CHAPTER 3

JURISDICTIONAL ISSUES IN AUSTRALIA

3.1 Introduction

The constitution of Australia is the grundnorm. It is the supreme authority in Australia. The Australian government operates under the limits laid down in the Constitution of Australia. It is also known as ‘Commonwealth Constitution’ as it was approved in a series of referendums and the approved draft was enacted as section of the commonwealth of Australia Constitution Act 1990, which became law on 9th July 1900 and entered into force on 1st January 1901. The Australian Constitution of 1901 apart from establishing a system of federal government also lays down the powers of federal government and the states of Australia. It defines exclusive and concurrent powers of the Federal government. The Federal government has exclusive power to make laws on matters such as trade and commerce, taxation, defence, external affairs, and immigration and citizenship. Under the concurrent powers, both Federal and State governments of Australia have the power to enact laws. The states and territories have independent legislative power in all matters not specifically assigned to the federal government. Where there is any inconsistency between federal and state or territory laws, federal laws prevail. Federal laws apply to the whole of Australia. Both the federal and the state system have three branches; legislative, executive and judiciary. The parliaments make the laws, the executive government administers the laws, and the judiciary independently interprets and applies them.

The High Court of Australia is the highest court in Australia. It was established in 1901 by section 71 of the Commonwealth of Australia Constitution Act. It is the final court of appeal and hear appeals by special leave. It has both

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1 Available at: www.wikipedia.com (last visited on April 3, 2013).
original\textsuperscript{3} and appellate jurisdiction,\textsuperscript{4} the power of judicial review over laws passed by the Parliament of Australia and the parliaments of the States, and the ability to interpret the Constitution of Australia.\textsuperscript{5} The High Court hears appeal from all the Federal Courts and Supreme Courts of each state and territory.\textsuperscript{6}

3.2 Types of Jurisdictions in Australia

1. Diversity jurisdiction

The Australian constitution under section 75 of the Commonwealth of Australia Constitution Act grants diversity jurisdiction to the High Court in personal matters between States, or between residents of different States, or between a State and a resident of another State. The power to decide these matters fall under the original jurisdiction of High Court of Australia. Such a jurisdiction is also known as diversity jurisdiction as it involves parties of different states. The diversity jurisdiction is granted by the constitution of Australia, so the federal parliament of Australia cannot restrict or take back the power from the High Court. However, the High Court itself has restricted the exercise of its diversity jurisdiction by the narrow interpretation of section 75 of the constitution. The High court through statutory provision has the power to remit the diversity cases to federal, state and territorial trial courts. The judiciary Act of 1903 regulates the exercise of jurisdiction of High Court of Australia. The Act grants power to the High Court under section 44 of remitting the matters to the other courts. In order to insist the High Court to exercise the diversity jurisdiction, the plaintiff must prove that the parties are resident of different states at the time the action is brought before the court. The term ‘resident’ used in section of Commonwealth of Australia refers to natural person. The question

\textsuperscript{3} Original jurisdiction of the High Court refers to matters that are originally heard in the High Court. The Commonwealth of Australia Constitution Act confers under s. 75 actual and under s. 76 potential original jurisdiction on High Court.

\textsuperscript{4} The Commonwealth of Australia Constitution Act, s.73.

\textsuperscript{5} Available at : www.wikipedia.com ( last visited on April 5, 2013).

\textsuperscript{6} Available at : www.hcourt.gov.au (last visited on April 5, 2013).
that comes next is that what law the High Court is bound to apply while exercising diversity jurisdiction. The answer is given by section 79 and 80 of the Judiciary Act 1903 which lays down that the High Court or the courts to which the High court has remitted the matters is to apply the law of state in which the courts are sitting. This includes the choice of law rules of that state, which may require the application of a foreign law, or the law of another state for the determination of the Substantive rights of the parties.7

2. Cross-vested jurisdiction

Cross-vesting schemes provide for the exchange of jurisdiction between the federal, state and territory superior courts in Australia in cases where proceedings are instituted in a court that is not appropriate for the determination of the dispute. The cross vesting schemes provide a system under which the proceeding can be transferred to the most appropriate court in Australia. But, the Federal court of Australia and the Family court of Australia cannot receive the jurisdiction of the State Supreme Courts or the Territory Supreme Courts because under the Commonwealth Constitution a Federal Court could be invested by the commonwealth parliament with the federal jurisdiction, which means that a federal court could not be invested with the non-federal jurisdiction. But, the federal jurisdictions of the federal court of Australia and the family court of Australia can be invested in the State Supreme Courts and the Territory Supreme courts. Also, there cannot be cross-vesting between the federal court and the family court of Australia. As far as the cross-vesting of the personal jurisdiction between the courts is concerned then in case of David Syme and Co. Ltd v. Gre,8 the court held that there cannot be cross-vesting of personal jurisdiction between the courts. It was held that cross-vesting legislation should be construed as affecting only subject matter jurisdiction, leaving the service of process

under actions in personam to be dealt with the civil procedure rules of the respective states and territories.

3. **Subject matter jurisdiction**

Much heed is not paid towards subject matter jurisdiction in Australia when compared with personal jurisdiction. In *Laurie v. Carrol*, the court held that the jurisdiction of Supreme Court of Victoria in the action in personam depends more on the amenability of the defendant to the defendant to the writ of expressing the sovereign” command in right of the state of Victoria. The court held that according to the common law doctrine the writ cannot run beyond the territorial limits of the state. In this case the court did not pay much attention on the question whether it had subject matter jurisdiction to decide the case, it straight way jumped on the personal aspect of the jurisdiction over the defendant. Further the court held that the court can exercise jurisdiction over the defendant only when a writ has been served on him which is the foundation of court’s jurisdiction. Also, the court relying on number of authorities upheld the preposition that where a writ cannot be served on a party personally it cannot be affected indirectly by substituted service. The proper course in such cases for the plaintiff is to apply for extra territorial service of writ over the defendant.

4. **Personal jurisdiction**

Australian courts can exercise personal jurisdiction over actions in personam against the on basis of defendant’s presence, submission, consent or agreement to submit to court’s jurisdiction. Where the defendant is physically present within the territory of the court in Australia, jurisdiction over him is asserted as of right under common law on the basis of his contact with the place where the court is located. Actions in personam are initiated by the service of the process or writ on the defendant who is inside any state or territory of Australia. The defendant has to be served personally with the process or the writ if he is present inside the territory of

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Australian jurisdiction. But if the defendant is outside the territory of Australian jurisdiction then the process need not be served personally so long as it is served in accordance with the law of the country in which service is effected. Where the defendant submits himself or gives consent or enters into an agreement to submit himself to the jurisdiction of a court in Australia, that court has jurisdiction over the defendant. But, the parties cannot confer jurisdiction by consent on a court which that court does not have in reality or where no jurisdiction exists in that court\(^\text{10}\). The acts which constitute submission on the part of the defendant are; making an unconditional appearance in the court by the defendant, making application for the extension of time for entering an appearance in order to apply for the security of costs or actually making an application for security of costs or filling affidavits and contesting the merits of the case even though an appearance has not been entered and consenting to an interlocutory injunction\(^\text{11}\). But where a defendant merely challenges the jurisdiction of the court without entering an appearance or entering an appearance by way of conditional appearance, does not submit him to the jurisdiction of the court. Submission can also be made by a defendant by entering into a contract with the plaintiff and agreeing to submit to the jurisdiction of the court in Australia. This ground has been codified under all the Supreme Court Rules of all the Australian jurisdictions which provide that courts can assume jurisdiction over an defendant outside the territory of Australia by serving a process upon such a defendant who has by contract submitted or agreed to the jurisdiction of the court issuing the originating process outside Australia\(^\text{12}\).

\(^{10}\) Horrigan v. Jennings [2015] FamCA 923.


\(^{12}\) FCt Rules, 2011, ch.2, pt. 10, div. 10.4, r. 10.42, item 19.; NSW Uniform Civil Procedure Rules, 2005, Sch. 6 (h); QLD, Uniform Civil Procedure Rules, 1999, ch.4, div. 1, Pt. 7, s. 124(1) (i); TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147A (1) (f); SA Supreme Court Civil Rules, 2006, ch.3, pt. 3, div. 2, r.40 (1) (l); WA Rules, of Supreme Court, 1971, o.10, r.2; VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7,Pt. 1, r.7.01 (1) (h); NT supreme Court Rules, 2006, Ch.1, pt. 3 , r. 7.01 1 (h); ACT Court Procedure Rules, 2006, ch.6, pt. 6.8 , div. 6.8.9, r. 6501(1) (i).
Although the courts in Australia give effect to the jurisdictional clause agreed between the parties unless there are strong reasons supporting to effect otherwise, but where the parties to a contract agrees between themselves to submit to the exclusive jurisdiction of a neutral court having no connection whatsoever with the parties or subject matter of the dispute, the court in Australia are reluctant to give effect to such a jurisdictional clause.  

5. **Jurisdiction under Service and Execution of Process Act.**

In Australia the inter-state or inter-territory service of process is regulated by the Service and Execution of process Act 1901 (cth). It is a Federal Act which applies to the whole of Australia. The service and execution of Process Act 1901 (cth) was passed to ensure that where a legal proceedings involve people from different states or territories of Australia, the service of process can be made on them without any difficulty, so as to ensure their appearance before the court in case of claims filed by or against them. The Act extends the personal jurisdiction of the state and territory court to the whole of Australia and its external territories and gives the court the right to compel the appearance of any person anywhere in the country or an internal territory. No leave is required to serve the defendant outside a state or territory but within Australia. The proceedings are commenced under this Act by serving an initiating process on the defendant who is out of any state or territory court but within Australia. As per section 3, initiating process means a process by which proceeding is commenced or by reference to which a person becomes a party to a proceeding. Section 15 of the Act lay down that an initiating process issued in a State may be served in another State. The plaintiff while making service on the defendant should attach certain notices with the process so as to enable the defendant to know about the claim against him and his rights as to applying for the stay of proceedings. However, if a plaintiff fails to give such a notice along with the process, it will be regarded as mere irregularity which can be cured by the defendant by electing to contest the

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claim. Section 8 of the Act expressly prohibits the reliance on the court rules of the states and territories for interstate service, meaning thereby that the state or the territory civil procedure rules providing for inter-state or inter-territory service of process are overridden by the provisions of this Act. The act does not however affect a decision of a court or tribunal to allow substituted service of a process.  

However, where the proceedings are before the Supreme Court of State or Territory, the service of process can be made on the defendant either under the civil procedure rules of that state court or under the Service and Execution of Process Act. Some of the Supreme Court rules of states and territories in Australia provide that service of process within Australia will be as per the provisions of Service and Execution of Process Act. The New south Wales Uniform Civil procedure Rules provide that the plaintiff may serve the defendant with an originating process outside New South Wales but in Australia either through the Uniform Civil Procedure Rules of the court or through the Service and Execution of Process Act. But, an originating process for service in Australia, but outside New South Wales, must bear a statement either that the plaintiff intends to proceed under the Service and Execution of Process Act, 1992 of the Commonwealth or that the plaintiff intends to proceed under the Uniform Civil Procedure Rules 2005. The plaintiff may proceed otherwise than in accordance with the intention stated under subrule (3), but only with the leave of the court. The Act has rendered almost other statutory provision for interstate

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14 Reid Mortensen, Richard Garnett and Mary Keyes, Private International Law in Australia 44 (LexisNexis Butterworths, Australia, 2nd edn., 2011).
15 The Service and Execution of Process Act, 1992, s.8.
16 QLD, Uniform Civil Procedure Rules, 1999, ch.4, pt. 6, s. 123; WA Rules, of Supreme Court, 1971, o.10, r.1A; ACT Court Procedure Rules, 2006, ch.6, pt. 6.8 , div. 6.8.5, r. 6430.
17 NSW Uniform Civil Procedure Rules, 2005, pt. 10, div. 1, r.10.3 (4). It reads thus:- “Service of originating process in Australia:-
(1) This rule applies to proceedings in the Supreme Court.
(2) Subject to this Part, originating process may be served anywhere in Australia, whether in New South Wales or elsewhere.
(3) An originating process for service in Australia, but outside New South Wales, must bear a statement either that the plaintiff intends to proceed under the Service and Execution of Process Act1992 of the Commonwealth or that the plaintiff intends to proceed under the Uniform Civil Procedure Rules 2005.
service obsolete which include the state and territory civil procedure rules, providing for interstate service.

3.3 Assumption of Jurisdiction over different juristic entities in Australia

3.3.1 Jurisdiction over individuals

To start a civil action against the defendant, the court has to issue an originating process on the application filled by the plaintiff. The originating process includes a claim, an application, notice of appeal or a notice of appeal subject to leave. Under the common law, an individual can be subjected to a court’s jurisdiction if he/she is personally present within the territorial or jurisdictional limits of the court. The originating process has to be served personally on the defendant, if the defendant is within the jurisdiction of the court. The court can also assume jurisdiction over such person if he voluntarily agrees to submit himself to the court’s jurisdiction. Under the Civil procedure Rules of the State and Territories, jurisdiction over an individual can be assumed by the court if the plaintiff personally serves the defendant with the originating process. Personal service is performed by personally serving or giving the originating document or copy of the originating document to the person to be served (defendant). But if the person or the defendant refuses to accept the originating document or copy of it, the person serving it (plaintiff) may serve it by putting the document down in the person presence and telling him or her what document is all about. It is not necessary to show the person served the original of the document. But, where an individual against whom a relief is claimed, is outside Australia, but, has domicile or is an ordinarily resident of a state or territory in

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(4) The plaintiff may proceed otherwise than in accordance with the intention stated under subrule (3), but only with the leave of the court”.

FCT Rules, 2011, ch.2, pt. 10, div. 10.1, r. 10.01; NSW Uniform Civil Procedure Rules, 2005, pt. 10, div. 2, r.10.5; QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 3, r. 105; TAS Supreme Court Rules 2000, pt. 7, div. 9, r. 132; SA Supreme Court Civil Rules, 2006, ch.4, pt. 2, div. 4, r.66; WA Rules, of Supreme Court, 1971, o.72, r.2; VIC Supreme Court (General Civil Procedure) Rules, 2005, o.6, pt. 2, r.6.02; NT supreme Court Rules, 2006, ch.1, o. 6 , Pt. 3, r.. 6.01; ACT Court Procedure Rules, 2006, ch.6, pt. 6.8 , div. 6.8.2, r. 6405.
Australia, then in such case the plaintiff can serve the originating process on such defendant according to the law of the country in which service is effected. Under the Service and Execution of Process Act, Service on an individual must be effected in the same way as service of such an initiating process in the place of issue.

3.3.2 Jurisdiction over the Corporations in Australia

In Australia the corporations whether domestic or foreign can be brought under the jurisdiction of Australian courts in three ways.
1. By exercising jurisdiction under the common law.
2. By exercising jurisdiction under Statutory Law.

