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Jurisdiction over defendants

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Introduction

A preliminary issue all litigants must determine before commencing an action for a civil claim is – in which court must I sue? To answer this question, one must consider several questions, including those following.

1. Does this court have jurisdiction over this defendant, to hear this sort of matter?
2. Is my claim within the monetary limit of this court?
3. Is this case within the geographical limits of this court?
4. Is this type of case (eg. insurance claim, breach of consumer contract, arrest of ship, family dispute, liquor licence) heard by this court?
5. Are there any special limitations on ordinary jurisdiction? (For example, a foreign diplomat may be immune from certain actions.)

What is a Jurisdiction?

As you can see, the term 'jurisdiction' is used in several different, though related, ways. Lawyers refer to a court's jurisdiction – but may be thinking about the nature of the claim, or the limited geographical jurisdiction of inferior1 courts (like the Magistrates, Local, County and District courts) or whether the court documents can even be served on a particular defendant to make that person take part in the case. It is this last issue in particular that this article will address.

An adversarial system

Our civil court system is predominantly adversarial. That is, the parties choose how to present their cases, which they argue as persuasively as they can, and a neutral judge decides who should win, based on the presentations of each case in the court. The State provides the mechanism for this 'civilised' form of dispute resolution. The State provides and funds the court venues and the judges and other court staff. Parties pay a filing fee to commence their proceedings, but this does not cover the enormous cost of the court system, which is funded from the State's other revenues (primarily taxes on citizens).

Natural Justice

In the common law adversarial system, the courts, over centuries, have devised various rules to enhance the likelihood that justice will be done. These are referred to as the rules of natural justice. One of the most important aspects of natural justice is that the defendant must have a fair opportunity to prepare and present a defence against the claim. It is very important that the defendant be clearly informed of the claim against her or him well in advance of the trial. The

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defendant must also have a fair opportunity to appear in court and defend the case. The courts ensure that defendants are informed by insisting that the claimant (or plaintiff) set out the details of her or his claim (all of the relevant, alleged facts) in writing and file a copy in the court and give a copy to the defendant. The process of providing the defendant with a copy of the claim is called 'service'. Someone must serve the court documents on the defendant.

Court Documents

These documents served often consist of 2 documents or 2 parts – a writ or claim or application document which sets out what the claimant is asking the court to order against the defendant, and a statement of claim which sets out the factual details alleged by the claimant. The first (part of the) document, the claim, also contains a written command from the court to the defendant to attend to the matter. This requires the defendant in the first place to file a document answering the claim, which sets out her/his defence. For example, s/he may agree with some of the facts alleged by the claimant, deny others and mention new facts which cast a different light on the events in question. After this stage, and other preparatory stages, the court requires both parties to attend court and argue the case. Of course, in most cases, parties can be represented by their lawyers, and need not attend in person for civil matters. In serious disputes, however, parties often want to be present to instruct their lawyers throughout the case.

Geographical reach of the courts

Originally, Common Law courts, including Australian courts would only compel defendants who lived (or at least were present) within their own geographical jurisdiction. So, the High Court could hear cases against anyone within Australia, the Supreme Court of Western Australia might hear cases against anyone present in that State, and the Magistrates Court in the Holland Park district of Queensland (a small area within the suburbs of Brisbane) could only deal with matters concerning defendants living or working in that district. Imagine if you were a Danish citizen, living in Denmark and someone came to your home and gave you a piece of paper ordering you to fly to Australia and defend a $2,000 claim in the Magistrates' Court in Holland Park, Queensland. That sounds a bit silly, and very unfair. Imagine then, that you ignore the summons. What can a Magistrate in Queensland do to you? Nothing2. It makes sense, then, to confine the jurisdiction of the local court to people living and working within the local area.

The primary approach of common law courts was to confine courts to hearing cases within their own geographical area. Imagine, however, a different story. Someone has been living and working in Sydney for 10 years. She runs a business and enters into several contracts with local suppliers to purchase designer clothing and footwear. In the last year, her business is not doing well and one day she closes the shop and flies out of Australia to set up shop in New Zealand. She does not pay her lease payments on the Sydney shop, or her rent on her home unit. She takes with her clothing and footwear to the value of $800,000, for which the suppliers have not been paid. Is it fair if all the people to whom she owes money have to fly to New Zealand to sue her? What if she left a car in Sydney and money in an Australian bank? Would it be reasonable to let the creditors sue her in the court in Sydney, and ask her to return to Australia to defend the case? If she chose not to return to defend the case, and the creditors proved their claims before the judge, would it not be fair to let them recover some money by selling her car and using the money in the local bank?

