**Characterization (Step 1)**

* What is the cause of action? (tort, contract, unjust enrichment validity of marriage?)
* Decided according to forum rules, concepts, and classification

**Substantive or Procedural** (relevant in choice of law and where forum is applying lex causae rules)

* Always apply forum procedural rules
* Always apply lex causae substantive rules
* If forum and lex causae both have rules dealing with the same issue and both are procedural rules, apply the lex fori.
* If forum and lex causae both have rules dealing with the same issue and both are substantive, apply the lex causae rule.
* If forum rule is procedural and lex causae rule is substantive, apply both. If forum rule is substantive and lex causae rule is procedural, apply neither.
* Typically, these last two aren’t options, so when characterizing, you’re arguing the first two.
* Tolofson: courts classify their own law as procedural for their own convenience.
* Despite this, courts should be biased against classifying lex causae rules as procedural.
* Tolofson: limitation periods are substantive – apply the lex causae.
* When in doubt on a lex causae rule, it’s substantive. Tolofson says you are to have a presumption against declaring both rules procedural. Ought to apply as much of the lex causae as possible.
* Hamsa: the legal status/capacity of a foreign entity is always determined by the rules of its home jurisdiction. Non-natural persons carry their status with them from home.
* Success International: Interprovincial registration for corporations carrying on business in the province is procedural and is required for out-of-province corporations to sue in the province.
* Quantum of damages is procedural (heads of damages are substantive), costs, form of pleadings, service, notice, rules of judicial proceedings, all procedural.

**Exclusionary Rules (choice of law and R&E)**

* BC as forum will not apply a law that is penal, revenue, against forum public policy, or other public law.
* BC will not R&E a judgment based on such a law either.

**Exclusionary Rule: Penal Law**

* Huntington: whether a law is discriminatory or not has no bearing on if it’s penal.
* Huntington: forum decides for itself whether a rule is penal. Penal laws are criminal or quasi criminal. Doesn’t need to be “State vs. X” though that’s a good indicator. It can be someone acting on behalf of the state.
* Can look at whether the lex causae characterizes its own law as penal or not, but that’s not determinative.

**Exclusionary Rule: Revenue**

* Another state’s tax law
* USA and Hardin: doesn’t matter if the judgment was a “settlement.” If it’s a settlement based on a tax law, it’s not R&E’d
* Dubois: indirect revenue claims are also unenforceable. If someone is trying to get an order to sell of property satisfy foreign tax, that’s a no-go.

**Exclusionary Rule: Public Policy**

* Lloyd’s: the law is contrary to our fundamental values and have a level of moral approbrium.
* Lloyd’s nonetheless found a judgment that R&E would force a breach of the Securities Act to breach public policy. Controversial since no moral opprobrium.
* Lloyd’s: public policy can be found where R&E or application of foreign law would force a breach of a statute of mandatory application – statutes with express unilateral choice of law clause saying “this statute applies to all actions in the province” or a statute where that can be implied.
* Kuwait Airways: higher standard than Lloyd’s – the result of applying this foreign law would be wholly alien to our fundamental requirements of justice.
* Won’t work where forum has a similar law

**Exclusionary Rule: “Other Public Law”**

* USA and Ivey: basically concedes this exists.
* Dicey says it’s an assertion of authority of central or local government, Iran v. Bakarat says it’s a law that seeks to enforce governmental interests.
* Equatorial Guinea: a law designed to promote sovereign state interests. Even if it’s framed as a private action, go to the substance and not the form of the claim.

