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Conflict of laws

M. Freeman

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- Professor Michael Freeman, LLB (UCL, London), LLM (UCL, London), Professor of English Law, Faculty of Law, University College London.

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NOTES

1 Introduction

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Introduction

Whenever English law addresses a legal problem that has a foreign element, there is a potential conflict of laws. Suppose you buy a computer in New York, but when you return to England it turns out to be faulty. You want to have it replaced, as would be your right against the retailer in English law, but the American retailer refuses to respond. If the matter comes to court, whose laws should apply – those of England, or those of the USA? Suppose you go to live and work in the Middle East, meet someone and have a child. If you later marry the person and return to live in London, whose laws determine the validity of the marriage and the legitimacy of the child? Alternatively, if your company sold unsatisfactory goods to a foreign country, and a judgment was made against you there, could that judgment be enforced in England?

These are complex issues, particularly since there are many different countries with different legal systems. In essence, whenever conflict of laws arises, the key issues are: whose courts have jurisdiction, whose laws are to be used, and can the judgement be enforced? These questions are at the core of this subject guide, and they range across every facet of human activity in which the law may play a role.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- ▶ state the three questions that are asked by 'conflict of laws'
- ▶ define what is meant by foreign law
- ▶ use the concepts and language of conflict of laws appropriately
- ▶ identify what aspects of a case will be considered procedural rather than substantive.

1.1 What is 'conflict of laws'?

1.1.1 The questions posed by conflict of laws

Conflict of laws is that part of English law which comes into operation whenever we are confronted by a legal problem which has a foreign element. Foreign elements can be of many kinds. For example, a contract may be made in France; it may require delivery of goods to Canada. An accident may occur as a result of negligence in Italy: the driver comes from Paris, the injured from England and they wish to pursue litigation in an English court. A painting may be stolen from an art gallery in Dresden and sold by the thief to an art dealer in Switzerland; the painting is now to be auctioned in London and not surprisingly, the Dresden gallery, having traced the painting, wants it back. An English woman has gone through a ceremony of marriage in Pakistan; the marriage is in polygamous form and she subsequently discovers her 'husband' has two other wives. She wants to know her status: is she married or not and is her marriage polygamous or monogamous? If he attempts to divorce her using a method acceptable within his religion (the *talaq*), she wants to know what effect this will have in England. These are just a few examples of foreign elements.[†] You will see as you study this subject that there are many others.

[†] What other problems can you think of which have foreign elements?

Conflict of laws poses three questions; or to put it another way, there are three main aims of this subject. They are:

- ▶ First, to set out the conditions under which a court is competent to hear an action. This is the question of **jurisdiction**.
- ▶ Second, to determine by what law the rights of the parties are to be ascertained. In a contract dispute, for example, it is necessary to determine the law governing the contract (its 'applicable law'). This is the question of **choice of law**.
- ▶ Third, where a dispute has been litigated in another country, to specify the circumstances in which the foreign judgment can be recognised and enforced by action in England. This is the question of **recognition and enforcement of foreign judgments**.

The first two questions must be asked and answered every time we are faced with a problem which has a foreign element. The third question only arises where there is a foreign **judgment**.

What is meant by 'foreign law'?

For the purposes of conflict of laws the expression 'foreign law' (or 'foreign system of law') means a legal system in a territory other than that in which the court functions. So, as far as an English court is concerned, Scots law is no less foreign law than French law or the law of South Korea or the law in a Commonwealth country.

1.1.2 The concepts and language used

There is a clear structure to conflict of laws. It has a methodology, and this section will introduce you to it. As we have already said, it will first have to be determined whether the court has **jurisdiction**. The question of jurisdiction is highly significant and there are complex rules which are discussed in later chapters. For the moment we will assume the English court has jurisdiction both over the parties and the cause of action.

The next stage is to determine the **juridical nature** of the question that requires a decision. For example, is it a question of breach of contract or the commission of a tort? Is it a question about capacity to marry or one relating to whether the appropriate formalities of marriage have been observed? Until this question is answered, it is impossible to apply the appropriate rule for the choice of law and thus to ascertain the applicable law. Therefore, it is essential to **characterise** the cause of action. Is it contract or tort? Is it capacity (also known as essential validity) to marry or formal validity of marriage? Having characterised (you will see this is sometimes described as 'classifying'), the court must select the legal system that governs the matter. Conflicts lawyers call this the **lex causae** (the law applicable to the dispute). This is the first of a number of classical expressions in Latin which all students of Conflict of Laws must learn and use.

Connecting factors

The selection of the governing law is conditioned by what is called a **connecting factor**. This varies with the facts and circumstances. For example, if a British subject dies intestate, domiciled in Italy, and leaves shares in England and a house in Scotland, the shares (which belong to a category of property called **movables**) will be distributed according to his *lex domicilii* (the law of his domicile), in other words according to Italian law, and his house (which belongs to a category of property called **immovables**) will be distributed according to the *lex situs* (the law of the place where the property is situated), which is the law of Scotland.

There are numerous connecting factors and you will learn and use these in the course of studying this subject. It may be helpful if the main examples are set out here.

The main personal connecting factor in England is the *lex domicilii* (the law of the domicile). Civil law jurisdictions (France, Germany, Italy etc.) use instead the *lex patriae* (the law of nationality). In English law there is also increasing use of residence, particularly **habitual residence**, as a personal connecting factor. The personal connecting factor is dominant in many questions of family law, for example where someone has the capacity to marry. Not all family law questions are governed by it: for example, if the question arises as to the validity of a marriage which does not comply with the local law, this is referred to by a different connecting factor, the *lex loci celebrationis* (the law of the place where the marriage is celebrated).

Other connecting factors include:

- ▶ *lex fori* (the law of the court in which the trial is taking place). For example, questions of procedure are so governed.
- ▶ *lex contractus* (the law which governs a contract). At common law this was referred to as the *proper law*: under the Rome Convention which applies to contracts made after 1 April 1991 it is referred to as the 'applicable law'. It is also so described under Rome I.
- ▶ *lex loci delicti* (the law of the place where the tort was committed)
- ▶ *lex situs* (the law of the place where land or some other thing is situated)
- ▶ *lex loci actus* (the law of the place where a transaction was carried out)
- ▶ *lex loci celebrationis* (the law of the place where a marriage is celebrated)
- ▶ *lex incorporationis* (the law of the place of incorporation): this governs assignments of registered shares
- ▶ *lex protectionis* (the law under which legal protection of an intellectual property right is conferred).

1.2 Procedure and substance

ESSENTIAL READING

- Clarkson and Hill, pp.466–470. (See section 1.3: 'Reading'.)

There is one aspect of conflict of laws in which the domestic law of the country where the legal proceedings are taking place is dominant. All matters of **procedure** are governed by the *lex fori* (in our case English law). This means that a rule of the *lex causae* which conflicts with it will not be applied. In simple terms, the *lex causae* governs issues of substance, not those of procedure. Of course, a question of characterisation may arise: is the issue one of procedure or of substance?

1.2.1 What matters are procedural?

You must grasp this distinction and have an understanding of which issues are regarded as matters of procedure. We only offer an outline (a) because much of the detail is for the practitioner rather than the student and (b) because some of the questions (e.g. damages) are easier to understand when substantive areas of law (e.g. torts) are studied.

By the end of this section you should, however, understand the distinction between substance and procedure and its significance, and have an insight into the main issues which English law regards as within the remit of its own law because it characterises them as procedural.

Matters characterised as procedural include the following:

The nature of the remedy

The forum grants its own remedies. Nevertheless, English law will refuse a remedy if it is so different from that provided by the *lex causae* as 'to make the right sought to be enforced a different right' (*Phrantzes v Argenti* [1960] 2 QB 19, 36).

The method of enforcing a judgment

The *lex fori* determines what property of the defendant is available to satisfy the judgment, and in what order. But in contract this is subject to the Rome Convention and now Rome I: the applicable law governs, 'within the limits of the powers conferred on the court by its procedural law', the consequences of breach, including the assessment of damages insofar as it is governed by rules of law. (See also Chapter 8: 'Contracts'.)

Parties

This is about who can sue and be sued. Thus, it has been held that proceedings cannot be commenced in the name of a dead person even though this was possible by the *lex causae* (*Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682). However, if a foreign entity enjoys legal personality under the law where it was established it can participate in English proceedings. An example is the Indian temple ('little more than a pile of stones') in *Bumper Development Corp. v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362.

Evidence

Questions such as whether a witness is competent or not, whether something needs to be proved by writing or not, whether certain evidence proves a certain fact or not, whether something is admissible as evidence. One area of difficulty are **presumptions**. Irrebuttable presumptions of law (e.g. that in s.184 of the Law of Property Act 1925 that the older person dies first) are rules of substance. (*Re Cohn* [1945] Ch 5.) Many rebuttable presumptions (e.g. presumption of resulting trust) are also rules of substance. It is less certain whether, for example, a presumption of marriage or legitimacy is a rule of substance or one of procedure.

Damages

In contract the Rome Convention (and the Rome I Regulation) provides that assessment of damages is a matter for the *lex causae*. In other cases, it is partly procedural and partly substantive. There is a difference between remoteness and heads of damage (a matter for the *lex causae*) and measure or qualification of damages (a matter for the *lex fori*). An example is the leading common law tort case of *Boys v Chaplin* [1971] AC 356 (discussed in Chapter 9: 'Torts')

Statutes of limitations

At common law, this was regarded as procedural. The law was changed by the Foreign Limitation Periods Act 1984 and it is now a substantive matter. However, realising that an English court might encounter a very long limitation period (say 50 years) or a very short one (say 6 months), s.2(1) of the Act provides that a court can refuse to apply a foreign law which conflicts with English policy: the *lex fori* would then be applied. This provision was invoked in a case where the foreign limitation period was 12 months and the plaintiff had spent some of this time in hospital and had been led to believe her claim would be met (*Jones v Trollope Colls Cementation, The Times*, January 26 1990).

ACTIVITIES 1.1–1.4[†]

- 1.1** Why do you think matters of procedure are governed by the *lex fori*? On what basis should the characterisation of a rule be based? Look at *Re Cohn* [1945] Ch 5 or *Leroux v Brown* [1852] 12 CB 801.
- 1.2** F and D are domiciled in X. D is F's daughter. D claims that by the law of X F is under an obligation to provide her with a dowry. The amount of the dowry is within the discretion and varies in accordance with F's wealth and social position and the number of his children, and with D's behaviour. F is now in England and D sues him. What problems will she have? *Phrantzes v Argenti* [1960] 2 QB 19 may help you.
- 1.3** M, who is domiciled in Y, leaves by will movable property to her daughter, D who is also domiciled in Germany. M and D came to England as refugees. M and D are killed in a car crash. It is uncertain which of them died first. By the law of Y they are presumed to have died together. English law (see s.184 of the Law of Property Act, 1925) says M died first. Which rule will an English court apply? Look at *Re Cohn* [1945] Ch 5.
- 1.4** A is injured in a road accident in Z caused by the negligence of an employee of B and Co. She spends seven months in hospital. She then starts proceedings in England within the three-year English limitation period, but after the expiry of the one-year limitation period under the law of Z. Will the English court apply the limitation period of the law of Z?

[†] **Activities:** This subject guide does not provide feedback to activities or advice on answering sample examination questions. There is enough information in this guide and in the related readings to enable you to formulate correct answers to these questions.

Summary

One question which the *lex fori* reserves for itself and thus excludes from the scope of the *lex causae* is matters of procedure. There are characterisation problems here (see Chapter 2), for it is by no means certain whether something is substantive or procedural. In most areas, however, the law is fairly clear, as the examples given in this chapter show.

1.3 Reading**Primary textbooks**

We recommend the following, and they are repeatedly referred to in the chapters that follow.[†]

- Clarkson, C.M.V. and J. Hill *The conflict of laws*. (Oxford: Oxford University Press, 2006) third edition [ISBN 9780199289134].
This is a straightforward presentation of the subject and it is reasonably up-to-date.
- Cheshire, North, and Fawcett *Private international law*. (Oxford: Oxford University Press, 2008) fourteenth edition [ISBN 9780199284382].
This is much more detailed and more rigorously analytical. But is also more difficult for a beginner.

