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NICK'S LAW NOTES

conflict of laws

CONFLICTS OF LAW

PRELIMINARY: *LEX FORI* + INTERNATIONALIST

If X (lex fori) says no but Y and Z says yes, mention that **characterisation has to go beyond domestic notions of classification in the law** (*Macmillan*) by adopting a more internationalist spirit.

PRELIMINARY: FORUM MANDATORY STATUTE – ILLEGALITY

Offer possibility of a quick route for or against client but mention the reluctance courts faced in such situations, have to defeat both presumptions against extra-territoriality.

Note that for **Hague Rules**, *Vita Foods* state that it is not mandatory to include it.
Hague-Visby Rules, on the other hand, are forum mandatory statute (*Akai*).

PRELIMINARY: SUBSTANCE-PROCEDURE DICHOTOMY

**Look out for damages/evidence/locus standi issue and bring up the dichotomy.*

WHICH APPROACH?

Traditional	☑ Modern
In Singapore, the traditional approach, which asks whether the rule in question is one that **affects the existence of the right or its enforcement**, remains in use (*Star City v Tan Hong Woon* (SGCA2002)). • This has the backing of the authority of the UK HL in *Harding* where it was held that the UK PILMPA did not change the common law distinction – should therefore be persuasive in Singapore. • Also, as Lord Rodger in *Harding* pointed out, the Australian/Canadian approach was based on what the courts saw as a requirement of the federal nature of the Australian and Canadian Constitutions – may thus not be applicable to other countries. • Furthermore, the decision in *Harding* related to inter-Australian states tort and **not an international tort**. There is thus uncertainty as to whether the approach would also apply to international tort claims: *Renault v Zhang*.	However, there is a discernible shift in local jurisprudence towards the modern approach of **narrowly characterising procedure** as rules which are directed to "governing or regulating the mode or conduct of court proceedings" (*Tolofsen*; *Pfeiffer*) and everything else as substantive (approved by *Goh Suan Hee* in *obiter*). This approach was employed in the subsequent case of *Shanghai Electric* in deciding that an interlocutory bond injunction is substantive. • **(1)** Is the **effect directly felt** on the proceedings and how proceedings are managed in court ○ If it is, then procedural, if not then substantive • **(2)** The predominant effect must be procedural – the moment there is a substantive effect, the issue is no longer procedural The benefits of adopting the modern approach are manifold: (1) it **leans towards issue-characterisation** rather than rule-characterisation; it (2) **departs from the illusory distinction between right and remedy**; (3) it **reduces risks of forum-shopping** (*Goh Suan Hee*); and (4) it is **in line with growing international consensus** to treat all issues as substantive unless they directly regulate proceeedings (*Tolofsen*; *Pfeiffer*).

CAP ON DAMAGES – NO-FAULT SCHEME

Under the traditional distinction, cap on damages rules would be considered 'procedural' since they fall under the quantum of damages: *Harding*. However, to classify the cap rules as procedural would essentially undermine the no-fault scheme because the price of strict liability is effectively restricted compensation; by treating right and remedy as separate and distinct issues, it would invariably break the linkage intended by foreign law, thereby circumventing the policy behind such statutes and run contrary to comity. It would thus be better to treat these issues as substantive.

CALCULATION OF DAMAGES

Traditional: **Procedural**	Traditional: **Substantive**
[1] Assessment of damages/cap on damages procedural (*Harding v Wealands* – NSW applicable law but ENG lex fori applied) **[2]** Damages paid in lump sum or by periodic payment (*The Baarn*)	**[1]** Heads of damage (*Boys v Chaplin*)

Can argue instead that **direct effect test** applies since *Goh Suan Hee* suggests that question remains open. Under direct effect test, limitations on recovery would not directly affect proceedings, thus substantive; only has indirect effect on amount and kind of evidence (*John v Rogerson*).

TIME BAR / LIMITATION PERIOD

Under the FLPA 2012, foreign limitation periods are classified as **substantive** such that the foreign rule should apply (s 3(1))

- NB: Secondary characterization; only applies after determining issue, connecting factor points to foreign law and that foreign law has limitation period
- However, the court has the discretion to reject the foreign rule on the ground of **public policy** (s 4(1)), or where its application would cause **undue hardship** (s 4(2)).

AGENT'S ADMISSION OF LIABILITY / LEGAL PROFESSIONAL PRIVILEGE

The court in *Siemens* simply assumed that for purposes of contract, questions of agency between contracting parties is a substantive contractual issue. However, a distinction can be drawn between specialised agency e.g. lawyer and commercial agency:

Lawyer-type agency: **Procedural**	Commercial agency: **Substantive**
[1] Specialized agent appointed specifically to make admissions of liability after the fact e.g. lawyer **[2]** Focus is on effect of such statements in court proceedings and not party autonomy	**[1]** General commercial agent engaged before the fact to act as agent, who then settled disputes and made admissions of liability **[2]** Uphold party autonomy because agent's expectation is proper law In *Siemens v Holdrich*, the issue of Siemens GmbHs authority to make statements on behalf of Siemens AG was governed by the proper law of contract.

ENTITLEMENT TO INTEREST RATES

Computation of interest rates payable on damages is a substantive issue, especially if the transaction is substantively in another country other than the *lex fori* and if the loss suffered is also felt in that other country.

House of Lords in *Wealands* restored Elias J's holding that interest goes to quantification and not the existence of the right because "the New South Wales legislation merely limits the amount of interest payable overall" and that "[i]t does not remove the liability to pay interest altogether because it is payable in respect of other heads of damage".

CONTRACT

STAGE 1: CHARACTERISATION

CONTRACT VS TORT

If the claim for a **pecuniary remedy** is not based on a contract but an allegation of a civil wrong, an internationalist approach encourages tortious characterisation (*Trafigura*).

There is no contractual issue where if the **contract does not provide a defence** (*Coupland*).

Where there is a **contractual defence**, dual characterisation should prevail over exclusive contractual characterisation (bring in benefits to weaker party).

However, **exclusive contractual characterisation** may be attractive for employers who seek to harmonise a uniform compensation scheme across all jurisdictions to achieve a common solution.

- Under dual characterisation, whether the contractual term can be a defence to a tort claim is a **tort** issue governed by the DAR/FE.
- But whether the contractual term pleaded as a defence is valid and enforceable is a **contractual** question to be determined by the proper law of the contract.
    - Alternatively, the validity of the contractual term may be regarded as an **incidental question** to be resolved by the contract choice of law rules of the applicable law to the tortious issue, but insufficient information is given for the latter approach.

STEP 1: CONTEXT

Contract: Frame issue as one where the rules apply to the

1. Nature of contractual relationship
2. Effect of contractual relationship
3. Continuance/Furtherance of contractual relations
4. Performance of any duties arising out of it

Tort:

1. Based on **pre-existing contractual relationship**; argue that
2. **Conduct complained** of is more important than the K rship
3. Conduct is **arising out of rship but distinct of rship**

Elements pointing to a tort characterization in *Trafigura*

- Component elements of Kookmin's security claim relate to a claim for a pecuniary **remedy**, which is not based on a contract, but an allegation that Trafigura has committed a civil wrong.
- Complaint that sellers had destroyed their security interests in the cargo – conduct arising out of but not requiring contract to prove.
    - The reasoning behind the security claim is that Kookmin had an expectation (but not a contractual right, per Cooke J's conclusions) of receiving valid bills of lading issued or endorsed to its order. If Kookmin had received such bills then it would have acquired an enforceable security interest in the cargo. Under Korean law Trafigura owed a duty, "in tort", not to act to the detriment of that security interest in the cargo.
- Contract allows parties to be paid by Letter of Indemnity instead of B/L; sellers chose B/L but failed to exercise duty of care to send clean B/L. → shows that tort arose out of a relationship but is distinct of relationship.

STEP 2: POLICY

Though the case of *Trafigura* was not explicitly reasoned on policy, the case can be better understood if we rationalize the decision on policy grounds (eventually decided on the **tort** characterization).

Contract

It would **go against parties' expectations** to adopt a tort characterization and the possibility of applying Korean law. The seller must have reasonably expected to confront the law that governs the relationship between the paying bank and the seller or the applicable law of the contract between the buyer and the seller since these are the visible systems to him, and would not have expected Korean law to spring on him.

Tort

Sellers' expectations are muted by the agreement they went into. Sellers were the ones who agreed in the contract to get payment by providing the letters of indemnity instead of the bills of lading. Through the agreement, the bills of lading were released into the banking system in a surprising manner and there was thus the possibility that they are non-conforming and would be replaced by conforming ones which are stamped.

	More conducive in doing justice where 3P is involved since contract law is designed to do justice between 2P.

SITUATIONS WHERE CONTRACT AND TORT INTERSECT

NB: Even if you characterize as tort, applicable law might end up being proper law of contract via FE (*Trafigura*).

(1) 3P + no contractual duty

Since the claim is not for remedies as a result of breach of contractual duty, the claim will be **exclusively characterized** as a tort, but the court can apply the **proper law of the contract as a flexible applicable law** to the tort applicable law, where the proper law of the contract has the closest connection to the issue.

- In *Trafigura*, the English court characterized the issues as relating to tort because they relate to Kookmin's claim for pecuniary remedy based on allegation of a civil wrong i.e. tort. But because the court found the **existence of the letter of credit contract the reason for any kind of connection between Trafigura and Kookmin** (third party financier) in the first place, it held that the **proper law of the contract had the closest connection to the tort issue and thus applied the proper law (English law) as the flexible applicable law** (flexible exception to DAR).

(2) Pre contractual negligence

Situation where there is negligent misrepresentation inducing the Pf into making the contract (tort committed prior to contract): *Jio Minerals*.

- In *Jio Minerals*, the contract's applicable law was not the applicable law of the tort issue (like in *Trafigura*) **but was used to determine if there was actionability in tort**.
- This was because according to the Misrepresentation Act, in order to have actionability in negligent misrep, contract must be governed by Singapore law.

When claiming **rescission**	Contractual characterization (*Jio Minerals*) • Pf claimed for rescission, damages for misrepresentation in tort and also damages for misrepresentation in contract • Court characterized claim for rescission as contractual but claim for damages for misrepresentation in tort/contract respectively as tort/contract issues
When claiming **damages**	**Not clear**, can be tort characterization or contractual characterization *Jio Minerals* • Pf claimed for rescission, damages for misrepresentation in tort and also damages for misrepresentation in contract • Court characterized **claim for rescission as contractual** but **claim for damages** for misrepresentation in tort/contract respectively **as tort**/contract issues *UBS v Telesto* • Pf claimed payment due under contract, Df was tortious defense based on negligent misrep. • Court did not really charact. discussed place of tort in context of natural forum • But TTE claim for negligent misrep. was for **damages, consistent with tort charact**.

(3) Post contractual negligence

Tort characterization when claim based on **actions outside of contract** (*Trafigura*)

Trafigura

- Kookmin relying on Trafigura's actions outside of the L/C – clausing B/L null and void
- Contract merely state of things under which wrongful conduct occurred
- Court held **tort characterization**, although in the end proper law of contract applied (pre-existing contractual relationship allowing for displacement of LLD)

OMG Holdings

- Df supposed to pass off even after termination of K, no dispute on termination at all
- Held implicitly tort characterization
- BUT if termination was disputed then may be contractual characterization

(4) Concurrent negligence

1. In this case, there is a possibility of **dual characterization** because the **lex fori (and not applicable law) recognizes concurrent liabilities** in tort and contract, thus the possibility of two different applicable laws arises.
2. In Singapore, the position is that the Pf has an unfettered choice of which of the claims he chooses to rely on, provided that he does so in the absence of bad faith (*Rickshaw*, CA).

Rickshaw

- **Tort**: Agent supposed to sell Tang Cargo, misrepresented to principal about existence of buyer

- **Contract**: Agents acts were in course of performing K obligations
  - But actions also incurred tortious liability independent of/concurrent with K obligations

3. BUT TWO CONTROLS

Contractual exclusivity	If contract **expressly limits or excludes tortious liability**, then **sole contractual** characterization (*Rickshaw*). → *Rickshaw*: mere COL in contract does not show exclusivity
Good faith	If there is **bad faith** in arguing concurrent liability/dual characterization, it will not be allowed (*Rickshaw*).

4. Possibility of SOLE tortious characterization
- Party free to choose course of action most advantageous to him (*Rickshaw*; *Coupland*)
- If K does not exclude or restrict tortious liability at all then not relevant to claim in tort (*Coupland*)
- If other party acquiesces, then possible sole tortious – although unlikely.

Problems with dual characterisation

In international arena, duties in contract and tort are likely to be inconsistent. There is no guarantee that the duties will be the same because of the possibility of 2 different applicable laws.

Generally, in local claims, the contents of the duties in tort and in contract are not very different because courts will try to align the contractual duty to the duty in tort. Perhaps the procedures are different in terms of remoteness rules and damage recovery rules, but not the contents.

Benefits of dual characterisation

Dual characterization is attractive because there are double chances to succeed. It does not prejudice the victim of a tort or a victim of a contractual breach; the victim can decide on either the contractual or tortious claim, based on the advantages of each claim.

Allowing concurrency in claims is especially **crucial for weaker parties in contractual relationships** e.g. employees in the employer-employee relationship. Because of employee's weaker bargaining power, the contract usually sets out a lower duty on the part of the employers and hence insisting on an exclusive contractual characterization may be unjust to the employee. Allowing an alternative tort characterization **prevents such injustice** because it accords the employee a second chance of likely, a better claim in tort.

(5) Contract defense to tort – exclusion

**Limit to one para at most*

The contractual exclusion clause, which **excludes liability in tort and replaces it with a duty in contract to compensate**, parallels the employment contract in *Sayers*, which excluded the compensation scheme under general law and provided an alternative compensation scheme. This issue is left open given the lack of discussion in *Rickshaw* and operates to set out a concurrent duties framework. It is submitted that (choose from one of the following):

(1) Dual characterisation: Both tort and K

Two stage process
1. Test validity of contractual defense by proper law of contract → if not invalid
2. Test validity by proper law of tort

Analysis: Applying a dual characterization can **cause problems at the applicable law stage**. Effectively, the exclusion of liability clause has to survive both the contract's applicable law and the tort's applicable law.

(2) Exclusive characterisation + Incidental question

It has been suggested that instead of using dual characterization, courts can characterize the issue exclusively as tort but the question of the extent to which tort liability is excluded should be treated as an incidental question.
- Primary question: Whether a tort has been committed and compensation should be made?
- Incidental question: To what extent is the compensation limited by exclusion?

Characterize main issue as tort, follow to applicable law (LLD + LF if no FE), ask applicable law whether it identifies IQ, if it does, follow that solution.
- Essentially law which has the contractual defense is the applicable law, since it would deny actionability under the DAR.

