1. Introduction

- "foreign" = anything not BC
- must know the whole picture to be able to answer a Conflicts Q in practice: from forum all the way to enforcement

About the area of law:

- "Conflicts" or "Private International Law" governs inter-jurisdictional relationships between private individuals
- Conflicts is traditionally made up of three areas: **(1)** jurisdiction (where to litigate); **(2)** choice of law (what law to apply on the merits), and; **(3)** recognition and enforcement
- it is a body of law which is an EXCEPTION to territorial sovereignty
- this exception has a long history –Greek and Roman civilizations – but what we call Conflicts came into being in the 18th Century; slow to develop in the UK common law because traditionally there was no access to UK courts for foreigners – so, as part of the CL it does not go back to time immemorial
- With growing mobility, technology, and globalization, Conflicts is an area that has grown exponentially post-19th Century and is really required knowledge for current practice
- there are Canadian and international organizations which are trying to harmonize the law of conflicts and create some uniformity (Haig Conference of Private International Law – Canada is a party and has implemented some conventions arising therefrom: keep in mind that private law is generally a Provincial 92(13) matter)
- within Canada – the Uniform Law Conference of Canada: tries to attain both uniformity of domestic substantive law across Provinces AND uniformity of Conflicts rules: this work is ongoing and has some success: some of last years' statutes (which we will look at) are products of this group

Foundational Principles

→ WHY do we make these exceptions to territorial sovereignty? **Comity**

→ **Comity is polite, self-interested respect for other legal systems – in certain circumstances it is just and right to apply a foreign rule of law**; the SCC often invokes this principle (it is not a rule)

- **Two core questions: (1) where is the substantive law most advantageous to your case located AND (2) where do you have the best chance of enforcing a possible judgment?**

2. General Considerations

EXCLUSION OF FOREIGN LAW

→ the exclusionary rule is relevant in all three areas of conflicts (jurisdiction; choice of law; R&E)
- defence to choice of law: can veto application of foreign law to merits on the basis that it is penal, revenue, or public
- defence to recognition of foreign judgment: can veto the ordinary rules of enforcement – point out it is enforcing a foreign penal, revenue or public law
- relevant to jurisdiction – only applying own law, but thinking ahead to the law that will be applied by the court; at jurisdiction parties are arguing which forum should be used

Why do we have the exclusionary rule?
- it is the rule that allows for the conflicts exception to territorial sovereignty
- these rules keep it a private law matter: excludes sovereign interests from the action:
- willing to help citizens of the foreign state in their private law matters, but not to help foreign state's interests
- has to do with the nature of the foreign law and that law's enforcement on state interests (ie does the foreign law operate to enforce a foreign state's interests?)
- blanket exclusionary rules also allows courts to not make value statements on the merits of another state's laws (ie comity)

→ **exclusionary rule**: **the forum will not apply any foreign law or recognize any foreign judgment based on (1) a penal law; (2) a revenue law; (3) any other public law; or (4) a law that is contrary to the public policy of the forum**
- these are alternative options
- this is the original CL rule: it may be modified by SCC in *Morguard*

How do we apply this rule?
- All work the same way: always TWO issues when asking to apply / not apply an exclusionary rule
  (1) definition of the class of law excluded
    - ie was is a penal law?
  (2) classification of the specific foreign law invoked / involved
    - characterization process to match the nature of the foreign law to a defined class

→ **foreign law is a question of fact, not law in conflicts cases**
→ **characterization of laws is a question of mixed fact and law**

- These are things to think about whether jurisdiction, choice of law, or recognition and enforcement cases
- Narrow; but when they work they are absolute
- If it is a choice of law case: the impugned law will not be applied (so need to be prepared to tell the court what to do if you succeed in telling the court that it cannot apply the particular law; if you succeed keep the "presumption" in reserve – failure to plead and prove foreign law to the satisfaction of the court the court presumes the local law will apply – the court can always apply its own law
- Keep in mind that it is always the forum definition, the forum fundamental values which are critical – not what the foreign place says

→ **no Canadian court will enforce a claim that falls into one of the categories – nor a foreign judgment which is based on some foreign penal, revenue, other public law** (which is more common)

Penal laws

***Huntington v. Attrill*, (1893 PC)**

FACTS

- a recognition and enforcement case
- NY law that officers of a corporation who make a false material representation, all officers who signed the same are jointly + severally liable for debts of the corporation contracted while they are officers
- H sues A on this basis in NY; obtained a judgment in NY for pecuniary damages
- A goes home to ON without satisfying the NY judgment
- H brings action in ON HC (H resides in ON) to realize judgment
- A argues the NY judgment was based on foreign penal law and therefore irrecoverable in ON courts
- A wins at trial and first appeal – H wins at PC

ISSUES

(1) ***classification*** What is meant my penal in the forum? Narrow or broad meaning?

(2) ***characterization*** How does the court characterize the foreign law?

HELD / REASONING

- This is not a penal law within the meaning of the exclusionary rule
- While the NY statute could be construed as penal in the wider sense of the word, in action the provision at issue creates an implied term of contracts between corporations and creditors
- in so far as the provisions concern creditors, they are protective and remedial in nature
- They are a civil remedy only to creditors whose rights the officers have calculated to injure, and are not enforceable by the state or public

RATIO

→ "**the courts of no country execute the penal laws of another**"

→ must look to the **particular provision which is said to be applicable to the facts of the case**, we do not characterize the whole foreign statute

(1) CLASSIFICATION ***what is a penal law in the conflicts context?***

→ in the domestic context usually construed broadly (hello federalism!), but **in the conflicts context "penal" is to be given a narrow definition**

→ for **conflicts purposes,** for a law or be penal it must be "**a proceeding, in order to come within the scope of this rule, must be in the nature of a suit in favour of the state whose law has been infringed**"

→ **it is enforcing a state interest – the plaintiff does not have to be the state – must look at the substance of the law and see whether it is protection or regulation of a state interest** (a third party could be invoking a law and in effect be protecting / regulating a state interest)

→ anything criminal will be a penal law, but the particular law does not have to be in the criminal code

(2) CHARACTERIZATION OF THE SPECIFIC LAW INVOLVED ***forum does its own characterization of any law and any matter using its own definitions***

- court always has two options:

(1) ***lex causae* method of characterization**: ask an expert in the foreign law; ask the foreign legal system how it classifies its own law; **this is rejected -** If you used *lex causae* you would have a weird patchwork – because the same law in different systems could be characterized differently in each (same law = criminal, not criminal)

(2) ***lex fori* method**:

→ PC says you can consider *lex causae,* but that is not binding; **it is necessary for the court to decide for itself how to classify the foreign law in issue – *lex fori* is the method to use**

- PC takes the position that what we want is **internal consistency**: We want to treat the same kind of law the same what no matter which legal system created it
- We take account of what the foreign legal system (factor to consider), but we consider it in looking at whether OUR LAW considers the law to be of a particular character

NOTES

→ **Nature of the damages sought – are punitive damages penal for purposes of the exclusionary rule?**

- One BCCA decision where the BCCA says that **extreme punitive damages are not penal**
- This question arose during American anti-trust actions which allowed for triple damages as an inducement for individuals to enforce the anti-trust legislation

Revenue Laws or Judgments Based of Foreign Revenue Laws

- **revenue laws are clearly designed to implement foreign sovereign interests**
- all forms of taxation, any level of government is encompassed
- not really difficult to detect direct enforcement: it is the indirect enforcement which causes difficulties
- same structure as applying the exclusionary rule in the penal law context: **(1)** definition and **(2)** characterization

US v. Harding (SCC case she talked about in class)
FACTS
- Attempt to enforce California judgment against person who did not pay US taxes
- In addition to CA judgment, there is a settlement agreement between the taxpayer and the state
- So US P comes to BC to try to get the judgment or the agreement recognized and enforced here
- SCC says no – we can **look through the judgment to the law on which it was based**, because the judgment AND the settlement was based on a foreign tax law

RATIO
→ **This exclusionary rule applies whether there is an attempt at direct OR indirect enforcement** (direct enforcement = bring original action here; indirect enforcement = via judgment)
→ **For conflicts purposes there is no merger – courts will look through the judgment to see and examine on what law the judgment is based: this is distinct from the domestic rule** (cause of action merges in the judgment so cannot go back to the original cause of action)

Illustrates the difficulty of indirect enforcement
***Stringam v. Dubois* (1992 AB CA)**
FACTS
- A succession case; Dubois dies domicile and resident in Arizona with a will; state tax and apportioned to different parts of the estate; Leaves property to her niece (400K worth); Executor: Valley Bank of Oregon
- There is AB property involved, gets letters of administration issues in AB and wants to sell the AB farm in order to recover a portion of the US estate tax due
- Valley Bank has already paid the tax: the estate administrator wants to get reimbursed
- The niece to whom the farm was left wants the farm and applies for an order that the farm be conveyed to her instead of sold

HELD / REASONING / RATIO
→ niece wins because the AB CA applies *US v. Harding* and says this **is indirect enforcement of a foreign revenue law so it cannot be enforced in Canada**
→ **the fact that it is a bank and not the state is irrelevant**

generally:
- Forum characterization according to our own definition – will take other's into account
- If we decide the non-BC law fits our definition of penal or revenue we will not apply it directly or enforce a judgment based on it

Other Public Law – the Residual category

- **claims and judgments based on sovereign or public rights are also vulnerable to exclusion**
- First judge to recognize and use this was Denning in *NZ v. Ortiz* (cultural property smuggled from NZ and an attempt to sell in UK; could NZ reclaim or should the NZ law requiring the reclamation be excluded; excluded, Denning on the basis of public law exclusion and other judges on other grounds)
- In the 1970's 80's it was argued a few times, but courts avoided resting their decision on exclusion on the basis of the law being an Other Public Law **-** *Ivey* is representative of those cases

United States v. Ivey **(1995 Ont. Gen. Div.)**
FACTS
- Recognition and enforcement case
- US government sought to enforce a US pecuniary judgment requiring a Canadian D to pay for the costs of a clean up of D's hazardous waste pursuant to a statute
- One Defence raised was the exclusionary rule; a shotgun approach: penal, tax, other public law, contrary to public policy of forum, but we will only examine the other public law category (residual category)

HELD / REASONING
- for P; claim enforced
- the statute does not fall into the residual category, but there is important discussion about this category
- this is not a case of a foreign state attempting to assert its sovereignty within the territory of ON: this law was an exercise by the sovereign government of its sovereign authority over property within its territory; D chose to engage in the activity in the US

RATIO
→ **the residual category of other public law is a further alternative category in Canada – it is most likely available in Canada**
→ **laws will not be enforced if they involve an exercise by a government of its sovereign authority over property beyond its territory**
→ public interests; governmental interests – laws that are enforced by a foreign state as an assertion of sovereign power . . . may not always be recognized and enforced by Canadian courts **if they are of a political nature**
- BUT? there is a public element to all statutes and to virtually all suits brought by government - the principle of comity should inform this area of law; comity strongly favours enforcement

NOTES
- ON has a similar statue (so do most Provinces) so cannot say it is contrary to public policy of the forum: very difficult to get a court to hold a law is contrary to public policy of the forum when there is an identical law in the forum!!
- difficult to characterize a claim for reimbursement of costs incurred as a result of the actionable conduct of the D as a tax
- comity particularly important here: environment is not a national problem

→ ***Ivey*** is the best Canadian authority for this category, but there are two UK precedents to consider:

Iran v. Barakat (UK CA 2007) *most relevant*
FACTS
- Iran attempting to reclaim antiquities from Barakat (a gallery) who said it properly bought the antiquities (cultural property reclamation)

Standing?
- did Iran have standing in the UK to maintain an action for conversion (tort) in the UK
- Series of issues: (1) what does the law of the forum require for conversion? (ie what are the elements) (2) what is the nature of the P's interest in the antiquities – is Iran the owner? This is subject to a conflicts analysis

- CA: title depends on the *lex citus* – where the artifacts came from (everyone agrees they were dug up in Iran): Who obtained title at the *lex citus* (the location) depends on the law of Iran because that is where they were when the stuff was dug up
- **Foreign law (Iran) is a question of fact in a UK (or Canadian) Court: so it must be pleaded and proven to the satisfaction of the court**
- **How do you prove what the law is? Don't just bring in the statute or a judicial decision – you have to prove foreign law through experts in the foreign law: practitioners, etc. CL is particular about who are experts in the foreign law – must have had a practice in the foreign place**
- Each party had their own expert and agree on the relevant statutes, but disagree on their meaning with no cases or scholarly works existing to break the tie
- UK court must decide who is right
- UK court decides that Iran was the owner according to the statute, even though Iran, as owner, was never in possession – that is just a finding in this case

Exclusionary rule – residual category

REASONING

- So Iran has standing to bring the conversion action, UNLESS there is an exclusionary rule
- The Iranian statute in question – the relevant provisions which give ownership to Iran are not penal (although parts of the statute are, but that doesn't matter) only concerned with the relevant provision
- Here the Iranian law vests title in the state – it is a personal right, not really sovereign interest (reasonable people and disagree on this obviously – but these are the two choices)
- Contrary to forum public policy: no, lots of countries (including UK and Canada) are signing treaties to return cultural property to the places where they were stolen from); this is consistent and forwarding forum public policy

RATIO

→ **This category does exist in UK law (a definitive yes from UK Court)**;

→ How do you define "another public law"? **The CA says that a "public law" is one that is seeking to enforce governmental interests in contrast to a law that creates personal rights to the sovereign.** Here, the Iranian law operated to vest title in the state; therefore, it is a personal rights provision.

NOTES

- As in *Ivey*, the CA goes on to discuss whether the foreign law is contrary to the forum public policy. This was almost an unnecessary discussion b/c there are laws in England (as in Canada) that provide for returning artifacts to the countries they are from.

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

- Case that falls on the other side of the line – claim was for the benefit of a sovereign state right so not granted standing

FACTS

- Discussed in Barakat
- President survived a failed coup attempt in ENG; lots of people arrested and sent to jail
- President decides to bring a civil action in UK relief sought: some tort claims, and an application for an injunction
- Tort claims seeking damages for conspiracy (to overthrow); assault; and some novel claim – damages sought consisted of the costs incurred by ENG in putting down the coup! Including costs to the economy, etc
- Injunction: asking for an order prohibiting future conspiracies for a coup from taking place in UK

HELD / REASONING / RATIO

- Not allowed to proceed

→ **Not because it was the President bringing the claim, the problem was that the tort claims were being brought to protect and enforce the sovereign public interest of ENG**

→ **No standing because while the claim was framed in private law tort actions, they are designed to promote sovereign state interests**

→ **Look through the form to the substance of the claim**

Contrary to the public policy of the forum

→ the discretion to refuse to apply a foreign law or recognize and enforce a foreign judgment which is repulsive to the forum vests in all common law and civil law courts
→ **this is a narrow exclusionary rule with a strict test: must be a foreign law (non-BC) which the court finds repulsive in some way – a law that is contrary to our fundamental moral and ethical values** (≠ just different, but must offend, repulse the court)
→ **offend "some fundamental principle of justice, some prevalent conception of good morals, a deep-rooted tradition of the forum"**
- in theory strict – but not always the practice: there are many cases where the D throws in this defence and all it is based on is a *difference* between the local and forum law – not repulsive – it is counsel's job to say that that is a misuse of the defence

→ **focus on *content* of the law, not the *result* (in theory)** this defence is supposed to be restricted to the content of the foreign rule not supposed to be a defence because we find the result of the application to be unfair
- however, you can make the argument, it has been accepted before but don't rest your case on it (ie recognize it is a long shot – particularly when you bring it up on the EXAM

→ **public policy evolves** forum public policy is subject to change: what might have been contrary 50 years ago may no longer fly

***Society of Lloyd's v. Meinzer* (2001 ON CA)**
- defence raised unsuccessfully on a UK recognition and enforcement action (on particular facts), but discusses the defence and contains a discussion of most of the leading Canadian CL cases discussing and applying the contrary to public policy defence
- Edigner thinks the ONCA set the bar to low for the threshold re: repugnancy (although the precedents discussed in it are not so low)

FACTS
- Contrary to public policy defence was raised in an attempt to enforce an English judgment.
- This a contracts case.
- The initial issue was whether the case should be heard in England or Ontario, the contracts contained a choice of law/choice of jurisdiction clause that said that the law of England would govern. The Ontario courts decided to stay the action in favour of an action in England.
- There was an English judgment and the Society of Lloyds applied to have the judgment enforced in Ontario.
- The Contracts at issue were in breach of the Ontario Securities Act. Thus, the defence raised was that the English judgments are inconsistent w/forum public policy b/c they are in breach of the Ontario Securities Act.

HELD / REASONING
- the judgments were found to be contrary to forum public policy: one of the few cases where the defence has been successfully
- The Ontario Court said that while the judgments would not ordinarily be enforced b/c contrary to forum public policy, b/c they sent the litigants to England, they were estopped from refusing to enforce the judgment.

RATIO
→ **every legal system has ultimate discretion to exclude the application of foreign law – or refuse to enforce foreign judgments or decisions if the result is offensive to forum public policy**

NOTES
→ *Securities Act* – a law of mandatory application; so to enforce would be enforcing something that breached our law
→ Edigner thinks the bar is too low – really contrary to moral imperatives, foundational values?
→ Could use this case in favour of a lower bar

CHARACTERIZATION: SUBSTANCE AND PROCEDURE

- A very important issue, especially when you are deciding WHERE to litigate – because you want a court with favourable procedural rules to your client
- So you want to think about difference of procedure between places
- The classification of rules as procedural is thus important
- Looking for a place where the LP has expired probably won't do you so good in Canada because of *Tolofson* – but might in the US where
- Think at the very outset when you are thinking about where to sue
- Think about discovery rules: they have very wide discovery rule, and we are narrower – if you want to go fishing, you may want to go to a US state
- Similarly – lots of litigants like to go to Texas where huge damages are available – the quantification of damages – so think about these issues as part of the package
- The procedural rules of the jurisdiction in which the action is brought
- As far as distinction – the cases don' take us to far – substituted by the convenience of the court approach
- Add to checklist – part of every case think about and be prepared to make arguments and lead the judge to the characterization you want for your client
- May be characterizing the type of action; may be defining a concept (penal; domicile); most often we will be characterizing a foreign rule (is it succession? Matrimonial causes? Is this foreign rule the rule that our choice of law rule says we should be applying?)
- Characterization is a process which is not unique to conflicts
- Characterization or classification is what we do all the time (contracts issue? Tort? Criminal?)
- We characterize in constitutional law all the time
- In conflicts it is more important, and a process which one must be conscious of – **characterization is a point to argue**
- In conflicts you must be conscious – because you will miss options! You want to be in a position of knowing what all your options are and choosing the best for your client
- **How do we go about characterization or classification? Three basic options**
  1. ***lex fori*** method: the forum does the characterization (of cause of action, foreign rule, etc is up to us) internal harmony and all that stuff
     - *Huntington – lex fori* for penal law
     - AND KNOW THIS THAT common law courts 99.9% characterize using the *lex fori* method; will consider other place's input, but is not bound and will make its own decision (internal peace and harmony)
     - Assume and argue for the *lex fori* method of characterization
  2. ***lex causae*** ask the foreign system how they characterize (rejected)
  3. ***via media*****:** combination; see what we say, what they say, and combine. Edigner says it does not work

→ **WHY is the KEY in conflicts? Because the forum always applies its own procedural rules and the forum never applies the procedural rule of another jurisdiction**

→ the characterization of a particular rule as a rule of SUBSTANCE or a rule of PROCEDURE will directly effect its applicability

→ in a jurisdiction case: BC procedure + BC substantive law
→ choice of law case: BC court will apply BC procedure + the foreign substantive law selected by our choice of law rule (or BC law if that is what is chosen)

- this rule has a positive and a negative component: because the law is both positive and negative, it is possible to come up with some interesting results if you are not thinking carefully
- the distinction between substance and procedure is very important in conflicts (you MUST think about this in jurisdiction and choice of law cases)
- characterization is something you must think through in advance so you know where you will end up

- **exam note** it is my job as counsel to make arguments and work it out for the court - explain to the court what will happen if it comes up with a particular combination – ie both or none apply problem

- in a conflicts case, when the court uses a choice of law rule and selects the law of another legal system to govern the merit, you always get a combination of forum procedural rules and the substantive law of another jurisdiction – producing what can be an anomalous decision because of the particular combination
- the more rules of the forum are characterised as procedural, the greater effect they will have on the ultimate decision

Characterization

→ current approach – to err in favour of a restrained characterization of forum law
→ the distinction between rules of substance and rules of procedure?
→ That is not easy – nobody *really* knows - Characterization is a functional operation, not an abstractly conceptual one
→ We have a simplistic definition of each – which you can memorize but its doesn't carry too far
→ **Substance relates to the rights and procedure relates to the remedy** – generally, things like rules of Court, rules of evidence are considered to be procedural – and tort, contract law etc are considered to be substantive
→ But there are many gray areas

***Tolofson v. Jensen* (SCC 1994)** 536
FACTS
- BC case involving a plaintiff had suffered injuries while on a family trip in Saskatchewan at the age of 12. Upon reaching the age of majority, he sued his father/ICBC.
- ICBC raised the defence that according to Saskatchewan law, the limitation period had expired
- In BC, the limitation period did not start until the plaintiff reached the age of majority

ISSUE
- Does the BC court apply Saskatchewan law to this tort? Yes because a tort action is governed by the law of the place of the tort
- Is a Statute of Limitation a matter of substance (right) or matter of procedure (remedy)?