[†] In subsequent chapters we will refer to these texts by their short form: 'Clarkson and Hill', 'Cheshire, North and Fawcett', 'Dicey, Morris and Collins', etc.

Other useful textbooks

- Briggs, A. *The conflict of laws*. (Oxford: Oxford University Press, 2002) first edition [ISBN 0198763336].
'Briggs' is short, very thoughtful and excellent once you have grasped the detail from Clarkson and Hill or Cheshire, North and Fawcett. It is a perfect revision instrument and will stretch your thinking.
- Collier, J.G. *Conflict of laws* (Cambridge: Cambridge University Press, 2001) third edition [ISBN 0521787815].
'Collier' is an alternative to Clarkson and Hill. It is very student-friendly, written in a lively style. It is not as comprehensive as Clarkson and Hill or Cheshire, North and Fawcett.

Practitioner text

- **Dicey, *Morris and Collins on the conflict of laws*.** (London: Sweet and Maxwell, 2006) fourteenth edition [ISBN 0421661402].
 'Dicey, Morris and Collins' is excellent for reference purposes; there are regular supplements to the two bulky volumes (the supplements are themselves substantial, and have their own ISBNs). It is to be hoped that you will find it in a local university library, as it is very expensive.

Cases

You should read as many cases as you can, and certainly those indicated in this text. As you study, think about the rules, the principle underlying them, and the policies they uphold. Conflict of laws is both practical and highly academic, and often the answers are not clear beyond question. Think about the alternatives: the textbook will help you do this. You will find, for example, that different books are impressed by different arguments. Weigh up these arguments, and see what conclusions you come to.

New cases are reported in:

- ***Lloyd's Law Reports***
- ***All England Reports*** (particularly their Commercial Reports and European Reports)
- ***Weekly Law Reports*.**

The Conventions and Regulations

You will discover that there are major Conventions in conflict of laws; for example, in matters of jurisdiction there are the Brussels and Lugano Conventions. Although these are largely superseded by the EU Council Regulation 44/2001, the Rapporteurs' Report is useful. You can find this in the *Official Journal of the European Communities* [1979] OJC 59.

In relation to contract you will study the Rome Convention and again the Report of the Rapporteurs (Giuliano and Lagarde) is very useful. You can find this at [1980] OJC 282; it is also in Plender, R. *European Contracts Convention* at pp.243–93. There are now also two Rome Regulations (I and II). 'I' supersedes the Rome Convention, and 'II' applies to non-contractual obligations, principally to tort.

SELF-ASSESSMENT QUESTIONS

1. What is meant by the question of jurisdiction?[†]
2. What do you understand by 'choice of law'?
3. In England is the law of Northern Ireland foreign law?
4. In New York what is the status of the law of Illinois?
5. Explain *lex causae* and *lex fori*.
6. What do you understand by 'connecting factor'?

[†] Try to think of a problem which may require the application of more than one foreign law.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain what questions are asked by 'conflict of laws'
- ▶ define what is meant by 'foreign law'
- ▶ use the concepts and language of conflict of laws appropriately
- ▶ identify what aspects of a case will be considered procedural rather than substantive.

Good luck with your studies.

Michael Freeman, Summer 2010

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the three questions that are asked by 'conflict of laws'	☐	☐	☐
I can define what is meant by foreign law	☐	☐	☐
I can use the concepts and language of conflict of laws appropriately	☐	☐	☐
I can identify what aspects of a case will be considered procedural rather than substantive.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
1.1 What is 'conflict of laws'?	☐	☐
1.2 Procedure and substance	☐	☐

2 Fundamental concepts and issues

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Introduction

This chapter introduces you first to the problem of characterisation. It is a difficult subject, not made easier by the fact that English courts have not always characterised in the same way. You will note that 'characterisation' is also called 'classification'. It is a basic analytical tool. It is discussed here for this reason but is a concept you will come to understand better as you familiarise yourself with the subject. This chapter also deals with what is meant by an incidental question – a question that arises in connection with the major question in a case – and the approaches that exist to answering it.

Another important problem arises with *renvoi*.[†] We need to explain what is meant by 'law' when a reference is made to foreign law; for example, does a reference to 'French law' mean French internal law, or the whole of French law, including its conflict of laws rules? The word 'law' is ambiguous and a number of approaches have been suggested. Different models of *renvoi* are discussed.

[†] *Renvoi* (French) = 'sending back'.

A further issue is **public policy** in the conflict of laws and its relationship to **human rights**. Public policy can arise in any area but two areas in particular cause problems, namely status and contract. These are singled out for treatment in section 2.5 which deals with the exclusion of foreign law. In addition to the public policy ground, English courts have refused to entertain actions for the enforcement of **penal**, **revenue** and other **public** laws of foreign states. We explore the basis for these exclusions and analyse what each of the headings involves.

Finally, section 2.7 teaches us how we conceptualise foreign law – as fact – and how it is proved in an English court. Many cases which have foreign elements are litigated without any reference to foreign law, either because it is not pleaded or because it is not proved. An example with which you will be familiar (from Contract Law) is *Suisse Atlantique* [1967] 1 AC 361.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- ▶ explain the purpose of characterisation (classification) and indicate the basis on which the English courts characterise cases
- ▶ indicate where the principal difficulties in characterisation arise
- ▶ explain what is meant by 'the incidental question' with examples from the case law and describe the ways to solve the incidental question
- ▶ explain the ambiguity of a reference to a foreign 'law' and describe the different approaches to unravelling this
- ▶ describe the different concepts of *renvoi* and give examples from the cases
- ▶ explain the role of public policy in the conflict of laws
- ▶ indicate areas where the Human Rights Act 1998 may influence the application of public policy in the conflict of laws
- ▶ appreciate its role where there is a fundamental breach of international law
- ▶ explain why English courts refuse to enforce certain laws of foreign states
- ▶ identify and give examples of the areas in which such exclusions are made
- ▶ explain the implications of regarding foreign law as fact
- ▶ explain how foreign laws must be proved in an English court and state who is competent to give expert evidence on a matter of foreign law.

2.1 Characterisation – an illustration: *Ogden v Ogden*

ESSENTIAL READING

- Clarkson and Hill, pp.456–469.
- Case: *Ogden v Ogden*.

We will start with an illustration drawn from the notorious case of *Ogden v Ogden* [1908] P 46. A domiciled Frenchman[†], who was 19, married a domiciled English woman in England without first obtaining the consent of his surviving parent, which he was required to do by Article 148 of the French Civil Code. The husband obtained an annulment of the marriage in a French court on the ground of want of consent. The wife then went through a ceremony of marriage in England with a domiciled Englishman. The second ‘husband’ petitioned for a decree of nullity on the ground that at the time of the ceremony his ‘wife’ was still married to the Frenchman.

[†] ‘Domiciled Frenchman’: this terminology indicates a man domiciled in France. On domicile see ch. 3.

The court had to decide whether the first marriage was valid. There were two connecting factors: the husband was domiciled in France; the marriage was solemnised in England. This indicates the existence of two rules:

- ▶ the essential validity of the marriage (that is the husband’s capacity) must be governed by French law
- ▶ the formal validity of the marriage ceremony is determined by English law.

So what the English court had to decide was whether the French law, the purpose of which was to protect French minors from marrying without parental permission, applied to a marriage in England. If the French rule was characterised as within matters of **essential validity** it would apply to marriages wherever they were celebrated and the marriage in England would accordingly be void. The second marriage would then, of course, be valid. If, on the other hand, it was characterised as a matter of **formal validity**, it would be governed by the *lex loci celebrationis* (English law) and the first marriage would be valid (English law rules that a marriage of a minor without parental consent is valid). The English court would therefore come to a different conclusion from the French court. It would, of course, enable the second husband to extricate himself from his marriage (which would be bigamous).

The Court of Appeal concluded that the French rule was formal. Indeed, it suggested that every rule requiring parental consent to a marriage must be characterised as formal. The result was that Mrs Ogden was in the eyes of English law not Mrs Ogden but the wife of a Frenchman. Of course, French law denied this: if asked it would say she was married to her second husband.

Characterisation is not some abstract academic game. Think of the consequences that it had here. The woman in this case ends up as married to two different men on different sides of the Channel. In France, she is married to an Englishman, who does not want her. In England, she is married to a Frenchman, who does not want her. And in 1908 it was probably worse than this because at that time (but not now) married women automatically acquired their husband’s domicile. So, according to English law, she was domiciled in France and an English court would have lacked jurisdiction to dissolve her marriage. Nor, it is thought, would a French court have been prepared to dissolve her English marriage. So it is distinctly possible that a woman married to different men in different jurisdictions could do nothing further about her status and, presumably, could never marry again.

2.2 The difficulties that arise with characterisation

Let us look again at what characterisation involves. It requires us to allocate the question in issue to its correct legal category. Its goal is to reveal the relevant rule for the choice of law. In most cases the answer will be clear: there will be no dispute that the case is concerned with breach of contract or succession to movables.

The difficulties occur:

- ▶ in penumbral cases, rather than those found within the core; Hart in 71 *Harvard Law Review* 615 (1958) discusses the difference
- ▶ where English law and the relevant foreign law do not agree on what the correct characterisation is
- ▶ where the concept is unknown in English law: how, for example, is an English court to characterise 'deferred dower' as property or as maintenance? (see *Shahnaz v Rizwan* [1965] 1 Q B 390). Similarly, courts in civil law countries have had difficulties with the English trust concept.

2.2.1 What basis for characterisation?

Lex fori

The question is how English courts characterise. It will have been observed that in *Ogden v Ogden* the Court of Appeal characterised the rule in the French Civil Code according to the *lex fori*. As Dicey, Morris and Collins (p.35) point out 'The principal argument put forward in favour of this view is that if the foreign law is allowed to determine in what situations it is to be applied, the law of the forum[†] [*lex fori*] would lose all control over the application of its own conflicts rules, and would no longer be master in its own home'. The problem is that it may lead to the forum refusing to apply a rule of foreign law which would be applicable if it were properly understood, as happened in *Ogden v Ogden*. It might also apply a rule of a foreign system where according to that law it is not applicable: the result would be that the law applied would be neither the law of the foreign system nor that of England. The *lex fori* approach also stumbles where there is no equivalent or close analogy in the forum to the rule of foreign law. What, for example, is an English court to do when it is asked to adjudicate on the French institution of community of property, as it did in *De Nicols v Curlier* [1900] AC 21?

[†] **Forum** (Latin) = public place. In legal terms it means the state in which a case is being heard.

Lex causae

An alternative approach is to characterise in accordance with the *lex causae*, that is, the appropriate foreign law. According to one leading thinker, 'every legal rule takes its classification from the legal system to which it belongs' (Wolff, 1950, p.154). The case of *Re Maldonado* [1954] p.223 is often cited as an example of this. The argument for this approach is that to say that the foreign law is to govern and then not to apply its characterisation is tantamount to not applying it at all. This is superficially convincing but it is arguing in a circle to say that the foreign law governs the process of characterisation before the process of characterisation has led to the selection of the appropriate legal system. And, secondly, it must not be overlooked that the potential conflict may not be between English law and a foreign system, but between two potentially applicable foreign laws: how and why are we to choose one rather than the other?