**Domicile**

* Everyone has a domicile at any given time, but only one domicile at a time.
* Domicile of origin: the place your father was domiciled at the moment of your birth.
* Domicile of dependency: until reaching age of majority, you mimick the domicile of your father.
* If you do not acquire a domicile of choice upon age of majority, domicile of dependency goes on
* To abandon a domicile, must leave that place with intention never to return.
* To gain a domicile of choice: physical presence + intention to live there indefinitely. No minimum amount of time, but there must be a moment where both elements are together.
* Indefinitely = not living there for a clearly foreseen/fixed period. Or if it is a clearly foreseen/fixed period, not one that’s reasonably foreseeable (live here until I win lottery).
* Bell: when assessing domicile at a moment in time, it’s not retrospective. Doesn’t matter if you never ended up leaving after the moment being assessed, it’s whether you had the intention never to leave at that moment being assessed.
* Agulian: sheer longevity of residence in a particular jurisdiction is never enough. Also, to acquire a new domicile of choice, you must leave the domicile of origin or prior domicile of choice completely and with no intention to return.
* If you leave a domicile of choice without forming a positive intention to live indefinitely anywhere else, the domicile of origin revives.
* Urquhart: to show a change in domicile, must show a necessary intent to abandon a domicile of choice, an intent to leave and never return as well as an intent to live in new place indefinitely.
* National Trust Company: corporate domicile is the place of incorporation.
* Whether the lex causae considers a person domiciled there is irrelevant: domicile and residence is up to the forum.

**Habitual/ordinary Residence (CJPTA, Family Law Act)**

* Place where you make your home for the time being. You have a home here and live here.
* You’ve resided in a place for an appreciable period of time with a settled purpose
* Settled purpose: can be one or several, specific or general. Does not need to be intention to stay indefinitely, it can be a limited period (business, education), just has to have enough continuity to be seen as settled.
* A person can be habitually resident in more than one place at a time.
* Mark: a person’s being in a place illegally does not prevent domicile or habitual residence.
* S.7 CJPTA: a corporation is ordinarily resident in BC if it’s required by law to have an office here, it has an address here or an agent here for service, it has a place of business here, or it’s central management is exercised here.

**Jurisdiction Procedure**

* Plaintiff can establish jurisdiction simpliciter by fitting the rules. Then if the defendant objects, he can say the rules don’t apply or try to argue that this isn’t the most appropriate forum for the action.

**Establishing Jurisdiction Simpliciter (s.3 of the CJPTA) (service ex juris, etc)**

* To service a foreign defendant ex juris or as of right, must fall within s.3
* BC court has territorial competence if: the foreign defendant submits by bringing an action in BC, by consenting to being sued in BC, or reaching an agreement with the plaintiff that BC has jurisdiction (contract at issue has a jurisdiction selection clause selecting BC)
* Defendant is ordinarily resident in BC at the time of the commencement of the proceeding. A physical presence of an appreciable length of time plus an intent to make their home here.
* Morguard’s real and substantial connection between BC and the facts on which the proceedings against the person are based.
* MTU Maintenance: plaintiff MUST show that it fits s.3 or s.10 in your pleadings (statement of claim and/or accompanying affidavit).

**Finding a Real and Substantial Connection**

* S.10 of CJPTA lists R&S connections, but is not exhaustive.
* (a) deals with rights in movable or immovable property in BC
* (b) deals with administration of deceased person’s immovable property in BC or ANY movable property of the deceased if he was ordinarily resident in BC at death.
* (d) brought against trustee where trust assets are in BC, the trustee is ordinarily resident in BC, the administration is principally carried out in BC, or trust has choice of law clause.
* (e) concerns contractual obligations substantially to be performed in BC, the contract has a choice of law clause.
* (f) restitutionary obligations arose in BC
* (g) concerns a tort committed in BC. This judged according to Moran: if any of the activities of the defendant or the consequences of it affected person in BC. So suffering damage in BC, hospitalization in BC, or long-term consequences in BC are enough. Spar Aerospace also establishes that substantial damage in the province isn’t necessary.
* (h) concerns a business carried on in BC
* (j) determines the capacity or personal status of a person ordinarily resident in BC.
* Van Breda: gives more grounds for R&S connection – domicile/residence of the defendant, carrying on business in the province, tort committed in the province, contract connected with the dispute is made in the province.
* Van Breda: to find an R&S connection, it just has to be a connection between the state and the dispute that is “not weak or hypothetical.” Very low standard

**CJPTA s.6 (last chance to find jurisdiction if no submission, no presence, and no R&S connection)**

* If court lacks territorial competence via s.3, court has residual discretion to hear the proceeding if there is no court outside BC where plaintiff can commence the proceeding.
* also hear it if the commencement of the proceeding outside BC cannot be reasonably required.

