Conflicts: Fall 2012

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# General Considerations

1. **Substance vs. Procedure: Characterization**

**Purpose of distinction:** To establish rules essential to functioning & machinery of forum vs. those which are determinative of the rights of the prtys

– Procedural🡪 Forum’s own rules apply

– Substantive🡪Foreign rules apply (if called upon by CoL rule)

\*When in doubt, characterize the rule as substantive [don't want to abdicate parties rights arbitrarily] **– Block Brothers**

- It's no longer about how rules are worded [the old CL rule], but about the pith and substance of the rule as substantive or procedural – **Tolofson**

-In general, heads of damage are substantive, quantification of damages or procedural – **Somers**

Procedural matters:

* Costs; Cap on damages; form of pleadings; appropriate service of process and notices; conduct of judicial proceedings, generally; mode of trial/appeal; execution of judgments; Registration of companies – **Success** **Int’l**

Substantive matters:

* Limitation periods – **Tolofson**; Legal status of a foreign party – **Int’l Assn of Science & Technology**; Pre-judgment interest

**Tolofson**

**Facts**: Accident is in Sask between BC and Resident and Statue in resident. Suit in BC. Who's law applies? If Saskatchewan, there's a 6 year limitation period that has elapsed. In BC court says Sask law applies via lex loci delicti for torts and it it limit period substantive, so were going to apply it. The claim is therefore barred.

**International Association of Science and Technology** – Legal status of foreign party to be determined by its home law

**Facts**: Husband/wife getting divorce. Husband shelters assets in Swiss organization. Wife seeks division of property. Swiss organization seeks a

declaration from Alta court that neither wife nor husband has property in its care.

**Issue**: Standing – who's law governs the legal status of the foreign party?

**Held**: Legal status of the foreign prty depends on its home law – bc non-natural persons carry their status with them and derive it from their home law.

**Success International**

**Facts**: NY company contracts with Ontario company. NY co invokes arbitration clause. Ontario co order to modify the packaging operations, but refuses. NY co applies to Ontario court for enforcement of arbitral order, but problem arises bc it hasn't registered as cob in Ontario. Court says yep, NY co was cob in Ontario without registering. Registration rule of procedure, so we apply our own law, and it has no standing to enforce the arbitral order.

1. **Exclusionary Rules to Choice of Law and R&E rules**

**Dicey Rule1**

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

**Society of Lloyds** – One of the few cases where the defense of "inconsistency with the forum's public policy" was successful.

**Facts:** Ontario stays action before the court in favor of England. Judgment granted in England based on the Ontario Securities Act.

Plaintiff comes to Ontario and says here, enforce it.

**Held:** Court says we can't, the contracts given rise to the judgment were in breach of the OSA, so it would be contrary to public policy

[but they did enforce it because they sent the parties to England , and so were estopped

**USA v Ivey – Facts**: USA wants to enforce Michigan judgment in Ontario for costs of environmental remediation. Defendant throws up every

defense, penal, contrary to public policy, breach of natural justice etc. He's unsuccessful.

**Equatorial Guinea** – Cant go to the courts of England to get an injunction and costs to stop a coup attempt there.

**Dicey Rule 2**:

Canadian courts have no jurisdiction to entertain an action for enforcement, *either directly or indirectly*, of a **penal, revenue** [tax – USA v Harden asked BC to enforce cali tax judgment], **or other public law** of the foreign state. [Predicated on the rhetorical sovereignty]

\*Indirect requires the court to look behind a foreign judgment to see what it's based on

**Iran v Barracat Galleries** – Iran entitled to bring action in forign court for conversion of antiques, where it was essentially asserting a private

ppty right in the goods, not sovereign ownership rights.

**Penal –** **Huntington**-p.105

**Rule:** Character of foreign law as penal is up to the forum, not the place where the law originates [persuasive]

**Rule:** penal laws involve a preceding in the nature of the suit BY THE STATE who's law has been infringed, OR BY AN OFFICER of the state, or

brought by a member of the public in character of a COMMON INFORMER

**Rule:** Penalties must be attached, but aren't in and of themselves indicative of penal law

**Rule:** The vindication must rest with the state itself or the community which it represents

**Facts:** NY plaintiff sues Ontario resident for debt based on NY statute. Ontario defendant says NY statute is penal, don't apply it Ontario court.

Ontario court says no, the NY provision making director/officers jointly/severally liable for material misrepresentations are protective

and remedial in nature, not penal.

**Revenue – Stringam v Dubois**-p110

**Facts:** testator domiciled in Arizona leaves a farm situate in Alberta to his niece. Executor wants to sell the farm to pay US estate tax. ALTA CA

no, property/estate taxes clearly part of revenue law 🡪 must convey farm to niece free and clear of foreign taxes.

**Rule:** Even though the executor is trying to collect, court recognizes the taxes will ultimately go to the US.

1. **Domicile and Residence**

– Domicile always governed by the law of the forum

– All-natural persons must have a domicile at all given times, but only one.

– Corporations domiciled in the place of incorporation – **National Trust Company**

– Relevant to jurisdiction, choice of law, and recognition & enforcement

1. **Domicile of origin** = the domicile you acquire at the moment of birth (meaning your father’s DOI at date of your birth, or mother if he’s gone)
2. **Domicile of dependency** = the domicile you have between birth and age of majority [women used to acquire husband's domicile on marriage]
3. **Domicile of choice** = once you are at age of majority, you are able to acquire a domicile of choice

– Requires Presence + "clear and unequivocal" intent to reside permanently or indefinitely (**Aguilam**; **Urqhart**

– BOP on the party seeking to assert acquisition of DOC

– Q isn't whether prty intended to return to DOI, but whether intention has formed to perm live elsewhere

– Possible to abandon DOC without acquiring a new one🡪DOI kicks back in

1. **Ordinary/Habitual Residence**

– Requires physical presence/residence + Present intention [not future] to reside [for a more continued.]