Another idea might be for the creditors to get a judgment from an Australian court, and then ask a court in New Zealand to enforce it against the debtor's assets over there. Do you think a New Zealand court should, or could do that? It is possible to do this in some (mainly common law) countries. But, that is an issue for another paper.

Our main interest in this paper is to consider when it might be fair to allow a court to 'extend' its jurisdiction to be able to compel a person3 not present within the geographical limits of that court to participate in the local proceedings or risk a judgment being granted and enforced by that court (and potentially enforced in other countries too).

Service *ex juris* (outside the natural geographical boundaries of a court's jurisdiction) is permitted by statutory extension of the common law jurisdiction, where there is some legitimate connection with that jurisdiction. When a Parliament considers extending the courts' jurisdiction with "long arm" legislation fairness and overall public interest must be considered. Some members of Parliament may be very happy to allow local plaintiffs to use the local court system to resolve their disputes (even though the disputes may involve global elements and international parties), and so will allow extensive jurisdiction based on minimal connection with the State. Others may be more concerned about the effect on the defendants of compelling them to become involved in court procedures in a country with which they have no present connection. Remember, you cannot assume that either the claimant or the defendant is "in the right" – that is for a court to determine. In addition, as a general rule a State will tend to assume that the courts of other States deserve respect, and so imagine that if a case cannot be heard locally, it can still be fairly heard in another country if the claimant really wants to pursue her or his or its interests.

Overseas Comparisons

It is interesting to compare the approaches taken in Australia with that taken in England and the European

Union ("EU").4 Australia consists of several States and Territories within a federation. The European Union consist of several countries which have joined into a union. England and Wales, Scotland and Northern Ireland are countries within a United Kingdom (similar in some ways to the Australian federation) and the United Kingdom is part of the European Union.

Within Australia, any court process can be issued in one State or Territory and served in another under Commonwealth legislation.5 A defendant to a superior court6 action can even be served outside Australia (whether in New Zealand, England, China or Uzbekistan) if the rules of the court so permit. Most Australian jurisdictions have rules permitting service *ex juris* in very many circumstances, including, for example, if someone is involved in a car accident in France, and after hospital care there, comes to Australia, but is still suffering from the injuries. Our "long-arm" jurisdiction is extensive. Look at the New South Wales rules, for example, in the Attachment below. Rule 10.1A (1) (e) would apply to the car accident in France scenario just mentioned. You will see from the Attachment the extensive range of issues over which people may litigate and the various factors which are sufficient to connect such litigation to a jurisdiction to justify a hearing in the courts of that jurisdiction. Rules similar to the New South Wales rules apply in the other Australian States and Territories. So, imagine, if a contract was made in Queensland between an agent of one party carrying out business in Victoria and a resident of South Australia, and delivery of goods was to take place in New South Wales, and the parties agreed that the law of Tasmania would govern the contract, then courts in Queensland, Victoria, South Australia, New South Wales, and Tasmania would have jurisdiction and a claimant could choose to sue in any of those States.

In the European Union, a Regulation7 has been passed which applies in all countries within the union (except Denmark). Under this regulation, jurisdiction is regulated rather differently. Similar rules apply to Denmark and some other countries, by Convention.

In civil cases8, the basic rule in the EU and within the United Kingdom ("UK") is that the court of the contracting state (State which is part of the EU) where the defendant is domiciled has jurisdiction. Only courts of that State have jurisdiction to deal with the dispute. Within the UK this means the court of the part of UK (England and Wales, Scotland or Northern Ireland) where the defendant is domiciled. Domicile9 is defined in s 41 of the Regulation to mean the place where a person resides and has some substantial connection. If a person has been resident somewhere for three months there is a rebuttable presumption that the person has a substantial connection with that place. Interestingly, multiple domicile is possible, so someone who travels regularly for work, and maintains two homes, one in England and one in France could be domiciled in both England and France.