An examination of *Re Maldonado* will reveal some of the difficulties. It concerned a woman domiciled in Spain who died intestate and without living relatives. She left movable property in England and this was claimed by both the Spanish Government and the British Crown. This raised the question of whether the applicable law was Spanish law (which said it went to the Spanish state) or English law (under which it escheated to the Crown). This in turn depended upon whether it was a question of succession to movables (in which case the Spanish rule would apply) or whether it raised a question of *bona vacantia* (ownerless property), in which case it would be covered by the rule that title to property is governed by the *lex situs*, and this would lead to the application of English law. The Court of Appeal held that since, under Spanish law, the Spanish state succeeded to the property as the 'final heir', it was entitled to the movables in England. The property was never ownerless with the result that the English rule never came into the picture. Had the Spanish state claimed as *bona vacantia*, the position would have been different. The decision looks right; the approach certainly seems preferable to that adopted in *Ogden v Ogden*. But the difference between the two rules is only verbal. And, as Dicey, Morris and Collins argue (p.40), 'is it desirable that the right to property in England should depend on a verbal formulation with no real content?'

2.2.2 Other cases

There are a number of cases in which questions of characterisation have come before the English courts. Some of these are discussed at relevant points in this text. You might like to look at: *Re Hoyles* [1911] 1 Ch 179; *Re Wilks* [1935] Ch 645; *Re Priest* [1944] Ch 58; *Re Cohn* [1945] Ch 5; *Apt v Apt* [1948] P 83; *Macmillan Inc v Bishopsgate Investment Trust plc* [1996] 1 ALL E R 585; *Raiffeisen Zentralbank v Five Star General Trading* [2001] QB 825.

Unfortunately, the cases give little indication of the method of characterisation used by the court to reach its conclusion. However, in one of the more recent cases (*Macmillan Inc v Bishopsgate Investment Trust plc*) there is a quite lengthy discussion. Auld LJ accepted that 'the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence'. Looked at in this way, characterisation is 'a process of refining English conflict rules by expressing them with greater precision' (Dicey, Morris and Collins, p.52). So, if the rule says 'succession to movables is governed by the *lex domicilii* of the deceased', characterisation involves deciding which issues should be governed by the *lex domicilii*. 'Succession' is a compendious term which embraces a bundle of issues that are regarded as appropriate for determination by the *lex domicilii*.

ACTIVITY 2.1

- a. Explain 'characterisation'.
- b. When are questions of characterisation most likely to arise?
- c. Do the English cases adopt any particular theory of characterisation? Are they consistent?
- d. What is wrong with characterising according to the *lex fori*?

Summary

Although characterisation is ever-present in conflict of laws, it is apparent most often where there is disagreement between English law and foreign law on the correct classification of an issue, and where the English court is confronted by a concept it does not know. Bad characterisation, as happened in *Ogden v Ogden*, can have serious consequences, as is evident from that case.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain the purpose of characterisation (classification)
- ▶ indicate the basis on which the English courts characterise cases
- ▶ indicate where the principal difficulties in characterisation arise.

2.3 The 'incidental question'

ESSENTIAL READING

- Clarkson and Hill, pp.479–483
- Gottlieb, 'The incidental question revisited – theory and practice in the conflict of laws' (1977) 26 ICLQ 734.

An incidental question is one that arises in connection with the major question in a case. Thus while the main question may be succession, we also need to know whether the person claiming as the deceased's widow is indeed his widow. The incidental question here would be the validity of the marriage.

The best way to understand the incidental question is to give an example. Suppose a Greek national dies domiciled in Greece leaving movables in England. The English rule would refer the distribution of this part of his estate to Greek law. Suppose also that under Greek law his widow is entitled to a proportion of his estate. The marriage was in England and, though valid by English domestic law (which an English court would apply since it is the *lex loci celebrationis*), is void by Greek domestic law (which is applicable under Greek conflict of laws rules) because no Greek priest was present at the ceremony. Should the widow's claim be determined by the English or Greek conflict rule? There are different views:

- ▶ on one view, the widow **should not** be permitted to share in the estate because otherwise full effect would not be given to the English conflict rule that succession to movables is governed by Greek law
- ▶ on another view, she **should** be permitted to do so otherwise full effect would not be given to the English conflict rule that the validity of the marriage is governed by English law.

The incidental question is rarely found in the cases. The most obvious examples are found in divorce and remarriage cases. Two will be cited to illustrate the problem further.

Schwebel v Ungar

The facts of *Schwebel v Ungar* [1964] 48 DLR (2d) 644 (a Canadian Supreme Court decision) are that a Jewish husband and wife domiciled in Hungary married in Hungary. They later decided to emigrate to Israel. While *en route* in Italy the husband divorced his wife by issuing a Jewish bill of divorcement (known as a 'get'). Under the law of Hungary (their domicile) and Italian law, the divorce was invalid, but it was recognised by the law of Israel. They acquired a domicile of choice in Israel. Subsequently, the wife went to Toronto and, while she was still domiciled in Israel, married a second husband. He brought proceedings for nullity on the ground that the marriage was bigamous. The Supreme Court of Canada held that the marriage was valid. There are different interpretations of this case (you may consult Dicey, Morris and Collins, p.54–56), but it is possible that what the court was doing was upholding the second marriage without recognising the divorce. If this is right, it means that the court decided the incidental question (the validity of the divorce) by the conflict rules of Israel, the country whose law governed the main question (the wife's capacity to marry).

Lawrence v Lawrence

The facts of *Lawrence v Lawrence* [1985] Fam 106 are that the first husband and his wife married in Brazil. Subsequently, the wife divorced the husband in Nevada (this was not recognised in Brazil) and the next day married the second husband in Nevada. The second husband petitioned for a declaration as to the validity of this second marriage. The incidental question arose from the fact that, under Brazilian law – the law of the wife's domicile – to which English choice of law rules referred capacity to marry, she lacked capacity to marry the second husband. The Court of Appeal (by a number of routes which will be discussed later in this guide) upheld the validity of the second marriage. They did this by giving primacy to the divorce recognition issue at the expense of that of capacity to marry.

You will have noted that for an incidental question to arise:

- i. there must be a main issue governed (under English conflict rules) by a foreign law
- ii. there must be a subsidiary question involving a foreign element which has its own choice of law rule (this could have arisen separately)
- iii. this choice of law rule should lead to a conclusion different from that which would have been reached had the law governing the main question been applied.

There are different views on the solution to adopt. Lipstein (see [1972 B] C L J 67, 90–96) favours the law governing the main issue. Dicey, Morris and Collins (p.59) believe that the determination of the problem will depend on the nature of the individual case and the policy of the forum towards this.

ACTIVITY 2.2

On the facts of *Schwebel v Ungar*,

- a. if the wife had petitioned the courts of Ontario for a declaration that her divorce was valid, what do you think they would have ruled?
- b. if after the second marriage the husband had petitioned for a declaration of status, the courts would have ruled that he was still married. What implications would this have had for the wife?

SELF-ASSESSMENT QUESTIONS

1. When does an incidental question arise?
2. What is a court to do when confronted with an incidental question?

Summary

Not every conflict of laws problem will hinge on a single issue. Sometimes a further question will be posed. Should this further (incidental) question be referred to the same law that governs the main issue, or to a different rule? There is no categorical answer to this, and different views have been expressed both by authors and within the case law.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain what is meant by 'the incidental question' and give examples from the case law
- ▶ describe the ways to solve the incidental question.

2.4 Renvoi: an explanation**ESSENTIAL READING**

- Clarkson and Hill, pp.470–478
- Briggs, pp.14–19
- Briggs, A. 'In praise and defence of *renvoi*' (1998) 47 ICLQ 877

When it is decided that an issue is governed by the **law** of a particular country, what is the meaning to be given to the word 'law'? When an English court decides that the *lex causae* is French law, does this mean the rules of French domestic law, as these would apply to a wholly internal case, or does it refer to law in its wider sense including French conflict of laws rules? This ambiguity in the expression 'French law' gives rise to the difficult problem of *renvoi*.

2.4.1 Approaches to *renvoi*

The problem may be understood best by using an illustration. Suppose T dies intestate and a question arises concerning succession to his estate. T is British but has died domiciled in France. English conflict rules say that succession to his movables is governed by French law as this was his domicile. Suppose that by French domestic law, A would succeed to the estate, but that according to French conflict of laws rules, succession would be governed by the *lex patriae* and this is the law of England. Suppose also that as a matter of English domestic law, B would succeed. What is the court to do? There are three possibilities.

First, the court might apply the French domestic rule. This would require proof of the domestic law of France, but not of its conflict rules. If this is done, the court would find in favour of A. This is simple and, some might add, rational (see *Re Annesley* [1926] Ch 692, 708–709; *Re Askew* [1930] 2 Ch 259, 278).

Secondly, the court might interpret the choice of law rule as pointing to French law including its conflict of laws rules. This would refer back to English law. The court could then interpret this as being English domestic law and find for B. This is known as 'accepting the *renvoi*'. This method requires proof of the conflict rules for the foreign country, but it does not require proof of the foreign rules about *renvoi*. It is usually called the theory of 'single' or 'double' *renvoi*. There are famous French authorities supporting this view (*Forgo's* case in 1883 and *Soulié's* case in 1910) and Article 27 of the Introductory Law of the German Civil Code of 1900 also enjoins it. *Forgo's* case is discussed by Cheshire, North and Fawcett at p.60.

Thirdly, the court might decide the case in the same way as it would be decided by the French court. So, if the French court would refer to English law and would interpret that reference to mean English domestic law, then the English court would apply English domestic law. If, on the other hand, the French court would refer to English law and interpret that reference to mean English conflict of laws, and would 'accept the *renvoi*' from English law and apply French domestic law, then the English court would apply French domestic law. This method requires proof not only of the conflict rule of the foreign country (in this case relating to succession), but also the foreign rules about *renvoi*.

The third approach represents the present doctrine of the English courts. It is usually called the theory of 'total' or 'double' *renvoi*.

2.4.2 Application of *renvoi*

The doctrine has been applied to:

- ▶ formal and intrinsic validity of wills
- ▶ cases of intestate succession
- ▶ legitimation by subsequent marriage.

There are indications that it might apply to:

- ▶ formal validity of marriage
- ▶ capacity to marry
- ▶ matrimonial property.

It should be stressed that it does not apply in the fields of contract (see Article 15 of the Rome Convention and Article 24 of Rome I Regulation, discussed below) or in relation to torts (see Private International Law (Miscellaneous Provisions) Act 1995 s.9 (5) and now Art 24 of Rome II Regulation).

The principal difficulties

There are three main difficulties in the application of the English doctrine.

1. It makes everything depend of the evidence of foreign experts. It requires proof not only of foreign choice of law rules, but of foreign rules about *renvoi*. See Wynn-Parry J's comment in *Re Duke of Wellington* [1947] Ch 506, 515.
2. The problem of a reference to the national law of a British citizen. It seems that Continental lawyers do not always understand the difference between 'British' and 'English'. In *Re Askew*, for example, the expert witness stated: 'I am informed and believe that John Bertram Askew was an Englishman (*sic*). Therefore, English law would be applied by the German court' ([1930] 2 Ch 259, 276).
3. There may be an inextricable circle. The effect of applying the doctrine of total *renvoi* is to make the decision turn on whether the foreign court rejects the *renvoi* doctrine or adopts a theory of single or partial *renvoi*. But if the foreign court also adopts the doctrine of total *renvoi*, then logically no solution is possible unless either the English or the foreign court abandons its theory, for otherwise a perpetual *circulus inextricabilis* is constituted. As Dicey, Morris and Collins remark (p.88), 'It is hardly an argument for the doctrine of total *renvoi* that it is workable only if the other country rejects it'.

ACTIVITIES 2.3–2.4**2.3**

- a. Should the doctrine of *renvoi* be abolished so that any reference to a foreign system of law is a reference solely to its domestic law?
- b. Why do you think *renvoi* is ruled out in contract and tort cases?
- c. Do you think the difficulties of applying total *renvoi* have been exaggerated?

2.4 H and W are Polish nationals domiciled in Poland. They marry in Italy in accordance with a form prescribed by Polish domestic law, but not in a form prescribed by Italian domestic law. Evidence is given that the Italian courts would recognise a marriage celebrated in Italy in accordance with the forms prescribed by the law of the parties' common nationality. H and W have now come to England and H claims he is not married to W. What do you think an English court would do? (Look at *Taczanowska v Taczanowski* [1957] P 301.)