REASONING
- If matter of substance = governed by the law of Saskatchewan; claim would have been dead
- If matter of procedure = governed by the law of BC; claim would have gone ahead
- Previous English and Canadian caselaw had held that a Statute of Limitations was procedural, based on the wording of the statute
- SCC overruled previous caselaw to hold that it shouldn't make a difference how the statute of limitations is worded (whether worded in terms of "bringing an action" or "extinguishing a right")
- The function of the rule is to prevent the bringing of "stale" claims
- All limitation periods should be characterized the same way

RATIO
→ **Limitation periods are a matter of substantive law**
→ **ordinary Canadian rule A LIMITATION PERIOD IS SUBSTANTIVE LAW, so the proper limitation period is the limitation period of the law you apply to the merits**
→ They are not tied to the machinery of justice.
→ They prevent the bringing of stale claims for reasons of **policy** (fairness to P/D, efficiency, etc).
- If it is a Saskatchewan tort, then the Saskatchewan limitation period applies.
- It is a tort that occurred in Saskatchewan.
- Therefore, the place of the tort is in Saskatchewan.
- Therefore, the law of Saskatchewan applies [**Tort Choice of Law Rule:** The law of the place of the
- tort is to be applied]
- Therefore, because limitation periods are a matter of substance → Saskatchewan limitation periods apply

NOTES
- very best was to get a forum rule YOU want applied applied is to say it is procedural: argue it relates to remedy, mechanics; OR for convenience of the courts - something that the court shouldn't vary because it is a complicated rule that the court shouldn't have to change
- above two args very important for CAN
- **universal rule:** a forum controls its own procedure
- however, different legal systems may draw the line between substance and procedure at different points
- **the modern approach to characterization is purposive**
- Limitations in procedural rules (ie time for filing pleadings) are matters of procedural

***Harding v. Wealands* (2005 UK HL)** in class
FACTS
- How to classify a New South Wales statue which imposed a cap on damages in a tort action
- Car accident in NSW, both parties UK residents, come home and sue

ISSUE
- Car caps on damages procedural? (if so – will get uncapped UK damages)

HELD / REASONING
- Held to be procedural so will apply UK not NSW

RATIO
- This is not universal or binding, as it was statutory interpretation; however, it is an example of another type of rule that needs to be characterized which will make a big difference in litigation
- **Generally, heads of damages are substantive and computation of damages in procedural**

NOTES
- **What if the rules is that you cannot bring an action unless the party was licensed in the jurisdiction and they were not?** Think about the degree of difficulty in applying (ie easy enough to count years, or to see if someone is licensed)

Parties

***International Association of Science and Technology for Development v. Hamza* (1995 AB CA)** 548
FACTS
- Case arose in Alta; involved a P who was neither incorporated nor a natural person. Thus, the immediate issue is whether the P could properly be a party to an action.
- Under Alta law, a "party" had to be a legal or natural person with a limited exception for other organizations such as unions. The P was not any of those things so under Alta law, it could not be a party.

ISSUE
- Can the P maintain an action in AB?

RATIO
→ **If the law of the jurisdiction where the entity came into existence gives the entity the capacity to sue and be sued, then the foreign entity can sue or be sued.**
→ You look to the law of the "home" jurisdiction – the legal system giving rise to the org and ask whether under the law of that system the entity has the capacity to sue and be sued
→ What are the characteristics of the capacity to sue and be sued?
- "the entity before the court must be capable of assuming fully the rights and liabilities of a legal person. Someone must be answerable for judgments, court directions, costs, etc. The court can satisfy itself this concern will be met if the foreign litigant is proven to be a legal person, separate and apart from its members, under the law of the foreign jurisdiction. If the foreign jurisdiction recognizes an entity, such as a partnership as a legal entity with status to sue, even if it is not for all purposes an entity separate and apart from its members, the above concern can still be satisfied if the law of the foreign jurisdiction is such that the actual legal persons who are responsible and subject to the court's directions and judgments are readily identifiable"

NOTES
- Summary: parties – first forum procedural law look to own law for definitions, if they do not cover the foreign entity in Q, then there is a conflicts rule that says that you look to the home jurisdiction for characteristics laid out in that big quote – look to see whether the entity has those characteristics described

DOMICILE AND RESIDENCE

- Domicile and residence: the relationship (factual and otherwise) between a person (natural or corporate) and a particular legal system
- For a variety of reasons, in conflicts we need to identify relationships between persons and legal systems
- Sometimes for purposes of jurisdiction (ie party must be domicile to bring action); for recognition and enforcement (ie used to only recognize judgments against people who were domiciled in the place where it arose); there are choice of law rules rely on domicile as a connecting factor (ie relevant for marriage and succession)
- Different legal systems use different relationships for different purposes
- The biggest difference is between CL and civil law system: traditionally the CL used domicile for everything and civil law used nationality for everything
- Most of the cases in which some kind of relationship has to be determined are cases involving natural persons (corporations is purely factual)
- What are some possible connections that a natural person can have with a geographically defined legal system
    1. Mere Presence
    2. Residence (three kinds from least to most connection: actual, ordinary, or habitual)
    3. Nationality
    4. Domicile
- all have strengths and weaknesses, and there is no judicial or scholarly consensus as to which one is the best to use
- the new contender for common use in this habitual residence – this is most often used in Conventions arising from the Haig Conference of Private International law, and is touted as the compromise between civil law's nationality and CL's domicile
- Has not been used as a CL alternative, but in Canadian statutes
- So the law is moving, but we are still trying to find an appropriate relationship for the variety of purposes
- We do not need a single concept for all purposes

Domicile

- The dominant concept in the CL and it is relevant for jurisdiction and choice of law
- CL says that every person whether they know it or not has a domicile - Every person has a single domicile at every moment in time
- Domicile comes in THREE varieties
    1. A the moment of your birth you acquire a **domicile of origin** (see below)
    2. Until you reached age of minority **domicile of dependency**
    3. then at age of majority you acquire capacity to select a **domicile of choice**
    - could be the same all the way through
- what is a domicile – what does it consist of?? domicile consists of actual presence in a legal system + the necessary intention
- FACT + STATE OF MIND - BE THERE + INTENTION TO STAY THERE INDEFINITELY (*a positive intention to make a place your home for the time being and the absence of a positive intention to leave in the even of a clearly foreseen and reasonable anticipated contingency*)
    1. **Domicile of origin** depends on where your FATHER was domiciled at the moment of your birth (now BC Infants Act gives choice between Mother or Father)– foundlings domiciled where they were found
    2. **Domicile of dependence** will change depending on where the parent you are living with is doing re place + Intention
    3. **Domicile of Choice** – once hit the age of majority (19) you now acquire domicile of choice (will still be same as domicile of dependence because you have to get to the place – must be presence in the geographical place)
- Three propositions with regard to domicile generally:
    1. **you can only have one domicile at a time – it can change but not overlap** (except in federal state – for all purpose of each unit of law you will have a domicile for operation of that unit's law)

2. **<u>you are never without a domicile</u>**: still true in BC: you can never abandon your domicile of origin; the law fixes it at the moment of birth (important at CL because if you are ever in a situation where you have abandoned one domicile of choice without immediately taking another – you have a gap and your domicile of origin revives); has been subject to criticism and some statutory reform because for example your origin could be in a country that does not even exist anymore – the reform takes the approach that your domicile of origin does not revive – you last domicile of choice continues until you have acquired a new one (BUT – people flee – are refugees – problematic that they should be subject to the legal system of the country that they were not safe in until they acquire a new domicile) – so struggle – at moment in BC we follow CL – so the gap with revived origin is what we do
   - **favourite exam question** – <u>there can be moments in a life where you abandon one but have not acquired the next – so origin revives</u> (*Bell v. Kennedy* case)
3. **acquire a domicile of choice there must be a moment in time where the two factors coincide** (1) actual physical presence <u>AND</u> (2) a freely formed intention to stay there indefinitely
   - UK CL used definition of necessary state of mind which was very permanent and hard to satisfy "intention to end ones days there" – was a very high standard of state of mind to reach
   - This changed in the 20th Century - modern formulation is not so hard to satisfy – **<u>a positive intention to make a place your home for the time being</u> and <u>the absence of a positive intention to leave in the even of a clearly foreseen and reasonable anticipated contingency</u>** (ie you are making your home and you do not foresee leaving – ie no plans to leave on a certain event – like go back to ON after law school)
   - You <u>still need a coincidence of physical presence and intention</u>
   - No minimum length of time of physical presence – the moment you step foot with the intention
   - To abandon a domicile of choice – have to actually <u>leave</u> + <u>have the intention</u> – intention would not be enough

Bell v. Kennedy **(1868 HL)**

- 19thC case - old definition, but illustrates the moment in time and how that state of mind is ascertained, shows relationship between and among the three types of domiciles, and is a choice of law case

FACTS

- Juridical category – succession – intestate succession to moveable property
- The choice of law rule to be used when the fact pattern reveals a conflicts case – <u>intestate succession to moveable property (chattel) is governed by the domicile of the deceased at the time of death</u>
- Mrs. K wanted a share in her deceased Mother's property

ISSUE

- Who's law governs the distribution of Mrs. Bell's estate?
- Choice of law rule – so <u>where was Mrs. Bell domiciled when she died</u> in Scotland in 1838

REASONING

- Mother was married – so had no capacity to have own domicile – she had domicile of dependency – on where her husband was domiciled in 1838; Mr. Bell was alive at litigation time; so to find out where he was domiciled in 1838 court needs to examine his life
- He was born in Jamaica where his Daddy was– so origin was Jamaica
- He was educated in Scotland and is there when he reaches the age of majority
- He decides to go back to Jamaica after reaching the age of majority
- In Jamaica from 1823-1837 – gets married there (to Mrs. Bell) and has three kids (including Mrs. K)
- 1837 tries to abandon Jamaica – leaves with no intention of returning because the government in Jamaica emancipated the slaves
- 1838 whole family physically in Scotland (one condition satisfied), but a the moment Mrs. B died (who's domicile is dependant on him) has he acquired the intention to stay permanently (now we say indefinitely)
- HL listens to what he said about what he thought; they examine all his letters, etc
- "in owing to the bad whether in Scotland and the high price of land he because dissatisfied with Scotland and undecided as to whether to settle there, in England, or in the South of France" – <u>so still hasn't formed the necessary intention to stay indefinitely</u>
- so as of 1838 (moment we need) he did not acquire domicile of choice so Mrs. B has not acquired dependence of choice

- **his domicile of origin steps in and is revived**

HELD

- so the law of Jamaica governs the distribution of Mrs. B's moveable intestate property

Jurisdiction and choice of law

***Gillespie v. Grant* (1992 AB Surr. Ct.)**

FACTS

- an AB case; needs to ascertain domicile at date of death for probate purposes (jurisdiction) and for choice of law purposes
- decides need to be a trial on the issue – so no decision as to domicile
- Edigner says state of mind definition is a bit out dated (ie old permanent one)
- But this is a classic case of a Canadian who moved around a lot (born in ON; comes to AB, acquires business interests an property in BC and on and on)
- To determine if BC or AB is the proper jurisdiction – where domiciled at the date of his death
- An examination of Mr. Grant's life is needed to find out the domicile at death

RATIO

→ **when you examine state of mind of the individual is at a specific point of time**
→ **what did the person intend at the time**
→ **consider all of the evidence – sounds like an objective assessment of the subjective intent of the person at the moment in time**

***Re Uquhart Estate* (1990 ON HC)**

FACTS

- jurisdiction – does ON Wills legislation apply?
- ON applies the act if testator domicile there
- So what Mr. U domiciled there
- He is a real mover – born NZ, in ON, worked in Florida . . . etc
- Retained domicile of choice in ON – or has he replaced it with domicile of choice somewhere else?
- Court talks about necessary intention for abandonment and does not really solve the issue
- Still domicile in ON says court – had not abandoned nor had he acquired a domicile of choice anywhere else

RATIO

→ **intention to leave and never return** – clear state of mind but not that common
→ **absence of a positive intention to return is easier to establish**

NOTES

- so those are two Cnd cases determining place of domicile at a particular moment in time
- demonstrate the evidentiary and factual problems in determining domicile
- especially when the person is a mover
- citizenship is a relevant factor (not determinative)

***National Trust Company Ltd. v. Ebro* (1954 ON HC)**

- CL has developed a simple rule for corporate domicile

→ A **corporation is domicile in the place in which it is incorporated**
→ **If it is continued elsewhere – best opinion that it changes but that is speculation at this point (no case law on this point)**

***Mark v. Mark* (2005 UK HL)** in class

FACTS

- Nigerian polygamous – fourth wife commenced divorce in UK
- Had she acquired domicile at time of commencing because the problem is that at the time she commenced the proceedings she did not have a valid visa – she was liable to be deported
- Could she have nonetheless acquired domicile?

→ **HL says that it is possible to acquire domicile even if you are eligible / liable to be deported**

- This comes up with classes of people who are not legally present somewhere but desperately want to stay – ie refugees

Residence

- Next two cases look at residence
- Residence (three kinds from least to most connection: actual, ordinary, or habitual)
- Really hard to differentiate between habitual and ordinary
- residence is not a connecting factor at CL
- Residence as a connecting relationship is purely statutory; therefore, the first thing you want to do is see if there is an applicable statutory provision. If there isn't, you go to the case law.
- There is a fair bit of case law now dealing w/"habitual residence".
- "Habitual Residence" requires some duration of residence. Unlike domicile which can be acquired the moment you set foot in the jurisdiction where you intend to stay indefinitely, habitual residence requires some duration of time. On the other time, the element of intention is much reduced.

Adderson v. Adderson **(1987 AB CA)** 157
- Matrimonial property statutes
- Habitual residence requires some length of time – arrival is not sufficient
- The element of intention is much reduced

Chan v. Chow **BCCA**
- Haig Convention on Child Abduction which operates in BC
- So where is the habitual residence of the child
- Question of fact – habitual residence establish "appreciable" length of time with a "settled" purpose

Haig v. Canada **(1993 SCC)** 163
FACTS
- Ordinary residence is defined by statute

3. Enforcement of Judgments

PECUNIARY JUDGMENTS: COMMON LAW

→ CJPTA s. 10 gives ct jurisdiction over actions for the recognition and enforcement of foreign judgments (including arbitral awards)
→ Consider how this interacts with recognition and enforcement above (ie only kicks in when must revert to common law process?)

→ **CL puts a burden on the judgment creditor (the P in the BC action) has to prove**
(1) that the foreign judgment was final and conclusive; AND
(2) that the foreign court had jurisdiction in the international sense
- it is possible to establish jurisdiction in the international sense at CL by showing either that
(a) presence the D was present there at the time the action was commenced, or
(b) submission or attornment the D submitted or attorned to the jurisdiction of the foreign court – OR
(**c) a real and substantial connection** we now take *Morguard* to say that the third alternative to establish jurisdiction – real and substantial connection between the action and the jurisdiction

- so establish any one of the three alternatives above, a BC court will say yes, jurisdiction is proved
- (a) and (b) are factual, and not to tricky to establish if you have the facts
- (c) threw a large amount of uncertainty into the strategic planning of the D – the D now has to calculate and speculate about the connections between the action and themselves and the foreign jurisdiction – must make a guess about whether a BC court will decide – after the action is completed – whether there was a real and substantial connection as to give foreign court jurisdiction: practical – more often than not the D has to go and defence, thereby submitting / attorning
- still have the defences (ie exclusionary rules)

- BC CL rules for R&E of foreign judgments
- All CL provinces of Canada (& Aus. NZ etc) will be very similar (if not identical) BUT never assume that the rules of the other jurisdiction are identical – could have been changed
- We are just concerned with the rules in BC for R&E
- BC rules are internally consistent regardless of which system of law the judgment comes from
- We choose which of the foreign judgments with be R&E in BC: not all will be
- What are our rules?
- **(1)** final and conclusive (normally not an issue re pecuniary judgments); never – family law judgments (maintenance and support – in all CL jurisdictions are not final); default judgments – considered traditionally to be final and conclusive for purposes of this rule (but if set aside P must start all over again so new judgment) – judgment from non-CL? Ie civil law? Must do research into foreign law to see if there is hope
- **(2)** the foreign court must have had jurisdiction in the international sense – how *we* define it; what *is the BC definition* – options: (a) presence (service on D in foreign jurisdiction at time of commencement of original action; service on corporate if company carries on business there); (2) submission / attornment (what we will talk about today); (3) real & substantial connection from *Morguard* (again, today or next)

(1) Finality and Conclusiveness

- each of these cases deals with the first condition: the foreign judgment must be final and conclusive

***Nouvion v. Freeman* (1889 HL)** - *leading case on the meaning of "final and conclusive" at common law*
FACTS
- originating court was Spanish, and a UK court is being asked to R&E the Spanish judgment

- HL must decide whether the Spanish judgment is the type of judgment it is willing to R&E

RATIO

→ The judgment must be final and conclusive
→ **Final and conclusive: it must be the kind of judgment which is *res judicata* between the parties**
→ There will always be an examination of the foreign law relating to the foreign judgment: this is not done in the abstract – the P must provide evidence to the court about the way the foreign judgment operates
→ if the D can go back to the court which gave judgment for variation of the order – it is not final and conclusive for purposes of R&E

NOTES

- a default judgment is final for these purposes
- family maintenance and support orders are never final in Canada because you can go back to the same court to have them varied – so that is why we have special legislation for R&E of family orders
- As far as the CL is concerned, a foreign judgment is final and conclusive if there is an appeal pending or if the defendant still has a right to appeal. It is acceptable at CL to commence an action for enforcement/recognition. This is not the case when it comes to the statutory procedures.

***NEC Corp. v. Steintron International Electronics Ltd.* (1985 Ont. HC)** 359

- this ON case is how the law in BC works to

→ even if there is an appeal pending or it is permissible to appeal it is still a final judgment – you can commence an action at CL on that foreign judgment **BUT you may not <u>register</u> per the statutory scheme if there is an appeal or the possibility of appeal**
→ **register a foreign judgment while there is the possibility of appeal BUT you can still commence an action at CL, and once you have a cause of action alive in the province you can seek prejudgment remedies (ie garnishment, Mareva injunction, etc)**

***Litecubes v. Northern Lite Products* (2007 BCSC)** do not have to read

→ Even though stayed – it is still alive, just in abeyance – can have pre-judgment remedy on
→ Traces the history of Rule 54 of the BC rules of court, which now gives the court a discretion to stay the action in BC until the appeal in the foreign jurisdiction has been decided.