3.3.2.1 Jurisdiction over the corporations under the common law.

Under the common law, the state and the territory courts in Australia have jurisdiction over the domestic or foreign corporation if they are present inside the territorial jurisdiction of the forum court. The presence of corporation is determined by the notion of “carrying on business” in the territory of the forum court. If the corporation carries on business in the jurisdiction of the court, the court is entitled to assume jurisdiction over the corporation. However it is not so easy as it seems. To come to the conclusion as to what constitute ‘carrying on business’ by the corporation, the courts have to analyze different aspects of the case and the nature of business of the corporation. In an important case of National Commercial Bank v. Wimborne Justice Holland laid down three criteria which will help in establishing that a corporation is carrying on business in the firm. These are:

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19 FcT Rules,2011, ch.2, pt. 10, div. 10.1, r. 10.01; NSW Uniform Civil Procedure Rules, 2005, Sch. 6 (g); QLD, Uniform Civil Procedure Rules, 1999, ch.4, pt. 7, r. 124(d); TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147A (1) (a);SA Supreme Court Civil Rules, 2006, ch.3, pt. 3, div. 2, r.40 (1) (b);WA Rules, of Supreme Court, 1971, o.10, r.1(c); VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r.7.01 (1) (c);NT supreme Court Rules,2006, ch.1, o.7 , pt. 1, r. 7.01( 1) (c); ACT Court Procedure Rules, 2006, ch.6, pt. 6.8 , div. 6.8.9, r. 6501(1)(d)(i).


21 [1979] 11 NSWLR 156 in Mary keyes, Jurisdiction in International litigation 64 (The Federation Press, Sydney, 2005).
1. The company is represented in the forum by an agent who has authority to make binding contracts with persons in the place.

2. The business is conducted at some fixed and definite place in the forum.

3. The business has been conducted in the forum for a sufficiently substantial period of time.

If the plaintiff is successful in proving all of the above mentioned conditions then he is entitled to urge the court to issue process against such company for the purpose of assumption of jurisdiction.

3.3.2.2 Jurisdiction over companies incorporated in Australia under the Corporation Act

The companies which are incorporated in Australia are governed by the Corporation Act, 2001 for any matter that arises against such company. Chapter 2A, Part 2A.2 of the Corporation Act deals with the procedure of registration of companies that are incorporated in Australia. For the purpose of any law service of document on such companies can be made by leaving at or posting the document to company registered office or by delivering a copy of the document personally to a director of the company who resides in Australia or in an external territory. If the company has appointed a liquidator or an administrator then the document may be served by leaving it or by posting the document to the address of the liquidator office or the administrator office that has been the most recent address lodged with Australian Securities and Investment Commission (ASIC).\(^\text{22}\) However, the above section does not affect any other provision of the said Act, or any provision of another law, that permits or the power of a court to authorize a document to be served in a different way.

But where a process is issued on a company under the Service and Execution of Process Act 1992, then the provisions of the Corporation Act relating to service of process do not apply.

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\(^{22}\) The Corporations Act, 2001, Ch.1, Pt. 1.2, Div. 8, S. 109X.
ASIC is Australia’s corporate markets and financial regulator. It is an independent commonwealth government body, which is set up under the Australian Securities and Investments Commission Act 2001. It administers the Australian Securities and Investments Commission Act 2001 also and performs the duties and responsibilities as laid done under the said Act. It carries out most of its work under the Corporations Act 2001. ASIC aims to contribute to Australia’s economic reputation and wellbeing by ensuring that Australia’s financial markets are fair and transparent, supported by confident and informed investors and consumers.23

3.3.2.3 Jurisdiction over foreign companies under the Corporation Act

Under the Corporations Act, 2001, a Foreign company is defined as a body corporate or unincorporated body that is incorporated in an external Territory, or outside Australia and the external Territories and does not have principal place of business in Australia.24 Apart from presence based jurisdiction over the companies, the Corporations Act provides the method in which service process over the foreign companies can be made. Every foreign company which intends to carry in business in Australia must be registered in Australia under part 5B.2 of the Australian Corporation Act 2001.25 The Act requires a person to register a company by lodging an application with ASIC. The corporation Act requires that a company must have registered office in Australia so that all the communications and notices of the company may be addressed to the registered office. The Corporation Act requires that a foreign company must not carry on business in the Australian State /Territory unless it is registered under the Corporation Act or unless it has applied to be so registered.

23 Available at: www.sic.gov.au (last visited on July 8, 2013).
24 The Corporations Act, 2001, ch.1, pt. 1.2, div. 1 s. 9. It reads thus:- “foreign company means: (a) a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories, and is not: (i) a corporation sole; or (ii) an exempt public authority; or (b) an unincorporated body that: (i) is formed in an external Territory or outside Australia and the external Territories; and (ii) under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and (iii) does not have its head office or principal place of business in Australia”.
25 The Corporations Act, 2001, ch.5B, pt. 5B.2, div. 2, s. 601CD.
and the application has not been dealt with. As per the section 601 CF, ASIC must not register a foreign company unless the foreign company has at least one local agent. The local agent is answerable for the doings of all acts, matters and things that the foreign company is required by or under this act to do and is personally liable to a penalty imposed on the foreign company for any contravention under this act, if the court or tribunal having the matter is satisfied that the agent should be so liable. The local agent of a foreign company can be a person or a company. Section 601CT requires that a foreign company must have a registered office to which all communications and notice may be addressed to. The foreign companies are also required under section 119A of the Corporations Act to nominate a state or territory for registration. All these provisions relating to a foreign company applies to a company which is incorporate outside Australia. The procedure for registering a foreign company is laid down in chapter 5B; Part 5B; Division 2, section 601CE of the Corporations Act.

The registration of domestic companies or foreign companies are advantageous from the view point that service of originating process or writ can be easily made on the company’s registered offices or their local agents in case of foreign companies. However, where a foreign company escapes compulsory registration in violation of Australian Corporation Act, in such case the presence of foreign company within Australia is to be established according with the principles of the common law. If a foreign corporation has registered itself under the relevant Australia law, there lies no problem in assuming jurisdiction over it for service can be easily affected under the corporations Act on the agent appointed by such corporation. But, the problem lies when the corporation does not register itself. In such case, the question as to how jurisdiction should be assumed over the unregistered corporation becomes critical. The available way out in such situation are the common rules and the rules of court permitting service ex-juris outside Australia. In case of rules relating to service outside Australia, if the foreign corporation is

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26 *Ibid.* ss.. 601CF-601CJ.
unregistered in Australia and enters into a contract, it may served outside Australia on the basis of grounds justifying service outside Australia. But, where the court relies on common rules for assuming jurisdiction over an unregistered foreign corporation, it must see that the corporation is ‘present’ in the territory of court for the purpose of assuming jurisdiction. ‘Presence’ refers to the carrying of business in the territory of the court by the foreign corporation. A corporation cannot be physically present like human individuals. Its presence can be ascertained only through its carrying on business. In the case of *Fiduciary Ltd & Ors v. Morningstar Research Pty Ltd & Ors* 27 at para 30, it has been held that, “The concept of presence in a jurisdiction sufficient to subject a corporation to the jurisdiction of the courts has been developed by reference to activities of sufficient significance to make it appropriate that the corporation be amenable to the local jurisdiction”. The Hon’ble Court tried to make the concept of ‘presence’ more clear by citing an example, if a Hong Kong company carrying on a tailoring business that sends a representative to a hotel room in Australia for short periods of time to take measurements for garments and receive orders may carry on business in Australia but, in the absence of a fixed place owned or leased by it and operated for more than a minimal period of time, the company is not in Australia. By this example the court made it clear that ‘presence’ in Australia requires elements additional to the carrying on of business by a foreign corporation.

The law on ‘presence of corporation’ in Australia has been long settled down in the case of *National Commercial Bank v. Wimborne [1979]11 NSWLR 156*. In the case of *Walker v. Newmont Australia Ltd* 28 citing the case of Wimborne, the court held that a corporation can only be held to be present within the territory of court :-

1. Firstly, it must be carrying on its business here and this it can do only by an agent and will not be doing unless the agent has authority on behalf of the

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27 [2004] NSWSC 381.
corporation to make contracts with persons binding on the corporation. The agent should not be ministerial agent, he should not be carrying on his own business, but, should do the business on behalf of the defendant foreign corporation.

2. Secondly, the business must be carried on at some fixed and definite place within the State.

3. Thirdly, the business must have continued for a sufficiently substantial period of time.

So, were a foreign corporation has fixed office in Australia, have representatives with authority of handling enquires relating to and promotion of business of the corporation and who are not doing independent business but only for the corporation, the corporation has adopted the course of advertisement like that of internet to establish its business presence in Australia and is under taking various market strategies to expand its business, all these activities constitute that the corporation is present within the Australian territory. As discussed above, in order to assume jurisdiction over the unregistered foreign corporations under the common law rules it is necessary that there is an agent of the corporation within the jurisdiction of the court who is undertaking business on behalf of the foreign corporation, in order to make the origin of corporation ‘present’ in the territory of the court. The authority of the agent to bind the principle is most significant in determining whether the principle is present through the representative. But, the rigid principle about the authority of Agent to bind the foreign corporation in order to make the foreign corporation ‘present’ in the territory of the court was relaxed in the case of *BHP v. Oil Basins [1985] VR 725*, making it easier for the territorial courts in Australia to assume jurisdiction over the unregistered foreign corporations. In this case, the court held that even if the foreign corporation does not trade, but merely

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30 Mary keyes, *Jurisdiction in International litigation* 64 (The Federation Press, Sydney, 2005).
invests, it can be ‘present’ through agents or solicitors who do no more than collect the cheques. In the same case it has been held that although the local agents had ‘no discretion or no authority’ to anything aside from discharge of instructions of the principle, those instruction constituted an important and substantial part of the business of the foreign corporation. Therefore, service upon local agent was sufficient to found jurisdiction. In the case of *Sunland Waterfront (BVI) Ltd v. Prudentia Investments Pty Ltd* the court has once made it clear that for the purpose of assuming jurisdiction over a foreign corporation under the phrase ‘carrying on business within Australia’ the court has to see that:

1. The foreign corporation is engaged in any commercial activity in Australia on a continuous, repetitive or systematic basis,
2. The mere engagement of a local solicitor or agent did not of itself mean that corporation is carrying on business in Australia, and
3. The critical conduct on the part of the foreign corporation and aspects relevant to it, took place in or was located in Australia and not in some other country.

As far as the role of agent is concerned, this case has made it clear that there should some activity on the part of the agent which reflects the doing of some business by the foreign corporation in the territory of the court. Since now-a-days foreign corporations are carrying on business without being present in the territory of the court, in such situations the rules relating to service ex-juris and the electronic transaction Act may apply to ascertain the jurisdiction over the foreign corporations on the basis of business connection with the territory of the court.

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32 Supra Note 29 at 65.
Validity of contracts

Foreign corporations in Australia have the right to sue and be sued and to hold property in the name of the secretary or any officer of the corporation.\(^{34}\) The corporations Act of 2001 (cth) provides that even if the foreign corporation contravenes any of the provision relating to its registration, such contravention will not effect an act, transaction, agreement, instrument, matter or thing\(^{35}\). It means that if the non-registered foreign corporation carries on business and enters into contract or transaction during the period, such a contract will not be invalid. The foreign corporation will not lose the right to sue in case any breach occurs with respect to that contract. Unlike Indian Companies Act, 2013\(^{36}\), there is no provision in the Corporations Act of Australia which require the foreign corporation to register it first so as to be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction.

3.3.2.4 Jurisdiction under the Civil Procedure Rules

The uniform Civil Procedure Rules of New South Wales, Queensland Uniform Civil Procedure Rules 1999, Victoria Supreme Court (General Civil Procedure) Rules 2005, Western Australia Rules of the Supreme Court 1971, Tasmania Supreme Court Rules 2000 and South Australia Supreme Court Civil Rules 2006, provide that a corporation can be served with the document in a manner in which service of such a document is provided by the law or by personal serving the document on the Corporation. Corporations Act 2001 is the Act that deals exclusively with all the aspects of corporate entities. The Corporation Act prescribes the mode in which document is to be served on the corporations. The Civil Procedure Rules or the Supreme Court rules of the states merely provide any alternative method which can be used for serving the documents on the corporations. However, these rules can only be resorted to if the documents cannot be served under the corporations Act. The

\(^{34}\) The Corporations Act, 2001, ch.1, pt. 1.2, div. 1, s. 9.

\(^{35}\) Ibid , ch 1, pt. 1.2, div.8, s. 103.

\(^{36}\) The Indian Companies Act, 2013, s.393.
Tasmania Supreme Court Rules\textsuperscript{37} provides that in the absence of any statutory provisions regulating service of process on corporations, an originating process may served on the mayor, president or other head officer, or general manager, treasure manager or secretary of the corporation, no matter whether or not the corporation is incorporated under the laws of the state. The Victoria Supreme court rules\textsuperscript{38} provide similar provision for service of process on corporation with the addition of service on chairman town clock or clerk. The Victoria rules provides under rule 6.07 (c) that where personal service is not required to be served on the corporation, the document may served on the corporation by serving the document in accordance with provision made by or under any Act for service of a document on a corporation. Similar provision is made under the NT Supreme Court rules 2006. It lays down that where personal service is not required, the document may be served on the corporation, where the corporation is a company within the meaning of the Corporations Act 2001 at the registered office of the company situated as indicated in section 109X of the Corporations Act 2001\textsuperscript{39}. However, Uniform Civil Procedure Rules 1955 of Queensland\textsuperscript{40} and ACT supreme Court Rules 2006,\textsuperscript{41} provide that a document required to be served personally on a corporation must be served in the way provided for the service of documents under the corporations Act or another applicable law. However under the ACT Supreme Court Rules it is not compulsory required to serve documents on the corporation under the Corporations Act or another applicable law, which will taken to be personal service of the document on the corporation.\textsuperscript{42} The documents may also be served according to rule by rule 6432, which lays down that a document may be served on a corporation by leaving it at, or sending it by post to, the corporation’s registered office. The rule does not affect the operation of any other law that authorizes or requires service of a document otherwise than as provided under

\textsuperscript{37} TAS Supreme Court Rules, 2000, pt. 7, div. 9, r.137.
\textsuperscript{38} VIC Supreme Court Rules, 2005, o. 6.r. 6.04 (a).
\textsuperscript{39} NT supreme Court Rules,2006, ch.1, o. 6, r. 6.06 (2) (i)
\textsuperscript{40} QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 3. r.107;
\textsuperscript{41} ACT Court Procedure Rules, 2006, Ch.6, Pt. 6.8, div. 6.8.5, r.6431 (1).
\textsuperscript{42} Ibid, r.6431 (2).
this rule. The South Australia Supreme Court Civil Rules 2006, New South Wales Uniform Civil Procedures Rules 2005, Northern Territory Supreme Court Rules 2006\(^{43}\) and Western Australia Rules of the Supreme Court 1971 lay down that personal service of a document on a corporation can be made by personally serving the document on the mayor, chairman, president or other officer of the corporation, or on the town clerk, clerk, treasurer, manager, secretary or other similar officer of the corporation in case Northern Territory;\(^{44}\) principle officer of the corporation in case of New South Wales;\(^{45}\) director, the secretary or the public officer of the company in case of South Australia.\(^{46}\) The Rules of the above states also provides that in addition to the above said provisions, the document on the corporation can be served in manner as authorized by the relevant statutory provision or law.\(^{47}\)

3.3.2.4.1 Service ex-juris in case of Corporation

The term ex-juris refers to service of process outside the jurisdiction of the court. The Federal Court Rules, Supreme Court Rules of New South Wales, Queensland and Tasmania provide that the originating process may be served ex-juris on a person who has membership in a company incorporated in above states.\(^{48}\) So, the members of the company incorporated in these states can be brought within the jurisdiction of the courts, where common law cannot be applied on such members owing to their non-presence in the states. The Federal Court Rules and the Australian Capital Territory Supreme Court Rules, expressly lay down that an originating process can be served ex-juris without the leave of the court, where the relief is claimed against the corporation or membership or office holding of a corporation

\(^{43}\) NT supreme Court Rules, 2006, ch.1, o. 6, r. 6.04 (a).