2.4.1 Mrs Smith is a British citizen, domiciled in England. Her husband got a job in China working for a branch of an English corporation in Beijing. She was injured at their residence in Beijing provided by the employer. She is suing the employer in England in contract and tort. If Chinese law includes its conflict of laws rules, it will confer discretion on the English court to apply English substantive law, which has a more generous limitation period. What should the English court do? You may get assistance from Cheshire, North and Fawcett, pp.70–71.

Summary

Where reference is made to a foreign law, this could be interpreted as a reference to the law it would apply in a case without a foreign element, or to the whole of its law including its conflict of laws rules. If it is the latter, this might refer back (*renvoi*) to the first system. This could go on for ever! So what are we to do to solve this? Different theories have developed to tackle the puzzle. But is *renvoi* a good idea? There are different views on this, as you will have gathered if you have read Briggs.

REMINDER OF LEARNING OUTCOMES

By this stage, you should be able to:

- ▶ explain the ambiguity of a reference to a foreign 'law' and describe the different approaches to unravelling this
- ▶ describe the different concepts of *renvoi* and give examples from the cases.

2.5 Public policy and the exclusion of foreign law**ESSENTIAL READING**

- Clarkson and Hill, pp.493–504.
- Carter, P. 'The role of public policy in English conflicts of law' (1993) 42 ICLQ 1.

An English court will not apply a foreign law, otherwise applicable according to English rules of the conflict of laws, if the law, or the result of its application, is contrary to public policy. As Lord Simon of Glaisdale put it in *Vervaeke v Smith* [1983] 1 AC 145,164:

There is abundant authority that an English court will decline to recognise or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy.

In the conflict of laws it is obviously necessary that public policy be kept within limits, for otherwise the whole basis of the system is liable to be frustrated. The courts should be, and are, therefore slower to invoke public policy in cases involving a foreign element than when a domestic legal issue is involved. That said, it must be stressed that with the Human Rights Act 1998 now in operation we may expect English courts to adopt a broader concept of public policy than hitherto (and see Briggs pp.44–45). Thus, as Briggs observes:

It has not yet been held that a rule of foreign law which allows a husband to divorce his wife, but not *vice versa*, should not be recognised, but discrimination between the sexes is hardly more acceptable than that between the races (p.45).

Are the Islamic *talaq* and the Jewish *get* now contrary to public policy? Or will the courts tread warily so as to avoid the suspicion of discriminating against religions? Insight into attitudes taken by English courts may be sought in *Oppenheimer v Cattermole* [1976] AC 249 (Nazi law depriving absent German Jews of their nationality and confiscating their property said to be 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as law at all' *per* Lord Cross at p.278). See also *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368,428 *per* Lord Templeman.

What is usually in question is not the foreign law as such, but the results of its recognition or enforcement in England in a particular case. Thus even in the days when English law set its face against polygamy – it takes a more liberal view now – it treated the children of a polygamous marriage as legitimate (see *Bamgbose v Daniel* [1955] AC 107) and wives were allowed to assert rights of succession on the grounds that they were wives (*Coleman v Shang* [1961] AC 481; *Re Sehota* [1978] 1 W L R 15 0 6).

Public policy may not only induce a court to refuse to recognise or enforce a contract or a marriage, etc. which is valid under applicable foreign law. It may also lead to its enforcement or recognition: that is, we must enforce what is invalid under its applicable foreign law. For example, foreign legislation which invalidates a contract or a marriage may be disregarded if it is penal or discriminatory. If foreign exchange control legislation is passed as 'an instrument of oppression' it may be disregarded on grounds of public policy (*Re Helbert Wagg & Co Ltd* [1956] Ch 323, 351).

Public policy can be invoked in any area of conflict of laws. We will see it subsequently in relation to the recognition and enforcement of foreign judgments. Here we will concentrate on its role in two areas: contract and status.

2.5.1 Public policy and contract law

At common law English courts have refused to enforce:

- ▶ champertous[†] contracts (*Trendtex Trading Corp v Crédit Suisse* [1982] AC 679)
- ▶ contracts in restraint of trade
- ▶ contracts involving trading with the enemy (*Dynamit A G v Rio Tinto Co* [1918] AC 260)
- ▶ contracts breaking the laws of friendly foreign countries (*Foster v Driscoll* [1929] 1 K B 470).

[†] **Champertous:** from champerty, a situation where someone helps to finance a legal action in return for a share of any damages won.

In each case the contract was valid under its applicable law. On the other hand, a foreign contract made without consideration will be enforced in England (*Re Bonacina* [1912] 2 Ch 394). The fact that it is contrary to the common law does not make it contrary to public policy. Article 16 of the Rome Convention and now Art 21 of Rome I Regulation provide that the application of the law of any country may be refused if its application is manifestly incompatible with English public policy. Note the word 'manifestly', suggesting a very limited role for public policy in this area. The cases just discussed are good instances of manifest incompatibility. This subject is further discussed in Chapter 8: 'Contracts'.

2.5.2 Public policy and status

The courts have said or held that incapacities imposed on account of slavery (most famously in *Somerset's case* [1771] 20 St Tr 1), religion or religious vocation (*Re Metcalfe's Trusts* [1864] 2 De G J & S 122), alien nationality (*Re Helbert Wagg & Co Ltd* [1956] Ch 323, 345–46), race (*Oppenheimer v Cattermole* [1976] AC 249, 265, 276–78, 282–83), divorce (*Scott v Att-Gen* [1886] 11 P D 128), physical incompetence (*Re Langley's Settlement* [1962] Ch 541, 556–57) and prodigality (*Worms v De Valdor* [1880] 49 L J Ch. 261 and *Re Selot's Trusts* [1902] 1 Ch. 488) will be disregarded. Public policy may also require that a **capacity** existing under a foreign law should be disregarded in England: see to this effect *Cheni v Cheni* [1965] P 85, 98, though in this case a law which allowed a marriage between an uncle and a niece was not regarded as so objectionable as to be overridden by English public policy when the marriage had nothing to do with England. In *Mohamed v Knott* [1969] 1 QB 1, a marriage with a girl of 13 in Northern Nigeria was recognised as valid in England (both spouses were domiciled in Nigeria).

Courts have also said they have 'residual discretion' to refuse to recognise a foreign status conferred or imposed upon a person by the law of his domicile or a foreign decree of divorce or nullity of marriage granted by a foreign court (see *Gray v Formosa* [1963] P 259 at 269, 270, 271 and *Lepre v Lepre* [1965] P 52, 63). This may be criticised. Thus Grodecki ((1962) 11 I C L Q 578, 582) commented:

to state the law in terms of judicial discretion... is to admit that no certainty or predictability is attainable in this matter.

2.5.3 Public policy and international law

It is part of English public policy that the courts should give effect to clearly established rules of international law.

The best illustration of this is *Kuwait Airways Corporation v Iraq Airways Co* (Nos. 4 and 5) [2002] 2 AC 883. Following the invasion of Kuwait by Iraq in 1990, aircraft belonging to KAC were seized and flown by IAC to Iraq. The Revolutionary Command Council of Iraq purported to divest KAC of its title to its aircraft and transfer this to IAC. KAC brought proceedings in England for the return of the aircraft or payment of their value, and for damages. The House of Lords held that it is legitimate for an English court to have regard to the content of international law when deciding whether to recognise a foreign law. The acceptability of a foreign law must be judged by contemporary standards. Iraq's invasion of Kuwait and the seizure of its assets were gross violations of established rules of international law of fundamental importance. So recognition or enforcement of the expropriatory decree were manifestly contrary to the public policy of English law.

Where there was a fundamental breach of international law, no connection was needed with England for the public policy exception to operate, since it is not based on a principle of public policy which is domestic in character. In this case public policy operated as an exception to the tort choice of law rules.

For further discussion see Rogerson (2003) 56 *Current Legal Problems* 265.

Summary

English courts will not apply a foreign law if the law, or the result of its application, is contrary to public policy. Public policy is used sparingly, for otherwise it could undermine the whole rationale of conflict of laws. Its application can be seen by examining its role in relation to contract and to status, and in relation to international law.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain the role of public policy in the conflict of laws
- ▶ indicate areas where the Human Rights Act 1998 may influence the application of public policy in the conflict of laws
- ▶ appreciate its role where there is a fundamental breach of international law.

ACTIVITY 2.5

- a. Define public policy. Does this doctrine have any dangers?
- b. What do you think the impact of the Human Rights Act 1998 is likely to be on this area of law?
- c. Do you think an English court will recognise a gay marriage celebrated where this is allowed? What if one or both of the parties is domiciled in England? And see *Wilkinson v Kitzinger* [2007] 1 FLR 295.
- d. Will English law recognise a marriage where the wife is 10 years old? What difference would it make if she is the husband's step-daughter? Or if the husband himself is only 12?
- e. Imagine a legal system that does not allow adulterers to remarry. Would English law recognise such an incapacity? See *Scott v Att-Gen* [1886] 11 P D 128. What of a legal system that does not permit those with HIV infection to marry? Or a legal system which did not allow persons of a particular religion to marry?

2.6 Penal, revenue and other public laws

ESSENTIAL READING

- Clarkson and Hill, pp.490–493.

2.6.1 The basis of non-enforcement

It is an almost universal principle that one state will not enforce the **penal** and **revenue** laws of another state.

Why not? Because enforcement of such claims is an extension of the sovereign power which imposed the taxes or penalties and 'an assertion of sovereign authority by one state within the territory of another, as distinct from the patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties' (*per* Lord Keith in *Government of India v Taylor* [1955] AC 491, 511; see also Lord Goff in *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, 808).

Who decides whether a law is a penal law or a revenue law or another public law? The answer is that this is a matter for English law: so whether the foreign system would so classify the law is irrelevant (*USA v Inkley* [1989] QB 255). See also *Tasarruff v Demirel* [2007] 1 WLR 2508.

Attempts to enforce such laws may be direct or indirect. Neither is permitted. Indirect enforcement occurs where the foreign state (or its nominee) seeks a remedy which is not based on the foreign rule in question but which is designed to give it extra-territorial effect. It can also occur where a private party raises a defence based on the foreign law to assert the right of the foreign State. As an example of the latter you might read *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 K B 140. (The bank sought delivery of securities owned by the former King of Spain and held by his agent in London to deliver them to the Spanish State, which had declared his property forfeit on account of his alleged treason.)

2.6.2 Categories of law that are excluded

We will look separately at the different categories of law which English courts will refuse to enforce.

Penal laws

The courts of no country execute the penal laws of another (Chief Justice Marshall in *The Antelope* (1825) 10 Wheat 66, 123).

What is a penal law? In *Huntington v Attrill* [1893] AC 150, 156 'penal' was defined to include not only crimes in the strict sense but 'all breaches of public law punishable by pecuniary mulct[†] or otherwise, at the instance of the state government, or someone representing the public' and 'all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties'. It is not necessary that the law in question is found in the criminal code of the foreign country. So, for example, a law intended to protect the historic heritage of New Zealand by forfeiting to the Crown historic articles illegally exported was held to be penal (see *Att-Gen of New Zealand v Ortiz* [1984] AC 1, 34–35 *per* Ackner and O'Connor LJ: the House of Lords affirmed on different grounds).

[†] **Mulct**: an obsolete word (verb or noun – noun in this instance) meaning the extraction of money, i.e. a fine.

Revenue laws

There is a well-recognised rule – it goes back nearly 300 years – that courts will not collect the taxes of foreign states. The reason is that 'tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction' (*Government of India v Taylor* [1955] AC 491, 514). So, the courts do not enforce foreign revenue laws, nor judgments based on foreign revenue claims.