(3) Sui generis

The issue of exclusion of liability can be characterized as an **independent issue**, neither falling within tort nor contract. The connecting factor for such an independent issue is the **law of the closest and most significant connection** to the events and the

	parties (which may be a different law from the applicable law of contract or tort): Lord Denning in *Sayers*. • As a conflicts technique, this suis generis approach of applying the law of the closest and most significant connection is valid as part of the choice-of-law process. • This is similar to the via media approach adopted in the South African case of *Society v Lloyd's Price* where the two rules were clashing and hence the court applied the law of the closest and most significant connection. However, Lord Denning's approach was **said in obiter** and such an approach may **cause a dent to party expectations**.
	CONCLUSION: Umbrella-kill (2) and (3), **select either (1A) or (1A+B)** • Different approaches may be appropriate for different factual situations (1A) Exclusive contractual approach good for international employment contracts • Employers want to create uniform liability; manages costs of intl employment • Especially when employees all over world e.g. oil rigs, employees on assignment • MAY be unfair to worker – but possibly countered by FMS, Vitafoods and illegality rule (1B) Incidental question good if not international employment contract • Especially if party is suing in country of residence, LF accords with party expectations (2) Both tort and K approach not favourable, too onerous as it is double barreled • Perhaps triple even (LF, LLD, proper law of K) (3) Sui generis approach not necessary • Seems to have been Denning's response to inflexible DAR • Now that we have flexible exception can get around DAR
Tort as defense to contract	Depends on what the tortious defense is *UBS v Telesto* • Pf claimed payment due under contract, Df was tortious defense based on negligent misrep. • Court did not really characterize, discussed place of tort in context of natural forum • But TTE claim for negligent misrep. was for damages, als consistent with tort characterization
Post tort agreement	1. Post tort agreement to characterize as contract may be allowed (*ASL Powers*) 2. BUT cannot extinguish rights that have already been accrued (*Amar*) 2. Should be allowed if we want to extend party autonomy outside of contract 3. Even if not allowed, may be possible by voluntary exclusion (*Parno*); although presumption of similarity losing influence (*D Oz International*; *EFT Holdings*)

CONTRACT VS PROPERTY

Contract	**Property**
Look at **who the contracts are between**: if the parties to the suit are not even connected by contract, then it cannot be contract, and it must be property.	
Promote PARTY AUTONOMY (*The Mount I*)	INVOLUNTARY nature of assignment (*WestLB*); thus artificial to focus on contractual terms.
DOES NOT INVOLVE 3P *Mount I* appears to stand for the proposition that a **dispute between immediate contractual parties would attract a contractual characterisation** whereas a dispute involving third parties would fall within a proprietary rubric. • However, see <universality argument>.	INVOLVES 3P • **Actual** (*WestLB*: putative 3P reach of the Chinn Assignment cannot be ignored; competing priority claims) • **Potential** (**Universality argument**: It is better to have a solution that is more universal, which achieves uniformity of result, rather than one which caters to a very specialized instance where only the contracting parties are involved (*Glencore*). Consider that 3P interests could intervene at any time e.g. **insolvency**.
INTANGIBLE PROPERTY (part contract, part property) In the context of a **chose in action**, the court in *Mount I* held that a contractual characterisation on the facts was more appropriate because a chose in action is **not a visible asset that 3rd parties rely**	TANGIBLE PROPERTY Generally, in context of tangible property, contractual context would not be taken into account because (a) there is **no duality** unlike choses in action and (b) the attitude of the court is such that **if the *lex***

upon. • ☒ However, court may have **underestimated the effect on third parties**. In *Mount I*, it is common knowledge that ships are insured, thus creditors can reasonably be expected to know of and rely on the existence of insurance contract; insurance contract may not be invisible after all. • ☒ Also, <potential 3P argument in *Glencore*>. ☒ **Enforceability**: Given that the debt is situated in the debtor's residence, it should be treated as property because the courts in the place of debtor's residence can exert coerceive power or control over the chose in action, thus allowing for better enforcement. • ☑ However, **modern conditions underline the artificiality of the supposed control** available at the debtor's residence since such intangible property can be easily moved out of the country, particularly for bank accounts or jewelry. This argument may be more persuasive for rooted property like tractors and cranes.	***situs* respects party autonomy** in determining rights of parties to property then it will refer to the proper law of contract via a non-conventional renvoi (*Glencore*). **Ultimate control argument**: Also, it would also not be realistic to apply proper law of contract when **lex situs has the ultimate control** over the **tangible property**. **Ostensible ownership argument**: Further, **where chattels can be seen in the situs**, there is **informal reliance by 3P** to do business with owners of the chattels. Therefore, if the issue were not characterised as property and lex situs were not applied, there may be **prejudice to 3P**. • cf *Mount I* intangible property; assignment of tangible property 3P may rely ☒ **Distinct from property**: If the issue is one as between two contracting parties and which party has the immediate right to possession of shares under a contract – the contract effectively determines whether the claimant has good possessor of title. Thus, no bearing on the question of proprietary title (*Kahler v Midland Bank*).
REMEDY is **damages** for breach of contract (*Mount I*) REMEDY is **specific performance** of contract: 3Ps not affected • But if contract is for sale of land, equity can intervene to accommodate the property characterisation better	REMEDY is **for the redelivery of title** (*Mount I*) • 3Ps likely to be affected • Practical control
Look at NATURE OF INTEREST claimed • If not claiming sale but **mortgage**, quite clearly property characterization • If claiming on **validity of transaction** as opposed to property right then: o *The Mount I*: validity of assignment, **no 3P involved** – contract charac o *West LB*: validity of assignment BUT also **3Ps involved** – property charac	
Look at EFFECT of contract → whether ultimately contractual or proprietary • In *RoP v Maler*, court held that the correct characterisation of the substance of the *issue* before this court is the **effect of the Chinn Assignment on the title to the Swiss Deposits** at the time that the judicial assignment allegedly took place, and this falls most appropriately within a proprietary rubric.	
If the real issue is as to the bona fide purchaser DEFENCE, then a proprietary characterisation is preferred (*Macmillan (No 3)*).	

Title transferred pursuant to contract; contract allegedly invalid **E.g. conversion**	1. Usually K separate from prop, prop only passes by possession or act of disposition, K not enough 2. BUT for **sale of goods** for consideration and **assignment of equitable ownership**, equity looks on that as done that which ought to be done. • E.g. agreement to assign debt enough, no need for physical delivery • E.g. sale of goods, ownership passes before delivery 3. So when contract is void/voidable, title is also void/voidable – difficult to characterize	
	[1] Current approach is property charact.	Must be prop, not K charact, even if only between parties to transaction (*Glencore*) (1) **Consistency of principle**; whether or not 3Ps are actually involved, same principle should apply • Usually 3Ps will be involved, prop issues in insolvency – 3P creditors affected • Nature of title to movables – person has vested rights against all other parties (2) **Practical control of situs** • Control of movables can only be regulated by state • This is a consideration whether or not 3Ps are involved NB: Usually if property characterisation is adopted, **mention that [4] non-conventional renvoi applies** such that lex situs could decide to refer back to proper law of contract if it decides that

		party autonomy is of overwhelming importance to the facts.
	BUT	If 3Ps not actually involved at all, *Glencore* can be distinguished • On facts, 3Ps were involved because MTI was insolvent, creditors were 3Ps • **If no 3Ps at all, party not insolvent**, weaker argument for prop charact • But practical control of situs argument remains strong If **practical control of situs not important**, *Glencore* can be distinguished (probably **intangible property** cases like chose in action).
	[2] Contract	Can argue that for movable property, the common law does not draw a sharp line between the contract of sale and the transfer. • In the law of sale of goods, the very contract to sell, if in line with parties' intention, will effect the transfer of title to the goods. • Therefore, at least in relation to movable property, should forsake the question on distinction and adopt a contractual characterization.

	[3] Part K, part prop (dual/sequential)	**Cady Case supports dual characterisation for **possession and ownership***
		From the HL decision in *Colonial Bank v Cady*, it seems possible to apply the **third solution**:
		• The HL decided that there were 2 applicable laws applied to 2 different sub-issues.
		  ○ (a) Whether the bank got title by estoppel: apply English law because the acts occurred in England and
		  ○ (b) Effect of a valid effective transfer of the certificates on the title to shares in the American company would be decided by NY law.
		• The third solution appears to **offer the best of both worlds**: gives effect to party autonomy by allowing parties to decide the effects of vitiating factors on their agreement and also respect the situs's interests in determining property rights and in the protection of third party interest.
		
		Facts
		• NY company shares entrusted to London broker who then used them to raise money for himself – broker given executed transfer form so he passed off as owner – deposited share certificates in London bank as security for personal loan
		• Ownership → Lex situs: NY
		• Possession → Lex actus: ENG (place where title delivered i.e. situs at time of transfer)
		  ○ Where broker physically **delivered share certificates / pledged / created equitable mortgage / created security interest** by delivering possession to the bank
		  ○ Lex actus applied in the end

	[4] With a 'non conventional' **renvoi**	1. Characterize as property, **if lex situs respects party autonomy** in determining rights of parties to property then refer to proper law of contract (*Glencore*) 2. Distinction: **effect of K on title still governed by LS**, cannot apply proper law of K to determine effect of K on title; only relevant to **intention of parties to transfer ownership** *Glencore* • Pf oil claimants, suing Df insolvent oil storage company for remaining oil • Issue of passing of proprietary rights under contract for storage of oil • Not K characterization, prop characterization, lex situs – Fujairah/UAE • Lex situs respected party autonomy so look to proper law of K – ENG law
Retention of title	Title retention cases should be **characterised as proprietary** given the nature of the interest. The proper law of the contract will only be relevant if referred to by the *lex situs*. E.g. unpaid seller's lien as long as seller has possession E.g. stoppage in transitu – if goods in transit and buyer becomes insolvent, unpaid seller can reclaim Is issue as to whether unpaid seller has a lien one of contract or property • Arises because proper law of contract may not recognize retention of title but lex situs does, so characterization important	

	1. Should be property charact	1. *ASL Power* issue of retention of T arose as Pf purchasers had to show they had title over pepper to establish locus standi for tort of conversion. 2. Bu *ASL Power* not authoritative, dealt with prop, K, tort charact and did not decide as all pointed to SG law in the end, where title did not pass to Pfs 3. But should be property charact • Look at nature of interest being claims; security rights – protection until paid • Possibly of rights arising out of equity, prop charact can give effect to that • Good for certainty, very limited exceptions to lex situs rule
	2. But NC renvoi	4. Similar to *Glencore* adopt property characterization, but if lex situs respects party intention, look to proper law of contract
Issues of priority about simple debt	Simple debt meaning not specialty contract (contract under deed e.g. mortgage debt under deed)	
	Should be contract charact	1. Instead of lex situs, apply law of obligation (*Macmillan*) 2. Especially when you have a question of priorities (*Macmillan*) • Question of priorities results in problems when applying LS to cases of simple debt – there can be more than one LS because situs is person's residence, parties getting priorities can be resident in many countries • Proper law of debt – only one 3. Similarly, should apply to characterizing, charact as K to avoid problems of LS rule
Security interests	A **proprietary characterisation** should be used over a contractual characterisation for security interests cases, e.g. mortgages, because security interests have implications on 3rd party creditors and 3rd parties reasonably expect that the law governing property matters would be that where the property is located. E.g. security interest (*Trafigura*) or negotiable instrument (*Macmillan*) Issue arises because three aspects to security transaction • Loan and terms of repayment – **contractual** → *personal* obligation to repay debt (*lex loci actus*, per Auld LJ in *Macmillan*) • Transfer of security interests – **property** (lex situs, Aldous LJ in *Macmillan*) • OR when in doubt, **lex fori** (Staughton in *Macmillan*). It is the **personal aspect that is more important** in security arrangements, so the situs should be where the person resides.	
	(1) Contract	Security interest **only ancillary/accessory** to contract
	(2) Property	Promotes **certainty**, parties whose rights are likely to be affected **can see the property** and deal with it accordingly

RESTITUTION CONSEQUENTIAL ON CONTRACT

The general rule is that where a contract becomes ineffective or fails, the law that would govern the consequential claims would be the law of the contract. However, where **fraud** gives rise to the plea of *non est factum*, or where **duress** goes to the root of the consent, the decision by the victim to agree to the choice of law clause is itself infected, and the applicable law may be that of closest and most real connection (*CIMB Bank*).

Where the question is responsibility for **authenticating the legal representation of another**, a contractual characterisation which predicates strict liability and places the risk of a want of authority on the agent better responds to the demands of international cases where P would not have easy access to the particulars of the relationship between the agent and the intended guarantor.

Concurrency of claims is allowed in the absence of bad faith (*Rickshaw Investments*).

STAGE 2: CHOICE OF LAW RULE AND CONNECTING FACTORS

GENERAL

The relevant choice of law rule is the **proper law of the contract**. This is determined in 3 stages. Firstly, express choice would be given effect to. Secondly, if there is no express choice, then an implied choice may be inferred from the contract and the circumstances of the transaction. Thirdly, if there is no express or implied choice of law, the contract is governed by the law of closest and most real connection (*Pacific Recreation*).

EXPRESS CHOICE

IMPLIED CHOICE

If there is no evidence of an express choice of law made, an implied choice, if found to exist, will be as effective as an express choice. However, if the parties **made an express choice of law which failed** for some reason (e.g. choice of non-national law or the *Vita Foods* limitation), the courts should not find an implied choice (Lords Wilberforce and Reid in *Compagnie d'Armement*); courts would impose an objective choice instead. This is because if parties have chosen a particular law which failed, they could not have intended to choose some other law. Here, the courts would look for a real and not merely hypothetical common intention of the contracting parties (*Komninos*).

Go straight to objective proper law if:

- If, after having searched for parties' implied choice, the court is **faced with a multiplicity of factors, each pointing to a different governing law**, the court should proceed to the third stage: *Pacific Recreation*.
- Court can skip the second stage if it is clear that parties **did not address their minds** to the question of which law was to govern their contract.
    - *Eg*, where the parties act entirely through brokers and had not even seen the documents in question (*OUI v Turegum Insurance*).
- If oral contract, not meaningful to determine intention from inference (*Las Vegas*)

Relevant factors:

Exclusive jurisdiction clause (best example)	Where parties have chosen a jurisdiction/forum, courts will generally be willing to find an implied agreement on choice of law, especially if the choice of jurisdiction is an **exclusive one** (*Kominos*; *Compagnie d'Armement*). In *Komninos*, the B/Ls contained a choice of forum agreement for disputes to be heard in the British courts. Even though there were overwhelmingly strong connection with Greece (ship was managed by Greeks; shippers were Greek; freight was payable in Greek currency in Greece), the court held that because of the choice of forum clause, the parties must have intended their contract to be governed by English law.	
Arbitration	An arbitral forum clause or arbitration clause may provide an inference of parties' choice of law (*Compagnie*). In *Pacific Recreation*, it was noted that the presence of the arbitral forum clauses in favour of CIETAC in the other contracts lent some support to the inference that the Deed was not intended to be governed by Chinese law.	However, the connection between between the arbitration agreement and the choice of law is 2 steps removed. There is thus a **weaker inference** of proper law: **[1]** Arbitrators are usually conversant with the laws of many countries. Therefore, the consideration that goes into choosing the choice of arbitration forum may be very different from that when choosing the choice of law for governing the main contract. **[2]** The choice of arbitration venue may merely signify choice of law of arbitration, pertaining to the laws which govern conducts of arbitration and has nothing to do with the governing law of the contract. **[3]** Also, it is in fact very possible for the containing contract to have one law as governing law and for the arbitration agreement to have another another law as governing law.
Use of particular forms or legal concepts peculiar	**[1]** The use of particular terms that are **unique or significant** to a legal system is a powerful indication of party choice (*Amin Rasheed*).	**[1]** Note that in *Amin Rasheed*, Lord Wilberforce dissented because the particular form of the contract had become so **internationalized** that one could not

to particular systems of law e.g. incorporated foreign terms	In *Amin Rasheed*, the terms of the policy were based on an obsolete Lloyd's form where the terms were peculiar to English law and this led the majority to decide that the parties intended the contract to be governed by English law. **[2]** Justification for the majority's approach: Kuwaiti law at this time **did not have an indigenous law** of marine insurance. This was important for the majority. Majority seemed to think that if Kuwait had an indigenous law of marine insurance, parties would have chosen Kuwaiti law. But because it did not, parties impliedly chose English law. Given the dominance of Lloyds' standard form, seems a reasonable argument. The minority did not give regard to this factor.	draw any conclusion on the proper law of the contract without considering other factors. It is true that the Lloyds' form had passed on internationally as a widely-used form and it may be too far a stretch to say that an implied choice of law can be implied from the use of it. **[2]** He further added that the proper law may not be applying a conflicts rule but merely importing English law for purposes of **interpreting** the legal concepts in the policy that are peculiar to English law. Thus, the objective choice of law was preferred by Lord Wilberforce, which would point to English law because of money of account and the form; same result, different reasoning. **[3]** In *Pacific Recreation*, Lord Wilberforce's approach was preferred because the court thought that the legal concepts of "deeds" and "indemnity" were "**hardly unique** to our jurisprudence" and by themselves, "the use of these two legal concepts could only point away from Chinese law, but not inexorably towards Singapore law". Accordingly, the implication by language and existence of peculiar terms failed because the implied choice approach could only eliminate Chinese law as the implied law but does not point to any particular system; it could be any common law country.
Interconnected contracts	In a composite transaction with various interconnected contracts, one of which contains an express choice-of-law provision, parties are likely to have intended the same choice of law to govern the interconnected contracts so as to get **matching duties and obligations** (*Marconi*). However, not all contracts would **share strong connections** with the related contracts, and thus the implication may be weaker in such cases. • **Key**: Compare *Marconi* and *Pacific Recreation*. • ☑ In *Marconi*, it involved a letter of credit paying mechanism, essentially a composite transaction made up of component contracts that share a functional unity. ○ Court held that English law would govern the obligations of the confirming bank because English law was an express choice of law in a related contract. • ☒ On the other hand, in *Pacific Recreation*, the contract was an indemnity deed, which could be differentiated from the main contract because it was a **secondary deed** and that **damages under the indemnity deed can extend to all consequential losses**. • In this case, the ____ would lean closer to the letter of credit/indemnity deed because ____. *Guarantee contracts/Performance bonds/Pledges* • **Does not share the same functional unity as the L/C** in *Marconi*; weaker link. In fact, it may be better for pledges to be insulated from the main contract such that it would still be valid even if main contract is vitiated. • Thus, might be better to construe the proper law as one **by which the pledge remains valid**. • If analysis concludes that there is no interconnection, provide client with **risk assessment**.	
Floating jurisdiction clause	If floating jurisdiction clause provides for laws of X and Y to apply, and case facts provide for Z, may argue that the FJC provides some weight in leaning towards X/Y law.	Alternatively, it may also be argued that a floating jurisdiction cause provides no forward inference whatsoever as to choice of law.
Illegality at proper law	If there is no express choice, when determining the implied choice or objective proper law, there is a **presumption** that the parties (for implied proper law) or just and reasonable parties (for objective proper law) could not have intended to	