\(^{44}\) Ibid.

\(^{45}\) NSW Uniform Civil Procedure Rules, 2005, pt. 10, div. 3, r. 10.22 (a).

\(^{46}\) SA Supreme Court Rules, 2006, ch.4, Pt. 2, div. 3, r.62 (b).

\(^{47}\) FcT Court Rules, 2011, ch.2, pt. 10, div. 10.4, r. 10.42; NT supreme Court Rules, 2006, ch.1, o. 6, r. 6.04 (b); SA Supreme Court Rules, 2006, ch.4, pt. 2, div. 3, r.62 (a); NSW Uniform Civil Procedure Rules, 2005, pt. 10, div. 3, r. 10.22 (b).

\(^{48}\) NSW Uniform Civil Procedure Rules, 2005, pt. 11, div. 1, r.11.2; QLD, Uniform Civil Procedure Rules, 1999, ch.4,pt. 7, r. 124 (1) (m); TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147A (r).
incorporated in territory, or a company registered in the territory or company or other corporations carry on business in the territory or office holding in such corporation or where the proceedings affecting the person to be served is in relation to the person's conduct as a member or officer of such a corporation or company, in such cases under the Federal Court Rules and the ACT Supreme Court Rules, the service of originating process can be made on the foreign defendant ex-juris. Under the Western Australia Supreme Court Rules, leave to serve a person outside Australia with a writ, or notice of a writ is only granted in case of a corporation or a company, when the subject matter of the action is the shares or stock of a corporation or joint stock company having its principal place of business within the State. In this sense the rules of court are rather narrow as they are confined to shares or stocks only if compared to rules of other states and territories and the federal court rules of Australia. Moreover, the rules of Western Australia focuses on the nexus of Principle Place of business rather than corporation’s or company’s incorporation or merely carrying on business in Western Australia. Under the Supreme Court Rules of South Australia, Victoria and Northern Territory no separate grounds for service ex-juris for corporations or the companies are laid down in their respective Supreme Court Rules.

Hence, the above stated rules clearly show that as far as rules for ex-juris in case of corporation is concerned there is no uniformity between them. Some rules have broader implications while some have narrow.

3.3.2.5 Jurisdiction under the Interstate Service of Initiating Process in Australia

As per section 9 of the Act, service of initiating process may be made on the company by leaving the process order or document or by sending them by post to the company’s registered office. The process, order or documents may also be served on a company by delivering a copy of them personally to the director of the company

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49 FcT Court Rules, 2011, ch.2, pt. 10, div. 10.4, r. 10.42, item 18 & 24 ;ACT Court Procedure Rules, 2006, ch.6, Pt. 6.8 , div. 6.8.9, r. 6501(1) (d)(ii)(iii)(iv) & (1) (m).
who resides in Australia. If a liquidator or the administrator of a company has been appointed, then such documents process or order may be served on the company by leaving them or by sending them by post to the address of the liquidator office or the administrator office in the most recent notice of that address lodged under the corporations Act 2001. Where a process had been issued on the company under section 9 of the Service and Execution of Process 1992 Act, then section 109X\(^{50}\) of the corporations Act 2001 does not apply for the service of the document on the company. The very important change that Service and Execution of Process Act, 1992 has made on all the jurisdictions of the State and Territory courts in Australia is that under section 8 of the said Act, it is expressly provides that the Act applies to the exclusion of law of all states with respect to the rules of court on the issuance of interstate service. So, where a process has been issued under the Service and Execution of Process Act, 1992, on an issue, then the civil procedure rules of the respective states will not apply with respect to the service of document on the aforesaid issue. This directly implies that the civil procedure rules of the states have

\(^{50}\) The Corporations Act, 2001, s. 109X. It reads thus: - “(1) For the purposes of any law, a document may be served on a company by: -

(a) leaving it at, or posting it to, the company's registered office; or
(b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
(c) if a liquidator of the company has been appointed--leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
(d) if an administrator of the company has been appointed--leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.

(2) For the purposes of any law, a document may be served on a director or company secretary by leaving it at, or posting it to, the alternative address notified to ASIC under subs. 5H(2), 117(2), 205B(1) or (4) or 601BC(2). However, this only applies to service on the director or company secretary:

(a) in their capacity as a director or company secretary; or
(b) for the purposes of a proceeding in respect of conduct they engaged in as a director or company secretary.

(3) Sub-sections (1) and (2) do not apply to a process, o, or document that may be served under s. 9 of the Service and Execution of Process Act 1992.

(6) This s. does not affect:

(a) any other provision of this Act, or any provision of another law, that permits; or
(b) the power of a court to authorize;

a document to be served in a different way.

(7) This s. applies to provisions of a law dealing with service whether it uses the expression "serve" or uses any other similar expression such as "give" or "send".
become redundant in Australia. As far as the service of process within Australia is concerned the Act is conspicuous for it allows the service of originating process within any state or territory in Australia hassle free. It gives the right to the plaintiff to compel the appearance of any person anywhere in the country. To overcome the chaos as to applicability of court rules or rules under Service and Execution of Process Act on service of process outside the relevant state or territory but within Australia the civil court rules of some of the states and territories have laid down that a writ or originating process shall be served under the Service and Execution of Process Act 1992 (Commonwealth).\textsuperscript{51} The Uniform Civil Procedure Rules of New South Wales specifically lays down that an originating process for service in Australia, but outside New South Wales, must bear a statement either that the plaintiff intends to proceed under the Service and Execution of Process Act 1992 of the Commonwealth or that the plaintiff intends to proceed under the Uniform Civil Procedure Rules 2005\textsuperscript{52}. But, in those states and territories where the rules of the court do not expressly provide that the service of process within Australia has to be made according to the provisions of the Service and Execution of Process Act, then if the plaintiff gets the service of originating document done on the defendant under the Service and Execution of Process Act, in such case the provisions of the said Act will prevail over the civil court rules of the States and territories\textsuperscript{53}. However, where the

\begin{itemize}
\item \textsuperscript{51} QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 6, r.123 (2); WA Rules, of the Supreme Court 1971, o.10, r. 1A; ACT Court Procedure Rules, 2006, ch.6, pt. 6.8,div. 6.8.5, r.6430.
\item \textsuperscript{52} NSW uniform civil Procedure Rules, 2005, pt. 10, div. 1, r.10.3 (3).
\item \textsuperscript{53} Service and Execution of Process Act, 1992, s. 8 (4). It reads thus: “Subject to this Act, this Act applies to the exclusion of a law of a State (the \textit{relevant State}) with respect to:
\begin{enumerate}
\item the service or execution in another State of process of the relevant State that is process to which. this Act applies; or
\item the service or execution in the relevant State of process of another State that is process to which. this Act applies; or
\item the service or execution in another State of judgments of a court of the relevant State that are judgments to which. this Act applies; or
\item the service or execution in the relevant State of judgments of a court of another State that are judgments to which. this Act applies; or
\item the service or execution in another State of judgments to which this Act applies that are orders of a tribunal of the relevant State; or
\item the service or execution in the relevant State of judgments to which this Act applies that are orders of a tribunal of another State.
\end{enumerate}
service of originating process is to be served outside Australia, the relevant Civil Court rules of the respective states shall continue to apply.

3.3.3 Partnership firm

As earlier stated the courts of state or the territory have undisputed jurisdictional rights over any person under their jurisdictional limits. This right flows from the common law rules which allow the courts to assume jurisdiction over any persons coming within their jurisdiction. This can be both advantageous and disadvantageous from the view point of jurisdiction over partnership firms because if the partnership firm consisted of limited number of partners say-two or three, the court can easily assume jurisdiction over them if all two or three number of partners are within its jurisdictional limits. However if a partnership firm consisted of more partners say five to ten or more, it would not be possible to assume jurisdiction over them because in practical terms not all the partners would be available or present in one state or territory. Some of them would be served with the writ/ originating process and some would be left. Under the civil court of various states and territories, the members of the partnership can sue and be sued in the name of the partnership firm, which means that if the service of document is to be made on all the members of the partnership firm, then it is sufficient to make the service of originating process on the name of the partnership firm, which will be construed as service on all partners of the firm. There is no need to serve partners individually. It will be presumed that all the partners of the partnership firm have been served with the originating process. The service of originating process on partnership firm can be made on one or more of the partners or on a person at the principal place of business of the partnership in the respective states who appears to have control or management of the business there54. The South Australia Supreme Court Rules does not talk about the service of

54 QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 4, r.114 (1) (a) & (b); VIC Supreme Court (General Civil Procedure) Rules, 2005 , o.17, r.17.03 (1)(a) & (b) ; WA Rules, of the Supreme Court, 1971, o.71, r. 3 (1) (a) & (b); TAS Supreme Court Rules, 2000, pt. 10, div. 3, r.310(1) (a) & (b) ; SA Supreme Court Civil Rules, 2006, ch.4, pt. 2, div. 3, r.64(1) ; ACT Court Procedure Rules, 2006, ch.6, pt. 6.8, div. 6.8.5, r 6433 (1) (a)& (b); NT supreme Court Rules, 2006, ch.1, o. 17, r. 17.03 (1)(a) (b).
originating process at the principle place of business, it simply provides that the service of originating process may be made on person who has the management or control of the partnership business. In addition to the above said rule the Supreme Court Rules of Queensland also provides that where a partnership is registered under the Partnership Act 1891, the originating process may be served at the registered office of the partnership firm in Queensland. In all the State and Territory civil court rules, it has been laid that where any of the partners is outside the state/territory when the originating process was issued, then he would be taken to have been served with the originating process, if he was a partner in the partnership firm when such process was issued. But where a partnership has been dissolved to the knowledge of the plaintiff, all members against whom the plaintiff desires to pursue the cause of action must be served individually. The Queensland Uniform civil procedure Rule 114 does not contain express provision as to the plaintiff’s knowledge about the dissolution of partnership firm before serving the originating process on the partners of the partnership firm, instead it requires that the plaintiff must get the service of originating process served on every person whom he seeks to be make liable as partner of the firm but who was not a partner when the originating process was issued. In case of Babcock & Brown P/L & Ors v. Arthur Andersen, The Court held that under the Queensland Uniform Civil Procedure Rules a proceeding may be brought against a partnership in the firm name after dissolution of the partnership.

55 SA Supreme Court Civil Rules, 2006, ch.4, pt. 2, div. 3, r.64(1) (b).
56 See QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 4, r.114 (2); VIC Supreme Court (General Civil Procedure) Rules, 2005, o. 17, r.17.03 (2); WA Rules, of the Supreme Court, 1971, o.71, r. 3 (1); TAS Supreme Court Rules, 2000, pt. 10, div. 3, r.310 (2); ACT Court Procedure Rules, 2006, ch.6, pt. 6.8, div. 6.8.5, r .6433 (2); NT supreme Court Rules, 2006, ch.1, o. 17, r. 17.03 (2).
57 SA Supreme Court Civil Rules, 2006, ch.4, pt. 2, div. 3, r.64 (2); QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 4, r.114 (1); VIC Supreme Court (General Civil Procedure) Rules, 2005, o. 17, r.17.03 (3); WA Rules, of the Supreme Court 1971, o.71, r. 3 (2); TAS Supreme Court Rules, 2000, pt. 10, div. 3, r.310(3); ACT Court Procedure Rules, 2006, ch.6, pt. 6.8, div. 6.8.5, r. 6433 (3); NT supreme Court Rules, 2006, ch.1, o. 17, r. 17.03 (3).
58 QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 4, r.114 (3).
But, the plaintiff must serve all the partners sought to be made liable individually whether or not he is aware of the dissolution before commencing the proceeding.

The originating process must also be served on anyone the plaintiff seeks to make liable as a partner but who was not a partner when the originating process was issued.\(^60\)

Under the Northern Territory, Victoria and Tasmania Supreme Court Rules, the plaintiff is also required to inform the defendant on whom an originating process is issued, at the time of such issuance, a notice in writing in what capacity the defendant is being served with an originating process, whether he is being served as a partner or as a person having the control or management of the partnership business or in both characters. If the plaintiff makes a default in serving such notice the person served shall be taken to be served as a partner.\(^61\)

The New South Wales Uniform civil Procedure Rules provide for the personal Service of Originating process on the partner whether sued in his or her own name or under the firm-name of the partnership, which means that each member of the partnership firm has to been served personally. The rules require that the originating process shall served by leaving the originating process with a person who is evidently engaged in the business and who is evidently of or above the age of 16 years or at the registered office of the partnership, or by sending it by post, addressed to the firm-name of the partnership, to the registered office of the partnership. However, this rule does not limit the operations of any other law with respect to the service of documents.\(^62\)

All the states and territories in Australia have their respective partnership Acts, which deals exclusively with every aspect of partnership in the states and territories. However, these statutory acts do not contain provisions regarding the

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\(^{60}\) ACT Court Procedure Rules, 2006, ch.6, pt. 6.8, div. 6.8.5, r. 6433 (5); QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 5, r.114 (3).

