Private International Law B

“Rules of private international law are made for men and women – not the other way round – and a nice tidy logical perfection can never be achieved.”
Gray v Formosa [1963] P 259 per Donovan LJ

INTRODUCTORY SURVEY OF THE COURSE

Fundamental Idea of Private International Law

• What is the domain of private international law? PrIL, like contract law and tort law, is a branch of the municipal law of every developed legal system. Its function is to assist in the adjudication in municipal courts of civil cases that contain a foreign element (in the sense that a relevant fact or element of the case is connected with a foreign legal system).
  o E.g. a defendant resident in another country, a contract governed by the law of a foreign country or a tort committed in a foreign country
  o NB relevance is an amorphous term, dependant on the rules of the nation
• Compared to public international law – a body of rules that regulate relations between sovereign states and is founded on the consent of states, is universal in character.
• Persistent Issues in Private International Law
  o Personal jurisdiction
  o Choice of the applicable law
  o Recognition and enforcement of foreign judgments
• Private international law is a technique – a technique of choice of law, directing us to the law which is applicable
• Country/law area/legal system for the purposes of private international law: geographical area, not necessarily a sovereign state in the public international law sense, with a single system of private law
  o e.g. we do not refer to the USA – we refer to the relevant state

“The relationship between PrIL and PIL”

- Private international law and public international law have a different scope and character – perhaps the only common feature is that each is concerned with the transnational dimension of law i.e. legal questions which transcend national or territorial boundaries and the confines of a single municipal legal system.
- Can relate – for example suppose a PrIL rule for the exercise of jurisdiction over a defendant resident in a foreign country is in breach of a public international law rule which seeks to limit excessive state jurisdiction. How would this matter be resolved (a) on the plane of municipal law and (b) on the plane of public international law?
- See also the situation as below, Anglo-Iranian Oil Co v Jaffrate (The Rose Mary) [1953] 1 WLR 246.
Suppose the property of an Australian national is expropriated in breach of public international law by the government of a foreign state in which the property is situated. If an Australian court is asked to recognise under PrIL rules the foreign expropriation, what significance will be attached to the breach of public international law by the expropriating state?

Anglo-Iranian Oil Co v Jaffrate (The Rose Mary) [1953] 1 WLR 246

In all the cases we look at involving expropriation of foreign property – we look at the private law dimension, we see the two bodies of legal principles (public international and private international) coming together.

Facts

- The P, an English company (now BP), owned and operated oil field in Iran under an agreement with the Iranian govt. In May 1951 the Iranian govt put into effect an Oil Nationalisation Law which expropriated the P’s oil fields in Iran without compensation. A quantity of oil (movable property) was extracted from the P’s oil fields in Iran and sold by the National Iranian Oil Co to an Italian buyer and loaded on the tanker *Rose Mary* for a voyage from Iran to Italy.
- In the course of the voyage the *Rose Mary* stopped into Aden (British territory). While in the Aden harbour, the P commenced proceedings for the tort of detinue (wrongful detention of goods).
- The proceedings were brought against the master of the *Rose Mary*, Mr Jaffrate, and the owner and charterer of the ship – the P contending that the cargo was the P’s property.
- The common law choice of law rule would dictate that *lex situs* (the law of the legal system where the tort was committed) would govern the alleged conversion of movable property – the law of Iran as the oil was situated there.
- However, the P alleged that the Iranian govt had failed to pay swift and adequate compensation for expropriation, contrary to forum public policy.

Issue

What law is applicable?

Held

Recognition of the expropriation of property by the government of a foreign country may be refused as contrary to forum public policy if the expropriation was unlawful under public international law on account of absence of prompt, adequate and effective compensation. The State (England) did not have to give effect within its territorial jurisdiction to a foreign law that is contrary to its own public policy. The charterer therefore could not be the bona fide purchaser for value of the oil, the property was still the property of the P’s and the cargo was returned to them.

Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883

Case study in the international or transborder dimension of private law.

Facts

- This case was concerned with events occurring in the aftermath of the invasion by Iraqi forces of Kuwait. The Revolutionary Command Council of Iraq adopted resolutions proclaiming sovereignty of Iraq over Kuwait and its annexation to Iraq. Invading forces directed Iraqi airways to seize aircraft from Kuwait, and take them to Iraq proper. Iraqi govt issued Resolution 369 that declared that those aircraft were now the property of the D, & purported to dissolve Kuwait Airways Corp.
• KAC commenced proceedings claiming the return of the aircraft. The acts of which
complaint is made took place in Iraq, neither of the parties have a connection with
England, the events have no connection with the forum court’s country.
• Given the alleged wrongs were committed in Iraq, and given also the absence of any
particular connection with any other country, it would have been expected that when
adjudicating the claims an English court would apply the law of Iraq.