**Good, Arguable Case (may come up if defendant objects to service ex juris)**

* you serve ex juris, the defendant can then object and say that you don’t fit s.10, you’re not the most appropriate forum, or you don’t have a good arguable case.
* Armino Mines: plaintiff must have a tryable issue on the facts, a serious question to be tried. Does not have to be more likely than not to win. Just can’t be a tenuous claim (like against a foreign defendant with a complete defence).
* If it’s a tenuous case, plaintiff can try to supplement with affidavit evidence

**Discretion/Forum non Conveniens – Applying for a Stay**

* Usually in discretion, it’s a stay you want, so you, defendant (after Amchem) have the burden of arguing that BC is not the most appropriate forum according Spiliada’s Scottish principle and then identify a more appropriate forum.
* Spiliada: court must identify the forum in which the case can be suitably tried for the ends of the parties and the ends of justice. Ends of parties = what’s good for the plaintiff vs. what’s good for the defendant. Ends of justice = finding most appropriate forum for the action while balancing the ends of the parties.
* Spiliada: basically, upon being served ex juris or as of right, defendant can apply for a stay.

**Anti-Suit Injunctions**

* Aerospaciale: first persuade the court that it is the most appropriate forum for the action, using Spiliada’s principles. Then show that the continuation of the foreign proceedings would be oppressive and vexatious (deprives applicant of advantages it would be unjust for them not to have, some form of serious injustice).
* Airbus Industry: it isn’t enough that the plaintiff you’re trying to get the injunction against is physically present in the jurisdiction of the court – the court must also have jurisdiction over the cause of action to grant an anti-suit injunction.
* Amchem: you can’t file for an anti-suit injunction until after the foreign proceeding has commenced – it’s an injunction against continuation, not commencement.
* Amchem: applicant should first apply to the foreign court for a stay, before turning to us.
* If a stay was declined, the Canadian court will then assess whether it was declined on a reasonable basis. If it was, we won’t grant the injunction.
* Amchem: if the foreign court didn’t grant the stay because they don’t have discretion in t heir procedure, the Canadian court will examine the circumstances and decide whether, if we were the foreign court but applied our concept of discretion, we would’ve granted the stay. If we wouldn’t have done so, then the court was not wrong to refuse the stay and we won’t grant the injunction.
* THE PROCESS: Was a stay refused on reasonable grounds? If no, would it be unjust to allow the foreign proceedings to continue? If yes, grant the injunction.

**Discretion – How to Determine if BC is Most Appropriate**

* CJPTA s.11(1): codificiation of Spilada principle – consider the interests of the parties to a proceeding and the ends of justice – may then decline jurisdiction/grant stay
* S.11(2): MUST consider these factors in deciding whether BC or another court is most appropriate: comparative expense and convenience of the parties and the witnesses of litigating here vs there, law to be applied to the issues, desirability of avoiding multiplicity of proceedings, desirability of avoiding conflicting decisions in multiple courts, the enforcement of the eventual judgment, the fair and efficient working of the Canadian legal system as a whole.
* S.11(2) says “includes” which suggests that while you must consider these six factors, you may consider others.
* Tyco: other factors – where contract was signed, applicable law of the contract, location of witnesses and evidence, where the factual matters arose, residence/place of business of the parties, loss of legitimate juridical advantage
* Tyco: for a defendant to displace the forum, they must show the other forum is CLEARLY more appropriate in light of the factors.
* Teck: parallel actions can happen, you don’t automatically defer if another forum asserted jurisdiction first. You MUST consider s.11.