\(^{61}\) VIC Supreme Court (General Civil Procedure) Rules, 2005, o. 17, r.17.03 (4); TAS Supreme Court Rules, 2000, pt. 10, div. 3, r.310 (4)& (5); NT supreme Court Rules, 2006, ch.1, o. 17, r. 17.03 (4).

service of originating process in actions against the firms. They simply contain
provision of service relating to partnership documents rather than documents relating
to court process. This implies that service on partnership relating to court issues are
dealt with civil procedure rules of the respective state and territory courts. Hence,
service on partnerships is made through these court rules. All the civil procedures of
the courts of the States and Territories provide that the Partners sued in the name of
their firm shall appear individually in their own names or file a notice to defend in
their own name. However the proceeding shall continue in the name of the
partnership firm.\footnote{QLD Uniform Civil Procedure Rules, 1999, ch.3, pt. 3, r. 84, VIC Supreme Court (General
Civil Procedure) Rules, 2005, pt. 2, o.17, r.17.04; WA Rules, of the Supreme Court 1971,
o.71, r. 5; TAS Supreme Court Rules, 2000, pt. 10, div. 3, r.311; ACT Court Procedure
Rules Ch.2, Pt. 2.3, Div. 2.3.1, r.108 and ch.2, pt. 2.4, div. 2.4.10, r. 286 (5); NT supreme
Court Rules, 2006, ch.1, o. 17, r. 17.04.}

3.4 General rules of jurisdiction under the civil court rules of States and
territories of Australia

3.4.1 Service of originating process under the contract

A party is free to enter into a contract and incorporate their own terms regarding the
service of originating process on each other. Many of states and territories courts in
Australia provide that if the parties to the proceeding either before or after the
commencement of the proceeding have entered into an agreement regarding the
manner, place and the person on which the originating process is to be served inside
or outside Australia, then such a contract is completely valid between the parties.
These agreements are usually entered into by the parties to save time as the service of
process is comparatively quick than the formal methods of service.\footnote{QLD Uniform Civil Procedure R.S 1999, Ch. 4,Pt. 5, r. 119; WA Rules of Supreme Court,
1971, O.9, r.3; NSW Uniform Civil Procedure Rules, 2005, pt. 10, div. 2, r. 10.6;VIC
Supreme Court (General Civil Procedure) Rules, 2005,O.6 r.6.14.}
3.4.2 Acceptance by Solicitor

The civil court Rules of all the six States and Territories in Australia also make the provision for the acceptance of originating process by the solicitor on behalf of his defendant client. The solicitor is not only empowered to accept the originating process on behalf of the defendant, but which will, if accepted in due manner as laid down in the civil procedure Rules of the States, would be deemed to have been personally served on the defendant. The solicitor shall make a note on a copy of the originating process that he or she is accepting the service of the originating document on behalf of his client (defendant). Then the court will assume that the originating process is served on the defendant on the date on which the note is made or on such earlier date as may be proved. If the defendant on whose behalf the solicitor has accepted the service of originating process, wants to deny the authority of solicitor to accept the originating process on his or her behalf, then he /she has to prove that the solicitor acted without the authority or has no authority to accept service for him or her.65

3.4.3 Agent

The civil court rules of Tasmania, 66 Northern Territorym, 67 Western Australia, 68 Victoria, 69 Australian Capital Territory 70 and Queensland 71 lay down that with the leave of court an originating process or writ may served on the agent, residing or carrying on business in relevant Australian State or Territory, entering into a contract with the plaintiff on behalf of principal defendant residing outside or carrying on business outside Australia. The court may on the application of the plaintiff, grant leave to serve the originating process or writ on such agent residing or

65 NSW Uniform Civil Procedure Rules,2005, pt. 10, div. 2, r.10.13; QLD, Uniform Civil Procedure Rules,1999, ch.4, pt. 5, r. 115; TAS Supreme Court Rules,2000, pt. 7, div. 9, r.134;SA Supreme Court Civil Rules,2006, ch.3,div.4, r.67(1)(c); WA Rules, of Supreme Court, 1971, o.9, r.1 (2); VIC Supreme Court (General Civil Procedure) Rules,2005, o.6, r.6.09; NT supreme Court Rules,2006, ch.1, o.6, r. 6.0;
66 TAS Supreme Court Rules, 2000, pt. 7, div. 9, r.139.
67 NT supreme Court Rules, 2006, pt. 3, o.6, r.6.12.
68 WA Rules, of the Supreme Court, 1971, o.9, r. 2.
69 VIC Supreme Court (General Civil Procedure) Rules, 2005, pt. 2, o.6, r.6.13.
70 ACT Court procedure Rules, 2006, ch.6, pt. 6.8, div. 6.8.7, r. 6462.
71 QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 5, r.118.
carrying on business in Australian State or Territory. However, the plaintiff is required to send a copy of the order and the originating process or writ by certified post to the defendant or the respondent at his/her address out of state or territory. Such service on agent may be made by the leave of court, even before the determination of such agent’s authority or of the agent’s business. Under the Queensland uniform Civil Procedure rules and the Western Australia rules of Supreme Court the court must also mention in the order giving the leave, the time within which the principal must file a notice of intention to defend.

In the case of *Commonwealth of Australia v. Peter Everett white & The Society of Lloyd’s*\(^{72}\) quoting the statement of Buckley LJ in *Okura & Co. Ltd v. Forsbacka Jernverks Aktiebolag* case, the court held that in order to serve an agent of a foreign corporation in any state or territory of Australia, with an originating process or a writ, the court has to see whether the person or the agent representing the foreign corporation in Australian state or territory, is really “here” in terms of carrying business. The foreign corporation carrying on business should have in reality carried on business in Australian state or territory for a substantial period of time. Secondly, the business carried on by the corporation should have been carried out at a particular fixed place. Thirdly, the most important of all, the corporation must be “here” in Australian state or territory by a person who carries on business for the corporation in Australia. It is not enough to show that the corporation has an agent ‘here’ rather he must be an agent who does the corporation’s business for the corporation in Australia.

Coming to the provision of service of originating process outside Australia, the Hon’ble court held that the words “by” and “through” used in paragraph 17.01(1) (f) (ii) which allows the service of originating process outside Australia in respect to the contract made ‘by’ or ‘through’ an agent trading or residing within the jurisdiction on behalf of the principle trading or residing out of jurisdiction, shows that the paragraphs covers not only the cases where the contract is made by an agent who has

\(^{72}\) [1999] VSC 262.
power to bind the overseas principal but also those cases where the contract is made by the principal through the efforts and intervention of the local agent.

### 3.4.4 Substituted service

When the plaintiff wishes to serve the originating process on the defendant outside the territory of Australia then he has to make sure that:

1. the originating process is based on the categories of the cases as allowed by the Civil Procedure Rules of the respective states,
2. that the requirement of notices or any other formality is duly complied with by the plaintiff which is required to be served along with the originating process,
3. where the originating process is not served personally on the defendant, then it must be served in accordance with the law of the country in which service is to be effected, and
4. if the Civil Procedure Rules of the respective States require the plaintiff to obtain leave from the court in case the defendant does not enter an appearance and the plaintiff has taken such leave from the court to proceed against the defendant.

But, sometimes the court finds that it is impracticable to serve an originating document on the defendant despite the efforts of the plaintiff, then in such cases the Court may make an order for substituted service on the foreign defendant. It may by order lay down the steps to be taken, instead of personally serving the foreign defendant, for the purpose of bringing the document to the notice of the person to be served. According to the civil procedure rules of the state and territory courts and the federal court, in such cases the courts may make an order for substituted service by substituting any other way of the serving the document on the defendant than for personal service. Where the court makes such an order, then it may also make an order specifying that the document be taken to have been served on the happening of a specified event or on the expiry of any specified time.73 New South Wales is the

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73 FCt Rules, 2011, ch.2, pt. 10, div. 10.2, r. 10.24; NSW Uniform Civil Procedure Rules, 2005, pt. 10, div. 2, r.10.14; QLD, Uniform Civil Procedure Rules, 1999, ch.4, pt. 5, r. 116; TAS Supreme Court Rules, 2000, pt. 7, div. 9, r. 141; SA Supreme Court Civil Rules, 2006, ch.3, pt. 4, div. 2, r. 41AE; WA Rules, of Supreme Court, 1971, o. 72, r. 4; VIC Supreme Court
only state in Australia, where the court has the authority to approve the steps which
the plaintiff has already taken for bringing the document to the notice of the person to
be served, even though such steps are not authorized by the Supreme Court Rules of
South Australia. The court may direct that the document to be taken have been served
on that person.\textsuperscript{74} In the case of \textit{Commonwealth Bank of Australia v. Diplock},\textsuperscript{75} the
court held at para 7 that, “The objective of substituted service is to bring the
proceedings to the knowledge of the person in question or of any person representing
his interest”. In the case of \textit{ANZ Banking Group Ltd v. Austin & Anor},\textsuperscript{76} the
plaintiff made several attempts to personally serve the defendants at their last known
and apparent residential address, to make contact with the defendants by calling their
last known telephone numbers, engaged an agent through his solicitor to personally
serve the defendants with the claim on the defendant but the agent was unable to enter
the property on any occasion because access to premises was barred by high fence
and aggressive dog. The agent’s attempts to engage the defendants to arrange a
meeting was unsuccessful because it was not responded by the defendants. The court
concluded that the only inference that can be arrived is that the defendants were
attempting to evade service, so personal service on the defendant was impracticable.
Hence, the court is entitled to make an order for substituted service against the
defendants.

Substituted service of originating process for an \textit{in personam} claim can be
ordered by the court, on the defendant outside the jurisdiction of the court, only, in
such cases where direct personal service could have been effected under the rules of
court. The plaintiff should not be permitted to use substituted service as a means of
sidestepping the obstacles to personal service abroad. Substituted service should not
be used as a means to extend court’s jurisdiction over the foreign defendants. Due
care should be followed by the court while making an order for substituted service so

\textsuperscript{74} (General Civil Procedure) Rules,2005, o.6, r.6.10; NT supreme Court Rules,2006, ch.1, o. 6,
\textsuperscript{75} r. 6.10; ACT supreme Court Rules, 2006, ch. 6, pt. 6.8 , div. 6.8.7, r. 6460.
\textsuperscript{76} NSW Uniform Civil Procedure Rules,2005, pt. 10, div. 2, r.10.14.
\textsuperscript{75} [2010] QSC 146.
\textsuperscript{76} [2014] QSC 222.
as not to harass the foreign defendants unduly. Various interpretations have been
given by the courts to the word, “impracticable”. In some of the cases the standard of
impracticability is set at higher level. The word has been used in the sense of
‘inability’ on the part of plaintiff to effect personal service, and said inability is the
main consideration for deciding whether substituted order should be made or not.
Affidavit in support of the application for the substituted service should show the
efforts which have been made to affect personal service. In *Foxe v. Brown* Mason
J. at para 15, expressed the view that when a plaintiff comes with the application for
substituted service on the foreign defendant, the court while making an order for
substituted service should point out in the order for substituted service that ‘the
plaintiff, using reasonable effort, is unable to affect personal service’. Although
‘Impracticability’ implies inability on the part of the plaintiff to effect personal
service on the foreign defendant, but the word demands only reasonable efforts on
the part of the plaintiff.

In the case of *ASIC v. Sweeney No.2*, it was held at para 71 that, “*In order
to establish impracticality some attempt, at least, should be made to effect service in
accordance with the rules, or evidence should be led that it is so obviously futile as
not to warrant an attempt at service*”. The realistic attempts made by the plaintiff to
effect service on the defendant serve as a proof of impracticability coming on the way
of plaintiff to serve originating service on the defendant. Sincere efforts are obvious
way of establishing impracticability.

3.5 **States and territories which require or do not require prior permission to
serve the originating process outside Australia in International cases not
involving Jurisdiction of New Zealand**

A plaintiff can serve a foreign defendant outside the territory of Australia in
case where there is a connection between the claim of the plaintiff or the defendant
and the forum court in which the case is instituted. To serve the defendant outside

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77 (1984) 58 ALR 542
Australia some courts lay down that the plaintiff has to obtain the permission from the court in order to serve and some courts dispense with taking such permission, but, provide for obtaining leave to proceed against the defendant outside the jurisdiction of Australia only in cases where the defendant does not make an appearance before the court issuing the originating process.

(A) Where leave is required to serve outside Australia

The Federal Court Rules, the Western Australia Court Rules and the Northern Territory Supreme Court Rules provide that the plaintiff has to obtain prior permission from the court if originating process or writ (in case of Western Australia) is to be served on the foreign defendant outside Australia. In case the originating process is served on the defendant outside Australia without obtaining leave of the court, the courts in Australia hold it to be mere irregularity which can be waived by a party or the court.

Under the Western Australia Court Rules, the plaintiff’s application seeking leave to serve the writ or notice of writ on the foreign defendant must be supported by an affidavit that in the belief of the plaintiff, the plaintiff has a good cause of action against the foreign defendant and must state the place where the defendant is or probable may be outside Australia. The Court will not grant any such leave unless the plaintiff makes the court sufficiently satisfied that his case is a proper for the service of writ or notice of writ outside jurisdiction of the court. Whereas, under the Federal Court Rules, the party applying for leave to serve originating application outside Australia must satisfy the court that the court has jurisdiction in the proceedings, the proceedings is a kind mentioned in rule 10.42, and the party has a prima facie case for all or any of the relief claimed in the proceeding.

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79 FcT, 2011, ch.2, pt. 10, div. 10.4, r.10.42.
80 WA Rules, of Supreme Court. 1971, o.10.r.2.
81 NT Supreme Court Rules, 2006, ch.1, o. 7, pt. 1, r. 7.02
83 WA Supreme Court Rules,1971, o.10, r.4.
84 FcT Rules,2011, ch.2, pt. 10, div. 10.4, r.10.43 (4). It reads thus:-, “Application for leave to serve originating application outside Australia-
application for the leave to serve outside must be accompanied by an affidavit stating the name of the foreign country where the person to be served is or is likely to be and the proposed method of service which means whether the service is permitted by a convention, if the Hague Convention applies — the Hague Convention or the law of the foreign country. In *Merpro Montassa Ltd v. Conoco Special Products Inc*, the court held that the requirement of ‘Prima facie case’ helps in finding out some

(1) Service of an originating application on a person in a foreign country is effective for the purpose of a proceeding only if:
   (a) the Court has given leave under subrule (2) before the application is served; or
   (b) the Court confirms the service under subrule (6); or
   (c) the person served waives any objection to the service by filing a notice of address for service without also making an application under rule 13.01.

**Note** A respondent may apply to set aside an originating application or service of that application — see rule 13.01.

(2) A party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country.

(3) The application under subrule (2) must be accompanied by an affidavit stating:
   (a) the name of the foreign country where the person to be served is or is likely to be; and
   (b) the proposed method of service; and
   (c) that the proposed method of service is permitted by:
      (i) if a convention applies — the convention; or
      (ii) if the Hague Convention applies — the Hague Convention; or
      (iii) in any other case — the law of the foreign country.

(4) For subrule (2), the party must satisfy the Court that:
   (a) the Court has jurisdiction in the proceeding; and
   (b) the proceeding is of a kind mentioned in rule 10.42; and
   (c) the party has a prima facie case for all or any of the relief claimed in the proceeding.

**Note 1** The law of a foreign country may permit service through the diplomatic channel or service by a private agent — see Division 10.5.

**Note 2** Rules 10.63 to 10.68 deal with service of local judicial documents in a country, other than Australia, that is a party to the Hague Convention.

**Note 3** The Court may give permission under subrule (4) on conditions — see rule 1.33.

(5) A party may apply to the Court for leave to give notice, in a foreign country, of a proceeding in the Court, if giving the notice takes the place of serving the originating application.

(6) If an originating application was served on a person in a foreign country without the leave of the Court, a party may apply to the Court for an order confirming the service.

(7) For subrule (6), the party must satisfy the Court that:
   (a) paragraphs (4) (a) to (c) apply to the proceeding; and
   (b) the service was permitted by:
      (i) if a convention applies — the convention; or
      (ii) if the Hague Convention applies — the Hague Convention; or
      (iii) in any other case — the law of the foreign country; and
   (c) there is a sufficient explanation for the failure to apply for leave.