(ii) <u>Jurisdiction in the International Sense</u>

(a) Presence

- Pretty straight forward
- Mere physical presence – can be fleeting
- Do not have to be resident or domicile – just present and served

***Forbes v. Simmons* (1914 Alta. SC)** 368

FACTS

- D comes to BC on a fleeting visit to see sick wife; P in BC action serves D with the writ

ISSUE

- Did the BC court have jurisdiction in the international sense – was there presence?

RATIO

→ <u>Mere fleeting presence is sufficient if you can get the D served</u>
→ Statutory protection if they are coming to be a witness
→ Cannot trick them into coming

***Moore v. Mercator Enterprises Ltd.* (1978 NSSC)** 371

- Corporate presence for purposes of the CL rule for R&E
- to have presence, corporation must have a street address and must carry on business in the province (agent here who is a conduit is not sufficient)

(b) Submission / Attornment

- Things get a little less certain, as the court must examine what the D actually did
- What was done must have been done voluntarily – **submission / attornment must be voluntary**
- There are a variety of ways in which a D may be found – *ex post facto* – to have submitted to the jurisdiction of the foreign court

Defend on the merits = submission
***First National Bank of Houston v. Houston E&C Inc.* (1990 BCCA)** 372
FACTS
- Action in Texas; accepted as a fact that counsel appeared for the D in the Texas action; default judgment; application to set aside via attorneys in Texas
- Many defences are raised by BC D's in the BC action to R&E – nerf defence
- [bottom 376 – D we are concerned with] – argued they did not submit because they did not give lawyers express instructions to submit

RATIO
- **test is objective:**
- you do not have to give express, precise instructions to submit – the question is **did you submit and did the lawyer who represented you have your authority to participate**
- leaves open that the lawyers could go off on a frolic without authority – if that were the case there would be no submission
- it was argued that the application to set aside the Texas default judgment could not be found to be submission because that would be *ex post facto* or retrospective, but the issue was not decided
- more recent case have dealt with this under the new statute which state that you cannot - have to participated at the original stage which produced the judgment – not definitively settled, but courts are reluctant to find submission from participating at a later stage to have a judgment set aside

What its aboot
***Clinton v. Ford* (1982 Ont. CA)** 377
- ON, but CL position

FACTS
- similar to *Houston* fact pattern: the D defended the foreign action on the merits
- garden variety contract action arising in South Africa
- both were physically present in South Africa at time of creation of contract; D subsequently moved to ON; P commences a contract action and served the D *ex juris* (ie in ON); at this time, had the D done nothing, the judgment would not have been recognized in ON
- → **what actions did the D take? (this is what must be examined in these cases):** entered appearance by mail, filed affidavit of defence and notice of defence; did nothing to object to the jurisdiction of the SA court – he defence on the merits
- argued: South African law allows the P to seize D's property before judgment (like a *Mareva* injunction); P seizes three pieces of property before judgment; there was some precedent for the position that if you act to project property that cannot be voluntary submission
- so the *quasi in rem* jurisdiction is getting jurisdiction by seizing property – a US thing to

ISSUE
- Raised an issue that had been open until this time
- found to have made a voluntary submission, but the CA says that there is some room for D's participation when their property has been seized by the foreign P – what are the limits?

HELD / REASONING
- because of the in rem stuff) –
- It is a no jurisdiction argument, because the *quasi in rem* jurisdiction is getting jurisdiction by seizing property – a US thing to

- so he could have gone about it by going to SA and arguing that South Africa does not have jurisdiction according to SA law that the seizure was not valid

RATIO

→ **can make an no jurisdiction argument without submitting**

→ **could have challenged the validity of the seizure of the property because the *quasi in rem* doctrine is a way of claiming jurisdiction by seizing property (ie the D left property, must have submitted) as this is about jurisdiction**

NOTES

- **letter to court may be considered submission**
- **submit in advance by putting in a jurisdiction clause in a contract**

***Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* (1995 BCCA)** 381

FACTS

- post *Morguard*, but we won't look at that aspect
- judgment which P wants R&E arose from action in OH, brought by OH residence against BC residence
- contract for D to acquire 7 cars in BC and to deliver and sell them to the OH company
- one car makes it, relations break down, action for breach brought in OH by OH company
- P gets judgment and comes to BC for R&E

ISSUE

- Did the OH have jurisdiction in the international sense?
- Let's work through the options
- Served in OH? No
- Was there a real and substantial connection between the action and the court? No
- BC D submit? . . .

HELD / REASONING

- BC D retained OH attorneys; attorneys argued three categories of things: (a) OH has no jurisdiction (according to OH rules); (b) even if have jurisdiction, OH not *forum conveniens* (not an appropriate forum – may have jurisdiction, but you are not the best place); (c) technical arguments with respect to the claim
- So – did any of these – or a combination – amount to submission
- found to be R&E – submission because of the technical arguments (procedural or on the merits) – went beyond mere jurisdiction
- do not go beyond mere jurisdiction

RATIO

→ BCCA says that at CL all that a D was allowed to do was to go to the foreign court and argue no jurisdiction; that is not submission -<u>if the D went to the foreign court and said you are *forum conveniens* that D is asking the court to exercise discretion – so it thereby concedes jurisdiction</u> The doctrine of *forum conveniens* is discretionary (ie you have jurisdiction, but you should not exercise it)

→ <u>BUT – that is not the law in BC – the CL has been changed here</u>

→ BCSC Rule 14(8) which is no longer there – it used to say that a D in a BC action could appear in BC argue no jurisdiction and *forum conveniens* and not be considered to have submitted

→ Although R.14(8) no longer exists, it has been replaced by 14(6.4)(b) which is essentially the same, so you can argue that this case stands for the proposition that a D can go to a foreign court and argue both lack of jurisdiction and forum (non) conveniens w/o having submitted to the jurisdiction of the foreign court.

→ <u>Still good law in BC for what constitutes submission</u>

→ What every D has to consider if facing an action is, where is his property and what are the rules for recognition and important in the jurisdiction where the D's assets are located b/c it is the rules for recognition and enforcement in the jurisdiction where the judgment is going to be enforced that will matter.

(c) Real & Substantial Connection

A Real and Substantial Connection

- R&SC is ambiguous which we have never firmly established its content
- *Morgaurd* also creates new constitutional principles and changes the CL rule re jurisdiction
- **So now there are constitutional aspects**
- Some Edigner propositions – as per LaForest in *Morguard*
  1. Conflicts rules (and R&E included) are outdated – globalization! living in new world and we need to modernize
  2. The operating concept is comity; enlightened self-interest; must allow individuals in the new global economy to transact beyond state boundaries – really, without comity we wouldn't have conflicts rules a all!
  3. within Canada, we have the federal principle – comity has a federalism counterpart – must be particularly nice to our sister Provinces – we are all the same for the most part, so it is easier to be nice!
  4. Federalism has two operating principles: order & fairness
  5. only have to give full faith and credit to judgments of other provinces – only if jurisdiction properly and appropriately assumed
  6. "properly and appropriately" = real and substantial connection between the action and the province
- for our purposes at this point – the basis for R&E (including non-Cnd) that there must have been a R&SC between the action and the jurisdiction
- **constitutional standards – full faith and credit + real and substantial – so all statutory rules and CL rules have to conform to the standard – so not a rule but a standard**
- in theory, the statutory provisions could be challenged on the grounds that they do not conform with the two constitutional principles set out (minimal chance of success, but theoretical state of affairs)

***Morguard Investments Ltd. v. De Savoye* (1990 SCC)** 35

- Life has never been the same in conflicts or constitutional law

FACTS

- P carrying on business in AB; D living in AB**;** P grants mortgage land located in AB; D first guarantees then assumes mortgage**;** D moves to BC; fails to make payments; foreclosure in AB and a pecuniary judgment in AB for the deficiency
- Before the action was commenced, the D had moved to BC; they were served *ex juris* in BC
- D consulted lawyer: finality not at issue; jurisdiction in the international sense - present? No; so best course of action (good and sound at that point) do nothing and do not go back to AB – D did nothing and ought to have been judgment proof
- P brings R&E action in BC for the pecuniary judgment despite the fact there was no presence or submission
- P had some basis for thinking there would be R&E; a few BCSC judgments which had adopted a theory that there ought to be more reciprocity in terms of R&E
- **Rationale** – if BC would have taken jurisdiction on the facts we should recognize a judgment based on the same facts

HELD

- Jurisdiction because of the real and substantial connection doctrine

REASONING / RATIO

→ **Third alternative for establishing jurisdiction in an international sense within the Canadian federation**
→ **presence and submission are a little outdated, we need <u>another option for Canadian judgments</u>**
→ **a new CL recognition rule only for judgments coming from other Canadian courts – the standard for reciprocity: <u>real and substantial connection</u>**
→ We currently interpret as holding that a R&S connection must be between the Province and the action: so fairly broad – can include cause of action, the parties, geographical things

→ what degree of connection does this mean? What level of proximity is required? Minimal? some? Balance? Close? How close must the proximity be?
→ Logically, less than presence : Edinger's best guess – referring to the kind of connection that every province had in their rules of court or in statute
→ Expressly made the new rule applicable to judgments from other Canadian provinces

NOTES

- Now we have three real alternative options: (1) presence; (2) submission; (3) real and substantial connection
- Satisfy one of those, the foreign court (Canadian or elsewhere) will have jurisdiction in the international sense
- D must now try to guess ahead of time if there was a real and substantial connection, which is very, very difficult to guess, even 18 years on after *Morguard*
- So D must err on the side of caution – if there is any doubt, the D probably has to make some kind of appearance in the foreign court (and then runs the risk of having the judgment recognized because of submission)
- Can go anywhere in the world and start your action – and the D has to make an assessment on what the connection of the action and that jurisdiction are – and will most likely have to defend
- A lot of uncertainty caused by *Morgaurd*

Beals v. Saldhana

→ **SCC held that it was appropriate to continue to apply the real and substantial test to non-Canadian judgments**.
→ Thus, if you can prove presence, submission *or* real and substantial connection, the foreign court will have jurisdiction.
→ The strategic problem for the D who was not present is to decide whether there is a real and substantial connection. If there is any doubt, the D probably has to defend the action. B/c of this very generous Canadian rule, the P can start an action in almost any court in the world and force the D to defend (Edinger likens this to "litigation blackmail").

***Braintech v. Kostiuk* (1991 BCCA)**

FACTS

- default judgment from Texas – action in tort for defamation
- defamation consisted of information posted on third party's bulletin board re tech stocks and investments
- D is BC resident at home in BC posting on the online site
- Braintech was a Nevada company that carried on most of its business in BC
- Brings action in Texas – bigger damages, but for four months in 1996 P had its technical development activities in Texas
- P brings it to BC for R&E – to convert it to a BC judgment – no presence, no submission . . .

ISSUE

- Was there a R&SC between Texas and the action as to establish jurisdiction in the international sense?

HELD / REASONING

- BCCA holds that this publication and the short presence of the P in Texas was too tenuous to be a R&SC
- Refused to R&E the Texas default judgment

RATIO

→ would have to be a very minimal connection to meet the standard
→ This case illustrates how tenuous the connection must be in order to be found to be not "real and substantial"; usually, the connection will be sufficient.

NOTES

- remember - It is perfectly acceptable for the BC courts to consider how other courts have grappled w/this problem (no one really knows how to deal w/such questions in the age of the internet), but it is not acceptable to ask whether the foreign jurisdiction had jurisdiction under its own rules; the only question is whether the foreign court had jurisdiction in the international sense according to our own law.

***Beals v. Saldhana* (2003 SCC)**

FACTS

- action commenced in Florida arising from the purchase of property in Florida by ON residents (confusion about which lot they actually owned)
- ON defendants filed a first defence in Florida, but under Florida law, you have to file a new defence every time the claim is amended, which it was several times.
- D didn't bother filing new defences b/c they thought they were only on the hook for at most 10,000 and they figured it wasn't worth it to get legal advice.
- Finally, in 1990 a default judgment is entered against the Ontario defendants in Florida for more than 200,000 dollars (crazy tripe damages in US law) plus interest.
- The Ontario defendants consult an Ontario lawyers who tells them that they are OK b/c they weren't present and didn't submit (NOTE: this was after *Morguard* so this was bad advice).
- By the time the case reaches the SCC, the amount of damages is 1,000,000.

ISSUE

- Does the real and substantial connection test apply to non-Canadian judgments

HELD

- The Florida Court had jurisdiction in the international sense

REASONING / RATIO

→ **This case extends the R&S connection test to apply to non-Canadian judgments *Morguard* applies to all judgments, not just Canadian judgments**

- The Court leaves open the possibility this test may be adjusted depending on where the judgment came from and the quality / variety of legal systems around the world: so in this case there is a recognition that there might have to be an adjustment to the standard - or scope of defences – when we extend to other jurisdictions which may not have the same quality of legal system as we have
- US jurisdictions (as here) on the whole we can usually trust that they conform to similar standards of independence, impartiality, fundamental justice

→ **Degree of nexus required to meet the R&SC test: "**The "real and substantial connection" test requires that **a significant connection exist between the cause of action and the foreign court**. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. **A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction**. The connection to the foreign jurisdiction must be a substantial one."

→ **R&SC <u>is now the overriding factor in the determination of jurisdiction, the presence of more of the traditional indicia (attornment, presence, etc) will serve to bolster the real and substantial connection between to the action or parties</u>**

- We assumed until this case that you could show either of the three, now R&SC seems to be the requirement, as demonstrated by the traditional indicia - In *Morguard*, the SCC stated specifically that you could establish *either* presence, submission *or* real and substantial connection.
- HOWEVER Edigner says as far as she knows, the courts are still using R&SC as the third option – has not fully displaced the traditional indicia
- There is still a lot of debate about what this case does to the relationship btw real and substantial connection and presence and submission.

→ **Parties remain free to select or accept the jurisdiction by attornment or agreement**

NOTES

- no other jurisdiction in the world applies the "real and substantial" connection test for recognition and enforcement; we are far more generous.

DEFENCES TO ENFORCEMENT: COMMON LAW

1. Fraud;
2. natural justice;
3. exclusionary rules

- *Beals* is the place to start re current SCC version of CL defences
- Fraud and breach of natural justice often come up together (the fraud of the P causes the breach of NJ)
- Ambiguity re defence of fraud in *Beals* para 50ish – Major J. fraud going to jurisdiction v. fraud going to the merit – as opposed to intrinsic / extrinsic – which actually doesn't change much
- Can always raise fraud to jurisdiction – but to raise fraud as to merits, the D must demonstrate due diligence – subsequently discovered, that could not have been discovered at time of trial in other jurisdiction – can't just sit back and allow the trial to happen in foreign jurisdiction and then when comes for R&E cry fraud

Now the case you go to in order to know what the parameters are for the CL defences – fraud, natural justice, exclusionary rules

***Beals v. Saldanha* (2003 SCC)**

Defence of Fraud

- Canadian courts generally give a narrow interpretation to fraud in the conflicts context
- While the traditional Canadian position distinguished between Extrinsic fraud (goes to the jurisdiction of the court- someone on the court has been defrauded into assuming jurisdiction) and Intrinsic fraud (fraud going to the merits of the case) here the courts gets rid of this distinction – NOW:
  - **fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment.**
  - **the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication.**
  - **material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.**
    - **BUT** D must demonstrate that she used **due diligence** – must exercise due diligence in trying to discover the evidence - must be active – if new evidence comes to light after judgment that would have changed the outcome bring to local court and the BC court can choose not to R&E because there was fraud on the court

Defence of Natural Justice

- **Major J. for the majority opts for a general test:**

→ **Q: is the basic legal system consistent with our concept of natural justice?**

- **Binnie J.** says it should be a specific test - **in this case for these parties**
- **Room for argument:** Majority is correct in terms of describing what is entailed, but Edinger thinks Binnie's application is the correct one: so argument for EXAM – choose the one that works

Contrary to forum public policy (the huge award)

- This case reaffirms what was said in the above cases – offensive to forum ideas of morality and justice?
- this was an exorbitant award – would "shock the conscience of the reasonable Canadian" and that kind of award offends our forum public policy? Court says that sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada

NOTES

- What did *Beals* decide – whether there is an absolute right to claim fraud to jurisdiction or if there are limits: courts have decided that there are some limitations even on a D of fraud as to jurisdiction of the foreign court
- If the D in that other place knew about the jurisdictional facts and did nothing – that is probably not going to be a successful defence of fraud here = probably won't even be considered
- D must show an absence of apathy – some due diligence

Cortes v. Yorkton Securities – in class discussion
- Judgment from Ecuador
- Yorkton and its Chilean subsidiary was carrying on business there and had, per Ecuadorian law, appointed a lawyer agent representative there (Cortes)
- Yorkton leaves EQ and lets go of Cortes; Cortes brings action against Yorkton
- Law of EQ requires that companies have a representative at all times, when Cortes brings an action against Cortes, the court appoints another rep for Yorkton
- New lawyer representative sends notification of the action to an office of Yorkton in Ecuador, which the court finds it knows had been closed for two years – so Yorkton gets no actual notice of the action – even though the new representative actually knew Canadian addresses, etc
- Judgment pronounced for Cortes for a ton of money – then Yorkton in Canada is given actual notice of the judgment!
- Defence at R&E - breach of natural justice, didn't even know there was an action against us!
- P argues that D can still go down to Ecuador and apply for nullification – issue – does it? Is it a bar to raising NJ here?
- Conflicting expert evidence – might be allowed to apply and might be able to get is set aside, but no certainty at all

HELD / REASONING / RATIO
→ **Notice & opportunity to be heard are at the foundation of natural justice**
→ Breach of NJ – no R&E
→ If you can still get the foreign judgment nullified if you can show fraud or breach of natural justice but there is no absolute rule
→ in *Cortes* there was **no obligation to have the foreign judgment nullified in that forum in order to claim breach of natural justice as a defence to R&E**
→ In many cases, the defendant tries to raise the defence of breach of natural justice based on the fact that the whole foreign legal system is corrupt. In order to do this, the defendant has to show that
(1) there is real evidence that the foreign legal system is corrupt **and**
(2) that this corruption actually affected the outcome of the case
→ **There is no defence that the foreign court decided the case wrong on the merits; this is not a defence to recognition and enforcement.**

Stanton v. Gulbrandson **(1999 BCSC)** 441 more important than Old North
FACTS
- Utah judgment. P brought an action against D for arrears of child support. P claimed that D was in a position to pay the arrears, but in fact she is well aware that he had been disabled since 1977.
- In other words, P deliberately lied to the court.
- D had many legal options to defend the Utah action, but he didn't take any of them because he didn't have any money.

RATIO
→ **BC court has the option to stay the enforcement of the judgment or modify the judgment so that the D can pay the amount by installments.**
→ **Clearly, the court is modifying the judgment using BC enforcement mechanisms so as to correspond to the facts of the case – this is always an option when it comes to recognizing and enforcing foreign judgments**.
→ Once converted, it becomes a BC judgment – once it is, the judgment creditor can use all of the remedies available
→ One of those remedies in BC for a judgment debtor is a stay or order for payment in installments: this is the tool
→ Court is stuck re R&E, but can control the enforcement process
→ BC court is dealing with the actual facts and modifying the judgment (now BC) according to BC enforcement rules
→ A useful point to remember – **there is judicial discretion to supervise enforcement of BC judgments**

***Currie v. MacDonald's Restaurants* (2005 Ont. CA)** do not have to read – not responsible for it

Note re class actions in Canada - two main models

- Illustrates a growing problem with class actions in Canada because do not all proceed the same
- BC employs what is known as "opt in model"(aka "federal friendly model" – start in BC and then people from other Provinces can opt in: voluntarily be added as P)
- ON has the "opt out" model – court can declare national class, and if you are in BC and you wish not to be – you have to opt out within time in statute
- So to opt out you need knowledge of class action
- statutes provide that once you are a member of the class you are bound by the decision or settlement (ie by opting in or failing to opt out in time)
- so if you did not opt out in time in ON you can't bring another action – you are bound!