	choose the proper law by which the contract is rendered illegal.
Mode of performance	It is not unreasonable to assume that the **mode** in which any part of it has to be performed abroad was **intended to be in accordance with the law of the foreign country**, and to **construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance**, and which were **not inconsistent with the contract** (*Jacobs v Credit Lyonnais*).
Overwhelming geographical connections	In *Komninos*, if not for the exclusive jurisdiction clause pointing to English law, Bingham LJ would have chosen Greek law as the objective proper law based on the geographical connections (ship was managed by Greeks; shippers were Greek; freight was payable in Greek currency in Greece).
Place where contract made	**[1]** Has lost significance; Modern communication e.g. telex (*Rev v International Trustee*) **[2]** Unless contract also to be performed in that country (*Pacific Recreation*) **[3]** Contract must show another connection other than just contract made in that place (*Pacific Recreation*)
Place of performance	*Lex loci solutionis* – *prima facie* inference as to party intention but can be rebutted (*Rev v International Trustee*) BUT depends on nature of contract; e.g. international contract, not paid in national currency.
Agency contract	**[1]** Generally law of country where relation of principal/agent created (*Swan Hunter*) **[2]** If principal and agent are located in different countries, give more weight to law of place where P has biz (*Swan*)
Language	However, English is the "*lingua franca* of international business", and may not point decisively to a legal system (*Pacific Recreation*).
Foreign currency	There is a difference between currency of account and currency of payment (*Amin Rasheed*). Currency of payment: a reference to convenience; depends on where the payment is made **<<** not important **Currency of account**: it is the currency in which parties have agreement on the primary obligation. The universality of the US Dollar suggests that its use as the legal currency may not point decisively to a particular legal system (*Pacific Recreation*).
The weight of each factor depends on all the circumstances. A choice of forum clause can carry very heavy weight on the assumption that it is likely that contracting parties would choose a forum most familiar with the law to be applied. The use of the English language is so universal that it is not a very meaningful indicator any more. The use of language or concepts alien to a particular legal system is indicative that the parties have not intended that law to apply, and conversely if the parties use language which is comprehensible only in the context of specific legislation in a particular country that is indicative that the parties intended to choose that system. However, some concepts (eg, common law devices) are fairly universally recognised and may not point to any particular country, but could still be helpful in pointing away from some other legal systems. The place of contracting is not a significant indicator of the parties' intention except perhaps where the contract is also to be performed in that country. The currency of the contract may not give rise to any useful inference if it is a universal one like the US dollar.	

OBJECTIVE PROPER LAW

Under the third stage, the contract is governed by the **law with the closest and most real connection with the contract**. There have generally been 3 techniques that courts have adopted (use the same factors highlighted above):

(1) **Assigning equal weights** to all the factors, even those factors which would not, under the second stage, have been strongly inferential of any intention as to governing law (*Pacific Recreation*)
   a. TYL: On principle, the factors cannot possibly be given equal weight. There are contracts where certain obligations are more important and should be given greater weight. For example, in sales contracts, the sellers obligation to deliver is more significant than the buyer's obligation to pay and hence more weight should be given to the seller's place of delivery for example (the obligation to deliver is unique to the sales contract while the obligation to pay is common).
   b. TYL: The court might have meant that they would disregard the disproportionate weight given by the parties, and not that all factors should be given equal weight. After all, in their actual application, they gave the factor of US currency little or no weight at all.

(2) **Isolate relevant factors** and disregard the rest. Assigned varying weights to the factors (Lord Wilberforce in *Amin Rasheed*).
   a. This approach would better imitate the parties' choice if they had put their minds to it, because surely, there are some factors that they would consider more significant than the rest.

(3) Give effect to **commercial purpose** (convenience and biz efficacy) such that where there are many related contracts, choice of law must not impede commercial purpose, hence apply the choice of law in the related contract (*Marconi*).

a. In *Peh Teck Quee*, the facts involved a multicurrency facility provided by a Singaporean bank for Malaysian individuals to be used for worldwide investments. In such situations, given the multitude of international factors, assuming that there were no express choice (on the facts, the court held that there was), objective proper law would likely be Singapore as place where individuals borrowed from since it is the only **permanent feature** in a multinational case.

LIMITATIONS TO PARTIES' CHOICE (I): *VITA FOODS* PRINCIPLE

The *Vita Foods* principle impugns party choice if it was not *bona fide* and legal, or if it is contrary to public policy.

(I) NOT *BONA FIDE* AND LEGAL

The question whether a choice is bona fide or not has generally been understood in terms of **evasive intention**. If the parties choose a law to govern their contract solely in order to **avoid the application of the law otherwise applicable to the contract**, then the choice may not be regarded as bona fide (*Peh Teck Quee*). An attempt to **evade a forum mandatory rule** may be regarded in the same way (*Golden Acres*).

Applying *Peh Teck Quee* – "whether there was good reason"	Alternatives
[1] Determine sole purpose by: • Looking at contract collectively, not individual terms • Ask why the parties have agreed on such terms • Extrinsic evidence can be brought in per parole evidence rule (*s 94, EA*) – facts which would invalidate document, separate oral agreement on which document silent/modifies document, facts showing how lang. of doc. relates to existing facts **[2]** Legititimate reasons: • ☑ *Vita Foods*: Eng law familiar, insurers were likely to be English = choice bona fide. • ☑ *Peh Teck Quee*: Bank operating in SG, credit facility booked in SG, accounts kept in SG = choice bona fide **[2A] Limitation of liability**: Allowed under *Vita Foods* – shipowners could limit liability by choosing English law – contract probably involved English insurers and thus no evasive motive – further, Hague Rules not mandatory at that point of time. **[2B] Illegality per place of contracting**: Does not matter. Even if contract was illegal according to law of Newfoundland where contract was made, forum does not have to give it relevance (*Vita Foods*, in obiter). **[2C] Main contract illegal**: Not clear. • *Torni*: held B/L illegal and COL invalid • *Vitafoods*: held B/L not illegal, so COL valid, disapproved of *Torni* but only on holding that B/L was illegal not on COL holding	**[1] Addressed by PP**: Instead of using bona fides as a requirement, the concern over unfairness of choice of law can be better addressed by traditional notions of public policy (*YTM*). The HCA approach in *Golden Acres* of classifying the relevant Queensland statute as a forum mandatory statute in dismissing the appeal would thus appear more convincing. Additionally, it may be better to adopt an objective approach focusing on the objective effects of particular laws rather than examining the subjective motives of parties to the contract (*Fawcett*). **[2] Objective/Akai balancing approach**: The *Akai* balancing test may be more suitable: balance party autonomy with need to prevent evasion i.e. what would be the effect of evasion.

(II) CONTRARY TO PUBLIC POLICY

Akai balancing approach: The court in *Akai* balanced the (a) mandatory policies of the objective law and (b) the interest in upholding party autonomy, while also considering whether either method would be contrary to the (c) forum's public policy.

In *Akai*, the court balanced the mandatory policy of Australian law, which was the interest in protecting insured people in breach of commercial undertakings, against the freedom of parties to choose the law, especially when they are **commercial entities**.

Mandatory foreign PP	Party autonomy
Argue that there is a greater need to **protect the vulnerable parties** (consumer, employee, insured persons).	**[1]** Argue that it is in the interest of **comity of nations** to uphold parties' choice of law because party autonomy is critical and fundamental in commercial contracts. **[2]** Effect of PP as **sword**? (see below)

(III) EFFECT OF APPLYING *VITA FOODS* – EITHER APPLY

It is not clear what is the legal effect should the express choice be ineffective because it is not bona fide or legal. It would appear rather harsh to say that there is no proper law and therefore no contract.

One solution is to **apply the law of the forum by default**.

The better solution may be to consider the contract to be governed by its **objective proper law** i.e. law of the closest and most real connection (*Akai*), given that one of the reasons for avoiding the choice of law is the evasion of that law (*Iran Vojdan*).

Law of significant connection: This appears to be enough for the Singapore courts in *Peh Teck Quee*. Even though Singapore was likely to have been the objective proper law, the court considered the evasion of laws using Malaysia law as the reference point because Malaysia had significant connection with the contract.

LIMITATIONS TO PARTIES' CHOICE (II): **NON-STATE LAWS**

☒ NO	☑ YES
[1] Generally, the **authorities are settled**: that parties can only choose a national domestic law. Non-national laws such as religious law or *lex mercatoria* will only be given effect to if the specific doctrines are incorporated by reference (*Musawi*). *Musawi* had an exception: where a government was a party to the contract, may be able to choose "general principles of law" or "public international law" as the proper law. **[2]** Might equate to **giving parties carte blanche to avoid state laws**. **Counter**: the anti-evasion doctrine can be employed to strike down the choice on public policy grounds.	**[1]** Can argue that English courts are bound to adopt the strict requirement of state laws because they are bound to apply the Rome I Convention which requires a choice of "national laws" (*Shamil Bank*), whereas since **Singapore courts are not party to the Rome I Convention**, our courts can decide to give effect to a choice of non-state laws. **[2]** Argue that courts should **respect party autonomy**. Since the real objection lies with uncertainty, a choice of non-national law should be given effect to as long as it is: (a) a system of law (b) party seeking to uphold the choice must be able to lead evidence as to the relevant rules of the non-national law (to overcome uncertainty) (c) In arbitration, parties are allowed to choose non-state laws. No reason why courts should give up their judicial power to develop non-state law and to leave such power entirely in the hands of arbitrators. In any event, parties could always circumvent the restriction by agreeing to arbitrate according to the non-state law and wait for the courts to give effect to the agreement.

Is incorporation of non-state laws into state laws precluded?

Choice of non-state laws can be introduced by way of incorporation to affect certain parts of the contract, as long as the doctrines of those laws are defined with **sufficient certainty** (*Shamil Bank*; *Halpern v Halpern*). The incorporated non-state law operates as a set of **contractual terms agreed between the parties**:

(a) Incorporated provisions takes effect from date of incorporation; changes in law not automatically attached.
    a. In contrast with state laws chosen as applicable laws where the law that applies is the state of the law at the time of dispute, therefore, changes made to the law between the time of contract and the time of dispute would be effected.
(b) Incorporated provision is tested for consistency with other terms
(c) Incorporated provision is construed according to the proper law of contract
(d) Incorporation requires specific words: e.g. specification of 'black letter' provisions of a foreign law or international code or set of rules.

Can parties choose a combination of 2 state laws?

[1] Depecage: concept of picking and choosing where some concepts are governed by one law while others are governed by another law. Technically, it is possible for different parts of a single contract to be governed by **different laws** (*Vesta v Butcher*), but courts will be slow to draw the inference that parties have intended more than 1 law to govern their contractual relationship (*Centrax v Citibank*). It may be possible to analyse the factual matrix as giving rise to a number of contracts (instead of one), each governed by a different law.

- There may be **commercial sense** in having 2 laws since one can fill in the gaps of the other.
- Yes: If from the context, we can infer that one of the laws is the pre-eminent one, and the other only applies when there is a gap, combination is fine.

- No: However, if from the context, it is not possible to get a sense of the weightage, then the combination fails for uncertainty.

[2] State law + principles of construction from international convention

- Yes: This is fine – the idea is that when there are ambiguities in the state law, the state law is to be construed in a way as to favour the result which has been reached internationally.

If **express choice fails** because contract purports to choose a non-national system of principles, it would appear rather harsh to say that there is no proper law and therefore no contract. Thus, the better solution may be to consider the contract to be governed by its **objective proper law** (*Shamil Bank of Bahrain EC v Beximco Pharmaceuticals*).

LIMITATIONS TO PARTIES' CHOICE (III): **FORMATION VS INCORPORATION**

Some courts have treated incorporation cases differently from that of formation (*OUI v Turegum*) while others seem to treat incorporation cases the same way as they treat formation cases (*Heidberg*; *Oceanic Sun Line*).

- The **true distinction** lies in whether (a) the true issue is that an allegation of non-incorporation leads to non-existence of the contract or that (b) the contract exists but the term is not incorporated.
- The **type of clause** in question might matter as well:
  - If the clause in question is a choice of law clause, there is a stronger argument that the clause is pivotal to the contract, since the consensus seems to be that a contract cannot exist without a proper law, and hence allegations about them being unincorporated into the contract would affect the existence of the contract, therefore a **formation issue**.
  - However, it is arguable that for other less pivotal terms (e.g. exclusive jurisdiction clause), allegations about their incorporation should not affect the existence of the contract and should hence be treated differently.
- If it is an **incorporation issue**, apply the objective proper law (not putative) to determine if the term was incorporated.
- If it is a **formation issue**, there are several contenders.

FORMATION	
Cue: Law of X provides that P is party to a contract; Law of Y and Z provides that P is not a party.	
Rejected	**[1] Law of habitual residence**: Jaffey advocates that this choice ignores the choice of parties to form the contract according to another law. **[2] Law of place of contracting**: This is unrealistic in a globalized world with correspondence conducted online.
Lex fori	**[1] *Oceanic Sun Line***: The lex fori has been used to determine if the parties have a consensus *ad idem* and hence whether a contract has been made. *Oceanic Sun Line*: "no system other than the municipal law to which reference can be made for the purposes of answering the preliminary question whether a contract has been made and its terms". **[2] Briggs' two-staged approach**: Briggs believes that (1) the lex fori should be applied to determine the validity of the contract. However he goes further to say that after the proper law of the contract is determined by the lex fori, (2) the proper law of the contract would decide if the contract is valid. • Justification: o The application of the lex fori can be justified on the basis that the question of the proper law is a question of a connecting factor which is usually for the forum to decide – can argue that Briggs' approach is simply **using the lex fori to decide the connecting factor**. o Simple solution • Criticism: o Rejected in *Heidberg* for **circularity** o This seems to suggest that before a claim can succeed, there is somewhat a concurrency requirement where there must be a contract according to both the lex fori and the proper law of the contract. This would likely **go against parties' expectation** as it is unlikely that they have set such high barriers for the contract to be valid, unless this was expressly stated so. o Imposing such additional barriers also inhibits international trade and is **inconsistent with international comity** o Application of the lex fori may **promote forum shopping** to a certain extent by encouraging parties to sue in a forum with unfriendly formation laws
Subjective putative proper law	In issues of contract formation, the case law appears to favour the subjective putative proper law approach. This is logically **open to criticism because of its circularity**, but is pragmatic in its **(1) pro-validating approach**. **(2) Whether freely negotiated vs standard terms**: Additionally, in most commercial cases, there would be **serious negotiations** going on and it it thus not illogical to apply the subjective putative law (negotiations indicate serious intent between parties to conclude a contract). • If standard terms, apply OPPL instead (*Heidberg*)

	(3A) However, there must be limits and this approach should not apply if it **causes injustice**. • In Singapore, the *Vita Foods* limitation could apply and argue that in some contracts, especially consumer contracts, it is **contrary to public policy to apply the subjective putative proper law**. Effect would be to apply either objective proper law (*Akai*) or law of most significant connection (*Peh Teck Quee*). • **Injustice**: Look at status of parties – if commercial entities, more likely to be fair. If consumer is involved, could argue that due to asymmetrical bargaining power, injustice may incur. **(3B)** Also, the SPPL does not apply if there were **2 different express choices**, and the issue may be determined by the objective putative proper law – the law of the contract having the most real and substantial connection with the transaction alleged to give rise to the contract (*The Heidberg*, in *obiter*). • In *Heidberg*, the court **preferred the subjective putative law approach**, but had no choice because there were conflicting arbitration clauses, thus applied the lex fori.
	Demerits: • There is a **problem of circularity** because we are presupposing the very thing that is in question. • Also, to apply the proper law of contract would be to **unfairly favour the party who inserted the clause** in the offer, because this presumes that the other party agreed to the choice of law in the offer when in fact, the party is denying that he ever made the contract. • It would **essentially allow one party to impose a system of law on the other**, just by throwing the choice of law question into negotiations.