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85 FcT Rules, 2011, ch.2, pt. 10, div. 10.4, r.10.43 (3).
86 [1991] FCA 72; 28 FCR 387
introductory details about the facts of the case. In *Fuk Hing Steamship Co Ltd v. Shagang Shipping Co Ltd*, the court held that the requirement of ‘prima facie case’ has to be met at the outset, usually on the ex parte application and without the advantage of discovery and other procedural aids to the making out of a case. Prima Facie requirement should not call for a substantial inquiry. It is sufficient to say that a prima facie case for relief is made out, if, on the material before the court, inferences are open which, if translated into findings of fact, would support the relief claimed. What the Court must determine is whether the case made out on the material presented before it shows that a controversy exists between the parties that warrant the use of the Court’s processes to resolve it and whether it is justified to cause the proposed respondent to involve in litigation in Australia. In *Clough Engineering Ltd v. Oil & Natural Gas Corporation Ltd.*, the court held that it is not necessary for an applicant seeking leave to show a prima facie case of action in respect of each of the causes of action pleaded.

(B) Where no leave is required to serve outside Australia but leave to proceed is required if the defendant does not make an appearance

Except for the Federal Court of Australia and Court of Western Australia, the civil procedure rules of High Court and the remaining five states NSW, TAS, SA,QLD, VIC and one territory ACT, provide that foreign defendant can be served with the originating process without the leave of the court where the claim relates to category of cases which do not require leave of the court. As far as the claims relating to contract is concerned the originating process can be served on the foreign defendant without the permission of the court where the contract is made within the jurisdiction; made by or through an agent residing within the jurisdiction on behalf of a principal trading or residing outside the jurisdiction; the contract is governed by the

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89 HC Rules, 2004, ch.1, pt. 9, r. 9.07.1; NSW Uniform Civil Procedure Rules, 2005, Sch. 6; TAS Supreme Court Rules, 2000, pt. 7, div. 10, r.147A; SA Supreme Court Rules, 2006, ch.3, div. 2, r. 40; QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 7, div. 1, r.124 (1); VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r. 7.01 (1); ACT Court Procedures Rules, 2006, ch.6, pt. 6.8, div. 6.8.9, r. 6501.
law of the jurisdiction or breach of contract is committed within the jurisdiction. But, where the defendant fails to appear before the court issuing originating process, the plaintiff may proceed against him after obtaining leave to proceed against such absent foreign defendant. No leave is required by the plaintiff to serve the defendant outside Australia, but leave to proceed is required by him in case the defendant does not make an appearance in the court serving originating process. However, the Queensland Uniform Civil Procedure Rules and the South Australia Supreme Court Rules are silent on the issue when the originating process is served on the foreign defendant and he does not make an appearance, whether to proceed without leave or to obtain the leave from court. The court may in such case make an order to proceed against the foreign defendant if it is satisfied that subject matter of the proceeding is based on those specified grounds, where permission to serve outside is not required.

3.6 Personal Jurisdiction in the cases involving Jurisdiction of New Zealand

In Australia, where a civil litigation involves a defendant from the country of New Zealand, then service of process or writ on such a defendant is to be made according to the provisions of Trans-Tasman Proceedings Act 2010 Act. The Trans-Tasman Proceedings Act 2010 (Commonwealth) has replaced the Evidence and Procedure (New Zealand) Act 1994 (Commonwealth) and makes provision for service of Australian initiating documents in New Zealand. The aim of the Act is to streamline the process for resolving civil proceedings with a Trans-Tasman element in order to reduce costs and improve efficiency, minimize existing impediments to enforcing certain NZ judgments and regulatory sanctions, and implement the Trans-Tasman Agreement in Australian law. Documents for service in NZ must be served in the same way that the documents are required or permitted, under the procedural

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90 HC Rules, 2004, ch.1, pt. 9, r. 9.07.03; NSW Uniform Civil Procedure Rules, 2005, pt. 11, div. 1, r.11.4; TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147B; VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r.7.04.


rules of the Australian court or tribunal, to be served in the place of issue.\textsuperscript{93} For service of the initiating document in New Zealand, it is not necessary for the Australian court or tribunal to give leave for the service or to be satisfied that there is a connection between the proceeding and Australia. A defendant, who is served with an initiating document in NZ and wishes to file an appearance in the issuing Australian court or tribunal, must do so within a specified timeframe\textsuperscript{94}. An issuing Australian court or tribunal may, on the application of the defendant, order that the plaintiff in the proceeding should pay such security to the defendant as the court or tribunal may specify. The court may also stay the proceeding until such that security is given by the plaintiff\textsuperscript{95}. A defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a NZ court is the more appropriate court to determine the matters in dispute\textsuperscript{96}. In determining whether the NZ court is the more appropriate court, the Australian court must take certain matters into account. However, if the parties have made an exclusive choice of court agreement that designates either an Australian court or NZ court as the court to determine the matters in dispute, the Australian court’s order as to whether to stay the proceeding must be consistent with that agreement.\textsuperscript{97}

\textbf{3.7 Jurisdiction in cases of Commercial Contracts}

A plaintiff is entitled in Australia to bring an action against the defendant on any of the below grounds which affect his contractual rights. The right to sue is given to the plaintiff even if the defendant is outside Australia. The court rules of all the six States and Territories of Australia and the Federal Court Rules and the High Court Rules of Australia empower the courts of the respective states and the federal court and the High Court of Australia to assume jurisdiction over a defendant outside the territory of Australia in cases of contract where:-

\begin{itemize}
\item Trans-Tasman Proceedings Act 2010 (Cth), s.9.
\item \textit{Ibid.} s. 13.
\item \textit{Ibid.} s. 15.
\item Trans-Tasman Proceedings Act 2010 (Cth), s. 17.
\item Available at : http://www.g.gov.au (last visited on October 16, 2013).
\end{itemize}
A. The proceedings are in relation to the contract, the contract is made in Australia, or in particular state, in which the proceeding is brought before the court with respect to the contract in dispute.

B. The contract is made by or through an agent trading or residing in the state on behalf of a principal trading or residing court of the state or

C. The contract is governed by the law of the state or

D. The contract contains a clause to the effect that the court of particular state is to have jurisdiction in claims relating to the contract.

The courts have the authority to enforce, dissolve, annual or otherwise affect a contract or to order the recovery of damages or any other remedy with respect to the contract fulfilling any of the four conditions mentioned aforesaid. These are the special provisions which are specifically directed to the cases of contract. These four conditions are:

1. **The contract is made in the forum**

   If the contract which is the subject matter of dispute is made in Australia, then all the States or Territories Supreme Court Rules and the Federal Court Rules allow the service of originating process outside Australia on a foreign defendant if he is party to the contract made in the jurisdiction of Australian State or Territory or anywhere in Australia. It is settled law that a contract is made within the jurisdiction when the last act necessary to create a binding contractual obligation took place within the jurisdiction. Lex fori’s rules are applied to determine ‘what is the last necessary act’ for the formation of the contract. Where the communication between the parties takes place through telephone cable, fax, and email etc, the place of formation of the contract would be place where acceptance is received through any of

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98 FcT Rules, 2011, ch.2, pt. 10, div. 10.4, r. 10.42; NSW Uniform Civil Procedure Rules, 2005, Sch. 6 (c) (i); QLD, Uniform Civil Procedure Rules, 1999, ch. 4, pt. 7, r. 124 (1)(g)(i); TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147A (1) (h) (i); SA Supreme Court Civil Rules, 2006, ch. 3, pt. 3, div. 2, r.40 (1) (d) (i); WA Rules, of Supreme Court, 1971, o.10, r.1(e)(i); VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r.7.01 (1)(f)(i); NT supreme Court Rules, 2006, ch.1, o. 7 , pt. 1, r. 17.01 (1) (f) (i); ACT supreme Court Rules, 2006, ch.6, pt. 6.8 , div. 6.8.9, r. 6501(1) (g) (i).

these forms of communication. In case of contracts made through internet or the e-mail, the contract will be formed where the customer receives merchants’ acceptance. It may be possible that in such case the merchant might be holidaying at some place or may be in travel, then in such cases it is difficult to determine the place where the contract is made. Based on the UNITRAL Model on Electronic Transaction, the common wealth and all the States and Territories in Australia have Electronic Transactions Acts which lay down that unless the parties agree otherwise, an electronic communication is taken to have been received at the addressee’s place of business. But if the party has not indicated a place of business and has more than one place of business, the place of business would be the place which would have the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction; and if a party has not indicated a place of business and has more than one place of business, but it is not possible to find out the place with which the transaction has the closest connection then, it is to be assumed that the party's principal place of business is the party's only place of business. Where a party is a natural person and does not have a place of business it is to be assumed that the party's place of business is the place of the party's habitual residence.\(^\text{100}\)

However in case where the contract is formed by the parties communicating via post or the telegram, the contract is deemed to be concluded at the place from where the letter of acceptance was posted. Since, now- a-days where means of communication have become faster as compared to the earlier years, the postal rules or the telegram rule seems to be obsolete with the rapid changing technology. If a contract is made in one jurisdiction and then it is amended in another jurisdiction, in such case the place where the contract was initially made will the place of formation

of the contract. However, if the amended contract operates as the discharge of the earlier contract and operates as fresh contract and a fresh contract comes to conclusion, then in such case, the place where the contract is amended and a fresh contract is formed is the place of the formation of contract. If the contract made in one jurisdiction need not be performed in same jurisdiction and can be performed in some other jurisdiction, then the place of performance of contract will not be regarded as the place of formation of the contract\(^{101}\).

The forum court while deciding the question as to place where the contract is concluded, shall take all the necessary factors into consideration which leads to the conclusion of a valid contract between the parties. In *Olivayle Pty Ltd v. Flottweg GMBH and Co. KGAA (No. 4)*\(^{102}\) the court held that in case of instantaneous mode of communication like email, the place where the email is received is the place where the contract is formed.

2. **Contract governed by the law of the forum**

When the terms of the contract provide that the contract is governed by the law of the Australian forum, then that forum court\(^{103}\) is empowered to assume jurisdiction over the defendant ex-juris through service of originating process outside the state or territory of Australia. The courts while granting leave make sure that whether the parties have expressed any choice as to the law governing the contract, or can the choice be inferred from the terms of the contract and the relevant surrounding circumstances. Where in the contract, there is no choice of law provision governing the contract, then in such cases; the law governing the contract is determined by considering the whole system of law with which the contract has the closet connection. Such an exercise involves consideration of the terms and nature of the

\(^{101}\) *Supra* note 9 at 4.


\(^{103}\) FcT Rules, 2011, ch. 2, pt. 10, div. 10.4, r. 10.42; NSW Uniform Civil Procedure Rules, 2005, Sch. 6 (c) (iii); QLD Uniform Civil Procedure Rules, 1999, ch. 4, Pt. 7, r. 124 (1) (g) (iv); TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147A (1) (h) (iii); SA Supreme Court Civil Rules, 2006, ch. 3, pt. 3, div. 2, r. 40 (1) (d) (i); WA Rules, of Supreme Court, 1971, o.10, r.1(e)(iii); VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r. 7.01 (1) (f) (iii), NT Supreme Court Rules, 2006, ch. 1, o. 7, pt. 1, r. 17.01 1(f) (iii); ACT Supreme Court Rules, 2006, ch. 6, pt. 6.8, div. 6.8.9, r. 6501(1) (g) (iv).
contract, the place of performance of contract and the surrounding circumstances.\textsuperscript{104} The parties to the contract have the autonomy to change the governing law of contract when they feel like. The courts in such cases have to give effect to the intention of the parties.\textsuperscript{105} However in \textit{Hayel Saeed Anam & Co. v. Eastern Sea Freighters Pty Ltd.}\textsuperscript{106} The court held that the choice of law will be not relevant in a contract under issue where a statutory provision binding the court subjects a contract to a particular legal system which is governing the contract. In \textit{Weckstorm v. Hyson}\textsuperscript{107} case the court held that while determining the question of ‘what is the governing law’ that governs the contract in issue, the court should first take into account the real or the presumed interests of the parties. But, if the court cannot find out clearly the express intention of the parties, the court should then select that law with which the contract has the most real connection. The court should select the law which a man of ordinary prudence and of reasonable sense would have thought to govern the contract when it was made by having regard to the terms of the contract, the situation of the parties and general surroundings of the facts of the case.

Also, where there are multiple proper laws governing the contract, then in such cases the leave to serve the originating process on the foreign defendant should not be granted unless the particular issue litigated between the parties were governed by the law of the forum.\textsuperscript{108} Where the proper law has been ascertained by the courts in a given issue, then in such case the rules of domestic law and not the conflict of law rules will apply to the issue, for, it is presumed that when the parties agree to a

\begin{itemize}
  \item[\textsuperscript{104}] \textit{John Pfeiffer Pty Ltd v. Rogerson}, (2000) 74 ALJR 1109.
  \item[\textsuperscript{105}] Reid Mortensen, Rich.ard Garnett and Mary Keyes, \textit{Private International Law in Australia} 451 (LexisNexis Butterworths, Australia, 2\textsuperscript{nd} edn., 2011).
  \item[\textsuperscript{106}] (1973) S.A.S.R 200.
  \item[\textsuperscript{108}] Martin Davies, Andrew Bell and Paul Le Gay Brereton, \textit{Nygh’s Conflict of Laws in Australia} 47 (Reed International Books Australia Pty Limited trading as LexisNexis, Australia, 8\textsuperscript{th} edn., 2010).
\end{itemize}
proper law of a particular place, that they have chosen the domestic law of that place.\textsuperscript{109}

3. **One party to the contract had connection to the forum**

All the civil procedure rules of State\textsuperscript{110} and Territory Courts\textsuperscript{111} and the Federal Court\textsuperscript{112} in Australia allow the service of originating process outside the territory of Australia in case of contract, where the contract is made on behalf of the foreign defendant outside Australia, by the defendant’s agent residing or carrying on business in Australia. In some jurisdiction of Australia this ground is also available where the plaintiff’s agent residing or carrying on business in Australia enters into contract on behalf of plaintiff residing or carrying on business outside Australia.\textsuperscript{113} The difference between the contract made on behalf of defendant and on behalf of plaintiff under the above rules can be found from the wording of the civil procedures rules allowing service outside Australia. Under the New South Wales, Federal Court Rules and Tasmania Supreme Court Rules, service is allowed outside Australia in case of contractual disputes where the contract is made, ‘on behalf of the person to be served’, by or through an agent carrying on business, or residing, in Australia or State. The language of court rules typically uses the word ‘the person to be served’, which in all circumstances implies defendant. In all other states and territories no such emphasis is give on the words ‘person to be served’, which implies that agent can both be of defendant as well as plaintiff. For example the Queensland Supreme

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\textsuperscript{110} NSW Uniform Civil Procedure Rules, 2005, Sch. 6 (c) (ii); QLD, Uniform Civil Procedure Rules, 1999, ch.4, pt. 7, r. 124 (1) (g) (iii); TAS Supreme Court Rules, 2000, pt. 7, div. 10, r. 147A (1) (h) (ii); SA Supreme Court Civil Rules, 2006, ch.3, Pt. 3, div. 2, r.40 (1) (d) (ii); WA Rules, of Supreme Court, 1971, o.10, r.1(e)(ii); VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r.7.01 (1) (f) (ii).