What is meant by 'revenue law'? There is no definition but it clearly includes income tax, capital gains tax, a succession duty, a municipal contribution (such the UK's 'Community Charge') and customs duties. Interestingly, it has been held that the recovery of social security payments and legal aid contributions do not come within this exclusionary rule (see *Weir v Lohr* [1967] 65 DLR (2d) 717 and *Connor v Connor* [1974] 1 NZLR 632).

Public laws

Although there is very little authority for this additional category, it is rational that claims for the enforcement of foreign laws which are analogous to penal and revenue laws should be dealt with similarly. These would include, for example, laws about nationalisation, exchange control and laws regulating the duties of those employed in the security services. Two cases illustrate the point.

***Att-Gen of New Zealand v Ortiz* [1984] AC 1**

The New Zealand Government sought to recover a valuable Maori carving which had been illegally exported from New Zealand. The carving had been bought by Ortiz and was in the possession of Sotheby's, the auctioneers, for sale on behalf of Ortiz. A New Zealand statute provided that historic articles exported without permission were forfeited to the Crown. In the Court of Appeal Lord Denning MR held that the New Zealand statute could not be enforced because it was a public law (for the other two judges it was a penal law). The House of Lords upheld the Court of Appeal on different grounds, and pointed out that the views of the Court of Appeal on the applicability or enforceability of penal or public law were *obiter*.

***US v Inkley* [1989] QB 255**

The US government sought to enforce in England a default judgment obtained against the defendant in Florida. He had been arrested on fraud charges and given an appearance bond as a condition of his being released on bail. The Court of Appeal refused to enforce the judgment. It was a penal law. However, Purchas LJ and Heilbron J accepted that there is a third residual category – foreign public law – which the court will not enforce. Oddly, they relied on Ackner LJ's judgment in *Ortiz*, although Lord Ackner did not think there was such a residual category!

The Spycatcher cases

Litigation arising from the notorious *Spycatcher* book provides us with a third example. The book had been written by a former member of the British security services, in breach of the Official Secrets Act. The Government sought to stop publication of the book in Australia and New Zealand. The High Court of Australia accepted that there was a principle that the court should not enforce foreign public laws. It suggested that rather than refer to 'public laws', it would be better to refer to 'public interests' or 'governmental interests' since this would signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government. It refused the injunction on the ground that it would not enforce a claim arising out of acts of a foreign State in the exercise of such powers in the pursuit of national security (see *Att-Gen (UK) v Heinemann Publishers Australia Pty Ltd* [1988] 165 CLR 30). In New Zealand, the court refused an injunction since the material in the book was by now well known. However, the court accepted the residual category of 'public laws', though it thought a secret service agent's duty of confidentiality should be enforced, at any rate if the local sovereign supported the claim (*A-G for the UK v Wellington Newspapers* [1988] 1 NZKR 129).

SELF-ASSESSMENT QUESTIONS

1. Define 'penal law'.
2. Why do states generally refuse to enforce the penal and revenue laws of other countries?
3. Give three examples of matters that may come under the heading of 'revenue law'.
4. Explain 'public law'.

Summary

English courts will not enforce penal, revenue and other similar public laws of foreign states. To do otherwise would be to recognise the assertion of sovereign authority by one state within the territory of another. What constitutes a penal law and a revenue law is clear. Courts are still trying to come to a clear conclusion as to what comes within 'other public law'.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain why English courts refuse to enforce certain laws of foreign states
- ▶ identify and give examples of the areas in which such exclusions are made.

ACTIVITIES 2.6–2.8

- 2.6 X incurs a penalty of £1,000 for breaking the law of Saudi Arabia by importing a bottle of whisky. The penalty is recoverable in the courts of Saudi Arabia in an action for debt brought by the Saudi government. X is now in England. Can the Saudi government recover £1,000 from him in an action in an English court? If not, why not?
- 2.7 Under legislation the City Council of Auckland (New Zealand) is authorised to carry out improvements in the city and charge the cost to the owners of the property affected. One of these owners lives in London. The Council sues him in London for the sum due. Can the claim be maintained? If not, why not?
- 2.8 X brings manuscripts to England from Bulgaria despite a decree of the Bulgarian government forbidding their export. X seeks to sell them in London to Y. The Bulgarian government claims an injunction to prevent the sale. Will it succeed? What defence is available to Y?

2.7 Proof of foreign law

ESSENTIAL READING

- Clarkson and Hill, pp.16–17.
- Fentiman, R. 'Foreign law in English courts' (1992) 108 LQR 142.

We conceptualise foreign law as fact. This has two consequences:

- ▶ it must be pleaded
- ▶ it must be proved.

An English court does not take judicial notice of foreign law.

Mode of proof

The foreign law must be proved by expert evidence: see *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 283. Expertise in foreign law is easier to describe than define. A judge or legal practitioner from the foreign country is always competent. Statute provides that:

in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to foreign law irrespective of whether he has acted or is entitled to act as a practitioner [in the foreign country] (Civil Evidence Act 1972 s.4(1)).

So an academic lawyer who has specialised in the law of the foreign country is competent (an example is *Bodley Head v Flegon* [1972] 1 WLR 680). Someone with practical knowledge of the law, though not a lawyer, is also competent (e.g. the ex-Governor of Hong Kong in *Cooper-King v Cooper-King* [1900] P 65).

An English court will not conduct its own searches into foreign law. But if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at these as part of the evidence.

If the evidence is uncontradicted, the English court should be reluctant to reject it. But it may reject evidence which is 'patently absurd' or 'obviously false'.

If there is conflicting testimony, the court is bound to decide for itself which it believes.[†]

Burden of proof

The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law.

[†] Under certain statutes proof of foreign law may sometimes be dispensed with. The details of these should not concern you.

ACTIVITIES 2.9–2.12

- 2.9 What implications follow from regarding foreign law as fact? Think of the role of the appellate court (see *Parkasho v Singh* [1968] P 223) or the unlikely event of a conflicts case being tried by a jury.
- 2.10 Do you think the methods of proving foreign law in an English court are satisfactory?
- 2.11 Are the following to be regarded as experts? Give your reasons.
 - a. a Bishop: the question in issue relates to the Canon law
 - b. an American Professor of Russian law: the question relates to Russian law
 - c. an Iraqi lawyer, in exile for the last 12 years, on current Iraqi law.
- 2.12 Given the difficulties of proving foreign law, should the court have the power to decline to hear the case, thus forcing litigation to take place in the courts of a country familiar with the foreign law in question? (Briggs pp.6–7)

Summary

English law regards foreign law as a fact. If it is not raised or proved, the court will apply English law. The burden of proof is on the party who bases his claim or defence on foreign law. Expert evidence is required: what constitutes expertise is easier to describe than to define. It is not limited to practitioners in law.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain the implications of regarding foreign law as fact
- ▶ explain how foreign laws must be proved in an English court and state who is competent to give expert evidence on a matter of foreign law.

SAMPLE EXAMINATION QUESTIONS

Question 1 Is it right for courts to characterise an issue in a case with a foreign element as they would characterise a case with no foreign elements?

Question 2 What do you consider the best approach to characterisation to be?

Question 3 Iraq invades Kuwait and seizes its aircraft. Iraqi legislation is then enacted purporting to dissolve Kuwait Airways and transfer its assets to Iraqi Airways. If Kuwait Airways sues Iraqi Airways in London, will the English court recognise the Iraqi legislation?[†] Or will it refuse to do so?

REFERENCES

- Wolff, M. *Private International Law*. (Oxford: Clarendon Press, 1950) second edition, p.154.

[†] You may find *Kuwait Airways Corp. v Iraqi Airways Co* [2002] 2 AC 883 helpful in answering this question. You might also like to read P. Rogerson (2003) 56 *Current Legal Problems* 265 on this case.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the purpose of characterisation (classification) and indicate the basis on which the English courts characterise cases	☐	☐	☐
I can indicate where the principal difficulties in characterisation arise	☐	☐	☐
I can explain what is meant by 'the incidental question' with examples from the case law and describe the ways to solve the incidental question	☐	☐	☐
I can explain the ambiguity of a reference to a foreign 'law' and describe the different approaches to unravelling this	☐	☐	☐
I can describe the different concepts of renvoi and give examples from the cases	☐	☐	☐
I can explain the role of public policy in the conflict of laws	☐	☐	☐
I can indicate areas where the Human Rights Act 1998 may influence the application of public policy in the conflict of laws	☐	☐	☐
I can appreciate its role where there is a fundamental breach of international law	☐	☐	☐
I can explain why English courts refuse to enforce certain laws of foreign states	☐	☐	☐
I can identify and give examples of the areas in which such exclusions are made	☐	☐	☐
I can explain the implications of regarding foreign law as fact	☐	☐	☐
I can explain how foreign laws must be proved in an English court and state who is competent to give expert evidence on a matter of foreign law.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
2.1	Characterisation – an illustration: <i>Ogden v Ogden</i>	☐	☐
2.2	The difficulties that arise with characterisation	☐	☐
2.3	The 'incidental question'	☐	☐
2.4	<i>Renvoi</i> : an explanation	☐	☐
2.5	Public policy and the exclusion of foreign law	☐	☐
2.6	Penal, revenue and other public laws	☐	☐
2.7	Proof of foreign law	☐	☐

3 Domicile and residence

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Introduction

This chapter discusses the personal connecting factors used in English conflict of laws. It examines the general principles of domicile and the ways in which domicile is ascertained. The three different concepts of domicile, domicile of origin, domicile of choice and domicile of dependency are each considered. A section at the end of this chapter discusses residence, in particular **habitual residence**, a concept which is becoming more important.

Solving domicile problems comes with practice, so we have included a number of activities relating to it. You should also read the cases to see how judges undertake the exercise. A test of how well you have understood domicile issues is whether you can answer the sample examination questions at the end of the chapter with confidence.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- ▶ explain and define the concept of domicile
- ▶ use the principles of domicile to determine where a person is domiciled
- ▶ explain how the domicile of dependents, particularly children, is established
- ▶ distinguish between domicile and habitual residence.

3.1 The concept of domicile

ESSENTIAL READING

- Clarkson and Hill, pp.18–51.
- Cases: *Winans v Att-Gen* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588; *IRC v Bullock* [1976] 1 WLR 1178; *Re Furse* [1980] 3 All ER 838.

3.1.1 Why domicile is important

Domicile (the *lex domicilii*) has a dominating role in family and matrimonial property law and a role in other areas such as capacity of persons to make contracts. It plays a part also in the law of taxation. There is only one concept of domicile: accordingly, a case on whether a taxpayer has acquired a domicile in England is also authority for the question of whether someone has the capacity to marry or make a will.

Domicile cannot be defined with precision

Old cases such as *Whicker v Hume* [1858] 7 HLC 124, 160 defined domicile as ‘permanent home’. However, you will find many reported cases where a person has lived in a place for 30 or 40 years and has not been held to have acquired a domicile there. After reading the cases listed above you may conclude that the persons in question (such a person is often called the *propositus*) had permanent homes in England, but in none of the four cases was a domicile acquired in England.

Domicile is ‘an idea of law’

Domicile[†] diverges from the notion of permanent home in three ways:

- ▶ Firstly, the elements required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. Thus, to acquire a domicile of choice in a country a person must **intend** to reside in it permanently or at least indefinitely.
- ▶ Secondly, the law attributes a domicile to everyone, whether they have a permanent home or not. A vagrant, for example, has a domicile.
- ▶ Thirdly, certain persons, for example children under 16, cannot acquire independent domiciles. They may thus have permanent homes in places in which they are not domiciled, because the person upon whom they are dependent is domiciled elsewhere.

[†] The notion of domicile as ‘an idea of law’ can be found in *Bell v Kennedy* [1868] LR 1 Sc & Div 307,320.

Domicile connects a person with the law of a country

For these purposes England and Scotland, Victoria and New South Wales, California and Texas, for example, are separate systems. So if X emigrates to the USA but cannot decide whether he will live in Florida or Oregon, he does not acquire a domicile of choice, and will retain his existing domicile until he does so.