– "Habitual" refers to the quality of the residence rather than duration –**Adderson**

– Only requires a present intention to reside – not future as in domicile inquiry (weaker animus) –**Adderson**

– Definition incorporates "for a settled purpose", which can be education, business, profession, employment, health, family, or merely for the

love of the place slippery floor paragraphs stopped

**Agulian** 129 – **Look to the parties whole life and all the surrounding circumstances, not just that the action**

**Facts:** testator dies in London - $6.5M estate. Leaves partner $50k. She seeks a variation. He was born in Cyprus but worked in England for 43 years

**Issue:** Her standing to depends on whether he was domiciled in England or retained his domicile of origin (Cyprus)

**Held:** Deputy judge erred by focusing too narrowly on the end of the testator's life and underestimated Cyprus’ enduring strength as DOI.

Wife failed to discharge the BOP on her re clear and unequivocal intent to reside in England indef.

**Urqhart Estate: 134** – **Example of acquiring DOC w/o intention to abandon it permanently (Guy moved around a lot)**

**Facts:** Testator lived with spouse for six years, died with $80k estate left to his son. Partner sought variation.

**Issue:** Where was the testator domiciled? ~~New Zealand (DOI)~~, Ontario, ~~Québec, Florida, New York~~?

**Held:** New York's out – never resided there; Florida's out – he had residence, but no desire to stay after pistol whipping;

That leaves New Zealand as DOI and Ontario as possible DOC. He established DOC in Ontario in 1980, but moved to Washington and 81 and

Florida and 82, but these moves did not establish an intention to abandon Ontario permanently.

**Adderson v Adderson** 163 – **Example of failure to acquire habitual residence**

**Facts:** Jurisdiction of Alta QB over matrimonial division of property statutorily permitted when the last joint habitual residence of the parties was in

Husband says no, last jhr was hawaii.

**Held:** Court says forget it, husband never acquired necessary ties to hawaii. they wanted to, but never did. they had to short stays, one with friends.

wife found work but husband never did. dr. went to school there. wife might have acquired residence, but husband never did, so no jhr in hawaii.

# Jurisdiction in Personam

1. **Jurisdiction Simpliciter [a.k.a. Territorial Competence]**

**Gen. Rule:** To establish JS in BC, you only need to bring yourself within section 3 or 10 of the CJPTA. Look there and find a circumstance that fits your case. If you can't find one, argued the residuary clause in 3(e) that other grounds exist upon which a R&SC can be established [see attached]

The constitutional standard was set by Morguard, which required at the very least that [the action] have A real R&SC with the forum. The constitutional standard does not require uniform provincial jurisdictional rules [Van Breda]. Morguard required only a MINIMAL CONNECTION [if you extrapolate the reasoning of Spar Aerospace]. In Ontario, the Muscott case took a MAXIMALIST APPROACH, setting the standard higher which it was entitled to do [not followed in BC]. Muscott set out eight factors to be considered in assessing JS. The difficulty is that those eight factors overlap significantly with the factors to be considered at this stage of discretion [– a difficulty picked up on by the NBCA in Coutu, where it was said that Muscott created too much uncertainty. So, there, the court only applied the first Muscott criteria at the JS stage – whether there was a factual connection between the cause of action and the forum]. In Stanway, the BCCA put Muscott to rest in BC, saying that approach had been eclipsed by the factors in CJPTA, s. 10 which create a rebuttable presumption of JS. Stanway it also clarified that post-Morguard the req8s of "order and fairness" were subsumed into R&SC.

* Van Breda – R&SC test does not host the traditional bases of jurisdiction (presence + submission per Maharanee of Baroda), but mere physical or technical presence alone does not satisfy the test

**How do you establish jurisdiction simpliciter?**

**General Rule:** If you want to litigate in a particular form, make sure you get all the material facts, including points of jurisdiction, into pleadings and documents, or else be prepared to supplement them with affidavit evidence in order to convince the court there is a fair Q to be tried on the merits.

1. JS not really decided on the sufficiency of pleadings alone –AG Armenio Mines
2. There's an exception if the foreign defendant puts material before the court that establishes the plaintiff's claim is tenuous, meaning the evidence contradicts material facts pleaded by the plaintiff – Furlan v. Shall Oil
3. You cannot use statements of counsel to supplement pleadings and the notice it of civil claim – MTU Maintenance

Armenio Mines 255 – Allegation by Armeno (BC) again Newmont (Delaware) re inducing breach of K in relation to Indonesian mine. Both put affidavit evidence before the chambers judge, who determines Armeno made out its case for JS but did not establish a good arguable case

MTU Maintenance 260 – It's important that the domestic court only to jurisdiction on the basis of the court record, not statements made by counsel during the course of proceedings because if the plaintiff is ultimately going to seek recognition and enforcement elsewhere, they're going to look at the basis on which the forum exerted jurisdiction and it should be apparent on the record.

1. **FNC Discretion: Stays and Anti-Suit Injunctions**

**The three issues are:**

1. The formulation of discretionary principles
2. The relevant factors to be considered in exercising discretion
3. Who bears the burden of proof, and what is the quantum of proof

**Rule:** BC Supreme Court Civil Rule 21-8 & CJPTA, s11(1) give jurisdiction to stay proceedings, the CL and CJPTA, s11(2 set of the factors to be considered

**The Canadian principles: Amchem**

1. The existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff (agrees with Spiliada)
2. Should consider juridical advantages among all other factors
3. Burden of proof (Edinger says this is bad)– puts it on D all the time, doesn’t explain why (Disposes of Spiliada’s distinction).