\textsuperscript{111} NT supreme Court Rules, 2006, ch.1, o. 7, Pt. 1, r. 17.01 (1) (f)(ii); ACT supreme Court Rules, 2006, ch.6, pt. 6.8, div. 6.8.9, r. 6501 1 (g) (iii).

\textsuperscript{112} FcT Rules, 2011, ch.2, pt. 10, div. 10.4, r. 10.42.

\textsuperscript{113} QLD Uniform Civil Procedure Rules, 1999, ch.4, pt. 7, r. 124 (1) (g) (iii); i; SA Supreme Court Civil Rules, 2006, ch.3, pt. 3, div. 2, r.40 (1) (d) (ii); WA Rules, of Supreme Court, 1971, o.10, r.1(e)(ii); VIC Supreme Court (General Civil Procedure) Rules, 2005, o.7, pt. 1, r.7.01 (1) (f) (ii); ACT supreme Court Rules, 2006, ch.6, pt. 6.8, div. 6.8.9, r. 6501 1 (g) (iii).
court allows the service of originating process outside Australia in case of contractual dispute where the contract is made by or through an agent carrying on business dispute or residing in Queensland on behalf of a principal carrying on business or residing outside Queensland, here no emphasis is given on the words 'person to be served'. This provision applies both in the cases where the contract is made either on the behalf of plaintiff residing outside Queensland or defendant residing outside by the agent residing or carrying on business in Queensland.

In addition, the Australian Capital Territory and Queensland civil court rules also provide the service of originating process outside Australia where the contract is made by one or more parties carrying on business or residing in Australian Capital Territory or Queensland. The court while deciding whether the agent has the authority to contract on behalf of the defendant has to keep in mind the principles that govern the agent-principle relationship. Every case has to be decided on its own set of facts and circumstances.

4. **Breach of contract in the forum**

Where breach of contract takes place in Australia or any state or territory of Australia, the Federal Court rules or Supreme Court rules of that respective state or territory or the federal allow the service of originating process on the defendant outside Australia pursuant to their respective civil procedure rules. Service on this ground is available even if the contract is not made in the state where the breach is alleged. The contract may be formed outside the respective state or outside Australia. But what constitutes breach of contract is a matter to be decided as per the facts of each case. In *Kim Michael Productions Pty Ltd. v. Tropical Islands Management*

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114 ACT Court Procedure Rules.,2006.ch.6.pt. 6.8, div. 6.8.9.r.6501(g)(ii);QLD Uniform Civil Procedure Rules.,1999, ch.4, pt. 4, r.124(1)(g)(ii).

115 FcT Rules, 2011, ch.2, pt. 10, div. 10.4, r. 10.42.

116 NSW Uniform Civil Procedure Rules,2005, pt. 11, div. 1, r.124 (1) (h); TAS Supreme Court Rules,2000, pt. 7, div. 10, r. 147A (1) (h) (iv); SA Supreme Court Civil Rules,2006, ch.3, pt. 3, div. 2, r.40 (1) (e); WA Rules, of Supreme Court, 1971, o.10, r.1(f); VIC Supreme Court (General Civil Procedure) Rules, 2005, ch.1, pt. 1, ch.3, div. 6.8.9.r. 6501(1) (h).

117 NT supreme Court Rules, 2006, ch.1, o.7, pt. 1, r. 17.01 (1) (g); ACT supreme Court Rules, 2006, ch.6, pt. 6.8, div. 6.8.9, r. 6501(1) (h).
case the important question was the determination of breach of contract in the state of New South Wales. Brief facts of the case are that the plaintiff (“KMP”) is a company that is incorporated in Australia and is carrying on business in the entertainment industry. Kim Douglas Michael is the sole director and shareholder of the company and is a resident in this State. The company’s place of business is also in New South Wales. The defendants are all incorporated and conduct their businesses outside Australia. Out of the three defendants, the first defendant (“TI Cayman”) is incorporated in the Cayman Islands, the second defendant (“TI Germany”) in Germany and the third defendant (“Tanjong UK”) is incorporated in the United Kingdom and registered in Malaysia. The third defendant is an investment holding company for the subsidiaries through which the group operates. In 2004 KMP and TI Germany entered into a written contract for the production of a show at the resort entitled “Viva Brazil”. The contract was expressed to be governed by German law and the German Civil Code would apply. Payments made under the contract were sent to KMP’s account at a Westpac Bank in Sydney. No dispute arose under this contract. Then came the second contract. According to the plaintiff in July 2005, discussions took place between KMP and Henry Fernando, an employee of a Malaysian subsidiary company of Tanjong (“TI Malaysia”) for the production of the resort called “Caribbean Carnivaleando” when the plaintiff was in Trinidad and Mr. Fernando in Malaysia. As result of which an oral contract entered between both of them. The plaintiff, KMP alleges that an oral contract was formed on or about 30 July 2005, between KMP and each of the defendant companies. As per the agreement the defendant is to pay US$500,000 to the plaintiff as consideration for staging the show pay interim invoices while the production was in progress. The plaintiff started working on the contract. One of the terms of the contract is that funds would be paid into the plaintiff’s account at a bank in Sydney. It is also alleged that the contract was varied on 15 August 2005 during further discussions between Mr. Michael (plaintiff), who was in Trinidad, and Mr. Fernando, who was in Malaysia. According to the

Lid,118 case the important question was the determination of breach of contract in the state of New South Wales. Brief facts of the case are that the plaintiff (“KMP”) is a company that is incorporated in Australia and is carrying on business in the entertainment industry. Kim Douglas Michael is the sole director and shareholder of the company and is a resident in this State. The company’s place of business is also in New South Wales. The defendants are all incorporated and conduct their businesses outside Australia. Out of the three defendants, the first defendant (“TI Cayman”) is incorporated in the Cayman Islands, the second defendant (“TI Germany”) in Germany and the third defendant (“Tanjong UK”) is incorporated in the United Kingdom and registered in Malaysia. The third defendant is an investment holding company for the subsidiaries through which the group operates. In 2004 KMP and TI Germany entered into a written contract for the production of a show at the resort entitled “Viva Brazil”. The contract was expressed to be governed by German law and the German Civil Code would apply. Payments made under the contract were sent to KMP’s account at a Westpac Bank in Sydney. No dispute arose under this contract. Then came the second contract. According to the plaintiff in July 2005, discussions took place between KMP and Henry Fernando, an employee of a Malaysian subsidiary company of Tanjong (“TI Malaysia”) for the production of the resort called “Caribbean Carnivaleando” when the plaintiff was in Trinidad and Mr. Fernando in Malaysia. As result of which an oral contract entered between both of them. The plaintiff, KMP alleges that an oral contract was formed on or about 30 July 2005, between KMP and each of the defendant companies. As per the agreement the defendant is to pay US$500,000 to the plaintiff as consideration for staging the show pay interim invoices while the production was in progress. The plaintiff started working on the contract. One of the terms of the contract is that funds would be paid into the plaintiff’s account at a bank in Sydney. It is also alleged that the contract was varied on 15 August 2005 during further discussions between Mr. Michael (plaintiff), who was in Trinidad, and Mr. Fernando, who was in Malaysia. According to the

discussions between the parties less number of performers was to perform at the carnival and that KMP would be paid only $420,000. The plaintiff requested a written contract from Mr. Fernando to which he agreed. But, in reality there was no written contract. As the plaintiff progressed on the contract he demanded further finances. The sum was authorized by Mr. Fernando KMP issued an invoice for the sum of US$65,000 for “Caribbean Carnivale Production Costs Payment”. The invoice instructed that payment be made by telegraphic transfer to KMP’s Westpac account in Sydney. On 14 September 2005, US$30,000 was transferred into that account. Mr. Fernando then travelled to Trinidad and gave the plaintiff a “Letter of Intent for the Production of the Caribbean Carnival”. This stated that a fee of US$185,150 was to be paid to KMP “on a scheduled payment over a period of 6 months commencing September 2005”. The document was signed by Mr. Michael on behalf of KMP but was not signed by Mr. Fernando. Mr. Michael stated that on 15 October 2005 Mr. Fernando informed him that the company’s lawyers were still working on the written contract. On 17 October, by Mr. Fernando suggested that the production might be delayed until the following February. KMP asserted that in late October and November 2005 the defendants repudiated the contract. This was the result of two telephone calls from an employee of TI Malaysia to Mr. Michael denying that there was no contract, because Mr. Fernando was not authorized to contract on behalf of the defendants. The first defendant wrote a letter from Malaysia to this effect to KMP on 10 November 2005. As a consequence of these repudiations, KMP terminated the contract. KMP filed claims for the recovery of damages for production costs, lost profits and lost opportunity. On 31 December 2008 KMP filed the Statement of Claim in this court. The plaintiff in the first statement of claim did not plead the breach of contract but only repudiation of contract. The plaintiff also commenced proceedings against each of the defendants in the District Court of Berlin in order to comply with the time limit for the commencement of proceedings under German law. The defendants filed a notice of motion seeking to set aside the Statement of claim. The defendants objected to these proceedings on the grounds that the court in New South
Wales did not have jurisdiction to serve the proceedings outside Australia and, secondly, that this Court is an inappropriate forum for the determination of dispute. On 29th April 2009, the plaintiff filed an amended Statement of Claim alleging breach of the contract by the defendant as they failed to pay the full amount of $65000 as invoiced by the plaintiff for only $30000 was paid and $35000 was still pending. The amended Statement of Claim was filed alleging breach of contract and to precise the particulars of loss and damage. This allegation was not alleged in the first statement of claim but was incorporated in the amended statement of claim, thereby making it as a basis for serving the originating proves outside Australia on the defendants so as to enable the court of New South Wales to assume jurisdiction over the defendants. But defendants argued that the court had no jurisdiction over them and the court of New South Wales is not the appropriate court. Coming to question of jurisdiction over the defendants for the breach of contract in New South Wales, the court determined whether there was actually any breach of contract occurred in New South Wales. The onus of establishing that there is a breach of contract in the state is on the plaintiff as he/ she has to establish that his claim falls under the appropriate head of the civil procedure rules for the purpose of enabling the court to assume jurisdiction over a foreign defendant. The defendant argued that the breach of contract occurred outside New South Wales. According to them breach of contract occurred with three acts of repudiation outside New South Wales. One was a letter written in Malaysia and the two were two phone calls made by an employee of TI Malaysia who was in Malaysia when he made the calls, hence it was alleged by the defendants that repudiation occurred in Malaysia and not in New South Wales. Also, the defendant argued that even if the affidavit of plaintiff suggested that there was breach of contract in the non-payment of contract price, then why didn’t the plaintiff raised such an allegation in the first statement of claim. The court in this case gave the findings that the assumption of jurisdiction by the court on the basis of breach of contract in New South Wales was very tenuous due to the reasons that, the allegations of breach of contract were not made in the first statement of claim filed by the
plaintiff. It was made in the second amended statement of claim by the plaintiff solely for the purpose of assuming jurisdiction. The conduct of plaintiff showed that he never demanded the full payment of the invoice even though only $US 30000 was paid by the defendants. It was never asserted to be a breach of the contract by the plaintiff until the hearing seeking leave to amend the statement of claim. When the defendants paid only a part payment of $30000 in lieu of the full payment of $65000, then why not the plaintiff objected to the part payment made by the defendant in lieu of the full amount. It was held that KMP was relying upon the repudiation of the contract as it’s grounds for later terminating the contract. KMP was trying its best to link the non-payment of the sum due into its NSW bank account to breach of contract on the part of the defendants so as to enable the court of NSW to assume jurisdiction over the foreign defendant. But the court regarded this breach of contract as highly technical. It was held at para 94 by the court that the jurisdiction of the court of New South Wales “is highly tenuous and based upon a breach which if it existed, was highly technical, in that it was never relied upon by the plaintiff except as a means of obtaining a finding that this court had jurisdiction when it was likely that such a finding would not be made”. The court found that the amount which is being demanded by the plaintiff as a result of the repudiation of the contract by the defendants is based on the conduct of the defendants who are wholly outside the state. The repudiation in this sense occurred wholly outside the state. Parallel proceedings were already going on in foreign state. Keeping these factors in mind the court held that proceedings are vexatious for the defendants and also that the New South Wales court is not a convenient forum to determine the dispute between the parties.

In case where breach of contract forms the basis for assumption of jurisdiction on the plea of the plaintiff, the plaintiff in order to justify his claim must show that the contract in dispute was a valid contract, there was breach of contract and the breach of contract took place in the forum. The most difficult of these three are to prove the place where the breach of contract takes place.
In *Showtime Touring Group v. Mosely Touring Inc*\(^\text{119}\) held that if repudiation takes place by letter or telephone the breach occurs at the place from where the message was sent. Where the breach of contract is made by telex message, the breach takes place where the telex is sent. Where the breach consists of non-feasance, the place of breach is the place where the obligation in question was due to be performed. But, if the obligation on the part of defendant could be performed in two or more forums, the Australian courts cannot assert jurisdiction over a foreign defendant as of right when Australia is not the sole place were the obligation was to be discharged by the defendant under the contract.

3.8. **Provisions relating to Forum Non Convenience, Stay and Transfer of Proceedings in Australia**

3.8.1. **Forum Non Convenience in Australia**

The Australian Courts have the power to decline to exercise jurisdiction against the defendant who has been served with the originating process outside Australia on the application made by the defendant that the service out of Australia is not authorized by the respective court Rules or the respective court is not a convenient forum for the trial of proceedings against the defendant. The second ground is generally referred to as forum non convenience ground. The defendant can make an application to the court that the forum selected by the plaintiff is not a convenient or appropriate forum as some other forum is more appropriate forum, so the proceedings be stayed in the forum selected by the plaintiff. The court may decline to exercise its jurisdiction either by way of staying the proceedings or by way of transferring them to another court in a different jurisdiction. The power of transfer is for the time being, restricted to transfers between the state and territory supreme Courts and Federal courts. The act dealing with the transfer of proceedings is the Cross-Vesting Acts of States and Territories and the Commonwealth Cross-Vesting Act\(^\text{120}\). The basic purpose for the stay or transfer of proceedings to other courts is to ensure proper justice to the parties and to avoid parallel proceedings in two courts of

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\(^{119}\) (2010) NSW 947.  
\(^{120}\) *Available at*: www.consult.govspace.gov.au (last visited on October 25, 2013).
different jurisdictions on the same issues so that different versions of judgments by two different courts might be avoided on the same issue. There is a long list of cases in Australia dealing with the issues of *forum non conveniens* lying down different tests for arriving at the conclusion of forum non convenience.

*Forum non conveniens* principle was first adopted in Australia by the Australian High Court in 1908 in the case of *Maritime Insurance co. Ltd. v. Geelong Harbor Trust Commissioners*.  