**Jurisdiction Selection Clauses**

* First step: is there a relevant statute for this situation that has a provision for these clause?
* Pompeii Industries: these clauses are entitled to very great weight/
* Pompeii: first assess if the clause is valid. If a contract is void due to fundamental breach, it still stands. Courts tend to be reluctant to find them void – may even say that there are two contracts, one for the jurisdiction clause, one for everything else, just to keep it valid.
* After finding clause valid, onus shifts to the plaintiff to demonstrate why the clause should NOT be given effect. This is different from the usual onus being on the defendant when arguing for a stay. Reason is because here, in bringing action in BC, plaintiff is breaking agreement.
* Strong cause test: starting point is that parties should be held to their bargain and plaintiff has burden of showing why a stay should not be granted.
* Pompeii says jurisdiction selecting clauses are decided at the discretion stage, but it’s a separate proceeding from FNC.
* Momentous: moves jurisdiction clauses to the jurisdiction stage – when a valid jurisdiction selection clauses is there, the court simply has no jurisdiction. Scholars tend to ignore this case.
* Viraforce: BC – jurisdiction clauses are outside the s.11 factors, a different assessment

**Jurisdiction for Class Actions**

* Typically, defendant will want just a single class action binding everyone else so will oppose jurisdiction of other class actions or say plaintiff is bound by a foreign class action judgment.
* Harrington: out-of-province plaintiffs have jurisdiction to be members of the class as long as there is one representative plaintiff whose action has an R&S connection with BC. For the out or province guys, sharing the common issue with the representative plaintiff is their R&S connection.
* FNC for class actions: based on convenience, law, and juridical advantage.

**Recognition and Enforcement**

* Canadian judgments go with the Enforcement of Canadian Judgments and Decrees Act.
* Non-Canadian judgments go with common law
* Court Order Enforcement Act Part 2 MAY be used for judgments from all provinces and territories but Quebec, Germany, Austria, UK, Australia, Alaska, Washington, California, Oregon, Colorado, or Ohio. Best where judgment doesn’t need R&S connection, otherwise use CL.
* Limitations Act s.7(b): judgment creditor from another jurisdiction has the shorter of BC’s period (10 years enforcement) or the limitation period from the originating jurisdiction.

**Common Law R&E – Non-Canadian Judgments**

* Plaintiff must establish that the order is final and conclusive and that the originating jurisdiction has jurisdiction in the international sense.
* Jurisdiction in the International Sense = presence (dude was served here), submission, or real and substantial connection.
* Forbes: fleeting or transient presence, like in Maharanee, is enough for R&E. Doesn’t count if defendant was tricked into coming into the jurisdiction. Corporate presence = registration in BC, permanent residence in BC, carrying on business in BC.

**Final & Conclusive**

* Nouvion: matter is res judicata – the parties cannot go back to the same court and get the pecuniary amount adjusted (like maintenance and support). Being able to appeal is okay.
* Frequently, can get court to stay the action until the appeal is decided or expired, but plaintiff can still commence the action for R&E, which is enough to get pre-judgment measures like mareva injunctions and garnishing orders.

**Jurisdiction in the International Sense – Submission for R&E**

* Must be voluntary, defendant can argue that it wasn’t. Trying to get stuff back that was seized is not enough to be involuntary. (Clinton)
* Submission is objective determined – its’ not what the defendant intended, but whether he submitted by his actions. Only exception if those actions were done by attorneys without authority to do so. (Houston) He they have the authority to do it, that’s submission.
* If you go to the merits of the case, you’ve submitted (Clinton). But you can protest the jurisdiction of the foreign court or object to pre-judgment seizures and measures.
* Mid-Ohio Imported Cars: you can argue both jurisdiction and FNC without submitting but if you go to merits, you’re done. Technical arguments or other motions beyond FNC or jurisdiction simpliciter can trigger submission.