\*However, BCCA & others continue to interpret the Rules of Court as putting BOP on plaintiff in service ex juris cases

**Factors to consider in common law jurisdictions: Young v Tyco (wrongful dismissal case concerning whether the K was in Ontario or Indiana)**

1. The location where the contract was signed
2. The applicable law the contract
3. The location of witnesses
4. Location where the bulk of evidence will come from
5. The jurisdiction in which the factual matters arose
6. The residence or place of business of the parties
7. The loss of a legitimate juridical advantage

**Factors to consider in CJPTA Jurisdiction – s11(2) –Teck says this is a complete codification of the discretionary principles of FNC**

1. 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,
2. the law to be applied to issues in the proceeding,
3. the desirability of avoiding multiplicity of legal proceedings, [see Teck below]
4. the desirability of avoiding conflicting decisions in different courts,
5. the enforcement of an eventual judgment, and
6. the fair and efficient working of the Canadian legal system as a whole.

**Amchem rules regarding anti-suit injunctions**

* 1. An application for an anti-suit injunction should not be brought in a Canadian court unless a foreign action has already been commenced
  2. The court must determine which is THE natural form for the action
  3. There should be no application for an anti-suit injunction until the foreign court has been asked to stay its own proceedings.
     + 1. We must determine whether the foreign court made its decision on a reasonable basis. If not, and anti-suit injunction will still only be granted if proceeding with the foreign action would be "unjust"– Doesn't follow oppressive/vexatious standard from Spiliada so don't mention that it
  4. Only then should a domestic court entertain the application, and ONLY IF it is alleged to be THE most appropriate and is potentially AN appropriate forum. [Edinger says no, we should only issue an anti-suit injunction if we are THE most appropriate forum.]

**Teck** – In relation to whether to issue an anti-suit injunction given pending proceedings in Washington, the court rejected the notion that a prior foreign assertion of jurisdiction could be construed as an overriding and determinative factor in the discretionary analysis. Edinger says that's fine, but that's not the argument that was advanced! Council said it should not be construed as determinative, but of overwhelming significance [much softer], based on principles of comity.

* Before Teck BC courts had been moving toward deferring to foreign courts if the foreign court already asserted jurisdiction, considering itself to be the most appropriate forum. This is consistent with what Sopinka said in Amchem regarding anti-suit injunctions. In any event, the court in Teck responded by saying "[notwithstanding that] parties to an extent in particular self-interest in choosing a forum for the action, parties are not entitled to invoke the laws of the jurisdiction with which they have little or no connection in order to avoid the laws of the jurisdiction which is the most appropriate forum for trying to dispute. As such, BC refused to issue an anti-suit injunction in Teck.

**Effect of a Jurisdiction Selecting Clause**

– Not determinative, but given great weight in the court's exercise of discretion whether to stay an action

– Simply one factor to take into account in the discretionary analysis

– Whether they are valid is determined by CoL rules

**Zi-Pompeii** – Said out a slightly different test than that proposed in Teck – the "Strong-Cause Test

"The burden is normally on the defendant to show why a stay should be granted, is the presence of a forum selection clause… Is, in my view, sufficiently important to warrant a different test, one where the starting point is that the party should be held to their bargain, and where the plaintiff has the burden of showing why the state should not be granted. I am not convinced that a unified approach to the FNC, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable.

# Jurisdiction over Class Actions

\*JS and FNC complicated by the # of plaintiffs and the fact that many may be non-residents

**Rule: The common issue in class proceedings may satisfy the R&SC test** – Harrington v Dow Corning 266

**Facts**: Class of P's claiming against breast implant manufacturer in BC. Problem is that non-resident subclass has no connection with BC (i.e.

the court doesn't have jurisdiction simpliciter over them).

**Held**: A R&SC may consist of the common issue in a CP. The test requires something more than then merely a plaintiff's choice to litigate in

the forum – the existence of the certified class action may satisfy this "something more" requirement to give JS to a BC court

**Rule**: **In assessing FNC application in the context of CP, apply the factors from Amchem –** Ward v Canada 388

**Facts**: Spraying of herbicides, soldiers exposed in NB. They sue in Manitoba, which Canada doesn't like for certain reasons.

**Held**: "Canada" is present in all the provinces & presence satisfies JS. The doctrine of FNC is to be applied exceptionally – Canada had not

shown that NB was clearly the more appropriate forum having regard to the factors set out in Amchem

# Recognition and Enforcement: in Personam Judgments

**\*Recall the two exclusionary rules from Dicey [General Considerations above, sub 2]**

1. **Any Canadian judgement (pecuniary non-pecuniary or otherwise) 🡪 ECJDA**

– Takes Morguard to its logical conclusion and incorporates Pro-Swing

– Registration system for Canadian judgment, the effect of which is if registered it can be enforced in BC as if it were a judgment of BC

– Virtually no defenses – blind full faith & credit – 6(3)and (4) eliminates fraud & breach of natural justice in the foreign court

– "Canadian judgment" means [money judgment, a judgment to do/not do act/thing, a judgment that acquires rights, obligations, status

1. **Foreign Pecuniary Judgment from a Reciprocating State 🡪COEA, pt2 (10yr limitation period)**

**–** Essentially just a codification of the CL w/o Morguard expressly included (**Re Carrick**)

– Reciprocating states include: Canadian provs, Australia, Alaska, California, Colorado, Idaho, Oregon, Washington, Austria, Germany, UK

– **Owen Rocketinfo** Limited the act's application. Can't take foreign judgment (Nevada) to reciprocating state (California) and ask what is

really a Nevada judgment to be enforced in BC

1. **Anything else 🡪 Common-Law [Note: Foreign judgments considered actions in debt – 6yr limitation period)**

a) Judgment Must Be Final and Conclusive – **Nouvion**

– Meaning final and conclusive in the court in which it was delivered, such that the existence of the debt/obligation cannot be

thereafter disputed other than by means of appeal. (A.k.a. appeal process in place doesn't vitiate finality, though if in fact under

appeal a court would likely decline to exercise discretion)

– Maintenance/Support orders not final and conclusive

–Default judgments are final and conclusive – can't be modified, only set aside.

b) The Foreign Court Must've Had Jurisdiction in the international sense

i) Presence – **Forbes v Simmons**

ii) Submission (intended or inadvertent, as long as a voluntary) – **First National Bank v Houston, Clinton v Ford**