FACTS

- Class action is a US (Illinois) against MacDonald's re promotional games and the prizes – consumer fraud and unjust enrichment after firm hired by McDonald's found to have embezzled
- US action extended the class to Canada – and it is an opt out
- Key to opting out is to allow the P's to let them know they are Ps! Who knows who all the McD's customers are!
- Procedure for notification ordered by court – notice in McLean's, three French language papers, and two US publications which circulate in Canada
- Mr. Currie said he did not know about the US action and had not opted out, but he wanted to bring an action in ON

ISSUE

- Will the ON court going to recognize the US judicially approved settlement (like a judgment) in order to block Currie's action in ON
- On what basis could Currie say you shouldn't recognize

HELD / REASONING

- Did not have adequate notice and therefore he could commence an action in Ontario.

RATIO

→ **court <u>builds a couple additional qualifications into the basic rule for R&E for class actions</u>**

- (1) real & substantial; **new!** (2) establish non-residents adequately represented; **new!** (3) non-residents much be accorded procedural fairness, including adequate notice
- (from Allison's notes) In addition to the jurisdiction in the international sense requirement, you have to show (1) that members of the class in other jurisdictions were adequately represented and (2) that they were given adequate notice.

<u>NON-PECUNIARY JUDGMENTS: COMMON LAW</u>

Hunt

- BC asbestos litigation
- QC has a statute prohibiting companies from producing docs anywhere outside of the Province (defensive legislation against aggressive US anti-trust litigation against Canadians)
- SCC decides on constitutional grounds that the statue is inapplicable to litigation anywhere in Canada – inapplicable because it is a pre-emptive strike against order from other Canadian courts – it refuses to give full faith and credit like *Morguard* requires
- *Morguard* principles consitutionalised in relation to non=pecuniary
- **The SCC extends the principle that one province must give full faith and credit to the orders of courts of another province to <u>non-pecuniary orders</u> from other Canadian Courts**

NOTES
- The question then becomes, once you've eliminated the distinction btw pecuniary and non-pecuniary judgment, is there any limit to the recognition and enforcement of foreign judgments. This question was answered in *Pro Swing*.

***Pro Swing Inc. v. Elta Golf Inc.* (2006 SCC)** find online
FACTS
- Pro Swing wanted it's Ohio injunction and contempt order against Elta enforced by the ON courts after Elta continued to sell is "Rident' golf clubs which infringed Pro Swings' "Trident" copyright

HELD / REASONING
- Order was not R&E because found not to be sufficiently precise; however, recognized that such orders may be R&E by Canadian courts if sufficiently precise
- Because equitable orders require judicial supervisions the imprecision rationale is highlighted in this case: such an order requires the Canadian court to supervise, so must be very clear about what it has to do
- Equitable orders – there tends to be more of a requirement of judicial supervision which requires judicial renounces AND going back to the court for directions – it is harder to convert because discretion might be exercised differently in the different jurisdictions

RATIO
→ **ONCA states that after *Morguard* and the invocation of the comity principle, the courts are prepared to recognize foreign injunctions**
- This is also truly foreign – not Canada – so SCC took a giant leap forward by R&E truly foreign non pecuniary order

NOTES
- The full range of equitable orders that will be enforced is not known
- Edinger predicts we will see more cases invoking and defining further the scope of this new rule in the future!
- Also found troubling and prevents form R&E: contempt proceedings are penal in nature and there is a quasi-criminal aspect (ie in Canada you can go to jail)

***Impulsora Turistica de Occidente SA de CV v. Transat Tours Canada Ltd.* (2007 SCC)** do not have to read
FACTS
- QC issued injunctions directed at D's in Mexico

RATIO
- SCC says unequivocal that QC has jurisdiction to issue injunctions purely extra-territorial in effect
- Orders intended to have extra-territorial effect are not unknown
- Equity acts *in personam*

NOTES
- You can get a world-wide *Mareva* injunction

PECUNIARY AND NON-PECUNIARY JUDGMENTS: STATUTES

- We have now looked at CL principles, which, in Canada (when Canadian judgments), do have some constitutional force
- These principles of recognition in relation to judgments from the rest of the world has not consitutionalised
- CL is still in operation, including *Morguard* but what should your actual strategy bee when your client wants a non-BC order R&E in BC (other than make sure judgment debtor has some assets here to execute on)?
  1. **identify the nature of the order**: pecuniary? Non-pecuniary? Family order (special statutory scheme for these)
  2. **identify the originating jurisdiction**
     → **Canadian Order – GO TO *Enforcement of Canadian Orders and Decrees Act* (**full faith and credit, with limited defences)
     → **Other Country that is a reciprocating state** (UK, Germany, AUS, few US); **– GO TO *Reciprocal Enforcement of Foreign Judgments Act***

- If the judgment is not Canadian and not from reciprocal state – you cannot register it, you must bring a CL action for R&E - You always have the CL action as a default position – you might be able to persuade courts that *Morguard* extends to one of those exceptions, OR you can go to specialty legislation that deals with that kind of excepted order
- All CL defences and rules re jurisdiction, etc apply – the full treatment
- Last option (not recommended, but still open theoretically) to start a new action on the original cause of actions (depending on time passed, limitations, costs, etc – then the choice of law and jurisdiction issues we are moving on to will apply)

Reciprocal Enforcement of Foreign Judgments Act

→ created a **streamlined registration process for judgments** from **reciprocating states** (**s. 29**) ("reciprocating state" = provinces except QC, some US jurisdictions, Aus, UK)

→ Not intended, nor does it, change the CL (CL is included in it for the most part – with a few differences, but basically if you can track it)

- What does this statute do?
- Register – desk order; bring docs; we register the judgment; then you serve
- 30 days to object (on the basis of defence) - once limitation period expires, the judgment is converted
- limitation period to convert **29(a) time for enforcement has expired in the reciprocating state** (ie their s. 3 *Limitation Act* 10 years) OR **29(b) 10 years have expired since judgment became enforceable** (reflecting our s. 3 *Limitation Act* 10 years and s. 11(2))

BC *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c. 29

- BC statute, enacted 2003 only proclaimed last May - intended to incorporate *Morguard* (so not much court treatment yet)
- Product of Uniform Law Conference of Canada (can see statute *and* commentary re purpose – will not be controlling of judicial interpretation (because it is the BC legislature's intention that counts), but will be given weight so can use it in argument)
- Does three things (summary):
  (1) introduces "blind full faith and credit": you do not concern yourself with the jurisdiction of the originating Canadian court (beyond *Morguard*);
  (2) goes with *Pro Swing* extends statutory R&E to non pecuniary orders
  (3) eliminates some CL defences (E: says without good justification)

Section 1 Definitions

- "**Canadian judgment**": an order in civil proceeding by Court in any Province, territory (including QC) other than BC
  (a) pecuniary judgment AND administrative tribunal that provides judicial function (site of argument) making a money award that is filed with Superior Court it will be recognized – so extends R&E to tribunal level if (1) pecuniary (2) judicial function (3) filed with SC and become enforceable like a court order
  (b) non-pecuniary: injunctions
  (c) non-pecuniary: declarations regarding rights, status, title, etc
  WE REFUSE to R&E:
  (d) family maintenance and support (own regime);
  (e) fine for committing offence (penal)
  (f) care or control welfare of a minor (probably own legislation)
  (g) administrative orders of tribunal (as distinct from judicial order)
  (h) probate, letters of administration, administration of estates (again, special rules)
  - more or less continues the CL rules, but if you take *Morguard* seriously from a constitutional point of view you could make an argument there should be no exclusion – you must give FF&C to *all* Canadian judgments – *Morguard* created a constitutional principle – (so here is the doing less than *Morguard*)

Section 2 final an conclusive

- 2(1) non-pecuniary judgments can be interlocutory
- 2(2) pecuniary still must be final and conclusive

- 2(3) you can sever orders (ie register some parts and not others of the same order)

Section 3 procedure for registration fee; certified docs; desk order

Section 4 effect of registration same as CL R&E; enforced in BC as an order of BC court

Section 5 limitation period the earlier of the expiration of time for enforcements in originating Province OR 10 years

- **5 (2)** equitable doctrines of delay, laches can be used

Section 6 directions to the receiving (BC) Court - makes R&E of Canadian judgments and orders in BC almost automatic – might gets stays or modifications but basically we will R&E Canadian judgments rather blindly

- **(1)** A party to the proceeding in which a registered judgment was made may apply to the BC court for directions regarding its enforcement (how it is to be enforced
- **(2)** powers of Court on application under (1)
  - **(a)** court *may* make order the judgment be modified as to make it enforceable in uniformity with local practice
  - **(b)** stipulate procedure to be used in enforcement;
  - **(c)** stay or limit the enforcement subject to any terms or condition the court thinks appropriate
    - this changes the COE Act – you can now register the Canadian judgment even if it is under appeal or the it to appeal is open – but it is stayed – you get the advantage of registration and using pre-judgment remedies (if allowed by court)
- **6(2)(c)(iv)** limit enforcement if judgment is contrary to public policy in BC – defence has arisen as a ground upon which to stay the judgment (weaker than CL because it allows for registration and then stay, not outright non-recognition)
- **6(3)(a)** blinders put on BC courts – notwithstanding (2) BCSC must not make an order staying or limiting the enforcement of register Canadian judgment solely on the grounds that the judge / tribunal lacked jurisdiction under private international law or its domestic law – *cannot say no R&SC; or that there was a flaw in forum law and thus originating – even Morguard said jurisdiction had to be properly and appropriately assumed* – so cannot use defence of jurisdiction anymore
  - ULCC was relying on a statutory requirement of assuming jurisdiction that has not been enacted in Provinces across the country – the idea was that we would have a perfect system
- **6(3)(b)** error of law is not a defence (ie cannot say ON court was wrong)
- **6(3)(c)** eliminates CL defences of breach of natural justice and fraud
  - could make argument that it is an abuse of process in BC to try to R&E a judgment obtained on fraud – ie BC's own inherent jurisdiction to control its process
- s. 6 contains a lot of the meat of the statute (READ IT) and it

Section 9 preserves the common law rights even if judgment registered

- preserves the non merger rule
- registering does not effect an enforcing party's right you can bring CL; you can bring action on merits; you can register

Section 10 Transitional clause

- **this statue applies to Canadian judgment in an action commenced AFTER May 2007 AND judgments commenced before that date if the party against whom enforcement is sought took part** (no definition of what "took part" meant – one SKCA judgment *Alsagar*: *ex parte* application in BC results in order; SK siblings not notified or allowed to take part; but do take part in subsequent proceedings but do not appeal that order – have they "taken part" in the BC proceedings? Majority SKCA - "no"; lack of participation cannot be cured by taking part in subsequent proceedings)

A. Briggs, *Crossing the River by Feeling Stones: Rethinking the Law on Foreign Judgments,* (2004) Singapore Yearbook of International Law I do not have to read

- criticism of *Beals*
- says SCC went way over the comity line to political correctness
- cannot blindly R&E from courts without a modification of the defences

4. Jurisdiction *in personam*

forum non conveniens the discretionary power of a common law court to decline jurisidiction

History
- Originally in UK no actions could be brought unless person present and served there – could not issue a writ and serve it on a D who was not present in the UK
- *Common Law Procedure Act* circa 1850 the UK legislature instituted service *ex juris* with Order 11 of the English rules of court listed a whole bunch of circumstances in which the English courts could authorize service *ex juris*; there always had to be a connection btw the action and England.
- BC adopted Order 11 and in the 1970's it became **BCSC Rule 13 which first allowed plaintiffs to apply *ex parte* for an order serve defendants *ex-juris*, and later to serve *ex juris* without getting judicial authorization in the same specified instances as Order 11**
- until 2007 when the subsections were subsumed in legislation – **the BC *Court Jurisdiction and Proceedings Transfer Act*** SBC 2003

→ act replaces all the other rules that used to be in the BCSC Rules – rules for when a BC court should and will take jurisdiction, but it is not really new law

→ Does modify the old rules of court a bit, but essentially is codification of the CL (including *Morguard*)

→ *Morguard* is the critical case for jurisdiction as well as for recognition and enforcement
- *Morguard* created new CL R&E rule for jurisdiction in the international sense where there is a real and substantial connection *provided that jurisdiction there was properly and appropriately assumed* - when is jurisdiction properly and appropriately assumed – where there is a real and substantial connection!!!!
- Still no concrete word on what the threshold is for R&SC

Process
- Assuming jurisdiction has two steps:
  (1) Rules that determine if the court has Jurisdiction Simpliciter
  (2) Discretion (to limit) – even if it has jurisdiction simpliciter, the court can exercise its discretion to stay its own jurisdiction if it thinks there is a more appropriate forum.
    - Civil law systems have explicit rules for determining jurisdiction; there is no discretionary element; thus, there is no equivalent of forum non conveniens
    - EU approach has made jurisdiction and R&E co-relative without discretionary power (this includes UK) – absolute and narrow rules: Once judgment given, every other country in the EU must recognize it

→ We do not know what LaForest was referring to when he referred to "real and substantial connection"; we do not know whether he was talking about jurisdiction simpliciter or jurisdiction modified by discretion.
- Jurisdiction and jurisdiction *similiciter* remained stable until *Morguard*
- Jurisdiction *simpliciter* has been totally confused since *Morguard* because we have no idea what LaForest had in mind re proximity – tight or loose?

NOW

→ CJPTA replaces the CL and applies to all BC courts in all cases and if you want to commence in BC you must be sure your facts fall within one of the section of the act
- The statute is drafted / enacted with the intention of implementing and applying the constitutional standard set out in *Morguard* (and subsequent cases) for jurisdiction properly and appropriately assumed jurisdiction
- Thought – if BC court adheres to the statute, should have properly and appropriately assumed jurisdiction

JURISDICTION SIMPLICITER: A REAL & SUBSTANTIAL CONNECTION

→ **Start with the *Court Jurisdiction and Proceedings Transfer Act* 2006 but be aware of the common law**

Common Law

→ **at common law there are TWO BASIS for the assumption of jurisdiction**:
(1) presence (serve party in jurisdiction = jurisdiction on as of right)
- ***Maharania*** action in UK because of a sale of a picture in Paris which was a fraud – wants to bring the action in UK; both P and D are "world citizens"; D comes for the Royal Ascot and is served with a Writ; UK CA says present = jurisdiction

(2) service *ex juris*
- Order 11 – Rule 13
- service *ex juris* – up until 1976 the procedure for bringing an action against a person not present was to make an *ex parte* application for leave to serve *ex juris*
- what did the P who wanted to serve *ex juris* have to establish:
  (1) that the facts of the case fell within one of the heads of Order 11 (Rule 13(1)) – there are descriptions (legal inquiry);
  (2) had to establish that one the merits the P had a good, arguable case (legal inquiry);
  (3) BC was the most appropriate forum for the action (discretionary)

- this process was followed in BC until 1976, when BCSC Rules amended and abolished the *ex parte* application for leave - you know longer had to get permission you could just follow the proper form and serve
- before 1976 and up to today, <u>there is a procedure in the rules for the D to object</u>: rationale for the amendment was that there no need to hear it twice
- this process remains
- in addition to Rule 13(1); sub (3) is a residual discretion in the court to give leave to serve *ex juris* if the P does not fall into the situations in Rule 13(1) – so can still apply for leave to serve
  - this was a stable process until 1990 – all jurisdiction *similiciter* hell breaks loose with *Morguard*!!
  - **Correlative – we will recognize judgments from within Canada where there is R&SC and will not recognized Canadian judgments if there is no R&SC**
  - Standard against which the assumption of jurisdiction is to be measured – <u>but what is being measured against the constitutional standard – the rules describing the circumstances (which are minimum) or the rules modified against the discretion (which is much broader)</u>
  - What did the SCC think they were doing??? Other, lower courts have interpreted, but there is not statement from the SCC until

Spar Aerospace
FACTS
- on appeal at SCC from QC; a challenge to the provisions in the QC civil code based on *Morguard*; the minimum connection – the circumstances listed in the civil code (ie tort committed in QC) satisfied *Morguard*'s need for R&SC

RATIO
→ This case appeared to mean that, for BC purposes, if the plaintiff could establish that the facts fit in w/one of the circumstances w/in 13(1) of the BCSC rules, there would be a real and substantial connection sufficient to establish jurisdiction simpliciter.
→ BCCA said satisfaction of a circumstance in BCSC Rule 13(1) was necessary but not sufficient (but gets you a long way there) – may have to do more to show R&SC – the "more" that was required by the BCCA was always <u>factual connections</u> (so tort committed in BC and some extra factual connection – ie witnesses here, parties here)
→ several BCSC cases subsequently held that there had to be more – the cases said that there had to be some additional factual connection.
→ Despite these BCCA cases ,which said that satisfaction on of the circumstances laid out in the BCSC R. 13(1) would get you a long way in terms of real and substantial connection but more factual connection might be required, establishing jurisdiction was relatively simple in BC
→ **Fit into one of the Rule 13 categories – goes <u>a long way to establishing the R&SC per *Morguard*, but the court MAY REQUIRE the party to demonstrate further factual connections</u>**

→ In BC is was relatively simple to show that more - jurisdiction *similiciter* was minimal threshold here
→ BUT NOW WE HAVE …..

CJPTA

***Court Jurisdiction and Proceedings Transfer Act* 2006 ("CJPTA")**

Introduction

→ this is where we now start!!! This is step one
→ enacted in BC using model statute from Uniform Law Conference of Canada; passed in 2003 but not proclaimed until May 4th 2006

Section 2: the territorial competence of a court is to be determined solely by this part

→ exclusive it replaces the CL and the 1976 version of Rule 13
- note: Rule 13 has been reenacted – we still have it but it is not the Rule 13 we will see discussed in any case up to 2006

So if a client comes into your office and says they want to start an action in BC

- Get facts; figure out where the D is physically located (corporate? Human? What am I suing and where is it located); if it is a situation in which the D is not located in BC, you go to CJPTA to see if the BC court will have jurisdiction
- There is no BC law re parties: **the only party for whom you cannot commence an action for is an alien enemy** (ie resident country we have declared war on)
- **Common law concept of mere presence is never enough anymore** (ie post-*Morguard*) – cannot serve someone passing through – no more *Maharania* for
- This statute sets out the grounds on which a BC court will be considered to have territorial competence – it is intended to implement the constitutional and other concerns (order & fairness) from *Morguard*

Section 3 – lists 5 different grounds or circumstances in which a BC court will be considered to have territorial competence (remember, this is now the exclusive rule for determining jurisdictional competence)

(a) D has counterclaimed = submission (look at this – what if they are P in another case)
(b) D has submitted to the court's jurisdiction during the course of the proceeding
(c) there is an agreement between P and D to the effect that the court has jurisdiction in the proceedings (reference jurisdiction selection clause in a contract)
(d) D is ordinarily resident in the Province at time of commencement of the proceeding (this clearly satisfies *Morguard* and eclipses the CL standard of mere physical presence) – 3(d) is expanded in ss. 7, 8, 9 for non-natural persons (7 corporation, 8 partnership, 9 unincorporated association)
(e) there is a R&SC between BC and the facts on which the proceeding against the D is based
- naked *Morguard* put directly against the facts which underlie the action – a factual connection

Section 10 defines "real and substantial connection" (this replaces the old Rule 13(1) circumstances)

→ preserves discretion – and the provision sets out non-exhaustive factors
→ **presumption of R&SC in the following circumstances**

(a) Moveable or immovable property that is the subject of the action is in BC.
(b) and (c) Concerned with the administration of estates and wills – moveable or immovable property that used to belong to the deceased is in BC and the deceased was ordinarily resident in BC.
(d) Trusts if:
(i) proprietary relief sough in rotation to property in BC;
(ii) the T is ordinarily resident;
(iii) the administration is principally carried on in BC; OR
(iv) the trust document expressly states the T is governed by the law of BC
(e) Contracts if:
(i) obligations were to be substantially performed in BC
(ii) contract expressly states it is governed by the law of BC, OR
(iii) was for sale of property / services in BC

- NOTE: this replaces the rule in 13(1) which limited the assumption of jurisdiction to cases in which there was a breach of contract in BC

(f) restitutionary obligations that arose in BC
(g) torts committed in BC
(h) concerns a business carried on in BC
(i) Injunction to restrain someone from doing something in BC or in relation to property in BC
(j) Personal status or capacity of a person ordinarily resident in BC
(k) Recognition and enforcement of foreign judgments (including arbitral awards)
- Consider how this interacts with recognition and enforcement above (ie only kicks in when must revert to common law process?)