Objective putative proper law	To determine the objective putative proper law according to the **conduct of the parties** and the **undisputed terms of the contract** (excluding the choice of law clause).
	• Place of negotiation:
	  ○ Critiques might say that the place of negotiation has already been rejected many years ago. But can argue that the rejection then was for determining the objective proper law when there is no express or implied choice of law.
	  ○ It might be that for the specific problem of determining the existence of the term of the contract, and not the contract itself, it could be justifiable to look to the place of negotiation.
	  ○ If the place of negotiation cannot be determined because the contract was concluded over the telephone or internet, can apply the law of the place where there was seeking out.
	• There are other connecting factors such as lex contractus or place of residence which have been considered by Garner. But note that these place **may be fortuitous**.
	• This approach has been criticized in *Heidberg* for being as **arbitrary** as the *lex fori*.

INCORPORATION: OBJECTIVE PROPER LAW

If the parties are agreed that there is a contract and the only issue is whether a particular term which may influence the determination of the proper law is incorporated (e.g. an arbitration clause, EJC), the court may characterize it as an issue of incorporation.

If so, the court may **use the objective proper law** to determine if the disputed term is incorporated according to the proper law, since the objective proper law usually decides on the validity of the terms in the contract (*OUI v Turegum*).

Critique: It may be argued that where there is **inconclusiveness** i.e. competing choice of competing arbitration clauses or conflicting choices, the objective proper law should not be used to decide the issue, because we would be making assumptions about parties intention or connecting factors by including or excluding either of the clauses (Heidberg).

- May explain why in *Heidberg* the court did not apply the objective proper law and instead **turned to the lex fori** given the conflicting arbitration clauses.

Argue against application of *lex fori*

- Argue that exclusive jurisdiction clause, all things being equal, **remains strong evidence of parties intention** for contract to governed by law X.
- Should not rely on lex fori as it would **go against parties intention** and **encourage forum shopping**.

NB: Don't have to prove Y or Z – just prove that it is impossible to be X.

LIMITATIONS TO PARTIES' CHOICE (IV): **FLOATING CHOICE-OF-LAW CLAUSE**

The issue of a "floating" choice of law is governed by the *lex fori*. A **[1A] contract cannot exist in a vacuum** and there must be a governing law from its inception (*The Armar*). It seems that the result of striking out such a clause is not that there was no contract because there was no proper law but that the contract is **[1B] governed by its objective proper law** (*The Iran Vojdan*). However if the parties had no positive intention to have a governing law from the outset, then there should not be a contract at all.

- ☒ *Armar* is a case where we cannot say there is an objective proper law because at the outset, the parties could have **intended inconsistent laws**, and hence there was no formation of contract to begin with.
- ☑ This is unlike cases where the parties work from the objective choice of law but **intended to delay the express choice** (as in *Iran Vojdan*, where contract is still valid).
    - 2011/12 Q2 delayed COL // *Iran Vojdan*

There may be **good commercial reasons** for allowing the proper law to be **[2] changed on the basis of future contingent events** (*The Mariannina*) on the basis of party autonomy.

- ☑ Was counterparty given sufficient notice of the crystallisation?
- ☑ Was choice prospective?
- ☒ Is effect retroactive? Link with following point ¬
- ☒ Would it result in contract becoming illegal or invalid? *Vita Foods* controls
    - If it becomes a tool which **allows beneficiary to destroy the contract** (as opposed to modifying it), it would arguably fall within the *Vita Foods* limitations as not being bona fide.
- ☒ Unilateral? Unclear whether there can be unilateral change (*The Iran Vojdan*)

☒ FLOATING COL SHOULD BE STRUCK DOWN	☑ FLOATING COL SHOULD BE UPHELD
[1] Argue that like in *Amar*, the floating choice of law clause should be simply be struck down. **[2]** Check if the floating jurisdiction clause is "**parasitic**" on any floating law clause (*Iran Vojdan*) such that the floating jurisdiction clause cannot be given effect to if the floating law were invalid. • Parasitic clause = "governed either by Iranian law in Tehran or by German law in Hamburg or by English law in London" = choice of jurisdiction cannot be excised from each of these sub-clases and given independent effect if choice of law fails (*Iran Vojdan*) • ☒ In *Iran Vojdan*, the English floating law clause was found to be invalid for lack of certainty. Hence, even though the floating jurisdiction clause was valid, the court cannot give effect to it because it was "parasitic" on the floating law clause. • ☑ Conversely, in *Sonatrach Petroleum v Ferrell*, **even though the choice of law could not be defined in advance with sufficient certainty**, court held that the trigger for crystallisation of jurisdiction was possible to define with certainty; unlike in *Iran Vojdan*, the floating jurisdiction clause was not "parasitic" on choice-of-law. **[2]** Result of striking down: (1) If the contract is such that the parties had not agreed on any choice of law at all or had inconsistent intentions, could be argued that like in *Amar*, the contract might not even be formed and hence there is **no objective proper law** to be applied after the choice of law clause is struck down. (2) Or if the contract is such that parties had worked from the objective choice of law but intended to delay the express choice of law, can argue that like *Iran Vojdan*, the striking down of the floating choice of law clause does not mean	**[1] Apply objective putative law**: • Apply the objective putative law to determine the validity of the floating choice of law clause (*Iran Vojdan*). • Should be applied since the **objective putative law determines the validity of every term in the contract** where there is no clear, express choice of law and there is no reason why it should not also determine the validity of the floating choice of law clause. • Argue that the **approach in *Mariannina* should be extended to allow party's unilateral choice to crystallize the float**, provided that the choice is prospective and the counterparty is given sufficient notice of the crystallization. • If the floating choice of law is valid, the proper law is then determined accordingly from the choice of law. **[2] Alternative approach by Briggs (1) lex fori (2) proper law**: 1. *Lex fori* is applied to determine the validity of the floating choice of law clause and if the clause is valid, 2. The **proper law applies to govern the interpretation and validity of every contractual term**, except the one that purport to determine the proper law (i.e. it does not matter here that the proper law would have decided that the choice of law clause was invalid – because to allow otherwise would mean that the first-chosen proper law could possibly be displaced by another proper law in the case that under the first-chosen proper law, the clause is invalid. This would admit renvoi, in that the proper law's conflict of rules are applied such that another proper law comes into place, which is generally not allowed in contract cases). 3. Similarly argue that the *Mariannina* reasoning should be stretched to allow for the validity of floating choice of law

the contract does not exist, but that the **objective proper law is now applied** to the rest of the contract.	clauses.
Reasons (a) **Lack of certainty** – causing unfairness to the counterparty. (b) Propensity for **abuse** (c) **Third parties** are adversely affected.	Reasons 1. Floating choice of law clauses are **stabilization devices which are superior** to incorporation techniques because they freeze the law in time. 2. Upholding the choice of law clause would **give effect to party autonomy** where parties intended for the choice of law to float. 3. **Insulates contract from frustration and discharge** if chosen law is illegal or unenforceable.

LIMITATIONS TO PARTIES' CHOICE (V): **CHANGING CHOICE-OF-LAW CLAUSE**

Is changing proper law dealt with the same way as floating proper law?

- Different from floating law. Here we are not delaying the choice of law but change the proper law applicable.
- Which law would determine whether you can change the applicable law? First or Second?
    - To be consistent with the presumption of similarity, it's the second law to which you are changing to that will decide.
    - **Practical significance**: problem of accured rights. Rights may have developed under the first law and it is important to ensure that these rights will be preserved under the second law you are changing to.
- The **proper law of the contract may be changed by**: (i) **estoppel** and (ii) **subsequent agreement**: (*James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* (Lord Wilberforce); *obiter in Kreditbank*)
- The proper law of the contract **may also change on the occurrence of a future event**, provided that the event causing the change may be defined with sufficient certainty: *Kredietbank NV v Sinotani Pacific*
    - *Kredietbank*: Proper law can shift in a l/c transaction because parties intend it to shift: most important factor here is the place where obligations under unconfirmed l/c would be performed.
- The **floating objection** (as in *Amar* and in *Iran Vojdan*) **only applies to contracts whose proper law is not fixed at time of contracting** and irrelevant when issuing contract added to by confirming contract.
- But, note qualifier in *Kreditbank*: That documentary credits involving the formation of multiple contracts at different points of time cannot be treated the same way as simple contracts.
- Demonstrates that floating clauses are stabilisation devices – superior to incorporation techniques which freeze the law in time.

STAGE 3: APPLYING SELECTED RULES OF LAW

NOTE DECIDING BETWEEN FM AND ILLEGALITY

- If client wants whole contract to be excluded – argue PP by illegality → claim dismissed
- If client wants only a specific term to be excluded – argue FM → term will be excluded, rest of contractual obligations subsist as governed by the proper law
- If client wants another law to apply – argue PP as sword

FORUM MANDATORY STATUTE

Whether ___ is a forum mandatory statute depends on whether it has **extraterritorial effect**. There is a **presumption** against extraterritoriality and it has 2 aspects.

Firstly, the statutory provision only applies if the relevant connecting factor points to the law of the forum as the law governing the issue.

Secondly, the statute is presumed to only affect activities occurring within the territory of the forum, or to activities abroad of nationals of the forum (*JIO Minerals*). The court in *JIO Minerals* preferred to see them as "part of a common exercise of discerning parliamentary intention".

In *JIO Minerals* on the first aspect, since the *lex causae* was not Singapore law, the court presumed that Parliament did not intend for the Misrepresentation Act to apply.

Regarding the second aspect, Parliament is generally presumed to have intended for its laws to only apply to activity in Singapore (*JIO Minerals*).

Rebuttal: This presumption **may be rebutted by clear indication of Parliamentary intention** that the statute concerned is intended to **apply extraterritorially** and this **need not be stated explicitly** (*Parno* at [38] – [39]).

- ☒ **Practical difficulties in enforcement**: In contrast in *Parno*, Parliament could not have intended for the FA to apply to premises abroad as it **would infringe upon the sovereignty of another state**, and would cause **practical difficulties in enforcement**. The main object of the FA is to protect and ensure the safety of the many workmen who work on industrial premises in Singapore.
- ☑ **Express**: In *Taw Cheng Kong*, the SGCA held that s 37(1), PCA is an example of a provision which expressly evinces Parliament's intention to depart from the general presumption as it **expressly provided** that the PCA has effect, in relation to citizens of Singapore, outside as well as within Singapore.
- ☑ **Protective**:
  - ☑ Statutes are likely to be forum mandatory rules if they involve **vital national interests**.
  - ☒ For example, in *JIO Minerals*, the Misrepresentation Act, not being a **conduct-regulating or protective statute**, was deemed not to require general extraterritorial application to have its purposes advanced.
- ☑ **Domestic statute implementing treaty obligations**: *Barakat* seems to suggest in *obiter* that if the **domestic statute stems from a rule passed to implement treaty obligations**, it may be likely construed as a forum mandatory rule.

Include: Why is it mandatory?

- **Domestic legislation**: The overriding character of such legislation is necessary to prevent parties from evading Act by choosing foreign law as govenring law, thus frustrating intention of the legislature (*Lawson v Serco*).
  - **Direct**: Language: "immaterial whether the law which governs… is the law of the UK or not", "Act has effect notwithstanding…", "application of Act does not depend on…"
  - **Indirect/Sanction**: "shall be void insofar as it purports"
- **Legislation based on international conventions**: This is a forum mandatory rule as the [Rules] are a harmonisation attempt of national substantive law. Foreign elements are just the scope of extraterritorial application. Because it attempts at harmonisation, it will **not be effective unless it is mandatory**.
  - Language: "force of law"

Though *Star City* held that s 5(2), CLA – "no action shall be brought against" – was both mandatory and procedural, the better approach would be that in *Poh Soon Kiat* where it was held to be substantive, and a forum mandatory rule. However, a technical approach focusing on the similarity of the wording

should be eschewed as over-inclusive. Protection against ___ is very different from the protection of the courts from being turned into debt collection agencies.

FOSTER V DRISCOLL – COMMON INTENTION ILLEGALITY

☑ APPLY FOSTER V DRISCOLL	☒ LIMITATIONS
If the parties had a common **intention to break the laws of a foreign friendly country**, the transaction would be unenforceable. This juridical basis is for public policy of the forum to give effect to international comity (*Regazzoni*). This applies even if the contract is meant to be an autonomous contract (*Foster v Driscoll*; *Peh Teck Quee*).	**[1] Scrutton LJ dissent**: Parties should not be assumed to perform contract illegally if it could be performed legally. **[2A] Restrictive application**: It is arguable that the *Foster v Driscoll* rule **only applies if the breach of the foreign law is a *malum in se*** (instrinsically wrong) rather than a *malum in prohibitum* (prohibited by statute): *Reynolds*. (1) *Reynolds* **argues that the restrictive rule is preferable** (not just any breach would render contract unenforceable but breach that creates serious wrong or goes against international morality). (2) **Policy for restrictive rule**: Forum should not interfere when contract has no connection with it (wholly fortuitous) – e.g. *KAC No. 4&5.* **[2B]** Perhaps **balancing solution** of comity of nations vs party autonomy better.
[1] Mere knowledge is insufficient and there must be **active participation and involvement** (*Foster v Driscoll*). **[2]** The court is **not bound by the terms of the relevant documents** – its role is to ascertain the true and real nature of the transaction (*Regazzoni*). • In *Regazzoni*, the contract does not require seller to obtain the goods from India – it is only after investigation of the facts that it appears he could not have gotten them anywhere else. • Contract also does not disclose buyer's intention to send the goods to South Africa. **[3]** In *Royal Boskalis*, the rule was **further extended to unilateral intention to break the rules** of a foreign friendly country. • Thus in *Royal Boskalis*, even though the IRQ authorities unilaterally intended illegality in violating Dutch/Swiss sanctions law to get money transferred to them, court held that the *Foster v Driscoll* rule applied to make the transaction unenforceable. • **[+]** This seems to be more fair than the common intention rule, as under common intention rule if there is only unilateral illegality, party intending illegality can still come to court and get claim enforced. • **[-]** However, extension should be questioned: at common law contract is lawful at inception even if one party has intention to perform contract illegally. *Royal Boskalis* is thus limiting contractual freedom substantially. **[4A] Reprehensible foreign law**: The court in *Regazzoni* suggested that a foreign law, the enforcement of which was against morals, will not be regarded by the *lex fori*; thus agreement to breach that law will not be rendered illegal. **[4B] Foreign penal/revenue law exception**: The courts were cognizant of not giving effect to foreign penal or revenue laws when they made it clear that the *Foster v Driscoll* rule did not permit the enforcement of such laws (*Regazzoni*). • On the facts, the case did not fall within the revenue law exception although Lord Somervell suggested that even if it did, courts should not enforce a contract to smuggle goods into or out of a foreign and friendly State.	
Practical difference: Though *Regazzoni* purported to apply *Foster v Driscoll*, the court in the latter refused to make any order and refused to award costs, while the court in the former dismissed the appeal and awarded costs (to whom?), signifying a more active approach.	