– No submission for simply contesting validity of a seizure/pre-garnishing order (involuntary); or

– Contesting the jurisdiction of the originating court

– An issue is that if D is asking for in court to decide it's FNC, submissions must inevitably be made re facts of the case

**Mid-Ohio** looked to BCSC Rule 14(8) said look, you can do this w/o submitting Problem is that the rule’s gone now

– So, you can contest JS in the foreign court for sure without submitting, but less clear whether you can argue FNC

c) Real and Substantial Connection

i) **Morguard** said BC must R&E any other Canadian judgment if there is a real and substantial connection between the action and the

originating court (now via the EJCDA though not expressly incorporated]

ii) **Beals v Saldana** extended Morguard to apply to non-Canadian judgments (w/ modifications), but left open the question whether

R&SC test subsumes presence + submission or leaves the 3 options independent of one another

\*R&SC test reqs "a significant connection exist btwn the cause of action in the foreign court… It must be a substantial one"

\*R&SC to the foreign court must be established at least to the level established in Morguard

\*Any unfairness can be resolved by the defenses of natural justice, public policy and fraud

iii) **Braintech** – Court botched the R&SC test by looking at whether foreign court (Texas) had R&SC according to its own rules.

\*Edinger says no, WE will judge whether we the D had a real and substantial connection to Texas

d) Exclusions: Fraud & Breach of Natural Justice and Public policy – **Beals**

i) Fraud going to the jurisdiction of the foreign court can always be raised as a bar to its enforcement. Fraud going to the merits of the

case can only be raised where the allegations are new and not the subject of prior adjudication (New material facts require reasonable

diligence on the part of the defendant)- Distinction between Intrinsic vs Extrinsic fraud abolished.

ii) Breach of natural justice limited to the due process of foreign procedures (i.e. adequate notice, opportunity to defend etc.), Keeping in

mind that parties are expected to know the law of a place where they have a R&SC 🡪doesn't extend to the merits of the case

iii) Public Policy is restricted to impugning foreign laws that offend Canadian standards of morality

1. **Arbitration Awards🡪Foreign Arbitral Awards Act; International Commercial Arbitration Act**

a) Both the statutes require BC courts to recognize and enforce foreign arbitral awards, subject to statutory defenses that require interpretation

b) If the foreign arbitral award is recognized it becomes enforceable in BC under the COEA

c) To be enforceable, the parties must have had a valid agreement to submit themselves to arbitration (which also requires interpretation)

**Screter** – Breach of natural justice & contrary to public policy valid defenses but not here (via Black of written reasons and acceleration it of

royalty payments). Further, D to R&E of Atlantan arb award in Ontario argues it's no longer registrable/enforceable as an arb award bc it was

registered in a Georgian court as a judgment 🡪the award merged into a judgment. Ont. Court says that's ridiculous, registration in a local

court is simply a common mode of enforcement.

**Non-Pecuniary Judgments**:Enforceable if clear and specific – **Pro-Swing**

a) "The non-pecuniary judgment must be rendered by a court of competent restriction and it must be final, and of such nature that the

principle of comity requires the domestic court to enforce".

b) The parties need to know exactly what has to be done to comply with the order.

c) We will not recognize non-pecuniary judgments that extend greater judicial systems than would be available to domestic litigants.

d) They're equitable in nature and require judicial oversight (in contrast to the enforcement monitor judgments) we need to be more cautious

**Class-Action Judgments**: Foreign class-action judgments will be recognized by Canadian courts if – **Currie**

(a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction

(b) the rights of non-resident class members are adequately represented, and

(c) non-resident class members are accorded procedural fairness including adequate proper notice about their options

**Nouvion** – action in BC for recognition and enforcement of a Spanish "remate judgment" refused

**Forbes** – Alta asked to recognize and enforce BC judgment against D nonresident in BC, but served there while visiting his sick wife in the hospital

**First National Bank** – BC asked to enforce Texas judgment where D's lawyer appeared without protest on their behalf. D argued it never instructed its solicitors to submit though. Too bad, objectively you submitted and your submission was voluntary (though inadvertent).

**Clinton** – Action in South Africa against lawyer/defendant. As part of that action 3 of his properties were seized. He entered an appearance by mail, but claimed the appearance was made in voluntary/under duress because this property was being seized. The court said okay, we won't deem you to have submitted in the following two circumstances, but neither applies because you defended the case on its merits.

1. You simply contest the validity of the seizure; or
2. You contest the jurisdiction of the originating court

**Beals** – Ontario couple owns ppty in Florida. Agreed to sell it to developer but indicated wrong lot were developer constructed building. Developer had to tear it down. Sued for cost of lot/lost profits etc. and obtain $4000 judgment. Couple notified of Florida judgment and opportunity to argue to have it set aside. They obtain negligent legal advice saying don't do anything and you're fine (the lawyer wasn't aware of Morguard). Surprise! The SCC says Morguard should be extended to apply to non-Canadian judgments (w/ certain modifications). $4000 ballooned to $800,000. Lol!!

**Braintech** – BC asked to enforce Texas judgment for defamation over the Internet. BC declines, saying under the Morguard test the D had no real and substantial connection to Texas🡪 A distinction should be drawn between "purposeful commercial activity on the Internet" and "mere transitory, passive presence in cyberspace of the defamatory material.

**Pro-Swing** – TM infringement case in Ohio relating to golf clubs. Ohio issues initial judgment that would have been enforceable in Ontario. It fails to comply so I should contempt order (w/ various associated obligations. Majority says the time is ripe to enforce non-pecuniary orders that are sufficiently certain, but this case is not one of them having regard to the Ohio order. In Canada a contempt order is quasi-criminal, and it's well established the Canadian courts will not enforce a penal order, either directly or indirectly (Dicey)

**Currie** – There's an American class-action judgment against McDonald's for the manipulation of "high-value prizes" such that no Canadian could win. It. Currie (an Ontario resident) hasn't opted out of the American class and applies to bring a class-action of his own in Ontario. McDonald's once the Ontario court to recognize the American judgment/settlement. Ontario refuses to recognize the American judgment as binding on Currie and other non-attorning Canadians because the notice given to non-resident class members (Canadians) under the Illinois judgment was inadequate (i.e. two advertisements in Maclean's magazine, Peoples, and TV Guide. McDonald's argument that Curry was res judicata bc he was essentially an alter ego of the representative plaintiff in the American judgment (same law firm represented both) also failed.