Issue

Could Iraqi law be recognised as valid and effective in vesting title of the aircraft in Iraq?
If the Resolution properly vested title in Iraq an action in conversion could not lie.
- KAC would have to prove the elements of the tort of conversion, namely that it was
the owner of the property at the time the acts contradictory to its ownership were
committed. BUT the Act purported to remove this title.
- Due to the violation of the territorial integrity of Kuwait, considering forum public
policy (England’s public policy), and public international law exclusion, the Act was
contrary to this and England refused to recognise it.
The court had regard to the grave infringements of human rights law on grounds of
public policy, would be contrary to public policy of England to give effect to the Act.

Held

A foreign law or foreign governmental act which purports to transfer title to tangible
movable property e.g. aircraft, situated within the foreign country, will not be recognised
if this would be contrary to forum public policy e.g. where the transfer of title involves
flagrant breach of rules of public international law of fundamental importance.

Rationale of private international law?

“Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a
foreign element. The jurisprudence is founded on the recognition that in proceedings having
connections with more than one country an issue brought before the court in one country may be more
appropriately decided by reference to the laws of another country even though those laws are different
from the law of the forum court.”

Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5) [2002] 2 AC 883

John Pfeiffer v Rogerson (2000) 203 CLR 503

“Ordinarily, the question whether a matter falls within federal jurisdiction will depend on the
identity of the parties or their State of residence, not the events which are said to give rise to tortious
liability. The rights and liabilities of parties should not be determined by such fortuitous matters…it
would be an affront to justice and common sense.”

Held

This case delineates the empirical approach of Australian law: considerations of justice,
convenience (including predictability of outcome and certainty), the promotion of
reasonable and legitimate party expectations, uniformity of decision and respect for the
territorial application of law.
- From the date of determination of this case, there is one choice of law rule in
intranational cases being lex loci delicti: the law of the place where the alleged tort
occurred. This is a universal solution that admits no exception.

Why we should adopt certain choice of law rules?
• Reasonable expectations of the parties.
• Territoriality – respect for territorial application of law
• Certainty

NB on uniformity – when Aust law directs to apply PRC law, cannot simply apply their internal law, must apply the private international law of that country (e.g. look to the choice of law rule)

### Neilson v Overseas Projects Corporation of Victoria (2005) 221 ALR 213

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<th>Facts &amp; Outcome</th>
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<td>P (Mrs Barbara Neilson) was an Australian national domiciled in WA. Suffered personal injury accident in PRC caused by the negligence of the D, a Vic owned corporation. After expiry of the one year limitation period under the law of the PRC but within the six (6) year limitation period under the law of WA, the P commenced a common law tort action against the D in the SCWA.</td>
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<td>- PRC law (Art 146) permitted a court to apply the law of their own country or of their place of domicile if both parties in a tort proceeding are nationals of the same country or domiciled in the same country.</td>
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<td>- Common law choice of law rule for a tort is <em>lex loci delicti</em>.</td>
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<td>- Thus the WASC and a court in the PRC would both have applied the law of WA. HELD: that for international torts, the lex causae includes the choice of law rules of the lex causae. Both parties [the employee and employer] accept for the purposes of the appeal that the principle extends to contracts.</td>
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#### Proof of foreign law:

- A court will not take judicial notice of foreign law, a party must please and prove the foreign law, otherwise the court will presume that foreign law is the same as the *lex fori*.

#### The renvoi doctrine

- The renvoi (or “reference back”) doctrine arises if a choice of law rule of the forum (e.g. the *lex loci delicti* rule in respect of foreign tort claims) is interpreted as referring to the whole of the law of a country including its choice of law rules. In such a case, the choice of law rules of the country may “refer back” to the *lex fori* (e.g. as the country of the nationality of the parties).
- The practical problem for the court of a forum when the renvoi doctrine arises is to identify the applicable **substantive law** of the foreign country or the substantive law of the forum.
  - E.g. in the current case McHugh thought that *lex loci delicti* referred to the law of the foreign country excluding choice of law rules (Art 146) – “internal law solution”
  - Similarly, Callinan J solved this problem by saying that if the choice of law rules of the foreign country “refer back” to the *lex fori*, it is referring back to the *lex fori* excluding the choice of law rules – “single renvoi solution”