The domicile of a corporation is the seat of the corporation, which means for example that if a company is incorporated and has its registered office or other official address in a part of the UK, that part of the UK. A company is also domiciled in, say, England, if its central management and control is based in England.

The primary approach under the EU Regulation, then, is that the claimant must follow the defendant. The approach within Australian States is to allow claimants the convenience of suing in their chosen jurisdiction if there is some (even small) connection between the dispute and the jurisdiction.

The EU Regulation does also provide for concurrent jurisdiction related to the nature of the dispute and a connection with the dispute and a jurisdiction other than that of the defendant's domicile, but only in very limited circumstances. So the policy behind this concurrent jurisdiction is very different from the policy approach in Australia which is to grant jurisdiction as often as possible – to the benefit of the claimant.

Under the EU Regulation, article 5(1) allows actions under a contract to be brought in the place of performance of the contract. This is called a special jurisdiction. The Regulation in article 5.1(b) specifies that the place of performance of the obligation in relation to sale of goods is where the goods were delivered or should have been, and in relation to the provision of services, is where the services were provided or should have been.

There is also a similar connecting factor for Australian courts. See for example Rule 10.1A (1) (b) in the Attachment below. A contract may be breached by inadequate or improper performance or even failure or refusal to perform. The place of such breach will be in the place of poor performance or in the case of non-performance the place in which the performance should have taken place. Note that in Australia, this is one of many connecting factors which may justify proceedings in a State. Under the EU Regulation, it is the only alternative to suing in the place of the domicile of the defendant for a case involving breach of contract.

In a case of non-contractual wrongdoing (for example negligence or trespass) which is called a tort, one may sue in courts of the place where the harmful event occurred. There are similar connecting factors in Australian State rules, such as the NSW rule in the Attachment below Rule 10.1A (1) (d). Under the EU Regulation this is the only alternative to suing in the place of the defendant's domicile for cases involving torts.

It is interesting, however, to note that this EU Regulation provision has been broadly interpreted. The case of *Handelskwekerij G J Bier B v Mines de Potasse*10 concerned discharge of industrial waste into the Rhine River in France, which caused harm to the plaintiff's plant nursery business in the Netherlands. The court decided that the place of the harmful event could include both the place where the tortious act (wrongful discharge of waste) occurred and the place where the damage ultimately occurred. The plaintiff had the option to sue in either of the States of France and the Netherlands. In this case, the court commented that the reason for the creation of special jurisdiction (in addition to jurisdiction based on the place of domicile of the defendant) is to allow for efficacious determination of the dispute by a court *closely connected to the issue*. This is still different from the Australian approach which really looks for any connection with the State.

The EU rules, then, favour the convenience of the defendant, but allowing for a court with a close connection with the dispute to hear it. The Australian rules, however, favour the claimant's convenience, allowing the claimant to select a court in a State which may have only a minimal connection with the parties and the dispute, and not a court best placed to determine the dispute.

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Question for Discussion

If you wanted to sue someone living in China, you might prefer the Australian approach. If you were being sued by someone living in China, however, you would probably favour the EU approach. Which is fairest?

ATTACHMENT

NSW – SUPREME COURT RULES 1970 – SECT 10.1A

Cases for service of originating process

10.1A Cases for service of originating process

(1) Subject to rule 2 and rule 2A, originating process may be served outside Australia in the following cases:

(a) where the proceedings are founded on a cause of action arising in the State,

(b) where the proceedings are founded on a breach in the State of a contract wherever made, whether or not the breach is preceded or accompanied by a breach wherever occurring that renders impossible the performance of any part of the contract which ought to be performed in the State,

(c) where the subject matter of the proceedings is a contract and the contract:

(i) is made in the State,

(ii) is made on behalf of the person to be served by or through an agent carrying on business or residing in the State,

(iii) is governed by the law of the State, or

(iv) is one a breach of which was committed in the State,

(d) where the proceedings are founded on a tort committed in the State,

(e) where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring,

(f) where the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the Court,

(g) where the person to be served is domiciled or ordinarily resident in the State,

(h) where the proceedings are proceedings in respect of which the person to be served has submitted or agreed to submit to the jurisdiction of the Court,

(i) where the proceedings are properly brought against a person served or to be served in the State and the person to be served outside the State is properly joined as a party to the proceedings,

(j) where, in respect of a person other than the person to be served:

(i) the proceedings are proceedings to which any of paragraphs (a) to (f) of subsection (1) of section 11 of the *Service and Execution of Process Act 1901* applies,

(ii) the proceedings are properly brought against him, and

(iii) originating process in the proceedings has been or is to be served on him under that Act or he has entered an appearance to originating process in the proceedings or liberty to proceed against him has been given in the proceedings under section 11 of that Act,

(k) where the subject matter of the proceedings, so far as concerns the person to be served, is property in the State,

(l) where the proceedings are for the perpetuation of testimony relating to property in the State,

(m) where the proceedings concern the construction, effect or enforcement of an Imperial Act or Commonwealth Act, or a regulation or other instrument having or purporting to have effect under such an Act, affecting property in the State,

(n) where the proceedings are for the construction, rectification, setting aside or enforcement of a deed, will or other instrument or of a contract, obligation or liability, affecting property in the State,

(o) where the proceedings are for an injunction as to anything to be done in the State or against the doing of any act in the State, whether damages are also sought or not,

(p) where the proceedings are for the administration of the estate of a person who dies domiciled in the State or are for relief which might be granted in proceedings for administration of such an estate,

(q) where the proceedings are for the execution of trusts which are governed by the law of the State, or are for relief which might be granted in proceedings for the execution of such trusts,

(r) where the proceedings affect the person to be served in respect of his membership of a corporation incorporated in the State or of an association formed or carrying on any part of its affairs in the State,

(s) where the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act,

(t) where the proceedings concern the effect or enforcement of an executive, ministerial or administrative act done or purporting to be done under an Act or regulation or other instrument having or purporting to have effect under an Act,

(u) where the proceedings:

(i) relate to an arbitration held in, or governed by the law of, the State, or

(ii) are brought to enforce in the State an arbitral award wherever made, or

(iii) are for orders necessary or convenient for carrying into effect in the State the whole or any part of an arbitral award wherever made,

(v) where the proceedings are brought to enforce in the State a judgment wherever given,

(w) where the proceedings are for relief relating to the custody, guardianship, protection or welfare of a minor, whether or not he is in the State, which relief the Court has, apart from service, jurisdiction to grant, or

(x) where the proceedings, so far as concerns the person to be served, fall partly within one or more of the foregoing paragraphs and fall, as to the residue, within one or more of the others of the foregoing paragraphs.

1 Inferior is a technical legal term. It does not suggest that these courts are less capable of dispensing justice, or in some way lacking credibility. You might like to look up this term in a legal dictionary and compare the meaning there to that found in an ordinary dictionary.

2 But what if you happened to visit Brisbane on a holiday? This is a civil claim, so you cannot be arrested. You could be served with court documents in Australia and asked to defend the case while you are here.

3 Person, of course, includes the legal personality of a company.

4 Member countries of the EU are Belgium, Germany, France, Italy, Luxembourg, Netherlands; Denmark, Republic of Ireland, UK; Greece; Spain, Portugal; Sweden, Finland, Austria; Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

5 *Service and Execution of Process Act* 1992.

6 The High Court of Australia, Federal Court of Australia, Family Court of Australia and all State Supreme Courts are Superior Courts in this legal sense.

7 EU Regulation 44 OJ L12 16.01.01. This slightly amends and replaces the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* for all EU countries except Denmark, which is still regulated

under the Brussels Convention. A parallel convention, the Lugano Convention applies similar rules for disputes concerning members of the EU and members of the EFTA countries, which are Iceland, Norway and Switzerland. The Brussels convention was enacted within the United Kingdom by the *Civil Jurisdiction and Judgments Act* 1982 (UK). This applies similar principles to determine where case should be heard involving cross-border disputes within the United Kingdom. Amendments have been implemented in the *Civil Jurisdiction and Judgments Act* 1991 (UK).

8 The Regulation applies to civil and commercial cases (art 1.1) and under article 1.2, expressly does not apply to -

- revenue, customs, administrative matters;
- status and natural capacity of natural persons, matrimonial property rights, wills and succession;
- bankruptcy, winding-up and related matters;
- social security and arbitration.

9 This is a statutory concept of domicile which is similar to but not the same as the Common Law concept of domicile.

10 (Case 21/76) [ECR 1735, [1978] QB 708

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