(l) for the recovery of taxes or other debts owed to the BC government (or local authority in BC)

Section 6 – residual discretion to assume jurisdiction if sub (3) not met if the court considers
(a) no court outside of BC in which P can commence a proceeding OR
(b) commencement of proceeding outside BC cannot reasonably be required
- Edigner says section 6 may be constitutionally fragile

Section 11 – discretion still exists to decline jurisdiction
(1) The court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding
(2) after considering the following:
(a) comparative convenience and expense for the parties (witnesses, etc)
(b) the law to be applied (juridical advantage?)
(c) desirability of avoiding multiplicity of proceedings
(d) desirability of avoiding conflicting decisions in different courts
(e) enforcement of eventual judgment (where are parties and their assets?) AND
(f) fair and efficient working of the Canadian legal system as a whole
- so nice and broad!

→ **Order of issues (1) jurisdiction *simpliciter* ? (2) discretion?** (BC is strict about this)

- **Still look to the discretion** – we have a broad rule re having jurisdiction, but is still must be considered by the court to be an appropriate forum (see the wording in s. 11) – can stay and say go to Texas that is more appropriate
- There is no reason / law that says you cannot start more than one action on the same facts in more than one jurisdiction at a time (many cases re discretion are cases where a P has commenced actions in more than one jurisdiction and the parties fought in both places about where the best place to litigate it)
- Part III deals with Transfers of Proceedings – don't worry about it yet, because only SK has also enacted this statute – you have to find a receiving court will to receive the proceedings in the middle (and right now SK seems to be the only place to go) – hasn't really been used / test run yet and probably won't get high use until it is more widely enacted

→ **What case law is still relevant to understanding CJPTA??**

Locating the Tort for purposes of jurisdiction

- You can locate where the tort was committed for two reasons (1) jurisdiction and/or (2) choice of law
- in Canada in CL provinces, ***Pile National*** supplies the rule for locating a tort for purposes of jurisdiction

Moran v. Pyle National
FACTS
- Products liability – light bulbs manufactured by Pile in ON; No place of business in SK, but sells bulbs there;
- Sold in SK, installed, burns out; while changing defective bulb, buddy is electrocuted and dies!
- Wife wants to bring an action in SK where she lives but needs to serve the company in ON

- SK statute said cannot bring action for tort occurring outside Province without leave of the court
- Everyone just assumed the tort took place in ON

ISSUE

- Where was the tort committed for purpose of the SK court assuming jurisdiction?

HELD

- Dickson J. holds both that Mrs. Moran doesn't have to seek leave to bring the tort action in Sask and that she can use the Sask *Fatal Accidents Act*.

REASONING / RATIO

→ the Canadian CL rule of locating place of tort for purposes of jurisdiction - **it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the D's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties**

→ so SK reasonably in mind of ON company selling things in Canada – but Brunei, maybe not so much (argue)

→ not a simple test, but this is taken as adopting the test for torts generally

→ "applying this test to a case of careless manufacture, the following rule can be formulated: where a **foreign D carelessly manufactures a product in a foreign jurisdiction which entrees into the normal channels of trade** and he **knows or ought to know** both that as a result of his carelessness a **consumer may well be injured** and it is **reasonably foreseeable that the produce would be used or consumed where the P used or consumed it**, then the forum in which the P suffered damage is entitled to exercise judicial jurisdiction over that foreign D

→ don't have to memorize that, but MUST understand the concept of this case – **a tort can be located in more than one place for purposes of jurisdiction and any of those possible places can assume jurisdiction if it is substantially effected** – the negative effect must not be a surprise to D (ie reasonable to think it would be used there)

→ **this case applies to all torts, not just product liability cases -** applies to torts generally in Canada

→ this rule **usually locates the tort where the harm occurred** (**even though that was rejected as the legal rule) but Edigner says the *Pyle* rule usually results in this outcome anyway – BUT never assume that where the harm occurred is EXCLUSIVE** – it is not by any means the only jurisdiction which could say it is where the tort took place for jurisdictional purposes

Imperial Tabacco

FACTS

- BCCA post SCC decision stating the legislation valid, what about jurisdiction: did the tort occur in BC?

HELD / REASONING / RATIO

→ *Pile* applies to determine where the tort occurred

→ Applied to conspiracy in the case – and found a conspiracy occurred here and harm occurred here because all the smokers here who were not warned by companies

Torts involving the internet: special difficulty

Dow Jones v. Gutnick

- AUS HC defamation case that is representative of the difficulty which courts have in deciding where a tort occurs which involves the internet: there is the possibility that every country in the world will have jurisdiction because, arguably, there is publication everywhere there is the internet.
- (this is where it would be good to remember that assuming jurisdiction by no means makes it exclusive, re *Pyle* and CJTPA and implied from the ability to have anti-suit injunctions)

Burke **(2005 BCSC)**

FACTS

- defamation case; internet; defamatory words by Brookes in NY Post online suggesting Virk told Canucks to get Moore (Burtuzzi)
- there are no NY Post subscribers in BC, but it is on the internet

REASONING

- while you can count the hits, you cannot get geographical location of those hits – but there was

- evidence that a one person read it in the jurisdiction and (evidenced by him reading it over CKNW and then on the next show had Virk on the show to talk about it) = clearly publication in BC
- BCSC decided that there was a R&SC and tort occurred in BC

RATIO

→ Need some evidence of publication in BC; not a clear threshold, assume one person good enough, note this was also read over the radio afterwards – could that have effected?

NOTE

- unlike in the *Braintech* case there was clearly publication in the place asserting jurisdiction (i.e. BC).

***Bangura* - ON**

FACTS

- publication in Washington Post when Bangura was on Ivory Coast working for UN; when the articles were published, the evidence was that there were 7 subscribers in ON

HELD / REASONING / RATIO

→ Bangura retires and comes to live in ON and *then* brings the defamation action **BUT the tort was found not to have occurred in ON because he was not a resident at the time of publication; thus, there could not have been any damage in ON**

→ Point – defamation on the internet is a tort which offers the P an opportunity to sue in more than one jurisdiction - **Where the P suffered the most damage to his/her reputation is usually found to be the place where the court was committed per CL rules**

Contract

Note on P's burden and nature of the evidence to satisfy jurisdiction simpliciter when raised by D

- *Fermina* and *Armino Mines*– two "how to cases" from BCCA – <u>what a P has to provide to persuade the court that the rule governing jurisdiction similiciter has been satisfied</u>
- Sometimes P might rely on jurisdictional facts not contained in the pleadings – ie the D ordinarily resident in BC – what the P is entitled to do if jurisdiction similiciter is put in issue by D and if the pleadings do not contain all the jurisdictional facts (because not related to cause of action) <u>the P can bring in those facts – in certain circumstances can go beyond pleadings and supplement with affidavit evidence to show BC has jurisdiction – that sub 10 is satisfied in some way</u>
- **Three things (1) jurisdiction similiciter (2) good, arguable case (on merits) (3) BC is forum convenience <u>burden on P throughout</u>**

Fermina – jurisdiction simpliciter and facts

- standard: <u>not frivolous, not tenuous, has a chance of succeeding (not a probability, but a realistic chance)</u>

Armino Mines – <u>in appropriate circumstances the D can produce supplementary evidence via affidavit to support argument that P does not have a good, arguable case; and if D does so P can respond with the same</u>

Strukoff v. Syncrude Canada Ltd.

FACTS

- P employed by D and all employment activities were in AB; P developed permanent disability and then moved to BC; he was paid benefits by D for 5 years and then they stopped; they terminated his employment by sending him a letter
- Argument of jurisdiction to bring the case in BC made was under old Rule 13(1)
- P argued BC had jurisdiction *similiciter* because there had been a breach of contract in BC because the letter was received in BC, but there was contrary BCCA precedent re mailbox rule

HELD / REASONING

- So no jurisdiction *similiciter* on the basis of Rule 13(1), but that did not mean that BC has no territorial jurisdiction, **because there is the default rule that you can apply to the court for leave to serve**
- The court says it can use Rule 13(3) (**still useable per. s. 10**) and **in its discretion decide that there is a sufficient connection with BC for P to get a writ to serve *ex juris***

RATIO

→ **Nothing has changed in the respect that if the facts of your cause of action does not fall within any subs of s. 10, you can still ask the court's permission for leave to serve *ex juris* under 3(e) a real and substantial connection**

→ Rule 13(1) [ref to factors in *Court Jurisdictions and Proceedings Transfer Act* now section 3] sets out specific factors that are presumed to satisfy the R&S connection test. Normally it is only when the proceedings do not fall within the section 3 criteria, that the R&S test must be canvassed

→ 3(e) R&S connection found because the P was medically treated in BC and much of the medical evidence will involve BC doctors-. Medical condition was the cause of his dismissal. Note that surveillance also occurred in BC, so the cause of action is connected with BC.

→ 3(e) is a residual catagory that the court can employ even if the facts don't fall within one of the classes of circumstances proscribed

CLASS ACTIONS

Harrington v. Dow Corning

FACTS

- Class action, so not quite fitting the mold for regular jurisdiction similiciter
- Appeal from action to certifying action as a class proceeding; Defendants seek to have the members of the class restricted to residents whose claims have a real and substantial connection with BC

ISSUE

- Should court relax the traditional approach to R&S, so that the benefits of a class action may be made available to all Canadian residents wishing to have their claims against the defendant's resolved in BC? Does BC have JS over non-residents whose breast implants were not purchased here or inserted here?

HELD / REASONING

- There is an R&S. The appellants are manufacturers of an allegedly defective product for personal use which they market throughout Canada. Such a person must anticipate the possibility of being haled into any Canadian court.

RATIO

→ **Broad principles of order and fairness must prevail**. A decision whether a court has jurisdiction must not depend on the mechanical application of a rigid test
  - I think going back to *Morguard* and the constitutional standard

→ **Where the traditional rules are not adequate to ensure fairness and order, then other considerations will become relevant**. **One such consideration will be the nature of the subject matter of the action**.
  - In this case, the alleged wrongful acts are defective manufacture or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved

→ **When you are trying to argue R&S and it looks like it might not be there, move up to the big principle of order and fairness.** Don't know how freely we can use this, but it applies to classifications

NOTES

- remember BC is an "opt in" jurisdiction
- lesson: courts are clearly prepared to treat class actions differently from the way they treat individual actions; it is the commencement of the class action itself in BC which is the R&SC for all P's
- so unless SCC deals with this, jurisdiction similiciter in class action litigation is not going to be a significant problem as long as the representative claimant and D have a R&SC with the province in which the action commenced

DISCRETION: STAYS AND ANTI-SUIT INJUNCTIONS

Discretion
- until *Morguard* most of the attention was on the exercise of discretion and the principles governing that exercise: this was the dominant element of the jurisdictional decision
- discretion narrows what the UK courts called the "exorbitant jurisdiction" given to the courts by the Rules
- Edinger's plan: give a background leading up to the present situation (no cases on that); there are two sections (1) UK Principles and (2) Canadian Principles – divided because the UK principles as set out in the two listed cases are clear and coherent and are good law in Canada (via other cases) – the Canadian cases are not as clear as they could be

Discretion at CL
- At CL a UK court has discretion to do one of two things
  (1) stay the local UK action OR
  (2) anti-suit injunction issue an injunction prohibiting a party from continuing or commencing an action somewhere else
    - An anti-suit injunction operates im personam against the P
    - Sopinka calles this "aggressive discretion" because while it operates in personam in the jurisdiction, it clearly has an effect on proceedings in other jurisdiction
    - Courts are very careful about issuing these because tend to frustrate the good manners of comity: will generously stay local actions, but careful with foreign actions

Background to *Spiliada* and *Industrielle Aerospatiale*
→ **Actions can be commenced in one or more than one jurisdiction at a time**

Stage (1) – Assume Jurisdiction (per principles in previous section)
- In UK CL the court would assume jurisdiction simpliciter three ways
  (1) serve within UK by right if there is presence or
  (2) submission or attornment
  (3) commence via service *ex juris* – issue a writ to be served out of the country because of some connection

Stage (2) – Exercise discretion to stay or issue an anti-suit injunction
- discretionary principles within service within UK cases was DIFFERENT from discretionary principles governing service *ex juris*

→ in both cases **A D must ask the court to exercise this jurisdiction; the court will never volunteer its discretion: the court will hear the case unless a party invites it not to**

ex juris
- P issues writ; D objects – burden of proof remains on the P to show that UK has jurisdiction similiciter; that P has good, arguable case; and that UK is forum convenience (most appropriate jurisdiction for the action in all the circumstances);
- these principles have remained unchanged throughout the decades

service within UK
- the development of discretionary principles have all been within the service within UK category of cases
- pre-1974 chances of getting court to use discretion to stay case nearly impossible because the principles of discretion when served in UK were relegated to basically abuse of process principles - "oppressive and vexatious" (*San Pierre*)
- 1974 HL decided ***Atlantic Star*** – collision in Belgian waters between two Dutch barges; commenced in UK because the ship at fault was arrested in UK (=service for a ship); application to stay UK action (which makes some sense, as happened in Belgium with Dutch barges!); **HL reinterprets the words "oppressive and vexatious" in the case law more broadly (ie give more respect to foreign legal systems)**
- 1978 ***McShannon*** **(eventually adopted in Canada)** produced a new formulation of the principle: "oppressive and vexatious" disappeared

→ **the case law in between here moved the test from abuse of process to where it is virtually identical to the discretion that has always been applied to service *ex juris***
→ **generally, in UK as easy to get a stay for service physically in UK as for service *ex juris* – onus in each case remains the same**

(i) <u>The English Principles</u>

***Spiliada Maritime Corp. v. Cansulex* (1987 HL)** (this, and *AmChem* are the foundational cases in Canada)
- not the last UK case on this, but it is the culmination of this line of cases and still considered to be the leading UK case and in Canada (despite *AmCam*) to be the leading case
- it is <u>a critical case</u>

FACTS
- Three separate ships were damaged by corrosion from their sulpher cargo because the sulpher was wet before it was loaded in Vancouver (each of the three ships has its own action)
- The Spiliada is a shop owned by a Liberian company, whose managers are located in Greece and Canada, and the ship is chartered by an Indian company to carry sulpher from Vancouver to India
- The D company (sulpher loader) is a Canadian corporation carrying on business in BC
- A charter contract and bills of laiding have a choice of law clause selecting the law of UK to govern the contract

→ **These choice of law clauses were sufficient ties to the UK to assume jurisdiction *simpliciter* and for the Spiliada to serve the D *ex juris* in Vancouver**
- so it is in the service *ex juris* category, YET t**his case is treated for authority for discretionary principles for <u>both *ex juris* AND in UK service</u>**

ISSUE
- not whether it has jurisdiction **- but whether the court should use its discretion to stay the UK proceeding in favour of a Canadian proceeding** (which had not been commenced yet – but that is okay see below)
- whether UK is **<u>forum conveniens</u>** – is UK **the <u>most appropriate forum for the action</u>**

REASONING
- **counting contacts; different contacts will have different weight in each proceeding, depending on the particular circumstances of the case**
- **Arguing connections and the significance of the connections** – Court must weigh the arguments and decide whether it is persuaded that it is the most appropriate forum for the act or whether the other <u>suggested</u> forum is the most convenient
- at CL the court is never being asked to compare itself to the world at large – <u>it requires the party to identify another forum where the action can be brought – even if no other action has commenced anywhere else</u>
- counsel in these cases count up the contacts with each forum to try to convince that whichever forum they want is the most appropriate forum – what kinds of contacts are considered relevant??
  - Where are the parties located;
  - where are the witnesses;
  - where are the expert witness;
  - cost comparison re forums for the parties;
  - language of the contract;
  - what law will probably be applied to the merits of the action (law of forum = strong tie<u>)</u>
  - non-English language law would equal big expense for translation of documents and will weigh against);
  - Court will also considers juridical advantages and disadvantages – distinguished from personal advantages (ie where party lives) – juridical advantages arise from the different legal systems – could be procedural advantages and also <u>entitled to examine the substantive law</u> to examine the juridical advantages / disadvantages
- Must weigh because advantage for one party is disadvantage for another – there is no easy way of predicting how a Court will rule – it is discretionary

RATIO

→ **Ultimate Q <u>whether served in UK or *ex juris*</u>** it is the same question now: **The Scottish Principle** "**to identify the forum in which the case can be suitably tried for the <u>interests of all the parties</u> and for <u>the ends of justice</u>**"
- **BURDEN OF PROOF** remains differences between the two groups of cases (ie UK service; *ex juris*):
- **service in UK** then the D has the burden to persuade the UK Court that there is another, more clearly appropriate forum somewhere else – specifically identified – and that it is most suitable for the interests of the parties and the ends of justice if it wants the action stayed;
- **service *ex juris*** then the P has the burden to persuade the UK Court that it is most suitable for the interests of the parties and the ends of justice if it wants the action stayed – <u>ultimate goal is the same</u>
- In complex conflicts cases where there is international evidence, etc the burden of proof can be particular heavy burden – especially when the contacts are evenly balanced

NOTES
- Can always attach conditions to a stay
- Cannot force the other court to do anything, but can attach conditions that the parties have to follow or the local action can be revive
- it can be temporary to see what happens elsewhere; it can be permanent too
- **'learning curve"** for companion cases: (Cambridgeshire was another ship with a UK action underway against the same D, and Spiliada had the same insurers and solicitors - Lord Goth and treats the "Cambridgshire factor" as very weighty – talks about the learning curve that goes into complex litigation like these actions and the fact that the Cambridgshire and Spiliada shared solicitors and those solicitors had already gone through this was a strong factor in refusing to stay the Spiliada – this pointed to interest as learning curve should be taken advantage of BUT – don't assume that a factor that is important in one case will be important in another – <u>the weight given is circumstance dependant</u>

Societe Nationale Industrielle Aeorspatiale v. Lee Kui Jak

FACTS
- Helicopter crash in the Territory of Brunei. A Brunei resided, Lee Kui Jak, who was worth about 20 million, was killed. His wife commences three actions – in Texas, France and Brunei. The French action gets discontinued, so the contest is btw Texas and Brunei. The defendants try to get the Texas action stayed. The don't succeed. So, the defendants go back to Brunei and try to get an anti-suit injunction. The Brunei Court of Appeal does not grant the injunction; they have *Castano* and *Spiliada* in front of them. So, the case goes to the JCPC.

HELD / REASONING
- In this case, Lord Goff does issue the anti-suit injunction; Edinger doesn't quite agree w/this decision b/c it's hard to see how the Texas action is oppressive, vexatious, or abusive

RATIO

→ **basic principle = injunction will only be granted where demanded by justice.**

→ **Injunction can be granted to restrain the pursuit of foreign proceedings on the grounds of <u>vexation</u> or <u>oppression</u> (still governed by the overriding concern for the <u>ends of justice</u>)**.