Countries may cease to exist or these boundaries may change

The Soviet Union broke up in the 1990s; so did Yugoslavia, and Czechoslovakia became two countries (the Czech and Slovak Republics). Surprisingly, little thought has been given to the consequences of these changes for the law of domicile. It may be supposed, for example, that someone with a Yugoslav domicile in 1990 who lives in Dubrovnik became domiciled in Croatia when that country was created, and that whether someone with a Czechoslovakian domicile is now domiciled in the Czech Republic or the Slovak Republic will depend on whether he lived in Prague or Bratislava at the time of the split. Briggs, in *The Conflict of Laws* discusses this briefly at p.23.

3.1.2 The principles of domicile

The basic principles set out most recently in *F v F* [2009] 2 FLR 1496, 1503, are that:

- ▶ no person can be without a domicile (see *Mark v Mark* [2006] 1 AC 98)
- ▶ no person can at the same time for the same purposes have more than one domicile (see *IRC v Bullock* [1976] 1 WLR 1178, 1184)
- ▶ an existing domicile is presumed to continue until it is proved that a new domicile has been acquired (*Winans v A-G* [1904] AC 287, 289).

The burden of proving a change of domicile lies on those who assert it. The change of a domicile must be proved on a balance of probabilities, not beyond reasonable doubt.

For the purpose of an English rule of the conflict of laws, the question of where a person is domiciled is determined according to English law. (See *Re Annesley* [1926] Ch 692; *Lawrence v Lawrence* [1985] Fam 106, 132).

3.2 The ascertainment of domicile

3.2.1 The domicile of origin

Every person acquires at birth a **domicile of origin**.

- ▶ This is the domicile of his **father** at the time of his birth if he is **legitimate**. It is the domicile of his **mother** if he is **illegitimate** or if his father dies before he is born.
- ▶ Foundlings have a domicile of origin in the country in which they are found.
- ▶ A domicile of origin may be changed **as a result of adoption**, but not otherwise.

A domicile of origin is more tenacious than a domicile of choice. It is more difficult to prove it has been abandoned. If a person leaves the country of his domicile of origin, intending never to return to it, he continues to be domiciled there until he acquires a domicile of choice in another country. But if a person leaves the country of his domicile of choice, intending never to return to it, he ceases to be domiciled in that country: unless and until he acquires a new domicile of choice, his domicile of origin revives.

3.2.2 Domicile of choice

Every independent person can acquire a domicile of choice by the combination of **residence** and **intention** of permanent or indefinite residence.

Residence

'Residence' means physical presence 'as an inhabitant' (see *IRC v Duchess of Portland* [1982] Ch 314, 318–319). It is not necessary that residence should be of long duration. In an American case (*White v Tennant* 8 SE 596 [1888]), part of a day was enough. An immigrant can acquire a domicile immediately on arrival if he or she intends to settle.

In *Puttick v Att-Gen* ([1980] Fam 1), it was held that a domicile of choice cannot be acquired by **illegal** residence (in this case it was claimed by a member of a German terrorist group). It may not follow that an English court would say that domicile of choice could not be acquired by illegal residence in a country outside the United Kingdom: for example, an Al-Qa'ida member with a domicile of origin in Saudi Arabia living permanently in Germany.

Intention

'Intention' is intention to reside permanently or indefinitely in a country, that is not for a limited period or a particular purpose. If the person will leave upon the occurrence of a contingency, this possibility will be ignored if the contingency is vague and indefinite (e.g. winning the lottery), but if it is clearly foreseen and reasonably anticipated (e.g. coming to the end of employment), it may prevent the acquisition of a domicile of choice.

Naturalisation is relevant, but it is not decisive as a matter of law. It is a circumstance and any circumstance which is evidence of a person's residence, or his intention to reside permanently or indefinitely, must be considered in determining whether he has acquired a domicile of choice in that country.

Most disputes as to domicile turn on the question of whether the necessary intention accompanied the residence. A court has said

There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime (*Drevon v Drevon* [1864] 34 L J Ch 129, 133).

Cheshire, North and Fawcett (p.164) say:

Nothing must be neglected that can possibly indicate the bent of the resident's mind. His aspirations, whims, *amours*, prejudices, health, religion, financial expectations...

A person whose domicile is in question may testify as to his intention, but courts view the evidence of an interested party with suspicion. Declarations of intention made out of court may be given in evidence by way of exception to the hearsay rule. Declarations of intention

must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions (*Ross v Ross* [1930] AC 1, 6-7).

It has been said that to acquire a domicile of choice there must be

a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief from illness (*Udny v Udny* [1869] L R 1 Sc & Div 441, 458).

This can be seen by examining certain categories of persons.

Summary

Domicile is the most significant connecting factor in English conflict of laws. It has a dominating role in family and matrimonial property law. It is difficult to define, but easier to understand in practice. There are important principles of domicile. Everyone is born with a domicile of origin, which remains (if only in abeyance). Domicile of choice can be acquired by residence and an intention to reside permanently or indefinitely.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain and define the concept of domicile
- ▶ use the principles of domicile to determine where a person is domiciled.

3.3 Domicile and categories of persons

Prisoners

A prisoner normally retains his domicile. But he can form an intention to reside permanently or indefinitely: in which case he acquires a domicile of choice there.

Persons liable to deportation

Such a person's residence will be precarious and so he is unlikely to be able to form an intention to remain. But if he forms the necessary intention, he acquires the domicile of choice.

Once a person has acquired a domicile of choice he does not lose it merely because a deportation order has been made against him. (*Cruh v Cruh* [1945] 2 All E R 545). He loses it only when he is actually deported.

Refugees and fugitives

If a **political refugee** intends to return to the country from which he has fled as soon as the political situation changes, he retains his domicile there unless the desired political change is so improbable that this intention is discounted and is treated as merely an exile's longing for his native land. But if his intention is not to return even when the political situation has changed, he can acquire a domicile of choice in the country to which he has fled. Contrast the cases of *Re Lloyd Evans* [1947] Ch 695 and *May v May* [1943] 2 All E R 146.

In the cases of a **fugitive from criminal justice**, the intention to abandon domicile will readily be assumed, unless the punishment he seeks to escape is trivial or there is a relatively short period of prescription barring liability to punishment. See *Re Martin* [1900] P 211. But in *Moynihan v Moynihan* (Nos 1 and 2) [1997] 1 FLR 59, it was held that M, who had left the UK to avoid arrest on serious fraud charges, had, at his death, acquired a domicile of choice in the Philippines, where he had lived for 20 years, built up a thriving business, acquired properties, married and had children.

Invalids

Does a person who resides in a country for the sake of his health acquire a domicile there? The objections are (i) the residence has been taken up for a special motive; and (ii) it may not be freely chosen. These factors make it improbable that a domicile has been acquired. If someone goes to a country for treatment, he clearly does not acquire a domicile there. But someone who settles in a new country because he believes he will enjoy better health there may well intend to live there permanently or indefinitely (see *Hoskins v Matthews* [1855] 8 De GM & G 13 for an example).

Members of the armed forces

It was once thought that members of the armed forces could not, as a matter of law, acquire a domicile of choice during service. But it is now settled that such a person can acquire a domicile of choice if that is his intention. (*Donaldson v Donaldson* [1949] P 363). Of course, it rarely will be.

Employees

If a person goes to a country merely to work, he does not acquire a domicile of choice there. So when a barrister with an English domicile of origin was appointed Chief Justice of Ceylon, and he went to Ceylon intending to stay until he had earned his pension he retained his English domicile (*Att-Gen v Rowe* [1862] 1 H&C 31). However, if a person goes to the country not merely to work, but also to settle in it, he does acquire a domicile of choice.

Diplomats

Generally, diplomats do not form the intention of settling in the country to which they have been accredited. But if they form the intention of residing permanently or indefinitely, they can, like everybody else, acquire a domicile of choice in that country. An example is found in the South African case of *Naville v Naville* [1957] (1) SA 280.

Loss of domicile

We have seen how domicile is acquired. We must now look at the ways in which it is lost. As we have already learned, domicile of origin cannot be lost as such. Even when a domicile of choice is acquired, the domicile of origin will remain as a resource to fill up any gap when a domicile of choice is abandoned.

A domicile of choice can be abandoned by a person when he or she ceases to reside in a country and ceases to intend to reside there permanently or indefinitely. When a domicile of choice is abandoned either a new domicile of choice is acquired, or the domicile of origin revives by operation of law.

ACTIVITIES 3.1–3.2

- 3.1** Suraj – who has a domicile of origin in India – left to join the rest of his family in New South Wales (Australia), which became his domicile of choice. Five years later, following the collapse of their business, the entire family emigrated to the USA, intending to settle there and ‘make a new start’. What is Suraj’s domicile at the moment of his arrival in the US? Why?
- 3.2** Odetta, an asylum seeker from Rwanda, had her application for asylum in the UK refused, and was sent to a detention centre pending deportation. She had wished and intended to establish her domicile in the UK. She did not want to return to Rwanda because she was wanted for questioning in connection with the killings there some years ago. Can she claim that she is domiciled in England?

Summary

Intention is crucial when the acquisition of a new domicile is in issue. It can be tested out by examining a number of categories of persons, such as refugees, fugitives, employees and invalids.

3.4 Domicile of dependency

The domicile of a dependent person is the same as, and changes with, the domicile of the person on whom he or she is, as regards domicile, legally dependent.

Until 1 January 1974 there were three categories of dependent persons: married women, children and the mentally disordered.

3.4.1 Married women

Married women ceased to be dependent persons on 1 January 1974 and since then have been able to acquire a domicile of choice independently. But this Act is not retrospective and many women who married before it came into operation will still have their husband’s domicile (albeit as one of quasi-choice).

A dependent person cannot acquire a domicile of choice by his own act. It follows that the domicile of a child who has no parents cannot be changed.

Until 1 January 1974 a married woman (even if a minor) was dependent for the purposes of the law of domicile upon her husband. So it was the same as, and changed with, the domicile of her husband. This applied even where they were living apart and had done so for many years: see for example *Re Scullard* [1957] Ch 107 (separation of 46 years; in different countries for 30 of those years). Lord Denning MR described the married woman’s domicile of dependency as ‘the last barbarous relic of a wife’s servitude’ (*Gray v Formosa* [1963] P 259, 267).

The domicile of a married woman is now ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile (see Domicile and Matrimonial Proceedings Act 1973 s.1 (1)).

The transitional provision of the 1973 Act s.1(2) needs to be examined carefully. To date it has only been interpreted by Nourse J[†] in *IRC v Duchess of Portland* [1982] Ch. 314. The provision states that where immediately before 1 January 1974 a woman was married and then had her husband’s domicile of dependence, she is treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after that date.

[†] You should study Nourse J’s judgment carefully. Ask yourself whether you find his arguments convincing, particularly where he suggests the same test applies for the abandonment of a domicile of quasi-choice (a ‘deemed’ domicile of choice) as applies to a ‘genuine’ domicile of choice. You will find it helpful to read Wade, J. ‘Domicile: a re-examination of certain rules’ [1983] 32 ICLQ 1.

This means that Mrs A who settled in New York in 1970 acquired a domicile of choice in New York on 1 January 1974 but Mrs B who always intended to settle in New York but was still living with Mr B on 1 January 1974 retains his domicile as a domicile of choice (or quasi-choice) and cannot acquire a domicile of choice until she resides as an inhabitant in New York and intends to live there permanently or indefinitely. This can cause problems, as the Duchess of Portland found.

3.4.2 Children

The domicile of a child 'under 16' is quite complicated.

- ▶ if **legitimate**, it is that of his father
- ▶ if he is **legitimated**, it is that of his father from the time of the legitimation (remember such a child will have his mother's domicile as a domicile of origin)
- ▶ if he is **illegitimate or his father is dead** it is that of his mother
- ▶ if he has **no parents**, his domicile probably cannot be changed
- ▶ if he is **adopted**, his domicile is determined as if he were the legitimate child of the adoptive parent or parents.