# E. In Rem Actions

1. **Recognition and Enforcement of In Rem Actions**

Rule: Our courts will not enforce a foreign equitable order if framed as in rem judgment – **Duke v Andler** [though one could always proceed under the ECJDA or **Pro-Swing** to bypass this – meaning it depends on how the action is framed]

Rule: Canadian courts will not enforce a foreign order where we consider ourselves to have exclusive jurisdiction over the subject matter – i.e. the conveyancing of domestic immovables (per Duke v Andler, p804)

Facts: 2 Cali residents enter into K for the purchase of real estate in Victoria. Vendor refuses to execute. Purchaser obtains Cali declaration that he's the owner. Brings it to BC for enforcement. BC refuses. Cali judgment operates in personom over the parties in that jurisdiction bc it related to a K made there, but SCC rejects the idea that a foreign court could make an order conveying property in Canada – that's our soul jurisdiction.

1. **Jurisdiction [Simpliciter] For In Rem Actions**

**First Step = Characterization**

1. First the forum will use its own law to locate the property. Once it is located as being here or abroad, the characterization of the property "movable" or "immovable" is made according to the law of the situs of the property [Hogg **v Tac Commish**]

- land + interests in land easy 🡪situs

- shares 🡪where share registry is located

**Second Step = Do we have jurisdiction having regard to the characterization?**

**CJPTA**  🡪 BC court always has JS when ppty located within the province

**Dicey: the Conflict of Laws**

A court has no jurisdiction to entertain an action for

1. The determination of title to, or the right to possession of, any immovable situate in foreign territory, or

– Note **Duke of Wellington** case, where they did bc although the immovable was situate abroad [Spain], it was part of an estate

primarily in the jurisdiction [England]

2. The recovery of damages for trespass to an immovable situate in foreign territory [**Mocambique; Hesperides**], but

\**unless* title to the foreign property is not in dispute and the issue is mixed w/ movables/immovables -**Godley**

A court has jurisdiction to entertain an action against a person who is within the geographical jurisdiction of the forum respecting an immovable situate in foreign land, on the ground of either:

1. A contract between the parties to the action reference to the immovable [**Ward** v **Coffin**], or

– [Note: Where the K/equity arises relevant at stage of discretion],

2. An equity between the parties with reference to the immovable [**Godley**]

3. The administration of an estate that has immovable ppty situate in a foreign jurisdiction

BUT

1. The domestic forum will not make a decree that runs contrary to the law of the place where the land is situate [see **Ward**]

\*\*\*"This indefinite jurisdiction [to invoke one of the exceptions] is exceptional, and is (substantially) confined to cases which there is either a contract or something of the nature of the trust" – Dicey

**Hogg v Provincial Tax Commissioner (Sask CA)**

**Issue**: Sask testator held 37 mortgages [interest in land] against ppty in BC. Mortgages movable or immovable? If movable, they devolve under the law of Sask who can apply tax. If immovable, they devolve under the law of BC w/ no Sask tax.

**Held**: No Sask tax – BC law says immovable's = not only land + houses, but also servitudes, easement & other charges such as mortgages.

**Mocambique 788**

**Facts**: P held South African mine and mineral rights. D co broke in, ejected the P and stole his personal ppty.

**Argument**: Was conceded the court had no power make declaration of title abroad, but they were asked to "inquire" into title and if found that P and did not D had title to award damages for trespass

**Held**: No grounds on which to draw this distinction. English court cannot award damages for trespass to land abroad

**Hersperides 792**

**Facts**: P owns a hotel in Cyprus , but leaves bc Turkish invasion. D start marketing holiday tours to P's hotel [trespass]

**Held**: This action cannot be maintained in England

**Held**: There should be no exception to Dicey Rule #2 should not distinguish between cases where title to the foreign property is contested and those where it is not. [latter pt overruled in Godley]

**Alt. Argument**: The land is abroad, but the conspiracy to trespass took place in England [rejected – conspiracy to trespass would require the court to look at title of foreign property]

**Godley v Coles 797**

**Facts**: P and D both reside in Ontario, but owned Florida condos where D toilet leaked, causing ppty damage to movables + immovable.

**Issue**: Whether the introduction of minute or some damage to immovables in foreign territory precludes Ontario action

**Held**: Where title to the foreign ppty is not in dispute and the interest in the immovable is of secondary importance to the thrust of the action, the domestic court has jurisdiction.

**Ratio**: Mocambique rule does not apply to cases where title to foreign lands is not in dispute.

**Ward v Coffin 799**

**Facts**: P and D residents of NB, enter into K for sale of land situated in Québec.

**Held**: Where the court has jurisdiction over the person (i**.**e. presence) it has jurisdiction to entertain an action for specific performance of an agreement of sale of land situated elsewhere

**Issue**: Whether enforcement of the agreement would be contrary to the law of Québec?

**Held**: No evidence that Québec wouldn’t enforce a non-written agreement or an agreement signed by an agent rather than principle

# F. Choice of Law

1. **Renvoi**

When the domestic court is presented with a choice of law rule that points abroad, do we just apply their substantive law or their "whole law", meaning we will look at where the foreign courts choice of law rule would point us?