RALLI BROTHERS – SUPERVENING ILLEGALITY

☑ APPLY RALLI BROS	☒ LIMITATIONS
[1] Under the *Ralli Bros* rule, a contract is unenforceable if it is **illegal by the place of contractual performance**. The breach of a mere purchasing policy is insufficient to invoke the *Ralli Bros* Rule (*Shaikh Faisal*). Does *Ralli Bros* apply to **initial illegality** (cf 2011/12 Q2) or only to supervening illegality? Yes. • Apart from respecting international comity, the *Ralli Bros* rule is ultimately based on a **principle of fairness** i.e. it is not right to make a party criminal by enforcing a contract that has become illegal by the contractually stipulated place of performance. Thus, it should apply regardless of whether illegality is supervenient or initial, as long as parties are not aware of the illegality. **[2]** The *Ralli Bros* rule only applies if the **contract "requires performance" at a stipulated place**. Hence, the rule does not apply if the contract does not require performance in any particular place: *Toprak v Finagrain* (L/C by first class western bank). • In *Peh Teck Quee*, the court held that because there was no requirement in the facility agreement as to a particular place of performance, repayment did not have to take place in Malaysia and performance of facility agreement would thus not be illegal there. • cf *Foster v Driscoll* where the court took a composite view of the transaction. **[3]** Courts have resisted efforts to combine elements of the *Foster v Driscoll* rule and the *Ralli Bros* rule (*Toprak*; *Peh Teck Quee*). Hence, one **cannot argue** that the court will not enforce a **contract which subsequently becomes illegal** in a foreign and friendly country. Must have either illegality at the **contractually stipulated place of performance** (*Ralli Bros*) or common intention to break the laws of a foreign and friendly country (*Foster v Driscoll*)] **[4]** Defence of illegality **does not relieve the D from obligations under contract** (*Toprak v Finagrain*); P can sue for damages in breach. In *Toprak*, D attempting to escape obligations to open L/C + evidence that parties did not contemplate performing illegally.	**[1]** It could be argued that the *Ralli Bros* rule is a **rule of domestic English law** and so should only be applied if the proper law of the contract is English (*Reynolds*; *Chesire & North*). In Singapore, the CA in *Peh Teck Quee* also stated that it was uncertain if the *Ralli Bros* rule is an independent conflict of laws rule or a manifestation of the doctrine of frustration in law of contract. • It should be noted that Scrutton and Warrington LJJ in *Ralli Bros* had relied on notions of implied terms (an old-fashioned way of explaining the doctrine of frustration) and cited familiar frustration authorities like *Paradine v Jane* in their judgment. **[2]** If the proper law is a foreign law, it should be **up to the foreign law to determine** if illegality by *lex loci solutionis* renders the contract unenforceable.

EURO-DIAM TAINTING RULE

☑ APPLY EURO-DIAM	☒ LIMITATIONS
The *Euro-Diam* tainting rule operates in 2 stages. • Firstly, the **transaction must be illegal in the conflicts sense**, e.g. *Foster v Driscoll* or *Ralli Bros* illegality. • Secondly, the **claim will be tainted with illegality** if P has to plead or prove illegal conduct to establish his claim (*Bowmaker* principle), or if the claim is so closely	**Potentially very far-reaching**. Court can make unenforceable an earlier contract because of an illegality in related contract. If applied too liberally in international cases, there is a danger of putting international commerce in jeopardy. Transactions which appear to be legitimate on its face would thus be re-examinable.

connected with the proceeds of crime as to offend the conscience of the court (*Beresford principle*).	

LEMENDA RULE – PUBLIC POLICY ILLEGALITY

Under the *Lemenda* rule, a contract will not be enforced if **(1)** it relates to an adventure which is contrary to *lex fori* public policy which is founded on general principles of morality, and **(2)** the same public policy applies to the country of performance so that the agreement would be unenforceable under the law of that country, at least where the contract is governed by the *lex fori* (*Lemenda*; *Shaikh Faisal*).

The gravamen of the objection appears to be the contravention of a public policy in the place of performance with coincides with the public policy of the forum. Therefore, this rule may be extended even if the proper law of contract is not the *lex fori*.

Though an arbitration award is not isolated from the underlying contract, there is nothing offensive to English public policy in the enforcement by an arbitral tribunal of a contract which did not offend domestic public policy under the proper law of the contract, even if English public policy might have taken a different view (*Westacre Investments*).

Examples:

☑ *Lemenda*: English law contract to use personal influence to obtain renewal of existing supply contract with Qatari national oil agency; contrary to PP of Qatar and England so unenforceable.

☒ *Shaikh Faisal v Swan Hunter*: Arms manufacturer contracted with agent to tender for contract to supply military craft to UAE; sued for commission (Singapore law contract); arms manufacturer claimed *Lemenda*; rejected; Lemenda distinguishable: no evid that contrary to PP of UAE; even if have evid doesn't follow that Singapore ct will follow suit: simple agency contract not using undue influence

SEVERANCE

Severance of the offending contractual terms may be allowed to save the remainder of the contract. Whether the contract is capable of severance should be determined by the proper law of the contract. If so, the law that gives rise to the objection to enforceability should then determine whether severance would defeat or undermine the public policy which gave rise to the unenforceability in the first place.

RENVOI

Generally, *renvoi* does not apply in choice of law for contracts (*Macmillan*) as it has been said that parties could not have intended to select the choice of law rules of the proper law (*Amin Rasheed*).

TORT

STAGE 1: CHARACTERISATION

TORT VS CONTRACT

See above

TORT VS PROPERTY

Diamond Centre and *KAC* may be authority for a **differentiated approach**. If there is no real dispute as to title, the issue is purely tortious (*KAC*), but if the only issue was whether D obtained a better title as a bona fide purchaser without notice, a property characterisation will be used (*Diamond Centre*).

Where the tort involved is **negligence** and not conversion, the *locus delicti* and the *situs* may differ, and dual characterisation may be required.

Where the property involved is **intangible**, the *locus delicti* and *situs* may also differ, and dual characterisation may be needed.

Where the **remedy** is compensation, which is not a property response, a tortious characterisation may be more appropriate.

<table>
<tr><td colspan="3">*NOTE tort issues arise because protection of tangible property rights is done through tort of conversion (e.g. KAC)</td></tr>
<tr><td>Intangible property</td><td colspan="2">1. Negative rule: NOT tort characterization (Macmillan No 3, as opposed to Kuwait Airways)
• May not have coincidence between LLD and LS (West LB)
• Law not protecting ownership by tort; intangible property cannot be possessed and so cannot be converted
• BUT for other torts e.g misrepresentation, conspiracy, tort characterization applies
2. Positive rule: Should be property characterization (Macmillan No 3)
• Law is protecting ownership not by tort but legal or beneficial ownership (equity)
• Equity brings in issues of priorities, first in time, which should be property characterization</td></tr>
<tr><td rowspan="3">Tangible property</td><td colspan="2">NB: Bills of lading/cheque seen as tangible property because they involve chattels – document of title</td></tr>
<tr><td>Tort charact</td><td>Kuwait Airways, as opposed to Macmillan No 3
• No need for property characterization because LLD coincides with LS
• Tort protects right to possession from 3P interference; for tangible movables can only have possession where property is situated
• No need to decide between the two, but tort characterization preferred (KAC)
• BUT other prop. issues may arise e.g. as defense to tort, priority, superior title
o Such issues arose in KAC, but overall still characterized as tort

Examples where LLD coincided with LS
• Kuwait Airways – airplanes, conversion, held tort characterization
• Rickshaw Investments – Tang dynasty artefacts or “Tang cargo”, conversion, held tort characterization
• The ASL Power – did not decide; actually did not need to, there was coincidence</td></tr>
<tr><td>UNLESS</td><td>1. Claim in tort is not claim for conversion but claim for negligence
• ASL Power: tort, contract, property discussed, court did not make decision
o Applying Kuwait Airways court did not have to make decision
o BUT KAC does not apply, not tort of conversion, but negligence
o LLD and LS may not coincide for tort of negligence (Trafigura)
2. Issue of title is in dispute
• KAC distinguished: no real dispute as to title, issue purely tortious
• Diamond Centre issue was whether better title obtained by Df as BFPWN, held prop characterization
3. Bona fide purchaser for value without notice defense or 3P involved
• Diamond Centre: tangible property, original owner claimed for conversion, purchasers who bought from middleman rogue claimed defense of BF purchase, court assumed property charac and not tort charac.
• Macmillan: characterize by defense when it governs the issue
• In principle justified, need result based on property characterization so that other 3Ps in the process</td></tr>
</table>

		of acquiring property interests can rely on it OR there *could be* 3Ps involved (*Glencore*) • Consistency of principle, 3Ps can become involved easily 4. Want to **avoid PP problems with tort characterization** • *KAC*: favored tort charac, but prop charac would have avoided problem of applying PP as sword, would have excluded ownership law to say ownership never passed, would not have needed to displace LLD for LF

STAGE 2: CHOICE OF LAW AND CONNECTING FACTORS

The relevant choice of law rule is the DAR with a FE. For a tort to be actionable in the forum, the alleged wrong must constitute a tort under the *lf* and give rise to civil liability under the *lld* (*Rickshaw Investments*).

- NB: Don't have to prove that a tort was committed under the LLD; just prove civil liability incurred e.g. statutory tort.

SUBSTANCE OF THE TORT – DETERMINE *LLD*	
The *lld* is determined by the **substance of the tort test**, which looks at the events constituting the tort in hindsight and asks where, in substance, the cause of action arose and what the essential complaint/gravamen was (*Distillers*; *Rickshaw*). • The approach taken in *JIO Minerals* was to look at the elements or events constituting the tort and to determine if location was fortuious. • ☒ In the UK, if the tort was in substance committed in the UK, the DAR with a FE can be disregarded and the tort is treated as a domestic tort (*Metall und Rohstoff*), but this has been rejected in *Rickshaw Investments*. • ☒ The all-encompassing approach in *Wing Hak Man* is too wide, and the substance test should focus only on elements that make up ingredients of the tort, and not events part of the narrative. Given that the general test may be too broad, specific rules have been developed to provide better guidelines for particular torts (*JIO Minerals*):	
Negligence	Substance of tort depends on whether the allegation is of **lack of care in the manufacture, distribution or sale of the product causing the harm**: *Distillers v Thompson*. In *Distillers*, the court held that the place of tort was NSW because the gravamen of the complaint was over the placing of the drug in NSW market without appropriate warning, and not where the defective product was manufactured i.e. England.
Misrep.	**[1]** The *lld* of the tort of misrepresentation is **where the representation is received and acted upon**, unless the place is fortuitous, or if receipt and reliance occurs in different countries, in which case the general substance of the tort test applies (*Jio Minerals*; *UBS v Telesto*). • *JIO Minerals*: (i) whether there were **negotiations** (Indonesia was the place where most of the negotiations took place), (ii) where the **reliance was acted upon** (Respondent took steps in reliance of representations in Indonesia), and (iii) the **fortuity** of location (the only reason why representations were received in India was because the Respondent was based in India). o Problem with reliance as applied in JIO: ▪ Court extended reliance from remission of funds from IND to also drilling in INDON ▪ Remission of funds was all that was important for reliance, the drilling was just the consequence of remission, it was follow up. ▪ By this extension, many other acts can also be considered acting upon, reduces scope of application of specific substance test, undermines any potential certainty ▪ Perhaps test has just shifted uncertainty in determining where tort occurred to uncertainty in determining where misrep relied upon, ultimately just use general substance test • *UBS v Telesto*: o **Fortuitious**: place of call not fortuitious; possible because party also lived there o **Reliance**: Where there is continuous acting upon look at place of crystallization (*UBS v Telesto*) ▪ Takes broad view of reliance (Jio Minerals) ▪ BUT can be criticized, see below. **[2]** Reliance may be extended to include acts of the representee's agent if there had been a **continuing action** (*UBS v Telesto*). • In *UBS v Telesto*, the court held that reliance crystallised when the bank agent acted in accordance with the principal's instructions in Singapore even though the misrepresentation had been received in Australia and the instructions transmitted there and then. • **Problem**: o Reliance was the instruction, the actual operation on account was the result of reliance o Court did not apply *Jio Minerals* by saying reliance in both SG/AUS, said SG only o Concept of crystallization and continuous communication vague when the specific substance test is supposed to promote certainty (*Jio Minerals*) o By this test, *Rickshaw* could also be continuous acting upon; crystallization of chain of communications

	could have occurred in Germ. rather than SG, as was decided ○ Problem could have been **solved by characterization** ▪ Court took into account party expectations of UBS – which influenced its decision on where reliance was ▪ In the end, court realized that tort was not actually being used to claim compensation but a defense to a contractual claim, following *Macmillan*, the issue could have been characterized as one of contract rather than tort
Internet defamation	**[1]** For defamation, the *lld* is usually the **law of the locality of download**, but a claim for damage to reputation will warrant substantial damages only when P has a reputation in the place of download (*Gutnick v Dow Jones*). **[2]** The majority in *Gutnick* suggests that if the **real issue is one of defences**, the law of the locality of upload or the law of the locality of the editorial seat (if the server is fortuitously located wrt to upload) may be used. Though this approach may be problematic especially if P has a substantial reputation in more than 1 legal jurisdiction, P in *Gutnick* had confined his claim to the recovery of damages and the vindication of his reputation in Victoria.

LIMITATIONS TO DAR

Exclusively territorial torts	**[1] Non-justiciability**: The lex fori has no jurisdiction to hear disputes involving territorial torts (*Mocambique*); the basis for distinction is **international comity** (*Pearce*). **[2] DAR bar**: Additionally, the DAR and its flexible exception are generally not relevant in determining the **applicability of statutes to torts committed overseas**, based on the presumption that statutes tend not to have extra-territorial effect (*Parno*).	
	☒ Local	**☑ Extra-territorial** (rebut presumption)
	[1] References to subject-matter which are **land-based**: suggests limited local application **[2]** Whether there are **remedies or procedures that require bureaucratic action** – e.g. injunctions, making inspections, issuing of clamming orders etc (*Parno*). • Peremptory powers suggest that the statute cannot be applied extraterritorially. ○ See 'ACT OF STATE DOCTRINE' below. • Practical difficulties of enforcement (*Parno*, at [41]). **[3]** Whether it is a statutory enactment which falls within that category of statutes that create new rules and standards of conduct which need only be **followed by the specified class of persons** at whom those statutes are specifically targeted (*Parno*, at [36]). **[4] Merely provides for interpretation of Singapore law**: In *Parno*, the court held that the fact that the contract of employment in this case provided for the applicability of Singapore law was of no avail to the appellant. All that that meant was that Singapore law applied, but **only to questions of interpretation** of the contract of employment, or where a claim is brought by either party for a breach of the contract. --- **[*]** Would the DAR be relevant if there were an **equivalent**	**[1]** Whether anything in the statute **expressly provides for it to apply to entities/persons beyond the forum's boundaries** **[2]** Whether it is a statute which does not create new rules of conduct, but **merely removes certain exceptions to common law liabilities**, such as the Contributory Negligence and Personal Injuries Act (Cap 54), or provisions which **attach new liabilities to the violation of existing rules of conduct**, such as s 12 of the Civil Law Act (Cap 43) which confers upon the personal representatives of a deceased person a right of action for the wrongful death of that person for the benefit of his dependants (*Parno*, at [36]). --- **[*]** Even if territorial statute cannot apply, **consider if forum's common law rule can apply to the foreign tort**. In *Parno*, because the parties did not plead Myanmar law, the court held that based on the **presumption of similarity**, the *lld* Myanmar law was treated as the same as the *lex fori* Singapore law and hence Singapore's common law on negligence applied.

	statute in the foreign country? **No**. The DAR would not apply because both the statutes are territorial. Cannot perform the hypothetical exercise of transposing events when the events are territorial; deeply rooted to the soil. 2 reasons: • Practical difficulties associated with such enforcement of statute on foreign land. • Applying the statute to premises abroad would be to infringe on the sovereignty of the foreign state.	
IP rights	☒	☑
	IPRs are generally strictly territorial in nature. Where there is a breach of local IPR within the forum, it will give rise to an actionable claim in the court. However, where there are foreign elements in the IPR claim, there are 2 bars: non-justiciability and double actionability rule. **[1] Non-justiciability**: The court has no jurisdiction to hear disputes involving title to or rights of possession in foreign immoveable property. The *Mocambique* rule has been extended to include IPRs (*Potter v Hills*). **[2] DAR bar**: The DAR will still apply to a foreign tort claim but **it will always fail**. • Because of the territorial nature of the law, the first limb (actionable under the lex fori) will never be satisfied. A foreign IPR can never be considered actionable under the lex fori and neither can a local IPR that was infringed in a foreign country be actionable under the lex fori. • See *Pearce* exception	*Pearce* (obiter) → LF displaced, apply LLD However in the context of copyright law, **the FE may be invoked to allow the claim** even if the foreign copyright statute is territorial as long as **(1) the claim is justiciable** (i.e. no issue of validity or existence of title and only issue of infringement) (*Tyburn Products v Conan Doyle*) AND **(2) claim would have been actionable under the forum law if infringement had occurred in the forum** (i.e. claim not unknown to forum) (*Pearce*). NB: If the issue involves validity of rights rather than infringement, the court will not make a declaration because it would be an "exercise in futility" since it would not be binding in the foreign State (*Tyburn Products v Conan Doyle*). But if this argument is correct, the exception is no longer an exception but a rule of general application. Perhaps this should only apply where the **remedy sought is damages**, but **not an injunction**.
Maritime torts	For torts committed within territorial **waters**, the *lld* is deemed to be the littoral state (*The Arum*). Though the ship may be unconnected with the littoral state and may be simply passing through, no distinction is drawn between internal and external torts (*Mackinnon v Iberia Shipping*). For torts committed on the high seas, external acts are governed by general maritime law while the *lld* for internal acts is the law of the registration state or in default of proof, the flag state. In determining whether the tort occurred on board the ship or on the high seas, the question is what the real gravamen of the tort is. The FE may be invoked if the *lld* is uncertain, but this may be difficult to accommodate within *Rickshaw Investments*. --- Normal tort choice of law rules (i.e. double actionability rule) apply to torts committed within territorial waters: *Mackinnon v Iberia Shipping*. **The law of the flag is generally irrelevant**. *The place where damage occurs:* • Territorial waters: country in whose territorial waters the damage occurs. . • High seas: maritime supranational laws apply. • Onboard the ship and unconnected with state in whose territorial waters: law of the flag displaces the law of the place of the tort (**exception**): Dicey & Morris. *Collision cases* Where the collision takes place on the high seas between 2 ships registered to a different country, it has been suggested that	

	the tort be governed by the law of the forum (*Aberdeen Artic v Sutter*; *Lloyd v Guibert*; *Chartered Mercantile Bank of India v Netherlands India Steam Navigation)*. *Intra-vessel torts on the high seas* Locality of the tort will be deemed to be the registration state of the vessel. If there is no proof of registration of the vessel, it will be determined according to the laws of the flag state (*Canadian National Steamships v Watson*). *Where there is uncertainty as to the location of the vessel (whether high seas or littoral waters*) There is suggestion that the flexible exception can apply in such cases.