121 In this case the court applied the criteria of “Vexation and oppression” test approach to arrive at the conclusion of forum non conveniens. The vexation and oppression test was taken from decision of Logon v. Bank of Scotland decision of the House of Lords. As per the “vexation and oppression” test approach the Australian court would grant relief from a suit if the exercise of jurisdiction by the Australian court would bring injustice to the defendant.  

122 The Australian Courts for all most more than half of 20th century followed the English law on the grant of stay in favour of defendant. Under the said rules, the defendant had to prove that the continuance of proceedings would cause an injustice to him, as they were oppressive or vexatious or the proceedings were an abuse of the process of the court. Also if the stay was granted in favour of him, it would not cause an injustice to the plaintiff. The English law till that time was in favour of the plaintiff.

However it was the case of *Oceanic Sun Line Shipping Co. v. Fay* 123 where the Australian High Court rejected the English law and attempted to develop a distinct approach to forum non conveniens. Although the above stated case has nothing to do with the general contracts it is based on tortuous liability and the contract of carriage, yet it is important as it deals with stay of proceedings and forum non conveniens, which are aptly applied in large number of contact cases as well. The

121 [1908] HCA 37.
majority of judges in the case rejected the English law of forum non convenience, except for Justice Wilson and Toohey. Before going further the brief facts of the case are that respondent is a resident of Queensland. The appellant is a company that is incorporated in Greece, which conducts Mediterranean cruises on its ships under the name of “Sunline Cruises” in collaboration with another company. The respondent was a passenger on the Greek ship having cruise of Aegean Sea. He suffered serious injuries while taking part in trap shooting on the ship board. The ship was then sailing in the Greek waters when the respondent suffered the injuries. The respondent then brought the proceedings against the appellants in the Supreme Court of New South Wales, claiming damages for negligence. He obtained leave to serve his claim on the appellant at its principle place of business in Athens (Greece). The leave was granted and the appellant then entered a conditional appearance. The appellant by a notice of motion sought to have the statement of claim set aside or struck on the grounds that the Supreme Court of New South Wales lack jurisdiction to entertain the suit and that Greece is the appropriate jurisdiction for the initiation of claim. The appellant based his arguments on the ground that the ticket given to the respondent to board on the ship contained a foreign jurisdiction clause, which meant that Greece is an exclusive jurisdiction to deal with the disputes if any arisen between the respondent and the appellant, also, the contract was made in Athens when the ticket to board the ship was issued to the respondent. But the majority of the Court of Appeal found that the contract was made in Sydney (Australia), when the appellant’s agent issued an Exchange Order entitling the respondent to obtain a ticket from the appellant in Athens before boarding the ship. The Exchange Order contained all the relevant information relating to the name of the ship, sailing date, time of sailing and of embarkation, posts of departure and arrival, names and cabin number, fare charged, nationality of the respondent and his wife, etc. The majority held that the Exchange Order constituted a contract between the parties. So, the contention of the appellant that the contract was made in Athens when the ticket was issued to the respondent was rejected by the majority. Hence, it was held that the exclusion clause did not
apply for the contract was made before the issuance of the ticket which carried with itself the exclusive jurisdictional clause. The contract was made when the exchange order was issued to the respondent in lieu of the ticket in Sydney.

Analysis of the court - Difference of opinion on the principle of Forum Non Convenience by the Justices deciding the appeal.

Justice Wilson and Toohey JJ.-Allowing the Appeal, Justice Wilson and Toohey, held that the present law of England has undergone a major change after the decision of the Atlantic Star (1974) case. The law stated by Lord Goff of Chieveley in Spiliada case is the present law of England according to which where jurisdiction has been found as of a right that is where the defendant has been served with the proceedings within the jurisdiction the defendant may now apply to the court to exercise its jurisdiction to stay the proceedings on the ground which is usually called forum non conveniens. As per Lord Goff, the plea of the defendant to stay the proceedings should not be allowed by the court to sustain unless the court is the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

Lord Wilson and Toohey pointed out in order to maintain consistency between the courts of different countries and in Australia, it is cogent to adopt the principles laid down in Spiliada case. The forum non conveniens doctrine which is part of law of Scotland and USA has also been adopted as law in England after the Spiliada case. It is also the law of Canada, then why not it be part of Australian law. The Spiliada approach should be a guiding law in Australia, whenever the question of stay of proceedings is raised in the Australian Courts by the foreign defendant, when there is more appropriate forum available in the foreign country. The Hon’ble judges in the case of Spiliada pointed out that Lord Diplock’s approach in an English case of Rock Glass v. Macshanno. In macshamon case it was held that in order to justify a stay, two conditions must be satisfied, one positive and the other negative:-
(a) The defendant must satisfy the court that there is another forum to whose jurisdiction he is amendable, in which justice can be done between the parties at substantially less inconvenience or expense, and
(b) The stay must not deprive the plaintiff of a legitimate personal or juridical advantage, which would not be available to him if he invoked the jurisdiction of the English Court.

But Lord Goff stated that the basic principle is, “a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction which is appropriate forum for the trial of the action i.e. in which the case may be tried more suitably for the interest of all parties and ends of justice”. In this case according to the two justices the word “appropriate forum” used in Spiliada case provides a broad frame of reference than a concentration on inconvenience and expense. Secondly, the absence of words like legitimate personal or juridical advantage in the Spiliada case diminishes the prominence which that consideration is to have in the Inquiry. What is advantageous to one party will certainly be disadvantageous to the other.

So, Justice Wilson and Toohey concluded that the proceedings in the Supreme Court of New South Wales should be stayed in the interest of both the parties and to the ends of justice. The Hon’ble Justice found that the alleged tort was committed in Greece, the appellant company is incorporated in Greece, carries on business there, the proper law to which both the parties agreed was that of Greece. Although the contract of Carriage was made in New South Wales, but this one factor cannot outweigh number of factors which are in favour of appellant. So, the appeal was allowed by the judges.

**Brennan J.**- According to Justice Brennan, the law before the Atlantic Star Case is the true law to be applied in case involving stay of proceedings in Australia. His honour points to the law as laid down in the cases of *Maritime Insurance Co. Ltd. v. Geelong Harbor Trust Commissioners* (1908), *St. Pierre v. South American Stores (Gath & Chaves)*, Ld (1938), and *Cope Allman (Australia) Ltd. v. Celermajer* (1968).
The Hon’ble Justice truly agreed with the statement of Gibbs J. delivered in the case of *Cope Allman (Australia) Ltd. v. Celenger* (1968) 11 FIR where Gibbs J. stated that while dealing with the stay application the court should see that in granting stay it does not do injustice and on the other hand the court ought to interfere whenever there is such vexation and oppression that the defendant objecting the exercise of jurisdiction, is subjected to injustice. Then, Brennan Justice cited the principles laid down by *Scots J in St. Pierre v. South American Stores*, citing them as the best known statement for dealing with power of stay by the court. According to the said principle (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in English Court if it is otherwise properly brought. The right of access to the King’s Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff.

In order to satisfy the first condition, the defendant has to show oppression, Vexation or other abuse of process in order to seek stay. By showing just that balance of convenience favours litigation in some other forum the defendant is burden of proof is not discharged. The principle favour the policy that, “any plaintiff bonafide seeing relief to have unrestricted access to the seat of judgment and that is a policy which prevails unless oppression, vexation or other abuse of process is shown”. According to him the term “Vexation” and “Oppression” should be construed according to their ordinary meaning. He rejected the new approaches reflected in the cases of Atlantic Star, Macshannon and Spiliada cases which favoured the approach that a stay should only be granted on the principle of forum non convenience where the court is satisfied that there is some other tribunal or forum available in another country having competent jurisdiction, and is appropriate forum for the trial of the action i.e. the forum in which the case may be tried more suitably for the interest of
all the parties and the ends of justice. In The Atlantic Star case the majority chose to pursue a different and more elusive policy than that to which Scott L.J.'s formulation gave effect. The new policy was not designed to prescribe limited exceptions to the court's duty to exercise its jurisdiction; the new policy sought to identify the forum in which the plaintiff should be constrained to litigate. By that policy, it was hoped to achieve an ideal result - a trial in the forum which would be the most suitable available forum having regard to the interests of both plaintiff and defendant. No longer was the enquiry directed to the question whether an exercise of jurisdiction would result in injustice to the defendant.

But, the court held that, the new approach does not offer proper guidance to a judge in ascertaining what is “suitable" as laid down in Spiliada case, when the parties have opposite interests, when advantage to one is disadvantage to the other. When the court starts the exercise of balancing of interests between the plaintiff and defendant, then it has to give a decision in favour of one which inevitably involves a discretionary conferring an advantage on one party and a disadvantage on the other. Such an exercise resultantly does not involve the enforcement of existing rights and liabilities of the parties but insisted leads to creation modification or abolition of rights and liabilities of parties. Similarly the discretion of stay based to meet the ends of justice, cannot be done except by reference to the law which would govern the matter of if it will tried in that court.

So, the new English approach cannot be adopted in Australia as that approach is inconsistent with the function and duty of Australian Courts. The job of the courts of this country is to enforce the rights and liabilities of the parties according to the law of the forum and to enforce the jurisdictional rights of the plaintiff unless the invocation of jurisdiction is oppression, vexations or otherwise in abuse of process. Dismissing the appeal, his honor held that English new approach cannot be applied and the plaintiff is therefore entitled to have his case heard and determined by Supreme of New South Wales. The invocation of jurisdiction by the plaintiff is not oppressive, vexatious or abuse of process. He emphasized that the formulation laid
down in the case of ‘St.Pierre’, by Scott. J. is and should remain the law of Australia and the words ‘oppression’ and ‘vexatious’ should be understood according to their ordinary meaning.

**Deane J.-**Justice Deane was of the view that a party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined. The prima facie right to access the jurisdiction of the court should be displaced only by a statute. The court should ensure that the language of the said statute should not be extended too much so that it goes beyond its permissible limits and burden the task of the court in finding the circumstances which allow the grant of stay to the defendant. The statute should use clear words to define the circumstances which enable the court in granting and justifying a stay. In Australia the common law has recognized certain special categories of cases in which the exercise of jurisdiction may be or must be refused, but a general discretion to dismiss or stay a proceeding on the ground that some other tribunal in another country is more appropriate, has not been embraced well in Australia. He agreed with the traditional approach for granting a stay as laid down in the case of Maritime Insurance Co., where it was held that the power of the court whose jurisdiction has been regularly invoked to dismissed or stay the proceeding on the ground that it should have been brought in some tribunal in another country is limited to the cases where the court is persuaded that it is such a unsuitable or inappropriate forum for their determination that this continuance would work a serious injustice that it would be oppression and vexatious to the defendant. The ‘clear inappropriateness’ of the local forum may justify the dismissal or stay of proceedings. The mere fact that some foreign tribunal would represent a more appropriate forum will not work. So, it was him who articulated the word ‘clearly inappropriate’ to be used by the court while applying the doctrine of forum non convenience in Australia. He emphasized on the traditional approach based on common law rules to be a right approach for refusing or granting a stay. Under the traditional approach the test is whether a continuation of the proceeding would be
vexatious and oppressive by reasons of the inappropriateness of the local forum. The test would be satisfied if the defendant establishes that there is available an appropriate tribunal in some other country and that the local court in which the proceedings are commenced is clearly inappropriate in all the circumstances. According to him the words “oppressive” or “Vexatious” should be used in sense as used in St. Pierre case, which means that the words should not be used as directly descriptive of the conduct of the plaintiff but as descriptive of the objective effect which continuance of the action would have on the defendant. The defendant must satisfy the court that the continuance of the action would work as injustice because it would be oppressive” or “Vexatious” to him rather than that the continuance of the action would involve more delinquency on the part of the plaintiff. “Oppressive” should be understood as meaning seriously and unfairly burdensome prejudicial or damming. While “Vexatious” should be understood as meaning productive of serious and unjustified trouble and harassment. The words should not be narrowly or rigidly construed and are to be applied in relation to the effect of the continuation of the proceedings rather than the conduct of the plaintiff in continuing them, the continuance of proceedings in a tribunal which is a clearly inappropriate forum, would, be in the absence of exceptional circumstances being established by plaintiff, be oppressive or vexatious to such a defendant if there is some available and appropriate tribunal in another country.

His honor was against the adopting of United Kingdom concept of broader forum non convenience on the basis of three reference points; namely (i) Legal principle, (ii) Divided Authority (iii). Policy. The legal principle connotes that where jurisdiction exists, access to the court is a right not a privilege which can be withdrawn except in clearly defined circumstance. Contrast to it as per UK broader forum non convenience concept, the court has discretion to stay the proceedings if it appears that some foreign tribunal is or a more appropriate forum. Secondly, the balance of authority in Australia favours the traditional doctrine which is a law for almost 80 years in Australia, as laid down in the case of Maritime Insurance
Company, whereas, the UK broader *forum non conveniens* adheres to the law as laid down in the case of Spiliada. Thirdly, the Hon’ble Justice is himself not clear with the policy position. According to him there is considerable force in the approach that if the courts in other country are more appropriate forum for the determination of a claim, it should be brought in the forum of that country, unless there are compelling reasons for not doing it. But in the view of his lordship the reasons based on policy are persuasive but not compelling. If the law of Australia is to be changed according to the policy then that should be done by legislature, so that comprehensive scales and guidelines could be laid down for the courts while deciding the grant of stay application.

So, the majority in Oceanic case rejected the English view of forum non conveniens taken in the case of Spiliada. But, due to different views of the judges in this case, no clear conclusion came out or a settled principle on the issue of stay of proceedings on the basis of forum non conveniens. The Hon’ble Justice dismissed the appeal on the ground that appellant has failed to establish that Supreme Court of New South Wales, is in all circumstances a clearly inappropriate forum.

**Gaudron J.**-According to him the determination of the question whether stay should be granted or not, the court has to see that if the rights and liabilities of parties are entirely to be determined by the application of foreign substantive law, the forum selected by the plaintiff will be clearly inappropriate notwithstanding that the defendant is domiciled, resident or carries on business within the jurisdiction of the court where the plaintiff has filed the case against him. The forum selected by the plaintiff will also be inappropriate if the defendant is also amenable to the jurisdiction of a forum whose laws govern the matter in issue (substantive law) and that country is the country with which the matter in issue has its closest connection. But, the selected forum should not be seen as inappropriate if it is fairly arguable that the substantive law of the forum is applicable in the determination of rights and liabilities of the parties. The lordship in this case found that the substantive law of New South Wales is applicable in the determination of the rights and liabilities of the
parties, so he dismissed the appeal of the appellants for the grant of stay of proceedings.