**Possibility 1:** The forum will simply look the substantive law of the foreign court chosen by the domestic choice of law rule

**Possibility 2:** The forum will look at the choice of law rule of the foreign court and apply the substantive law selected by that rule (which may be their

own or some other 3rd jurisdiction's substantive law – **Partial Renvoi**

**Possibility 3**: The forum will defer totally to the foreign court selected by the domestic choice of law rule and ask how it would solve these facts -**Total R**

a) The foreign court might just apply its own domestic law

b) The foreign court might apply its CoL rule and apply whatever substantive law is selected [its own or some 3rd jurisdiction] – partial renvoi

C) The foreign court might apply the "whole law" of the jurisdiction selected by its CoL rule, which may point back to the foreign jurisdiction

or the domestic court trying the issue, whose CoL rules point back to each other (and it goes in a big circle) – **Total Renvoi**

**\*Be alert for renvoi in:**

**a) Validity of marriages**

**b) Transfers of title to immovable property** (i.e. where the immovable as part of, but not the whole of, an estate. In such circumstances, courts may ignore the rule that they can't determine title to and immovable situate abroad – as in Duke of Wellington case where an English court was decided to apply its law over who should inherit land in Spain owned by the Duke.

**c) Torts (Nielsen)**

**d) \*WESA Expressly Excludes Renvoi [don't apply it here to wills and estates]**

**Neilson –** Basically says that partial renvoi is a bit of a copout bc if are going to apply the full body of law the foreign jurisdiction, including conflict rules, you need to do it all the way along. Otherwise were basically encountering the same problem as applying no renvoi (i.e. not applying the law that would ultimately be applied), but for some reason were going through additional steps to get an equally arbitrary application of the law. They say go with total renvoi – but end up applying partial renvoi!

1. **The Incidental Question**

Arises if there's a main issue that the domestic court says should be solved by foreign law, but the main issue has a subsidiary issue for which our choice of law rule differs from the foreign court. As such, resolution of the main issue will depend on who's choice of law rule we think should apply to the subsidiary issue.

**Schwebel** – Wife formerly married, obtains "get" divorce, Marys new guy. New guy want out. Challenge her capacity to marry bc "get" divorce no-good

Main issue🡪Did the wife have capacity to enter into this second marriage?

Subsidiary Issue 🡪Should the "get" divorce be recognized as valid? Israel says yes, BC says no.

SC C says will recognize the Israeli judgment – doesn't say why but it solves the incidental question.

1. **Marriage**

**Choice of Law Options**

1. lex loci contractus (the law of the place of celebration)
2. lex domicilli a.k.a. dual domicile rule (each pty must be capable of marrying according to the thought of their ante-nuptial domicile)
3. Law of the place of the intended matrimonial home (or Spirit of the IMH, per **Narwal**]

**Distinction between Formal vs Essential validity (introduced in Brook v Brook)**

**Formal** governed by law of the place of celebration

- Notice of banns, witnesses (need & number), registration, civil/religious reqs, parental consent

**Essential** governed by dual domicile OR law of the intended matrimonial home

- Consent, capacity (age, consanguinity, affinity, fraud, marital status), same-sex and polygamy, impotence

**Brooke v Brooke (1891), 924**

**Facts**: 2 British subjects, domiciled in England, went to Denmark to get married to avoid the English statutory rule that a man could not marry the sister of his deceased wife

**Rule**: "if the contract of marriage is such, In essentials, as to be contrary of the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of country in which it was celebrated".

**Held**: Formal validity satisfied bc Denmark law permits these marriages in that the lex oci contractus. Essential validity governed by England, though, bc that's where they're domiciled, and English law disallows these marriages. So HL not prepared to say that the marriage would be valid in Danish courts, though perhaps it would if the parties abandoned their English domicile.

**Canada v Narwal [1990], 927 - FCA**

**Facts**: 2 East-Indians, one a Canadian landed immigrant, married in England contrary to the law of India – he was the brother of her former husband. She comes back to Canada and wants to sponsor him, but is denied by the minister of immigration, who says that marriage is invalid according to India

**Held**: The Minister of Immigration erred in applying the law of India. Canada was the correct law via IMH and it contained no such bar to their marriage.

**Reasoning**: "the fact that the couple had not yet established a home here is not due to any lack of interest or effort on their part but is, rather, due to their inability to convince Canadian authorities of the merit of their application. *I am thus satisfied that the spirit of the intended matrimonial home theory is met*. The marriage is valid according to Canada

**Sanga v Mander [1985], 969 – Demonstrates a judge and Counsel's ability to choose**

**Facts**: Both prtys resident in BC at date of marriage and commencement of proceedings. Wife's ante-nuptial domicile is BC, his was India bc he hadn't acquired a domicile of choice in BC. Wife wants to nullify the marriage b/c husband is impotent thus can't consummate the marriage. Judge canvasses all the possible CoL rules and decides on anti-nuptial domicile of the impotent person [following De Reneville] bc not convinced there was an IMH.

**Held**: Whether we apply the anti- nuptual domicile or IMH, the result is the same because the husband never showed up the prove the law of India. There is a presumption that unproven law is the same as the law of the formum, Inability to consummate a marriage is grounds for nullity in BC so the marriages void

1. **Torts**

**Choice Of Law Options**

**Formerly**, the tort had to be (i) actionable in the forum and (ii) illegal or unjustifiable according to the law of the place where it was done. (**Phillips v Eyre; MacLean v Pettigrew**) – \*overturned on the basis of forum shopping and constitutional concerns in **Tolofson**

* 1. **Conspiracy of silence 🡪The forum applies its own law**
  2. **If CoL raised by either party, the general rule is *lex loc delicti*, with the following possible exceptions**

1. Cases involving "international" torts to avoid injustice [see **Tolofsen** below] – rejected on the facts of ***Somers***
2. Defamation actions

– the applicable governing law in defamation actions should be that of the place of the most substantial harm to the reputation of the plaintiff":

***Banro***, per Lebel

1. Renvoi (***Neilson***) – Don’t like applying the law of LLD? Look at their CoL rule 🡪 it might point to some were more favorable for your client
2. Public Policy
3. Contractual relationship that include a COL clause designed to cover any tort actions arising out of the contract (misrepresentation, etc)
4. Forum shopping – take your action somewhere that doesn't apply LLD

**Tolofson**

**Facts**: "Domestic" conflicts case – not international actors.

**Rule**: The general rule is lex loce delicti. "However, courts retained the discretion to apply their local law in international litigation were necessary to avoid injustice. That discretion is limited, however, and is to be exercised only in compelling and exceptional circumstances… there may be room for exceptions but the circumstances would need to be very carefully defined"

**Somers v Fournier** – Rejects argument for international exception on the facts [not totally]

**Facts**: Accident in New York between plaintiff Ontarion (Somers) and defendant New Yorker (Fournier), who conceded Ontario as proper formum because he wanted to take advantage of Ontario's cap on damages etc.