FLEXIBLE EXCEPTION

***RICKSHAW*: (I) FORTUITY (II) INJUSTICE**

The flexible exception allows the displacement of either the *lf* or the *lld*, or even both in favour of the law of a 3rd system. *Rickshaw* appears to have set a high threshold to invoke the exception – **a conjunctive test of fortuity and injustice**, but this **may just be an example** in *obiter* (at [57]).

`LF > LLD`: Lex fori can displace the *lld* such that only the *lf* applies (in *Boys v Chaplin*, the exception was applied such that only the lex fori was applied to exclude a limited measure of damages imposed by the lld).

- *Boys v Chaplin*
  - Pf (UK soldier) injured by car driven by Df (UK solider) in Malta
  - Actionable under LF (UK) but not LLD (Malta)
  - Held could claim solely under LF (BUT ratio not clear (*Red Sea*))

`LLD > LF`: LLD can displace the *lf* such that only the *lld* applies (recognized in *Rickshaw*; applied in *Red Sea*)

- *Red Sea*
  - Building proj; contractors/sub, architects, engineers, claimed insurance for loss incurred
  - Insurer argued if liable to pay other Pfs, subcontractor should pay insurer (direct subrogation); it supplied faulty precast building units; preemptive, insurance not paid out yet
  - Under LF (HK) not allowed, under LLD (SA) allowed
  - Held all connections SA, could claim solely under LLD
    - (Insurance policy subject to SA law, project in SA, property in SA, main building contract SA law, performed in SA, breach and damage in SA, Df incorporated in HK but head office SA)

`3RD > LF/LLD`: Third country's law can displace either the *lld* or the *lf* (recognized in *Rickshaw*).

Argue that although strict application is right, the content of 'strict' may not be conjunctive requirement of fortuity and injustice.

[1] Issue segregation: Lord Wilberforce in *Boys v Chaplin* proposed segregation between **actionability-creating and loss-allocating** issues. Such a distinction would mean that *Rickshaw* would **apply only to rules of conduct** as opposed to rules of liability.

- Though Lord Hodson's view was approved in *Red Sea Insurance*, excessive issue segregation should be avoided. However, where almost all of the significant factors point in favour of 1 law, the exception may be applied to the whole claim and not just isolated issues (*Red Sea Insurance*).

[2] The requirements of fortuity and injustice make sense for non-market torts but **may not work very well with market torts** (which maritime torts could be analogised to – entrusting of goods to someone else).

PUBLIC POLICY – DISPLACE *LLD*

The case of *KAC (Nos 4 and 5)* has been taken as authority for the position that **public policy**, at least when invoked in relation to the DAR, **can displace the *lld* and operate to apply the *lf*** (*Briggs*).

- In *KAC*, the HL identified and framed a tort issue and because the statute did not apply, the governing law would be determined by the DAR. Lord Hoffman and Lord Nicholls held that the flexible exception allowed an action to succeed where it would be contrary to public policy to exclude the claim. In effect, the HL used public policy as a 'sword' to displace the *lld* in favour of the *lf*.
- *Briggs* describes the case as authority for the use of PP as a sword. If the court had used PP as a **shield**, it would have excluded only the offending part of the Iraqi law, which was the decree vesting ownership of the aircraft in the IAC. This would have led to the result that the acts were actionable under Iraqi law as well. However, the majority of the HL invoked PP such that only the lex fori applied

(**sword**). In other words, PP was relied upon to displace the whole of Iraqi law.

☑	☒
[1] A better reading of *Rickshaw* is that the **test of fortuity and injustice is only 1 way of invoking the flexible exception** given that the SGCA used the words "for example" at [57]. If this is the case, courts would thus not be precluded from considering public policy as a ground for invoking the exception. **[2]** Additionally, the mention of FE in *Rickshaw* was **in *obiter*** because the FE did not even apply on the facts.	**[1]** If ***Rickshaw* were to be strictly applied**, public policy should not be allowed to displace the *lld* as the HL did in *KAC* did because while there might be injustice, the connection to Iraqi law was certainly not fortuitous as the aircraft was deliberately flown to Iraq. Based on *Rickshaw*, both elements have to be satsified to trigger the flexible exception. **[2]** Giving public policy such a significant role – to displace the *lld* and apply the *lf* – may result in **forum shopping** (based on the most favourable public policies). ○ Counter: Forum shopping may be justifiable when PP involved is gross violation of public international law/breach of *jus cogens*. Issue is where to draw the line at. **[3]** Difference in using public policy as a shield, as opposed to a sword, is that the **judgment does not create estoppel** and parties can sue elsewhere. **[3A]** Effect of treating PP as a **SHIELD**: result is a **dismissal of the claim** (PP applied at 3rd stage) • This **does not extinguish his rights to vindicate his** case, it just means that the court cannot look at the rule that plaintiff is relying on to vindicate his rights • Seems to accord with **international comity** because the court is simply saying that we are unable to apply the rule, and does not say anything bad about other laws **[3B]** Effect of treating PP as a **SWORD**: result is a **replacement of the rule** under the applicable law with the forum's rules (PP applied at 2nd stage) • This **extinguishes the plaintiff's rights** because the court makes a decision based on the *lex fori* and the Pf **can no longer lodge a similar claim** • Given the **potential prejudice** that may be suffered by the plaintiff, there is a need to limit the use of PP as a sword, preferably through devising some kind of criteria – Briggs recognises that special cases warrant the use of PP as a sword **[3C]** But see above for Briggs' analysis of the **necessity of using PP as a sword** instead of a shield in *KAC*.

PRE-EXISTING CONTRACTUAL RELATIONSHIP – DISPLACE *LLD* WITH PROPER LAW OF THE CONTRACT

☑	☒
[1] The law of an underlying contractual relationship may be a factor to invoke the FE (*Trafigura*). *Prima facie*, this would not square with *Rickshaw*, which provides for the application of the FE only when fortuity and injustice are satisfied. However, it is submitted that a better reading of *Rickshaw* is to see the **test of fortuity and injustice as only 1 way of invoking the flexible exception** given that the SGCA used the words "for example" at [57]. If this is the case, courts would thus not be precluded from considering underlying contractual relationships as a ground for invoking the exception. **[2] Additionally, certainty is further promoted** if the law of the underlying contractual relationship is applied over the DAR as contracting parties can plan and act according to a single system to achieve a common solution. • This is particularl so where 2 sophisticated, commercial entities agree to a choice of law clause because the most reasonable interpretation is that they intended the clause to apply to all causes of action arising from or related to their contract (*Nedlloyd Lines v San Mateo*).	**[1]** This **would not fit squarely with *Rickshaw***, which requires both fortuity and injustice, since Singapore, being the place where the bill of ladings were released, was clearly not fortuitous. While there might be injustice caused if Singapore law were applied, the fortuity element would almost certainly not be fulfilled.

[3] However, the **FE cannot be invoked solely due to an underlying contractual relationship** as this would overwhelm the DAR altogether. • The FE may be invoked if other than the underlying contractual relationship, the parties shared a common domicile, which is also where insurance contributions and welfare benefits are payable and distributable (*Johnson v Coventry Churchill*). • This would also be **consistent with party autonomy** especially if the parties had agreed on a non-exclusive choice of law clause. Examples • *Trafigura*: existence of K was **only reason** for 3P to be involved with the seller • *Glencore*: claim between oil claimants and *MTI* tort of conversion **arose out of commingling contract,** no 3Ps involved o Claim between oil claimants and 3Ps who had bought the oil from MTI – not contract, that claim did not arise out of contract	

STAGE 3: APPLICABLE LAW

PRESUMPTION OF SIMILARITY

☑	☒
[1] In default of proof of the law of the place of the tort, it will generally be assumed to be the same as the law of the forum (*Rickshaw*). • In *Parno*, Myanmar law was not pleaded, thus Singapore common law of negligence was applied. • A bare majority of the HCA in *Neilson* favoured the application of the presumption of similarity. **[2]** The presumption of similarity also applies to public policy (*Royal Boskalis*).	**[1] Unjust**: But the presumption of similarity will not apply if it is **unjust** to apply it against a party so as to make him liable on a claim despite P failing to prove foreign law (*D'Oz*). It may be argued that *D'Oz* should be extended to situations where **3rd parties are unfairly prejudiced**. **[2] Injunction**: It will also not apply where an **injunction is sought** to restrain a wrong committed in a foreign jurisdiction because it is more invasive and purports to apply extraterritorially (*OMG Holdings*). This is even though there is a line of cases emphasising the **common legal heritage** of Singapore and Malaysia. **[3] Judicial notice**: Courts may **take judicial notice** that the principles in the foreign jurisdiction will differ from the *lex fori* in some respects (*Rickshaw Investments*). S 59(1)(b), EA also allows courts to take judicial notice of Commonwealth Statutes. **[4] Where statute permits exercise of discretion**: A bare majority of the HCA in *Neilson* favoured the application of the presumption of similarity. However, McHugh J in his dissenting judgment held that the **presumption divorces the discretion from its context** because the Chinese choice of law rule with a flexible exception had no counterpart in Australian law. Kirby J held that this was an unrealistic fiction since Chinese law was so distinct from Australian law. **[5] Stay of proceedings**: As in *Westacre Investments*, Singapore proceedings may in rare circumstances be stayed pending a reference to the foreign court for a determination of the contents of the foreign applicable law if the Singapore court has case management powers.

RENVOI

☑	☒
There is Australian authority for applying renvoi for tort issues: *Neilson*. • However, note that as	**The English courts do not apply renvoi for tort issues** as this is provided in their statute. **Should Singapore courts apply renvoi for tort issues**?

recognized by Gummow and Hayne JJ in *Neilson*, renvoi does not arise under double actionability rule or where the flexible exception exists (Callinan J). • In Australia, since *Regie National des Usines Renault v Zhang*, **the double actionability rule has been abrogated**.	• The application of renvoi in *Neilson* was necessary to achieve a fair result – since both the parties were Australian and domiciled in Australia and the law of China was fortuitous (but China was the lld). • In Singapore, the double actionability rule and the flexible exception are still part of our law. Courts would be able to achieve a similarly fair result by **using the flexible exception to displace the *lld* on the basis of fortuity** (*Rickshaw*) i.e. given that employee was in China for a transient job assignment and P and D company both from Australia. *Boys v Chaplin* could have applied. • There is thus no need for Singapore courts to apply renvoi in tort issues. • But according to Briggs, renvoi is **necessary to prevent forum shopping**. o However, Singapore prefers the narrow characterization on substance/procedure (CA in *Goh Suan Hee*) and hence most questions would be 'substantive' and decided by the *lld*. This should effectively prevent forum shopping.

FORUM MANDATORY STATUTE

☑	☒
[1] The doctrine of forum mandatory rule has **only been invoked once in a torts case** involving the DAR (*Brodin*). The Scottish court held that the clause in the Norwegian contract excluding liability under general law was void in view of the forum mandatory rule i.e. UK Law Reform (Personal Injuries) Act, and therefore the employment contract was unenforceable in the Scottish court. **[2]** The **effect of this case is unclear** since Scotland was both the lld and the lf, it was not clear if the court applied the rule voiding exclusion clause as part of the lld or regardless of the lld (as a forum mandatory rule). This is especially since in *Sayers*, which also involved an English statute that purported to void an exclusion clause excluding liability for personal injury, there was no discussion of the doctrine of forum mandatory rule and Lord Denning adopted a **suis generis approach** and applied Dutch law, thus upholding the exclusion clause as effective to bar the claim in tort. **[3]** Alternatively • **(1)** Can argue that since LLD was Scotland, the FMS was applied under FE (stage 2); if it was FMS, then it may have applied to override the proper law of contract (i.e. implied proper law was Norway, which contained exclusion of liability) rather than the applicable law of tort. • **(2)** FMS does not arise at all; any FMS would have been taken into account under stage 2 because of double actionability where the statute would have been assessed for extra-territorial application (*Parno*). In *UBS v Telesto*, the court considered the FMS of Australia under stage 2 LLD.	The presence of the first limb of the DAR already ensures pre-eminence of the lex fori such that the role of a forum mandatory rule is **limited**.

(A) Apply via flexible exception It is possible to apply the flexible exception such that the lld or even a third country law (CA in *Rickshaw*) to displace the lf and hence give effect to the foreign mandatory rule. According to *Rickshaw*, this is possible if (1) the connection to the lld or/and the lf is fortuitous and (2) applying the lld or/and the lf causes injustice to the parties. ***** But what about cases of foreign illegality?** • If the **foreign illegality is in the lld**, can argue that the *Rickshaw* requirements are not intended to be rigidly applied as a formulation and even though the lf may not be fortuitous, because of injustice caused, sufficient for the lld to displace the lf. • If the foreign illegality is **not in the lld but in a third country**, Rickshaw says that it is possible to apply a third country's law but presumably also subject to the requirements of (i) fortuity and (ii) injustice. Does not seem to allow an *Akai* balancing approach between the competing policies. • But the CA in *Rickshaw* cautioned that the **flexible exception must be applied strictly so that "the exception might not "overwhelm" the rule"** – by applying a third country law when the lf and/or the lld is not fortuitous may be an overly	**(B) Apply as an independent doctrine under Stage 3** • See criticism on over-stretching the flexible exception. • Arguably, it might be better to isolate the policies at the third stage and determine if effect should be given to the foreign mandatory rule instead of over-working the flexible exception. • At the third stage, an *Akai* type of balancing approach can be taken to determine if the foreign mandatory rule should be applied.

liberal application of the flexible exception which can result in "an emasculation or even de facto abolition of the "double actionability rule" (*Rickshaw*).	

ACT OF STATE (IMPLICATED BY STATUTORY TORTS REQUIRING BUREAUCRATIC ACTION)

[1] Statutory torts such as unfair competition torts (e.g. Competition Act) may possibly be **bureaucratic in nature**, especially where these statutes empower certain individuals and bodies to make rulings that certain activities are anti-competitive. Accordingly, the act of state doctrine would apply:

> The **Act of State Doctrine** immunises public government acts within a state's own territory from deeper scrutiny. It applies to legislative and executive, but not judicial acts (*WestLB*). There must also exist a "**factual predicate**" – i.e. the outcome of the case must turn upon the effect of official action by a foreign sovereign. On a narrow reading of *KAC*, the veil will only be lifted where there is an egregious breach of international law/human rights, but on a broad reading, the veil will be lifted where it is contrary to forum public policy. This is based on **international comity** by recognising and giving effect to the legislative acts of the sovereign within its own territories.

[2] The issue that arises with such torts is that these acts will not be torts until declared torts by the rulings of these tribunals.

- However, these rulings may be taken to be so bound up with official acts such that the AOS doctrine is invoked.
- Once the tribunal makes a ruling that this is a statutory tort, this classification of the acts as a tort may be treated as an executive act
- E.g. a policeman in a foreign country (Y) wounds you and you bring an action against him back home (X). Under the law of Y, such actions can only be brought against the authorities in a government tribunal, which determines whether the authorities are liable to compensate. We may have problems transposing the act of the policeman's tort to X and determining if the act is actionable in X. **According to the AOS doctrine, this may be an executive act and we will not be able to call the policeman to be questioned**.

