) property in British Columbia that is immovable or movable property, or
   (ii) movable property anywhere of a deceased person if at the time of death was
ordinarily resident in British Columbia,
(d) is brought against a trustee in relation to the carrying out of a trust in any of the following
circumstances:
   (i) the trust assets include property in British Columbia that is immovable or movable
property and the relief claimed is only as to that property;
   (ii) that trustee is ordinarily resident in British Columbia;
   (iii) the administration of the trust is principally carried on in British Columbia;
   (iv) by the express terms of a trust document, the trust is governed by the law of British
Columbia,
(e) concerns contractual obligations, and
   (i) the contractual obligations, to a substantial extent, were to be performed in British
Columbia,
   (ii) by its express terms, the contract is governed by the law of British Columbia, or
   (iii) the contract
      (A) is for the purchase of property, services or both, for use other than in the
course of the purchaser’s trade or profession, and
      (B) resulted from a solicitation of business in British Columbia by or on behalf of
the seller,
(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
(g) concerns a tort committed in British Columbia,
(h) concerns a business carried on in British Columbia,
(i) is a claim for an injunction ordering a party to do or refrain from doing anything
   (i) in British Columbia, or
   (ii) in relation to property in British Columbia that is immovable or movable property,
(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in
British Columbia,
(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral
award made in or outside British Columbia, or
(l) is for the recovery of taxes or other indebtedness and is brought by the government of British
Columbia or by a local authority in British Columbia.

- This section fleshes out s. 3(e)
- It is clearly and expressly stated in Van Breda that this section is not exhaustive
- The section itself says: "Without limiting the right of the plaintiff to prove other circumstances ... a real
and substantial connection is presumed to exist if ..."
- Most of the categories are continuing the reproduction of the old Rule 13(1) rules and the categories you
find in Rule 17.02 in Ontario
- Categories:
  - Actions concerning property in the province
  - Succession
  - Enforcement of contracts
  - 10(d) is a new one – deals with trust actions (didn’t have an equivalent in Rule 13(1)
  - 10(e) causes of action in contracts – some choices – it’s not just contracts made in BC
  - 10(f) restitutionary obligations
  - 10(g) the traditional, tort was committed in BC
  - 10(i) injunctions
• But this is not exhaustive – so if you can’t find a circumstances in s. 10 that fits, you can go back to s. 3 and argue that there is a real and substantial connection, and you have to make it out

**CJPTA s. 11: Discretion as to the exercise of territorial competence**

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

• s. 11(1) is basically the Scottish principle

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:
(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
(b) the law to be applied to issues in the proceeding,
(c) the desirability of avoiding multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

• s. 11(2) is the operating section

• **So BC courts (and any court subject to the CJPTA) has to consider all those factors – they HAVE to consider them**
• **And this is inclusive – not exhaustive – if there are other circumstances relevant, counsel can raise them**
• **If the law to be applied is the law of BC, that a factor in favour of proceeding the action in BC**
• **Section 11: Preserves the discretionary component of the court**
**ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT**

- The most important provisions to be aware of in terms of substantive rules in the ECJDA:

**ECJDA s. 1: Definition of a "Canadian judgment"**

"Canadian judgment" means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than British Columbia

(a) that requires a person to pay money, including

(i) an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than British Columbia and that is enforceable as a judgment of the superior court of unlimited trial jurisdiction in that province or territory, and

(ii) an order made and entered under section 741 of the Criminal Code in a court of a province or territory of Canada other than British Columbia,

(b) under which a person is required to do or not do an act or thing, or

(c) that declares rights, obligations or status in relation to a person or thing,

and, subject to section 1.1, includes a domestic trade agreement award, but does not include a judgment, decree or order that

(d) is for maintenance or support, including an order enforceable under the Family Maintenance Enforcement Act,

(e) is for the payment of money as a penalty or fine for committing an offence,

(f) relates to the care, control or welfare of a minor,

(g) is made by a tribunal of a province or territory of Canada other than British Columbia, whether or not it is enforceable as an order of the superior court of unlimited trial jurisdiction of the province or territory where the order was made, to the extent that it provides for relief other than the payment of money, or

(h) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person;

- *It is quite a broad definition*
- *Includes pecuniary judgments*
- *Also includes equitable orders*
- *s. 1(c) is an interesting provision which might authorize registration of judgments dealing with title to moveables*
- *Should also notice: the rest of the definition of Canadian judgment, which excludes certain kinds of judgments*

**Section 6** giving BC courts discretion to make various orders

(cont’d)
**ECIDA s. 6(3): Blind full faith and credit**

(3) Notwithstanding subsection (2), the Supreme Court must not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that

(a) the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment, or over the party against whom enforcement is sought, under

(i) principles of private international law, or

(ii) the domestic law of the province or territory where the judgment was made,

(b) the Supreme Court would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge, court or tribunal that made the judgment, or

(c) a defect existed in the process or proceeding leading to the judgment.

- **s. 6(3),** prohibiting BC courts from staying or limiting the enforcement of a Canadian judgment solely on the grounds that the judge that made the judgment lacked jurisdiction either under the principles of private international law or the domestic law of the province – this is the critical provision – blind full faith and credit
- You can’t even examine the competence of the other Canadian court – you have to trust them
- **s. 6(3)(b):** It is impermissible, as it is at common law, to consider whether we would have come to a different finding of fact or law
- Error of law is not a defence
- **s. 6(3)(c) –** defect existed in the process or proceeding leading to the judgment
  - This is to be interpreted as excluding defences of breach of natural justice and fraud on the foreign court
- EXCEPT: **s. 6(2)(c)(iv)** – defence of contrary to public policy can still be used