**Rule**: Lex loci delicti points to New York for substantive law, but forum required to apply its own procedural law. P wants out of New York law.

**Issue**: P unsuccessfully tries to invoke “ international exception" from Tolofsen, saying the application of New York law will work undue hardship via inability to claim no-fault benefits under its statutory scheme and expiry of limitation period to claim from her insurer. Court says no, at the time of the accident she could elect a claim Ontario benefits or New York benefits. She elected, and received, Ontario benefits. She can't now complain of that election. Further, there's no evidence New York benefits were any greater than those she received in Ontario. Further, she says, applying New York law will create difficulty in quantifying her damages because she was in overlapping accidents and had multiple claims going across jurisdictions. Courts is no problem, were used to applying foreign law – that's what we do, were not stupid.

Ontario's Cap on non-pecuniary damages – Procedure (Ontario applies) bc heads of damage substantive; quantification procedural

Costs – Procedure (Ontario applies)

Pre- Judgment Interest – Substantive (New York applies)

1. **Contracts**

**General Rule:** Absent a conspiracy of silence, contracts are governed by "the proper law of the contract", unless the issue in question relates to formation, formalities, capacity, raises concerns of public policy [see ***Amin Rasheed***], or invokes a rule of mandatory application

1. Express intention of the parties –***Vita Foods***

– Connection with the chosen forum is not as a matter of principle essential

1. Implied intention of the parties (only look within the K)–***Richardson Intl***

– Presence of arb clause preferring a jurisdiction highly persuasive, though not determinative

– legal terminology used; form of the documents; currency of payment; use of a particular language; K validity in what jurisd; connection of

this contract with the preceding transaction; nature of the location of the subject matter of the contract ; Residence of the parties; head

office of the Corporation

1. Objective determination of the closest and most real connection (only applied in absence of former two: ***The Star Texas***)

– The place where the contract was made is not determinative in asking what law will apply – ***Colemaneres***

– Head office of an insurance company + totality of circumstances – ***Colemaneres***

– lex loci contractus has lost much of its force in the last 50 years in the commercial context dude electronic means of communication whereby

it is no longer clear where a contract has been concluded – ***Amin Rasheed***

**Areas not following these rules: [see below]**

1. Formation
2. Formalities
3. Illegality: Mandatory rules of applications

**Vita Food Products – Express intention**

**Facts**: New York Co consigned ship to deliver herring from Newfoundland, which showed him damaged after the ship ran aground due to the captain's negligence. The bills of lading absolved the consignee of any negligence, but it was argued they were invalid for failing to incorporate the Hague Rules. The bills of lading contained a clause in favor of English law

**Held:** Yep, the parties selected English law so look there. English law says the Hague Rules do not apply to the contract, so the bills of lading are valid

**Richardson International – Implied intention**

**Facts:** The plaintiff, an American, claimed a maritime lien over a Russian fishing trawler as "a supplier of necessaries" and caused the ship to be arrested in Nanaimo. Pursuant to a series of agreements ("the security package"), the Americans were to supply financing for refitting in exchange for the right to market the fleets catch.

**Issue**: USA law would grant a maritime lien, Canadian law would not – which applies?

\*\*\* Russian law had not been proved, so the law of the formum (Canada) was the alternative

**Held**: American law applies so maritime lien granted

* The parties understood their relationship to be govd by a complex series of interrelated components, and not discrete, stand-alone contracts.
* Most notably, the "marketing contract" contained an arb clause in preference of Seattle w/o contrary intention appearing in the document
* Legal terminology, form of the agreement, currency and payment all favored US law
* Further, there was a pre-existing mortgage agreement in the commercial relationship the preferred Seattle

**Colmenares – closest and most real connection**

**Facts**: Cuban guy, who now lives in the US, applies for life insurance while resident and domiciled in Cuba. Application goes to "the Imperial Life Insurance Company of Canada", head office in Toronto. Problem: under Cuban law it would be illegal to pay him in US so he wants Ontario law applied, saying that the proper law of this contract

**Issue:** Does Cuban law or Ontario law apply

**Held**: Ontario law

* Contract was formed in Ontario via the "Post Rule" – that's where acceptance was mailed
* Considers authority for "the head office of an insurance company" and expresses doubts whether this can be conclusive in and of itself, but totality of circumstances dictate Ontario law applies, including that's where the decision with the "go on the risk" and that the applications and policies were prepared in Toronto, and though written in Spanish, were drawn in the common standard form of Ontario.

**Amin Rasheed v Kuwait Insurance**

**Facts**: Assured was a Liberian shipping company having its head office in Dubai. It suffered a total loss of a vessel and claimed insurance. The insurer brought suit in England and sought to have English law applied.

**Held**: Court says sure, no problem, English law applies because Kuwait has no indigenous law of Marine liability insurance and contracts cannot exist in a legal vacuum – they can only be interpreted by the governing law and here there is no law.