PUBLIC POLICY

[1] If *KAC (No. 4 and 5)* are right, **public policy is already relevant at the second stage** as a reason for triggering the flexible exception, there is **little room for public policy at stage 3**.

[2] Statutory reform: However, considering the amount of controversy surrounding the use of public policy as a sword in *KAC*, perhaps the solution lies in removing the lf by way of statutory reform.

- The reason why public policy was used as a sword in *KAC* was because the *lf* was present as a limb, such that after public policy displaces the lld, there remains the *lf* to be applied, such that public policy effectively acted as a sword by replacing one law with another.
- If the *lf* were removed, it would **effectively be a case of public policy being applied as a shield in the third stage**, as it is in other single actionability cases.
- E.g. In *Kaufman v Gerson*, public policy was applied as a shield to throw out the claim for enforcement of a contract.

[3] Difference in using public policy as a shield, as opposed to a sword, is that the **judgment does not create estoppel** and parties can sue elsewhere.

[4] Reform by removing *lex fori*: If Singapore moves in the direction of the Australian/Canadian/English courts and remove the first limb of *lf*, the role of public policy would then be at stage 3 to act as a shield to knock out the application of the *lld* insofar as it is contrary to the forum's public policy.

PUBLIC/PENAL/REVENUE LAW

See below

PROPERTY

STAGE 1: CHARACTERISATION

CONTRACT VS PROPERTY / TORT VS PROPERTY

See above

SECONDARY CHARACTERISATION – NATURE OF PROPERTY

After characterizing the issue as one of property, the lex situs further characterizes the nature of the property.

General approach (Windeyer J in *Haque v Haque*)

- (A) Identify the property to be characterized.
    - E.g. shares
- (B) Identify the question on the nature of the property
    - E.g. negotiable? Movable?
- (C) Where is the situs of the property?
- (D) What does the lex situs say about the question? This should be final and the lex fori must not introduce its own views.

- Question of negotiable or non-negotiable: *Macmillan*
    - Auld LJ: lex loci actus (transfer of negotiation took place)
    - Aldous LJ: lex situs
    - Staughton LJ: suggests that it is the lex fori.
- Question of movable or immovable or res nullius
- Question of alienable or inalienable or derelict
- Question of inter-vivos or testamentary
- Queston of inheritable or prerogative

Complications:

- Intangible Property
    - Usually when the test applied to tangible property is a physical test, there is no problem of circularity.
    - But for intangible properties, there is a problem – because applying a legal test would result in **circularity**.
- Security Interests
    - There are 2 aspects: (1) personal obligation to repay the debt and (2) proprietary obligation.
    - It is the **personal aspect that is more important in security arrangements**, so the situs should be where the person resides.

STAGE 2: CHOICE OF LAW AND CONNECTING FACTORS

The *lex situs* governs issues of property. The *lex situs* also determines whether the property is **movable or immovable** (R 114, D&M).

☑	☒
• **Produces realistic and enforceable judgment** because of ultimate control over immovable property by court in situs • **Promotes security of title** by providing simple solution to priorities • **Facilitates business** by avoiding extensive and fruitless inquiries into provenance of proeprty	• **Detrimental to party autonomy** • **Ease of evasion**: Furthermore, today, property can be moved very easily. Even bulky items can be transferred by bills of sale. • The argument on enforceability of judgment is unpersuasive because the way to deal with possible unenforceability is via the **doctrine of natural forum** i.e. if there is a strong risk that the judgment will not be enforced at the place where property is, then forum court should stay the proceedings – no real need to choose the lex situs for the reason of increasing prospects of enforceability.

WHERE THE *LEX SITUS* IS

Generally, for TANGIBLE PROPERTY, *situs* is where the property is located. As for INTANGIBLE PROPERTY, to say that the *lex fori* determines the situs of the intangible property will run into problems of circularity; hence the *lex fori* is often referred to for simplicity.

LAND is situated in the country where it lies.

In general, a CHATTEL is situated in the country where it is at the relevant time (*Cammell v Sewell*).

- Exceptionally, however, a MERCHANT SHIP OR A CIVIL AIRCRAFT may for some purposes be deemed to be situated at the port or country of registration (*Dornoch v Westminster*).
- The ascription of such situs may be required by statute.
- Under the common law, where *lex situs* is the applicable law for choice of law purposes in a civil matter, it may make better sense to ascribe an artificial situs when the **relevant vessel is not physically within the territories of a country**, than to have a situation where no law is applicable.

Generally, a CHOSE IN ACTION OR DEBT is situated in the country's of the debtor's residence.

- Where the debtor has more than one residence however, courts may then look at the further criteria of place of enforcement or place of payment.
- However, Rogerson persuasively argues that the better connecting factor is instead the proper law of the debt, which is often the proper law of the contract. It appears from *Macmillan (No 3)* that the *lex situs* rule has been replaced by the proper law of the debt.
- Residence in the context of a **corporation** is where business is carried on for a fixed duration of time from a fixed place of business in the country (*New York Life Insurance v Public Trustee*).
- Where the debtor has two or more places of residence and there is an **express or implied stipulation for payment in one of them**, that country of residence is the *situs* of the debt (*Kwok Chi Leung Karl v Commissioner of Estate Duty*).
    - The practical significance of this approach is that if Singapore law governs a contract between a (local) bank and a (local or foreign) customer, the **bank's obligation to pay is primarily to be performed at the place where the account is kept**, and that country (usually Singapore) will usually be the *situs* for all the bank's obligations to pay arising thereunder. **If there is no stipulation** of which of more than one residence payment is to be made at, then the **debt is situated in the country of residence where it would be paid in the ordinary course of business**.

Where the DEBT WAS INVOLUNTARILY ASSIGNED – e.g. validity of a foreign garnishee order vis-à-vis a foreign debt, the proper law of the debt (the law of closest and most real significant connection) will be applied (*WestLB*).

- Reasons: (1) Artificiality of treating debts as capable of having a situs; (2) incapability of situs of debt to point to a single system of law.

Generally, for SHARES, situs is the place of incorporation of the company because the transfer of shares will pass by registration at the company (*Macmillan (No 3)*).

- **Where registration is necessary** to effect the transfer of shares, the lex situs is the law of the place where the share register is kept (R 115, D&M; *Macmillan No 3*).
- If shares are **negotiable** (transferable by delivery/bearer or order shares), the stius ithe place where thet pieces of paper constituting the negotiable instruments are at at the relevant time (*Macmillan No 3*).
- But where the issue is one of **estoppel** – i.e. if the agent was clothed with apparent authority to deal, *Cady's Case* applies the *lex loci actus* instead of the *lex situs*. The estoppel is meaningful only when the transaction occurs and representations are made, and the impact is felt in the place of the *actus*.

POSSESSORY INTERESTS: The principle of applying the ***lex loci actus*** instead of the lex situs in *Cady's case* may be extended to the **creation of possessory interests, e.g. bailments/pledges/equitable mortgage/security interests/share certificates**, where it is sufficient to consult the place where the bailor wants to create the bailment.

- *Lex locis actus*: **place where title delivered** i.e. situs at time of transfer

The *lex situs* of NEGOTIABLE INSTRUMENTS is where the document is found at the relevant time. This tends to correspond with the *lex loci actus* since the instrument is ultimately worthless if the obligation it represents cannot be enforced against the debtor (*Alcock v Smith*).

An INTELLECTUAL PROPERTY RIGHTS is movable property, though there has been some controversy whether it should be treated as an immovable property at least for jurisdiction purposes. The controversy arises because of the territorial character of intellectual property rights. It follows from the **territorial nature** of such rights that a patent (*British Nylon Spinners Ltd v ICI Ltd*), trade mark (*Lecouturier v Rey*) or copyright (*Peer International v Termidor*) is **situated in the country which governs its existence**. The *situs* of the goodwill of a business is the country where the business premises are to which the goodwill is attached (*IRC v Muller*).

CHAIN OF TRANSFERS ISSUE

Chronological (first lex situs)	**Dispersed transfer (ultimate lex situs)**
Although *Winkworth* suggested that the last *lex situs* be applied to all previous transfers in a **chain of transfers** on grounds of practical control, the *lex situs* rule should in principle be applied **chronologically**, which is supported by *Glencore* and *Cammell v Sewell* (though practical control was not an issue in *Cammell* as the property had been returned to the 1st *lex situs*).	One interpretation of *Diamond Centre* is that it supports the dispersed transfer approach, where the governing law of a dispersed transaction is the ultimate situs (*Fawcett*; *Diamond Centre*). Alternatively, *Diamond Centre* could be explained on the basis that the application of the lex situs must be made on a **strictly territorial basis**, hence once the goods left Switzerland, there was no more scope for applying the first lex situs.
Security of title is important (*Winkworth*) Therefore there is a need to ensure that all the previous transferors had good title to begin with, under the relevant lex situs. **Gives effect to the CL position on nemo dat rule** Cannot give what you do not have.	**Security of transaction** Since the transaction had already taken place, it is only critical to look at the final lex situs. **Can be argued that it is the act that completes the transfer that is critical** – last point at which ownership was divested. **It would be too onerous for the bona fide purchaser to have to investigate the past titles** (*Winkworth*, in rejecting Counsel's proposed exception). **Assumption of risk analysis** Consider whether the original owner assumed the risk that the immediate transferee might divest the property in another jurisdiction. • If the owner has assumed that risk, it would not be unfair to prefer the policy of security of transaction by adopting a dispersed transaction analysis. • The court in *Diamond Centre* was justified in adopting a dispersed transaction approach because Esmerian assumed the risk of divestment in another jurisdiction by entrusting

	the jewels to an agent. He could have retained control until a firm sale was reached.

Incidential question

If the issue is **whether the sale to C gives B a good title**, this gives rise to an incidental question. Under the law of Y, this depends on whether B had a good title (*nemo dat*), which in turn depends on the 1st transaction. The incidental question is thus whether B had obtained an unencumbered title under the 1st transaction. D&M suggests that that this incidental question should be decided under the conflict rules of Y so as to reach the same decision as the courts of Y would have reached if the case had come before them, thus promoting certainty. But since the conflict rules of Y are not available in this question, the conflict rules of X (*lex fori*) will be applied.

EXCEPTIONS TO LEX SITUS

Winkworth acknowledges 5 exceptions to the *lex situs* rule (only need to know 3):

Exceptions	Content

Casual transit	The casual transit exception provides that **where the situation of the goods is uncertain because the goods are in transit**, the *lex situs* is not applied.
	
	(A) Whether casual transit exception applies
	There are 2 possible ways of applying the causal transit exception:
	• **Broad construction**:
	  ○ A wider reading of the casual transit exception is that the exception applies as long as at the time of the purchase, the buyer does not know where the goods are; need not know the exact point of departure and arrival (*ASL Power*, but question whether the extension is correct).
	• **Narrow construction**:
	  ○ If the starting and ending points are known, the exception **cannot** apply.
	  ○ If the exception cannot apply, must decide which of the 2 points supplies the governing law.
	  ○ There is stronger support for taking the ending point as the governing law – since the purpose of the contract is to get the goods to the buyer, it is proper to apply the law of the buyer.
	
	The Singapore court seemed to have applied the **BROADER construction of the exception** in the case of *ASL Power*.
	○ Even though it was clear that there were 2 end-points in mind – Singapore and Netherlands – the court relied on the proper law of the transfer as replacing the lex situs.
	○ **If it is not in the client's favour to apply the casual transit exception**, can argue that it is unclear if the Singapore court was really applying the exception because the judge answered all the arguments with one broad brush, it was difficult to tell what the ratio was.
	
	(B) Proper law of the transfer
	Assuming that the casual transit exception applies, the *lex situs* is substituted by the proper law of the transfer, which refers to the law law having the "closest and most real connection" with the transfer of property rights which takes place by virtue of the sale. If the issue is **ownership**, the proper law of the sale contract will be applied, but if the issue is **possession**, the proper law of the contract of carriage will be applied.
	
	Alternatively, *ASL Power* may be seen as a **documentary sale** since both parties intended to deal in the document of title, and the proper law of the sale contract should be applied to the question of **ownership** and the question of **possession** will be determined by the fact of the transfer of the document of title. Perhaps as between buyer and seller, the document of title is seen as a chattel (i.e. situs = place where chattel is at relevant time), but as between the banks involved, it is seen as a chose in action (i.e. situs = debtor's residence/place of enforcement/payment).
	
	(C) Should **party agreement** then be allowed to displace proper law of the transfer? E.g. post-dispute choice-of-law (*ASL*)

	☑ YES, allow (but not limitations) • **Limitation**: Cannot extinguish rights that have already been accrued (*Amar*) • May be applicable to non-market torts, since it is impossible to agree on a non-applicable law in **non-market torts** (not premised on contracts) before the dispute, arguably a post-dispute choice of law agreement would

	be given effect to. • There may be **good practical reason** to apply the post-dispute agreed choice-of-law if there is **uncertainty as to which law is the applicable law.** For e.g. in tort cases taking place on the high seas, it is uncertain if general maritime law or the law of the flag should apply. Might result in high costs for the court to decide on the applicable law. • Allowing parties to agree on a choice-of-law after the dispute is **nothing more than formalizing the presumption of similarity of laws** because the court would effectively, by presuming the similarity of laws, still apply Singapore law (*Parno*; *YTM*). o **Limitation**: However, note that POS is losing influence: courts are reluctant to apply presumption where it may result in **party injustice** (*D'Oz*) or where **injunction is sought** (*OMG Holdings*). Courts may **take judicial notice** that the principles in the foreign jurisdiction will differ from the *lex fori* in some respects (*Rickshaw*). o **Limitation**: Also, where statute permits exercise of discretion, applying POS would divorce discretion from context, and would thus be an unrealistic fiction (minority in *Neilson*).
Bad faith	Another exception is a **want of good faith** on the part of the person acquiring title, in which case no law is applicable and the previous title continues. This has been doubted by *Glencore*, but it is arguable that this exception was applied in *Bataafsche*. • Not sure if it is about the bad faith of the ultimate purchaser or would bad faith of some intermediate person qualify? • Unclear what 'good faith' means: can range from dishonesty to undue influence to constructive fraud. • Perhaps not a real exception and should be fit under public policy. • If the relevant rule in the lex situs is truly objectionable, then it could be disapplied on the basis of contravention of the fundamental PP of the forum (e.g. in *KAC* for tort) → PP as **sword**
Contrary to public policy	When PP is applied at this stage as an exception to the lex situs rule, it is **different from the third stage type of PP** where PP excludes the application of the foreign law on the basis of it being contrary to some fundamental injustice; here PP is **used more as a 'sword'** where the lex situs can be displaced and replaced on wider policy grounds. Unlike the use of PP as a sword in tort, if PP results in the exclusion of the lex situs, there is **unlikely to be any substitutionary effect** – the transaction is just invalid and title returns to the last owner without a substitution of the lex fori. Reasons for NOT accepting public policy as an exception to the lex situs rule: (*Peer International*) • However, it is arguable that PP should not be accepted as an exception to the lex situs: 1) PP could change from time to time; 2) it requires forum to assess merits of foreign legislation; 3) it requires court to balance one PP against the PP that states do not interfere with property situated abroad; and 4) it is unclear what the test is for determining whether a foreign law should displace property rights otherwise existing under the lex situs (*Peer International*). If PP were used so flexibly as an exception, it would **almost amount to the court adopting the American's Governmental Interest Analysis** where the court is weighing the different interests of its own and the foreign government's. • Thus, the court in *Peer International* refused to recognize the act of the Cuban body which forfeited the UK copyrights of certain musical work. Stuck to the general rule that the English court will not recognize a governmental act purporting to affect property situated outside the jurisdiction of that government i.e. **effectively rejecting the use of public policy as a sword**.

STAGE 3: APPLICABLE LAW

ACT OF STATE DOCTRINE

The act of state doctrine provides that an act of government purporting to affect rights in property, whether immovable or movable (whether tangible or intangible), will be recognised by the law of the forum as valid and effective by the *lex situs* of the thing in question at the time of the act in question, but not otherwise. The underlying principle is that **every sovereign state must be recognised to have law making power within its own territories**, but not outside them. This is based on **international comity** by recognising and giving effect to the legislative acts of the sovereign within its own territories.
GO TO [1](A) BELOW ¬

PUBLIC POLICY AND FOREIGN EXPROPRIATORY RULES

There are **2 ways** in which an application of the lex situs can be contrary to public policy:

[1] Lex situs includes a foreign expropriatory rule: expropriatory rule says that the forum cannot given effect to expropriation outside the forum.