Then came the case of *Voth v. Manildra Flour Mills Pty Ltd*,¹²⁴ which ultimately settled the law on the question of stay of proceedings. The case also deals with the commission of torts. The two respondents (plaintiffs) are companies incorporated and resident in New South Wales. They are members of a group of companies, known as the "Manildra Group", which carry on business related to the manufacture and sale of starches and starch products. The activities of the Group extend beyond Australia. At all material times the first respondent was the principal operating company in the Group. The Group’s operating company there was Manildra Milling Corporation ("MMC"), a corporation established under the laws of the State of Kansas. MMC is a wholly-owned subsidiary of the second respondent and it was to MMC that the appellant, in the ordinary course of his professional practice, provided accounting, auditing and related services. The appellant (defendant) is an accountant who is a citizen and resident of USA, practicing in the state of Missouri. ‘Manildra group’ sold starch products to MMC which resold them in USA. As a result, MMC became indebted to the first respondent and became obliged to pay it, or credit it with, interest. During the period in question, the Internal Revenue Code (IRS) of the United States imposed upon the first respondent liability to income tax in respect of the interest income derived by it from MMC and also imposed an obligation upon MMC to deduct and withhold the tax upon interest paid by it to the first respondent. MMC did not make the required deductions and payments of withholding tax nor did the appellant firm notice this omission. Later on, appellant’s firm discovered the omission. It was decided that the withholding tax and penalty interest should be paid to the IRS. The first respondents filled case against the appellant that the appellant acted without due care in failing to draw the attention of MMC, and of the other companies in the Manildra Group, to the requirement to pay withholding tax on MMC’s interest payments to the first respondent. That omission had two relevant

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¹²⁴ (1990) 65 ALJR 83 (HC).
consequences for the respondents in relation to liability to Australian income tax. First, the interest in question was treated as assessable income of the first respondent, when it should have been treated as exempt income. This resulted in an overpayment by the first respondent which, it is alleged, is irrecoverable. Secondly, the second respondent in some of the years in the relevant period, if matters had been dealt with properly, would have shown tax losses and would have been able to carry those losses forward into future years. Apart from that damage, the respondents allege that the first respondent incurred liability to the IRS for penalty interest. So, the respondents (plaintiffs) decided to sue the appellant (defendant) in the court of New South Wales, claiming damages for professional negligent. The respondents contended that the Supreme Court of New South Wales has jurisdiction to entertain the action because they suffered some or all of the relevant damage in that State. The appellant contended that the Supreme Court of New South Wales lacked jurisdiction to entertain the action and stay should be granted or the action should be dismissed, but the contention of the appellant was rejected both at first instance and by the Court of Appeal.

Analysis of the court- Opinion of various Justices on the issue in the case.

Mason C.J., Deane, Dawson and Gaudron JJ.- held that the court while deciding the application of stay and dismissing the action or setting aside service ex - juris, should follow the test of “clearly inappropriate forum” set out by Deane J. in Oceanic Sun Case. The test states that the jurisdiction of the court which has been invoked to dismiss or stay the proceedings on the ground that the suit should have been brought in some tribunal in another country is limited to case, where the court is persuaded that it is such an unsuitable or inappropriate forum for the determination that the continuance of the case would work as a serious injustice to the defendant in the sense that it would be oppressive and vexatious to the defendant. The ‘clear inappropriateness’ of the local forum may justify the dismissal or a stay. The mere fact some foreign tribunal would represent a “more appropriate forum” will not work. However, the Hon’ble Justice also held that in arriving at the conclusion of
“inappropriateness” the connecting factors and the legitimate personal or judicial advantage” as laid down by Lord Goff in Spiliada’s case may provide valuable assistance to the court while dealing with such applications. They agreed with the law laid down in the cases of *Oceanic Sunrise* to the extent that -

1. A plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise.

2. The traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case.

3. The mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay, and

4. That the jurisdiction to grant a stay or dismiss the action is to be exercised "with great care" or "extreme caution".

The respective judges disagreeing with the decisions of the Court of Appeal allowed the appeal of the appellant to stay the action by taking into account that (1) the action has a substantial connection with the law of Missouri (2) the relevant acts and Omissions took place predominantly in Missouri (3) the appellant resides and works in Missouri (4) a large part of damage which the appellant caused to the respondents were referable to United States Taxation law and (5), the greater part of the evidence in any trial of the action was to be found in Missouri.

The Hon’ble Judges also took into account the factors which favored the plaintiff such as (1) the plaintiff are residents of New South Wales (2) the legitimate personal juridical advantage to the plaintiff which includes : (a) Concession of limitation bar to the plaintiff because if the plaintiff sues the defendant in same suit in Missouri, the defendant has the opportunity to resist the suit due to an effective
limitation bar that exists under the law of Missouri, (b) In Missouri, the costs to be awarded in favour of a successful plaintiff may not include attorney fee, and (c) the damages to be awarded by way of interest are less advantageous to the plaintiff as compared to the amount that may be awarded by the Supreme Court of New South Wales. However, the court held that as far as first juridical advantage to the plaintiff is concerned the court may impose a condition while granting stay to the defendant, that the defendant will not plead any defence relating to limitation in Missouri if the respondents file the proceedings in Missouri and secondly as far as second and third juridical advantages to the plaintiff are concerned they are not that important so as to compel the courts to refuse the stay of application, when compared with overall considerations.

On these bases the Hon’ble Judges allowed the appeal. They set aside the order made by Court of Appeal and ordered that the action be stayed.

Toohey. J- Justice Toohey was the patrician of doctrine of forum non conveniens. According to him doctrine of forum non conveniens should determine whether the cause should be stayed or not. The doctrine is to be applied to the facts of the case. It requires the court to search for the appropriate forum with which the action has the most real and substantial connection. It recognizes that in the modern world, particularly in the modern commercial world, there may be more than one forum available to a plaintiff to litigate. According to him there is no dearth of opportunities which are available to the plaintiff to institute his cause of action. Where the dispute is of international character, there should not be any limitation or restriction imposed on the right of the plaintiff to choose the venue for the action. But, it should also be kept in mind that fairness and equity requires that a defendant should be able to challenge the venue selected by the plaintiff. In such situation the doctrine of forum non conveniens plays an important role.

According to him the test of “inappropriateness” as propounded by Justice Deane for deciding the grant of stay question must look into the appropriateness of the local forum and not necessarily to any other forum. It should carry with it the
possibility that the forum in which the proceedings are commenced may be held clearly inappropriate, without arriving at any conclusion as to the appropriateness of another forum. According to him the question of ‘onus’ plays an important role in deciding the application of the grant or refusal of stay. Where the onus lies on the defendant, whether by reason of the common law or rules of court, and the doctrine of forum non conveniens is applicable, it will not be easy for a defendant to obtain a stay of proceedings or an order setting aside service out of the jurisdiction. As it is clear, the search is for the more appropriate forum, a search which does not require a comparison of the merits and demerits of the alternative forum, except perhaps where 'legitimate personal or juridical advantage' comes into play.

The Hon’ble Judge allowed the appeal for the stay of proceedings but the reasons on the basis of which the stay was allowed by him were different from Mason C.J, Deane, Dawson and Guarrdon JJ., who allowed the appeal on the basis of “inappropriate test”, whereas his lordship allowed the appeal on the basis of ‘forum non conveniens’. The lordship held that the cause of complaint was committed in Missouri although some of the damage was sustained in New South Wales. Missouri is forum which is more appropriate and with which the cause of action has most the real and substantial connection.

Brennan J. The Hon’ble Judge also supported the ‘clearly inappropriate test’ for the determination of grant of stay application. However, his outcome was different from the decision arrived at by the other judges. According to him to arrive at the correct decision it is first necessary to appreciate the nature of claims which the respondent-plaintiff has made. The Hon’ble Judge dismissed the appeal on the ground that the plaintiff were residents of Australia, the misrepresented advice induced the plaintiff to prepare the relevant mistake return of income in Australia. The conduct of the defendant whether it consisted in a communication of false advice to the Plaintiffs or a failure to correct false advice, occurred in New South Wales. Hence New South Wales is the appropriate forum for hearing and determining the cause of action. Accordingly, in this case the majority decision allowed the appeal and granted the
stay on the application made by the appellant, but the reasoning with which they gave
the decision differed.

In both the cases namely the *Oceanic Sunrise and Voth* the Australian law
moved away from the traditional test of Vexatious and oppressive to clearly
inappropriate while deciding the application the stay of application. At para 32 in the
case of *Voth v. Manildra Flour Mills Pty Ltd*,125 the court laid down an important
distinction between then "clearly inappropriate forum" test and the traditional test
based on vexation or oppression or an abuse of process. The distinction goes like this,
“The content of the "clearly inappropriate forum" test is more expansive than the
traditional test applied by Brennan J. The former test, unlike the latter, recognizes
that in some situations the continuation of an action in the selected forum, though not
amounting to vexation or oppression or an abuse of process in the strict sense, will
amount to an injustice to the defendant when the bringing of the action in some other
available and competent forum will not occasion an injustice to the plaintiff. Thus, in
order to obtain a legitimate advantage, the plaintiff may commence an action in the
selected forum though the subject-matter of the action and the parties have little
connection with that forum and the defendant may be put to great expense and
inconvenience in contesting the action in that forum. On the application of traditional
principles, a stay would be refused in such a case, notwithstanding that the selected
forum was a clearly inappropriate forum. Since the traditional test is apt to produce
such an extreme result, the "clearly inappropriate forum" test is to be preferred to the
traditional test.”

Also the court in the above case held that in majority of cases the result
produced by both test of "clearly inappropriate forum" and “more appropriate forum”
would be same in majority of cases. But, the difference between the two tests will be
of critical significance only in those cases - probably rare where the available foreign
tribunal is the natural or more appropriate forum and the local tribunal is also not
clearly inappropriate one.

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125 (1990) 65 ALJR 83 (HC).
The Australian courts did not consent to the approach taken by the English Courts as laid down in the case of *Spiliada*, the approach which most of the common law countries followed while deciding the application of stay of proceedings.

### 3.8.2 Transfer of Proceedings under the cross-vesting jurisdiction scheme

All the States and Territories and the Commonwealth in Australia have passed the cross-vesting Act in their jurisdiction to resolve the jurisdictional problems between the federal court on one hand and the State and Territory court on another hand.\(^{126}\) The Act enables the transfer of proceedings between the Supreme courts of States and Territories and Federal courts. The Acts does not apply to the proceedings of inferior court. Under section 5 of all the cross-vesting Acts of the States and Territories and the commonwealth, the courts are under obligation to transfer the proceedings in certain cases where it appears appropriate to the court that the relevant proceedings be heard by other court in the interest of justice. The cross-vesting Acts give discretion to the court to decline jurisdiction that or otherwise properly established.\(^{127}\)

### 3.8.3 Stay of Proceedings under the Service and Execution of Process Act

Where the proceedings are going on in inferior court than the Supreme Courts of States and Territories, the defendant can apply to the court under section 20 of the Service and Execution of Process Act, 1992, for the stay of the proceedings on the ground that a court of another State has jurisdiction to determine all the matters in issue between the parties and is the appropriate court to determine those matters. The provision for stay under the Act does not apply where the proceedings are in relation to which the Supreme Court of a State or Territory is the court of issue.\(^{128}\) They apply to proceedings going in inferior courts. The court may order that the proceeding be

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\(^{126}\) See jurisdiction of courts (cross-vesting) Act 1987 (Cth); jurisdiction of courts (cross-vesting) Act 1993 (ACT); jurisdiction of courts (cross-vesting) Act 1987(NSW); jurisdiction of courts (cross-vesting) Act 1987(NT); jurisdiction of courts (cross-vesting) Act 1987(Qld); jurisdiction of courts (cross-vesting) Act 1987(SA); jurisdiction of courts (cross-vesting) Act 1987(Tas); jurisdiction of courts (cross-vesting) Act 1987(Vic); jurisdiction of courts (cross-vesting) Act 1987(WA).

\(^{127}\) Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* 133 (LexisNexis Butterworths, Australia, 2nd edn., 2011).

\(^{128}\) The Service and Execution of Process Act, 1992, s.20.
stayed if it is satisfied that a court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters. In granting stay the court is to take into account the following matters while determining whether the court of another State is the appropriate court for the proceeding,\(^{129}\) namely:

(a) the places of residence of the parties and of the witnesses likely to be called in the proceeding and

(b) the place where the subject matter of the proceeding is situated; and

(c) the financial circumstances of the parties, so far as the court is aware of them; and

(d) any agreement between the parties about the court or place in which the proceeding should be instituted; and

(e) the law that would be most appropriate to apply in the proceeding; and

(f) whether a related or similar proceeding has been commenced against the person served or another person;

but do not include the fact that the proceeding was commenced in the place of issue.

The above list is not exhaustive. None of the factor is given particular weight.\(^{130}\) If the court finds that there are grounds other than those mentioned above justifying the grant of stay to the defendant, it may make an order of stay on those very grounds.

Looking at the above provisions regarding granting of stay under the Service and Execution of Process Act, it is seen that the Act uses the word “appropriate” in contrast to “clearly inappropriate” while deciding the question of stay in the proceedings going on in inferior courts. The word “appropriate court” signifies forum with which the action has the most real and substantial connection, and which can therefore be regarded as the natural forum. To arrive at the decision of what could be the appropriate court for the determination of proceeding, the court has to take into consideration all the matters that are specified in section 20 of the said Act as well as

\(^{129}\) *Ibid.*

\(^{130}\) See *St George Bank Ltd v. McTaggart & Ors* [2003] QCA 59; *Lenard’s Pty Ltd and Anor v. Kimart Pty Ltd and Others* [2009] QDC 150; *Irrigear Stores Ltd v. Waterick Pty Ltd* (19 August 2015).
any other relevant matter to determine justifying the grant of stay. For example, exclusive jurisdictional clause in an agreement would be relevant matter for deciding the application of stay, though this ground is not mentioned under section 20 of the Act. In the case of *Irrigear Stores Ltd v. Watertek Pty Ltd*[^131] at para 9, the court held that the applicable principles for granting stay under section 20 can be summarized as follows:

a) An applicant has the onus of satisfying the court on the balance of probabilities that the proceeding should be stayed.

b) The applicant must show that there is another State court, with jurisdiction to determine all matters in issue, which is “the appropriate court to determine those matters”.

c) The factors in section 20(4) of the Act do not constitute a code and are not exhaustive of the factors which may properly be taken into account in exercising the court’s discretion.

d) The court must decide which court is the one with which the action has the most real and substantial connection.

Section 20 of the Act does not apply to Superior courts or where the proceedings are before the state or the territory Supreme Courts, in such cases the supreme courts are empowered to apply principles of forum non conveniens according to the Australian concept as opposed to the English understanding of the doctrine. But after the enactment of cross-vesting legislations by all the state and territories in Australia, reliance on the doctrine has been reduced to much extent. The legislation empowers the superior courts to transfer the proceedings to the more appropriate superior courts in the interest of justice. So the relevancy of Australian doctrine of forum non conveniens is limited to international cases in Australia. The

word “appropriate” is used in the English law while deciding the application on grant of stay on the doctrine of forum non convenience. But, as discussed earlier in Australia the English doctrine of forum non convenience is not applicable. This would only lead to the conclusion that only in cases involving international litigation the test propounded in the case of Voth is applicable to grant stay on forum non conveniens basis.