**Jurisdiction in the International Sense – R&S Connection for R&E**

* Beals: Morguard rule is extended to R&E of non-Canadian judgments.
* Two different connections – for Canadian judgments, it’s the miminal, not weak/hypothetical connection of Van Breda. For foreign judgments, it’s a substantial connection – defendant can be reasonably brought within that jurisdiction’s law or participated or is actively involved in something of significance in that jurisdiction. BCCA has yet to accept this higher standard.
* Braintech: draws a distinction between a business’ having purposeful commercial activity (R&S connection in foreign) and mere transitory presence (no R&S connection)

**R&E of Non-Pecuniary Judgments (Pro Swing)**

* Order must be final and complete.
* Originating jurisdiction must have jurisdiction in the international sense.
* The order must be sufficiently specific, it must have been intended to apply extra-territorially (to a guy in Canada), and it must not be an order that’d be a drain on local judicial resources.
* Contempt orders, civil or criminal, are too close to penal to be R&E’d.

**Defences Against Common Law R&E (Beals) – Fraud**

* Can use all the exclusionary rules.
* Fraud going to jurisdiction of the foreign court – the judgment creditor somehow fooled court into taking jurisdiction. Can always be raised and evidence you’re relying on is not subject to due diligence requirement if it’s fraud going to jurisdiction simpliciter. (Lang)
* Fraud going to the merits: can only raise this where the allegations are new (not the subject or prior adjudication) and the new facts are material and not previously discoverable by due diligence. Not enough to say plaintiff lied and foreign court believed him.
* Alleging fraud in the FNC process before foreign court goes to the merits and has the due diligence requirement (Lang).

**Defences against Common Law R&E – Breach of Natural Justice**

* Burden is on defendant alleging it with heightened scrutiny on non-Canadian judgments (Beals)
* Procedure based: did you get proper notice, did you get your day in court, was there fair process (judicial independence, fair ethical rules). It’s about showing some foreign procedure contrary to Canadian notions of fundamental justice. Like foreign court was biased/corrupt.
* Look at the foreign system generally – if it resembles ours, no breach. Dissent said it’s not the system generally but the wrong in the particular case.

**Defences against R&E – Breach of Public Policy**

* Same traditional rule – is the foreign law contrary to forum’s basic public morality?
* A mere difference in laws or quantum of damages is insufficient.
* These defences are not exhaustive – unusual situations may warrant creating new defence for circumstances not covered by these (Beals)

**R&E of Class Actions**

* Currie: three criteria for recognizing foreign, non-Canadian class action judgments: there must be jurisdiction/R&S connection between the action and the forum (is there a common issue between those plaintiffs and the guy we’re R&Eing it against), non-residents have to be adequately represented there, and the non-residents have to be given procedural fairness – there must have been adequate notice (to opt-in or out).
* Adequacy of notice is that the notice procedure must be such that it’s likely to reach it’s intended recipients (actual individual notice isn’t necessary) and the wording of the notice must take into account the context in which it’s published and the situation of the recipients and not be misleading (Canada Post).
* Is there a common issue with the guy here, then was there adequate notice?

**Canadian Enforcement of Judgments and Decrees Act – R&E for Canadian Judgments**

* Blind full faith and credit: if it’s a Canadian judgment, we don’t have to look for jurisdiction in the international sense. S.6
* Can’t stay or limit because we think the other court lacked jurisdiction/R&S, we can’t refuse because we would’ve come to a different conclusion
* Includes registration of both pecuniary AND non-pecuniary orders
* Does not include penal stuff, maintenance and support, payment of penalties and fines, care/control of minors, or non-pecuniary orders of tribunals.
* S.5: can’t register after the time of enforcement has expired in the originating province or later than 10 years after the date the judgment became enforceable in that province.
* S.6(2): court has discretion to make modifications to the original judgment to bring it into conformity with local practice or stipulate the procedure to be used in enforcing it or can stay or limit enforcement subject to terms or conditions. One such basis for a stay is if it’s on appeal – but can still commence and pursue pre-judgment measures.
* S.6: defences of breach of natural justice or fraud won’t work against Canadian judgments – defects in process or proceeding don’t matter
* S.6(2)(iv): we can stay a Canadian judgment if it’s contrary to public policy of BC.
* S.2: to be R&E’d, Canadian pecuniary judgments must be final.