→ **the anti-suit injunction should only be issued if the commencement or continuation of the action would be oppressive, vexatious or an abuse of the process of the court.**

→ **UK court should not issue an anti-suit injunction just because it thinks UK is the better place to litigate.**

NOTE
- this case is a good English precedent i.e. it's also like an HL judgment.

Airbus Industries v. Patel

FACTS
- Plane crash in India. Some of the Plaintiffs are English, 3 of the plaintiffs are living in Texas. An action gets started in India and an action gets started in Texas. The Defendants go to the Indian court seeking an injunction against the action in Texas. The Indian court issues a world-wide anti-suit injunction. In response, the defendants go to the English court and tries to get it to recognize and enforce the anti-suit injunction.

HELD / REASONING
- Trial Court refuses to recognize and enforce the anti-suit injunction b/c at CL non-pecuniary judgments could not be recognized and enforced (NOTE: this was changed in Canada in *Pro Swing v. Elta*).

RATIO

→ The broad principle underlying the jurisdiction to issue an anti-suit injunction is that it is to be exercised when the ends of justice require it.

→ **England will not issue an anti-suit injunction if they do not have jurisdiction over the action – UK must have jurisdiction over defendant + action.**

→ Issuing an anti-suit injunction where there is no connection between the English jurisdiction and the proceedings in question is not open to English courts because it would be inconsistent with comity.

(ii) Canadian Principles

BCSC Rule 14

- If you have a client objecting to either jurisdiction simpliciter or forum conveniens you have to invoke Rule 14
- **Rule 14(6) deals with jurisdiction simpliciter** a party who has been served with an originating process in a proceeding may
  (1) apply to strike out the pleading or dismiss / stay the proceeding on the grounds that court does not have jurisdiction OR
  (2) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party
- **14(6.1) discretion to apply for stay on grounds court ought to stay (discretion)**
- **14(6.2)** is a technical objection that allows for a court to set aside a write if it is not properly served; usually a plaintiff will just start the action again.
- **14(6.3) power of court** (to grant stay; other remedies such as directions)
- **14(6.4) no submission before court decides on it** the foreign D can challenge jurisdiction AND defend on the merits until the court decides on the application
  - however, the problem w/this section is that it carefully omits any reference to sub (6.1)
  - Thus, there are lots of cases now that say that Rule 14(6.4) only applies where the defendant is only challenging jurisdiction simpliciter and if the defendant wants to raise forum non conveniens, they will be found to have submitted if they do any of the things permitted by rule 14(6.4).
  - This means that if you are advising a client who wants to argue forum non-conveniens, you have to make sure that he/she doesn't do any of the things allowed by rule 14(6.4) (e.g. defend the action on the merits).
  - NOTE ALSO: when it comes to recognition and enforcement of a BC judgment, foreign courts may say that a defendant who took steps to defend on the merits submitted and thus enforce the judgment in spite of rule 14(6.4)

***Court Jurisdiction and Proceedings Transfer Act* BC 2003**

Section 11 – discretion still exists to decline jurisdiction

(1) The court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding

(2) after considering the following:

(g) comparative convenience and expense for the parties (witnesses, etc)
(h) the law to be applied (juridical advantage?)
(i) desirability of avoiding multiplicity of proceedings
(j) desirability of avoiding conflicting decisions in different courts
(k) enforcement of eventual judgment (where are parties and their assets?) AND
(l) fair and efficient working of the Canadian legal system as a whole

- so nice and broad!
- Each BC court in an application under s.11 *MUST* consider *all* of the factors contained in 11(2); the factors are pretty similar to the factors considered prior to the CJPTA; thus, there is no real change in the CL approach to forum non-conveniens.

- 11(2) does not purport to be exhaustive thus, if there are other factors not mentioned that might be relevant to a particular case, counsel is free to raise them. Therefore, you aren't limited by the statute, but the statute is the place to start.
- Different factors will have different weight depending on the facts of the particular case

Case Law
- The simplest type of case, is where only one action has been commenced (e.g. action has commenced in BC, but the D argues that Texas would be a more appropriate forum, but no action has commenced in Texas).
- The cases we are dealing with are all cases involving parallel proceedings

Amchem Products
FACTS
- Asbestos litigation; P's all Canadian, mostly from BC
- D's mostly US companies from a variety of states, Texas as good as anyplace for WCB to bring its actions
- The Ds didn't want to be sued in Texas so they applied to the Texas court to stay the Texas action on the grounds that Texas was not the most appropriate forum for the action – Texas court refused to stay its own action
- The American Ds decide to come to BC and bring an action in BC seeking damages for abuse of process, a declaration that the BC court is the appropriate forum and an anti-suit injunction to prevent the Texas action

ISSUE
- what are the principles surrounding the exercise of discretion when the application is for an anti-suit injunction as distinct from a stay of the local action

HELD / REASONING
- BCCA had gotten the principles right, but applied them incorrectly. Sopinka J. reviews the principles and then applies them. The net result of this on the facts of the case are that the anti-suit injunction which had been issued by the BCSC and upheld by the BCCA was discharged and the Texas action was allowed to continue.

RATIO
→ The Canadian approach to issuing an anti-suit injunction –
→ **Basically, three step test:**
(1) Domestic forum must be alleged to be the most appropriate forum and must at least be an appropriate forum
- In terms of the quantum of proof, Sopinka J. says that it is the civil standard, but the other forum should be clearly more appropriate.

(2) Foreign court must have inappropriately assumed jurisdiction
(3) Continuation of the action in the foreign court must result in an injustice.

→ **principles which *ordinarily* apply**:
(1) An anti-suit injunction is available in Canada in order to prevent *continuance* of an action NOT to prevent the *commencement* of one.
(2) Before seeking an anti-suit injunction, the party should ask the foreign court to stay its own proceedings.
- Edinger says that there are problems w/this: it may be that there is no discretion in the foreign court e.g. civil law courts generally don't have discretion to stay an action properly commenced there; thus, this clearly has to be an ordinary rule and not an absolute one.
- in **appropriate cases, the court will not insist on it** e.g. in *Hudon* the P couldn't afford to make an application for a stay in Japan before seeking an anti-suite injunction in Ontario and the court was fine with this.

(3) The forum in which there is an application for an anti-suit injunction must be an appropriate forum for the action to be brought; you don't have to prove that it is the only appropriate forum or that it is the most appropriate forum, but you have to show that the forum has jurisdiction simpliciter over the cause of action e.g. BCSC must have jurisdiction simpliciter according to the CJPTA. This requirement is mandatory.

Once the three above criteria have been assessed, the court should consider the following:

(4) Could the foreign court have *reasonably concluded* that it was a natural (appropriate) forum.
- Essentially, this would mean the BC court applying the forum conveniens doctrine to the foreign court. the BC court should ask if we were sitting as the foreign court, but applying our own doctrine, would we have found ourselves to be the appropriate forum.

(5) If we conclude that the foreign court could reasonably have considered that it was *a* natural forum, then that is the end of the issue; we defer to the foreign court as a matter of comity. However, if we conclude that they could not reasonably have considered that it was a natural forum, then we ask **if continuation of the foreign action would result in an injustice** – this is where Sopinka's judgment departs from the *Aero Spatial* case; that case used the words "oppressive" or "vexatious" whereas Sopinka wanted more room. NOTE, however, there is no indication that this makes it easier to get an anti-suit injunction in Canada, but it does tell you what language you have to use when seeking an anti-suit injunction.

NOTES
- *AmCam* SCC contemplated the possibility of parallel actions with some equanimity: may be some cases where cases in both jurisdictions legitimately think they are forum conveniences and refuse to stay the local action

Westech v. Raytheon
- BC company (Westch) carrying on business in BC only; Raytheon is a Kansas company only carrying on in Kansas; enter into a contract in 1989 under which D will use, under license, software developed by P; D was required to return the products to P at the end of the term of the contract – D failed to do so
- D commences Kansas action seeking declaration it is not in breach
- Informs P who does nothing for two months and then starts BC action claiming breach of contract
- BCCA stays the action

ISSUE
- How should BC courts approach the problem of parallel proceedings in terms of how BC exercised its discretion?

REASONING / RATIO

→ **Three steps that a court has to go through where parallel proceedings alleged**

(1) are there parallel proceedings as defined by the court
- a factual inquiry
- Says that we should not be too technical in how we define parallel proceedings: generally the same okay, do not have to be identical in all respect to qualify

(2) if so, is the other jurisdiction an appropriate forum for the resolution of the dispute
- not "the most appropriate" but just "an": like *AmCam* – look at connections

(3) assuming there are parallel proceedings in another appropriate forum, has the P established objectively by cogent evidence that there is some personal or juridical advantage that would be available to her only in the BC action that is of such important that it would cause injustice to her to deprive her of it
- **juridical advantage** is going to be some advantage in either the procedural law of BC (which is always applies) or substantive law that the BC court would apply
- will not hear "tenuous innuendo" about the quality of justice in fora: what is required if you want to argue that issue (which may be an issue with respect to courts in certain jurisdictions) is to produce evidence that you will not get justice in other forum

- A balancing – the exercise of discretion – taking into account an additional factor – the factor of **an action proceeding elsewhere**
- the fact that an action that has been properly commenced elsewhere will have some weight which varies case by case
- here after it weighed everything they could see no injustice to staying the BC action

NOTES
- Parallel proceedings: same parties, same cause of action, same relief sought in separate fora
- Concurrent actions: not identical

Lloyd's Underwriters v. Tech Cominco

FACTS

- Teck operating smelter in Trail and discharges slag, which, after Grand Coolidge Dam built and Roosevelt lake created in 40's, the slag started to go into there; 1990s Clean up talk began under CIRCLA (which is designed around the polluter pays concept); Slag stops in 1995, but negotiations continue
- Tech declines to settle, says they did nothing wrong and no actions commenced
- 2004 an action is commenced in Washington state by the Federated Tribes relying on a cause of action created by the American legislation
- Tech applies in Washington to have the WA action discharged on jurisdiction – Canada also appears
- In 2006 a settlement is reached between Tech and the EPA with respect to the alleged contamination of Lake Roosevelt; Tech agrees to undertake and to fund an investigation into the contamination in the Lake – so this will cost money; Tech says no submission because just subsidiary agrees
- But, even though they never submit, they notify their insurance companies who say no way Jose that is not what you are covered for !
- Nov 2005 the standstill agreement ends (ie between Tech and Lloyd's not to sue each other) and the very next day Tech commences an action in WA against Lloyd's by delivering the process to a WA judge at home (which you can do there); 9 hours later in BC Lloyd's commences (because here you have to wait for the registry to open!)
- Both seeking declarations

HELD / REASONING

- WA refuses to stay the claim in WA; BC refuses to stay the claim in BC
- Parallel proceedings
- In BC relying on s. 11 CJTPA
- BCCA decides that Tech was improperly forum shopping in WA – looking for the best result; this has a bad connotation, but counsel are supposed to try to get the best result for their client – <u>but you cannot forum shop in an unfair way in such that the connection is tenuous and you get an unfair advantage</u>
- BCCA says it <u>doesn't matter that the WA action was commenced first</u>
- Considers *Thrifty* and *Westech* and holds that those cases **<u>do not create a bright line first in time test: it is always a matter of discretion in the light of all the circumstances of the case</u>**
- A few interesting questions - R&E and registration of possible WA judgment: would it R&E the WA judgment if it were the first to be delivered and the case was still before the court here?? And, would a US Federal Court in WA count as a WA court for purposes of registration under the *Court Order Enforcement Act* (WA is a reciprocating state)

(iii) <u>Jurisdiction Selecting and Arbitration Clauses</u>

Equiline & Pompy Industry Case

- Jurisdiction and selection arbitration clauses
- Approaches here represent the solution to litigating where to litigate (not 100%)
- Weakness of the solution: limited to where there is an agreement between parties (contract or trust doc)
- Parties can agree on (1) <u>choice of law clause</u> the law to govern the agreement between them AND/OR (2) <u>choice of jurisdiction clause</u> the forum in which disputes will be litigated (must be "exclusive" jurisdiction)

→ CL at first didn't like them – couldn't oust jurisdiction of the court by agreement – but now we accord **very great weight to such clauses but we have not reached the point where they are absolute**

→ Her proposition to begin this section: <u>these are very important clauses to put into contracts in order to avoid the whole mess of litigating about where to litigate</u> (you would be stupid not to include a choice of jurisdiction and choice of law clause

- The law on this can be applied to arbitration clauses also
- SCC approves the common law conflicts principles which always covered jurisdiction selection clauses and their effects

FACTS

- Maritime law (involves a bill of lading)

- Basically – a shipping case; Pompy sells equipment to a purchaser and it needs to be shipped to Seattle where it will be resold; equipment is put on board a ship in Belgium to go to Seattle (owned by Equiline) and the bill of lading is executed in France; clause: governed by the law of Belgium (choice of law) and Antwerp courts "and no other courts" as choice of jurisdiction (apparently exclusive); cargo goes from Antwerp, but gets on a train in Montreal to get to Seattle – but it gets damaged from the jerking – there was a reason they wanted it to go by water (smoother ride); action for damages commenced in Montreal (in Federal Court); D applies for a stay of those Canadian proceedings on the basis of forum non convenience and on the basis of the jurisdiction selection clause in the contract – want a stay in favour of the jurisdiction chosen by the parties in their contract
- Argument in SCC – a stay is like an injunction so you should you the injunction test approved by SCC - a different test than the conflicts test
- **RATIO**

→ SCC decides that the conflicts test is the appropriate test – adopts this **TEST**: **a party who chooses to litigate (commences an action) in a jurisdiction other than the one selected by the parties has to establish strong cause as to why that party should be permitted to do so**

- A heavy burden to show the Canadian court why it should not enforce the clause
- Forum convenience principles still operative – but the BURDEN is heavy on the party challenging
- What might discharge this? Showing Unequal bargaining position would work (ie really had no choice) *and* the connections are there per forum convenience
- Here, the court found no strong reason why the litigation should not happen in Belgium – both sophisticated; equal connections with Belgium as with Canada
- While we give weight we haven't moved to the statutory approach which has happened with arbitration clause – which has made such clauses absolute

NOTES

- Draft carefully; make as comprehensive as possible; certainty of terms – *exclusive* jurisdiction is what you need

5. Immovables: Recognition of Judgments and Jurisdiction *in rem*

→ **In the conflict of law all property is divided into movables OR immovables**
→ **There are different jurisdiction, choice of law, recognition, and succession rules for immovable property: so whether property in question is moveable or immovable can make a huge impact on the out come of a case**

classification
Hogg
- An approach (not a definition) to classification
- Is the property moveable or immoveable??

FACTS
- SKCA
- Classification of property for purposes of selecting the proper choice of law rule to see if SK tax can be imposed on the estate
- Deceased was domiciled in SK; had an estate (property) this case is only concerned with the mortgages which the deceased owned on real property in BC; SK taxing statute imposed tax only on property devolving by or under the law of SK (if SK law applies to determine the question of who inherits the property it can be taxed; if the law of some other jurisdiction applies to this end SK cannot tax on it); that is a choice of law Q – who's law determines inheritance to the mortgages

ISSUE
- Are mortgages moveable or immoveable property?? CL considers mortgages to be interests in land; statutory treats as interest in land

HELD / REASONING / RATIO
(1) Step one: decide where the asset to be classified is located
- Interests are intangible – but land is easy to locate – land in BC so mortgages located in BC . . .

(2) Step two: get expert evidence on the *lex citus* classification – we defer absolutely to the classification of that legal system; of the legal system where the property is located

NOTES
- ie how does BC classify mortgages? Does BC characterize them as moveable or immovables???
- Personal property act generally as moveable – BUT moveable can be intangible – you might have to locate intangible property – so you often do step one even for personal property AND occasionally there will be a legal system which will say it is immoveable

From here, property already classified as immoveable
- UK Courts developed specific rules with relation to immoveable property

→ ***Mocambique* rule**: **no foreign law has exclusive jurisdiction over immovables in UK and, as corollary, a UK court will not assume jurisdiction to decide title of foreign immovables** –
→ **if a question of title of foreign immoveable arises usually a UK or Canadian court will not assumed jurisdiction**
- This rule was challenged in *Hesperides* and a more modern HL case dealing with the primary rule of exclusive jurisdiction

***Hesperides* 1979**
FACTS
- P attacked rule of exclusive jurisdiction over immovables in two ways (1) tried to frame action in tort as to not run afoul of foreign jurisdiction immoveable rule and (2) challenged it head on
- Hotels in the Turkish part of Cypress: immoveable property in Cypress – fixtures on real property – clearly located – clearly immoveable under CL or civil law
- Furniture: moveable
- Owners of Hotels are Greek and now in UK because Turks kicked them out; they discover that Aegean Turkish Holidays is booking UK tourists into their hotels

- Commence action in UK; not directly raising the issue of ownership of the hotels (of the foreign immovables) because of the rule against assuming jurisdiction over disputes about the title of foreign immovables; so they frame their action in tort; claiming damages for conspiracy to trespass, account of profits and an injunction (smart, because if they just went for trespass they would have to prove title – it is a necessary issue even if no once challenges)

REASONING

- No, cannot do an end run this way and avoid operation of the *Mocambique* rule
- Direct attach on the *Mocambique* rule: argument – time for a change, the world has changed; lots of criticism of the rule; rule ripe for change
- No – rule is used throughout the commonwealth now; deference to Parliamentary supremacy – and they should modify the law; changing could result in forum shopping; circumstances have not changed
- So there was nothing in the arguments to persuade the HL to change the *Mocambique* rule

RATIO

→ **Rule remains – a UK court (BC / Can) will not assume jurisdiction in an action involving any issue of title to foreign immovables**

→ **Three big exceptions – Courts will take jurisdiction**:

(1) Contracts related to immovables

(2) Equities among the parties as long as the order is *in personam* – ie ***Penn v. Baltimore*** UK court could making an *in personam* order

(3) Context of administering an estate if there is a portion of the estate which consists of a foreign immoveable the court may take jurisdiction to settle questions regarding the estate

→ **So what does the *Mocambique* rule mean practically – you have to go to the jurisdiction where the immoveable property is located to litigate about matters which involve a question regarding the**

***Godley v. Coles* ONHC 1988**

FACTS

- ON Ps and ON residents
- Both Ps and Ds own condos in Florida – Ds own upstairs condo, Ps own bottom
- No question that condos are foreign immovables
- Ds toilet leaks and damages the Ps lower condo – clearly damage to immoveable property and to furniture and other movables located in the lower condo – Ps bring action in ON for damages
- Canadian courts have generally been more rigid with the *Mocambique* rule than UK

ISSUE

- Should the ON court take jurisdiction?

HELD / REASONING

- Immovables in FA, but everything else is connected with ON and ON court takes jurisdiction over the tort action (title is not an issue)
- Substantial portion of the damage may well be found to be damage to immovables – so assumes most of the claim will be damages for damage to moveable, and some damage to immovables should not disentitle P from bringing ON action
- How binding is this type of rationalization to be – can you use it in another claim??

RATIO

→ So can use case to help argue **where the bulk or substantial amount of damages is to movables, and a minority of the value of the claim is damage to immovables, a Canadian court will *probably* take jurisdiction**

Ward v. Coffin

FACTS
- NB CA (equivalents in BC and other provinces)
- Example of the exceptions to the rule
- Action commenced in NB to enforce a contract for the sale of land in QC
- Possible for the court to classify the cause of action as an action in contract

Duke v. Andler **SCC 1932**
- Canadian CL rule for R&E of foreign judgments dealing with immovables – <u>still good law</u>

FACTS
- **CA takes jurisdiction in a contract action re sale of BC land and makes an order for specific performance to re-convey title (an *in personam* order) … but to affect title**
- There is a re-conveyance executed by force in CA; P comes to BC and commences action of declaration that they are the owners of the BC land by either the CA conveyance OR by virtue of the CA judgment
- A BC court might have done the same thing – contract; equitable remedy; remedy for breach
- Should BC R&E judgments from courts which exercise jurisdiction on the same basis we would??
- Answer given by SCC is No!