- The majority (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) arguably
Theoretical speculation on the application of foreign law

- Although abstract speculation on the application of foreign law, divorced from the decision of actual cases, is not an activity in which practitioners and judges in common law systems readily engage, an understanding of private international law requires some acquaintance with the following theories:

Territorial theory of law

- *Ulrich Huber*: complete theory set out in three paragraphs. Theory, by far, which has the greatest influence in Anglo law.
  - First proposition – law of a country (legal system) has exclusive authority within its own territory but not beyond – congenial to Aust private international lawyers.
  - Second proposition – however, considerations of comity i.e. courtesy and respect within legal systems, require the recognition of foreign law which has been applied within the territory of a foreign country, other countries should respect that application.
  - Third proposition – as always, the application of foreign law is subject to the exclusionary doctrine of forum public policy e.g. *Kuwait* law of Iraq recognised as having complete authority within Iraq but not beyond, however the law in that territory, forum public policy led clearly to rejection of Iraqi law.

Vested rights theory – associated with AB Dicey, one of leading scholars in the CL realm in private international law, also associated with Joseph Henry Beale.

- The theory is predicated on the foundation that a court of the forum does not apply foreign law, rather when the case has a foreign element then a court of the forum may give effect to and apply a foreign acquired right (hence vested right). In other words what is given effect by the forum is not French law, for example, but a right that has been acquired under French law.
- Why was there a reluctance to acknowledge that the forum is actually applying foreign law?
  - Believe that to acknowledge this, would diminish the sovereignty of the Australian court – but this is untrue. Why? Because foreign law is applied, and foreign judgments are enforced, all the time. This happens by reference to principles of Australia private international law – only given *authority* by reference to Aust PrIL.
- Solely of historical interest – modern jurisprudence has discarded this theory – implicit in it is an untruth. Further, fails to identify under which legal system will provide the foreign law under which the vested right springs.
LOCAL LAW THEORY – propounded by Walter Wheeler Cook – physical scientist.
- A court of the forum on no occasion applies any law apart from its own, nor will it apply a legal right apart from one of its own creation. Then went on to suggest that what happens in PrIL cases, where there is a relevant foreign element, the court of the forum moulds its own law to match so far as is practicable the law of a foreign country.

COMITY OF NATIONS OR INTERNATIONAL COMITY – a spirit of courtesy or respect between nations or legal systems, as an informing principle of PrIL.
- E.g. international comity would be violated if the forum enforced a contract to perform an unlawful act in a foreign country (Foster v Driscoll); or if the forum did not recognise a legal personality created by foreign law (Bumper Development Corp v Commissioner of Police of the Metropolis)

### In re Cohn [1945] 1 Ch 5

| Facts | 1918 Mr and Mrs Cohn were living in Germany and made a joint will that provided that the survivor would inherit the whole of the estate, and on the death of that survivor the estate should be shared equally between their three children. Mr Cohn dies, Mrs Cohn and children become refugees due to Nazi persecution, came to live in England. They had not yet acquired domicile in England, Mrs Cohn retained domicile in Germany. Mrs Cohn and one of children were killed in London, in circumstances in which it was forensically impossible to tell which died first. |
| Query | Whether the daughter, Mrs Oppenheimer, had survived her mother? |
|       | - There is by statute in the UK which provides for a presumption of survivorship \(\rightarrow\) ‘where persons die in circumstances where it is impossible to tell which of those persons died first, then those persons are deemed to die in order of seniority’. Thus, if UK law applied here Mrs Cohn ‘would have died first’, meaning there was a legal moment at which Oppenheimer survived her mother. However under German law, in these circumstances the deceased are deemed to have died at the same time. |
| Issue | To determine which choice of law rule to apply, the legal question in issue must be established. |
|       | - Is the issue part of the law of evidence (an issue of procedure, therefore the law of the forum would be applied)? Or is it part of the law of succession (the presumption of survivorship)? |
|       | - Is it procedural or substantive? Why is this important? Because all procedural aspects of a case are governed by lex fori. |
|       | - On the other hand the substantive issues will be decided per lex causae (the legal system identified by the relevant choice of law rule of the forum) – which in the case of succession would be lex domicilii. |
| Held | Properly characterised this is a substantive issue of succession (the presumption of survivorship), not a procedural issue of the law of evidence. German law was therefore applicable. |
|       | - The evidentiary fact to prove in this case is, did Mrs O survive Mrs C? And the answer to that fact is, it is impossible to determine this – proof stops there – the UK
Act containing the presumption does not come into the picture in re evidence, but contains a rule of substantive law directing a certain presumption to be made.