One anomaly that must be understood is that a mother who changes her domicile will only change the domicile of a child dependent on her if what she does furthers the child's interest. Fathers are not so constrained. See *Re Beaumont* [1893] 3 Ch 490.

The 1973 Act created an exception to the rules just set out. You should examine s.4 of this Act very carefully. It applies to legitimate and legitimated children under 16 whose parents are living apart or were living apart at the death of the mother. In such cases the child's domicile is determined as follows:

- ▶ if he has his home with his mother and no home with his father, his domicile is, and changes with, the domicile of his mother
- ▶ if this has applied to him at any time and he has not since had a home with his father, his domicile is, and changes with, the domicile of his mother
- ▶ if at the time of his mother's death, his domicile was the same as his mother because of either of these rules, and he has not since had a home with his father, the domicile of the child is the domicile his mother last had before she died.

3.4.3 The mentally disordered

The law as regards the mentally disordered can be briefly stated. Such a person cannot acquire a domicile of choice and retains the domicile he had when he began to be legally treated as such. However, if he was born mentally disordered or he becomes mentally disordered while a dependent child, his domicile is determined, so long as he remains mentally disordered, as if he continued to be a dependent child.

Summary

The only persons today who can have a domicile of dependency are children and the mentally disordered. But married women did formerly, and many who married before the change in the law in January 1974 will still share their husband's domicile.

3.5 Residence

'Residence', 'ordinary residence' and 'habitual residence' are increasingly used as personal connecting factors. Of these 'habitual residence' is the most significant for the student of **Conflict of laws**. We will concentrate on it here. As you study it observe the differences with the concept of domicile.

ACTIVITY 3.3

Make a list of the differences between the concept of residence and the concept of domicile.

The term 'residence' is often found in the Hague Conventions and often makes its way into English law through this route. The Hague Conventions do not define 'habitual residence'. The Court of Appeal has said that it is primarily a question of fact to be decided by reference to the circumstances of each particular case (see *Re M* [1993] 1 FLR 495).

'Habitual' indicates a quality of residence, rather than its length (see *Cruse v Chittum* [1974] 2 All E R 940). It has been said that it means 'a regular physical presence which must endure for some time' (*Cruse v Chittum* [1974] 2 All E R 940, 942 *per Lane J*). It cannot be acquired in a day since 'an appreciable period of time and a settled intention' are required (*Re J* [1990] 2AC 562). 'Settled intent' has been identified as one to take up long-term residence in the country concerned (*A v A* [1993] 2 FLR 225, 235). But this comes close to conflating habitual residence with domicile and a settled purpose to reside in a country does not necessarily involve any long-term plan. Habitual residence may continue during temporary absences (see *Oundjian v Oundjian* [1979] 1 FLR 198). It will be lost if a person leaves a country with a settled intention not to return to it.

It is possible to have no habitual residence (but one would have to be a nomad). Habitual residence in two (or more) places is also possible.

Many cases which hinge on habitual residence are involved with the sensitive issue of international child abduction. This is not in the syllabus and accordingly this guide does not explore this issue further.

SELF-ASSESSMENT QUESTIONS

1. Raj, who is 12 years old and legitimate, was born in England to a father with an Indian domicile. His father has now been posted to Dubai and is intending to live there until he retires. Where is Raj's domicile?
2. Can a person have more than one domicile at a time?
3. On what basis does a person acquire a domicile of choice?
4. Why is naturalisation not a decisive factor in establishing domicile?
5. Chou, who has a Singapore domicile of origin, was sent by his company in Singapore to work in London, where he has remained for 15 years. He has now retired but cannot return to Singapore because of his involvement in political activities in England of which the Singapore government disapproves. Where is he domiciled?
6. How is 'habitual residence' usually defined?

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain how the domicile of dependents, particularly children, is established
- ▶ distinguish between domicile and habitual residence.

SAMPLE EXAMINATION QUESTIONS

Question 1 The law of domicile 'remains rooted in its Victorian origins when the establishment of a home was an affair of a lifetime' (Clarkson and Hill, p.23). Discuss.

Question 2 Is the law of domicile in need of reform?

Question 3 Would we be better to select 'habitual residence' or nationality as a personal connecting factor?

Question 4 Sam was born in Greece in 1942 to parents who were domiciled in Greece. Shortly after his birth, his father, Ben, went to France to join the French resistance forces. A year later Sam's mother received news that Ben had been killed and she remarried Josh, whose domicile of origin was in Hungary. Josh was a Jew on the run from the Nazis and had found his way to Greece. In 1944 Sam, Ruth and Josh were deported by the Nazis to Auschwitz in German-occupied Poland. Josh was killed shortly after arrival, but Sam and Ruth miraculously survived. In 1946 they took a ship to Palestine (as Israel was formerly known) but this was turned back by the British. Sam was, however, smuggled in. The ship sank on the high seas and Ruth drowned.

Ben had not in fact been killed and was still in France. After the war he qualified as a lawyer in France and prospered. He had no idea that his son had survived the war. He became a committed Zionist, was involved in charitable activities for Israel, and frequently talked about emigrating to Israel. In 1954 his law firm set up an office in Cairo, and he was offered a lucrative appointment. He enjoyed the lifestyle of wealthy Europeans in Egypt and began to think that his future lay there. He was however forced to leave in 1957. He returned to France but could not settle and, in 1958, decided to see if he liked living in Israel.

- ▶ He was reunited with his son and the two of them lived together in Israel until 1959. Ben retained links with his law firm in France, which was about to set up a branch in Sydney and Ben and Sam moved to Australia. In 1960, Sam went to University in Sydney. In 1963, just before his 21st birthday, he got a postgraduate scholarship to Harvard. He did not like living in the United States but, when he obtained his PhD in 1966, he was offered a very good job in Minnesota. He found the climate too cold and was looking for another post (he had applied for jobs in Australia) when war broke out in Israel in 1967 and he returned to Israel.
- ▶ Sam stayed in Israel for ten years. He married, obtained a University appointment, integrated into Israeli society and rediscovered his Jewish roots. But he was unhappy about the Israeli treatment of Palestinians and in 1977 went to South Africa to take up a university appointment in Cape Town. He could not settle in South Africa. He despised the apartheid regime, became an outspoken critic and joined the African National Congress. He was arrested and sentenced to a lengthy term of imprisonment in 1982. He was released in 1992. He came to England, took a job as a school teacher and obtained UK citizenship. He always talked of returning to Israel if 'there was ever true peace'. In 2002 he heard that his elderly father was unable to look after himself any longer in Sydney. He thought of bringing him over to England but was advised that Australia would be better for the health of both of them.
- ▶ Sam set out for Australia last week. The taxi taking him to Heathrow crashed and he was killed. Where did Sam die domiciled?

ADVICE ON ANSWERING THE QUESTIONS

Domicile questions require a clear head and logical thinking. It is often helpful to draw a chart for yourself. It will sometimes be necessary to consider a person's domicile on alternative lines of reasoning. Always find the person's domicile of origin first, and always trace each step in his or her life. Work out the significance of every fact you are given and you should be able to come to a reasoned step-by-step decision. Do not waste time setting out the detailed law: go straight to the problem set.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain and define the concept of domicile	☐	☐	☐
I can use the principles of domicile to determine where a person is domiciled	☐	☐	☐
I can explain how the domicile of dependents, particularly children, is established	☐	☐	☐
I can distinguish between domicile and habitual residence.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
3.1 The concept of domicile	☐	☐
3.2 The ascertainment of domicile	☐	☐
3.3 Domicile and categories of persons	☐	☐
3.4 Domicile of dependency	☐	☐
3.5 Residence	☐	☐

NOTES

4 Jurisdiction

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Introduction

Jurisdiction has become the central focus of conflict of laws. More cases relate to jurisdiction issues than the rest of the subject put together. We will have to study two parallel jurisdictional frameworks, one now governed by the Council Regulation 44/2001 (see Chapter 5) and the other by traditional or common law rules.

After a brief review of the historical background we turn to look at the law governing jurisdiction. Before we do so we must take note of categories of institutions and persons who cannot be sued in the English courts (immunity). Here we encounter an overlay between conflict of laws and public international law. The subject of state immunity is of greater relevance to public international law and, for the purposes of conflict of laws an outline knowledge only is required. By the end of this chapter you should have this outline knowledge.

We must next look at the traditional (common law) rules of jurisdiction. These only apply where the defendant is not domiciled in a Member State of the European Union, for example when the defendant is a New York corporation or a Russian domiciled in Russia or elsewhere outside the EU. These rules are less complex than the Regulation regime. By the end of this chapter you must know these rules.

Unlike the fairly rigid set of rules in the Regulation you will see that the common law is relatively flexible. In particular, as we shall see in Chapter 6, the courts possess the power to stay proceedings. We will be concentrating on jurisdiction *in personam* (you do not need to study jurisdiction *in rem*).

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- ▶ **outline the historical background to the jurisdiction rules laid down by Council Regulation 44/2001**
- ▶ **explain the relationship between the Regulation rules and the common law traditional rules**
- ▶ **describe the extent to which States and international bodies are immune from the jurisdiction of the English courts**
- ▶ **explain the limits to the doctrine of state immunity**
- ▶ **describe the circumstances in which an action may be commenced on a defendant (a) within and (b) outside the jurisdiction of England and Wales**
- ▶ **explain what is meant by 'presence' and 'submission to the jurisdiction'.**

4.1 Historical background

ESSENTIAL READING

- **Clarkson and Hill, pp.131–134.**

First, a few words of historical introduction. Until 1 January 1987, the High Court had jurisdiction over persons who were present in England at the time of service of process and in certain specified cases over persons who were outside England. In the latter case it was generally necessary for permission to be obtained from the court for issue of process and its service outside the jurisdiction (see section 4.3.2 below). In each case the court's jurisdiction was subject to a discretion (in the former case to stay proceedings – although these powers did not really emerge until the 1980s – and in the latter to refuse leave).

In 1968 the original Contracting States of the European Union signed the Brussels Convention. The UK, Ireland and Denmark acceded to it in 1978 (there was an Accession Convention, which contained some important modifications of the 1968 Convention). In 1982 Greece joined and in 1989 Spain and Portugal acceded (this accession convention, the San Sebastian Convention, made a number of substantive changes). Austria, Finland and Sweden have since joined, and the Regulation also applies to all the new countries which joined the European Union in May 2004, namely Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. In addition, a parallel Convention was signed at Lugano in 1988: this bound the states of the European Union and of the European Free Trade Area (the remaining EFTA countries are Iceland, Norway and Switzerland).

With effect from 1 March 2002, for 14 of the Member States of the European Union (that is all except Denmark) the Brussels Convention was replaced by the Council Regulation (EC) 44/2001. This makes major changes to the Brussels Convention and it is directly effective in the Member States. As such it will be easier to amend. Issues arising for decision between Denmark and the Member States will continue to be governed by the Brussels Convention, and between Member States and Iceland, Norway and Switzerland by the Lugano Convention.

Things are much more complex than they need to be; it is difficult to see whose interests this serves. There are many traps for the unwary.

The traditional rules remain and still govern jurisdiction over persons who are not domiciled – a concept that has its own special meaning – within the European Union or the Lugano area. Thus, for example, if it becomes necessary to decide whether a Trinidadian businessman or a Japanese corporation can be sued in England, it is to the common law that we look.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ outline the historical background to the jurisdiction rules laid down by EU Council Regulation 44/2001
- ▶ explain the relationship between the Regulation rules and the common law traditional rules
- ▶ be aware of which countries are in the EU.

4.2 Immunities

ESSENTIAL READING

- Cheshire, North and Fawcett, pp.490–510.