RATIO
→ **Would not R&E because it involves immovables in BC and do not want foreign jurisdictions playing around with our immovables**
→ **California judgment may have been in personam, but the property is in BC and BC courts won't stand a foreign court deciding what will happen to land here.**
→ If you want specific performance to convey immovable property, you better go to that jurisdiction to litigate b/c the courts in that jurisdiction are the only ones who will have the ability to convey title to that immovable property. You can try to get specific performance in another jurisdiction, but the defendant may not obey the in personam order.

<u>CL Choice of Law Rules and Movable and Immovable Property</u>
- Intestate succession of movable property is governed by the last domicile of the testator. Thus, once you've determined where the testator was domiciled at the time of death, you have determined which law governs.
- Intestate succession of immovable property is governed by the lex situs – i.e. the law of the place where the immovable is located.

7. Choice of Law

→ Every juridical area has its own choice of law rules and that is why the characterization of the matter is so important to conflicts of laws.

→ **When it comes to selecting the law to govern the merits of the action, you**
(1) determine the nature of the action (contract, tort etc.)
(2) apply the choice of law rules governing that area to determine whose law governs and
(3) "domesticate the facts" i.e. pretend that all the facts occurred in the chosen jurisdiction.

→ REMEMBER YOU CAN ALWAYS ARGUE THE EXCLUSIONARY RULES

How to Approach Choice of Law
→ This is strategic: you then have to decide whether it is in the interests of your client to invoke BC or some other legal system
- The ordinary CL rule is that the court does nothing of its own motion with respect to choice of law; thus, if foreign law would be better for the D, but the D doesn't know that, the P doesn't have to mention it.

- Even at this preliminary stage, you have to do some kind of preliminary research about the other legal system and its relevant and possibly applicable rules. Once you have done this, you decide whether to treat the case as a choice of law case or as a purely domestic case.

PROOF OF FOREIGN LAW

Proof of Foreign Law
→ **Foreign law is a question of fact**
→ If you want to rely on the law of a foreign jurisdiction, you have to plead it and you have to prove it to the satisfaction of the court.
→ To do this, you bring in experts (practitioner in the foreign law) or affidavits from experts.
→ It's not unusual for the foreign law to be uncertain, so if a P brings in an expert to say that the law is X, then the defendant can bring in an expert to say that the law is Y and the court then has to be persuaded which is correct.
→ **Common law presumption = that foreign law is the same as the forum law in the absence of satisfactory proof to the contrary.**

Amosin v. The Ship 'Mercury Bell'
FACTS
- In rem action against a ship that is in Montreal; ship is registered in Liberia and its crew is Pilipino.
- Crew wanted benefit of a collective agreement that the company had signed with other workers so they walk off the ship in Montreal.
- This sort of matter would normally be governed by the *Canada Shipping Act*; the C of L rules in this Act say that the law of the flag of the ship governs i.e. in this case Liberia. The Plaintiffs don't want the law of Liberia, so no one pleads it. Thus, the CL presumption that the law of the forum governs kicks.

ISSUE
- FCA asks itself what this means – does this mean that the court applies forum CL or forum statute law.

HELD
- FCA decides that it is not strictly limited to the CL, but neither should strictly apply the statute law

REASONING / RATIO
→ **The forum court should only apply the general parts of the law of the forum statute – not the specific parts dealing with local circumstances.**
- i.e. the court can always ask itself whether a provision in a statute was intended to apply in a conflicts case – this is a matter of statutory interpretation.

NOTES

- ***Doctrine of Laws of Mandatory Application*** = in some circumstances, the forum may have some laws that represent over riding fundamental policy and those laws should be applied regardless of whatever other laws govern the merits of the case. This will be discussed when we do Contracts.

RENVOI

- **Renvoi: the rule that in some jurisdictions the capacity of a nonresident to sue upon a cause arising locally may be determined by the court looking into the law of her domicile rather than local law.** An application of the renvoi doctrine occurs when the whole law of a foreign state, including its conflict of laws rules, is looked to for a solution. If reference is to the whole law and not merely the internal law of the other state, then use of the renvoi concept is involved.

- Common law choice of law rules just reference "the law" of the foreign jurisdiction it does not say whether it is talking about the foreign jurisdiction's domestic law or its choice of law rules.
- Civil law systems do not usually use domicile as a connecting factor. Traditionally, civil law systems use nationality whenever CL systems use domicile. CL choice of law rules, do not specify whether the reference is to the domestic law of the domicile or its C of L rules. E.g. if testator dies domiciled in France, but testator was not of French nationality, do the French C of L rules govern? In this situation, it is open to a party who doesn't want the French domestic law to apply to argue that French C of L laws apply and therefore the law that actually governs the merits of the case is the law of the country of which the testator was a citizen.
- 95% of the time, the rule is that the choice of law rule points you to the *domestic* law that is to apply to the merits (e.g. there are cases that say that this is always the case in contracts cases)
- Renvoi relies on the ambiguity in the choice of law rules to rely either on the domestic law of the legal system that has been selected *or* its choice of rules.
- Foreign choice of rules may be the same as the forum's or they may direct the action back to the forum's law or they may deflect to a third legal system.

There are Two Types of Renvoi:

1) ***Partial Renvoi*** – Gives the forum a choice btw the domestic law of the *lex causa* or whatever domestic law the *lex causa* C of L rule would apply. The CL cases, w/very few exceptions, reach the result as if they used partial renvoi although they pay lip service to total renvoi.
2) ***Total Renvoi*** **– occurs when the question asked of the foreign expert is how would your court solve this problem**; you just turn the whole thing over to the foreign expert and follow whatever he/she says. The leading case on total Renvoi = *Re: Anisley*. The Justification for total renvoi is uniformity i.e. that we are trying to produce the result here in the forum that would have occurred if the litigation had occurred in the other jurisdiction whose laws we've decided to apply. This is usually a deference to the control of the foreign court over the matter. Total revoi, in Edinger's opinion, is not useful b/c it leads to uncertainty b/c who knows what the foreign expert will say that his jurisdiction would do.
   - Edinger can't say which is the law of BC.
   - If you want total renvoi, just ask the foreign expert what his/her legal system would do.
   - If you want partial renvoi, just ask the foreign expert what his/her legal system's C of L rules would be in the situation.

Collier v. Rivaz
FACTS
- Testator dies with a will that has six codicils attached.
- Dies domicile in Belgium, but he's still an English citizen.

- The choice of law rule that the English court applies is that the formal validity of a will is governed by the law of the last domicile. Thus, the English court decides that the law of Belgium should apply to determine the validity of the will and the six codicils; two of the codicils were valid under Belgium law, but four of them were not.
- The court says that it has a forum policy of trying to uphold the validity of the will. Thus, they look at ways that they could uphold the four codicils.
- Therefore, they look at Belgian **c**hoice of law rules which say that the validity of a will is governed by the nationality of the testator.

HELD / REASONING

- applying the domestic law of Belgium to the first two codicils, they hold them to be valid. Then, using Belgian choice of law rules, they apply the law of England to validate the other four codicils. The do all of this, because it is forum public policy to try to uphold the validity of wills.
- the English court didn't apply Belgian law to the will and all six codicils; thus, they used partial renvoi.

RATIO

→ **renvoi gives the court the alternative choice of law option – the choice of law rules of the forum who's law is governing the action**

NOTES

- Very 1st case in which renvoi was used in a CL case.

Re: Anisley (Total Renvoi Case)

FACTS

- succession case; testator was originally English.
- Testator's husband died in 1884 and then she moves to France and stays there until 1924, rarely visiting England. However, there were things that she could have done under French law to acquire a French domicile, but she never did this.
- She died with a will that was formally valid under English law, but the issue was whether the will was essentially valid.
- Under English choice of law rules, the law of the last domicile governs the essential validity of a will; testator had presence and intention to remain permanently in France so she was domiciled in France.
- However, according to French law, she was not domiciled there.
- The problem is that by French domestic law, there are limits to the "proprietary capacity of the testator" – in other words, there is a requirement under the civil law that certain portions of the estate must be left to spouses/children.
- under French law, the testator is obliged to leave one third of her estate to each daughter which means that she has disposing power over only 1/3 of her estate; she hasn't done this. Under English law, there was no limitation on disposing power.

HELD / REASONING / RATIO

- The English court assumes that the French court would apply the law of the nationality, but not to English domestic law, but rather the English C of L rule which says that the law of the domicile governs i.e. France.

MARRIAGE

- Marriage comes up most often not with direct challenges, but rather in the context of other matters (ie succession; immigration; in tort or conflict) – here it is still rather important
  → ***Narwal*** Federal Court uses the intended matrimonial home test in an immigration case
- All CL across Canada, has not been reduced to statute yet
- When the choice of law rules for determining the validity of a marriage were first formulated in UK there was only one rule: marriage must be valid, the law governing the validity of the marriage was the law of the place where the marriage was celebrated *lex loci celebrationis* (llc)– easy geographical rule
- If you complied with the local law you were validly married
- This is still the choice of law rule in most US jurisdictions

→ **Marriage must be both <u>FORMALLY</u> and <u>ESSENTIALLY</u> valid**
→ **Identify the defect alleged, and characterize it as going to either formal or essential validity**
- Precedent gives some categorization, which is pretty complete (not exhaustive), but you can mostly find a precedent of the classification of the defect

Formal Validty
- Notice or banns; witnesses (need and number); registration; civil / religious requirements; proxy marriages; UK CL says to form but civil law systems say essential – parental consent

Essential Validity - capacity
- Age for capacity to marry; consanguinity; affinity; fraud; mental reservations; consent (various was to vitiate); sex (same sex okay in Canada not in other places); number (polygamy)

FORMAL VALIDITY CHOICE OF LAW RULE – LLC, OR <u>common law marriage</u> OR <u>renvoi</u>
(1) formal validity of a marriage is governed by the law of the place where it was celebrated
- Formal validity governed by place of ceremony
- Can go anywhere in the world and comply with the legal local ceremony and when you come home and someone challenges the formal validity if you can show you complied with local requirements (whatever they are) you will have a formally valid marriage
- What if for some reason you fail to comply with the local law??? You have two alternatives to this rule which originated following WWII in the Polish marriage cases which involved marriages between Polish nationals during the dislocation of people during the war

- **alternatively** if you do not find formally valid by local law of place where ceremony:

(2) <u>common law marriage IF not possible to comply with the llc</u> and this is not <u>a matter of choice</u> – a matter of no law in place or you are part a discrete group which cannot be expected to comply (ie Jewish people in Nazi Germany)
- no ceremony but exchange vows – but you must be in a situation where not right to require compliance with local law
  - Would be difficult to comply with the local law when there is mass social unrest!!! May be no civil law system working or it may be completely unreasonable to require people who are in a refugee / concentration camp to comply to the local law – so in circumstances where not right / possible to comply, the UK came up with the common law marriage exception

(3) renvoi apply the <u>domestic choice of law rule of the place where the marriage ceremony took place</u> OR
- <u>Renvoi</u> – no compliance? Common law exception? Still no? can ask what law the place the llc would apply - refers to the choice of law rule of the llc (law of the nationality is what Italy would have applied, so looked to the law of Poland – did they comply with Polish

→ Only need to hit one of those three to get formal, but it must also be ESSENTIALLY valid

Hasan *Polygamous Marriages*
- When is a marriage polygamous? Not a math question.
- **What kind of ceremony of marriage was held. Look to the llc to get information about the <u>nature of the ceremony</u> and information about the <u>incidence of the ceremony and what parties who participated in such a ceremony are entitled to do</u> – that is a matter of expert evidence of the local law**
- **If the local law as described to the court is that anyone who participates in the ceremony is able to take other wives, then you have a <u>potentially polygamous marriage</u>**
- So you define a polygamous marriage by looking at the particular form of ceremony that the parties went through
- **<u>It is not a polygamous marriage because more than one wife, but because the wedding ceremony allowed for the taking of others wives</u>** – *Hyde* is an example of a polygamous marriage with only one wife

(married in Utah when still legal – they were Mormon – but did not take more wives, but the ceremony allows for such!)

- **Even though monogamous in fact there was the potential for polygamy on the basis of the nature of the ceremony**
- **Considered valid if capacity – for all purposes except granting of matrimonial relief** (ie 9 wives and 20 kids – succession issue all kids are legitimate, but no support)

ESSENTIAL VALIDITY CHOICE OF LAW RULE

- we have two choice of law rule and we don't know which is *the* rule, or if we should only have one =
  (1) domicile rule – must be essentially valid according to the domestic law of the parties, in relation to each other
    - (two chances to strike the marriage down every time you use this rule)
    - moment of domicile – the moment of the marriage
    - traditional and used more often:

  (2) intended matrimonial home test: apply the domestic law of the legal system where the couple intended to make their matrimonial home
- Argue for the one that benefits your client, although there will often be no difference in result

Essentially Valid?

Brook v. Brook

FACTS

- Will Brook got married twice: 1840 to Charlotte and they have two kids and she dies; then marries Charlotte's sister Emily (his sister in law)
- Could not married sister in law at this time (but cousins could!)
- Will and Emily go to Denmark to get married where it is allowed, they have a marriage ceremony and go home to UK as husband and wife
- They have three kids in five years and then both Will and Emily die of cholera
- There is a will that leaves the residue of his property to his five named children, one dies
- Litigation: AG claims the share of the dead child as belonging to the Crown as no heir – on the basis that marriage number 2 is void because Will married sister in law which is prohibited under UK law
- But the simple choice of law rule at the time was complied with

HELD / REASONING

- Does not say llc – they are offended by the fact that they went off to Denmark to get married and creates a new choice of law rule
- A few alternatives which would have worked to invalidate the marriage and is still a possibility
    - Dual domicile of the parties OR
    - Indented matrimonial home ?
    - Contrary to public policy (ie God's law)

→ **You have a choice between Dual domicile of the parties OR Indented matrimonial home as the choice of law rule –** usually there a coincide of the factors as such that it would make no difference at all which one you pic

→ **Dual domicile rules means that each party must have capacity to marry the other party by the law of his or her domicile at the moment before marriage (ante-nuptial domicile)**

→ **Must find both his and hers and satisfy both sets of rules**

→ **Dual domicile probably the dominant rule but it has (a) difficulty of determining domicile and (b) you must satisfy both legal systems**

→ Other possible rule to derive for determining the essential validity – **the indented matrimonial home test – this choice of law rule looks to the future – where did the parties intend to make their matrimonial home**

- Problem with this – sometimes no intended, or they do have one but it takes a while to settle there

- This makes some sense in light of the purpose of choice of law rules which is to find a system of law to govern which has legitimate ties to an issue

Huddard

→ This area of the law are still not finally settled – the choice of law rules with respect to marriage are not set in stone

→ You can still select and argue for the one that benefits your client either because it upholds or voids the marriage

Verraeke v. Smith

- Belgian prostitute (Maria) who works in London for a crime organization gets married in 1954 to a bum to she won't get departed every time she is arrested as was the law back then – ceremony in UK
- He disappears; she works for a while and then goes to Italy and lives with one of her pimps who is now out of jail (after doing time in Belgium); in 1970 they get married he dies on the wedding night intestate – he has two brothers and a lot of property (including immovables in UK)
- Brothers want the property and so does Maria, but she can only get property if she is his wife
- Is her Italian wedding to her pimp valid?
- She is married already and therefore has no capacity
- Brings application in UK for declaration of nullity of the first wedding: not any problem with the formal validity, so looking for an essential – no consent: yes she was there and said the words, but it was not consent to a true marriage, it was a sham marriage
- **Choice of law rule: would have to be the dual domicile rule because no intended matrimonial home**
- Where were they domiciled? You would want to know where the best substantive law is for her – was she domiciled in Belgium or UK – on consent UK is pretty strict, but Belgian law at the time was that sham marriages were not valid
- Turns out that bum was remarried to a Russian, who then ran off to the US and divorced him
- In the end HL did not recognize the Belgium law because it was contrary to forum public policy

TORTS

→ The old rule was "double barrel" the rule in *Phillips* –forum applied its own law subject to any substantive defences arising under the law of the place where the tort occurred

→ Choice of law rule of torts in Canada – *Tolofson* changes the CL dramatically and surprises everyone

***Tolofoson v. Jensen* (1994 SCC)** *see above, Pyle National!*

- Apply limitation period of the law that you select to govern the claim on its merits (ie substantive law) (see above – this is not limited to torts)
- **Choice of law rule: the law governing tort liability is the law of the place where the tort occurred**
- This was the US rule, thrown out years ago because it was bad
- It is straightforward and easy to remember – apply the substantive law of the place where the tort occurred
- **Possible exception suggested by La Forest in the case: is that there might be room for "international torts" – where the parties are nationals or residents of the forum** – ie if the people involved all from ON but tort in NY; at trial this was used a bit in lower courts, but not a single CA decision which has found the facts to support this exception)
- **We don't have a rule yet for deciding where the tort occurred if different elements took place in different places – like products liability – the *Moran and Pile National* is probably the safest route for purposes of locating the tort for choice of law purposes – but there is no definitive rule**
- Another option: *depracage* dividing the issues up and using the law of one jurisdiction to govern one issue, and the law of another for another issue – lower courts will do this, CA and SCC not so hot on it yet

- Can always argue the ll is contrary to forum public policy
- So tort is relatively straightforward

Aspects of tort claim – substantive or procedural??

***Somners v. Fourneir* (2002 ONCA)**

FACTS

- Plaintiffs are residents of ON who were in a car accident in NY; action is commenced in ON.

ISSUE

- Are costs, prejudgment interest, cap on non-pecuniary damages matters of procedure to be governed by the lex fori?

RATIO

→ **Costs** are an essential tool designed to make the machinery of the forum run smoothly = procedural.
→ **Prejudgment interest:** = a matter of substantive law.
→ **Heads of damage:** substantive
→ **Cap on non-pecuniary damages**: procedural law.
→ **Exception to LLD:** it is not mere differences in public policy that can ground the exception to the general rule of lex loci delecti; the exception is only available in circumstances where the application of the general rule would give rise to an injustice. Every difference in the laws of the two forums is going to benefit one side or the other and be perceived as unjust to the one not benefiting.