- The German presumption was therefore applied as the part of the lex domicilii.

NB It is completely irrelevant that the forum must apply a provision of a country with which at war → Only if was contrary to forum public policy could the forum court refuse to apply the relevant foreign law.

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**Foster v Driscoll [1929] 1 KB 470**

**Facts & Outcome**

1929 enterprising group of people in England, Foster entered into a contract with Driscoll, others also involved. Object and purpose – to purchase a steam ship and to load on this whiskey and import to US in violation of the prohibition laws of the US. When repudiated, English COA said in no way is this enforceable as it would violate the laws of the USA

- International comity would be violated if the forum enforced a contract to perform an unlawful act in a foreign country.

**Held**

Sankey LJ “An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally.”

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**Bumper Development Corp v Commissioner of Police of the Metropolis [1991] 1 WLR 1362**

**Facts**

- Aftermath of the theft of a bronze Hindu statue – stolen cultural heritage item (13th C) – person who is described as ‘landless labourer’ found it. Sold by the finder to a dealer and the dealer removed the statue unlawfully from India, where it found its way onto the international art market. Bumper purchased the statue, but claimed they were a bona fide purchaser.

- B then delivered the statue to the British Museum for the purpose of restoration, at that point seized by Police. Putting into effect policy of seizing and restoring stolen heritage items. The museum claimed B had good title, and a temple also claimed they had good title. The Hindu temple itself was seeking to become a party to the proceedings in England – however under English law temples were not recognised as a natural person or a corporation and couldn’t properly be joined to a proceeding.

**Issue**

Whether or not the UK must recognise the legal personality that the temple would have as recognised by law of India?

**Held**

Adopted and applied language used in the HCA, comity of nations required that the legal personality the temple had under Indian law must be recognised in England.

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**Characterisation (or classification) by the lex fori**

- Identification of the nature of the legal question in issue is determined by the lex fori.
  - i.e. The forum court is tasked with determining the correct legal question, applying the concepts of the law of the forum.
• Correct classification of the precise legal question in issue will be determinative of the system of law applied (lex causae)**

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**Apt v Apt [1948] P 83**

| Facts | • Application by a woman to the UK HC for a decree of nullity of marriage. The woman was a British national, a UK citizen domiciled in England, and the man was Argentinian, domiciled in Argentina. The marriage ceremony occurred in Argentina, but the woman was not present. She had conferred on an attorney power of attorney to attend the ceremony and give consent to the marriage.  
  • The woman contended in proceedings that no marriage had come into existence. In the UK the persons are required to be present for a marriage to be valid, however Argentina (and some other civil law countries) permitted proxy marriages. |
|---|---|
| Issue | Which legal system will determine the validity of the marriage? *What is the correct legal question in issue?*  
  • When look at marriage validity there are two aspects – formal validity (largely concerned with ceremony) and essential validity (capacity to marry and reality of consent).  
  • Formal validity – governed by law of the place where marriage ceremony conducted *lex loci celebrationis*.  
  • Essential validity – *lex domicilii*, whether this English woman had entered into a marriage which was essentially valid would be determined by UK law. |
| Held | Concerned formal validity. The court of the forum determined the legal nature of the question in issue (to determine which choice of law rule applied), undertook this task by reference to *lex fori*.  
  • Characterisation of the legal question in issue is a matter for the forum judge. |

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**Winkworth v Christie Manson & Woods [1980] 1 Ch 496**

Leading case on choice of law in property – deals with tangible movable property.

| Facts | • W resident in England, had a valuable collection of Japanese artworks. Unknown person stole, removed from England, turns up in Italy. The 2D was a bona fide purchaser of the stolen art collection. The purchaser returned the collection to England for the purpose of sale by auction by C (1D). W discovers the collection on sale and wants art collection back.  
  • Brings a claim in England for the tort of conversion.  
  • In common law countries in relation to determining validity of transfer of tangible movable property we have reference to *nemo dat quod non habet* – a thief has defective title and cannot pass valid title.  
  • However, in civil law systems there is a preference for the bona fide purchaser. If one of two innocent parties is to be the loser, the loser will be the true owner. |
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<tr>
<td>Issue</td>
<td>Will it be English or Italian law?</td>
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<td>Held</td>
<td>• Characterise – legal nature of the question – validity and effectiveness of <em>inter vivos</em> transfer of tangible and movable objects – is that to be recognised as a valid and effective disposition taking priority over rights of former owner?</td>
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Historical Development