**Court Order Enforcement Act**

* Instead of bringing an action for R&E, you just bring documents to an ex parte application, disclose fully, and register. Don’t need to notify judgment debtor in advance.
* Creditor than has 30 days to notify judgment debtor tha tyou’ve registered the judgment. Defendant than has 30 days to object. These time limits are strict, no extensions (Central Guarantee Trust).
* Defendant can object by saying originating court lacked jurisdiction in the international sense or can raise the common law defences.
* For jurisdiction in the international sense, R&S connection does not matter. It is just presence or submission. So if defendant objects to originating court’s jurisdiction, cannot point to R&S.
* Carack Estate: transient presence may be sufficient to establish jurisdiction in intn’l sense at common law, but the COEA requires more than that. Also, applying to have judgment set aside is not enough for submission.
* Rocket Info: no chaining – you can only seek to register the original judgment, not a conversion.

**R&E of Arbitral Awards (Foreign Arbitration Act)**

* Shreter: even if you registered the arbitral award as a judgment in originating jurisdiction, you can still seek to have it filed here as an arbitral award.
* Unique defences: incapacity of the party, no proper notice or ability to present case (codification of natural justice), award deals with something not covered in arbitration clause, the arbitration procedure or composition of tribunal was not according to laws or the agreement, award hasn’t become binding, subject-matter isn’t capable of settlement by arbitration, or R&E of the award would be contrary to forum public policy.

**Classifying Property (Hogg)**

* In succession, law governing movables is domicile of deceased at date of death, immovable is location of the property.
* First: where is the property physically located?
* Second: the forum classifies the property according to the rules of that jurisdiction where the property is located. Bring in expert witnesses from that jurisdiction to say how their law would classify it.
* Intangible interests in land (ie mortgages) are located where the land is.
* Intangible property that isn’t related to land is either where the shareholder lived, location of the share transfer office, location of the business, or where shareholder certificate was issued.
* S.10 of CJPTA: BC courts ALWAYS have jurisdiction if the property, movable or immovable, is located in BC.

**Mocambique Rule: Jurisdiction over Immovable Property outside BC**

* Mocambique rule: BC court will have no jurisdiction over actions concerning title to foreign land or trespass to foreign land.
* Hesperides: same cannot be said for movables in foreign land.
* Lucasfilm: this doesn’t apply to other property areas (IP – can sue for foreign copyright).
* Godley: if the action is for damages to BOTH movables and immovable outside BC, that’s okay as long as the damages to the immovable is only “some” of the damage (20%? 30%? Unknown, best to keep it minimal).
* Dicey exceptions: can take jurisdiction if the issue concerns foreign immovable but is framed as a contract action or a claim in equity (like breach of confidence). Like a breach of a contract of A’s agreement to sell French land to B. (Ward – subject matter is foreign immovable but done in the context of a contract action)
* Other exception is that BC can take jurisdiction if it’s a question regarding administraiotn of estate or trust and property consists of movables or immovable both inside BC and outside BC (Duke of Wellington)
* Duke: modification of the contract exception – for R&E, foreign judgments based on contracts with a subject matter of BC immovable property will not be recognized if the judgment is an equitable order instead of just damages.

**Partial Renvoi**

* Choice of law rule points to the law of another jurisdiction.
* If we don’t get the result we want under their law, we can look to their choice of law rule to see if it points to another jurisdiction. It’s especially easy to do this in context of validity of wills or marriages, where public policy wants to find these valid.
* Transmission: BC choice of law rule looks to France, France’s choice of law rule looks to Austria, BC applies Austria’s law.
* Remission: BC choice of law rule looks to France, France’s choice of law rule looks to BC, BC applies its own law.
* Basically, use partial renvoi where you get the “wrong result” after using lex causae law.