Subject to some exceptions (see below) a foreign State is **immune** from the jurisdiction of the English courts. See the State Immunity Act 1978 s.1(1), and Lord Atkin's classic statement in *The Cristina* [1938] AC 485, 490:

the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

Does this conflict with the European Convention on Human Rights Act 6 (1)? In *Al-Adsani v UK* (2001) 34 EHRR 273, the ECHR accepted that, in cases of sovereign immunity, the right of access to a court under Act 6 (1) is engaged. Therefore, to be compatible with Act 6 (1), the limitation on jurisdiction under the doctrine of sovereign immunity has to pursue a legitimate aim and be proportionate. The case was a civil claim against Kuwait alleging torture. A majority of the ECHR said that the

grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

The restriction is proportionate to the aim pursued since state immunity reflects 'a generally accepted rule of international law'. See also *Jones v Minister of Interior of Kingdom of Saudi Arabia* [2007] 1 AC 270. British nationals alleged they were tortured by Saudi officials, and they sued the Saudi state and the officials in England. The House of Lords held that the state and its officials were both entitled to immunity. It was contended that the restriction imposed by the law of state immunity was disproportionate since the proscription of torture by international law had the authority of a peremptory norm, precluding the grant of immunity to states or individuals sued for committing acts of torture. The House of Lords found itself unable to accept that torture could not be a governmental or official act. Immunity under the 1978 Act was not disproportionate as inconsistent with a peremptory norm of international law. Therefore, there was no infringement of the claimants' rights under Article 6 (1) of the Convention. Cases like *Jones* were not envisaged when the 1978 Act was passed. Should it be reconsidered?

'State' includes the sovereign, the government and any department of government.

4.2.1 Limits of state immunity

State immunity may be limited in three respects:

- ▶ a state can **submit** to the jurisdiction of the English courts (s.2 (1))
- ▶ a state is not immune as respects proceedings relating to a commercial transaction entered into by the state or an obligation of the State which, by virtue of a contract, fails to be performed wholly or partly in the UK (s.3(1))
- ▶ a State is not immune as respects proceedings relating to a **contract of employment** between the State and an individual where the contract was made in the UK or the work is to be wholly or partly performed in the UK (s.4 (1)).

English courts have no jurisdiction to entertain an action or other proceeding against any person entitled to immunity under the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968. So, for example, an ambassador cannot be sued.

English courts have no jurisdiction to entertain an action or other proceeding against an **international organisation** or its officials specially protected by or under statute.

ACTIVITIES 4.1–4.2**4.1 Why is there state immunity?****4.2 Decide and explain the following:**

- a. A, an English company, is granted a concession by the government of X to work mines in X. The government repudiates the contract. A brings an action for damages in England. Does the court have jurisdiction?
- b. B, an English company, agrees to supply arms to the government of Y. The contract is governed by English law. Y government refuses to pay for the arms. B sues in England. Does the court have jurisdiction?
- c. C, a British citizen, is employed by the government of Z to run its tourist office in London. He is dismissed and sues for damages. Does the English court have jurisdiction?
- d. D is injured in a motor accident caused by the negligence of H, the chauffeur of a foreign ambassador, who is a member of the service staff of the mission. He was driving the ambassador's car. H is a citizen of that country. Is H liable to pay damages to D? If he was not on official business but was taking his wife for a run in the country, would your answer be different? Is the ambassador vicariously liable, in either case? What about the liability of the insurance company? (See *Dickinson v Del Solar* [1930] 1 KB 376.)
- e. E, a British citizen, is arrested and tortured in prison in X. Can he sue (i) the state of X; (ii) the torturer in England?

Summary

State immunity is a firmly established principle, but it has been abused and therefore the modern legislation (the State Immunity Act, 1988) imposes important limits on it. Whether these limits are sufficient is coming to be doubted.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ describe the extent to which states and international bodies are immune from the jurisdiction of the English courts
- ▶ explain the limits to the doctrine of state immunity
- ▶ understand the relationship between the doctrine of state immunity and human rights norms.

4.3 Jurisdiction under the traditional rules**ESSENTIAL READING**

- Clarkson and Hill, pp.62–95.

4.3.1 Presence within the jurisdiction

An action may be commenced by service of a claim form on the defendant while he is present in England and Wales. His or her presence may be fleeting. The test is not residence.

Thus in *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283, the defendant was visiting the Ascot races (and the litigation had no connection with this country – it would certainly have been stayed today). And in *Colt Industries Inc v Sarlie* [1966] 1 All ER 673, the defendant was visiting England for a few days and not in connection with any possible litigation. The only exception to this exorbitant jurisdiction is if the defendant was enticed into the jurisdiction fraudulently or improperly. The presence test was reaffirmed recently in *Chellaram v Chellaram* (No 2) [2002] 3 All ER 17.

Rules for companies, etc.

Where the defendant is a partnership, the claim form may be served on any one of the parties who is present in England or at the principal place of business within the jurisdiction.

As far as companies are concerned

- i. A company registered in England may be served by leaving it at, or sending it by post to its registered office (Companies Act 2006 s.1139(1)).
- ii. The rules for suing an overseas company are contained in the 2006 Act, part 34. An overseas company is defined as a company incorporated outside the UK (s.1044). A document may be served on an overseas company whose particulars are registered
 - a. By leaving it (or sending it by post to) the registered address of any person registered in the UK authorised to accept service on the Company's behalf; or
 - b. If there is no such person, or the person refuses service, by leaving it or sending it by post to any place of business of the company in the UK.

There are alternative methods of service (e.g. personal service). A document can be served personally on a company by leaving it with a person holding a senior position within the company, such as a director. But there is some uncertainty over whether this applies to a foreign company.

Submission to the jurisdiction

The High Court has jurisdiction to entertain a claim against a person who submits to the jurisdiction of the court. He may do this by acknowledging service or instructing a solicitor to accept service on his behalf. Note also that:

- ▶ commencing an action as a claimant will give the court jurisdiction over a counterclaim
- ▶ an acknowledgment of service to protest that the court does not have jurisdiction **does not** constitute submission (*Re Dulles' Settlement* (No 2) [1951] Ch 842)
- ▶ an application for a stay is not a submission to the jurisdiction, because it is not inconsistent with a protest to the jurisdiction (*Williams & Glyn's Bank v Astro Dinamico* [1984] 1 WLR 438)
- ▶ it is possible to submit to the jurisdiction of the court by agreeing in a contract that the English court shall have jurisdiction. But choosing English law to govern the contract does not amount to an agreement to submit to the jurisdiction (*Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* [1968] 2 Lloyd's Rep 394)
- ▶ parties cannot by submission confer jurisdiction on the court to entertain proceedings beyond its authority (e.g. a dispute about title to foreign land).

4.3.2 Service out of the jurisdiction

Because of the presence rule English courts will not always have jurisdiction in cases where jurisdiction would be appropriate, (e.g. over an English contract made and broken in England). There is some irony in this in that the rule itself sometimes gives an English court jurisdiction in totally inappropriate cases like the *Maharanees of Baroda* case.

As a result, since 1852, it has been possible with permission to serve a claim form out of the jurisdiction. This is now governed by the Civil Procedure Rules (CPR 6.20). The jurisdiction is discretionary. The court will not give permission unless satisfied that England is 'the proper place in which to bring the claim' (CPR 6.21 (2A)). The claimant must show that:

- ▶ there is a serious issue to be tried
- ▶ the claim comes within one of the paragraphs of CPR 6.20
- ▶ England is the *forum conveniens*, that is the forum in which the case can most suitably be tried in the interests of the parties and the ends of justice (on which see *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460).

It is easier to establish that the English court will normally be regarded as the natural forum in a claim in tort if the tort was committed in England (*The Albaforth* [1984] 2 Lloyd's Rep 98).

There are 19 grounds for service outside the jurisdiction. The most important are:

In relation to contract

- ▶ If the contract was made within the jurisdiction.
- ▶ If the contract was made through an agent trading or residing within the jurisdiction.
- ▶ If the contract is governed by English law.
- ▶ If the contract contains a term that the court shall have jurisdiction to determine any claim in respect of the contract (only if either the subject matter of the dispute falls outside the Regulation regime or none of the parties to the contract is domiciled in a Member State).
- ▶ If a breach of contract is committed within the jurisdiction.

In relation to tort

- ▶ If the claim is made in tort where
 - ▶ damage was sustained within the jurisdiction, or
 - ▶ the damage sustained resulted from an act committed within the jurisdiction.

By damage is meant that either 'significant damage' was sustained in England or the damage resulted from 'substantial and efficacious acts' committed by the defendant in England: see *Metall and Rohstoff AG v Donaldson Lufkin & Jenrette* [1990] 1 QB 391, 437.

An interesting recent illustration is *Berezovsky v Michaels* [2000] 2 All ER 986. You should try to read this case (which critics have said could turn England into the libel capital of the world).

In relation to property

- ▶ Where the whole subject matter of the action is land within the jurisdiction, for example an action for the recovery of land: see *Agnew v Usher* [1884] 14 QBD 78.
- ▶ Where a claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land within the jurisdiction, for example an action against the assignees; a lease for breach of covenant to repair (*Tassell v Hallen* [1892] 1 QB 321).
- ▶ Where a claim is made for a debt secured on immovable property within the jurisdiction, for example an action for non-payment of a bank loan secured by a mortgage of a house.

In relation to restitution

- ▶ Where the defendant's alleged liability arises out of acts committed within the jurisdiction. This includes an action for equitable relief for *breach of confidence*. See *Douglas v Hello! Ltd* [2003] EWCA 139.

In relation to multiple defendants

- ▶ Where a claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party to the action. The second defendant will not be a 'necessary or proper party' if he has a good defence in law to the claim and it is therefore bound to fail. Nor will he be if the claimant's rights are predominantly against the first defendant. There is a particular reluctance to exercise the discretion to allow service out of the jurisdiction under this head, perhaps because it is not founded upon a territorial connection between the claim, the subject matter of the action and the jurisdiction of the English courts.

ACTIVITY 4.3

- a. A wishes to sue B who is domiciled in New York in London. In what circumstances can he do so?
- b. Jurisdiction based on presence has been described as exorbitant. Why? Can it be justified?
- c. Your client, a Malaysian company, wishes to contest the jurisdiction of the English court over it. The dispute arises out of a contract that an employee of the Malaysian company made with an English company. Advise it as to how it can do this without submitting to the court's jurisdiction.
- d. Explain when an English court will give leave to serve a claim form on a defendant in Russia where the claim is for damages for breach of contract.
- e. There is a power station accident in Bulgaria and this causes damage to crops on a farm in England. The farmer wishes to sue the Bulgarian power station in England. Can he do this? Explain.

Summary

The traditional rules of jurisdiction require the defendant either to be present within the jurisdiction of the courts of England and Wales or to submit to this jurisdiction. There is also the possibility of serving a claim from out of the jurisdiction with the leave of the court.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ describe the circumstances in which an action may be commenced on a defendant (a) within and (b) outside the jurisdiction of England and Wales
- ▶ explain what is meant by 'presence' and 'submission to the jurisdiction'.

SAMPLE EXAMINATION QUESTIONS

Question 1 A tennis player from California owes a considerable amount of money to an English company. He will be in England for the Wimbledon tennis championship next week. Can the company serve a claim form on him?

Question 2 Suppose (on the facts of question 1) the tennis player decides not to come. The contract concerned was made in California and there is no express choice of applicable law. Can the company get permission to serve the claim form on the player in California, out of the jurisdiction? Explain how.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can outline the historical background to the jurisdiction rules laid down by Council Regulation 44/2001	☐	☐	☐
I can explain the relationship between the Regulation rules and the common law traditional rules	☐	☐	☐
I can describe the extent to which States and international bodies are immune from the jurisdiction of the English courts	☐	☐	☐
I can explain the limits to the doctrine of state immunity	☐	☐	☐
I can describe the circumstances in which an action may be commenced on a defendant (a) within and (b) outside the jurisdiction of England and Wales	☐	☐	☐
I can explain what is meant by 'presence' and 'submission to the jurisdiction'.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
4.1 Historical background	☐	☐
4.2 Immunities	☐	☐
4.3 Jurisdiction under the traditional rules	☐	☐

NOTES