- There was a late development of Private International Law (PiIL) in the English common law (in contrast with continental Europe, particularly Italy and France): almost unknown before the end of the 18th C and described by the legal historian Sir William Holdsworth as “the youngest branch of English law”.
- A universal common law, firmly established since the 12th C, precluded intranational conflict of laws in medieval England → c.f. Italy, for example, which maintained city states, involving intranational conflicts (like Australia now).
- The requirement of a local English jury summoned from the place where the cause of action had arisen and deciding the case according to its own knowledge of the facts, precluded the litigation of foreign causes of action in the English common law courts, although, from the mid-14th C, the Court of Admiralty (applying the law merchant and law maritime rather than the CL) provided a limited forum for transborder commercial and shipping disputes.
- Late 16th C development of the legal fiction that, in the case of transitory actions (e.g. tort, contract) but not local actions (e.g. trespass to land), a foreign place (e.g. Dunkerque, France) was situated in the London parish of St Marylebone thus allowing the sheriff to summon an English jury, in conjunction with this there was a liberation of the law of evidence, allowing the jury to decide the case by reference to witness testimony.
  - Why was this legal fiction created? Driven by monetary gain, Chancery clerks realised that judges were making a lot of money through filing fees and wanted to be able to hear more cases in the Court.
- However, at first, there were few occasions for the CL courts to consider the application of foreign law as cases involving foreign causes of action invariably were commercial and shipping disputes governed by the law merchant and the law maritime.
- The first reported case in 1674 involving application of foreign law (Ashcomb’s case (1674) 22 ER 776) involved the application of Dutch law.

Statutes and Private International Law

Foreign Statute

- Subject to consideration of forum public policy, a foreign statute (other than a procedural statute) will be given effect provided that the foreign statute is part of the lex causae (the applicable substantive law in accordance with the relevant forum choice of law rule).
  - The lex fori is used to determine the choice of law rule, which is a ‘sign-post’ directing us to the relevant foreign statute.
**Re Claim by Helbert Wagg & Co [1956] Ch 323**

**Facts**
In 1924 HW lent £350000 to a German borrower. Somewhat unusually the contract provided that the governing law was the law of Germany, why would the creditor agree to a foreign legal system governing the agreement? The K provided that the money be repaid by instalments of principal and interest by 1945, also to be repaid in £ and in England. In 1933 a moratorium law was enacted in circumstances where great deal of stress on German govt, little foreign currency available to service debt. The law as applicable German borrowers:
- Debt no longer to be repaid to foreign creditor, but to the German govt agency
- Debt to be repaid to German govt agency to an account of the creditor, payment to be made by a date fixed by govt agency
- Debt no longer to be repaid in foreign currency, to be repaid in German currency at prevailing rate of exchange
- Also when borrower makes payment of principal and interest then debt discharged – according to borrower would feel right not to have to pay twice.
- Borrower paid during war. HW sees nothing of £174000, after the second world war is he entitled to see that? If he is, can recoup out of German enemy property seized in England per Distribution of German Enemy Property Act 1949.

**Issue**
Can an English court apply the Moratorium Law? Did the German borrower still owe HW money under the loan agreement?

- *How do we characterise the nature of the legal question?*
  - We’re concerned with K, terms of K, variation of terms, and discharge of K.
  - Look to choice of law rules – ‘proper law of the contract’ – German law including Moratorium Law. Under German law the borrower’s obligations to HW had been fully discharged, accordingly HW had no claim under the Distribution of German Enemy Property Act 1949 in respect of German enemy debts.

Subject to forum public policy – was this a law of expropriation?? No reason not to recognise the foreign statute. Recognised German law, formed part of lex causae, no concerns of forum public policy – applicable.

“In my judgment these courts must recognise the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law…”

**Held**
The proper law governs the performance, variation and discharge of a contract. Where a particular legal system is identified as the proper law of a contract, the reference is to that legal system as it exists from time to time. Subject to considerations of forum public policy, effect will be given to a foreign statute forming part of the proper law of the contract.

**Forum Statute**
- A *forum statute*, expressed in general words, e.g. “every mortgage” (Barcelo) or “an obligation to pay interest” (Wanganui-Rangitikei) will be construed prima facie as having a scope of operation consistent with the common law rules of PrIL.
  - However, as a matter of principle, a forum statute expressed in clear and unambiguous language may override the common law rules of PrIL e.g. Marriage Act 1961 (Cth) s 23A.