**Total Renvoi**

* Tescan: forum characterizes the issue and uses a choice of law rule to select a lex causae.
* Forum, BC, then does whatever the lex causae would do, bringing in expert’s from there to tell the BC court how the lex causae, the foreign court, would resolve these facts.
* Experts may say: “we’d apply our own domestic law” = BC applies lex causae’s law
* Experts may say: “we’d apply our conflicts law” = BC applies the lex causae’s choice of law rule and either gets transmission or remission – partial renvoi.
* Experts may say: “we would see this as a conflicts case and apply our choice of law rule, but we would also use renvoi”= BC would apply the choice of law rule of the jurisdiction selected by the lex causae’s choice of law rule and then apply the law of the jurisdiction selected by this transmitted jurisdiction.
* Experts would say “we would use total renvoi, do what you’d do” = perennial deference, a circle, no resolution.
* No renvoi in contract actions, but can use it in marriages, succession, and immovable property.
* No Canadian case on torts, but Australia (Re Ainsley) says it applies there too. Iran v Berend says you can’t do it for transfers of movable property.

**Incidental Questions**

* Main question is calling for application of a foreign law, a subsidiary/corollary question also raises a conflicts/choice of law issue, and if the forum applies its own choice of law rule to the subsidiary question it will get an answer inconsistent than if it applied the lex causae’s choice of law rule to the subsidiary question.
* With these three conditions fulfilled, there’s a choice with no rule on which rule to apply – forum choice of law rule to sub question or lex causae’s choice of law rule.
* Resolution of the main issue will likely depend on which one applies to sub question.
* Schwebel: frequent example – main issue (capacity to marry), subsidiary issue (recognition of a foreign divorce) where guy wanted declaration his wife couldn’t have married him. If he just asked for a declaration that foreign divorce was invalid, no incidental question.
* The main question has a choice of law rule that’s given us a lex causae, and then issue is whether it’s the lex causae’s choice of law rule or ours that decides the sub question.

**Choice of Law Rule – Validity of Marriage (Brooks)**

* Formal validity is governed by the law of the place of celebration.
* Essential validity is governed by either the dual domicile rule or the law of intended matrimonial home (whichever makes it valid)
* Formal validity = procedural issues – requirements for notice, requirement for witnesses, registration issues, religious/formal ceremony, proxy-marriages, parental consent, validity of online marriages, whether parties are required to be physically present.
* Essential validity = minimum age, consanguinity (are the parties related by blood), affinity (are they siblings-in-law?), single status (are they already married), duress (can it be vitiated by fraud/duress/mistake?)
* Academics have argued that pre-nuptial defects should be dual domicile and post-nuptial should be intended matrimonial home.
* Dual domicile = must be essentially valid by the laws of the domiciles of both parties.
* Narwal: if there is not a matrimonial home yet, it’s the law where the parties intended to make their matrimonial home.
* Sangha: questions of annulment (like for defect of impotence) go to essential validity.
* Getting into a sham marriage where you never intended to live as a married couple does not vitiate consent – you’re married (Varraeke)

**Polygamous Marriages**

* Forum first characterizes whether a marriage is polygamous by looking at what the foreign system where the ceremony occurred permits. If the legal system there permits man to take more than one wife, it’s a polygamous marriage.
* second: if both parties are domiciled in a legal system that permits polygamy, the union is valid if they went through the proper ceremony. MUST be both parties.
* Hyde: even if your polygamous marriage is a valid one, you cannot obtain matrimonial relief from a legal system that doesn’t support polygamous marriages.

**Choice of Law Rule – Torts**

* Choice of law rule = law of the place where the tort occurred, lex loci delecti (Tolofson)
* Exception for “international torts”: where facts warranted creation of exception to the lex loc delecti rule, the court applies the law of the forum. No case where this has been applied. It’s where the facts would qualify it.
* International exception = circumstances where applying the lex loci delecti instead of the law of the place where the tort occurred would result in an “injustice” – unlikely to be found in interprovincial since our laws are similar. You need a very sympathetic plaintiff who will get virtually nothing if you applied the lex loci delecti.
* There may also be exceptions for particular torts that are difficult to locate. Suggested choice of law rule for defamation is the law of the place of most substantial harm to reputation (Banro).