**"**Except by reference to the English statute and to the judicial exigencies of the code that in the next it is not possible to interpret the policy or to determine what those mutual rights and obligations [of the parties] are [because at the time the policy was entered into there was no indigenous law of Marine insurance in Kuwait that the parties could rely on]"

### Exceptions to PLoK – i.e. the law the parties chose

1. **Capacity [No Cases]**

* Depending on the forum, diff classes of persons have no capacity
* Corporate capacity always governed by law of the corps domicile
* Humans capacity governed by objectively ascertained proper law

1. **Formation**

**Mackender**

**Ratio**: If the argument is non est factum at the jurisdiction stage, you just see whether or not there has been a basic agreement btwn the parties

**Issue**: Whether there was a contract at all? D says this should be determined not by Belgian law, but by some “putative objective proper law” [there’s case law for this: ***Parouth***] and that’s England

**Facts**: Lloyds in insures jewelers in Switzerland, Belgium and Italy. Loss occurs in Italy. Agreement contains clause in favor of Belgian law, but Lloyds sues in England, saying the K was void bc the jewelers were smuggling their diamonds into Italy.

**Held:** Belgian law applies.Non-disclosure does not avoid a contract but only makes it voidable. If the insurer walks away, the contract is not avoided from the beginning but only from the moment of avoidance, rendering the clause applicable

1. **Formalities –** Formal validity of K governed EITHER by the law of the place where its made OR by the PLoK

**Greenshields v Johnston**

**Facts:** Parties contracted in Alberta for a personal guarantee, but didn’t comply with the Alberta statute by having the debt acknowledged by a public official. However, the agreement contained a CoL clause for Ontario and no such reqmnt there. Alberta law –invalid; Ontario law – valid

**Held**: Ontario law applies. "A contract is valid if it meets the reqs of either (a) ~~the law of the place where it was made~~ or (b) the proper law of the contract". Proper law was Ontario: that's what they chose and there was a real connection there. It could not be said that that choice of law was inserted for the purpose of evading the Alberta statute. Furthermore, it would not offend the rules of public policy in the circumstances of this case.

1. **Illegality: Mandatory rules of Application**
2. Rules of procedure, always apply the law of the forum
3. Illegality by the law of the place of the contract not relevant by the CL- ***Vita*** ***Foods***
4. Express statutory directive to apply the law of the forum
5. Implied statutory intention to apply the law of the forum – ***Avenue Properties***
6. Material misrep in a K 🡪 Apply law where reliance occurred, not "most substantial connection" – ***Pearson***
7. Illegal, non-incidental performance, of a K in foreign jurisdictions 🡪 our court will not enforce the K – ***Gillespie***

**Avenue Properties** – **Implied statutory intention**

**Facts**: BC plaintiff, in BC, purchases 3 condos in situate in Ontario with a CoL clause in favor of Ontario. Plaintiff wants to back out for vendor's failure to file a prospectus pursuant to the *BC Real Estate Act*.

**Held:** Notwithstanding CoL for Ontario, BC4REA contains an implied law of mandatory application

Court says: it would be contrary to public policy in this court to permit the sale. (Edinger doesn’t like this stmnt.)

* Notwithstanding that s. 62 of the Act is substantive, the TJ erred in failing to consider whether it could form the basis of a "choice of law rule" [A law of mandatory application]. The legislature stated that a person soliciting agreement for the sale of land in British Columbia, whether that land is inside or outside of the province, must comply with the BC statutes prospectus requirements if he wishes the subsequent agreement to be enforceable in this province. If the Act requiring prospectus did not specifically apply to sale the land outside the province, the situation might be different.

**Pearson v Boliden** – **Material misrep in a K 🡪 apply law where reliance occurred, not "most substantial connection"**

**Issue**: Material misrepresentation in a K

**Held**: CoL is for the province where the misrep was relied upon, not lex loci delicti. This avoids uncertainty with the "most substantial connection" rule for CoL in K

**Facts:** Class of P’s entered into K for purchase of securities. Prospectus had material misrep. 8 of the 10 provincial statutes deemed the misrep to be relied on. 2 P's left out said it's a tort, so apply lex loci delecti (i**.**e. the tort occurred in Ontario so let us all the piggyback their legislation).

**Gillespie Management** – **Rules of foreign laws other than the proper law: Law of the place of performance**

**Ratio:** If performance is illegal according to the law of the place of performance, the courts of the domestic forum will not enforce the agreement unless performance in the foreign jurisdiction is merely incidental to the K here

**Facts:** Agreement in BC to provide oversight and collect rents in Washington, but it's illegal to do so in Washington without a license. Part performance was to take place in Washington, but mostly in BC (oversight).

**Held:** Performance in Washington was not merely incidental to the K and it was illegal. We won't enforce it in BC

1. **Unjust Enrichment [very open area for argument]**

Dicey on Conflicts, s. 230:

1. If the obligation arises in connection with a contract 🡪 PLoK applies
2. it K re immovable 🡪lex situs
3. “Other circumstances” 🡪law of the place where the enrichment occurs (**Christopher v Zimmerman**)

**Manera v Aquilina – What happens when there are multiple Dicey options?**

**Facts**: Mining claim re immovable but also a contract. Parties argue for different CoL rules. Immovables are in in Argentina, but P said they have no law of unjust enrichment, in this case concerns obligation arising in a contract in the PLoK is Colorado. D says no, it relates to an immovable, so Argentina law applies via lex situs

**Issue**: Whether Dicey rules are a hierarchy

**Held**: TJ declines all 3 options. CA says ok. SCC says consider a bunch of factors where there's multiple dicey options and find the most substantial connection.

• 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.

1. **Property**
2. Movables: *Inter Vivos* Transfers
3. Succession: Wills and Trusts

**CJPTA, ss. 3 & 10**

**3** A court has territorial competence in a proceeding over a [defendant] ONLY if

(a) he is defendant by way of counterclaim (i.e. he's actually the plaintiff),

(b) the defendant attorns/submits ,

(c) the parties agree the court jurisdiction in the proceeding, [expressly or by CoL clause]

(d) the defendant 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.

**10** Without limiting the right of the plaintiff to prove [a R&SC between BC and the facts of the case on other grounds] , a R&SC is presumed to exist if the proceeding

(a) [relates to] a proprietary or possessory right in property in BC,

(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.