☒ NOT ENFORCEABLE

(A) Contrary to fundamental PP of forum: An expropriatory law of a foreign state **having effect within its own territory** may nevertheless not be recognized by the forum if the law/recognition would **lead to consequences which are contrary to the fundamental PP of the forum** (*Williams and Humbert* at 428)

- Expropriation by a belligerent occupant (Japan) in violation of the Hague Regulations; court was prepared to refuse to apply Netherlands Indies law's (lex situs) doctrine of specification where original ownership would disappear if property (oil) were modified: *Bataafsche* (obiter).

(B) Not enforceable if the expropriatory rule is **discriminatory**: *Oppenheimer v Cattermole*.

- However, the prohibition against the direct or indirect enforcement of foreign penal, revenue and other public laws does not apply as the issue is not enforcement but recognition, possibly unless the foreign state is required to take further steps in the court of the forum to perfect its title (*AG of New Zealand v Ortiz).*

(C) Not enforceable if the expropriation is in **gross breach of public international law/*jus cogens*** e.g. expropriation in an attempt to annex another state in a way of aggression: *KAC (Nos. 4 and 5)*.

☑ ENFORCEABLE

(A) Patrimonial/~~confiscatory~~: compensation?

In *Barakat Galleries*, the court held that the claim by the Iranian Government for its cultural antiquities that were unlawfully exported to England was a **patrimonial claim** that the English court could recognize and enforce.

- Court said it was *not* a claim to enforce a public law or assert sovereign rights.
- Furthermore, there was **compensation** here and expropriation is usually without compensation.
- Thus, no need for reduction to possession.
- NB: This technique may not work for percolating oil; intuitively different from cultural antiquities and thus may need reduction to possession.

Claiming for property outside of forum = ☒?

- But it is uncertain if the **claiming for other property outside of the forum** can qualify as patrimonial taking; afterall, the English court here was greatly influenced by the nature of the chattel in Barakat, being that

(B) Foreign PP: benevolent + shared by forum

Alternatively, the foreign public law should be enforced in the forum because the public policy underlying the law is benevolent and shared by the forum.

In *Barakat Galleries*, the court was largely influenced by the "international acceptance of the desirability of **protection of the national heritage**".

Also relied on the many **International Conventions that seek to protect cultural antiquities** (even though Iran was not a party to the Convention, the court relied on the fact of the instruments to illustrate the international acceptance).

(C) Expropriation within territory + reduction into poss

Even if the law were confiscatory, if (i) the expropriation was made within the territory and (ii) property has been reduced into possession, the expropriation should be recognized and enforced.

This was the position in *Williams v Humbert* (foreign government expropriated (non-bearer) shares in a company incorporated within its territory and took action to collect the company's assets in the forum).

NB: In cases like *Barakat*, possession of the relics is clear. But how does one reduce shares to possession? Share certificates are not equivalent to ownership of the assets, they are simply evidence of fractional ownership of the company. The focus should thus be on

of **cultural antiques** that formed part of Iran's cultural heritage. Note that in *Barakat*, **the English court was willing to recognize and enforce the patrimonial claim even though**: (a) The antiquities have not been reduced to possession of the Iranian Government and (b) The taking is of property that is outside Iran.		**control** rather than possession.
[2] Even if lex situs is not expropriatory, is it nevertheless **contrary to public policy**?		
[3] When will expropriatory decree be denied even if it is enforceable? Consider when expropriatory decree is also **a penal/revenue law**: • Is it actually **penal/revenue law**? See below ¬ • Consider **severance**. See below ¬ • Also note *Williams and Humbert (HL)*'s qualification that with regards to expropriatory laws, **courts are not concerned** with penal or revenue laws simplicter.		

RENVOI

Position is unsettled so choose based on which is favourable to the client:		
☒ **Renvoi is not allowed**: **Intangible property**: Rejected reference to the choice of law rules in applying the lex situs of shares to determine the issue of priority of competing claims (Millet J in *Macmillan (No.3)*) **Tangible property**: Eady J in *Berend* refused to allow renvoi for French law to recognize Iran law in governing the title of an Iranian artifact. **Reason**: The reasons for consistency of title motivating a need for applying renvoi are not strong when the **property can be easily removed from one state to another**.	☑ **Renvoi is allowed** Even though in *Glencore*, Moore-Bick J said that Millet J's reasons for not applying the doctrine of renvoi to issues of title to shares apply with equal force to issues of title to movables, he made an exception and said that where the lex situs rule in relation to movables rests on a recognition of the practical control exercised by the state in which they are situated, the court's (of the lex situs) choice of law rules would be applied. **Reasons**: Better to allow renvoi when considerations of **uniformity of decisions** and the **control of the court of the situs** feature (*Glencore*).	☑ **Internal renvoi → contract** *Lex fori* would permit a **reference to the proper law of the contract** if the lex situs will look at the proper law of contract to determine the intentions of parties under the contract: *Glencore*.

FORUM MANDATORY RULE

Except for the obiter in *Winkworth*, there is no case that says the forum mandatory statute is an exception to lex situs/applied at the third stage to property issues.

EXCLUSIONARY RULES

PUBLIC POLICY

Foreign laws will not be enforced insofar as it is contrary to the fundamental public policy of the forum. It may be invoked in situations of contents repugnance (*Oppenheimer v Cattermole*) or results repugnance (*Vervaeke v Smith*). *Royal Boskalis* clarifies that the **morals of the governing law is controlling**, but may be overridden if the immorality is "shocking". It may be argued that the duress rule in *Royal Boskalis* and *Kaufman* should be **confined to threat of person or life**. Generally, public policy is used as a shield to dismiss the claim, but in rare cases, it has been used as a sword to displace the applicable law (*KAC*). Briggs cautions against subordinating the public policy standards of the conflict of laws to public international law and resolutions of the Security Council should not be decisive of public policy as this would surrender legislative competence.

Though *Star City* held that s 5(2), CLA was both mandatory and procedural, the better approach would be that in *Poh Soon Kiat* where it was held to be substantive. *Goh Suan Hee* in *obiter* established that **procedure** should only be directed to matters governing or regulating the mode or conduct of court proceedings.

It seems that **public policy may be distilled from statutes** (*Poh Soon Kiat*), and that **statutory public policy is more fundamental** than common law public policy (*Poh Soon Kiat*). Any reference to public policy in statutes refers to the public policy of Singapore, be it common law public policy or statutory public policy.

Consider whether PP should encompass **contents repugnance or results repugnance** (if it matters)

- CONTENTS REPUGNANCE: One analysis of the case of *KAC* points towards a contents repugnance analysis. The Iraqi decree was not simply an expropriatory rule, **but a rule of annexation and thus a serious violation of public international law**. Such expropriation could not be justified by war, particularly when it was waged for the sake of territorial annexation. Cases concerning **anti-discriminatory rules** were cited as authority as well.
- RESULTS REPUGNANCE:
    - The decision of *Vervaeke v Smith* suggests that what PP is concerned with is results repugnance. The case also suggests that in terms of results, the focus of the analysis seems to be an institutional one. Furthermore, the level of scrutiny appears to be rather abstract, such that PP may be invoked as long as some effects on the forum's institution are possible.
    - One analysis of *KAC* points towards a results repugnance analysis, where the **focus was on the effects on the English forum**. England, being a member of the UNSC, was party to a resolution condemning the war. The effect of recognising the Iraqi decree would therefore have been felt on the conduct of English foreign policy.
    - Lord Scott however, while sharing the results repugnance analysis view, took issue with the abstract nature of the effect on English foreign policy, which to him, was insufficient. He also took issue with the lack of connection between the case and England, which should not have entitled it to intervene with its own notions of PP.
- **Aligning considerations of public international law with private international law**:
    - Should not: To align the two is inappropriate because some violations of public international law cannot be solved by the courts and have to be dealt with on a much higher executive level, unless it is clear that the court is not prohibited by the AOS and NJ doctrines, as was the case in *KAC*.
    - Should: Violations of international law should have private international law consequences as well, otherwise states can go around breaking public international law without consequences.
- **Immoral laws**:
    - *Royal Boskalis* reconciled apparently conflicting authorities on immoral contracts and arrived at a two-stage analysis: (1) determine whether the contract is **valid by the moral standards of the governing law**, (2) even if valid, these standards may be **overridden if the morality is "shocking"**.
    - It is submitted that the decision was not only welcome, but appropriate. When parties choose a governing law, prima facie, that governing law should determine the moral standards by which we evaluate their choice as to the morality of the contract. However, if the immorality is shocking and extreme, we can no longer rely on party choice because the very party choice of moral standards is questionable
    - Based on this, the argument may be made that with morality in terms of contracts, this type of reference to the governing law suggests that we are more concerned with results rather than contents repugnance

Consider whether PP can be used as a **sword, or only as a shield**

- Shield: This seems to accord with international comity because the court avoids any consideration of the laws of other countries. Furthermore, this is much less prejudicial to the Pf than if used as a sword.

- The effect of PP as a shield is that the party cannot rely on the rule that he seeks to rely on, which will lead to a dismissal of his claim.

- Sword: *KAC* may be interpreted as authority for the use of PP as a sword. If the court had used PP as a shield, only the expropriatory Iraqi decree would have been excluded. However, PP was invoked such that only the lex fori applied. In other words, PP was relied upon to displace the whole of the Iraqi law.
- Difference: Difference in using public policy as a shield, as opposed to a sword, is that the **judgment does not create estoppel** and parties can sue elsewhere.

PENAL, REVENUE AND PUBLIC LAW

PENAL LAW RULE

Whether a rule is **penal** is determined by the *lex fori*. A rule may be penal even if it does not form part of a criminal code but the fact that a provision is found within a law which contain criminal sanctions does not mean that the provision is itself penal (*Barakat*).

☒ If the law is **remedial and protective**, it does not offend the penal rule (*Huntington v Attrill*).

- 2011/12 Q2: Although there is no proof of damage, it is arguable that the Govt of Z applied the Resource Management Act to expropriate the equipment on Blackacre for deterrence purposes.

☒ Expropriation by legislative or executive directed at one person would not make it penal (*W&H*).

☑ If the law provides for **summary forfeiture as punishment**, it is clearly penal (*WestLB*). Singapore law only prevents the enforcement of such laws and not recognition, unless they are so offensive that they shock the conscience of the court and contrary to forum public policy. **Unwarranted arbitrariness** appears to point towards a penal rule.

☒ However, the rule may not be penal if it is predicated on **compensation or restitution**, or if private law redress would have been ineffective for procedural reasons (*USA v Ivey*).

- US govt claiming compensation from Df for clean up after Df pollution
- Held CERCLA not a tax law; reimbursement, damages measured directly and precisely by actual cost of remedial measures, not a tax

Examples

PENAL	*Inkley*	• US trying to enforce judgment for bail • Held action in civil form, but penal
	Ortiz	• NZ trying to claim cultural relics based on statutes allowing forfeiture of artifacts on seizure • Held expropriatory law also penal law (Ackner, O Connor), Denning: other PL • Claim made by state, vindication by confiscation, did not reduce to possession
	West LB	• Philippines trying to enforce foreign judgment for Swiss deposits forfeited in favor of P • The republic act provided for **forfeiture** of property in favor of state whenever any property was found to be unlawfully acquired by public officer • Held clearly penal – forfeits property of public officials for wrong committed • XREF *Barakat*: state not forfeiting/punishing but **revesting** what it originally owned (not penal)
	Ireland v Meeneghan	Order made pursuant to criminal statute confiscating convicted person's assets
	Gersten v Law Soc	Order committing person to prison for contempt of court
NON-PENAL	*Huntington*	Remedial law • Pfs enforcing NY judgment for trading losses because of false representation • NY statute: directors of coy personally responsible for debts if false repre • Held right not enforceable by state but by individuals, law remedial and not penal, **implied term** in every K between corporation and creditors
	Ivey	Restitutionary law • US govt claiming compensation from Df for clean up after pollution

		• Held not penal law, not **punitive deterrent** IE not meant to punish • Restitutionary, tied directly to cost
	Barakat	Patrimonial law • Pf IR govt claiming return of antiquities from Df gallery, based on IR law • Penal law is forfeiture, patrimonial law confers title and ownership • **Not punishing but enforcing pre-existing right/re-vesting** • Therefore no need to reduce into possession, could be enforced
	Consortium	Foreign law for exemplary damages
	Old North	Foreign law for punitive damages

Even if it may be penal, consider **whether court should relax the penal rule for insider trading/competition laws**:

- If the penal rule is applied strictly, it may inhibit attempts to regulate insider trading/competition. Such legislation not only seeks compensation from perpetrators, but also imposes some form of punitive damages, meaning that such legislation will be wholly excluded from application under the penal rule.

Consider **severance** of penal portion.

- The better approach suited for modern times is that the penal portion of the foreign law should be severed and analysed separately: to the extent that compensation is sought, the penal rule should not be invoked; to the extent that punitive and penal effects are felt, these will be excluded.

REVENUE LAW RULE

The forum court will not assist foreign countries in collecting **taxes** (*Govt of India v Taylor*). The question is whether the claim is in substance one brought for the purpose of collecting the debts of a foreign revenue authority. Singapore law only prevents the enforcement of such laws and not recognition, unless they are so offensive that they shock the conscience of the court and contrary to forum public policy. In this case, it is arguable that Country X would not be indirectly enforcing revenue laws but only recognising it because the **damages sought are merely quantified by the amount of tax liability** (*Shahdadpuri*) since the **tax claim has already been satisfied** (*W&H Trade Marks*).

- ☒ It is easy to see the action as an enforcement one when a **foreign AG seeks to enforce** a dishonoured bail bond or when a foreign collector sues for unpaid taxes (*Govt of India v Taylor* (1955)).
- ☑ Thus, in *W&H v W&H Trade Marks (Jersey)*, court held that the action for the delivery up of trade marks would not constitute indirect enforcement of a revenue law as **all claims under the law of Spain have been satisfied** – the action was merely an action by companies to recover property which they were entitled to before the enactment of the Spanish decrees.
- ☑ In *Shahdadpuri*, even though the claimant is a tax authority and the claim involves a fraudulent manipulation of the tax system, court construed claim as one for damages as a result of the tort of unlawful means conspiracy, **quantified by the amount of the output tax** which should have been paid to it

FOREIGN GOVERNMENT INTEREST

Shahdadpuri suggests a "**foreign governmental interest**" test involving acts *de jure imperii* that may overlap with and undercut the penal and revenue rule. Therefore even if it is a recognition and not an enforcement issue, the **claim may still be disallowed if it concerns a foreign governmental interest**. To avoid rendering the penal and revenue rule otiose, there must be something more, e.g. the **motive** of enforcing the claim must have been a central governmental interest – foreign policy or national security (*Heinemann*), i.e. acts which only a state can engage in.

ACT OF STATE AND NON-JUSTICIABILITY

The **act of state doctrine** immunises public government acts within a state's own territory from deeper scrutiny (*KAC Nos 4 & 5*). It applies to legislative and executive, but not judicial acts (*WestLB*). There must also exist a "**factual predicate**" – i.e. the outcome of the case must turn upon the effect of official action by a foreign sovereign. On a narrow reading of *KAC*, the veil will only be lifted where there is an egregious breach of international law/human rights, but on a broad reading, the veil will be lifted where it is contrary to forum public policy. This is based on **international comity** by recognising and giving effect to the legislative acts of the sovereign within its own territories.

- BUT can argue no recognition by arguing act of state **does not apply at all** (*Kuwait Airways*)
    - Act of state doctrine did not apply because not about diplomacy, was about civil aviation

- Not about private party v state, but private party v private party

The **doctrine of non-justiciability** delineates judicial from executive functions. The forum court will not enter into questions involving transactions of foreign states, e.g. questions involving disputes regarding the borders between states, and would exercise judicial restraint because the court has no judicial standards with which to resolve the issues (*Buttes Gas*). The Doctrine of Non-Justiciability was not an obstacle in *KAC* because the court was not asked to pronounce on the correctness on the invasion, but on title to the airplanes. Under a narrow formulation, the veil will only be lifted where there is an egregious breach of international law/human rights, but on a broad formulation, the veil will be lifted where it is contrary to forum public policy.