**Choice of Law Rule for Contracts**

* Contracts are governed by the proper law of the contract (Vita Foods) unless it’s an issue of capacity, formation, or formalities.
* Proper law is the law the parties intended to apply. Either express through a choice of law clause, implied, or objectively ascertained.
* Chocie of law clause will apply provided it’s legal, bona fide (neither defined) and not contrary to forum public policy.
* Does not matter if the choice of law clause selects a jurisdiction with no connection to the parties or the facts.

**Choice of Law Rule for Contracts – Finding Proper Law with no Choice of Law Clause**

* Court can say the parties impliedly selected a proper law or the court can try to objectively ascertain a proper law based on circumstances and contract (Richardson)
* Can look at totality of the contractual relationships between the parties, look at all the contracts between them for anything indicative of implied intention on proper Law (Richardson)
* If contract contains arbitration clause pointing to a jurisdiction, that’s implied intention that that’s the proper law (Richardson), same goes for jurisdiction clauses.
* Implying intention = looking within the four walls of the agreement, usually.
* Objective Ascertainment: where was the contract made, where was it prepared, what was the form, where was payment made to, where was the head office (Colmenares), currency. Proper law is determined by considering the contract a as a whole, in light of all the circumstances which surround it, applying the law with the closest and most substantial connection.
* Substance of the obligation is determined by the proper law – system of law that was intended either expressly or impliedly or which transaction had closest/realest connection with.
* If one of the contenders has no law on the particular issue, that’s probably not the proper law (Amin Rasheed). The form, the money of account, where it’s payable, where contract was made

**Formation of Contracts – Choice of Law for Deciding if There IS a Contract**

* Option 1: law of the forum decides if there’s a contract (Mackender)
* Option 2: putative proper law of the contract.
* Option 2 is frequently used where there is no official contract document (Camborian Shoe Machine, Parouth).
* Option 1 is used where there is such a document (Mackender).
* Formation is brought up by parties to kill jurisdiction and choice of law clauses – no contract.

**Formalities of Contracts – Choice of Law Rule for Formal Validity of Contract**

* Rule of alternative reference: either the proper law of the contract or the law of the place where the contract was made. Just have to comply with one system. (Greenshields)

**Illegality**

* Where a party is alleging a contract is illegal because it breaches a law of mandatory application (like consumer protection – “this statute applies to this action/this contract”
* Failure to comply with a statute that’s part of the proper law = illegality
* Failure comply with a statute that’s part of the place of contracting = irrelevant (Vita Foods)
* Failure to comply with a statute that’s part of the law of the forum: can be illegality if that law is procedural, if it’s a law of mandatory application/unilateral choice of law rule, or if the court has already refused to apply a foreign law for being contrary to forum public policy and applies its own to fill the void – can’t breach that one. (Avenue Properties)
* Mandatory application = drafted in such a way to direct courts to apply it to all actions, certain contracts, etc.
* Failure to comply with the law of the place of performance: if we have a similar requirement, we should enforce their requirement (Southin – Gillespie), also where performance in that place is not merely incidental to the contract, we should enforce its statutes – we can find illegality on that (Gillespie)

**Unjust Enrichment – Choice of Law Rule**

* Dicey: it’s the proper law of the obligation.
* Dicey says that proper law of obligation is A) if the obligation arises in connection with a contract, it’s the proper law of the contract.
* B) if the obligation arises in connection with a transaction concering an immovable, it’s the lex situs, the law of the immovable property’s location
* C) if it arises in any other circumstance, it’s the law of the country where the enrichment occurs.
* Dicey does not say how these relates to one another, if they’re alternatives or hierarchical, and does not say what happens when both arise.
* Fourth ground (when A and B were both argued in different directions): it’s the law of the place with the closest and most real connection to the obligation in question (Minera)