CONTRACTS

- Very important area
- Only talking about CL choice of law rules, there is a lot of legislation in this area because in the commercial world certainty is in high demand
- For the most part, contracts conflicts cases are governed by the common law choice of law rules

→ **Party autonomy is the governing rule: contracting parties for ordinary commercial contracts are allowed to choose the legal system to govern their contract (ie not marriage contracts)**
→ **The choice of law rules reflect this principle: parties may choose the law to govern contractual relationship and to select the forum in which actions will be brought with respect to the contract** – they can arbitrate or litigate, etc

- Then you draft clauses that are so clear and so comprehensive that no court can mess up by saying the parties didn't really know what they were agreeing on – never absolute as court can interpret
- **Courts keeps saying there is no *renvoi* in contract so you are entitled to assumed it is not available, because we want certainty and *renvoi* introduces uncertainty**
- CHOICE OF LAW RULE for most contract issues: the contract is governed by the proper law of the contract which is either (1) the law expressly chosen by the parties OR (2) the law objectively ascertained by court

→ **Our choice of law rule for contracts– governed by the proper law of the contract**
  - Proper law of the contract – how to ascertain? Main issue for the first four cases
- **Branch one the law chosen by the parties to govern** (**express or implied choice**) underpinned by party autonomy: – minimal limitations – must be (1) bone fide and (2) not contrary and (3) not floating – these rarely come into play – parties really have autonomy at CL to choose the law to govern heir contractual relationships (reinforces ideas of certainty)

OR

- **Branch two: the law objectively ascertained (imputed choice)** from the contract and what is to be done under the contract - if fail to exercise freedom of choice and do not include a choice of law clause in the contractor fail to include provisions in the contract form which an inference can be drawn that they did in fact subjectively choose a system of law to govern

→ the **Proper Law of the Contract governs all contract issues except:**
(1) formation
(2) contract formalities
(3) capacity to contract AND
(4) illegality in contracts (the main site)
- So watch for these in the **EXAM – <u>what is the objection to the CONTRACT!!! Because that will decide the choice of law rule</u>**
- The proper law, however ascertained, governs most contract issues (validity, discharge, etc)
- It is easier to id the contract issues which <u>are governed by a different choice of law rule than to list the ones that are covered by the PLC (proper law of the contract)</u>

Ascertaining the Proper Law of the Contract

→ The proper law is a test that is formulated in different ways by different people; formulation makes some difference b/c looking at different factors depending on how you formulate the test.
→ <u>Express choice</u> is the easiest: means that the K has an express COL clause, and can avoid the difficult process of trying to ascertain the proper law in the absence of express choice of law clause.
→ <u>Implied choice</u>: must look at the intention of the parties. Can be determined by looking at choice of forum (*Star Texas*). Need to draw inferences about the parties actual intentions.
→ <u>If unable to determine intention</u>: need to objectively ascertain based on the terms of the K and relevant surrounding circs.
- Note that in addition to choosing the law to govern the K, can choose to incorporate into the K any terms of a statute you want→can choose to have K governed by English law but incorporate BC statute.

***VitaFoods* -** PC declares the CL for the entire commonwealth – <u>it remains the leading case on this</u>
FACTS
- Herring! Sent from NFLC to NY – bills of laiding issued in NLFD; herring makes a stop in Nova Scotia because of a storm; the herring get "reconditioned"; loaded onto another ship and go to NY
- The bills of laiding are issued in NFLD which had recently implemented the Hague rules, and the NFLD statue stated that "every bills of laiding issued in NFLD shall expressly state it is subject to the Hague rules"
- The bills issued for the herring were the old form – pre Hague forms
- So the bills did not contain the required statement that it was subject to the Hague rules (which deal with negligence, and no real substantive difference between the actual terms of the Herring Bills and the rules for Bills in the Hague rules)
- The herring bill contained terms: **(1)** to the effect that the bill of laiding would be <u>governed by UK law</u> (selection by parties of UK law to settle any disputes arising under contract); **(2)** incorporated the *Carriage of Goods by Sea Act* Can. statute (NFLD not yet in Canada so not automatic) and a US statute - this equals incorporation by reference – same force as if you cut and paste it into the contract – not the same thing as choosing a legal system to govern your contractual relations – it is <u>just adding terms to the contract</u> – as it then existed, your contractual terms do not change with amendment) but <u>these are not choice of law clauses, they are only additional terms of the contract</u>
- Litigation ensues – taking place in NS
- Argument was that bills were void because they did not comply with NFLD statue and so <u>no exclusions for negligence</u>
- Parties all seemed to assume the contract was governed by NFLD – case goes to PC

ISSUE
- **PC says there are two main Q**
(1) <u>what is the proper law of the contract (what are the rules for deicide what the PCL is)</u> **and**
(2) <u>what is the proper interpretation of the NLFD statute and its effect on the bill?</u>

HELD / REASONING/ RATIO

→ **party autonomy is the primary rule for determining the Proper Law of the Contract: the Proper Law of the Contract is legal system the parties expressly selected to govern their contract**

→ **as long as the (i) intention is *bone fide* and (ii) legal and (iii) there is no reason for not honouring the choice on the grounds of public policy, that is the law that should be applied**

(i) *bone fide* ?

- Conflicts generally has no doctrine of evasion – you are allowed to find a jurisdiction where you like the law, so the doctrine of *bone fide* choice is a bit out of place, and there as a possibility to use
- not *bone fide* = an attempt to avoid the law that would otherwise govern (ie a contract made in BC to be performed in BC but choose to have it governed by the law of Bermuda – if to avoid the application of some otherwise applicable BC statute – if you had that fact pattern and the knowledgeable parties were say trying to get out of the *Employment Standards* act it might held to be an express choice that is not *bone fide)*
- much more common and easier to plead contrary to public policy

→ **what level of connection needed between the contract and the expressly chosen PLC?**

- Does there need to be any connection between the contract and the law expressly chosen? Not really in UK law, proposition has become that **our law does not require any necessary connection between the contract and what is to be done under the contract and the law chosen by the parties to govern the contract**
- Has been tested a lot because it is not unusual that parties in different sovereign states to chose some neutral third place (UK is very often used)
- Having said that, Lord W. finds there is some UK connection in this case
- Not dealt with here: the procedure to be followed when the parties fail to choose a law to govern the contract (dealt with in *Imperial Life Insurance,* below)

→ **NS does not have to apply any or all of the statutes of the llc – we can disregard statutes that are part of the law of the place where the contract was made (*even* mandatory statues)** UNLESS the litigation takes place in the llc! – the NFLD court would apply its own law – coincidence of llc and the forum then of course the forum will consider relevant its own statute and have to go into interpretation / application / effect issues otherwise, **ignore illegality of the llc**

→ **Seems counter-intuitive, but it is the rule!**

NOTES

- **Conflicts rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions**
- Our CL choice of law rules have not changed – so if one of the parties to a contract is arguing the contract is illegal or void, the analysis proceeds exactly like it does here (1) what is the relationship of that place to the contract (is the only connection to the contract that it is where the contract was made, if that is the only connection then the court can simply say and will say that the statute does not apply it is just part of the llc
- When parties to a contract incorporate a statue by reference they normally incorporate the statute as of the time of contracting (dates the statute), when however parties chose a legal system to govern any disputes they do not ordinarily freeze it as of a particular date: so if the contract is in existence foe 20 years, the court, when it comes to apply the expressly chosen PCL will apply the PLC as it now exists

***Star of Texas** can imply the choice from ??*

- Sometimes parties fail to include a choice of law clause, even though it can be argue a system of law has implicitly been chosen to govern
- Case law is fairly ambiguous on this – remember there is subjective (express or implied/inferred choice) and objective rules (were no choice)
- First best subjective – by express choice in the contract, but it is not unusual for there to be subjective implied
- Choice of jurisdiction (arbitration, etc) will name a place – and similarly arbitration will often name a place for arbitration
- **Can deduce implied choice and this is still subjective choice**
- In this case parties included an arbitration clause but did not name one jurisdiction as a place of arbitration from which you can infer a choice of law
- Here included arbitration clause which states problems to be referred to arbitration in Beijing or London at the D's option

- What can you infer from a choice between two cities? Can you infer that this contract is governed either by Chinese of UK???
- One party argues that this is a choice of law clause which is a floating choice of law clause (which are void) so no agreement to arbitrate so we can sue away
- EFFECT OF CASE; a contract cannot exist in a legal vacuum – it has to belong to some system; only legal systems give rise to contractual rights; you have to know from the beginning of formation that it belongs to and will be governed by a particular legal system;
- it is neither theoretically or juridical possibly to have it governed either by one or the other; any choice of law clause (which this is not, but it could have been on from which one was inferred) any choice o f law clause that purports to have the contract governed either by one of the other will not be effective – you cannot let choice of law float, **having said that it is still permissible to ask the court to determine or decide that the parties have actually, implicitly chosen a legal system to govern**
- Ie if this particular clause had said arbitration to take place only in London – can infer that the parties must actually have intended UK law to govern (permissible, but not necessary inference, and one that is often made)
- Can't let it float, but can imply
- Could you as parties agree to have some parts of a contract governed by one system and other parts of the same contract governed by another??? Some dicta to the effect that this would be permissible – so it is *not* impermissible, but not very apt to really ever happen

***Texas Star* – better brief**

FACTS

- Jurisdiction case; D trying to set aside service ex juris under Order 11 based on governing law of K being English law. Had a floating COL clause as arbitration in England or China.
- is floating COL clause valid? If not, how to determine the COL?

RATIO

→ floating clause is NOT valid; law chosen by looking at choice of place of arbitration.

→ **Implied choice of proper law**: choice of place of arbitration is a good indication of the parties choice of law (but not determinative)→if you fail to include a COL clause but you do decide that any disputes arising under the K shall be determined in England, the courts are going to draw an inference that you want English law to govern the dispute.

→ Probably has to be an exclusive jurisdiction clause.

NOTES

- if the parties do not include a COL clause and the court examining the K cannot draw any inferences about the parties actual intentions, then go to *Imperial Life Insurance.*

PCL objectively ascertained – ***Imperial life* and *Rashid Shipping***

- Today we probably consider, for objective ascertaintion purposes, both the system of law with which the contract reflects as well as what is to be done under the contract and its locations – and we put the two together to come to a conclusion about the objective PCL

- No express choice?

Rashid Shipping

FACTS

Facts: claim for insurance. Plaintiff is a corporation incorporated in Liberia, but whose head office is in Dubai. The insurance policy was issued in Kuwait by the insurers who have their head office there and branch offices elsewhere in the Gulf, including Dubai, but have no office or representative in England. Policy was on insurers standard form, in English language, followed that of Lloyd's SG policy scheduled to the UK *Marine Insurance Act*. Argues that proper law is English.

ISSUE
Issue: What is the proper law of the K?
HELD
Holding: English (Diplock implied; Wilberforce objectively ascertained).
RATIO
→ **Need to determine whether the parties have, by its express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained.**
→ Note that it is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi.
→ **Diplock**: trying to discover the actual but unexpressed intention of the parties:
- critical factor was that Kuwait had no marine insurance law at the time of the contracting.
- Also, the incorporation of English statutory terms require courts to use English law to give meaning to the statute.

→ **Wilberforce**: court's task must be to have regard objectively to the various factors pointing one way or the other and to estimate, as best as it can, where the preponderance lies.
- Use of English language
- Use of UK form contract
- **What to be done under contract:** Money of account payable in Sterling BUT payment to be made in Kuwait (Provision in claims to be paid in Kuwait—this is of little consequence.)
- The nationality of the parties, the defendants being incorporated and carrying on business in Kuwait, and the plaintiffs being Liberian and resident in Dubai (neither England or Kuwait).
- The issue of the policy in Kuwait—to this gives little weight.

Other Kuwait had no law of Marine insurance at the time! (I would think that really weighs for implicit but no one argued that)
NOTES
- Need to (1) look for COL clause (2) if no COL clause search four corners of the K for provisions that you can draw inferences from (3) if cannot draw inferences, then move to *Colmenares* approach of objectively determining the proper law (this is the widest approach). Difficult to read a lot of the cases and decide whether approach 2 or 3 was taken.
- POINT OF THIS CASE – **two very smart and very conflicts-experienced LJ's who come to different decisions** (Diplock LJ says parties implicitly chose; and other dude Wilberforce LJ says no implicit choice and does it objectively – but comes to same end) **so the line is very fuzzy between implied choice and objectively ascertained – different judges can reach same conclusion using the different routes**

Imperial Life Insurance
- **Where not express choice and no way of determining from the terms of the contract what they meant to choose (implied choice) – objective determination**

FACTS
- Life insurance policy issued in Cuba to Cuban resident; home office of insurer is in ON and ON form used. K is in Spanish. No COL clause. Payout is illegal under Cuban law and would not have been able to receive any of the money.

ISSUE
- What is the proper law of the K where there is no COL clause?

HELD
- Proper law is ON law.

RATIO
→ **Need to consider the contract as a whole in light of all the circumstances which surround it and apply the law which appears to have the closest and most substantial connection** (*Bonython v. Commonwealth of Australia*).
→ **objective test; not what actual parties to the contract intended, but in terms of reasonable business people and their position.**

Factors used to determine that ON law governed:

- language (always a factor) Language in which the contract was written– [here Spanish] (UK may not be as weighty as UK is more universal now)
- Form of contract (always a factor) Form of the contract – here Standard form contract [ON form]
- Home office took the risk rather than Havana office
- Expectation of person applying to ON that ON law would govern
- Use of ON form that complied with ON law

Other factors that could be relevant:

- Place where the contract was made -llc
- Domicile and residence of the parties
- National character of a corporation and the place where its principal place of business is situated
- Place where the contract made and the place where it is to be performed
- The style in which the contract is drafted (language appropriate to one system of law but in appropriate to another)
- Fact that a certain stipulation is valid under one law but void under another
- Economic connection of the K with some other transaction
- Nature of the subject matter or its situs
- Head office of an insurance company, whose activities range over many countries
- Any other fact that serves to localize the contract

NOTES

- Need to look at the factors within the four corners of the K itself. Note that different judges will weigh these factors differently.

(i) Issues that may be referable to a law other than the proper law

CONTRACT ISSUES NOT NECESSARILY GOVERNED BY THE PLC

- There are some issues which have variations on the primary rule
- The next cases represent the variations
    1. Formation
    2. Formalities
    3. Illegality
    4. Capacity to contract

(1) FORMATION

→ Law that governs whether there is a contract at all.

→ T**WO** options:

(1) law of the forum OR

(2) putative proper law of the contract (law that would have been the proper law of the contract if the contract had been completed).

- Simplest of the possible choice of law rules for this issue – **law of the forum**
- another possible rule floated judicially is the **putative proper law** which is the law that *would* be the PLC if the contract *had been* completed

***MacKender v. Feldia* (1967)**

FACTS

- Insurance policy on jewelry store; diamonds go missing; insurer alleges smuggling and argues that makes the contract void—never meant to insure a smuggling operation.
- contract contains a COL clause stipulating Belgium. Insurers want to bring the action in England and argue that if the contract is void, then the COL clause also does not exist.

ISSUE
- Which law is applied to determine the formation of the contract?

HELD
- Forum law—contract exists so off to Belgium per contract's choice of jurisdiction clause.

RATIO
→ When there is an issue as to whether there is a contract, the forum can apply its own law to determine whether there is a basic agreement (doesn't have to be a contract in the legal sense). You can use this instead of the putative law of the contract. However, you can also argue that the putative law of the contract should govern.
→ **NOTE:** See s.10 of the CJPTA
→ **Need to apply forum law to determine whether there is a contract. However, this is basic offer and acceptance without any technicalities (consideration is viewed as a technicality). Need to ask whether there was an agreement.**
→ **What is the role of the forum? It is for the forum to determine if there is consensus** – if so – off to PCL
→ **Proposition** when there is an issue about whether a contract exists (ie formation of contract) the CL court relying on *MacKender* may apply the law of the forum to decide if there **is a basic agreement – consensus ad item** - So apply llc to see if there was a basic agreement – not necessarily full contract
- What is the role of the forum? It is for the forum to determine if there is consensus – if so – off to PCL
- **Proposition** when there is an issue about whether a contract exists (ie formation of contract) the CL court relying on *McEnder*may apply the law of the forum to decide if there **is a basic agreement – consensus ad item**
- So apply llc to see if there was a basic agreement – not necessarily full contract

(2) FORMALITIES

Greenshields v. Johnston

FACTS
- AB statute required notarization of contracts that included a guarantee. There was no notarization, but the choice of law clause selected ON law.

ISSUE
- Which law governs the formalities required for a valid contract?

HELD
- contract is formally valid because it complies with ON law.

REASONING / RATIO
→ a rule of alternative validity - sufficient to comply with any formal requirements of the PCL, but alternatively if the parties do not comply with the formal requirements of the PLC it will be sufficient if they comply with the formal requirements of the llc
→ **A contract is formally valid if it meets the requirements of either (a) the law of the place where the contract was made or (b) the proper law of the contract**
→ contracts have to be formally and essentially valid (like marriage) but there are very few formal requirements.

NOTES
- the CA took a different approach, regarded it as one of procedure and substance. Said that the statute was substance (rather than procedure) and thus did not apply to the action in ON (which only applies ON substantive law).
- the exclusionary rules remain relevant (as they are in all cases, this is just a nice example of TJ going through entire analysis) AND it is also possible for one (or other or both) of the rules going to formal validity as being substantive or procedural

(3) CAPACITY

- Capacity to contract is governed by the objectively determined PCL (***Charron v. Monreal Trust***)
- See above, ***Imperial Life*** for the TEST to objectively determin the PLC if no choice of law clause

(4) ILLEGALITY

- A defence that comes up regularly in conflicts (and domestic contract law too)
- A contract has connections with more than one legal system – contracts is substantive law which provokes a lot of legislative attention around the world … bound to violate something! (ie consumer contracts, etc)
- The individual contract may "run afoul" of legislation - the conflicts choice of law rules allow for the application of laws emanating from legal systems other than the PCL

- **Allegation of illegality – PLC applies** (this is always subject to the substantive v. procedural exception)
- THEN in addition to PLC the forum may give effect to other contract laws
  (i) Forum law explicitly applicable – court must apply
  (ii) Law of the place of performance (subject to the substantive v. procedural exception) - it too is potentially relevant to the illegality of the contract
  (iii) Only one not applicable – the llc IF is is NOT also the forum / PCL / or performance) but merely place where contract entered into - happily ignore it

Avenue Properties v. First City Development Corp. **(1986 BCCA)**

FACTS

- BC purchaser busy 3 units of real estate development in ON from ON companies. The contract for purchase expressly provided that they would be governed by the law of ON and the parties attorn to the jurisdiction of ON.
- Purchaser does not complete the purchase because of failure of the vendors to comply with the provisions of the BC *Real Estate Act*, which require vendors to comply with BC prospectus requirements (for land with is inside or outside the province).

ISSUE

- Is BC forum conveniens? Does the statute apply?

HELD

- yes

REASONING / RATIO

→ **precedent for the proposition** that the law of the forum may apply – **laws of mandatory application of the forum will apply to the contract action, even if the PLC is the law of another jurisdiction**

→ Legislature may direct the courts to apply a particular substantive rule even to a foreign K, and even if it overrides the parties' choice of governing law.

→ A court can apply the law of its own jurisdiction in substitution or supplementation for the proper law of the contract in two circs:

(1) where the local law is procedural and

(2) where the local law, although substantive rather than procedural is of such a nature that it should be applied

- The statute has a choice of law rule rule: a statute which includes or contains a unilateral choice of law rule – a direction that it applies in specified circumstances Here, the BC *Real Estate Act* expressly states that persons soliciting the sale of land in BC, whether that land is inside or outside the province, must comply with the prospectus requirements.
  - ***Doctrine of Laws of Mandatory Application*** = in some circumstances, the forum may have some laws that represent over riding fundamental policy and those laws should be applied regardless of whatever other laws govern the merits of the case.
- Where it would be contrary to public policy not to apply the rule (McL would also uphold on public policy grounds given the specificity of the provisions.)

NOTES

- applicable contract law being factored into the jurisdiction selecting process.
- BC is FC based largely on the juridical advantage to P of having the statute apply.

***Gillespie Management Corp. v. Terrace Properties* (1989 BCCA)**

FACTS

- contract in BC; proper law of the contract is BC law and action in BC.
- Plaintiff entered into contract with defendants to assume management of the defendant's apartment building in Washington. The defendant terminated the agreement, because the plaintiff was not licenced as a real estate broke as per Washington law. Plaintiff sues for breach of contract.

ISSUE

- Is the contract, which is unlawful in WA, enforceable?

HELD

REASONING / RATIO

→ **A contract that is illegal by the laws of the country where it is to be performed will not be enforced.**

→ **Note that Southin frames this as being contrary to public policy. Domestic public policy is such that it will not enforce unlawful bargains**

  → Not absolute, but will be the normal rule – **will always defer to foreign law (which makes the contract illegal) unless repugnant to ours**

→ Edinger thinks that an argument could be made that this WA provision was procedural and could not be enforced by the BC court. **Anytime you see the words "no suit or action shall be brought" can make argument that provision is procedural.**